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**Secret ballot voting by the National Assembly in motions
of no confidence**

A comparative report prepared for the Council for the
Advancement of the South African Constitution

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EXECUTIVE SUMMARY

I. INTRODUCTION

1. This is a report prepared by Oxford Pro Bono Publico (‘OPBP’) for the Council for the Advancement of the South African Constitution (CASAC), to assist in the preparation of their submission in the case, *UDM v Speaker of the National Assembly CCT 89/17*. The key issue in the case is whether the South African National Assembly is required or permitted to vote by secret ballot in a motion of no confidence in the President. The CASAC seeks to make an application to intervene in the above-mentioned litigation as an *amicus curiae*.
2. The South African National Assembly is scheduled to consider a motion of no confidence in the President. However, the South African Constitution does not expressly address the manner in which this vote is to be conducted. Section 102(2) of the South African Constitution only provides that “If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.”
3. In contrast to motions of no confidence, section 86(1) and (2), read with item 6(a) of Part A to Schedule 3 of the South African Constitution, prescribe the procedure to be followed in the election of the President by the National Assembly. Specifically, if there is more than one candidate nominated for the Presidency, the vote must be conducted by secret ballot.
4. The main application, instituted by the UDM, primarily argues that members of the National Assembly are required by law to vote by secret ballot in the motion of no confidence.
5. In the alternative, the UDM argues that even if the law does not *require* members of the National Assembly to vote by secret ballot in the motion of no confidence, it *permits* such a vote in appropriate circumstances. This contention is based on the fact that neither the Constitution nor the Rules of the National Assembly

expressly prohibit a vote by secret ballot in motions of no confidence. Accordingly, the Speaker of the National Assembly, upon request, has the power to determine if the vote should be conducted by secret ballot. The UDM argues that the exercise of this discretion is reviewable by the courts. The Speaker thus has an obligation, when exercising her discretion, to apply her mind to the facts of the particular case. A failure to apply her mind would render her decision irrational, unlawful and unconstitutional.

6. Furthermore, the UDM argues that even if the court finds that the National Assembly Rules preclude a vote by secret ballot in motions of no confidence, the rules are to that extent contrary to the Constitution.

II. NATURE OF THE RESEARCH

7. To assist the CASAC with its intervention in this case, OPBP has undertaken research to establish the legal position and practice in comparative jurisdictions regarding the procedures applicable when national legislatures vote in motions of no confidence and in analogous circumstances.
8. Our research addresses three questions in respect of each of the jurisdictions covered:
 - I. Under what circumstances is it permissible for a motion of no confidence by the national legislature in the government, head of state, or member of the executive branch to be conducted by secret ballot?
 - II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature to conduct a vote by secret ballot?
 - III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

9. These three questions all concern the key legal issues which this Report seeks to address, namely whether the National Assembly is *required* to vote by secret ballot in a motion of no confidence, or in any event, if it is *permitted* to do so. Additionally, that if the *power* to call for such a vote is vested in the Speaker of the National Assembly, to what extent do courts have the power to *review* the decisions made by the Speaker in the exercise of her power, or test the Rules of the National Assembly against the Constitution?

10. The comparative perspective brought to this issue draws on the following jurisdictions:

- i. Australia
- ii. European Parliament
- iii. Germany
- iv. India
- v. Namibia
- vi. New Zealand
- vii. Switzerland
- viii. United Kingdom

11. These jurisdictions reflect a range of legal cultures and offer diverse perspectives on the research questions. The selected jurisdictions include: (i) prominent common law jurisdictions (the UK, New Zealand and Australia); (ii) an African common law jurisdiction whose constitution is a forerunner to the South African Constitution and whose jurisprudence is closely allied with South African jurisprudence (Namibia); (iii) a common law jurisdiction with a strong practice of public interest litigation that resonates with South Africa's transformative constitutionalism (India); (iv) civil law jurisdictions with proportional representation systems similar to that in South Africa (Germany and the European Parliament); (v) and Switzerland, a jurisdiction with a unique democratic arrangement that has alternative accountability mechanisms for the presidential office.

III. SUMMARY CONCLUSIONS

12. This section is a summary of our main findings for each of the three questions considered. By identifying broad trends as well as significant differences across jurisdictions, we hope that our comparative research will enrich an understanding of the South African legal position and practice on these questions.

Question 1:

Under what circumstances is it permissible for a motion of no confidence by the national legislature in the government, head of state, or member of the executive branch to be conducted by secret ballot?

13. Germany expressly provides that a motion of no confidence in the Federal Chancellor must mandatorily be conducted by secret ballot. The rationale behind this rule is to protect members of parliament (MPs) from any undue influence from fellow MP's and the equivalent party whips. In addition, the nomination of a successor (or successors) is a legal prerequisite to a vote of no confidence. The Bundestag cannot force the resignation of a Chancellor without choosing a successor at the same time. Germany envisages impeachment and appointment as equivalent issues; hence they are dealt with through the same procedure. Other jurisdictions either provide for voting by secret ballot in certain circumstances, upon request from MPs (European Parliament and Namibia) or empower the Speaker of the assembly with the discretion to determine when a vote should be passed by secret ballot, with some explicit constitutional exceptions (India).

14. In the case of the European Parliament, a secret ballot vote can be held on any matter upon request by one-fifth of MPs. However, this procedure has yet to be used in circumstances of a censure against the European Commission. In the circumstances where it has been invoked, the rationale behind it has been to protect the MPs from being bullied by their national governments to vote in one way or the other on politically contentious issues. For example, the European Parliament's vote on the EU Budget 2014-2020 was conducted by secret ballot.

15. In Namibia, in terms of the Rules of the National Assembly, the Speaker is required to permit a vote by secret ballot upon a request by a majority of members present in the National Assembly. This applies when the subject of a vote is considered to be one which invokes the MPs' conscience, and would include motions of no confidence in the President.

16. Like Namibia, the Speaker of the Lok Sabha in India has the discretion to order that a no confidence vote in the government be conducted by secret ballot. However, unlike Namibia, the exercise of the Speaker's discretion is limited by the constitutional framework that vests her powers. In a situation where any party has issued a whip (or voting directions), it triggers the operation of the Anti-Defection Law (10th Schedule of the Constitution). Apart from the election of the President, Vice-President and members of the Rajya Sabha, parties are permitted to issue whips for any vote, including no confidence votes. This implies that MPs are mandated to vote as per their party line. If there is any form of deviation from the voting directions of the whip, the Speaker has the discretion to disqualify the MPs engaging in the same. This prevents members from voting on conscience when a party whip has been issued. Thus, the Speaker's exercise of discretion to hold a secret ballot to vote on a no confidence motion in such a circumstance, would render the operation of the 10th Schedule of the Constitution ineffective.

17. The UK, New Zealand and Australia have no provisions for voting by means of a secret ballot in motions of no confidence. In addition, there are no exceptional mechanisms to enable such a vote. In all three of these jurisdictions, there is a strong sense that Parliament has the sole discretion to determine its own procedures. One explanation for this is that these jurisdictions have strong traditions of parliamentary sovereignty, it is unlikely that any constitutional framework would interfere with parliamentary rules. However, in all these jurisdictions, there is no express prohibition on voting by secret ballot.

18. A different approach is that of Switzerland, which not only has no procedure for voting in a motion of no confidence, but simply does not have any provision governing impeachment. This is perhaps explained by the uniqueness of the office

of the Presidency, which rotates annually between the seven ministers of the Federal Council, who collectively serve as executive head of government and state of Switzerland.

Question 2:

Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature to conduct a vote by secret ballot?

19. Almost all the jurisdictions provide for voting by secret ballot in the appointment of persons to specific positions. Chief among these are the positions of Speaker and Deputy Speaker to the National Assembly (Germany, Namibia, the UK and Australia). This list also includes elections for other important positions such as members of special/select committees (in the UK and Switzerland) as well as the Federal Chancellor and the Commissioner of the Armed forces (Germany), and that of the President and Vice President (India). The underlying rationale behind this is that, bearing in mind the importance of these positions, MPs must not be unduly influenced in their voting.

Question 3:

If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

20. In most of the jurisdictions covered, the courts are either expressly prohibited from considering and/or adjudicating over internal parliamentary proceedings, including non-compliance with parliamentary rules or procedures; or there have been no cases considering this matter. The only exceptions are Germany and India. In Germany, the Federal Constitutional Court in BVerfG 114,121, held that it has the power to intervene in cases concerning the call of votes of no confidence by the Federal Chancellor. It held that it could rule on the scope of the rights and duties of members of the Bundestag in this regard. The Federal Constitutional Court argued that it had the power to decide on the interpretation of the Basic Law on grounds of disputes concerning the extent of the rights and obligations of supreme federal organs or other parties who are endowed with their

own rights by the Basic Law or by the Rules of Procedure of a supreme federal government.

21. In India, despite Articles 122 and 212 of the Constitution which expressly prohibit the Courts from exercising jurisdiction over matters in the legislature that are related to the conduct of the business of the house (regulating procedure, and maintaining order), the Supreme Court has held in *Kiboto Holloban v. Zachillbu and Others*, 1992 SCR (1) 686 that decisions of the Speaker in exercise of her judicial function (specifically in this case, the disqualification of members falling afoul of the Anti-Defection Law) are reviewable by the Court and do not fall within the above ouster. Additionally, the Supreme Court has previously exercised its jurisdiction to compel the Speaker to reverse his decision to disqualify members of the state legislature in Karnataka (*D. Sudhakar and Ors v. D. N. Jeevaraju and Ors.*) It has also issued broad directions with regard to how exactly the Speaker (or the Principal Secretary, or the Pro Term Speaker, as the case may be) is to carry out voting procedures, and determined the choice of voting procedures (*Union of India v. Harish Chandra Singh Rawat and Ors.*, MANU/SC/0611/2016, Supreme Court Order in S.L.P.(C) No. 11567 of 2016, dated 06/05/2016).

III. TABULAR SUMMARY OF RESULTS

22. The following table is a summary of the findings from our research in respect of the eight jurisdictions covered:

JURISDICTION	<p>QUESTION 1: <i>Under what circumstances is it permissible for a motion of no confidence by the national legislature in the government, head of state, or member of the executive branch to be conducted by secret ballot?</i></p>	<p>QUESTION 2: <i>Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature to conduct a vote by secret ballot?</i></p>	<p>QUESTION 3: <i>If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?</i></p>
Australia	<p>There is no express provision setting out whether a motion of no confidence can be conducted by secret ballot. However, according to Practice’s Chapter 8 (6th edition of the House of Representatives Practice (“Practice”, described as “...the comprehensive and authoritative text on the procedure and practice of the House of Representatives”)),¹ consideration has been given to the possible use of secret ballots on certain conscience issues which were to be decided by free vote, but no such procedure has been proposed to the House.²</p>	<p>Yes, the appointment of the Speaker, Deputy Speaker and the second Deputy Speaker must be conducted via secret ballot as set out in Chapter 3 of the House of Representatives Standing and Sessional Orders.</p>	<p>No. The courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the improper application of those procedures.</p>
European Parliament	<p>As a general rule, motions of censure against the European Commission, the executive of the European Union are conducted by roll call. Taking a vote by roll call has the effect of placing on record how each member of parliament has voted.</p>	<p>Yes, the appointment of the President, Vice-President, the Quaestors of the European Parliament as well as committee bureaux is done by secret ballot.</p> <p>Rule 180(a), (1), specifically provides that “In the case of</p>	<p>So far, the Court of Justice of the European Union (CJEU) has never had to intervene in parliamentary process and procedure. However, this is not expressly prohibited.</p>

¹http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6.

²http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=Chapter8§ion=10. Emphasis added.

	<p>However, there is an exception. According to Rule 180(a)(2) of the Rules of the Procedure of European Parliament, voting by secret ballot is allowed upon request by one-fifth of Parliament.</p> <p>This special procedure was utilised by a request of one-fifth of MPs when the Vote on the EU Budget 2014 – 2020 took place back in February 2013. In that instance, the special procedure was aimed at preventing national governments from bullying MPs by threatening to expose their votes in this sensitive matter.</p> <p>It remains to be seen if this could also apply to motions of censure. This is not expressly precluded by the text.</p>	<p>appointments, voting shall be by secret ballot.”</p>	
Germany	<p>Motions of no confidence in the Federal Chancellor must be conducted by way of secret ballot.</p> <p>The rationale behind this rule is to protect MPs from the undue influence of fellow MPs and the equivalent party whips.</p>	<p>Yes, the Rules of the German Bundestag provide for three other instances in which the vote must be by secret ballot. This is in the appointment of the President of the Bundestag, the election of the Federal Chancellor and in the election of the Commissioner of the armed forces.</p>	<p>The German Constitutional court has held, in BVerfG 114,121 -195 that it has the power to intervene in cases concerning the call of votes of no confidence by the Federal Chancellor. It held that it could rule on the scope of the rights and duties of members of the Bundestag. See Appendix A.</p>
India	<p>As a general rule, the Speaker of the Lok Sabha has the discretion to determine the manner in which any voting should occur on all matters in the Lok Sabha, including motions of no confidence.</p> <p>However, the Anti-Defection Law (in the 10th Schedule of the Constitution) prohibits not only floor-crossing, but also cross-voting, especially in matters that endanger the stability of the government, as clarified in <i>Kiboto Holloban v Zachillbu and Others</i>, 1992 SCR (1) 686. If a party whip</p>	<p>Yes, secret balloting is mandatory for the elections of the President and Vice President as explicitly mentioned in the Constitution; and otherwise permissible for any other motion, depending on the Speaker’s discretion (with the caveat of the operation of the Anti-Defection Law discussed in the first column).</p>	<p>Despite Articles 122 and 212 of the Constitution that expressly prevent the Court from exercising jurisdiction over matters in the Legislature that are related to the conduct of the business of the house, regulating procedure, and maintaining order, the Supreme Court has held in <i>Kiboto Holloban v Zachillbu and Others</i>, 1992 SCR (1) 686 that decisions of the Speaker in exercise of her judicial function are reviewable by the Court and do not fall within the above ouster.</p>

	<p>has been issued, MPs are required to vote according to the party line.</p> <p>So, if the Speaker were to exercise her discretion and determine that a motion of no confidence should be conducted by secret ballot, it would be entirely in line with her power and permissible in general. <i>However</i>, it would render the Anti-Defection Law ineffective since it would be impossible to find out which way MPs had voted.</p>		<p>Additionally, the Supreme Court has exercised its jurisdiction to compel the Speaker to reverse his decision to disqualify members of the state legislature in Karnataka (<i>D. Sudhakar and Ors v D. N. Jeevaraju and Ors.</i>, (2012) 2 SCC 708). It has also issued broad directions with regard to how exactly the Speaker (or the Principal Secretary, or the Pro Tem Speaker, as the case may be) is to carry out voting procedures, and has laid down the choice of voting procedures as well (<i>Union of India v Harish Chandra Singh Rawat and Ors.</i>, MANU/SC/0611/2016, Supreme Court Order in S.L.P.(C) No. 11567 of 2016, dated 06/05/2016).</p>
Namibia	<p>The Namibian Constitution is silent on whether a vote that considers the President's impeachment or non-confidence in a member of Cabinet is to be conducted by secret ballot.</p> <p>However, Rule 81 of the National Assembly Standing Rules and Orders and Internal Arrangements provides that the Speaker shall permit a "personal vote to be held by deposit of individual secret ballot" where the majority of the Members of the National Assembly present "on a motion moved, consider that the subject of a vote is to be treated as a conscience issue".</p>	<p>Yes, Rule 7(e) of the National Assembly Rules and Orders and Internal Arrangements provides that in the case where more than one Member is nominated for the office of Speaker, a vote by secret ballot must be conducted.</p>	<p>No court cases have arisen on the issue of secret ballot voting. However, there is no express prohibition against a review of parliamentary rules and decisions.</p>
New Zealand	<p>New Zealand has no provision for voting by secret ballot on any matter. However, there is no express prohibition on voting by secret ballot.</p> <p>According to Standing Orders 137, 139, 138 and 139, all voting occurs by either a voice vote (an indication of Aye or No), a party vote (the leader of the party or an authorised member casts a vote on behalf</p>	No.	No.

	of the party) or a personal conscience vote (individuals vote by division on the floor). All these procedures are public.		
Switzerland	<p>Swiss law does not make any provision for votes of no confidence in the federal government, head of state or any member of the executive branch. Accordingly, there is no accompanying voting procedure.</p> <p>One possible explanation for this is that Swiss Law has strong alternative accountability methods. Firstly, federal government reaches decisions as a collegial body and is composed of seven ministers. Secondly, the position of President only lasts one year and rotates among the seven members.</p>	Yes, Articles 130 and 140(3) of the Federal Act on the Federal Assembly provide that the election of members into specific positions in the Federal Assembly is done by secret ballot.	No, Swiss courts are very deferent to the federal legislature. Article 190 of the Swiss Constitution expressly prohibits the courts from striking down any federal legislation and the courts are unlikely to intervene in federal voting procedures.
United Kingdom	<p>There is no law governing the manner in which motions of no confidence should be conducted.</p> <p>Currently, MPs vote on motions of no confidence by way of division, which involves walking to a specific lobby to vote. Public tallies of the MPs votes are kept. However, secret ballot voting in motions of no confidence are not expressly prohibited.</p>	Yes, in the House of Commons, the Speaker, Deputy Speaker and Select Committee chairs are appointed by secret ballot.	<p>No. Article 9 of the UK's 1698 Bill of Rights provides that the debates or Proceedings in Parliament cannot be not impeached or questioned in any court or place out of Parliament. Accordingly, the courts will not interfere in the internal processes of Parliament, and could never compel Parliament to adopt any procedure, nor will they enforce what procedures Parliament has laid down.</p> <p>In addition, according to the <i>Pickin v British Railways</i> case, the courts cannot check for compliance with parliamentary procedure. It is for Parliament to determine its own procedures.</p>

GERMANY

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

1. It is a requirement of the Rules of Procedure of the German Bundestag (*Geschäftsordnung des Deutschen Bundestages* – “GO-BT”)³ that motions of no confidence in the Federal Chancellor are mandatorily conducted by secret ballot.
2. Votes of no confidence in the Federal Chancellor, the head of the German government, take place in accordance with Article 67 *Grundgesetz* (GG).

Article 67

(1) The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected.

(2) Forty-eight hours shall elapse between the motion and the election.⁴

3. This provision sets out that a vote of no confidence may only take place where a majority of MPs elect a successor and call on the Federal President to dismiss the Chancellor. The Federal President must then dismiss the Chancellor and appoint their successor. 48 hours must pass between the motion and the vote.
4. The procedure for the vote of no confidence is set out in Rule 97 GO-BT. The GO-BT draws its constitutional authority from Article 40(1) GG.

Rule 97 Vote of no confidence in the Federal Chancellor:

(1) On a motion in accordance with Article 67, paragraph (1) of the Basic Law, the Bundestag may express its lack of confidence in the Federal Chancellor. The motion shall be signed by one quarter of the Members of the Bundestag or a parliamentary group comprising at least one quarter of the Members of the Bundestag and shall be worded in such a way as to propose a successor by name for election by the Bundestag. Motions that do not fulfil these conditions may not be placed on the agenda.

(2) A successor shall be elected in a single secret ballot (Rule 49), even where several candidates have been proposed. The successor shall be considered elected only if he or she receives the votes of the majority of the Members of the Bundestag.

³ <https://www.btg-bestellservice.de/pdf/80060000.pdf>, last accessed 10 April 2017.

⁴ https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0310, last accessed 10 April 2017.

(3) The time of the election shall be determined in accordance with Article 67, paragraph (2) of the Basic Law.⁵

5. A motion of no confidence, proposing a successor, must be signed by a quarter of MPs before a vote is taken. That vote is conducted by secret ballot. Any proposed successor Chancellor must secure the votes of at least half the members in this secret ballot. The 48 hours' constitutional period applies.
6. The nomination of a successor (or successors) is a legal prerequisite to a vote of no confidence. The Bundestag cannot force the resignation of a Chancellor without choosing a successor at the same time. This provision has its origins in the Weimar Republic, which was often beset by political turmoil and consequent consolidation of power in the hands of the President. This had the effect that the drafters of the Basic Law were very keen to promote the stability of Parliamentary government. While it has been argued that the existence of the possibility of a, *destruktives Misstrauensvotum* ("destructive vote of no confidence" – the German term for a vote of no confidence which brings down a Government but does not name a successor) was not in and of itself a cause of the collapse of democracy in Germany, the potential for chaos was enough to convince the drafters to exclude it.⁶
7. The conduct of votes by secret ballot is governed by Rule 49 GO-BT.

Rule 49 Elections by secret ballot

(1) Where a federal law or these Rules of Procedure provide for elections by the Bundestag using official ballot papers, the ballot shall be secret. The ballot papers shall be handed out only before the polling booth is entered (when each Member's name is called). The polling booths to be set up to ensure the secrecy of the ballot shall be used for casting the votes. The marked ballot papers, placed in the envelopes supplied, shall be inserted in the urns provided for the purpose.

(2) Section 56, paragraph (6), subparagraph (4) of the Federal Electoral Code shall apply *mutatis mutandis*.

8. Rule 49 GO-BT sets out that wherever statute or the Parliamentary rules set out that a vote is to be taken *mit verdeckten Stimmzetteln* (by secret ballot), that vote will be secret. Ballot papers are handed out as MPs enter a closed room to vote, in accordance with the rules governing the secrecy of ballots at federal elections. The paper must be marked and placed in a ballot box.

⁵ <https://www.btg-bestellservice.de/pdf/80060000.pdf>, last accessed 10 April 2017.

⁶ David Southern, "The Chancellor and the Constitution" in Padgett (eds.), "Adenauer to Kohl, the Development of the German Chancellorship," Hurst & Co. (1994), 28

9. The strict secrecy of this procedure is designed to prevent undue influence on MPs from fellow MPs and the equivalent of Party whips.⁷

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

10. Three other votes by secret ballot are provided for in the GO-BT. All concern the appointment of officials, and the secret ballots they provide for are governed by Rule 49 GO-BT.
11. The first is the election of the President of the Bundestag, in accordance with Rule 2 Paragraph 1 GO-BT.
12. The second is the election of the Federal Chancellor from a list of candidates who have been proposed through signature of a motion by at least ¼ of MPs in accordance with Rule 4 GO-BT, which fleshes out Article 63 GG.
13. The third is the election of the *Wehrbeauftragter des Deutschen Bundestages* (Commissioner for the Armed Forces), an official responsible for assisting the Bundestag in its scrutiny of the German Armed Forces. The procedure is laid out in Rule 113 GO-BT.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

14. The legal consequence of a vote of no confidence in the Chancellor is that the Federal President must require their resignation and appoint their successor. Whether this obligation is triggered by the process adopted in Parliament is a question of constitutional law which falls within the jurisdiction of the Federal Constitutional Court (the FCC).

⁷ http://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go_ertl/gescho05/244664, last accessed 9 April 2017.

15. The FCC is responsible for the interpretation of the Basic Law. In dealing with a matter arising from Article 68 GG – which concerns confidence votes called by the Chancellor – the Court has held that it will rule on the scope of the rights and duties of members of the Bundestag, whether set out in the Constitution specifically or in the GO-BT.⁸

16. Therefore, the FCC has the competence to intervene in such matters, and has done so in the past. Please see Appendix A for brief summaries of two cases in which votes of no confidence have been considered by the FCC.

⁸ BVerfG 114, 121 – 195 [120].

SWITZERLAND

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

17. Swiss law does not contain any provisions on parliamentary motions of no confidence in the federal government, head of state, or member of the executive branch.
18. Article 169(1) of the Swiss Constitution merely provides that the Federal Assembly (the Swiss federal parliament) exercises “oversight over the Federal Council” (i.e., the federal government). Article 26(1) of the Federal Act on the Federal Assembly (“FAFA”) provides that the Federal Assembly exercises “supervisory control over the conduct of business by the Federal Council”. This oversight concerns the government’s activities in general;⁹ it is not comparable with parliamentary powers to vote on a motion of no confidence.
19. The parliament can declare individual members of the federal government “unable to discharge their duties of office” (Article 140a(1) FAFA). However, this notion of inability is narrowly defined. It encompasses “serious health problems or other reasons that prevent [the official] from returning to work” (Article 140a(3)(a) FAFA). Moreover, the Federal Council itself may be involved in the procedure (Article 140a(2) FAFA).
20. The law does not state that a secret ballot is required for the vote of the Federal Assembly in such cases. One could argue that a secret ballot is required based on Article 130 FAFA, which provides that a secret ballot be conducted for elections (and, thus, arguably, for removals); however, given the narrow grounds based on which a member of the federal government can be removed (Article 140a FAFA), the *rationale* for removing him/her is arguably different from a standard election (or removal).
21. The absence of motions of no confidence may seem surprising, but can be explained by the fact that Switzerland’s federal government “reaches its decisions as a collegial body” (Article 177(1) of the Swiss Constitution) and is composed of seven ministers that represent the various

⁹ E.g. Giovanni Biaggini, ‘Article 169 BV’, in *BV Kommentar*, Orell Füssli, Zurich 2007, p. 751 f.

political forces in the country. The position of President rotates among the seven ministers, and the Presidency only lasts one year (Article 176(2) of the Swiss Constitution).

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

22. Two votes by secret ballot are provided for in the FAFA. All pertain to elections.
23. Article 130 FAFA provides that “voting in elections in the Federal Assembly is carried out by secret ballot”.
24. A vote by secret ballot is also required when the Federal Assembly is legally required to confirm an election (Article 140(3) FAFA).

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

25. It seems unlikely that Swiss courts would intervene to compel a secret ballot in such a case.
26. The Swiss Federal Tribunal is competent to examine alleged violations of federal law (Article 189(1)(a) of the Swiss Constitution). However, Swiss courts, including the Swiss Federal Tribunal, must apply federal acts and cannot strike them down (Article 190 of the Swiss Constitution).

UNITED KINGDOM

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

27. There is no provision in the Standing Orders of Parliament for a secret ballot on a motion of no confidence.
28. The mechanism by which Parliament requires the Government's resignation is the motion of confidence. If the Government loses such a vote, this will lead to an early general election if no alternative government can be formed within 14 days.¹⁰
29. MPs' vote on motions in the House of Commons by way of division, which involves physically walking to a particular lobby to vote. Public tallies of MPs' votes are kept. There have been proposals to modernise this system, but MPs consider the system of going out to lobbies an important opportunity to meet and attempt to convince colleagues.¹¹
30. Parliament is master of its own procedure. This is an aspect of Parliamentary privilege known as "exclusive cognisance".¹² There have been debates about the extent of exclusive cognisance,¹³ but it most certainly covers internal procedure for voting.¹⁴ The European Court of Human Rights has confirmed that the immunities granted to MPs by parliamentary privilege are proportionate even where they restrict the general principle of the rule of law.¹⁵ While it is for the Courts to determine what the limits of Parliamentary privilege are,¹⁶ there is no question but that determining the procedure for a vote of confidence would fall within them.
31. As such, there is no "law" (in the form of statute or common law) precluding motions of no confidence by secret ballot, because the general law does not govern Parliamentary business.

¹⁰ Fixed Term Parliaments Act 2011, section 2(3).

¹¹ Sandford, *Divisions in the House of Commons: House of Commons Background Paper*, House of Commons Library SN/PC/06401, [3.4].

¹² Joint Committee on Parliamentary Privilege, First Report (1999) [13].

¹³ For example, arising from the expenses scandal: *R v Chaytor* [2010] UKSC 52.

¹⁴ McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage Of Parliament*, 23rd Edition, LexisNexis UK (2004) 110-111.

¹⁵ *A v UK* [2002] ECHR 35373/97.

¹⁶ *R v Chaytor*, [15 - 16].

Parliament sets its own rules, and has chosen not to provide for secret ballots where a motion of no confidence is voted upon.

32. This section is subject to the caveat that the full implications of the Fixed Term Parliaments Act 2011 (“FTPA”) have yet to be explored.¹⁷

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

33. In the House of Commons, the Speaker (unless an incumbent Speaker seeks re-election at the start of the new Parliament and is not opposed),¹⁸ Deputy Speakers¹⁹ and Select Committee chairs²⁰ are elected by secret ballot. Otherwise, is no provision for secret ballots.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

34. The courts will not interfere in the internal processes of Parliament, and would never compel Parliament to adopt any particular procedure, nor will they enforce what procedures Parliament has laid down.
35. Article 9 of the 1689 Bill of Rights sets out the basic rule which governs the relationship between the courts and Parliament: “[T]he Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.”²¹
36. This is but one manifestation of exclusive cognisance, and the recognition of the appropriate division of constitutional roles between courts and Parliament. What goes on within Parliament’s walls and in performance of its legislative function is a matter for Parliament alone to determine.²²

¹⁷ *Infra*, [38].

¹⁸ Standing Orders of the House of Commons, Public Business, 2016, 1B.

¹⁹ Standing Orders 2016, 2A (2).

²⁰ Standing Orders 2016, 122B (9).

²¹ Article 9 of the Bill of Rights, 1689.

²² *Prebble v Television New Zealand Ltd.* [1995] 1 A.C. 321, 332.

37. In addition to not ruling on the validity of Parliamentary procedures, courts will not check for compliance with them. It is for Parliament to determine compliance with its own procedures. It was held by Lord Morris in *Pickin v British Railway Board* that:

It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed.²³

38. A very challenging and largely unconsidered question is to what extent this general rule has been displaced by the Fixed Term Parliaments Act, 2011. The FTPA specifies in s2 the consequence of a vote of no confidence “passing,” but it is unclear to what extent this limits Parliament’s ability to determine, as a matter of exclusive cognisance, what it means for such a vote to pass,²⁴ a question further complicated by the fact that the act specifies the “form” which a vote of no confidence must take, but not the procedure to be adopted. Some have argued that this could be the subject of litigation in the future,²⁵ as it would presumably fall within the court’s jurisdiction to determine whether the consequences set out in the FTPA had been triggered.

39. During debate on the Bill which became the FTPA, however, the Deputy Prime Minister made it clear that the bill was not supposed to be amenable to judicial review,²⁶ although the iteration of the Bill under discussion at that point provided that the Speaker would determine when a vote of no confidence had passed. The House of Lords forced an amendment to remove that power from the Speaker,²⁷ which arguably casts doubt on the continued relevance of that explanation. It has also been argued by an author of authority that courts would consider litigation arising under the

²³ [1974] AC 765, 788 – 790.

²⁴ Alison Young, “Fixed-Term Parliaments and Neurath’s Ship” UKCLA Blog 24/9/2011, <https://ukconstitutionallaw.org/2011/09/24/alison-l-young-fixed-term-parliaments-and-neurath%E2%80%99s-ship/>

²⁵ Youngs and Thomas-Symmonds, “The Problem of the ‘Lame Duck’ Government: A Critique of the Fixed-term Parliaments Act”, *Parliam Aff* (2013) 66 (3): 540-556.

²⁶ *HC Deb.* 13 Sept. 2010, col. 629.

²⁷ Norton, “The Fixed-term Parliaments Act and Votes of Confidence” *Parliam Aff* (2016) 69 (1): 3-18.

FTPA non-justiciable.²⁸ The matter is not dealt with in the Standing Orders, and no court has yet ruled on it. The question therefore remains unresolved.

²⁸ Hazell, *Fixed Term Parliaments*, London, The Constitution Unit (2010)

EUROPEAN PARLIAMENT

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

40. The European Parliament has the power to propose and adopt a Motion of Censure - a vote of no confidence in the Commission, the executive of the European Union. If such a motion of no confidence is adopted by a two-thirds majority, the Commission is dismissed (Article 234 Treaty on the Functioning of the European Union, TFEU):

Article 234 Treaty on the Functioning of the European Union

(ex Article 201 TEC)

If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.

If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from duties that he or she carries out in the Commission.²⁹

41. This makes the European Commission democratically accountable, just like national executives. However, the Rules of Procedure of the European Parliament, which it draws up based on Article 232 TFEU, do not require the vote to be conducted by secret ballot per se:³⁰

Rule 119: Motion of censure on the Commission

1. A motion of censure on the Commission may be submitted to the President by one tenth of the component Members of Parliament.

2. The motion shall be called 'motion of censure' and supported by reasons. It shall be forwarded to the Commission.

...

5. The vote on the motion shall be by roll call and shall not be taken until at least 48 hours after the beginning of the debate.³¹

²⁹ Consolidated Version of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>, last accessed 10 April 2017.

³⁰ A recent motion of censure against President Juncker's Commission was rejected by a large majority. A secret ballot did not take place. It is known how different political formations voted: <http://www.europarl.europa.eu/news/en/news-room/20141121IPR79864/motion-of-censure-against-the-commission-rejected-by-a-large-majority>, last accessed 10 April 2017.

³¹ Rules of Procedure of the European Parliament, 8th Parliamentary Term, July 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+RULE-119+DOC+XML+V0//EN&navigationBar=YES>; See also the Provisional Edition, January 2017:

42. Thus, the motion is conducted by roll call. Taking a vote by roll call has the effect of placing on the record how each member, or sometimes each delegation, votes; therefore, it has exactly the opposite effect of a ballot vote.
43. However, Rule 180(a)(2) of the Rules of Procedure of the European Parliament enables voting by secret ballot if this is requested by Members of political groups reaching at least the high threshold (under Rule 168 a, paragraph 1 lit. c “high threshold” means “one-fifth of Parliament’s component Members made up of one or more political groups or individual Members, or a combination of the two”):

Rule 180a: Voting by secret ballot

(...)

2. Voting shall also be by secret ballot if this is requested by Members or political group(s) *reaching at least the high threshold*. Such requests must be made before voting begins.³²

44. Thus, voting by a secret ballot in a motion of censure is possible under certain circumstances.

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

45. The Rules of Procedure of the European Parliament traditionally envisage a vote by secret ballot in the case of new appointments.

Rule 180a: Voting by secret ballot

1. In the case of *appointments*, voting shall be by secret ballot without prejudice to Rules 15(1) and 204(2), first subparagraph.³³

46. Parliament elects the Commission President, Rule 117 and the whole Commission, Rule 118 and is involved in appointments to institutions like the European Central Bank and the Court of Auditors, as well as in economic governance bodies (121 – 122 a).³⁴

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20170116+RULE-119+DOC+XML+V0//EN&language=EN&navigationBar=YES>, last accessed 10 April 2017.

³² Provisional Edition of the Rules, January 2017, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20170116+RULE-180-1+DOC+XML+V0//EN&navigationBar=YES>, last accessed 10 April 2017.

³³ Provisional Edition of the Rules of Procedure, 2017, Rule 180a: Voting by secret ballot, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20170116+RULE-180-1+DOC+XML+V0//EN&navigationBar=YES>

³⁴ Above, Rules 117 – 122a.

47. A recent example for the procedure in Article 180a, paragraph 1 being triggered was the election of a new president of the European Parliament on January 17th 2017.³⁵ Another example was the election of Jean-Claude Juncker as President of the European Commission on 15th July, 2014.³⁶
48. According to the special procedure in Article 180(a)(2), set out above, a secret ballot may also be requested by members of political group(s) reaching at least the high threshold. Under paragraph 3 of the same provision a request for a secret ballot shall take priority over a request for a vote by roll call. This special procedure was utilised by a request of 1/5 of MEPs when the Vote on the EU Budget 2014 – 2020 took place back in February 2013.³⁷ In that particular instance, the special procedure was aimed at preventing national governments from bullying MEPs by threatening to expose their votes in this sensitive matter.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1), and (2) have the courts intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

49. So far, the CJEU has never intervened to compel voting in Parliament by secret ballot. However, there is no provision expressly excluding its jurisdiction.
50. The matter is regulated in the Rules of Procedure of the European Parliament. Under Article 232 of the Treaty on the Functioning of the European Union, the directly democratically elected European Parliament has the power to adopt its own rules of procedure, and thus whether to trigger Article 180 (a)(2),³⁸

³⁵ Parliament set to elect new President, European Parliament News, <http://www.europarl.europa.eu/news/en/news-room/20170109STO57511/follow-it-live-parliament-set-to-elect-new-president>, last accessed 11 April 2017.

³⁶ Parliament elects Jean-Claude Juncker as Commission President, EP News, <http://www.europarl.europa.eu/news/en/news-room/20140714IPR52341/parliament-elects-jean-claude-juncker-as-commission-president>, last accessed 11 April 2017..

³⁷ Euractiv, Parliament to use secret ballot in vote on EU budget, <http://www.euractiv.com/section/eu-priorities-2020/news/parliament-to-use-secret-ballot-in-vote-on-eu-budget/>, last accessed 10 April 2017..

³⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:o10000>, last visited on 10.04.2017.

INDIA

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

51. India follows a bicameral legislative system with the Lok Sabha as the directly elected Lower House of Parliament, and the Rajya Sabha as the indirectly elected Upper House of Parliament, or Council of States. The President is the titular Head of State. However apart from a few exceptions, executive power is exercised through the Prime Minister and his or her Council of Ministers, who make up the Union Cabinet. As explicitly mentioned in the Constitution under Article 55(3) and 66(1), the President and Vice President are mandatorily required to be elected by secret ballot.
52. The method for removal of the President is through an impeachment procedure provided for in Article 61 of the Constitution, for the “violation of the Constitution.” This procedure has never been implemented. There is no explicit method specified for carrying this out either in the Constitution or in the Rules of Procedure and Conduct drafted by either house.
53. Particularly with regard to the Prime Minister and the Cabinet (at the central government level), and the Chief Minister and his Council of Ministers (at the state level), the principle of collective responsibility to the legislature operates, as enshrined in Articles 75(3) and 163(2). This means that if a motion of no confidence is passed against any minister, in the Lok Sabha or the state legislative assembly the government is collectively responsible for the conduct of that minister, and the ruling government is bound to vacate office with the Prime Minister or Chief Minister having to step down, as the case may be. The law that governs motions of no confidence are the Rules of Procedure and Conduct of Business in Lok Sabha,³⁹ as adopted per Article 118(1) of the Constitution which provides that each House of Parliament has the power to make its own rules, subject to the Constitution, in the setting of procedure for the conduct of its business. Chapter XVII, Rule 198 provides for the procedure and restrictions

³⁹ The Lok Sabha is the Lower House of the Parliament – otherwise known as the House of the People. It is constituted through direct elections of Ministers of Parliament through universal adult franchise -- constituency elections held by secret ballot open to the general public.

regarding the leave to raise the motion of no confidence in the Council of Ministers,⁴⁰ following a description of the powers of the Speaker in this regard.⁴¹ A motion of no confidence can only be raised in the Lok Sabha, and does not affect the functioning of the Rajya Sabha.

54. The Rules provide for various mechanisms for voting, including voting by secret ballot. The choice of voting procedure is at the discretion of the Speaker of the Lok Sabha.⁴² It states that

—

In certain cases, as determined by the Speaker, in their discretion, if secret voting is to occur on a particular matter, the Automatic Vote Recording Equipment LEDs will not flash as per the colour corresponding to the direction of the members' vote, but will alternatively flash once to indicate that a vote has been cast.⁴³

55. It is thus permissible and entirely lawful as per the Rules and Constitution, for the Speaker to exercise her power in holding a secret ballot in the Lok Sabha, for a vote on a no confidence motion, in ordinary circumstances.

56. However, the exercise of the Speaker's discretion is limited by the constitutional framework. Except for voting for the President, Vice-President, and members of the Rajya Sabha, parties are permitted to issue whips, or voting directions, in any matter they so choose to – including votes of no confidence.⁴⁴ In situations where any party has issued a whip, it triggers the operation of the Anti-Defection Law (10th Schedule of the Constitution). The Anti-Defection Law has been heavily criticized, and there have been multiple reforms suggested with regard to its implementation, but it is still in operation for the most part.⁴⁵ The power of a political party to issue a whip extends to motions of no confidence. This implies that MPs are mandated to vote as per their party line. If there is any form of cross voting, or floor crossing, the Speaker has the discretion to disqualify the MPs engaging in the same, thus preventing members from voting on conscience, in order to ensure party accountability and stability. Thus, the Speaker's

⁴⁰ Rule 198 (1), of the Rules and Procedure of the Lok Sabha, available at: http://164.100.47.132/LssNew/rules/RULES-2010-P-FINAL_1.pdf

⁴¹ Ibid.

⁴² Rules 367, 367A, 367AA, 367B, of the Rules of Procedure of the Lok Sabha, available at: http://164.100.47.132/LssNew/rules/RULES-2010-P-FINAL_1.pdf See also, "Voting and Division," Lok Sabha, http://164.100.47.132/LssNew/abstract/voting_and_division.htm

⁴³ "Frequently Asked Questions about the Lok Sabha," Lok Sabha, available at: <http://164.100.47.132/LssNew/Others/FAQ.htm>

⁴⁴ For more details on the problems with the issuing of whips, see "The Whip Hand," Indian Express, available at : <http://archive.indianexpress.com/news/the-whip-hand/589000/0> See also, "Parties Cannot Issue Whips to MLAs in the Rajya Sabha," The Hindu, <http://www.thehindu.com/news/national/tamil-nadu/parties-cannot-issue-whips-to-mlas-in-rajya-sabha-polls/article4824376.ece>

⁴⁵ The Supreme Court, in *Kiboto Holloban v. Zachillbu and Others*, 1992 SCR (1) 686, struck down Part 7 of the Schedule as unconstitutional.

power to hold a secret ballot for a vote on a no confidence motion in such a circumstance, would render the operation of the 10th Schedule of the Constitution ineffective, thereby creating a clash between two provisions of the Constitution (Article 100, read with Article 118; and the 10th Schedule). As per the canon of harmonious construction, the Constitution is to be read as a whole, and provisions that are seemingly contradictory must be read so as to give each of them its full effect.⁴⁶

57. The implementation of secret ballot as regards voting on a no confidence motion, would render the Anti Defection Law ineffective since the Speaker would be unable to verify whether MPs voted as per their party line.⁴⁷ Thus, as we have noted in the recent Tamil Nadu Legislative Assembly vote held in February 2017, despite repeated requests from the DMK and Congress party about their concerns regarding ensuring that the nature of the no confidence vote remains free and fair, the Speaker did not accede to conducting the vote via secret ballot, since party whips had already been issued by another party, the AIADMK.⁴⁸

58. Therefore, the power to determine the manner in which the vote on a no confidence motion is to be carried out, is vested in the Speaker -- secret ballot voting is thus permissible in ordinary circumstances.

59. However, in the specific circumstance where a party whip has been issued, the holding of a vote through secret ballot by the Speaker could be challenged on the basis that it potentially defeats the object and purpose of the Anti-Defection Law, and renders it ineffective.

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot? Please consider any applicable law, regulations, manuals as well as internal procedural rules of the national assembly/congress or parliament.

⁴⁶ The Court laid down the principles of harmonious construction in *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57, p. 74.

⁴⁷ “Jugaad Jurisprudence,” *The Hindu*, available at : <http://www.thehindu.com/opinion/lead/Jugaad-jurisprudence-the-Tamil-Nadu-way/article17314028.ece>

⁴⁸ News articles pertaining to the demand for secret ballot, and an examination of its rejection by the Speaker in the Tamil Nadu Legislative Assembly issue, all available at : <http://www.thenewsminute.com/article/can-there-be-secret-ballot-palaniswami-s-vote-confidence-all-probability-no-57388> ; <http://www.newindianexpress.com/states/tamil-nadu/2017/feb/17/panneerselvam-camp-demands-secret-ballot-to-decide-on-confidence-motion-1571667.html> ; <http://www.india.com/news/india/secret-ballot-voting-not-possible-in-tamil-nadu-assembly-heres-why-1852254/> ; <https://www.pressreader.com/india/thehindu/20170221/281668254741157>

60. As explained in the previous section, the Speaker may opt for a secret ballot method of voting in *any* question that is put to the House, in her discretion, so long as it is within the bounds of her power as sourced in Articles 75 and 118 of the Constitution, and the Rules of Procedure as outlined above.
61. In the Indian Supreme Court case of *Kuldip Nayar v Union of India*, the provisions of the Representation of Peoples Act 2003 that mandated open ballot, instead of secret ballot, for elections to the Upper House of Parliament (the Rajya Sabha) by members of the state legislatures, were challenged as eroding the foundations of a free and fair election as mandated by the Constitution.⁴⁹ The Court highlighted, that where the Constitution specifically required secret ballot (in Articles 55(3) and Article 66(1) with regard to the election of the President and the Vice President), it is made *explicit* in the text and hence mandatory. In all other circumstances it is not compulsory, but left to the discretion of the relevant authority, and is thus a lawful but not a necessary condition for a free and fair vote in all circumstances.⁵⁰
62. It is thus clear that secret ballot is constitutionally permissible, depending upon the discretion of the Speaker.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

63. Article 122(1) of the Constitution provides that the validity of any proceedings that have been carried out in the Parliament shall not be called into question by Courts on the grounds of procedural infirmities or irregularities. Additionally, Article 122 (2) states that Courts do not have jurisdiction over the members or officers of the Parliament, whose powers have been vested in them by the Constitution in order to regulate procedure, conduct business, or maintaining order, in the exercise of those powers. The same principle is replicated in Article 212 (1) and (2) respectively, that deal with state legislatures. The Courts however, have not

⁴⁹ India has a bicameral legislature -- the Rajya Sabha is the Upper House of Parliament -- also called the Council of States. The members of the Rajya Sabha are elected indirectly largely from state legislative assemblies, through single transferable vote. This house is not subject to dissolution upon the passage of a no confidence motion, unlike the Lok Sabha.

⁵⁰ *Kuldip Nayar v Union of India*, 2006 (7) SCC 1, para 179.

taken a very strict view with regard to the circumscribing of its jurisdiction in this regard, as follows.

64. In the case of *Kiboto Holloban*, the Court was asked to adjudicate upon the question of whether the judicial power exercised by the Speaker, with regard to the disqualification of members as under the 10th Schedule, could be held to be final, thereby ousting the Court's jurisdiction as under Articles 122 and 212. In response to this question, it held that the decisions made by the Speaker with regard to disqualification of an elected member, was not conducted in exercise of their legislative function (as defined under Article 122 read with parliamentary privileges under Article 105 of the Constitution), and is thereby not hit by the immunity that is granted to regulate procedure, conduct business or maintain order. The Court went on to hold that the Speaker is analogous to a tribunal acting under Paragraph 6(1) of the 10th Schedule in relation to disqualifications of MPs— and that their decision may be reviewable insofar as it is not on the grounds of procedural infirmities and irregularities.⁵¹
65. It is thus clear that if the Speaker acts to settle disputes, she is acting in exercise of her judicial functions. The Courts may review this functioning, and thereby compel a certain outcome – for instance, the Supreme Court in 2012 reviewed the decision of the Speaker in a case where 16 ministers of the state legislative assembly in Karnataka were disqualified, and quashed the same citing a violation of the principles of natural justice and basic constitutional principles.⁵²
66. However, if the Speaker acts in exercise of their legislative functions, the immunity provided in Articles 122(2) and Articles 212(2) applies.⁵³ Voting on motions appears to fall within the ambit of the legislative functions of the House, as per Article 105 of the Constitution,⁵⁴ and in any event, it falls within the ambit of conducting ordinary business of the House under Articles 122(2) and 212(2). However, that is not to say that Courts have strictly followed the textual ouster of its jurisdiction on matters enshrined in Articles 122(2) and 212(2), discussed as follows.

⁵¹ *Kiboto Holloban v Zachillbu and Others*, 1992 SCR (1) 686, para 40.

⁵² *D. Sudhakar and Ors v D. N. Jeevaraju and Ors.*, (2012) 2 SCC 708. See also, “SC Quashes Karnataka Speaker’s Decision to Disqualify,” Livemint, available at: <http://www.livemint.com/Politics/kpf9jHpIuoxThDRvCEVSgM/SC-quashes-Karnataka-speaker8217s-decision-to-disqualify.html>

⁵³ *In Re: Keshav Singh (Special Reference No. 1 of 1964)*, (1965) 1 SCR 413.

⁵⁴ *Raja Ram Pal v The Hon’ble Speaker, Lok Sabha and Ors.*, (2007) 3 SCC 184.

67. The Supreme Court of India has had the opportunity to adjudicate upon three instances wherein a state government has been asked to demonstrate confidence in the state legislative assembly. It has provided detailed orders in all three instances, even going to the extent of creating a new procedure of a “composite floor test” in one, which was subsequently referred to in the other two cases.⁵⁵ However, although in none of these did the Court explicitly compel a secret ballot method of voting, in one case it made a decision that the Speaker is to carry out the vote through the division method, and went on to prescribe a detailed method of conducting such a division vote. There was no assessment of the Court’s jurisdiction as being contrary to Articles 122 or 212 of the Constitution in any of these cases.
68. In the first case, *Jagdambika Pal v. Union of India*, the Governor of Uttar Pradesh dismissed the government in power at the time, led by Kalyan Singh, and within hours administered the oath of office to Jagdambika Pal as the new Chief Minister. Pal was then asked to prove that he had the confidence of the assembly in the next three days. In the meanwhile, Singh approached the High Court, which ruled in favour of his reinstatement. This decision was then challenged by Pal in the Supreme Court. The Supreme Court ordered that there would have to be a “composite floor test” between both parties in order to prove which of the two candidates had the confidence of the House.⁵⁶ The manner in which such a test was carried out was via ballot slips, wherein members of the state legislative assembly could vote for either Pal or Singh -- thereby notionally acknowledging both members as Chief Ministers, which is an unprecedented act for the Indian state. However, the procedure for the same was that the ministers had to cast their votes and sign on the ballot paper, thus identifying themselves.⁵⁷ The one vote that went unidentified was discarded by the Speaker as invalid. The Supreme Court, ordered this “composite floor test” in the exercise of its power of enforcement of decrees under Article 142 of the Constitution, which empowers it to “pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it,” but this jurisdiction cannot be used to supersede other constitutional provisions, and is generally considered to be a bad precedent. The Supreme Court then went on to confirm

⁵⁵ “Courts can’t be final solution in a democracy,” Deccan Chronicle, available at: <https://www.pressreader.com/india/deccan-chronicle/20170322/281921657868002>

⁵⁶ *Jagdambika Pal v Union of India*, (1999) 9 SCC 95, Supreme Court order dated 24/02/1998, available at: <https://indiankanoon.org/doc/157266/>

⁵⁷ “Kalyan Singh wins floor test,” Rediff News, available at : <http://www.rediff.com/news/1998/feb/26up.htm>

the results of the vote.⁵⁸ This case has been cited in the following two circumstances as a pretext for the Supreme Court's continued exercise of its jurisdiction over such matters.

69. In the second case of *Anil Kumar Jha v Union of India*, the Supreme Court provided detailed directions as regards how exactly the floor test in the Jharkhand Legislative Assembly was to be conducted. The Governor of Jharkhand had invited Shibu Soren to form the government, notwithstanding that Arjun Munda had more members of the legislative assembly from his party.⁵⁹ Munda moved the Supreme Court, which held that a floor test is to be held between contending political alliances or parties, in order to determine who holds the confidence of the House, and hence the claim to Chief Ministership. This decision provided clear directions as regards the method and security of the environment in which the floor test was to be conducted – however it fell short of specifying the method of voting.⁶⁰
70. In the third case of *Union of India v Harish Chandra Singh Rawat*, by way of background, the President had declared a state of emergency in Uttarakhand, upon a request by the Governor of the state under Article 356 of the Constitution. This placed the state under direct control of the Governor, who dismissed the then-Chief Minister, Harish Chandra Singh Rawat, who subsequently moved the Supreme Court. The Court passed an order detailing how exactly the floor test in the Uttarakhand legislature was to be carried out. Since there was no Speaker or Pro Temp Speaker, the Court ordered that the Principal Secretary of the Legislative Assembly was to carry out the vote in the form of a Division. The Court went on to specify the method of voting as well – that those inclined to vote for the motion should move to one side, whilst those inclined to vote against the motion should move to the other side. The Principal Secretary was to then ask for those in favour to raise their hands, and then those against, and keep a clear count of the same.⁶¹ The Court ordered the entire proceedings to be videographed and the results of the vote were to be placed before the Court in a sealed cover. This is the most detailed order by a Court thus far, intervening in parliamentary procedure, and prescribing how voting is to be carried out in such a situation. However, it is under exceptional

⁵⁸ *Jagdambika Pal v Union of India*, Supreme Court order in S.L.P. (C) No. 4495/98, part heard on 24/02/1998, dated 27/02/1998, MANU/SC/0167/1998.

⁵⁹ “Courts can't be final solution in a democracy,” Deccan Chronicle, available at: <https://www.pressreader.com/india/deccan-chronicle/20170322/281921657868002>

⁶⁰ *Anil Kumar Jha v Union of India*, (2005) 3 SCC 150, para 4.

⁶¹ *Union of India v Harish Chandra Singh Rawat and Ors.*, MANU/SC/0611/2016, Supreme Court Order in S.L.P.(C) No. 11567 of 2016, dated 06/05/2016, paras 4-5.

circumstances that such a case has arisen, given the call for President's Rule in the state.⁶² The Court then went on to confirm that Harish Rawat was to be reinstated as Chief Minister as the result of the vote clearly indicated that he had the confidence of the House.⁶³

71. Thus, Courts have not shied away from compelling legislatures, to carry out procedures (and in some cases votes) in certain ways, in extenuating circumstances.

⁶² "Uttarakhand Floor Test Order by Supreme Court raises serious issues," Firstpost, available at: <http://www.firstpost.com/politics/uttarakhand-floor-test-order-by-supreme-court-raises-serious-issues-congress-modi-harish-rawat-2770572.html>

⁶³ "Uttarakhand Supreme Court Confirms Rawat's Floor Test Victory," The Wire, available at: <https://thewire.in/35311/uttarakhand-supreme-court-confirms-rawats-floor-test-victory/>

NAMIBIA

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

72. The Namibian legislature follows a bi-cameral parliamentary model with the National Assembly (constituted by 92 voting Members elected via a party list system and 8 non-voting Members appointed by the President) and National Council (constituted by 42 members, three from each of the 14 Regions in Namibia). While the President is elected directly by all eligible, Namibian voters, voting Members of the National Assembly are elected through a party list based on proportional representation.

73. The Namibian Constitution provides, in Article 29(2), for the circumstances under which the President's impeachment can be conducted in the National Assembly and National Council, and the processes to be followed pursuant thereto. It states that:

President shall be removed from office if a two-thirds majority of all the members of the National Assembly, confirmed by a two-thirds majority of all the members of the National Council, adopts a resolution impeaching the President on the ground that he or she has been guilty of a violation of the Constitution or guilty of a serious violation of the laws of the land or otherwise guilty of such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of President.

74. Article 39 of the Constitution further provides that the President shall terminate the appointment of a member of Cabinet (the Executive branch of Government) where the majority of National Assembly resolves that it has no confidence in that member.

75. The Constitution is silent on whether a vote that considers the President's impeachment or a non-confidence in a member of Cabinet is to be conducted by secret ballot or not. However, the National Assembly Standing Rules and Orders and Internal Arrangements⁶⁴ prescribe the procedure by which a vote is to be conducted.

⁶⁴ As amended and approved in September 2015.

76. *The National Assembly Standing Rules and Orders and Internal Arrangements:*

1. The Rules provides for a vote on a motion before the House to be conducted after a ‘division’.⁶⁵
2. Rule 81 provides for the Speaker shall permit a “personal, vote to be held by deposit of individual, secret ballot” where the majority of the Members of the National Assembly present “on a motion moved, consider that the subject of a vote is to be treated as a conscience issue”.

77. There is no law, rule or regulation that makes it unlawful to vote secretly in either the National Assembly or National Council.

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

78. Both the National Assembly and National Council have procedures for voting by secret ballots. Rule 7(e) of the National Assembly Rules and Orders and Internal Arrangements provides that in the case where more than one Member is nominated for the Office of Speaker, a vote by secret ballot shall be conducted.

79. Rule 14(4) of the National Council Standing Rules and Orders makes provision for a secret ballot for the Election of the Chairperson, Deputy Chairperson, or Presiding Officer of the National Council, where more than one person is proposed and seconded.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

80. There are circumstances under which voting by secret ballot may be permitted as detailed in the answers to questions (1) and (2). No court decisions on the issue have arisen on the

⁶⁵ Per the definitions section of the National Assembly Standing Rules and Orders and Internal Arrangements “Division” means the procedure followed when the House is divided and a vote is called.

question of secret ballot voting. However, there is no express prohibition against the review of parliamentary rules and decision.

NEW ZEALAND

- I. *When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?*

81. Neither secret ballot nor secret personal vote are authorized in New Zealand's Parliament, according to Chapter 3 of the Standing Orders of New Zealand's House of Representatives, 2014,⁶⁶ and to Chapter 17 of the "Parliamentary Practice of New Zealand,"⁶⁷ not even for matters regarded as "Conscience issues".

- II. *Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?*

82. No, there are not (see previous answer).

- III. *If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?*

83. The High Court is the most likely body to analyse the matter, since the Supreme Court is only an appeals court, without original jurisdiction.⁶⁸ It is not likely that this court would intervene since the use of secret ballots or secret personal votes by members of New Zealand's Parliament it is not considered at all in this body's rules.

⁶⁶https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders-2014-by-chapter/chapter-3-general-procedures/#_Toc395620672.

⁶⁷ McGee, David, Parliamentary Practice in New Zealand, 3rd ed., Dunmore Publishing Limited, Wellington, 2005. Available at https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/document/00HOOOCPNZ_171/chapter-17-termination-of-debate.

⁶⁸Section 66 of the Senior Courts Act 2016, <http://www.legislation.govt.nz/act/public/2016/0048/44.0/DLM5759403.html#DLM5759403>; as well as <http://www.teara.govt.nz/en/judicial-system/page-2>

AUSTRALIA

I. When the national legislature in your country votes on a motion of no confidence in the government, head of state, or member of the executive branch, under what circumstances is it permissible for the vote to be conducted by secret ballot? Is it unlawful to do so?

84. Although Australia's Parliament is divided into a Senate and a House of Representatives, according to Chapter 9 "Motions" of the country's 6th edition of the House of Representatives Practice ("PRACTICE," described as "...the comprehensive and authoritative text on the procedure and practice of the House of Representatives"),⁶⁹ motions of no confidence in the government are determined by the latter.⁷⁰
85. The House of Representative's Standing Order ("S.O.") 117 sets that, once the motion (including the no confidence ones) has been moved and seconded, the question on the motion is proposed to the House and "put...to the House for decision"⁷¹ This does not specify the manner of conducting the vote. Section 40 of the Australian Constitution simply states that "Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker [...]"⁷²
86. Voting for/against motions in the House of Representatives can take place by a majority of voices,⁷³ a physical division in case several members of the House challenge the Speaker's opinion about the outcome of a voting through majority of voices.⁷⁴

⁶⁹http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6.

⁷⁰ "Perhaps the most crucial motions considered by the House of Representatives are those which express censure of or no confidence in a Government, as it is an essential tenet of the Westminster system that the Government must possess the confidence of the lower (representative) House. By convention, loss of the confidence of the House normally requires the Government to resign in favour of an alternative Government or to advise a dissolution of the House of Representatives" http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=Chapter9§ion=07.

⁷¹ Chapter 10 "Motions" of the House of Representatives Standing Orders. http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/House_of_Representatives_Standing_Orders.

⁷² Emphasis added.

⁷³ S.O. 125, Chapter 11 "Voting" of the House of Representatives Standing Orders, *idem*.

⁷⁴ S.O. 126, Chapter 11 "Voting" of the House of Representatives Standing Orders, *idem*.

87. According to Practice’s Chapter 8, “Consideration has been given to the possible use of secret ballots on certain conscience issues which were to be decided by free vote, but no such procedure has been proposed to the House.”⁷⁵

II. Are there any other matters (apart from a motion of no confidence in the circumstances above) in which it is permissible for the national legislature in your jurisdiction to conduct a vote by secret ballot?

88. Yes, In terms of Practice’s Chapter 8:

Apart from ballots for the election of the Speaker, the Deputy Speaker and the Second Deputy Speaker, the standing orders make provision for the taking of a ballot to elect a Member to a position or to perform a function—for example, to serve on a committee, statutory body or delegation—whenever the House thinks fit.

III. If there is no applicable law, regulation or rule requiring secret ballot voting in the circumstances in questions (1) and (2) above, to what extent may and/or have the courts in your jurisdiction intervened to compel a secret ballot? To what extent is this an issue on which the courts may not intervene?

89. There is an immunity of parliamentary proceedings from question before court. The courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the improper application of those procedures.

90. The Courts have not intervened to compel a ballot vote. However, Courts in Australia have occasionally described the need for ministers to ‘possess the confidence of Parliament’ as a ‘constitutional rule’.⁷⁶ This recognizes the existence of the convention of ministerial liability to resign upon a parliamentary vote of ‘no confidence’.

⁷⁵http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=Chapter8§ion=10.

⁷⁶ *The Commonwealth v Colonial Combing, Spinning and Weaving Committee Ltd* (1920) 31 CLR 421 at 449–150.

APPENDIX A

91. There have been two cases on votes of confidence in the Bundestag. Both have concerned Art. 68 GG, which empowers the Chancellor to call for a vote of confidence (distinct from the *express* vote of no confidence in Art. 67). The provision specifically provides that “If a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days.” MPs then vote, as under Art. 67, but the President may choose whether to dissolve the Bundestag or not. Under Art. 67, the President must dissolve the Bundestag. This difference has been emphasised by the Court.⁷⁷
92. In the first case, *Vertrauensfrage I*, a question arose as to whether the dissolution of the Bundestag by the President in January 1983, purportedly in accordance with Art 68, was lawful. The question arose because the Chancellor of the day had come to power through election by MPs rather than the people, by way of Art 68. He wanted to secure a popular mandate, and so engineered a vote of confidence. The question was whether the President could lawfully dissolve the Parliament after such a vote. Four MPs asked the FCC to declare an engineered (“*unechte*”) vote of confidence unlawful. The FCC refused to do so, holding that such a requirement was nowhere to be found in the wording of Art. 68, nor its history.⁷⁸
93. This decision on Art. 68 is salient for the question of the reviewability of Art 67 votes of confidence.
94. First, the ratio applies in principle to Art. 67. All that is required is that the majority of MPs can no longer support the Chancellor, and that the formal conditions of the Article are met. There is no requirement that the Chancellor is unable to discharge their functions, nor that MPs intend to refuse to support them after new elections.⁷⁹

⁷⁷ BVerfG 62, 1 (“*Vertrauensfrage P*”) [102]

⁷⁸ *Vertrauensfrage I*, [105] - [107]

⁷⁹ *Vertrauensfrage I*, [108]

95. Second, the court emphasised the importance of all organs of government in concretising constitutional rules.⁸⁰ It also emphasised that a chancellor chosen by MPs under the conditions of Arts. 67 and 68, rather than after a popular vote, enjoyed full democratic legitimacy.
96. Thirdly, as regards the question of whether the President's decision under Art. 68 was reviewable, the FCC stated that, where constitutional requirements for political behaviour are set out can it intervene and declare whether those requirement shave been breached or not. It cannot however interfere in political rather than legal determinations. In the case at hand, it held that although the shortening of the life of a Parliament should only happen under exceptional circumstances,⁸¹ this was a political question, for the President's determination exercising his choice under Art. 68.
97. These conclusions were solidified and expanded upon in a second judgment in 2005.⁸² The FCC set out that the use of Art 68 had to meet the formal requirements of Art 68, it also had to meet the constitutional goal of that provision, which was stable parliamentary democracy. However, the Court held that the test of whether the political situation was of such a nature that the stability of Parliamentary democracy was best served by a no confidence in accordance with Art 68 is one for the Chancellor, with which the Court would not interfere. This is a matter of the appropriate role of the constitutional organs.⁸³ However, this does not mean that the FCC will not discharge its constitutional duty to resolve questions of government power. It will however respect the room for discretion which political actors have, and in a case where the GG clearly divides power between the President, Chancellor and Bundestag, as in Art 68, will only review for breach of the constitutional requirements of political behaviour. There seems little doubt that compliance with procedural conditions precedent for the exercise of power explicitly set out in the Constitution will be reviewable.⁸⁴
98. Please let us know if you would like more details on these cases.

⁸⁰ *Vertrauensfrage I*, [110]

⁸¹ *Vertrauensfrage I* [123]

⁸² *Vertrauensfrage II*

⁸³ *Vertrauensfrage II*, [154], [159], [160]

⁸⁴ *Vertrauensfrage II*, [165]

