A Practical Guide to Constitution Building:

The Design of the Executive Branch

Markus Böckenförde

This paper appears as chapter 4 of International IDEA's publication *A Practical Guide to Constitution Building*. The full Guide is available in PDF and as an e-book at <http://www.idea.int> and includes an introductory chapter (chapter 1) and chapters on principles and cross-cutting themes in constitution building (chapter 2), building a culture of human rights (chapter 3), constitution building and the design of the legislature and the judiciary (chapters 5 and 6), and decentralized forms of government in relation to constitution building (chapter 7).

International IDEA resources on Constitution Building

A Practical Guide to Constitution Building: The Design of the Executive Branch

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Foreword

The oldest constitutions in the world were framed in the 17th century and have been described as revolutionary pacts because they ushered in entirely new political systems. Between then and now, the world has seen different kinds of constitutions. Quite a number following the end of the cold war in 1989 have been described as reformatory because they aimed to improve the performance of democratic institutions.

One of the core functions of any constitution is to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose. But constitutions neither fall from the sky nor grow naturally on the vine. Instead, they are human creations and products shaped by convention, historical context, choice, and political struggle.

In the democratic system, the citizen claims the right of original bearer of power. For him or her, the constitution embodies a social contract that limits the use of power by government to benefit the citizen in exchange for his or her allegiance and support. The term 'constitutionalism' sums up this idea of limited power.

At the same time, the core importance of constitutions today stretches beyond these basic functions. Constitutions come onto the public agenda when it is time to change to a better political system. People search for constitutions that will facilitate the resolution of modern problems of the state and of governance. Today, these problems are multifaceted and increasingly global—from corruption to severe financial crises, from environmental degradation to mass migration. It is understandable that people demand involvement in deciding on the terms of the constitution and insist upon processes of legitimising constitutions that are inclusive and democratic. The term 'new constitutionalism' has entered the vocabulary of politics as further testament to this new importance of constitutions. Its challenge is to permit the voices of the greatest cross section of a society to be heard in constitution building, including women, young people, vulnerable groups and the hitherto marginalized.

Conflict still belies constitutions. Older constitutions were the legacy of conflict with colonialism; newer constitutions have aimed to end violent internecine rivalry between groups with competing notions about the state and to whom it belongs. Certainly, these new constitutions are loaded with the expectation that they will herald a new era of peace and democracy, leaving behind authoritarianism, despotism or political upheaval.

Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world. This would have taken longer without the role of international organizations, in particular the United Nations and others such as International IDEA. It is noteworthy that declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability—all of them important ingredients of any constitutional system. Shared values

permit organizations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections.

I encourage constitution builders to take advantage of the lessons and options that other countries and international agencies can offer. There is little need to reinvent the wheel to deal with issues such as incorporating human rights in constitutions, guaranteeing the independence of the judiciary, subsuming security forces under civilian democratic control, and guaranteeing each citizen the exercise of a free, fair and credible vote. The mistake is to believe that this superficial commonality justifies a blueprint approach to framing constitutions.

The idea of shared norms and values should not discount the fact that constitution builders have been learning by doing. Each instance of constitution building will present tough issues to be resolved, for instance what to do with incumbents who refuse to leave power and use all means in order to rule. The concentration of power observed recently by Mikhail Gorbachev in his assessment of the world today after the legacy of the 1990s is indeed a real threat to constitutional democracy everywhere.

The world is changing at a rapid pace. The constitution builder today has an advantage lacked by his or her predecessor. National constitutions have become a world-wide resource for understanding shared global values and at the click of a button information technology permits an array of constitutional design options to be immediately accessed.

What this new Guide from International IDEA offers actors who are engaged in the constitution-building process is a call for more systematic ways for reviewing constitutions and an emphasis that there are neither inherently stable or superior constitutional systems nor one-size-fits-all formulas or models. The Guide highlights the fact that each country must find its own way in writing its own constitution. Furthermore, designing a constitution is not a purely academic exercise in which actors seek the best technical solution for their country. The drafters and negotiators of constitutions are political actors aiming to translate their political agendas into the text of the constitution. Thus, the constitutional documents that result are rarely the best technical option available, but the best constitutional compromise achievable.

The Guide aims to enhance debates in the search for a model that reflects the needs of a particular country as the result of a political compromise. Addressing constitution builders globally, it is best used at an early stage during a constitution-building process. It supplies information that enriches initial discussions on constitutional design options and will prove extremely useful as an introduction to the understanding of the complex area of constitution building.

The world may soon witness a regional wave of democratic constitution building as a result of the current dynamics in the Arab world. Thus, this Guide is published at a timely moment.

Cassam Uteem,
former President of Mauritius

Preface

In recent decades countries from all continents have reframed their constitutional arrangements—in the last five years alone Bolivia, Ecuador, Egypt, Iceland, Kenya, Myanmar, Nepal, Sri Lanka, Sudan, Thailand and Tunisia have all been involved in one stage or another in a constitution-building process. In the aftermath of the people-led uprisings in the Arab world in 2011, constitution building is set to play a fundamental role in creating sustainable democracy in the region.

Constitution building often takes place within broader political transitions. These may relate to peace building and state building, as well as to the need for reconciliation, inclusion, and equitable resource allocation in a post-crisis period. Many constitutions are no longer only about outlining the mechanics of government, but also about responding to these broader challenges in a way which is seen as legitimate and widely accepted. As the demands placed on constitutions have increased, they have often become complex and lengthy, and hence more challenging to design, as well as implement. As a result, those involved in shaping constitutions require access to broad, multidisciplinary and practical knowledge about constitution-building processes and options.

The sharing of comparative knowledge about constitution building is one of International IDEA's key areas of work, and this publication draws together this comparative knowledge and expertise for the first time in a *Practical Guide to Constitution Building*, which has been carefully compiled by expert authors.

This publication aims to respond to the knowledge gaps faced by politicians, policymakers and practitioners involved in contemporary constitution building. Its principal aim is to provide a first-class tool drawing on lessons from recent practice and trends in constitution building. It is divided into chapters which can be read as individual segments, while the use of a consistent analytical framework across each chapter provides a deeper understanding of the range of issues and forces at play in processes of constitutional development.

The *Practical Guide to Constitution Building* reflects how fundamental constitution building is to the creation of sustainable democracy. Constitution building is a long-term and historical process and is not confined to the period when a constitution is actually written. While focusing on constitutions as key documents in themselves, this publication stresses understanding constitutional systems as a whole, including the relevant principles (chapter 2) and the need to build a culture of human rights (chapter 3), as well as the provisions for institutional design (chapters 4 to 6) and decentralized forms of government (chapter 7). It does not offer a blueprint or model for constitutions, but draws lessons from recent practice and knowledge. Among those lessons is that constitutions may well say one thing on paper but work differently in practice.

I would like to express my sincere gratitude to the authors, to the practitioners who contributed insights derived from their experience, and to the government of Norway for its support. *A Practical Guide to Constitution Building* would not have become a reality without them.

Vidar Helgesen
Secretary-General, International IDEA

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Contents

The Design of the Executive Branch

1. Introduction

The executive branch is one of the three branches of government, which are central to the institutional design of a constitution. The allocation of powers and the interrelation between the three branches of government—the executive, the legislature, and the judiciary—are key elements of such a structure. Beyond the broad and general distinction that the legislature makes the laws and approves the budget, the executive implements the laws, and the judiciary adjudicates on laws, many questions need to be addressed and answered in order to design the appropriate balance between the three. The extent to which these branches should be separated from one another and the different degrees of reciprocal checks and controls between them are a source of constant debate in the process of drafting a new constitution or reforming an existing one. Thus, the design of the executive branch cannot be discussed in clinical isolation, but requires an understanding of the governmental structure within which it operates.

Before addressing design options for the executive in more detail, a brief overview of the interrelation of the three branches seems helpful. In particular, the institutional balance between the executive and the legislative branches of government offers a variety of different arrangements and design options. People who study and debate constitutions often sort the wide array of systems into three categories: the presidential system, the parliamentary system, and, in between the two, with characteristics of both, the mixed systems. The elementary difference between the presidential and parliamentary system is that in a presidential system the legislature and the head of government are both

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The allocation of powers and the interrelation between the three branches of government, the executive, the legislature, and the judiciary, are key elements of institutional design of a constitution. Each constitution designs its own specific and context-related balance between the three.

directly elected for a fixed term, whereas in a parliamentary system only Parliament is directly elected, and the head of government is selected or elected by Parliament and requires its constant support. Other distinctions between systems can be made, but opinions vary as to whether these distinctions support the classification of a given system as presidential, parliamentary, or semi-presidential.

2. Systems of government and their impact

One central issue in democratic constitution building and constitutional design is the framing of the state structure.

Generally, constitutions do not expressly declare that they have adopted a presidential, parliamentary or mixed system. Instead, each constitution designs its own specific and context-related balance between the two branches of government, and political scientists then categorize them as following a specific model design. Since different scholars rely on different parameters to define those models, a number of countries are categorized differently by different authors. This vagueness makes it very difficult, if not impossible, to argue reliably the potential strengths and weaknesses of one system.[1] Acknowledging this caveat, the following paragraphs briefly introduce the systems and give a general overview. Those characteristics that are commonly acknowledged as a generally accepted parameter to describe a specific system of government are indicated in bold type in boxes 1–3. Criteria that are often referred to by some observers but which others regard as irrelevant are also added though they are not considered defining elements of the respective governmental system.

The quest for a stable, democratic constitution to establish peace and functioning government is often accompanied by an evaluation of the relative merits and consequences of different systems of government.

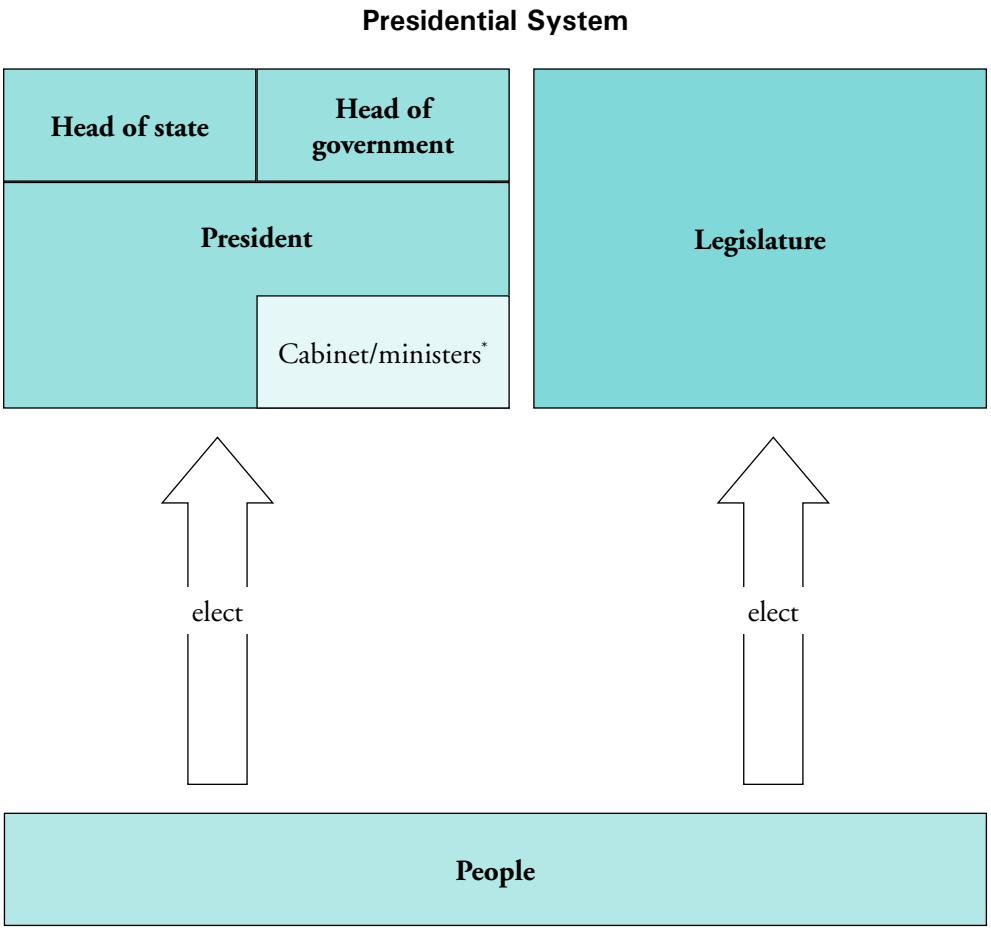
2.1. A presidential system

Box 1. Characteristics of a presidential system of government

The key characteristic of the presidential system is that the executive and legislature are separate agents of the electorate, and their origin and survival are thus separated (which creates the possibility of an impasse between the two without a constitutionally available device to break the impasse).

- **The President is both the head of state and the head of government.**
- **The President is elected by popular vote (or by an intermediate institution that carries out the popular preferences).**
- **The President's term of office is fixed (there is no vote of no provision for a confidence). S/he is neither politically accountable to the legislature nor dependent on his/her party's support to stay in office.**
- Generally, the Cabinet derives its authority exclusively from the President.
- Often, the President has some political impact in the process of law-making.

Figure 1. A presidential system of government



* Ministers are generally appointed and dismissed by the President.

Source: Adapted from Diehl, Katharina, et. al. Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution, 2nd edn (Max Planck Institute, 2009)

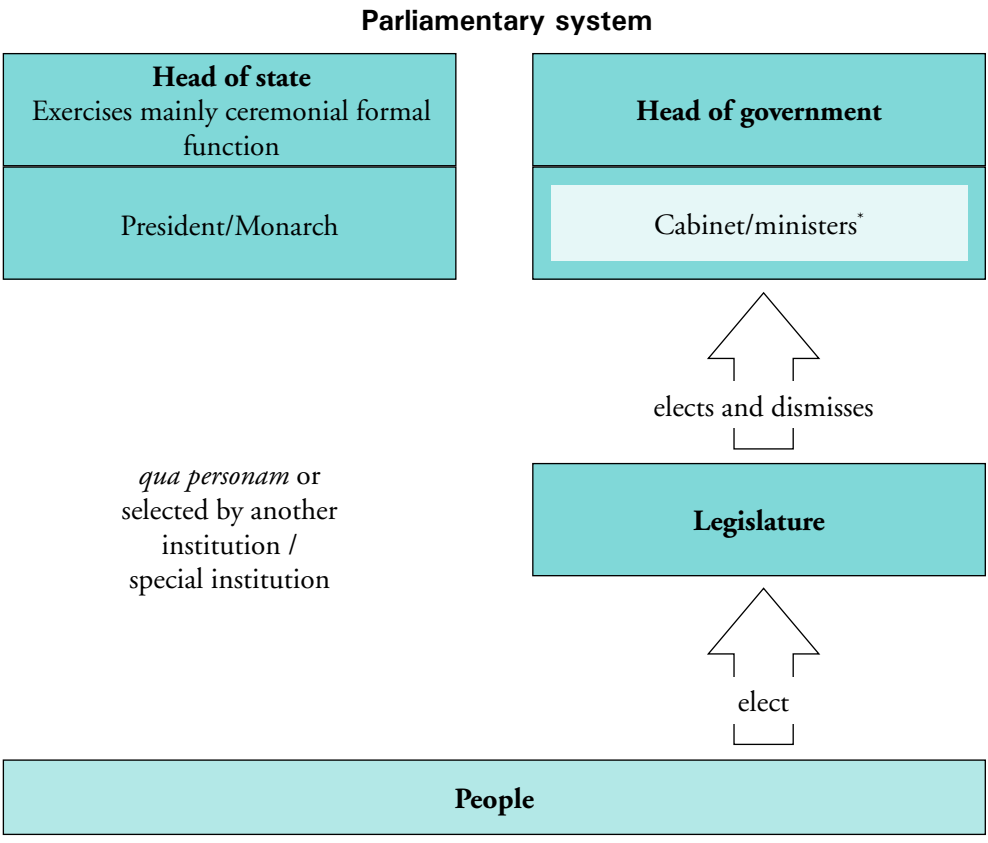
2.2. A parliamentary system

Box 2. Characteristics of a parliamentary system of government

The key criterion is the fusion of powers: the executive is hierarchically subordinated to the legislature, thus its origin and survival depend on the legislature.

- **The head of government is elected by the legislature.**
- **The head of government is accountable to Parliament (through a vote of no confidence) and dependent on his/her party's support.**
- Generally, the head of state (often a monarch or ceremonial President) is not the same person as the head of government.

Figure 2. A parliamentary system of government



* Ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from: Diehl, Katharina, et. al. Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution, 2nd edn (Max Planck Institute, 2009)

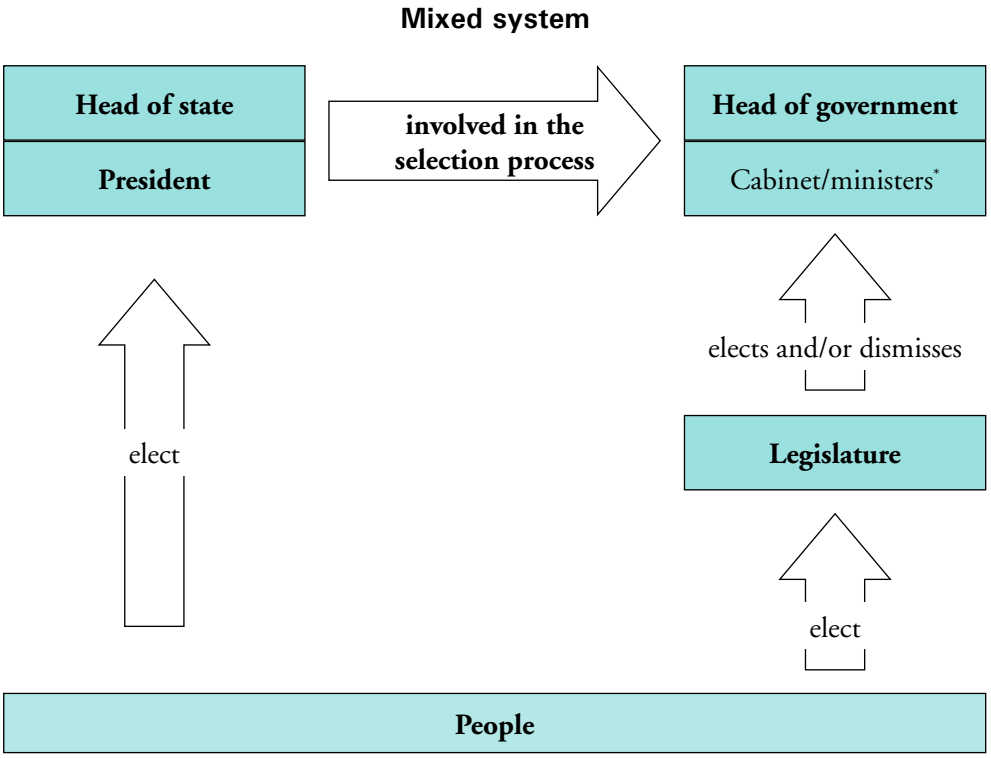
2.3. A mixed system (often referred to as a 'semi-presidential system')

Box 3. Characteristics of a mixed system of government

The key characteristic of a mixed system is a dual executive. It combines a transactional relationship between the executive and the legislature with a hierarchical one.

- **The President, who serves as the head of state, is elected by popular vote.**
- **Neither the President nor the legislature is in full control of selecting/appointing and removing the Prime Minister.**
- The Prime Minister as the head of government is accountable to Parliament (through a vote of no confidence).
- Generally, the President possesses quite considerable executive powers.

Figure 3. A mixed system of government



* Ministers might be part of the appointment / dismissal process that applies for the head of government; or ministers are either appointed/dismissed by the head of government, sometimes subject to legislative approval.

Source: Adapted from: Diehl, Katharina, et. al. Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution, 2nd edn (Max Planck Institute, 2009)

2.4. Potential strengths and challenges of different systems of government

Constitution builders are expected to design a constitution that provides peace, stability, reconciliation and (often) a democratic transition as well as capable governments that are effective and do not abuse their powers. The quest for the appropriate system of government is thus often accompanied by evaluating the relative merits and consequences of the respective systems of government to reach those ends. Indeed, a vast literature exists that explores the strengths and challenges of each system. Table 1 illustrates the strengths that are commonly attributed to the respective systems of government and the challenges associated with each.

Table 1. The potential strengths of and challenges to different systems of government

	Strengths	Challenges
Presidential system	**Direct mandate.** The direct mandate provides citizens with more choices, allowing them to choose a head of government and legislative representatives who can more closely reflect their specific preferences; furthermore, it provides citizens with a more direct mechanism by which to hold the executive accountable. **Stability.** Fixed terms of office for the President provide more predictability and stability in the policymaking process than can sometimes be achieved in parliamentary systems, where frequent dismantling and reconstructing or Cabinet instability might impair the implementation of governmental programmes and destabilize the political system. **Separation of powers.** The executive and the legislature represent two parallel structures, allowing each to check the other. It also provides more freedom to debate alternative policy options, since opposition to the government does not endanger the survival of the government or risk the calling of new elections.	**Tendency towards authoritarianism.** Due to the 'winner-takes-all' nature of presidential elections, presidents are rarely elected with more than a slim majority of voters, but gain sole possession of the nation's single most prestigious and powerful political office for a defined period of time. Despite sometimes thin margins of majority support, the sense of being the representative of the entire nation may lead the President to be intolerant of the opposition, inclining him or her to abuse executive powers in order to secure re-election, or even create a feeling of being above the law. **Political gridlock.** Dual legitimacy often results in political stalemate if the President does not have the required majority to get his/her agenda through the Parliament.

Parliamentary system	**Inclusiveness.** A parliamentary system may offer the possibility of creating a broad and inclusive government in a deeply divided society. **Flexibility.** The head of government can be removed at any time if his/her political programme no longer reflects the will of the majority; the head of government might call new elections if s/he lacks the support of Parliament. **Effectiveness.** The legislative process might be faster since no political veto of the executive retards or blocks the process.	**Instability.** Government could collapse by majority vote; coalition governments especially might have difficulty sustaining viable cabinets. **Lack of inherent separation of powers.** Parliament may not be critical of the government due to the intimate relationship; in turn, there is a risk that the government may not be able to introduce bold policies and programmes for fear for being ousted.
Mixed system	**Inclusiveness.** A mixed system can allow for a degree of power sharing between opposing forces. One party can occupy the presidency, another can occupy the premiership and, thereby, both can have a stake in the institutional system. In a best case scenario, it might combine some of the strengths of both the other systems.	**Stalemate.** In a mixed system, there is potential for intra-executive conflict between the President and the Prime Minister, especially during periods of 'cohabitation' where the President and the Prime Minister come from different parties. Under cohabitation, both the President and the Prime Minister can legitimately claim that they have the authority to speak on behalf of the people (similar to the presidential system). In a worst case scenario, it might combine some of the challenges of both the other systems.

Source: author's compilation.

2.5. The limited significance of indicators of strengths of and challenges to different systems of government

To predict the effect of a system of government on political life in a country is a difficult task. Table 1, which gathers together the different opinions of various authors with regard to the strengths and challenges of those systems, needs to be read with caution, for several reasons.

First, as stated above, there is no general agreement on the definition of each system. At present, at least three different definitions of a mixed/semi-presidential system are commonly applied, and each categorizes countries differently. Some countries are still considered parliamentary or already perceived as semi-presidential (Austria, Ireland) or counted as presidential instead of semi-presidential (Republic of Korea, or South Korea), depending on the respective definition. It is difficult to argue reliably that presidential or semi-presidential regimes are potentially problematic if there is no common agreement on how to define each concept.

Second, within the set of presidential systems there is a tremendous variety among types of presidentialism, encompassing different degrees of presidential power and accountabilities. Thinking in terms of a generic category—the presidential system—and trying to generalize about the consequences of presidentialism might give an inaccurate picture. Explaining political outcomes requires greater focus on the details of institutional structure.

The wide array of political systems are often sorted into three categories: the presidential system, the parliamentary system, and in between, with characteristics of both, the mixed systems. There is no general agreement on the definition of each system.

Third, determining the viability of a constitution and its potential for stable and effective government by focusing on one institutional variable only (the system of government) is sometimes misleading. For example, parliamentary systems with disciplined political parties and single-member plurality electoral districts promote a 'winner-takes-all' approach more than many presidential systems do. Indeed, as a result of the points raised above, there is a controversy about the actual impact of the type of governmental system on political behaviour. Whereas some researchers argue that presidential systems are more likely than parliamentary systems to experience breakdown and be replaced by an authoritarian regime,[2] others make the opposite argument,[3] while still others argue that there is no relationship whatsoever.[4]

Determining a country's potential for stable and effective government by focusing on one institutional variable only (the system of government) can be misleading.

Fourth, next to the country-specific context, individual actors also matter. Russia, for example, has a dual executive consisting of both a President and a Prime Minister. While some prime ministers during Boris Yeltsin's presidency were able to exert influence on the direction of government policies, prime ministers when Vladimir Putin was President were resigned to executing his policy decisions. Despite its formal structure, political scientists considered Putin's government as hyper-presidentialist. This evaluation altered once more when Putin became Prime Minister and Dmitriy Medvedev was elected President. Without any amendment to the Russian Constitution, actual executive power shifted due to the identity of individual players.

Fifth, the drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether one should choose

The drafters of constitutions do not necessarily choose between one model and the others. In the real world the issue is most often not whether to choose a parliamentary or presidential system, but rather finding a system that works given the specific context of the constitution-building process.

a parliamentary or presidential system, but rather looking for a system that works. Often, there are contextual, historical and symbolic reasons for an institutional system existing in a country, and only under very specific circumstances is a dramatic change from one institutional system to another pursued.

Considering these statements, this chapter relies more on identifying specific aspects of institutional design reflecting the interaction within a branch of government and between the branches of government. By addressing particular constitutional devices (for example, the dissolution of the legislature, the selection of the Cabinet, presidential term limits, modalities for second chambers in the legislature, etc.) the chapter acknowledges that these aspects are part of a larger whole. The way in which they work and interact depends on the broader context in which they are adopted. However, singling them out in the first place and initiating a debate on these lesser issues may help to identify which system best meets the actual needs. Agreeing on specific institutional powers, institutional checks, and intra-institutional decision-making processes may allow a mosaic to be formed. This inductive approach is not meant to be applied exclusively, but it might help to avoid getting gridlocked in an early political debate on which governmental system to choose.

There is another factor that is not captured by analysing systems of government but that plays an important role in the broader picture of checks and balances and the separation of powers—the role of the judiciary, its institutional independence including the appointment procedure, and the authority to review laws or even check on the constitutionality of constitutional amendments. This is the topic of chapter 6 of this Guide.

3. Aim/overview

Reading the relevant textbooks, the executive is one of three potential branches of government, traditionally with a distinct objective—to enforce or implement the law as drafted by the legislature and interpreted by the judiciary. Practically, the executive can play a uniquely powerful role and is often viewed as the natural leader or ruler of a country, personifying the country's image nationally and globally. Unsurprisingly, then, the election of the head of the executive branch is an important event that can sow great disharmony, particularly in societies emerging from conflict with pronounced ethnic identification. An election separates winners and losers, and the losers justifiably may fear that the new leader may deal preferentially with his or her supporters at the expense of the opposition or even anyone not deemed an ally. Indeed, many internal conflicts start or re-emerge as part of a struggle about keeping, aggregating and/or extending executive power, be it within or beyond the constitutional framework.

The election of the head of the executive branch is an important event that can sow great disharmony, particularly in societies emerging from conflict with pronounced ethnic identification.

However, the process of drafting a constitution is not a purely academic exercise in which actors seek the best technical solution available for their country. The drafters of constitutions and negotiators are also political actors/parties aiming to translate their own political agendas into the text of the constitution. Thus, constitutional design often represents a compromise between various actors with different interests and expectations. Several post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Thus, constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available. As a consequence, constitutional designs will differ depending on whether a strong executive is present and influences the course of a constitutional process.

Constitutional design often represents a compromise between various actors with different interests and expectations. Post-conflict stakeholders, including spoilers and perpetrators of violence, will demand accommodation. Constitution builders may not be able to achieve the best technical constitution possible but may succeed by securing the best constitutional compromise available.

By offering constitutional options in a comparative, structured and coherent manner, this chapter attempts to help the relevant actors to translate their agendas into a constitutional format as well as to facilitate the accommodation of various competing interests towards a viable constitutional compromise. The chapter focuses mainly on constitutional options to de-concentrate executive powers. Without ignoring the potential benefits of a strong national executive in specific cases, the chapter presumes that many violent conflicts are at least in part caused or sustained by an overly centralized executive, concentrating powers on a few and marginalizing many. The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of a system of institutional checks and balances vis-à-vis other branches of government. Including more players in running the executive or checking its powers, at the same time, creates more potential veto players, delaying decision-making processes. Thus a careful balance needs to be found between an inclusive and an effective executive design.

The bottom line of de-concentrating executive powers is to allow more actors to be involved in decision-making processes, be it within the executive or as part of a system of institutional checks and balances vis-à-vis other branches of government.

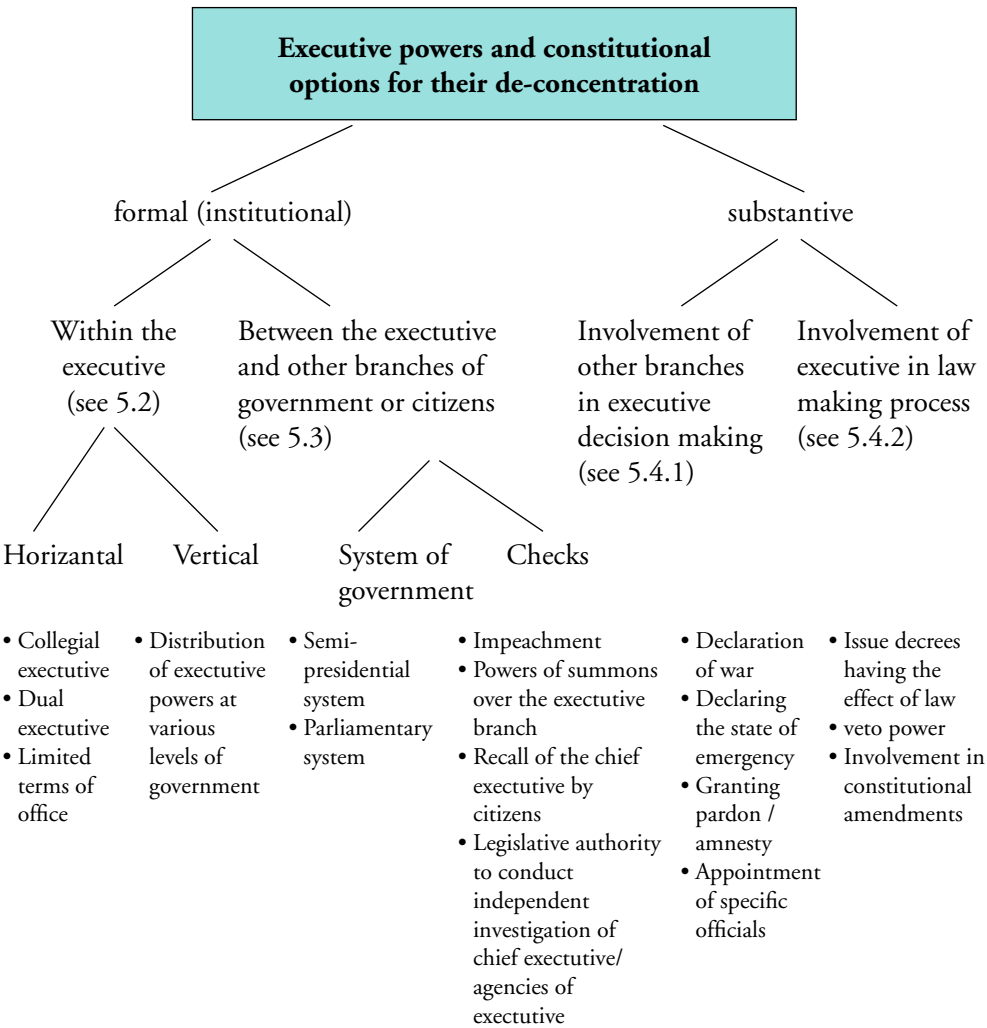
Figure 4 highlights the different segments of executive design options addressed in this chapter and is divided into two parts. The first addresses formal or institutional design options of the executive, and the second focuses more on the substantive powers actually assigned to the executive within the institutional design.

1. With regard to the first part, again two different aspects of institutional design are highlighted: the institutional design within the executive, and between the executive and other branches of government. The institutional design within the executive comes in two different dimensions: horizontal and vertical. The horizontal dimension explores options for de-concentrating the executive structure at the national level, be it through the formation of a collegial presidency (more than one person is involved in running presidential affairs), a dual executive (President and Prime Minister) or the regulation of presidential term limits. The vertical dimension addresses the allocation of executive powers at various levels of government through different forms of decentralization. Next to the constitutional design within the executive, the institutional relationships between the branches of government are of great importance. Different systems of government have different impacts on the executive in an overall setting of the separation of powers and checks and balances. In addition, more specific institutional design options offer various opportunities to check the performance of the executive and different degrees to which this can be done.

2. The specific powers assigned to the chief executive determine the degree of substantive concentration of executive powers. One might draw a distinction between those powers that traditionally rest with the executive—such as declaring a state of emergency, granting pardons or an amnesty, or declaring war—and those tasks traditionally under the authority of the legislature, but with executive involvement. Among the chief executive's legislative powers might be the authority to veto bills approved by the legislature, enact legislation by decree, take executive initiative in some policy matters, call referendums or plebiscites, and shape the budget.

A careful balance has to be found between an inclusive and an effective executive design.

Figure 4. Executive powers and constitutional options for their de-concentration



4. Context matters

There is an enormous literature on hypotheses and predictions about the implications and consequences of specific forms of constitutional design for political behaviour, public policy, political stability and social cohesion, and so on.[5] But reality proves that there are very few clearly established generalizations in this area. As stated by one author, the world of constitutional predictions is littered with failed predictions and unanticipated consequences.[6] This is because there are so many different variables—political, economic and social—that intervene between the wording of a constitutional text and its impact or effect.[7] Acknowledging these dynamics, the chapter presents a comparative analysis of a range of constitutional options as drafted and promulgated around the globe without attempting to explain the historical pedigree of particular provisions in any particular national context, since the same norm, when applied to different contexts, can yield different results; similarly, competing norms can produce identical effects.

> 'The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.'
>
> Damaška, Mirjan (Sterling Professor of Law, Yale University), 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments', 45 *Am. J. Comp. L. 839* (1997)

Because no two constitutions are identical, lessons from one may apply differently in another context, to another people, or against another cultural background. Some institutional arrangements that work very well in one set of social conditions may be useless or even destructive in other. Constitutions can lay down the rules and principles, but by themselves these rules and principles will not change society.

There are many different variables—political, economic and social—that intervene between the wording of a constitutional text and its impact or effect. The same norm, when applied to different contexts, can yield different results.

For instance, the Constitution of Thailand assigns the King a predominately ceremonial role, yet the Thai people nevertheless afford him great adoration and respect, which in turn bestow upon the King significant informal powers to direct the political affairs of the country. Likewise, implicit legal or political conventions in other countries, which may be imperceptible to outsiders, may distribute power extra-constitutionally. Although neither provided for nor supported in the constitution, these conventions can shape and structure political actions. This is especially apparent in some Commonwealth countries: the greatest political and constitutional crisis in Australia—'the Dismissal'[8] —did not exactly constitute an unconstitutional act, but rather reached that status by aggregating several acts that, while technically constitutional, opposed long-standing Australian conventions.

Governmental systems may shape the structure of executive power in a distinct manner, but can only indicate the power dynamics derived from the actual context. Implicit legal or political conventions which may be imperceptible to outsiders may distribute power extra-constitutionally.

Governmental systems may shape the structure of executive power in a distinct manner, but can only indicate the power dynamics derived from the actual context. A President endowed with strong constitutional powers may nonetheless be weak in the face of a highly fragmented political party system and an unreliable base of support in the legislature. Similarly, a President with fairly weak constitutional powers may appear to dominate the policymaking process if his or her party controls a majority of seats in the legislature and is highly disciplined. On the other side, even in parliamentary systems in which the legislative majority selects the Prime Minister, political parties fighting parliamentary elections often link the campaign to the personality and character of their leaders rather than to particular programmes. When announcing electoral results, the media crown an individual 'winner'. Individual actors also matter if it comes to the actual power design, as the example of Russia underlines (see above).

Considering the interplay of factors that determine the actual impact of constitutional provisions, one can hardly predict the effect of those provisions without intimate knowledge of a specific context. Abstract theorizing as to which model might fit best is doomed to failure without a careful understanding of both the context from which a particular provision is taken and the context in which a particular provision will apply. Therefore, while the discussion below should facilitate the understanding of constitutional design for the executive, this chapter does not endeavour to provide specific case studies or advice, but rather recommends that we look deeper into the specific context once a constitutional option from a specific country has prima facie been identified as helpful.

One can hardly predict the effect of constitutional provisions without intimate knowledge of a specific context.

5. Design options

5.1. Design for a centralized executive in a democratic setting

In a centralized executive, power is concentrated in one individual at the national level, representing both the government and the country. Politically, the authority of the head of the executive will not originate in the legislature, which may not dismiss him/her by a vote of no confidence. He or she, moreover, has full control over the Cabinet. Except at periodic elections, therefore, the head of the executive branch is largely free from political oversight and has only limited exposure to questioning by the legislature. These characteristics are often reflected in the institutional design of a presidential system. However, centralized executives are not only found in countries with a presidential system. In part, this is due to the fact that not only institutional design matters, but also the strength and structure of the political party system (see section 2.5) or the authoritarian character of the government. In part, various institutional structures in parliamentary systems may also have an impact on centralizing executive power. One aspect, for example, is how far the prime minister in a parliamentary system has full and exclusive control over the Cabinet (see also section 5.3.2.). Thus, although the core element of a parliamentary system is the government's political dependence on the legislature, it makes a considerable difference whether the individual composition of the Cabinet is the sole responsibility of the Prime Minister (see for example Germany[9]). Next to the institutional structure, the tasks assigned to the chief executive contribute to the actual concentration of executive authority: the extent to which s/he is involved in declaring a state of emergency (and the increasing executive powers that come along with it), granting pardon or amnesty, or declaring war and so on are indicators of the strength of the executive branch, as is the chief executive's impact on the law-making process.

A strong executive is not destructive by nature. It might provide stability and hold together a country in which there are many divisive forces (see for example the case of Brazil). It may also strengthen the executive to ensure that policies are consistent and

facilitate long-term planning. In the United States of America (USA), for instance, some of the challenges currently facing President Barack Obama's administration regarding implementing the reform agendas promised in the electoral campaign are due to the legislature being opposed. This example highlights the challenge facing an executive that needs to accommodate veto players from other branches of government. The main challenge for strong executive design is to prevent its structure facilitating a shift to autocracy and undemocratic rule. Managing autocratic tendencies becomes an even greater challenge if executive power is largely free from legal oversight and/or there is too close a link between the supreme judges and the executive because appointment procedures are predominately in the hands of the latter.

The main challenge for designing a strong executive is to prevent its structure facilitating a shift to autocracy and undemocratic rule. Managing autocratic tendencies becomes an even greater challenge if executive power is largely free from legal oversight and/or there is too close a link between the supreme judges and the executive branch.

The Egyptian Constitution and its development over the last 40 years highlight the challenges of an overly centralized executive. It allowed an autocratic system to grow in the first place, which then was further strengthened by executive-driven constitutional amendments that redefined the institutional imbalance later on. In its 2007 version, the Constitution of Egypt not only centralized executive power in the President with no term limits (although formally it qualified as a semi-presidential system); it also authorized him/her to dissolve the legislatures if deemed necessary, and to appoint some members in the first legislative assembly and quite a few in the second chamber (one-third of them), and gave him/her strong legislative veto powers and far-reaching authorities under the label of the 'fight against terrorism', next to being the supreme commander of the armed forces and the supreme chief of the police. Constitutional reforms in countries with similar structures might want to focus on ways and means to de-concentrate executive powers.

5.2. Options for institutional de-concentration within the executive

Drafters can seek a dispersal of executive powers within the executive by two different means: (a) horizontally, by instituting a collegial executive or a dual executive, and (b) vertically by adding additional levels of government.

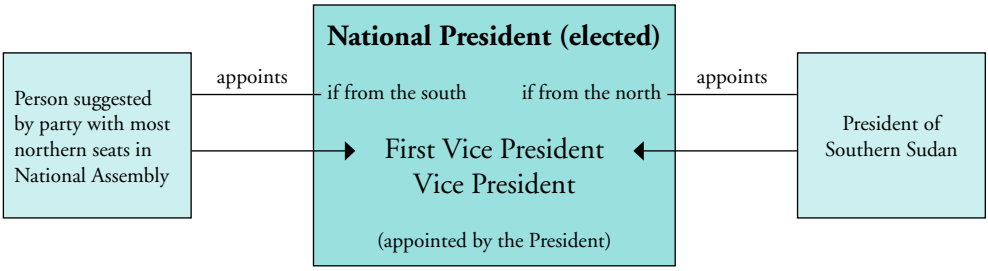
Executive powers can be dispersed by instituting a collegial executive or a dual executive, or by adding additional levels of government.

5.2.1. A collegial executive

A collegial executive comprises various actors in the institution of the head of state/chief executive. Collegial executives can take several forms. Following a peace protocol signed in 2004, Sudan established a fairly loose form consisting of a President, a First

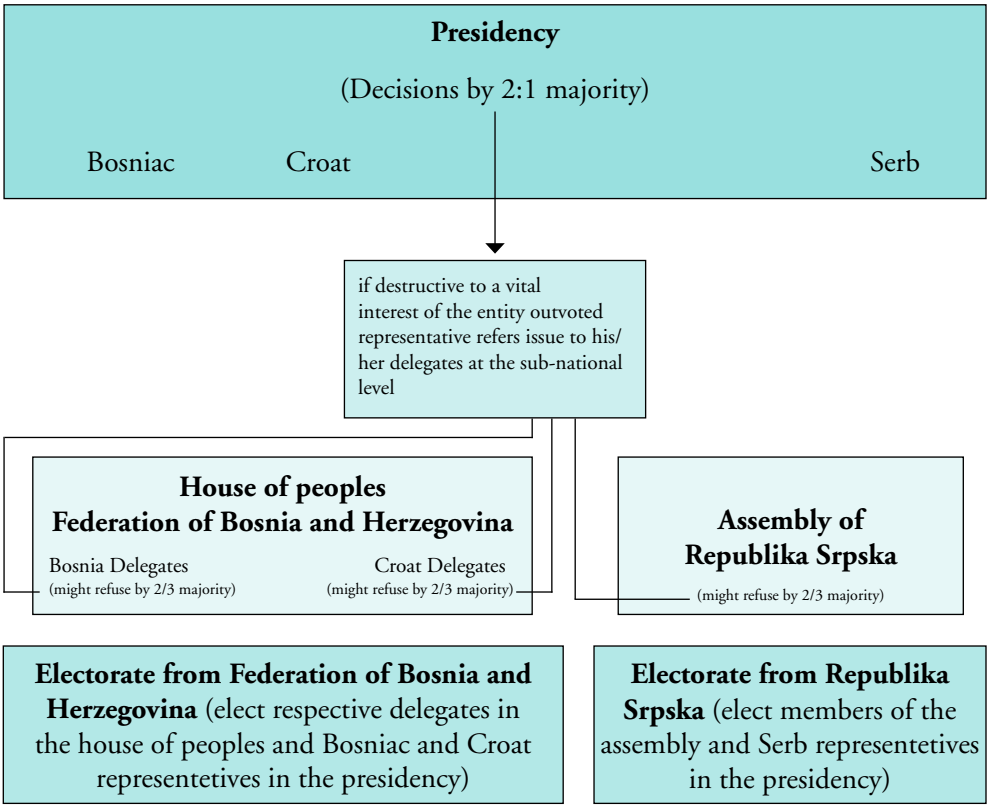
Vice-President and a Vice-President with a clear hierarchy (see figure 5). Before the independence of South Sudan in July 2011, the President of Sudan served as the single head of state, but several decisions required consultation within the presidency or even the consent of the First Vice-President. While the President appointed both subsidiary positions, one had to hail from 'northern' Sudan, and the other from 'southern' Sudan (now independent South Sudan). Moreover, the First Vice-President could not come from the same region as the President. The first vice-president did not hold office at the will of the President, rather the Constitution predetermined their length of service by other means.

Figure 5. The defunct collegial executive in Sudan prior to its partition



Constitution drafters in Bosnia and Herzegovina designed a stronger form of collegial executive, in which power flows equally to all three co-executives (see figure 6). Ethnicity determines membership in the presidency: each territory elects a representative—one must be a Croat, one a Serb, and the other a Bosniac. One will act as the nominal President representing the country in external affairs, but each will serve on a rotating basis, 'primus inter pares'. The executive must make most decisions by consensus if possible and ultimately by majority decision if not. Consensus is preferred, however, since a dissenting President may declare a decision 'destructive' to a vital interest of his territory. The legislature from that region can then vote to block that decision by a two-thirds majority.

Figure 6. The collegial executive of Bosnia and Herzegovina

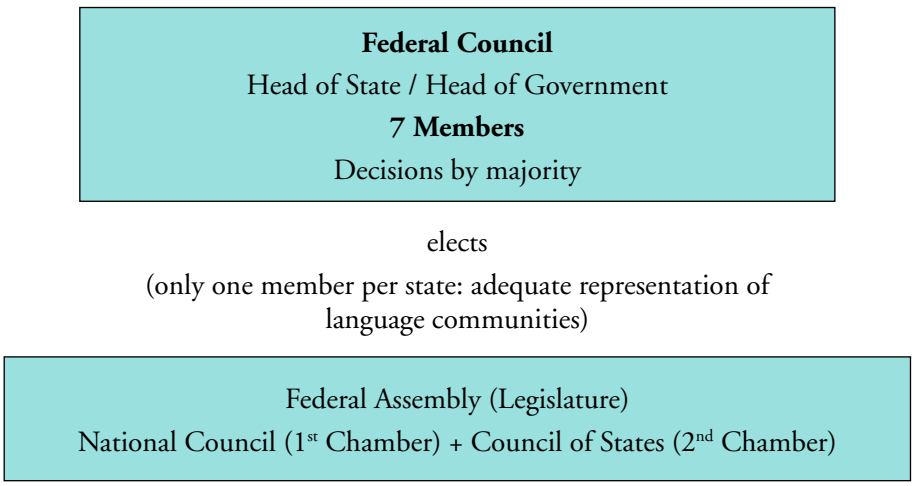


Both models of collegial executives were part of peace deals brokered after severe civil wars along ethnic lines (the 2005 Comprehensive Peace Agreement with respect to Sudan and the 1995 Dayton Peace Agreement with regard to Bosnia and Herzegovina). In both cases, power brokers could not have struck a peace deal without representatives in the executive at the highest level. Though critical to end hostilities between warring factions, these compromises have made governing significantly more challenging. Particularly in Bosnia and Herzegovina, mutual mistrust between ethnic groups still prevails, significantly hampering efforts to build a common way forward.

A third model of a collegial executive is practiced in Switzerland (see figure 7). The Federal Council is the highest executive institution in the country, constitutes the national government and serves as a collective head of state. It comprises seven members, who must come from different states (cantons) with due consideration of adequate representation of the different language communities.[10] The seven federal councillors are elected individually by the Federal Assembly (legislator) for a four-year mandate, which is not subject to a vote of no confidence. They are elected as equals although every year one of them is nominated President, mainly for representative and ceremonial purposes. The Federal Council decides as one body. Each councillor administers a specific sphere

of competences. Although this is not mandated by the Constitution, since 1959 the four biggest parties have been represented in the Federal Council. The rationale for the grand coalition is a consequence of the strong direct democracy instruments in Switzerland.

Figure 7. The collegial executive of Switzerland



As the three examples demonstrate, a collegial executive is not linked to any specific system of government. It is applied in a presidential system (Sudan), a semi-presidential system (Bosnia and Herzegovina) and a quasi-parliamentary system (Switzerland).

5.2.2. A dual executive

Horizontal dispersal also can occur by establishing a dual executive composed of a head of state and a head of government. 'Dual executives' in the literal sense have a long tradition and are widespread. For example, in many countries, the head of government manages the government's affairs and sets policy, while the head of state, often a President or a monarch, holds a ceremonial position with little political authority (the head of state 'reigns', the head of government 'rules'). Over the last two decades, a more evenly matched dual executive, a system often referred to as semi-presidentialism, has become more common. A dual executive in a semi-presidential system divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President. The precise balance of authority between the two heads of the executive can vary widely. Depending on the power balance, some models of a dual executive resemble rather a presidential system, others rather a parliamentary system. For example, in Egypt, the Constitution of 2007 defined the government as the supreme executive and administrative organ of the state with a Prime Minister at the top. However, this definition cannot obscure the fact that the government's main function was to assist the presidency in the implementation of its

policies. Ultimate decisions on all important policy issues rested with the President, on whose confidence the Prime Minister depended (next to the confidence of the Legislative Assembly). At the other end of the spectrum, the powers and functions conferred on the directly elected President in Ireland 'shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion […]'. In both cases, one of the two heads of the executive does not have the power to act as a veto player within the executive. Many other countries have chosen a more balanced approach in assigning powers to the two respective heads of the executive. Next to actual powers (which functions are considered presidential and which are considered governmental) the involvement of the President in the process of selecting or dismissing the Prime Minister and the Cabinet is crucial. Because the Prime Minister is responsible and accountable to the legislature, dual executive designs are also addressed in section 5.3.1 (Authority to appoint/select/dismiss the head of government (Prime Minister).

Dual executives in the literal sense have a long tradition. In many countries, the head of government manages the government's affairs and sets policy, while the head of state holds a ceremonial position with little political authority.

Relying on the potential of dual executives in dispersing power, some countries introduced the dual executive as an interim solution to defuse conflict after contested elections and to craft a 'coalition government'. In the case of both Kenya (2008) and Zimbabwe (2008), these interim measures saw the appointment of opposition leaders as prime ministers but with the president in each case retaining both functions of head of state and head of government. Instead of governing together in a coalition, the prime ministers were squeezed into the presidential structure with few substantive executive powers.

Over the last two decades, a more evenly matched dual executive, a system often called semi-presidentialism, has become more common. Drafters of constitutions have also recently introduced the dual executive as an ad hoc interim solution to defuse conflict after contested elections and to craft a 'coalition government.

Between 1996 and 2001, Israel's governmental system relied on a reverse electoral approach of its dual executive: whereas the head of state (a mainly ceremonial figure) was elected by the legislature, the head of government (Prime Minister) was directly elected by the people, simultaneously with the new legislature. In Israel, due to the highly fragmented legislature, this system failed to produced a stable government, since the Prime Minister's party was too weak in the legislature to allow for a stable government. Different contexts elsewhere (e.g. a different party landscape) may have led to a different appreciation of this unique approach, but in the specific case of Israel it was not a success story.

The involvement of the President in the process of selecting or dismissing the Prime Minister and the Cabinet is crucial.

5.2.3. Presidential term limits

One might also consider the dimension of time as an important factor in de-concentrating executive power from an individual person by constitutionally regulating the chief executive's term of office. Although term limits, on the surface, restrict the full democratic choice of the people as to whom they want to have in office, they are one of the most important devices that support democratic transformation and strength in electoral authoritarian regimes or infant democracies. Or, as two authors put it, 'the combination of term limits and regular elections has displaced the coup d'état as the primary mode of regime change and leadership succession in contemporary Africa'.[11] Notably, neither Tunisia nor Egypt had term limits enshrined in the constitution.

Individual alternation of the chief executive is considered important for various reasons. Prima facie, term limits only restrict the time for which a chief executive rules, but not his/her authorities at any one point in time. However, without term limits, chief executives often have been unable to resist the temptation to use their powers to create an environment that guarantees their constant re-election under authoritarian rule. Thus, the introduction of term limits preventing the chief executive from being re-elected indefinitely is crucial. Two different types of term limits are available. The first sets limits on the number of consecutive terms in office permitted. For example, Russia[12] and Austria[13] only allow for two terms in succession, but do not prevent a former President from standing for election again after pausing for one term; in Panama[14] this pause is increased to the next two following terms. The second type of term limit establishes an absolute restriction on the number of terms an individual can serve. Whereas some countries have opted for one term only (e.g. Paraguay,[15] South Korea[16]), the majority of countries introducing term limits decided on two terms (e.g. South Africa,[17] Turkey[18]).

Term limits are one of the most important devices that support democratic transformation and strength in infant democracies. Without term limits, chief executives often have been unable to resist the temptation to use their powers to create an environment that guarantees their constant re-election under authoritarian rule.

Probably no other single constitutional provision has been amended, repealed or reinterpreted around the globe as often as the one that establishes presidential term limits (e.g. in Algeria, Belarus, Burkina Faso, Côte d'Ivoire, Gabon, Kazakhstan, Namibia, Peru, Sri Lanka, Uganda). Although *de jure* they are rarely involved as key actors in the constitutional amendment process themselves, presidents have managed to arrange for particular constitutional adjustments. In an attempt to restrict these dynamics, some drafters of constitutions have added additional safeguards. In El Salvador,[19] Honduras[20] and Niger,[21] the constitutional provisions on presidential terms are immutable, in Honduras,[22] the army is even empowered to safeguard its immutability. The Constitution of South Korea[23] takes a different approach: here, amendments to the Constitution concerning the extension of the term of office of the President shall not be effective for the President who is in office at the time when the proposal for such amendments to the Constitution was made.

5.2.4. Distributing executive powers to various levels of government through decentralization

Models of a collegial or a dual executive offer opportunities to distribute the highest executive powers at the national level of government between more than one person, either by their making decisions together or by assigning different executive powers to different persons. In addition or alternatively, executive powers can also be distributed in a vertical manner by allocating executive powers to different levels of government. Creating executive elements at different levels of government (regions, provinces, villages etc.) is another way to involve and include more stakeholders in the executive. By delegating/devolving particular competences to a lower level of administration/government, responsibility and substantive powers seep down from the national executive. For example, the US Constitution allocates the making of much of the penal law to the subunits (states). Thus the governors of states must answer requests for pardons, including those of capital offenders in those states where capital punishment exists. Without legally eliminating the President's right to pardon, which still reaches offenders in cases of national crimes, this devolution of powers in the United States has contributed to the dispersal of presidential power.

Different forms of decentralization can impact on the executive differently. The degree and depth of dispersal depend on two questions. What types of responsibilities does the constitution devolve to other levels of administration/government? And what level of oversight does the national executive retain? The more significant the executive powers devolved to lower levels of administration/government—such as penal law or police powers—the higher the degree of decentralization. The degree of decentralization ranges on a continuum across systems, from those that are strongly centralized to the heavily decentralized.

Powers can also be redistributed by allocating executive powers to different levels of government. Creating executive elements at different levels of government (regions, provinces, villages etc.) is another way to involve and include more stakeholders in the executive.

To measure the amount of decentralization more accurately, its three core elements—administrative decentralization, political decentralization, and fiscal decentralization—need to be considered. Administrative decentralization refers to the amount of autonomy non-central government entities possess relative to the central government. Political decentralization refers to the degree to which central governments allow sub-governmental units to undertake the political functions of governance such as representation. Finally, fiscal decentralization refers to the extent to which central government surrenders fiscal responsibility to sub-central units. These three elements of decentralization are addressed in more detail below.

Administrative decentralization can mean de-concentration, delegation and devolution.

While distinguishing between these three elements facilitates measurement, effective decentralization requires coordinating all three. Decentralization of authority will

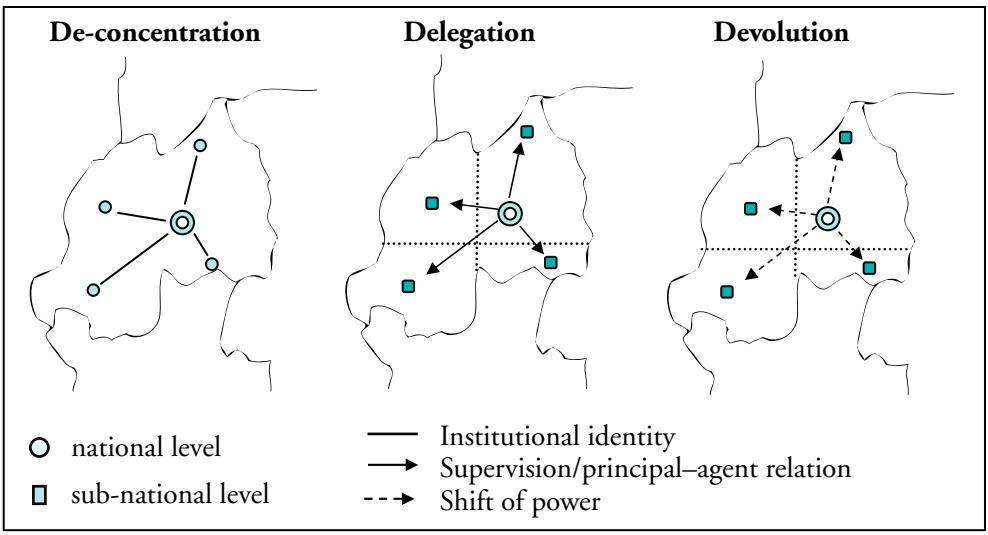
remain shallow if, for example, administrative and fiscal decentralization does not support and follow political decentralization.

Administrative decentralization

Administrative decentralization comes in three varieties: 'de-concentration',[24] 'delegation' and 'devolution', with each term encompassing additional administrative autonomy (see figure 8).

Figure 8. De-concentration, delegation and devolution: the distinctions

De-concentration occurs when the central government disperses responsibility for implementing a policy to its field offices. This transfer alters the spatial and geographic distribution of authority, but responsibility and power remain at the centre, and the



Source: Adapted from Diehl, Katharina, et. al. Max Planck Manuals on Constitution Building: Structures and Principles of a Constitution, 2nd edn (Max Planck Institute, 2009). See also: Böckenförde, M., Decentralization from a Legal Perspective: Options and Challenges (Unpublished, 2010).

transfer does not transfer actual authority to lower levels of government and thus does not create additional levels of government (see figure 8).

Delegation requires the central government to refer decision-making and administrative responsibilities for various public functions to another level of government. Delegation features a principal–agent relationship, with the central government acting as principal and the local institution acting as agent. The degree of supervision varies and might include substantial central control, permitting little discretion at the lower level. Conversely, at the same time as enforcing adherence to formal guidelines, the central government might fully allocate the administration and implementation of policy to the subunits.

Devolution is the strongest form of decentralization and involves the transfer or shift of a portfolio of authority to regional or local governments. Again, various models exist. The portfolio may include either limited powers to implement a set of national laws concerning a particular area—with potentially significant discretion over their implementation—or more closely resemble self-governance, in that the subunit exercises legislative powers—adopting rules and norms and devising policies and strategies. Depending on the degree of devolution, the central government might interfere only to a limited extent, if at all. A degree of political decentralization must accompany devolution, given that the central government can no longer hold subunits fully responsible; the electorate must assume that responsibility by voting in popular elections.

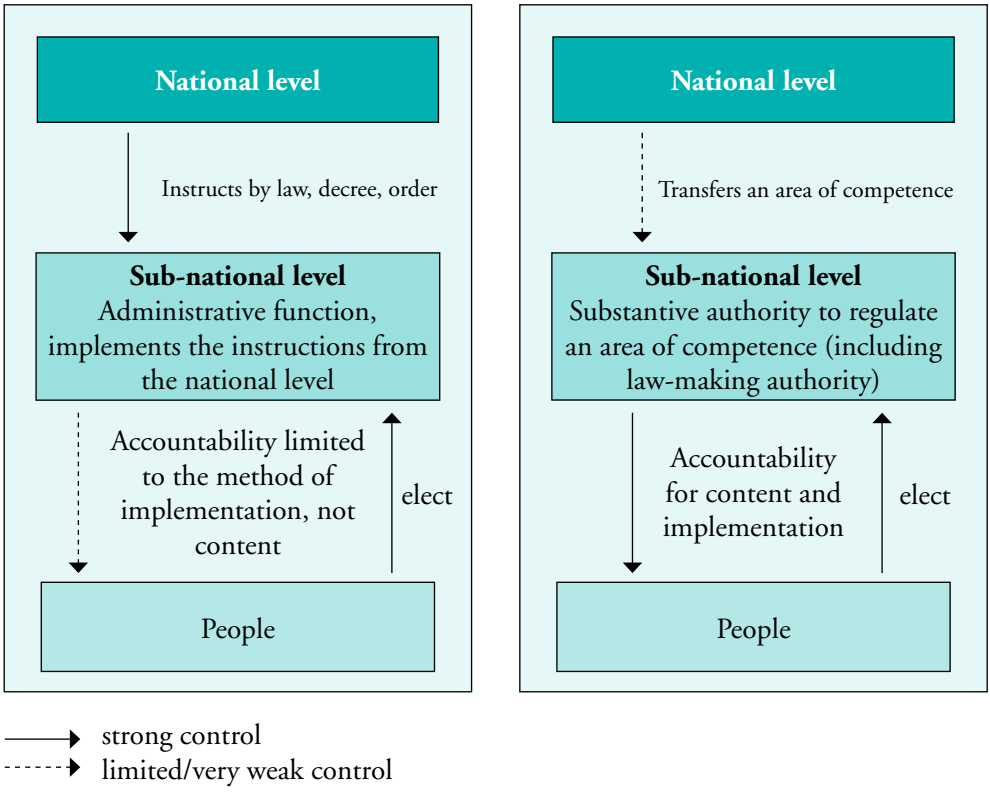
A degree of political decentralization must accompany devolution.

Political decentralization

Political decentralization involves two elements: (a) transferring the power to appoint representatives and a political leadership from the central government to local governments; and (b) transferring the authority to structure government at the regional or local level. One might describe the first element as electoral decentralization, which allows citizens, rather than the central government, to elect representatives who will serve in regional or local subunits. Yet, even with the ability to elect local officials, citizens can influence policy only to a limited extent as long as the elected officers still implement national directives. Citizens can thus hold these representatives accountable only for implementation, not for substantive policies, despite the potential overlap (see figure 9, the left-hand column).

Promoting the second element of political decentralization requires—in addition to permitting voters to select their local leadership—implementing structural arrangements and practices that empower the local political leadership to formulate, monitor and evaluate policy portfolios transferred from the national centre. Such an arrangement would require a high degree of local autonomy and free-standing legislative or quasi-legislative bodies whose remit extends to designing and elaborating on policy issues transferred from the national government (see figure 9, the right-hand column).

Figure 9. Examples of political decentralization



Source: Böckenförde, M., *Decentralization from a Legal Perspective: Options and Challenges* (Gießen: TransMIT, 2010).

Fiscal decentralization

Whereas administrative decentralization focuses on the allocation of governmental responsibilities, and political decentralization involves a degree of self-governance in the implementation of those responsibilities, fiscal decentralization determines the degree of financial autonomy. Without sufficient financial resources, regional or local authorities will not be able to perform their newly assigned tasks adequately, thus weakening accountability and legitimacy. Omitting or delaying fiscal decentralization, moreover, often renders other aspects of decentralization ineffective.

National executives may also maintain intermediate control by influencing the appointment of sub-national officials. In Afghanistan and India, the President appoints the chief executives of sub-national units. In Ghana, the National Ministry of Local and Rural Government nominates candidates to the post of District Chief Executive (DCE); the President appoints nominated candidates; and the District Assembly approves candidates by a two-thirds majority. Also noteworthy, the President appoints up to 30 per cent of the District Assembly's members.

Omitting or delaying fiscal decentralization often renders other aspects of decentralization ineffective. The assignment of responsibility for expenditure must accompany the assignment of tasks and competences.

5.3. Institutional checks on the executive

Another way to control executive powers is by designing a system of checks by and dependencies on the other branches of government. As highlighted at the beginning of the chapter, two institutional designs are particularly adept at checking executive power: a parliamentary system and the dual executive in a so-called semi-presidential system. To maintain political authority and thus power in both, the executive cannot alienate the legislature. In parliamentary systems, executive authority (a) arises from the legislature and (b) is subject to a legislative vote of no confidence that can bring down the government. These dynamics create a hierarchical relationship between the branches of government in the legislature's favour. The power of the executive might be even further controlled if the legislature also has a direct impact on the composition of the Cabinet. A dual executive in a semi-presidential system literally divides the executive into two independently legitimized and constitutionally distinct institutions: an indirectly selected head of government, the Prime Minister, subject to majority support in the legislature, and a popularly elected head of state, the President.

Another way to control executive powers is by designing a system of checks by and dependencies on the other branches of government. Two institutional designs are particularly adept at checking executive power: a parliamentary system and the dual executive in a semi-presidential system.

The precise balance of authority between the executive and the legislature can vary greatly. Four indicators may help to identify the appropriate degree of executive powers and legislative checks: (a) authority to appoint/select/dismiss the head of government (Prime Minister) in a dual executive; (b) control over the Cabinet; (c) the possibility of a vote of no confidence/censure; and (d) ability to dissolve the legislature.

5.3.1. Authority to appoint/select/dismiss the head of government (Prime Minister)

Many constitutions that have opted for a dual executive permit the President to select the Prime Minister (e.g. those of France, Mongolia, Mozambique, Namibia, Peru, Poland, Russia, Senegal). In some countries, the discretion of the President is somewhat reduced by obliging him/her in the constitution to take 'the opinion of the parties represented in the Assembly of the Republic and with due regard for the results of the general election' (Portugal).[25] Often, the authority to remove the Prime Minister rests exclusively with the majority of the legislature (e.g. in France, Portugal, Senegal). As a consequence, the President cannot guarantee that his or her choice can remain in post. S/he is restricted in his/her selection insofar as s/he must identify a person whom s/he expects to obtain support (or at least acquiescence) from the legislature. In addition, once the Prime Minister is selected, s/he is no longer under the control of and subordinated to the President, but subordinated to the legislature

One indicator of the degree of executive powers and legislative checks on the executive is the President's authority to appoint/select/dismiss the head of government in a dual executive.

and therefore more inclined to align governmental policies with the legislature's. Some constitutions avoid this dynamic and strengthen the President's position by providing him/her with the discretion to dismiss the Prime Minister (e.g. Mozambique, Namibia, Peru, Russia). As a result, the Prime Minister is sandwiched between and dependent on the President and the legislature and their political strategies.

In parliamentary systems the way of selecting the Prime Minister also varies, although his/her origin ultimately depends on the will of the legislature. In some countries, the election of the prime minister is exclusively in the hands of the legislature. In Sweden, for example, the Speaker of the legislature nominates the Prime Minister. In other countries, the Prime Minister is nominated by the President, but the legislature may elect another person if no absolute majority of votes supports the presidential nomination (as in Germany). The President then has to appoint that person. Again, in other constitutions, the President has to nominate the Prime Minister from the party obtaining the highest number of seats in the election of the legislature (Greece). Some countries in turn constitutionally oblige the head of state to appoint the person elected by the legislature (Japan) and might even determine that the person so elected becomes Prime Minister *ipso jure* if the President does not appoint him/her after a certain period of time has passed (Ethiopia).

5.3.2. Control over the Cabinet

Designing control over the Cabinet is another way to influence or fine-tune the relation between the executive and the legislature. In most presidential systems, the Cabinet is appointed by the President and serves exclusively at his/her pleasure. However, a few presidential systems also allow the legislature to intervene politically in the composition of the Cabinet. For example, in Colombia, individual ministers are subject to legislative censure[26] and in Argentina the same applies to the Chief of the Ministerial Cabinet.[27] In dual executives, the challenge is to strike a diligent balance between the impact of the President, the Prime Minister and the legislature in selecting/dismissing the members of the Cabinet. According to the French Constitution, the Prime Minister recommends candidates for appointment or removal to the President, who then decides. Parliament's vote of no confidence affects only the government as such, not its individual composition. In Peru, the legislature has the authority to censure individual members of the Cabinet, thereby weakening the Prime Minister's position. In Mongolia, the Prime Minister proposes the Cabinet's composition after consulting the President, and Parliament approves the members individually. Again, by influencing the design of the Cabinet, the legislature can shape the direction of the executive.

Designing control over the Cabinet is another way to influence or fine-tune the relation between the executive and the legislature. By influencing the design of the Cabinet, the legislature can shape the direction of the executive branch.

The Interim Constitution of South Africa (1994–6) took a different approach: the composition of the legislature determined the composition of the Cabinet, which in turn selected the President. A party gaining more than 5 per cent of the total number

of seats in the legislature had the right to one post in the Cabinet.[28] The purpose of this provision was to form an all-inclusive government after apartheid rule.

5.3.3. Votes of no confidence

The legislature's power to censure the head of government as part of the political setting may also be designed in various ways to channel potential dynamics. Several constitutions have introduced some restrictions to the authority of the legislature to withdraw its confidence from the Prime Minister. In Russia, the President may reject Parliament's vote, which can then proceed by expressing a vote of no confidence again three months later. Other options include the dismissal of the Prime Minister only after s/he has been in post for a set period of time, or the legislature can dismiss only a limited number of cabinets per term.[29] Some constitutions go even a step further, requiring that the no-confidence vote needs to be 'constructive', meaning that the majority dismissing the Prime Minister must simultaneously select a new one (Germany,[30] Hungary,[31] Lesotho,[32] Poland,[33] Spain[34]). As a result, a motion of no confidence does not automatically force either the resignation of the Cabinet or a new election. Instead, the Prime Minister may continue as leader of a minority government if the opposition is unable to agree to a successor. In a system with a dual executive (Poland), a constructive vote of no confidence can have two implications: it potentially permits the President greater leeway in the initial appointment of the Prime Minister/Cabinet, since s/he is harder to remove. On the other hand, after the vote of no confidence, the President is sidelined in the process of establishing a new government.

The legislature's power to censure the head of government by a vote of no confidence may also be designed in various ways to channel potential dynamics.

5.3.4. Dissolution of the legislature

The ability of the President to dissolve the elected assembly is another issue in determining the relation between the executive and the legislature. Giving the President power to dissolve the assembly allows him/her to shorten the term of the legislature originally assigned to it by the electorate. Depending on the actual design of the power of dissolution, it might have some considerable impact on the balance of power: if there are no meaningful restrictions in the setting of a dual executive, the President could appoint a government without the legislature's consent, and threaten it with dissolution if the legislature intends to introduce a motion of no confidence, thereby pre-empting the no-confidence vote. The power of dissolution would also allow the President to influence the timing of elections to the legislature to suit his/her political agenda. In govermental systems where the head of government is elected by the legislature, the power of dissolution may become an even more tactical tool to increase the probability of his/her own re-election (through his/her party's majority in the legislature). For example, in Japan, the House of Representatives of the Diet can be dissolved at any time by the initiative of the Prime Minister (followed by a ceremonial act of the Emperor), but it needs to be dissolved at the latest at the end of the legislature's four-year term. Only once in over 60

years has a dissolution occurred at the end of the four-year term; all other legislatures have been dissolved prematurely.

The power of the President to dissolve the elected assembly is another issue in determining the relation between the executive and the legislature. Depending on its design, this can have considerable impact on the balance of power.

In the light of the various challenges illustrated above, several constitutions give the President the authority to dissolve Parliament, subject to additional requirements or restrictions, of which there can be many, including a limitation on the time of dissolution (Portugal: not within the first six months after parliamentary elections); on its frequency (France: once per year); Gabon (once a year but not more than twice during one presidential term); the cause for dissolution (Austria: only once for the same cause); or establishing a prerequisite for dissolution such as parliamentary (in)action (Mozambique, Poland). In some countries, dissolution of the legislature by the President simultaneously triggers presidential elections (Namibia[35]); in others, the President may only initiate the legislature's dissolution, subject to a final decision by the electorate in a referendum (Egypt 2005[36]).

5.3.5. Impeachment

Impeachment constitutes another method to control the executive. In contrast to the *political* control exercised by a vote of no confidence, impeachment authorizes the removal of the head of the executive on the basis of his/her legal wrongdoing. In presidential systems where the political removal of the head of the executive by the legislature is not part of the institutional arrangements, impeachment becomes particularly relevant. In general, two factors should be considered: the type of offence that can trigger an impeachment procedure, and other branches' involvement in that procedure. Some constitutions limit the initiation of impeachment to severe offences such as high treason. Others are much broader, only requiring a violation of the constitution or any other law while in office (Hungary). At one extreme is the case of Tanzania, where presidential conduct that damages the esteem in which the office is held can trigger impeachment. Such vague and/or broad thresholds risk transforming impeachment into a political tool, particularly if the decision rests solely with the legislature (as in Moldova). Generally, however, the judiciary plays the role of gatekeeper, either by ruling on the constitutionality of the President's behaviour or by participating in the work of the investigation committee. Honduras has followed a very particular approach: if the President brings the constitutional order into disrepute by, among other things, amending the limitations to his tenure, the armed forces may intervene pursuant to Article 272(2) of the Constitution: 'They [the military] are established to defend the territorial integrity and sovereignty of the Republic, to maintain peace, public order and the rule of the Constitution, the principles of free suffrage *and alternation in the exercise of the Presidency of the Republic*' (emphasis added).

Impeachment—the removal of the head of the executive on the basis of legal wrongdoing—is another method to control the executive. Where the removal of the head of the executive by the legislature is not part of the institutional arrangements, impeachment becomes particularly relevant.

5.3.6. Citizens' recall

Next to institutional control within or between the different branches of government, the citizens' right to remove the chief executive before the end of his/her term is another way to check executive power. In general, there are two different types of recall at national level, mixed recall and full recall. The latter means that both the initiative and the final decision rest exclusively with the citizenry. With regard to the executive, this type of recall is less common and only applicable in some Latin American countries (e.g. Ecuador[37]). Mixed recall is the process in which the citizenry is involved only in one of the steps, either initiating it or deciding it in a referendum. Whereas in some countries the citizens' involvement is part of a suspension procedure as a result of presidential wrongdoing (as in Romania[38]), in most cases citizens become part of a purely political debate, in which they have to approve the recall of the President (as in Austria[39] and Iceland[40]).

Citizens' recall has to balance principles of participation and effective governance and the need to harmonize recall procedures with effective institutions of representative democracy. On the one hand, frequent recall votes may undermine the idea of a representative democracy and may hamper the executive in implementing its mid- and long-term political agendas. On the other hand, making the process overly cumbersome in order to avoid excessive use may limit its original intent to allow citizens to hold their representatives directly accountable.

5.4. Designing the executive's substantive powers

In addition to the disaggregation of executive powers through institutional design, as discussed above, the drafters of constitutions might also want to control executive powers through the involvement of other actors in a decision-making process. Two options are worth considering: first, the involvement of other actors in decision-making processes traditionally under executive control; and, second, the limitation of executive influence in the substantive domains of other branches of government.

5.4.1. Involving other actors in substantive executive decision-making processes

The first category—diluting executive authority—might include decisions concerning the declaration of a state of emergency, granting pardons or amnesty, or formally declaring war. The second category—insulating decisions that are traditionally the legislature's against executive influence, for instance—might include limiting the executive's ability to issue legal acts or decrees that have the force of law, or attempts by the executive to choreograph the formal law-making process.

State of emergency

The constitutional questions of *who* declares a state of emergency and *by what method* this is done both offer different degrees of involvement of institutions other than the executive. A constitution can delineate clearly those occasions—and only those

occasions—when the government can declare a state of emergency, such as invasion or a natural catastrophe. But the drafters of constitutions may want to leave room for discretion: consider for instance threats to public health or to internal order. Attempting to articulate all such circumstances will probably prove impossible and unwise. Someone must determine when a threat level rises to the level of an emergency; and, to avoid abuse, someone else must be empowered to evaluate that determination. Peru's Constitution requires prior approval by the Cabinet before the chief executive can declare an emergency, an internal dispersal of powers within the executive. Malawi's Constitution permits the executive to declare a state of emergency but requires retroactive parliamentary approval within a defined period of time. The constitutions of Ethiopia and Fiji mandate prior parliamentary approval before the executive may declare a state of emergency. The Constitution of Mongolia states that only Parliament may declare a state of emergency—which constitutes the broadest dispersal of power from the executive in declaring states of emergency. Only if Parliament is in recess can the President act, but such a declaration lasts for only seven days and lapses if Parliament remains passive.

The powers of the executive branch can be controlled through the involvement of other actors in a decision-making process (for example, the declaration of a state of emergency) or by limiting executive influence in the substantive domains of other branches of government (such as law-making powers).

Declaring a state of emergency can arguably aggregate power like no other executive act, removing many checks to unilateral action. Many post-conflict countries have suffered severely from emergency rule applied in an abusive way. Wary of that eventuality, many drafters of constitutions have overcompensated by mandating overly cautious prerequisites for a declaration of a state of emergency to be valid. In true emergencies, the absence of functioning institutions can make it impossible to meet prerequisites. In Haiti, for example, any declaration of an emergency recently required the countersignature of the Prime Minister and all other government ministers—in addition to an immediate determination by Parliament concerning the scope and desirability of the President's decision. Also recently, under the Haitian Constitution, only foreign invasion and civil war—but not a natural disaster—constituted a state of emergency. Because of this restrictive wording and the exigencies of the situation—including an unprecedented earthquake and the death of many ministers and parliamentarians—the Haitian government ignored the applicable constitutional provisions and declared a state of emergency anyway, protecting sovereignty but forced to disregard the principles of the rule of law.

Declaring a state of emergency can arguably aggregate power like no other executive act. Many drafters of constitutions have overcompensated by mandating overly cautious prerequisites for a declaration of an emergency.

Granting amnesty/power of pardon

Another function traditionally exercised by the executive is the right to grant pardons or

amnesty. In post-conflict scenarios, constitutional regulations for transitional justice that also include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. Amnesty as part of transitional justice after violent conflict is not covered in this chapter. Instead, it looks at provisions on granting amnesty and pardon that are meant to be applied during the ordinary course of constitutional life. But even in this context the power to grant amnesty/pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely. Thus, identifying the proper balance of actors involved in the process of granting amnesty/pardon is crucial. Also here, various constitutional options are available, ranging from exclusive executive authority to grant amnesty (Burkina Faso, the Czech Republic) or pardons (Georgia, Kenya) to the complete exclusion of the executive from amnesty decisions (Hungary). Between these extremes, the array of options includes both the executive and the legislature exercising parallel pardon and amnesty powers (Mozambique 1990); executive power to grant amnesty and pardons under limited circumstances (Haiti); joint powers requiring both the executive and the legislature to approve amnesty or pardons (Indonesia, South Korea); or even a combination of the last two arrangements—in Greece, amnesty is available only for political crimes and only if approved by both the executive and Parliament.

In post-conflict scenarios, constitutional regulations that include elements of amnesty are of paramount importance and often the prerequisite for a peaceful start to a new era. The power to grant amnesty or pardon is sensitive and carries the potential to influence the administration of justice on a large scale if used unwisely.

5.4.2. Limiting the executive's impact in law-making activities

Traditionally, the authority to draft law rests with the legislature, not the executive. The executive may aggregate power to block, check or influence central activities of other branches of government, such as law-making. Moderating the degree to which the executive can influence the law-making process is thus another consideration when designing executive power. Two different kinds of executive involvement in law-making activities can be distinguished: (a) the power of the executive to legislate by decree, and (b) the involvement of the executive in the legislative law-making process itself.

Moderating the degree to which the executive can influence the law-making process is thus another consideration when designing executive power.

Legislating by decree

It is important not to confuse the power to issue decrees of a regulatory or administrative nature with the power to legislate by decree. Most executives, at least those where the head is directly elected, enjoy the power to issue executive orders to implement the political agenda. In some cases, the President has extensive discretion in interpreting the intentions of the legislature in implementing the law.[41]

Legislating by decree comes in two forms: (a) as powers delegated from the legislature; or (b) as original constitutional powers. In the former, the legislature itself controls and may revoke the delegation of such authority at any time (Croatia). If this power is given temporarily by a majority of the legislature and its content is carefully circumscribed this might help in getting individual measures enacted in a specific area more efficiently. With regard to the law-making authority directly assigned to the executive, again two facets are worth considering: first, the power to legislate in exceptional circumstances only, and, second, the power to legislate on particular matters. A common exceptional circumstance is periods when the legislature is not in session. However, those decrees commonly lapse if they are not confirmed by the legislature within a certain period of time after it reconvenes (e.g. Brazil). Another exception is the state of emergency. However, if it is not designed carefully (see above), such a provision potentially opens the door to a fairly extensive form of legislative power and is prone to misuse, as can be seen in Egypt, Sudan, and elsewhere.

The power of the executive to legislate by decree can mean powers delegated from the legislature or original constitutional powers.

Alternatively, a constitution may permit the executive to issue decrees with the force of law in particular policy areas, thus circumventing the legislature in those fields (e.g. France).

Involvement of the executive in the law-making process

The legislative process includes various stages, starting with the initiation of legislation and ending with a bill's promulgation into law. Substantive executive involvement in this process may occur at two stages—(a) at the very beginning, and (b) after the legislature has passed the bill.

(a) Initiative to legislate

In most constitutions, the legislature holds the unlimited authority to initiate the law-making process in all matters, and sometimes even exclusively (e.g. the USA). In many countries, however, the authority to introduce bills is at least in part shared with the executive. In some constitutions, the executive even has the exclusive capacity to introduce budgetary laws, international treaties or trade and tariff legislation. This authority might extend to other policy areas as well (e.g. Brazil, Chile and Columbia). Such a 'gatekeeping' function enables the executive to maintain the status quo in the particular policy areas to which it applies. A President who wants to keep a legislature that is dominated by the opposition from making changes in a given area can just refrain from introducing legislation.

(b) Presidential veto powers

After the legislature passes a bill, many constitutions enable the President to influence, impede or even block it. Thus, the way in which a constitution defines veto powers can also aggregate or disperse power. Two different types of presidential intervention can be distinguished: the President may (a) reject a bill strictly for political reasons, or (b)

challenge the constitutionality of a bill. The first is considered a *political* veto, the second a veto on the *constitutionality* of a bill. Political vetoes are more common in presidential and semi-presidential systems where the electorate, rather than the legislature, elects the President directly. If the legislature can overrule a veto by a majority equal to or greater than the majority by which the bill in question was originally passed (e.g. Botswana, India, Turkey), then the presidential veto is weak and only amounts to a right of delay. A veto may require the lapse of several months before the legislature can reconsider a bill. The intervening time may permit further discussion or media attention (e.g. Uruguay). If the threshold required for the legislature to overrule the veto rises, however, then the presidential veto becomes more substantial. Higher thresholds can vary significantly, from an absolute majority (Peru), to a 60 per cent majority (Poland), to a 67 per cent majority (Chile) of all members of the legislature who are *present*, to a 67 per cent majority of the *full* membership of the legislature (Egypt). Depending on the composition of the legislature and the strength of the opposition, a presidential veto might equate to a de facto absolute veto that can block all legislative initiatives if it is applied. A *de jure* absolute veto rarely exists; where it does, it usually applies only to limited policy areas (e.g. Cyprus).

Involvement of the executive in the law-making process may mean the power to initiate legislation or powers of veto. In many countries the authority to introduce bills is at least in part shared with the executive, or the veto can be overridden under various conditions.

In addition to a so-called 'package veto' that allows the President to register only a yes or no opinion, a 'partial veto' permits him/her to object to portions of a bill (Uruguay). The partial veto arguably engages the President more closely in the law-making process by authorizing a more limited interjection into the details of legislation. That limited intervention cumulatively permits great influence over the final form of legislation.

Another option allows the President to broaden the spectrum of approval required for a proposed law to be passed. The executive also may influence the legislative process by sending a bill to referendum for approval or rejection by direct majority vote (France, Peru). The power to convoke a referendum or plebiscite can be an important tool, used by a President to put pressure on the legislature to go along with his/her policy proposal. Next to a debate on the purely substantive content of a bill, it may also be used by presidents to reaffirm their popular mandate and legitimacy.

A constitution may authorize the President to challenge the constitutionality of a bill by forwarding it to the appropriate court for review (Croatia, South Africa). Here, the President's concern as to the constitutionality of the law delays and—if it is supported by the appropriate court—ends the process on legal instead of political grounds. Permitting the President to veto a bill only on constitutional grounds allows for a legal check at an early stage.

6. Conclusion

The ways in which the executive branch of government can be designed are manifold and the options illustrated above have only provided some examples of the rich menu available. The various suggestions on disaggregating executive powers will enhance discussions to transform political ideas into a legal setting. But constitutionally constructing institutional relationships that strike the right balance of power and responsibilities, both within the executive branch and between all three branches of government, can only be a first step. Political dynamics and actors can work around constitutional provisions and generate results that are inapposite to what the drafters of the constitution intended. Occasionally, constant support and vigilance from the relevant political actors might be required to avoid overly expansive interpretation of the law by the executive. For instance, the Constitution of Brazil provides the President with the power to issue 'provisional measures' in times of 'relevance and urgency'. Under the provisions of the 1988 Constitution, such measures expired after 30 days unless passed by law. However, this provision was interpreted as allowing presidents to reissue the provisional measures indefinitely. A 2001 reform lengthened the pertinent time period to 60 days, but also specified that the provisional measures could only be renewed once. However, sometimes the principles of separation of power and institutional checks and balances, both designed to control the executive, may prove irrelevant if the Prime Minister de facto controls his/her political party.

The constitutional dilemma of preventing executives from extending their tenure beyond that permitted in the constitution also illustrates the limited reach of constitutional provisions that lack political support: although rarely involved in the constitutional amendment process, chief executives repeatedly have managed to initiate and direct those processes, resulting in extensions of their terms (Burkina Faso, Côte d'Ivoire, Gabon, Uganda). To avoid this outcome, some constitutions have declared presidential terms immutable (El Salvador, Honduras, Niger), and Honduras's Constitution has even empowered the armed forces to enforce that provision (see above). It may be more

than a coincidence that when presidents have sought to overcome this limitation in Honduras and Niger they failed and were removed from power. Flagrant disrespect of this norm and the ignorance of the other branches' interventions to safeguard it mobilized opposition and resistance. In the end, the constitutional coups of both presidents were stopped at different stages by military intervention.

Table 2. Issues highlighted in this chapter

Issues	Questions
1. System of government	• Shall the head of government be directly elected by the people for a fixed term or shall s/he derive his/her legitimacy from the legislature, making his/her origin and survival dependent on the legislature? • Shall the head of state also be the head of government? If so, shall s/he be elected by the people (presidential system) or by the legislature (South Africa, Botswana)? • Shall there be a dual executive with a directly elected head of state and a head of government that is selected by both the head of state and the legislature?
2. Designing the executive branch at the national level	• Shall the position of head of government (and head of state) be exercised by one single person or rather by a collegial executive, where the presidency is composed of several members? • If the latter, shall all members of the presidency have the same powers or shall they have weighted powers, requiring the presidency to decide collectively only on important issues? • In the case of a dual executive, shall the head of state have the power to appoint/select/dismiss the head of government? • In a dual executive, shall the head of state be involved in appointing and/or dismissing Cabinet members or shall this power vest exclusively in the head of government?
3. Presidential term limits	• Shall there be term limits for a directly elected President? How can term limits be protected against easy amendment?

4. Decentralization of executive powers	• From a vertical perspective, shall there be various levels of administration or levels of government in the country? • If the latter, shall the respective head of administration be elected by the people of that unit or shall s/he be appointed by the national executive? • Shall the head of administration/government implement national policies only or shall s/he be empowered to determine the policies with regard to specific issues autonomously (either by himself/herself or through a legislative assembly at that level) and represent that level of government? • Shall the level of government be able to raise its own revenues?
5. Institutional powers of the executive	• Shall the head of the executive have the power to dissolve the legislature? If yes, under which circumstances?
6. Institutional checks on the executive	• Shall the head of the executive have exclusive control over the Cabinet or shall the control be shared with the legislature? • Shall there be a political vote of no confidence of the legislature against the head of government? • Who shall be involved in an impeachment procedure against the head of state/head of government? • Shall there be the opportunity for citizens to recall the head of state under specific circumstances?
7. Substantive powers of the executive	• Shall the executive have exclusive control over declaring a state of emergency or should other actors (e.g. the legislature) be involved as well? • Shall the executive have exclusive control over declaring war or should other actors (e.g. the legislature) be involved as well? • Shall the executive have exclusive control over granting pardons/amnesty or should other actors (e.g. the legislature) be involved as well? • Shall the executive be involved in the law-making process? If so, shall there be the possibility for the executive to legislate by decree and what kind of limitations shall apply? • Shall the executive have the right to initiate legislation, in some areas even exclusively? • Shall the executive have the right to veto bills? If so, shall it be a purely suspensive veto or shall a super-majority of the legislature be required to overcome the presidential veto, or shall there even be an absolute veto in some areas? • Shall the executive have the right to question the constitutionality of a bill before it becomes law?

Notes

1 See Mainwaring, S. and Shugart, M. S., 'Juan Linz, Presidentialism, and Democracy: A Critical Appraisal', *Comparative Politics*, 29/4 (1997), pp. 449–71.

2 Linz, J. J., 'The Perils of Presidentialism', *Journal of Democracy*, 1/4 (1990), pp. 51-69.

3 Horowitz, D., 'Constitutional Design: Proposals Versus Processes', in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford and New York: Oxford University Press, 2002), pp. 15–36.

4 Carey, J. and Shugart, M. S., *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992).

5 Simeon, R., 'Constitutional Design and Change in Federal Systems: Issues and Questions', *Publius: The Journal of Federalism*, 39/2 (2009), pp. 241–61.

6 Horowitz, 'Constitutional Design: Proposals Versus Processes'.

7 Simeon, 'Constitutional Design and Change in Federal Systems'.

8 For an in-depth analysis of the 'Dimissal' see Kelly, P., *The Dismissal* (Melbourne: Angus & Robertson, 1983). A similar dynamic framed the 2008–09 Canadian parliamentary dispute, which opposition parties in the House of Commons triggered by supporting a motion of no confidence against the minority government.

9 Article 64 of the German Basic Law (1949) as of 2009.

10 Article 175 of the Swiss Constitution.

11 Posner, D. N. and Young, D. J., 'The Institutionalization of Political Power in Africa', *Journal of Democracy*, July 2007, p. 131.

12 Article 81 (3) of the Constitution of the Russian Federation (1993) as of 2008.

13 Article 60 (5) of the Constitution of the Republic of Austria (1920) as of 2004.

14 Article 178 of the Constitution of the Republic of Panama (1972) as of 2004.

15 Article 229 of the Constitution of Paraguay 1992.

16 Article 70 of the Constitution of the Republic of Korea (1948) as of 1987.

17 Article 88 (2) of the Constitution of South Africa (1996) as of 2007.

18 Article 101 (2) of the Constitution of the Republic of Turkey (1982) as of 2008.

19 Article 248 of the Constitution of El Salvador (1983).

20 Article 374 of the Constitution of Honduras (1982).

21 Article 36 and 136 of the Constitution of Niger (1999).

22 Article 272 of the Constitution of Honduras (1982).

23 Article 128 (2) of the Constitution of the Republic of Korea (1948) as of 1987.

24 The term 'de-concentration' is used here as a technical term to describe a specific degree of decentralization. If not related to administrative decentralization, the term is used more generally.

25 Article 187 (1) of the Constitution of Portugal (1976) as of 2004.

26 Article 135 (9) of the Constitution of Colombia (1991) as of 2005.

[27] Article 101 of the Constitution of Argentina (1994).

[28] Article 88 of the Interim Constitution of South Africa (1994–96).

[29] Article 87 of the Constitution of Ukraine (1996) as of 2004.

[30] Article 67/Article 68 of the German Basic Law (1949) as of 2009.

[31] Article 39 A of the Constitution of Hungary (1949) as of 2007.

[32] Article 87 (8) of the Constitution of Lesotho (1993).

[33] Article 158 (1) of the Constitution of Poland (1997).

[34] Article 113 of the Constitution of Spain (1978) as of 1992.

[35] Article 57 of the Constitution of Namibia (1990) as of 1998.

[36] Article 136 of the Constitution of Egypt (1971) as of 2005 (before the 2007 amendments).

[37] Article 105 of the Constitution of the Republic of Ecuador (1998) as of 2008.

[38] Article 95 of the Constitution of Romania (1991) as of 2003.

[39] Article 60 (6) of the Constitution of the Republic of Austria (1920) as of 2004.

[40] Article 11 of the Constitution of the Republic of Iceland (1944) as of 1999.

[41] Payne, J. M. et al., *Democracies in Development: Politics and Reform in Latin America* (Washington, DC: Inter-American Development Bank, International IDEA et al., 2007).

Key words

Collegial executive, Dual executive, Vertical separation of executive powers, Institutional dependence

Additional resources

- **Peacebuilding Initiative**

  <http://www.peacebuildinginitiative.org/index.cfm?pageId=1759>

  This site provides an in-depth overview of democracy and governance issues in post-conflict peace-building contexts. It addresses definitions and conceptual issues related to the notions of democracy, governance and the rule of law. It also examines how democratic governance has become a central political framework for post-conflict peace building over the last two decades and contains a discussion specifically dedicated to constitutions.

- **ACE Electoral Knowledge Network**

  <http://aceproject.org/ero-en/index_html?filter&topic=&country=&type=Essays and Papers>

  The ACE Electoral Knowledge Portal—a joint initiative of International IDEA, the Electoral Institute of Southern Africa (EISA), Elections Canada, the Federal Electoral Institute of Mexico, the International Foundation for Electoral

Systems (IFES), the United Nations Department of Economic and Social Affairs (UNDESA), the United Nations Development Programme (UNDP) and the UN Electoral Assistance Division (UNEAD)—is an online knowledge repository that offers a wide range of services related to electoral knowledge, assistance and capacity development. The website contains in-depth articles, global statistics and data, an Encyclopedia of Elections, information on electoral assistance, observation and professional development, region- and country-specific resources, daily electoral news, an election calendar, quizzes and expert networks.

- **Institute of Federalism**

  <http://www.federalism.ch/index.php?page=22&lang=0>

  The Institute of Federalism is a centre for research and academic expertise that focuses on federalism and cultural diversity. Its website offers an international research and consulting centre that focuses on the peaceful creation of multicultural societies.

- **Geneva Centre for the Democratic Control of Armed Forces**

  <http://www.dcaf.ch/>

  The Centre for the Democratic Control of Armed Forces (DCAF) is an international foundation supporting the development of security forces which are accountable to the state and its citizens. This site contains a number of publications, including a policy paper that discusses states of emergency—'Securing Democracy? A Comparative Analysis of Emergency Powers in Europe' (2009).

- **National Democratic Institute**

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

  The National Democratic Institute (NDI) is a non-profit, non-partisan organization that seeks to support democratic institutions worldwide through citizen participation, openness and accountability in government. The website offers a library of key documents as well as other publications.

- **Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights**

  <http://www.osce.org/odihr>

  The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization that aims to offer a forum for political negotiations and decision making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation. Funded by its member states, the organization puts the political will of the participating states into practice through its network of field missions. The website contains multimedia resources, news services, databases and a documents library.

- **Semi-presidential One website**

  <http://www.semipresidentialism.com/The_Semi-presidential_One/Blog/Blog.html>

  This website features posts about semi-presidentialism and semi-presidential governments by the political scientist Robert Elgie.

Glossary

Administrative decentralization	The degree of autonomy that governmental subunits possess relative to the central government in running governmental affairs. Forms of administrative decentralization are, for example, de-concentration, delegation and devolution.
Branches of government	Different sections of authority and power within the institutional design of a state. Traditionally there are three different branches with distinct powers in a modern state (executive, legislative and judicial).
Collegial presidency	A system with more than one person involved in running presidential affairs, often used as a way to accommodate diverse groups
De-concentration	Occurs when the central government disperses responsibility for implementing a policy to its field offices without transferring authority
Delegation	A mechanism under which the central government refers decision making and administrative responsibilities for various public functions to other levels of government on a revocable basis. The degree of supervision varies and might include substantial central control, or might fully allocate the administration and implementation of policy to subunits.
Devolution	The strongest form of decentralization that involves the transfer or shift of a portfolio of authority to regional or local governments
Dual executive	A system with both a President and a Prime Minister
Executive branch	The executive branch is one of the three *branches of government*. Its main task is to implement the laws.
Fiscal decentralization	The extent to which governmental subunits are able to undertake fiscal responsibilities, such as revenue-raising and spending
Full recall	In constitutions providing for full recall, both the initiative and the final decision rests exclusively with the citizenry
Horizontal separation of authority	A measure that explores options for de-concentrating power, either within one branch of government (for example, a collegial presidency in the executive branch or a second chamber in the legislature) or between branches of government at the national level
Impeachment	The process of bringing legal charges against a high constitutional authority, public official or judge, which would authorize their removal

Legislating by decree	The ability of the executive branch to make law, manifested either as powers delegated from the legislature or original constitutional powers. In the former, the legislature itself controls and may revoke at any time the delegation of such authority.
Mixed recall	In a mixed recall, the citizenry is involved only in one of the steps of the process of recall, either initiating it or deciding on it in a referendum.
Mixed system	A design of the executive branch that in some way combines aspects of the *presidential* and *parliamentary systems*
Parliamentary system	The institutional design of the government in which the head of government is elected by the legislature and is accountable to it
Political decentralization	The degree to which governmental subunits are able to undertake the political functions of governance such as representation
Presidential system	The institutional design of the government in which the head of state and the head of government are typically the same individual who is directly elected by the people for a fixed term
Recall	The competence of the electorate to recall its representatives in the legislature or the executive branch prior to the end of their term. Depending on the involvement of the citizens, a distinction is made between full recall and mixed recall.
Separation of powers	The distribution of state power among the different branches of government and actors, in such a way that no branch of government can infringe on the powers specifically granted to another
State of emergency	A temporary period under which extraordinary powers are granted, usually to the executive branch, in order to deal with extenuating circumstances that are deemed an emergency
Vertical separation of authority	A measure that explores options for allocating power among various levels of government through different forms of decentralization
Veto	The ability of an official or body to block, impede or delay decision making or the passage of legislation
Veto players	Political actors and institutions, such as second legislative chambers, or presidents, that have the ability to veto, for example, legislative action

About the author

Markus Böckenförde is currently the Leader of the Advisory Team to the Policy Planning Staff at the Federal Ministry for Economic Cooperation and Development and Senior Researcher at the German Development Institute. From 2009 until April 2011, he was Programme Officer and in part Acting Programme Manager for the Constitution Building Programme at International IDEA, Stockholm. Before joining IDEA, he was the Head of the Africa Projects and a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg (2001–2008). In 2006–2007 he was seconded by the German Foreign Office to the Assessment and Evaluation Commission (AEC) in Sudan as its legal expert. The AEC has been mandated to support and supervise the implementation of the Sudanese Comprehensive Peace Agreement. From 1995 to 1997 he was research assistant to Justice Professor Helmut Steinberger, the German delegate to the Venice Commission (the Council of Europe's advisory body on constitutional matters).

Dr Böckenförde holds a law degree and a PhD from the University of Heidelberg and a Master of Laws degree from the University of Minnesota as well as the equivalent of a Bachelor degree in political science (University of Freiburg). He has been involved in the constitution-building processes of Sudan and Somalia, working together with the relevant constitutional assemblies, and has been otherwise involved in the processes in Afghanistan and Nepal. He has published widely in the area of constitutional law and constitution building and is the co-author of several Max Planck Manuals used as training materials for Max Planck projects. He has worked as a consultant for the United Nations Development Programme (UNDP), the German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit, GTZ, now the Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ), the German Foreign Office, the Konrad Adenauer Foundation and the Friedrich Ebert Foundation.

International IDEA at a glance

What is International IDEA?

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization that supports sustainable democracy worldwide. International IDEA's mission is to support sustainable democratic change by providing comparative knowledge, assisting in democratic reform, and influencing policies and politics.

What does International IDEA do?

In the field of elections, constitution building, political parties, women's political empowerment, democracy self-assessments, and democracy and development, IDEA undertakes its work through three activity areas:

- providing comparative knowledge derived from practical experience on democracy-building processes from diverse contexts around the world;
- assisting political actors in reforming democratic institutions and processes, and engaging in political processes when invited to do so; and
- influencing democracy-building policies through the provision of our comparative knowledge resources and assistance to political actors.

Where does International IDEA work?

International IDEA works worldwide. Based in Stockholm, Sweden, it has offices in Africa, Asia and Latin America.