

Memorandum on Options for Executive Formation in Presidential Systems

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0. Introduction

This memorandum provides an overview of options for the formation of the executive branch of the government. In presidential systems, the executive branch is comprised of the president, normally a vice president, and ministers. The following memorandum will not be concerned with the election of a president (or a joint ticket of president and vice president). Rather the focus will be on procedures for the appointment of ministers (and where applicable a vice president). The memorandum will also not consider in any further detail mechanisms and procedures related to impeachment of the president/vice president or presidential powers to dissolve the legislature.

The memorandum is structured as follows:

1. Options for executive formation
2. Different special measures in relation to various mechanisms of executive formation

1. Options for executive formation

Choices have to be made about four issues when considering executive formation in presidential systems:

1. Whether eligibility for membership in the executive should be specifically constrained.
2. Whether presidential appointment powers are in any way constrained.
3. Whether presidential appointments require confirmation by the legislature.
4. Whether presidential powers of dismissal are in any way constrained.
5. Whether the legislature can force the president to dismiss ministers, for example to ensure that ministers who do not discharge their duties in line with provisions in the constitution can be removed from office.

1.1. Eligibility for executive office

Eligibility for executive office is usually constrained to ensure that a proper separation of powers is maintained and no individual is simultaneously holding more than one office of state in one or more branches of government. More general eligibility rules are often also established to guarantee that those appointed are fit for office and to avoid any conflict of interest in the exercise of their executive functions.

Provisions can be drafted such that specific incompatibilities are stated for holding executive office. For example:

Constitution of Angola

- **Article 138:** 1. The offices of Minister of State, Minister, Secretary of State and Vice-Minister shall be incompatible with the office of member of the National Assembly and with serving as a judge or public prosecutor. 2. The offices of Minister of State, Minister, Secretary of State and Vice-Minister shall also be incompatible with any of the following: a) Paid employment in any public or private institution, except those dedicated to teaching or academic research; b) Administrative, managerial or any other

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corporate position in commercial companies and other institutions engaged in profit-making pursuits; c) The liberal professions.

Constitution of Brazil

- **Article 54.** Deputies and Senators may not: II – after taking office: d) be the holders of more than one public elective position or office.
- **Article 87.** The Ministers of State shall be chosen from among Brazilians over twenty-one years of age and in possession of their political rights.

In most constitutions, equivalent incompatibilities are stated in respect of each relevant office. For example:

Constitution of Cyprus

- **Article 46:** The Ministers may be chosen from outside the House of Representatives.
- **Article 59:** 1. No person shall be appointed as a Minister unless he is a citizen of the Republic and has the qualifications required for a candidate for election as a member of the House of Representatives. 2. The office of a Minister shall be incompatible with that of a Representative or of a member of a Communal Chamber or of a member of any municipal council including a Mayor or of a member of the armed or security forces of the Republic or with a public or municipal office or in the case of a Turkish Minister with that of a religious functionary (din adami).
- **Article 70:** The office of a Representative shall be incompatible with that of a Minister or of a member of a Communal Chamber or of a member of any municipal council including a Mayor or of a member of the armed or security forces of the Republic or with a public or municipal office or, in the case of a Representative elected by the Turkish Community, of a religious functionary (din adami). For the purposes of this Article "public office" means any office of profit in the service of the Republic or of a Communal Chamber the emoluments of which are under the control either of the Republic or of a Communal Chamber, and includes any office in any public corporation or public utility body.

Constitution of the United States

- **Article 1 Section 6 (2)** No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

In some cases, (in-)eligibility for holding executive office are established indirectly qua constraints on other relevant positions. For example:

Constitution of Uruguay

- **Article 91:** The following may not be Representatives: 1. The President and Vice President of the Republic, members of the Judicial Power, the Tribunal of Accounts, the Contentious-Administrative Tribunal, the Electoral Court, of the Councils or Boards of Directors, or Directors of the Autonomous Entities and of the Decentralized Services, of the Departmental Boards, the Local Boards, and Intendants;

Constitution of Venezuela

- **Article 189:** The following shall not be eligible for the office of deputy: (1) The President of the Republic, the Executive Vice-President Ministers, the Secretary of the Office of the President of the Republic and the Chairpersons and Directors of Autonomous Institutes and State owned enterprises, until three months after leaving such offices.

It is also possible to establish eligibility through a requirement that members of parliament have to resign their electoral mandate before they can be appointed to the executive. For example:

Constitution of Argentina

- **Section 105.-** The ministers shall be neither senators nor deputies without resigning their offices as ministers.

1.2. Presidential powers of appointment

In most constitutions, presidential powers of appointment to executive office are free from constraints. For example:

Constitution of Afghanistan

- **Article 64:** The President shall have the following authorities and duties: 11. Appoint the Ministers, ..., and their dismissal and acceptance of resignation

Constitution of Angola

- **Article 119:** As Head of State, the President of the Republic shall be responsible for: a) Appointing the Vice-President of the Republic, from amongst the individuals on the respective election list, and discharging them from office; e) Appointing and discharging from office Ministers of State, Ministers, Secretaries of State and Vice-Ministers;

Constitution of Argentina

- **Section 99.** The President of the Nation has the following powers: 7.- on his own account, he appoints and removes the Chief of the Ministerial Cabinet and the Ministers, the officers of his Secretariat, consular agents, and other employees whose appointments are not otherwise regulated by this Constitution.

Constitution of Brazil

- **Article 84.** The President of the Republic shall have the exclusive power to: I – appoint and dismiss the Ministers of State;

Constitution of Indonesia

- **Article 17:** (2) Ministers of State shall be appointed and dismissed by the President.

However, in some cases, presidents have to consider certain criteria in appointing members of their cabinet, for example to ensure a constitutionally mandated (pre-determined) degree of representativeness in the executive.

Constitution of Burundi

- **Article 108:** The President of the Republic, in consultation with the two Vice-Presidents, appoints the members of the Government and terminates their functions.
- **Article 129:** The Government is open to all the ethnic components. It includes at most 60% of Hutu Ministers and Vice-Ministers and at most 40% of Tutsi Ministers and Vice-Ministers. A minimum of 30% of women is assured. The members come from the different political parties that have received more than one-twentieth of the votes and which so desire. These parties have the right to a percentage, rounded to the inferior number, of the total number of Ministries at least equal to that of the seats that they occupy at the National Assembly. When the President revokes a Minister, it proceeds to his replacement after consultation with his political party of origin [provenance].
- **Article 130:** The President of the Republic, after consultation with the two Vice-Presidents of the Republic, sees to it that the Minister given the charge of the Force of National Defense is not of the same ethnicity as the Minister responsible for the National Police.

Constitution of Cyprus

- **Article 46:** The President and the Vice-President of the Republic in order to ensure the executive power shall have a Council of Ministers composed of seven Greek Ministers and three Turkish Ministers. The Ministers shall be designated respectively by the President and the Vice-President of the Republic who shall appoint them by an instrument signed by them both. One of the following Ministries that is to say the Ministry of Foreign Affairs, the Ministry of Defence or the Ministry of Finance, shall be entrusted to a Turkish Minister. If the President and the Vice-President of the Republic agree they may replace this system by a system of rotation.

Constitution of Kenya

- **Article 130:** (2) The composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya.
- **Article 132:** (2) The President shall nominate and, with the approval of the National Assembly, appoint, and may dismiss—(a) the Cabinet Secretaries, in accordance with Article 152;
- **Article 152** (5) The President—(a) may re-assign a Cabinet Secretary;

Constitution of Nigeria

- **Section 14:** (3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also

to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies.

- **Section 147:** (2) Any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President. (3) Any appointment under subsection (2) of this section by the President shall be in conformity with the provisions of section 14(3) of this Constitution:- provided that in giving effect to the provisions aforesaid the President shall appoint at least one Minister from each State, who shall be an indigene of such State.

1.3. Confirmation of executive appointments by the legislature

Some constitutions require that presidents submit their candidates for appointment to executive office to legislative approval. This constrains presidential power and can contribute to ensuring more stable and consensual government, especially in cases where the legislature also has powers to dismiss or require the president to dismiss ministers of the government (on the latter, see sections 1.4 and 1.5 below). For example:

Constitution of Kenya

- **Article 132:** (2) The President shall nominate and, with the approval of the National Assembly, appoint...—(a) the Cabinet Secretaries

Constitution of Nigeria

- **Section 147:** (2) Any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President. (6) An appointment to any of the offices aforesaid shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate.

Constitution of the United States

- **Article 2, Section 2:** 2 ... he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. 3 The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

It is also conceivable that confirmation of the president's appointed cabinet by the legislature is established as an option for the president to exercise. For example:

Constitution of Uruguay:

- **Article 174:** The President of the Republic, acting in the Council of Ministers, may redistribute attributions and competences. The President of the Republic shall allot the Ministries to citizens who, by virtue of their parliamentary support, are assured of permanency in office. The President of the Republic may require an express vote of confidence from the General Assembly for the Council of Ministers. To this effect he shall appear before the General Assembly, which shall decide without debate, by the vote of the absolute majority of the total of its members and within a period not greater than seventy-two hours from when the General Assembly receives the communication from the President of the Republic. If it does not meet within the time stipulated or, having met, does not adopt a decision, it shall be understood that the vote of confidence has been granted.

1.4. Presidential powers of dismissal

Presidential powers to dismiss members of his or her cabinet normally go hand-in-hand with the relevant powers to appoint. For example:

Constitution of Afghanistan

- **Article 64:** The President shall have the following authorities and duties: 11. Appoint the Ministers, ..., and their dismissal and acceptance of resignation

Constitution of Angola

- **Article 119:** As Head of State, the President of the Republic shall be responsible for: a) Appointing the Vice-President of the Republic, from amongst the individuals on the respective election list, and discharging them from office; e) Appointing and

discharging from office Ministers of State, Ministers, Secretaries of State and Vice-Ministers;

Constitution of Indonesia

- **Article 17:** (2) Ministers of State shall be appointed and dismissed by the President.

Constitution of Uruguay

- **Article 174:** The Ministers shall cease in their responsibilities by resolution of the President of the Republic, without prejudice to that established in Section VIII.
- **Article 175:** The President of the Republic may declare that the Council of Ministers lacks parliamentary support, if he so understands it. Without prejudice to that provided in Article 174, this declaration empowers him to substitute one or more Ministers.

In some cases, provisions are made to make powers of dismissal part of the exclusive rights of an elected president, rather than a vice president standing in for the president:

Constitution of Afghanistan

- **Article 67:** The First Vice-President, in acting as interim President, shall not perform the following duties: 2. Dismiss ministers;

In other cases, presidential powers to dismiss can be constrained to prevent the president from undermining the executive's representativeness. For example:

Constitution of Burundi

- **Article 108:** The President of the Republic, in consultation with the two Vice-Presidents, appoints the members of the Government and terminates their functions.

It is also possible that the president is not only given the power to dismiss members of his or her cabinet, but may also be required to do so under specific circumstances other than their impeachment (see also section 1.5 below). For example:

Constitution of Kenya

- **Article 132:** (2) The President ... may dismiss—(a) the Cabinet Secretaries, in accordance with Article 152;
- **Article 152 (5)** The President—(b) may dismiss a Cabinet Secretary; and (c) shall dismiss a Cabinet Secretary if required to do so by a resolution adopted under clauses (6) to (10).

1.5. Parliamentary motions of censure against cabinet ministers

A number of constitutions contain provisions according to which the legislature can force the president to dismiss ministers by passing a motion of censure, for example to ensure that ministers who do not discharge their duties in line with the expectations of the legislature can be removed from office. Such motions of censure usually require the application of special voting procedures, such as qualified majorities (see section 2 below). For example:

Constitution of Afghanistan

- **Article 92:** The House of People, on the proposal of twenty percent of all its members, shall make inquiries from each Minister. If the explanations given are not satisfactory, the House of People shall consider the issue of a no-confidence vote. The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the House of People.

Constitution of Argentina

- **Section 101:** The Chief of the Ministerial Cabinet ... may be interpellated for the purpose of considering a vote of censure, by the vote of the absolute majority of all the members of either House, and he may be removed by the vote of the absolute majority of the members of each House.

Constitution of Burundi

- **Article 203:** The National Assembly can present a motion of censure against the Government with a majority of two-thirds of its members. It can be dissolved by the Head of the State. A motion of defiance can be voted by a majority of two-thirds of the members of the National Assembly against a member of the Government who shows

[accuse] a manifest failure in the administration of their ministerial department or who performs acts contrary to moral integrity or probity or who, by their conduct, disturbs the normal functioning of the Parliament. In this case, the member of the Government presents his resignation obligatorily.

Constitution of Kenya

- **Article 95:** (5) The National Assembly—(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office;
- **Article 152:** (6) A member of the National Assembly, supported by at least one-quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary—(a) on the ground of a gross violation of a provision of this Constitution or of any other law; (b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or (c) for gross misconduct. (7) If a motion under clause (6) is supported by at least one-third of the members of the National Assembly—(a) the Assembly shall appoint a select committee comprising eleven of its members to investigate the matter; and (b) the select committee shall, within ten days, report to the Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated. (8) The Cabinet Secretary has the right to appear and be represented before the select committee during its investigations. (9) If the select committee reports that it finds the allegations (a) unsubstantiated, no further proceedings shall be taken; or (b) substantiated, the National Assembly shall—(i) afford the Cabinet Secretary an opportunity to be heard; and (ii) vote whether to approve the resolution requiring the Cabinet Secretary to be dismissed. (10) If a resolution under clause (9) (b) (ii) requiring the President to dismiss a Cabinet Secretary is supported by a majority of the members of the National Assembly—(a) the Speaker shall promptly deliver the resolution to the President; and (b) the President shall dismiss the Cabinet Secretary.

Constitution of Venezuela

- **Article 187:** It shall be the function of the National Assembly: (10) To vote resolutions of censure against the Executive Vice President and Ministers. A censure motion shall be debated only two days after being submitted to the Assembly, which shall have the power to decide by a three fifths vote that the censure shall include the removal from office of the Executive Vice-President or the Minister concerned.
- **Article 246:** The approbation of a vote of censure against a Minister by at least a three fifths vote of the members present in the National Assembly, shall result in the Minister's removal from office. The removed official shall be barred from serving as a Minister or Executive Vice-President for the remainder of that presidential term.

It may also be possible to link the exercise of parliamentary powers to censure specific members of the president's cabinet with presidential powers to dissolve the legislature in specific circumstances. For example:

Constitution of Venezuela

- **Article 240:** Passage of a motion to censure the Executive Vice President, by vote of at least two-thirds of the members of the National Assembly, automatically involves his removal from office. The removed official, shall not be eligible to serve as Executive Vice President or Minister, for the remainder of the current presidential term of office. The third removal of an Executive Vice-President, during the same presidential term of office as a consequence of motions of censure, authorizes the President of the Republic, to dissolve the National Assembly. The dissolution order includes the calling of elections to form a new legislature within 60 days of the dissolution of the old. The Assembly cannot be dissolved during the final year of its constitutional term of office.

The fact that the legislature may have the power to require the dismissal of a member of the cabinet does not preclude a balancing power on the part of the president to retain this cabinet member. Such mutual checks and balances can then also be connected with presidential powers to dissolve parliament and constraints thereon. For example:

Constitution of Uruguay

- **Article 147:**
Either of the Chambers may pass judgment on the conduct of Ministers of State by proposing that the General Assembly in joint session shall declare that their acts of administration or of government are censured.

Whenever motions to this effect are presented, the Chamber in which they are made shall be specially convoked, within a period of not over forty-eight hours, to decide upon its course of action.

If the motion is approved by a majority of those present, notice shall be given to the General Assembly, which shall be called within forty-eight hours.

If upon the first convocation of the General Assembly there are not a sufficient number of members present to hold a meeting, a second convocation shall be made and the General Assembly shall be considered organized with the number of Legislators who attend.

- **Article 148**

The disapproval may be individual, plural, or collective, but in all cases it must be adopted by an absolute majority of the votes of the full membership of the General Assembly, at a special and public session. However, a secret session may be decided upon whenever circumstances so demand.

Individual disapproval is one that affects one Minister; plural disapproval one that affects more than one Minister; and collective disapproval is one that affects a majority of the Council of Ministers.

Disapproval adopted in accordance with the foregoing articles shall mean the resignation of the Minister, the Ministers, or the Council of Ministers, as the case may be.

The President of the Republic may veto the vote of disapproval whenever it has been adopted by less than two-thirds of the full membership of the body.

In such case the General Assembly shall be convoked into special session to be held within the next ten days.

If after the first call the number of Legislators in the General Assembly necessary to meet do not attend, a second call shall be made, in not less than twenty-four hours nor more than seventy-two hours after the first call, and if the necessary number again is not present, the act of disapproval shall be considered revoked.

If the General Assembly maintains its vote by less than three-fifths of its full membership, the President of the Republic, within the next forty-eight hours, may, by express decision, retain the censured Minister, Ministers, or Council of Ministers, and dissolve the Chambers.

In such case he must call for a new election of Senators and Representatives which shall be held on the eighth Sunday following the date of the decision referred to.

The retaining of the censured Minister, Ministers, or Council of Ministers, the dissolution of the Chamber and the call for a new election must be made simultaneously in the same decree.

In such case the Chambers are suspended, but the rights and privileges of the Legislators continue.

The President of the Republic may not exercise this power during the last twelve months of his term.

During that period the General Assembly may vote a disapproval with the effects indicated in the third paragraph of this article, if it is adopted by two-thirds or more of its full membership.

In the case of a disapproval that is not collective, the President of the Republic may not exercise this right more than once during his term of office.

From the moment the Executive Power does not comply with the decree calling for new elections, the Chambers shall resume their sessions ipso jure and recover their

constitutional rights as a legitimate Power of the State, and the Council of Ministers shall fail.

If within ninety days following the election, the Electoral Court has not proclaimed elected a majority of the members of each Chamber, the dissolved Chambers shall also recover their rights.

If a majority of the members of each of the new Chambers is proclaimed elected by the Electoral Court, the General Assembly shall meet with all its rights within three days following the respective notification.

The new General Assembly shall meet without prior convocation by the Executive Power and the previous one shall terminate at that time.

Within fifteen days after its organization, the new General Assembly, by an absolute majority of its full membership, shall maintain or revoke the vote of disapproval. If it is maintained the Council of Ministers shall fail.

The Chambers elected by special election shall complete the normal term of those who left office.

2. Special measures in relation to executive formation in presidential systems

This part of the memorandum should be read in conjunction with the “Memorandum on constitutional mechanisms to implement Item 9 of Part II of the Agreement on a Just Solution to the Southern Question” for more detailed discussion of relevant special measures, as well as in conjunction with the “Memorandum on Options for Executive Formation” (under semi-presidential systems of government).

Special measures can principally apply to:

1. Procedures for the appointment of members of the presidential cabinet.
2. Procedures for the dismissal of members of the presidential cabinet.

2.1. Special measures applicable to procedures for the appointment of members of the presidential cabinet

In this context, special measures can principally ensure, even in presidential systems, a greater role of the legislature in the process of executive formation, as long as the constitution establishes such a role by requiring the legislature’s confirmation of presidential appointments.

Without going in to specific detail of examples noted already above, special voting procedures may be applied for confirmations:

- In one or more chambers of the legislature or in a joint sitting of them.
- By requiring a higher than usual quorum for votes to be valid.
- By requiring a qualified majority for a motion of confirmation to be passed.

Specific requirements that the executive be representative can also be considered as special measures, for example:

- Setting a quota for the representation of women or members of specific groups in society (determined, for example, in relation to ethnicity, religion, language, regional origin).
- Assigning particular portfolios to representatives of such groups.

2.2. Special measures applicable to procedures for the dismissal of members of the presidential cabinet²

Whereas special measures in the context of presidential appointments to the executive are meant to increase the role of the legislature in this process, special measures in the context of the dismissal of members of the presidential cabinet are meant to constrain the same influence, or put differently, restrict it to cases where there is broad consensus on such dismissals.

As has been apparent from relevant examples cited above, special measures as they relate to procedures for the dismissal of cabinet ministers principally take the form of:

- Qualified voting procedures for motions of dismissal to be approved, including requirements for their application:
 - in one or more chambers of the legislature or in a joint sitting of them;
 - to be subject to a higher than usual quorum for votes to be valid.
- Setting a minimum criteria for the possibility of debating dismissals, including:
 - a minimum number of members of one or more chambers to request a debate (in absolute or relative terms);
 - a requirement to pass such a threshold but applied simultaneously to sub-sets of members of the legislature (determined, for example, on the basis of membership in different political parties; ethnic, religious, or linguistic groups; or on the basis of regional origin).

In general, special measures in relation to executive formation should be used sparingly and judiciously. They should be seen as part of a wider set of checks and balances between different branches of the executive and established in such a way that they encourage moderation and consensus rather than disruption of the process of government.

² Note that the following discussion relates to dismissals outside the process of impeachment.