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**(VENICE COMMISSION)**

**PRELIMINARY DRAFT**

**PARAMETERS ON THE RELATIONSHIP  
BETWEEN THE PARLIAMENTARY MAJORITY  
AND THE OPPOSITION IN A DEMOCRACY:  
A CHECKLIST**

on the basis of comments by

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## PART ONE: BACKGROUND AND SCOPE

### A. Background

1. On 23 January 2008 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1601 (2008) on “Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament” (PACE Resolution 1601). Shortly thereafter, the Venice Commission decided to undertake a study which would supplement Resolution 1601. This study resulted in a report “On the role of the opposition in a democratic Parliament” (CDL-AD(2010)025, hereinafter the 2010 Report), adopted at the 84th Plenary Session of the Commission (Venice 15-16 October 2010).

2. In Resolution 1601 (2008) the PACE stated that the existence of “a political opposition inside and outside of parliament is an essential component of a well-functioning democracy”, and the Venice Commission fully subscribes to this view. In the past decade the Venice Commission observed a worrying political trend in a growing number of countries, which is sometimes described by the formula “the winner takes it all”. Following this trend, checks and balances restraining the power of the parliamentary majority are dismantled. Rushed adoption of laws without genuine political debate have become more frequent. Top judges and officials of independent agencies are appointed or dismissed single-handedly by the majority. In its relevant opinions, the Venice Commission has warned against reducing democracy to simple majoritarianism.<sup>1</sup> The 2010 Report, in § 159, was still optimistic, when stating that “democracy is today stronger in Europe than ever before in history”. It may be that this is not the case anymore, as demonstrated by more tense relations between the majority and the opposition.

3. This worrying trend was also noted by the Secretary General of the Council of Europe in his 2016 annual report.<sup>2</sup> The Secretary General has asked the Venice Commission to formulate guidelines on the relations between the majority and the opposition. Following his call, the Venice Commission tasked a group of rapporteurs, including B. Aurescu (substitute member, Romania), R. Kiener (member, Switzerland), H. Suchocka (Honorary President, Poland), K. Tuori (member, Finland), and B. Vermeulen (member, the Netherlands) with the update of the 2010 Report.

4. On 6 and 7 April 2017, the Venice Commission, jointly with the President of Romania, and with the support of the Parliamentary Assembly of the Council of Europe, held a conference in Bucharest on “The interaction between the political majority and the opposition in a democracy”, under the patronage of the President of Romania and of the Secretary General of the Council of Europe. After this conference the rapporteurs held several meetings. The rapporteurs agreed that the 2010 Report needs to be updated, in the light of the recent observations of the Venice Commission, and that it should also be supplemented with a new part – a Checklist.

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<sup>1</sup> In two of its opinions (CDL-AD(2011)001, § 74, and CDL-AD(2013)012, § 136) the Venice Commission stressed as follows: “[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections.”

<sup>2</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680646af8>

## B. Why a checklist?

5. The choice of the form for this document – a Checklist – is justified for two reasons. The *first* reason is that the need exists not only to update the 2010 report, but also to transform it into a more practical instrument, useful for an assessment of parliamentary organisation, procedures and practices.<sup>3</sup> This Checklist is destined to *systematise* the ideas contained in the 2010 Report, and adapt them for practical purposes, as a reference document for a variety of actors who may need to assess the situation of the parliamentary opposition in a given jurisdiction and its relations with the ruling majority and with other State institutions.<sup>4</sup>

6. The *second* reason why the format of a Checklist is chosen is the lack of established standards for many important issues. As noted in the 2010 Report, there is no common model defining the respective roles of the parliamentary opposition and majority. It is impossible to devise a comprehensive set of precise legal rules in this area, which would be valid for all democratic political regimes.

7. It is possible, however, to identify certain general principles which govern this relationship and which reflect the common European constitutional heritage, and to explain their inner logic. Furthermore, based on the Venice Commission's recent observations, it is useful to point at some best practices, or, sometimes, at some negative examples.<sup>5</sup>

8. The questions included in the Checklist permit to identify weak points in the domestic regulations. Many of these questions are open-ended, but each question is followed by a commentary which explains general principles, mentions best (or bad) practices and points at possible solutions. The structure of the Checklist allows it to be supplemented and adjusted in the future, in the light of the political and legal developments in the European and non-European democracies. The Checklist is intended to be a living instrument.

9. The Venice Commission emphasises the insufficiency of legal rules on their own. Even if all recommended legal mechanisms are formally in place, this does not guarantee that the respective regime is necessarily democratic. In the absence of a genuine political pluralism (which involves the existence of independent and sufficiently strong political parties, free media, fair elections, robust civil society, etc.), the legal guarantees for the opposition in Parliament will remain a dead letter. However, the focus of the Checklist is not on autocratic regimes but rather on "vulnerable democracies", where political pluralism exists but is nevertheless fragile. The Checklist is supposed to help legislators in those vulnerable democracies to formulate legal rules which would preserve the role of the parliamentary opposition as a watch-dog and as a viable alternative to the governments in place.<sup>6</sup> Furthermore, it may also be useful to assist so-called "established democracies", which face the risk of imbalances undermining the culture of political pluralism.

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<sup>3</sup> This approach was broadly inspired by the Rule of Law Checklist, adopted by the Venice Commission in 2016, CDL-AD(2016)007

<sup>4</sup> These actors may include Parliaments and other State authorities when addressing the need and content of legislative reform, civil society and as well as the political actors within the member-States, such as the political parties and their leadership, international organisations, such as the Council of Europe and the European Union (see CDL-AD(2016)007, § 27)

<sup>5</sup> That being said, those principles and best practices should be applied in the member-States with caution, with due regard to the specific national context, political traditions, etc.

<sup>6</sup> See the enumeration of the main functions of the opposition in CDL-AD(2010)025, § 25. This Checklist therefore continues the work started in the 2010 report "to explore the ways and means by which the role of the parliamentary opposition can be formally better regulated and protected" (§ 161).

## C. Sources

10. Although democracy is one of the core values of the Council of Europe,<sup>7</sup> and this notion is mentioned in many international agreements, there is no international treaty explicitly defining democracy (and, *a fortiori*, defining the standards related to the position of minority groups in parliaments).<sup>8</sup> The preamble to the Statute of the Council of Europe<sup>9</sup> and various human rights treaties speak of “democracy” and “democratic society” (see, for example, ICCPR, Article 22, or ECHR, Article 11), but do not define these concepts.<sup>10</sup> Some of the provisions of the European Convention on Human Rights (the ECHR) proclaim freedoms necessary for political participation (freedom of speech or freedom of association) or the obligation of the State to hold regularly free elections (Article 3 of Protocol no. 1 to the ECHR), which are essential for the existence of a political opposition.

11. However, the 2010 Venice Commission report, as well as the present Checklist, are focused on the procedures within Parliament, and on the institutional relations between the parliamentary opposition, the majority and other State institutions. In this sphere, the human rights standards are of little help. Thus, this Checklist is based essentially on “soft law” instruments (like Resolution 1601 (2008) of the PACE),<sup>11</sup> and on the Venice Commission’s own opinions and studies.<sup>12</sup> To some extent, the Checklist also draws from comparative material and from the reports of such international bodies as the Inter-Parliamentary Union, the Commonwealth Parliamentary Association, etc.

## D. Scope

### 1. Parliamentary opposition vs. political opposition in general

12. The role of the parliamentary opposition is defined by a variety of factors, many of which are external to Parliament (the extent of political freedoms, pluralism of the media, free elections, etc.). Basic constitutional choices are also very important, and so the place of the political opposition in Parliament will vary depending on the type of the electoral system (majoritarian, proportionate, mixed), the type of the regime (parliamentary, semi-presidential or presidential), bicameral or unicameral organisation of the legislature, federal or unitary structure of the State, etc.

<sup>7</sup> And also of the United Nations; see <https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Democracy.aspx>

<sup>8</sup> An attempt to regulate the notion of democracy was made by the Organization of American States (OAS) in the Inter-American Democratic Charter, adopted in Lima in 2011, <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/Americas.aspx>

<sup>9</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052>

<sup>10</sup> Neither the concept of “democratic security” is better defined - see the 2018 Report by the Secretary General of the Council of Europe, <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5>.

<sup>11</sup> See also some regional instruments: the Inter-American Democratic Charter, adopted by the Organization of American States, <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/Americas.aspx>; the Guidelines on the rights and duties of the opposition in Parliament, adopted by the participants at the Parliamentary Seminar on Relations Between Majority and Minority Parties in African Parliaments under the aegis of the Inter-Parliamentary Union, <http://archive.ipu.org/splz-e/gabon.htm>; the Commonwealth Parliamentary Association Recommended Benchmarks for Democratic Legislatures, <https://www.wfd.org/wp-content/uploads/2018/10/Recommended-Benchmarks-for-Democratic-Legislatures-updated-2018-FINAL-online-optimized.pdf>; the intergovernmental Warsaw Declaration of 2000, <https://community-democracies.org/app/uploads/2016/10/2000-Warsaw-Declaration-ENG.pdf>

<sup>12</sup> The comparative examples come partly from the Venice Commission own opinions and studies, and partly from external sources, reports by think-tanks, etc.; see, for example, [https://agora-parl.org/sites/default/files/NDI%20Toward%20the%20Development%20of%20International%20Standards%20for%20Democratic%20Legislatures\\_A%20Discussion%20Document%20for%20Review%20by%20Interested%20Legislatures\\_0.pdf](https://agora-parl.org/sites/default/files/NDI%20Toward%20the%20Development%20of%20International%20Standards%20for%20Democratic%20Legislatures_A%20Discussion%20Document%20for%20Review%20by%20Interested%20Legislatures_0.pdf); [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=PUMA/LEG\(2000\)2/R/EV1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=PUMA/LEG(2000)2/R/EV1); [https://agora-parl.org/sites/default/files/Rules\\_of\\_Procedure\\_OPPD\\_160x230.original.pdf](https://agora-parl.org/sites/default/files/Rules_of_Procedure_OPPD_160x230.original.pdf)

13. The 2010 Report focused on the role of the opposition represented *in Parliament*. It did not deal with the political opposition in society in general, with the level of human rights and freedoms or with basic constitutional choices. The present Checklist remains essentially within the same scope – it deals with the rules and principles pertinent to the functioning of the parliamentary opposition and to its interaction with the majority, and with other State institutions.

## **2. Notions of the “opposition”, “minority” and “majority”**

14. The term “opposition” does not lend itself to a short definition. There is a great deal of difference between the opposition in a multi-party parliamentary regime, in a UK Westminster type of parliament, in a presidential regime like in the US where the executive does not need to have the confidence of the legislature, in a semi-presidential regime (like a France), and in a Swiss “consensual” model of the federal government (which is composed of members of all main parties represented in Parliament).

15. Most of the previous opinions of the Venice Commission where it has examined the role of the opposition in Parliament have concerned *multi-party parliamentary regimes*, where the parliamentary majority party (or a coalition) is at the same time a “governing” majority forming the Cabinet and determining its political program.<sup>13</sup> The 2010 report primarily described “the main situation, in which the opposition parties are in minority, and therefore in need of some level of protection in order to fulfil the basic legitimate opposition functions that are necessary in order to ensure effective and sustainable democracy” (§ 37). The present Checklist has the same focus.

16. In the Checklist both terms “opposition” and “minority groups” are used to denote groups of MPs politically opposed to the Government.<sup>14</sup> There are other minorities in Parliament (for example, ethnic, religious or gender minorities), but the Checklist focuses on political minorities only.

## **3. Role of the opposition vs. role of Parliament**

17. The parliamentary majority is often (but not always – see above, §§ 14 and 15) the *governing* majority, in the sense that it supports the Government.<sup>15</sup> Hence, the Checklist will, inevitably, touch upon questions regarding the relation between the executive, including the President, and the legislature. As a result, some issues discussed in the Checklist are not limited exclusively to the role of the opposition groups or opposition MPs, but also concern the proper functioning of a democratic Parliament in general, that however are of predominant importance to the opposition: the publicity of parliamentary debates, free mandate, need for a qualified majority for certain decisions, immunities, etc.

## **E. Conceptual basis of the Checklist – general principles**

18. Against the background of developments witnessed by the Venice Commission in the past decade, there is a clear need for ensuring that majorities do not abuse their otherwise legitimate rights just because they won the elections. The status of a governing majority implies certain responsibilities and limitations, which will be discussed in the Checklist below. When talking about these responsibilities, one cannot ignore the tendency, in election

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<sup>13</sup> In presidential systems the situation may be different; an executive President may be of the same political colours as a minority party in Parliament.

<sup>14</sup> As in the 2010 report, which spoke of the “legal protection of the parliamentary opposition and minorities” – see the title of Section IV).

<sup>15</sup> In a presidential or semi-presidential regime the situation may be different, and the party having majority in Parliament will not necessarily be the President’s party.

processes across Europe, of a lower turnout, the effects of which are even stronger in constituency voting systems. In such a context, the political majority, even if it won the elections with a large percentage, is obliged to an even higher extent to deliver responsible governance.

19. There is a growing need to strengthen the framework of parameters and safeguards regarding the interaction between the majority and the opposition. In the absence of such safeguards for the opposition, liberal constitutional democracy may turn into an authoritarian regime. To avoid such degeneration, in addition to the rules of the Constitution and the legislation, certain overarching principles should be respected, which are outlined below.

20. *First*, a liberal democratic State should respect values of pluralism and freedom. In a democratic society, the criticism by the opposition cannot be seen as a destructive element and cannot be interpreted as a lack of acceptance of the results of democratic elections. It is a part – as legitimate as the effort and activity of the majority – of a sound liberal democratic system. The voice of the opposition – or of multiple oppositions – is not a voice against the country. And its voice must be audible.

21. *Second*, a liberal democratic State cannot exist without checks and balances amongst different State institutions. The power should be diffused and its exercise should require coordination amongst State bodies and officials with different institutional roles and interests, of different loyalties and convictions, etc.

22. The *third* principle requires loyal and constructive cooperation amongst State bodies and between State bodies and the institutions of the civil society (such as mass media, for example). Checks and balances require *constructive* cooperation in order to achieve the public interest, they require mutual respect between State institutions belonging to different powers, as well as an appropriate balance and mutual control among them.<sup>16</sup>

23. The *fourth* principle is that of a shared responsibility of the majority and opposition towards society, or the principle of political solidarity, which should transcend party divisions. Both the majority and the opposition have to act based on the same joint and responsible commitment to the public interest of the citizens, who are the legitimate source of democratic power. This commitment has to come first, surpassing the stakes of any political confrontation – although such confrontations are normal and essential in a democracy. The majority, precisely because it is a majority, has to act in the exercise of power with self-restraint and with respect towards the opposition, in an inclusive and transparent manner, having in mind that probably in the future itself will become, in accordance with the democratic rules, an opposition group.

24. *Fifth*, any changes to the system should keep open the “channels of political change”.<sup>17</sup> Measures taken by the majority should not affect the Rule of Law, and should not be aimed at changing the rules of a democratic “game”, which ultimately means the possibility of alternation in power through free and fair elections. The majority should not abuse its powers to make it impossible (or very difficult) for the minority to become the majority. If the rules of the democratic “game” need to be changed, this should not be too easy to do, should be

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<sup>16</sup> In this respect, the Venice Commission stated, in 2012, that “the respect for a Constitution cannot be limited to the literal execution of its operational provisions. [...]. The purpose of these provisions is to enable a smooth functioning of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, the Judiciary, all serve the common purpose of furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the office holder. Even if an institution is in a situation of power, when it is able to influence other state institutions, it has to do so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority” (CDL-AD(2012)026, § 87).

<sup>17</sup> J.H. Ely, *Democracy and distrust: a theory of judicial review*, 105 (1980).

transparent and preceded by proper public consultation, should not be aimed at undermining the basics of the democratic system and the Rule of Law and should respect the rights of the minority.

25. *Sixth*, the system should allow for efficient decision-making. The majority should be able to pursue its political agenda<sup>18</sup> and the opposition, on its side, should not indulge in a deliberate obstruction of the normal work of Parliament.<sup>19</sup> If parliamentary politics is prone to compromise, it may lead to loss of interest in politics amongst the voters, to their political alienation or even their radicalisation. To put it simply, the minority should have its say, and the majority should have its way. The interaction between the majority and the opposition should always respect the imperative of ensuring a fair balance between the legitimate interests of the majority and those of the opposition.

26. These are some basic general principles which distinguish a constitutional democracy: freedom, pluralism, checks and balances, loyal cooperation and respect for institutions, solidarity towards the society, possibility of alteration of power, efficient decision-making. To these principles, some meta-legal principles may be added (like, for example, equality and proportionality).<sup>20</sup> This list is not exhaustive, and those principles can be specified differently, depending on the political regime, the constitutional culture and historical traditions. Some of those principles are translated into more specific legal mechanisms and rules which are examined in the Checklist.

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<sup>18</sup> Insofar as the daily politics are concerned – on more fundamental changes see the paragraph above

<sup>19</sup> CDL-AD(2011)016, § 13

<sup>20</sup> See the Rule of Law Checklist, CDL-AD(2016)007, § 41.



## PART TWO: THE CHECKLIST

### A. Level and type of legal regulations

#### **1. Should the rights of the opposition be guaranteed at the level of the Constitution, at the legislative level, or otherwise?**

27. Historical traditions play a major role here. In some older democracies such matters are regulated by constitutional custom and/or by lower-level regulations (CDL-AD(2010)025, 2010 Report, § 38).

28. In principle, and particularly in the younger democracies the constitutional entrenchment of the rights of the opposition is positive (CDL-AD(2014)037, § 19),<sup>21</sup> but it should be possible to adapt procedural rules to changing circumstances. Only the *most fundamental* principles should be set out in the Constitution or in an organic law (CDL-AD(2011)016, § 24) – such as the principle of proportionate representation in committees, reasonable opportunity to make legislative proposals, rules on qualified majorities required for taking certain decisions, etc.

29. As to more detailed regulations, these are better left to ordinary laws, rules of Parliament, standing orders or constitutional conventions. In certain situations it is better not to regulate certain areas at all; for example, overly strict rules on coalition-building in Parliament may be counter-productive (CDL-AD(2017)026, § 43).

30. In sum, the most fundamental rules on parliamentary opposition and minority rights should preferably be regulated in a form that the majority cannot alter or amend at its own discretion (CDL-AD(2010)025, 2010 Report, § 88).

#### **2. If these matters are regulated by ordinary laws or Rules of Procedure (RoP), how are those to be adopted?**

31. There are various models of regulation of the rights of the opposition: by ordinary legislation,<sup>22</sup> by the Rules of Procedure of Parliament (RoP), or by both.<sup>23</sup>

32. It is important to ensure the stability of those regulations (laws or RoP). So, in some countries a heightened majority for their amendment is required,<sup>24</sup> or an external check by the Constitutional Court on the modification of those regulations.<sup>25</sup> It is also possible to introduce a delay for the amendments to take effect,<sup>26</sup> so that the incumbent majority cannot be the immediate beneficiary of the measures it proposes. That being said, it is difficult to exclude changes with immediate effect altogether.<sup>27</sup>

33. In some countries, the Rules of Procedure are not laid down in a law but in an autonomous regulation *sui generis* by Parliament. This is explained by the fact that adoption of a law involves external institutional actors, such as the President, and it may be possible to challenge the law before the Constitutional Court, which may be seen as incompatible

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<sup>21</sup> For example, the Constitution of Portugal (Article 114) guarantees certain procedural rights of the opposition.

<sup>22</sup> For example, in the UK the status of the leader of the opposition is recognised by the Minister of the Crown Act

<sup>23</sup> Like in Switzerland.

<sup>24</sup> For example, a two-thirds majority is required in Austria, but in most countries only a simple majority is needed.

<sup>25</sup> For example, in France amendments to the RoP, once voted by both Chambers, should be approved by the Constitutional Council.

<sup>26</sup> CDL-AD(2010)025, 2010 Report, § 88.

<sup>27</sup> In the US each Congress adopts the RoP in the beginning of its term, so it is not bound by the previous rules.

with the parliamentary autonomy (CDL-AD(2010)025, 2010 Report, § 94; CDL-AD(2017)026, § 23).

34. Although it is not the case for all countries, the Venice Commission recommends that those matters are regulated in the Rules of Procedure, rather than in a law, out of respect for parliamentary autonomy. In any event, any regulations in this matter should be amendable with a qualified majority (while the Commonwealth Parliamentary Association, in Recommended Benchmarks for Democratic Legislatures, § 2.1.4, insists that changes to the RoP shall be adopted with “near unanimity”).

### **3. What role does constitutional/parliamentary custom play in regulating parliamentary procedures?**

35. Constitutional custom, where it is accepted as a source of law, is another method of regulating the rights of the opposition,<sup>28</sup> especially in older democracies. But this method is acceptable only under the condition that it is strictly followed. Sudden and drastic diminution of the procedural rights of the opposition in parliamentary procedures may be avoided if the Speaker and other governing bodies of the legislature follow customs formed in more peaceful periods of its history.<sup>29</sup> Indeed, to amount to a custom the practice should be consistently followed and obeyed for a prolonged period of time. The practice of the governing bodies of the legislature should be consistent irrespective of who is in the majority and who is in the opposition, and should be taken into account in resolving internal disputes.

#### **B. Establishment of the majority and minority groups (opposition) in Parliament**

##### **1. Equal status of individual MPs**

###### **1. Is there any difference between the status of the opposition and majority MPs?**

36. All MPs should have the same individual rights irrespective of whether they belong to the ruling majority, to the opposition, or are independent (PACE resolution 1601 (2008), p. 5). The basic rights of all deputies typically include:<sup>30</sup>

- The right to vote (on legislation, budgets, etc.)
- The right to table bills and motions
- The right to speak in debates
- The right to ask oral or written questions of the Government
- The right to participate in committee work
- The right to receive information and documents presented to parliament
- Parliamentary immunities, such as parliamentary non-liability (freedom of speech) and parliamentary inviolability (freedom from arrest)
- Freedom of political opinion, including protection from “imperative mandate” and the right to change party allegiance
- The right to initiate cases before the Constitutional Court

37. Some of these rights are absolute (such as the right to vote, to have access to the materials prepared for the parliamentary debates, the immunities); others have implied limitations, which are discussed in the following sections. The principle of equality of MPs is normally supplemented by a principle of proportional representation and participation by party groups (CDL-AD(2010)025, 2010 Report, § 113).

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<sup>28</sup> For example, in Canada the opposition party with the largest number of the MPs receives the title of “official opposition”, as a matter of custom

<sup>29</sup> The CPA Benchmarks, § 2.2.3: “The Presiding Officer decides all questions of procedure, and in doing so is guided by previous decisions and practice”.

<sup>30</sup> See CDL-AD(2010)025, 2010 Report.

38. The principle of equality does not exclude that some MPs having leadership positions within Parliament (the Speaker, heads of the permanent committees, rapporteurs, etc.) may have additional rights and privileges (like more personal assistants, additional indemnities etc.).

## **2. Majority and minority as institutionalised groups**

### **1. Does the opposition or opposition groups have any special status?**

39. There may be different degrees of institutionalization of the opposition or opposition groups. Opposition parties often do not represent a single block, and their formal recognition and institutionalization is not a *conditio sine qua non*. It is desirable, however, that party groups (both opposition groups and majority groups) are formally established and recognised for at least some purposes – for example, for the distribution of the leadership positions (in the Bureau or in the permanent committees of Parliament), for the allocation of the speaking time, for the allocation of additional financial and administrative resources, etc.

40. It is preferable to define the “opposition” with reference to one simple criterion, namely the behavior of the MPs at the moment of the appointment of the Government or adoption of the budget (CDL-AD(2013)032, § 90). The subsequent behavior of MPs in the context of law-making would no longer be relevant, and even MPs who are member of the opposition may support bills submitted by the Government, and vice versa (CDL-AD(2007)015, § 4).

### **2. How many MPs may form a group having a special status? Is there an obligation of MPs to affiliate themselves with any of those groups? Should the groups govern themselves or be governed by the external rules?**

41. While some procedural rights belong to the MPs individually, additional rights may be given to institutionalised groups (fractions, parties in Parliament). Hence, it is important to define how many MPs may form such a group in order to enjoy those rights, and how those groups are formed.

42. Creation of many small parliamentary groups may be counter-productive, expensive and make procedures cumbersome. It is reasonable to try to achieve a clear partition in Parliament between a parliamentary majority and a parliamentary minority to avoid “an excessive fragmentation of the legislative organ” (CDL-AD(2007)015, § 8). However, rules regarding group affiliation should not run counter to the basic principle of the free mandate. An MP should have the right to join a group, or become an independent.

43. A “mixed” group composed of non-affiliated MPs may be a solution for those MPs who do not belong to any major party but who wish to accede to the additional collective rights enjoyed by the groups (CDL-AD(2009)025, § 44). The law (or other regulation) should not prevent alliances between non-affiliated MPs or MPs belonging to small political parties, and should also allow MPs to continue their work as independents.

44. It is important to respect the institutional autonomy of parliamentary groups and not to over-regulate those matters in external documents. Some external regulations may be acceptable, in order to maintain a relative stability of the political processes and of the Government, provided that “the deputies remain free to vote for or against the position of the fraction/party or coalition” (CDL-AD(2016)025, § 90). A parliamentary group can, but should not be obliged to publish its programme (CDL-AD(2007)015, § 17).

45. There should be a possibility for MPs from different political groups (majority and minority) to create cross-party caucuses, i.e. groups of deputies of the same ethnicity, gender, religion, conviction or other common interest or characteristic (see the

Commonwealth Parliamentary Association Benchmarks for Democratic Legislature, the CPA Benchmarks, § 4.3.1).

### **3. Do the party groups receive additional financial and human resources from Parliament?**

46. To be able to exercise their functions efficiently, institutionalised minority groups should receive additional financial and administrative resources from the overall budget of Parliament (in addition to resources available to each and every MP), largely proportional to their membership.<sup>31</sup> Attribution of resources and facilities should not “unduly advantage the majority party” (CPA Benchmarks, § 4.2.2).

#### **3. Free mandate, floor crossing and party discipline**

##### **1. Is it possible for an MP to change political allegiance or vote against the party line without losing the mandate?**

47. The Venice Commission has always expressed preference for the free and independent mandate (CDL-AD(2009)027, § 39, CDL-AD(2017)026, § 33), even though some forms of imperative mandate exist in some European democracies.<sup>32</sup> Free mandate means that the deputy may change party allegiance (or “cross the floor”) or become independent without the risk of losing the mandate. Free mandate also implies that there is space for a dissenting vote, without definitive floor crossing.

48. That being said, the very notion of an institutionalised majority or opposition group in Parliament requires some party discipline. Where cross-party defections are common, the will of the voters is thwarted, so it is legitimate to introduce counter-measures preventing the “sale” of mandates to the top payer (CDL-AD(2009)027, § 39). These measures, falling short of the withdrawal of the mandate, will be examined below.

##### **2. What legal mechanisms can be used to prevent floor crossing or for the breach of the party discipline?**

49. In many European states, party switching in Parliament is prevented not by constitutional or legal mechanisms but otherwise (CDL-AD(2009)027, § 17). Generally, it is better to maintain party discipline by political, rather than purely legal means; the only exception may relate to the special rights given to the MP as a member of a particular political group.<sup>33</sup> It should always be possible for a group to expel a deputy (CDL-AD(2015)014, § 51).

50. Measures against floor crossing may be adopted by parties individually or through inter-parties agreements.<sup>34</sup> In some countries, floor crossing has been curtailed by specific mechanisms which however avoid depriving representatives from their mandates.<sup>35</sup>

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<sup>31</sup> In Denmark, Finland, the Netherlands and Sweden, for example, all parliamentary groups receive grants which are used to pay secretaries, experts, press officers etc.

<sup>32</sup> Under Article 160 of the Portuguese Constitution, an MP loses his/her seat in the event that he/she “register as members of a party other than that for which they stood for election”.

<sup>33</sup> For example, in Canada an MP voting against a bill proposed by the government supported by his group may be revoked from the position of a head of the parliamentary committee, allocated to this political group.

<sup>34</sup> In Spain, thirteen parties represented in the national parliament signed in 1998 the Pact against floor crossing. Parties signing the pact commit themselves not to collaborate with representatives who cross the floor in the creation, maintenance or change of government majorities in any public body. Parties also committed themselves to reform all rules of procedure in local corporations for impeding that representatives who cross the floor may obtain in this way extra resources.

<sup>35</sup> In the Canada province of Manitoba, the provincial Legislative Assembly Act mandated that MPs who quit their political party are obliged to serve out the remainder of their term as independents.

51. The party leadership may try to put informal pressure on their members in order to prevent dissenting votes. Such pressure may be prevented, for example, by a secret voting procedure, which, if it is provided for in the regulations, should then be followed in practice (CDL-AD(2017)005, § 22). Secret voting may favour the internal opposition within the governing party (which is quite distinct from the formally recognised external opposition);<sup>36</sup> however, it cannot be considered as a standard procedure appropriate for all situations.

#### **4. Withdrawal of the mandate for other reasons**

##### **1. Is it possible to withdraw the mandate for a specific offence or due to incompatibility?**

52. It should be possible to withdraw the mandate for a serious offence or for incompatibility with other activities or status.<sup>37</sup> It is important that the opposition is involved in the decisions related to the withdrawal of mandates

53. Grounds for withdrawal of mandate for offences, as well as incompatibilities, should be set out at the constitutional level (CDL-AD(2009)024, § 52), and not left to the level of ordinary laws and thus to majoritarian decision-making (CDL-AD(2008)015, § 40, CDL-AD(2009)024, § 52).

54. As regards the procedure, it appears that there is no single model amongst modern democracies concerning the process of removal of criminal offenders from Parliament. Some systems require the intervention of Parliament, whereas in other systems a criminal conviction involving deprivation of political rights automatically leads to the loss of the mandate. If such decisions are taken by a simple majority of votes in Parliament, without a clear constitutional basis, this may be used abusively against parliamentarians belonging to the minority (CDL-AD(2016)029, § 75). A combination of two mechanisms (approval by Parliament and decision by a judicial body) gives better protection to opposition MPs.<sup>38</sup> In the latter case it makes more sense to give controlling power to the Constitutional Court rather than an ordinary court (CDL-INF(1996)006, page 10).

55. Even where the mandate is not formally withdrawn, opposition MPs may be prevented from participating in parliamentary work by other means, for example if they are arrested in connection with a pending criminal investigation (CDL-AD(2017)005, § 26). Rules on inviolability (protecting the MPs from such measures) will be discussed separately below.

##### **2. Can the mandate be withdrawn for unjustified absence of an MP from work?**

56. Boycott of the work of Parliament cannot entirely be ruled out as a legitimate form of political behaviour. Political action may follow various paths, and attendance at sittings is not the sole form of action. It would nevertheless be conceivable for the Constitution to lay down a rule of attendance and indicate penalties on defaulting members, ranging from partial or complete withdrawal of indemnity to withdrawal of the right to vote, but without providing for

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<sup>36</sup> In Europe, secrecy of vote is required for elections under the parliamentary rules of procedure in Albania (under the Constitution, when electing the President of the Republic), Armenia, Austria, Belgium, Finland, France, Hungary, Lithuania, Republic of Moldova (under the Constitution), Monaco, Netherlands, Portugal and San Marino.

<sup>37</sup> The Venice Commission's Report on the exclusion of offenders from Parliament (CDL-AD(2015)036cor) gives a comparative description of the rules in this area.

<sup>38</sup> In France the loss of the mandate should be confirmed by the Constitutional Council, which is a good practice, since it introduces an additional check on the majority's power to strip opposition MPs of their mandates.

loss of office (CDL-AD(2002)012, § 27 and 29).<sup>39</sup> Some constitutions, however, provide for the automatic loss of mandate.<sup>40</sup>

### **C. General principles governing parliamentary debates**

#### **1. Are the parliamentary debates accessible for the general public and the press?**

57. Publicity of the debate helps the opposition to effectively perform its function as a watch-dog, and to attract public attention to problems and weaknesses of the Government's policies. Not all of the hearings are of much interest for the public; yet, it is necessary to provide a reasonable accommodation for the members of the public or the journalists who want to follow them (in person or on-line). The general rule should require reasonable access of the media and of the general public to Parliament during the debates.

58. Rules governing the granting of passes to the media to the building of Parliament or licences on coverage of the debate may be subject to obvious safety and order requirements. They should ensure the pluralist and non-partisan character of the coverage, and be administered by an independent staff press officer or alike.

59. The availability and modalities of live transmission or press-coverage of the debate are particularly important when constitutional amendments or other important reforms are discussed. In such cases the usual arrangements for the broadcasting on TV, radio and internet should be amended due to the importance of the matter; for example, the time-slots for the TV broadcasting should be extended (CDL-AD(2017)005, § 25).

60. There should be a possibility to conduct debates, exceptionally, in camera, where secret matters are discussed (defence, foreign policy negotiations, etc.). The decision to close the debate may be taken by plenary Parliament, preferably by a qualified majority, provided that the decisions taken at the session in camera are published afterwards (CDL-INF(1996)006, page 11).

61. Publicity in committees in the decision-making phase is a more delicate issue, since it may make political negotiations more difficult, and since committees are even more likely to examine classified information (CDL-AD(2014)013, § 13). Committee meetings may therefore be closed for the public, for solidly justified reasons. However, hearings before the inquiry commissions should rather be public, or, at least, this should be a general rule.

#### **2. How many MPs and party groups should participate in the debate and in the voting?**

62. The decision-making process should be inclusive, i.e. involve all political groups in Parliament. Rules on quorums give additional legitimacy to the decisions taken by Parliament. Quorum rules should not, however, be unrealistically high – otherwise the normal functioning of Parliament may be disturbed (CDL-AD(2008)015, § 47).

63. Certain political processes – such as the amendment of the Constitution – require the broadest political support. Even if the ruling coalition has the necessary number of votes to pass the amendments, it does not absolve the Government and Parliament from conducting a genuine all-inclusive debate. Democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition (CDL-AD(2018)015, §§ 17 and 18).

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<sup>39</sup> See, for example, see Article 63.3 of the Greek Constitution

<sup>40</sup> MPs in Portugal lose their seat, under Article 160 of the Constitution, if “they do not take up their seat in the Assembly, or they exceed the number of absences laid down by the Rules of Procedure”

### **3. How are the votes in Parliament counted?**

64. It is important to ensure that the process of counting of votes is fair and transparent, that the procedure cannot be manipulated by the majority,<sup>41</sup> and that the opposition has a possibility of controlling the process of counting.

65. There should be procedural mechanisms in place to ascertain the quorum and record the results of the voting, as a general rule, or at the request of a minority group (CPA Benchmarks, § 2.6.2).<sup>42</sup> This does not exclude the possibility of relying on the oral vote in some other, less controversial, situations.<sup>43</sup>

66. The risk of manipulations exists even in Parliaments having an electronic voting system, where decisions may be taken by the MPs having electronic “voting cards” of their absent colleagues, (ECtHR, *Oleksandr Volkov v. Ukraine*, 9 January 2013, § 141), even though the manipulations are possible not only by the majority but also by the opposition.

### **4. How much time is allocated for public consultations and for the preparation of a plenary debate in Parliament?**

67. It is difficult to define *in abstracto* how much time is necessary for debating a bill in Parliament. However, the legislation or the RoP may provide for certain basic rules preventing rushed adoption of laws, such as intervals between readings and deliberations in a committee.

68. Constitutional amendments should be the result of a “slow and incremental” process and should follow other procedures than those of everyday politics (CDL-AD(2010)001, § 75).<sup>44</sup> Sometimes constitutional amendments are subject to repeated decisions with a “reflection delay” in between, intervening elections (which means that afterwards a second reading debate in the new parliament will take place) and referendums, and other procedural impediments which are supposed to slow down the process and make the final decision more informed and well-considered.<sup>45</sup> These mechanisms may help the parliamentary opposition to resist constitutional change proposed by the majority.

69. As regards ordinary legislation, whether Parliament (and in particular the opposition) has adequate time to discuss the bill should be decided by the body responsible for setting the agenda of Parliament and of its committees in the light of all relevant circumstances, and in particular the complexity and importance of the bill.<sup>46</sup>

70. Laws changing fundamental institutional arrangements – for example, the composition and the principles of functioning of the Constitutional Court – need more time than ordinary legislation (CDL-AD(2016)001, § 132). Complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet-)consultation takes place.<sup>47</sup> The public should have a meaningful opportunity to provide input (CDL-AD(2017)028, § 24). Allocation of additional time for public

<sup>41</sup> See the example of the non-respect of the quorum rules in Germany in 1933, CDL-AD(2012)010, § 43.

<sup>42</sup> For example, in the US Senate 1/5 of the quorum of senators may require a roll call vote.

<sup>43</sup> Oral vote exists, for example, in the US, UK and India.

<sup>44</sup> For example, two months was considered too short a period by itself to allow the general public, politicians, civil society and experts to analyse and discuss the reform which modifies 29 articles of the Constitution CDL-AD(2016)029, § 18

<sup>45</sup> See, as an example, Article 88 of the Danish Constitution; Article 137 of the Dutch Constitution (second reading in parliament).

<sup>46</sup> for example, in most OECD countries Parliaments receive the budget bill between two and four months in advance of the new fiscal year.

<sup>47</sup> As it is the case in the Netherlands.

consultations increases the ability of the opposition to influence the content of the legislative proposals by the Government or the majority; the majority should not manipulate the procedure in order to avoid such public consultations.

71. By contrast, for the passage of minor and uncontroversial legislation shorter time-frames and simpler procedures (for example, not involving a separate examination in a relevant committee) may be designed. However, such cases shall be clearly defined and tightly circumscribed in the regulations. In an emergency situation there should be a possibility to speed up the procedure and to reduce time allocated for the general debate (CDL-AD(2009)025, § 52). The Venice Commission has previously criticised the practice of using an accelerated procedure for adoption of acts of Parliament regulating important aspects of the legal or political order (CDL-AD(2018)021, § 39). Thus, for example, the Government should not use the accelerated procedure provided for private bills (i.e. bills introduced by individual MPs of the majority rather than by the Government itself) in order to avoid meaningful public consultations which would otherwise be required for a Government-sponsored bill (CDL-AD(2017)028, § 24), and should not use the Government ordinances for regulating matters which otherwise should be regulated by law discussed and adopted following a normal procedure. The Venice Commission criticised the recourse to legislation through a Government ordinance in a situation where the ordinance affected the status of a fundamental state institution (the Constitutional Court), and where the urgency of such measure had not been established (see CDL-AD(2012)026, § 27).

72. The suspensive veto, which may be imposed on the bill by the President in several countries, may have the same effect – to delay the adoption of the law. The Venice Commission has recommended, however, that the suspensive veto may be overcome by a simple majority and not a qualified one (CDL-INF(1996)006, page 12).

### ***5. How may the public, stakeholders, experts and witnesses participate in the parliamentary debates?***

73. Not only should the discussions be inclusive (in the sense of involving all political groups in Parliament), they sometimes require hearings with external participants, such as experts (i.e. professionals in the relevant field) and stakeholders (for instance those who represent social, ethnic, professional, religious etc. groups affected by the policy at issue).

74. Hearing of external participants is most appropriate in the relevant committees meetings. Minority members should be able to invite experts and stakeholders to be heard at the committee meetings, and such requests should be, as a rule, granted. The choice of external participants should ensure that hearings cover the diverse perspectives (the CPA Benchmarks, § 3.2.4). The time-limit set in the agenda for the discussion of the relevant items should give due regard to the need to hear those external figures. Committees should have sufficient resources for the payment of their services (the CPA Benchmarks, § 3.2.4).

75. External input to the law-making process may be obtained not only through the participation of the stakeholders in the relevant committee meetings, but also through the process of public consultations in which members of the general public may address their proposals and comments in writing to the relevant committees and to the Plenary, or express their opinion through other means (by signing petitions, for example). Public consultations, in one form or another, are particularly important when constitutional amendments are discussed (CDL-AD(2014)010, § 27; CDL-AD(2011)001, §§ 18-19). The process of public consultations should be accompanied by an (informal) public discussion in the media and in the civil society, facilitated by a pluralist media coverage and respecting political freedoms (such as the freedom of speech, freedom of assembly etc.).



**6. Does the opposition have reasonable access to the bills, reports and other supporting materials?**

76. The agenda of the upcoming period should be published and the supporting material made available in advance to the opposition and the general public to prepare for the debates on a particular issue/bill (the CPA Benchmarks, § 6.2.3).

77. The Government may try to avoid scrutiny of its legislative proposal by the practice of *cavalier législatif* (“legislative rider”, or “omnibus laws”) which means inclusion of provisions unrelated to the subject of the law in which they are included (CDL-AD(2008)035, § 121). The motives of the government in using this procedure may vary, but generally it aims to circumvent the ordinary, strict conditions of the deposit and discussion of legislative initiatives, so it should be avoided.

78. The internal rules of Parliament should ensure that the texts proposed for vote are clear and accessible to MPs with sufficient time before the vote, that the results of the vote are properly recorded, and that texts adopted are not modified after the vote (except for purely technical corrections, not affecting the substance).

**D. Appointment to positions of responsibility in Parliament**

**1. How are the positions of responsibility allocated?**

79. If all appointments to the positions of responsibility within Parliament (the Speaker, heads and members of the permanent committees, etc.) can be made by a majority alone, there is a risk that the opposition will be totally excluded from the governing bodies of Parliament.

80. A better solution is to formulate a rule ensuring the opposition fair access to the positions of responsibility in Parliament (PACE Resolution 1601 (2008), § 2.3.1). This rule may be established by a law, the RoP or constitutional custom. Sometimes the distribution of the positions of responsibility is a result of *ad hoc* political agreements,<sup>48</sup> but in the younger democracies it is better to formulate this rule in some legal regulations, whereas in the older ones it may be a matter of constitutional custom.

81. The Speaker should ideally be a unifying figure, acting as an arbiter in internal conflicts, so it is desirable to elect him or her with a qualified majority of votes. That being said, in some democracies the Speaker is one of the leaders of the majority party.

82. The Venice Commission endorses the principle of proportional representation in the positions of responsibility as an important instrument for ensuring opposition rights (CDL-AD(2010)025, 2010 Report, §§ 63 – 66; CDL-AD(2009)025, § 18).<sup>49</sup> In most important committees (for example, responsible for the budget or for the oversight of the security services)<sup>50</sup> it is recommended to reserve certain seats for the opposition even going beyond its actual representation in Parliament, or give the opposition the chairmanship positions (PACE Resolution 1601 (2008), § 2.5.1; CDL-AD(2018)024, § 30).

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<sup>48</sup> In Romania, for example, the composition of the Bureau is decided in negotiations between leaders of the parliamentary groups.

<sup>49</sup> The principle of proportionate representation exists, for example, in Denmark, Greece, Portugal, Bulgaria, Canada, France, Germany, Hungary, Switzerland, the United Kingdom, and the United States. Inter-Parliamentary Union, (Guidelines, III.2), also adheres to the principle of proportionate representation.

<sup>50</sup> In Germany, France, UK, and Canada the head of the committees dealing with budget and finance is a member of the opposition.

## **2. How the staff of Parliament is appointed and managed?**

83. Parliament shall have non-partisan professional staff to support its operations, including the operations of its Committees (the CPA Benchmarks, § 5.1.1), particularly the non-partisan media relations facility (ibid., 10.1.4). It is particularly important that the Secretary General, the chief of staff and the media relations officer of Parliament are appointed on the basis of a consensus, enjoy sufficient independence from the majority, and that their mandate outlives the term of the current legislature. Some positions in secretariat (for example, personal assistants to the MPs and those in secretariat of parliamentary groups, factions etc.) may be reserved to staff members appointed by the MPs or parliamentary groups themselves.

## **3. How are the procedural decisions made within Parliament?**

84. Proportional representation will be useless if all important procedural decisions concerning the functioning of Parliament (setting the agenda, establishing the liability of individual MPs, etc.) are taken by the Speaker alone (CDL-AD(2009)025, § 39), or by a simple majority in Parliament. Therefore, representatives of the opposition should have a say in the collective bodies of Parliament, which should have sufficient powers in such procedural matters.

85. Strong presence of the opposition is *a fortiori* more important in those structures of Parliament which have the competence to set internal procedures and rules or to resolve disputes – like the Bureau, the Ethics Commission etc. – and which, consequently, may affect the rights and the privileges of the opposition itself. Here the proportionate representation principle may be supplemented by additional mechanisms, such as a qualified majority voting, giving the opposition a blocking power in respect of certain most important procedural decisions. In addition, in some countries decisions made by such bodies should receive cross-party support (i.e. support from a certain number of members representing the opposition). If a consensus-based decision is impossible, the representatives of the opposition on the committee should be able to table a minority report.

## **4. What role do the permanent committees play in law-making and in other parliamentary procedures?**

86. The rule of proportional representation in permanent committees would be devoid of any sense if the majority can bypass the permanent committees or if the permanent committees do not have sufficient powers within the legislative and other processes in Parliament. Committees usually have the power to hold hearings, to request documents, and summon and hear officials, experts, etc. (the CPA Benchmarks, § 3.2.1);<sup>51</sup> some permanent committees should have a power of amendment, and, ideally, the power of legislative initiative. Minority members of such committees should be able to co-report (CDL-AD(2007)015, § 24).

87. Parliament should not create special procedures and committees aimed at circumventing the normal law-making process and the scrutiny of the bills by the existing permanent committees (CDL-AD(2018)021, § 34).

88. Permanent committees should exercise efficient control in their area of competency, which should not be restricted to the examination of reports submitted by the State bodies and officials, but should also include a more pro-active scrutiny of the actions of the executive and of the independent agencies. In the context of the parliamentary oversight of the security services, for example, the Venice Commission insisted that the relevant sub-

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<sup>51</sup> Which is the case, for example, in the Czech Republic, Georgia, and Romania.

committee, in addition to discussing the yearly report of the security service, should be able to look into the specific files, question the staff of the security service, etc. and have other investigative powers (CDL-AD(2018)024, § 29). On similar powers of the inquiry committees, see section G (2) below.

## **E. Participation of the opposition in the law-making process**

### **1. Participation of the opposition in setting the agenda**

#### **1. Can the opposition convene an extraordinary session of Parliament?**

89. In most modern democracies Parliament is in session permanently, except for holiday periods, and extraordinary sessions have lost most of their relevance. However, in a recess/holiday period the opposition, or a qualified minority of members, should be able to convene an extraordinary session, and such request should be granted if a quorum of one quarter of members is reached (PACE Resolution 1601 (2008), § 2.2.5).<sup>52</sup> That being said, in certain democracies an absolute majority is required for calling an extraordinary session.<sup>53</sup>

#### **2. What role does the opposition play in setting the agenda for an upcoming session? Does the opposition have the right to table bills?**

90. According to the principle of parliamentary autonomy in the field of the internal organization, Parliament generally is the master of its order of business (CDL-AD(2008)035, § 112). The right to set the agenda is linked to the right of legislative initiative. The latter may belong to each individual MP (which is the case in most European parliaments, CDL-AD(2010)025, 2010 Report, § 57), or to a qualified minority of MPs (CDL-AD(2008)035, Report on Legislative Initiative, § 42), in addition of course to the Government.

91. However, “in the vast majority of regimes the inclusion of a legislative initiative is not automatic (CDL-AD(2008)035, Report on Legislative Initiative, § 111). There are different models of how the agenda of the upcoming session is approved: by the plenary Parliament,<sup>54</sup> by the Bureau, by the agreement amongst leaders of the political groups,<sup>55</sup> etc.<sup>56</sup>

92. In some countries the Government-sponsored bills have precedence over the “private bills” (i.e. bills introduced by the individual MPs).<sup>57</sup> Where there is such a domination of the governing majority on the Parliament’s agenda, this may lead to a weakening of the legislative initiative of parliament (CDL-AD(2008)035, § 103).<sup>58</sup>

93. The opposition should have a reasonable opportunity to influence the agenda, for example by proposing items for the inclusion in the agenda at the request of a qualified minority.<sup>59</sup> The powers of the governing majority to set the agenda may also be

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<sup>52</sup> Thus, under Article 47 § 1 of the Constitution of the Republic of Korea, an extraordinary session may be convened at the request of ¼ of the total number of MPs. In Denmark, an extraordinary session is convened at the request of 2/5 of the MPS, and in Japan at the request of ¼.

<sup>53</sup> For example in France.

<sup>54</sup> In Belgium, the agenda is defined by the plenary session of Parliament, but may be amended at the request of the Speaker, of the Government, or of 8 MPs (Article 17 (2) of *Règlement de la Chambre des Représentants*).

<sup>55</sup> In Italy the agenda of the upcoming session is defined by unanimous decisions of the leaders of the political groups; where such unanimity cannot be achieved, it is defined by the Speaker.

<sup>56</sup> In Portugal, all parliamentary groups may contribute to the setting of the agenda, depending on their respective weight in Parliament.

<sup>57</sup> Like in the UK, government-sponsored bills have precedence in the order of business, and private bills rarely succeed to being discussed.

<sup>58</sup> For example, the constitutions of Spain and of France before the constitutional reform of July 2008.

<sup>59</sup> In the Republic of Korea an item can be put on the agenda at the initiative of twenty MPs.

counterbalanced by the inclusion of “opposition days” in the plenary session,<sup>60</sup> which should be seen as a good practice (CDL-AD(2009)025, § 36).<sup>61</sup> The right to include items on the agenda, at some regular intervals, concerns not only legislative proposals but other issues related to the control of government actions and evaluation of public policies and spending (PACE Resolution 1601 (2008), § 2.2.6).

94. Some constitutions explicitly specify that parliamentary groups and parliamentary committees also have the right of legislative initiative.<sup>62</sup> Higher quotas can be required for legislative initiatives which aim at amending the constitution.<sup>63</sup>

95. There are other mechanisms (besides the threshold requirement) which limit the possibility of the opposition to table bills. Some constitutions prevent MPs from tabling bills which may increase public spending,<sup>64</sup> or even from amendments increasing public spending. The latter is problematic for parliamentary minorities, as many amendments will involve additional public spending (see further § 106). Certain types of bills may be introduced exclusively by the government, for example budget laws or laws, or laws with regard to international issues. “The Government tends to have an exclusive right to propose for adoption by the Parliament bills related to the ratification of international treaties signed by the executive” (CDL-AD(2008)035, § 27).

### ***3. Is it possible for the opposition or majority to add an item on the agenda urgently, in the course of a session?***

96. Opposition MPs should have the right to ask for debates to be held, including urgent or current affairs debates, “which should be granted if a quorum of one quarter of members is reached” (PACE Resolution 1601 (2008), 2.2.7).

97. The right to add items to the agenda urgently (out of order) may also belong to the Government, but in this case, there is a risk that the Government may abuse this possibility in order to prevent the opposition from discussing matters seriously.

## **2. Allocation of the speaking time**

### ***1. How is the speaking time allocated at the hearings?***

98. Normally, speaking time should be distributed not to individual MPs but to the groups (CDL-AD(2010)025, 2010 Report, § 56), in proportion to their weight in Parliament.<sup>65</sup> It is also possible to give the opposition a bigger share of time, especially as regards bills introduced by the Government or private bills sponsored by majority MPs.<sup>66</sup> A particular

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<sup>60</sup> Under Article 48 of the French Constitution, the opposition groups in the relevant House have the right to set the agenda on one day of sitting per month. In the UK and Canada the opposition has a certain number of days during the year when it can define the agenda (in the UK these are 20 opposition days per session, which are divided amongst the opposition parties).

<sup>61</sup> In CDL-AD(2007)015, § 23, the Venice Commission recommended that “the number of the opposition days could be raised from one day per session to a higher number”.

<sup>62</sup> For example, Estonia, Latvia or Switzerland

<sup>63</sup> In of Estonia the support of one fifth of the members of the Parliament is required for the amendments to the Constitution.

<sup>64</sup> For instance, the Constitution of France in its art. 40 provides specifically that “Bills and amendments introduced by members of parliament shall not be admissible where their adoption would have as a consequence either a diminution of public resources or the creation or increase of an item of public expenditure”. In the UK the establishment of additional financial burdens or incomes must be approved by a Resolution of the House of Commons and can only be introduced by a Minister.

<sup>65</sup> This is the rule in the Netherlands, for example.

<sup>66</sup> In Italy the speaking time given to the opposition is, in certain circumstances, superior to the speaking time given to the majority during the discussion on the draft legislation.

sequence of taking the floor may be indicated in the RoP or governed by the custom.<sup>67</sup> Allocation of an equal speaking time between majority and opposition, irrespective of their strength, should be privileged under certain circumstances (PACE Resolution 1601 (2008), § 2.2.9).

## **2. Is it possible to reduce speaking time or withdraw it completely, and by whom?**

99. There should be a possibility for the Speaker to regulate speaking rights of the individual MPs, within margins set by the agenda, to limit irrelevant or too lengthy speeches, abusive language etc. However, this power may be easily abused by a Speaker affiliated with the majority, in order to silence legitimate criticism expressed by the opposition MPs. Hence, there should be the possibility to appeal the Speaker's decisions (relating to the speaking time and, more general, to the conduct of the procedures in Parliament) to a collective body where the opposition is adequately represented (for instance, a council composed by committee presidents, provided that the presidencies have been allocated in proportionate manner).

## **3. Tabling amendments**

### **1. Who may table amendments and what are possible limitations of this right?**

100. As a general rule, opposition MPs or groups should have the right to table amendments to the bills proposed by the Government. However, the right of amendment is not absolute.

101. First of all, the right of amendment cannot be exercised at any moment of the legislative process. It must fit into the progression of the parliamentary deliberations. The rules of procedure of the Parliament should therefore frame some temporal order as to the exercise of this right (CDL-AD(2008)035, § 122).

102. Next, the right of amendment shall be constitutionally framed by the subject-matter of the bill it is supposed to amend (CDL-AD(2008)035, § 55). The amendments should not re-introduce proposals which have been already discussed and rejected by Parliament in connection with the bill under examination (CDL-AD(2008)035, § 124).

103. The question is who is controlling the relevance and the originality of the amendments; the "filtering" function may be entrusted to a relevant committee, to the Speaker etc.<sup>68</sup> It is important, however, that the "filtering" body is a neutral arbiter (CDL-AD(2008)035, § 130) or exercised by an appropriately composed body where the opposition is properly represented, or there is a possibility of appeal to such a body.

104. The discussion of all amendments can bring about a parliamentary obstruction, and every Parliament will have its own solutions to dealing with this issue. Some chambers prefer to discuss the amendments in a chronological order, others will use the criteria of relevance to initial text (CDL-AD(2008)035, § 128).

105. Sometimes, the right of legislative initiative in certain areas belongs solely to the Government and not to individual MPs. Thus, in many countries strict limitations to the right of amendment on issues related to the Budget Act will be imposed on MPs. These restrictions aim to ensure the coherency and the balance of the Budget Act. Parliamentary

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<sup>67</sup> In Canada, the leader of the opposition is allowed to take the floor immediately after the relevant Minister expressed the Government's point of view.

<sup>68</sup> In the UK House of Commons, according to Standing Order n°32, the Speaker can select those amendments to be discussed.

amendments which may increase public expenditure or decrease public incomes are subject to prior governmental approval.<sup>69</sup> The Venice Commission has acknowledged that this limitation exists in some western constitutions also, but expressed reserves, since “examining and amending the proposed Budget should be one of the main prerogatives of Parliament” (CDL-AD(2004)008, § 34, and CDL-AD(2018)005, § 36).

106. In some countries the Government may request a bulk vote on the whole draft without amendments<sup>70</sup> This permits to avoid delaying the adoption of the bill or its deformation by hundreds of amendments which otherwise can be tabled by the opposition. However, the Venice Commission has expressed strong reserves about this mechanism, since it deprives Parliament of the right of amendment, which is “an essential requirement for the exercise of its legislative function.” (CDL-AD(2002)012, § 42).

#### **4. Qualified majorities**

##### **1. Which bills require a qualified majority?**

107. Most of the qualified majority rules relate to constitutional amendments,<sup>71</sup> although different models for constitutional revision are possible (CDL-AD(2012)010, § 58). A constitutional requirement that amendment of a constitution needs at least a qualified majority of votes (in addition to other safeguards) strengthens the role of the opposition and in principle is welcome.

108. A qualified majority may also be required for organic laws to preserve the reinforced protection of certain important matters (such as the composition of the Chambers of the Parliament, the acquisition of citizenship, protection of property, the freedom of association, the Public Defender, the participation of political associations in elections, the election of the President, the immunity of the President, the Constitutional Court, the appointment of the judges, the National Bank and the Council of National Security and local self-government, etc. (CDL-AD(2010)028, § 23). However, the subject-matter of organic laws should be defined with sufficient precision; for example, it is inappropriate to require that all human rights matters should be regulated by an organic law since the notion of “human rights” is too broad and imprecise (CDL-AD(2013)032, § 96).

109. A qualified majority is recommended for the adoption of the Rules of Procedure of Parliament, and of other regulations concerning the internal organization and procedures in Parliament. Finally, a qualified majority may be required to overcome a presidential veto, which may make the President a tactical ally of the opposition.

110. What majority is needed to adopt a particular legislative act (2/3, 3/5, ¾ etc.) varies from country to country and its significance to a considerable extent depends on the electoral system. Thus, the requirement of a certain qualified majority should not be carved in stone. At the moment of quick transition to a new political regime high qualified majority requirements may be counter-productive. This is also the case where the governing coalition has the qualified majority which may help it to cement its policy choices for several electoral cycles ahead. A wide use of organic laws is problematic: “functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order (CDL-AD(2011)016, § 24). There are issues which in general

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<sup>69</sup> This is the case in Spain or Republic of Moldova, for example. Reference to France, Germany?

<sup>70</sup> This is the case in France under Article 44 part 3 of the Constitution.

<sup>71</sup> Thus, a 2/3 majority is required, for example, in Belgium, Finland, Mexico, Netherlands, Norway, Korea, and Spain

should be left to ordinary legislation and simple majorities, such as social and taxation regulations or economic policy.

## **5. Introducing a referendum initiative**

### **1. Is it possible for the opposition to initiate a referendum or oppose it?**

111. The possibility of holding referendums on matters which normally belong to the legislature is a matter of constitutional choice. Where such a choice is made, the opposition should be able to initiate a discussion on the necessity of holding a referendum, but declaring a referendum should not be too easy (CDL-AD(2009)007, § 10), and the decision to hold a referendum should usually belong to the majority in Parliament. Alternatively, where it is provided by the Constitution, the opposition may choose the procedure of collecting signatures of voters if it wishes to have a referendum, when the majority blocks the initiative of the referendum. If a referendum could be asked by the opposition, be it through a parliamentary minority or through part of the electorate, the threat of a referendum could lead to a compromise (CDL-AD(2008)010, § 31).

112. The majority may wish to use the referendum in order to circumvent the normal parliamentary procedures, or to turn the referendum into a plebiscite of support, and thus create political pressure on the minority. The Venice Commission has warned against constitutional referendums without a prior qualified majority vote in Parliament (CDL-PI(2016)009, § 25). The possible abuses that cause representative institutions to be undermined include above all the misuse of referendums to increase the power of the executive vis-à-vis parliament, either directly or indirectly (CDL-AD(2005)028, § 16).

## **6. Initiating constitutional review of laws**

### **1. Can the opposition challenge the constitutionality of a law or a bill?**

113. Not all democracies have the possibility of judicial review of statutes.<sup>72</sup> In some of those which do have such a review, it may only be triggered in a specific case (*in concreto*), by the alleged victim of the violation of constitutional rights.<sup>73</sup> In some countries of continental Europe constitutional review is also available in respect of a legislative text as such (*in abstracto*), and sometimes even before the bill becomes law. Availability of the review of constitutionality of laws and bills is a matter of political choice, but where this choice is made, there are good reasons to give the power to trigger such a review also to a minority group in Parliament (CDL-AD(2002)16, § 46, PACE Resolution 1601 (2008), § 2.7.1-2).<sup>74</sup> For the Venice Commission, submitting a bill to a constitutional court should be possible at the request of "one third or one quarter of the members" (CDL-AD(2003)14, § 29), but the threshold may be even lower.

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<sup>72</sup> For example, it is virtually absent - at least in its strong forms - in the UK. In the Netherlands, the absence of constitutional review is compensated by judicial review of statutes on the basis of international law, having higher legal status than national law.

<sup>73</sup> Like in the US, for example

<sup>74</sup> In Germany, 1/4 of the MPs of the Bundestag may lodge a case with the Federal Constitutional Court to rule on the constitutionality of laws. In France, an act of Parliament may be referred to the Constitutional Council, before its promulgation, by sixty MPs of the National Assembly or sixty Senators. In Hungary, Article 24 (2) e) of the Fundamental Law rules that the Constitutional Court shall, at the initiative of one quarter of the Members of the National Assembly review the conformity with the Fundamental Law of any law.

## F. Legislation by government decrees, delegated legislation, and emergency situations

### 1. Is it possible for the executive to legislate, and what are the mechanisms of parliamentary control in such a case?

114. In some legal orders, the executive (the Government or the President) have legislative functions. The executive may have such functions either directly by virtue of the Constitution or by virtue of a delegation received from Parliament. Where the Government has legislative power, Parliament and in particular the opposition lose control of the law-making process (CDL-AD(2018)028, § 92; CDL-AD(2013)032, § 95) and may be, for practical reasons, bound to accept the government decrees as a *fait accompli*. Moreover, the executive may be tempted to use legislative functions to change institutional arrangements and curtail political dissent and weaken the system of checks and balances. It is therefore necessary to circumscribe the power of the executive to legislate as narrowly as possible, to exclude the possibility of institutional changes curtailing the rights of the opposition, and to introduce mechanisms of parliamentary control over the Government's legislative acts, involving the opposition, including by providing the possibility to use judicial or constitutional review of such acts.

115. The Venice Commission is critical to the idea of the general legislative power being given to the executive directly by the Constitution (CDL-AD(2017)010, § 36). As the least, such powers should be limited in time and in scope (CDL-AD(2002)033, § 21), and should be phased out as quickly as possible.<sup>75</sup>

116. Furthermore, Parliament may decide to delegate some legislative functions to the Government on an *ad hoc* basis. Such practice may be explained by the complexity of the legislative procedure (CDL-AD(2014)010, § 167), but in this case the delegating law should limit the substantive scope for delegated legislation (by indicating areas where the Government may or may not legislate), by setting time-limits, etc. In any event, Parliament should be able to revoke the delegated power and revoke/amend specific decrees.

117. Many constitutions provide for the possibility of the executive to legislate in emergency situations. Parliament should be involved in this process through the approval of the declaration of the state of emergency, and/or through *ex post* scrutiny of the emergency decrees or any extension of the period of emergency.<sup>76</sup> Participation of the opposition in those matters may be ensured by requiring a qualified majority for the prolongation of the state of emergency beyond the original period (CDL-AD(2016)006, § 63). It may also be useful to limit the legislative powers of the executive in emergency situations to certain specific matters, so that the executive cannot use its legislative functions to suppress opposition rights.<sup>77</sup> The Venice Commission has emphasised that parliamentary life should continue throughout a state of emergency, and indicated that Parliament should not be dissolved during the exercise of emergency powers (CDL-AD(2016)006, § 62). It is recommended not to undertake constitutional amendments during situations of emergency

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<sup>75</sup> Indeed, it is normal for the executive to keep regulatory powers in the areas not regulated by law, provided that those regulatory powers are subordinated to the law.

<sup>76</sup> In Italy, for example, (Article 77 of the Constitution), the executive may, in extraordinary situations, adopt provisional measures which have the force of law, but if those measure are not confirmed by Parliament within a 60 days they lose legal effect.

<sup>77</sup> Thus, under the Spanish Constitution (Section 86), in case of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-laws, but these decree-laws "may not affect the legal system of the basic State institutions, the rights, duties and freedoms of the citizens contained in Part 1, the system of Self-governing Communities, or the general electoral law".



(CDL-AD(2017)005, § 29).<sup>78</sup> These limitations prevent the executive from using an emergency as a pretext for curtailing the rights of the opposition.

## **G. Participation of the opposition in the parliamentary supervision of the executive**

### **1. Questions, interpellations, no confidence vote and impeachment**

#### ***1. What are the modalities for the regular reporting of the executive before the plenary Parliament?***

118. The schedule of Parliamentary debates should give the opposition a reasonable opportunity to hear Government, ministers and other officials of the executive and specific agencies (such as the security service) at regular intervals, and put questions to them, orally or in writing (CDL-AD(2009)025, § 45). The obligation to report regularly to Parliament is also provided for certain independent agencies and officials (such as the Ombudsperson, Prosecutor General, Audit Chamber, etc.), and for major state-owned enterprises (the CPA Benchmarks, § 7.1.4). The possibility to address Parliament is at the same time a privilege of those officials and a duty.

119. The process of submitting reports to Parliament should not be one-sided, and should provide for a question time. During this question time, the opposition may address questions to the reporting official to which he or she has to answer. The opposition should have the right to open question time and to ask more questions to the government than members of the majority (PACE Resolution 1601 (2008), § 2.2.2-3).

#### ***2. How may the opposition obtain answers from the State bodies outside of the regular reporting mechanism?***

120. The opposition should be able to obtain information and answers from State bodies outside of question time. The State bodies should be under a duty to provide timely responses questions (the CPA Benchmarks § 7.1.2).

121. In some legal orders MPs have the power to address individual inquiries to the State bodies and officials outside of the sessions and committee meetings. However, this power may be abused, if the MP requests information and answers too often or for irrelevant reasons.<sup>79</sup> Thus, the law or the RoP should specify whether the MPs have the right to obtain documents which are not otherwise in the public domain (for example, internal correspondence), whether the MP should demonstrate interest in obtaining documents, and which documents/information can/cannot be obtained in this way.

122. A minority member of the relevant parliamentary committee should have the right to request appearance of a Government official or a person designated by him or her at the committee meeting.<sup>80</sup> Appearance of the official is then usually requested by the chairperson of the committee.

123. Opposition members may invite Government officials to appear at the plenary debate to respond to their inquiries. Finally, the strongest political tool in the hand of the opposition members is the right of interpellation (accompanied by a debate), which is often connected with the right to move a motion of no confidence (PACE Resolution 1601 (2008), § 2.2.4).

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<sup>78</sup> Such a prohibition is contained, for example, in Albania, Estonia, Georgia, Lithuania, Republic of Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain, Ukraine.

<sup>79</sup> The Venice Commission expressed doubts whether, for example, the State Treasury should be obliged to give accounts on every single payment from the budget (CDL-AD(2007)015, § 21).

<sup>80</sup> For example, in the Netherlands the RoP provide for consultations with the Government minister or a civil servant on a document referred to the executive or on a general question related to its area of competency.

Interpellations are followed by a debate where all political groups have the right to participate (CDL-AD(2009)025, § 37). In order to reduce the risk of abuse of the right to interpellate by minority MPs, a threshold requirement may be introduced for such motions (requiring that interpellation requests are supported by a qualified minority of the MPs).<sup>81</sup> The Venice Commission has recommended separating the interpellation procedure (which may lead to the vote of no confidence) from a simple inquiry, in order to avoid the danger of artificial escalation of conflicts (CDL-INF(1996)006, page 11).

### **3. May the opposition initiate a vote of no confidence or trigger an impeachment procedure in respect of a State official?**

124. In a parliamentary regime, it is essential that the opposition should be able to trigger the vote of no confidence<sup>82</sup> in the Government. The no confidence motion should concern the Government as a whole; a no confidence vote in respect of individual ministers is not recommended (CDL-AD(2009)024, § 59). A no confidence vote should be a collective rather than individual initiative of MPs (CDL-INF(2001)026, § 28).<sup>83</sup> To remove a Government, an absolute majority of votes should suffice (CDL-AD(2016)025, § 85), but the motion can be put on the agenda by a qualified minority of the MPs. The Venice Commission has previously expressed, in a particular national context, preference for a constructive vote of no confidence (CDL-AD(2009)024, § 59).

125. A vote of no confidence with regard to the Government (political responsibility) should be distinguished from the impeachment procedure in respect of the Head of the State or a governmental minister (for the commission of specific wrongful acts). Starting an impeachment procedure and obtaining the impeachment would require higher majorities than initiating and obtaining the vote of no confidence, especially if the potential outcome is to impeach an elected President.<sup>84</sup> However, those majorities should not be too high to make impeachment virtually impossible.<sup>85</sup> On the other hand, a higher threshold required for impeachment may benefit opposition parties which are of the same political group as the President, during the periods of so-called “co-habitation” of the executive President with Parliament dominated by political groups opposed to the President.<sup>86</sup>

## **2. Parliamentary inquiry committees**

### **1. How are the inquiry committees created, and how may the opposition participate in their work?**

126. In most countries the opposition has the right to request the creation of an inquiry committee (IC) or a similar body.<sup>87</sup> The mandate of an IC is to investigate specific events or situations (for example, corruption allegations against Government officials, mismanagement

<sup>81</sup> The threshold for interpellation varies in different countries: thus, for example, under Article 61 of the Constitution of Lithuania, one-fifth of the members of the Seimas may direct an interpellation to the ministers (29 deputies out of 141 member). In Northern Macedonia, interpellation of a government official may be triggered by a motion of five MPs or more, out of the overall number of 120 deputies (article 72 of the Constitution); in the Netherlands 30 out of 150 members are required.

<sup>82</sup> The procedure of the vote of no confidence has no place in the pure presidential regimes.

<sup>83</sup> In this opinion, the Venice Commission suggested that the motion of no confidence may be put on the agenda upon request by 10 or 20 MPs.

<sup>84</sup> In Spain, a charge of treason or of any offence against the security of the state brought against ministers needs the initiative of one quarter of the members of Congress and the approval of the absolute majority thereof. In Romania, either Chamber or the President of the Republic have the right to ask for criminal proceedings against members of government.

<sup>85</sup> Thus, the opening of the investigation requiring three-fifths majority was considered to be a high bar which is difficult to meet (CDL-AD(2017)005, § 102)

<sup>86</sup> In some countries - for example, in Italy- it is for parliament to decide whether to initiate criminal proceedings against ministers, but if they do so, then the process is left to the ordinary criminal courts.

<sup>87</sup> For example, in Greece, Portugal, and Germany.

in case of natural disasters, poor state of the national health system etc.). The primary functions of an IC is to ensure parliamentary supervision of the executive, but it may also be created for other purposes, for example collecting information for law-making purposes (CDL-AD(2014)013, § 7). In some countries ICs are composed of MPs, while in others they are composed of outside experts, acting on behalf of and reporting back to Parliament. Alternatively, a permanent committee may receive a special mandate of that kind.

127. However, if the power to create an IC is not limited, it may paralyse the work of Parliament. While the proposal to create an IC may be introduced by a small number of MPs or even by an individual MP,<sup>88</sup> the decision to establish an IC and define its mandate and other parameters of its work may require a higher threshold.<sup>89</sup> The PACE recommends that a qualified minority of 1/4 of the representatives should have the legal competence to demand the setting-up of IC (see PACE Resolution 1601 (2008), § 2.2.8). The Venice Commission has observed that the threshold of one fourth in most political systems would be regarded as rather low (CDL-AD(2010)025, § 123).<sup>90</sup> The IPU (Guidelines, III.3) recommends that “each parliamentary group shall be entitled, at intervals fixed following consultations, to have a commission of inquiry established on the subject of its choice. In this case, the opposition shall be represented thereon”.

128. Members of the IC perform an investigative and even a quasi-adjudicative function; hence, it is desirable that they act in their individual capacity and are not bound by party discipline. The principle of proportionate representation of opposition and majority MPs is fully applicable to the IC (CDL-AD(2009)025, §§ 55-56), which however does not preclude creating an IC where the opposition members will be in a majority or where the IC will be chaired by an opposition MP.

## ***2. What are the powers and the outcome of the inquiry and how may the opposition influence them?***

129. The establishment of the IC would be of no use for the opposition members who requested it, unless the IC have sufficient powers to conduct an effective inquiry and its findings are then presented to the Parliament and debated there.

130. The IC should have procedural powers which are necessary to perform their functions: the right to hear witnesses and experts, and to obtain documents, including those of restricted use. Public employees have an obligation to cooperate with the IC. According to comparative law studies, the powers of IC's go much further: generally they can avail themselves of all the powers assigned to investigating judges (CDL-AD(2013)032, § 89).<sup>91</sup> Opposition MPs - IC members - should be able to cross-examine witnesses and study documents on equal footing with the majority MPs; they may request disclosure of evidence, especially held by State authorities and officials. The IC may have rules of procedure specifying, in particular, how the decisions regarding attendance and questioning of witnesses and discovery of other evidence are made.

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<sup>88</sup> Article 156 (f) of the Constitution of Portugal gives every MP the right to “request the formation of parliamentary committees of inquiry”.

<sup>89</sup> Under the German Constitution (Article 44 § 1), an IC must be established if requested by one-fourth of the MPs. Under Article 45a § 2 of the Constitution the permanent Defence Committee may receive the powers of an IC, if it is requested by one-fourth of its members.

<sup>90</sup> In another opinion the Venice Commission observed that “the reduction of the number of MPs required for establishing a parliamentary commission [to one fifth of MPs] might help to strengthen the role of smaller opposition parties and is therefore to be welcomed” (CDL-AD(2010)028, § 25).

<sup>91</sup> In one of its opinions the Venice Commission took a more restrictive stance noting that “the committee of inquiry has no power over individuals, except to call them to testify” (CDL-AD(2014)013, § 30).

131. The discovery of possible criminal offences should not in itself stop a process of inquiry. The inquiry should go on, and the IC should continue to look into the case and to make its own (political) assessments of the facts of the case, even if these facts may also be of relevance to the criminal proceedings (CDL-AD(2014)013, § 31).

132. The IC should be able to formulate its conclusions and recommendations in a report, discuss the report in a plenary session of Parliament (CDL-AD(2014)013, § 18), and publish it for the general public. It will then be for parliament to decide whether the process should lead to political sanctions (such as a vote of no-confidence) or legislative or budgetary reforms. IC reports should not replace or pre-empt the findings of the prosecution or the judicial bodies (CDL-AD(2014)013, § 19, CDL-AD(2014)010, § 124, CDL-AD(2014)013, § 30) except for very specific situations where the legal responsibility of certain top officials (akin the impeachment process) is discussed. The relation between on-going criminal investigations and the IC proceedings should be clarified in the law.

133. If the decisions of the IC are made by majority, it is important to reserve certain procedural rights to the members of the IC representing the opposition, and provide for the possibility to be co-rapporteur or provide an alternative “minority report”.<sup>92</sup>

#### **H. Participation of the opposition in the appointment of certain top office holders**

##### ***1. How does the opposition participate in the appointment of top office holders who do not belong to the Government?***

134. Appointments to certain top positions outside Government or to independent collegial bodies and agencies need to be depoliticised to the maximum extent possible. Therefore, the procedure of selection, nomination and appointment should be, to the maximum extent possible, based on a cross-party consensus. At least, mechanisms should be in place which would reduce the dominance of the parliamentary majority within such collective bodies or limit the relevance of the affiliation of the office-holders with the governing party or a coalition.

135. The list of independent agencies and office-holders vary from country to country; it usually includes judges of the Constitutional Court, lay members of the High Judicial Council and of the High Prosecutorial Council,<sup>93</sup> the Prosecutor General, Ombudsperson, President of the Central Bank, President and members of the Central Electoral Commission, head and members of the media regulatory authority, head and members of the Audit Chamber, and alike.

136. The most evident solution ensuring political neutrality of those officer holders is to provide for a qualified majority for their election (CDL-AD(2003)019, § 34 – regarding the head of the security services, anti-monopoly authority and broadcasting authority; CDL-AD(2008)015, § 42 – regarding the ombudsperson; CDL-AD(2007)047, § 122 – regarding the members of the Constitutional Court; CDL-AD(2010)040, § 40 – regarding the Prosecutor General, CDL-AD(2010)040, § 66 – regarding the members of the Prosecutorial Council).

137. The qualified majority required for an appointment (3/4, 2/3, 3/5 etc.) would depend on the political context of each particular country (CDL-AD(2016)009, §21).<sup>94</sup> However, a

<sup>92</sup> The practice of minority reports is common in countries such as Austria, Finland, Germany, Italy, Norway, Sweden and Switzerland.

<sup>93</sup> It must be stressed that members of certain collective bodies are not to be elected solely by Parliament. For example, at least half of the members of the Judicial Councils should be judges elected by their peers.

<sup>94</sup> For example, the German Law on the Constitutional Court provides for a procedure of electing the judges by a two-third majority in Parliament.

qualified majority rule will not have any use in a system where the Government party or a block already has the necessary number of vote to appoint candidates single-handedly. In that case, the requirement of a qualified majority may be even detrimental to the opposition in the long run, if it is not supplemented with an efficient anti-deadlock mechanism: without such a mechanism the replacement of an official at the end of his or her term (and probably in the next electoral cycle) may be problematic, and the qualified majority rule will therefore help to cement the influence of the governing majority.

138. Other mechanism may involve proportional representation: members of a collective body may be appointed on a proportionate basis by the majority and the opposition, or quotas for the opposition may be provided for (CDL-AD(2015)039, § 51). The opposition may also control, to some extent, the process of pre-selection of candidates (CDL-AD(2015)005, § 132). A mixed system is also possible, where a collective body includes members elected by a simple and a qualified majority. Finally, it is possible to introduce, in collective bodies, the possibility of members nominated by the other, more neutral actors (professional associations, civil society, etc.) in order to counterbalance the dominance of the political appointees in such bodies (CDL-AD(2018)014, § 52; CDL-AD(2015)039, § 52). These mechanisms may ensure political neutrality of the body if the decision-making procedure within those bodies is designed in such a manner that the members affiliated with the parliamentary majority will not be able to govern alone, and, for taking certain most important decisions, will have to seek alliances either with non-political members, or with the members affiliated with the opposition.

## **2. How to avoid dead-locks in appointment procedures?**

139. A qualified majority requirement in the law-making process gives the opposition an absolute right to block some legislative initiatives of the ruling majority (provided that the opposition has the necessary number of votes to block such initiatives). By contrast, a qualified majority rule in the matters of appointment should not prevent, at least not for a very long time, the appointment of an office-holder or members of a collective body, since without them the State cannot function adequately. Hence, the “blocking power” of the opposition is not absolute and may be overridden, on the condition that this blocking power is not devoid of substance.

140. In such situations an effective anti-deadlock mechanism should be in place, stimulating all political actors to reach a compromise. The risk of paralysis of an institution is not always a sufficient deterrent, so other dead-lock breaking mechanisms should be devised. Anti-deadlock mechanisms have to discourage the opposition from behaving irresponsibly. This is why they should be limited in time and, while avoiding permanent blockages they should not aim at avoiding any blockage at all, which can be an expression of the need for political change (CDL-AD(2018)015, § 15).

141. Some systems provide that, if in the first round of elections a necessary qualified majority cannot be reached, a second round is held, which requires a smaller majority for the election (and sometimes a simple majority). In such systems the deadlock is avoided, but the governing majority or coalition will not be strongly inclined to find a compromise with the opposition, and may simply wait for the second round (CDL-AD(2013)028, § 23). A better option would be to entrust the appointment to a neutral body or actor (CDL-AD(2015)037, § 162), so that, if the politicians are unable to reach a compromise, they would lose the power of electing the candidate(s). Who this “neutral body” is depends on the legal order; for example, the President in a parliamentary regime may play the role of such a neutral arbiter (CDL-AD(2015)022, § 51). In the case of a dead-lock, the incumbent official or his or her deputy may continue to perform functions *ad interim*, until the solution is found.

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## I. Immunities of the MPs

### **1. What is the scope of the immunity enjoyed by the MPs in connection with their work in Parliament?**

142. Parliamentary immunities are more important for opposition MPs than for majority MPs, especially in countries where law-enforcement bodies may have a political agenda and may be subservient to the majority.<sup>95</sup> The core of parliamentary immunity protects the freedom of speech (expressed in votes and in opinions) of an MP in Parliament (the CPA Benchmarks, § 1.4.1). It is important to define in the law the scope of any immunities enjoyed by the MPs and devise procedural safeguards which would make lifting of the immunity and subsequent prosecution harder.

143. Immunity can be of two sorts: non-liability (which essentially means that an MP may not be brought to liability in connection to the votes and opinions related to the exercise of his or her mandate) and non-violability (which means that an MP cannot be subjected to certain coercive measures, like, for example, arrest, without permission of Parliament or a body of Parliament).

144. Parliamentary immunity relating to parliamentary rights (opinions and votes expressed in Parliament) should apply not only during a member's term of office, but should be perpetual and final (CDL-AD(2013)032, § 99), as is the case in some countries.<sup>96</sup> While the speech uttered within Parliament and on parliamentary business enjoys very strong protection, other forms of expression (outside of Parliament's work or inside Parliament but on purely private matters) may give rise to liability.

145. Substantive immunity (as opposed to non-violability – see the next question) means that the voting of the MP in the plenary session or in the parliamentary committees, or opinions expressed during the discussions enjoys very strong protection and, in many countries, cannot give rise to liability at all.<sup>97</sup> This is the basic principle of European political tradition (ECtHR, *A. v. the United Kingdom* (no. 35373/97)). However, there are substantial differences with regard to the scope of protection: it normally protects MPs against all sorts of external legal action, including criminal prosecution as well as civil lawsuits, but in some countries it only applies to penal procedures (CDL-AD(2014)011, §§ 52 and 54). In many countries MPs are immune from charges of defamation or insult, but in some countries such expressions are exempted from immunity, allowing members to be sued on this basis in the same way as other citizens (CDL-AD(2014)011 § 69).

### **2. Who may lift the immunity of an MP and how?**

146. The Venice Commission considers that there should be procedural safeguards which would protect members of the minority from politicized prosecutions. At the same time, those procedural safeguards should not make criminal prosecution impossible. Several legal mechanisms can be devised: the requirement of a qualified majority in Parliament to lift immunity<sup>98</sup> (which is, however, not a universal rule),<sup>99</sup> involvement of an external judicial

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<sup>95</sup> Indeed, if the MPs enjoy privileges and immunities, they should be applied equally to all MPs, irrespective of the fact whether they belong to the majority or to the opposition.

<sup>96</sup> As for example, France and Belgium.

<sup>97</sup> Thus, Article 58 of the Belgian constitution provides for a substantive immunity against any prosecution and even investigation "with regard to opinions expressed and votes cast by him in the exercise of his duties". It simply cannot be regarded as an offence.

<sup>98</sup> In Finland, the proposal to lift non-liability is made by the person competent to do so depending on the circumstances, such as a police officer, a prosecutor or a plaintiff, and the decision to lift non-liability is taken by a majority of 5/6 of votes cast in parliament. In Greece, the decision to lift non-liability is taken by the Chamber,

authority (CDL-AD(2014)011, § 96), or involvement of an internal parliamentary committee composed of the representatives of the majority and opposition in equal parts. As a good practice, the Venice Commission recommended a model where prosecutors and ordinary judges would be obliged to inform Parliament about the arrest of, and the institution of criminal proceedings against an MP, in which case a minority of the MPs (maybe one-third of its members) would then be entitled to complain against the arrest and prosecution to the Constitutional Chamber within a given deadline. The measures taken against the MP would then remain suspended until the Chamber decides on the matter (CDL-AD(2015)014, § 44).

147. That being said, immunity should not give protection to MPs for common criminal offences, not linked to the normal exercise of their mandate. In some countries in transition the misuse of immunity regulations constitutes a widespread problem, and the lifting of the immunity by Parliament becomes virtually impossible, as the majority tends to protect corrupt MPs irrespectively of their political colours due to an otherwise rare instinct of "cross-party solidarity" (CDL-AD(2010)015, § 43). Immunity should not apply to preliminary investigations, for cases where a deputy is caught in flagrante delicto, or for minor or administrative offences (e.g. traffic violations) (CDL-AD(2015)014, § 44).

#### **J. Resolution of disputes related to the rights of the opposition**

##### **1. Who may examine ethical breaches by individual MPs? How are disputes between party groups in Parliament resolved?**

148. There is a need to maintain good order in Parliament and resolve disputes related to the rights and behaviour of individual MPs or groups. Even if members of parliament are protected from external legal action for their opinions and remarks, they may still be subject to internal disciplinary sanctions (CDL-AD(2014)011, § 100), devised and implemented within Parliament. At the same time, internal bodies dealing with disciplinary and other procedural matters should not become a tool of political manipulations in the hands of the majority.

149. In countries with a strong tradition of parliamentary autonomy (which means, *inter alia*, that the decisions of internal bodies of Parliament are not susceptible to any external review), disputes related to internal procedures and ethical breaches are usually decided within Parliament itself (the CPA Benchmarks, § 1.4.4).<sup>100</sup> Most parliaments have internal rules of procedure or codes of conduct (house rules) under which the members can be silenced or disciplinary sanctioned for certain remarks or behaviour, although the nature of such sanctions vary greatly (CDL-AD(2014)011, § 55).

150. It is necessary that the opposition has a very strong presence in the composition of such bodies, that the procedures before them satisfy basic requirements of due process, and

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which must decide within 45 days. In Hungary, the proposal to lift non-liability is submitted to the President of the National Assembly by the Prosecutor General, or by the competent court. The request is considered within 30 days by the Committee on Parliamentary Immunities and Incompatibilities. The decision is taken by the National Assembly without debate and requires a two-thirds majority of the votes of members present. In Malta, where, according to the common law system, there is no lifting of non-liability in the strict sense, the Speaker of the House refers to the Committee of Privileges any cases of "breach of privilege" or contempt committed "prima facie" against the Parliament. The Committee of Privileges was set up in order to investigate in each case whether a member had committed contempt or acts in excess of or in breach of his/her privileges. The Committee then refers the matter to the House, which has competence to either bring the person concerned to justice or impose its own disciplinary measures. In Germany, when "defamatory insults" are made, non-liability can be lifted in accordance with the rules on lifting inviolability.

<sup>99</sup> Proceedings against a legislator accused of a crime or civil infraction in Switzerland are possible after federal chamber authorization through a simple majority.

<sup>100</sup> For example, in the UK House of Commons, the Standards and Privileges Committee oversees the enjoyment of privileges by the MPs.

that disciplinary measures imposed are proportionate and do not affect the essence of the parliamentary mandate of the MP.

151. Another option would be to entrust the function of dispute resolution to an external body – a Constitutional Court or another similar high judicial authority. This model is less respectful to the autonomy of Parliament but better guarantees the independence of the adjudicative body.<sup>101</sup> It is important, however, to make clear which measures of Parliament may be reviewed by the Court or other external body, and which are not subject to such review. Constitutional Courts in many countries may examine the process of the law-making, when analysing constitutionality of the laws. A serious breach of the rights of the opposition may, at least in theory, lead to the invalidation of the law by the Constitutional Court. At the same time, resolution of disputes related to the internal organisation of Parliament and its working procedures may be left to Parliament itself and to its internal bodies, provided that the opposition is adequately represented in such bodies, or are formed on the basis of a cross-party consensus.

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<sup>101</sup> In Germany the Constitutional Court may examine a complaint about alleged breaches of the constitutional rights of parliamentarians (article 93 § 1).