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Post-Conflict Constitution Drafter's Handbook

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January 2007

NOTE FOR USERS

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

The Handbook divides the core provisions commonly found in post-conflict constitutions into individual chapters. The chapters include: Preamble Provisions, State Structure and Devolution of Powers, the Executive, the Legislature, the Judiciary, Electoral System, Financial Matters and the Central Bank, Human Rights, Minority Rights, Women's Rights, Defense and Security, the Role of Religion, Natural Resources, and Extraordinary Measures.

In each chapter, the Handbook describes core provisions and provides sample language options for drafters to incorporate into their constitutions. In some cases, the drafter may select sample language from a variety of options. In these instances, the sample language is identified as "Option One" and "Option Two." In other cases, the Handbook provides optional language that drafters may or may not wish to include. In those instances the sample language is identified as "Optional."

Because every post-conflict situation is unique, the drafter may have to make adjustments to certain elements to enhance the constitution's relevance and applicability to a particular context. Although each chapter offers drafters a guiding framework, it may be necessary to reshape the provisions to address the nuances of each situation. The Handbook's comparative provisions and sample language are not exclusive, recommended, or mandatory. The purpose of the sample language is merely to provide sample language 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.

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CHAPTER I: PREAMBLE PROVISIONS

Many states begin their constitution with a preamble that outlines the general principals that underlie the entire document. Typically, preambles identify and declare sovereignty of the state, describe national identity, explain the means to achieve citizenship, and detail official symbols, holidays and languages.

Identification of the State

The constitution may identify the type of government¹ and the boundaries of the state that it governs and how the borders may be altered.² Many constitutions also include a provision declaring the independence and sovereignty of the state.³ Such a declaration may include language providing that state sovereignty is inalienable, indivisible, and non-transferable. This provision may also indicate the source of the sovereignty, which commonly derives from and is vested in the people.⁴

Sample Language: State Identity

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.**

¹Art. 1 of the Albanian Constitution: "Albania is a parliamentary republic."

²Art. 1 of the Eritrean Constitution: "The territory of Eritrea consists of all its territories, including the islands, territorial waters and airspace, delineated by internationally recognized boundaries." Art. 2 of the Georgian Constitution: "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." Art. 5 of the Portuguese Constitution: "1. Portugal comprises the territory on the Continent of Europe as is historically defined and the archipelagos of the Azores and Madeira. 2. The extent and limits of territorial waters and the exclusive economic zone, and the rights of Portugal to the adjacent sea bed, shall be laid down by law. 3. The State shall not transfer ownership of any part of the territory of Portugal, or any of the sovereign rights that it exercises over that territory, unless for the purpose of rectifying frontiers."

³For example, the constitutions of Eritrea, Latvia, Croatia, Czech Republic, and Mauritania all have this provision.

⁴Art. 3 of the Eritrean Constitution: "Sovereign power is vested in the people, who shall exercise such power through their representatives, duly elected pursuant to the procedures authorized by the provisions of this Constitution." Art. 2 of the Latvian Constitution: "The sovereign power of the State of Latvia is vested in the people of Latvia." Ch. 2, Art. 1 of the Croatia Constitution: "Power in the Republic of Croatia derives from the people and belongs to the people as a community of free and equal citizens." Art. 2 of the Czech Republic's Constitution: "All state power derives from the people..."

Type of Government:

[State] is a [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].

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 it have no force.⁵ 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.

National Identity

Post-conflict states containing many nationalities or ethnicities often include a provision in their constitution describing national identity. In defining national identity, constitutions may acknowledge the variety of nationalities within the state, while simultaneously noting the commonality and unity of the state's citizens.⁶

Additionally, some post-conflict states with significant Arab presence choose to claim some connection to the Arab Nation in the constitution's preamble.

⁵Art. 6 of the Armenian Constitution: "The Constitution of the Republic has supreme juridical force, and its norms are applicable directly." The Constitution of Zimbabwe: "The supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." Ch. 1, Art. 2 of South African Constitution: "The supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

⁶Art. 3 of the Albanian Constitution: "[t]he 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."

Some states accomplish this connection by referring to its people as part of the Arab Nation.⁷ Others however, make no reference to the Arab Nation, but do acknowledge the Arab character of the state.⁸

Sample Language: National Identity

[State] is a country of many 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 of [State].

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.

Citizenship

Most post-conflict constitutions address citizenship in one of two ways: either by describing specific citizenship requirements, or simply by noting that citizens have both rights and duties of citizenship.⁹ If the state elects to detail requirements for citizenship in its constitution, this section may include the means by which individuals qualify for citizenship of the state. Typical ways to gain citizenship are being born in the state, having one or both parents as citizens, or being naturalized as a citizen.¹⁰

⁷The constitutions of Egypt, Libya, and Syria all describe their people as part of the Arab nation.

⁸For example, the Preamble of the Algerian Constitution provides that the state is “an Arab land.” The Preamble of the Lebanese Constitution provides that the Lebanon is “Arab in its identity.” Art. 1 of the Saudi Arabian Constitution provides that the state is a “sovereign Arab Islamic state.”

⁹Ch. 2, Art. 4 of the Zimbabwean Constitution sets forth specific qualifications to acquire citizenship. South Africa's Constitution, however, is much more general. Art. 3 of the South African Constitution: “(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.”

¹⁰Ch. 2, Art. 4 of the Zimbabwean Constitution defines a citizen as “a person who, immediately before the appointed day, was or was deemed to be a citizen by birth, descent or registration shall, on and after that day, be a citizen of Zimbabwe by birth, descent or registration, as the case may be.” The Zimbabwean Constitution also provides detailed provisions of how to qualify under each citizenship option.

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.

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

Some constitutions specify the state's capital city, the official flag, symbol, anthem, and holiday(s). However, other constitutions provide that specifics of these matters should be determined by law. If such provisions are detailed in the constitution, generally the descriptions are simple and straight-forward.¹¹

Sample Language: Official State Capital, Flag, Anthem, Symbol, and Holidays

Option 1: Specify Official State Capital, Flag, Anthem, Symbol, and Holiday(s) in 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].

¹¹Art. 14 of the Albanian Constitution: "(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 Skanderbeg. (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"; Art. 3 of the Democratic Republic of Congo's Constitution: "(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."

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

Some post-conflict constitutions designate one or more languages as the official state language(s). In states where multiple languages are spoken, 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.¹² One option is to mandate one official language.¹³ A second option is to proclaim one or more official languages, while recognizing and allowing and/or protecting the use of other languages.¹⁴ This second option may be desirable in states with many indigenous or regional languages.

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.

¹²For example, South Africa, Turkey, Albania, and Eritrea.

¹³Art. 3 of the Turkish Constitution: "(1) The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish." Art. 14 of the Albanian Constitution: "1. The official language in the Republic of Albania is Albanian."

¹⁴Art. 6 of 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." Similarly, art. 5 of the Eritrea Constitution recognizes "[t]he equality of all Eritrean languages is guaranteed." Art. 3 of the Constitution of the Democratic Republic of Congo: "(4) The official language is French. (5) The functional national languages are Lingala and Munukutuba."

CHAPTER II: SELECTING A STATE STRUCTURE AND DEVOLUTION OF POWERS

Following conflicts, many states choose to alter the structure of the state and the devolution of powers in order to restore stability and to prevent future violent engagements. There are over 200 states in the world and there are as many state structures.

Depending on the nature of the conflict and the final status of the constituent territories, states choose their state structure from a continuum. Although states are almost universally structured either according to a unitary or federal model, it is important to conceptualize the two models as ends of a spectrum of options rather than as two mutually exclusive arrangements. On one end of the continuum, a state might choose a highly centralized government with little power given to local authorities. On the other end of the continuum, a state might choose to delegate a great deal of authority to its provinces. Along the spectrum there are numerous organizational variations designed to meet the particular needs of the state.

Several factors are important to consider when deciding which type of state structure will best suit the needs of the people. Drafters may consider, among others the cause of the conflict, the final status of the territories, economic rights of the people, human rights, and other factors unique to the new state. Although the starting point for most post-conflict states is to choose one state structure, that designation is not as important as the powers reserved to the central government and those devolved to provincial or municipal governments.

This chapter begins with a brief description of the primary characteristics of unitary, federal, and confederal state structures. It next explains major aspects of devolution of power including: (1) territorial delineation of provinces, (2) asymmetrical devolution of power, (3) distribution of powers between central and provincial governments, (4) procedures to allow provincial governments to assume powers over time, (5) national framework legislation and legislation to harmonize provincial laws, (6) means to foster cooperation between the central and provincial governments, (7) dispute resolution mechanisms, and (8) restrictions on constitutional amendments regarding state structure.

Unitary State

A unitary state is organized so there is a single central source of authority, and administrative units exercise their rights primarily through the organs of the

central government. While regional political institutions may be established, they are constitutionally subordinate to and receive all their political authority from the central government. The regional political institutions do not independently represent citizens or undertake independent legislative or executive decisions. The unitary model is a common choice for post-conflict states. Many such states adapt this structure and devolve powers to meet their specific needs and preferences.¹

Sample Language: Unitary State

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

Federations

Federations are multi-tiered governments that involve a combination of shared rule by central and regional government institutions. Power is divided by constitutional right between national and provincial units of government in regions or areas. Each system of government rules over different matters, and neither is subordinate to the other. As such, federations combine equally authoritative provinces with a co-equal central government.

In a federation, legislative and executive authority is constitutionally divided between the central government and the provincial governments, ensuring political autonomy for each government in defined areas and shared authority in other areas. The provincial governments also are represented in the central government at the legislative level, sometimes within a pluralistic executive, such as a plural presidency or vice presidency. Both the central government and the provincial governments possess executive, legislative and often judicial powers.

Sample Language: Federal State

[State] is a federal state.

Confederations

Confederations exist when two or more pre-existing units come together to form a common government for limited constitutionally established purposes. In

¹For example, Turkey, France, and Afghanistan are unitary states. Although Macedonia is also a unitary state, it has constituent units which are subordinate to the central government. While ultimate authority rests with the central government, certain constitutionally identified administrative powers may be devolved to the constituent units, which then exercise functional autonomy.

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 governmental institutions. However, these states coexist under a common federal constitution and parliament and have a single international body to enter into treaties or contracts with other sovereign states.² Confederation functions can be adapted according to the needs of the member states.³ Confederations tend to be inherently unstable, and sometimes serve as a phase in the process towards full independence of the parties.⁴

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.

Devolution of Powers

Although states are almost universally structured either according to a unitary or federal model, states may alter the organizational structure by devolving powers in order to meet the states' particular needs. In choosing which powers to devolve and the process to devolve those powers, post-conflict states must decide whether and how to (1) delineate provincial boundaries, (2) devolve powers

²This 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.

³For example, 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, even if international personality was single for both entities, 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.

⁴One example is the former 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.

asymmetrically, (3) determine which powers will be exercised by the central government and/or provincial governments, (4) create a process to allow provincial governments to assume powers over time, (5) create a means for the central government to provide framework legislation and legislation to harmonize provincial laws, (6) establish institutions to foster cooperation between the central and provincial governments, (7) describe methods to resolve disputes between the two levels of government, and (8) restrict constitutional amendments that alter the fundamental relationship between the central and provincial governments.

Delineating Provinces

In structuring either a federal or unitary government, it may be necessary to identify the number of provinces to be created and the criteria to be used in delineating their boundaries. When delineating provinces, the drafters may choose to use criteria such as geography and economic viability, or identity-based criteria such as ethnicity, language, and religion. Although geographic and economic criteria may appear desirable because of their seeming objectivity, most federations are based on criteria related to historical and group identity, as geography and economics can become matters of contention. It is not necessary to include the factors that the state considered in determining provincial boundaries, but it is important to consider how the state will be divided before deciding if and how to devolve power to provinces. A constitution may include a list of all the provinces; however, if boundaries or provinces later changes, a constitutional amendment would be required.

Sample Language: Delineating Provinces

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

Asymmetrical Devolution of Powers

After delineating the provincial boundaries, some post-conflict states choose to devolve a disproportionate amount of power to a particular region. In unitary states such devolution may take the form of special autonomy arrangements. In this scenario, the unitary state grants one region a particular status through the arrangement.⁵ The emphasis is on the region's power to control its own affairs, rather than to participate in national institutions. In an asymmetrical federation, provinces are granted different powers, or some possess greater autonomy than do

⁵Examples include the Autonomous Republic of Crimea within the unitary state of Ukraine.

others.⁶ Such powers may approximate that of an independent, sovereign state and may include the ability to sign treaties, engage in foreign trade, or participate in diplomatic missions independent from the state of which the province is a part.

Options for varying the degree of autonomy given include: (1) granting the entity a local assembly able to legislate on all matters related to local affairs,⁷ (2) granting the entity its own autonomous government with legislative, executive and judiciary branches,⁸ and (3) granting the region certain powers during a transitional period before the final status of the region is determined.

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) powers not specifically allocated to the central or provincial governments. Although issues of power-sharing are typically linked to a federal, rather than unitary structure, unitary states may wish to devolve powers to provincial governments.

Powers Exercised Exclusively by Central Government: While no set formula exists for the allocation of powers between the central and provincial governments, generally the central government exercises exclusive power over foreign affairs, the armed services and national security, monetary policy, customs

⁶For example, 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.

⁷The local assembly may be recognized by a national law, as it is in Corsica. The Corse Assembly has competence in certain defined areas such as economic development, the protection of heritage, and territorial planning. It does not have the ability to enact laws, but gives its advice to the national government on bills concerning Corsica.

⁸The 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.

and duties, communications, interregional transportation, debt management, immigration and naturalization, and management of the national economy.⁹

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: Although great variation exists among states regarding the powers granted to provincial governments, typically provinces control matters related to education, health, social welfare, police powers, local taxes, and regional transportation. Often, oversight of natural resources extraction, production, and management are also devolved to provinces.¹⁰

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: The provinces and central government frequently share powers concerning taxation and environmental policy. Other areas over which provincial and central governments exercise joint competencies are health, social welfare, education, housing, police and prison administration, and 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

⁹These powers are allocated to the central government in the following agreements: Protocol Between the Government of Sudan and the Sudan People's Liberation Movement (2004); Transitional Federal Charter of the Somali Republic (2004); Constitution of Bosnia and Herzegovina (1995); and Bougainville Peace Agreement (2001).

¹⁰These powers are allocated to the regional governments in the following agreements: Protocol Between the Government of Sudan and the Sudan People's Liberation Movement (2004); Transitional Federal Charter of the Somali Republic (2004); Bougainville Peace Agreement (2001).

welfare; education; housing; 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 other powers not specified in the constitution fall under the jurisdiction of the central or provincial governments.¹¹

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.

Summary: Distribution of Powers		
<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"> • International affairs and national security • Foreign relations • Defence and armed forces • Immigration and naturalization • Communications and transportation • International commerce and trade 	<ul style="list-style-type: none"> • Education • Social welfare • Health • Police powers • Local taxes • Regional transportation • Natural resources 	<ul style="list-style-type: none"> • Health • Welfare • Education • Housing • Transport and traffic regulations • Environment management • Police and prisons administration

¹¹Art. 111 of the Iraq Constitution: “All powers not stipulated in the exclusive authorities of the federal government shall be the powers of the regions and governorates that are not organized in a region. The priority goes to the regional law in case of conflict between other powers shared between the federal government and regional governments.”

Process for Provincial Governments to Assume Powers over Time

Often following violent conflicts, provinces do not have the ability to effectively govern, yet creation of provincial governments seems necessary for political stability. A phased approach to the assumption of powers by provincial governments may provide the governments time to build their capacity and infrastructure. This is especially useful in states where the necessary financial capacity and infrastructure at the provincial level do not yet exist. In states where the provincial governments assume certain powers over time, the provisions that provide for this process vary in terms of the criteria applied and the means of evaluating provinces' progress towards fulfillment of the criteria.¹²

Sample Language: Assuming Powers over Time

All provinces may assume power and responsibility over the following matters: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

All provinces may begin the process for assuming these powers no earlier than [one/three] year[s] after the entry into force of this Constitution.

¹²Art. 148 of the Spanish Constitution: "(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."

The following powers may be assumed by the provinces after [one/ three] year[s] following the entry into force of this Constitution: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

The following additional powers may be assumed by the provinces after [three/ five] year[s] 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].

Adoption of Framework Legislation for Provincial Governments

Some post-conflict constitutions also provide that the central government may adopt framework legislation regarding powers that are in its exclusive competence and/or those powers that may be shared with provincial governments.¹³ Such legislation serves the purpose of establishing a cohesive national policy and providing guidance for implementation. Consistent with this guiding framework, the provincial governments may then adopt implementing policies and legislation.

¹³Art. 12 of the Austrian Constitution.

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 establish 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.

Cooperation between Central and Provincial Governments

A post-conflict constitution may also include provisions that not only foster cooperation between the central government and provincial governments in the administration of their exclusive and shared powers, but also help increase the level of interaction and connection between the governments. One option 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.

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].

Harmonization of Provincial Legislation

To ensure that the allocation of powers does not result in inconsistent laws and policies on issues of national importance, some post-conflict constitutions provide the central government with authority to adopt legislation, in specific circumstances, that harmonizes the laws and policies of its provincial governments. Such constitutions usually provide that harmonizing legislation, like other types of legislation, shall be passed with the affirmative vote of a set percentage of the legislative body.

Sample Language: Harmonization of Provincial Legislation

When it is necessary in the general interest of the country, 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 [two-thirds/three-fourths/four-fifths] of the [Assembly].

Dispute Resolution Procedures

Many post-conflict constitutions specify that disputes between the central government and provincial governments regarding the constitutionality of the activities, laws, powers, or policies of the other may be brought to a Constitutional Court for resolution.¹⁴ 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 settle disputes between the central and provincial governments.

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.

¹⁴Art. 131 of the Indian Constitution provides original jurisdiction of the Supreme Court in disputes "between the Government of India and one or more States."

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. If desired, this language can also establish a higher standard to be applied before the constitution may be amended to alter the fundamental relationship between the central government and the provincial governments. Such higher standards may take the form of a higher vote in the assembly than required for regular legislation or of submitting changes to a public referendum. This higher standard would ensure that a larger national dialogue takes place before significant changes occur in the powers exercised by either the central government or one or more of the 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 the [two-thirds vote of the Assembly and provincial legislatures/ approval by three-quarters of eligible voters in a public referendum].

CHAPTER III: STRUCTURING THE EXECUTIVE

The executive branch of government plays an important role in any stable democratic state, as many constitutions grant the president/prime minister political, economic, military, and social policy decision-making powers. For post-conflict states in transition, the executive branch is especially important because it is the primary component in shaping the government. Therefore, post-conflict states usually exercise great care in selecting the president/prime minister and granting him/her powers, by enshrining 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) powers and functions; (3) role of the cabinet/council of ministers; (4) selection of the president/prime minister; (5) removal of the president/prime minister; (6) term of office; (7) eligibility; and (8) oath of office.

Executive Branch Systems

There are three basic executive branch systems: presidential, parliamentary, and mixed.¹ In a presidential system, the president is the singular authority within the executive branch. In a parliamentary system, the prime minister and the parliament are able to represent multiple parties and opinions within the executive branch. States with the 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) whether they want a strong central government, (2) the level of checks and balances, which is the desired 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.² These factors help determine which system of government best fits the state's needs.

¹The United States has a presidential system. The United Kingdom has a parliamentary system. France has a mixed presidential/parliamentary system.

²International Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 178 (Peter Harris & Ben Reilly, eds., 1998). http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

Presidential System

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

The presidential system has many advantages for post-conflict situations. First, it ensures separation of powers, which is the division of power between different branches of the central government. This limits the potential for the abuse of power by any one group or individual. Second, the direct election of the president also increases the degree of accountability to voters. Third, the president serves as a unifying force for the state, which may be especially positive in a state with significant ethnic or linguistic diversity. Finally, a presidential system may increase the degree of voter choice and offer stability and continuity in public policy.

Presidential systems also have potential disadvantages. One disadvantage for states with multiple ethnic groups is that it is less likely that members of minority groups will hold the position of chief executive. Therefore, minority groups may not feel represented. Another disadvantage is that this system is widely associated with Western democracies and may lack legitimacy as a non-indigenous executive structure. Finally, the presidential system has a lesser degree of significant 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. Empirical evidence suggests that presidential systems are more greatly associated with democratic failure than parliamentary systems.³

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.

³For a detailed discussion on the different systems, see International Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 196 (Peter Harris & Ben Reilly, eds., 1998). http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

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. In parliamentary systems, 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 because cabinets are usually drawn from members of the elected legislature, enabling the inclusion of all political elements represented in the legislature in the executive. It is common for cabinets to be a coalition of several different parties. In deeply divided societies, the principle of inclusion can be imperative to stable, sustainable government.⁴

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.⁵ Also, many parliamentary systems enable elections to be called at any time, rather than be subject to the fixed terms common to presidential systems.⁶ This brings 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 decisions are made.

Moreover, parliamentary systems have proven to be more sustainable for new democracies than presidential systems. Of the many states that became

⁴South Africa's "grand coalition" government allows the significant political parties to be represented in the cabinet and take part in executive decision-making. International Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 197 (Peter Harris & Ben Reilly, eds., 1998). http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

⁵For example, a discredited government may be dismissed from office by the parliament itself. This is what occurred in Ecuador in 1994.

⁶The United Kingdom, Canada, and Australia are examples of this type of parliamentary system.

independent in the three decades following the end of World War II, all the continuously democratic states have parliamentary systems.⁷

However, potential disadvantages to parliamentary systems also exist. While more efficient, parliamentary systems may be less stable over the short term than presidential systems. Though most federations adopt the parliamentary model, they are often plagued by frequently collapsing coalitions and dissolutions of governments when the executive loses the legislature's support.⁸ In addition, parliamentary systems may be less accountable than presidential systems because responsibility for decisions is taken by the collective cabinet rather than a single figure.

Parliamentary systems, particularly in new democracies, may contain a single party rather than multiple parties. In divided societies, such parties can represent predominantly or exclusively one ethnic group. When placed in a parliamentary system, a 51 percent majority of the seats in such cases can result in 100 percent of the political power if there are few or no devices to restrain the power of the executive. Moreover, compared to the separation of powers that occurs in presidential systems, many parliaments provide a relatively weak legislative check on governments because of the party unity. This means that a slim parliamentary majority can win every vote on every issue in the parliament.

Sample Language: Parliamentary System

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

⁷“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 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.” Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 182 (Peter Harris & Ben Reilly eds., 1998), http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

⁸“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 example 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.” Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 182 (Peter Harris & Ben Reilly eds., 1998), http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

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.⁹ As in Sri Lanka, states with the mixed form of government combine a parliament and prime minister with a president. The president is directly elected by voters while the cabinet is drawn from and subject to the confidence of the 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 best of both the presidential and parliamentary systems. It may also lead to greater consensus in requiring the two executive officers, the president and the prime minister, 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 gridlock 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.

⁹This system may also be called a semi-presidential system. Examples of this mixed form of government structure are France, Portugal, Finland, Poland and Sri Lanka.

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

Pluralistic Executive Systems

In rare situations, post-conflict states may select a pluralistic executive system.¹⁰ This system may be effective in post-conflict situations where there are multiple, dominant ethnic groups because it ensures equal representation within the executive. In Bosnia and Herzegovina, for example, the presidency consists of one Serb, one Bosniac, and one Croat. The members of the presidency appoint one chair of the presidency. When one member of the presidency dissents from the decision of the others, that member has three days to declare that the decision is “destructive of a vital interest of the Entity.” If this declaration is confirmed by two-thirds of the House of Peoples, the decision shall not take affect.¹¹

Sample Language: Pluralistic Executive Systems

The presidency shall consist of three members: one [representing one ethnic group] and one [representing another ethnic group], each directly elected from the territory of the [one province], and one [other ethnic group] directly elected from the territory of the [other province].

The members of the presidency shall appoint from their members a [Chair/Chairman/Principal].

A dissenting member of the presidency may declare a presidency decision to be destructive to the vital interest of the state, provided that the member does so within three days of its adoption. Such a decision

¹⁰Art. V of the Constitution of Bosnia and Herzegovina provides there are three constituent peoples: the Bosniacs, the Croats, and the Serbs. To ensure representation from each group, the executive consists of one Bosniac, one Croat, and one Serb.

¹¹Art. V(2) of the Constitution of Bosnia and Herzegovina.

shall be referred immediately to the [Parliament/Legislature]. If the declaration is confirmed by a two-thirds vote within ten days of the referral, the challenged presidency decision shall not take effect.

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 power. In a parliamentary system, the prime minister has fewer executive powers.

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

Sample Language: Powers and Functions

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

Domestic Powers

The executive is generally granted many domestic powers. Examples of such powers include: (1) signing, promulgating, and executing laws, (2) vetoing legislation passed by the legislature, (3) declaring a state of emergency, (4) conferring titles, orders, and decorations, (5) granting individual pardons and amnesties, (6) appointing state officials and judges, (7) announcing elections, (8) calling referenda, (9) dissolving the legislature, and (10) dissolving the legislature.¹²

Sample Language: Domestic Powers

Essential Powers:

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

¹²Where constitutions grant the executive the power to dissolve the National Assembly/Parliament, they often specify when this can happen. Ch. 2, Art. 103 of the Croatian Constitution: "the President may not . . . dissolve the Croatian Parliament if the impeachment proceedings against him for violation of the Constitution have been instituted." Art. 103 also prohibits the dissolution of the Parliament by the President when the Parliament has instituted impeachment proceedings against him or her. In contrast, Art. 62(c) of the Czech Constitution grants the President the power to dissolve the Chamber of Deputies with no restrictions. Art. 48 of the Latvian Constitution grants the President the power to propose the dissolution of Parliament. The Parliament then votes on the proposed dissolution.

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.

In a Mixed Presidential/Parliamentary 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.

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; (2) negotiating the terms of treaties; (3) appointing ambassadors and envoys; and (4) accrediting and receiving foreign ambassadors and envoys.

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.

Commander-in-Chief

Many post-conflict constitutions grant the executive power as the Commander-in-Chief of the armed forces.¹³ The Commander-in-Chief generally has discretion over the appointment and dismissal of armed forces personnel.¹⁴ The Commander-in-Chief may also have the power to declare war.¹⁵ In addition, some constitutions include provisions for a national security council to advise the Commander-in-Chief on issues of security and defense.¹⁶

All the powers of the Commander-in-Chief may occur at the proposal or with the consent of the prime minister (if there is a prime minister) or the legislature.

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.**

¹³Arts. 168-69 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. Art. 9 of the Azerbaijan Constitution provides that the President of the Republic is the Commander in Chief of the Armed Forces.

¹⁴In 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 (Albanian Constitution, Art. 169).

¹⁵In Croatia, the President of the Republic, who is also the Commander-in-Chief of the armed forces, can declare war and conclude peace. (Croatian Constitution, Art. 99).

¹⁶The Albanian Constitution, however, does not include requirements for the selection of the National Security Council. (Albanian Constitution, Art. 168(3))

Role of the Cabinet/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. It is also common for constitutions to specify the ministries or cabinet positions, and the processes for selection and removal of ministers or cabinet members. Constitutions may require a balanced representation on the cabinet or council of ministers from different groups.¹⁷

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]

¹⁷For example, in Belgium, the Council of Ministers is appointed and must include an equal number of Dutch and French-speaking members. 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.

Selection and Removal of the Cabinet/Council of Ministers

Some constitutions specify the procedures for selecting and removing the cabinet or council of ministers. In many states, the executive nominates or appoints the cabinet or council of ministers.¹⁸ In mixed systems, constitutions generally specify whether the president or prime minister fulfills this function.

Granting power of selection exclusively to the executive may lead to a situation where all ministers are from the same political party, ethnicity, or regional area. Thus, some constitutions require the legislature to approve these nominations.¹⁹ 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.²⁰ 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.²¹

Sample Language:

Selection and Removal of the Cabinet/Council of Ministers

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

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

***Optional:* If the [simple majority] of the [Legislature] passes a motion of no confidence in the [Cabinet], the members of the [Cabinet] must resign.**

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

¹⁸Art. 64 of the Afghanistan Constitution provides that ministers are chosen by the President. Some states refer to these executive advisors by other names (for example, the "federal government" in Switzerland).

¹⁹The following are examples of European states that require Parliament's approval of nominated Ministers: Albania, Czech Republic, Croatia, Greece, Italy, Macedonia, Slovakia, Slovenia, and Switzerland.

²⁰Art. 139 of the Costa Rican Constitution.

²¹Art. 69 of the Japanese Constitution; Art. 102 of the South African Constitution.

Selection of the President/Prime Minister

It is common for post-conflict constitutions to provide how the president/prime minister will be selected. Usually, they are selected either by direct election by the people or appointment or election by the legislature.

The way that the president/prime minister is selected is important because it significantly shapes political competition, the role of political parties, and eventual structure of the political system and government. For example, the same number of popular votes could lead either to a coalition government or a government where a single party has the majority control, depending on how the president/prime minister is selected.²²

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/Prime Minister

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

Removal of the President/Prime Minister

Many states' constitutions include procedures in the event that the executive is not able to fulfill his/her duties. The most common reasons for removal of the executive are: (1) disability or death and (2) impeachment.

Disability or Death of the Executive

Many constitutions include provisions in the case that the executive cannot perform his/her functions. In the case of short-term disability, most constitutions designate another state official to assume presidential powers.²³ If the executive's

²²For more complete discussion, please see Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 191 (Peter Harris & Ben Reilly eds., 1998) http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

²³Art. 7 of the French Constitution grants the President of the Senate the power to perform the President's duties in the case of the President's temporary disability. Art. 64 of the Austrian Constitution grants this power to the Federal Chancellor.

disability is permanent (or if he/she dies), constitutions often require new elections.²⁴

Sample Language: Disability or Death of the President/Prime Minister

In the case that the [President/Prime Minister] is unable to fulfill his or her duties for a period of [20/100 days], 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 within [10/100] days 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. Generally, impeachment is limited to willful actions that undermine the constitution or the sovereignty of the state.²⁵

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] of the [Legislature/Parliament/National Assembly] may introduce a motion to impeach the [President/Prime Minister].

If [one-half/two-thirds] of the [Legislature/Parliament/National Assembly] vote to impeach the [President/Prime Minister], he or she shall immediately abdicate the office.

²⁴Art. 64 of the Austrian Constitution.

²⁵Some 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.

New [presidential/executive] elections must be called within [20/50] days in accordance with the law.

Term of Office

Many constitutions include provisions for how long the executive may remain in office, and the number of opportunities for re-election or re-appointment.²⁶ The terms of office range from as short as one year²⁷ to as long as seven years.²⁸ Longer terms of office allow for greater continuity, while shorter terms of office make it easier to remove officials whom the populace disapproves.

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.²⁹ Additionally, in some states, the executive may not hold any other office.³⁰ Constitutions may also preclude the executive from holding an official office in any political party.³¹

Sample Language: Eligibility

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

²⁶Art. 127(2) of the Polish Constitution allows the President to hold a maximum of two five-year terms.

²⁷Art. 152 of the Swiss Constitution.

²⁸Art. 85(1) of the Italian Constitution provides that Italy's President serves seven years while Art. 6 of the French Constitution provides that France's President serves a five-year term.

²⁹Art. 127(3) of the Polish Constitution requires presidential candidates to be Polish citizens of at least 35 years of age.

³⁰Art. 55 of the German Constitution provides that the Federal President cannot be a member of the government or a legislative body while in office

³¹Art. 55 of the German Constitution prohibits the German President from being the member of the government or a legislative body while in office. Art. 84 of the Italian Constitution: "the presidency is incompatible with any other office."

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.

Oath of Office

Some constitutions require the executive, upon assuming office, to take an oath swearing loyalty to the constitution and/or state.³² Some states consider the oath so important that it may regard a winning candidate not elected if the candidate refuses to take the oath or takes it with a reservation.³³ States may also specify whether the oath may be taken without religious affirmation.³⁴

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.

³²Art. 94 of the Croatian Constitution requires the President to take an oath swearing loyalty to the Constitution. Similarly, Art. 81 of the Estonian Constitution includes the exact oath the President must swear to the Estonian people before the Parliament.

³³Art. 96 of the Croatian Constitution.

³⁴In 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."

CHAPTER IV: DESIGNING THE LEGISLATURE

The legislative branch allows for the recognition and accommodation of the diverse interests of a state and its peoples. The two most common types of state legislatures are bicameral and unicameral.¹ A bicameral legislature is a parliament consisting of two chambers, whereas the unicameral legislature consists of only one chamber.

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

Structure of the Legislative Branch

Some commentaries argue that unicameral systems are better suited for smaller, non-federal, culturally and ethnically homogeneous countries. In contrast, other commentaries argue that bicameral legislatures better serve larger, federal states.² A bicameral system may also provide a more balanced perspective on public policy, of particular concern when a state has one dominant political party.³

Sample Language: Structure of the Legislative Branch

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

Unicameral

Unicameral legislatures, as in Sweden, are usually more efficient and less expensive than bicameral legislatures.⁴ However, the absence of a second chamber

¹One exception to this is Norway, which has a hybrid model.

²Rakhimkulov, Edward R. *The Relative Pros and Cons of the Second Chamber in the Ukrainian Context*, www.spea.indiana.edu/pdp/analyses/Research%20Publications/Bicameralism_ER.htm.

³Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 220-23 (Peter Harris & Ben Reilly eds., 1998), http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

⁴National Democratic Institute for International Affairs. *One Chamber or Two? Deciding Between a Unicameral and Bicameral Legislature*, http://www.accessdemocracy.org/library/029_ww_onechamber.pdf.

limits the exercise of checks and balances or separation of powers within the legislature. As a result, tyranny by the majority may be possible.⁵

Unicameral legislatures are common in small, ethnically and socially homogenous countries 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 and divisive atmosphere, they may be an attractive alternative for states with divisions along regional or ethnic lines.⁶

Sample Language: Unicameral

The [Legislature] shall have one [chamber].

The [chamber] shall have [50/100/200] members.

Bicameral

Constitutions in a bicameral system usually allocate distinct responsibilities and rights to each chamber in order to create a stronger system of checks and balances. Further, the chambers' composition and the manner in which representatives are elected usually differ.⁷

⁵However, 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. Weise, Tania, Institute for Public Policy Research. *Playing House—The Theory of Bicameral Parliament*, 7 (2003), <http://www.ippr.org.na/Briefing%20Papers/BP22.pdf>.

⁶For example, 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.

⁷For example, in Brazil, Australia, and Switzerland, 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. Brown, Trevor L. *An Examination of Bicameralism vs. Unicameralism in Federal and Unitary States*, http://www.spea.indiana.edu/pdp/analyses/Research%20Publications/Bicameralism_TB.htm.

A bicameral system, such as in Switzerland, is generally the most effective method to combine proportional representation with recognition of other internal concerns of local governments, geographic regions, ethnic groups, and underrepresented constituencies.⁸ Another advantage of bicameral systems is that they allow the state as a whole and its individual territories or regions to be represented simultaneously in the legislative process.⁹

Some states have moved away from bicameral systems because of complications, delays, and expenses attributed to the bicameral relationship.¹⁰

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 [50/75/100] members. Members shall be elected every [4-9] years.

The [lower house] shall have [100/150/200] 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.**

⁸Rakhimkulov, Edward R. *The Relative Pros and Cons of the Second Chamber in the Ukrainian Context*, www.spea.indiana.edu/pdp/analyses/Research%20Publications/Bicameralism_ER.htm.

⁹Brown, Trevor L. *An Examination of Bicameralism vs. Unicameralism in Federal and Unitary States*, http://www.spea.indiana.edu/pdp/analyses/Research%20Publications/Bicameralism_TB.htm.

¹⁰For example, Denmark and Sweden experimented with bicameral systems, but have now opted for a unicameral system. Brown, Trevor L. *An Examination of Bicameralism vs. Unicameralism in Federal and Unitary States*, http://www.spea.indiana.edu/pdp/analyses/Research%20Publications/Bicameralism_TB.htm. National Democratic Institute for International Affairs. *One Chamber or Two? Deciding Between a Unicameral and Bicameral Legislature*, http://www.ndi.org/ndi/library/029_ww_onechamber.txt.

Selection of the Speaker

Regardless of whether constitutions create a bicameral or unicameral system, most provide for the selection of a Speaker of each house of the legislature. Speakers serve as the leader of their respective house of the legislature and oversee the house's rules and procedures.¹¹ Typically, constitutions include how the Speaker will be selected and the Speaker's duties.¹² It is common for the Speaker to oversee the functioning of the legislature, to represent the legislature to other branches of government, call extraordinary sessions of parliament, and perform other duties as defined by law.

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.

¹¹Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict; Options for Negotiators*, 220 (Peter Harris & Ben Reilly eds., 1998), http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf. The Speaker may also be called the President, Talman, Marshall, etc.

¹²Art. 89 of the Slovak Constitution enumerates the Chairman of the National Council's responsibilities.

It is common in post-conflict constitutions to grant the legislature the power to represent the goals and interests of the people, to propose legislation, and to approve legislation. Many constitutions also describe that the rules of the legislature are determined by law with the legislature's approval, and that the general sessions of the legislature are to be determined by law.

Constitutions also set forth the responsibilities of the legislature. These may include: (1) electing the prime minister (in a parliamentary system), (2) passing laws and other administrative measures, (3) passing constitutional amendments, (4) deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state, (5) approving a budget for the institutions of the state, (6) ratifying treaties signed by the prime minister or president, (7) overseeing government administration, (8) overseeing government regulatory and spending powers; and (9) impeaching the executive for violating the constitution, committing a crime, or breaching his/her oath.¹³

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.

¹³Art. 74 of the Lithuanian Constitution.

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

Optional: The [Legislature] shall by [three-fifths] 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.

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”) committees¹⁴ and temporary (“ad-hoc”) committees.¹⁵

¹⁴For example, since its 1994 elections, Sweden has 16 committees that play an important role as every matter must be referred to a committee before it is approved.

<http://www.sverigeturism.se/smorgasbord/smorgasbord/society/government/parlament.html>.

¹⁵For example, in Poland, an ad hoc working group is formed for each bill proposed which may include members from several different standing committees.

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/justice, finance/treasury, health, and education.¹⁶ 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].**

Term of Office and Eligibility of Members

Constitutions usually provide that elected legislative representatives serve for a specific and fixed length of time.¹⁷ Longer terms can provide more stability and allow legislators more freedom of action because they are not as preoccupied

¹⁶In 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.

<http://www.sverigeturism.se/smorgasbord/smorgasbord/society/government/parliament.html>.

¹⁷Lijphart, A. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven, Yale University Press. 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. And in the US 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.

or concerned with re-election. Longer terms may also make legislators less susceptible to sudden, but temporary, shifts in public opinion.

In contrast, shorter terms ensure greater responsiveness to public opinion because elections are more frequent. However, this may also result in representatives spending increased portions of their terms focusing on re-election.

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 [four 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.¹⁸ Such provisions are often linked to votes of no 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.

¹⁸Art. 35 of the Czech Constitution provides that the President of the Republic 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, Art. 17(2) provides that elections for a new Chamber take place within sixty days.

New elections shall be arranged within [20] 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.

Parliamentary System:

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.¹⁹ To prevent corruption, these rules often include mandatory financial disclosure requirements for elected and appointed officials,²⁰ restrictions on gifts that members may accept, and limits on outside employment during and after their tenure.²¹

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

¹⁹In South Africa, for example, 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, adopted May 21, 1996, § 1). Art. 233(1) of the Ugandan Constitution authorizes the Parliament to establish a code of conduct for its members.

²⁰National Democratic Institute, *Legislative Ethics: A Comparative Analysis*, 10 (1999), available at http://www.accessdemocracy.org/library/026_ww_legethics_1_1_27.pdf.

²¹National Democratic Institute, *Legislative Ethics: A Comparative Analysis*, 9-10, 15 (1999), available at http://www.accessdemocracy.org/library/026_ww_legethics_1_1_27.pdf.

legislature and independent persons, or (3) self-enforcement, whereby the members of the legislature police themselves.²²

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.**

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.

²²National Democratic Institute, *Legislative Ethics: A Comparative Analysis*, 18-20 (1999), available at http://www.accessdemocracy.org/library/026_ww_legethics_1_1_27.pdf.

Freedom of Legislative Speech: Some constitutions protect freedom of legislative speech to promote free discussion between legislators and citizens about their concerns.²³ This allows the legislator to more effectively represent the interests of the people without risk of legal liability.

Immunity from Legal Liability: Legislators may also receive a degree of immunity from legal liability while in office.²⁴ Although the immunity granted rarely is absolute, many states grant general immunity to legislators.²⁵ 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,²⁶ while others specify the scope of immunity within the constitution itself.

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.

²³Art. 75 of the Croatian Constitution: “No representative shall be prosecuted, detained or punished for an opinion expressed or vote cast in the Croatian Parliament.” Art. 57 of the Austrian Constitution: “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.”

²⁴Art. 46 of the German Constitution contains the indemnity and immunity provisions for members of the House of Representatives. Art. 90 of the Constitution of Azerbaijan, proscribes immunity for deputies within the Legislature. Art. 83 of the Slovenian Constitution also provides immunity for deputies.

²⁵Art. 76 of the Estonian Constitution: “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.”

²⁶Art. 57(7) of the Austrian Constitution provides that details of immunity will be settled by federal law. Art. 58(2) of the South African Constitution: “Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.”

Quorum Requirements

Most constitutions prescribe quorum requirements necessary for the legislature to conduct business.²⁷ The term “quorum” refers to the minimum number or ratio of the total legislature that must be present to call a session to order. In the absence of a quorum, a legislature cannot conduct official business because there is not sufficient representation to make decisions affecting the state.

Sample Language: Quorum Requirements

[40/60 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.

²⁷For example, in Bosnia Herzegovina, the House of Peoples has 15 members: five Bosniacs, five Croats, and five Serbs. Nine delegates, three from each group, must be present to satisfy quorum requirements.

CHAPTER V: CREATING A JUDICIARY SYSTEM

All post-conflict constitutions establish an independent, functioning 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.

Post-conflict constitutions generally include several provisions concerning the functioning and structure of the judiciary, including: (1) powers and functions of the judiciary, (2) judicial independence, (3) judicial authority, (4) structure of the judiciary, and (5) administration of the judiciary.

Powers and Functions

States include general provisions in their constitutions concerning the judiciary's function to ensure justice and safeguard the rights and interests of the people within its boundaries.¹ 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, because conflict-torn states usually have lacked an impartial and neutral body to enforce laws and uphold justice.

¹Art. 117 of the Bulgarian Constitution: "The judicial branch of government shall safeguard the rights and legitimate interests of all citizens, legal entities, and the state."

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 government. This is especially important in post-conflict states as it relates to the protection of human rights, the promotion of political stability, and the establishment of a healthy economy.²

The following elements are particularly important in establishing the independence of the judiciary: (1) separation of the judiciary from other branches of government³ and (2) creation of a judicial council to oversee the judiciary and its judges, and to administer it effectively and independently.⁴

If a state chooses to establish a judicial council, typically the constitution addresses the selection, composition, administration, and financing of the judicial council to maintain judicial independence.⁵ Constitutions may outline the composition of the judicial council and the selection of its members, specifying who is eligible to serve on the council (for example, 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 may 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.⁶

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.

²General Assembly of the United Nations, Resolution No. 217 A (III) of December 10, 1948.

³Art. 203 of the Portuguese Constitution: "The courts are independent and subject only to the law."

⁴Art. 217 of the Venezuelan Constitution: "The pertinent organic law shall create a Council on the Judiciary, the organization and powers of which it shall fix for the purpose of ensuring the independence, efficiency, discipline, and decorum of the Courts and of guaranteeing the benefits of a judicial career to judges. Adequate representation on it must be given to the other branches of the Public Power."

⁵Art. 147 of the Albanian Constitution.

⁶Art. 131 of the Slovenian Constitution: "The 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." Art. 178 of the South African Constitution also describes the composition of the Judicial Service Commission.

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 Council:

The Judicial Council shall ensure the autonomy, independence, impartiality, competence, and efficiency of the judiciary.

The responsibilities of the Judicial Council shall include, but shall not be limited to, 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 Council shall be defined by law.

The Judicial Council is composed of [eleven] members. On the proposal of the president, the Assembly elects [five] members from among university professors of law, attorneys and other lawyers; 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.

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

The judiciary generally acts as a check and balance upon other branches of government. Constitutions usually specify whether judicial decisions are binding upon other branches of the government. Also, constitutions explain the jurisdiction of each court and which individuals, institutions, or agencies have standing to bring cases to the various courts.

Some constitutions discuss the judicial authority of the courts generally, without mentioning the specific courts of the state. These states provide for the legislative branch to create specialized courts.⁷ Other states choose to enumerate roles, responsibilities, and other provisions separately according to each court.⁸

In particular, constitutions may create a system of checks and balances by defining or specifying judicial authority over other government branches, judicial authority through administrative and specialized courts, and the power of judicial review.⁹

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.

⁷Art. 143 of the Slovakian Constitution: “(1) The system of courts consists of the Supreme Court of the Slovak Republic and other courts, (2) The detailed arrangement of the court system, the courts’ sphere of competence and organization, and the manner of court proceedings will be set out in a law.” See also Art. 82 of the Latvian Constitution, Art. 91 of the Czech Constitution, Art. 45 of the Hungarian Constitution, and Art. 210 of the Venezuelan Constitution.

⁸Art. 92 of the Brazilian Constitution lists several courts: the Supreme Federal Court, the Superior Court of Justice, the Federal Regional Courts, the Labour Courts, the Electoral Court and the Military Courts.

⁹Art. 165 of the South African Constitution.

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

Structure of the Judiciary

Constitutional determination of the role and structure of the courts varies from state to state. Some constitutions provide for creation of specialized courts. Other constitutions leave creation of courts, other than the Supreme Court and Constitutional Court, to the legislature.¹⁰ In cases where the constitution specifies the courts, the constitution also includes provisions concerning jurisdiction of the courts and who has standing to bring cases to the various courts.¹¹

Generally, this section includes: (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.¹²

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.

¹⁰Art. 166 of the South African Constitution: "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."

¹¹Arts. 167 – 70 of the South African Constitution describes the structure and jurisdiction of the Constitutional Court and the Supreme Court; it also describes the jurisdiction of the High Court and Magistrate Courts.

¹²Art. 125 of the Azerbaijan Constitution: "Judicial power is implemented by way of constitutional, civil and criminal legal proceedings and other forms of legislation provided for by law."

Constitutional Court

Many post-conflict states include in their constitutions the creation of a Constitutional Court. This is important in the new constitutions of rebuilding states to ensure judicial independence and to provide a mechanism for upholding and enforcing the constitution. The constitution generally specifies that the Constitutional Court makes final interpretations of the constitution, defends the constitution, and is the highest court in all constitutional matters.¹³ States may choose to include the definition of a constitutional matter.¹⁴ Alternatively, instead of creating a separate court, drafters may fuse the constitutional review powers of the Constitutional Court with the Supreme Court.¹⁵

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

¹³Art. 167(3) of the South African Constitution: "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."

¹⁴Art. 167(7) of the South African Constitution: "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

¹⁵Art. 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 measure undertaken by government." Similarly, Art. 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."

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.

Judges 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.¹⁶

Sample Language: Judges 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:

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

¹⁶Art. 167 of the South African Constitution: "The Constitutional Court consists of a President, a Deputy President and nine other judges." Art. 222 of the Portuguese Constitution: "1. The Constitutional Court shall be composed of 13 judges, 10 of whom shall be appointed by the Assembly of the Republic; the remaining 3 shall be co-opted. 2. Six of those members appointed by the Assembly of the Republic or co-opted must be selected from among the judges of the other courts; the remainder shall be jurists. 3. Judges of the Constitutional Court hold office for 9 years, non-renewable. 4. The President of the Constitutional Court shall be elected by the judges of that court. 5. Judges of the Constitutional Court enjoy the same guarantees as to independence, security of tenure, impartiality and immunities, and are subject to the same disqualifications, as judges of the other courts. 6. The law may prescribe the immunities and other rules with respect to the status of judges of the Constitutional Court."

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 delineate the jurisdiction of the Constitutional Court to hear and decide specific matters arising under the constitution. Constitutions may assign to the Constitutional Court the responsibility to decide upon the constitutionality of legislative and executive acts, failure to implement the constitution, constitutional disputes, and the legality of constitutional amendments.

One of the matters that constitutions generally address is the constitutionality of legislative and executive acts. Some constitutions specify how legislative and executive decisions and orders are reviewed and brought before the Constitutional Court.¹⁷ 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.

Another provision that states may choose to include in their constitutions concerns the consequences for the failure of state agencies and government bodies to implement the constitution. Constitutions generally specify that the Constitutional Court is the body that decides if an agency or government has failed to implement the constitution.¹⁸ 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.¹⁹

¹⁷Art. 102 of the Lithuanian Constitution: "The Constitutional Court shall decide whether the laws and other legal acts adopted by the Parliament are in conformity with the Constitution and legal acts adopted by the President and the Government, do not violate the Constitution or laws."

¹⁸Art. 167(4)(e) of the South African Constitution: "Only the Constitutional Court may decide that Parliament or the President has failed to fulfill a constitutional obligation."

¹⁹Art. 74 of the Lithuanian Constitution: "For gross violation of the Constitution, breach of oath, or upon the disclosure of the commitment of felony, the Parliament may, by three-fifths majority vote of all the Parliament members, remove from office the President of the Republic, the Chairperson and judges of the Constitutional Court, the Chairperson and judges of the Supreme Court, the Chairperson and judges of the Court of Appeals, as well as Parliament members, or may revoke their mandate of a Parliament member. Such actions shall be carried out in accordance with impeachment proceedings which shall be established by the Statute of the Parliament."

Constitutions generally allocate responsibility to the Constitutional Court to decide disputes between central and regional governments over the constitutional status or functions of those governments, their departments, and agents.²⁰

In addition, constitutions may include a provision specifying that the Constitutional Court decides on the constitutionality of any amendments to the constitution.²¹

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.

²⁰Art. 167(4)(a) of the South African Constitution: "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."

²¹Art. 167(4)(d) of the South African Constitution: "Only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution."

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.

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. Some states allow any person to initiate proceedings if under the belief that his/her rights, as enumerated under the constitution, have been violated.²² Some states also allow persons to appeal directly to the Constitutional Court from any other court.²³ Some states even allow an individual to initiate proceedings regardless of whether or not the individual has been injured by a policy.²⁴ 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.²⁵

²²Derived from German Basic Law. Another example is Part IX, Sec. 159 and 161 of the Spanish Constitution, which allows individuals to lodge a direct complaint 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." Similarly, Ch. 8, Art. 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," which has been instrumental in upholding minority protections.

²³Art. 167(6) of the South African Constitution: "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."

²⁴Ch. IV, Art. 32A(3) of the Hungarian Constitution: "Everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by law."

²⁵Art. 106 of the Lithuanian Constitution: "(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

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.

Binding Effect: A binding clause is included to assert that rulings made by the Constitutional Court are final and binding upon all agencies, organizations, official bodies, and individuals.²⁶

Sample Language: Binding Effect of Constitutional Court Rulings

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

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.”

²⁶Art. 107(2) of the Lithuanian Constitution: “The decisions of the Constitutional Court on issues assigned to its jurisdiction by the Constitution shall be final and may not be appealed.” Art. 167(3)(c) of the South African Constitution: “[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.”

Supreme Court

Most constitutions include the creation of a Supreme Court which acts as the state's highest appellate court. Additionally, states without a Constitutional Court delegate constitutional review to a Supreme Court.²⁷ Supreme court decisions are generally 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.²⁸

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.

Judges of the Supreme Court: Constitutions generally set the number of judges for the Supreme Court, designate terms, and articulate grounds for removal or suspension of judges on the Supreme Court.²⁹

Sample Language: Judges 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].

²⁷Art. 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 measure undertaken by government." Similarly, Art. 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."

²⁸Art. 215 of the Venezuelan Constitution describes the powers of its Supreme Court, including its power to "settle any conflicts that may exist between the different legal provisions and declare which of them is to prevail."

²⁹Art. 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. Art. 177 also sets provisions for the discharge of any judges in general, including Supreme Court judges. Similarly, Art. 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."

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

Jurisdiction of the Supreme Court: As the highest court of appeals in the state, the Supreme Court has jurisdiction to hear all claims upon final appeal.³⁰ Some states allow individuals appealing a case to appeal directly to the Supreme Court. Should the Supreme Court coexist 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.³¹

Sample Language: Jurisdiction of the Supreme Court

The Supreme Court shall have such original jurisdiction as is provided by [federation] 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 must go through an intermediary appeals court before they petition the Supreme Court to hear their cases.³² In other states, individuals may petition directly to the Supreme

³⁰Art. 168(3) of the South African Constitution provides that the Supreme Court is the highest court of appeal in all matters except constitutional matters.

³¹Sheive, Sarah Wright. *Central And Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 Law & Pol'y Int'l Bus. 1201, 1212 (1995). Sheive explains that 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.

³²Art. 210(3) – (5) of the Portuguese Constitution: “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.”

Court.³³ 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.

Binding Effect: Most states stipulate that Supreme Court decisions are binding upon the government, the legislature, and individuals.³⁴

Sample Language: Binding Effect of Supreme Court

Decisions of the Supreme Court shall be final and binding.

Other Courts

In addition to the Constitutional Court and the Supreme Court, some states provide in their constitution for the creation of other courts. Additional courts include: administrative courts, security courts, bankruptcy courts, personal status courts, religious courts, criminal courts, and customary law courts.

A state which aligns with a particular religion may decide the role of that religion in the judiciary system. Some states have chosen to incorporate religious law, such as *Shari'a*, into their constitutions.³⁵ 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.³⁶ Alternatively, constitutions may use *Shari'a* courts as general courts with jurisdiction over all legislated matters.³⁷

³³Art. 210(5) of the Portuguese Constitution: "The Supreme Court of Justice shall operate as a court of first instance or of second instance in the cases prescribed by law."

³⁴Art. 102(2) of the Brazilian Constitution: "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."

³⁵Art. 3(2) of the Syrian Constitution: "Islamic jurisprudence is a main source of legislation." Similarly, Art. 7 of the Constitution of the United Arab Emirates provides that "Islam is the official religion of the Union, and Islamic *Shari'a* is a primary source of legislation, and the official language of the Union is Arabic."

³⁶Art. 9 of the Lebanese Constitution: "... guarantees that the personal status and religious interests of the population, to whatever religious sect they belong, is respected." Under the laws, specialized courts also

Administration of the Judiciary

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

Impartiality

Constitutions generally provide for the impartiality and independence of judges. For example, constitutions may include incompatibility provisions providing that judges should not hold positions incompatible with their positions as judges of the courts of law.³⁸

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 Court and the Supreme Court. Those that do not specify the number of judges in the constitution provide that the structure and makeup of the courts will be determined by law.³⁹

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.

³⁷Saudi Arabia is an example of a state in which all general courts are *Shari'a* courts. Art. 8 of the Saudi Arabian Constitution: "Government in the Kingdom of Saudi Arabia is based on the premise of justice, consultation, and equality in accordance with Islamic *Shari'a*."

³⁸Art. 109(2) of the Lithuanian Constitution.

³⁹Art. 167(1) of the South African Constitution specifies the number of judges on the Constitutional Court: a President, a Deputy President and nine other judges. However, Arts. 168 – 170 leave the

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 to be selected. Three main options exist: cooperative selection, presidential selection with parliamentary approval, and parliamentary selection. Some states use a combination of two or three of the options to select judges for their various courts.⁴⁰ In any of the options, the judicial council may play an important role in nominating and/or approving judges.

Option 1: 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 example, 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 is entrusted with the choice of the remaining three of the nine member high court.⁴¹ 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.⁴²

Option 2: In most presidential selection systems, the president selects the judges and the legislature must approve his selection.⁴³

Option 3: In parliamentary selection models, a supermajority of the parliament selects the judges.

number of Supreme Court judges and other judges to be determined by the legislature. Similarly, Art. 103(1) of the Lithuanian Constitution defines the term of years for the Constitutional Court only.

⁴⁰Art. 174 of the South African Constitution sets forth the process for selection of judges, combining elements of each of these options.

⁴¹Art. VI(1)(a) of the Constitution of Bosnia and Herzegovina.

⁴²Art. 125(2) of the Constitution of East Timor.

⁴³Art. 117(1) of the Afghani Constitution: "the Court is composed of members who are appointed by the President, with the approval of the House of Representatives."

Sample Language: Appointment of the Judges

Option 1: Cooperative Selection

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

Option 2: Plurality System

Judges of all Courts shall be selected by the president and approved by [two/three] members of parliament [and the Judicial Council].

Option 3: Majority System

Judges of all Courts shall be selected by [two/three] 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.⁴⁴ Others also include provisions for diversity in the courts in an effort to include women and minorities.⁴⁵

Post-conflict constitutions may include provisions about the role of international judges within the judiciary system, especially in situations in which the United Nations played an active role in the administration and functioning of the state. Such provisions may include the qualifications of the international judges and requirements for training on the state's laws and legal system.

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

⁴⁴Art. 136(5) of the Albanian Constitution: "Judges may only be citizens with higher legal education. The conditions and procedures for selection are defined by law."

⁴⁵Art. 174 of the South African Constitution: "(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."

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.⁴⁶

Constitutions may also include provisions for the removal of a judge, usually for crimes of moral turpitude/high crimes. Constitutions may also determine which government branch (executive, legislative, or both) has the authority to dismiss a judge.⁴⁷

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].

⁴⁶In Albania, the High Court judge remains on the Court until (s)he is 65, or is dismissed. In South Africa, a Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire by age 70. In Slovenia, the office of a judge is permanent, with retirement age and dismissal to be determined by law.

⁴⁷Art. 177 of the South African Constitution grants such authority to the Judicial Service Commission, National Assembly, and the President.

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].

CHAPTER VI: BUILDING AN ELECTORAL SYSTEM

Establishing a transparent electoral system that encourages full voter participation is an important element for post-conflict constitutions. Post-conflict states generally address the issues of transparency and universal and equal suffrage in their 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) 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. Some states use more than one system to elect members of the legislature, using a combination of proportional and majority or plurality systems.¹

Plurality System

Under the plurality system, the candidate who receives the most votes wins the election, regardless of the number of votes.² This system is often called the “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.

¹Russian electoral law provides that half of the State Duma 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, available at http://www.cikrf.ru/m_menu_i.htm.

²Art. 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.

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 must have a clear majority of the votes instead of simply the highest number of votes. This system requires voting for individual candidates instead of voting for a party list.³ Because candidates must garner a high percentage of the vote to win, there is often more than one round of voting.⁴

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].

³In Malawi and 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.

⁴Art. 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.

Proportional Representation

A proportional representation system is the representation of all parties in the legislature in proportion to the number of votes they receive. Under the proportional representation system, an individual votes for a party or for a list of candidates from one party.⁵ The number of votes that a party/candidate wins determines the number of seats they receive. This system requires multi-member districts. States may either choose a closed party list (citizens vote for a particular party, not a particular candidate)⁶ or an open party list (citizens vote for a particular candidate).⁷ The goal of proportional representation systems is to ensure that voters receive representation 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 may be a significant factor in the function of elections because it may determine how different areas of the state vote and how the residents of those areas are represented. Constitutions generally specify the electoral system as a single or multi-district system.

Additionally, states must decide how many representatives will be elected from each district, depending upon which system they decide to use. If a state uses a plurality/majority system, a single district system is sufficient, and voters need to select only one representative. However, if the system is proportional, multiple-member districts are required, and voters elect a number of representatives.⁸

⁵Art. 45 of the Brazilian Constitution: "The Chamber of Deputies is composed of representatives of the people, elected, by the proportional system, in each state, territory and in the Federal District."

⁶South Africa uses closed party lists.

⁷Finland and Sweden use open party lists.

⁸Art. 149 of the Portuguese Constitution provides that electoral districts are delineated by law and are designed, either as plurinomial 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. Art. 152 provides that deputies represent the entire country, not their electoral district.

Generally, the electoral law, and not the constitution, determines provisions regarding such election procedures.

States must consider how to delineate electoral districts. States may either choose to use existing boundaries of provinces/regions, or they may draw new boundaries. If a state decides to draw new boundaries, the state may determine size and boundaries of the districts while taking into consideration a variety of factors related to the district, such as population, geography, history, ethnicity, religion, and race.

Single District System

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

Some states have a first round of elections after which the two candidates who received the most votes participate in a second round of elections if no candidate received a clear majority of the votes. The winner of the second round becomes the representative of the district.⁹

Sample Language: Single District System

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

Optional: 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-District System

In a multi-district system, the state is divided into a number of electoral districts in which voters elect more than one representative for the district. Each district has a set number of representatives, usually determined by electoral law.

⁹France 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. <http://www.uiowa.edu/~electdis/Alternative.htm>

Sample Language: Multi-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 minority requirements. Set asides are seats reserved for ethnic or religious minorities.¹⁰ Party requirements stipulate that all political parties must include candidates from different ethnic or confessional groups.¹¹

Sample Language: Minority Mechanisms

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

¹⁰The 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. The Constitution of Afghanistan also provides for the general and just representation of all the country's constituencies. In order to ensure that its female population receives adequate and fair representation, the law requires that at least one female delegate be elected from each province to the Wolesi Jirga (House of the People) and fifty percent of the Presidential appointments to the Meshrano Jirga (House of Elders) be female (Art. 83 – 84). Additionally, the participation of nomads in the Afghani municipal councils is encouraged and regulated by law (Art. 140).

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 choose to include in their constitutions set-asides or specific party requirements for women.

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 provisions concerning the elections of the legislative branch of the state. Such provisions usually specify voting requirements, method of voting, frequency of elections, and when the newly elected representatives' powers take effect.

Unicameral Legislature

In states with a unicameral legislature, voters elect legislators to one chamber of parliament. The legislators may represent the interests of a particular region and/or the interests of the entire polity. A unicameral legislature results in the concentration of the legislative power in a single body, which promotes efficiency and unity.

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 representatives of the first chamber usually serve the interests of the entire state while the representatives of the second chamber serve the interests of regions, provinces, or other political sub-units of the state. Most states with bicameral legislation 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 populations elect both chambers of the legislature. However, in many bicameral states, such as Bosnia and Herzegovina and South Africa, the population elects only the first chamber while either the president or members of the first chamber appoint the second chamber.¹²

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.

¹²Art. IV(1)-(2) of the Constitution of Bosnia and Herzegovina: "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 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." Article V, Section 4 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."

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 eligibility for the post (age, citizenship), length of term, nomination and re-election requirements, and the percentage of votes required to win the election.

The procedure for nominating and electing the executive officers varies from state to state, with several rounds of voting possible. Some states allow for direct elections of the officers.¹³ Others provide for executive appointment by the legislature.¹⁴

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.

¹³Art. 121 of the Portuguese Constitution: "1. The President of the Republic shall be elected by universal, direct and secret suffrage by the Portuguese citizens who are registered as voters in the national territory, as well as Portuguese citizens resident abroad, in accordance with the following section. 2. The law shall regulate the exercise of the right to vote held by Portuguese citizens resident abroad, taking account of the existence of effective links with the national community." Additionally, Art. 124 provides: "1. Nominations for the office of President of the Republic require the support of a minimum of 7500, and a maximum of 15,000, citizens entitled to vote. 2. Nominations shall be submitted to the Constitutional Court at least 30 days before the date fixed for the election."

¹⁴ 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.

OR

Nominations for the office of President of the Republic require the support of a minimum of [X], and a maximum of [Y], 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 [7] 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 [seven] 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.¹⁵

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 of the government and composed of members who reflect gender differences and the diversity of opinions and interests of the people.¹⁶

¹⁵Art. 49 of the Portuguese Constitution: "1. All citizens over the age of 18 years have the right to vote, unless subject to an incapacity under the general law. 2. The exercise of the right to vote is personal and constitutes a civic duty."

¹⁶Arts. 153-54 of the Albanian Constitution: "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."

Some states, such as the Central African Republic, establish a mixed electoral commission in which all political parties participate.¹⁷ Other states provide a mixed electoral commission comprised of international representatives to assist with the promotion of free and fair elections. For example, 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.¹⁸ Post-conflict states may request the help of international election monitoring bodies, such as the Organizations for Security and Cooperation in Europe (OSCE), for assistance with election monitoring.

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.

¹⁷U.S. Department of States, *Central African Republic Human Rights Practices* (1994), available at http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/CentralAfricanRepublic.html.

¹⁸Second Period Report of Sudan to the United Nations Human Rights Committee on the ICCPR (1997), available at <http://www.unhchr.ch/tbs/doc.nsf/0/1321353755974268802564bc003eb86e?Opendocument>.

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.

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. Electoral law may also aim to achieve fair representation among minority groups. 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.¹⁹

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

¹⁹Article 113 of the Portuguese Constitution: "General Principles of Electoral Law: 1. Direct, secret and regular elections are required for the selection of members of the elective organs with supreme authority, of the autonomous regions and of local government. 2. Registration of electors is compulsory and permanent and shall be officially initiated. There shall be a single registration system for all elections that take place by direct universal suffrage, without prejudice to the provisions of Article 15(4) and (5) and Article 121(2). 3. Election campaigns shall be conducted in accordance with the following principles: a. Freedom to canvass; b. Equality of opportunity and treatment for all candidates; c. Impartiality towards candidates on the part of public bodies; d. Transparency and supervision of electoral expenses. 4. Citizens have the duty to co-operate with the election administration as laid down by the law. 5. Votes cast shall be converted into effective elections in accordance with the principle of proportional representation. 6. Action dissolving collegiate organs that are elected by direct suffrage shall set the date for new elections, which shall be held within the following 60 days under the election law in force at the time of the dissolution; otherwise the action has no legal validity. 7. The courts have the power to rule as to the proper conduct of, and the validity of action taken during, the election process."

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 political parties law in the constitution or designate it as the function of the electoral commission. The purpose of the law of political parties is twofold: to promote the right of free association and to promote unity through political ideas and opinions that reflect the interests of all citizens.²⁰ The law generally establishes the conditions for the organization and registration of political parties and the requirements for submitting lists of candidates for elections.²¹

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.

²⁰Art. 114 of the Portuguese Constitution: "1. Political parties shall participate in organs that are elected by direct universal suffrage to the extent of their electorally determined representation. 2. The right of democratic opposition of minorities shall be recognised on the conditions set out in this Constitution and under the law. 3. Political parties that are represented in the Assembly of the Republic but not in the Government have the right in particular to be informed regularly and directly by the Government on the progress of the principal matters of public interest; political parties that are represented in the regional legislative assemblies and any other assemblies formed through direct elections but not in the associated executive organ enjoy the same right with respect to that organ."

²¹ Art. 35 of the Afghani Constitution: "(1) The citizens of Afghanistan have the right to form social organizations for the purpose of securing material or spiritual aims in accordance with the provisions of the law. (2) The citizens of Afghanistan have the right to form political parties in accordance with the provisions of the law, provided that: The program and charter of the party are not contrary to the principles of sacred religion of Islam, and the provisions and values of this Constitution; The organizational structure, and financial sources of the party are made public; The party does not have military or paramilitary aims and structures; [and] The party should have no affiliation to a foreign political party or sources. (3) Formation and functioning of a party based on ethnicity, language, Islamic school of thought (mazhab-i fiqhi) and region is not permissible. (4) A party set up in accordance with provisions of the law shall not be dissolved without lawful reasons and the decision of an authorized court."

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 VII: FINANCIAL MATTERS AND THE CENTRAL BANK

Following conflict, many states face the challenge of restructuring and stabilizing their economies. Thus, in drafting post-conflict constitutions, many states include in their constitutions mechanisms to promote a healthy, stable economy.¹ Specifically, many states' constitutions address the (1) collection of revenue and taxes, (2) the creation and approval of a budget, (3) requirements for audits of public accounts, and (4) the establishment of a central bank.

In restructuring a post-conflict economy, transparency and accountability in government institutions are essential, because the credibility and efficiency of state organs affects the credibility and efficiency of economic policy. Convincing consumers and investors of the coherence, stability, and predictability of the policies adopted and the stability of the policies implemented is crucial.² Moreover, to maintain peace and deter conflict, great care must be taken to distribute economic resources and obligations equitably. If certain groups perceive governmental discrimination, renewed tension or violence may ensue.

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.³ Additionally, governments need revenue from taxes to promote projects that serve the whole population, thus promoting the legitimacy of the state government among citizens.

Post-conflict constitutions vary in the procedures required and amount of detail included regarding taxes and state revenue funds. However, post-conflict constitutions often specify the establishment of a treasury or central revenue fund,⁴ into and out of which all government income and expenses are funneled. Many states grant their legislature the authority to exclude funds from the central revenue

¹Albania, Zimbabwe, Latvia, South Africa, and Portugal provide these provisions.

²International Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, §5.3.4 (Peter Harris and Ben Reilly, eds., 1998), available at http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

³International Institute for Democracy and Electoral Assistance, *Democracy and Deep-Rooted Conflict: Options for Negotiators*, §5.3.4 (Peter Harris and Ben Reilly, eds., 1998), available at http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf.

⁴South Africa and Zimbabwe are examples.

fund, if it deems such exclusion necessary to facilitate budgetary flexibility. Additionally, many post-conflict constitutions contain a prohibition against retroactive taxes.⁵ For the purpose of flexibility, many constitutions leave details regarding taxation, such as incidence, rate, and concessions, to law.⁶

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.⁷ Such constitutions often specify the time frame for creation and approval of a national budget (usually annual),⁸ and a requirement for legislative approval of the budget before it takes effect.⁹

⁵Portugal and Albania are examples.

⁶Art. 155 of the Albanian Constitution: "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." Similarly, art. 103 of the Portuguese Constitution provides: "taxes shall be imposed under law, which shall determine the incidence, rates, concessions and guarantees for taxpayers."

⁷The Albanian Constitution (Art. 159), the Portuguese Constitution (Art. 106), and the Colombian Constitution (Art. 346) all contain provisions regarding the budget preparation.

⁸Art. 106 of the Portuguese Constitution: "1. The Budget law shall be prepared, structured, enacted and implemented annually...". Art. 96 of the Ukrainian Constitution: "The State Budget of Ukraine is annually approved by the Verkhovna Rada of Ukraine for the period from 1 January to 31 December, and under special circumstances for a different period. The Cabinet of Ministers of Ukraine submits the draft law on the State Budget of Ukraine for the following year to the Verkhovna Rada of Ukraine no later than on 15 September of each year. The report on the course of the implementation of the State Budget of Ukraine in the current year is submitted together with the draft law." See also Art. 158 of the Albanian Constitution and Art. 349 of the Colombian Constitution.

⁹Art. 147 of the Portuguese Constitution: "Implementation of the Budget shall be the subject of review by the Court of Audit and the Assembly of the Republic; having received the opinion of that Court, the Assembly shall scrutinise and approve the General Accounts of the State, including the social security

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 include a requirement for regular audits of public accounts and specify that such audits be conducted by an Auditor General. The role of an Auditor General is to encourage accountability of the government by conducting independent audits of its operations. Typically, states require the Auditor General to issue annual reports to the legislature, in order to provide its members with objective information to help them examine the government's financial activities and hold it accountable. Wide variation exists among post-conflict constitutions regarding the detail describing duties of such an auditor. Some explicitly list all duties,¹⁰ whereas others provide that the duties shall be determined by law.¹¹

In addition to listing the role and duties of an Auditor General, many post-conflict constitutions also specify the process for appointing an Auditor General

accounts.” Art. 158 of the Albanian Constitution: “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.” See also Art. 103 of the Zimbabwe Constitution and Arts. 347-49 of the Colombian Constitution.

¹⁰Art. 105 of the Zimbabwean Constitution establishes the position of Auditor General; Art. 106 enumerates his/her duties.

¹¹Art. 54 of the Eritrean Constitution provides that the Auditor General's duties shall be established by law. See also Art. 110 of the Mauritius Constitution.

and the term of the appointment. Post-conflict states often provide for nomination of the Auditor General by the executive, 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 [two/five] years by the [President] with the approval of the [Assembly].

Central Bank

Many post-conflict states' constitutions include information about the establishment of a central bank.¹² If the state elects to include provisions regarding a central bank in its constitution, it may also wish to address the bank's: (1) purpose; (2) powers and functions; (3) independence; and (4) form of governance.

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 structural stability of the payments, banking, and financial system. Many post-conflict constitutions acknowledge these goals by including a broad, general statement of purpose.¹³

¹²Poland, South Africa, Albania, Colombia, and Eritrea are examples.

¹³Art. 224 of the South African Constitution: "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." Art. 55 of the Eritrean Constitution: "There shall be a National Bank, which performs the functions of a central bank, controls the financial institutions and manages the national currency." Art. 99 of the Ukrainian Constitution: "To ensure the stability of the monetary unit is the major function of the central bank of the State — the National Bank of Ukraine."

Sample Language: Purpose of 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 in the nation.

Powers and Functions

A post-conflict state may grant the central bank tools which enable it to manage the state's monetary system, either in the state's constitution or in national legislation. The powers that many states elect to include in their constitutions include the sole authority to issue and organize currency circulation and to formulate and implement the country's monetary policy, supervisory authority over operations of other banks, and regulatory powers over the operations of finance companies or similar institutions.¹⁴

Sample Language: Powers and Functions of 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 country.

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.

¹⁴Art. 161 of the Albanian Constitution: "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." Art. 371 of the Colombian Constitution: "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." Art. 227 of the Polish Constitution: "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" and "the organization and principles of activity of the National Bank of Poland, as well as detailed principles for the appointment and dismissal of its organs, shall be specified by statute."

Independence

A central bank usually can best achieve its objectives if it is independent from the government. Therefore, the constitution may specify that the central bank must perform its functions independently from other governmental organs.¹⁵ However, the constitution may also provide that despite its independence, the Bank remains accountable to the government.¹⁶

Sample Language: Independence of 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

If a post-conflict constitution included provisions on governance of the central bank it usually also details requirements for the composition and eligibility of the governing body, and the appointment and election of representatives. Central banks with a lower turnover of governors or chairmen have greater success in achieving price stability.

Many states choose to have a governing board and chairperson to administer the Bank. The constitution may detail the number of members on the board. Also, it may explain the process by which board members are appointed or elected.¹⁷

¹⁵Art. 371 of the Colombian Constitution: "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." Art. 372: "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."

¹⁶Art. 371 of the Colombian Constitution: "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."

¹⁷Art. 55 of the Eritrean Constitution: "(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 presided by the Governor and whose members shall be appointed by the President." Art. 151(2) of the Albanian Constitution: "The Bank of Albania is directed by a council, which is chaired by the Governor. The

The constitution may include eligibility requirements for the chairperson or governing board member.¹⁸ Alternatively, a state may leave such details to be decided by the legislature.¹⁹

Sample Language: Governance of 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 [25] 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.

Governor is elected by the Assembly for 7 years, upon proposal of the President of the Republic, with the right of reelection." See Art. 372 of the Colombian Constitution and Art. 227 of the Polish Constitution.

¹⁸Art. 227 of the Polish Constitution: "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."

¹⁹Art 55 of the Eritrean Constitution employs this provision.

CHAPTER VIII: PROTECTING HUMAN RIGHTS

Conflict-torn states that have experienced human rights violations often include in their constitutions protections for human rights. The protections are intended to prevent human rights violations from reoccurring and institute mechanisms to address future violations of human rights.

Existing international norms and conventions often guide post-conflict states as they consider how to incorporate human rights into their constitutions. Many post-conflict states also create oversight bodies or mechanisms to uphold fundamental human rights. Post-conflict states may also specify certain rights as non-derogable, or not to be compromised under any circumstance, to minimize the impact of any potentially limiting language in the constitution.

Mechanisms for Including Human Rights in Post-Conflict Constitutions

The main mechanisms for protecting human rights in post-conflict constitutions are: (1) adopting existing international human rights norms or (2) enumerating fundamental rights and freedoms. States may use only one of these mechanisms or both simultaneously.¹

International Human Rights Norms

Incorporating international human rights norms into the constitution may benefit post-conflict states by (1) creating a stable anchor of 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 internalize international human rights doctrines directly into the constitution.² Other states adopt provisions requiring that national constitutional

¹The Constitution of Bosnia and Herzegovina devotes several provisions to human rights. Art. II provides for the formation of a Human Rights Commission, specifies that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols have priority over all other laws, enumerates human rights and fundamental freedoms, and includes an anti-discrimination clause.

²One example of this would be the Constitution in Bosnia and Herzegovina. Bosnia has a history of human rights atrocities, but is attempting to ensure that the same or similar human rights violations do not occur again; and one way in which the country is doing so is by recognizing all international human rights treaties. Bosnia expressed the commitment to provide the highest level of internationally recognized human rights and fundamental freedoms by enumerating them in the Constitution. The Constitution states that these rights are not to be denied to any person in Bosnia on the grounds of sex, race, color,

rights be interpreted in accordance with the international treaties they have ratified. Some states place international law on par with domestic law.³ Other states choose to elevate international law to a position of prominence in the constitution by declaring that international treaties take precedence over laws determined by the legislature.⁴ States may also list in their constitutions the international treaties to which they are a party.

language, religion, political opinion, national or social origin and association with a national minority, property, birth or other status. Art. II of the Constitution also requires that all authorities and government officials in Bosnia are required to cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia, the International Tribunal for the Former Yugoslavia, and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law. The Constitution also provides that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols not only directly apply in Bosnia, but also take priority over all other law.

³Ch. 6, Art. 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 states 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 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. In order 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’s Constitution also contains verbatim replica of certain international human rights treaties. One example is in Sec. 37 which states: “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.” This incorporates the American Convention on Human Rights (Arts. 23, 24), available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>, and the International Covenant on Civil and Political Rights (Arts. 3, 25), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. The internalization of international human rights doctrines in Argentina is a result of severe human rights abuses that occurred from 1976 through 1983, during a military dictatorship. Levit, Janet Koven. *The Constitutionalization of Human Rights in Argentina: Problem or Promise?* 37 Colum. J. Transnat’l L. 281, 288-89 (1999). Levin explains that during the 1994 constitutional reform, drafters hoped that explicitly incorporating human rights treaties would strengthen the protection of fundamental rights.

⁴The Paraguayan Constitution ranks international treaties below the Constitution, but above laws determined by Congress. Levit, Janet Koven. *The Constitutionalization of Human Rights in Argentina: Problem or Promise?* 37 Colum. J. Transnat’l L. 281, 302-05 (1999). Levin evaluates the effectiveness of the internalization of international law, focusing on Argentina.

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].

Fundamental Rights

Many states list individual rights in the constitution to ensure that basic and fundamental rights are constitutionally protected.⁵ Though states vary as to which rights they include in their constitutions, most rights generally fall into the following categories: (1) political rights; (2) civil rights; (3) cultural rights; (4) social rights; and (5) economic rights. States also may include a clause concerning respect for all human rights not listed in the constitution.

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 other 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.

⁵Art. 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. Likewise, Arts. 35-37 of the Chinese Constitution list numerous fundamental rights including the freedom of speech, press, assembly, association, religious belief, and from unlawful search.

Political Rights: Political rights are important in post-conflict constitutions. States emerging from conflict often either temporarily suspended political rights or denied political rights altogether. Thus, post-conflict constitutions may enumerate rights such as the right to vote and participate in the political process.

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.

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.

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;

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 persons:

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 country.

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.

Cultural Rights: Post-conflict constitutions may also include provisions for cultural rights, especially regarding respect for language, culture, and religion. Cultural rights are important for minority populations so as to maintain and preserve cultural identity and cohesion.

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.

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.

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.

Social Rights: Post-conflict states may include in their constitutions provisions for social rights, especially in states with a history of forced marriage or restrictions on children and family planning.

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.

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.

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.

Regulatory and Protective Mechanisms for Human Rights

Post-conflict constitutions often provide oversight bodies to protect fundamental human rights and monitor government administration. Oversight bodies may consist of an Ombudsman's office, a human rights commission, or a combination of the two. These institutions often provide avenues for individuals to seek redress for human rights violations.

Ombudsman

Many post-conflict states include an Ombudsman's office in their constitutions to monitor the conduct of the public administration and to safeguard against human rights abuses.⁶ While Ombudsman offices generally do not have an articulated human rights mandate, they often handle cases that raise human rights issues. Numerous states have maintained the name "Ombudsman," while other states have labeled the institution with other titles.⁷ Some constitutions include

⁶Reif, Linda C. *Building Democratic Institutions: The Role of National Human Rights Institutions In Good Governance and Human Rights Protection*, 13 Harv. Hum. Rts. J. 1, 8-9 (2000). Reif discusses the types and roles of national human rights institutions in improving good governance and protecting human rights.

⁷Arts. 182-83 of the South African Constitution titles the Ombudsman office the Public Protector. The Public Protector has the power to investigate complaints by the public against government agencies or officials. The power to recommend corrective action and to issue reports is also held by the Protector. 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. Other examples of other names for Ombudsman offices include Permanent Commission of Enquiry (Tanzania), Public Complaints Commission (Nigeria), Investigator-General (Zambia), Parliamentary Commissioner for Administration (United Kingdom), and Inspector-General of Government (Uganda).

very specific provisions about the appointment and function of the Ombudsman, including what measure the Ombudsman takes when investigating complaints of human rights abuses.⁸

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, which act to ensure that the laws and regulations protecting human rights are effectively applied. Duties of the commission may also include monitoring a state's compliance with domestic and international human rights law and recommending changes if necessary. Commissions are generally composed of a number of

⁸Arts. 196-98 of the Constitution of Thailand specifies that the Ombudsman shall be no more than three people appointed by the King, and the Ombudsman should be people publicly known "with knowledge and experience in the administration of the State affairs, enterprises or activities of common interest of the public and with apparent integrity." The Ombudsman is given the power to 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. Under the Thai Constitution, if the Ombudsman thinks that the complaint raises a question of constitutionality, he or she is required to submit the case to the Constitutional Court.

experts from diverse backgrounds, but each state may have specific requirements for the selection of its members.⁹

Post-conflict constitutions may describe the duties of a human rights commission, such as advocating and promoting human rights, maintaining harmony between individuals and diverse groups in society, resolving unlawful discrimination claims, and protecting human rights in accordance with United Nations Covenants and Conventions.¹⁰ Constitutions may explicitly list the duties of the human rights commission and explain the mechanisms by which the commission develops policy and implementation.¹¹ Constitutions may also provide for the creation of subcommittees to assist with monitoring and implementing human rights standards.

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.

***Optional:* To assist in carrying out these functions, within the Commission there shall be established a Subcommittee on Human Rights.**

⁹Office of the High Commission for Human Rights, Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights, *available at* <http://www.unhchr.ch/html/menu6/2/fs19.htm>.

¹⁰New Zealand's Human Rights Commission, *available at* <http://www.hrc.co.nz/home/hrc/abouthumanrights/humanrightsinnewzealand/humanrightsinnewzealand.php>.

¹¹The South African Constitution explicitly lists the duties of its independent Human Rights Commission. Sec. 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'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/sahrc_cms/publish/cat_index_26.shtml.

Hybrid Human Rights Commissions

Instead of providing for a traditional Ombudsman's office or a human rights commission, some post-conflict constitutions create a category of hybrid human rights commissions whose responsibilities include both protecting human rights and monitoring government administration.¹² This structure combines the function of an Ombudsman with the function of a human rights commission to create an institution which 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. These additional powers include the 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.¹³

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,

¹²Examples of 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).

¹³The Ombudsman office in Namibia is another example of a hybrid human rights commission. Established in Namibia's 1990 Constitution (Arts. 25, 91), 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.

and report on issues concerning the promotion and protection of the rights affirmed in this Constitution and recognized by the principles of international law.

Constitutional Courts

Constitutional courts are responsible for settling disputes on constitutional issues. Accountable for constitutional enforcement, these courts have the ability to strongly impact individual human rights by helping preserve the freedom and liberties of individuals.¹⁴ The Constitutional Court may act as a vehicle for redress if the constitution allows individuals to appeal directly to the court in cases of human rights violations. Constitutional 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.

¹⁴In Costa Rica, a Constitutional Chamber of the Supreme Court examines the constitutionality of legislation, executive decrees and all *habeas corpus* warrants. U.S. Department of State, *Background Note: Costa Rica*, available at <http://www.state.gov/r/pa/ei/bgn/2019.htm>. 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. Buergenthal, Thomas. *Modern Constitutions and Human Rights Treaties*, 36 Colum. J. Transnat'l L. 211, 218 (1997). Buergenthal describes the constitutional development in states taking an internationalist attitude in international agreements and human rights. Composed of nine judges, the Macedonia Constitutional Court determines whether statutes preserve particular rights and freedoms of individuals, and analyzes whether statutes conform to the Constitution. American Bar Association, *Legal Information for Macedonia*, available at <http://www.abanet.org/ceeli/countries/macedonia/legalinfo.html>. Among the duties listed in Macedonia's Constitution (Art. 110), the Constitutional Court should protect "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, Art. 125 of the Russian Constitution prescribes 19 judges for the Constitutional Court with jurisdiction "proceeding from complaints about violation of constitutional rights and freedoms of citizens and requests from courts reviews the constitutionality of the law applied or due to be applied in a specific case in accordance with procedures established by federal law." Since the Russian Constitutional Court's beginning, it has confirmed the supremacy of international human rights law validating fundamental rights. For example, the guarantee of legal protection, the right to be protected against discrimination, and the right to property has all been preserved by the Court. Russian Federation Constitutional Court, *Constitutional Court of the Russian Federation: Development and Activity* (English booklet), available at <http://ks.rfnet.ru/english/booklet.htm>.

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.

Potentially Limiting Language

Frequently, constitutions include phrases such as “in accordance with law” or “as determined by law” to allow for the subsequent development of more specific legislation.¹⁵ While appropriate in certain circumstances, such as during a state of emergency, the use of these phrases with regard to human rights may be limiting.¹⁶ Including “in accordance with law” indicates that there may be situations in which the government may limit certain rights. Thus, clarification of which rights are non-derogable is important in defining fundamental rights in post-conflict constitutions.

The use of these phrases is an issue that has arisen in past negotiations of constitutions and various international instruments. In these past negotiations, the matter has been addressed by simply including a provision that (1) acknowledges that some rights and freedoms can be limited under specific circumstances 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”).¹⁷ States have

¹⁵Art. 36 of the South African Constitution: “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.”

¹⁶Similarly, in Muslim countries, the phrase “in accordance with Islam/Sharia” may be appropriate in certain circumstances, but raises similar concerns when used in the context of human rights and women’s rights. Art. 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.”

¹⁷Art. 37(5) of the South African Constitution includes a Table of Non-Derogable Rights which includes rights that are protected even during a state of emergency. The table enumerates the rights and explains

found that using this one provision removes most of the limiting language from the final text.

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; and

Freedom of thought, conscience, and belief.

to what extent they are protected. For example, “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. (emphasis added). Ch. 44 of the Constitution of Malawi 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.

CHAPTER IX: PROTECTING MINORITY RIGHTS

Many states emerging from conflict provide for minority rights in their constitutions. Minority provisions play an important part in the constitutions of states which have substantial ethnic or religious minorities, especially states in which minorities have historically been disadvantaged. States address minority provisions in different ways. Some states provide for more general anti-discrimination and fundamental rights provisions which apply to the population as a whole. Other states choose to explicitly enumerate the rights of the various minorities within their state.

States which enumerate rights may include provisions addressing: (1) minority mechanisms in electoral systems, (2) freedom of religion and culture, and (3) local governance within ethnic communities.

When drafting provisions for minority rights two aspects should always be considered. The first is how this language will ensure that the minority rights granted in the constitution will not be manipulated or derogated. The second is that minority rights should not hinder the efficacy of the state, such as an ill-defined ethnic veto.

General Provisions

Instead of specifically enumerating minority rights in their constitutions, some post-conflict states include anti-discrimination provisions in conjunction with enumerating fundamental human rights for all residents within the state.¹ This has the effect of applying all enumerated fundamental rights to ethnic and religious minorities. This method does not provide specific protection mechanisms for minorities; rather, it places the entire population on equal footing.

¹Art. 38 of the Afghani Constitution: "Citizens of the Republic of Afghanistan, both men and women, have equal rights and duties before the law, irrespective of their national, racial, linguistic, tribal, educations and social status, religious creed, political conviction, occupation, kinship, wealth, and residence. Designation of any illegal privilege or discrimination against rights and duties of citizens are forbidden." Art. 9(3) of the South African Constitution provides: "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." Art. 29 of the Lithuania Constitution provides: "(1) All people shall be equal before the law, the court, and other State institutions and officers. (2) A person may not have his rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions."

Post-conflict states may go further in establishing that minorities are to be treated equally and without discrimination by emphasizing and clarifying special minority protections to preserve the cultural integrity of the community.

Sample Language: Minority Protections

The members of national minorities shall not be discriminated against on the basis of their national minority status.

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.

Electoral Systems

Many post-conflict states choose to include in their constitutions mechanisms to ensure minority representation, such as set asides or specific party minority requirements. Set asides are seats reserved for ethnic or religious groups.² Party requirements may stipulate that all political parties must include candidates from different ethnic groups. Allocations may also be mandated on a regional level to provide stronger minority representation in heterogeneous societies. For example, the constitutions of both Spain and Italy provide language that takes their state structure into account while allocating rights to minorities at the federal, provincial, municipal, and city levels.³

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 with at least one seat reserved for [minorities with less than one percent of the national population].

²Art. 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. The Constitution of Afghanistan also provides for the general and just representation of all the country's constituencies.

³Art. 57 (1) of the Italian Constitution: "The senate is elected on a regional basis except for the seats assigned to the constituency of Italians abroad." Art 69 of the Spanish Constitution:

"1. The Senate is the House of territorial representation.

2. In each province, four Senators shall be elected by the voters thereof by universal, free, equal, direct and secret suffrage, under the terms to be laid down by an organic law.

3. In the island provinces, each island or group of islands with a "Cabildo" or Island Council shall constitute an electoral district for the purpose of electing Senators, of whom there shall be three for each of the larger islands -Gran Canaria, Mallorca and Tenerife- and one for each of the following islands or groups of islands: Ibiza-Formentera, Menorca, Fuerteventura, Gomera, Hierro, Lanzarote and La Palma.

4. The cities of Ceuta and Melilla shall each elect two Senators.

5. The Autonomous Communities shall, moreover, nominate one Senator and a further Senator for each million inhabitants in their respective territories. The nomination shall be incumbent upon the Legislative Assembly or, in default thereof, upon the Autonomous Community's highest corporate body, in accordance with the provisions of the Statutes, which shall, in any case, guarantee adequate proportional representation."

[Representatives] shall be elected on a regional basis.

Group Vetoes

Some states allow minorities to use group vetoes, which enable minority groups to block laws they feel are not in the interest of their members. Few states have this form of minority protection, and those that do tend to limit its application. States that choose to include group vetoes in their constitutions generally limit the vetoes to certain issues, mainly relating to self governance. Some states allow minority group vetoes in matters of legislation and election of judges.⁴

Several options exist for group vetoes with regard to minority interests in proposed laws. Members of one branch of the legislature or the executive may invoke the veto. The veto may be invoked by one branch of the legislature in the case of a bicameral system or by an ad hoc or standing committee composed of members of the legislature. In addition, the constitution may allow the minority group to appeal the decision to the Constitutional Court to determine the validity of the vital national interest of the group.

Sample Language: Group Vetoes (*Optional*)

The constituent minorities of [State] have an inherent right to protect their national interests.

⁴Amendments X, XIV, XV, XVI, and XVIII of the Macedonian Constitution allows for a type of minority veto within the National Assembly on certain issues, particularly 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.” Art. 54 of the Belgian Constitution, similar to Bosnia and Herzegovina, allows three-quarters of the members of any of the three linguistic groups, Flemish, German, and French, to “declare that the provisions of a draft bill or of a motion are of a nature to gravely damage relations between the communities.” The group may only make the motion in the period after a bill has been introduced and prior to its final vote in public session. The motion also must be “justified,” though the Constitution does not define what might be “justified.” Once a linguistic group has made a protective motion, the motion is sent to the Council of Ministers, which has 30 days to make recommendations. After settling on its recommendations, the Council of Ministers invites the Chamber of Parliament that invoked the motion to comment on them. Protective motions cannot be invoked against budgets or laws requiring a special majority. Additionally, each linguistic group is limited to using the protective motion once on each bill or motion.

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 & 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 15 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.

Freedom of Religion and Culture

Post-conflict constitutions generally include provisions about freedom of religion and culture for ethnic and religious communities.⁵ Most states include cultural and religious freedom as a fundamental premise for ensuring the protection of minority rights.⁶

⁵Art. 30 of the South African Constitution: "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." Art. 63 of the Paraguayan Constitution: "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."

⁶Art. 31(1) of the South African Constitution: "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture,

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 include a provision about the independence and autonomy of places of worship.⁷ Additionally, constitutions may specify that individuals may not be questioned or be made to testify about their religious beliefs or ideologies.⁸

Cultural freedom generally includes the right of the individual to use and preserve their language of choice and participate in the cultural customs of their choice.⁹ Additionally, cultural freedom includes the ability to associate with others who share the same culture and language.¹⁰ 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.¹¹

Sample Language: Religious Rights

All individuals shall enjoy freedom of religion and worship.

practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

⁷Art. 24(3) of the Paraguayan Constitution: “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.” Art. 41(4) of the Portuguese Constitution: “Churches and religious communities shall be independent of the State and are free to determine their own organisation and to perform their own ceremonies and worship.”

⁸Art. 24(4) of the Constitution of Paraguay: “No one may be disturbed, questioned, or forced to give testimony by reason of his beliefs or ideology.” Similarly, Art. 41(3) of the Portuguese Constitution: “No one shall be questioned by any authority about his or her convictions or religious observance, except for the purpose of gathering statistical information that does not identify individuals, nor shall anyone be prejudiced by his or her refusal to reply.”

⁹Art. 30 of the South African Constitution: “Everyone has the right to use the language and to participate in the cultural life of their choice.” Art. 34(1) of the Slovakian Constitution: “(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.”

¹⁰Art. 34(1) of the Slovakian Constitution: “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.”

¹¹Art. 42 of the Portuguese Constitution: “1. Intellectual, artistic and scientific originality shall not be restricted. 2. This freedom includes the right to originate, produce and disseminate scientific, literary or artistic works, and includes legal protection for copyright.”

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.

Local and Regional Self-Governance

Post-conflict states may include systems for local or regional self-governance in geographic areas in which particular minorities are clustered. This system would occur within the rubric of the national system of governance and is meant to ensure that geographic pockets of minorities have a functioning civil society and a framework for autonomy within national governance.¹²

¹² Art. 64 of the Slovenian Constitution: “(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

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.

Potentially Limiting Language

Frequently, constitutions include phrases such as “in accordance with law” or “as determined by law” to allow for the subsequent development of more specific legislation.¹³ While appropriate in certain circumstances, such as during a state of emergency, the use of these phrases with regard to minority rights may be limiting.¹⁴ Including “in accordance with law” indicates that there may be situations in which the government may limit certain rights. Clarification of which rights are non-derogable then becomes important in defining fundamental minority rights in post-conflict constitutions.

The use of these phrases is an issue that has arisen in past negotiations of other constitutions and various international instruments. In these past negotiations, the matter has been addressed by simply including a provision that (1) acknowledges that some rights and freedoms can be limited under specific circumstances and (2) provides that other rights and freedoms can never be limited

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.”

¹³Art. 36 of the South African Constitution: “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.”

¹⁴Similarly, in Muslim countries, the phrase “in accordance with Islam/Sharia” may be appropriate in certain circumstances, but raises similar concerns when used in the context of human rights and women’s rights. Art. 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.”

– even in times of state emergencies (that is, they can never be subject to “derogation”).¹⁵ States have found that using this one provision removes most of the limiting language from the final text.

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; and

¹⁵Art. 37(5) of the South African Constitution includes a Table of Non-Derogable Rights which includes rights that are protected even during a state of emergency. The table enumerates the rights and explains to what extent they are protected. For example, “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. (emphasis added). Ch. 44 of the Constitution of Malawi 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.

Freedom of thought, conscience, and belief.

CHAPTER X: PROTECTING WOMEN'S RIGHTS

The status of women is especially important in the rebuilding and restructuring of a post-conflict state. Women often play important roles in conflicts and are especially vulnerable in times of war. Post-conflict constitution drafting is an opportune time to provide for and codify the importance of women's rights and gender equality. The constitution may be a first step in instituting a concrete mechanism to ensure that all people can participate equally and fully in society and enjoy equal freedom.

Constitutions incorporate women's rights in several ways. In post-conflict states where women's rights were routinely violated, constitutions generally enumerate women's rights in detail to emphasize the importance of equality. Alternatively, states may choose to enumerate human rights at great length, and include provisions about equality and anti-discrimination to emphasize that these rights apply to women.

Mechanisms for Including Women's Rights in Post-Conflict Constitutions

Three main options prevail in how states choose to address women's rights. One option is to use gender neutral language throughout the constitution or include a gender specific language clause. States may also choose to include anti-discrimination clauses. A second option is to enumerate general fundamental rights and freedoms and include anti-discrimination clauses to emphasize the importance of applying these provisions to all people, regardless of gender or minority status. These states may choose to further demonstrate their stance on women's rights by enumerating international conventions and treaties binding upon them. A third option is include very specific provisions relating to women's rights and the importance of gender equality.

States may incorporate in their constitutions any one of these three options and may also include special protections in electoral provisions. States may also address potentially limiting language by specifying some rights as non-derogable.

Gender Neutral Language in the Constitution

The first option is to maintain gender neutral language throughout the constitution or include a provision about gender-specific language.¹ States that maintain gender neutral language or insert a gender-specific language clause in their constitutions usually include general anti-discrimination and/or equal opportunity provisions to protect women.²

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.

General Fundamental Rights and Freedoms

A second option for addressing women's rights is to enumerate fundamental freedoms applicable to all residents of the state and include an anti-discrimination clause which emphasizes that the rights are to be applied to all people, regardless of gender or other protected grounds.³ In addition,

¹The Portuguese Constitution is careful about its use of "his" and "her." Most of the provisions have "his or her" or "he or she" when necessary. Otherwise, non-gender specific nouns are used.

²Art. 9(3) of the South African Constitution: "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." See also Art. 10 of the Namibian Constitution, Art. 15 of the Canadian Charter of Rights and Freedoms, and Art. 48 of the Paraguayan Constitution.

³Constitutions that do not enumerate women's rights generally list fundamental rights and a non-discrimination provision. Arts. II (3)-(4) of the Bosnian Constitution lists fundamental human rights and then stipulates that these rights are secured to all persons regardless of sex: "All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: (a) The right to life. (b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment. (c) The right not to be held in slavery or servitude or to perform forced or compulsory labor. (d) The rights to liberty and security of person. (e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. (f) The right to private and family life, home, and correspondence. (g) Freedom of thought, conscience, and religion. (h) Freedom of expression. (i) Freedom of peaceful assembly and freedom of association with others. (j) The

constitutions may enumerate binding international human rights treaties and conventions to which the state is a party and by which the state intends to abide.⁴

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:⁵

right to marry and to found a family. (k) The right to property. (l) The right to education. (m) The right to liberty of movement and residence. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in . . . this Constitution shall be secured to all persons in Bosnia and Herzegovina 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.”

⁴Art. 31 of the Cambodian Constitution: “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.”

⁵European 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.]

Please see Chapter VIII: Protecting Human Rights for sample language enumerating individual rights.

Specific Provisions about the Rights of Women

While some states include anti-discrimination provisions when discussing the fundamental rights of all individuals, other states choose to include a section devoted to specific enumerable rights particular to women.⁶ These rights may fall into five categories: (1) individual rights and freedoms;⁷ (2) familial rights and freedoms;⁸ (3) social and moral rights and freedoms;⁹ (4) rights and freedoms in commerce and industry;¹⁰ and (5) political rights and freedoms.¹¹

⁶Art. 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.”

⁷Art. 48 of the Constitution of Paraguay: “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.”

⁸Art. 38 of the Lithuanian Constitution: “(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.

Individual Rights and Freedoms: 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.

Sample Language: Individual Rights and Freedoms

A woman shall enjoy equal freedom of individual will.

A woman shall enjoy equal freedom of expression.

A woman shall enjoy equal freedom of association and freedom to travel within and outside of the State.

Familial Rights and Freedoms: Constitutions may include provisions about the familial rights of women, such as equality in marriage and the right to bear and raise children.

Sample Language: Familial Rights and Freedoms

Women have the right to equality in marriage.

Women have the right to paid leave for working mothers during a reasonable period before and after childbirth.

(3) Marriage shall be entered into upon the free consent of man and woman. (5) In the family, spouses shall have equal rights.”

⁹Art. 31 of the Algerian Constitution: “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.”

¹⁰Art. 89 of the Paraguayan Constitution: “(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.” Art. 59(2)(c) of the Portuguese Constitution provides for “special protection at work for women during pregnancy and after childbirth.”

¹¹Art. 117 of the Paraguayan Constitution: “(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.” Art. 109 of the Portuguese Constitution: “Direct and active participation by men and women in political life is a requirement of, and a basic instrument for consolidating the democratic system. The law must promote equality in the exercise of civil and political rights and non-discrimination on the basis of gender for access to political positions.”

A woman 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.

Social and Moral Rights and Freedoms: Constitutions may include social and moral rights and freedoms when discussing women's rights, including the right to education, due process, and citizenship.

Sample Language: Social and Moral Rights and Freedoms

A woman shall enjoy equal rights to social and moral self-determination.

A woman shall enjoy equal rights to education, to teach and to learn.

A woman shall enjoy equal rights to social welfare benefits.

A woman shall enjoy equal rights of citizenship.

A woman shall enjoy equal rights to due process and equal rights before the courts of law.

Rights and Freedoms in Labor, Commerce, and Industry: Constitutions may include provisions to ensure that women play an active role in the economic growth of the state. Provisions may include the equal right to own land and to participate in the economy.

**Sample Language:
Rights and Freedoms in Labor, Commerce and Industry**

A woman shall enjoy equal rights to the ownership, use, alienation, and inheritance of real and personal property.

A woman shall enjoy equal rights to enter into contracts and to conduct business and commerce.

A woman shall enjoy equal rights and opportunities in labor and employment.

A woman shall enjoy equal rights to independence in economic affairs.

A woman shall have the right to receive remuneration equal to a similarly qualified man employed in a similar or identical position.

Political Rights and Freedoms: 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: Political Rights and Freedoms

A woman 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.

Special Protection in Electoral Provisions

Some states, especially those in which women's representation and participation in civic life has been historically limited, may wish to include specific ways in which women are guaranteed representation, equal access to the judicial system, and power within governmental structures. One way for post-conflict

states to provide fair representation is to include minority and set aside provisions in the constitution.¹²

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.

Potentially Limiting Language

Frequently, constitutions include phrases such as “in accordance with law” or “as determined by law” to allow for the subsequent development of more specific legislation.¹³ This has the effect of allowing certain rights to become derogable during a time of war or emergency. To ensure that certain fundamental rights are upheld in any and all circumstances, some constitutions specify certain rights as non-derogable.

Please see Chapter VIII: Protecting Human Rights for a further discussion and sample language regarding potentially limiting language.

¹²Arts. 83-84 of the 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.

¹³Art. 36 of the South African Constitution: “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.”

CHAPTER XI: PROVIDING FOR DEFENSE AND SECURITY

Post-conflict constitutions commonly address questions concerning the defense and security of the nation and include provisions for armed forces.¹ 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

Usually, post-conflict constitutions specify that the primary purpose for the armed forces is for national defense of the homeland.² Sometimes, however, peace agreements may require a state to organize its armed forces in a certain way to provide reasonable and productive reintegration of militants.³ The legislature often serves as the primary check on the powers of the armed forces.⁴

Constitutions may provide a general description of the armed forces. Constitutions may also include the purpose for armed forces.

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].

¹However, some constitutions (i.e. Sudan and Afghanistan) do not contain explicit provisions for Armed Forces.

²Art. 76 of the Constitution of Azerbaijan: "Citizens shall serve in the armed forces according to the order specified by the Law." Art. 26(1) of the Polish Constitution: "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."

³This was the case in Kosovo.

⁴Art. 87(b) of the German Constitution requires Senate consent for passing statutes regarding the military. Article 7 of the Croatian Constitution expressly requires approval of the Croatian parliament before the armed forces may act outside of Croatia's borders. Further, Article 7 provides, "Organization of defense, command, administration and democratic control over the armed forces of the Republic of Croatia shall be regulated by this Constitution and law."

Domestic Role of the Armed Forces

Common purposes of the armed forces include its domestic role to protect civilian property and traffic control functions during defense missions. In addition, the armed forces may also support police measures for protection of civilian property and for defense from armed insurgents. The legislature may discontinue these activities of the armed forces at any time.⁵

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.

⁵Art. 87a (3)-(4) of the Basic Law for the Federal Republic of Germany: “(3) While a state of Defense or a state of tension exists, the Armed Forces shall 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 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 be inadequate, use the Armed Forces to support the police and the Federal Border Guard in the protection of civilian property and in combating organized and militantly armed insurgents. Any such use of the Armed Forces shall be discontinued whenever the Bundestag or the Bundesrat so demands.”

International Role of the Armed Forces

Post-conflict constitutions often provide for the armed force's involvement with humanitarian and peace keeping missions by international agreements to which the state is a party.

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.⁶ Generally, constitutions do not describe in detail the components and responsibilities of each branch.

Sample Language: Organization of 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].

Service Requirements for Citizens

It is common practice for post-conflict constitutions to prescribe whether service in the armed forces is compulsory⁷ or voluntary.⁸ For example, in Croatia,

⁶Art. 168(1) of the Albanian Constitution: "The Armed Forces of the Republic of Albania are composed of the army, navy, and air force."

⁷States with mandatory military service include Austria, Belarus, Bermuda, Brazil, Bulgaria, Chile, China (PRC), Croatia, Cyprus, Denmark, Egypt, Eritrea, Finland, Germany, Greece, Israel, Lebanon, Malaysia, Mexico, Norway, Poland, Romania, Russia, Singapore, Slovenia, South Korea, Sweden, Switzerland, Taiwan (ROC), Turkey, Ukraine, and Venezuela.

⁸States 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.

military service is “the duty of every capable citizen.”⁹ In contrast, military service in Portugal can be either voluntary or compulsory as determined by law.¹⁰

Constitutions may mandate compulsory military service to provide training for citizens, prevent military coups, promote personnel diversity, and generate a greater sense of nationalism. Constitutions prescribing compulsory military service often include provisions for alternative work available for those who conscientiously object to rendering war service.¹¹ On these occasions, constitutions may provide anti-discrimination provisions for those who choose alternative service.¹²

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.¹³

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 with weapons in 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 with weapons in armed forces and who perform an alternative service enjoy all the constitutional rights and freedoms, apart from cases when the law provides otherwise.

⁹Art. 47 of the Croatian Constitution.

¹⁰Art. 276(2) of the Portuguese Constitution.

¹¹For example, Art. 12(a)(2) of the German Constitution, Art. 166(2) of the Albanian Constitution, and Art. 47 of the Croatian Constitution provide that citizens who refuse to participate in military service will be required to serve in an alternative way.

¹²Art. 167 of the Albanian Constitution: “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.”

¹³Art. 182 of the Belgium Constitution specifies that army recruitment methods shall be determined by law.

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

Some post-conflict constitutions set forth eligibility requirements for service in the armed forces.¹⁴ Many require armed forces personnel to be citizens. In addition, constitutions may not allow women to serve in the armed forces or otherwise make it non-compulsory.¹⁵ Further, some states prohibit elected or appointed officials from serving in the armed forces.¹⁶ Some states also prohibit individuals convicted of committing war crimes from participating in the armed forces.

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.**

¹⁴Art. 12(a)(1) of the German Constitution: "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 defence organization." However, some constitutions (i.e. Albania) do not include eligibility requirements.

¹⁵Art. 12(a)(4) of the German Constitution: "[women] may in no case be obliged to render service involving the use of arms."

¹⁶Art. 167(1) of the Albanian Constitution does not allow military servicemen to concurrently participate in party or political activity. Art. 141 of the Lithuanian Constitution also does not allow "[s]oldiers in active military service or alternative service, officers of the national defence, the police and the internal service, non-commissioned officers, re-enlistees who have not retired from service, and other paid officers of military and security services may not be members of the Parliament or of local government Councils. They may not hold elected or appointed posts in State civil service, and may not take part in the activities of political parties and political organizations." Such provisions allow the armed forces to remain politically neutral.

***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 grant the president or prime minister power as the Commander-in-Chief of the armed forces.¹⁷ The Commander-in-Chief generally has discretion over the appointment and dismissal of armed forces personnel.¹⁸ The Commander-in-Chief may also have the power to declare war.¹⁹ In addition, some constitutions include provisions for a national security council to advise the Commander-in-Chief on issues of security and defense.²⁰

All the powers of the Commander-in-Chief may occur at the proposal or with the consent of the prime minister (if there is a prime minister) or the legislature.

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].

¹⁷For example, in Azerbaijan, the President of the Republic is the Commander in Chief of the Armed Forces (Azerbaijan Constitution, Art. 9).

¹⁸In 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 (Albanian Constitution, Art. 168, 169).

¹⁹In Croatia, the President of the Republic, who is also the Commander-in-Chief of the armed forces, can declare war and conclude peace. (Croatian Constitution, Art. 99).

²⁰See Art. 168(3) of the Albanian Constitution. The Albanian Constitution, however, does not include requirements for the selection of the National Security Council.

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

Neutrality of the Armed Forces

Some constitutions provide for the neutrality of the armed forces.²¹ This may be especially relevant to post-conflict situations and states where there are strong opposing political parties.

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.

²¹Art. 26(2) of the Polish Constitution: "The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control."

CHAPTER XII: ROLE OF RELIGION IN GOVERNMENT

Wide variation exists among post-conflict states regarding the role of religion in government. Some states do not address this issue in their constitutions. However, among post-conflict constitutions that do address religion, there are a number of nuanced differences in the courses a state can take. The route a state chooses should reflect the interests of the state, take into account the nature of the preceding conflict, and gauge how to include or exclude religion in comprising a post-conflict state.

Post-conflict states typically address the role of religion first by determining whether to have an official state religion or a secular government. States may also wish to consider whether to use religion as a source of law. Additionally, many post-conflict states include constitutional provisions to protect their citizens' religious rights and freedoms.

Each of these three elements relates to what role, if any, religion will play in the state. However, the elements are all independent from each other. For example, although some post-conflict states with Islam as the official religion elect to use *Shari'a* as a source of law, having a state religion does not necessarily require religion to be a source of law. Similarly, secular post-conflict governments do not all include constitutional provisions to protect religious freedom. Post-conflict states may choose which, if any, of these elements to include in their constitutions based on their preferences.

Secularism or State Religion

Constitutions usually include specific religious provisions in one of four ways: (1) declaring the preeminence of one religion as the official state religion, (2) declaring an official state religion but providing religious protections, (3) acknowledging but not endorsing any particular religion, and (4) proclaiming the state to be secular.

Official State Religion with no Religious Protections

A constitution may address religion by declaring the preeminence of a specific theology as the official state religion.¹ In addition to making one religion

¹Ch. 1, Art. 2 of the Libyan Constitution: "Islam is the religion of the State." Ch. 1, Art. 5 of the Mauritanian Constitution: "Islam shall be the religion of the people and of the State." Ch. 1, Art. 1 of the Saudi Arabian Constitution: "The kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam

the sole official doctrine of the state, in this scenario the constitution excludes protections for religious freedoms and minority rights. Post-conflict states whose constitutions specify an official state religion often have a homogenous population that observes the same faith. Moreover, these states typically have not experienced a religious conflict to influence the inclusion of protection for other faiths.²

**Sample Language:
Official State Religion with no Religious Protections**

[Religion] is the official religion of the state and the people.

The state protects [Religion]; it orders people to do right and shun evil; it fulfills the duty regarding God's call.

***Optional:* The [President/Prime Minister] must be a member of the [Religion] religion.**

Official State Religion with Religious Protections

States may address religion in their constitution by declaring an official state religion while retaining protections for religious freedom.³ Like post-conflict states that declare preeminence of a specific theology, states that declare a national religion while still protecting religious freedom often have a fairly homogenous population that practices the national religion. These states usually have not experienced religious conflict that would necessitate adopting more than one

as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution."

²For example, Libya is 97% Sunni Muslim. *CIA World Fact Book: Libya*, available at <http://www.cia.gov/cia/publications/factbook/geos/ly.html>. Mauritania is 100% Muslim. *CIA World Fact Book: Mauritania*, available at: <http://www.cia.gov/cia/publications/factbook/geos/mr.html> (last visited October 10, 2005). Saudi Arabia is 100% Muslim. *CIA World Fact Book: Saudi Arabia*, available at: <http://www.cia.gov/cia/publications/factbook/geos/sa.html>.

³Art. 3 of the Syrian Constitution requires that the President be Muslim and also stipulates that Islamic jurisprudence is the primary source of law. However, Art. 35 provides "(1) The freedom of faith is guaranteed. The state respects all religions. (2) The state guarantees the freedom to hold any religious rites, provided that they do not disturb the public order." Similarly, the Danish Constitution creates a national religion to be supported by the state (Netherlands Constitution, Sec. 4), but also includes detailed protections for the inclusion of other faiths and for the right for minorities to worship freely (Sec. 67). Sec. 67 provides "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." Sec. 70 states 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."

national religion. However, such states may have significant sectors of the population with an alternative faith, so they recognize the need to provide for minority rights.

**Sample Language:
Official State Religion with Religious Protections**

[Religion] is the official state religion.

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.

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.

Secularism While Acknowledging Religion

Some constitutions acknowledge the importance of religion, but do not commit to one state doctrine.⁴ States that acknowledge religion in a constitution while still remaining secular often have fairly heterogeneous populations that practice a range of religions. A history of religious conflict often plays a role in a state's decision to be secular while still acknowledging the role of religion in the state's history or culture.

Sample Language: Secular State Acknowledging Religion

No state religion may be recognized.

⁴Art. 44 of the Irish Constitution: "(1) the State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor 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." Art. 9 of the Mongolian Constitution: "(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."

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.

Secularism

Some constitutions declare a secular state while providing for religious protections.⁵ Although religion is not prohibited by the constitution in this scenario, it is not incorporated into the state in the form of a preeminent religion or a declaration of religious roots. Secularism is often a result of either a heterogenous religious population, or the legacy of religious turmoil.

Sample Language: Secular State

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.

All citizens enjoy the freedom of religion.

No state religion may be recognized, and church and state are to be separated.

⁵Art. 10 of the Albanian Constitution: "The state is neutral in questions of belief and conscience, and also, it guarantees the freedom of their expression in public life." Art. 19 of the Eritrean Constitution: "(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." See also Art. 18 of the Rwandan Constitution and Art. 15 of the South African Constitution.

Religion as a Source of Law

Constitutions may specify that the state's laws must be derived in whole or in part from religious law such as Islamic (or *Shari'a*) law or the Ten Commandments. Whether to use religion as a source of law is primarily a concern in Islamic societies because *Shari'a* covers not only religious rituals, but also many aspects of day-to-day life, politics, economics, banking, business or contract law, and social issues. Among post-conflict constitutions that choose to use religion as a source of law, some states specify that religion is *the* source of law,⁶ whereas others declare that religion is just one potential source of law.⁷

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.

Protection of Religious Freedoms

Drafters may wish to enumerate protections of religious freedoms in the post-conflict constitution. Usually, such protections are general safeguards, such as freedom of religion and religious expression⁸ and prohibition of discrimination on the grounds of religion.⁹

⁶Art. 1 of the Saudi Arabian Constitution: "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."

⁷Art. 3 of the Syrian Constitution: "(2) Islamic jurisprudence is a main source of legislation."

⁸Eritrean Constitution (Art. 19(4)).

⁹Art. 9 of the South African Constitution: "(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."

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.

CHAPTER XIII: PROTECTING AND REGULATING NATURAL RESOURCES

States with significant natural resources may wish to include constitutional provisions to protect and regulate its resources. Because of the history of conflict over natural resources like oil, constitutional protection may be useful for post-conflict states endowed with such resources. If natural resources are addressed in a state's constitution, it may be advisable for the constitution to define the type of ownership, describe the allocation of revenue from the resources, and specify who has 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.¹ Although each state's approach is unique, arrangements can be broadly classified into three categories: (1) national ownership;² (2) regional ownership;³ and (3) shared ownership.⁴

National Ownership

National ownership vests control of natural resources in the national government. Among oil-producing states, a vast majority maintain national ownership of their oil resources.⁵ For post-conflict states with highly centralized governments, vesting control of natural resources in the national government may be desirable. National ownership of natural resources is typically protected by the constitution, whereas regional ownership is typically not included in the constitution.⁶

¹For example, Russia, Norway, Venezuela, Indonesia, Algeria, Angola, Chad, Egypt, Iran, Kuwait, Libya, Nigeria, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen.

²Algeria, Angola, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, and Yemen employ this system.

³United States and United Arab Emirates are examples.

⁴Canada is an example.

⁵For example, Algeria, Angola, Chad, Egypt, Iran, Kuwait, Libya, Nigeria, Oman, Qatar, Saudi Arabia, Syria, and Yemen.

⁶For example, Algeria, Angola, Chad, Iran, Kuwait, Nigeria, Oman, Saudi Arabia, Syria, and Yemen.

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 and seems to be most compatible with decentralized governments.⁷

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 national and regional governments.⁸ A shared ownership approach may provide a compromise between those who desire regional ownership and those who desire national ownership of natural resources.

Sample Language: Shared Ownership

Ownership of natural resources may be in regional government, central government, or in other forms. The possession, utilization, and

⁷ The most cited examples of regional ownership are the U.S./Alaska and United Arab Emirates approaches.

⁸ The prime example of shared ownership is the Canadian approach. 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 example, 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.

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 wish to determine how to use the wealth garnered from its natural resources. Post-conflict states have implemented numerous formulas for the allocation of natural resource revenue. Some apply the same formula as used for other budgetary distributions, while others distribute revenue according to the revenue received. Still others follow different criteria such as population, basic needs, or tax capacity. Regardless of which allocation formula a state selects, it will usually not specify the formula in its constitution. Rather, to allow for flexibility, states often relegate the specifics of allocation to national law.

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].

Allocation of Authority and Responsibility

A state may also wish to address a number of issues relating to the allocation of authority and responsibility over the state's natural resources. Specifically, the state may wish to specify (1) who has the authority to grant concessions, licenses, production sharing agreements, (2) who has the responsibility over production (*i.e.*, extraction, refining, transporting), (3) how to tax natural resources (regional and/or central government), and (4) who governs the discovery of new natural resources.

Sample Language: Authority and Responsibility

Authority to Grant Concessions, Licenses, and Product Sharing Agreements:

[National, Regional] government[s] shall have the authority to grant concessions, licenses and product sharing 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.

CHAPTER XIV: 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. If drafters include such provisions, they may wish to define: (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 a state of emergency may last.

Defining a State of Emergency

Some constitutions define what constitutes a state of emergency, such as during state of war, an immediate threat to the independence and unity of the state, or in the event of a severe natural disaster.¹ Others leave defining and declaring states of emergency to the discretion of one or more branches of government.²

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 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

¹Art. 37 of the South African Constitution allows for declaration of state of emergency only 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.”

² Compared to the South African Constitution, the Congolese Constitution leaves more discretion to interpret the definition of state of emergency. Art. 109, Sec. 1 of the Congo Constitution provides 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.”

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 regarding who has the authority to declare a state of emergency. Some post-conflict states vest this power solely in the executive branch.³ 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.⁴

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 [majority/two-thirds] 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.

Restrictions during a State of Emergency

The constitution may define the types and scope of restrictions during a state of emergency. One such restriction is to prohibit all amendments to the

³See Art 75(11) of the Afghani Constitution and Art. 71 of the Mauritanian Constitution.

⁴Arts. 173 and 176 of the Albania Constitution: "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." Art. 37 of the South African Constitution: "(1) A state of emergency may be declared only in terms of an Act of Parliament."

constitution.⁵ Another option is to limit allowable restrictions to those that do not pertain to 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.⁶

Constitutions may also include a provision prohibiting the dissolution or suspension of any state organs or their powers under the constitution during a state of emergency.⁷

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.

Duration of the State of Emergency

Drafters may choose to specify maximum duration of a state of emergency and ways, if any, that such time may be extended.⁸

⁵Art. 177 of the Albanian Constitution: “2. No revision of the Constitution may be undertaken during the time when the extraordinary measures are taken.”

⁶Art. 9 of the Mongolian Constitution: “(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.” The German Constitution only allows amendments to fundamental rights if they make the rights stronger.

⁷Art. 39 of the Mauritanian Constitution: “The National Assembly may not be dissolved while the President of the Republic is exercising exceptional powers.”

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] 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.

Constitutional Enactment and Amendment

Providing effective mechanisms to enact and amend a constitution are crucial for ensuring its integrity and stability. While some post-conflict states include a constitutional provision to make enactment conditional on formal adoption, nearly all post-conflict constitutions explicitly detail the process by which the constitution may be amended. Because changes to a constitution may alter the state's basic principles and potentially affect the entire population, states may wish to give special thought to amendment mechanisms. Generally, the key points a post-conflict state may wish to consider are: (1) the process for proposing amendments, (2) the process for drafting amendment, (3) the process for approving amendments, and (4) deciding whether to impose restrictions on the subject matter and/or the timing of amendments.

Constitutional Enactment

Some post-conflict states condition a new constitution's entry into force on its formal adoption.⁹ States most commonly choose to adopt their constitutions in one of two ways: (1) a vote of the legislature or (2) a popular referendum. A small number of post-conflict constitutions allow for both of these adoption

⁸Art. 173 of the Albanian Constitution: "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."

⁹For example, the constitutions of Lithuania, Macedonia, Hungary, Armenia, and Albania contain provisions for enactment.

mechanisms.¹⁰ The constitution may also specify the date on which the constitution enters into force.¹¹

Vote of the Legislature

Some post-conflict states enact their constitutions through legislative approval, typically by a vote of two-thirds or three-fourths majority.¹² After the required number of legislators approves the constitution, it may come into force on the day the constitution is declared in the legislature.¹³ An advantage of requiring more than a simple majority is that approval by a higher margin signifies widespread support and assures that the constitution represents the will of more than just a narrow majority of parties. This, in turn, helps promote greater stability.

Sample Language: Vote of the Legislature

This Constitution is adopted by a [two-thirds/three-fourths] 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].

Popular Referendum

States may also choose to adopt a new constitution through an affirmative vote by a majority of the eligible electorate.¹⁴ If a state selects a popular referendum for enactment, the entire electorate may vote directly to accept the enactment of the constitution. The result of the referendum depends on whether the state requires a simple majority or more than a simple majority vote in favor of the enactment. If the state chooses a simple majority vote, more than 50 percent of

¹⁰Ch. 8, Art. 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

¹¹See Ch. 9, Art. 134 of the Macedonia Constitution. Art. 78 of the Hungarian Constitution: “[t]he Constitution of the Republic of Hungary comes into force on the day of its proclamation. The Government is to see to its implementation. The Government bears the obligation of submitting to Parliament the Bills necessary for the enactment of the Constitution.” Art. 183 of the Albanian Constitution stipulates that the Constitution enters into force following promulgation by the President.

¹²Art. 133 of the Macedonian Constitution.

¹³Art. 134 of the Macedonian Constitution.

¹⁴For example, Lithuania (Ch. 15, Art. 151) and Armenia (Ch. 8, Art. 111) have adopted this approach. Estonia also adopted its constitution by national referendum.

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.

Constitutional Amendment

Most constitutions establish a fixed procedure for proposing and approving amendments. The procedure is important because changes to a constitution may alter the state's basic principles and potentially affect much or all of the general population. In outlining the process of amending a constitution, several key points to consider include: (1) the process for proposing amendments, (2) the process for drafting amendment, (3) the process for approving amendments, and (4) deciding whether to impose restrictions on the subject matter and/or the timing of amendments.

Process for Proposing Amendments

Constitutions may 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.

First, an amendment may be proposed by a vote of a fixed number of members of the state's legislature. For example, this fixed number may be one-fifth,¹⁵ one-third,¹⁶ one-half,¹⁷ or two-thirds of the members.¹⁸ Another option to

¹⁵For example, Art. 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."

¹⁶Mozambique allows for one-third of the Deputies to the Assembly to propose an amendment to the Constitution. Turkey requires proposals amending the constitution in writing by at least one-third of the total number of members of the National Assembly.

¹⁷Afghanistan allows for a majority of the National Assembly can propose a constitutional amendment.

propose a constitutional amendment is to allocate the authority to the executive.¹⁹ A third option is to allocate the power to a large group of voting-eligible citizens.²⁰ The size of this group should be small enough to allow for meaningful deliberation, but large enough to demonstrate the commitment of a significant portion of the populace. Often called a constituent assembly, the sole purpose of this group of individuals is to propose the amendment; it should dissolve after its mandate is complete. A final option is to allow the general public to propose amendments through a popular referendum. A constitution may include any 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-quarter/one-half] 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 [thirty] 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 and/or requirements for drafting a proposed amendment. Some post-conflict states require the creation of a governmental committee to prepare a draft of the proposed

¹⁸For example, the United States requires two-thirds of both houses of the legislature to propose an amendment to the Constitution. Japan's Constitution allows Parliament to propose an amendment through a concurring vote of two-thirds or more of the members of each house.

¹⁹The constitutions of France, Afghanistan, Eritrea, Afghanistan and Mozambique allow the President to propose an amendment to the constitution.

²⁰Art. 374 of the Colombian Constitution: "The Political Constitution of Colombia may be amended by Congress, a Constituent Assembly, or by the people through a referendum."

constitutional amendment.²¹ Others require drafts of the proposed amendment to be given to the legislature before the governing debate.²² There are virtually limitless options for procedures by which post-conflict states may permit amendments to their constitutions. Regardless of the procedure selected, states may wish to consider the need for a high degree of public support to change the constitution. States may also consider the need for adequate time for the public and the legislature to understand and debate the proposed change.

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 days] before the opening of debate.

Process for Approving Amendments

The process of approving amendments to the constitution varies greatly among states. Because 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 that required to pass general legislation.²³

Possible approval scenarios include: (1) approval of the proposed amendment by a fixed number of members of the legislature,²⁴ (2) approval of the proposed amendment by a fixed number of members of the legislature plus the

²¹Afghanistan employs this option.

²²Mozambique employs this option.

²³For example, in Sudan, each chamber of the national legislature must approve an amendment to the Interim National Constitution by three-fourths of all its members to prevail. Similarly, Germany requires two-thirds of the members of both houses of Parliament to approve a statute amending the Constitution. The Brazilian constitution may be amended with a three-fifths majority in both chambers of Congress.

²⁴Germany requires two-thirds of the members of both houses of Parliament to approve a statute amending the Constitution. The French Constitution provides that the President can decide to allow the Parliament to approve a constitutional amendment by a three-fifths majority.

endorsement of the executive,²⁵ (3) approval of the proposed amendment by a fixed number of members of the legislature followed by ratification by popular referendum,²⁶ (4) submitting the proposed amendment for approval in a referendum,²⁷ (5) approval by a fixed number of the legislatures of the state's constituent units,²⁸ and (6) public debate and referendum.²⁹

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

²⁵Afghanistan's Constitution requires two-thirds of the majority of the Grand Council plus the endorsement of the President for approval.

²⁶Countries like Spain and France require approval by both houses of Parliament prior to submitting the proposed amendment for ratification by referendum. Spain, for example, requires approval by a majority of three-fifths of the members of both houses of Parliament when amending certain provisions of the constitution.

²⁷Art. 89 of the French Constitution "requires approval by referendum for an amendment to come into force."

²⁸Amending the United States Constitution requires ratification by the legislatures of three-fourths of the several states or by conventions in three-fourths.

²⁹The Mozambique Constitution requires public debate and referendum for proposed amendments implying fundamental changes in rights of citizens or organization of public powers.

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

Because constitutions often embody fundamental principles and core principles of the state, post-conflict states may wish to restrict its amendment. Specifically, some states do not allow any amendment of the constitution during a state of emergency or war.³⁰ Others prohibit amendments regarding religion.³¹ Other states restrict constitutional amendments that pertain to fundamental rights so that amendment is impossible unless such rights are afforded greater protection.³² In addition, some states restrict amendments so that they may not alter fundamental aspects of the state.³³

Sample Language: Restrictions

No Amendments during Emergency or War:

This Constitution may not be amended during [a state of emergency].

No Amendments Regarding Religion:

³⁰Art. 177 of the Albanian Constitution: “[n]o revision of the Constitution may be undertaken during the time when the extraordinary measures are taken.”

³¹For example, Afghanistan and Algeria prohibit any amendment regarding Islam.

³²For example, Art. 178 of the German Constitution prohibits any amendments to the Constitution that affect the basic rights detailed in articles one through twenty, such as human dignity, liberty and equality. Similarly, Afghanistan permits the amendment of fundamental rights “only to make them more effective.” The Algerian Constitution states that a “constitutional revision cannot infringe on ...fundamental liberties and citizen’s rights.”

³³Art. 178 of the Algerian Constitution states “any constitutional revision cannot infringe on... the republican nature of the State [and]... the integrity of the national territory.”

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 [Republican] nature of the State or the integrity of the national territory.

ANNEX I: CONSTITUTIONS

- Afghanistan:** http://www.oefre.unibe.ch/law/icl/af00000_.html
- Albania:** <http://www.ipls.org/services/kusht/contents.html>
- Algeria:** <http://www.apn-dz.org/apn/english/constitution96/preambule.htm>
- Argentina:** http://www.oefre.unibe.ch/law/icl/ar00000_.html
- Armenia:** <http://www.arminco.com/hayknet/laws/conarm-e.htm>
- Austria:** http://www.oefre.unibe.ch/law/icl/au00000_.html
- Azerbaijan:** http://www.oefre.unibe.ch/law/icl/aj00000_.html
- Bosnia and Herzegovina:** http://www.oefre.unibe.ch/law/icl/bk00000_.html
- Brazil:** <http://webthes.senado.gov.br/web/const/const88.pdf>
- Bulgaria:** <http://www.parliament.bg/?page=const&lng=en>
- Cambodia:** http://www.cambodian-parliament.org/english/Constitution_files/Constitution.htm
- China:** <http://english.people.com.cn/constitution/constitution.html>
- Colombia:** http://confinder.richmond.edu/admin/docs/colombia_const2.pdf
- Costa Rica:** <http://usembassy.or.cr/engcons1.htm>
- Croatia:** <http://www.constitution.org/cons/croatia.htm>
- Czech Republic:** <http://www.psp.cz/cgi-bin/eng/docs/laws/constitution.html>
- East Timor:** <http://www.etan.org/etanpdf/pdf2/constfnen.pdf>
- Eritrea:** <http://home.planet.nl/~hans.mebrat/eritrea-constitution.htm>
- Estonia:** <http://www.president.ee/en/estonia/constitution.php>

France: <http://www.assemblee-nationale.fr/english/8ab.asp>

Germany: <http://www3.assembly.go.kr/file/10010002352000100504481.htm>

Hungary: http://www.oefre.unibe.ch/law/icl/hu00000_.html

India: <http://www.constitution.org/cons/india/const.html>

Ireland: <http://www.taoiseach.gov.ie/upload/publications/297.htm>

Italy: http://www.oefre.unibe.ch/law/icl/it00000_.html

Japan: <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>

Latvia: http://www.oefre.unibe.ch/law/icl/lg00000_.html

Lebanon: http://www.oefre.unibe.ch/law/icl/le00000_.html

Libya:

<http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN004643.pdf>

Lithuania: http://www.oefre.unibe.ch/law/icl/lh00000_.html

Macedonia: http://www.oefre.unibe.ch/law/icl/mk00000_.html

Malawi: <http://www.sdn.org.mw/constitut/dtlindx.html>

Mauritania: http://www.oefre.unibe.ch/law/icl/mr00000_.html

Mauritius:

<http://www.gov.mu/portal/site/AssemblySite/menuitem.ee3d58b2c32c60451251701065c521ca/>

Mongolia: <http://www.indiana.edu/~mongsoc/mong/constttn.htm>

Namibia: http://www.oefre.unibe.ch/law/icl/wa00000_.html

Paraguay: http://www.oefre.unibe.ch/law/icl/pa00000_.html

Poland: http://www.oefre.unibe.ch/law/icl/pl02t_.html

Portugal: <http://www.parlamento.pt/ingles/cons%5Fleg/crp%5Fing/>

Saudi Arabia: <http://www.the-saudi.net/saudi-arabia/saudi-constitution.htm>

Slovakia: <http://www.vescc.com/constitution/slovakia-constitution-eng.html>

Slovenia: http://www.oefre.unibe.ch/law/icl/si00000_.html

Spain: <http://www.spainemb.org/information/constitucionin.htm>

South Africa: <http://www.polity.org.za/html/govdocs/constitution/saconst.html>

Sudan: <http://www.sudan.net/government/constitution/english.html>

Syria: http://www.oefre.unibe.ch/law/icl/sy00000_.html

Uganda: <http://www.parliament.go.ug/Constitute.htm>

Ukraine: <http://www.rada.kiev.ua/const/conengl.htm#r10>

United Arab Emirates:

<http://www.almajles.gov.ae/Front/ConstitutionSubjects.asp> (Arabic)

Venezuela: <http://www.vheadline.com/readnews.asp?id=6831>

Zimbabwe: <http://www.parlzim.gov.zw/Resources/Constitution/constitution.html>

ANNEX II: SAMPLE LANGUAGE

PREAMBLE PROVISIONS

Sample Language: State Identity

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.

Type of Government:

[State] is a [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].

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 country of many 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 of [State].

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.

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

Option 1: Specify Official State Capital, Flag, Anthem, Symbol, and Holiday(s) in 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; 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: Assuming Powers over Time

All provinces may assume power and responsibility over the following matters: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

All provinces may begin the process for assuming these powers no earlier than [one/three] year[s] after the entry into force of this Constitution.

The following powers may be assumed by the provinces after [one/ three] year[s] following the entry into force of this Constitution: [education; social welfare; health; police powers; local taxes; regional transportation; natural resources].

The following additional powers may be assumed by the provinces after [three/ five] year[s] 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 establish 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: 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.

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: Harmonization of Provincial Legislation

When it is necessary in the general interest of the country, 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 [two-thirds/three-fourths/four-fifths] of the [Assembly].

Sample Language: Dispute Resolution

The [Constitutional Court] may settle disputes between the central and provincial governments.

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 the [two-thirds vote of the Assembly and provincial legislatures/ approval by three-quarters 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 who shall be the Head of the Government and of the Cabinet of Ministers, 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: Pluralistic Executive Systems

The presidency shall consist of three members: one [representing one ethnic group] and one [representing another ethnic group], each directly elected from the territory of the [one province], and one [other ethnic group] directly elected from the territory of the [other province].

The members of the presidency shall appoint from their members a [Chair/Chairman/Principal].

A dissenting member of the presidency may declare a presidency decision to be destructive to the vital interest of the state, provided that the member does so within three days of its adoption. Such a decision shall be referred immediately to

the [Parliament/Legislature]. If the declaration is confirmed by a two-thirds vote within ten days of the referral, the challenged presidency decision shall not take effect.

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.

In a Mixed Presidential/Parliamentary 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.

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/Council of Ministers**

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

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

Optional: If the [simple majority] of the [Legislature] passes a motion of no confidence in the [Cabinet], the members 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/Prime Minister

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

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

In the case that the [President/Prime Minister] is unable to fulfill his or her duties for a period of [20/100 days], 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 within [10/100] days 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] of the [Legislature/Parliament/National Assembly] may introduce a motion to impeach the [President/Prime Minister].

If [one-half/two-thirds] 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 [20/50] 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 [50/100/200] 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 [50/75/100] members. Members shall be elected every [4-9] years.

The [lower house] shall have [100/150/200] 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 [three-fifths] 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.

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 [four 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 [20] 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.

Parliamentary System:

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

[40/60 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 Council:

The Judicial Council shall ensure the autonomy, independence, impartiality, competence, and efficiency of the judiciary.

The responsibilities of the Judicial Council shall include, but shall not be limited to, 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 Council shall be defined by law.

The Judicial Council is composed of [eleven] members. On the proposal of the president, the Assembly elects [five] members from among university professors of law, attorneys and other lawyers; 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.

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: Judges 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:

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

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: Judges 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 [federation] 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 [three] of the judges, the Assembly shall appoint [three] of the judges and the Judicial Council shall appoint [three] of the judges on the [Supreme/Constitutional/Other] Court.

Option 2: Plurality System

Judges of all Courts shall be selected by the president and approved by [two/three] members of parliament [and the Judicial Council].

Option 3: Majority System

Judges of all Courts shall be selected by [two/three] 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].

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 District System

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

Optional: 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-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], and a maximum of [Y], 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 [7] 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 [seven] 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 [two/five] years by the [President] with the approval of the [Assembly].

Sample Language: Purpose of 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 in the nation.

Sample Language: Powers and Functions of 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 country.

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 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 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 [25] 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 other 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: 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: 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;

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 persons:

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 country.

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: Cultural Rights

Language:

All people have the right to speak their own language, and to teach and publicly communicate in their own language.

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.

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.

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: 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: 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.

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.

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; and

Freedom of thought, conscience, and belief.

[Other rights]

MINORITY RIGHTS

Sample Language: Minority Protections

The members of national minorities shall not be discriminated against on the basis of their national minority status.

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: 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 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 & 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 15 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: 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: 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.

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; and

Freedom of thought, conscience, and belief.

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:¹

¹European 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: Individual Rights and Freedoms

A woman shall enjoy equal freedom of individual will.

A woman shall enjoy equal freedom of expression.

A woman shall enjoy equal freedom of association and freedom to travel within
and outside of the State.

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Sample Language: Familial Rights and Freedoms

Women have the right to equality in marriage.

Women have the right to paid leave for working mothers during a reasonable
period before and after childbirth.

A woman 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.

Sample Language: Social and Moral Rights and Freedoms

A woman shall enjoy equal rights to social and moral self-determination.

A woman shall enjoy equal rights to education, to teach and to learn.

A woman shall enjoy equal rights to social welfare benefits.

A woman shall enjoy equal rights of citizenship.

A woman shall enjoy equal rights to due process and equal rights before the courts of law.

**Sample Language:
Rights and Freedoms in Labor, Commerce and Industry**

A woman shall enjoy equal rights to the ownership, use, alienation, and inheritance of real and personal property.

A woman shall enjoy equal rights to enter into contracts and to conduct business and commerce.

A woman shall enjoy equal rights and opportunities in labor and employment.

A woman shall enjoy equal rights to independence in economic affairs.

A woman shall have the right to receive remuneration equal to a similarly qualified man employed in a similar or identical position.

Sample Language: Political Rights and Freedoms

A woman 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: 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.

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.

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 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 with weapons in 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 with weapons in 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.

ROLE OF RELIGION IN GOVERNMENT

Sample Language: Official State Religion with no Religious Protections

[Religion] is the official religion of the state and the people.

The state protects [Religion]; it orders people to do right and shun evil; it fulfills the duty regarding God's call.

Optional: The [President/Prime Minister] must be a member of the [Religion] religion.

Sample Language: Official State Religion with Religious Protections

[Religion] is the official state religion.

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.

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.

Sample Language: Secular State Acknowledging Religion

No state religion may be recognized.

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.

Sample Language: Secular State

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.

All citizens enjoy the freedom of religion.

No state religion may be recognized, and church and state are to be separated.

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.

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.

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 Grant Concessions, Licenses, and Product Sharing Agreements:
[National, Regional] government[s] shall have the authority to grant concessions, licenses and product sharing 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 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/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 [majority/two-thirds] 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] 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.

Sample Language: Constitutional Enactment and Amendment

Option 1: Vote of the Legislature

This Constitution is adopted by a [two-thirds/three-fourths] 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].

Option 2: 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-quarter/one-half] 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 [thirty] 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 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 [Republican] nature of the State or the integrity of the national territory.