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Semi-presidentialism and Inclusive Governance in Ukraine

Reflections for Constitutional Reform





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Sujit Choudhry, Thomas Sedelius and Julia Kyrychenko

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About this report



This report assesses the ways in which the semi-presidential form of government can be best structured to promote stable, democratic and inclusive governance in Ukraine. It does so by analysing key challenges to Ukraine's constitutional stability in recent decades, presenting relevant comparative knowledge from other semi-presidential systems in the region and globally, and offering reflections on the Ukrainian context, which could benefit a wide range of stakeholders, such as legislators, policy advisors, think tanks and civil society.

Over the past few decades, constitutional stability in Ukraine has faced four main challenges: (a) recurring institutional conflict among the president, legislature and government, which has stalemated the political system and prevented effective legislation; (b) a presidency that has fallen prey to autocratic tendencies; (c) a fragmented and weak party system that has undermined the capacity of the legislature to act coherently; and (d) a weak constitutional culture and a weak Constitutional Court, manifested by irregular, politically motivated unilateral amendments to the Constitution.

In responding to these challenges, the report identifies the following key objectives: (a) guarding against presidential autocracy; (b) effective power sharing and executive leadership; and (c) an effective legislature that is capable of exercising oversight of the president and the government, as well as effectively enacting legislation. In doing so, the report addresses the following issues:

1. **Formation and termination of branches of government:** government formation (appointment of the prime minister and cabinet, and approval of the government programme); dismissal of the government; dissolution of the legislature; and presidential term limits and impeachment.



2. **Distribution of powers:** different models of relations between president and prime minister; domestic policy; foreign affairs; decree powers and countersignature requirements; chairing the cabinet; veto of legislation; referendums and legislative initiative; and appointment powers, including to the Constitutional Court.
3. **Additional constitutional design issues:** multi-level governance; consequences of bicameralism; constitutional amendments; the National Security and Defence Council; and referendums.

This report is based on, and contains extensive extracts from, an earlier report, *Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring* (Choudhry and Stacey 2014), which was co-published by the International Institute for Democracy and Electoral Assistance (International IDEA) and the Center for Constitutional Transitions at NYU Law (now the Center for Constitutional Transitions). This report summarizes a larger report which will be released online.

Many of the reflections presented in this report were discussed and further refined based on input from leading Ukrainian constitutional law experts and practitioners who attended a round table hosted by the Centre of Policy and Legal Reform (CPLR) and International IDEA in Kyiv, Ukraine, in July 2017 (International IDEA 2017).

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Executive summary



Since 1996, Ukraine's Constitution has provided for a semi-presidential form of government, but these constitutional arrangements have proved to be unstable. Semi-presidential constitutions provide for a directly elected president, who shares executive power with a prime minister and government who can be dismissed by the legislature. There are two main subtypes of semi-presidential government: (a) *president-parliamentary*, where both the legislature and the president can dismiss the prime minister; and (b) *premier-presidential*, where only the legislature can dismiss the prime minister.

Ukraine has experience with both varieties of semi-presidentialism. After independence from the Soviet Union, Ukraine adopted a president-parliamentary Constitution in 1996. In the wake of the Orange Revolution, the Constitution was amended in 2004 to create a premier-presidential system, which was in force between 2006 and 2010. In October 2010, the Constitutional Court annulled the 2004 constitutional amendments on procedural grounds, bringing back the president-parliamentary system from 2010 until 2014. The Euromaidan protests in 2013–14 led to a return to the premier-presidential system in early 2014 (by re-enactment of the voided 2004 amendments). The shifts back and forth between varieties of semi-presidential government have revolved around the balance of power between president and prime minister. There is ongoing contestation of the roles and responsibilities of the president and prime minister, and strong calls for further constitutional reform continue unabated. Alongside these major constitutional changes since 1996, a struggle has been ongoing among the key institutional actors, which has resulted in repeated constitutional conflicts and ineffective governance under both varieties of semi-presidential rule. Although institutional conflict was greatest during the periods of president-

parliamentarism, it has also happened in the premier-presidential periods, both during the presidency of Viktor Yushchenko (2005–2010) and since 2014.

Specifically, this report provides options for the *further reduction* of presidential power, even under the current premier-presidential system, in which presidential power is already weaker than it was under president-parliamentary rule. We recognize that the current state of armed conflict in Ukraine counsels caution regarding introducing new constraints on presidential authority, given the short-term need for effective leadership; however, the longer-term debate over presidential powers is unlikely to go away. This report provides comprehensive comparative data and analysis to inform those discussions.

Certainly, there are many factors that affect the process of democratization in Ukraine, as anywhere else. These include economic development, good governance, corruption, political culture and external influences, to name just a few. However, this report is based on the premise that the design of government institutions also matters. Indeed, as repeated studies have shown over time (see e.g. Elgie 2011; Sedelius and Linde 2018), the arrangement of powers within the dual executive of a semi-presidential system can be a significant factor in establishing and consolidating democracy.

The report identifies four principal challenges to democratic constitutional governance in Ukraine:

1. recurring institutional conflict among the president, legislature and government, which has stalemated the political system and prevented effective legislation;
2. a presidency that has fallen prey to autocratic tendencies;
3. a fragmented and weak party system that has undermined the ability of the legislature to act coherently; and
4. a weak constitutional culture and a weak Constitutional Court, manifested by irregular, politically motivated unilateral amendments to the Constitution.

These challenges set the context for any debate about the functioning of the current Constitution, or possible future constitutional reforms. In response to these challenges, we identify three principles to guide constitutional design: (a) guarding against presidential autocracy; (b) power sharing and executive leadership; and (c) legislative oversight of the executive. The development of a stable political party landscape should also be considered, but such a discussion would involve detailed and lengthy engagement with the complex interaction between institutional design, electoral systems and political party regulation. It is therefore beyond the scope of this report, which focuses primarily on constitutional design.



Table 1. Constitutional design issues discussed in this report

Area of constitutional design	Issues
Formation and termination of branches of government	Government formation (appointment of the prime minister and cabinet, and approval of the government programme) Dismissal of the government Dissolution of the legislature Presidential term limits and impeachment
Distribution of powers	Different models of relations between president and prime minister Domestic policy Foreign affairs Decree powers and countersignature requirements Chairing the cabinet Veto of legislation Referendums and legislative initiative Appointment powers, including to the Constitutional Court
Additional constitutional design issues	Multi-level governance Consequences of bicameralism Constitutional amendments The National Security and Defence Council (NSDC) Referendums

This report examines three sets of constitutional design issues (see Table 1). The first two sets of issues address the relationship between the prime minister and the president, as well as their relationships with the legislature and other constitutional bodies; the third set of issues assesses a number of considerations of relevance to Ukraine. For all of these constitutional issues, the report presents comparative approaches and Ukraine's own constitutional and political practice, and offers specific reflections on Ukraine.

Key reflections

Appointing the prime minister

At present, in Ukraine the president nominates the prime minister, on the basis of a proposal by the parliamentary coalition including a majority of the national deputies. The Verkhovna Rada (parliament) formally appoints the prime minister. An option to discuss is removing the role of the president entirely, so that the legislature nominates and may even appoint the prime minister. Under this approach, the Speaker could play the role currently played by the president.

Appointing the rest of the cabinet

In Ukraine, the president nominates the Minister for Defence and the Minister for Foreign Affairs, who are then appointed by parliament. Consideration should be given to authorizing the prime minister to nominate the entire cabinet.

Appointment of government officials in the civil service and bureaucracy, including presidential administration

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. It may also be fruitful to consider whether to utilize cross-party committees or an independent civil service commission. 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 the military should require co-decision in the form of a countersignature, as well as approval by the legislature. The prosecutor general should be appointed on the basis of a merit-based, competitive process. The Rada should no longer have the power to dismiss the prosecutor general by a vote of no confidence. The president's power to create a presidential administration should be expressly granted by the Constitution, and restricted to the presidential areas of responsibility.

Dismissing the government

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 prime minister should be able to dismiss individual members of her or his cabinet without the need for legislative approval. Replacing these members should follow the existing methods for the appointment of the cabinet.

Dissolution of the legislature

The president's discretion to dissolve the legislature should be triggered only in specific circumstances (which must be specified in the Constitution), such as the 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 allowed only once within a 12-month period; and no successive dissolution for the same reason.

The president should be obliged to dissolve the legislature (or the legislature should be 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 should take place during a state of emergency. Dissolution must be followed by parliamentary elections within a set time period. No changes to the electoral law or the Constitution should be made while the legislature is dissolved.

Presidential term limits

A person should serve a maximum of two terms as president, whether those terms are successive or not.

Removal and impeachment

The president must not be able to control or determine the composition of the institution that decides whether or not to impeach or remove the president—the Constitutional Court. The process must involve only two or three steps, and 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.

Domestic policy

The prime minister should be responsible for domestic policy in all its functional areas. This power should be exercised in the cabinet, after consultation with its members.

Foreign affairs

The president participates in setting policy in specific functional areas related to foreign affairs, defence and national security. The president's policymaking powers in these specific functional areas should be exercised in consultation with the prime minister, through a co-decision mechanism such as countersignature. The president should be empowered to exercise specified symbolic powers and to perform symbolic and representative functions. The prime minister and president should appoint ambassadors jointly. The president should negotiate and sign treaties, which would require legislative ratification before becoming binding or having domestic effect. The president should be the state's representative at international meetings and organizations.

Decree power and countersignature requirements

The Constitution should expressly enumerate the areas in which the president, the prime minister and the cabinet can issue decrees. The prime minister's countersignature should be required on all presidential decrees. The president's countersignature should be required on all prime ministerial regulations.

Chairing the cabinet

Given that the President of Ukraine also possesses quite considerable decree powers as well as significant veto powers, he or she should not chair cabinet meetings. However, should Ukraine consider limiting the president's decree and veto powers, there would be reason to also consider an extension of the president's right to chair cabinet meetings, in order to enhance power sharing. The president should have the power to chair cabinet meetings in specific areas of her or his competence, but only if the president lacks strong decree powers and is not empowered to dismiss the prime minister or other ministers.

Veto of legislation

The president should have a straight up-or-down veto that the legislature can override by the majority that was required to pass the original legislation (suspensive veto). If the president's decree and policy powers are strictly limited, 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.

Multi-level governance

Since presidential authority should be limited in the domestic policy context, the cabinet alone should have control over the appointment and dismissal of prefects. For the same reason, the cabinet should have sole oversight of regional governments. There should be a third party (e.g. the Constitutional Court) to adjudicate legal disputes between regional and central governments.

Consequences of bicameralism

Consistent with the constitutional principle of executive leadership, and in the light of the fragmented and divided nature which has characterized the Ukrainian parliament to date, any arguments offered in favour of establishing a second chamber should be weighed against the fear of increased deadlock and delay in the passing of legislation, and the resulting strengthening of the position of the president.

Constitutional amendments

The president should not retain the right to initiate constitutional amendment proposals. The president should continue to lack any role in approving constitutional amendment proposals that have been approved by the requisite parliamentary majority and/or referendum.



National Security and Defence Council

The definition of national security should be narrowed. If Ukraine resorts to a system of prime ministerial appointment for all cabinet members, this should affect the allocation of power between the prime minister and president over national security and defence, including the design and operation of the NSDC.

Referendums

The president should no longer have the power to call referendums. Alternatively, the president should be able to exercise that power only under well-defined and limited circumstances.

1. Introduction



The distribution of power between the executive and legislative branches of government significantly influences the capacity of constitutional orders to foster and protect democracy (Sedelius and Åberg 2017). This report examines this issue in the context of semi-presidentialism in Ukraine.

Semi-presidentialism is a system of government with a directly elected president with a fixed term of office, who shares executive power with a prime minister and government that rely on the support of an elected legislature. It has become a very popular form of government worldwide, and was the most common choice among the post-Communist countries of eastern and central Europe and the former Soviet republics. Twenty of those countries—Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, the Czech Republic, Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Macedonia, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia and Ukraine—have at some point adopted a semi-presidential constitution (Sedelius and Mashtaler 2013).

The existence of a dual executive is a feature of semi-presidential government that lends itself to power sharing between different political parties. Thereby, it offers some promise for checking presidential autocracy. 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 presidential domination (Choudhry and Stacey 2014). Indeed, the majority of the presidential autocracies in the post-Soviet region have operated through what are formally semi-presidential structures.

There are two main subtypes of semi-presidential government, which differ in the balance of power between the president and the prime minister: (a) *president-parliamentary*, in which both the legislature and the president can dismiss the

prime minister; and (b) *premier-presidential*, in which only the legislature can dismiss the prime minister.

One general pattern that has emerged from the past three decades of constitutional experience in the region is that the post-Communist countries whose constitutions contain the strongest presidential powers have also had the weakest records of democratization. Partly in response to this negative experience, the regional trend has been away from president-parliamentarism towards premier-presidentialism, through limiting presidential powers and enhancing the power of parliament over the cabinet. Such a shift has occurred in Armenia (2015 onwards), Croatia (2001 onwards), Georgia (2013 onwards) and Ukraine (2006–2010 and 2014 onwards). Among the former Communist dictatorships, only the autocratic regimes of the former Soviet republics of Azerbaijan, Belarus and Russia retained president-parliamentary constitutions by 2017.

After independence from the Soviet Union, Ukraine adopted a president-parliamentary Constitution, in 1996. In the wake of the Orange Revolution, the Constitution was amended in 2004 to create a premier-presidential system, which was in force between 2006 and 2010. In October 2010, the Constitutional Court annulled the 2004 constitutional amendments on procedural grounds, bringing back the president-parliamentary system, previously in force between 1996 and 2006. That system continued from 2010 until 2014. The Euromaidan protests led to yet another return to a premier-presidential system in early 2014 when parliament re-enacted the voided 2004 amendments.

Constitutional change has therefore occurred only through extraordinary and irregular processes in periods of constitutional and political instability, such as the Orange Revolution in 2004 and the Euromaidan protests in the winter of 2013–14 rather than through deliberative political negotiations. In both cases, constitutional reform followed, which shifted the system from president-parliamentarism to premier-presidentialism. Alongside these major constitutional changes since 1996, a struggle has been ongoing among the key institutional actors, which has resulted in repeated constitutional conflicts and ineffective governance. At the same time, Ukraine has moved back and forth along a continuum between full-fledged democracy and authoritarianism throughout the post-Soviet era.

The failures of semi-presidentialism in Ukraine were greatest during the periods of president-parliamentarism, but were also present during the premier-presidential periods, both during the presidency of Viktor Yushchenko (2005–2010) and also more recently. One example was the controversial appointment of the prosecutor general in 2016. Presidents have attempted to expand the reach of their powers, sometimes beyond the constraints of the Constitution, under both types of semi-presidentialism. Examples include the abuse of the power to appoint and dismiss judges (including the power to appoint presidents and deputy presidents of the courts), dissolving parliament by presidential decree, the partisan

abuse of security sector institutions, lack of progress on decentralization reforms, manipulation of the Constitutional Court, domination of the prime minister and cabinet, and recurring constitutional proposals to shift the institutional balance in favour of the president. At the core of this recurring dynamic is a lack of a consensus among political elites over the role of the president in the political system.

Constitutional reform in Ukraine requires a shared basic understanding about the role and function of the president, which must precede and inform the constitutional arrangements. Arriving at such a consensus is particularly challenging because Ukraine is divided among competing political groupings that disagree on basic questions about the underlying issue of the very nature of the country, and the current constitutional system creates a ‘winner-takes-all’ scenario which locks one side out of power for the president’s term and denies it institutional power to negotiate over these basic concepts. While parliament should provide a forum for such negotiations, and the ability of parliament to debate and manage constitutional change is a key to future success, thus far constitutional changes have generally been driven by extraordinary, non-parliamentary events.

In a context of pervasive corruption and patrimonial structures, constitutional stability in Ukraine has faced four main challenges: (a) recurring institutional conflict among the president, legislature and government, which has stalemated the political system and prevented effective legislation; (b) a presidency that has fallen prey to autocratic tendencies; (c) a fragmented and weak party system that has undermined the capacity of the legislature to act coherently; and (d) a weak constitutional culture and a weak Constitutional Court, manifested by irregular, politically motivated unilateral amendments to the Constitution.

This report investigates how semi-presidentialism can be designed to promote three objectives that respond directly to these obstacles to constitutional stability in Ukraine: (a) guarding against presidential autocracy; (b) effective power sharing and executive leadership; and (c) an effective legislature that is capable of exercising oversight of the president and the government, as well as effectively enacting legislation.

Chapter 2 of this report examines past and ongoing constitutional challenges and failures in Ukraine. Chapter 3 describes the three main objectives of constitutional design set out above. Chapter 4 investigates how the institutions, rules and structures of a semi-presidential system could be designed to increase the likelihood of achieving these objectives of constitutional design in Ukraine. Chapter 5 addresses additional constitutional issues. To concretely illustrate its arguments, the report will refer as needed to the 1996 Constitution of Ukraine and the constitutional amendments of December 2004 (confirmed by a parliamentary resolution in the Verkhovna Rada in February 2014).

2. Constitutional history and challenges in Ukraine



Ukraine has oscillated between the two forms of semi-presidential constitution described in Chapter 1: the original 1996 Constitution, which was president-parliamentary and was in force from 1996 to 2006 and again from 2010 to 2014; and the premier-presidential Constitution in force from 2006 to 2010 and reinstated in 2014. In this Chapter, we survey Ukraine’s constitutional history and set out the key challenges that have plagued governments. In the following chapters, we will address how carefully designed semi-presidentialism can reduce the risk that these challenges will recur.

In a semi-presidential system, the roles of the president and the prime minister are ideally complementary and clearly defined: the president possesses popular legitimacy and represents the continuity of state and nation, while the prime minister exercises policy leadership and takes responsibility for the day-to-day functions of government (Sedelius and Berglund 2012; Duverger 1980). However, in practice, the existence of two separately chosen chief executives creates a situation of ‘dual legitimacy’, with both the president and the prime minister claiming authority on a popular mandate (although it is indirect in the case of the prime minister). This creates a built-in potential for conflict over powers.

Ukraine has been marked by numerous confrontations both within and between national political institutions, which have affected the constitutional and political system and the policy process. The conflicts have reflected an ongoing disagreement over the very nature of the country, the type of constitutional system that should be in place and the proper roles of the legislative and executive branches. This tug of war between different institutional actors has resulted in

repeated constitutional clashes and ineffective policy decisions, both of which have driven Ukraine's repeated constitutional reforms.

The following sections address key constitutional components in relation to these failures: government formation and dismissal; policy domains and power sharing; a strong president; weak parties, regional divisions and the electoral system; and informal politics and patrimonial structures.

2.1. Government formation and dismissal

The defining distinction between the president-parliamentary and premier-presidential forms of semi-presidential government is the distribution of powers over government formation and dismissal. In president-parliamentary regimes, both the legislature and the president can dismiss the prime minister and/or government, whereas, in premier-presidential regimes, only the legislature can dismiss the prime minister and/or government.

The 1996 Constitution provided for a president-parliamentary system, with a directly elected president who had the first say on the appointment of the prime minister, and a cabinet that required the support of both the president and parliament. The president was given the power both to appoint, with the consent of parliament, and to dismiss, unilaterally, the prime minister (article 106 § 9). The president was furthermore required to appoint and dismiss, upon nomination of the prime minister, other cabinet ministers, 'chief officers of other central bodies of executive power, and also the heads of local state administrations' (article 106 § 10).

Leonid Kuchma served as President of Ukraine under the 1996 Constitution, between 1994 and 2005. Under Kuchma's rule, Ukraine witnessed several intra-executive and executive–legislature struggles among the president, parliament and prime minister that ended in stalemate. The Kuchma era demonstrated a typical feature of the president-parliamentary system: the president can use the unilateral power to dismiss the prime minister to shift the blame for poor policy performance. Indeed, up to the end of his presidency in 2004, Kuchma went through no fewer than seven prime ministers.

With the constitutional amendments of December 2004 (which became effective in 2006), the president lost the power to appoint the prime minister, and was instead required to propose a candidate for the post to be appointed by parliament (article 114). In addition, the president lost the power to dismiss the prime minister (article 87). The powers of the prime minister remained relatively stable (Sedelius and Berglund 2012). The prime minister retained the right to nominate candidates for the cabinet, although the authority to appoint them shifted from the president to parliament (article 114); an exception was made for the Ministers of Foreign Affairs and Defence, whose nomination remained among the president's powers (article 106 § 10). The overarching goal was to shift power

from the executive (president and prime minister) to the legislature, thereby creating a premier-presidential system with power more evenly balanced both within the executive and between the executive and legislative branches (Sedelius and Berglund 2012; O'Brien 2010).

Notwithstanding these important constitutional changes, the institutional tug of war continued under the premier-presidential framework. The institutional rivalry among parliament, government and president still existed, the domains of power within the executive were still largely unresolved and the level of intra-executive conflict remained high. Indeed, there is some validity to the view that intra-executive conflict increased. Given this, President Yushchenko never fully adjusted to the constitutional reform and failed to build a durable parliamentary platform. In the opinion of the European Commission for Democracy Through Law of the Council of Europe (the Venice Commission), 'a number of provisions [in the 2004 Constitution] . . . might lead to unnecessary political conflicts and thus undermine the necessary strengthening of the rule of law in the country' and the amended Constitution did 'not yet fully allow the aim of the constitutional reform of establishing a balanced and functional system of government to be attained' (Venice Commission 2005).

2.2. Policy domains and power sharing

Ukraine has experienced recurring conflicts and stalemates among the president, prime minister and parliament, with control over policy domains occupying the centre of attention.

The powers of the president and prime minister normally overlap partly in semi-presidential systems, in particular concerning foreign and security policy. The 1996 Constitution, even after the amendments of 2004, explicitly singles out the president's responsibility for national security (article 106 § 1), foreign policy and international relations (article 106 § 3), the appointment and dismissal of diplomats and officials (article 106 § 5) and the appointment of the Minister for Defence and the Minister for Foreign Affairs (article 106 § 10). At the same time, the Constitution states that the Cabinet of Ministers (led by the prime minister) is responsible for the 'implementation of domestic and foreign policy' (article 116 § 1), 'the defence potential and national security' (article 116 § 7) and 'foreign economic activity' (article 116 § 8).

The president's formal powers, coupled with a political norm that the president should have principal decision-making authority in these shared areas of responsibility, created a system in which the president functioned as the de facto chief executive in both foreign and domestic policy. This was especially the case under the president-parliamentary constitution, but has also been the norm under the premier-presidential one.

Conflicts over powers and policy domains have recurred repeatedly. For instance, appointment and control over the ‘presidential ministers’—the Minister for Foreign Affairs and Minister for Defence—were contested under Yushchenko’s presidency. Following the formation of Viktor Yanukovich’s cabinet in 2006, ‘the anti-crisis parliamentary coalition’ led by Yanukovich’s Party of Regions passed a parliamentary vote of no confidence, dismissing the Ministers for Foreign Affairs and the Interior in December 2006. The most intense conflict concerned Yushchenko’s Minister for Foreign Affairs, Borys Tarasyuk, whose policies favouring deeper Euro-Atlantic integration and opposing the Russian Black Sea Fleet in Crimea were sharply opposed to the Moscow-friendly orientation of the Prime Minister, Yanukovich. Tarasyuk disputed his dismissal by parliament in a district court, which suspended parliament’s decision without a final decision. On the same day, Yushchenko issued a decree that Tarasyuk should stay in office (Office of the Ukrainian President 2006). Despite the court order and presidential decree, Tarasyuk was prevented from entering meetings. Political conflict on this issue turned on different interpretations of the Constitution. In January 2007, Tarasyuk announced his resignation.

2.3. A strong president

The personalization of power in the president is a function of (a) her or his role as both the ceremonial head of state and chief executive; and (b) the strong democratic mandate that a president claims through popular election. These symbolic trappings are reinforced by the lack of any institutional mechanisms that compel presidents to seek conciliation or compromise. This 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, or to a court in the rare event of an impeachment procedure, due to allegations of criminal acts or treason. By contrast, in parliamentary or premier-presidential systems, if a prime minister’s party has a plurality or enjoys only a tenuous electoral majority, he or she must work through compromise, consultation and persuasion to ensure that a majority of members of parliament supports the government.

Presidential powers are prone to the risk of abuse: the president could use them to eliminate the political opposition, to undermine institutional obstacles to executive action and to gradually consolidate power in the office of the president. While a constitutionally strong president will not necessarily become a presidential autocrat, a number of constitutional features can increase this risk.

A general trend among the post-Soviet countries, including Ukraine, is that the presidents have used their control over the administration to effectively curb the opposition and thereby direct the trajectory of constitutional developments in

their own favour. This has led to the rapid and deliberate processes of centralizing and concentrating authority in the presidential apparatus. These have consisted primarily of establishing strong presidential rule, reformulating relations between the central government and the regional and local administrations, maintaining direct control over the media, manipulating elections, reinvigorating a centrally managed party system and actively excluding organized political opposition (Jones-Luong 2002). To a greater or lesser degree, these features have been common in Ukraine, where particular problems have also included presidential interference in government authority, encroachments on the independence of the judiciary and the Constitutional Court, partisan abuse of the office of the prosecutor general and self-serving constitutional reforms.

In addition, the dominance of state institutions by a single and hegemonic party loyal to the president can have a significant and detrimental effect on the growth and development of robust political competition. Putin's party, United Russia, is an example of how control over state institutions has allowed the suppression of 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. Presidents in Ukraine have also created parties and party blocs whose main purpose is supporting the president's agenda—albeit with less severe consequences. This includes Yanukovich's Party of Regions and Poroshenko's Petro Poroshenko Bloc. In a context of weak party system structures, presidential parties create a potential threat to democratization.

2.4. Weak parties, regional divisions and the electoral system

A strong and coherent parliamentary arena and a consolidated party system can reduce the risk that semi-presidential democracies tend towards presidential dictatorship (Sedelius 2015; Kitschelt et al. 1999).

Political parties in Ukraine have been characterized by low levels of institutionalization, considerable personalization and weak programmatic development. That is quite typical of the post-Soviet context. From the break-up of the Soviet Union in 1991 until the early 2000s, the political process was dominated by a constitutionally strong president and by a number of clientelistic networks organized around private enterprises and regions. Political parties were only among several actors on the political scene, and did not have a major role in determining policy outcomes in that period. In addition to the fact that the president had no formal party affiliation, parties controlled neither parliament nor cabinets in the 1990s. From the early 2000s onwards, parties have gradually increased their significance as actors on the political scene. However, they have

often been instruments for furthering presidential powers and had close connections to one or more groups of economic elites.

Since long before the Russian occupation of Crimea and the armed conflict between the Ukrainian state and the separatists in the Donbass region since 2014, the divide between the eastern and southern parts of Ukraine, on the one side, and the central and western parts of the country, on the other, has been the principal political cleavage. Ukraine's regional division presents a formidable obstacle to stability and democratic consolidation, and may create the need for power sharing. Political leaders and parties will need to build cross-regional support in order to win elections and become widely accepted throughout the country. Thus far, no party has been able to build an effective organization across the country. Therefore, they need to form coalitions and share power in various ways. As one region or leader becomes powerful enough to threaten to dominate the system, the others will oppose it, her or him (D'Anieri 2011: 30–32). Regional preferences for political parties and presidential candidates, especially since the Orange Revolution, reveal the impact of this historical fracture. Western Ukraine supports pro-European and pro-Orange forces, and eastern and southern Ukraine support pro-Russian ones.

Discussion of a decentralization reform and constitutional foundations for it is ongoing. It is linked to the question of the system of central government. Devolving political power vertically may both lessen the stakes for contestation of power at the centre and help to develop cross-cutting cleavages between groups. This issue is further explored in Section 5.1.

Ukraine has used three different electoral systems for parliamentary elections: (a) a single-member district (SMD) system in 1994; (b) a mixed-member system (MMS) in 1998 and 2002; and (c) a closed-list PR system in 2006 and 2007. In 2012, it returned to the MMS, which is currently in force (see Table 2).

Table 2. Semi-presidential subtypes and electoral systems: Ukraine, 1991–2016

Period	Semi-presidential subtype	Electoral system
1991–96	President-parliamentary*	SMD (1994–96)
1996–2005	President-parliamentary	SMD (1996–98), MMS (1998–2002)
2006–2010	Premier-presidential	PR
2010–14	President-parliamentary	PR (2010–12), MMS (2012–14)
2014–	Premier-presidential	MMS

Notes: * Interim post-Soviet constitution. MMS = mixed-member system; PR = proportional representation; SMD = single-member district.

The return to the MMS, interacting with the highly personal rivalry among party leaders in Ukrainian politics (often based on fear that a counterpart might become a presidential contender) and the pervasive influence of corruption and money in politics, has largely prevented the consolidation of parliamentary majorities gravitating around a common policy platform. As in other post-Communist countries, the MMS has generated more parties on the SMD side than on the PR side. Because the electoral system has allowed non-party candidates, who form alliances after the elections and often jump between groups and majorities along the way, it distorts coherence and representation within parliament.

2.5. Informal politics and patrimonial structures

Semi-presidentialism in Ukraine has emerged in the context of political-economic networks of financial and industrial groups (FIGs) that were forged to exploit and benefit from the privatization of the Soviet-era industrial infrastructure and from vast government concessions (Carrier 2012). Executives and parliamentarians largely create their power bases along the lines of these economic strongholds, and politics is more or less entrenched in patrimonial structures. The literature contains many concepts for capturing the kind of informal networks that characterize many post-Soviet countries, e.g. patronalism, clientelism, informal politics and neopatrimonialism. For individuals in patrimonial societies, what matters most is belonging to a coalition that has access to resources and is able to provide material welfare.

From the Orange Revolution to 2010, Ukraine made significant progress on democratic openness, pluralism and the democratic quality of the electoral process. In fact, Ukraine became the only non-Baltic post-Soviet country ever to have been rated 'free' by Freedom House's *Freedom in the World* ranking (Freedom House 2009). That reflected strong improvements on major indices of democracy. However, Freedom House's records on the levels of corruption and governance showed no significant improvements, reflecting the fact that politics and society remained highly patrimonial. Similarly, the Economist Intelligence Unit's democracy measure revealed that Ukraine during the same period was at the level of Switzerland and Ireland in terms of the electoral process, but at the level of Mali and Nicaragua on the functioning of government (Hale 2015: 325–26).

Therefore, the Orange Revolution and the subsequent shift from president-parliamentarism to premier-presidentialism did not change the level of patrimonialism and personalization, or the importance of political and economic links to regionally based FIGs and oligarchs. Yushchenko, Yulia Tymoshenko and Yanukovich each had the support of major FIGs that could assist financial operations designed to influence voter decisions. It would be too much to expect

a constitution to alter such deep-rooted societal and political-cultural factors in such a short time. What did change, however, was that the more balanced executive structure of premier-presidentialism, in combination with PR elections, challenged existing patrimonial networks to be more open and competitive. The premier-presidential constitution made it difficult for one power centre to emerge as dominant to the same extent as during the terms of office of President Kuchma (1996–2004) and later of President Yanukovich (2010–14) (Hale 2011).

3. Principles for constitutional governance



The president-parliamentary constitution in Ukraine has allowed the emergence of a strong president and led to a conflictual relationship among the president, parliament and government, accompanied by the disintegration of the party system and the suppression of fair political competition. Indeed, the constitutional rules have exacerbated rather than mitigated tensions, polarization and conflict.

These constitutional failures, in turn, yield three principles according to which the constitutional design of a new political system can be organized: guarding against presidential autocracy; power sharing and executive leadership; and legislative oversight of the executive. This chapter outlines these principles and indicates how the premier-presidential form of government can help uphold them.

3.1. Guarding against presidential autocracy

The need to guard against presidential autocracy is a key objective, and a revised constitution in Ukraine should be designed with this imperative in mind. The experience of president-parliamentary systems in the region demonstrates how this system carries a greater risk of presidential autocracy than the premier-presidential form of government. The latter establishes, to a greater degree, a dual executive or ‘dyarchy’ in which neither the president nor the prime minister wields all executive power. Even under the current premier-presidential system, we recommend that Ukraine further shift power from the president to the prime minister, for example with respect to appointment powers (e.g. of cabinet

ministers and the prosecutor general), powers over national security and defence, and the scope and powers of the presidential administration.

Presidential appointment powers regarding the judiciary should be nominal. In the light of Ukraine's past experience with presidents using the Constitutional Court to achieve their political goals (including annulling constitutional amendments), consideration should be given to transferring powers to appoint judges in the Constitutional Court from the president to parliament.

The president, parliament and Congress of Judges each appoint six members to the 18-member Constitutional Court. Article 148 of the June 2016 constitutional amendment enshrines the procedure for the selection of judges through a competitive process. The selection process is regulated by article 12 of the Law on the Constitutional Court of Ukraine (2017) and by the terms for conducting a competition for vacant positions of judges of the Constitutional Court of Ukraine approved by the competition commission (Office of the Ukrainian President 2017). The selection procedure consists of the examination of the application documents, interviews and a screening of the applicants based on the procedures outlined in the Law on Prevention of Corruption (2014). We note that the June 2016 constitutional amendment did not fully address the objective of decreasing political influence over the court, as the president can still create a loyal competition commission for the selection of presidential nominees to the constitutional court and appoint partisan candidates to the court, failing to uphold the required features of high moral character and strong legal expertise.

3.2. Power sharing and executive leadership

Sharing executive power can ensure that the executive branch represents differing political views. With two sites of executive power carefully designed, the likelihood of the prime minister or the president (or the party of either) capturing state institutions is reduced. This may also require consideration of the procedure for amending the Constitution, to ensure that neither party can engineer self-serving, unilateral constitutional reform. However, as Chapter 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.

A reason that semi-presidentialism retains appeal for post-authoritarian countries 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. Presidential leadership under a semi-presidential constitution can be viewed as a safeguard against this risk.

A 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. Moreover, if institutions are weak, a strong president may impede the development of political parties altogether, and is likely to be detrimental to the development of party institutions and programmatic cohesion.

If the president is an executive authority who holds an electoral mandate separate from the legislature, some executive authority can still be exercised in the event of parliamentary instability. 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 interests and 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' under a semi-presidential system (Skach 2011: 124).

The design of a semi-presidential system has to outline the president's role carefully and set out her or his powers in the constitution in order to ensure appropriate presidential leadership without the risk of presidential autocracy. Second, the president should 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. This role will be enhanced if the president can, to some degree, rise above party politics and represent the nation as a whole. This imperative must also be reflected in the constitutional rules that establish the president's role and powers, and in the way he or she is elected. Chapter 4 covers these rules in detail.

3.3. Legislative oversight of the executive

A semi-presidential system that constrains both sites of executive power meaningfully and makes them accountable to 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 entail the ability to impose consequences: the legislature must be empowered not only to investigate and call into question the conduct of the executive, but also, if necessary, to act against the executive for constitutionally unacceptable conduct. In this respect, a semi-presidential constitution should (a) set out procedures for questioning the members of the government and dismissing a government if it loses the confidence of the legislature; and (b) empower the legislature to act against a president who overreaches. It must be able to do that either by overruling presidential vetoes or referring presidential decrees and decisions to a Constitutional Court or, ultimately, by impeaching the president. Parliament's ability to exercise these powers depends on the trust and legitimacy it enjoys among the people.

Of course, where a dominant party loyal to the executive controls the legislature, even a constitutionally powerful legislature may not check the executive. This scenario highlights the important role that electoral outcomes play in shaping the legislature's role as a brake on executive power (Choudhry and Stacey 2013).

3.4. Caveat: electoral system design

A major caveat regarding the limits of semi-presidentialism's ability to uphold the three principles set out above is the design of the electoral system. Executive power sharing under a semi-presidential government requires meaningful competition between institutionalized political 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 subordinated position and reducing the semi-presidential system to a presidential one. However, 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 through power sharing. Cohabitation is a double-edged sword, as it may lead to increased tension and intra-executive conflict between the president and the prime minister.

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, capable and constructive opposition and minority representation in the legislature, there is less 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.

Discussion of electoral rules is beyond the scope of this report, but it is important to bear in mind that they can have critical consequences with regard to the constitutional principles discussed above.

4. The constitutional design of semi-presidential government



The report now turns to consider how the design of a semi-presidential system can reduce the risk of a recurrence of the failures noted in Chapter 2, and can increase the likelihood of upholding the principles of constitutional design set out in Chapter 3. We consider the architecture—the structure of institutions and the relationship between them—first, and then discuss the allocation of powers between institutions.

4.1. The architecture of semi-presidential government

The main issues to consider are government formation (Section 4.1.1), government dismissal (Section 4.1.2), presidential dissolution of the legislature (Section 4.1.3), presidential term limits (Section 4.1.4) and presidential removal and impeachment (Section 4.1.5).

4.1.1. Government formation

4.1.1.1. *Appointing the prime minister*

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

- **Option 1.** The president has exclusive authority to select and appoint the prime minister without approval by the legislature.

- **Option 2.** The legislature has the power to nominate (and even appoint) the prime minister without consulting the president, and the president may serve a ceremonial role by formally appointing the legislature's candidate.
- **Option 3.** The president and legislature jointly appoint the prime minister; the president nominates the prime minister and the legislature approves the nomination.

Under **Option 1**, the president alone selects and appoints the prime minister. The legislature plays no role in either selecting the prime minister or confirming the president's choice. However, since the legislature retains the power to pass a vote of no confidence in the prime minister and the government, 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, in particular as the threat of dissolution if no government can be formed may discourage the legislature from dismissing the prime minister. Moreover, if the legislature is divided, Option 1 gives the president considerable power.

If the constitution empowers the president to appoint the prime minister without legislative involvement, the principle of power sharing suggests that two additional safeguards be established. First, the constitution should require the president to take the legislature's preferences into account when forming the government, to increase the likelihood that the president will appoint a prime minister who is acceptable to the legislature, and allow for power sharing within the executive. Second, the president should not be authorized to dismiss the prime minister or the government (see Section 4.1.2 below).

Under **Option 2**, the legislature nominates and may even appoint the prime minister, while the president plays at most a ceremonial role. This system often emerges in semi-presidential regimes that resemble parliamentary regimes, for example Finland (article 61 of the Constitution of Finland).

Option 2 is attractive to guard against presidential autocracy. One risk is that a fragmented and divided legislature may not be able to form or sustain a stable government, which in turn may set the stage for a power grab by the president. In a semi-presidential system, the president holds a separate electoral mandate and may thus represent interests that are not represented in the legislature. As we discuss below, one way to diminish the risk of presidential autocracy under these circumstances is to mandate legislative dissolution by the president and the calling of new elections (see Section 4.1.3).

Under **Option 3**, the president nominates the prime minister, and the legislature approves the prime minister through some means of formal confirmation that must be obtained before the formation of the government. Where the prime minister must be confirmed by the legislature before taking

office, the president is encouraged to negotiate with the party leaders in the legislature and cooperate in finding a candidate who is acceptable to both.

Where the same political party dominates the presidency and the legislature (or the president dominates the political party that controls the legislature), the two will cooperate in appointing a prime minister. 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 with identical political interests or parties.

Under Option 3, if there is a divided legislature, the president can leverage her or his influence to overcome a divided legislature and form a government, because the president takes the first step in the government formation process.

It should be noted that whether or not the president has the power to dismiss the prime minister and government has a significant impact on considerations of power sharing at the appointment stage. Section 4.3.2 considers government dismissal more fully, but at this stage it is enough to indicate that, whichever appointment process is selected, *power sharing is enhanced when the president is unable to dismiss the government.*

The principle of power sharing supports an appointment process in which the legislature and the president are encouraged to cooperate. Therefore, Option 1, whereby the president unilaterally selects the prime minister, should be rejected. *Only Options 2 and 3 should be considered for meaningful power-sharing governments in Ukraine.*

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. Options 2 and 3 have advantages and disadvantages with respect to these situations. On balance, we recommend Option 2, to reduce the risk of presidential autocracy.

Appointing the prime minister: reflections for Ukraine

At present, in Ukraine the president nominates the prime minister, on the basis of a proposal by the parliamentary coalition including a majority of the national deputies (article 106 § 9 and article 114). The Rada formally makes the appointment (article 85 § 12 and article 114). This is Option 2, and closely resembles the procedure in Finland (article 61 of the Constitution of Finland). An option to discuss is removing the role of the president entirely, so that the legislature nominates and may even appoint the prime minister. Under this approach, the Speaker could play the role currently played by the president.

4.1.1.2. *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.
- **Option 3.** The prime minister and president share the power to appoint the cabinet.

Option 1 strengthens the prime minister's control over the cabinet vis-à-vis the president. It encourages power sharing, guards against presidential autocracy and enhances the stability of the government, as a prime minister who selects her or his own government is more likely to produce an effective and unified government.

For countries in the post-Soviet region, **Option 2** 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.

Option 3 shares the appointment power between the president and prime minister, for example by enabling the prime minister and president to appoint different ministers separately. The rationale for the shared appointment power is connected to the principle of the president as a national symbol and crisis manager. The president represents the country in international affairs, administers foreign policy and acts as commander-in-chief with oversight of security and national defence. The fact that the ministers in charge of these sectors often work closely with the president may provide a justification for allowing the president to appoint them.

While dividing appointment power over different ministries follows the principle of power sharing, it may overly expand a president's power, which is certainly a risk in the post-authoritarian context. Autocrats tend to use the security and intelligence services to punish dissenters, consolidate power and prop up their regimes. By appointing the relevant 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, weaken cohesion in the cabinet or manipulate the prime minister.

Appointing the rest of the cabinet: reflections for Ukraine

In Ukraine, the president nominates the Minister for Defence and the Minister for Foreign Affairs, who are then appointed by the Rada (article 85 § 12, article 106 § 10 and article 114). Shared appointments have caused significant disagreements between prime minister and president during Ukraine's recent past, notably resulting in a political crisis in 2007 during the presidency of Yushchenko. Consideration should be given to authorizing the prime minister to nominate the entire cabinet.

4.1.1.3. Appointment of government officials in the civil service and bureaucracy, including the presidential administration

In semi-presidential systems, considerable attention is given to the appointment processes for cabinet members. By contrast, the distribution of powers to appoint and dismiss regional governors and lower-level government officials (e.g. 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 a president or prime minister can quickly lead to either officeholder capturing the bureaucracy and undermining power sharing. Constitutions can guard against this possibility through three appointment mechanisms, although each carries 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 her or him. This should be avoided, but, where the president does hold residual appointment powers, they should be subject to prime ministerial 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.

To ensure that the system of appointments and dismissals in a semi-presidential system is in line with principles of power sharing and limited presidential power, the option chosen should have two elements: (a) a set of enumerated presidential appointments, with residual appointments to be made by the prime minister; and (b) 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 the president.

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 jointly.

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.

Appointment of government officials: reflections for Ukraine

The President of Ukraine has considerable appointment and dismissal powers in the public sector under both the 1996 and 2004 Constitutions. Among high-ranking officials, he or she appoints and dismisses the procurator (prosecutor) general (with the Rada's consent) (article 85 § 2 and article 106 § 11); half of the members of the Council of the National Bank (article 106 § 12); half of the National Council on Television and Radio Broadcasting (article 106 § 13); the Head of the Security Service (with the Rada's consent) (article 85 § 12-1 and article 106 § 14, in the 2004 Constitution only); and heads of diplomatic missions (article 106 § 5). Heads of local state administrations are appointed and dismissed by the president but at the request of the cabinet (article 118). The president appoints one-third of the judges of the Constitutional Court (article 106 § 22).

Ukraine's Constitution 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 is a combination of the mechanisms described above as Options 1 and 2. Appointments to the military or security service bureaucracies must be made through co-decision procedures requiring countersignature and parliamentary approval.

Appointment of government officials: reflections for Ukraine (cont.)

Article 106 § 28 gives the president far-reaching powers to create ‘consultative, advisory, and other subsidiary bodies and services’ at her or his discretion. Successive presidents have used this power to create a large presidential administration. Although the constitution does not mention the presidential administration, the size of the current presidential administration in Ukraine is considerable, and its functions are far reaching. Although article 106 § 28 implies that the president can create advisory bodies only in constitutionally assigned areas of presidential authority (e.g. defence, national security, foreign affairs), in practice the presidential administration includes officials whose areas of responsibility encompass the portfolios of a broad cross-section of cabinet members, including those not nominated by the president.

The presidential administration (as of 2017) includes departments with responsibility for reforms, legal policy, law enforcement and anti-corruption; humanitarian policy; domestic policy; information policy; access to public information; and local government and decentralization. The scope and scale of the presidential administration enable the president to shape the political agenda on a broad range of issues because he or she has the staff and resources to drive policy processes. The presidential administration should be vastly reduced in size (or parts of it placed under the government). It is possible to restrict its influence by reducing budget allocations to the advisory bodies of the president. (The 2017 budget includes UAH 746,629,800, or USD 28,649,995, for the maintenance and support of the activities of the President of Ukraine and the Administration of the President of Ukraine, which is 0.09 per cent of the total budget for 2017). This consideration also highlights the need to establish clearly that the president’s role and powers should not include domestic policy. Ukraine should consider limiting the president’s options in this respect in order to decrease her or his influence over the political system in general and over the public administration in particular.

Ukraine has recently revised appointment and dismissal powers over the courts. Competition for control of the courts has been an essential part of the power grabs among the key political actors during the post-Soviet era. For example, in the presidential election campaign of 2010, Prime Minister (and presidential contender) Tymoshenko controlled the Supreme Court; her main opponent, Yanukovich, controlled the Supreme Administrative Court; and President Yushchenko controlled the Constitutional Court (Hale 2015: 334–35). The June 2016 changes to the Constitution, and the Law on the Court System and the Status of Judges (2016), remove the unfettered power of the president to make appointments and now require that judges be nominated first by the High Council of Justice. Once appointed, judges now hold office indefinitely, as opposed to an initial five-year term after which an indefinite appointment could occur. Both changes are designed to increase the degree of judicial independence.

Appointment of government officials: reflections for Ukraine (cont.)

Under the 1996 Constitution, the president appointed the prosecutor general, with the Rada's consent (article 85 § 25, article 106 § 11, article 122). The president possessed an independent power to dismiss the prosecutor general (article 106 § 11, article 122). The Rada had a separate power to pass a vote of no confidence in the prosecutor general, who was then required by the Constitution to resign (article 85 § 25, article 122). The 2004 Constitution, in contrast, requires the consent of the Rada for the president to dismiss the prosecutor general (article 85 § 25, article 106 § 11, article 122). The June 2016 constitutional amendments again reformed the arrangements for the prosecutor general. The powers of the prosecutor's office were reduced to supporting public prosecutions in court, organizing and supervising the pre-trial investigation, and, in exceptional cases, representing the state in the judicial process. The prosecutor general's term in office was lengthened from five to six years. The procedure for appointment and dismissal as well as the option of a no confidence vote by parliament remained as before.

Since independence, the Rada has frequently used its power to pass a vote of no confidence in the prosecutor general, leading to resignations in several instances, either directly or indirectly. Vladislav Datsyuk in 1995 and Viktor Pshonka in 2014 were both directly dismissed by no-confidence votes. Signatures for resolutions expressing no confidence were collected, and resolutions of no confidence adopted, against Mikhaylo Potebenko (2000, 2001), Genady Vasiliev (2004), Svyatoslav Piskun (2005), Oleksandr Medvedko (2007) and Vitaliy Yarema (2014). These resolutions did not lead to their resignations (Khavronyuk 2015) but did succeed in increasing political pressure.

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 be held by the prime minister. It may also be fruitful to consider whether to utilize cross-party committees or an independent civil service commission. 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 the military should require co-decision in the form of countersignature, and legislative approval.

The prosecutor general should be appointed on the basis of a merit-based, competitive process and should hold tenure for a fixed term, and be subject to removal only for misconduct or incompetence. The Rada should no longer have the unfettered power to dismiss the prosecutor general by a vote of no confidence.

The president's power to create a presidential administration should be expressly granted by the Constitution, and restricted to the presidential areas of responsibility.



4.1.2. Government dismissal

No power-sharing regime can exist without carefully designed means to dismiss the prime minister and the government. There are two main design options for crafting the power of dismissal.

- **Option 1.** In president-parliamentary regimes, both the legislature and the president can dismiss the prime minister.
- **Option 2.** 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 discussed above, comparative experience clearly indicates that allowing the president to dismiss the prime minister and government can be a critical factor in upsetting the balance of powers and encouraging presidential autocracy.

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: (a) thresholds of legislative support for tabling a motion of no confidence; and (b) 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 no-confidence motion before the legislature will debate and vote on it (article 49 of the Constitution of France). After debate, the legislature can dismiss the government only by passing the no-confidence resolution with an absolute majority (article 49). The French threshold is relatively low; Portugal's Constitution requires that the motion must 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 no-confidence motion during the same legislative session (articles 194 and 195).

Transitional democracies that adopt the premier-presidential subtype of semi-presidentialism should consider adopting relatively high threshold requirements, but 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 relatively high 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 cannot unilaterally appoint the prime minister or cabinet members, heightened threshold requirements will help to foster cabinet stability. 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. Thus, 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 for 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. The constructive vote of no confidence enhances the stability of the regime by eliminating the power vacuum that would exist between governments.

Constitutional rules must determine whether or not cabinet members can be dismissed individually. In some cases, the conduct of individual cabinet members may not warrant the dismissal of the government as a whole and the ability to remove individual ministers may preserve the stability of the overall government. On the other hand, collective government responsibility will help promote government cohesion and may actually increase stability, as it increases the political cost of censure by the legislature. That is because, if no new government can be formed, the legislators may be forced to face new elections.

Furthermore, the president should not be able to interfere in the composition of the prime minister's cabinet by dismissing individual ministers. In contrast, the prime minister should be able to ensure efficiency and accountability in the cabinet by dismissing individual ministers.

Table 3 shows how government formation and dismissal powers are formally distributed among the president, prime minister and parliament in the constitutional text of 31 semi-presidential countries. In some cases, political dynamics may mean that the text does not capture actual practice.



Table 3. Government formation and dismissal powers in selected semi-presidential countries

Country	Who chooses the prime minister?			Who chooses the cabinet?			Who can dismiss the prime minister and cabinet?	
	PRES.	PRES. + LEG.	LEG.	PM	PRES. + PM	PRES.	LEG.	PRES. + LEG.
Austria	X			X				X
Belarus		X				X		X
Bulgaria			X	X			X	
Burkina Faso			X	X				X
Cabo Verde		X		X			X	
Central African Republic	X			X				X
Croatia		X		X			X	
Finland			X	X			X	
France	X			X			X	
Georgia			X	X			X	
Iceland	X					X		X
Ireland			X	X			X	
Lithuania		X		X			X	
Macedonia			X	X			X	
Madagascar			X	X				X
Mali	X			X			X	
Mongolia			X	X			X	
Mozambique	X					X		X
Namibia	X					X	X	
Niger	X			X				X
Peru	X			X				X
Poland		X		X			X	
Portugal		X		X			X	

Country	Who chooses the prime minister?			Who chooses the cabinet?			Who can dismiss the prime minister and cabinet?	
	PRES.	PRES. + LEG.	LEG.	PM	PRES. + PM	PRES.	LEG.	PRES. + LEG.
Romania			X	X			X	
Russia		X		X				X
Senegal	X			X				X
Slovakia	X			X			X	
Slovenia		X		X			X	
Sri Lanka	X					X		X
Taiwan		X		X				X
Ukraine		X		X			X	

Source: adapted from Choudhry and Stacey (2014: 64–65).

Notes: LEG. = legislature; PM = prime minister; PRES. = president. Shaded rows indicate countries with a president-parliamentary system. In systems where the prime minister appoints the cabinet, the cabinet members are either directly appointed by the prime minister or appointed by the president acting on the recommendation, proposal or nomination of the prime minister.

Government dismissal: reflections for Ukraine

Under the 1996 Constitution, both the president and the Rada possessed the authority to dismiss the government. Comparative experience argues strongly against a return to the president-parliamentary form of government. Indeed, the Kuchma period shows that a president with the power to dismiss the cabinet is less likely to cooperate with either the cabinet or the legislature. The 2004 Constitution amended article 85 § 12 to expressly confer on the Rada the exclusive power to dismiss the prime minister. The mechanism for exercising this power of dismissal remained the passing of a motion of no confidence (articles 87 and 115). Although Yushchenko's presidency was crippled by tensions and interinstitutional conflict, the 2004 Constitution provided for a distribution of dismissal powers that prevents presidential autocracy.

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 prime minister should be able to dismiss individual members of her or his cabinet without the need for legislative approval. Replacing these members should follow the existing methods for the appointment of the cabinet.



4.1.3. Presidential dissolution of the legislature

Dissolution is a drastic power with far-reaching implications. Despite the reflection above that the president should not have the power to dismiss the government, the presidential power to dissolve the legislature is nonetheless necessary because it provides a deadlock-breaking mechanism. If power sharing fails, the power to dissolve the legislature offers an opportunity to call new elections and begin the power-sharing experiment again (Roper 2002: 258).

A presidential dissolution power may also increase the incentives for power sharing when forming the government. If the president can nonetheless dissolve the legislature, it 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 (Shugart 2005: 334–35).

There is another reason for the presidential power of dissolution. A divided legislature 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 new elections is an important element of this role.

However, presidential abuse of the dissolution power could easily 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.

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 should contain three kinds of restrictions to establish a controlled and limited presidential power of dissolution: substantive triggers, temporal restrictions and procedural requirements.

Substantive triggers empower the president to dissolve the legislature only if certain specified events occur, and may be *discretionary* or *mandatory*.

The president may have the *discretion* to dissolve the legislature after a vote of no confidence in the government, or if the legislature fails to perform an ordinary function. As the president's dissolution power extends beyond government dismissal 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 discretionary dissolution and set strict rules regarding both the frequency of dissolution and the procedures for dissolution.

Non-discretionary or *mandatory* dissolution is intended to overcome the threats posed by the failure of a legislature to perform its most basic function of forming a government, either initially or after the dismissal of 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 for a presidential power grab. To guard against presidential autocracy, and to provide a better platform for stable government, constitutions instruct the president to dissolve the legislature and call new elections.

Temporal restrictions either limit how frequently a president can dissolve the legislature or prohibit the exercise of this power during certain periods, such as in states of emergency or immediately after an election.

These restrictions usually fall into two groups—those during periods of political crisis and those during normal periods of the legislature's or the 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. 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. Since there may be strong political incentives for a president to dissolve the legislature immediately after its election, in the hope of a more favourable legislative majority, 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). That would achieve the objectives of power sharing and presidential leadership. Conversely, Peru, for example, bars the president from dissolving the legislature during the last year of the legislature's term (article 134 of the Constitution of Peru). Dissolutions are prohibited during the last six months of the president's term in Belarus (article 94 of the Constitution of Belarus), Portugal (article 172 of the Constitution of Portugal) and Romania (article 89 of the Constitution of Romania). These temporal restrictions reduce the risk of a presidential coup d'état by ensuring that legislative and presidential elections take place. In the absence of 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 the power of dissolution multiple times for the same reason. In Austria, the president can dissolve the legislature only once for the same reason (article 29 of the Constitution of Austria).

Finally, constitutions should restrict how often the president can dissolve the legislature. Multiple dissolutions prevent the legislature from acting as a strong

check on executive power. To encourage power sharing, the Constitution should prohibit the president from dissolving the legislature more than once per year.

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. Well-drafted provisions will explicitly state that, upon dissolution, if elections are not held within the stipulated period, then the dissolved legislature is automatically reinstated. 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.

Presidential dissolution of the legislature: reflections for Ukraine

Presidential power to dissolve the legislature has caused debate during Ukraine's constitutional history. President Kuchma repeatedly called for the limited power of dissolution under the 1996 Constitution to be expanded. That was part of the contentious referendum of 2000. The 2004 amendments expanded the discretionary powers of dissolution, and President Yushenko sought to test the limits of that power during the major political crisis of 2007.

The president's discretion to dissolve the legislature should be 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 6 months) after the election of the legislature; dissolution allowed only once within a 12-month period; and no successive dissolution for the same reason.

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. Dissolution is to be followed by parliamentary elections within 40 to 50 days of dissolution. No changes to the electoral law or the Constitution may be made while the legislature is dissolved.

4.1.4. Presidential term limits

The limitation on the number of terms a president can serve is a simple but important way of limiting opportunities for a president to centralize power. Recent history is littered with attempts, both successful and unsuccessful, to evade term limits. There are three valuable lessons from comparative practice in this regard.

First, although term limits have been manipulated or outright ignored in many cases, their presence will, at a minimum, raise the political costs of over-staying (Ginsburg et al. 2010).

Second, given the temptation, and capacity, for incumbents to seek to evade term limits, the relevant provision(s) must be drafted as clearly as possible to avoid any possible loopholes. For example, it should be clear that the term limit applies to the individual and does not ‘reset’ in the event of constitutional change.

Third, term limits can take one of two forms: (a) limits on the total number of terms; or (b) limits on the number of consecutive terms. The experience of Russia shows that, in semi-presidential systems, prohibiting only consecutive terms allows incumbent presidents to rotate in and out of the presidency, using the position of prime minister as a temporary base from which to continue to control executive power.

Presidential term limits: reflections for Ukraine

An opportunity to win re-election, but with a fixed limit of two terms in total (consecutive or not) strikes a good balance between maximizing the benefits of retaining an experienced president and reducing the risk of presidential consolidation of power and autocratic presidential rule. Ukraine’s Constitution appears to fall somewhat short, since article 103 provides that ‘the same person shall not be the President for more than two consecutive terms’, creating the possibility that an individual could serve more than two non-consecutive terms. Ukraine should set a maximum of two terms for an individual to serve as president, whether those terms are successive or not.

4.1.5. Removal and impeachment

For the removal of sitting presidents, there are two procedures. Under the first, the president is impeached for crimes he or she is alleged to have committed 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. Under the second procedure, the president is removed 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 the

president with a crime. Such removal procedures are more flexible, and allow the legislature to exercise greater control over the functions of the president.

The president may be impeached, for crimes allegedly committed, by a supermajority of two thirds of the legislature (or the lower chamber in bicameral systems) in Bulgaria (article 103 of the Constitution of Bulgaria), Cabo Verde (article 132 of the Constitution of Cabo Verde), Croatia (article 105 of the Constitution of Croatia), the Weimar Republic (article 59 of the Constitution of the Weimar Republic), the former Yugoslav Republic of Macedonia (article 87 of the Constitution of the former Yugoslav Republic of Macedonia), Madagascar (article 131 of the Constitution of Madagascar), Mali (article 95 of the Constitution of Mali), Poland (article 145 of the Constitution of Poland), Portugal (article 130 of the Constitution of Portugal) and Sri Lanka (article 38(2) (a) of the Constitution of Sri Lanka). In Russia (article 93 of the Constitution of Russia), a two-thirds majority in both houses is necessary to impeach the president; in Senegal (article 101 of the Constitution of Senegal), 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 of the Constitution of Finland).

In other countries, a supermajority is not necessary to impeach the president. In Armenia (article 57 of the Constitution of Armenia), Niger (article 53 of the Constitution of Niger) and Slovenia (article 109 of the Constitution of Slovenia), 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 of the Constitution of Georgia). In Peru (articles 99 and 100 of the Constitution of Peru), the Standing Committee of Parliament brings criminal charges against the president, and a simple majority vote in the legislature approves them.

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 of the Constitution of Russia), 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 Cabo Verde (article 132 of the Constitution of Cabo Verde) and Finland (article 113 of the Constitution of Finland), an ordinary criminal prosecution and trial is held in the ordinary courts, and in Poland (article 145(3) of the Constitution of Poland) 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 of the Constitution of Croatia), the former Yugoslav Republic of Macedonia (article 87

of the Constitution of the former Yugoslav Republic of Macedonia), Niger (article 53 of the Constitution of Niger) and Slovenia (article 109 of the Constitution of Slovenia), the court's guilty verdict must be supported by a vote of two-thirds of the judges.

The following constitutions clearly state that the president is automatically removed from office upon a verdict of guilty—those of Bulgaria (article 103(3)), Cabo Verde (article 132(3)), Croatia (article 105), Madagascar (article 132), Niger (article 53) and Portugal (article 130(3)). In Niger, after the president is found guilty of treason (as defined in the Constitution) by the High Court, he or she is removed from office. The Constitutional Court declares the president's removal at the conclusion of High Court proceedings (article 142 of the Constitution of Niger). In other regimes, the legislature must decide whether or not to remove the president after a guilty verdict. This occurs if supported by a vote of two-thirds of the house in Armenia (article 57 of the Constitution of Armenia), Georgia (article 63(2) of the Constitution of Georgia) and Sri Lanka (article 38(2)(e) of the Constitution of Sri Lanka). In Poland, the president is suspended on the day the charges are put before the Tribunal of State (article 145 of the Constitution of Poland), and the Speaker of the legislature serves as acting president until the president is discharged by a decision of the Tribunal of State (article 131). In Peru, the legislature needs a simple majority vote to approve the removal of the president for crimes (article 100 of the Constitution of Peru).

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. 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' (article 93.1 of the Constitution of Russia). 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.

In contrast to impeachment proceedings, removal proceedings do not involve either a criminal 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 with 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 of the Constitution of Burkina Faso), the President may be removed from office by a vote in the legislature supported by four-fifths of its members. In Belarus (article 88 of the Constitution of Belarus), a

two-thirds majority in both houses of the legislature may remove the president. In Austria (article 60 § 6 of the Constitution of Austria), Iceland (article 11 of the Constitution of Iceland), Romania (article 95 of the Constitution of Romania), Slovakia (article 106 of the Constitution of Slovakia) and Taiwan (article 100 and additional article 2 of the Constitution of Taiwan), the president is removed by referendum (by a simple majority of voters) following a vote in the legislature to remove the president. The initial 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 of the Constitution of Lithuania), the president may be removed by a vote in the legislature that is supported by a three-fifths majority, and in Namibia (article 29 of the Constitution of Namibia) 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 of the Constitution of France). Once both chambers approve the removal 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) of the Constitution of Ireland), 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. The second house, on the conclusion of its investigation, can remove the president with a two-thirds majority vote.

Removal and impeachment: reflections for Ukraine

Under the Ukrainian Constitution (both the 1996 and 2004 versions), the impeachment procedure is 'initiated by the majority of the constitutional composition of the Verkhovna Rada' and the Rada 'establishes a special temporary investigatory commission whose composition includes a special procurator [i.e. prosecutor] and special investigators' (article 111). The next step in the procedure is that the Rada considers the conclusions and proposals of the commission and 'by no less than two-thirds of its constitutional composition, adopts a decision on the accusation of the President' (article 111). Finally, a decision to remove the president requires 'no less than three-quarters of [the Rada's] constitutional composition' after receiving the opinions of the Constitutional Court (on the constitutionality of the procedure) and the Supreme Court (on whether or not the alleged acts contain elements of state treason or other crime) (article 111).

Removal and impeachment: reflections for Ukraine (cont.)

Following the Euromaidan protests, the Rada impeached President Yanukovich in February 2014, but through a process that departed from the one specified by the Constitution. The legal basis for this move was the Rada's resolution on 23 February 2014, which determined that President Yanukovich had 'withdrawn from performing his constitutional duties' through his departure from Kyiv the day before, and on that basis conferred the powers of the president to the Chairman of the Parliament (Resolution No 764-VII 23, February 2014). The requirements of article 111 were not met: the President was not formally charged with a crime or constitutional violation, there was no review by the Constitutional Court and the final decision did not reach the required three-fourths majority (318 votes in favour, short of the 338 votes needed).

Ukraine should consider if the constitutional procedure for impeachment in its current form is too strict and includes too many steps. The simplified and hasty process by which Yanukovich was formally removed, however, should not be a model for impeachment, as it would not provide sufficient protection for the president from politically motivated removal.

The president must not be able to control or determine the composition of the institution that decides whether or not to impeach or remove the president—the Constitutional Court. The process must involve no more than three steps, and 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. Semi-presidentialism as a power-sharing mechanism in practice

There is no 'right' or 'wrong' way to frame the allocation of powers in semi-presidential constitutions. Much will depend on context, and specifically on the role envisaged for the president in terms of political leadership. Semi-presidential constitutions lay out three different models for such roles: (a) the principal–agent model; (b) the figurehead–principal model; and (c) the arbiter–manager model.

Under the principal–agent model, the leading example of which is Russia, the president enjoys explicit control over foreign and domestic policy (article 80 of the Constitution of Russia). 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.

Under the figurehead–principal model, the president is merely a ceremonial head of state and the prime minister controls the bulk of the policymaking process. Finland's 2000 Constitution, for example, adopts this model, in which

the directly elected president is just a little more than a ceremonial figurehead. Examples of this model in eastern Europe include Bulgaria, Slovakia and Slovenia. A potential risk with the figurehead–principal model is that a weak and marginalized president can seek to compensate for her or his limited powers with obtrusive behaviour, especially if the president’s popularity outweighs her or his formal powers. In Bulgaria, this dynamic was a basis for intra-executive conflict in the 1990s, when the constitutionally weak President Zhelev repeatedly challenged prime ministers (see Section 4.1.1). In general, the president and the prime minister should have stronger incentives to seek cooperation when there is a more balanced distribution of power between the government and the president and if the two executives share powers in particular policy areas.

Under the arbiter–manager model, the president serves 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 outlines considerations relevant to how the arbiter/manager model can keep strict limits on the president’s power over policy direction.

4.2.1. 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 in relation 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.

Domestic policy: reflections for Ukraine

The prime minister is responsible for domestic policy in all its functional areas. This power is exercised in the cabinet, after consultation with its members.

4.2.2. Foreign affairs

Affording the president a role in a country's foreign affairs and in representing the nation abroad is consistent with the principle that the president acts as 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.

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.

- **Option 1** follows the principal–agent model and envisages 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 wording of the Ukrainian Constitution (both 1996 and 2004) is less direct but states that the president shall 'administer the foreign political activity' (article 106), while the government ensures its 'implementation' (article 116).
- **Option 2** is more balanced, 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). The provision recognizes the president as the ultimate authority in foreign affairs but binds her or him operatively to the government (Nousiainen 2001). 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.
- **Option 3** follows the figurehead–principal model, in which the prime minister and cabinet are responsible for setting foreign and international relations policy, and the Minister for Foreign Affairs 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 of the Constitution of Iceland), but concludes international treaties on the country’s behalf subject to legislative approval (article 21).

- **Option 4** does not explicitly distribute power over foreign policy 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 squabbling 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 presidents of both 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 Option 2 (Poulard 1990: 261–62; Baylis 1996: 304, 313).

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. Some foreign affairs functions are more closely tied to the president’s role as a symbol of the nation and serve the principle of a ‘president as unifier’, 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, and may simply expand the president’s powers and undermine the principles of power sharing, limited presidential power and the arbiter–manager relationship, without serving the principles of presidential leadership and national unity.

Policymaking powers should not be assigned to the president, and should be closely controlled if they are. In addition to policymaking powers, this report considers three important powers and functions related to foreign affairs: appointing diplomats; negotiating and ratifying international treaties; and representing the nation.

1. *Appointment of diplomats.* Giving the president the power to appoint either diplomats or the Minister for Foreign Affairs allows her or him to indirectly set the state’s foreign policy. A scheme in which the president and prime minister jointly appoint ambassadors may 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 the Minister for Foreign Affairs, will influence the substance and direction of foreign policy.

2. *Negotiation and ratification of 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. 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 and 53). The Russian Constitution provides that the president has the power to sign treaties, but the legislature has the power to ratify and denounce treaties (article 86 § b and article 106 § d). Signing treaties is an important function of the president as a symbol of the nation, both internationally and domestically. A requirement of parliamentary approval of the president's decisions to enter into treaties serves as a check on her or his power and ensures that the president is not able to legislate by treaty and circumvent or undermine the legislative functions of the legislature.
3. *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. To prevent these types of international embarrassments, constitutions 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). Without such a provision, disagreements over international representation can cause intra-executive tensions to fester. For the president to act as a symbol of national unity, he or she alone should represent the nation abroad.

Foreign affairs: reflections for Ukraine

The Constitution of Ukraine provides the president with a range of formal powers. Coupled with a political norm that the president should have principal decision-making authority in shared areas of responsibility, the large bureaucratic resources at the disposal of the office of the president and a legislature which has been often weakened by fragmentation, they have created a system where the president has often functioned as the *de facto* chief executive in both foreign and domestic policy. This was most true under the president-parliamentary constitution, but has also been the case under the premier-presidential one and has resulted in repeated conflict over powers and policy domains.

Ukraine should consider a constitutional balance between presidential authority and government policy power. Finland's 2000 Constitution aimed to reduce the powers of the president and to condition the exercise of the president's remaining powers on the cooperation of the parliamentary government. Moreover, the introduction of European Union affairs into the Finnish political system in 1995 caused challenges for intra-executive relations. This was firmly set in the new Constitution by stating the government's authority also in matters of foreign and security policy. While article 93 recognizes the president as the ultimate authority in foreign affairs, it binds her or him operatively close to the government. The main forum for discussion and decisions is the ministerial committee chaired by the president, where the decisions are based on papers presented by the Minister for Foreign Affairs, rather than on unilateral statements by the president. Parliament is involved in approving the ratification of treaties and obligations of significance (Nousiainen 2001).

The president participates in setting policy in specific functional areas related to foreign affairs, defence and national security. The president's policymaking powers in these specific functional areas should be exercised in consultation with the prime minister, through a co-decision mechanism such as countersignature. The president should be empowered to exercise specified symbolic powers and to perform symbolic and representative functions. The prime minister and president should appoint ambassadors jointly. The president should negotiate and sign treaties, which would require legislative ratification before becoming binding or having domestic effect. The president should be the state's representative at international meetings and organizations.

4.2.3. Decree power

With regard to presidential decrees, 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. However, because the government

is directly accountable to the legislature and can be dismissed by no-confidence procedures, government decree powers raise fewer concerns about power consolidation and autocracy than do presidential decree powers.

There are two options for framing decree power. In the first option, the constitution gives the president the power to issue decrees in most areas, as long as decrees do not violate national law or the constitution. In the second option, 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. The second option will more effectively guard against autocracy and preserve the power-sharing relationship.

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, which do not conflict with national law, and only when the prime minister countersigns. Meanwhile, a constitution can guard against the aggrandizement of power in the office of 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.

Decree power: reflections for Ukraine

The Constitution (both 1996 and 2004) authorizes the president to issue decrees 'on the basis and for the execution of the Constitution and the laws of Ukraine' in her or his domains of power specified by article 106. Countersignature by the prime minister is explicitly required for appointments of diplomats and foreign representatives, the introduction of a state of emergency, declaring certain areas of Ukraine zones of an ecological emergency, and decisions of the NSDC put into effect by decrees of the president (article 107).

President Kuchma—just like President Yeltsin in Russia—was eager to use his decree powers, especially in the areas of appointment and policy, as a way to influence the political process. The excessive use of decrees in Ukraine in the 1990s and early 2000s partly undermined parliament and the policymaking process as a whole. Pursuant to Transitional Provision 4 of the 1996 Constitution, the president was granted the authority, for a period of three years, to issue decrees (countersigned by the prime minister) on economic issues not covered by formal laws. The president had to submit a bill on the matter to the Rada simultaneously. Such decrees took effect if the Rada failed to adopt or reject a bill in 30 days.

Decree power: reflections for Ukraine (cont.)

Decree powers were also used and misused during the post-Orange Revolution period, 2004–2010. For example, the weakness of President Yushchenko’s parliamentary support forced him to rely on constitutional prerogatives, such as decree powers, which he used frequently in order to influence policy. This caused tensions within the executive, and Prime Minister Yanukovich repeatedly rendered presidential decrees nugatory by simply refusing to countersign them (Hale 2015; O’Brien 2010: 363–64).

The Constitution should expressly enumerate the areas in which the president, the prime minister and the cabinet can issue decrees. The prime minister’s countersignature should be required on all presidential decrees. The president’s countersignature should be required on all prime ministerial regulations.

4.2.4. Chairing 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.** The prime minister or the president holds the authority to chair cabinet meetings.
- **Option 2.** The president holds a reserved right to chair cabinet meetings in specific areas of presidential competence, while the prime minister holds a residual right to chair cabinet meetings.

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 her or 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 Option 1 (article 9 of the Constitution of France). 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 legislature tabled and passed the bill one week later, Chirac's move was a symbolically important act (Elgie 2002: 303).

Chairing the cabinet: reflections for Ukraine

Article 114 (both 1996 and 2004 Constitutions) stipulates that the 'Prime Minister of Ukraine manages the work of the Cabinet of Ministers and directs it for the implementation of the Programme of Activity' approved by the Rada. Yet the president has important powers over foreign affairs, security and defence policy. Article 107, for example, states that the president chairs the NSDC, which is the coordinating body on security and defence (the prime minister, the Minister for Internal Affairs, the Minister for Defence, the Minister for Foreign Affairs and the Head of the Security Service are ex officio members of the Council).

Given that the President of Ukraine also possesses quite considerable decree powers (Section 4.2.3) as well as significant veto powers (Section 4.2.5), he or she should not chair cabinet meetings. However, should Ukraine consider limiting the president's decree and veto powers, there would be reason to also consider an extension of the president's rights to chair cabinet meetings, in order to enhance power sharing. The president should have the power to chair cabinet meetings in specific areas of her or his competence, but only if the president lacks strong decree powers and is not empowered to dismiss the prime minister or other ministers.

4.2.5. Veto power

When designed correctly, a presidential veto power can encourage cooperation and negotiation between the parties or interests that the president and prime minister represent. 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.

However, where a veto power operates in such a way that a president can easily prevent the legislature from making law, a new legislature may be stunted in its development and prevented from growing into an institution capable of fulfilling legislative and oversight roles.

There are two main dimensions along which presidential veto powers vary. The first revolves around the scope of the veto power. 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). The two options available in each of the two variations produce four options for designing veto powers.

- **Option 1.** A line-item or amendatory veto that is subject to supermajority override may allow the president to dominate the legislature and ensure that bills unfavourable to the president or the president's party never become law. This problem is compounded if the president has an absolute veto, since he or she can decide which parts of draft bills will become law. In a post-authoritarian context, it is important that a new legislature be 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.
- **Option 2.** A line-item or amendatory veto that is subject to override by the originally required legislative majority, is a more favourable alternative for serving the principle of power sharing and preserving a meaningful role for the legislature. 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 her or his 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 upholds the normative principles relevant to this context. However, if the president possesses strong decree and policy powers (which can be exercised in the absence of legislation), Option 2 should not be considered.
- **Option 3.** A straight up-or-down veto, without line-item or amendatory veto powers, that is subject to supermajority override represents a good balance in principle. However, in Ukraine, where parliament has often been fractured and polarized, 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 therefore unsuitable for Ukraine.
- **Option 4.** A straight up-or-down veto that is subject to override by the originally required legislative majority ('suspensive veto') represents an acceptable alternative to Option 2. The low thresholds (as required in a suspensive veto), however, may ensure that a president is largely excluded

from the policymaking and legislative process. If the president's decree and policy powers are also strictly limited, this option does not serve the principle of power sharing. Therefore, Option 4 is most appropriate under conditions where the president also holds decree and policy powers.

Veto power: reflections for Ukraine

In Ukraine, the president holds line-item and amendatory veto powers (article 94). This has allowed the president to significantly alter the content of the country's laws and alter legislation to suit her or his interests and preferences. With the requirement of a two-thirds majority of the membership of the Rada to override the president's veto, Kuchma heavily relied on his veto powers during his presidency. Furthermore, 'in instances where enough votes were mobilized to override the veto, Kuchma used other tactics, such as not signing the newly adopted bill, to prevent laws from coming into force' (Protsyk 2005: 25).

The president should have a straight up-or-down veto that the legislature can override by the majority that was required to pass the original legislation (suspensive veto). If the president's decree and policy powers are strictly limited, 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.

5. Additional constitutional design considerations of specific relevance to Ukraine



Chapter 4 focused on the structure and allocation of powers in semi-presidential constitutions. In doing so, the report presented the critical, general considerations across all semi-presidential forms of government. There are, however, issues of particular and compelling importance for Ukraine, which deserve additional discussion. These include territorial organization of executive power (territorial organization of executive power); potential consequences of bicameralism; constitutional amendments; the NSDC; and referendums. This chapter briefly frames these issues and raise questions for discussion.

5.1. Territorial organization of executive power

Decentralization reforms have been high on the political reform agenda for many years in Ukraine, particularly since the 2013–14 revolution.

A broader discussion of the full range of issues relating to political and fiscal decentralization is beyond the scope of this report. We focus on the juncture between decentralization and semi-presidential power sharing, with a particular focus on the appointment of regional executives (e.g. prefects). The power to appoint regional executives speaks to the broader conceptualization of the roles and responsibilities of president versus prime minister (and cabinet). It also has significant practical consequences as an informal source of power, through the allocation of patronage.

There are two principal sets of questions about decentralization in semi-presidential systems that are geared towards sharing power within the dual

executive. First, what kind of relationship will exist between the subnational entity and the centre? That is, what will be the balance between regional autonomy and central control and oversight? Second, how will responsibilities with regard to subnational entities be divided between the president and the prime minister with respect to decentralization?

The first question raises a number of issues that are beyond the scope of this report. We note that decentralization of power is likely to lower the stakes for struggles over power at the centre, by strengthening multiple pyramids of power. With respect to the second question, there are two major design choices to consider: who appoints regional executives (assuming they are not to be elected or appointed at the regional level) and who provides oversight for the regional government?

Consider two comparative examples. In Poland, the prime minister has the power to appoint and dismiss the heads of regional state administrations (*voivods*) based on the recommendation of the Minister for Public Administration (Law on Voivod and State Administration in a Voivodship 2009: article 6 § 1). The prime minister may repeal acts of the *voivod* if they are incompatible with existing law or with the policy of the Council of Ministers, or if they ‘breach the principles of fairness and thriftiness’ (article 61). In this way, the *voivods* are very much agents of the prime minister and cabinet, and have no direct interaction with the president (although the reality would be different under cohabitation). Likewise, in France, regional prefects are appointed/dismissed by the Council of Ministers and, under the Constitution, are responsible for national interests, administrative supervision and compliance with the law (article 72 of the Constitution of France). Prefects have seen their powers over decision-making at the regional level diminish over time; those are also powers that are limited by *ex posteriori* central control on legality and issues of national security.

Territorial organization of executive power: reflections for Ukraine

Heads of local state administration are appointed, and dismissed, by the president upon the submission of a proposal by the cabinet (article 118 § 4). They ‘are responsible to the President of Ukraine and to the Cabinet of Ministers of Ukraine, and are accountable to and under the control of bodies of executive power of a higher level’ (article 118 § 5). Proposed draft amendments to the Constitution (Draft Law No. 2217a of 1 August 2015 on Decentralization) would create a new post, the prefect, who would oversee the activities of local self-governing bodies and territorial bodies of the central executive bodies. Prefects would be appointed and dismissed by the president, at the request of the cabinet. Prefects would be responsible to the president (as regional heads of state administrations are at present) and would be accountable to and supervised by the cabinet.

Territorial organization of executive power: reflections for Ukraine (cont.)

Since presidential authority should be limited in the domestic policy context, the cabinet alone should have control over the appointment and dismissal of prefects. For the same reason, the cabinet should have sole oversight of regional governments. There should be a third party to adjudicate legal disputes between regional and central governments (e.g. the Constitutional Court).

5.2. Potential consequences of bicameralism

Previous efforts to establish a second chamber (i.e. a senate) in Ukraine—in order to enhance the participation of the regions in the national legislative process—have been met with fears that bicameralism would strengthen the hand of the president by further weakening the lower house, which forms the power base for the prime minister (Fisun 2016). A full assessment of bicameralism is not possible without first understanding the composition and powers of the proposed second chamber, as well as the underlying principle shaping both.

Consistent with the constitutional principle of executive leadership proposed in Chapter 3, however, and in the light of the fragmented and divided nature which has characterized the Ukrainian parliament to date, any arguments in favour of establishing of a second chamber should be weighed against the fear of increased deadlock and delay in the passing of legislation, and the resulting strengthening of the power of the president.

5.3. Constitutional amendments

There are two issues to consider with regard to constitutional amendments and the design of semi-presidentialism. First, what should be the involvement of the president in the initiation of constitutional amendment proposals? Second, what should be the president's role in the adoption of constitutional amendments?

With regard to the comparative practice of the presidential power to propose constitutional amendments, there are a variety of approaches. In Croatia and Poland, the president may submit a bill to amend the Constitution, while in Kyrgyzstan and Portugal the president does not have the right to initiate a proposal for constitutional amendment. In France, the president can do so only on the recommendation of the prime minister.

Generally, comparative practice does not accord presidents any formal role in approving (or rejecting) constitutional amendments if they have been passed by the requisite parliamentary or referendum procedures. However, in Poland the president has the discretion to refer amendments passed by parliament on certain,

specified subjects to a referendum; and in Tunisia the president can refer any amendment passed by parliament to referendum.

Constitutional amendments: reflections for Ukraine

The involvement of the president in initiating proposals for constitutional amendments contains inherent risks. Presidents in eastern and central Europe and the former Soviet republics have often resorted to the strategy of challenging the legitimacy of the existing constitutional framework and enlarging presidential power through proposing constitutional reforms. Examples include Ion Iliescu in Romania, Petru Lucinschi and Mircea Snegur in Moldova, Alyaksandr Lukashenka in Belarus, Nursultan Nazarbayev in Kazakhstan, Lech Wałęsa in Poland and Boris Yeltsin in Russia.

In Ukraine, the president has the authority to unilaterally propose a constitutional amendment (article 154). As in other former Communist dictatorships, in Ukraine successive presidents have sought to use the constitutional amendment process as a mechanism to expand their own power, for example President Kuchma in 2003–04 and President Yushchenko in 2009. However, approval of constitutional amendments requires adoption by the Rada and, in some cases, approval by referendum. With respect to formal amendment procedures, the constitutional thresholds for amendment have thus far been sufficiently robust to prevent any one-sided *autogolpe* from augmenting presidential powers.

The president should not retain the right to initiate constitutional amendment proposals. The president should continue to lack any role in approving constitutional amendment proposals that have been approved by the requisite parliamentary majority and/or referendum.

5.4. National Security and Defence Council

The divided nature of the dual executive at the heart of semi-presidential constitutions can pose challenges for the civilian oversight of the military. In semi-presidential systems, there can be ‘at least three major actors, and very often four: the president, the prime minister, the minister of defense and generally a joint chief of staff . . . the hierarchical line that is so central to military thinking acquires a new complexity’ (Linz 1994: 57).

At the same time, aligning oversight of the security forces too closely with one actor (usually the president) may result in partisan abuse of the security sector agencies, which are co-opted to become protectors of the regime, rather than of the nation. Perhaps nowhere is the tension so apparent between the constitutional principles of power sharing and executive leadership.

An institutional option to mitigate potential conflict between the president and prime minister can be through a national security and defence council. Constitutions increasingly provide for these institutions. A principal goal of these bodies is to coordinate institutions in different sectors (military, police, intelligence services) with distinct missions and scopes of activity. A risk created by these bodies is that they permit a small group of civilian officials to create a total security strategy that could lead to the partisan abuse of the security sector against the political opposition. However, a possible benefit of such an institution in a semi-presidential system could be to facilitate transparency, consultation and joint decision-making between the president and prime minister, in order to check abuse and build trust.

National Security and Defence Council: reflections for Ukraine

In Ukraine, article 107 of both the 1996 and 2004 Constitutions creates an NSDC, chaired by the president. The prime minister serves *ex officio*, as do the two cabinet ministers appointed by the president—the Minister for Defence and the Minister for Foreign Affairs—and the Minister of Internal Affairs. Its overall goal is to coordinate and oversee national security and defence across ministries. Under the Constitution, the president has special authority for national security, exercised directly and through the Ministers for Defence and Foreign Affairs. The inclusion of the prime minister in the council can be understood as a power-sharing device to guard against presidential control.

The specific powers and functions of the NSDC are determined by law (article 107 § 8), specifically the Law on the Fundamentals of the National Security of Ukraine (2003). It defines national security very broadly, and far beyond the strict confines of defence and internal security. In combination with the president's constitutional power to effect decisions of the NSDC through decree (article 107 § 7 of the Constitution), this law effectively converts the NSDC into a parallel government that can bypass both the cabinet and the Rada. The definition of national security should be narrowed. If Ukraine resorts to a system of prime ministerial appointment for all cabinet members, this should affect the allocation of power between the prime minister and the president over national security and defence, including the design and operation of the NSDC.

5.5. Referendums

Referendums can allow popular ratification (or rejection) of important decisions, giving the public a direct voice in democracy. However, they bypass legislative deliberation, and in semi-presidential contexts can allow populist presidents to

circumvent, rather than negotiate with, the prime minister and legislature. Indeed, this was the experience of Russia in 1993 under President Yeltsin, and France through successive referendums under President de Gaulle in the 1960s.

In some countries (e.g. Russia), the president has unfettered power to call a referendum unilaterally, whereas in others the president must seek some degree of legislative support before calling a referendum. For example, Poland requires the support of a majority in the Senate with a 50 per cent quorum. In France, the Constitution makes the presidential power to call a referendum conditional on a request from the government or a joint motion of the National Assembly and the Senate; alternatively, one-fifth of the members of parliament supported by one-tenth of registered voters can bring a referendum directly to the public. When the president's party also controls the National Assembly, the president can bypass parliamentary debate in proposing a referendum.

In Ukraine, the president can initiate a referendum in two circumstances—a referendum on a popular initiative, and a referendum regarding proposed constitutional amendments, after these proposed amendments have been adopted by parliament with not less than 300 votes. The president's power to initiate a referendum on a popular initiative is a threat to Ukrainian democracy, because it allows her or him to circumvent other government institutions, through the effect of the Law on National Referendum (2012). This law, which allows the president to use a referendum to adopt any law or constitutional amendments without the consent of parliament, is regarded as unconstitutional but is still in force. A constitutional challenge to the law has been pending before the Constitutional Court for three years.

Referendums: reflections for Ukraine

Article 72 (under both the 1996 and 2004 Constitutions) grants the president the power to call a referendum. Allowing the president the power to call referendums, all else being equal, moves a semi-presidential system away from the arbiter/manager model towards the principal/agent model of presidential leadership. Such a power could serve as an important agenda-setting tool for the president. Even the threat of a referendum can be enough to tilt the balance of power away from effective power sharing, or even attenuation of presidential power, in the president's favour. The president should no longer have the power to call referendums. Alternatively, the president should be able to exercise that power only under well-defined and limited circumstances.

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About the organizations



International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<<http://idea.int>>



The Center for Constitutional Transitions

The Center for Constitutional Transitions (CT) generates and mobilizes knowledge in support of constitution building by assembling and leading international networks of experts to produce evidence-based policy options for decision-makers and agenda-setting research, in partnership with a global network of multilateral organizations, think tanks, and NGOs. We have worked with over 50 experts from more than 25 countries. CT's current projects are: Security Sector Reform & Constitutional Transitions in New Democracies; Dealing with Territorial Cleavages in Constitutional Transitions; Security Sector Oversight: Protecting Democratic Consolidation from Authoritarian Backsliding & Partisan Abuse; and Semi-Presidentialism & Constitutional Instability in Ukraine.

<<http://www.constitutionaltransitions.org>>

The Centre of Policy and Legal Reform

The Centre of Policy and Legal Reform (CPLR), a Ukrainian think tank established in 1996, works to promote institutional reforms in the field of rule of law, responsible government and active grassroots participation in decision-making processes. The CPLR works through research, policy advising, monitoring of public decision-making and civic education. The work of the CPLR is focused on the following policy areas: constitutionalism, public administration, the judiciary and criminal justice. The issues of human rights, combatting corruption and gradual adaption of the Ukrainian legal system to the standards of the European Union are cross-cutting themes throughout all policy areas. The centre's expertise is frequently used by international organizations working in Ukraine, and think tanks and civil society groups in and outside Ukraine.

<<http://pravo.org.ua/en/>>

This report assesses the ways in which the semi-presidential form of government can be best structured to promote stable, democratic and inclusive governance in Ukraine.

Constitutional stability in Ukraine has faced four main challenges: (a) recurring institutional conflict among the president, legislature and government; (b) a presidency that has fallen prey to autocratic tendencies; (c) a fragmented and weak party system that has undermined the capacity of the legislature to act coherently; and (d) a weak constitutional culture and a weak Constitutional Court.

The report presents comparative knowledge from other semi-presidential systems, and reflections on the Ukrainian context, which could benefit a wide range of stakeholders, such as legislators, policy advisors, think tanks and civil society. It is based on an earlier report, *Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring*, co-published by International IDEA and the Center for Constitutional Transitions in 2014.

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