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## Consociationalism in the Russian Federation?

[Paul Pryce](#), Oct 3 2011

Within the territory of the Russian Federation, there are 170 officially recognized ethnic groups.<sup>[1]</sup> Recent years have seen a multitude of conflicts between the Russian Federation and regionally-based secessionist groups, such as in Chechnya and Tatarstan. There is a significant body of literature addressing the question of how these regional and ethnic conflicts might be resolved. One possible mechanism for conflict prevention and resolution lies with consociational democracy. Here we will focus particularly on the Council of the Federation as a previous, and potentially future, instrument of consociationalism in Russia.

Consociationalism was originally articulated by Arend Lijphart, applied to the case of the Netherlands initially but then later transferred to Switzerland and other subjects of analysis. Indeed, consociationalism has since become a widely accepted concept of power-sharing within a democratic polity that corresponds to an ethnically diverse society. The conditions by which a polity can be identified as consociational have varied

between authors. However, four key components can be said to be common to most consociational frameworks: "...government by a grand coalition of political leaders of all significant segments; the mutual 'veto', which serves as an additional protection of vital minority interests; proportionality as the method of political representation; and a high degree of autonomy for each segment in its own affairs."<sup>[2]</sup>

This concept of consociationalism has come under criticism from some authors, with many of these criticisms submitting that these theoretical conditions have in fact not been applied in any of the case studies used by Lijphart. One of the more controversial cases of this has been Lijphart's assertion that the Swiss confederal state is consociational.<sup>[3]</sup> But, as Barry points out in his own critique, there are (or were at the time of his writing) many political parties in Switzerland which strive to cross-cut ethnic cleavages within Swiss society and appeal more so to the civic commons and social consensus than to any sub-state identity.<sup>[4]</sup> However, this only discredits Lijphart's example of Switzerland as a consociational democracy and does not necessarily undermine the theory itself. Given the powers mandated to the Council of the Federation under the original terms of the 1993 Constitution of the Russian Federation, it is certainly possible to speak of a past application of consociational democracy in Russia and the potential for a future such application as a remedy to ethnic tension.

"Consociationalism focuses on the grand coalition or rules which allow all groups to be brought on board."<sup>[5]</sup> If anything, the Council of the Federation in its original format served as a 'grand coalition', satisfying the first condition by which we can say consociationalism is present in a system of governance. By directly electing representatives to the Council, institutionalized rules had been set in place to 'bring all groups on board' from all the myriad regions of Russia's vast territorial and cultural space.

The Council was also afforded powers equivalent to that of an upper house of parliament, conveying upon the regions the capacity to veto or amend legislation passed by the State Duma. The powers of the Council go even further than the veto on legislation brought before it, however. Article 93 of the Constitution describes the Council's authority to impeach the President. "The Federation Council also has a key role in changing the Constitution, which could potentially limit the powers of the president."<sup>[6]</sup> It is noteworthy that these powers were placed with the Council, a body consisting of regionally-based and directly elected representatives, rather than a more centralized institution, such as the Senate of Canada whose members are appointed under the sole authority of the Prime Minister. The Council of the Federation therefore fulfills the second criteria of a consociational democracy in its role as a check or a balance in the core-periphery relationship between Moscow and the regions, possessing veto power in vital areas of governance.

"...The Council of the Federation was specifically created to represent the regions."<sup>[7]</sup> Regional governors and legislatures have the power to enact legislation on the regional level, but the Council allowed for a direct interaction between the regions and the centre. This constructs the relationship between the dominant ethnic group – in this case, ethnic Russians – and the various minorities as one of constructive and mutually beneficial dialogue within a civic commons rather than one of confrontation and armed resistance. By electing representatives to the Council, "this would allocate key political posts at both the central and local levels on a proportionality principle that mirrors the ethnic segmentation of the country."<sup>[8]</sup> Where an ethnic group is the dominant community in a given region, that ethnic group would very likely have representation on the Council – for example, as ethnic Tatars make up the majority of the population in Tatarstan, it follows that an ethnic Tatar would likely, though not necessarily, be elected as Tatarstan's representative on the Council of the Federation. The choice for a national self-determination in this regard would be an electoral one, uninhibited by restrictions from the centre.

This consociationalism had civic nationalist connotations. As espoused in the time preceding the referendum to adopt the 1993 Constitution, "the new Russian federalism was said by its proponents to refer to the ideal of

civic or civil federalism.”<sup>[9]</sup> The Council of the Federation could act as a bridge between the ethnic nationalisms of the latent identities emerging in the regions with the collapse of the Soviet Union and the civic ideal of a Russian state. Without this consociationalism, it is not clear whether one can identify a coherent civic nationalism or civic federalism in Russia, but rather an increasingly centralized state that discounts the role ethnic identities have come to play in regions like Tatarstan, Bashkortostan or Chechnya.

In fact, many of the aforementioned conditions for consociationalism have been undermined by measures taken in the later years of Boris Yeltsin’s presidency and by the administration of former President Vladimir Putin. First of all, there was the centralization of power under “...the Bill on Amending the Law on the Principles of Organizing the Legislative and Executive Bodies of Russian Territories, which proposed giving the Russian president the powers to remove governors or suspend regional legislatures when they fail to comply with federal laws.”<sup>[10]</sup> Subsequent steps to centralize power have included the realignment of the regions and the current system for filling the seats on the Council of the Federation by presidential appointment rather than by election. “The creation of seven administrative regions, together with the reform of the upper house of parliament so that places in the Council of the Federation would thereafter be held not by governors, but by their representatives, was one of the main thrusts of this reform.”<sup>[11]</sup> This set several layers of divide between the centre and the periphery, essentially ending or at least suspending the dialogue between the Russian Federation, as embodied by the President, and the regional communities.

To be more precise, the representatives of each region on the Council were directly elected by their constituents in regionally-mandated elections rather than a federation-wide election. “From the mid-1990s, the elected governor of each region and the head of the regional legislature themselves sat on the Federation Council. Since 2000, the system has again shifted so that these representatives are appointed, one by the region’s governor and the other by the region’s legislature.”<sup>[12]</sup> Since the implementation of reforms put forward under Putin, “the federal provinces are further divided into so-called federal districts... These districts are governed by a governor, appointed by the president.”<sup>[13]</sup> This has limited the responsiveness of the Council to the regional needs and interests of the Federation’s myriad constituencies. It also fundamentally alters the symmetry of the federal structure intended under the 1993 Constitution, replacing a kind of ‘bottom-up’ federalism with a ‘top-down’ arrangement that increasingly resembles that of a unitary state.

With regard specifically to concerns regarding the makeup of the Council during the tenure of Yeltsin and Putin, “in constitutional terms, the fact that the Federation Council had a substantial corps of presidential appointees contradicted the principle of the separation of powers.”<sup>[14]</sup> Indeed, the unique place of the Council in the governance institutions of the Russian Federation had been compromised by the tightening of presidential authority over the body. The Council cannot, in its current state, function as a check or a balance on both the legislative and executive branches of government in much the same way that it can no longer serve as a liaison between the core and the periphery of Russian society. Rather, it has been made an instrument of the centre and of the core. Several authors concur with this assessment, pointing out that “...the Federation Council has shown itself to be ineffective in the Russian political system. Not being directly elected, its membership has been open to manipulation in the way that it is recruited. The Council has come, in fact, to reflect the dominance of the centre over the regions.”<sup>[15]</sup>

This may have been prompted by a concern over the assertive populism of Russian governors and of the directly elected members of the Council of the Federation in the early years of Yeltsin’s presidency. This populism presented a risk of latent or emerging nationalisms oriented in opposition to Russian unity. “Heading into the 1999-2000 campaign season, Russia’s governors appeared ready to capitalize on the power vacuum that had developed in the Kremlin. The political and economic crisis created a window of

opportunity for a well-organized regionally-based movement to take power in post-Yeltsin Russia.”[16] This assertiveness was likely perceived by Putin to be a challenge to the cohesion of the Russian Federation, leading him to view the regional governments as competition for the powers accrued by the central government under Yeltsin. The federal reforms undertaken under Putin might then have not necessarily been intended to convert Russia into a unitary state but to safeguard federalism and prevent further decentralization and devolution to a confederal state. “The ultimate result of Putin’s federal reforms, however, was the return to a de facto unitary state, killing Russian federalism in order to save it.”[17]

More than anything, the difficulty with applying consociationalism in Russia has been para-constitutional behavioural norms on the part of political elites both in the centre and on the periphery. “Para-constitutional behavioural norms predominate that, while not formally violating the letter of the constitution, undermine the spirit of constitutionalism.”[18] Consociationalism depends on a certain degree of constitutionalism present in the polity. In the case of the Russian Federation, this is because the 1993 Constitution enshrined the consociational mechanism of representation in its provisions pertaining to the Council of the Federation and the structure of asymmetrical federalism itself with the splitting of jurisdictions between the federal government and the regional governments. “...Para-constitutional behaviour gets things done, but is ultimately counter-productive because its reliance on bureaucratic managerialism undermines popular trust and promotes self-interested behaviour on the part of elites.”[19]

With consociational democracy having been undermined, the legitimacy of the federal government has been harmed and popular trust in these institutions, especially among the ethnic communities that once benefited from consociational democracy, has diminished. Until para-constitutional behaviour is limited, prospects for a return to consociationalism do not appear to be significant. However, as para-constitutional behaviour itself is a highly subjective and narrative-based concept, it is difficult to measure precisely how pervasive this behaviour is or to devise legal or structural mechanisms for its limitation and restraint.

Furthermore, there are challenges or risks inherent in the restoration of a consociational model of governance in the Russian Federation that need to be addressed in this analysis. “A constitutional arrangement may exclude the possibility of a homogenous executive, composed exclusively by persons belonging to the dominant/majority group. The right of peoples to self-determination requires representative government.”[20] While the possible exclusion of an ethnically homogenous executive is a given, even inherent scenario, in the case of a directly elected Council, the question of self-determination and representative government could lead to the long-term fragmentation of the Russian Federation and the disintegration of a unifying Russian civic identity. If ethnic minorities require directly elected representation in not only their regional legislatures and through their regional governors but also through regional representatives on the Council of the Federation, then this could contribute to the social construction of an ethnic nation with a right to full national self-determination – that is to say, ethnic minorities may come to press even further for an independent and sovereign state better capable of meeting the needs of the corresponding community.

It must be noted that the Russian Federation has a particular social and political situation that may avoid the risk of entrenching ethnic division. As was previously mentioned, the Russian Federation has officially recognized 170 ethnic groups within its territory. Article 65 of the 1993 Constitution also sets out a complex federal structure for the Russian state, including a series of republics, territories, regions and autonomous areas. With such officially recognized diversity, this reduces the potential for the consociational dialogue between the core and the periphery to be constructed as confrontational. The framing is not one of the Self pitted against a monolithic Other. Rather, the Constitution sets out mechanisms for vertical and horizontal accountability between different levels of government and different centres of power within the federal structure of the state. This is not to say that the diversity of the Russian Federation entirely eliminates the

potential for political competition between institutions and regions to emerge as social tension or even ethnic conflict. However, it does reduce this risk as there could never be a direct competition between the core and a particular community on the periphery – it would inevitably emerge in the Council of the Federation’s lack of cooperation on a given proposal that all or most of the communities on the periphery would be opposed to any unilateral initiative of the core.

Conversely, a small state might not possess such an advantage. For example, a small state like Estonia is not characterized by the same level of ethnic diversity as the Russian Federation. The principal ethnic minority in Estonia would be ethnic Russians. Whereas ethnic Russians make up 25.6% of Estonia’s population, the next most populous ethnic minorities in the country would be ethnic Ukrainians and ethnic Belarusians, who make up 2.1% and 1.2% of the population respectively.<sup>[21]</sup> It is clear that any consociational arrangement would pertain specifically to power-sharing with the sizeable ethnic Russian minority rather than affording the same opportunity to the minimal presence of the smaller ethnic Ukrainian and Belarusian minorities.

Given the regional consolidation of ethnic Russians particularly in Ida-Virumaa, it may seem to be reasonable to institute a consociational arrangement for Ida-Virumaa within the Estonian state. However, without any other similar consociational arrangement for another region or ethnic minority, there is a risk of intensifying ethnic division in Estonia for the short-term with an aim to reaching a long-term civic commons that may be unattainable. Thus, a consociational arrangement for the Estonian region of Ida-Virumaa could create the potential for a prevailing narrative whereby ethnic Estonians and ethnic Russians are directly opposed and in constant competition over the policymaking process. This would be tantamount to the social construction of a mutual ‘Othering’, deepening ethnic division within Estonia rather than reducing tensions.

With this Estonian comparison, it is evident that the Russian Federation possesses considerably greater potential for consociational democracy. Estonia would perhaps be better served by the model of governance that Lijphart identifies as ‘consensus democracy’. After all, Lijphart himself “...admits that consensus democracy is better at representing...”<sup>[22]</sup> The consolidated space of the Estonian state allows for this viability of consensus democracy, whereas the diffusion of the Russian Federation’s citizens across such sprawling territory seems to require a consociational arrangement simply by virtue of the disparity in needs and social consciousness of those living, for example, in Murmansk versus those living in Vladivostok.

Therefore, the Russian Federation finds itself presented with deeper challenges than simply restoring the direct election of regional governors. Indeed, the challenge experienced by the Russian Federation is not unlike that of the European Union or of Canada or any other federal or supranational entity in the early 21<sup>st</sup> century: the so-called ‘democratic deficit’. A democratic deficit insinuates that political decisions are taken ‘far’ from the level of the individual citizen or that the decision-making process lacks legitimacy due to an attendant lack of input from the *demos*. Therefore, any measures to be taken by Russian political elites to restore consociational democracy will need to take place within a body of other intensive reforms.

Restoring public confidence in the decision-making process will doubtless require finding means by which to prevent or discourage para-constitutional behaviour, while decentralizing political power from the presidency to other institutions and offices. A process of such considerable devolution and deconcentration of political power will also require considerable political will, which might only be generated through increasing social tensions. Such a political and social atmosphere in Russia could just as well contribute to securitizing narratives and the further centralization of power as it would bring about this shift back to consociational democracy.

As we have discussed here, the Russian Federation originally possessed a consociational democratic



framework under the terms of the 1993 Constitution. With the introduction of subsequent reforms and the centralization of political power under the Russian Federation, consociationalism has apparently been abandoned as the model of governance. However, as discussed, consociationalism still has the potential to defuse ethnic tensions and improve accountability between levels of government.

Nonetheless, the challenges and obstacles to the re-introduction of consociational democracy in Russia are considerable and the prospects are not promising. The diminishing public trust in political elites, exacerbated by para-constitutional behaviour, means that consociationalism alone may not be sufficient to restore the confidence of ethnic minorities in the Russian state as an institution that can meet the needs of all its communities. Furthermore, even if consociational democracy could be reintroduced in Russia, it is possible that consociationalism will only entrench ethnic division and provide regional elites an opportunity to demonstrate to their constituents the viability of full national self-determination.

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**Semi-Presidentialism as Power Sharing:  
Constitutional reform after the Arab Spring**

**Center for Constitutional Transitions at NYU Law  
International Institute for Democracy and Electoral Assistance**

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## Executive summary

The political history of many of the countries in the Middle East and North Africa (MENA) region over the last 60 years has been one of strong presidents and weak legislatures. The democratic revolutions of the Arab Spring created the opportunity to reconstitute the political system in a way that marks a fundamental break from the dictatorships of the recent past. This report assesses the contribution that the semi-presidential form of government can make to preventing the re-emergence of presidential dictatorship and consolidating democracy in the MENA region.

The failure of the constitutional systems in place before the Arab Spring can be attributed to a combination of three factors. First, presidential power was largely unlimited. The absence of constitutional limitations to presidential action allowed them to centralize and accumulate power. Second, the system of government did not allow the legislature to act as an effective check on presidential power. Constitutionally and legally, legislatures had few powers or mechanisms with which to oppose the president's exercise of political power. Third, many pre-Arab Spring countries were single-party states, in which much of the bureaucracy and many state institutions were dominated by the president's political allies and supporters. In these circumstances, it was easy for the president to execute his preferred policies and maintain a grip on political power, while it was difficult (if not impossible) to remove the president through ordinary political procedures.

Semi-presidential government, if carefully designed, can act as a mechanism to ensure that presidential dictatorship does not re-emerge. The relevant institutional feature of semi-presidentialism is a directly elected president who shares executive power with a prime minister and government accountable to an elected legislature. Semi-presidentialism can lower the risk that power will become centralized in a single person or office by dividing it between two office holders. However, a dual executive is only one element of the complex set of institutions and relationships through which real political power is exercised in semi-presidential systems. The design of such a system must be guided by three principles that respond directly to the constitutional failures in the MENA region: (1) limited presidential power, (2) an effective legislature that is capable of exercising oversight of the president and the government and (3) effective and meaningful power sharing between the prime minister and the president. The need for presidential leadership in times of crisis or parliamentary incapacity must be added to these three principles. Semi-presidentialism can serve as a hedge against the possibility of parliamentary chaos by trying to ensure that an executive leader (i.e. the president) can provide effective and decisive leadership in times of crisis or when the legislature and prime minister are otherwise incapable of action.



The report applies these principles to the design of a semi-presidential system for the post-Arab Spring MENA region under three headings: (1) the establishment of the semi-presidential system, (2) the day-to-day operation of the semi-presidential system and (3) the operation of the semi-presidential system during times of crisis, including the use of emergency powers and control of the armed and security forces.

## ***1 The establishment of the semi-presidential system***

How a specific semi-presidential system is designed and established has a significant effect on the extent to which the system can serve as a device for power sharing. Semi-presidential systems can be designed differently with respect to questions of government formation, government dismissal, powers to dissolve the legislature and presidential term limits/removal of the president. This report considers how different approaches to each of these elements of design can create varying incentives for the president and prime minister to cooperate in power-sharing structures, and thus promote the establishment of a stable and effective government.

### ***1.1 Government formation***

Several semi-presidential constitutions in the pre-Arab Spring era authorized the president to form a government without input from or consultation with the other political branches. As a result, the president was able to exert great influence over the country's policy agenda and direct the government's programme. Moreover, the president could ensure that the prime minister and cabinet members were ideologically aligned with the president or loyal to his political interests. Executive power sharing is not possible if the president, as one locus of executive power, dominates the appointment of the other locus of executive power. The principle of power sharing requires that opportunities for cooperation between the president and the legislature are built into the process of government formation. Further, limiting the president's influence over selecting and appointing the government increases the likelihood that the prime minister and government will be independent of the president and willing to check presidential overreaching. This increases opportunities for executive power sharing among different political parties.

### ***1.2 Government dismissal***

Power sharing in a semi-presidential system, and effective government more generally, requires that the prime minister can be dismissed when the government fails to perform. The procedures for dismissal must be carefully designed, however, to guard against abuse. There are two main design options for crafting the power of dismissal in semi-presidential systems: (1) president-parliamentary and (2) premier-presidential. The defining characteristic of each these two sub-forms of semi-presidentialism is the following:



- President-parliamentary: both the legislature and the president can dismiss the prime minister.
- Premier-presidential: only the legislature can dismiss the prime minister.

Since the power of dismissal defines the relationship between the president and prime minister, the president is comparatively weaker in premier-presidential regimes. If the president has the power to dismiss the prime minister, the president can become overly strong relative to the prime minister, and the prime minister may become the president's puppet. However, if the president does not have this power, or if the power is sufficiently moderated, the prime minister and president can become coequal executives, thus increasing the chances of a successful power-sharing system. Because the premier-presidential structure provides a stronger check on presidential power, it guards against autocracy, enhances power sharing and serves the normative principle of limiting presidential power better than its counterpart. Therefore the premier-presidential design option represents the better choice for the MENA region.

### ***1.3 Presidential dissolution of the legislature***

The president's power to dissolve the legislature is relevant to the balance of power between the prime minister and the president. Since the prime minister and the government in a semi-presidential system govern only with the confidence of the legislature, the government's term of office comes to a natural end when the legislature's term expires. The president's power to dissolve the legislature before the natural end of its term, therefore, carries with it (by necessary implication) the power to dismiss the government. It is a drastic power with far-reaching implications, but it is necessary in parliamentary and semi-presidential systems—especially where power sharing is an objective—because it provides a deadlock-breaking mechanism. Where power sharing fails as a result of a deadlocked or fractious parliament, the power to dissolve the legislature offers an opportunity to call for fresh elections and begin the power-sharing experiment again.

This report notes the distinction between two types of dissolution: (1) mandatory dissolution, in which the president must dissolve the legislature or the legislature is automatically dissolved under specific circumstances and (2) discretionary dissolution, in which the president may decide to dissolve the legislature.

Discretionary dissolution of the legislature, however, carries opportunities for abuse. For example, the president can sweep away political opposition in the legislature by dissolving it. The power thus needs to be subject to strict controls regarding: the conditions under which it can be used (substantive triggers), the frequency with which it can be used and clear rules for when it may not be used (temporal restrictions), and clear procedures through which it must be used (procedural restrictions).



## ***1.4 Presidential term limits and removal of the president***

Limiting the number of terms a president can serve is a simple but effective way of curbing opportunities for a president to centralize power. Term limits also create opportunities for presidential candidates to compete meaningfully for the presidency if an incumbent president must leave office after a set number of terms. Provision must also be made for removing a president before his or her term of office expires. A realistic threat of removal, which has been absent in the MENA region, may discourage presidents from acting beyond the scope of the law for personal enrichment or political gain.

## ***2 The day-to-day operation of semi-presidentialism***

This section considers design options that serve the four principles of design in the daily operation of the government: the division of control over domestic and foreign policy, decree authority, the ability to appoint officials to the civil services and bureaucracy, and chairmanship of the cabinet. It also discusses mutual checks and balances between presidential and prime ministerial powers, such as countersignature requirements and veto powers. It is important to consider the distribution of these powers in light of the framework under which the semi-presidential system is established, since the extent to which this framework can uphold the four principles of constitutional democracy for the MENA region will be influenced by the powers that the president and prime minister are able to exercise in practice.

### ***2.1 Responsibility for domestic and foreign policy***

The three models of how the president and prime minister can share responsibility for domestic and foreign policy are: (1) the principal/agent model, (2) the figurehead/principal model and (3) the arbiter/manager model. The arbiter/manager model best upholds the four principles of design for post-Arab Spring semi-presidentialism. According to this model, the prime minister should take the lead on domestic matters, while the president plays an arbitration role and intervenes only where necessary. Domestic matters include important areas such as macro-economic policy, but it is perhaps easier to define the prime minister's general responsibility in residual terms: the president exercises specified powers as commander-in-chief of the armed forces and is allocated specified responsibilities in functional areas relating to foreign affairs, defence and national security, while the prime minister retains responsibility and authority over all non-specified or residual matters of state policy. Affording the president a role in the country's foreign affairs and in representing the nation abroad is consistent with the principle that the president is a symbol of the nation. This role is relevant to the extent to which the president is able to act as an autonomous crisis manager if the country or legislature is divided.

## ***2.2 Decree powers***

If either the president or the prime minister acting alone has the power to issue decrees that become law immediately and do not require legislative approval to remain in effect, the balance of power can be upset. Presidential decree powers pose a particular dilemma, because their exercise allows a president to sidestep the legislature and the legislative process and pave the path to autocracy. Yet a presidential decree power can be necessary at times: it allows for quick, efficient policymaking, which may assist in the transitional period in the MENA region, where sweeping economic reform may be needed sooner rather than later. To maximize the power-sharing relationship, semi-presidential constitutions must steer between two poles: giving the president too much decree power, which carries risks of presidential consolidation and autocracy; and giving the president too little power, which removes an effective and useful tool from the policy-making process. An effective mechanism to preserve power sharing and limit the excessive use of decree powers is to expressly define these powers in the constitution and impose the procedural safeguard of ‘countersignature’, whereby the prime minister must approve the president’s decrees before they take effect. If the prime minister is empowered to exercise decree powers, these too should be subject to countersignature by the president.


## ***2.3 Appointment of bureaucratic officials***

In semi-presidential systems, considerable attention is given to the appointments processes for cabinet members. By contrast, the distribution of powers to appoint and dismiss lower-level government officials—such as heads or directors general of government departments and senior officials—is often overlooked, even though it is crucial to the functioning of any successful power-sharing regime. Domination of these bureaucratic appointments, either by the president or the prime minister, can quickly lead to a politically ‘captured’ bureaucracy, reinstating a single-party state and undermining power sharing.

A constitution that identifies the officials the president is empowered to appoint (with the prime minister holding residual power to appoint and dismiss all other officials), alongside the requirement of prime ministerial countersignature for the president’s appointments, is most likely to encourage power sharing.

## ***2.4 Chairmanship of the cabinet***

A presidential right to chair cabinet meetings poses greater risks to the prospects of power sharing when the president also holds broad dismissal and decree powers. In the president-parliamentary subtype of semi-presidentialism, for example, a presidential right to chair the cabinet and direct state policy is augmented by the ability to dismiss the prime minister and cabinet. By contrast, in premier-presidential regimes (in which



the president has no power to dismiss the prime minister or cabinet), granting the president a right to chair cabinet meetings can enhance power sharing and encourage presidential 'buy-in' to policy decisions. During periods of cohabitation in particular, when presiding over cabinet meetings, the president can influence the government's agenda and make clear his or her approval or disapproval of policy choices to the cabinet. This, in turn, may foster negotiation within the dual executive and the political interests they represent. In the MENA region, if a premier-presidential system is adopted in which the president has neither powers to dismiss the government nor broad decree powers, a presidential power to chair cabinet meetings may foster power sharing and interparty cooperation and negotiation without creating opportunities for presidential domination of the policymaking process or the expansion of presidential power.

## **2.5 Veto powers**

A presidential right to refuse to promulgate or to veto legislation duly passed by the legislature acts as a counterbalance to the prime minister's power to set policy and initiate legislation. When designed correctly, therefore, a presidential veto can encourage cooperation and negotiation between the parties or interests represented by the president and the prime minister. The veto acts as a bargaining chip in the hands of the president, ensuring that he or she has some leverage over the prime minister and the government: if the prime minister refuses to negotiate or consider the president's preferences in forming policy or initiating legislation, the president may choose to veto the prime minister's legislative efforts.

However, where a veto power operates such that a president can easily prevent the legislature from making a law, a young legislature may be stunted in its development and prevented from growing into an institution capable of fulfilling legislative and oversight roles. A veto power must strike a balance between encouraging power sharing and avoiding the risks of an overly powerful president or prime minister. The normative principles that must be kept in mind when thinking about a veto power for the MENA region are therefore: (1) power sharing and (2) the need to allow the legislature to function as the primary generator of legislation and to develop into a meaningful political institution.

There are two questions relevant to striking this balance in designing a veto power. First, can the president veto legislation in its entirety only ('straight up-or-down' veto), or can the president also veto discrete provisions within the legislation ('line-item' veto)? Further, can the president propose specific amendments to vetoed legislation, which the legislature is bound to consider ('amendatory veto')?

Second, what legislative majorities are required for the legislature to override the president's veto? Either an ordinary majority (or the same majority the legislation was originally required to meet) or an elevated supermajority can be required.

The combination of the answers to these two questions will yield different levels of presidential power vis-à-vis the legislature and prime minister. This is relevant to the principles of power sharing which demand that the legislature function as the primary generator of legislation.

### ***3 Operation of the semi-presidential system during times of crisis***

The experiences of countries in the MENA region serve as a stark warning of the abuses that can result from a president's unrestrained use of emergency powers and control over the security services (i.e. police, military, intelligence). Presidents in the MENA region in particular have historically declared states of emergency in order to rule by decree, to target the political opposition and to consolidate executive power. The emergency powers that the state of emergency has afforded them have led to violations of human rights, the alteration of judicial systems and significant increases in the role of internal security apparatuses in regulating society.

In order to avoid the presidential autocracy of the pre-Arab Spring era, new constitutions in the MENA region must impose real limitations on the president's ability to declare a state of emergency, on the scope of executive lawmaking during a state of emergency, and on the president's capacity to assume unilateral command of the security sector during a state of emergency and to target political opponents or partners in a power-sharing government. Mechanisms of legislative oversight should be contemplated, such as legislative confirmation of the declaration of a state of emergency. Requirements of co-decision between the president and prime minister can help further limit the president's emergency powers. These imperatives apply to both the declaration and regulation of the state of emergency. Whether the president or the prime minister is empowered to declare a state of emergency or exercise emergency powers, it is important to constrain and ensure oversight of those powers.

Similar considerations apply to the power to control the internal security forces and the military. Where a president is able to exercise exclusive command over the military, police and intelligence services, or to 'capture' these security services, he or she may be able to deploy them to suppress political opposition and consolidate power even without declaring a state of emergency. The principle of limited presidential power is important to questions of whether the president or prime minister appoints the ministers for defence and security, whether the president or prime minister appoints senior military and security officials, the extent of the president's powers as commander-in-chief of the armed forces and the role of supporting institutions such as a national defence council.





# Recommendations

## *1 Appointment of the prime minister*

The principle of power sharing supports an appointments process that encourages the legislature and the president to cooperate.

- The president should appoint the prime minister with the consent of the legislature.
- If the president and the legislature cannot agree on the appointment of the prime minister, the president should appoint the candidate who is most likely to win the consent of the legislature.
- In the event that the legislature does not confirm this candidate as prime minister, the legislature should appoint the prime minister.

## *2 Appointment of other cabinet members*

The power to appoint cabinet ministers affects the balance of power between the branches as well as the likelihood of power sharing in practice, and should be structured to ensure that the president cannot undermine the prime minister's cabinet.

- Primary recommendation: The prime minister appoints all cabinet members, with no input from the president.
- Alternative recommendation: The president and prime minister appoint ministers in functional areas related to the president's symbolic and crisis-management roles using co-decision procedures. These appointments should in any case be subject to subsequent legislative approval.

## *3 Dismissal of the prime minister and the cabinet*

- The legislature should have the exclusive power to dismiss the prime minister and the entire government through a constructive vote of no confidence; it must select and approve a replacement prime minister before the dismissal of the incumbent takes effect.
- The legislature should be empowered to dismiss individual cabinet members, other than the prime minister, through an ordinary (i.e. not constructive) vote of no confidence.
- The prime minister should be able to dismiss individual members of his or her cabinet. Replacement of these members should follow the existing appointment methods.

## ***4 Dissolution of the legislature***

### ***Discretionary dissolution***

The president's discretion to dissolve the legislature is triggered only in specific circumstances that must be specified in the constitution, including:

- failure to pass a budget law after two successive votes; and
- dismissal of the government provided that the constitution does not authorize the president to unilaterally appoint the prime minister or government.

Discretionary dissolution must be subject to limitations:

- no dissolution during a state of emergency;
- no dissolution after impeachment or removal proceedings against the president have been initiated;
- no dissolution within a set period (at least six months) after the election of the legislature;
- dissolution is allowed only once within a 12-month period; and
- no successive dissolution for the same reason.

### ***Mandatory dissolution***

- The president must dissolve the legislature, or the legislature is automatically dissolved by operation of law, if it is unable to approve a prime minister and government within a set period from the date of legislative elections.
- No mandatory dissolution shall take place during a state of emergency.

### ***Procedural restrictions***

- Dissolution is to be followed by parliamentary elections within 40 to 50 days of dissolution.
- If elections are not held within that period, the dissolved legislature is automatically reinstated.
- No changes to the electoral law or the constitution may be made while the legislature is dissolved.

## ***5 Presidential term limits***

- An incumbent president can be re-elected to serve a successive term of office. A person may serve a maximum of two terms as president, whether those terms are successive or not.
- The presidential term of office should be limited to four or five years.



## ***6 Removal/impeachment of the president***

Whether removal or impeachment proceedings are chosen, the same set of principles applies:

- The president must not be able to control or determine the composition of the institution that decides whether to impeach or remove the president.
- The process must involve no more than two or three steps, and the decision thresholds at each point must strike a balance between insulating the president from politically motivated removal attempts and allowing effective removal where necessary.
- The president must face impeachment for ordinary crimes committed while in office.

## ***7 Domestic policy***

In line with the arbiter/manager model, the prime minister should take the lead on domestic matters, while the president exercises an arbitration role.

- The president participates in setting domestic policy in specific functional areas related to foreign affairs, defence and national security.
- The president's policy-making powers in these specific functional areas are exercised in consultation with the prime minister through a co-decision mechanism such as countersignature.
- The prime minister is responsible for domestic policy in all residual functional areas. This power is exercised in the cabinet, after consultation with its members.

## ***8 Foreign affairs***

The president represents the nation on the international stage and receives foreign dignitaries and ambassadors. The president should thus act in consultation with the prime minister in formulating foreign policy with respect to these symbolic functional areas.

- Clearly distinguish between foreign affairs powers with a policy-making dimension and those with a symbolic dimension. Empower the president to exercise enumerated symbolic powers and to perform symbolic functions, leaving residual foreign affairs powers (including policy-making powers) to the prime minister and government.
- Require the joint appointment of ambassadors by the prime minister and president.
- Permit the president to negotiate and sign treaties, but require legislative ratification before a treaty binds the state or has domestic effect.

- Designate the president as the representative of the state at international meetings and organizations.

### ***9 Decree power***

- Expressly enumerate the areas in which both the president and the prime minister can issue decrees.
- Require the prime minister's countersignature on all presidential decrees.
- Require the president's countersignature on all prime ministerial regulations.
- Prohibit changes to the electoral law through presidential or prime ministerial decrees while the legislature is dissolved.

### ***10 Appointment of government officials***

- The prime minister should make the majority of appointments. The constitution should expressly define which government officials the president can appoint and dismiss, and give the prime minister the residual power to appoint and dismiss all other government officials.
- Where either the prime minister or the president is authorized to make specific appointments and dismissals, the countersignature of the other should be required.
- Appointments to the security services and military should require co-decision in the form of countersignature, as well as legislative approval.

### ***11 Chairmanship of the cabinet***

- If the president has strong decree powers and can dismiss the prime minister, expressly give the prime minister the exclusive power to chair cabinet meetings.
- If the president lacks strong decree powers and is not empowered to dismiss the prime minister, expressly give the president the power to chair cabinet meetings.

### ***12 Veto power***

- The president should have the power to veto discrete provisions within a draft law (line-item veto) and the power to propose amendments to the draft law, which the legislature cannot refuse to debate (amendatory veto).
- The legislature should be able to override the president's veto or reject the president's proposed amendments by the same majority with which the constitution required the original draft law to be passed.



## ***13 Security and defence powers***

### ***Appointment of defence and security officials***

Mechanisms for appointing defence and security officials should strive to ensure the maximum degree of power sharing and reduce the risk of presidential capture of the defence and security forces.

#### ***Principal recommendations***

- The prime minister should appoint the entire cabinet. The president should not participate in selecting the cabinet ministers responsible for foreign affairs, defence or internal security.
- The prime minister should make appointments to senior positions in the military, security and intelligence services, with the countersignature of the relevant cabinet minister.

#### ***Alternative recommendations***

- The presidential power to appoint cabinet members responsible for defence, security and foreign affairs must be exercised jointly with the prime minister through co-decision procedures (such as countersignature, appointment by the president on proposal by the government, or appointment by the cabinet as chaired by the president). The constitution must set out unambiguous co-decision procedures that clearly state the role of the president and prime minister and set out the decision process. These appointments should be subject to subsequent approval by a majority vote of one or both chambers of the legislature.
- The presidential power to appoint officials to senior positions in the military, security and intelligence services must be exercised jointly with the prime minister through co-decision procedures (such as countersignature, appointment by the president on proposal by the government, or appointment by the cabinet as chaired by the president), or the president's appointments should be subject to subsequent approval by a majority vote of one or both chambers of the legislature.

#### ***Defence and security powers***

- The constitution should designate the president as commander-in-chief of the armed forces. The commander-in-chief should not have power to determine security or defence policy or set armed forces protocol or doctrine; these powers should instead remain within the purview of the cabinet and the armed forces bureaucracy.
- Declarations of war or a state of martial law should be made by the president as commander-in-chief, subject to legislative approval. The deployment of the armed forces within or outside the nation's territory, upon the declaration of war or state of

martial law, must be proposed by the president as commander-in-chief and authorized by the legislature.

- The deployment of the armed forces beyond the territory of the nation without a formal declaration of war may be authorized by the government, or by co-decision of the president and prime minister, for specific purposes and for a limited time. The legislature must be immediately informed of deployment and, after a specified period of time once it has been informed of the deployment of the armed forces (for example 48 to 72 hours), the legislature must declare war. Otherwise the armed forces must be withdrawn.
- A National Defence Council can be created to determine security and defence policy. Its function and terms of reference must be clearly stipulated in the constitution. As a power-sharing mechanism, it must represent the government, the legislature and ideally opposition parties as well. The president can act as the chairperson of the Council.


### ***Accountability***

- Immunity from criminal prosecution for members of the security forces and the responsible ministers should be eliminated. At most, the president should be afforded immunity from criminal prosecution only for the duration of his or her term of office.
- The constitution should create independently accountable oversight mechanisms, such as inspectors general, to monitor the security forces.

## ***14 Emergency powers***

### ***Limitations on the initiation of a state of emergency***

- Constitutions should place one or a combination of the following temporal limits on the state of emergency:
  - an absolute limit on the duration of the state of emergency (for example, six months);
  - a requirement that the president submit the declaration of the state of emergency to the legislature for approval within a short period (for example, 48 hours);
  - a limit on the length of a state of emergency as declared by the president without legislative confirmation (for example, seven days);
  - a limit on the length of the period for which the legislature can extend a state of emergency as declared by the president (for example, 30 days); and/or
  - a requirement that legislative renewal of the state of emergency after each 30-day period requires a two-thirds majority of the members of the legislature.
- The president should be able to declare emergencies only with the formal consultation of the government and/or countersignature by the prime minister.

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- Substantive triggering circumstances should be enumerated. These can include, for example:
    - actual or imminent aggression by foreign forces;
    - serious threat to (or disturbance of) the democratic constitutional order;
    - interruption of the functioning of public authorities;
    - where the fulfilment of international obligations is impeded; or
    - natural disaster.

### ***Substantive limitations during a state of emergency***

- Dissolution of the legislature during the state of emergency must be prohibited.
- The alteration of laws affecting the powers of the president or the prime minister, and the alteration of electoral laws and the constitution itself, must be prohibited.
- Emergency decrees must not derogate from fundamental rights, including those designated by the International Covenant on Civil and Political Rights (ICCPR) as non-derogable.
- Emergency decrees should be subject to parliamentary approval, or at least be confirmed by the legislature within a certain time period or lose the force of law.


## Part 1: Introduction

The revolutions of the Arab Spring toppled autocratic governments in Tunisia, Libya and Egypt, and created the opportunity to reconstitute political systems in these countries in a way that marks a fundamental break from the dictatorships of the recent past. The prevalence of presidential dictatorships in the MENA region before the Arab Spring can be attributed to the combination of three failures of the constitutional systems: (1) the absence of constitutional limits on the president's powers; (2) a legislature that is both institutionally weak and, as a result of the poor representation of minority and opposition parties, unable to offer any real political opposition to the president or mobilize the legislature to act as a check against the president and (3) a single-party state in which important and influential positions in the government, administration and bureaucracy are filled from the ranks of a single party that is loyal to the president.

A critical element of the transition from autocracy to democracy is the adoption of new constitutions that are capable of preventing the abuses of the past and establishing systems of government that are consistent with the demands of the Arab Spring. How power is distributed between the executive and legislative branches, as well as how it is structured within the executive branch, will significantly influence the capacity of a new constitutional order to guard against the three constitutional failures described above. Countries can choose from a range of constitutional mechanisms and political structures to establish constitutional democracy and representative, responsive and limited government. This report focuses on the 'semi-presidential' form of government. The primary feature of semi-presidentialism is a dual executive: a directly elected president shares executive power with a prime minister and government that enjoys the support or 'confidence' of an elected, representative legislature. This essential feature of semi-presidential government lends itself to power sharing between different political parties, and offers some promise for preventing a return to presidential autocracy in the post-Arab Spring countries.

However, a dual executive is only one element of the complex set of institutions and relationships through which real political power is exercised in semi-presidential systems. On its own, the existence of a dual executive will not immunize a semi-presidential government against the risk of executive domination. Indeed, the presidential dictatorships of both Egypt and Tunisia operated through semi-presidential structures for at least some of their existence. This report investigates how semi-presidentialism can be designed to achieve three objectives that respond directly to the constitutional failures of the MENA region: (1) limited presidential power, (2) an effective legislature that is capable of exercising oversight of the president and the government and (3) effective and meaningful power sharing between the prime minister and the president. A fourth principle of government, not directly related to the





constitutional failures of the pre-Arab Spring era, requires attention also: (4) the need for effective presidential leadership in times of crisis or parliamentary incapacity.

Semi-presidentialism can address fears that the weak and undeveloped party systems in the region, and the legacy of autocratic and oppressive one-party rule, may lead to fractious legislatures from which neither clear policy mandates nor stable governments can emerge. This type of system can serve as a hedge against the possibility of parliamentary chaos by trying to ensure that an executive leader (i.e. the president) can provide effective and decisive leadership in times of crisis or when the legislature and prime minister are otherwise incapable of action. Part 2 of this report examines more closely the three constitutional failures in pre-Arab Spring MENA. Part 3 describes the four principles of constitutional design set out above. In Part 4, the report investigates how the institutions, rules and structures of a semi-presidential system should be designed to best uphold these principles of constitutional design in the region.

The draft Constitution of the Republic of Tunisia (June 2013) and the 2012 Egyptian Constitution will be analysed in this context. Note in this regard that the 2012 Egyptian Constitution was suspended on 8 July 2013. A 10-member technical committee, composed of six judges, one professor and three retired academics, proposed changes to the 2012 Constitution. These proposals were published on 20 August 2013. On 1 September 2013 a presidential decree called for the establishment of a 50-member committee to prepare a complete draft Constitution. At the time of writing (November 2013), the 50-member committee was in the process of revising Egypt's Constitution.

## Part 2: Three constitutional failures

Semi-presidentialism can lower the risk that the three failures of constitutional democracy that have plagued the region will recur. We will consider these failures in detail.

### 2.1 *A strong president*

Presidential dictatorship emerged in the MENA region out of constitutional systems that imposed no significant limits or restraints on the president's exercise of executive power. A large body of research supports the concern that a presidential form of government, with a single site of executive power, is more susceptible to democratic authoritarianism than either semi-presidential or parliamentary systems. The personalization of power in the president is a function of (1) his or her role as both the ceremonial head of state and chief executive and (2) the strong democratic mandate that a president claims through popular election. The president carries an image of the state and the nation that other political office holders struggle to match. These symbolic trappings of a president's democratic mandate are reinforced by the lack of any need for a president, once in office, to concern him- or herself with the opposition party. By contrast, in parliamentary or semi-presidential systems, if a prime minister's party enjoys a tenuous electoral majority he or she must work to ensure that a majority of members of parliament supports the government. A president need not make such overtures, however slim or fragile the electoral majority. There are no institutional mechanisms that compel presidents to seek conciliation or compromise, which encourages presidents to centralize rather than share executive power. The president is ultimately accountable to no one other than the voters, at elections every handful of years.<sup>1</sup>

Only the United States and Chile have enjoyed long periods of democratic stability under presidents, and even Chile's government collapsed in the 1970s. However, the conditions that support presidential democracy in the United States—a preponderance of centrist voters, right- and left-wing candidates divergent only within a broader moderate consensus and the electoral insignificance of extremists—are unlikely to be present in post-authoritarian contexts in which extremist political parties tend to be well organized and have considerable electoral appeal (for example, the electoral dominance of the Muslim Brotherhood in Egypt and Ennahda in Tunisia).<sup>2</sup>

The failure of a constitution to impose limits on presidential power increases the risk that the president will eliminate political opposition, undermine institutional obstacles to executive action and gradually consolidate power in the office of the president. While a constitutionally strong president will not necessarily become a presidential dictator, a number of constitutional features increase this risk.



### 2.1.1 *Presidential longevity*

Presidents in the MENA region have tended to assume the office for extended periods of time, unhindered by constitutional rules. Tunisia, Libya and Egypt were all governed as constitutional monarchies until well into the second half of the 20<sup>th</sup> century. Their respective monarchs, the Bey in Tunisia, the Sultan and later the King in Egypt, and the King in Libya, ruled as heads of state and exercised executive power until death or abdication. The pattern continued into the republican era in each case; chief executives were not subject to limitations on the number of terms they could serve or removal or recall by the legislature.

In Egypt, for example, the 1971 Constitution set the presidential term of office at six years and, as originally drafted, allowed the President to be re-elected once for a total of two terms of office (article 77). In 1980, this article was amended to remove the term limit, allowing Presidents to serve an unlimited number of successive terms. Mubarak was serving his fifth successive term when he was ousted in 2011. In Tunisia, the country's first post-independence leader, Habib Bourguiba, took office in 1957. Article 40 of the 1959 Constitution initially provided that the President would be elected for five years and could not 'renew his period of office [or 'shall not be eligible for re-election'] more than three times consecutively'. However, in 1975 the Tunisian National Assembly amended this article (renumbering it as article 39) to declare Bourguiba 'President for life'. He remained President until 1987, when Tunisia's other pre-Arab Spring president, Zine El Abidine Ben Ali, invoked a section of the 1959 Constitution to have Bourguiba declared incompetent and removed. Although Ben Ali introduced an amendment to article 39 in 1988 to abolish the for-life presidency and limit re-election to no more than two times consecutively, the presidential term limit was removed for a second time in 2002. Ben Ali held onto power for two decades before he fled the country at the height of the Arab Spring. Libya's arrangements for executive power were even less restrictive. Muammar Qaddafi seized power in a 1969 coup and set about dismantling the state. With no institutional structures within which anyone other than Qaddafi could lead the country, such as elections or a competitive party system, he ruled Libya unchallenged for 40 years. Qaddafi introduced the 'Jamahiriya' in 1977, a system of direct democracy constituted by a hierarchy of 'basic people's congresses' at various levels, which replaced formal electoral government.<sup>3</sup>

In Syria, Hafiz al-Asad became President in 1971 after building up personal power as minister of defence from 1966. The 1973 Constitution ensured that the presidency remained in the hands of a partisan political elite by requiring the legislature to nominate a candidate for the post of President on the recommendation of the regional leadership of the Ba'ath Arab Socialist Party. The candidate for President was to be presented to the people for approval in a referendum (article 84(1)). Article 85 provided that the President would serve a term of seven years, but the 1973 Constitution placed

no limit on the number of terms. Reforms to the Constitution in 2012 removed the Ba'ath monopoly on presidential candidature, meaning that opposition parties were legally able to present candidates for the presidency (article 85). In addition, article 88 of the Constitution as amended in 2012 provides that no person shall serve more than two seven-year terms as president. However, article 155 provides that the presidential term limits contained in article 88 shall come into effect only upon the next presidential election, which is scheduled for 2014. This means that President Bashar al-Asad may serve another two seven-year terms as President, remaining in office until 2027.<sup>4</sup>


In Iraq, the British-drafted 1925 Constitution was abrogated and the monarchy abolished. Constitutional documents between 1958 and 2003 contained no effective limits on executive power, and the 1970 'interim' Constitution, in force until 2003, allowed the Revolutionary Command Council (RCC) to elect the President of the country from among its number (article 38(a)). The Constitution provided that the RCC would select its members from among the regional leadership of the Ba'ath Arab Socialist Party (article 38(c)). Saddam Hussein came to prominence after a palace coup in 1979, and was constitutionally able (with the support of a vast patronage network supported by oil revenue) to remain in power until 2003.<sup>5</sup>

Historically, presidents in the MENA region have not faced a credible threat of impeachment or removal by the legislature. While the 1971 Egyptian Constitution provided that the President could face impeachment and trial by an ad hoc court, 'the composition, prosecution, procedure and penalty' of such an impeachment was left to ordinary law (article 85). A legislature packed with party members loyal to the President, alongside the President's own powers to dissolve the legislature (see section 2.2.1 below), allowed the President to influence even the procedures for presidential impeachment. The Tunisian Constitution of 1959 made no provision for the removal of the President.

The absence of term limits allows a president to consolidate control over state institutions, expand the power of the executive, and use state resources to punish rivals and suppress opposition. Only death or voluntary abdication could realistically remove a president from office in the pre-Arab Spring era. Even disability carries little weight as a bar to presidential service, as President Jalal Talabani of Iraq, President Abdelaziz Bouteflika of Algeria and Hosni Mubarak (while still President of Egypt) all spent significant time abroad receiving medical treatment.<sup>6</sup>

### **2.1.2 Emergency powers**

Expansive emergency powers and vague rules for their exercise by the president create opportunities for a president to rule without input from, or subject to the oversight of, the legislature or judiciary. Former Egyptian President Hosni Mubarak's use of



emergency powers is an example of how a president can use such powers to avoid ordinary legal constraints to consolidate state power and suppress political and social opposition to the regime.<sup>7</sup>

Following Anwar Sadat's assassination in 1981, Mubarak stepped from the vice presidency to the presidency and immediately introduced a state of emergency under article 148 of the 1971 Constitution (amended in 2007), which provided:

The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law.

Such proclamation must be submitted to the People's Assembly within the following fifteen days so that the Assembly may take a decision thereon. In case of the dissolution of the People's Assembly, the matter shall be submitted to the new Assembly at its first meeting. In all cases, the proclamation of the state of emergency shall be for a limited period, which may not be extended unless by approval of the Assembly.

Article 148 required only that the President declare an emergency 'in the manner prescribed by law' and subject to confirmation by the legislature. The Constitution also provided that the legislature could extend the state of emergency, but did not limit the number of extensions or prescribe the duration of each period of emergency. The 'law' referred to in article 148 was the 1958 Emergency Law, which granted the President vast powers. For example, the Emergency Law exempted the President from the provisions of the Criminal Procedure Code, which required warrants for search and arrest and imposed limits on post-arrest detention. The result was routine mass arrests and lengthy detentions without trial, restrictions of detained persons' access to lawyers (or even communication), and torture. Article 108 of the 1971 Constitution also conferred lawmaking powers on the President 'under exceptional circumstances' and upon delegation by the legislature. Since many of the rights in the Bill of Rights were expressly subject to 'the limits of the law', this allowed the President to legally determine the content of rights, unburden his regime from the need to respect political rights, and reinforce executive dictatorship. All these powers were exercised with little parliamentary oversight: although the legislature was required to confirm a presidential decree-law within 15 days, the Egyptian legislature never failed to do so. In addition, article 147 of the 1971 Constitution empowered the president to make decree-laws whenever the legislature was not in session. The President only needed to wait for the annual recess to pass laws that, in the President's opinion, could not wait for the prorogation of the legislature.<sup>8</sup>


The 1958 Emergency Law also authorized the creation of State Security Courts. In 1981 Mubarak issued a presidential decree exercising this power to refer crimes relating

to state security, public incitement, public demonstration and public gatherings to these courts. Further, the 1958 Emergency Law allowed the President, by decree, to seat military judges in place of civilian judges in the State Security Courts to preside over specific cases, and to decide whether special rules of procedure (including trial in secret and restrictions of ordinary fair trial rights) were to apply in specific cases. Decisions of these courts could not be appealed, except to the President himself. Yet there were some checks on the President's authority. In 1985, the Supreme Constitutional Court (SCC) of Egypt assumed jurisdiction to review emergency laws enacted under article 147 and, in reviewing a particular emergency decree issued by the President, held that no emergency circumstances existed to justify recourse to article 147 and struck down the President's decree.<sup>9</sup>

### ***2.1.3 Executive control of the legislature and legislative process***

While states of emergency often extend the reach of the president's power or allow the president to assume decree powers, constitutions in the MENA region also have allowed legislatures to delegate lawmaking power to the president in non-emergency circumstances. Under Tunisia's 1959 Constitution, the legislature could authorize the President to issue 'decree-laws' for a set period of time and for a specific purpose through an ordinary majority (article 28). Moreover, presidents in the region have had the capacity to manipulate the legislative process. The key to sidelining the legislature as an institution of executive oversight and an engine of legislative action was packing the legislature with members of a party loyal to the president. In pre-Arab Spring Egypt, electoral rules and procedures protected Mubarak's National Democratic Party (NDP) from electoral competition by banning religious political parties. In addition, an electoral threshold of 8 per cent made it difficult for rival parties that were allowed to stand in elections to secure legislative representation. After the SCC overturned this latter restriction as unconstitutional, Mubarak ensured his electoral dominance by relying on the state machinery to intimidate and undermine opposition political parties before election day, cracking down on political activity, association and public gatherings. In Tunisia, similarly, a repressive regime and abuse of security laws made it difficult for opposition parties to organize even if electoral laws formally allowed political competition.<sup>10</sup>

If a large majority loyal to the president dominates the legislature, it undermines the protection provided by the constitutional entrenchment of limits on presidential power and constitutional amendment procedures requiring supermajorities. Presidents Sadat in Egypt and Bourguiba in Tunisia proposed constitutional amendments removing presidential term limits, and Mubarak proposed constitutional amendments in 2005 (changes to the electoral system to allow direct popular election of the president) and 2007 (changes including reducing judicial oversight of elections, bypassing human rights protections and limiting any political activity based on religious affiliations). In 1997,



the Tunisian Constitution was amended to allow the President to submit Constitutional amendments to referendum, circumventing the legislature altogether. In 2002, Tunisian President Ben Ali used this provision to secure popular support for eliminating presidential term limits.<sup>11</sup>

## ***2.2 A weak legislature incapable of checking executive power***

The legislatures of the pre-Arab Spring era were notoriously weak, and aside from a few isolated examples largely acquiesced to the will of the executive. Constitutional rules allowed legislatures to pass laws, but prevented them from scrutinizing executive conduct or restricting executive power through three devices: the president's power to dissolve the legislature, limitations on legislative initiative, and strict rules governing the formation and dismissal of government by the legislature.<sup>12</sup>

### ***2.2.1 President's dissolution powers***

Empowering the president to dissolve the legislature has a chilling effect on the legislature's activities, even if the power is never used. The mere threat of dissolution enables the president to coerce the legislature and government to act in specific ways. Moreover, dissolution of the legislature may endow the president with legislative and decree powers until a new legislature is elected. During this period, presidential decrees amending electoral laws, and/or the shifting tides of electoral preference, may result in the election of a new legislature that is more supportive of the president.

The power to dissolve the legislature and call for new elections has allowed MENA leaders to entrench executive authority and undermine the institutions of representative government. In Egypt in 1986–87, Mubarak redrafted the electoral law by exercising decree powers under the state of emergency that was still in place. He promptly dissolved the legislature and called for new elections in terms of the new law. Dissolution powers complement emergency powers and executive lawmaking powers as one of the mechanisms through which the executive can overcome the principle of the separation of powers to exercise legislative power. Leaders in Jordan and Kuwait have abused dissolution and decree powers in similar ways, ensuring that legislatures present little meaningful opposition to autocratic leadership. In Jordan, King Abdallah dissolved the legislature after its term ended in June 2001, ruling by decree for two years and passing over 80 laws by decree. In November 2009, King Abdallah again dissolved the legislature, this time two years before the expiry of its term, and instructed the cabinet to adopt a new electoral law to govern the election of the legislature in November 2010. This law increased the government's ability to manipulate the outcome of elections. In Kuwait, the government responded to an increasingly assertive legislature in the 1970s by dissolving it and ruling by decree between 1976 and 1981, and again between 1986

and 1992. After another dissolution in 1999, the government issued a series of decrees that amended voting rights and procedures.<sup>13</sup>


### ***2.2.2 Legislative initiative***

In executive-dominated and autocratic regimes, holding parliamentary elections can become a mechanism of pacifying opposition forces by offering them a chance to participate in the legislature while ensuring that the legislature has little real political power. There are two scenarios in which this can occur. In the first, the legislature is overwhelmingly dominated by a single political party loyal to the president. Opposition parties are represented in the legislature, but have little meaningful voice relative to the dominant party. In the second scenario, a powerful president can easily dominate a fragmented legislature composed of weak and poorly organized parties. The right of legislative initiative is an important mechanism by which the public agenda can be determined, but in both of these scenarios, the rules of legislative initiative can serve to reinforce the president's political dominance. In the MENA region, the right of legislative initiative has tended to be held by the president, the government and the members of the legislature, but the rules governing 'members' bills' have made it difficult for minority parties to have any influence on the legislative agenda. Under Tunisia's 1959 Constitution, for example, while the right of legislative initiative was shared equally between the President and members of the legislature, all draft bills were submitted to committees dominated by the majority party and debated and amended, in secret, before the draft bill was presented to the legislature's plenary session. In practice, opposition members of the legislature had no ability to influence the legislative agenda through the right of legislative initiative.<sup>14</sup>

### ***2.2.3 Government formation and dismissal***

As noted above, the pre-Arab Spring regimes in Egypt and Tunisia were at times formally semi-presidential. As a matter of constitutional law, this meant that the prime minister and government exercised executive power only with the confidence of the legislature. But in both countries, in which a single party overwhelmingly dominated the legislature, there was no need for members of the legislature to compromise on the composition of the government. The government reflected the preferences of the dominant party, and minority opposition parties—to the extent that they participated in the legislature at all—had very little say in government formation. The legislature's power to dismiss a government will be similarly dominated in single-party states. Moreover, opposition parties' ability to table a motion of no confidence in the government is often restricted. For example, Tunisia's 1959 Constitution provided that a motion of censure had to be supported by at least one third of the members of the legislative chamber, and did not allow the legislature to censure individual ministers (article 62). The Constitution was amended three times in this respect. Between 1959





and 1976 there was no constitutional mechanism for introducing a motion of censure, but in 1976 article 62 was amended to allow the introduction of a motion of censure only if it was supported by at least one third of the members of the lower chamber of the legislature. In 1988 the article was amended to raise the required level of support to one half of the members of the lower chamber, and in 2002 the required majority was again reduced to one third. In addition, a president's power to dissolve the legislature can be used to discourage an assertive legislature from dismissing the government.

### ***2.3 The one-party state***

A strong president who enjoys wide-ranging powers and is largely unfettered by formal constitutional constraints may nevertheless face opposition from other sites of power in a constitutional system, such as offices of the bureaucracy, administrative agencies, prosecuting authorities or the courts. Filling these institutions with personnel loyal to the president and the president's party establishes a 'one-party state' in which these formally independent sites of power become servants of the dominant party and offer no check on the power of an autocratic president. In parallel fashion, a legislature dominated by the president's party cannot check executive power (as mentioned in section 2.1.3).

In Egypt and Tunisia, the party and the President captured the security sector, ensuring that the security services could be relied on to safeguard the party's interests. The security services routinely ignored legal provisions that prohibited indefinite detention and secret trials. Anti-terrorism laws in both countries were vague and imposed little control or direction on the security forces mandated to combat terrorism. Torture and coercive interrogation were accordingly rampant, and used against a broad range of people the regime perceived as opponents. The security institutions came to represent the interests of the regime far more than the interests of the people. Indeed, the 2011 murder of Khaled Said by Mubarak's police force in Alexandria is widely seen as the spark that ignited protests against his oppressive security state.<sup>15</sup>

Ben Ali's Tunisia provides a stark example of how a president can manipulate state institutions to ensure that he or she remains in power. Ben Ali began his presidency in promising fashion, releasing political prisoners, abolishing the security courts, repealing security laws allowing lengthy pre-trial detention and abolishing the for-life presidency. Liberal political party legislation was passed as part of a 'National Pact' with prominent social and political organizations. He broke with the previous regime by symbolically renaming the Socialist Destourian Party the Constitutional Democratic Rally.<sup>16</sup>

The promise of democracy lasted only until the first parliamentary elections in 1989, however. The refusal to alter the electoral system from a majority list system (in which the party list securing majority support in an electoral district won all the seats) to


proportional representation, and the exclusion of the Islamist Ennahda party from the elections, allowed Ben Ali's party to win every seat in those elections and dominate the legislature in every election until the end of his rule. All five of his presidential elections were carefully stage-managed, with Ben Ali running either unopposed or against mostly handpicked opponents. Challengers who volunteered their own candidacy were routinely prevented from standing, in one way or another. Ben Ali's rule demonstrated the same suppression of political pluralism that Bourguiba's nationalist single-party state had engendered, but without the charisma that Bourguiba had exuded as Tunisia's liberator, Ben Ali had to rely on excessive policing and tight control over the economy to retain and consolidate power.<sup>17</sup>

The office of the Prime Minister in Tunisia's previous semi-presidential system had already been undermined during the Bourguiba era, becoming more of a proving ground for Bourguiba's possible successor than a distinct site of executive power. Rather than challenging the President, successive Prime Ministers sought Bourguiba's approval. Ben Ali continued in this vein by appointing technocratic Prime Ministers with weak or non-existent political ties and few connections in the civil service or state bureaucracy. He had 'no tolerance for a prime minister who show[ed] any sign of becoming a power in his own right'.<sup>18</sup>

In Egypt, power struggles following the Free Officers' Revolution and the abolition of the monarchy resulted in a constitutionally mandated one-party system. The 'Liberation Rally' became the political vehicle for the aspirations of the revolution, replacing political parties and undermining any political movements opposed to the revolution. A series of legal instruments consolidated the power of the Liberation Rally: a 1956 law establishing state control over all forms of political participation; a 1960 law nationalizing the media and press, barring all political expression except that approved by the government; a 1963 law requiring all trade union leaders to be members of the party; and a 1964 law allowing the government to ban all organizations that threatened 'morality' and 'the interests of the Republic'.<sup>19</sup>

When Anwar Sadat succeeded Nasser, he took rapid steps to replace officials loyal to the old regime with his own cronies, perpetuating the model of personalized and centralized power. He reorganized the cabinet, appointed key governors, had parliamentary immunity lifted and expelled a handful of its members, purged the security services of Nasser's appointees, and initiated the process of drafting a new constitution—which added a second legislative chamber (the Shura Council), with one third of its members appointed by the president himself—to solidify his control of parliamentary processes.<sup>20</sup>

Both the Iraqi Constitution between 1970 and 2003 (article 38) and the Syrian Constitution between 1973 and 2012 (articles 8 and 84) provided that the President



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would be drawn exclusively from the Ba'ath Arab Socialist Party, thus entrenching a single-party state in the Constitution and ensuring a monopoly on executive power for the party.

### ***2.3.1 Consequence of the one-party state***

A political leader can consolidate power only when the other state institutions and sites of political and bureaucratic power do not oppose him or her. If people loyal to the president hold political and bureaucratic offices, they are unlikely to serve as checks on presidential power. The alignment of president, party and state enables the president to deploy institutions that should be independent such as the security services (police, military, intelligence services), electoral institutions, financial institutions, the courts and prosecutorial services to suppress political opposition, root out dissent, and ensure that state structures are either loyal to the president or too afraid to challenge him or her.

## Part 3: Principles of constitutional design

The three failures of constitutions outlined above are a result of both the constitutional rules under which MENA countries in the pre-Arab Spring era operated and the political consequences of those rules. Constitutional rules allowed the emergence of a strong president and a dominant party, which in turn facilitated the suppression of political opposition and the disintegration of the party system and meaningful political competition. Indeed, the rules were in many cases deliberately instituted in order to reflect and maintain the political reality, and did little more than institutionalize the prevailing political conditions.


These constitutional failures, in turn, yield three principles according to which the constitutional design of new political systems can be organized. To these principles we add a fourth, which responds to the breakdown in the political party system and the disappearance of well-established and organizationally coherent political parties, and the need to ensure executive leadership in times of parliamentary failure. This section outlines these four principles and indicates how the semi-presidential form of government can help uphold them.

### *3.1 Guarding against presidential autocracy*

The need to guard against a return to presidential autocracy is a driving imperative of the constitutional transitions in the MENA region, and new constitutions in the MENA region should be designed with this imperative in mind. The semi-presidential form of government is promising in this respect because it establishes a dual executive or ‘dyarchy’, in which neither the president nor the prime minister holds all the executive power. However, the experience of presidential autocracy in the semi-presidential systems of pre-Arab Spring Egypt and Tunisia demonstrate that the system itself is insufficient to prevent presidential autocracy. Rather, specific elements of this system must be designed in order to increase the likelihood that the principle of limited presidential power is upheld. The report returns to this theme in Part 4.<sup>21</sup>

### *3.2 Legislative oversight of the executive*

A semi-presidential system in which both sites of executive power are to be meaningfully constrained and made responsive to the demands and wishes of the people is one in which the legislature is able to exercise some level of oversight over the activities of both the president and government. Moreover, these oversight powers must carry consequences: the legislature must be empowered not only to investigate and call into question the conduct of the executive, but to act against the executive if it finds the latter’s conduct unacceptable. In this regard, a semi-presidential constitution must



(1) set out procedures for questioning the members of the government and dismissing a government if it loses the confidence of the legislature and (2) authorize the legislature to act against a president who overreaches, either by removing the president from office directly or by impeaching the president and beginning trial-like proceedings through which his or her conduct can be scrutinized.

Of course, where a dominant party loyal to the executive controls the legislature, it is easier for the president and the president's party to ensure that even a constitutionally powerful legislature does not limit the executive. This scenario highlights the important role that electoral outcomes play in shaping the legislature's role as a brake on executive power. It falls outside the scope of this report to examine how to broaden political participation in the legislature and prevent single-party dominance; it is confined to examining the institutional and legal mechanisms for legislative oversight of the executive.

### ***3.3 Power sharing***

The first principle of constitutional design set out above is the need to guard against presidential autocracy. One apparent solution to this problem is to adopt a purely parliamentary system, in which the head of state or president is not directly elected, has no popular mandate, and has very limited and largely ceremonial powers. Yet Iraq's experience shows that eliminating the office of the president does not by itself eliminate the problem of wide executive power.<sup>22</sup> Iraq's 2005 Constitution establishes a purely parliamentary system, with a Prime Minister as head of the executive who is responsible for the general policy of the state. Iraq's incumbent Prime Minister, Nouri al-Maliki, nevertheless exercises considerable power, acting as minister of the interior, minister of defence and minister of national security alongside his functions as Prime Minister. A law limiting a person to two terms in office as Prime Minister was overturned by Iraq's Federal Supreme Court in August 2013.

The need to guard against wide executive power is thus a consideration in both presidential and parliamentary systems. Semi-presidentialism may guard against wide executive power by establishing a power-sharing structure. Sharing executive power among the political parties, interests and groups that fill the public space in the post-authoritarian setting reduces the opportunities for centralizing executive power. The need to ensure that a diversity of political views and groups is represented within the executive branch is a response to the experiences of single-party dominance and the consequences of the one-party state. Executive power sharing is a method of reducing the risk that a single party will capture the institutions of state. The executive dyarchy of semi-presidentialism offers an attractive framework for executive power sharing. With two sites of executive power, neither the prime minister nor the president (nor the parties of either) will be able to capture the state institutions. But as Part 4 will discuss,


the precise design of the relationship between the president and the prime minister will determine whether semi-presidentialism functions as a system of power sharing or degenerates into presidential autocracy.

### ***3.4 Executive leadership***

Another reason that semi-presidentialism retains appeal for post-authoritarian countries even though it involves presidential leadership is the apprehension that a dearth of viable political parties will result in parliaments that are fractured and divided, and consequently unable to provide a platform for stable government.

This fear is not unfounded. The dominance of state institutions by a single party loyal to the president has a significant and detrimental effect on political competition. During the pre-Arab Spring era, control over the state institutions allowed dominant parties to suppress opposition parties and dissidents by, for example, banning them outright, closely monitoring their activities, preventing free organization and association, restricting electoral campaigning, and limiting freedom of expression and criticism of the government. Opposition parties that are subject to government restriction and confined to marginal participation in the legislature are left with neither experience of legislative government nor the opportunity to develop coherent policy programmes. The opposition parties in Ben Ali's Tunisia were weak, not credible with the public, institutionally insubstantial, and plagued by small memberships and shaky leadership structures. Libya's parliamentary experience in the post-Arab Spring era is a clear example of this problem. The Libyan General National Congress appointed Mustafa Abu Shagur as Prime Minister but then dismissed him after failing to endorse his cabinet. The next Prime Minister, Ali Zeidan, built a coalition cabinet of liberals and Islamists in order to win the confidence of the Congress. The General National Congress was unable to form a new government for over three months after the interim National Transition Council handed over power on 8 August 2012. The Congress approved a new government only on 14 November 2012. In Iraq, although the second parliamentary election under the 2005 Constitution was held on 7 March 2010, no government was approved until 21 December 2010—a result of the three main electoral alliances winning similar numbers of seats in the Council of Representatives, with no single party holding a majority.<sup>23</sup>

The concern is that governments that rely on the support of a parliament with fragmented political parties will be unstable. The legislature may find it difficult to agree on a government to exercise executive power, and governments may struggle to lead effectively in the absence of a clear and unambiguous policy mandate from a divided legislature. Officials and leaders in the region have echoed these concerns. While a parliamentary system may seem best for the region, the lack of individuals with parliamentary experience to serve as members of parliament is perceived as a threat to



the effectiveness of parliamentary government. During the transitional period after authoritarian government, a system that blends parliamentary and presidential leadership may produce the best results. Indeed, semi-presidentialism may be a staging post between presidentialism and parliamentarism, and a pragmatic alternative to a rapid switch from presidential to parliamentary government.<sup>24</sup>

Retaining a president as an independent executive authority who holds an electoral mandate separate from the legislature ensures that some executive authority can still be exercised in the event of parliamentary chaos. Even if the legislature cannot agree on a government, the president will be able to provide executive leadership. If a government is formed but cannot develop a coherent policy programme because it must accommodate numerous ideologically divergent voices in the legislature, the president's independent electoral mandate will allow effective and legitimate leadership. The president has appropriately been described as an 'autonomous crisis manager' in the semi-presidential system. A president can also act as a symbol of national unity, rising above petty party politics and representing the interests of the nation as a whole, especially in times of crisis and emergency.<sup>25</sup>

Yet a pure parliamentary system may not resolve the problems posed by a strong executive if the constitution allows a prime minister to consolidate power. In Iraq, for example, the 2005 Constitution's silence on how the Prime Minister is to exercise powers as commander-in-chief of the armed forces (article 78) has allowed the Prime Minister to give direct instructions to military units without scrutiny or accountability.<sup>26</sup> When designing a semi-presidential system, two elements of presidential leadership should be addressed. First, the president must hold sufficient power to be able to assume a leadership role when the vagaries of parliamentary politics render the legislature or the prime minister's government ineffective. This power, however, has to be balanced against competing principles of limited presidential power and power sharing—especially if the legislature is dominated by a political party loyal to the president, as in President Mohamed Morsi's post-Arab Spring Egypt. The president's role as executive leader, therefore, has to be carefully outlined and his or her powers carefully set out in the constitution in order to ensure appropriate presidential leadership without the risk of presidential autocracy. Second, the president must be seen as a symbol of the nation, for example by speaking for the nation on the international stage and recognizing and receiving foreign dignitaries. The president will not easily rise above politics and represent the nation as a whole if he or she is embroiled in party political squabbles and sullied by the horse-trading and pork-barreling that occurs on the floor of the legislature. This imperative must also be reflected in the constitutional rules that establish the president's role and powers.

### 3.5 Caveat: *electoral system design*

The main caveat regarding the limits of semi-presidentialism's ability to uphold the four principles set out above (in sections 3.1 to 3.4) is the design of the electoral system. Executive power sharing under a semi-presidential government will be most effective when the president and the prime minister come from different parties. Indeed, the experiences of other semi-presidential countries suggest that where the president and the prime minister represent the same party and are supported by a legislative majority, the president is able to exert a great deal of power over national politics, effectively relegating the prime minister to a politically inferior position and reducing the semi-presidential system to a presidential one. Yet during periods of 'cohabitation', in which the prime minister and the president represent different parties and the president's party is not represented in government, the balance of power tends to shift to the prime minister. This may facilitate power sharing between different political parties.<sup>27</sup>


In addition, the rules for legislative oversight of the executive can quickly become meaningless when a single party that is loyal to the executive is able to dominate the legislature. If there is meaningful opposition and minority representation in the legislature, there is a smaller risk that dominant parties or hegemonic interests will be able to co-opt the legislature to the executive's agenda and ensure that otherwise promising rules for legislative oversight are undermined.

Three mechanisms of electoral system design can decrease the likelihood that a parliament will be dominated by a single political party or incapacitated by a plethora of small and disorganized political parties.

First, if presidential candidates are required to win an absolute majority in an election, the winner must be capable of rising above party politics and transcending narrow party interests. This requirement makes it more difficult for a party to win elections in both the legislature and the presidency. The need for a strong electoral majority encourages parties to present presidential candidates with wide appeal. Indeed, separate parties may be compelled to support a single compromise candidate rather than present their own candidates. A president who has broad appeal will be more likely to stand as a symbol of the nation, and will hold greater legitimacy as an 'autonomous crisis manager', if needed.

Second, legislative and presidential elections should be held at different times in order to allow public opinion to react to the performance of a government or the president. The party or coalition that forms the government may not be able to present a winning presidential candidate in subsequent presidential elections if the government performs poorly or abuses executive power, and vice versa.





Third, the representation of broad interests and minority and opposition parties in the legislature can be encouraged by an electoral system that sets few bars to the electoral success of smaller parties, or which guarantees the representation of minority interests. An electoral system based on proportional representation, but with low thresholds, encourages the broad representation of minority interests in the legislature.

## Part 4: The constitutional design of semi-presidential government

The report now turns to consider how the design of a semi-presidential system reduces the risk of a recurrence of the failures of democracy noted in Part 2, and increases the likelihood of upholding the principles of constitutional design set out in Part 3.

Part 4 of the report is divided into three sections, tracking three broad aspects of a working system of government:

- The fundamental architecture of government, including questions about how the government is formed and dismissed; relationships between the legislature, the government and president; and the role of each institution in relation to the other institutions (section 4.2).
- The distribution of powers between the president and the government, and the allocation of ordinary, day-to-day government functions (e.g. powers of appointments to the civil service and bureaucracy, executive lawmaking powers, cabinet control and veto powers) (section 4.3).
- How a semi-presidential system responds to stress or crisis. The powers that presidents have been able to assume and exercise under states of emergency have had a significant impact on peace and democratic stability in the MENA region in the past; therefore constitutional rules that manage such events are important (section 4.4).


In each of these sections, discussions about constitutional design will be framed in light of the four principles described above in Part 3.

### ***4.1 France and Russia: successful and failed cases of semi-presidentialism***

In discussing the particular design issues set out above, the report will frequently refer to the semi-presidential systems of France and Russia. France is an example of a semi-presidential system that upholds the principles of democracy and limited government, while Russia has become a system characterized by the personalization of power, and an increasingly powerful President and subservient Prime Minister.

#### ***4.1.1 France***

France routinely ranks as one of the most successful democracies in the world, and experts often cite it as the ideal model of semi-presidentialism. France adopted a semi-presidential system in the Fifth Republic, by amending the 1958 Constitution in 1962 to allow for direct popular election of the President. This followed a failed experience with a purely parliamentary system during the post-war Fourth Republic, which



suffered from a powerful but politically paralyzed legislature and a weak executive. A fragmented party system split along both religious lines and secular issues was a factor in the chaos and inefficiency of the Fourth Republic: few coalitions formed, the left-leaning parties disagreed on religious issues and could not unite as a coalition or bloc in the legislature, and the right-leaning parties disagreed on class issues and were similarly unable to form lasting coalitions. Meanwhile, minority parties frequently changed their party labels and affiliations. In the first few years of France's semi-presidential system in the 1960s, political parties became less polarized and more willing to build coalitions. The de-polarization of France's political party system, helped by the introduction of the two-ballot electoral system in the Fifth Republic, made the formation of stable, consolidated majority governments more likely and contributed to the success of the system.<sup>28</sup>

France's Constitution empowers the President to name the Prime Minister, regardless of partisan majorities in the legislature and without the need for formal legislative approval or investiture of the Prime Minister (article 8(1)). The legislature can, however, dismiss the Prime Minister and government at any time by passing a vote of no confidence. The French Constitution gives the President emergency powers (article 16), but limits this power by subjecting many of the President's official decisions to the Prime Minister's countersignature (article 19). In comparison, the Constitution gives the Prime Minister broad but vague formal powers: he or she 'directs the conduct of government affairs', 'ensures the implementation of legislation' and can initiate legislation (articles 21(1), 39(1)). Both the Prime Minister and the cabinet are collectively responsible solely to the legislature (article 20).<sup>29</sup>

Despite the strength of the Prime Minister in the French Constitution, in practice French Presidents wield considerable power over the Prime Minister and the legislature. This disparity between the Constitution and constitutional practice stems from the fact that, for most of the Fifth Republic's history, the President's party has commanded a majority in the legislature and the political system has operated largely as a presidential regime. The Prime Minister defers to the President in areas where their executive power overlaps. Despite the recurrence of majority governments that are aligned with the President, France has experienced three instances of cohabitation in its history. The French government survived all three periods of cohabitation, due largely to the fact that the President does not have the power to dismiss the government and usurp power. During times of cohabitation in France, power shifts toward the Prime Minister and the system tends to operate much as a parliamentary regime. A 2000 amendment of the French Constitution shortened the President's term of office from seven to five years, and changed the electoral calendar so that presidential and legislative elections occur at the same time. This change has made it less likely that cohabitation will occur in the future.<sup>30</sup>

### 4.1.2 *Russia*

Russia's political tradition echoes that of the MENA region: Russia has a history of strong executives and weak legislatures, and suffered under a monarchy's formal autocratic rule until the early 1900s. When the monarchy was overthrown in the 1917 revolution, the power structure that emerged to replace it centralized power in a small communist party elite that exercised unrestricted power until the Soviet system collapsed in 1989.<sup>31</sup>

The semi-presidential system in Russia was established in the early 1990s precisely to curb the centralized leadership that had plagued Russia. It was envisaged that a broadly representative legislature could act as a counterweight to an otherwise powerful executive President with powers over spending, legislation and government. By 1993, however, constitutional reforms had expanded presidential powers. The Russian form of semi-presidentialism is strongly weighted in favour of the President. While both Freedom House and Polity IV—projects that assess the democratic or authoritarian characteristics of governments—class Russia as a partial democracy for a time after 1993, democracy is generally recognized as having collapsed around 2004. The regime was not particularly stable even during the 1990s, with a rapid turnover in Prime Ministers and governments, legislative impeachment of the President (although unsuccessful), and over 200 presidential vetoes between 1994 and 1999. Government in this period was deadlocked, fractious and inefficient. Under constitutional arrangements in which both the legislature and the president have the power to remove the government, there is little incentive for the president, the prime minister and the legislature to work together. With no 'joint stake' in the system, the Russian President has been willing to work against the legislature and vice versa.<sup>32</sup>

The consequence has been a shift toward the consolidation of power in the presidency and a form of electoral authoritarianism. The instability of the relationship between the legislature and the President during the 1990s meant that there was little to lose, and much to gain, from centralizing power in one place. Vladimir Putin has done just this since 2001, after building a sympathetic majority in the legislature. During Putin's time in office, both as Prime Minister and as President, the regime has been stable but democracy has been sacrificed. With few constitutional limits to the President's power and no institutional checks on the exercise of that power, the modern Russian system has become a virtual dictatorship. In practice, Russia has never operated with a dual executive, since the Prime Minister has been subject to the manipulation and control of the President. Although semi-presidential in name, Russia's government is a presidential dictatorship in practice.<sup>33</sup>



## **4.2 The architecture of semi-presidential government**

The mechanisms by which a government is constituted in a semi-presidential system have a significant effect on the extent to which such a system can serve as a device for power sharing. Semi-presidential systems vary in the incentives they offer to the president and the prime minister to cooperate in power-sharing structures and establish stable and effective government. The main issues to consider are government formation (section 4.2.1), government dismissal (section 4.2.2), powers to dissolve the legislature (section 4.2.3) and presidential term limits (section 4.2.4).

### **4.2.1 Government formation**

In the pre-Arab Spring era, several constitutions authorized the president to form a government without input from or consultation with the other branches of government. As a result, the president was able to exert great influence over a country's policy agenda and direct the government's programme. Moreover, the president could ensure that the prime minister and cabinet members were ideologically aligned with the president or loyal to his or her political interests.

Executive power cannot be shared if the president, as one locus of executive power, dominates the appointment of the other locus of executive power. Opportunities for cooperation between the president and the legislature must be built into the process of government formation in order to share executive power. Furthermore, limiting the president's influence in selecting and appointing the government increases the likelihood that the prime minister and government will be independent of the president and willing to check presidential overreaching, and will increase opportunities for executive power sharing among different political parties.

#### **4.2.1.1 Appointing the prime minister**

In a semi-presidential system, the prime minister and government must retain the confidence of the legislature, regardless of how the prime minister is appointed. The legislature always holds the power to dismiss the government. But the legislature's role in appointing the prime minister and government varies.

In post-authoritarian constitutional democracies, in which the political community has no experience of either meaningful party competition or a parliament with real political power, two possible electoral results should be considered when selecting among the constitutional options for government formation. First, the legislature may come to be dominated by a single, powerful party (as in Egypt and, to a lesser extent, Tunisia). Second, the legislature may be fragmented and divided, composed of a relatively large number of parties that each hold a few seats, with no party or coalition holding a clear majority (as in Libya). These electoral outcomes are suboptimal. Ideally, a legislature is

composed of a few strong parties with clear and coherent policy programmes. This allows political parties in the legislature to form the majorities necessary for government appointment and dismissal, with no one party overwhelmingly dominating the parliamentary processes.

This optimal electoral outcome, however, can be neither predicted nor taken for granted at the constitutional design stage. Institutional arrangements for the appointment of the prime minister should therefore bear these two suboptimal electoral outcomes in mind and plan for their contingency. A strong constitutional arrangement can function even in suboptimal conditions and in circumstances of stress.

There are three principal design options for appointing a prime minister:


Option 1: the president has exclusive authority to select the prime minister;

Option 2: the legislature has the power to appoint the prime minister, and the president serves a ceremonial role; or

Option 3: the president and legislature jointly appoint the prime minister.

In option 1, the president alone appoints the prime minister. The legislature plays no role in either selecting the prime minister or confirming the president's choice of prime minister. The legislature retains the power to pass a vote of no confidence in the prime minister after the president has appointed him or her and a government has been formed, which would lead to the government's dismissal. Faced with the possibility of a no confidence vote, a president may consider the legislature's preferences when selecting the prime minister. Even so, the power to form the government rests firmly in the president's hands.

France is the key model for this design option, but other examples include Peru (article 122), Central African Republic (article 22),<sup>34</sup> Weimar Republic (article 53), Niger (article 56), Senegal (article 49), Cape Verde (article 135(1)(i)), Mali (article 38), Portugal (article 187), Slovakia (article 102), Sri Lanka (article 43) and Syria (article 97). In some countries, the president is specifically required to consider the legislature's preferences when forming the government. For example, in Sri Lanka the President is to 'appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament' (article 43). In Portugal, the President is to 'appoint the Prime Minister after consulting the parties with seats in Assembly of the Republic and in the light of the electoral results' (article 187). Similarly, in Cape Verde, the President is to 'appoint the Prime Minister, in consultation with the political parties represented in the National Assembly and taking into account the results of the elections' (article 147).



In France, the President can appoint the Prime Minister irrespective of electoral results and without consultation with the legislature (article 8). The legislature's only check against presidential prerogative in appointing the Prime Minister is the vote of no confidence, which would force the resignation of the Prime Minister. However, the French President has the power to dissolve the legislature if it forces the resignation of the President's prime ministerial appointee (see section 4.2.3 below on dissolution powers). The balance of incentives in this model thus encourages the legislature to accept the President's choice for Prime Minister, rather than encouraging the president to defer to the legislature's preferences.<sup>35</sup>

In France, however, despite the President's wide discretion to appoint the Prime Minister, the President has refrained from appointing Prime Ministers who are not supported by a majority of the legislature. Indeed, the French executive has gone through three periods of 'cohabitation' since 1958, in which the President has appointed a Prime Minister from a different party and the President's party has not been represented in the government. This is in part a result of the vitality of party democracy and a strong and disciplined party system in France. If a legislature is composed of weak parties and a fragile parliamentary majority, the legislature is unlikely to be able to form a majority that is stable enough to pass a vote of no confidence in the president's choice of prime minister. This is not the case in France, where strong parties and a competitive party system have resulted in parliamentary majorities that would be stable enough to carry motions of no confidence. In addition, the French President does not have the formal power to dismiss the Prime Minister (on dismissal of the prime minister generally, see section 4.2.2 below), meaning that during periods of cohabitation the President must defer to the legislature's ongoing support for the Prime Minister.<sup>36</sup>

Despite the stability of the French model, constitutions in the MENA region should avoid adopting a system in which the president acts alone to appoint the prime minister. In a situation where strong political parties will be able to muster coherent and lasting parliamentary majorities, a president's power to appoint the prime minister may follow the wishes of the legislature, as in France. But if parties are poorly organized, inexperienced and institutionally weak, the suboptimal outcome of a fragmented and weak legislature may result. The president's power to appoint a prime minister in these situations may go unopposed by the legislature, resulting in presidential domination of the appointment of the prime minister and a failure of power sharing.

If the constitution empowers the president to appoint the prime minister without legislative involvement, the principle of power sharing suggests that two additional safeguards should be established. First, the constitution should require the president to at least take the legislature's preferences into account when forming the government. This increases the likelihood that the president will appoint a prime minister who is acceptable to the legislature, and thus allow for political power sharing within the


executive. Second, the president should not be empowered to dismiss the prime minister or the government (see section 4.2.2 below).

In the second design option, the legislature directly appoints the prime minister, while the president plays at most a ceremonial role. Typically, the president's only responsibility is to formally appoint the prime minister chosen by the legislature. This system often emerges in semi-presidential regimes that resemble parliamentary regimes. Countries with this system include Bulgaria (article 99), Armenia (article 55), Madagascar (article 54), Finland (article 61), Ireland (article 13), Macedonia (articles 68, 90), Mongolia (articles 25, 33) and Romania (article 103).

This design option seems ill suited for the MENA region for two reasons. First, a situation in which a legislature is divided, fragmented, and composed of political parties with no coherent policy programme or experience of parliamentary government may struggle to form unambiguous majorities capable of selecting a prime minister and endorsing a government's policy programme. The result will be an inability to form a government and instability in governments that are formed. The power vacuum created when a divided legislature cannot form a government may set the stage for a power grab by the president and a return to presidential dictatorship. Libya's recent experience in this regard demonstrates that it can be difficult for a divided and fractured parliament to appoint a government. The newly elected General National Congress first appointed Mustafa Abu Shagur as Prime Minister, but after twice failing to present a cabinet capable of winning the confidence of the Congress, the Congress dismissed him. Ali Zeidan was later appointed Prime Minister, and managed to win approval from the Congress for a coalition cabinet that represents both liberal and Islamist interests. The Libyan legislature was successful in appointing a government only on the third attempt. Iraq, although a 'pure' parliamentary system, experienced a similar period of instability following the March 2010 parliamentary elections; no government was formed until December 2010.

Second, this option may be problematic if a single party dominates the legislature but the president comes from a different party. In such circumstances, the dominant party will not have to cooperate with minority parties or the president's party in appointing a prime minister. In a semi-presidential system, the president holds a separate electoral mandate and may thus represent interests that are not represented in the legislature. Allowing the legislative majority to appoint the prime minister without consulting the president may result in a dual executive that represents very different interests with no prior negotiation as to how the president and prime minister will work together. A likely result is conflict between the president and prime minister and an ineffective power-sharing arrangement.





The third design option empowers the president to appoint the prime minister with the positive affirmation of the legislature. Under this system, the president appoints the prime minister and the legislature approves the government through some means of formal confirmation, investiture or consultation. In contrast to the first design option, the legislature's consent must be obtained before the formation of the government. Where the prime minister must be confirmed by the legislature before he or she takes office, the president is encouraged to negotiate with the legislature and cooperate in finding a candidate who is acceptable to both. And unlike the second design option, the president plays a substantial role in the appointment of the prime minister. Finally, the president must lack the power to dismiss the prime minister for this option to fulfil its power-sharing potential.

This design option is followed in a range of countries including Belarus (article 84), Lithuania (articles 84, 92), Croatia (article 98), Slovenia (article 111), Russia (articles 111–12) and Ukraine (article 114). The specific manner in which the president and legislature cooperate varies. For instance, in Croatia, the President must 'entrust the mandate to form the government to a person who, based on the distribution of seats in the Croatian Parliament and completed consultations, enjoys the confidence of a majority of all deputies' (article 98). In Slovenia, the President must propose a candidate for Prime Minister to the National Assembly after consulting with the leaders of parliamentary groups (article 111). Similarly, in Ukraine, the Prime Minister is appointed by the legislature upon submission of a proposal by the president, based on a proposal from the leading coalition in the legislature (article 114).

The implications of this design option for executive power sharing should be considered in light of various electoral outcomes. On the one hand, where the legislature has a clear majority—either in the form of a coalition or a single party—neither the president nor the legislature can unilaterally appoint a prime minister. The two must cooperate. Of course, where the same political party dominates the presidency and the legislature, the two will cooperate in appointing a prime minister who is aligned with the party and is unlikely to offer any real check on the president's executive power. Where the legislative majority is a coalition representing different political parties, a power-sharing prime ministerial appointment is more likely. The prospects for power sharing under this design option therefore increase greatly when the president and the legislative majority are not aligned to identical political interests or parties.


On the other hand, if the legislature is fragmented and divided, this design option may result in a situation in which the legislature's consent becomes meaningless and the president dominates the appointment process. This has been the experience in Russia. The Russian Constitution provides that the President must appoint the Prime Minister (referred to as the 'Chairman of the Government' in the Russian Constitution) with the consent of the Duma (the lower house), and briefly sets out the procedures for

appointing the Prime Minister (article 111). On paper, the legislature seems to share power with the President in appointing the Chairman of the Government. Yet little power sharing takes place in practice, and the Russian President commandeers the process. The President's influence over the formation process stems from three features of the Russian system: (1) the Duma's limited ability to reject the President's nominees, (2) the President's power to dismiss the Chairman of the Government and (3) Russia's fragmented political party system.

First, the Constitution constrains the Duma's ability to reject the President's candidate for Prime Minister. If the Duma fails to consent to the President's nominees three times, the President appoints an interim Prime Minister and dissolves the legislature (article 111). There is no indication that the President must submit three different candidates to the Duma. Duma members are thus strongly discouraged from rejecting the President's candidates, since their own survival depends on it. Further, once a government is formed, the Duma's ability to dismiss the government is limited. The striking feature of the Russian system is that the President is entitled to 'reject' a vote of no confidence and keep the government in power even though it does not command the confidence of the legislature. The President's power to override a vote of no confidence is somewhat limited by the provision that if the Duma passes a second vote of no confidence in the government within three months, the President must announce the resignation of the government or dissolve the legislature (article 117). The Russian Duma is thus dissuaded from refusing to approve the president's government and from dismissing the government once in office. With such limited powers, power sharing between the Duma and the President is not the motivating principle of the Russian rules for government formation.<sup>37</sup>

Second, the President's power to dismiss the Prime Minister reduces the long-term significance of the Duma's input into the Prime Minister's appointment (article 83; see further section 4.2.2). Even if the Duma somehow convinces the President to appoint its preferred candidate as Prime Minister, the President can subsequently dismiss that Prime Minister. The President's power of dismissal has helped him exercise control over the legislature and the Prime Minister, often at the cost of democratic legitimacy.<sup>38</sup>

Third, Russia's weak party system has given the Russian President even more freedom to choose a Prime Minister. During Yeltsin's presidency, Russia's party system was weak and deeply divided, and stable majorities rarely arose in the legislature. If no majority exists, the requirement that the Russian President must appoint a Prime Minister with the legislature's consent is meaningless. With a divided legislature that is unable to produce a stable coalition, Yeltsin repeatedly dismissed the Prime Minister and, ultimately, circumvented the legislature by ruling by decree.<sup>39</sup>



The Russian case serves as a warning that the success or failure of arrangements for appointing a prime minister will depend on both the specifics of those arrangements and institutional arrangements elsewhere in the constitutional system. If this third option is chosen as a model for prime ministerial appointment, care must be taken to ensure that the legislature is not discouraged from opposing the president's preferences and that the president cannot ignore the legislature's resolutions. If carefully designed, this third option can result in meaningful cooperation between the president and legislature, fostering power sharing.

Indeed, this third option can be beneficial if there is a divided legislature. On its own, a divided legislature might never reach a consensus on its choice for a new government (see option 2). However, by empowering the president to take the first step in the government formation process, the president can leverage his influence to overcome a divided legislature, form a government and enhance political stability.<sup>40</sup>

In summary, where the president's nominee for prime minister must be confirmed by the legislature *and* the president has no power to dismiss the prime minister, the president faces two choices: (1) appoint a candidate who is acceptable to the legislature or (2) appoint his or her preferred candidate, who the legislature can dismiss. Where the president lacks the power to dismiss the government, his incentives shift toward sharing power, because the government's ongoing survival depends on the legislature alone.<sup>41</sup>

#### **4.2.1.2 Recommendations**

Whether the president has the power to dismiss the prime minister and government, however they are appointed, has a significant impact on considerations of power sharing at the appointments stage. Section 4.2.2 considers government dismissal more fully, but at this stage it is enough to indicate that whichever appointments process is selected, power sharing is enhanced when the president is unable to dismiss the government.

The principle of power sharing supports an appointments process in which the legislature and the president are encouraged to cooperate. Therefore the first option outlined above should be rejected. Only the second and third options should be considered for meaningful power-sharing governments in the MENA region.

At the same time, consideration should be given to how to guard against a suboptimal electoral outcome that either undermines power sharing in the appointment of a prime minister or introduces instability into government. The second and third options have advantages and disadvantages related to these suboptimal situations. The now-suspended Egyptian Constitution of 2012 took an interesting approach to maximizing the advantages of both options while minimizing their disadvantages. Our recommendations are largely based on this approach.

Article 139 provided that:

The President of the Republic nominates the Prime Minister, who is assigned by the President the task of forming a government and presenting its programme to the Council of Representatives within 30 days. If the government is not granted confidence, the President appoints another Prime Minister from the party that holds a plurality of seats in the Council of Representatives. If the second nominee does not obtain confidence within a similar period, the Council of Representatives appoints a Prime Minister who is assigned by the President the task of forming a government, provided said government obtains parliamentary confidence within a similar period. Otherwise, the President of the Republic dissolves the Council of Representatives and calls the elections of a new Council of Representatives within 60 days from the date the dissolution is announced.

In all cases, the sum of the periods set forth in this article should not exceed 90 days. In the case the Council of Representatives is dissolved, the Prime Minister presents the government and its programme to the new Council of Representatives at its first session.

The now-suspended 2012 Egyptian Constitution blended the second and third design options for selecting the Prime Minister, creating a multi-step process that would help resolve deadlocks over the Prime Minister's appointment while encouraging cooperation. Under such an arrangement, a legislature's role in selecting the prime minister expands progressively with each instance of deadlock. In the first step, the legislature merely grants confidence to the government; it plays no role in the initial selection process. If deadlock occurs, the legislature's influence swells in the second step, in which the party composition of the legislature constrains the president's choice of prime minister. If deadlock occurs again, the third step provides that the legislature directly appoints the prime minister. By gradually increasing the legislature's role, the approach balances the need for cooperation (which is maximized in the first step) with the need to minimize the risk of a failure to form a government—which can result in a presidential power grab. The recommendations that follow from this analysis track the position that was adopted in the now-suspended 2012 Egyptian Constitution:

- The president should appoint the prime minister with the consent of the legislature.
- If the president and the legislature cannot agree on the appointment of the prime minister, the president must appoint the candidate most likely to win the consent of the legislature, who must subsequently win the confidence of the legislature.
- If the legislature does not confirm this candidate as prime minister, the legislature should appoint the prime minister.



### 4.2.1.3 *Appointing the rest of the cabinet*

The power to appoint cabinet ministers affects both the balance of power between the branches and the likelihood of power sharing. There are three main design options:

Option 1: the prime minister appoints the cabinet;

Option 2: the president appoints the cabinet; or

Option 3: the prime minister and president share power to appoint the cabinet.

The first option is best suited for the MENA region. It strengthens the office of the prime minister vis-à-vis the president, while minimizing the risk of governmental deadlock. In most semi-presidential regimes, the prime minister appoints the cabinet members using one of two methods. The first method is for the prime minister to appoint the ministers unilaterally, as occurs in Bulgaria (articles 84, 108), Ireland (article 13), Macedonia (articles 68, 90) and Mongolia (article 39). The second method is for the president to appoint the cabinet members upon the recommendation of the prime minister. This is the case in France (article 8), Russia (articles 83(e), 112), Austria (article 70), Central African Republic (article 22), Croatia (article 110), Weimar Republic (article 53), Niger (article 56), Peru (article 122), Senegal (article 49), Cape Verde (article 135(2)(d)), Mali (article 38), Portugal (article 187), Slovakia (article 111), Burkina Faso (article 46), Madagascar (article 54), Finland (article 61) and Lithuania (article 92). In the second method, while the president formally appoints the cabinet, the prime minister selects the cabinet members and the president cannot refuse to appoint the prime minister's cabinet. The president's role in this regard is purely formal. In post-transition countries in the MENA region, the prime minister should have the power to appoint the cabinet. Strengthening the prime minister's control over the cabinet vis-à-vis the president encourages power sharing. A prime minister who is able to appoint his own cabinet can exercise closer control of that cabinet and ensure that it can act as a bulwark against presidential power. The efficacy of this power, of course, depends on whether or not the president has the power to dismiss individual cabinet members or the entire government. Where this is the case, the prime minister's discretion to appoint the cabinet is made subject to the president's veto (see further below).

Not only does the prime minister's control of the cabinet guard against presidential autocracy, it also enhances the stability of the government. A prime minister who selects his own government is more likely to produce an effective and unified government. In comparison, a prime minister who cannot select his own government is more likely to preside over an ineffective and divided government. Yet even when the prime minister has the unilateral power to select his own government, this power is not absolute. The

prime minister remains an agent of the legislature, and must select a cabinet that will retain the confidence of the legislature.


The second design option gives the president the power to appoint the cabinet, without requiring the president to consult with the prime minister. Such systems are rare; examples include Iceland (article 15), Mozambique (article 160), Namibia (article 32), Belarus (article 84) and Sri Lanka (article 44). All of these systems also empower their respective Presidents to dismiss the cabinet (see section 4.2.2 below), giving the President significant control over the cabinet and drastically reducing incentives for power sharing.

For countries in the MENA region, this is the least attractive design option. It cements the president's control over the government, thereby removing a crucial check on presidential power and undermining power sharing. It also undermines the autonomy of the prime minister. Post-transition MENA countries that give the president unilateral power to appoint the cabinet will allow the president to wield excessive influence over government and the policymaking process, and run the risk of reintroducing vestiges of the prior, autocratic regime.

The third option shares the appointment power between the president and prime minister, for example by dividing the appointments that the prime minister and president can make. For a brief period in Ukraine (2006–10), for example, the President was empowered to nominate the heads of the defence and foreign affairs ministries, while the Prime Minister nominated the other cabinet members (article 114). The legislature had to approve the entire cabinet (article 114). A second mechanism is co-decision, experimented with in Poland between 1992 and 1997, where the Prime Minister was required to consult with the President before making appointments to defence, internal affairs and security portfolios.<sup>42</sup>

The rationale for these two mechanisms of shared appointment power is connected to the principle of the president as a national symbol and crisis manager. In Ukraine, the President represents the country in international affairs, administers foreign policy, and acts as commander-in-chief with oversight of security and national defence (article 106). The fact that the ministers in charge of these sectors work more closely with the President than the Prime Minister provided a justification for allowing the President to appoint them (see further below).

While these mechanisms may induce power sharing, they may overly expand a president's power—a risk to be avoided in the post-Arab Spring MENA region. It is not a coincidence that in nearly every autocratic regime in the region, the president has tightly controlled the security and intelligence services. As described in Part 2, autocrats tend to use the security and intelligence services to punish dissenters, consolidate power



and prop up their regimes. By appointing ministers, the president can create ‘mini-empires’ within the government and bureaucracy. Through these points of influence, the president can control key sectors of the country, deadlock the government or manipulate the prime minister. Barring the president from appointing the ministers in charge of the defence, intelligence and other security forces reduces the risk of a post-authoritarian country sliding back into democratic authoritarianism.

If the president does have power to appoint specific cabinet members, these risks may be mitigated by requiring legislative approval of the president’s cabinet nominees. Many semi-presidential constitutions require legislative approval of the entire cabinet, regardless of who appoints it: for example Croatia (article 110), Poland (article 154), Slovenia (article 112), Ukraine (article 114), Mongolia (article 39) and Romania (article 103). The co-decision mechanism creates fewer risks of presidential power consolidation, since the president cannot act unilaterally and must engage (and negotiate with) the prime minister. This mechanism may encourage power sharing within the executive and increase the representation of different political interests in the government. The risk posed by co-decision is that government formation may be easily beset by horse-trading and conflict between the president and prime minister, leading to deadlock. In order to avoid deadlock, it is preferable that co-decision mechanisms are required only for appointments to cabinet positions that are closely related to the president’s functions as a unifying national symbol and autonomous crisis manager.

#### **4.2.1.4 Recommendations**

- Primary recommendation: The prime minister appoints all cabinet members.
- Secondary recommendation: The president and the prime minister appoint ministers in functional areas related to the president’s symbolic and crisis management roles, through co-decision procedures. These appointments should be subject to legislative approval.

#### **4.2.1.5 Analysis of the Tunisian draft Constitution (June 2013)**

Article 88 of the draft Constitution of Tunisia (June 2013) provides:

The government shall be composed of a Prime Minister, ministers, and state clerks selected by the Prime Minister. The ministers of foreign affairs and defence shall be selected by the Prime Minister in consultation with the President of the Republic.

Within one week after the date on which the definitive election results are declared, the President of the Republic shall assign the candidate of the party or the election coalition having won the largest number of seats in the Chamber of Deputies to form the government within a one-month period extendable only once. If two or

more parties or coalitions have the same number of seats, then the nomination should be made based on the numbers of votes that were cast in the election.

If the specified period of time elapses without the formation of the government or in the event of failure to receive the vote of confidence of the Chamber of Deputies, the President of the Republic shall consult with the parties, coalitions, and parliamentary blocs to entrust the person most capable of constituting a government within a period of no more than one month.

If a four-month period elapses from the date of entrusting the first candidate and the members of the Chamber of Deputies fail to agree on granting confidence to the government, the President of the Republic is entitled to dissolve the Chamber of Deputies and to call for new legislative elections to be held within at least 45 days and not more than 80 days.

The government shall present a brief programme to the Chamber of Deputies to gain confidence. When the government gains the confidence of the Chamber, the President of the Republic shall nominate the Prime Minister and members of the government.

Tunisia's draft constitutional rules fall into the second design option for the appointment of the Prime Minister; the President serves a mostly ceremonial role. The President first instructs the candidate selected by the majority party or coalition in the legislature to form a government within one month of the legislative elections. The candidate must then present the cabinet and government programme to the legislature.

With respect to the appointment of the rest of the cabinet, Tunisia's June 2013 draft Constitution establishes a system of joint appointment. These provisions largely follow this report's recommendations by giving the Prime Minister the power to appoint ministers, but the ministers of foreign affairs and defence must be appointed in consultation with (i.e. jointly agreed with) the President.<sup>43</sup>

While this is an unusual approach to appointments, it may encourage power sharing: the provision forces the President and Prime Minister to act jointly in making appointments to key ministries. In the Tunisian context, where control over foreign policy and the security sector is a major post-transition concern, there is an even more compelling argument to divide the power to appoint these ministries between the two sites of executive power.





### 4.2.2 Government dismissal

No power-sharing regime can exist without a carefully designed means of dismissing the prime minister and the government. The two main design options for crafting the power of dismissal are:

- In *president-parliamentary* regimes, both the legislature and the president can dismiss the prime minister.
- In *premier-presidential* regimes, only the legislature can dismiss the prime minister; the president has no power to dismiss the prime minister and/or government.

As a result, the president is comparatively weaker in premier-presidential regimes. The dismissal power defines the relationship between the president and prime minister. If the president has the power to dismiss the prime minister, he can become overly strong, and the prime minister becomes the president's puppet. However, if the president does not have this power (or if it is sufficiently moderated), the prime minister and president can become coequal executives, thereby increasing the chances of a successful power-sharing system. Because the premier-presidential structure provides a stronger check on presidential power, it guards against autocracy, enhances power sharing and serves the normative principle of limiting presidential power better than its counterpart. Thus the premier-presidential design option represents a better choice for the MENA region.

Comparative experience indicates that premier-presidential systems resist autocracy, executive dominance and democratic authoritarianism better than president-parliamentary regimes. Failures of democracy occur over ten times more frequently under president-parliamentarism than under premier-presidentialism. The relative power of the president helps explain the divergent rates of success. The stronger the president (with respect to powers of dismissal as well as decree, veto and emergency powers), the more likely he will be to govern without the prime minister's cooperation, increasingly sidelining the prime minister politically and increasing the risk of a return to presidential dictatorship.<sup>44</sup>


In addition to a powerful president, the increased instability of president-parliamentary government in divided government situations helps explain why these regimes tend to fail. In divided government (cohabitation) situations, as the president and legislature struggle against each another, the shared power of dismissal may lead to a string of appointments and dismissals of the cabinet. No stable government can form, and the president (or another actor, such as the military) may be tempted to seize power unilaterally. This tug of war between the president and the legislature could occur in countries in the MENA region, which often contain fractured political parties with conflicting agendas. However, premier-presidentialism, by confining the power to dismiss the cabinet to the legislature, creates an incentive for the president to work with

the legislature. In short, premier-presidentialism can reduce institutional conflict, or at the very least restrict the president's ability to usurp power in a conflict situation. The premier-presidential form of government thus incentivizes compromise, results more often in power sharing in practice, and limits opportunities for the president to sideline the prime minister and centralize power.<sup>45</sup>

The president-parliamentary option permits both the president and the legislature to dismiss the government. Despite the risks inherent in such a system, many semi-presidential systems adopt it. The specific mechanisms for government dismissal vary by country. In Russia, for example, the Constitution confers a broad power on the President to 'adopt decisions on the resignation of the Government' (article 83(c)). Belarus also empowers the President to 'take the decision on the resignation of the Government, or any of its members' (article 84(7)). In contrast, Portugal's Constitution allows the President to dismiss the government only if it is 'necessary to do so in order to ensure the normal functioning of the democratic institutions' and only after first consulting an advisory body (article 195). The fact that the Portuguese President cannot dismiss the government at his discretion means that it is more accurately described as a premier-presidential system.<sup>46</sup>

The power of dismissal is a dangerous tool in the hands of the president. Presidents in many president-parliamentary regimes have abused the power of dismissal, using it to remove oppositional prime ministers and consolidate power. These problems are particularly acute in Russia. From 1993 to 2001, the President's party did not have a majority in the Duma, which made conditions ripe for power sharing—yet no power sharing occurred. The President used his power of dismissal to appoint six different Prime Ministers during this eight-year period. Five Prime Ministers served with President Boris Yeltsin between 1998 and 1999 alone. These dismissals largely served Yeltsin's own quest for power: he dismissed Prime Minister Viktor Chernomyrdin shortly after citizens began calling for Chernomyrdin to be the next President, and he dismissed Prime Minister Yevgeny Primakov because he feared Primakov's growing popularity. Partly due to these repeated dismissals, Russia was frequently without a sitting government for a period of months. The ensuing political instability harmed both the transitioning democracy and the economy.<sup>47</sup>

Constitution drafters in the MENA region should not give the president the power of dismissal. The premier-presidential design option is a far better choice. As Russia's experience shows, a president that enjoys the power of dismissal is less likely to cooperate with either the cabinet or the legislature. Not only does a president's power to dismiss the government discourage power sharing, but it may also prevent stable governments from forming. In the MENA region, such political instability could in turn damage the prospects for democracy and economic investment, at a time when both are exceedingly fragile. Political instability also sets the stage for dictatorial rule, as



either the president or another party may step in to fill the power vacuum and restore stability through autocracy. Any benefits that presidential dismissal of the government may bring by allowing speedy dismissal and circumventing the need for voting procedures in the legislature do not outweigh these disadvantages. The importance of ensuring that the president does not hold the power to dismiss the government at will cannot be overstated.

The premier-presidential option permits only the legislature to dismiss the government. In addition to avoiding the pitfalls of president-parliamentary government with respect to the principles of power sharing and limited presidential power, the premier-presidential subtype serves the principle of legislative oversight of the government better than president-parliamentarism. While a presidential power to dismiss the prime minister and government does not replace or preclude the legislature's power to do the same, it may undermine the legislature's oversight functions. Dismissal is the legislature's ultimate sanction against a government, and a key element of legislative oversight. When a government faces dismissal by either the legislature or the president, it is unclear to whom the government is ultimately accountable. The government must accordingly respond to the preferences of both the president and the legislature, with the result that the legislature is less able to maintain control of the government. A prime minister and government accountable only to the legislature, on the other hand, need not account for their actions to the president.

Although the premier-presidential arrangement (in which dismissal power is confined to the legislature) is preferable, a constitution can nevertheless impose two limitations on the legislature's power of dismissal: (1) thresholds of legislative support for tabling a motion of no confidence and (2) a requirement that the legislature approve a replacement prime minister before dismissing the current government.

Many countries impose the first type of limitation. In France, for example, one tenth of the legislature's members must support a confidence motion before the legislature will debate and vote on it (article 49). After debate, the legislature can only dismiss the government by passing the no confidence resolution with an absolute majority (article 49). The French threshold is relatively low, while Portugal's Constitution requires that the motion be supported by 25 per cent of the legislature's members before it is tabled, and if the motion fails its signatories cannot make another motion during the same legislative session (articles 194-195).

Countries in the MENA region that adopt the premier-presidential subtype of semi-presidentialism should consider adopting threshold requirements only if the president cannot unilaterally appoint the prime minister or members of the cabinet. If the president can unilaterally appoint the prime minister and/or cabinet members, then the constitution should not impose heightened threshold requirements for initiating a

motion of no confidence, because they would diminish the legislature's influence over the cabinet and shift more power to the president.


By contrast, if the president does not unilaterally appoint the prime minister or cabinet members, heightened threshold requirements will help to protect nascent democracy in the region. Heightened threshold voting requirements and limitations on the number of no confidence votes that can be initiated (as in Portugal) encourage government stability without overly weakening the legislature. Repeated no confidence votes freeze the political process and inhibit power sharing, while repeated government dismissals may provide incentives and justifications for the president to seize power.

The MENA region, in particular, may witness an above-average number of no-confidence votes. Many MENA legislatures are composed of fractured and polarized political parties that may try to pass no confidence votes to challenge the ruling government. Therefore in countries where the president cannot unilaterally appoint the prime minister and cabinet, imposing limitations on the legislature's ability to dismiss the government seems wise.

The second mechanism of limiting votes of no confidence requires the legislature to approve a new prime minister before dismissing the current government. This procedure is called a 'constructive vote of no confidence'. For example, in Poland the Sejm (the legislature's lower chamber) can dismiss the government only by initiating and passing a vote of no confidence and approving a new Prime Minister. Article 158 of Poland's 1997 Constitution provides:

The Sejm shall pass a vote of no confidence in the Council of Ministers by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such a resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office.

The constructive vote of no confidence enhances the stability of the regime by eliminating the power vacuum that exists between governments. In Poland, a new Prime Minister assumes office immediately upon the dismissal of the previous government. If the Sejm cannot agree on a replacement Prime Minister, then the current government remains in power. This occurred in 1997 and 2000. Yet the constructive vote of no confidence does not over-insulate the Prime Minister; in 1995 the Sejm passed a constructive vote of no confidence to replace a Prime Minister who was widely perceived as ineffective.<sup>48</sup>



This mechanism is preferable for countries in the MENA region, because it will minimise the opportunity for centralisation of power. The power vacuum that can form between the dismissal of one government and the formation of the next may encourage the president to seize power. The constructive vote of no confidence guards against the emergence of a power vacuum and encourages the legislature to carefully weigh its decision to dismiss the government.

Constitutional rules must determine whether cabinet members can be dismissed individually, and if so by whom (i.e. the president, the legislature or the prime minister). The principles of power sharing, limited presidential power and legislative oversight of the government are all relevant to structuring these constitutional rules.

First, if a president can dismiss ministers with whom he or she is dissatisfied, the president may be able to exert greater influence over the direction and policy of government. The exercise of this power by the president may disrupt any power-sharing arrangements that are in place. A president may also be able to increase his or her hold on executive power by dismissing specific cabinet ministers.

Second, the power to dismiss the government through a vote of no confidence is a crucial element of legislative oversight of the government. In some cases, however, the conduct of individual cabinet members may not warrant the dismissal of the government as a whole. The stability of the government, as well as the effectiveness of legislative oversight and the legislature's ability to hold the government accountable for its actions, are served by allowing the dismissal of individual members of government.

Third, the principle of power sharing is served by allowing the prime minister to dismiss cabinet members. Power sharing works best under semi-presidential arrangements in which the president and prime minister hold different electoral mandates and represent non-identical political interests. The purpose of a dual executive is to allow the representation of more than one political ideology or interest in the executive. Following this logic, the president should not be able to interfere in the composition of the prime minister's cabinet by dismissing individual ministers, and the prime minister should be able to ensure efficiency and accountability in the cabinet by dismissing individual ministers.

Comparative experience suggests that a presidential power to dismiss individual members of the government is more common in president-parliamentary systems, where the president already holds the power to dismiss the whole government. This is the case in Belarus (article 84), Iceland (article 15), Mozambique (article 160), Sri Lanka (article 47) and Ukraine (article 106(10)). This is by no means standard, however, as in other president-parliamentary regimes the president cannot dismiss individual cabinet members at will. In Austria (article 70), Burkina Faso (article 46),

Central African Republic (article 22), Croatia (1991–2000, article 98), Madagascar (article 54), Niger (article 56), Peru (article 122), Russia (article 83(e)), Senegal (article 49) and the Weimar Republic (article 53), the President's power to dismiss individual members of government must be triggered by a recommendation or proposal from the Prime Minister. Among premier-presidential systems, Portugal is unique in empowering the President to remove the government, but only when it is necessary in order to preserve the functioning of the democratic institutions and after consulting the Council of State (article 195(2)).

Among all other premier-presidential regimes, there are two models for dismissing individual ministers. In the first model, the president formally dismisses individual cabinet members on the advice or proposal of the prime minister. This model is adopted in Armenia (article 55(4)), Cape Verde (article 135(2)(d)), Finland (article 64), France (article 8), Ireland (article 13), Mali (article 38), Poland (article 161) and Slovakia (article 111). In Lithuania, the President may dismiss the Prime Minister with the assent of the legislature, and may dismiss individual government members on the advice of the Prime Minister (article 92). In Romania, the President may dismiss 'some members of the Government' on the proposal of the Prime Minister and subject to parliamentary approval (article 85).

In the second model, the prime minister alone is empowered to dismiss individual cabinet members. This model is used in Bulgaria (article 108). There are variations on this model: in Croatia (article 116) and Namibia (article 39), the legislature may propose motions of no confidence in individual ministers, and in Macedonia (article 94) and Slovenia (article 112) the legislature can dismiss individual ministers on the proposal of the Prime Minister.

The principles guiding this report suggest that the power to dismiss individual members of government should not be conferred on the president. But effective government, as well as meaningful legislative oversight and government accountability, demand that individual members of government face sanction for their misconduct. Unlike the dismissal of the prime minister and the entire government, however, the dismissal of individual cabinet members does not create a power vacuum. Therefore there is less reason to require the legislature to approve a new minister before dismissing an incumbent.

#### **4.2.2.1 Recommendations**

- The legislature should have the exclusive power to dismiss the prime minister and the entire government through a constructive vote of no confidence: it must select and approve a replacement prime minister before the dismissal of the incumbent takes effect.

- The legislature should be empowered to dismiss individual cabinet members, other than the prime minister, through an ordinary (i.e. not constructive) vote of no confidence.
- The prime minister should be able to dismiss individual members of his or her cabinet. Replacing these members should follow the existing methods for the appointment of the cabinet.

#### ***4.2.2.2 Analysis of the 2012 Egyptian Constitution and the Tunisian draft Constitution (June 2013)***

Article 126 of the now-suspended 2012 Egyptian Constitution provided:

The Council of Representatives may decide to withdraw its confidence from the Prime Minister, a deputy of the Prime Minister, or any one of the ministers.

A motion of no confidence may be submitted only after an interrogation, upon proposal by one tenth of the Council of Representatives' members. The Council of Representatives should reach a decision within seven days from the date of debating the motion. A withdrawal of confidence requires a majority of the Council of Representatives' members to be successful.

In all cases, a no confidence motion may not be passed in connection with an issue that had already been decided upon in the same juridical term.

If the Council of Representatives decides to withdraw confidence from the Prime Minister or a minister, and the government announced its solidarity with him before the vote, then that government is obliged to offer its resignation. If the no confidence resolution concerns a certain member of the government, that member is obliged to resign their office.

The Egyptian Constitution reflected some, but not all, of the recommendations laid out above. By adopting a premier-presidential regime (i.e. only the legislature can dismiss the government), the Constitution curbed the power of the Egyptian President. This constitutional safeguard reduces the risk of the re-emergence of dictatorial rule in post-authoritarian democracies. The now-suspended 2012 Constitution imposed no heightened threshold requirements on the legislature's power to dismiss the government, which seems appropriate in this instance, given the President's substantial role in the government formation process.

The Egyptian Constitution did not include a constructive vote of no confidence, which would have raised the danger of a power vacuum arising in the wake of a government dismissal. To truly guard against autocracy and protect power sharing, it would be

preferable to require the legislature to approve a new prime minister before passing a vote of no confidence in the incumbent prime minister.

Article 94 of the draft Constitution of the Republic of Tunisia of June 2013 provides that ‘The government is held accountable before the Chamber of Deputies.’ Article 96 states that:

Votes may be taken on a motion of censure brought against the government after at least one third of the members of the Chamber of Deputies make a justified request to the Speaker of the Chamber of Deputies. The voting process shall not take place except after the elapse of a fifteen-day period as from the date that the request was presented to the chairmanship of the Chamber.

Withdrawal of the vote of confidence given to the government shall be conditional upon the approval of an absolute majority of the members of the Chamber of Deputies and upon the presentation of a candidate alternative to the Prime Minister whose candidacy shall be ratified in the same voting process. The President of the Republic shall entrust the candidate with the task of forming the government. In the event of failure to attain the specified majority, the motion of censure may not be reintroduced against the government except after the elapse of a six-month period.

The Chamber of Deputies may withdraw the vote of confidence given to a member of the government after a justified request is submitted to the Speaker of the Chamber by no less than two thirds of the members. Withdrawal of the vote of confidence shall be by an absolute majority of votes.

As with the Egyptian Constitution, the Tunisian draft Constitution of June 2013 adopts the premier-presidential design option. Unlike the Egyptian Constitution, however, the Tunisian Constitution requires a constructive vote of no confidence in dismissing the government. It stipulates that an ‘absolute majority of the members’ of the legislature must approve an alternative government before dismissing the current government. This should help ensure government stability, particularly in the initial years of the regime. If the legislature’s no confidence motion fails, then the legislature must wait six months before reintroducing it. Because the draft Constitution envisages that the Tunisian President will play a more limited role in the government formation process than in Egypt, imposing the more onerous constructive vote of no confidence may not harm the objectives of power sharing or legislative oversight of the government in Tunisia.



Table A. Government formation and dismissal powers in selected semi-presidential countries

	Prime minister appointment			Cabinet appointment			Dismissal	
	Pres.	Pres. + Leg.	Leg.	PM <sup>49</sup>	Pres. + PM	Pres.	Leg.	Pres + Leg.
Austria	Y			Y				Y
Belarus		Y				Y		Y
Bulgaria			Y	Y			Y	
Burkina Faso			Y	Y				Y
Cape Verde	Y <sup>50</sup>			Y			Y	
Central African Republic	Y			Y				Y
Croatia		Y		Y			Y	
Egypt		Y <sup>51</sup>		Y			Y	
Finland			Y	Y			Y	
France	Y			Y			Y	
Georgia			Y	Y			Y	
Iceland	Y					Y		Y
Ireland			Y	Y			Y	
Lithuania		Y		Y			Y	
Macedonia			Y	Y			Y	
Madagascar			Y	Y				Y
Mali	Y			Y			Y	
Mongolia			Y	Y			Y	
Mozambique	Y					Y		Y
Namibia	Y					Y	Y	
Niger	Y			Y				Y
Peru	Y			Y				Y
Poland		Y <sup>52</sup>		Y			Y	
Portugal	Y <sup>53</sup>			Y			Y	
Romania			Y	Y			Y	
Russia		Y		Y				Y
Senegal	Y			Y				Y
Slovakia	Y			Y			Y	
Slovenia		Y		Y			Y	
Sri Lanka	Y <sup>54</sup>					Y		Y
Taiwan		Y		Y				Y

	Prime minister appointment			Cabinet appointment			Dismissal	
	Pres.	Pres. + Leg.	Leg.	PM <sup>49</sup>	Pres. + PM	Pres.	Leg.	Pres + Leg.
Ukraine		Y		Y			Y	


#### 4.2.3 Presidential dissolution of the legislature

Since the prime minister and government in a semi-presidential system only govern with the confidence of the legislature, the government's term of office comes to a natural end at the expiry of the legislature's term. The president's power to dissolve the legislature before the natural end of its term, therefore, implies the power to dismiss the government. It is a drastic power with far-reaching implications, but it is necessary in parliamentary and semi-presidential systems, especially where power sharing is an objective, because it provides a deadlock-breaking mechanism. If power sharing fails, the power to dissolve the legislature offers an opportunity to call for new elections and begin the power-sharing experiment again.<sup>55</sup>

A presidential dissolution power may also increase the incentives for power sharing in the government formation phase. In the premier-presidential subtype of semi-presidentialism, in which the president does not have the power to unilaterally dismiss the government, empowering the president to dissolve the legislature counterbalances the legislature's exclusive power to dismiss the government. Just as the legislature's power to withdraw confidence from the government creates an incentive for the president to consider the legislature's preferences when selecting a government, the president's dissolution power should lead the legislature to consider the president's preferences when it exercises control over the government.<sup>56</sup>

Yet presidential abuse of the dissolution power can destroy power-sharing arrangements. A legislature under the ever-present threat of dissolution will not provide effective or credible checks on the exercise of presidential power. The absence of meaningful checks on presidential power is wholly out of keeping with the idea of limited presidential power as a principle of constitutional design for post-Arab Spring countries. Kuwait is a good example of these dangers, where the Emir dissolved the legislature five times between 2006 and 2012.<sup>57</sup>

Finally, a parliament that is divided and beset by conflict between a number of parties with weak representation in the chamber will struggle to produce necessary legislation or give stable support to a government. In these circumstances, semi-presidentialism may allow the president to act as an 'autonomous crisis manager' and provide effective executive leadership in the face of parliamentary turmoil. Dissolving an ineffective legislature and calling for new elections is an important element of this role.



Therefore it is important to ensure that the president's power to dissolve the legislature serves the principles of power sharing and presidential crisis management, without conferring too much power on the president. Constitutions in the MENA region should thus contain three kinds of restrictions to establish a controlled and limited presidential power of dissolution: (1) substantive triggers, (2) temporal restrictions and (3) procedural requirements.

**Substantive triggers** empower the president to dissolve the legislature only if certain specified events occur. It is necessary at the outset to distinguish between two kinds of dissolution power: discretionary dissolution and non-discretionary or mandatory dissolution powers, both of which may be subject to substantive triggers. Common substantive triggers of the discretionary power to dissolve the legislature arise from the inability of a divided legislature to perform its ordinary functions (such as meeting or approving a budget) or out of conflict between the legislature and the executive (such as the passage of a vote of no confidence in the government), whereas a common substantive trigger of a mandatory dissolution power is the failure of the legislature to form a government. The important point is that in neither case can the president dissolve the legislature unless specified conditions are met.

The president may have discretion to dissolve the legislature after a vote of no confidence in the government, or if the legislature fails to perform a more ordinary function. The president is not obliged to exercise this power, but has the discretion to choose to do so or not. As the president's dissolution power in these cases extends beyond government formation to ordinary government functions, it enhances the president's power relative to the legislature. The principles of power sharing and limited presidential power are thus served by safeguards that strictly define the substantive triggers for dissolution and set strict rules regarding the frequency of dissolution and the procedures for dissolution. Countries that grant the president a discretionary power of dissolution—for example, if the legislature fails to approve the president's candidate for prime minister or the prime minister's cabinet, or if legislation cannot be passed within a set time period—include Russia (articles 111, 117), Lithuania (article 58), Romania (article 89), Slovakia (article 102), Ukraine (article 90), Mozambique (articles 159, 188), Taiwan (additional articles 2, 3) and Peru (article 134).


Non-discretionary or mandatory dissolution is intended to overcome the threats posed by the failure to form a government. Where a fractured legislature cannot form a stable government, the prolonged absence of a government creates a power vacuum and may provide the opportunity and justification for a presidential power grab. To guard against this outcome, and to provide a better platform for stable government, constitutions instruct the president to dissolve the legislature and call for new elections. Countries that oblige their President to dissolve the legislature if it proves incapable of forming a

government include Bulgaria (article 99), Mongolia (article 22), Poland (articles 98, 155) and Slovenia (articles 111, 117).

As Russia's experience illustrates, a power-hungry president can abuse a poorly designed set of substantive triggers and expand his or her powers—especially if the triggers involve conflict between the legislature and the government rather than a non-functional legislature. There are two triggers in the Russian system, which both confer discretionary powers of dissolution on the President. First, the President may dissolve the legislature if two successive votes of no confidence are passed within a three-month period (article 117). Second, the President may dissolve the legislature if it rejects the President's nominee(s) for Prime Minister three consecutive times (article 111). Bearing in mind that the President plays a significant role in appointing the government, empowering the President to dissolve the legislature if it dismisses or blocks the formation of the government undermines power sharing between the President and the legislature and unduly safeguards the President's preferences in government formation. The legislature is discouraged from rejecting the President's proposed Prime Minister, because doing so triggers the President's power to dissolve the legislature. Similarly, by allowing the President to dissolve the legislature after it passes successive votes of no confidence, the legislature is discouraged from checking the government and passing a vote of no confidence. The end result of these substantive triggers in Russia is a damaged power-sharing arrangement that gives the bulk of power to the President.<sup>58</sup>

Where a president is not empowered to appoint the prime minister and the government, these substantive triggers for legislative dissolution are less of a threat to power sharing. When the legislature appoints the prime minister and government, the president has no say in selecting the prime minister, and presidential dissolution triggered by the rejection of the prime minister does not protect any presidential preferences regarding the choice of prime minister. While a dissolution power triggered by the legislature's rejection of the president's preferred prime minister amounts to a form of punishment that encourages legislative acquiescence to the president's preferences, a dissolution power in which the legislature itself selects a prime minister is a valuable deadlock-breaking device if a stable government cannot be formed.

Following the logic of legislative dissolution as a deadlock-breaking device, a perverse outcome of affording a president the discretion to choose whether to dissolve the legislature if no government can be formed is that the president may choose not to dissolve the legislature, precisely so that no government forms. In this power vacuum, the president can exercise greater power. Bulgaria (which has a premier-presidential system) avoids this perverse consequence by establishing a mandatory dissolution power with substantive triggers that preserve the objectives of power sharing and limited presidential government. In Bulgaria, if the legislature fails to form a government according to the procedure set out in the Constitution, the President must dissolve the



legislature, appoint a caretaker government and schedule new elections (article 99). This non-discretionary trigger, confined to situations of legislative inability to form a government, curbs the Bulgarian President's ability to abuse the dissolution power. The Bulgarian President dissolved the legislature in 1994, triggered by its failure to form a government during a period when the legislature was composed of fractious political parties that refused to cooperate. Prior to its dissolution, the legislature was deadlocked and the legislative process was frozen. Votes on important matters were delayed, while the parties abused confidence votes and dismissed the government six times in one year. When the legislature finally proved incapable of forming a government and was mandatorily dissolved, the country was freed from a deadlocked and ineffective legislature and it became possible to elect a new legislature that would support a more stable government. However, the subsequent dissolution of the legislature in 1997 under the same constitutional rule made it impossible for political disagreements to be resolved in the legislature, thereby encouraging extra-legislative political action and endangering the transition to democracy. Against the experience of presidential domination in the MENA region, however, the danger posed by a fractured legislature that is unable to form a government to counterbalance the executive power of the president outweighs the danger posed by the dissolution of the legislature and fresh elections.<sup>59</sup>

Countries in the MENA region should adopt substantive triggers for dissolving the legislature that check, rather than expand, the president's power. Russia's experience highlights the danger, where the president is central to appointing the government, of empowering the president to retaliate against legislative votes of no confidence by dissolving the legislature. Russia's arrangements weaken the legislature, expand the power of the President, and undermine the prospects and incentives for power sharing. Discretionary powers of dissolution should be triggered by indications of legislative deadlock related to the ordinary legislative process, rather than by the legislature's dismissal of the prime minister or government. In the MENA region, with its polarized political parties, legislative deadlock remains a real risk that may undermine effective legislation and government through, for example, the inability to pass a budget law. The president should be empowered to dissolve the legislature, at his or her discretion, if a fractured parliament is incapable of passing a budget law or other resolutions that are crucial to effective government. The expansion of presidential power that these discretionary powers create can be limited by temporal restrictions and procedural requirements. With respect to mandatory dissolution, MENA constitutions should require dissolution when government formation becomes impossible.


**Temporal restrictions** limit either how frequently a president can dissolve the legislature or prohibit the exercise of this power during certain periods, such as states of emergency or immediately after an election. As with substantive triggers, temporal restrictions encourage the president to share power rather than to usurp it.

Some constitutions limit the frequency with which the president can dissolve the legislature. For example, the French President cannot dissolve the National Assembly (the lower house of the legislature) more than once within 12 months (article 12), or dissolve the National Assembly during a state of emergency (article 16).

However, the French Constitution lacks any requirements for substantive triggers for dissolving the legislature: the President can dissolve the lower house after simply consulting with the Prime Minister and the heads of both chambers of the legislature (article 12). Despite this broad discretion, the French National Assembly has been dissolved only five times since 1958. In most of these cases, the President has used the power to overcome a legislature dominated by an opposition party and avoid cohabitation. This calculation was influenced by non-simultaneous presidential and legislative elections in France and the different term lengths of legislatures and the President. When Francois Mitterrand won presidential elections in the middle of the legislative term in 1981 and 1988, for example, his rationale for dissolving the Assembly on both occasions was to realign party representation in the Assembly with the electoral preferences expressed in the recent presidential elections. Yet in 1986, when legislative elections gave Jacques Chirac's conservative *Rassemblement pour la République* a legislative majority in the middle of Mitterrand's presidential term, President Mitterrand was forced to abide by the clear will of the electorate and appoint Chirac as Prime Minister, thus entering France's first period of cohabitation.<sup>60</sup>

Chirac subsequently stood against Mitterrand in the 1988 presidential elections but was defeated by a large margin. Sensing that the electoral tide had turned back to the left, Mitterrand dissolved the Assembly, now two years into its term, and called for fresh elections. Although Mitterrand's *Parti Socialiste* (PS) was unable to win a majority in the 1988 elections, he was able to gather legislative support for governments headed by PS Prime Ministers Michel Rocard (1988–91), Edith Cresson (1991–92) and Pierre Bérégovoy (1992–93). Chirac was eventually elected President in 1995. He dissolved the legislature in 1997 before scheduled elections, despite having a majority at the time, in order to 'renew' the government's mandate. This backfired spectacularly, however, as voters saw the move as a power grab and reacted by returning a legislative majority hostile to Chirac. The subsequent period of cohabitation lasted until 2002.<sup>61</sup>

De Gaulle's two dissolutions of the legislature followed different slightly rationales. In 1962, he called for a referendum on constitutional changes that would allow for the direct popular election of the President. Members of the legislature opposed to the proposal passed a motion of no confidence against the government. De Gaulle felt that conflict between the President and the legislature should not endure and promptly dissolved the legislature, allowing the constitutional referendum to go ahead. This change created a semi-presidential system in France by allowing for the direct popular election of the French President. In 1968, de Gaulle dissolved the legislature in an



attempt to ensure his political survival through a turbulent period of political and civil unrest.<sup>62</sup>

Although limited only by temporal restrictions, the French President's power to dissolve the legislature has been used sparingly. Moreover, the power has not allowed Presidents to assume greater power. In many ways, this is a result of the lively and vigorous political competition in France. In general, a president would be unwise to make use of the power of dissolution for purely expedient political purposes, unless he or she was certain that the electorate's response in subsequent elections would be favourable. Chirac's miscalculation illustrates this. French Presidents have also refrained from using the power to dissolve the legislature when cohabitation results from legislative elections held in the middle of the President's term, precisely because the electorate has already shown its hand in preferring a party other than the President's. The outcome is that French Presidents in cohabitation with opposition Prime Ministers (i.e. in power-sharing governments) have been encouraged to act in a symbolic function as the *rassembleur* or unifier of the Republic, and as managers of a divided government.

This outcome would suit the MENA region well, as presidents should be encouraged to act both as unifiers of the nation and in ways that foster power sharing. While there may be strong political incentives for a president to dissolve the legislature immediately after its election in the hope of a more favourable majority in subsequent elections (as in France), it would be prudent to adopt a constitutional restriction that prohibits presidential dissolution within a certain period after the legislature's election (except in cases of impasse and inability to form a government) to achieve the objectives of power sharing and presidential leadership.

Other countries, in addition to France, impose temporal restrictions on the power of dismissal. Examples include Mali (articles 42, 50), Romania (article 89), Burkina Faso (articles 50, 59) and the Central African Republic (articles 30, 33), all of which limit their President to dissolving the legislature only once per year.

A constitution can also restrict the president's ability to dissolve the legislature during certain periods. These restrictions usually fall into two groups: those during periods of political crisis and those during normal periods of the legislature or president's term. Constitutions often ban a president from dissolving the legislature during political crises such as states of emergency, martial law or siege, or during impeachment proceedings, for example in Portugal (article 172), Romania (article 89), Peru (article 134), Belarus (article 94), Burkina Faso (article 59) and Senegal (article 52) (see section 4.4.7 below on the state of emergency). By limiting a president's ability to dissolve the legislature during a political crisis, a constitution can prevent the president from capitalizing on the political crisis, dissolving the legislature and consolidating power. Some temporal restrictions, by contrast, bar the president from dissolving the legislature either early or


late in the legislature's term, or late in the president's own term. Peru, for example, bars the President from dissolving the legislature during the last year of the legislature's term (article 134). Dissolutions are prohibited during the last six months of the President's term in Romania (article 89), Portugal (article 172) and Belarus (article 94). These temporal restrictions reduce the risk of a presidential *coup d'état* or autogolpe by ensuring that legislative and presidential elections take place. Absent such temporal restrictions, the president might dissolve the legislature to forestall a potential electoral loss or circumvent presidential term limits.

Constitutions can also prevent the president from exercising his power of dissolution multiple times for the same reason. In Austria, the President can only dissolve the legislature once for the same reason (article 29). However, the Austrian Constitution is a poor model: other than this single temporal restriction, the Austrian President enjoys broad discretion to dissolve the legislature—without providing a reason (article 29). As drafted, the power of dissolution in the Austrian Constitution remains open to abuse.

Countries in the MENA region should consider imposing temporal restrictions on the president's ability to dissolve the legislature to reduce the risk that a president may take advantage of the resulting power vacuum to flout term limits and rule unilaterally. Particularly when there are no substantive triggers, temporal restrictions provide a necessary check on the president's ability to dissolve the legislature. The risk that the president will take advantage of a power vacuum is exacerbated when legislatures are dissolved during political crises, such as states of emergency, underlining the need for substantive restrictions as well. MENA region presidents already have a history of abusing emergency powers, while the legislature is dissolved, to consolidate their power. For instance, Egypt's legislature was dissolved twice under emergency rule during Mubarak's presidency, as well as in Algeria (under emergency rule between 1992 and 2011) and Syria (under emergency rule between 1963 and 2001). Given this history, it is important that MENA region countries consider barring the president from dissolving the legislature during periods of political crisis. Dissolutions can also hijack the electoral process in the months leading up to new elections. For instance, following electoral successes in the early 1990s by the Islamic Salvation Front in Algeria, the military (in response to this new threat to its power) forced the President to dissolve the legislature and resign, and then cancelled the second round of elections. Preventing the president from dissolving the legislature late in its term or late during the president's term increases the likelihood that the president will respect both his term limits and the democratic process.<sup>63</sup>

Finally, constitutions should restrict the frequency with which the president can dissolve the legislature. Multiple dissolutions prevent the legislature from acting as a strong check on executive power. In Kuwait, the monarch dissolved the legislature five times between 2006 and 2012 following a power struggle between the government and the





legislature. The virtually routine dissolutions in Kuwait have hampered the legislature's ability to participate in policy planning, engendered an adversarial relationship between the executive and the legislature, reduced confidence in the legislature and created an atmosphere of instability. To prevent such outcomes and encourage power sharing, a constitution should prohibit the president from dissolving the legislature more than once per year.<sup>64</sup>

Two main procedural requirements for legislative dissolution are that elections should be held within a certain period and that certain consultations should take place in connection with the dissolution. Because the purpose of dissolution is to hold new legislative elections, constitutions often define the specific window of time during which elections must take place after the dissolution. By defining this window, the constitution inhibits the president's ability to rule by decree. Well-drafted provisions will explicitly state that, upon dismissal, if elections are not held within the stipulated period, then the legislature is automatically reinstated. The length of this window varies from country to country. France requires elections within 20 to 40 days of dissolution (article 12), whereas Poland calls for elections within 45 days (article 98) and Bulgaria within three months (articles 64, 99). Peru's Constitution imposes a window of four months, but wisely bans any changes to the electoral laws before the election (article 134), which effectively prevents the President from rigging the upcoming election in his favour and ensuring a loyal legislature.

Namibia's Constitution provides that in addition to triggering fresh parliamentary elections, the dissolution of the legislature triggers fresh presidential elections, both of which must take place within 90 days of the dissolution (article 57). However, Namibia's variation might discourage the President from exercising dissolution powers even if dissolution would be appropriate to replace a fractured and deadlocked legislature. A president faced with the prospect of either continuing to govern alongside an ineffective legislature or triggering his own removal may prefer to remain in power with an ineffective legislature. Power sharing, as well as legislative activity, may suffer as long as the president is dissuaded from dissolving an ineffective legislature.

Some constitutions also require the president to consult with other stakeholders before dissolving the legislature. In France, the President must consult with the heads of both chambers of the legislature before dissolving the legislature (article 12). In Portugal, the President must consult with the parties represented in the legislature as well as the Council of State—an advisory body composed of the President, Prime Minister, Judge President of the Constitutional Court, Presidents of regional governments, former Presidents, and five citizens nominated by the President and five by the legislature (articles 133, 172). The Croatian President can dissolve the legislature only after substantive triggers including a vote of no confidence and the government's request for dissolution; the procedural requirements in Croatia are that the President consult with

representatives of parliamentary parties and that the Prime Minister countersign the President's dissolution order (article 104). A consultation requirement can enhance power sharing by giving the other branches a voice in the dissolution decision. Consultation may also lead to a negotiated solution to the deadlock, which can avoid the political instability associated with legislative dissolution.

#### **4.2.3.1 Recommendations**

In making recommendations for how to structure a dissolution power in light of the above discussions, it is important to point out that a prohibition on the dissolution of the legislature for a period immediately after the election of the legislature would conflict with the requirement that the legislature must be dissolved if it cannot form a government. The solution to this dilemma is to explicitly specify different temporal restrictions for the president's mandatory and discretionary powers of dissolution. The following are recommended:

##### **Discretionary dissolution**

- The president's discretion to dissolve the legislature is triggered only in specific circumstances (which must be specified in the constitution) such as:
  - failure to pass a budget law after two successive votes; or
  - dismissal of the government, provided that the constitution does not authorize the president to unilaterally appoint the prime minister or government.
- Discretionary dissolution must be subject to limitations:
  - no dissolution during a state of emergency;
  - no dissolution after impeachment or removal proceedings against the president have been initiated;
  - no dissolution within a set period (at least six months) after the election of the legislature;
  - dissolution is allowed only once within a 12-month period; and
  - no successive dissolution for the same reason.

##### **Mandatory dissolution**

- The president must dissolve the legislature, or the legislature is automatically dissolved by law, if it is unable to approve a prime minister and government within a set period after legislative elections.
- No mandatory dissolution shall take place during a state of emergency.

##### **Procedural restrictions**

- Dissolution is to be followed by parliamentary elections within 40 to 50 days of dissolution.
- If elections are not held within that specified period, the dissolved legislature is automatically reinstated.

- No changes to the electoral law or the constitution may be made while the legislature is dissolved.

#### ***4.2.3.2 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 127 of the now-suspended 2012 Egyptian Constitution provided:

The President of the Republic may not dissolve the Council of Representatives except by a causative decision and following a public referendum.

A Council of Representatives may not be dissolved during its first annual session, nor for the same cause for which the immediately previous Council of Representatives was dissolved.

To dissolve the Council of Representatives, the President must issue a decision to suspend parliamentary sessions and hold a referendum within 20 days. If voters agree by a valid majority on the dissolution, it is to be carried out. The President calls for early parliamentary elections to take place within 30 days from the date of the dissolution. The new Council of Representatives convenes within the 10 days following the completion of elections.

If no such majority agrees to the dissolution, the President of the Republic resigns.

If, however, the referendum or elections do not take place within the specified time limit, the existing Parliament reconvenes of its own accord on the day following the expiry of the time limit.

Article 139 provided:

The President of the Republic nominates the Prime Minister, who is assigned by the President the task of forming a government and presenting its programme to the Council of Representatives within 30 days. If the government is not granted confidence, the President appoints another Prime Minister from the party that holds a plurality of seats in the Council of Representatives. If the second nominee does not obtain confidence within a similar period, the Council of Representatives appoints a Prime Minister who is assigned by the President the task of forming a government, provided said government obtains parliamentary confidence within a similar period. Otherwise, the President of the Republic dissolves the Council of Representatives and calls the elections of a new Council of Representatives within 60 days from the date the dissolution is announced.

In all cases, the sum of the periods set forth in this Article should not exceed 90 days.


In the case the Council of Representatives is dissolved, the Prime Minister presents the government and its programme to the new Council of Representatives at its first session.

The now-suspended 2012 Egyptian Constitution did contain a substantive trigger for a discretionary dissolution of the legislature, but this trigger was vague. Article 127 provided that the President could dismiss the legislature for a ‘causative decision’, but the Constitution nowhere defined this term. An overly zealous President might choose to define ‘causative decision’ broadly, to the detriment of power sharing. Yet a failure to form the government would have resulted in a mandatory dissolution of the legislature according to article 139. As discussed above, this increases the opportunities for a power-sharing government in cases where a legislature represents diverse interests.

Keeping the Russian example in mind, where the President is empowered to dissolve the legislature if it dismisses the Prime Minister, it is important to distinguish between two triggers of dissolution power: (1) when the legislature cannot form a government within a specific time and (2) when the legislature dismisses the prime minister (who the president may be empowered to appoint). The Egyptian Constitution provided for the first trigger by requiring legislative dissolution if the legislature failed to form a government. This is an appropriate power-sharing arrangement, because the Egyptian President’s dissolution power would have been triggered under article 139 only if the legislature failed to approve the leader of the majority party or coalition as Prime Minister—not if the legislature failed to approve the President’s preferred Prime Minister.

However, under article 139, the Egyptian Prime Minister may have been the President’s preferred candidate. The President was empowered to dissolve the legislature for a ‘causative decision’ under article 127, which could conceivably include the dismissal of the Prime Minister. The Egyptian Constitution thus mirrored the Russian situation, in which the President can discourage the legislature from dismissing his preferred Prime Minister by threatening to dissolve it. In order to avoid this situation, a constitution should much more clearly define the substantive triggers for legislative dismissal.

The Egyptian Constitution did impose certain temporal and procedural requirements, but these may have failed to fully check executive power. In line with this report’s recommendations, the Egyptian Constitution prohibited dissolution both during the first annual session of the legislature and multiple dissolutions for the same reason. However, article 139 contained a troubling ambiguity: it provided that the President must ‘call’ elections within 60 days but made no provision for when elections must occur. The President could within 60 days schedule elections for some point in the future after the 60-day period. It is also not clear why articles 127 and 139 stipulated different time periods within which elections must be called (30 and 60 days,



respectively). It is preferable that elections occur as soon as possible, since the longer a country operates in a power vacuum with neither a legislature nor a government in place, the greater the risk that a president can seize or consolidate power.

Article 88 of the draft Tunisian Constitution of June 2013 states that:

If a four-month period elapses from the date of entrusting the first candidate and the members of the Chamber of Deputies fail to agree on granting confidence to the government, the President of the Republic is entitled to dissolve the Chamber of Deputies and to call for new legislative elections to be held within at least 45 days and not more than 80 days.

Article 79 provides:

In the event of imminent danger threatening the nation's institutions, and the security and independence of the country in such a manner preventing the normal operation of the entities of the state, the President of the Republic may undertake any measures necessitated by the circumstances, after consultation with the Prime Minister and the Speaker of the Chamber of Deputies. The President shall announce the measures in an address to the nation.

The measures shall aim to secure the normal reoperation of the public authorities as soon as possible. The Chamber of Deputies shall be deemed in a state of continuous session throughout such period. In such event, the President of the Republic may not dissolve the Chamber of Deputies and may not bring a motion of censure against the government.

As with the now-suspended 2012 Egyptian Constitution, the draft Tunisian Constitution contains a variety of substantive triggers and restrictions related to dissolution. Article 88 provides that the President is 'entitled' to dissolve the legislature in the case of a prolonged failure to form a government, but this is a discretionary power, not a mandatory power as in Egypt. Dissolving the legislature can enhance political stability in such a situation, but without an obligation to dissolve the legislature within a fixed period of time, the President may be able to take advantage of the power vacuum and consolidate political power.

Article 88 is unclear as to whether the President must only 'call' for new elections or ensure that they are held within the specified time period. The time period ('at least 45 days and not more than 80 days') is also vague.

There are two more significant grounds for concern. First, article 76 of the Tunisian draft Constitution gives the President the mandate to dissolve the legislature in accordance with the Constitution's provisions. The draft Constitution does not mention

the dissolution power except in the circumstances described by article 88, which implies that the President has no discretion to dissolve the legislature otherwise. Article 79 prohibits the dissolution of the legislature in emergency situations. These two provisions could create a bizarre situation in which during an emergency, when the elected legislature is unable to form a government as contemplated by article 88, the President is prohibited from dissolving the legislature. This would have the consequence of preserving a hung parliament that cannot form a government and allowing the President to exercise emergency powers in the absence of a government. This creates a significant risk that the President will be able to consolidate power. This risk is even more significant in light of the fact that the President can exercise emergency powers after merely consulting the Prime Minister and legislature, and subject to limited legislative and judicial oversight (see below).


Second, the Constitution contemplates dissolution only if a government cannot be formed. Without the ability to dissolve the legislature in other situations—for example if the legislature fails to pass a budget law or consistently fails to reach agreement on ordinary laws—the President is not able to break parliamentary deadlock, call for fresh elections and create a new opportunity for effective power sharing.

#### ***4.2.4 Presidential term limits and mid-term removal of the president***

The limitation on the number of terms a president can serve is a simple but effective way of limiting opportunities for a president to centralize power. Term limits also create opportunities for presidential candidates to compete meaningfully for the presidency where an incumbent president must leave office after a set number of terms.

Few countries in the MENA region impose fixed, enforceable term limits on the president, and almost no presidents face a credible threat of impeachment. Although Algeria's Constitution fixed a two-term limit on the President, President Bouteflika spearheaded a constitutional amendment that permitted him to run for a third term in 2008. His abuse of term limits echoes other abuses in the region. Egyptian President Anwar Sadat used his dominance of the legislature to amend article 77 of the Constitution in 1980 to allow the President to rule for an unlimited number of successive terms. A president who does not face term limits may act in an autocratic and corrupt manner, with a sense of impunity, to thwart political opposition and abuse the benefits of office. In Tunisia, for example, Ben Ali amassed a personal fortune through the forced sales of businesses and privatizations. The 1959 Tunisian Constitution failed to provide any means of impeaching the president; neither, after constitutional amendment in 2002, did it impose term limits on Ben Ali.<sup>65</sup>

The likelihood that a president will lose an election decreases with each re-election; a president amasses greater power the longer he or she stays in office. Elections rarely oust



an incumbent president. Incumbents can point to a track record of accomplishments, they can fundraise more easily and their party is usually more cohesive than the opposition's party. Incumbents can also use state resources to reward supporters and eliminate rivals. Partly due to these advantages, neither of Tunisia's pre-Arab Spring Presidents (Bourguiba and Ben Ali) ever faced any real opposition in their nearly half-century in office. Requiring an incumbent president to leave office after a set number of terms ensures that the benefits of incumbency cannot be extended indefinitely to maintain a single president's grip on power.<sup>66</sup>

Imposing a cap on term limits will weaken presidential power and help guard against autocracy, as well as strengthen the party system in MENA countries. An open-seat election increases the odds that an opposition candidate will assume the executive. This reduces the risk that a single party will dominate the presidency, strengthens the political party system as a whole and increase opportunities for power sharing.<sup>67</sup>

It is important that presidents in the MENA region have an opportunity to win re-election, but that opportunities for presidential longevity be kept to a minimum. A fixed limit of two terms strikes a good balance between maximising the benefits of retaining an experienced president, while reducing the risk of presidential consolidation of power and autocratic presidential rule.

Term limits that prohibit more than two successive terms but allow more than two non-successive terms as president fail to strike this balance, because a president need only leave office for one term after serving two terms in order to stand for a third term. This is the case in Russia (article 81). When paired with the Russian President's strong executive power, the possibility of multiple terms opens the door to autocracy. President Vladimir Putin maintained a hold on executive power by nominating Prime Minister Dmitri Medvedev as his successor and then reclaiming the presidency after serving as Prime Minister for a single term. A fixed cap on term limits would have barred Putin from assuming office for what will likely be another two terms as President.

The French Constitution did not impose any term limits on the President until 2008, when article 6 was amended to introduce a limit of two consecutive terms. A direct comparison of the pre-2008 French Constitution and the Russian Constitution reveals that the French Constitution imposed weaker term limits on the President than Russia, and would thus have enabled even greater presidential centralization of power. However, no French President served more than two terms in office. The relative constitutional strength of the Russian President compared to the French President helps explain the greater presidential longevity in Russia. An institutionally weak president is less able to use his or her powers to bypass existing rules or to maintain a hold on power. Limiting presidential longevity thus involves both the institutional rules that impose

term limits and limiting the president's powers of decree, emergency, dissolution and appointment.

Consequently, any discussion of term limits must distinguish between the rules for term limits and the enforcement of those rules. Presidents may seek to resist term limits or circumvent them by amending the constitution or seeking favourable judicial rulings to provide for longer terms. Alternatively, presidents might bypass term limits by handpicking and bankrolling successors, or ignore them altogether by simply staying in office. The stronger the president, the more likely that presidential efforts to bypass term limits will succeed. Weakening the president's powers of decree, emergency, dissolution and appointment will help ensure that the president cannot abuse his or her powers to ignore or circumvent term limits.

The ability to remove a president is a significant element of a power-sharing system. For a president to share power, he must also face a credible threat of removal before the expiry of his or her term of office. Mechanisms for removal will dissuade a president from acting in ways that attract the censure of the other branches and create an incentive for the president to consider the wishes of opposition or coalition parties when exercising presidential powers. MENA presidents have not faced the threat of removal, partly because they have tended to wield hegemonic power over all government institutions. Giving the president broad powers of appointment, dissolution, emergency and dismissal reduces the likelihood that other state institutions and branches will act to remove the president either for fear of reprisal or because those institutions have already been captured by the president.

The constitutional rules governing the processes for removing the president are thus important, and vary widely within semi-presidential systems. There are two procedures for removing a president. The first is impeachment, in which the president is impeached for crimes he is alleged to have committed, tried by a specially constituted tribunal or court, and faces removal upon a guilty verdict. Removal by impeachment thus involves two processes: the impeachment itself—that is, bringing charges against the president—and the trial. The second procedure involves removing the president without a trial or formal charges of misconduct. Procedures of this kind can allow the legislature to initiate proceedings for removing the president without charging that the president is guilty of a crime. Such removal procedures are more flexible, and allow the legislature to exercise greater control over the functions of the president.

In a minority of semi-presidential countries—the Central African Republic, Mozambique and Mongolia—the Constitution is silent on procedures for impeaching or removing the President.





#### 4.2.4.1 *Impeachment*

The President may be impeached, for crimes allegedly committed, by a supermajority of two thirds of the legislature (or the lower chamber in bicameral system), in Bulgaria (article 103), Cape Verde (article 132), Croatia (article 105), Weimar Republic (article 59), Macedonia (article 87), Madagascar (article 131), Mali (article 95), Poland (article 145), Portugal (article 130), Sri Lanka (article 38(2)(a)) and Ukraine (article 111). In Russia (article 93), a two-thirds majority in both houses is necessary to impeach the President; in Senegal (article 101), a three-fifths majority of both houses is needed. In Romania (article 96), the President may be impeached by a two-thirds majority of a joint sitting of both houses. In Finland, Parliament decides to bring charges against the President by a three fourths majority, in which case the prosecutor general brings charges against the President in the High Court of Impeachment (article 113).

In other countries, a supermajority is not necessary to impeach the president. In Armenia (article 57), Niger (article 53) and Slovenia (article 109), only a simple majority is needed to impeach the President and begin tribunal proceedings, and in Georgia this threshold is only one third of the members of the legislature (article 63). In Peru (articles 99–100), the charge of crimes committed by the President is brought by the Standing Committee of Parliament and approved by a simple majority vote in the legislature.

Once charges have been brought and the president has been formally impeached, proceedings commence. The high court, a special judicial court of impeachment or a tribunal composed of members of the legislature, as the case may be, then tries the president on the charges. In Russia (article 93), the Supreme Court must reach a verdict of guilty, and the Constitutional Court must confirm that the correct procedures were followed in order for the President to be removed. In Cape Verde (article 132) and Finland (article 113), an ordinary criminal prosecution and trial in the ordinary courts is held, and in Poland (article 145(3)) the Tribunal of State, composed of members of both houses of the legislature, convenes to examine the charges against the President. In Croatia (article 105), Niger (article 53), Macedonia (article 87) and Slovenia (article 109), the court's guilty verdict must be supported by a vote of two thirds of the judges.

The Constitution clearly states that the President is automatically removed from office upon a verdict of guilty in Madagascar (article 132), Bulgaria (article 103(3)), Cape Verde (article 132(3)), Croatia (article 105), Niger (article 53) and Portugal (article 130(3)). In Niger, after the President is found guilty of treason by the High Court, as defined in the Constitution, he or she is removed from office. The President's removal is declared by the Constitutional Court at the conclusion of High Court proceedings (article 142). In other regimes, the legislature must decide whether to remove the President after a guilty verdict. This occurs with a supporting vote of two thirds of the


house in Armenia (article 57), Georgia (article 63(2)) and Sri Lanka (article 38(2)(e)), and a supporting vote of three fourths in Ukraine (article 111). In Poland, the President is suspended on the day the charges are put before the Tribunal of State (article 145), and the Speaker of the legislature serves as acting President until (and if) the President is discharged by a decision of the Tribunal of State (article 131). In Peru, the legislature approves the removal of the President for his crimes with a simple majority vote (article 100).

Impeachment proceedings, which involve the courts, may create opportunities for presidents who have influence over the courts to undermine the proceedings and survive attempts to remove them from office. In Armenia between 1995 and 2005, for example, the President was empowered to appoint all the judges of the Constitutional Court (article 55(10)), which would try the President if he or she were impeached by a majority of the legislature. After changes to Armenia's Constitution in 2005, the President now appoints only four of nine members of the Constitutional Court (article 55(10)), and the President's influence over the Court is reduced. Russia provides a striking example of a President who controls the cogs of the impeachment process. Impeachment in Russia involves both the legislature and the Constitutional Court, both of which the Russian President effectively controls. The Russian President's influence over the legislature stems from his extensive powers of emergency, appointment, dismissal and dissolution. Such a legislature will rarely produce enough votes to impeach the President. When Russia's Duma tried to impeach President Yeltsin in 1999, it could not muster enough votes to even initiate the process. Even if the Russian legislature chooses to impeach the President, the President's power to appoint judges to the Constitutional Court fosters a sense of loyalty to the President within the Court and makes it unlikely that the Court will confirm an impeachment decision as required by the Constitution (articles 91, 93, 128).<sup>68</sup>

Impeachment proceedings may also flounder where the constitution narrowly restricts the crimes for which the president can be impeached. In Russia, for example, the President can be impeached for 'high treason or some other grave crime'. This sets a high bar for impeaching the President, who should perhaps face censure for crimes less severe but no less damaging to the nation—such as corruption or fraud.

#### **4.2.4.2 Removal proceedings**

As opposed to impeachment proceedings, removal proceedings do not involve either a charge or a court finding that the president has committed any misconduct. Removal proceedings are accordingly simpler and less complex than impeachment proceedings, and often occur only within the legislature. The relative simplicity of removal procedures compared to impeachment procedures raises concerns about stability and may undermine a president's ability to provide effective leadership in times of crisis or to



serve as a symbol of unity and overcome political discord. For this reason, the legislative majorities needed to remove a president from office tend to be high.

In Burkina Faso (article 139), the President may be removed from office by a vote in the legislature supported by four fifths of its members. In Belarus (article 88), a two-thirds majority in both houses of the legislature may remove the President. In Austria (article 60(6)), Iceland (article 11), Slovakia (article 106), Romania (article 95) and Taiwan (article 100, additional article 2), the President is removed by referendum (by an ordinary majority of voters) following a vote in the legislature to remove the President. The vote in the legislature must be supported by a two-thirds majority in Austria and Taiwan, a three-fifths majority in Slovakia, a three-fourths majority in Iceland and a simple majority in a joint sitting of both chambers of the legislature in Romania. In Lithuania (article 74), the President may be removed by a vote in the legislature that is supported by a three-fifths majority, and in Namibia (article 29) by a vote supported by two thirds of each chamber of the legislature.

In France, either house may propose the removal of the President by a two-thirds majority, which must be confirmed by a similar majority in the other chamber (article 68). Once both chambers approve the impeachment motion, the two chambers convene, sitting jointly as the High Court, to consider the President's removal. The President is removed by a vote in the joint sitting supported by a two-thirds majority. In Ireland (article 12(10)), either house may impeach the President for stated misconduct by a two-thirds majority. The non-impeaching house must then investigate the charges, to which the President is entitled to respond in the house. The second house, on the conclusion of its investigation, can remove the President with a two-thirds majority vote.

#### **4.2.4.3 Assessment**

A semi-presidential constitution should establish procedures for removing or impeaching the president, in order to preserve power-sharing arrangements and check a president who assumes too much power or otherwise threatens the interests of the nation. These procedures must limit the executive's control over the process and the institutions involved. Impeachment procedures may be meaningless where the president controls the courts, and removal procedures may be meaningless where the president controls the legislature. Limiting the president's ordinary powers is thus crucial to ensuring that he or she can be removed from office if necessary. The removal and impeachment procedures must therefore be examined in the context of the rest of the distribution of executive power.

The process should be simple and workable. It must strike a balance between procedural hurdles that decrease the likelihood of removal on the one hand, and domination by a

strong legislature capable of abusing the process on the other hand. While Russia's Constitution suffers under an unduly strong President to begin with, it compounds this problem by establishing an overly complex impeachment process that consists of five separate steps: a vote by the lower house to initiate impeachment, a vote by both houses in favour of impeachment, approval by the Constitutional Court, a vote by a separate council to impeach the President and time constraints (articles 91, 93). Failure at any one of these steps scuttles the impeachment process.

Providing broad grounds for impeachment and limited criminal immunity will also increase the threat of impeachment. Historically, MENA presidents enjoyed broad judicial immunity for crimes committed while in office. Narrow grounds of impeachment, when paired with sweeping judicial immunity for the executive, make impeachment difficult. In Russia, the legislature can only impeach the President for 'high treason or some other grave crime'. For all other actions, the President enjoys sweeping immunity (article 91). In contrast, Portugal's Constitution sets out broad grounds of impeachment and no judicial immunity. The President is accountable for all crimes he commits while acting as President, and conviction for any of these crimes results in removal from office (article 130). No Portuguese President has faced impeachment, but Portugal's Constitution still provides a valuable lesson. Compared to Russia, Portugal's broad grounds for impeachment and limited judicial immunity result in a stronger legislature and weaker president (on immunity, see section 4.4.5 below).

France's procedure is simple, but imposes reasonably high institutional thresholds for removing the President. Both houses must vote to indict the President, one after the other, and then a joint session of the legislature sitting as the High Court may remove the President with a two-thirds majority vote (articles 67–8). This insulates the process from the influence of the President by locating it in the two houses of the legislature, while the requirement of three separate votes, two supported by supermajorities, ensures that the legislature cannot lightly take the decision to remove the President.

#### **4.2.4.4 Recommendations**

##### **Term limits**

- An incumbent president can be re-elected to serve a successive term of office. A person may serve a maximum of two terms as president, whether those terms are successive or not.
- The presidential term of office should be limited to four or five years.

##### **Removal/impeachment**

- The president must not be able to control or determine the composition of the institution that decides whether to impeach or remove the president.

- The process must involve no more than two or three steps, and the decision thresholds at each point must strike a balance between insulating the president from politically motivated removal attempts and allowing effective removal when necessary.
- The president must face impeachment for ordinary crimes committed while in office.

#### ***4.2.4.5 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 133 of the Egyptian Constitution provided that:

The President of the Republic is elected for a period of four calendar years, commencing on the day the term of his predecessor ends. The President may only be re-elected once.

Article 152 provided:

A charge of felony or treason against the President of the Republic is to be based on a motion signed by at least one third of the members of the Council of Representatives. An impeachment is to be issued only by a two-thirds majority of the members of the Council of Representatives.

As soon as an impeachment decision has been issued, the President of the Republic ceases all work; this is treated as a temporary obstacle preventing the President from carrying out Presidential duties until a verdict is reached.

The President of the Republic is tried before a special court headed by the President of the Supreme Judicial Council, the longest-serving deputies of the President of the Supreme Constitutional Court and of the State Council, and the two longest-serving Presidents of the Court of Appeals; the prosecution to be carried out before such court by the Prosecutor General. If any of the foregoing individuals are prevented from leaving their positions, they are replaced by order of seniority.

The law organizes the investigation and the trial procedures. In the case of conviction, the President of the Republic is relieved of his post, without prejudice to other penalties.

Regarding term limits, article 133 of the Egyptian Constitution was consistent with this report's recommendations. Under the now-suspended 2012 Egyptian Constitution, the President would have served no more than two four-year terms. The constitutional rule that the President 'may only be re-elected once' suggested that the two-term limit applied to non-consecutive terms as well. The Egyptian Constitution's procedure for impeachment was likely to encourage executive accountability. The grounds for

impeachment—any felony or any finding of treason—were fairly broad. The procedure for impeachment, moreover, was fairly simple. A two-thirds legislative majority was required, followed by a trial (article 152).

Article 74 of the June 2013 draft Tunisian Constitution provides:

The President of the Republic shall be elected for a five-year period during the last sixty-day period of the presidential term by means of general, free, direct, and secret elections. The election process shall be by an absolute majority of valid votes.

It is forbidden to assume the Presidency of the Republic for more than two successive or separate terms.

Article 86 provides:

The President of the Republic benefits from judicial immunity during his mandate. All statutes of limitations and other deadlines are suspended. Judicial measures may recommence after the end of his mandate.


The President of the Republic cannot be prosecuted for acts that were carried out in the context of his functions.

Article 87 provides:

A majority of the members of the Chamber of Deputies may initiate a justified statement approved by a majority of two thirds to bring an end to the President of the Republic's mandate for the deliberate violation of the Constitution. In such event the matter is referred to the Constitutional Court for deciding on the matter. In the event of condemnation, the Constitutional Court may not render its sentence except by way of ousting. This shall not mean an absolution of punishment when necessary. No President who has been forced from office is entitled to run in any other election.

The Tunisian Constitution's term limit provision provides for fixed terms and prevents the President from serving more than two terms, whether separate or successive.

Together, articles 86 and 87 do not provide a credible threat of impeachment. Article 86 gives the President sweeping judicial immunity for all 'acts ... carrie[d] out in the context of his functions'. Even though article 87 allows the legislature to impeach the President for the 'deliberate violation of the Constitution', it is unclear what constitutes a violation of the Constitution for the purposes of impeachment. By cloaking the President with judicial immunity for all acts executed as part of the office, article 86 could be interpreted as blocking impeachment of the President because the Constitutional Court is barred from considering any act the President takes in his



capacity as President, including deliberate violations of the Constitution. Article 87 fails to define ‘deliberate violation of the Constitution’. This is reminiscent of the Russian model, which restricts the cases in which impeachment proceedings can be initiated.

### ***4.3 Semi-presidentialism as a power-sharing mechanism in practice***

Having discussed how a power-sharing government within a semi-presidential framework is created, this section considers design options that serve the four principles of design in the daily operation of the government: the division of control over domestic and foreign policy, decree authority, and the ability to appoint officials to the civil services and bureaucracy. It also discusses checks on presidential and prime ministerial power, such as chairmanship of the cabinet, countersignatures and veto power. It is important to consider the distribution of these powers in light of the discussion in section 4.2, since the extent to which the architecture of a semi-presidential framework can uphold principles of power sharing, limited presidential power, legislative oversight and effective leadership will be influenced by how much power the president and prime minister can exercise in practice. For power sharing to work in practice, the constitution must check the president’s ability to hijack the policymaking process, particularly by issuing decrees, appointing lower-level officials or abusing his veto power.

Semi-presidential constitutions lay out three different models for directing domestic policy: (1) the principal/agent model, (2) the figurehead/principal model and (3) the arbiter/manager model.<sup>69</sup>

Under the principal/agent model (the leading example of which is Russia), the President enjoys explicit control over foreign and domestic policy (article 80). The government, on the other hand, is tasked with merely ‘exercising’ executive authority (article 110). While this model streamlines the policymaking process, it risks creating an autocratic president. The risk of autocracy is particularly acute in countries in the MENA region, which have histories of strongman presidents. The Russian experience is instructive. In Russia, the President’s broad policy mandate—when combined with his broad power to issue decrees, chair cabinet meetings and make appointments—has ensured presidential domination of the policymaking process.<sup>70</sup>

Under the figurehead/principal model, the president is a ceremonial head of state and the prime minister controls the bulk of the policymaking process. Iceland’s Constitution, for example, adopts this model, in which the President is head of state and little more. While this model removes the president from the policymaking process, it risks investing too much power in the prime minister, particularly when the prime minister controls the government formation process, thus excluding the president from any meaningful executive power and undermining the objectives of power sharing. The figurehead/principal model is unsuitable for a semi-presidential system that seeks to

share power, and ill suited for countries in the MENA region, which lack a long history of parliamentary government. Where parliaments are inexperienced and the party system is underdeveloped, the figurehead/principal model risks creating an inefficient and uncoordinated policymaking process.<sup>71</sup>

This report recommends that the president serve as an arbiter of the government's domestic policy, while the prime minister serves as a manager. The arbiter/manager model gives the prime minister control over setting the government's domestic programme. The prime minister appoints civil service and bureaucratic officials, co-signs presidential decrees and manages the day-to-day functions of government. As an arbiter, the president should enjoy limited powers to weigh in on policy decisions taken in cabinet meetings and hold a limited veto over legislation. This report also suggests that MENA constitutions impose consultation or legislative approval requirements for both diplomatic appointments and treaty ratification.


This section considers the distribution of powers in the arbiter/manager framework in the context of the normative principles of power sharing, limited government and presidential leadership. It addresses the benefits of the arbiter/manager framework (section 4.3.1), the distribution of specific powers between the dual executive (section 4.3.2), decree power (section 4.3.3), appointment powers of lower government officials (section 4.3.4), chairmanship of the cabinet (section 4.3.5) and presidential veto powers (section 4.3.6).

#### ***4.3.1 The arbiter/manager model***

The arbiter/manager model best upholds the four principles of semi-presidential system design described in Part 3. This model grants the prime minister and the president overlapping but complementary mandates to engage in the policymaking process. The French Constitution adopts this model, granting the government as a whole authority over national policy (article 20). Additional articles specify that the President will operate as an 'arbiter' and ensure the efficient functioning of the government, while the Prime Minister will 'direct' the government's actions (articles 5, 21). As a result, when one party controls both offices, the French model generates a hierarchical system of governance in which policy priorities are set by the President and managed by the Prime Minister. During periods of cohabitation, however, this flexible division in responsibilities, as complemented by the countersignature requirements and other procedural checks discussed below, leads to a policy environment in which the President can weigh in on (but not entirely block) the Prime Minister's direction of domestic policy. In France, cohabitation has been characterized by compromise, as well as conflict, between the President and the Prime Minister.<sup>72</sup>

This report discusses the division of specific powers between the president and the prime minister and government, in particular the president's role as commander-in-





chief and the distribution of powers related to foreign affairs, defence and security (section 4.4 below). The distribution of these powers is in part guided by the arbiter/manager model and the principles of presidential leadership. As described in Part 2, an important motivation in adopting semi-presidentialism in the post-Arab Spring MENA region is that it establishes a government for the business of day-to-day and domestic government, accountable to the legislature, but establishes alongside the government a president who can serve as a symbol of national unity in times of political turmoil and act as an autonomous crisis manager when political turmoil renders the legislature and government largely ineffective. These two roles of the president—symbol of national unity and autonomous crisis manager—provide a rationale for the distribution of powers and functions within the dual executive.

### ***4.3.2 Responsibility for domestic and foreign policy***

#### ***4.3.2.1 Domestic policy***

According to the arbiter/manager model, the prime minister should take the lead on domestic matters such as macro-economic policy, while the president exercises an arbitration role and intervenes only where necessary. It is perhaps easier to define the general responsibilities of the prime minister in residual terms: the president exercises specified powers as commander-in-chief and holds specified powers related to foreign affairs, defence and national security, while the prime minister retains responsibility and authority over all non-specified or residual matters of state policy.

#### ***4.3.2.2 Recommendations***

- The president participates in setting domestic policy in specific functional areas related to foreign affairs, defence and national security.
- The president's policymaking powers in these specific functional areas are exercised in consultation with the prime minister, through a co-decision mechanism such as countersignature.
- The prime minister is responsible for domestic policy in all residual functional areas. This power is exercised in the cabinet, after consultation with its members.

#### ***4.3.2.3 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Relevant provisions of the now-suspended 2012 Egyptian Constitution provided:

The President is the head of state and chief of the executive branch of government ... (article 132)

The President of the Republic, in cooperation with the government, lays out the state's public policy and oversees its implementation, in the manner prescribed in the Constitution ... (article 140)

The President of the Republic exercises presidential authority via the Prime Minister ... (article 141)

The government exercises the following functions in particular . . . Collaborate with the President of the Republic in laying down the public policy of the state and overseeing its implementation ... (article 159)

The now-suspended 2012 Egyptian Constitution adopted the principal/agent model, clearly designating the President as the 'chief' of the government and directly tasking him or her with laying out domestic policy (articles 132, 140). The government's involvement was merely to 'cooperate' in setting policy priorities and to operate as the President's agent (articles 140, 141). Thus Egyptian Presidents under this Constitution may have been able to exploit this language to assert their authority over the domestic policymaking process.<sup>73</sup>

Relevant provisions of the June 2013 Tunisian draft Constitution provide:

The Prime Minister determines the state's general policy and shall ensure its execution. (article 90)

The Prime Minister is responsible for the following:


- Creating, amending and dissolving ministries and bureaus of state, as well as determining their mandates and authorities upon discussing the matter with the council of ministers.
- Removing one or more members of the government and receive the resignation of one or more members of the government.
- Creating, amending and dissolving public institutions, public entities and administrative departments as well as regulating their mandates and authorities upon discussing the matter with the council of ministers.
- Nominating and dismissing individuals from senior civil positions. These positions are determined by law.

The Prime Minister informs the President of the Republic of the decisions taken within the abovementioned mandates.

The Prime Minister governs the administration and concludes international agreements of a technical nature.

The government ensures the enforcement of laws. The Prime Minister delegates some of his authorities to the ministers.

If the Prime Minister is temporarily unable to carry out his tasks, he shall delegate his authorities to one of the ministers. (article 91)



In contrast to the now-suspended 2012 Egyptian Constitution, the Tunisian draft Constitution is largely consistent with the arbiter/manager model with respect to domestic policy. The Prime Minister is primarily responsible for the ‘general policy’ of the state, exercises functional control over a number of the formal aspects of government and is required to keep the President informed of his or her decisions.

#### **4.3.2.4 Foreign affairs**

Affording the president a role in a country’s foreign affairs and representing the nation abroad is consistent with the principle that the president act a symbol of the nation. This role is relevant to the extent to which the president is able to rise above politics and act as an autonomous crisis manager if the country or the legislature and government become divided. The same logic informs considerations of the president’s role as the commander-in-chief of the armed and security services, and in emergency situations (see section 4.4 below).

The distribution of foreign affairs powers between the prime minister and president varies among semi-presidential countries. There are three arrangements that roughly correspond to the three models described above, as well as a fourth that has emerged. The first design option follows the principal/agent model and envisions the president as the ultimate authority on international relations, while the government is charged with implementing the president’s policy. For example, the Russian Constitution grants the President the power to ‘supervise control over foreign policy’ (article 86(a)) and charges the government with ‘implementing’ the foreign policy (article 114).

The second design option follows a more balanced route, giving the government broad, enumerated powers to set foreign policy. For example, the Finnish Constitution provides that ‘the foreign policy of Finland is directed by the President of the Republic in co-operation with the Government’ (article 93(1)). However, the government retains authority over decisions regarding the European Union, which tips control of foreign affairs in favour of the government (article 93(2)). This balanced option corresponds to the arbiter/manager option, in the sense that the government retains some control over the day-to-day management of foreign affairs, and the president is primarily responsible for articulating and setting foreign policy.


The third option follows the figurehead/principal model, in which the prime minister and cabinet are responsible for setting foreign and international relations policy, and the foreign minister is charged with executing this policy. The president merely represents the nation at international events and plays a largely ceremonial diplomatic role. Iceland follows this model, as it does with respect to domestic policy. The President of Iceland ‘entrusts his authority to Ministers’ (article 13), but concludes international treaties on the country’s behalf subject to legislative approval (article 21).

A fourth option that has emerged frequently in practice is one in which power over foreign policy is not explicitly distributed between the prime minister and the president. In practice, this has proven to be a poor design choice. Issues relating to foreign affairs often spark conflict during periods of cohabitation, and failing to define who controls foreign and international policymaking can quickly undermine a power-sharing scheme. This has occurred in France, with the President and Prime Minister left to squabble over who would represent France at international events. Ambiguity can also encourage the creation of parallel foreign policy structures. For example, in the early 1990s the respective Presidents of the Czech Republic and Romania attempted to consolidate their influence by developing their own departments of foreign affairs. Poland abandoned similar arrangements in favour of the second design option, which vests the government with the bulk of the power to set foreign policy.<sup>74</sup>

The desire to have a president who stands as a symbol of the nation would justify extending some role on the international stage and in the formulation of foreign policy to the president. It is important to distinguish, however, between the president's role as a symbol of the state and the president's power to influence and determine foreign policy. Conferring certain foreign affairs powers and functions on the president will serve the principle of a 'president as unifier'; but conferring certain other powers on the president may simply expand his or her powers and undermine principles of power sharing, limited presidential power and the arbiter/manager relationship, without serving the principle of presidential leadership and national unity. Thus, some foreign affairs functions are more closely tied to the president's role as a symbol of the nation, and can be allocated to the president alone. However, a presidential power to determine foreign policy and foreign policy objectives may cause tension and conflict if the government is empowered to determine domestic policy. Such tension may affect the balance of power between the president and the government/legislature, which may in turn undermine power sharing. Policymaking powers should not be allocated to the president, or should be closely controlled if they are.

In addition to policymaking powers, the report considers three important powers and functions related to foreign affairs: (1) appointing diplomats; (2) negotiating and ratifying international treaties; and (3) representing the nation.

**Appointment of diplomats:** Giving the president the power to appoint either diplomats or the minister of foreign affairs allows him or her to indirectly set the state's foreign policy. A handful of semi-presidential states give the prime minister the power to appoint the foreign minister, but grant the president the power to appoint ambassadors. Ukraine is exceptional: between 2006 and 2010 it allowed the President to appoint the ministers responsible for defence and foreign affairs while leaving the Prime Minister free to appoint the rest of the cabinet. These provisions have since been repealed, and the President now appoints the cabinet on the submission of the Prime Minister (article



114). The Finnish Constitution grants the President the power to unilaterally appoint diplomats (article 126(1)), as do the Portuguese (article 135) and Ukrainian (article 106(5)) Constitutions. The French Constitution provides for shared appointment authority between the President and government, as they are appointed ‘in the Council of Ministers’, which the President chairs (article 13; see section 4.3.5 below). The President also approves these appointments through accreditation (article 14). While leading to deadlock over the appointment of ambassadors on occasion, this arrangement tends to promote compromise between presidents and prime ministers. The Macedonian President used a shared appointment scheme in the Constitution to block the government’s appointment of an ambassador to Taiwan, which would have functioned as an implicit acceptance of Taiwan’s sovereignty.<sup>75</sup>

In the MENA region, a scheme in which the president and prime minister jointly appoint ambassadors is consistent with the logic of power sharing, and may indeed create incentives for power sharing. A shared appointment scheme allows both the president and the government to have a say in choosing ambassadors, thereby encouraging cooperation and safeguarding political neutrality in international affairs. Moreover, the appointment of ambassadors, like the appointment of foreign minister, will influence the substance and direction of foreign policy. Empowering the president to appoint diplomats without consulting the government or legislature may raise the risk that the president will hijack foreign affairs policymaking. This report suggests that the principles of power sharing and limited presidential government do not support arrangements in which the president appoints all or some members of the cabinet. Therefore it warns against establishing unlimited presidential powers to appoint diplomats and functionaries in the foreign affairs department.

**Treaties:** The negotiation and ratification of international treaties is an important issue in foreign affairs. Several semi-presidential regimes allow the president to negotiate and sign treaties, but also require parliamentary approval for a treaty to operate as law within a country. In Ukraine, for example, the President retains unilateral authority over treaty negotiations. Article 106(3) provides that the President ‘conducts negotiations and concludes international treaties of Ukraine’. However, article 85(32) curbs the President’s power by requiring parliamentary consent to give legal effect to treaties, and allows the parliament to denounce treaties. Similarly, the French Constitution grants the President the power to negotiate and ratify treaties, but also provides that most treaties do not take effect unless ratified by the legislature (articles 52–3). The Russian Constitution provides that the President has the power to sign treaties, but the legislature has the power to ratify and denounce treaties (articles 86(b), 106(d)). Signing treaties is an important function of the president as a symbol of the nation, both internationally and domestically. Constitutions in the MENA region could thus serve the principles of presidential leadership by mirroring the arrangements in Ukraine and France. A requirement of parliamentary approval of the president’s decisions to enter

into treaties serves as a check on his or her power and ensures that the president is not able to 'legislate by treaty' and circumvent or undermine the legislative functions of the legislature.

**Representation of the nation:** A final power in foreign relations is the ability to represent the state at international events. Although this power has mostly symbolic significance, it can nonetheless create conflict within the executive and lead to international embarrassment if poorly defined. In France, for example, cohabiting Presidents and Prime Ministers have vied for seats at international summits and councils, often evoking annoyance from host nations. To prevent these types of international embarrassments, constitutions in the MENA region should specify whether the prime minister or the president will represent the country on the international stage. For example, the Bulgarian Constitution specifies that the President 'shall embody the unity of the nation and shall represent the state in its international relations' (article 92(1)). Absent such a provision, disagreements over international representation can cause intra-executive tensions to fester.<sup>76</sup> For the president to act as a symbol of national unity, he or she alone should represent the nation abroad.

#### **4.3.2.5 Recommendations**


- Clearly distinguish between foreign affairs powers with a policymaking dimension and those with a symbolic dimension. Empower the president to exercise enumerated symbolic powers and to perform symbolic functions, leaving residual foreign affairs powers, including policymaking powers, to the prime minister and government.
- Require the joint appointment of ambassadors by the prime minister and president.
- Permit the president to negotiate and sign treaties, but require legislative ratification before a treaty becomes binding or has domestic effect.
- Designate the president as the state's representative at international meetings and organizations.

#### **4.3.2.6 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)**

Article 145 of the now-suspended 2012 Egyptian Constitution provided:

The President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the Council of Representatives and the Shura Council. Such treaties have the force of law after ratification and publication, according to established procedures.

Approval must be acquired from both chambers with a two-thirds majority of their members for any treaty of peace, alliance, trade and navigation, and all treaties



related to the rights of sovereignty or that make the state treasury liable for any expenditures not included in its annual state budget.

No treaty contrary to the provisions of the Constitution can be approved.

Article 147 provided:

The President of the Republic appoints civil and military personnel and dismisses them, appoints diplomatic representatives and removes them, and confirms political representatives of foreign countries and organizations. This is organised by law.

The now-suspended 2012 Egyptian Constitution clearly established a role for the President in representing the nation in foreign relations and negotiating and signing treaties. Article 145 imposed a high burden for the legislative ratification of treaties. This arrangement prevents indirect presidential domination over domestic matters through international obligations. However, article 147 gave the President the power to appoint ambassadors unilaterally, a model that can lead to an over-politicization of state diplomacy and gives a president greater influence over foreign affairs. In addition, the now-suspended 2012 Constitution did not clearly allocate a primary role in the formulation of foreign policy to either the President or the government. This ambiguity increases the risk of intra-executive conflict in the field of foreign affairs.

Relevant articles of the June 2013 draft Tunisian Constitution provide:

The President of the Republic is responsible for representing the state. He is responsible for outlining the general policies on the aspects of defense, foreign relations and national security related to protecting the State and the homeland from internal and external threats in compliance with the general policy of the State. (article 76)

The President of the Republic is responsible for:

- Appointing the General Mufti of the Tunisian Republic.
- Appointing and dismissing individuals with respect to senior positions in the Presidency of the Republic and affiliated institutions. These senior positions are determined by law.
- Appointing and dismissing individuals with respect to senior military and diplomatic positions that are related to national security. These appointments can only be made if the relevant parliamentary committee does not object within 20 days. These senior positions are regulated by law.
- Appointing the governor of the Central Bank upon a proposal from the Prime Minister to the President of the Republic. The parliament must approve the appointment by a majority of the members present, and by no less than one third

of the total number of members. The governor shall be dismissed in the same manner or upon the request of an absolute majority of the Chamber of Deputies and by approval of a majority of the members present on the conditions and by no less than one third of the members. (article 77)

The Prime Minister determines the state's general policy and shall ensure its execution. (article 90)

The Prime Minister governs the administration and concludes international agreements of a technical nature. (article 91)

The June 2013 draft Tunisian Constitution is consistent with the figurehead/principal model: the President is responsible for representing the state, and the Prime Minister is empowered to conclude international agreements of a technical nature. However, the President plays a dominant role in the formation of defence, foreign relations and internal security policy. This affords the President a great deal of influence and power, which is more consistent with the principal/agent model. With respect to the formulation and execution of the state's general policy, beyond the President's enumerated areas of policy responsibility, the Prime Minister assumes the dominant role (article 90), which reflects the arbiter/manager model. In order for this mixture of all three models of horizontal power sharing to work in practice, sufficient procedural guarantees need to be in place to ensure that (1) the Prime Minister retains control over the government's domestic programme, and that the President can weigh in when appropriate and (2) the President's control over foreign affairs, defence and national security cannot be used to usurp control over domestic policy or provide a platform for expanding the President's influence over the government and undermine power-sharing arrangements. The provision that the President's policymaking powers with respect to defence, foreign affairs and national security be exercised 'in compliance with the general policy of the state' (article 76) is a step in the right direction, since the Prime Minister is responsible for 'the state's general policy' (article 90).

On balance, it would be preferable for the President's power with respect to foreign affairs, defence and national security to be exercised through mechanisms of co-decision or consultation with the Prime Minister. With respect to senior military appointments and the appointment of diplomatic positions related to national security, the draft Constitution stipulates that the President will act alone, with no need for co-decision or consultation with the Prime Minister. This is cause for some concern, since this may undermine the principle of power sharing; but the provision that a committee of the legislature may object to the President's choices in this regard offers some measure of protection against unilateral presidential action.





### 4.3.3 Decree power

A distribution of specific powers and functions of domestic and foreign policy between the president and the prime minister is critical to ensuring effective and balanced power sharing. However, where either the president or the prime minister acting alone has the power to make decrees that become law immediately and do not require legislative approval to remain in effect, the balance of power sharing can be upset.

Presidential decree powers pose a particular dilemma, because their exercise allows a president to sidestep the legislature and the legislative process and pave the path to autocracy. Yet presidential decree power can be necessary at times: it allows for quick, efficient policymaking, which may assist in the transitional period in the MENA region, where sweeping economic reform may be needed sooner rather than later. To maximize the power-sharing relationship, then, semi-presidential constitutions must steer between two poles: giving the president too much decree power (which carries risks of presidential consolidation and autocracy) and giving the president too little power (which removes an effective and useful tool from the policymaking process).

Prime ministerial and governmental decree powers raise similar concerns about upsetting power-sharing arrangements, but because the government is directly accountable to the legislature and can be relatively easily dismissed by no confidence procedures, government decree powers raise fewer concerns about power consolidation and autocracy than presidential decree powers.

There are two common methods for framing decree power. In the first method, the constitution gives the president the power to issue decrees in most areas, as long as decrees do not violate federal law or the constitution. In the second method, the constitution gives the president the power to issue decrees in only a few, discrete areas, subject to a countersignature requirement, while giving the prime minister a decree power subject to presidential countersignature. To guard against autocracy and to preserve the power-sharing relationship, MENA countries should consider the second design option.

A president who is empowered to issue decrees subject only to the restriction that they not violate existing federal law or the constitution is, in practice, subject to very few restrictions. The president may use this largely unrestricted authority to accumulate power, or simply to undermine or neutralize the activities and decisions of the prime minister and government, thus upsetting the power-sharing arrangements.

Russia's experience with this model of decree power, established by article 90 of the Russian Constitution, cautions against adopting this design option. The Russian President enjoys a power to legislate that is largely unchecked, and in the 1990s President Yeltsin manipulated the law (through use of the decree power) to bolster his

popularity and shore up his electoral prospects. The excessive use of decrees in early post-communist Russia, moreover, undermined the nascent legislature and the policymaking process as a whole. In 1996, President Yeltsin issued over 600 decrees; the legislature's enactment of laws or regulations was meagre in comparison. The Russian President is now a largely unrestricted autocratic ruler.<sup>77</sup>


Constitutions in the MENA region should consider including a more substantive check on the president's decree power for three reasons, each of which is related to the principles of constitutional design outlined in Part 3. First, nascent legislatures in the MENA region will become strong, and act as an effective check on executive power, only through the experience of effective lawmaking. A broad and unrestrained decree-making power creates an alternative centre of legislative power in the president's office and undermines legislative and popular lawmaking. This allows the president to usurp legislative power from the legislature, and may reduce the chance that a strong legislature capable of braking excesses of executive power will emerge in the region.

Second, power sharing may suffer as a result of the presidential use of a broad decree power. The MENA region, in particular, remains susceptible to presidents who abuse the decree power. In the past, as in Russia, autocrats in Egypt regularly used decrees to circumvent the legislative process and push through the executive's own policies. To ensure true power sharing in the policymaking sphere, constitutions in the MENA region should not establish a decree power unless it balances the president's power against a government decree power or includes effective legislative checks against presidential overreach.

Third, a broad presidential decree power poses the obvious threat of a return to autocratic presidential rule.

A constitution can better preserve the objectives of power sharing and limited presidential power by allowing the president to issue decrees only in enumerated and clearly defined areas, and only when the prime minister countersigns. Meanwhile, a constitution can guard against the aggrandizement of power in the prime minister by requiring the president to countersign the government's decrees, which would cover residual areas. Mutual countersignature requirements enhance the accountability of the dual executive, and thus protect the power-sharing relationship and ensure that the legislature remains the primary source of legislation and law.

France's history highlights the benefits of a countersignature requirement, particularly during periods of cohabitation. Decree-making power in France is divided between the President and the Prime Minister. The President performs a handful of functions through decrees: the appointment of the Prime Minister (article 8), the exercise of emergency powers (article 16), calling referendums (article 11), opening and closing



extraordinary sessions of the legislature (article 30), dissolution of the legislature (article 12), reference to the Constitutional Council on the constitutionality of an international undertaking (article 54) or draft law (article 61), and appointments to the Constitutional Council (article 56). Under article 19 of the French Constitution, ‘instruments of the President’ other than these enumerated decree powers (for example, appointments of various functionaries in terms of an institutional act (article 13)) must be countersigned by the Prime Minister and the minister concerned.

The French Prime Minister has the power to make regulations (article 21); the Constitution provides that matters other than those reserved for the legislature under article 34 of the Constitution are matters for regulation (article 37). Article 37 empowers only the Prime Minister to make autonomous regulations with legislative effect. The Prime Minister’s regulation-making power is subject to article 13, which provides that ‘Ordnances and Decrees deliberated upon in the Council of Ministers’ shall be signed by the President. In sum, the President holds enumerated powers to make non-legislative decrees in a handful of cases, while the Prime Minister must countersign all other presidential instruments. Similarly, the Prime Minister holds residual power to regulate matters that fall outside the legislature’s enumerated powers in article 34, but all decrees and ordinances issued by the Prime Minister must be signed by the President.

Unlike in Russia, therefore, the French President cannot enact laws unilaterally, and presidential excesses of decree power are much less common in France than in Russia. The countersignature requirement has fostered increased negotiation between the Prime Minister and President during times of cohabitation in France. While the President exercises decree powers enumerated in article 19 without countersignature, the President’s other decree ‘instruments’ must be countersigned by the Prime Minister. Similarly, the Prime Minister holds decree power with respect to the residual matters outside the legislature’s enumerated competence, and all the Prime Minister’s regulations must be countersigned by the President. The countersignature requirement gives the Prime Minister the incentive to review the President’s instruments with care and caution, while the Prime Minister, by countersigning, becomes publicly accountable for the effects of these instruments. Meanwhile, article 13 has helped preserve the power-sharing relationship by checking the Prime Minister’s power during periods of cohabitation. In France’s first period of cohabitation, President Mitterrand refused to countersign Prime Minister Chirac’s decrees in certain economic areas by asserting the article 13 power. The President’s refusal to sign the decrees forced the Prime Minister to use the normal cogs of the policymaking process—the legislature—to enact the laws, with a consequent increase in legislative output and responsibility.<sup>78</sup>

In Morocco, the 2011 Constitution expressly devolves the power to issue decrees (*dahirs*) to the King (article 42). While the Constitution stipulates that the Prime

Minister must countersign decrees, article 42 expressly exempts certain royal decrees from the countersignature requirement. These decrees include those dealing with religious matters (article 41), appointment of the Council of Regency (article 44), appointment of the Prime Minister and the dismissal of the government after the resignation of the Prime Minister (article 47), the dissolution of either or both chambers of the legislature (article 51), approval of the Judiciary Council's appointment of magistrates (article 57), the introduction of the state of exception (article 59), the appointment of half of the judges of the Constitutional Court, and the appointment of the President of the Constitutional Court from among the judges of the Constitutional Court (article 130), and the submission of proposed constitutional amendments to the legislature (article 174).

Countries in the MENA region should consider following France's example in requiring countersignature from both their president and prime minister with respect to decrees issued by the other. However, if the president and prime minister belong to the same party, countersignature requirements offer little protection against the excessive use of executive law-making powers. Countries that are likely to be dominated by a single political party should consider explicitly designating the subject areas over which both the president and prime minister hold decree power. This reduces the range of issues over which either can exercise decree power independently, and restrains decree power when the procedural check of countersignature is rendered politically meaningless.


#### **4.3.3.1 Recommendations**

- Expressly enumerate the areas in which both the president and the prime minister can issue decrees.
- Require the prime minister's countersignature on all presidential decrees.
- Require the president's countersignature on all prime ministerial regulations.
- Prohibit changes to the electoral law through presidential or prime ministerial decrees while the legislature is dissolved.

#### **4.3.3.2 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)**

Various articles of the now-suspended 2012 Egyptian Constitution provided:

[...] In the absence of both chambers, and where there is a requirement for urgent measures that cannot be delayed, the President of the Republic may issue decrees that have the force of law, which are then presented to the Council of Representatives and the Shura Council, as the case may be, within 15 days from the start of their sessions.



If such decrees are not presented to the chambers, or if they are presented but not approved, their legality is revoked retroactively, unless the Council affirms their validity for the previous period, or chooses to settle the consequent effects in some other manner. (article 131)

The President of the Republic exercises presidential authority via the Prime Minister, his deputies and ministers, except those authorities related to defence, national security and foreign policy, and the authorities set out in Articles 139, 145, 146, 147, 148 and 149 of the Constitution. (article 141)

The government exercises the following functions in particular: [...]

3. Prepare draft laws and decrees; 4. Issue administrative decisions in accordance with the law, and monitor their implementation. [...] (article 159)

Issuance of regulations: The Prime Minister issues necessary regulations for the enforcement of laws, in such a manner that does not involve any disruption, modification, or exemption from their enforcement, and has the right to vest others with the authority to issue them, unless the law designates who should issue the necessary regulations for its own implementation. (article 162)

Issuance of regulations on public service: The Prime Minister issues the regulations necessary for the creation and organization of public services and facilities upon the government's approval. The Council of Representatives' approval is required, if such regulations result in new expenditures in the annual state budget. (article 163)

Disciplinary regulations: The Prime Minister issues disciplinary regulations upon the government's approval. (article 164)

The history of Egypt, both in the pre-Arab Spring era and under former President Morsi's presidency, is replete with examples of excessive presidential decree power. President Morsi abused his decree power in the fall of 2012, for example, to sidestep the legislative and judicial process and dismiss a lower government official. It is important, then, that Egypt minimize the risk that presidential (or governmental) decree powers can be abused to undermine power sharing or centralize political power in a single executive functionary.<sup>79</sup>

Emerging from this history, the now-suspended 2012 Constitution's provisions on executive decree powers were, unsurprisingly, restrictive. To begin with, neither the Prime Minister nor the President held the power to make law by decree in the ordinary course of government business. The Prime Minister had the subordinate power to issue regulations necessary for the enforcement of laws, but had no original lawmaking power (article 162). Further, while the Prime Minister was empowered to make regulations related to the organization of the public service and to make disciplinary regulations,

this power had to be exercised in consultation with the cabinet, and was required to be approved by the legislature when imposing expenditures on the state budget.

The now-suspended 2012 Egyptian Constitution vested decree power in the President in the case that both chambers of the legislature were dissolved (article 131). Any decrees that the President issued under these circumstances were to be presented to the legislature within 15 days of the start of the legislative session, and would lose the force of law if not presented to the legislature or if not confirmed by the legislature. However, since the Constitution did not provide for the dissolution of the Shura Council (the upper house of the legislature), it was not clear whether the conditions necessary for the exercise of presidential decree power, as outlined in article 131 of the Constitution, could ever have arisen.<sup>80</sup>

The now-suspended 2012 Egyptian Constitution did not impose any countersignature requirements on the President's exercise of decree power, which is regrettable in light of the above discussion. However, in March 2013 an Administrative Court decision held that under article 141 of the Constitution, which provided that the President 'exercises presidential authority via the Prime Minister', a decree calling for elections had to be signed by the Prime Minister first and then countersigned by the President because elections fall outside the list of matters enumerated in article 141. Many of the drafters of Egypt's 2012 Constitution have since said that they did not intend article 141 to impose limits on the President's decree power through countersignature, making the administrative court's interpretation all the more indicative of the new Constitution's failure to set limits on presidential power.<sup>81</sup>

Articles 69 and 93 of the June 2013 draft Tunisian Constitution provide:


In the event of the Chamber's dissolution or during its recess, the Prime Minister may issue decrees to be submitted for ratification to the Chamber during its subsequent ordinary session. The electoral system cannot be amended by decrees.

The Chamber of Deputies may with three fifths of its members authorize by law for a limited period and for a certain purpose the Prime Minister to issue decree-laws to be submitted for ratification to the Chamber upon the end of the period mentioned. (article 69)

The Prime Minister shall practice the general arrangements authorities and shall issue individual orders that shall be signed after discussion with the cabinet.

Orders issued by the Prime Minister are referred to as governmental orders.

Regulatory decrees are signed by the competent minister.



The Prime Minister shall sign the dispositional decrees issued by ministers. (article 93)

The draft Tunisian Constitution grants decree-making power to the Prime Minister under ordinary circumstances (i.e. other than in situations of emergency or if the legislature is dissolved) under a ‘general arrangements authority’. While the intention of the quoted phrase is to confine the Prime Minister’s power, the vagueness of the phrase could prove open to abuse. Further, while the provision requires that the Prime Minister’s decree power must be exercised after discussion with the cabinet, the failure to require consultation with or the countersignature of the President undermines the objectives of power sharing by denying the President any oversight role in decree making.

The Prime Minister can issue decrees that have the force of law when the legislature is dissolved, however. Since the President holds the power to dissolve the legislature, it makes sense to confer decree-making power on the Prime Minister in this situation. However, the principle of power sharing demands that the President have either a consultative role or the power of co-decision with respect to the Prime Minister’s exercise of decree powers under article 69. Finally, the prohibition on amendments to electoral law by decree is a limitation of decree power that serves the principles of limited power and power sharing.

#### ***4.3.4 Appointment of government officials in the civil service and bureaucracy***

In semi-presidential systems, considerable attention is given to the appointments processes for cabinet members. By contrast, the distribution of powers to appoint and dismiss lower-level government officials—such as heads or directors general of government departments and senior officials—is often overlooked, even though it is crucial to the functioning of any successful power-sharing regime. Domination of these bureaucratic appointments by the president or the prime minister can quickly lead to either office capturing the bureaucracy, reinstating a single-party state and undermining power sharing. Constitutions can guard against this possibility through three appointment mechanisms, although each carries its own risks:

Option 1: The constitution explicitly identifies which officials the prime minister has the power to appoint; the president retains residual power to appoint and dismiss all other officials. This option raises the risk that a president will be able to make extensive appointments to the bureaucracy and ensure that the state’s administrative structures are loyal to him or her. This should be avoided, but where the president does hold residual appointment powers, they should be subject to countersignature.

Option 2: The constitution identifies which officials the president is empowered to appoint; the prime minister holds residual power to appoint and dismiss all other officials. Prime ministerial countersignature of the president's appointments is sometimes required. A combination of enumerated (and limited) presidential powers of appointment and countersignature requirements is likely to encourage power sharing.

Option 3: The constitution leaves appointment and dismissal powers undefined, giving neither the president nor the prime minister the express power to appoint or dismiss bureaucratic officials.


Semi-presidential states vary in the extent to which they prefer the president over the prime minister in allocating bureaucratic appointment powers. Kyrgyzstan provides an interesting example of how an unbridled presidential appointment power can quickly undermine power-sharing arrangements.

Kyrgyzstan ousted an autocratic ruler through the electoral 'Tulip Revolution' in 2005. The two political forces that emerged to replace the President agreed to divide power between the offices of the President and Prime Minister. However, Kyrgyzstan's 1993 Constitution, as amended in 2007 following the Tulip Revolution, remained 'presidentialist', granting the President wide powers to appoint and dismiss bureaucratic officials (article 46). President Kurmanbek Bakiyev wielded these powers freely. For example, he installed loyal supporters in the senior bureaucracy in regional governments, the interior ministry and the secret police, and created a Financial Intelligence Service and Financial Police Service and staffed them with his supporters. Bakiyev was able to accumulate enough influence to dismantle the informal power-sharing agreement entirely and dismiss the Prime Minister.<sup>82</sup>

Like Kyrgyzstan, MENA countries have historically clientelistic societies and traditions of government patronage. Kyrgyzstan demonstrates how, in such a context, a president can abuse the power to appoint or dismiss officials and undermine power-sharing arrangements. When a president enjoys wide powers of appointment that are set out in the constitution, he or she can pack the institutions of state and the bureaucracy with loyalists, co-opt opposition members and undermine power-sharing arrangements. Residual presidential appointment powers should be avoided, but if a country in the MENA region chooses to follow this approach, the president's appointment power should be subject to the prime minister's countersignature in order to reduce the chances that the president can capture the bureaucracy.

A better design option for ensuring that the system of appointments and dismissals in a semi-presidential system is in line with principles of power sharing and limited presidential power has two elements: (1) a set of enumerated presidential appointments,





with residual appointments to be made by the prime minister and (2) the express requirement of countersignature for all bureaucratic appointments made by either the prime minister or president. The combination of both elements maximizes power sharing and reduces the risk of capture by either the prime minister or president.

The constitution can carve out specific appointment powers for the president and grant a broad residual appointment power to the cabinet. The Finnish Constitution expressly grants the cabinet the authority to make all appointments that are not specifically entrusted to the President or another actor, and gives the President the power to appoint expressly identified ministry secretaries and diplomats (article 126(1)-(2)). By carefully defining the president's and the cabinet's powers of appointment and dismissal, this design option avoids conflict and encourages power sharing. It is worth noting that in Finland it is the cabinet, not the Prime Minister, which is empowered to exercise appointment powers. Requiring collective cabinet appointment may further enhance the capacity of the appointments process to resist domination by the prime minister and increase opportunities for power sharing.

However, there are two caveats. First, there is no reason to think that a prime minister with residual powers will not act in the same way as a president with residual powers, and use appointments to capture the bureaucracy. A semi-presidential constitution that aims to enhance power sharing should, therefore, avoid concentrating broad appointment powers in either the president or the prime minister, and specify as far as possible which appointments both the president and the prime minister are empowered to make.

Second, while it is difficult for a constitution to specify all appointments, residual powers should be left with the prime minister rather than with the president (i.e. option 2 instead of option 1). In addition to the principle of power sharing, the need to limit presidential power is also an important element of constitutional design with respect to appointment powers. Ensuring that residual appointment powers do not rest with the president serves this principle.

France combines these two principles by conferring appointment powers on both the President and the Prime Minister and making these appointments subject to countersignature. Article 13 provides that the appointments to be made by the President and the Prime Minister (acting with the cabinet) are to be determined by institutional acts, meaning that the appointment powers of both the President and Prime Minister are express, rather than residual or undefined. The cabinet (i.e. the Prime Minister) must approve the President's appointment and dismissal of bureaucratic officials, and the President must approve the Prime Minister's appointments (articles 13, 21). In periods of cohabitation, the President and Prime Minister are forced to negotiate with each other for public sector appointments. This

prevents newly formed governments from immediately clearing out appointments made by previous governments, which allows continuity and brings stability to the bureaucracy. Significantly, this option also helps to create informal power-sharing norms. For example, under the cohabitation of President Chirac and Prime Minister Jospin, a norm developed to avoid disagreements over appointments: for civil appointments, the President received one preferred appointment for every two granted to the Prime Minister.<sup>83</sup>

MENA countries should adopt this approach, but remain aware of electoral considerations. Although countersignature is an effective tool for power sharing during cohabitation, it fails to guard against the risk of state capture when the president and prime minister come from the same political party. In these situations, countersignature requirements can become a ‘rubber stamp’. This problem is more acute when the president exerts control over the selection or dismissal of the prime minister. A presidential power to dismiss the prime minister, in other words, discourages the prime minister from opposing the president’s appointment or dismissal decisions, which is another reason the president should not appoint the prime minister.

A constitution’s failure to clearly distribute the power to appoint or dismiss bureaucratic officials is dangerous for power sharing. The Russian Constitution, for example, grants the President and the legislature power to make a limited number of specific appointments (articles 83, 102). Capitalizing on the Constitution’s silence on how all other appointments are to be made, and taking advantage of the President’s broad decree powers, Russian Presidents have used appointments and dismissals to bend the state bureaucracy toward themselves. Indeed, the appointment and dismissal of officials has become the preferred way for Russian Presidents to consolidate power, even though other options (such as substantive policy decrees) are available for this purpose.<sup>84</sup>

MENA constitutions must carefully define and delineate who has the power to appoint and dismiss bureaucratic officials. Leaving this power undefined may allow the president or the prime minister to capture the state. The appropriate model for the MENA region is a combination of the mechanisms described above as options 1 and 2. Appointments to the military or security services bureaucracies must be made through co-decision procedures requiring countersignature and parliamentary approval.

#### **4.3.4.1 Recommendations**

- The prime minister should make the bulk of appointments. The constitution should expressly define the government officials that the president can appoint and dismiss, and provide that residual power to appoint and dismiss all other government officials will be held by the prime minister.

- Where either the prime minister acting alone (as opposed to the government acting collectively) or the president is authorized to make specific appointments and dismissals, the countersignature of the other should be required.
- Appointments to the security services and military should require co-decision in the form of countersignature, as well as legislative approval.

#### ***4.3.4.2 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 147 of the now-suspended 2012 Egyptian Constitution provided:

The President of the Republic appoints civil and military personnel and dismisses them, appoints diplomatic representatives and removes them, and confirms political representatives of foreign countries and organizations. This is organised by law.

Article 165 provided:

The authority in charge of the appointment and dismissal of civil servants, the functions of the main positions, and the responsibilities, rights and securities of employees, is regulated by law.

The now-suspended 2012 Egyptian Constitution vested considerable appointment powers in the President. Article 147 empowered the President to appoint civil and military officials and diplomatic representatives as organized by law, which could be read to mean (1) that the President had residual power to appoint all civil and military personnel and diplomatic representatives, with the procedures for such appointments organized by law or (2) that the specific appointments the President was empowered to make would be determined by law, as in France. Such ambiguity leaves room for abuse; it would be better for a constitution to confine the president's appointment powers to an express list of officials and leave residual appointment power to the prime minister.

Moreover, the now-suspended 2012 Egyptian Constitution contained no requirement for the Prime Minister's countersignature of presidential appointments. Article 147 created the risk that the President could undermine power sharing by exerting his own influence in all levels of government.

Article 77 of the June 2013 draft Tunisian Constitution provides:

The President of the Republic is responsible for:

- Appointing the General Mufti of the Tunisian Republic.
- Appointing and dismissing individuals with respect to senior positions in the Presidency of the Republic and affiliated institutions. These senior positions are determined by law.

- Appointing and dismissing individuals with respect to senior military and diplomatic positions that are related to national security. These appointments can only be made if the relevant parliamentary committee does not object within 20 days. These senior positions are regulated by law.
- Appointing the governor of the Central Bank upon a proposal from the Prime Minister to the President of the Republic. The parliament must approve the appointment by a majority of the members present, and by no less than one third of the total number of members. The governor shall be dismissed in the same manner or upon the request of an absolute majority of the Chamber of Deputies and by approval of a majority of the members present on the conditions and by no less than one third of the members.

Article 91 provides:


The Prime Minister is responsible for the following:

- Creating, amending and dissolving ministries and bureaux of state, as well as determining their mandates and authorities upon discussing the matter with the council of ministers.
- Removing one or more members of the government and receive the resignation of one or more members of the government.
- Creating, amending and dissolving public institutions, public entities and administrative departments as well as regulating their mandates and authorities upon discussing the matter with the council of ministers.
- Nominating and dismissing individuals from senior civil positions. These positions are determined by law.

The Prime Minister informs the President of the Republic of the decisions taken within the abovementioned mandates.

The draft Tunisian Constitution establishes a system for appointments in which the President's appointment powers are enumerated, and the Prime Minister holds the residual power to appoint individuals to senior civil service positions. The provision that the relevant committee of the legislature can reject the President's appointments to senior military and diplomatic positions related to national security acts as a check against the risk that the President can expand his or her political power through strategic appointments to key military and security positions. The President's power to appoint the governor of the Central Bank is exercised on proposal from the Prime Minister.

There is some cause for concern, however, since the specific positions that the President and the Prime Minister are to appoint are to be specified in legislation. If a party opposed to the President overwhelmingly dominates the legislature, it may enact



legislation that reduces the scope of the President's appointments powers and expand the Prime Minister's powers. It is preferable for enumerated appointment powers to be specified in the constitution, and thus protected against legislative manipulation.

The draft Tunisian Constitution further fails to require explicit countersignature for presidential or prime ministerial appointments. The requirements that a parliamentary committee tacitly approve the President's appointments to senior military and diplomatic positions alleviates much of this concern, in that it provides at least legislative oversight of the President's appointments. The appointment of the governor of the Central Bank also proceeds through co-decision, in which the Prime Minister must nominate a candidate for the President to appoint. The Prime Minister is obliged to inform the President of appointments the Prime Minister makes, but it is not clear that the President must countersign or otherwise approve these appointments.

#### ***4.3.5 Chairmanship of the cabinet***

In addition to appointment powers and countersignature requirements, control over the cabinet can help shape the extent to which power is shared between the president and the prime minister. There are two options:

Option 1: Either the prime minister or the president holds the authority to chair cabinet meetings; or

Option 2: The president holds a reserved right to chair cabinet meetings in specific areas of competence, while the prime minister holds a residual right to chair cabinet meetings.

As discussed above, the division of policy-formulation powers by subject areas (foreign affairs and defence, for example) between the president and the government should be rejected. For this reason, deciding on the right to chair cabinet meetings need not consider option 2 above.

A presidential right to chair cabinet meetings poses greater risks to the prospects of power sharing when the president also holds broad appointment and decree powers. In the president-parliamentary subtype of semi-presidentialism, for example, a presidential right to chair the cabinet and direct state policy is augmented by the ability to dismiss the prime minister and the cabinet. The Russian and Moroccan Constitutions combine these two powers. First, the Russian President is empowered to dismiss the government (see section 4.2.2 above). Second, the President has the authority to preside over meetings of the government (article 83), to lead and coordinate government (article 32), and to resolve disagreements between the branches (article 85). Together, these powers make the Russian President the dominant player in the policy process. The Prime Minister is reduced to an agent of the President, whose only check against the President

is the impeachment process, which is unduly complex and nearly impossible to effectuate, as discussed above. In Morocco, the King can dismiss ‘one or more members of the government’ after consulting with the Prime Minister (article 47). Nevertheless, in October 2011 the King dismissed the Prime Minister under the 2011 Constitution. Article 48 of the Constitution provides that the King presides over the Council of Ministers, which is composed of the Prime Minister and the ministers. Where the president wields strong appointment or dismissal powers, the constitution should restrict the president’s right to chair cabinet meetings.<sup>85</sup>

By contrast, in premier-presidential regimes in which the president has no power to dismiss the prime minister or cabinet, granting the president the right to chair cabinet meetings can enhance power sharing and encourage presidential ‘buy-in’ into policy decisions. During periods of cohabitation in particular, when presiding over cabinet meetings, the president can influence the government’s agenda and make clear his approval or disapproval of policy choices to the cabinet. This, in turn, may foster negotiation within the dual executive and the political interests they represent.

France’s premier-presidential system follows this model (article 9). In 2001, during France’s third cohabitation, President Chirac used the President’s right to chair cabinet meetings to prevent the government’s bill dealing with the future of Corsica from being placed on the agenda. Although Chirac subsequently allowed discussion of the bill in the cabinet, and the bill was tabled and passed by the legislature one week later, Chirac’s move was a symbolically important act.<sup>86</sup>

In the MENA region, if a premier-presidential subtype of semi-presidentialism is adopted in which the president has neither powers to dismiss the government nor broad decree powers, a presidential power to chair cabinet meetings may foster power sharing and interparty cooperation and negotiation without creating opportunities for presidential domination of the policymaking process or expanding presidential power.

#### **4.3.5.1 Recommendations**

- Expressly give the prime minister the exclusive power to chair cabinet meetings if the president has strong decree powers and the power to dismiss the prime minister.
- Expressly give the president the power to chair cabinet meetings if the president lacks strong decree powers and is not empowered to dismiss the prime minister or government.



#### ***4.3.5.2 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 143 of the now-suspended 2012 Egyptian Constitution provided:

The President of the Republic may call for government meetings to discuss important matters, presides over such meetings, and requests reports about public affairs from the Prime Minister.

Article 155 provided:

The government consists of the Prime Minister, the Prime Minister's deputies and the ministers.

The Prime Minister heads the government, oversees its work, and directs it in the performance of its functions.

The now-suspended 2012 Egyptian Constitution was, at best, ambiguous on the question of whether the President was empowered to convene and chair cabinet meetings. The President's power to chair cabinet meetings was restricted to those meetings that the President himself called. Read with article 155, article 143 suggested that the President could not chair cabinet meetings that were regularly scheduled or called by the Prime Minister. A president's limited power to chair cabinet meetings may, in fact, reduce the opportunities for power sharing in government. Under the now-suspended 2012 Egyptian Constitution, this interpretation was complicated by a contextual reading of the Constitution: article 159 required the government to 'collaborate with the President of the Republic in laying down the public policy of the state and overseeing its implementation.' At the very least, then, the collaborative approach taken in the Constitution suggested that the President had a right to attend all cabinet meetings, even though his or her right to chair cabinet meetings was limited to the meetings he or she personally called.

This interpretation was only weakly supported by the text. It is preferable for constitutional provisions to set out clearly and unambiguously whether the president or prime minister is empowered to chair cabinet meetings.

Article 92 of the June 2013 draft Tunisian Constitution provides:

The Prime Minister presides over the Council of Ministers.

The Council of Ministers meets by convocation by the Prime Minister, who fixes the agenda. It is mandatory for the President of the Republic to preside over the Council of Ministers in issues relating to defence, foreign policy, national security in so far as the protection of the state and of the national territory from internal and

external threats are concerned. The President may also attend the Council of Ministers' other sessions. If the President attends, he presides over the session.

All draft laws are deliberated in the Council of Ministers.

Article 92 confers on the President the mandatory duty to chair cabinet meetings that deal with matters of national defence, foreign policy and national security, and to chair any other meetings that the President decides to attend. The Prime Minister, in other words, chairs only those cabinet meetings that are not attended by the President.

This broad presidential power to chair cabinet meetings occurs in the context of a premier-presidential system, in which the powers of the President—particularly decree and dismissal powers—are otherwise effectively curtailed. Allowing the President to attend and chair cabinet meetings may thus encourage power sharing, as in France, rather than expand the President's power, as in Russia.


#### **4.3.6 Veto power**

A presidential right to refuse to promulgate, or veto, legislation duly passed by the legislature acts as a counterbalance to the prime minister's power to set policy and initiate legislation. When designed correctly, therefore, a presidential veto can encourage cooperation and negotiation between the parties or interests that are respectively represented by the president and prime minister. The veto acts as a bargaining chip in the hands of the president, ensuring that the president has some leverage over the prime minister and the government: where the prime minister refuses to negotiate or consider the president's preferences in forming policy or initiating legislation, the president may choose to veto the prime minister's legislative efforts. The veto gives the president a voice in the policymaking process, which furthers the objectives of power sharing between branches of government.

However, where a veto power operates in such a way that a president can easily prevent the legislature from making law, a young legislature may be stunted in its development and prevented from growing into an institution capable of fulfilling legislative and oversight roles. A veto power must strike a balance between the needs to encourage power sharing and avoid the risks of an overly powerful president or prime minister. The principles that must be kept in mind when thinking about a veto power for the MENA region are, therefore: (1) power sharing and (2) the need to allow the legislature to function as the primary generator of legislation and develop into a meaningful political institution.

There are two main dimensions along which presidential veto powers vary. The first revolves around the scope of legislation that is subject to veto. Some veto powers are limited to a straight up-or-down rejection of a bill, while more 'expansive' vetoes allow a





president to insert amendments ('amendatory veto') or veto specific provisions of a bill ('line-item' veto). Second, the legislative majorities required to override a veto and pass bills into law despite the president's opposition vary from country to country (no country has an 'absolute veto' that cannot be overruled). In some cases, the legislature may overrule the president's veto by an ordinary majority (or by the same majority with which the legislation was originally passed); in other cases the legislature may overrule the veto only by passing the legislation for a second time by a special majority (usually two thirds).<sup>87</sup> The two options available in each of the two variations produce a two-by-two matrix of four options for designing veto powers:

Option 1: line-item or amendatory veto that is subject to supermajority override;

Option 2: line-item or amendatory veto that is subject to override by the originally required legislative majority;

Option 3: straight up-or-down veto that is subject to supermajority override; and

Option 4: straight up-or-down veto that is subject to override by the originally required legislative majority (also known as a 'suspensive veto').

Most semi-presidential constitutions give the president the power to veto legislation. The Russian Constitution establishes a straight up-or-down veto and sets a high threshold for legislative override. The Russian President can both abrogate prime ministerial decrees and veto legislation duly passed by the legislature (articles 115 and 107). Legislative override of a presidential veto requires a supermajority of three fifths of each house of parliament, making it difficult for the legislature to override a presidential veto, especially if the legislature is fragmented and divided (article 115). This has enabled Russian Presidents to render legislation passed by the legislature largely meaningless and replace it with presidential decrees.

Russian Presidents have made frequent use of their veto power. President Yeltsin, for example, vetoed nearly 30 per cent of all bills passed by the legislature during his time in office. As relations between the Russian President and the legislature worsened from 1991 to 1996, the likelihood of vetoes increased and the justifications for them became more idiosyncratic. During times of cohabitation, when the interests of the legislature and the president diverge, a veto power of this nature kills any hopes of power sharing. In Ukraine (article 94), the President holds line-item and amendatory veto powers, which have allowed the President to significantly alter the content of the country's laws and manipulate legislation to suit the President's interests and preferences.<sup>88</sup>

Despite the experiences of Russia and Ukraine, the veto power has benefits, which can only be realized if the veto power is carefully crafted and takes into account the distribution of powers elsewhere in the semi-presidential system. One of these benefits,

particularly for nascent democracies, is that overcoming a presidential veto can encourage a fragmented legislature to solidify around the policies and bills it wishes to make law: supermajority override rules can require larger parties in a legislature to involve minority parties in the override vote, which may result in more fully negotiated and inclusive legislation. This is certainly in line with the principles of power sharing.


The ‘suspensive veto’ allows the legislature to override a presidential veto by passing the draft law a second time, supported by the same legislative majority originally required to pass the bill. The president’s veto in such cases merely ‘suspends’ the legislative process for a time and requires the legislature to reconsider the draft legislation without having to meet a higher threshold in order to make the draft bill law. The French Constitution confers a right of suspensive veto on the President (article 10), which allows the President to ask Parliament to reopen debate on a draft law (or sections of it) that has been submitted to the President for signature. Parliament may not refuse such a request, although if Parliament passes the draft law for a second time, the President must sign it into law.

Keeping in mind the two principles of power sharing and preserving a meaningful role for the legislature as the driver of legislation, three of the four options in the matrix can be rejected.

First, a supermajority override requirement, especially where there is a divided and fragmented legislature, may allow the president to dominate the legislature and ensure that bills disfavoured to the president or the president’s party never become law. This problem is compounded if the president has a line-item or amendatory veto, since he or she can decide which parts of draft bills will become law. In a post-authoritarian context, and the MENA region in particular, it is important that the legislature is allowed to develop as a meaningful political institution that acts as both the primary driver of legislation and a check on executive power. A line-item or amendatory veto that is difficult to override gives a president too much power and undermines the prospects for a healthy and effective legislature. Therefore option 1 should be rejected.

Second, option 3 in principle represents a good balance: the president has a straight up-or-down veto, without line-item or amendatory veto powers, which can be overridden only by a supermajority. But in the MENA region, where fractured and divided parliaments are a possibility, the imposition of supermajority override requirements may produce a situation in which very little legislation is ever passed and the president assumes greater power and influence. Option 3 is thus unsuitable for the region.

Third, low thresholds (as required in a suspensive veto) may ensure that a president is largely excluded from the policymaking and legislative process, especially if the



president has a straight up-or-down veto. The principles of power sharing are therefore not served by option 4.

Finally, although low legislative thresholds for overriding a veto may exclude the president from the policymaking and legislative process, allowing a line-item or amendatory veto retains a role for the president. The arrangement in which the president is able to veto draft laws while proposing amendments or exercising a line-item veto, while allowing legislative override by the original majority, ensures both that the president cannot stymie the legislative process and that his or her views are taken into account. Further, allowing the president to propose amendments or veto discrete provisions of draft legislation fosters debate and negotiation between the parties that are represented by the president and the legislature. Option 2 therefore best upholds the normative principles relevant in this context.

#### **4.3.6.1 Recommendations**

- The president should have line-item veto power, as well as the power to propose amendments to the draft law that the legislature cannot refuse to debate (amendatory veto).
- The legislature should be able to override the president's veto or reject the president's proposed amendments by the same majority with which the constitution required the original draft law to be passed.

#### **4.3.6.2 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)**

Article 104 of the now-suspended 2012 Egyptian Constitution provided:

The Council of Representatives notifies the President of the Republic of any law passed for the President to issue the new law within 15 days from the date of receiving it. In case the President objects to the draft law, it must be referred back to the Council of Representatives within 30 days.

If the draft law is not referred back within this period, or if it is approved again by a majority of two thirds of the members, it is considered a law and is issued.

If it is not approved by the Council of Representatives, it may not be presented in the same session before four months have passed from the date of the decision.

The now-suspended 2012 Egyptian Constitution's veto provision ran the risk of leading to parliamentary deadlock. Although article 104 granted the President a straight up-or-down veto, it only permitted the legislature to override the President's veto with a supermajority vote. This corresponds to option 3 described above, which we recommend against.

Political parties in Egypt are fractious and polarized. Although the first legislature of the post-Arab Spring regime was fairly unified, a supermajority override requirement could lead to legislative deadlock when the legislature is more divided. Such deadlock could permit a President to use the veto power to commandeer the legislative process. Alternatively, the Egyptian President might have used the veto power given to him in the 2012 Constitution to capitalize on the ambiguities found in other parts of the Constitution and to rule by decree. In light of these dangers, article 104 of the Egyptian Constitution was not an ideal model for the MENA region.

Article 80 of the June 2013 draft Tunisian Constitution provides:


The President of the Republic shall seal and issue laws in the Official Gazette of the Tunisian Republic within a period of no more than fifteen days as of receipt thereof from the Constitutional Court.

Except for the budget law, the President of the Republic is entitled, during a period of ten days as from the receipt of the draft law from the Speaker of the Chamber of Deputies, to return the draft law to the Chamber for a second reading. If the draft law is ratified by an absolute majority of the members of the Chamber, with respect to normal laws, and by a majority of three-fifths of the members, with respect to organic laws, the President of the Republic shall seal and issue thereof within a period of no more than fifteen days as from the receipt thereof from the Constitutional Court. In the event of amending the draft law in accordance to the suggestions of the President of the Republic, it shall be ratified by an original majority.

The draft Tunisian Constitution gives the President a somewhat limited veto. To start with, the President cannot undermine the government's control over the budget by vetoing the budget law. However, article 80 suggests that the President can propose amendments to draft laws that he or she refuses to promulgate. Since there is no suggestion that the President holds a line-item veto, the President therefore holds only an amendatory veto: he or she can veto entire bills and propose specific amendments, but cannot veto discrete provisions within bills.

Second, the legislature can overrule the President's veto with slightly increased majorities: with respect to ordinary bills (which are usually passed by an ordinary majority), the President's veto can be overruled by an absolute majority; with respect to organic bills, (which must usually be passed by an absolute majority), the legislature may overrule the President's veto with a three-fifths majority (see article 63).

Thus, the draft Tunisian Constitution comes close to, but is not entirely consistent with, the recommendations of this report. First, the President holds an amendatory veto, but not a line-item veto. Second, the veto can be overridden by legislative



majorities that are slightly higher than the majorities with which the legislation must initially be passed, although these increased majorities are not as imposing as the two-thirds (or higher) supermajorities required in other countries.

#### ***4.4 States of emergency and executive control over the security sector***

The experience of countries in the MENA region is a stark warning of the abuses that can result from a president's unrestrained use of emergency powers (see section 2.1 above). The principle of limited presidential power is nowhere more important and relevant than with respect to the exercise of emergency powers and the control of the security services: for example, if a president controls the security services (police, military, intelligence) and is able to declare a state of emergency and sidestep all procedural and substantive limits to the exercise of executive power, there is a very real risk that he or she will be able to seize power and deploy the security services in order to maintain his or her new grip on power. Indeed, this has happened many times in the MENA region already, and a fundamental objective of the constitutional transition through the Arab Spring is to drastically curtail the opportunities for such presidential (or prime ministerial) power seizures.

A second principle of constitutional design is that there be effective executive leadership during times of crisis, and if the legislature and government are incapacitated by political division and a weak party system. This principle justifies having the president represent the nation abroad, sign treaties and play some role in the formulation of foreign policy (subject to government countersignature), since it allows the president to serve as a symbol of the nation and unify the nation more effectively in times of crisis (for more on the president's role in foreign affairs, see above). This principle is also relevant to the distribution of powers between the president and prime minister in times of crisis or states of emergency. In such situations, the president can serve an important role as an autonomous crisis manager who is not necessarily bound by the procedures and processes that might prevent a legislature or government from acting quickly and decisively to avert a crisis. Therefore, the president should be granted a primary role in managing emergencies, but the president's emergency powers must be closely regulated. Similar considerations support the view that it may prove undesirable to subject national defence powers to excessive legislative oversight or intra-executive power sharing in a divided government, since doing so may undermine the executive's capacity to lead effectively in times of threat or war. This logic supports a broader role for the president than for the prime minister, but attention must be paid throughout to the need to guard against conferring too much power on the president and raising the risks of a presidential power grab during an emergency.

#### ***4.4.1 Two forms of limited government***

This section considers two mechanisms for limiting the power that either a president or a prime minister may exercise over the security sector and during times of crisis. Both mechanisms do so by dividing these powers between the president and the prime minister.

The first mechanism divides specific executive powers between the prime minister and the president. Although both can exercise their powers unilaterally, neither has plenary authority. The second mechanism shares the exercise of power between the prime minister and the president by requiring ‘co-decision’: the exercise of emergency or security powers thus requires the assent of both the president and the prime minister. The objective of both mechanisms is to ensure that neither the president nor the prime minister can unilaterally recreate the pre-Arab Spring situation of a security state ruled by emergency powers. If neither actor is able to exercise all of these powers unilaterally, the opportunities for a constitutionally legitimate centralization of power are reduced.


#### ***4.4.2 Appointment of cabinet members responsible for security and defence***

In most semi-presidential countries, the appointment of the cabinet members responsible for the defence and security portfolios follows the procedure laid out for the appointment of the rest of the cabinet (on appointments procedures, see section 4.2.1 above). Two variations of this system share appointments powers between the prime minister and the government—the first by division of specific appointments and the second by co-decision.

##### ***4.4.2.1 Division of appointments***

In Ukraine in 2006, constitutional amendments passed in December 2004 took effect. These amendments divided responsibility for naming members of the cabinet between the President and Prime Minister: the Prime Minister appointed the majority of the cabinet, while the President appointed the ministers responsible for defence and foreign affairs. The Constitutional Court reversed these amendments in 2010 and re-instated the 1996 model. It is telling that the 2006 model of divided appointments has now been rejected, and has not been followed in any other semi-presidential system in the world.

The Orange Revolution of 2004–05 was a series of civil protests and demonstrations mounted in Ukraine following presidential elections that were perceived to be marred by fraud, vote rigging and intimidation. The Supreme Court eventually annulled the vote and ordered fresh elections, allowing Viktor Yushchenko to assume office and replace the increasingly corrupt and autocratic Leonid Kuchma as President. A series of constitutional reforms was made as part of the Orange Revolution, which was mostly



intended to reduce the powers of the President, strengthen the legislature and the government, and establish a more balanced distribution of power between the President and Prime Minister. The first period of Ukrainian government following the Orange Revolution was a power-sharing cohabitation, with Prime Minister Yulia Tymoshenko's Batkivshchyna party in opposition to President Yushchenko's party.<sup>89</sup>

A significant change in the 2004-05 package of constitutional reforms, which took effect in 2006, was the division of cabinet appointment powers between the President and the Prime Minister. Ukraine's Constitution as enacted in 1996 provided that the Prime Minister would nominate cabinet members, who would then be appointed by the President. The Prime Minister was appointed by the President and confirmed by the legislature (Verkhovna Rada) (article 114). After the amendments took effect in 2006, however, the Constitution divided the power to appoint certain members of the cabinet between the President and the Prime Minister:

Article 114 of Ukraine's 2006–10 Constitution provided:

The Cabinet of Ministers of Ukraine is composed of the Prime Minister of Ukraine, the First Vice Prime Minister, Vice Prime Ministers and Ministers.

The Prime Minister of Ukraine is appointed by the Verkhovna Rada of Ukraine upon the submission by the President of Ukraine.

The name of a candidate for the office of the Prime Minister of Ukraine is put forward by the President of Ukraine upon the proposal by the parliamentary coalition formed in the Verkhovna Rada of Ukraine as provided for in article 83 of the Constitution of Ukraine or by a parliamentary faction whose People's Deputies of Ukraine make up a majority of the constitutional membership of the Verkhovna Rada of Ukraine.

The Minister of Defence of Ukraine and the Minister of Foreign Affairs of Ukraine are appointed by the Verkhovna Rada of Ukraine upon the submission by the President of Ukraine; the other members of the Cabinet of Ministers of Ukraine are appointed by the Verkhovna Rada of Ukraine upon the submission by the Prime Minister of Ukraine.

The Prime Minister of Ukraine manages the work of the Cabinet of Ministers of Ukraine and directs it for the implementation of the Programme of Activity of the Cabinet of Ministers of Ukraine adopted by the Verkhovna Rada of Ukraine.

The unusual feature of the 2006 constitutional model was the provision that the President was responsible for appointing the ministers responsible for defence and foreign affairs, while the Prime Minister appointed the rest of the cabinet. The

President's discretion in nominating a Prime Minister was also reduced: the amended article 114 required the President to nominate the candidate preferred by the dominant party or coalition in the legislature.

The logic behind an arrangement of this type is to recognize the principle that the president must be able to act with authority and decisiveness in times of crisis or war in order to fulfil the president's role as autonomous crisis manager. The exercise of defence and foreign affairs powers are likely to be central to managing such crises. Allowing the president to appoint his or her preferred (politically aligned) candidates to these posts augments the president's ability to act with authority and decisiveness in these crucial areas. In addition, if the constitution requires some form of co-decision between the president and the relevant minister for the exercise of certain powers, presidential discretion to appoint these ministers will increase the likelihood of ministerial countersignature and decisive action.

These motivations for a divided appointment power must be balanced against the principle of limited presidential power. A president empowered to appoint certain cabinet ministers may be able to carve out an area of influence that is insulated from the rest of the government. Moreover, the ministries of defence, security and foreign affairs together constitute the state's machinery of armed and coercive force. Presidents and leaders around the world, including in the MENA region, have deployed the defence and security forces to seize power and maintain autocratic rule. Allowing the president to appoint the ministers of defence and foreign affairs creates a risk that the president will be able to capture the machinery of state violence and use it to undermine power sharing. On balance, the risks of presidential autocracy outweigh the benefits of presidential leadership, and a divided appointments process should be avoided altogether. To reiterate, we know of no semi-presidential constitution that divides cabinet appointment powers in this way.


#### ***4.4.2.2 Co-decision in appointment***

A second option for power sharing in the appointments process is to require the president and prime minister to jointly appoint certain ministers. This was the approach taken in Poland's 'Small Constitution' between 1992 and 1997.

Article 57(1) of Poland's 1992 Constitution provided:

- (1) The President shall nominate the Prime Minister, and on his motion the President shall appoint the Council of Ministers according to the composition proposed by the Prime Minister, within a period of 14 days following the first sitting of the House of Representatives or the acceptance of the resignation of the Council





of Ministers. The appointment of the Prime Minister by the President shall be in conjunction with the appointment of the Council of Ministers.

Article 61 provided:

The Prime Minister shall lay a motion to appoint the Ministers of Foreign Affairs, of National Defence and of Internal Affairs after consultation with the President.

The difficulty with this co-decision procedure was that it did not stipulate how it was to operate. It was not clear whether the President or the Prime Minister could veto the other's selection of these ministers, for example, or whether the consultation requirement meant that the Prime Minister could appoint the specified minister despite the President's objection. President Lech Walesa accordingly refused to recognize several of the Prime Minister's appointments, claiming that he had not been allowed sufficient input, which resulted in serious obstacles to effective government and efficient policymaking.<sup>90</sup>

Co-decision arrangements run the risk of deadlock in the cabinet formation process: if neither the president nor the prime minister is prepared to compromise to reach agreement on suitable candidates, no appointments will be possible and the cabinet will not be formed. Yet empowering either the president or the prime minister to make appointments unilaterally to key ministries such as defence and security runs the risk of creating opportunities for the manipulation of the armed forces and security services. In the context of the political history of the MENA region, where presidents have been able to retain power because of their control of these forces, the risk of captured defence and security forces must be avoided. Therefore the risk of deadlock in government formation is preferable to the risk that a president or prime minister will be able to unilaterally control appointments to the defence and security forces and ensure their loyalty.

#### **4.4.2.3 Assessment**

These two mechanisms for sharing appointment power between the president and the prime minister are informed, on the one hand, by the principle of presidential leadership in times of crisis, and on the other hand by the principle of executive power sharing. However, both mechanisms carry great risks to competing principles that must inform constitutional design in the MENA region.

The division of appointment powers, on the one hand, confers great power on the president and poses the risk of presidential abuse of security and defence powers to seize or consolidate power. If the president appoints some members of the cabinet while the prime minister appoints others, this may create division within the executive and undermine the collective responsibility of the government, making it difficult for the

legislature to exercise effective oversight of the entire cabinet and reducing the coherence and effectiveness of government policy. It is worth bearing in mind that Ukraine has abandoned this mechanism.

Co-decision arrangements, on the other hand, may generate intra-executive conflict and, where each executive holds an effective veto over the other, produce deadlock in the formation of the cabinet. However, co-decision may also foster negotiation between the president and the prime minister, both of whom benefit more from forming a government that is able to carry out their respective policies than from political deadlock in which no policy can be formulated or pursued. Thus both parties have an incentive to reach agreement in a co-decision mechanism. The trade-off in co-decision arrangements lies between deadlock and power sharing: while co-decision mechanisms create the risk of deadlock, the benefits of power sharing are highly attractive and outweigh these risks. In the context of the political history of the MENA region, deadlock is an acceptable risk to assume.


#### **4.4.2.4 Recommendations**

- The president should not be empowered to unilaterally appoint cabinet members responsible for foreign affairs, defence or internal security.
- Acting jointly through co-decision-making procedures, the president and prime minister should appoint cabinet members responsible for foreign affairs, defence and internal security. The constitution must set out the procedures and decision process unambiguously, clearly stating the roles of president and the prime minister. These appointments should in any case be subject to subsequent legislative approval.

#### **4.4.3 Appointment of senior security and defence officials**

Senior security and defence personnel such as top-ranking generals, the chief of police and the director of intelligence services bear great responsibility in implementing security and defence policy. How senior officials in the security services are appointed is an important consideration. A president or prime minister may be able to expand his or her grip on power if supported by police, military and intelligence forces loyal to him or her, thus undermining the power-sharing objectives of semi-presidentialism. The autocratic regimes of the MENA region have remained in place, in many cases, only for as long as the security services remain loyal to the president.

The appointment of senior security and defence officials should thus be structured in a way that is consistent with principles of power sharing and limited executive power. In some semi-presidential systems, however, the president is given power to appoint senior military and defence officials unilaterally, for example in Armenia (article 55(12)), Belarus (article 84(28)), Burkina Faso (article 52), Central African Republic (article 22: in the context of the President's broader power to appoint both civil and military



officials), Croatia (article 100), Mozambique (article 161(e)), Senegal (article 45), Ukraine (article 106(17) and Russia (article 83(k)).

These arrangements are not ideal, because they create the risk that the president will be able to manufacture a security and defence apparatus loyal to him or her by deploying supporters and allies to key offices in the military, intelligence and security services. This creates the risk that power will be centralized in an ambitious and power-hungry president. For this reason, procedures that divide or share appointments between the president and the government or legislature are preferable. There are a number of models, such as:

- In Niger, the President appoints the military officials by decree taken in the cabinet, and on the advice of the Superior Council of National Defence (articles 64, 70).
- In Madagascar, the Prime Minister and President share appointments, including security appointments, in accordance with a government decree. The President unilaterally appoints the military officers called to represent the state in international organs (articles 55(4), 65(12)).
- In Bulgaria, the President appoints and dismisses the higher command of the armed forces on motion from the government (article 100(2)).
- In Lithuania, the President appoints the Head of the Security Service and the Commander of the Armed Forces with the assent of the lower chamber of the legislature (article 84(14)).
- In Romania, the Director of Intelligence Services is appointed by a joint sitting of both chambers, on the proposal of the President (article 65(2)(h)), who has the power to make promotions within the armed forces to the rank of Marshal, General and Admiral (article 94).
- In France, the President makes appointments to the lower-ranking military posts of the state, but the Council of Ministers appoints the highest-ranking military officers. A statute may determine that certain of the appointments the President is entitled to make to lower-ranking military positions can be made only after consultation with the relevant standing committee. The President's appointment can be rejected by a vote of three fifths of the relevant standing committee of the National Assembly (article 13).

These options are examples of power-sharing mechanisms in the appointments process. While co-decision or legislative approval procedures may produce deadlock or delay appointments to senior defence and security positions, this drawback poses far less risk to the objectives of limited presidential power, power sharing and legislative oversight than an unchecked and unilateral presidential appointments power.

#### 4.4.4 *Commander-in-chief*

Decisions on how a country's military power is to be used, both at home and abroad, are ultimately taken by the commander-in-chief. Clearly designating a commander-in-chief sets out the chain of command in the military and authorizes a single functionary to oversee and assume responsibility for a country's military apparatus. Further, clear lines of authority, responsibility and command are important to a military's capacity to act quickly and efficiently in times of crisis or threat, but within the constraints of a command structure that maintains accountability to constitutional parameters. The president's role as commander-in-chief of the armed forces is therefore consistent with his or her role as an autonomous crisis manager in a semi-presidential system.


The majority of semi-presidential systems around the world therefore designate the president as commander-in-chief. This is the case, for example, in Austria (article 80), Belarus (article 84(28)), Bulgaria (article 100), Croatia (article 100), Finland (article 128), France (article 15), Lithuania (article 140), Macedonia (article 79), Mozambique (article 146), Peru (article 167), Poland (article 134), Russia (article 87), Slovakia (article 102), Slovenia (article 102), Sri Lanka (article 30), Ukraine (article 106) and Portugal (article 120).

The scope of the commander-in-chief's authority varies from country to country, ranging from a merely ceremonial title to enumerated powers to formulate military doctrine and defence policy or unilaterally deploy the military abroad. The variations in these two areas are worth exploring.

Of the countries listed above, only Russia and Ukraine confer wide-ranging policy powers on the President (articles 83 and 106, respectively), which increase opportunities for presidential domination of the security and defence forces and raising the risk of presidential consolidation of power.

In most other countries, the prime minister remains responsible for defence, security and foreign affairs policy, which is preferable (see section 4.3.2 above). The president's power to act as commander-in-chief is thus constrained by the prime minister and government's primacy in policy formulation, which ensures that the president can function in his or her capacity as commander-in-chief only when an emergency or crisis requires the active deployment of the military and defence forces. This arrangement strikes an appropriate balance between the imperatives of limited presidential power, power sharing and effective presidential leadership during times of crisis.

The French example follows this preferable approach for the most part, but ambiguities in the constitutional text have led to a situation in which control over the defence and security forces is shared between the President and Prime Minister through an informal convention. The Prime Minister is formally vested with responsibility for defence



(article 21), but the President has taken a leading role in defence and security policy in the exercise of the commander-in-chief powers. During periods of cohabitation, disputes have arisen about the proper scope of the Prime Minister's authority in foreign affairs. In defence, it has been more accepted that the President will take the lead: the allocation of defence and security issues to the President's 'reserved domain' has been largely uncontroversial, although the textual basis for this division is unclear. Important decisions about France's nuclear arsenal, for example, have been taken and announced by the President acting alone. In practice, the French presidential prerogative in defence and security must operate within the limits set by the legislature's budgetary authority and the countersignature requirements set out in article 19. While the French President's 'reserved domain' powers have gone largely unchallenged during periods of cohabitation, this can be attributed to a long-term historical practice rather than to the text itself. The vagueness and overlapping authority of these provisions, taken in isolation, is highly problematic because on their face they do not establish clear areas of authority for the President and Prime Minister.<sup>91</sup>

In Poland, the President's authority as commander-in-chief is left to be specified in detail by statute (article 134(6)). It is preferable that responsibility for formulating defence and security policy is entrenched in the constitution rather than determined by ordinary law.

The authority to deploy the military, at home or abroad, can be a vital lever for presidents seeking to gain power. As the Egyptian experience under three decades of martial law attests, using martial law for extended periods—especially when military courts supplant civilian judicial processes—can be an effective way of cementing a president's rule and damaging republican institutions. Unmitigated control over the initiation of hostilities with other states can damage democratic rule by empowering leaders to deploy the armed forces in another country. A declaration of martial law, with or without the surrounding context of hostilities with foreign nations, may also enable the deployment of the armed forces within the country. The risk this poses is that presidents or prime ministers with a unilateral power to declare war or martial law will be able to deploy the military at home, suppress political opposition and consolidate political power.<sup>92</sup>

Therefore the two issues for consideration are: (1) how declarations of war or martial law fit into the foreign affairs or security powers that a president or prime minister and legislature may hold and (2) whether the deployment of the armed forces at home, during times of war or martial law, creates conditions under which the person in charge of deploying the armed forces can seize political power.

In this area, Russia presents a cautionary example. Article 87 of the Russian Constitution requires the President to 'inform' the legislative branch if he or she

introduces martial law within Russia in response to a direct threat of aggression or acts of aggression against Russia. It is unclear whether this imposes any real limits on the President's power or enables the legislature to restrain the President's power to declare martial law.

Article 87(3) of the Russian Constitution provides that 'The regime of martial law shall be defined by the federal constitutional law.' In accordance with this provision, the Federal Constitutional Law on Martial Law (30 January 2002) regulates more closely the declaration of martial law and the use of force in a state of martial law. Article 4 of the Law on Martial Law provides that a state of martial law is declared by order of the President, setting out (1) the circumstances that justify the introduction of martial law, (2) the date and time for which the period of martial law is to remain in effect and (3) the boundaries of the territory for which martial law is to remain in effect. The President's order may also deploy the armed forces within the territory in which martial law is declared (article 10(1)) in order to take a range of enumerated measures, including measures, for example:


[T]o strengthen maintenance of public order and provision of national security, guarding of military, important state and special institutions, institutions that provide for vital functions of society, transport operations, communications and signal service, institutions of power engineering, as well as establishments that are of higher danger for people's life and health and for the environment (article 7(2)(i)).

Other measures that may be entrusted to the armed forces include measures:

[T]o suspend the activity of political parties, other public organizations, religious missions that propagandize and/or agitate and carry out any other activity that jeopardize defense and security of the Russian Federation at the time of Martial Law (article 7(2)(v)).

The President's order is to be submitted immediately to both chambers of the legislature, and considered by the Federation Council (the upper chamber) within 48 hours. The President's declaration of martial law must be supported by a majority of the members of the Federation Council, failing which the state of martial law lapses the day after the Council's decision to reject it (article 4(7)).<sup>93</sup>

The Russian President can assume vast powers on the introduction of martial law. The armed forces can be deployed for a wide range of extremely repressive functions, and the President, as commander-in-chief of the armed forces, remains in charge of these military deployments in times of martial law. While the President's declaration of martial law and concomitant use of the armed forces will lapse unless it is approved by the legislature within 48 hours, this requirement arises only in terms of ordinary, non-entrenched, federal constitutional legislation. Without constitutional protection, a



legislature sympathetic to the President could conceivably change these laws to expand the President's powers.

A president's commander-in-chief power must strike a balance between the need for decisive action in times of threat and the need to restrict presidential power and reduce the risk of presidential abuse of the armed forces to centralize power. The Russian approach purports to require legislative oversight of the President's action in this regard; however, the regulation of the President's powers by ordinary legislation undermines this balance. The Russian President's extensive military powers create the risk of presidential power seizure.

In contrast, in Portugal, Poland and France, the President's military powers are limited even though the President is designated as commander-in-chief of the armed forces.

According to article 135 of Portugal's Constitution:

In international relations the President of the Republic shall be responsible for:

c) Upon a proposal from the Government, after consulting the Council of State and subject to authorisation by the Assembly of the Republic, or, if the Assembly is not sitting and it is not possible to arrange for it to sit immediately, by its Standing Committee, declaring war in the case of effective or imminent aggression and making peace.

The Portuguese Constitution thus requires that the President seek the (non-binding) opinion of the Council of State, but also receive (binding) approval from the Assembly or its Standing Committee for a declaration of war. These requirements are better suited to upholding the principle of power sharing. In Poland, the President must appoint a separate commander-in-chief during times of war if the Prime Minister makes a request to this end. The authority of this wartime commander-in-chief, as well as the relationship between the wartime commander-in-chief and the constitutional organs of Poland, must be determined by statute (article 134(4)). The French constitution provides an elegant solution by requiring the Assembly to 'declare war', but allowing the government (defined as the Prime Minister and the members of the cabinet) to decide to send armed forces abroad for short periods of time and merely 'inform' the Assembly when doing so (article 35). This avoids wars led by the President, but preserves the capability of swift and decisive action. In emergency situations, discussed below, the French President may act for a limited period of time without being subject to the countersignature requirement (articles 16, 19).

Thus while parliamentary declarations of war are the global norm, the constitution should contemplate less formal mechanisms for authorizing the use of force in narrowly constrained and closely regulated situations of imminent threat and emergency. This

can be achieved by vesting the authority to deploy forces abroad in the prime minister, with some requirement of countersignature from the responsible cabinet member, or by establishing co-decision procedures between the president and the prime minister. In Cape Verde, for example, the President may declare war only on the proposal of the government acting collectively (article 136). If the decision to deploy forces abroad is vested with the president, it should be subject to legislative approval—but measures should be designed to prevent the circumvention of legislative approval as happened in Russia. This may also be an area in which a National Defence Council can play a consultative role, although, as discussed below, the robustness of such a council as a check depends on its membership, the powers of the president, and the extent to which the legislature can set determine its composition and powers through ordinary law.


#### **4.4.4.1 National Defence Council**

In contrast to designating either the prime minister and government or the president solely responsible for the formulation of defence and security policy, a National Defence Council can be established with responsibility for policy formulation. A National Defence Council is composed of the president and members of the government, and can include members of the legislature (both majority party and opposition party representatives) or independent appointees and experts. It is, at its heart, a power-sharing mechanism, which also ensures that the president's powers are not too broad and that there is legislative oversight of security and defence activity. Careful attention must be paid to the architecture of such a council, however, since an opportunistic president can use it to centralize power.

It is common for the president to head the National Defence Council, for example in France (article 15), Russia (article 83), Ukraine (article 106) and Portugal (article 133(o)). However, constitutions frequently fail to specify the scope of authority of the Council and leave many of the details up to positive law. Egypt's 2012 Constitution allowed the President to preside over the Council and left its competencies to be defined by law (article 197). From a constitutional perspective, it is essential that the National Defence Council operate in tandem with (rather than supplant) parliamentary committees and other non-executive bodies.

The Romanian experience offers an example of the problematic aspects of a National Defence Council. President Iliescu used the chairmanship of the Council to accumulate increasing authority over defence issues, sidestep the legislature's attempts to establish control over the military and police, and to deploy the armed forces to protect his regime from internal opposition. The Romanian President's ability to control the Council was in part due to the Constitution's failure to specify its membership, and in part due to the weak parliamentary tools to control executive officials. These shortcomings in the design of the Council allowed Iliescu to establish a power base in





the highest echelons of the armed forces, effectively capturing the armed forces and augmenting his grip on political power.<sup>94</sup>

Article 92 of the Romanian Constitution states that ‘The President of Romania shall be Commander-in-Chief of the Armed Forces and preside over the Supreme Council of National Defence’. Article 119 reads:

The Supreme Council of National Defence shall unitarily organize and co-ordinate the activities concerning the country’s defence and security, its participation in international security keeping, and in collective defence in military alliance systems, as well as in peace-keeping or restoring missions.

In creating national defence and security councils in the MENA region, drafters should be aware of their complex relationship to parliamentary bodies and ensure that the councils are subject to parliamentary checks. Constitutions should also take into consideration that the membership of these councils plays an important role in determining whether they act as a rubber stamp or a true consultative body. Setting out membership requirements in the constitutional text, rather than positive law, can ensure that those requirements are difficult to amend, thus limiting the possibility that the security sector can make a power grab to regulate itself.

#### ***4.4.5 Accountability***

To maintain power-sharing arrangements and prevent abuses of the power to control the security services, constitutions must ensure that the members of the executive who are responsible for security power are held to account for their actions. Accountability reduces the risk that the executive will abuse its powers, and the need for accountability is heightened with respect to the security services because their abuse carries great risks to the stability of power-sharing arrangements and the vibrancy of political competition. Specifically, constitutions must accomplish three tasks: (1) limit criminal immunity for members of the executive, (2) hold members of the security forces accountable to the law and (3) establish independent civilian oversight of the security sector.

Immunity from criminal prosecution for members of the executive and security officials is often justified by the need to ensure that the security and defence establishment can act (and be ordered to act) quickly and decisively in times of crisis, without having to answer to criminal charges during the crisis. Similarly, subjecting members of the executive to criminal proceedings while in office may hamper the effective functioning of government and allow competing factions of a power-sharing government to undermine one another. However, extensive criminal immunity is inconsistent with principles of accountability and creates the risk that security officials and the members of the executive responsible for security powers will be free to act with impunity to undermine political opposition and centralize power.<sup>95</sup>

Achieving the appropriate balance between these two imperatives is usually achieved by a narrowly circumscribed criminal immunity for actions taken in fulfilment of the office, but which does not extend to crimes or violations of the law. In France, for example, article 68-1 specifically affirms that 'Members of the Government shall be criminally liable for acts performed in the holding of their office and classified as serious crimes or other major offences at the time they were committed'. A similar rule is established for the President of France, although the President is shielded from prosecution for the duration of his or her term of office. Proceedings can be brought against the President one month after the expiry of his or her term of office. All periods of prescription or limitation are suspended during the President's term but resume upon the expiry of his or her term of office.

Article 67 of the French Constitution of 1958 affirms:


The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 and 68 hereof.

Throughout his term of office the President shall not be required to testify before any French Court of law or Administrative authority and shall not be the object of any civil proceedings, nor of any preferring of charges, prosecution or investigatory measures. All limitation periods shall be suspended for the duration of said term of office.

All actions and proceedings thus stayed may be reactivated or brought against the President one month after the end of his term of office.

MENA constitutions should consider adopting a similar approach. These provisions expose members of the government and the president to criminal liability, fostering transparency and accountability within the security services and discouraging abuse of the security services through criminally proscribed conduct. At the same time, limited temporal immunity for the president prevents politically motivated prosecution that may undermine effective presidential leadership and power sharing. Immunity for all members of the government for official acts and conduct pursued in the fulfilment of their duties likewise reduces the risk of prosecutions tainted by partisanship that may also have collateral consequences for power sharing.

The security forces must also be subject to the constitution and the law. If a constitution creates room for the security forces to break the law with impunity, it weakens the authority and control of the security leadership and impairs the security forces' ability to do their job. Therefore MENA constitutions should consider adopting provisions that require national security to be pursued in compliance with both the constitution and the law. These provisions should also subordinate the security forces to democratic, civilian control.



An accountable security sector cannot exist without independent accountability mechanisms, including inspectors general, national human rights instruments and legislative oversight. Independent civilian monitoring bodies can serve as an important check on partisan abuse of the military, police and intelligence services, which can undermine power sharing. However, they risk being perceived as tools of the regime if they are not part of a more holistic commitment to restraining emergency abuses. In pre-Arab Spring Egypt, for example, the National Council for Human Rights, established in 2003, was largely ineffective in ensuring that the security services respected human rights in light of the fact that the Emergency Law authorized the security services to violate rights when necessary. Given the history of unaccountable security sectors in the MENA region, the region's constitutions should also establish independent accountability mechanisms and ensure that their operations and effectiveness are not undermined by other elements of the constitutional and legal system.<sup>96</sup>

#### ***4.4.6 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 146 of the now-suspended 2012 Egyptian Constitution provided that:

The President of the Republic is the Supreme Commander of the Armed Forces. The President cannot declare war, or send the armed forces outside state territory, except after consultation with the National Defence Council and the approval of the Council of Representatives with a majority of its members.

Article 147 provided that 'the President of the Republic appoints civil and military personnel and dismisses them', while article 195 declared that 'the Minister of Defence is the Commander in Chief of the Armed Forces, appointed from among its officers'.

Article 193 provided:

The National Security Council... is presided over by the President of the Republic and includes in its membership the Prime Minister, the Speakers of the Council of Representatives and the Shura Council, the Minister of Defence, the Minister of Interior, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Justice, the Minister of Health, the Chief of the General Intelligence Services, and the Heads of the Committees of Defence and National Security in the Council of Representatives and the Shura Council.

Article 197 provided:

A National Defence Council is ... presided over by the President of the Republic and including in its membership the Speakers of the Parliament and Shura Council,

the Prime Minister, the Minister of Defence, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the armed forces, the Commander of the Navy, the Air Forces and Air Defence, the Chief of Operations for the armed forces and the Head of Military Intelligence.


The Council is responsible for matters pertaining to the methods of ensuring the safety and security of the country, for discussing the armed forces' budget. Its opinion must be sought in relation to draft laws on the armed forces.

In general, the now-suspended 2012 Egyptian Constitution gave the Prime Minister the power to appoint the cabinet. There is some vagueness in this text, however, about the appointment of the minister responsible for defence. Article 195 provided that the Minister of Defence must be a military officer, and according to article 147, the President was responsible for appointing military 'personnel'. There is some risk that this textual ambiguity could have led to conflict over who held the authority to appoint the Minister of Defence, but in any case it allowed the President indirect control over the identity of the Minister of Defence because the President was empowered to appoint the military personnel from which the Prime Minister would have had to select the Minister.

Such a lack of clarity also raises difficulty in identifying which official exercises authority as commander-in-chief. Article 146 provided that the President was the 'Supreme Commander of the Armed Forces' while article 195 provided that the Minister of Defence was the Commander-in-Chief. The principles of accountability and oversight, as well as limited executive power, require clear lines of command within the defence bureaucracy. It is preferable that a single functionary exercise ultimate authority over, and assume ultimate responsibility for, the defence forces. The confusing designation of the Minister of Defence as Commander-in-Chief and the President as Supreme Commander is problematic.

However, because the Prime Minister appointed the Minister of Defence and the President acted as Supreme Commander of the Armed Forces, the Prime Minister would have been encouraged to appoint a person agreeable to both the President and the Prime Minister as Minister of Defence. If the appointment process encourages agreement on a compromise candidate, it is less likely that either the Prime Minister or the President will capture the armed forces through the appointments process.

By contrast, the provisions for declaring war, authorizing force abroad and the national councils were well drafted and clear in the now-suspended 2012 Egyptian Constitution. Deployment of troops abroad required both a consultation with the National Defence Council and approval by the legislature. The National Security Council and National



Defence Council both balanced membership among civilians and security sector personnel. However, the provision in article 197 that the National Defence Council ‘discusses the armed forces’ budget’ was vague and ambiguous, and could be read to intrude on the legislature’s prerogative to dispense funds. The broad lack of clarity regarding the functions and terms of reference of both the National Defence Council and National Security Council was therefore problematic.

The Egyptian Constitution fell short in terms of security sector oversight. It did not subject the military, police or intelligence services to independent accountability mechanisms, or clearly establish that these services must operate within the constraints of the law and the Constitution. The Egyptian Constitution generally banned military trials for civilians, although it retained an exception for ‘crimes that harm the armed forces’ (article 198). An exception of this nature creates the risk that media or non-governmental exposure of corruption or political abuse of the armed forces may be prosecuted in military courts as ‘crimes that harm the armed forces’. This would not only pose risks to the rights to fair trial and freedom of expression, but would also have a chilling effect on the reporting and exposure of political security sector abuse, thus reducing the accountability of security forces personnel.<sup>97</sup>

Various articles of the June 2013 draft Tunisian Constitution provide:

No member of the Chamber of Deputies may be prosecuted at a civil or criminal level, arrested or tried for opinions or proposals suggested or for the work performed thereby because of the performance of the parliamentary functions thereof. (article 67)

If the member maintains criminal immunity in writing, he may not be prosecuted or arrested during his term of office for a criminal charge unless his immunity is lifted.

In the event of *flagrante delicto*, the member may be suspended and the Chamber of Deputies shall immediately be notified on the provision that the member be released if the Bureau of the Chamber so requests. (article 68)

The President of the Republic is responsible for representing the State. He is responsible for outlining the general policies on the aspects of defence, foreign relations and national security related to protecting the State and the homeland from internal and external threats in compliance with the general policy of the State.

He is also responsible for:

- Presiding over the National Security Council.
- Being the Commander-in-Chief of the armed forces.

- Declaring war and establishing peace, upon the approval of a three-fifths majority of the Chamber of Deputies, as well as sending troops abroad, upon the approval of the Chamber of Deputies and the government provided that the Chamber shall convene with a view to deciding on the matter within a period of no more than sixty days. (article 76)

The President of the Republic is responsible for:

Appointing and dismissing individuals with respect to senior military and diplomatic positions that are related to national security. These appointments can only be made if the relevant parliamentary committee does not object within 20 days. These senior positions are regulated by law. (article 77)


The President of the Republic benefits from judicial immunity during his mandate. All statutes of limitations and other deadlines are suspended. Judicial measures may recommence after the end of his mandate.

The President of the Republic cannot be prosecuted for acts that were carried out in the context of his functions. (article 86)

The government shall be composed of a Prime Minister, ministers, and state clerks selected by the Prime Minister. The ministers of foreign affairs and defence shall be selected by the Prime Minister in consultation with the President of the Republic. (article 88)

The provisions for appointing the ministers responsible for foreign affairs and defence in the Tunisian draft Constitution remain somewhat vague and open to the same conflict that plagued Poland. Article 88 appears to contemplate a form of joint appointment, but the nature or extent of presidential input is not clear. This ambiguity creates the possibility that a President could reject an appointee if he felt he was insufficiently ‘consulted’.

The President’s role as Commander-in-Chief, combined with his role in setting policy in the areas of defence, foreign relations and national security—and the power to make appointments to key positions in the military and diplomatic services and in appointing the Ministers of Defence and Foreign Affairs—increase the risk that the President will be able to seize control of the country’s security and armed forces. In the context of the political history of Tunisia and the MENA region more broadly, this risk should be guarded against. While it is common in many countries for a president to act as commander-in-chief of the armed forces, the Tunisian President’s powers of appointment as defined in the draft Tunisian Constitution greatly expand this power. Therefore it would be preferable if the President were not empowered to appoint ministers in these key ministries.



While article 76 establishes clear rules for the declaration of war, and the requirement of a three-fifths majority in the legislature is an extremely robust checking mechanism, the constraints on the deployment of the armed forces abroad are unclear. Article 76 appears to require the government and Chamber of Deputies to approve deployments abroad before they occur, but the text then indicates that they should convene ‘within 60 days’. It is not clear, in other words, whether approval must come before or after the deployment takes place. The Constitution also does not appear to set out the consequences, remedies or sanctions if this provision is ignored.

The mandate of the National Security Council, as well as its membership, is entirely neglected in the text of the Tunisian Constitution. Leaving these to statute is problematic because it leaves Council membership open to manipulation and abuse by different stakeholders, including the security sector itself.

Article 86 seems to follow the model of the French Constitution in affording presidential immunity for the duration of the term of office, but it also declares that the President shall not be prosecuted for acts ‘carried out in the context of his functions’. This creates doubt as to whether the President can claim criminal immunity, even after his or her term of office, by asserting that criminal acts he or she committed were executed as part of the office. This should either be altered to make it plain that it does not extend to immunity for criminal prosecution or removed entirely.<sup>98</sup>

Article 67 confers a form of parliamentary privilege that is recognized in most constitutional democracies, but article 68 creates a troubling immunity for members of the government. It confers immunity from criminal prosecutions, if a member of government maintains such immunity, for the duration of office and unless lifted (the Constitution does not specify how immunity is to be lifted). Immunity should be confined to non-criminal acts executed as part of the office, and should apply only for the duration of the office.

#### ***4.4.7 States of emergency***

The president’s power to declare an emergency and assume emergency powers carries great risks to the principles of power sharing, limited presidential government and legislative oversight of the executive. A state of emergency allows the president to exit the constitutional framework and expand the president’s share of power. Presidents in the MENA region, in particular, have historically triggered states of emergency in order to rule by decree, target the political opposition and consolidate executive power. The emergency powers that a state of emergency affords a president have, in the MENA region, led to violations of human rights, the alteration of judicial systems and significant increases in the role of internal security apparatuses in regulating society. The constitutional rules regulating the declaration of states of emergency and the president’s

powers under the state of emergency must therefore carefully balance the principles of presidential leadership and crisis management with the principles of power sharing and limited presidential power.

Any constitution in the MENA region that wishes to avoid the presidential autocracy of the pre-Arab Spring era must impose real limitations on the president's ability to declare a state of emergency, the scope of executive lawmaking during a state of emergency, and the president's capacity to assume unilateral command of the security sector during a state of emergency and target political opponents or partners in a power-sharing government. Legislative oversight mechanisms should be contemplated, such as legislative confirmation of the existence of the state of emergency. Co-decision mechanisms between the president and prime minister can further help to limit the president's emergency powers. These imperatives apply to both the declaration of the state of emergency and the regulation of the state of emergency itself.

In many semi-presidential countries, the president is empowered to declare a state of emergency, and to assume certain emergency powers during the state of emergency. This is consistent with the principle that the president provide leadership in times of crisis and act as a symbol of unity and stability for the nation in times of crisis or division. In some countries, however, the state of emergency is declared by the government or by the government and president acting together, and emergency powers are assumed by the government rather than the president alone (see further below). This is consistent with the principle that presidential power be limited. Whether the president or the prime minister is empowered to declare a state of emergency or exercise emergency powers, the need to constrain and ensure oversight of those powers is important.


#### ***4.4.7.1 Procedural limitations: who declares the state of emergency?***

Procedural limitations that restrict the president's ability to declare a state of emergency can protect the normative principles of power sharing, limited presidential power and legislative oversight. There are, broadly speaking, two sets mechanisms for doing this: (1) procedures for declaring a state of emergency and (2) substantive condition precedents that trigger the president's discretion to declare a state of emergency.

There are, in principle, four ways in which a state of emergency can be declared. It can be declared by: (1) the president unilaterally, (2) the president acting in consultation with the prime minister, (3) the prime minister unilaterally or (4) the legislature.

Option 1: France (article 16) and Francophone countries including Mali (article 50), Burkina Faso (article 59), Central African Republic (article 30) and Niger (article





67) confer a right on the President to take emergency measures in specific circumstances (see below) after formally consulting the government, the legislature and the Constitutional Council. The power to declare emergency measures is constrained to some extent by the procedural requirement of formal consultation with all three branches of government, but the President declares the state of emergency in each case. In France and Mali, the President holds an expansive right to assume wide-ranging lawmaking powers without formally declaring a state of emergency. In Armenia (article 55(14)) the President may declare a state of emergency after consulting with the chairman of the National Assembly and the Prime Minister.

In Madagascar (article 61) and Senegal (article 52) the President need not consult with the government before declaring a state of emergency. In Lithuania (articles 144, 84(17)) and Bulgaria (article 100), the President has the power to unilaterally declare a state of emergency only if the legislature is in recess.

In Sri Lanka (article 155), the President need not formally declare a state of emergency in order to exercise emergency legislative authority: the Public Security Ordinance, referred to explicitly in the Sri Lankan Constitution, empowers the President to make emergency regulations that override all laws except the Constitution. The President need only make a proclamation for these regulations to come into force. In the Weimar Republic, the infamous article 48 empowered the President to declare a state of emergency at his discretion.<sup>99</sup>

Option 2: Peru (article 137), Croatia (article 17), Poland (article 229), Taiwan (article 43) and Ukraine (article 106(21)) empower the President and the government, acting in concert, to declare a state of emergency. In Croatia, the President exercises the power to declare a state of emergency, on the advice of the government, only if the legislature cannot meet. In Taiwan, the President may exercise emergency powers only upon a resolution of the government and if the legislature is in recess. In Ukraine, the President's decision to introduce a state of emergency must be countersigned by the Prime Minister. These procedures are different from the requirement that the president consult with the government before declaring a state of emergency under option 1.

Option 3: Slovakia (article 119(n)) and Slovenia (article 92) empower the government to unilaterally declare a state of emergency. In Slovenia this applies only if the legislature cannot meet.


Option 4: If the legislature is able to meet, the following semi-presidential regimes require legislative authorization of the declaration of a state of emergency: Bulgaria (article 84(12)), Cape Verde (article 135(2)(h)), Croatia (article 17), Ireland (article

28(3)), Lithuania (article 67(20)), Macedonia (article 125), Portugal (article 138) and Slovenia (article 92). In Bulgaria and Macedonia, either the cabinet or the President can propose the motion to the legislature to declare a state of emergency. In Cape Verde and Portugal, the President can declare a state of emergency in consultation with the cabinet, but only after authorization by the legislature. In Slovenia, the legislature declares the state of emergency on the proposal of the government.

It is therefore common for the president to be authorized to declare a state of emergency. The need to balance the president's power to do so, and provide effective leadership during a time of emergency, must be balanced against the need to restrain his or her power. Setting strict requirements of consultation, co-decision, or legislative approval or authorization on a president's power to declare a state of emergency reduces the risk that he or she will be able to unilaterally declare a state of emergency.

Other procedural restraints can protect against this risk. A number of countries specify a timeframe within which the legislature must approve a declaration of a state of emergency; otherwise it will lift automatically: Belarus (three days: article 84(22)), Mozambique (the President must submit the declaration to the legislature for approval within 24 hours and the legislature must decide within 48 hours: article 285), Georgia (48 hours: article 46(1)), Mongolia (seven days: article 33(12)), Namibia (seven days: article 26), Romania (five days: article 93) and Ukraine (two days: article 85(31)). In Macedonia the President may declare a state of emergency only if the legislature cannot meet, but the declaration must be confirmed by the legislature as soon as it can meet, or else the state of emergency lapses (article 125). In Ukraine the declaration requires only 'subsequent confirmation' by the legislature to remain in force (article 106(21)), while in Russia the subconstitutional Federal Constitutional Law on the State of Emergency requires upper chamber approval within 72 hours.<sup>100</sup> In Bulgaria, the President can declare martial law in cases of armed attack (article 100), but only the legislature can introduce a state of emergency (article 84). Senegal has no requirement that a declaration of the state of emergency has to be confirmed by the legislature, but any emergency measures put into effect by the President during the exercise of emergency powers must be confirmed by the legislature within 15 days, or they lapse (article 52).

The Portuguese Constitution combines the procedures of consultation and legislative approval. The President must consult with the government prior to issuing a declaration, which must be authorized by the legislature (or by the relevant standing committee if the legislature cannot meet) to declare a state of emergency. Where the standing committee authorizes the declaration, the full plenary session of the legislature must decide whether to confirm or lift the state of emergency at its first possible sitting (article 138).



In France, the Constitution and law establish three different mechanisms for declaring a state of emergency. Article 16 empowers the President to exercise emergency powers without formally declaring a state of emergency if the security of the nation is endangered. Second, article 36 provides that a 'state of siege' shall be declared 'in the Council of Ministers'. Third, an ordinary piece of legislation, the Act of 3 April 1955, empowers the Council of Ministers to declare a state of emergency. The declaration in all three cases must be confirmed by the legislature, failing which the state of emergency or any emergency measures in place will lapse. The state of siege in terms of article 36 of the Constitution or the state of emergency in terms of the 1955 law, both of which are declared by the Council of Ministers, can only be extended beyond 12 days by the legislature. Emergency measures adopted by the President in under article 16 can be submitted to the Constitutional Council for review after 30 days by a minority of either chamber of the legislature, and can be reviewed by the Constitutional Council after 60 days, to determine whether the substantive conditions justifying their enactment still exist.

The Weimar Republic is a striking example of the danger of not limiting the duration of a state of emergency as declared by the executive. The Weimar executive repeatedly used its emergency powers to legislate, most often in the economic realm. The account of President Mubarak's abuse of emergency powers in Egypt, offered in Part 2, is a similarly stark warning of the dangers of a state of emergency with an unlimited duration.<sup>101</sup>

Countries in the MENA region should ensure that there are procedural checks on the president's ability to declare a state of emergency. However, because emergency powers exist in order to hasten government action during political crises, requiring full parliamentary approval before declaring an emergency undermines the rationale of declaring a state of emergency in the first place. Therefore, while the state of emergency should be introduced by a co-decision of the president and the government, as described in option 2 above, requirements for legislative approval of the state of emergency or judicial review of the existence of the substantive conditions precedent for the state of emergency need not arise for a period of some days.

#### ***4.4.7.2 Substantive conditions that trigger the power to declare a state of emergency***

It is important to ensure that a state of emergency cannot be declared unless the circumstances justify it. The substantive conditions precedent for the declaration should be set out in the constitution. There are two broad approaches to defining these substantive circumstances. The first approach is to specify precisely the set of circumstances and substantive conditions in the constitution, while the second is to allow the declaration of a state of emergency in broadly construed circumstances of


emergency. However, the form an emergency takes cannot always be anticipated, and a particular crisis may not have been stipulated in the constitution. This may, theoretically, limit a nation's capacity to respond effectively to a particular crisis, but this danger could be avoided by carefully crafting a detailed set of precedent conditions. A constitution that does not define emergency circumstances may expand the president's ability to manipulate the constitutional rules to declare a state of emergency and assume emergency powers where no real emergency exists. This creates the risk of increased presidential power. In new democracies, flexible or broadly defined conditions precedent to the declaration of a state of emergency pose a major risk of presidential overreach, precisely because there is no tradition of democratic or accountable government or scrutiny of executive action.

Two of the three mechanisms for declaring a state of emergency in France stipulate substantive preconditions. First, article 16 allows the President to exercise emergency powers without a formal declaration of a state of emergency if 'the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted'. This provision sets substantive conditions for the exercise of emergency powers.

Second, article 36 provides that a 'state of siege' shall be declared 'in the Council of Ministers', but does not define the substantive circumstances under which a state of siege can be declared. However, the procedural requirement that the state of siege is declared in the Council of Ministers means that the President cannot initiate it unilaterally. The state of siege is limited to a period of 12 days, after which it must be authorized by the legislature.

Third, an ordinary piece of legislation, the Act of 3 April 1955, empowers the Council of Ministers (i.e. the cabinet as chaired by the president; see section 4.3.5 above) to declare a state of emergency in cases of imminent danger resulting from serious breaches of public order, or where the nature and severity of events poses a threat of public calamity.<sup>102</sup>

Thus in France, two of the three routes to the declaration of a state of emergency set out the conditions precedent for the use of emergency powers. Both article 16 and the 1955 law list substantive circumstances that trigger the executive's use of emergency powers that are broad and open to wide interpretation. The list of specific circumstances does not provide a meaningful check on the power to declare a state of emergency. The need to ensure flexibility in the executive's response to crisis, however, may mean that the preconditions for emergency powers must be broad and open to wide interpretation.



The Portuguese Constitution also provides more than one route to the activation of emergency powers. Article 19 provides:

- (1) Bodies that exercise sovereign power shall not jointly or separately suspend the exercise of rights, freedoms and guarantees, save in the case of a state of siege or a state of emergency declared in the form provided for in this Constitution.
- (2) A state of siege or emergency may be declared in all or part of the national territory, only in cases of actual or imminent aggression by foreign forces, serious threat to or disturbance of the democratic constitutional order, or public calamity.
- (3) A state of emergency is declared where the circumstances mentioned in the preceding paragraph are less serious; it may at most entail the suspension of some of those rights, freedoms, and safeguards that allow ground for suspension.
- (4) When choosing between a state of siege or a state of emergency, when deciding for one or the other, and when enforcing that decision, the principle of proportionality has to be respected; in particular, the scope of the decision, the duration and the ways and means provided for, must be limited to what is strictly necessary to promptly resuming the constitutional standards.
- (5) The declaration of a state of siege or emergency is to be adequately substantiated and must specify the rights, freedoms, and safeguards whose exercise is to be suspended; it is in force for no more than fifteen days or, where that declaration results from the declaration of war, for no longer than the period laid down in the law, although it may eventually be renewed within the limits above.

The Portuguese Constitution allows the declaration of either a state of siege or a state of emergency in cases of ‘actual or imminent aggression by foreign forces, serious threat to or disturbance of the democratic constitutional order, or public calamity’. Rather than narrowly defining the substantive triggers for declaring a state of emergency, the Constitution provides that the decision to introduce a state of emergency or a state of siege—the latter allowing for a greater restriction of rights and freedoms—should be influenced by the nature of the crisis. The Constitution thus requires that the response to the crisis should be proportional to the severity of the crisis itself. Mozambique’s Constitution establishes a similar model (article 283).

The most open approach is the one taken by the Russian Constitution, which allows the President to introduce a state of emergency ‘in accordance with the procedure envisaged by federal constitutional law’ (article 88). This parallels article 148 of Egypt’s 1971 Constitution, which permitted the President to declare a state of emergency ‘in the manner prescribed by the law’. This model is exceedingly dangerous. Ordinary or non-constitutional law usually only requires an ordinary majority in the legislature to enact or amend, which raises the possibility that a dominant party could simply amend the ordinary law to allow the president or government to more easily exercise emergency

powers. The relevant Russian law in turn defines the conditions precedent to the state of emergency as:


- (a) attempts to alter by force the constitutional system of the Russian Federation, to seize or take over power, an armed uprising, mass riots, acts of terrorism, blockade or taking over of especially important installations or individual areas, training and operation of illegal armed formations, ethnical, interconfessional and regional conflicts accompanied by acts of violence which create a direct threat to the life and security of citizens, the normal functioning of the state authorities and bodies of local self-administration;
- (b) nature or technology-induced states of emergency, emergency ecological situations, including epidemics and epizootics occurring as a result of accidents, hazardous natural phenomena, calamities, natural and other disasters which entailed (which may entail) human casualties, the infliction of damage to the health of people and the environment, considerable material losses and disturbance to vital activities of the population which require the carrying out of major emergency, rescue and other urgent operations.<sup>103</sup>

Like the Portuguese model, which differentiates between states of siege and states of emergency, the Russian Constitution differentiates between states of emergency and martial law. In cases of aggression or direct threat of aggression to the nation, the President may declare martial law in all or parts of the country (article 87; see above). The details of the state of martial law, as with the state of emergency, are to be regulated by ordinary law.

Given the history of abuse of emergency powers in the MENA region, a preferable design option for the region's constitutions is to enumerate the events that trigger a state of emergency. Limiting the circumstances that constitute a state of emergency can help ensure that the executive does not manufacture circumstances to cement its own power and rule by decree. However, even a circumscribed list of substantive precedent conditions is open to interpretation and abuse. Given these shortcomings, constitutions in the MENA region must contain additional procedural checks on the president's emergency power.

#### ***4.4.7.3 Limitations on emergency powers***

In addition to limiting when and how a state of emergency can be introduced, constitutions should delineate which powers the president or government can exercise during a state of emergency. In many constitutions, the president is empowered to take emergency measures or make decrees with the force of law during a state of emergency, for example in Burkina Faso (article 59), Central African Republic (article 30), Croatia (article 101), France (article 16), Georgia (article 46), Madagascar (article 61), Mali



(article 50), Namibia (article 26(2)), Niger (article 67), Poland (article 234), Slovenia (article 92), Senegal (article 52), Sri Lanka (article 155) and the Weimar Republic (article 48). In Armenia, the President may ‘take measures’ appropriate in the circumstances, but the ‘legal regime of the state of emergency’ shall be defined by legislation (article 55(14)). In Finland (article 23) and Macedonia (article 125) the government, but not the President, is empowered to enact decrees in emergency situations that may limit specified rights. In France, the government may exercise decree power once a state of siege has been declared (article 36). The Portuguese Constitution includes the vague provision that ‘the public authorities’ may take appropriate steps to restore constitutional normality (article 19(8)).

Substantive limitations on the exercise of these powers, which are entrenched in the constitution, can ensure that power-sharing arrangements between the president and prime minister remain intact during the state of emergency and reduce the risk that emergency powers will be abused. Substantive limitations fall into five general categories: (1) temporal limits, (2) bans on legislative dissolution, (3) fundamental rights restrictions, (4) countersignature requirements and (5) limits on the decree power. To fully guard the power-sharing relationship during a state of emergency, constitutions in the MENA region should adopt all five types of substantive limitations.

**(1) Temporal limits:** Limits to the length of time that a state of emergency can remain in effect reduce the opportunities for either executive to abuse emergency powers to bolster its own position and undermine power-sharing arrangements. Typical provisions impose an upper limit on the state of emergency, such as the six-month cap found in the now-suspended 2012 Egyptian Constitution (article 148) and the Lithuanian Constitution (article 144). In Mozambique, the duration of the emergency is limited to periods of 30 days, renewable three times (article 284).

In addition to procedural restrictions requiring legislative confirmation of the declaration of a state of emergency after a set time period, it is advisable to impose an absolute limit on the duration of a state of emergency in the MENA region. This ensures that a president or government cannot rule by decree indefinitely under the auspices of a continuous ‘emergency’. This imposes restrictions on executive powers and reduces the risks to power sharing.

**(2) Dissolution of the legislature:** Power sharing between the president and prime minister can be undermined if the president dissolves the legislature (see section 4.2.3 above). If the president dissolves the legislature, thus effectively dismissing the government, while exercising emergency powers, he or she will assume broad—and unchecked—powers to rule. Several semi-presidential constitutions thus prohibit the dissolution of the legislature during a state of emergency, for example: Armenia (article 63), Belarus (article 94), Burkina Faso (article 59), Cape Verde (articles 144 and 273),

Central African Republic (article 30), France (article 16), Mali (article 50), Mozambique (article 189), Niger (article 67), Peru (article 134), Poland (article 228), Portugal (article 172), Romania (article 89), Russia (article 109(5)) and Senegal (article 52).

This prohibition avoids the Weimar-style tactic of declaring an emergency and using the opportunity to dispense with the political opposition and call new legislative elections. The Polish Constitution prohibits both new elections and changes to the electoral law during ‘extraordinary’ periods (article 228). Bans on parliamentary dissolution and changing the electoral law protect the power-sharing relationship.


Historically, executives in the MENA region have abused the power of dissolution to amend electoral laws and seize more power. The danger of power grabs is particularly acute during times of political crises, when political branches tend to defer to the executive. An effective, accountable legislature must remain in office during the emergency to counterbalance executive power; a prohibition on legislative dissolution furthers this objective.

**(3) Respect for fundamental rights:** The value of a constitution is undermined if a president or government can violate basic rights during a state of emergency. Many constitutions expressly limit the extent to which emergency decrees or measures can infringe upon fundamental rights. Even the Russian Constitution, for example, which imposes very few restrictions on the initiation or duration of emergency powers, prohibits the infringement on the right to life, dignity, choice of religion and due process (article 56(3)).

Some constitutions provide that under a state of emergency ordinary legislation can limit rights, in a manner that would be unconstitutional otherwise. However, certain rights remain ‘non-derogable’ even during a state of emergency. Protections against derogation often apply to the right to life, prohibitions on torture, fair trial rights such as the rights to counsel and protections against self-incrimination, and rights of personal liberty such as the prohibition on detention without trial. See, for example, Armenia (article 44), Bulgaria (article 57), Cape Verde (article 274), Finland (article 23), Georgia (article 46), Ireland (article 28), Lithuania (articles 144, 145), Mongolia (article 19), Peru (article 137), Russia (article 56), Slovakia (articles 51, 102(3)), Slovenia (article 16) and Ukraine (article 64).

Although the French Constitution does not define non-derogable rights, France is party to many human rights treaties that set out non-derogable rights, including the European Convention on Human Rights (article 15(2): these rights include the right to life, prohibitions against torture and slavery, and the right to be punished only in terms of law). The French Constitution recognizes these treaties as *supralegislative* (article





55), which means they have the status of constitutional law. The European human rights system thus checks the French President's ability to use states of emergency to restrict citizens' basic liberties, and in particular the President's ability to target political opponents or partners in a power-sharing government. Similarly, states party to the International Covenant on Civil and Political Rights are required to comply with its limitations on the derogation of rights to life, freedom from torture, freedom from enslavement, and freedom of thought and religion during times of emergency (article 4). The Egyptian experience under the Emergency Law is a vivid reminder of how emergencies can endanger basic rights. Under the Emergency Law, individuals considered to be 'national security threats' could be indefinitely detained without due process of law. Suspects could be secretly held in detention facilities run by the State Security Investigations forces. Terrorism suspects could be tried by either the President-appointed Emergency Supreme State Security Courts (whose judgments were not subject to appeal) or, in some cases, by military courts, where the right to appeal was limited to questions of law. The judgments of both types of courts were finalized 'only after ratification by the President'. Accusations of torture and mistreatment were rampant. In short, the executive consolidated power in the presidency using a widespread system of executive detention and violations of basic human rights—which precluded any hopes of a balanced system of government, with the President sharing power with the other branches.<sup>104</sup>

Consistent with states' obligations under international law, constitutions in the MENA region should include provisions that expressly forbid the executive from derogating from basic rights during a state of emergency. At the very least, the list of non-derogable rights must include the right to life, prohibitions against torture, rights to fair trial including the right to counsel and the right against self-incrimination, and rights of personal liberty including prohibitions on detention without trial. Without such provisions, executives in the MENA region can use a state of emergency to suppress political opposition and cement their control over the country. This may result in a stultification of political expression and opposition and increase the risks of a return to single-party rule.<sup>105</sup>


**(4) Countersignature:** Countersignature requirements can increase power sharing within the executive branch, even during a state of emergency. While neither France nor Russia imposes countersignature requirements on decrees issued during states of emergency, other constitutions require countersignatures during a state of emergency. In Portugal, all presidential decrees must be countersigned by the government before being considered valid (article 140). In Peru, the Prime Minister must countersign presidential emergency decrees (article 123).

**(5) Limitations on emergency decree powers:** Once a state of emergency is in effect, the executive may be empowered to take legislative action. Whether this is the case, and

the extent or limitations of the emergency legislative action the executive may take, are important considerations. The principles of power sharing and limited presidential power justify substantive limitations to executive lawmaking power during periods of emergency, and these limitations become even more important if the president or the executive has the power to declare a state of emergency unilaterally. Narrowly defined and closely regulated emergency powers are less easily abused by a president or government to centralize power. The two mechanisms for limiting presidential decree-making power, where it is conferred, are (1) requirements of legislative oversight or authorization and (2) substantive limitations on the content of presidential emergency decrees.

It is not uncommon for semi-presidential constitutions to confer emergency legislative authority on the president (although the Macedonian Constitution gives the government the power to issue decrees for the duration of the state of emergency (article 126)). Yet not all constitutions that confer emergency lawmaking power impose substantial limitations on that power, or require legislative oversight. Countries where the President enjoys emergency lawmaking powers that require no legislative approval for their validity include Burkina Faso (article 59), Madagascar (article 61), Niger (article 67), Russia,<sup>106</sup> France (article 16) and Mali (article 50). In the five Francophone systems (Burkina Faso, Madagascar, Niger, France and Mali), as well as Armenia, the President is empowered to take exceptional measures, appropriate in the circumstances, to remedy the threats to the nation. In Russia, the President's emergency powers may not curtail certain rights in the bill of rights, including the rights to life, human dignity, privacy, freedom of religion and rights of fairness in criminal proceedings (article 56). Mozambique (article 286) and Georgia (article 46) have similar provisions prohibiting the infringement of fundamental rights by emergency decrees.

In other semi-presidential regimes, emergency presidential legislative acts must be ratified by the legislature or else they lapse. In the Central African Republic (article 30), Senegal (article 52) and Sri Lanka (article 155), the President enjoys wide-ranging emergency powers, but all legislative acts lapse if not ratified by the legislature within 15 days. In the Weimar Republic, the President was required to submit emergency legislative acts to the legislature without delay, although they remained in force unless the legislature expressly revoked them by a simple majority (article 48). The limited emergency power to issue decrees only when the legislature is in recess is conferred on the President in Taiwan and Iceland (although in Iceland, article 28 of the Constitution confers this power on the President 'in case of urgency', rather than in a formal state of emergency). In Taiwan, all presidential legislative acts must be ratified by the legislature within one month (article 43), and in Iceland within six weeks (article 28). In Peru the President can exercise emergency powers only in concurrence with the government (article 137), while in Austria the President has no such powers.



Some countries define the lawmaking powers the president assumes during a state of emergency more narrowly. In Croatia (article 101) the President exercises only the powers that are expressly delegated to him or her by the legislature, and in Slovenia (articles 92, 108) and Poland (article 234) the President exercises authority only if the legislature is unable to meet. In both Slovenia and Poland, the President acts in these cases only on proposals from the government. In Namibia, presidential regulations made under the state of emergency lose the force of law after 14 days unless they are confirmed by the legislature (article 26(6)). In Armenia (article 55(14)), the President may take measures that are appropriate in the given circumstances, but subject to a legal regime defined by law. In Romania, the legislature can delegate decree-making power to the government (article 115); ‘emergency ordinances’ issued by the government ‘in exceptional cases’ have no force or effect until they are approved by the legislature. This presumably includes states of emergency, but it is not clear whether it extends beyond declared states of emergency to other cases of urgency.

In some cases the legal regime of the state of emergency and the powers the president or government assume are determined by legislation or ‘enabling acts’. In Ukraine, the President enjoys no inherent constitutional power to exercise emergency legislative power. Instead, the legislature regulates the legal regime of the emergency by law, and may in doing so authorize the President to take emergency legislative measures (article 92(19)).<sup>107</sup>

The history of abuse of emergency powers in the MENA region highlights the importance of limiting the president’s or the executive’s powers to make substantive law during times of emergency. Requirements that certain rights remain non-derogable should be considered, alongside mechanisms to ensure that the legislature is not dissolved or the institutional architecture of power-sharing arrangements changed. In addition, the legislature should be required to exercise some degree of oversight of any emergency powers that the president or the executive exercise.

#### ***4.4.7.4 Analysis of the 2012 Egyptian Constitution and Tunisian draft Constitution (June 2013)***

Article 148 of the now-suspended 2012 Egyptian Constitution provided:

The President of the Republic declares, after consultation with the government, a state of emergency in the manner regulated by law. Such proclamation must be submitted to Council of Representatives within the following seven days.

If the declaration takes place when the Council of Representatives is not in session, a session is called immediately in order to consider the declaration. In case the Council of Representatives is dissolved, the matter is submitted to the Shura Council, all within the period specified in the preceding paragraph. The declaration of a state of

emergency must be approved by a majority of members of each chamber. The declaration is for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum.

The Council of Representatives cannot be dissolved while a state of emergency is in place.

Article 148 of the now-suspended 2012 Egyptian Constitution contained some, but not all, of this report's recommendations. It failed to stipulate the circumstances necessary to trigger a state of emergency, although it seemed to anticipate that a statute might define some of the terms of emergency powers. Following the constitutional tradition of other countries, it gave the President the authority to declare an emergency. Promisingly, it required consultation with other governmental actors; it also required legislative approval of the emergency. The requirements of consultation and legislative approval help to protect power-sharing arrangements. The six-month limit on the duration of the state of emergency contained in the 2012 Constitution was strict and admirable. However, the 2012 Constitution failed to impose any substantive or procedural limitations on the types of decrees the executive can issue under a state of emergency, or to establish any protection of human rights. Thus appropriate limitations on the President's emergency powers were not imposed.


Article 48 of the June 2013 draft Tunisian Constitution provides:

The law will determine the limitations that can be imposed on the rights and freedoms that are included in this Constitution and their application on the condition that it does not compromise their essence. The law can only take away from these rights to protect the rights of others or based on the requirements of public order or national defence or public health. The judicial authorities ensure that rights and freedoms are protected from all violations.

Article 79 provides:

In the event of imminent danger threatening the nation's institutions, and the security and independence of the country in such a manner preventing the normal operation of the entities of the state, the President of the Republic may undertake any measures necessitated by the circumstances, after consultation with the Prime Minister and the Speaker of the Chamber of Deputies. The President shall announce the measures in an address to the nation.

The measures shall aim to secure the normal reoperation of the public authorities as soon as possible. The Chamber of Deputies shall be deemed in a state of continuous session throughout such period. In such event, the President of the Republic may



not dissolve the Chamber of Deputies and may not bring a motion of censure against the government.

After the elapse of a thirty-day period as of the implementation of the measures, and at any time after such, the Speaker of the Chamber of Deputies or thirty of the members thereof shall be entitled to resort to the Constitutional Court with a view to verifying whether the circumstances specified in Paragraph 1 of the present article still exist. The Court shall issue the decision thereof publicly within a period no later than fifteen days.

The measures cease to bear effect upon the termination of the reasons causing the existence thereof. The President of the Republic shall, to that effect, address the nation.

Article 79 of the draft Tunisian Constitution contains only some of this report's recommendations. First, on procedural grounds, the article does require that the President consult with the Prime Minister and the speaker of the legislature before taking any measures to address the emergency. However, it is not clear what the content of this consultation is, or whether it empowers the Prime Minister or speaker to block the President's actions in any way. This low procedural hurdle to the exercise of emergency powers is thus unlikely to act as an effective check against the abuse of emergency powers.

Second, also on procedural grounds, there is no opportunity for legislative oversight of the exercise of emergency powers. The speaker of the legislature (or 30 of its members) can ask the Constitutional Court to determine whether the substantive conditions justifying the state of emergency still exist, but only after 30 days have passed. Moreover, the Court is not entitled to inquire into the emergency measures taken by the President. Similarly, at no point must the measures adopted by the President be confirmed by the legislature, meaning that the President's emergency measures remain in force indefinitely. This not only poses the risk that the President will seize power; it is also inconsistent with the vast majority of the world's constitutions.

Article 79 is very vague regarding the substantive conditions precedent to the taking of emergency measures by the President. It states only that the president may take emergency actions in circumstances of imminent danger that threaten the nation's institutions and the security and independence of the country in such a manner that prevents the normal operation of the entities of the state. This broad provision allows the President to act in a wide range of circumstances, and the President's actions cannot be called into question before the Court until 30 days have elapsed.

There is only one restriction on the President's powers: he or she cannot dissolve the legislature by means of an emergency measure. The draft Constitution does not impose

a temporal limit on the duration of emergency measures, reinforcing the view that such measures remain in effect indefinitely. This is a significant threat to the stability of the constitutional order.

Finally, the limitations clause in the bill of rights (article 48) offers little protection against the infringement of rights, indicating that laws can infringe rights ‘based on the requirements of public order or national defence or public health’. Worse, the article provides that ordinary law will determine the limitations that can be imposed on rights. While rights often act as a bulwark against emergency powers by limiting the effect that emergency powers can have on them, this provision suggests that the extent of emergency laws will not be limited by the need to respect rights in the bill of rights.

#### **4.4.8 Recommendations**

##### **Appointment of defence and security officials**

These recommendations are intended to ensure the maximum degree of power sharing and reduce the risk of presidential capture of the defence and security forces.

##### **Principal recommendations**


- The prime minister should appoint the entire cabinet. The president should not participate in the selection of cabinet ministers responsible for foreign affairs, defence or internal security.
- Appointments to senior military, security and intelligence services should be made by the prime minister, with the countersignature of the relevant cabinet minister.

##### **Alternative recommendations**

- A presidential power to appoint cabinet members responsible for defence, security and foreign affairs must be exercised jointly with the prime minister through co-decision-making procedures (such as appointment by the president on proposal of the government or appointment by the cabinet as chaired by the president). The constitution must set out co-decision procedures unambiguously, clearly stating the roles of the president and prime minister and the decision process. These appointments should be subject to subsequent legislative approval.
- A presidential power to appoint officials to senior positions in the military, security and intelligence services must be exercised jointly with the prime minister through co-decision procedures (such as appointment by the president on proposal of the government or appointment by the cabinet as chaired by the president). Otherwise, the president’s appointments should be subjected to subsequent approval by a majority vote of one or both chambers of the legislature.

##### **Defence and security powers**

- The constitution should designate the president as commander-in-chief of the armed forces. The commander-in-chief should not have the power to determine



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security or defence policy or set armed forces protocol or doctrine; these powers should remain within the purview of the cabinet and the armed forces bureaucracy.

- Declarations of war or a state of martial law should be made by the president as commander-in-chief, subject to legislative approval. The deployment of the armed forces within or outside the nation's territory, upon a declaration of war or state of martial law, must be authorized by the legislature after a proposal by the president as commander-in-chief.
- The deployment of the armed forces beyond the territory of the nation (but not within the nation's borders) without a formal declaration of war may be authorized by the government, or by co-decision of the president and prime minister, for specific purposes and for a limited time. The legislature must be immediately informed of deployment and, after a specified period of time (for example 48 to 72 hours) must declare war or withdraw the armed forces.
- A National Defence Council can be created to determine security and defence policy. The function and terms of reference of such a council must be clearly set out in the constitution. As a power-sharing mechanism, it must represent the government, the legislature and (ideally) opposition parties as well. The president can act as the chairperson of the Council.

#### Accountability

- Immunity from criminal prosecution for members of the security forces and the responsible ministers should be eliminated. At most, the president should be afforded immunity from criminal prosecution only for the duration of his or her term of office.
- The constitution should create independently accountable oversight mechanisms, such as inspectors general, to serve as monitors of the security forces.

#### Limitations on the initiation of a state of emergency

- Constitutions should place one or a combination of the following temporal limits on the state of emergency:
  - an absolute limit on the duration of the state of emergency (for example, six months);
  - a requirement that the president submit the declaration of the state of emergency to the legislature for approval within a short period (for example, 48 hours);
  - a limit on the length of a state of emergency as declared by the president without legislative confirmation (for example, seven days);
  - a limit on the length of the period for which the legislature can extend a state of emergency as declared by the president (for example, 30 days); or
  - a requirement that legislative renewal of the state of emergency after each 30-day period requires a two-thirds majority of the members of the legislature.
- The president should be able to declare emergencies only with the formal consultation of the government and/or countersignature by the prime minister.

- Substantive triggering circumstances should be enumerated. These can include, for example:
  - actual or imminent aggression by foreign forces;
  - serious threat to, or disturbance of, the democratic constitutional order;
  - the interruption of the functioning of public authorities;
  - where the fulfilment of international obligations is impeded; or
  - natural disaster.

Substantive limitations during a state of emergency

- Dissolution of the legislature during the emergency must be prohibited.
- The alteration of laws affecting the powers of the president, the prime ministers, or electoral laws and the constitution must be prohibited.
- Emergency decrees must not derogate from fundamental rights, including those designated by the ICCPR as non-derogable.
- Emergency decrees should be subject to parliamentary approval, or at least confirmed by the legislature within a certain time period or else lose the force of law.



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## Endnotes

<sup>1</sup> Linz, 'The Perils of Presidentialism', pp. 51–60; Linz, 'Presidential or Parliamentary Democracy', pp. 7, 18.

<sup>2</sup> Linz, 'The Perils of Presidentialism', pp. 51–2, 57–60.

<sup>3</sup> Angrist, 'Parties, Parliament and Political Dissent in Tunisia', p. 91; Hajjar, 'The Jamahiriya Experiment', pp. 181, 185–8.

<sup>4</sup> Owen, *The Rise and Fall of Arab Presidents for Life*, pp. 80–1.

<sup>5</sup> Ibid., pp. 118–20; Brown, *Constitutions in a Nonconstitutional World*, pp. 43–5, 86–7.

<sup>6</sup> Owen, *The Rise and Fall of Arab Presidents for Life*, pp. 54–7; BBC News, 'Iraq's Jalal Talabani Arrives in Germany for Treatment'; Reuters, 'Algeria's Bouteflika back home from treatment in France'; BBC News, 'Egyptian President Mubarak's Surgery "Successful"'.

<sup>7</sup> Reza, 'Endless Emergency', pp. 533–4; 537–9.

<sup>8</sup> Article 3 of Egypt's Emergency Law No 162 of 1958 is worth quoting in full. It provided that the president was enabled, 'by an oral or written order', to:

- (1) Restrict people's freedom of assembly, movement, residence, or passage in specific times and places; arrest suspects or [persons who are] dangerous to public security and order [and] detain them; allow searches of persons and places without being restricted by the provisions of the Criminal Procedure Code; and assign anyone to perform any of these tasks.
- (2) Order the surveillance of letters of any type; supervise censorship; seize journals, newsletters, publications, editorials, cartoons, and any form of expression and advertisement before they are published, and close their publishing places.
- (3) Determine the times of opening and closing public shops, and order the closure of some or all of these shops.
- (4) Confiscate any property or building, order the sequestration of companies and corporations, and postpone the due dates of loans for what has been confiscated or sequestered.
- (5) Withdraw licenses of arms, ammunitions, explosive devices, and explosives of all kinds, order their submission, and close arms stores.
- (6) Evict some areas or isolate them; regulate means of transport; limit means of transport between different regions (quoted and interpolated by Reza, 'Endless Emergency', p. 538).

For more on the president's powers under the state of emergency in Egypt, see Amnesty International, *Egypt: Systematic Abuses in the Name of Security*; Rutherford, *Egypt After Mubarak*, p. 1; Bernard-Maugiron, 'Strong Presidentialism', pp. 379–80.

<sup>9</sup> Reza, 'Endless Emergency', pp. 537–39; Human Rights Watch, *Anatomy of a State Security Case*; Brown, *Constitutions in a Nonconstitutional World*, p. 153; Emergency Law No 162 of 1958, articles 7 and 10.

<sup>10</sup> Brown, *Constitutions in a Nonconstitutional World*, pp. 124–9; Owen, *The Rise and Fall of Arab Presidents for Life*, pp. 73–7.

<sup>11</sup> Brown, Dunn and Hamzawy, 'Egypt's Controversial Constitutional Amendments'; Owen, *The Rise and Fall of Arab Presidents for Life*, p. 54.

<sup>12</sup> Brown, *Constitutions in a Non-constitutional World*, Chapter 4.

<sup>13</sup> Makram-Ebeid, 'Political Opposition in Egypt', fn 16; Yom, 'Jordan: Ten more Years of Autocracy', p. 157; Lucas, 'Deliberalization in Jordan', p. 143; Lust and Hourani, 'Jordan Votes: Election or Selection?', pp. 122–4; Democracy Reporting International, 'Jordan's New Election Law'; Brown, *Constitutions in a Nonconstitutional World*, pp. 131–4.

<sup>14</sup> Angrist, 'Parties, Parliament and Political Dissent in Tunisia', p. 98.

<sup>15</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mission to Tunisia*; United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mission to Egypt*; Ashour, *From Bad Cop to Good Cop*, p. 3.

<sup>16</sup> Alexander, 'Back from the Democratic Brink', p. 35; Sadiki, 'Bin Ali's Tunisia', p. 65.

<sup>17</sup> Alexander, 'Back from the Democratic Brink', p. 35; Sadiki, 'Bin Ali's Tunisia', p. 67.

<sup>18</sup> Alexander, 'Back from the Democratic Brink', p. 37. See also Zartman, 'Political Elites in Arab North Africa'.

<sup>19</sup> Lust-Okar, *Structuring Conflict in the Arab World*, p. 61.

<sup>20</sup> Cooper, *The Transformation of Egypt*, pp. 70–1.

<sup>21</sup> Duverger, 'A New Political System Model', p. 173.

<sup>22</sup> New York Times, 'Iraq: Term Limits Overturned'.

<sup>23</sup> Angrist, 'Parties, Parliament and Political Dissent in Tunisia', pp. 94–5; Al-Khoei, 'Decoding Iraq's Sectarian Rivalries'.

<sup>24</sup> Al Arabiya, 'Egypt Needs Semi-parliamentary System in Transitional Stage'; Mainwaring and Shugart, 'Juan Linz, Presidentialism and Democracy', pp. 468–9; Sartori, *Comparative Constitutional Engineering*, pp. 94–5, 136.

<sup>25</sup> Skach, *Borrowing Constitutional Designs*, pp. 124–5.

<sup>26</sup> Al-Ali, 'Iraq: Ten Years of Hubris and Incompetence'.

<sup>27</sup> Mazo, 'Constitutional Roulette', pp. 135–6; Martinez, 'Inherent Executive Power', p. 2488; Skach, 'The "Newest" Separation of Powers', pp. 100–3.

<sup>28</sup> Poulard, 'The French Double Executive and the Experience of Co-Habitation', pp. 244–5; Skach, *Borrowing Constitutional Designs*, pp. 71–9.

<sup>29</sup> McQuire, 'President-Prime Minister Relations, Party Systems, and Democratic Stability in Semi-presidential Regimes', pp. 436–7.

<sup>30</sup> *Constitutional Law* 2000–964, 2 October 2000; Poulard, 'The French Double Executive', pp. 243, 248–9; Roper, 'Are all Semi-presidential Systems the Same?' p.

255; Skach, *Borrowing Constitutional Designs*, pp. 98–108; Mazo, ‘Constitutional Roulette’, pp. 135–6; Boyron, *The Constitution of France*, pp. 70–1.

<sup>31</sup> Willerton and Shulus, ‘Constructing a New Political Process’, pp. 790–2.

<sup>32</sup> Freedom House, <http://www.freedomhouse.org/>; Polity IV Project: Political Regime Characteristics and Transitions 1800–2012, <http://www.systemicpeace.org/polity/polity4.htm>; Elgie, *Semi-presidentialism: Sub-Types and Democratic Performance*, pp. 147–51; and generally White, ‘Russia’.

<sup>33</sup> Mazo, ‘Constitutional Roulette’, pp. 123, 136–8.

<sup>34</sup> The Central African Republic’s 2004 Constitution was suspended in March 2013 by a rebel group led by Michel Djotodia, which seized power and ousted former leader Francois Bozize. At the time of writing, CAR was neither a democracy nor a semi-presidential system (BBC News, ‘CAR Rebel Head Michel Djotodia Suspends Constitution’).

<sup>35</sup> McQuire, ‘President-Prime Minister Relations, Party Systems, and Democratic Stability in Semi-presidential Regimes’, pp. 434–5.

<sup>36</sup> Ibid., pp. 439–41.

<sup>37</sup> Ibid., pp. 444–6.

<sup>38</sup> Ibid., p. 445.

<sup>39</sup> Ibid., pp. 447–50.

<sup>40</sup> Protsyk, ‘Prime Ministers’ Identity in Semi-presidential Regimes’, pp. 736–7; Shugart, ‘Semi-presidential Systems’, p. 343.

<sup>41</sup> Protsyk, ‘Prime Ministers’ Identity’, p. 726; Shugart, ‘Semi-presidential Systems’, pp. 333–4.

<sup>42</sup> Constitution of the Republic of Poland, 1992, article 61.

<sup>43</sup> This is in contrast to the phrase ‘after consultation with’, which requires only that the advice or opinion of a second party be sought. While the use of the phrase in this context indicates co-decision, the provision gives no indication of the formal mechanisms for co-decision. It is preferable for co-decision procedures to be clearly spelled out.

<sup>44</sup> Elgie and Schleiter, ‘Variation in the Durability of Semi-presidential Democracies’, pp. 45, 57–9; Elgie, *Semi-presidentialism: Sub-Types and Democratic Performance*, 62. The data sources according which failures of democracy are determined in these studies include:

- Freedom House classifications of countries as Free, Partly Free or Not Free;
- the Polity IV dataset, which ranks nations on a 21-point scale between -10 (hereditary monarchy) and 10 (consolidated democracy);
- the Polyarchy dataset, which ranks the level of electoral competition; and
- the Alvarez, Cheibub, Limongi and Przeworski dataset and the Svoboda dataset, both of which identify countries as democracies or non-democracies.

See also Skach, *Borrowing Constitutional Designs*, p. 14.

<sup>45</sup> Schleiter and Elgie, 'Government Accountability and the Survival of Semi-presidential Democracies', pp. 3–4, 8–15; Elgie, *Semi-presidentialism: Sub-Types and Democratic Performance*, pp. 30–5.

<sup>46</sup> The Portuguese Constitution of 1976 was amended in 1982, effectively making the change from a president-parliamentary to a premier-presidential form of semi-presidentialism; Elgie, *Semi-presidentialism: Sub-Types and Democratic Performance*, pp. 29, 122, 132–43.

<sup>47</sup> Morgan-Jones and Schleiter, 'Governmental Change in a President-Parliamentary Regime', pp. 132, 149–52, 156–7; Schleiter and Morgan-Jones, 'Russia', pp. 159–60; Mazo, 'Constitutional Roulette', pp. 159–60; Elgie, *Semi-presidentialism: Sub-Types and Democratic Performance*, pp. 147–52; Colton and Skach, 'A Fresh Look at Semi-presidentialism', p. 117.

<sup>48</sup> Sanford, *Democratic Government in Poland*, pp. 148–50, 161.

<sup>49</sup> Cabinet members are either directly appointed by the prime minister or are appointed by the president acting on the recommendation, proposal or nomination of the prime minister.

<sup>50</sup> In Cape Verde (article 135(1)(i)), the President must 'appoint the prime minister, in consultation with the political parties represented in the National Assembly and taking into account the results of the elections'.

<sup>51</sup> In Egypt's 2012 Constitution (article 139), the power to appoint the prime minister followed a three-tier process. In the first step, the President nominates a candidate for Prime Minister. If this nominee fails to obtain the confidence of the legislature, then the President must put forward a second nominee from the party that holds a plurality in the legislature. If that nominee also fails to gain legislative confidence, the legislature appoints the Prime Minister.

<sup>52</sup> In Poland (article 154), in the first instance, the President appoints the Prime Minister, who proposes the composition of the Cabinet. If the Prime Minister and Cabinet fail to obtain the confidence of the legislature, or if a government has not otherwise been appointed, then the legislature will choose the Prime Minister, who, together with his Cabinet, must be appointed by the President.

<sup>53</sup> In Portugal (article 187), the President must 'appoint the prime minister after consulting the parties with seats in the Assembly of the Republic and in light of the electoral results'.

<sup>54</sup> In Sri Lanka (article 43), the President must 'appoint as prime minister the member of Parliament who in his opinion is most likely to command the confidence of Parliament'.

<sup>55</sup> Roper, 'Are all Semi-presidential Systems the Same?' p. 258.

<sup>56</sup> Shugart, 'Semi-presidential Systems', pp. 334–5.

<sup>57</sup> Badri Eid, *Kuwait's 2012 National Assembly Elections*; Kinninmont, *Kuwait's Parliament*; BBC News, 'Kuwait Emir Al-Sabah dissolves parliament'.

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<sup>58</sup> McQuire, 'President-Prime minister Relations', p. 445.

<sup>59</sup> Karasimeonov, 'The Legislature in Post-communist Bulgaria', pp. 50–6; Tanchev, 'The Separation of Powers in the 1991 Constitution of Bulgaria', p. 441.

<sup>60</sup> Poulard, 'The French Double Executive', pp. 252–3, 255–6; Warren, 'The French President's Veto', pp. 65–6.

<sup>61</sup> Conley, 'Presidential Republics and Divided Government', pp. 262, 280–3.

<sup>62</sup> Poulard, 'The French Double Executive', p. 245; Elgie, 'France', p. 78; Dogan, 'How Civil War was Avoided in France', pp. 273–4.

<sup>63</sup> Reza, 'Endless Emergency', pp. 545–6; Owen, *The Rise and Fall of Arab Presidents for Life*, pp. 47–8, 89–90; UN Development Programme, *Arab Human Development Report 2009*, p. 61.

<sup>64</sup> Kinninmont, *Kuwait's Parliament*, pp. 8, 14; Badri Eid, *Kuwait's 2012 National Assembly Elections*, p. 2; BBC News, 'Kuwait Emir Al-Sabah dissolves parliament'.

<sup>65</sup> Owen, *The Rise and Fall of Arab Presidents for Life*, pp. 67, 78–9.

<sup>66</sup> Ibid, pp. 72–9; Cheeseman, 'African Elections as Vehicles for Change', pp. 145–6.

<sup>67</sup> Maltz, 'The Case for Presidential Term Limits', pp. 130–2, Ginsburg, Melkin, and Elkins, 'On the Evasion of Executive Term Limits', pp. 1818–23.

<sup>68</sup> Mazo, 'Constitutional Roulette', pp. 150, 173–4; BBC News, 'Yeltsin Survives Impeachment Vote'; Balikian, 'The New Russian Federation Constitution', pp. 256–9; Willerton and Shulus, 'Constructing a New Political Process', pp. 804–5.

<sup>69</sup> Robert Elgie divides semi-presidential systems into three types based on the balance of power between the president and the prime minister: highly presidentialized semi-presidentialism, balanced semi-presidentialism and a form of parliamentarized semi-presidentialism characterized by a largely ceremonial president (Elgie, 'A Fresh Look at Semi-presidentialism', pp. 102–9; see also Pasquino, 'The Advantages and Disadvantages of Semi-presidentialism', p. 16). The models in this typology correspond, respectively, with the principal/agent, arbiter/manager and figurehead/principal models.

<sup>70</sup> Schleiter and Morgan-Jones, 'Russia', pp. 165–6.

<sup>71</sup> See Kristinsson, 'Iceland'; Cadoux, 'Semi-presidentialism in Madagascar', pp. 98–100, which describes the difficulties facing a weak 'figurehead' president against the background of a fractured legislature that is unable to form stable majorities.

<sup>72</sup> Elgie, 'La Cohabitation de Longue Durée', pp. 300–4.

<sup>73</sup> Al-Ali and Brown, 'Egypt's Constitution Swings into Action'.

<sup>74</sup> Poulard, 'The French Double Executive', pp. 261–2; Baylis, 'Presidents versus Prime Ministers', pp. 304, 313.

<sup>75</sup> Poulard, 'The French Double Executive', p. 262; Frison-Roche, 'Semi-presidentialism in the Republic of Macedonia', p. 91.

<sup>76</sup> Poulard, 'The French Double Executive', pp. 261–2.

<sup>77</sup> Schleiter and Morgan-Jones, 'Russia: The Benefits and Perils of Presidential Leadership', pp. 166–8, 174–5; Colton and Skach, 'A Fresh Look at Semipresidentialism', pp. 119–21; and generally, Parrish, 'Presidential Decree Authority in Russia, 1991–1995'.

<sup>78</sup> Poulard, 'The French Double Executive', pp. 258–61; Elgie, 'La Cohabitation de Longue Durée', pp. 297–304.

<sup>79</sup> Al Jazeera, 'Egypt's Morsi Assumes Wide Powers'.

<sup>80</sup> Welikala, 'The Legislature under the Egyptian Constitution of 2012', pp. 10–11.

<sup>81</sup> Al-Ali, 'The Constitutional Court's Mark on Egypt's Elections'.

<sup>82</sup> Hale, 'Formal Constitutions in Informal Politics', pp. 589–93, 595–7.

<sup>83</sup> Elgie, 'La Cohabitation de Longue Durée', p. 304.

<sup>84</sup> Protsyk, 'Ruling with Decrees', pp. 648–52; and generally Protsyk, 'Intra-Executive Competition between President and Prime Minister'.

<sup>85</sup> Schleiter and Morgan-Jones, 'Russia: The Benefits and Perils of Presidential Leadership', pp. 165–6, 172–4; CNN, 'Jordan's King Dismisses Prime Minister and Government'.

<sup>86</sup> Elgie, 'La Cohabitation de Longue Durée', p. 303.

<sup>87</sup> Roper, 'Are all Semi-presidential Systems the Same?' p. 257.

<sup>88</sup> Chandler, 'Presidential Veto Power in Post-Communist Russia', pp. 490–3; Tsebelis and Rizova, 'Presidential Conditional Agenda Setting', pp. 1170–2; Shugart and Carey, 'Presidents and Assemblies', pp. 134–8.

<sup>89</sup> Way, 'Between National Division and Rapacious Individualism'; Karatnycky, 'Ukraine's Orange Revolution'.

<sup>90</sup> Baylis, 'Presidents versus Prime Ministers', p. 307.

<sup>91</sup> Knapp and Right, *The Government and Politics of France*, pp. 112–15, 126–7; Bell, *Presidential Power in Fifth Republic France*, pp. 65–85.

<sup>92</sup> Reza, 'Endless Emergency', pp. 535–41, 552–3.

<sup>93</sup> Federal Constitutional Law on Martial Law, 30 January 2002, available at <[http://www.dcaf.ch/content/download/36027/527271/file/BM\\_Arbatov\\_13\\_Martial\\_Law.pdf](http://www.dcaf.ch/content/download/36027/527271/file/BM_Arbatov_13_Martial_Law.pdf)>.

<sup>94</sup> Barany, 'Democratic Consolidation and the Military', pp. 33–4.

<sup>95</sup> Roach, 'Security Forces Reform for Tunisia', pp. 3–5.

<sup>96</sup> Cardenas and Flibbert, 'National Human Rights Institutions in the Middle East', pp. 424–8.

<sup>97</sup> Al-Ali and Dafel, 'Egyptian Constitutional Reform and the Fight Against Corruption', p. 19.

<sup>98</sup> Roach, 'Security Forces Reform for Tunisia', pp. 3–4.

<sup>99</sup> See generally Coomaraswamy and de los Reyes, 'Rule by Emergency'.

<sup>100</sup> Federal Constitutional Law No.3-FKZ on the State of Emergency 2001, article 7(3).

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<sup>101</sup> Gross and Aoláin, *Law in Times of Crisis*, pp. 83–5; Skach, *Borrowing Constitutional Designs*, pp. 49–52.

<sup>102</sup> Loi no. 55-385 du 3 avril 1955 Relatif à l'état d'urgence.

<sup>103</sup> Federal Constitutional Law on the State of Emergency, No. 3-FKZ, 30 May 2001, article 3.

<sup>104</sup> United Nations Human Rights Council, *Report of the Special Rapporteur – Egypt*, pp. 9–13.

<sup>105</sup> Stacher, 'Parties Over', pp. 216–17.

<sup>106</sup> Federal Constitutional Law No.3-FKZ on the State of Emergency 2001, article 5.

<sup>107</sup> See also Armenia (article 55(14)) and Slovakia (articles 51(2), 102(3)).

# Consociationalism

Part of the Politics series
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<b>Oligarchy</b> <div><ul style="list-style-type: none"><li>Aristocracy</li><li>Military junta</li><li>Plutocracy</li><li>Stratocracy</li><li>Timocracy</li></ul></div>
<b>Authoritarianism</b> <div><ul style="list-style-type: none"><li>Autocracy</li><li>Despotism</li><li>Dictatorship</li><li>Totalitarianism</li></ul></div>
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<b>Politics portal</b>
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**Consociationalism** (/kənˌsoʊʃiˈeɪʃənəlɪzəm/<sup>kən-SOH-shee-AY-shən-əl-iz-əm</sup>) is often viewed as synonymous with **power-sharing**, although it is technically only one form of power-sharing.



Consociationalism is often seen as having close affinities with corporatism; some consider it to be a form of corporatism while others claim that economic corporatism was designed to regulate class conflict, while consociationalism developed on the basis of reconciling societal fragmentation along ethnic and religious lines.<sup>[2]</sup>

The goals of consociationalism are governmental stability, the survival of the power-sharing arrangements, the survival of democracy, and the avoidance of violence. When consociationalism is organised along religious confessional lines, it is known as confessionalism, as is the case in Lebanon.

## Definition

Political scientists define a consociational state as a state which has major internal divisions along ethnic, religious, or linguistic lines, with none of the divisions large enough to form a majority group, yet nonetheless manages to remain stable, due to consultation among the elites of each of its major social groups. Consociational states are often contrasted with states with majoritarian electoral systems.

## Concept origins

Consociationalism was discussed in academic terms by the political scientist Arend Lijphart. However, Lijphart has stated that he had "merely discovered what political practitioners had repeatedly – and independently of both academic experts and one another – invented years earlier". John McGarry and Brendan O'Leary trace consociationalism back to 1917, when it was first employed in the Netherlands.

Indeed, Lijphart draws heavily on the experience of the Netherlands in developing his argument in favour of the consociational approach to ethnic conflict regulation. The Netherlands, as a consociational state, was between 1857 and 1967 divided into four non-territorial pillars: Calvinist, Catholic, socialist, and general, although until 1917 there was a plurality ('first past the post') electoral system rather than a consociational one. In their heyday, each comprised tightly-organised groups, schools, universities, hospitals and newspapers, all divided along a pillarised social structure. The theory, according to Lijphart, focuses on the role of social elites, their agreement and co-operation, as the key to a stable democracy.

## Characteristics

Lijphart identifies four key characteristics of consociational democracies:

Name	Explanation
Grand coalition	Elites of each pillar come together to rule in the interests of society because they recognize the dangers of non-cooperation.
Mutual veto	Consensus among the groups is required to confirm the majority rule. Mutuality means that the minority is unlikely to successfully block the majority. If one group blocks another on some matter, the latter are likely to block the former in return.
Proportionality	Representation is based on population. If one pillar accounts for 30% of the overall society, then they occupy 30% of the positions on the police force, in civil service, and in other national and civic segments of society.
Segmental autonomy	Creates a sense of individuality and allows for different culturally-based community laws.

Consociational polities often have these characteristics:<sup>[3]</sup>

- Coalition cabinets, where executive power is shared between parties, not concentrated in one. Many of these cabinets are oversized, meaning they include parties not necessary for a parliamentary majority;
- Balance of power between executive and legislative;
- Decentralized and federal government, where (regional) minorities have considerable independence;
- Incongruent bicameralism, where it is very difficult for one party to gain a majority in both houses. Normally one chamber represents regional interests and the other national interests;
- Proportional representation, to allow (small) minorities to gain representation too;

- Organized and corporatist interest groups, which represent minorities;
- A rigid constitution, which prevents government from changing the constitution without consent of minorities;
- Judicial review, which allows minorities to go to the courts to seek redress against laws that they see as unjust;
- Elements of direct democracy, which allow minorities to enact or prevent legislation;
- Proportional employment in the public sector;
- A neutral head of state, either a monarch with only ceremonial duties, or an indirectly elected president, who gives up their party affiliation after their election;
- Referendums are only used to allow minorities to block legislation: this means that they must be a citizen's initiative and that there is no compulsory voting.
- Equality between ministers in cabinet, the prime minister is only *primus inter pares*;
- An independent central bank, where experts and not politicians set out monetary policies.

## Favourable conditions

Lijphart also identifies a number of 'favourable conditions' under which consociationalism is likely to be successful. He has changed the specification of these conditions somewhat over time. Michael Kerr summarises Lijphart's most prominent favourable factors as:

- Segmental isolation of ethnic communities
- A multiple balance of power
- The presence of external threats common to all communities
- Overarching loyalties to the state
- A tradition of elite accommodation
- Socioeconomic equality
- A small population size, reducing the policy load
- A moderate multi-party system with segmental parties

Lijphart stresses that these conditions are neither indispensable nor sufficient to account for the success of consociationalism. This has led Rinus van Schendelen to conclude that "the conditions may be present and absent, necessary and unnecessary, in short conditions or no conditions at all".

John McGarry and Brendan O'Leary argue that three conditions are key to the establishment of democratic consociational power-sharing: elites have to be motivated to engage in conflict regulation; elites must lead deferential segments; and there must be a multiple balance of power, but more importantly the subcultures must be stable. Michael Kerr, in his study of the role of external actors in power-sharing arrangements in Northern Ireland and Lebanon, adds to McGarry and O'Leary's list the condition that "the existence of positive external regulating pressures, from state to non-state actors, which provide the internal elites with sufficient incentives and motives for their acceptance of, and support for, consociation".

## Advantages

In a consociational state, all groups, including minorities, are represented on the political and economic stage. Supporters of consociationalism argue that it is a more realistic option in deeply divided societies than integrationist approaches to conflict management. It has been credited with supporting successful and non-violent transitions to democracy in countries such as South Africa. Wikipedia:Citation needed

## Criticisms

### Brian Barry

Brian Barry has questioned the nature of the divisions that exist in the countries that Lijphart considers to be 'classic cases' of consociational democracies. For example, he makes the case that in the Swiss example, "political parties cross-cut cleavages in the society and provide a picture of remarkable consensus rather than highly structured conflict of goals". In the case of the Netherlands, he argues that "the whole cause of the disagreement was the feeling of some Dutchman...that it mattered what all the inhabitants of the country believed. Demands for policies aimed at producing religious or secular uniformity presuppose a concern...for the state of grace of one's fellow citizens". He contrasts this to the case of a society marked by conflict, in this case Northern Ireland, where he argues that "the inhabitants...have never shown much worry about the prospects of the adherents of the other religion going to hell". Barry concludes that in the Dutch case, consociationalism is tautological and argues that "the relevance of the 'consociational' model for other divided societies is much more doubtful than is commonly supposed".

### Rinus van Schendelen

Rinus van Schendelen has argued that Lijphart uses evidence selectively. Pillarisation was "seriously weakening," even in the 1950s, cross-denominational co-operation was increasing, and formerly coherent political sub-cultures were dissolving. He argued that elites in the Netherlands were not motivated by preferences derived from the general interest, but rather by self-interest. They formed coalitions not to forge consociational negotiation between segments but to improve their parties' respective power. He argued that the Netherlands was "stable" in that it had few protests or riots, but that it was so before consociationalism, and that it was not stable from the standpoint of government turnover. He questioned the extent to which the Netherlands, or indeed any country labelled a consociational system, could be called a democracy, and whether calling a consociational country a democracy isn't somehow ruled out by definition. He believed that Lijphart suffered severe problems of rigor when identifying whether particular divisions were cleavages, whether particular cleavages were segmental, and whether particular cleavages were cross-cutting.

### Lustick on hegemonic control

Ian Lustick has argued that academics lack an alternative 'control' approach for explaining stability in deeply divided societies and that this has resulted in the empirical overextension of consociational models. Lustick argues that Lijphart has "an impressionistic methodological posture, flexible rules for coding data, and an indefatigable, rhetorically seductive commitment to promoting consociationalism as a widely applicable principle of political engineering", that results in him applying consociational theory to case studies that it does not fit. Furthermore, Lustick states that "Lijphart's definition of 'accommodation'...includes the elaborately specified claim that issues dividing polarized blocs are settled by leaders convinced of the need for settlement".

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## Other criticisms

Critics point out that consociationalism is dangerous in a system of differing antagonistic ideologies, generally conservatism and communism. Wikipedia: Citation needed They state that specific conditions must exist for three or more groups to develop a multi-party system with strong leaders. This philosophy is dominated by elites, with those masses that are sidelined with the elites having less to lose if war breaks out. Consociationalism cannot be imperially applied. For example, it does not effectively apply to Austria. Critics also point to the failure of this line of reasoning in Lebanon, a country that reverted to civil war. It only truly applies in Switzerland, Belgium and the Netherlands, and not in more deeply divided societies. If one of three groups gets half plus one of the vote, then the other groups are in perpetual opposition, which is largely incompatible with consociationalism.

Consociationalism focuses on diverging identities such as ethnicity instead of integrating identities such as class, institutionalizing and entrenching the former. Furthermore, it relies on rival co-operation, which is inherently unstable. It focuses on intrastate relations and neglects relations with other states. Donald L. Horowitz argues that consociationalism can lead to the reification of ethnic divisions, since "grand coalitions are unlikely, because of the dynamics of intraethnic competition. The very act of forming a multiethnic coalition generates intraethnic competition – flanking – if it does not already exist".

Consociationalism assumes that each group is cohesive and has strong leadership. Although the minority can block decisions, this requires 100 per cent agreement. Rights are given to communities rather than individuals, leading to over-representation of some individuals in society and under-representation of others. Grand coalitions are unlikely to happen due to the dynamics of ethnic competition. Each group seeks more power for itself. Consociationalists are criticized for focusing too much on the set up of institutions and not enough on transitional issues which go beyond such institutions. Finally, it is claimed that consociational institutions promote sectarianism and entrench existing identities.

## Examples

The political systems of a number of countries operate on a consociational basis, including, Belgium, Lebanon, the Netherlands (from 1917 until 1967), Switzerland, New Zealand. Some academics have also argued that the European Union resembles a consociational democracy.

Additionally, a number of peace agreements are consociational, including:

- the Dayton Agreement that ended the 1992-1995 war in Bosnia and Herzegovina, which is described as a "classic example of consociational settlement" by Sumantra Bose and "an ideal-typical consociational democracy" by Roberto Belloni.
- the Belfast Agreement of 1998 in Northern Ireland (and its subsequent reinforcement with 2006's St Andrews Agreement), which Brendan O'Leary describes as "power-sharing plus".
- the Ohrid Agreement of 2001 setting the constitutional framework for power-sharing in the Republic of Macedonia.

Post-Taliban Afghanistan's political system has also been described as consociational, although it lacks ethnic quotas.

In addition to the two state solution, some have argued for a one state solution under a consociational democracy in the state of Israel to solve the Arab-Israeli Conflict, but this solution is not very popular, nor has it been discussed seriously at peace negotiations.<sup>[4]</sup>

During the 1980s the South African government attempted to reform apartheid into a consociational democracy. The South African Constitution of 1993 applied Lijpart's powersharing ideas by establishing a Tricameral Parliament. During the 1990s negotiations to end apartheid the National Party (NP) and Inkatha Freedom Party (IFP) proposed a settlement based upon consociationalism. The African National Congress (ANC) opposed consociationalism and proposed instead a settlement based upon majoritarian democracy. The NP abandoned consociationalism when the

US State Department came out in favour of the majoritarian democracy model in 1992.

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## Further reading

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