Memorandum on Options for Executive Formation

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0. Introduction

This memorandum provides an overview of options for the formation of the executive branch of the government, taking account of provisions in three relevant outcome documents of the National Dialogue Conference: the Final Report of the Working Group on State Building, the Agreement on a Just Solution to the Southern Question, and the Final Report of the Working Group on the Sa'adah Issue.

The memorandum is structured as follows:

1. Applicable Outcomes of the National Dialogue Conference
2. Relevant options for executive formation compatible with such provisions
3. Different special measures in relation to various mechanisms of executive formation
4. Issues for separate consideration

1. Provisions in outcome documents of the National Dialogue Conference relevant to executive formation

Three Outcome documents contain relevant provisions.

The **Final Report of the Working Group on State Building and Constitution** establishes that "[t]he system of governance is presidential" (Fifth: Decisions Relevant to the System of Governance) and further specifies that the Parliament, inter alia shall be mandated to exercise the function of "[g]ranting of confidence to the government and withdrawal thereof." (Seventh: Decisions Relevant to the Legislative Authority: First: The Parliament, paragraph 2) It also notes that "[t]he appointment of members of the Parliament or the Federal Council in an executive position is prohibited, except for the position of the Prime Minister or a cabinet minister." Seventh: Decisions Relevant to the Legislative Authority: Some Principles Relevant to the Legislative Authority, paragraph 2).

In the **Final Report of the Working Group on the Sa'adah Issue**, members reached consensus, inter alia, on "[n]ational partnership in the government through a constituting phase and, after that, the government can be formed on the basis of the elections that will follow the constituting phase." (First: Solutions, Treatments and Guarantees, paragraph 31)

The **Agreement on a Just Solution to the Southern Question** establishes that "[d]uring the first electoral cycle after the adoption of the federal constitution, the South shall have a 50% representation in all leadership structures in the executive, legislative and judicial bodies, including the armed and security forces, and in levels where appointments are made by the President of the Republic or the Prime Minister. Similarly, the South shall have a 50% representation in the House of Representatives." It further stipulates: "The federal constitution shall provide for executive, judicial and parliamentary mechanisms to protect the vital interests of the South after the first electoral cycle. These may include special veto rights or special voting rights on issues related to the vital interests of the South and special representation based on the formula of population weighted by territory. [...] Moreover, the

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federal constitution shall define arrangements to realize power sharing." (II. PRINCIPLES, paragraph 9)

2. Issues to consider for executive formation and applicable options

On the basis of the the outcome documents, executive formation needs to involve the president and requires parliamentary approval. In addition, for a transitional period (constituting phase/first electoral cycle), the executive needs to be formed to reflect both a norm of national partnership and a 50% representation in its leadership structures. Beyond that interim period, there is a requirement for executive, judicial and parliamentary mechanisms to protect the vital interests of the South and arrangements to realise power sharing.

While the President in a mixed system is directly elected, the government remains accountable to parliament. In other words, the approval of parliament is required for a government to be established and to remain in place, providing a balance of power between the Executive (President and government) and the Legislature (chambers of parliament).

The key issues in the relationship between Executive and Legislature in mixed systems relate the process of nomination and appointment of the prime minister (as well as other members of the government), the rules that govern the use of a vote of confidence/no confidence by parliament in the government, and presidential powers to dissolve parliament.[2]

Nomination and appointment of the prime minister
Two options are necessary to consider:

1. The president exercises an exclusive and absolute right to nominate and appoint a candidate for prime minister.
2. This right is qualified and balanced against a parliamentary role in the process that can involve approving a presidential choice for the entire cabinet or for the prime minister only.

Most common practice is that the president nominates and appoints a candidate for prime minister who is then subsequently confirmed by parliament upon presentation of his or her government and a government programme. Examples of this practice can be found in the constitutions of Algeria (Article 77), Georgia (Article 73), Haiti (Article 137), Lithuania (Article 67), Mongolia (Articles 25 and 33), Poland (Article 154), Russia (Article 83), and Ukraine (Article 106). This effectively means that the President is constrained in his or her choice of Prime Minister as Prime Minister (and his or her cabinet) require parliamentary approval before they are confirmed in their roles.

This right is qualified in the constitution, in a number of cases, by requiring the president to consult with parliament with a view to identify a candidate likely to carry a majority in parliament (e.g., Georgia, Guinea-Bissau, Haiti, Mongolia, and Portugal).

The qualification of the presidential right to nominate and appoint a candidate for prime minister may include determining the sequence of such consultations (largest party/bloc, second-largest party/bloc, etc., e.g., Bulgaria, Article 99, and Romania, Article 103) and

[2] The use of a vote of confidence/no confidence by parliament in the government and presidential powers to dissolve parliament are briefly considered in Section 4 below.

requiring the president to appoint a candidate as a result of these consultations. This means essentially that the candidate for prime minister is designated from within parliament, even though the president formally appoints the candidate so designated. This is the case in East Timor (Articles 85, 86, 106), Madagascar (Articles 53 and 90), and Tunisia (Article 89).

> The Constitution of Tunisia realises such a role of parliament under Article 89 which requires the president to "ask the candidate of the party or the electoral coalition which won the largest number of seats in the Assembly of the Representatives of the People to form a government, within a one month period, extendable once." The provision, however, is qualified if this mechanism of executive formation fails. Then the president has more discretion and can hold wider consultations "with political parties, coalitions, and parliamentary groups, with the objective of asking the person judged most capable to form a government within a period of no more than one month to do so." Thus, the case of Tunisia is an example of realising parliamentary designation of the prime minister by restricting the president's right of selecting a candidate for prime minister.
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> The 2005 Constitution of Armenia states in Article 55(4) that the president "shall, on the basis of the distribution of the seats in the National Assembly and consultations held with the parliamentary factions, appoint as Prime Minister the person enjoying confidence of the majority of the Deputies and if this is impossible the President of the Republic shall appoint as the Prime Minister the person enjoying confidence of the maximum number of the Deputies."
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> Article 103 of the Romanian constitution states: "The President of Romania shall designate a candidate to the office of Prime Minister, as a result of his consultation with the party which has obtained absolute majority in Parliament, or—if no such majority exists—with the parties represented in Parliament."
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> Article 99 of the 2007 Constitution of Bulgaria establishes that "[f]ollowing consultations with the parliamentary groups, the President shall appoint the Prime Minister-designate nominated by the party holding the highest number of seats in the National Assembly to form a government."
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> Article 61 of the Finnish constitution establishes a different sequence of events: "The Parliament elects the Prime Minister, who is thereafter appointed to the office by the President of the Republic. The President appoints the other Ministers in accordance with a proposal made by the Prime Minister. Before the Prime Minister is elected, the groups represented in the Parliament negotiate on the political programme and composition of the Government. On the basis of the outcome of these negotiations, and after having heard the Speaker of the Parliament and the parliamentary groups, the President informs the Parliament of the nominee for Prime Minister. The nominee is elected Prime Minister if his or her election has been supported by more than half of the votes cast in an open vote in the Parliament." Such an arrangement balances a parliament-led process of designating a prime minister with a prime minster/president-led process of appointing the remaining members of the government.

Consideration also needs to be given to circumstances in which parliament and president cannot agree on an acceptable candidate for the office of prime minister. In other words, a

contingency provision should be in place if the president fails to appoint a candidate for the office that can command parliamentary majority support.,

> The Constitution of Poland stipulates "1. The President of the Republic shall nominate a Prime Minister who shall propose the composition of a Council of Ministers. The President of the Republic shall, within 14 days of the first sitting of the Sejm or acceptance of the resignation of the previous Council of Ministers, appoint a Prime Minister together with other members of a Council of Ministers and accept the oaths of office of members of such newly appointed Council of Ministers. 2. The Prime Minister shall, within 14 days following the day of his appointment by the President of the Republic, submit a programme of activity of the Council of Ministers to the Sejm, together with a motion requiring a vote of confidence. The Sejm shall pass such vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of Deputies. 3. In the event that a Council of Ministers has not been appointed pursuant to para.1 above or has failed to obtain a vote of confidence in accordance with para. 2 above, the Sejm, within 14 days of the end of the time periods specified in paras 1 and 2, shall choose a Prime Minister as well as members of the Council of Ministers as proposed by him, by an absolute majority of votes in the presence of at least half of the statutory number of Deputies. The President of the Republic shall appoint the Council of Ministers so chosen and accept the oaths of office of its members." Under Article 155, if this procedure fails, the president can then appoint a prime minister and, upon the latter's recommendation, government ministers who then subject themselves collectively to a confidence vote in the Sejm. If they fail to obtain such confidence, the president may dissolve the Sejm and call fresh elections.
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> Article 90 of the constitution of Madagascar makes a similar provision, albeit starting from a right of the legislature to designate a prime ministerial candidate: "(1) At the beginning of each legislature, or in case of resignation of the Government or vacancy in the office of Prime Minister for any other reason, the National Assembly, by a majority of its members, shall designate a Prime Minister from among its members or elsewhere within a period of seven days from the opening of the special session or from the date of the vacancy. (2) Within two weeks of his election, the Prime Minister shall present his general program of action to the National Assembly. (3) Election shall be by secret ballot by a majority of the members of the National Assembly. This vote is personal and shall not be delegated. The President shall appoint the Prime Minister elected by the National Assembly. If the appointment does not take place within ten days, the election by the National Assembly shall take effect immediately." However, the same Article also provides significant presidential powers in case the National Assembly is unable to elect an executive: "(4) In the event of rejection, the designated Prime Minister shall have a maximum of seven days to present a new program which shall be adopted under the preceding conditions. (5) In the event of another rejection, or in case the National Assembly has not elected a Prime Minister for whatever reason within thirty days from the opening of the special session or the vacancy in the office of Prime Minister, the President of the Republic shall appoint a new Prime Minister. In this case, no motion of censure may be voted upon before the presentation of the annual report provided for in Article 92."

Nomination and appointment of other ministers

A further issue to consider for the process of executive formation is how the remaining ministers of the government are appointed, i.e., members of the executive apart from the prime minister. There are two principle options in this context—a prime minister-led process or a president-led process.

Under a prime minister-led process, ministers can either be appointed by the prime minister directly or (formally) by the president upon recommendation of the prime minister. The former approach is used, for example, in Bulgaria (Article 84) and Mongolia (Article 39). In both cases, ministerial appointments by the prime minister remain subject to parliamentary approval.

> The Bulgarian constitution, for example, stipulates in Article 84 that parliament shall "elect and remove the Prime Minister and, on his motion, the members of the Council of Ministers."
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> The Mongolian constitution additionally requires the prime minister to consult the president over ministerial appointments. It also gives the parliament an opportunity to confirm or reject their appointment individually, rather than collectively. Thus, according to Article 39, "(2) The Prime Minister, in consultation with the President, submits his or her proposals on the structure and composition of the Government and on the changes in these to the National Parliament. (3) The National Parliament considers the candidatures proposed by the Prime Minister one by one and take decision on their appointment."

Such a requirement for consultation means that prime minister still retains primacy in the process of selecting his or her ministers. The president's role in prime minister-led processes, however, can be strengthened if the president is formally required to appoint ministers upon the prime minister's recommendation. Such is, for example, the case in Finland (Article 61), France (Article 8), Lithuania (Article 92), Portugal (Article 187), and Russia (Article 83).

> The Constitution of France states in its Article 8 that the president "[o]n the proposal of the Prime Minister … shall appoint the other members of the Government and terminate their appointments."

A president-led process—where the president can appoint all the other members of the executive without formal input from the prime minister—is far less common.

> The Constitution of Mozambique, under Article 121, establishes that "[i]n the function of directing government activity, the President of the Republic shall have power to … appoint, exonerate and dismiss Ministers and Deputy Ministers."
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> The Namibian constitution provides in Article 32 that "the President … shall have the power, subject to this Constitution to … appoint … Ministers and Deputy-Ministers." This is further confirmed in Article 35, stating that "[t]he Cabinet shall consist of the President, the Prime Minister and such other Ministers as the President may appoint from the members of the National Assembly..."

In equally rare cases, a presidential role in ministerial appointments is confined to specific portfolios.

The Constitution of Tunisia establishes in Article 89 that "[t]he government shall be composed of a Head of Government, Ministers, and secretaries of state selected by the Head of Government, and in the case of the Ministers of Foreign Affairs and Defence, in consultation with the President of the Republic."

Poland, under its 1992 constitution, included similar mechanisms of co-decision making in Article 61: "The Prime Minister shall lay a motion to appoint the Ministers of Foreign Affairs, of National Defence and of Internal Affairs after consultation with the President."

To summarise, the options available for consideration in line with the relevant provisions in the outcome documents of the National Dialogue Conference are:

- The president nominates and appoints a prime minister in consultation with parliament and his or her choice of a candidate is subsequently confirmed by parliament upon presentation of a whole government and its programme. The remaining members of government are appointed by the prime minister directly or by the president on the recommendation of the prime minister.
- The president nominates and appoints a prime minister and further government ministers (of his or her own choosing or upon prime ministerial recommendations).The executive so formed does not require parliamentary approval and can only be dismissed by parliament qua a vote-of-no-confidence.
- Parliament has the ability to designate a candidate for prime minister and formally approve him or her prior or subsequent to a formal presidential appointment. Further members of the government can then either be appointed by the prime minister directly (or by the president on the recommendation of the prime minister) and/or remain subject to parliamentary approval.

3. Special measures relevant to executive formation[3]

Two provisions in the outcome documents of the National Dialogue Conference suggest the need to consider the application of special measures in the first electoral cycle/transitional period. These are the requirement for a "[n]ational partnership in the government through a constituting phase" (Final Report of the Working Group on the Sa'adah Issue) and that "[d]uring the first electoral cycle after the adoption of the federal constitution, the South shall have a 50% representation in all leadership structures in the executive"[4] (Agreement on a Just Solution to the Southern Question). Another provision in the Agreement on a Just Solution to the Southern Question demands that the federal constitution, beyond the first electoral cycle, provide for executive, judicial and parliamentary mechanisms to protect the vital interests of the South and arrangements to realise power sharing.[5]

Given the mechanisms of executive formation outlined above, special measures can be conceived of principally in relation to the confirmation of the executive by parliament, and are thus related to various mechanisms pertaining to parliamentary voting procedures. In

[3] This section should be read in conjunction with the "Memorandum on constitutional mechanisms to implement Item 9 of Part II of the Agreement on a Just Solution to the Southern Question" for more detailed discussion of relevant special measures.

[4] I shall not discuss here in greater detail the need to define the meaning of 'the South' or of 'leadership structures'.

[5] The focus here is on relevant mechanisms in the context of executive formation. As outlined below, these constitute one form of power sharing qua parliamentary mechanisms (but not the only one) and can potentially also ensure executive representation of the South as a form of executive power sharing (again, not the only one).

other words, the emphasis is on meaningful participation of parliament in executive formation, going beyond the requirement of a minimum winning coalition. Relevant mechanisms in this context can accomplish the "[n]ational partnership in the government" required in the Final Report of the Working Group on the Sa'adah Issue, as well as serve as a means to establish the "parliamentary mechanisms to protect the vital interests of the South and arrangements to realise power sharing" foreseen in the Agreement on a Just Solution to the Southern Question.

The principle options available are to require qualified majorities for the approval of a government appointed by the president. This can take the form of:

- an absolute majority of all members (rather than just members present and voting);
- a super-majority (e.g., three-fifths, two-thirds, three-quarters, etc.);
- a concurrent majority overall and among representatives of the South (or another specifically designated group), with such a concurrent majority again possibly qualified.

Any of these procedures can be further qualified by requiring either an overall quorum (minimum number of members of parliament that need to be present for a vote to go ahead) and/or by requiring that votes in favour (or against) represent at least a certain percentage of members (e.g., that a majority vote approving the government needs to represent at least one-third of all possible votes in parliament).[6]

Given that Yemen will be a federal state, the approval of government could also be subject to a majority in both parliament and federal council voting separately (again, if deemed necessary, requiring an absolute, super, or concurrent majority). An alternative procedure would be to give the federal council an opportunity to object to parliamentary approval of the government (with a simple or qualified majority). This would then normally either trigger a conciliation procedure (involving president, parliament and federal council) and/or provide parliament with the option to overturn the federal council's objection with a qualified majority.

Another option to involve the second chamber would be to seek a majority in a joint session of both chambers in the National Assembly. This could again be done by requiring a qualified majority overall and/or a concurrent majority on the basis of either chamber membership or another (self-) designation of representatives voting.

By way of illustration, it is useful to consider the following examples. The Constitution of the DRC, in Article 90, determines that, "[b]efore assuming his functions, the Prime Minister presents the program of the Government to the National Assembly. Once this program has been approved, by absolute majority of the members of the National Assembly, the latter invests the Government with its powers." An absolute majority requirement is, inter alia, also enshrined in the constitutions of Georgia (Article 80), Madagascar (Article 90), and Ukraine (Article 114). In the case of East Timor, the constitution, under Article 109, requires: "Rejection of the programme of the Government shall require an absolute majority of the Members in full exercise of their functions."

[6] Unrelated to executive formation, the Constitution of Tunisia provides an example of such a provision in Article 64: "The Assembly of the Representatives of the People shall adopt draft organic laws by an absolute majority of all members, and ordinary draft laws by a majority of members who are present, provided that such a majority represents no less than one-third of the members of the Assembly."

A quorum requirement is included in Article 154 of the Constitution of Poland: "The Sejm shall pass such vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of Deputies."

A joint sitting of both chambers is required for the approval of the executive appointed by the president under Article 103 of the Romanian constitution: "The programme and list of the Government shall be debated upon by the Chamber of Deputies and the Senate, in joint sitting. Parliament shall grant confidence to the Government by a majority vote of the Deputies and Senators."

The specific requirement in the Agreement on a Just Solution to the Southern Question that "[d]uring the first electoral cycle after the adoption of the federal constitution, the South shall have a 50% representation in all leadership structures in the executive", needs to be considered separately from the above provisions that could be applied during and beyond the first electoral cycle. Following clarification of what 'leadership structures' are and who is considered a representative of the 'South', a specific transitional provision in the Yemeni constitution could simply be drafted to the effect that, for example, the cabinet must include such 50% Southern representation.

Depending on the specific nature of the appointment process, this could mean that, following the appointment of the prime minister, the latter is required to appoint and or nominate for presidential appointment, a certain (pre-determined) number of representatives from the South, possibly including to pre-determined cabinet positions (e.g., one or more from foreign affairs, defence, interior, finance, etc.). Alternatively, the same could be required of the president if he or she has the power to appoint (with or without prime-ministerial nomination) the other members of the cabinet.

Parliamentary approval of an executive so formed during the first electoral cycle could apply any of the mechanisms previously described.

4. Related issues for separate consideration

It is important to bear in mind that processes of executive formation as outlined here should not be seen in isolation from a range of other constitutional mechanisms that principally relate to the relationships between and within the different branches of government (e.g., executive—legislature—judiciary; president—cabinet/council of ministers; first chamber—second chamber).

They include the exercise of votes of confidence/no confidence in the government by parliament (particularly important if parliament has limited involvement in executive formation); where powers to dismiss the government, the prime minister, and/or individual ministers are vested; procedures for the dissolution of parliament; and mechanisms for the impeachment of the president. These will have a bearing on the formation of the executive, as well as its stability and representativeness.

For example, when parliament has no direct input into the formation of the executive, it would still normally possible for parliament to exercise a vote-of-no-confidence to dismiss an executive appointed by the president. In other words, even in cases in which the president exercises an exclusive and absolute right to nominate and appoint a candidate for prime minister without parliamentary involvement the executive so formed still remains accountable to parliament if the latter is able to dismiss the government through a no-

confidence-vote. Such is, for example, the case in France (Article 8) and Portugal (Articles 133 and 187).

However, if a motion for a vote-of-no-confidence requires a minimum number of members of parliament before it can be introduced or if such a motion can only be carried by a qualified majority and/or must be constructive in nature (i.e., simultaneously nominate an alternative candidate for prime minister), the executive once initially formed may be significantly more stable than otherwise. At the same time, however, such mechanisms may reduce the need to maintain a broad-based and inclusive government.

Similarly, the need for compromise between president and parliament would be significantly reduced if the president can dissolve parliament if the government he or she appoints fails to secure parliamentary approval or is dismissed by a vote-of-no-confidence. The same is potentially true if the president can ignore a parliamentary vote-of-no-confidence and govern by decree for extended periods of time or if parliament can form an executive without presidential approval.

Balancing these different mechanisms and procedures and factoring them into executive formation and vice versa should, thus, be seen as a key task for further discussion among members of the Constitutional Drafting Commission.