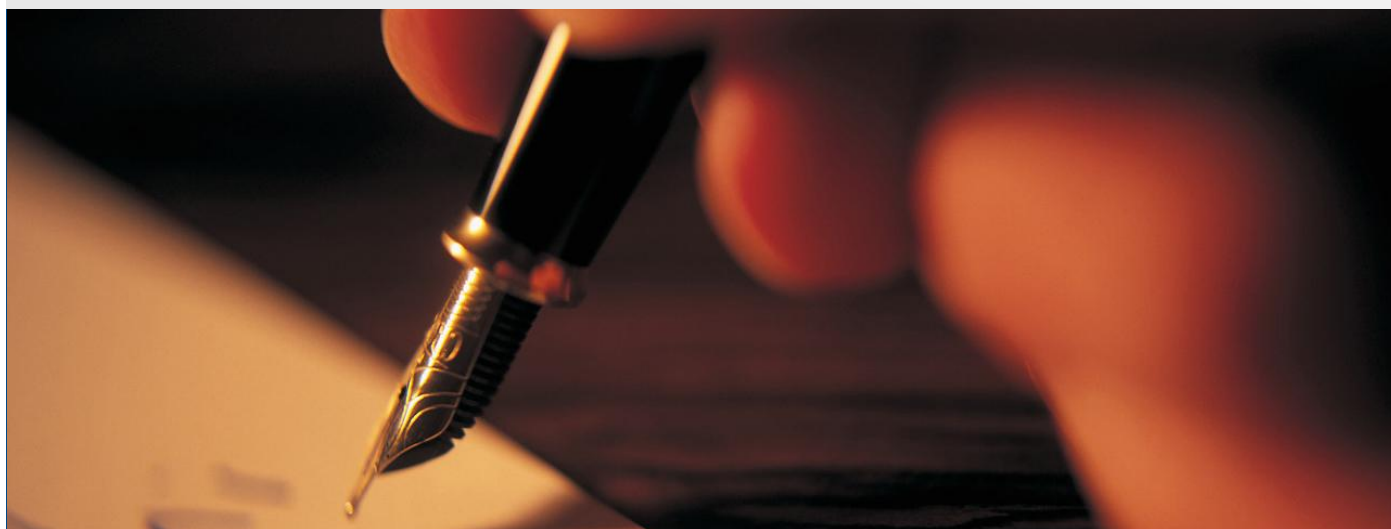


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# For a Semi-Presidential

## Regime:

Where is the New-Born Republic  
Heading?



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Group for Legal and Political Studies  
'Rexhep Luci' str. 10/5  
Prishtina 10 000, Kosovo  
Web-site: [www.legalpoliticalstudies.org](http://www.legalpoliticalstudies.org)  
E-mail: [office@legalpoliticalstudies.org](mailto:office@legalpoliticalstudies.org)  
Tel/fax.: +381 38 227 944

Friedrich-Ebert-Stiftung  
'Mujo Ulqinaku' str. 4/App 10  
Prishtina 10 000, Kosovo  
Web-site: [www.fes-prishtina.org](http://www.fes-prishtina.org)  
Email: [contact@fes-prishtina.org](mailto:contact@fes-prishtina.org)  
Tel: +381 38 609 900, 609 901  
Fax: +381 38 609 902

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# FOR A SEMI-PRESIDENTIAL REGIME: WHERE IS THE NEW-BORN REPUBLIC HEADING?



## I. BACKGROUND

As a state established under certain international supervisory conditions,<sup>1</sup> Kosovo drafted its first state constitution in a process both straightforward and opaque. The parliamentary political parties managed and owned the constitutional drafting process, starting immediately after the revelation of the Ahtisaari Settlement Proposal.<sup>2</sup> This control kept this process essentially closed to public opinion and citizen participation, although, in late 2007 and 2008, the parties did organize a limited number of formal debates around Kosovo to discuss the choices.<sup>3</sup> One can sum up this process as one wherein a politically headed commission supervised the constitutional drafting process in which it insisted upon the inclusion of certain partisan-favoured solutions in the new state Constitution. The resulting Constitution created a consociational model of democracy for Kosovo—quite less rigid than that of Bosnia—and logically and substantially based on the Ahtisaarian prescriptions. Nevertheless, the constitutional status of the President of the Republic carries no value of consociation; instead, it falls well within the margins of intergrationism.<sup>4</sup>

Although written via a quick-moving political process, Kosovo's new Constitution had a good start<sup>5</sup> with a progressive institutional framework. Observers affirmed that the new, modern constitutional structure and associated institutional arrangements followed the logic of Ahtisaari Plan. However, as the new political processes took shape, the media and the civic sector voiced criticisms of the constitutional prescriptions on the status of the President of the Republic. In particular, the constitutional prohibition that

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<sup>1</sup>Tunheim, J. (2009) 'Rule of Law and the Kosovo Constitution'. *Minnesota Journal of International Law*. Vol. 18, No. 2: 371-379.

<sup>2</sup> Ahtisaari Settlement Proposal is a short term for the international *Comprehensive Proposal for the Kosovo Status Settlement* of 2007, which was proposed by the United Nations Office of Special Envoy for Kosovo (Ahtisaari Plan, in the official form, is the UN Doc. S/2007/168/Add. 1, 26 March 2007); As regards the harmony of the Constitution of Kosovo with the Ahtisaari Settlement Proposal, see: Press Release of the Constitutional Commission of Kosovo, as regards to the Peter Faith's decision 'on the certification of the Kosovan Constitution', 2 April 2008. Accessed at (25 March 2010): <http://www.kushtetutakosoves.info/?cid=1,203,1316>.

<sup>3</sup> See, for instance: The Constitutional Commission of Kosovo, 'Minutes from Second phase of the public discussions for the draft constitution of Kosovo'. Decan, 27 February 2008. Available at: <http://www.kushtetutakosoves.info/repository/docs/minutesdeqan.pdf>.

<sup>4</sup> Korenica, F., and Doli, D., (2010) 'The Politics Of Constitutional Design In Divided Societies: The Case Of Kosovo'. *Croatian Yearbook of European Law and Policy*. Vol. 6, pp. 265-292;

<sup>5</sup> See, for instance: Weller, M., (2009) 'Contested Statehood: Kosovo's Struggle for Independence'. Oxford: Oxford University Press.

the President of the Republic cannot serve in any other public post fuelled public debate. The then-President of the Republic, Mr. Fatmir Sejdiu, had not resigned from his post as the president of the Democratic League of Kosovo and, instead, had deemed it sufficient to 'freeze' his position as the president of the given political party. He argued that decreasing/freezing his ability to exercise effectively his role within the political party served as sufficient grounds for not violating the Constitution.<sup>6</sup>

Not long after the enactment of Kosovo's first state Constitution, the Constitutional Court reviewed the constitutional provisions regulating the position of the President of the Republic. The Court addressed the issue of the incompatibility of the President of the Republic, ruling that the President of the Republic violates the Constitution if he/she simultaneously holds the post of the president of a political party.<sup>7</sup> In *Rrustemi v. President of the Republic*,<sup>8</sup> the Constitutional Court examined the relevance of the constitutional principle that the President of the Republic is a representative of the "unity of the people." The Court ruled that the President of the Republic violates the given constitutional principle if he/she simultaneously exercises or formally holds the post of the president of any political party. Note that the President of the Republic won appointment in the third round via a 50%+1 formula in the Assembly, in accord with the agreement between coalition-government political parties wherein they included the post of the President of the Republic.<sup>9</sup> The two principal coalition-government parties shared among them the post of the Prime Minister and that of the President of the Republic.

The Constitutional Court decision *Rrustemi v. President of the Republic*, on the one hand, questioned the extent to which the coalition agreement can also involve arrangements about the post of the President of the Republic; on the other hand, it altered the logic used to build coalition governments in Kosovo up to that point in time. The Constitutional Court determined that the president of the political party should resign his post in the political party upon assuming the post of the President of the Republic. As a consequence, the then-President of the Republic, Mr. Fatmir Sejdiu, resigned from his post as the President of the Republic. The coalition government agreement between the Democratic Party of Kosovo (DPK) and the Democratic League of Kosovo (DLK) did not anymore provide any realistic space for the post of the President of the Republic. Because of the Constitutional Court's decision, the agreement provided no alternative for the leader of the DLK except for the termination of the coalition agreement with his

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<sup>6</sup> Doli, D., & Korenica, F., (2010) 'Calling the Kosovo's Constitution: A Legal Review'. Vol. 22, No. 1, pp. 51-85.

<sup>7</sup> According to the Constitution of Kosovo: 'Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.' See Constitution of Kosovo, art. 113, para. 6. Moreover, according to the request submitted 30 by a number of thirty deputies, the president of the Republic has committed serious violation of the constitution while we has simultaneously holding the post of the president of the political party. For more see *Rrustemi et al v. President of the Republic*, Constitutional Court of Kosovo, Judgement No. KI 47/10. Available at: [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_shq\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_shq_2.pdf).

<sup>8</sup> *Rrustemi et al v. President of the Republic*, Constitutional Court of Kosovo, Judgement no. KI 47/10. Available at: [http://www.gjk-ks.org/repository/docs/ki\\_47\\_10\\_shq\\_2.pdf](http://www.gjk-ks.org/repository/docs/ki_47_10_shq_2.pdf).

<sup>9</sup> Doli, D., & Korenica, F., (2010) 'Calling the Kosovo's Constitution: A Legal Review'. Vol. 22, No. 1, pp. 51-85.

counterpart at the DPK and the subsequent withdrawal of the DLK members from ministerial positions.

In October 2010, through a vote of no confidence, the Assembly asked the acting-president of the Republic to dissolve the Assembly and call for early parliamentary elections in 2010.<sup>10</sup>

Those parliamentary elections occurred in December 2010, and the Democratic Party of Kosovo retained the majority in the Assembly. In this new political course, the DPK and Alliance for New Kosovo (ANK) agreed upon a new coalition government, with the post of the President of the Republic belonging to Mr. Behxhet Pacolli, the President of the ANK. Under a very complex parliamentary arrangement, the DPK managed to acquire 50%+1 votes in the Assembly, sufficient for appointing both the President of the Republic and the new government. However, the opposition political parties immediately called the procedure for the appointment of Bexhet Pacolli as the President of the Republic unconstitutional. The DLK referred the Assembly's presidential appointment decision to the Constitutional Court, wherein the DLK argued that, although the appointment of the President of the Republic requires a 50%+1 majority in the Assembly in the third round, the appointment could not take place without a quorum of two-thirds of the members of the Assembly. This issue, at a first glance, seemed unqualified constitutionally. The Constitutional Court, in *DLK v. Assembly*, however, ruled that—per the Constitution—in order to proceed with the voting procedure in the third round for appointing the President of the Republic, two-thirds of members of Parliament must be present.<sup>11</sup> The Constitutional Court ruled that the procedure for the appointment of Mr. Behxhet Pacolli as the President of the Republic was unconstitutional. This transformed the entire arrangement for both the appointment and status of the President of the Republic, as it made it impossible to appoint the president without the presence of the oppositional parties in the Assembly (or the quorum of two-thirds of the members of the Assembly).

Subsequent to this ruling, the opposition political parties, explicitly refused to participate in the third round of the appointment procedure making it impossible to have the necessary quorum of members present. However, opposition political parties agreed to participate if a consensual candidate—as opposed to a candidate deriving from the coalition government—were appointed president. In practice, the case *DLK v. Assembly* made it impossible for any other coalition government with less than two-thirds of the votes in the Assembly to appoint their preferred candidate President of the Republic. In other words, the Constitutional Court's decision imposed a situation in which either a candidate is consensual or the appointment procedure fails. Given this, we argue that the Constitutional Court's decision barred political parties with the majority in parliament from using the post of the president as part of the coalition government agreement, without the consensus of the opposition political parties. This first step later put forth the need to reform the entire system of appointment and status for the President of the

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<sup>10</sup> See the Constitution of Kosovo, art. 82, para. 2.

<sup>11</sup> *DLK v. Assembly*, Constitutional Court of Kosovo, Judgment No. KO 29/11. Available at: [http://www.gjiks.org/repository/docs/ko\\_29\\_11\\_agj\\_om\\_shq.pdf](http://www.gjiks.org/repository/docs/ko_29_11_agj_om_shq.pdf)

Republic of Kosovo, keeping in mind that the political parties could not find a consensual candidate for president.

Via a negotiated dialogue between the three main political parties (two belonging to the incumbent coalition government and one to the opposition) facilitated by the U.S. Embassy in Prishtina, the key political parties determined that reforming the constitutional provisions governing the position and appointment of the President of the Republic was necessary. Reform seemed the only solution that could overcome political vacuums that might arise from the inability to appoint a consensual President of the Republic in parliament. Thereafter, the main political parties signed a political agreement that requires the Assembly to initiate the process of amending the constitutional provisions regulating the appointment of the President of the Republic. Establishing a President of the Republic appointed by direct election remains the goal. The lack of consensus on finding an acceptable and consensual candidate forced the political parties into this new stance. The central argument here—that the lack of consensus within the Assembly should not be a reason to support such partisan and monopolistic choices with regard to the regulation of the appointment of President of the Republic—points to the lack of an elemental political culture in Kosovo that can sustain more neutral and less partisan political institutions having credible independence and civic attribution.

Following this political decision, the Assembly adopted a resolution initiating a constitutional amendment addressing two issues: first, the procedure for the appointment of the President of the Republic and, second, the electoral system for the parliamentary elections. This policy report however considers only the first issue. Through its deliberations, the Assembly predetermined that the president be appointed via direct popular suffrage, thereby dismissing the prior method of presidential appointment by parliament. Since the method of appointing the President of the Republic produces a number of outcomes related to the overall position of the president within the political system, one must examine these potential outcomes and their implications. A number of related issues derive from the relationship between the government and the parliament in the new constitutional design of the republic. Therefore, to begin this examination, this chapter explores the general effects of this transformation on a semi-presidential republic—mainly based upon a number of sources from the literature—and will turn to the examination of the current draft-amendments being proposed in the Functional Constitutional Amendment Commission (FCAC) in subsequent chapters.

## II. ADVANTAGES AND DISADVANTAGES OF A SEMI-PRESIDENTIAL REPUBLIC: DISCUSSING THE PRACTICE OF OTHER COUNTRIES

A number of features characterize Kosovo's governing system, as explained in the first section of this article; these share, to some extent, similarities with countries enjoying the very same governing system. In general, the result of parliamentary governance has predetermined an almost continuous negative trend in terms of democratization of the country. In particular, over the past several years, the predominant political role of the

Prime Minister vis-a-vis both the parliamentary majority and the president in determining policy choices has continuously raised concerns. The Prime Minister's predominant role in relation to other offices resulted from the coalition agreement and the division of executive posts (of the Prime Minister and the President) between the coalition leaders. In particular, the low level of democracy within the Prime Ministers' political party has significantly influenced this role. Hence, as it now stands, the leader of the party determines the choices of the political parties within parliament. The evidence suggests that the behaviour of the incumbent political parties in supporting the government and the prime minister is an ordinary conduct. Indeed, the Prime Minister, with the help of his coalition partner, controlled the majority in Parliament, while simultaneously (constitutionally) controlled the executive. The political orientation and the behaviour of the parliamentary majority is attuned according to the needs and preferences of the biggest coalition partners.

The general assumption, however, is that in parliamentary republics, the executive plays the 'role of a parliamentary political executive'—that is, the executive directed by a government responsible to the parliament.<sup>12</sup> However, in Kosovo, the role of the Parliament changed from a formal (constitutional) dominant governing actor, into a (dominant) protector of the choices of the Government. Considering this, one should therefore view the shift from a parliamentary republic in a semi-presidential 'featured' republic in an optimistic light.

The transition from a Republic characterized by formal 'parliamentary domination' (not the case with Kosovo as explained above) into a Republic encapsulating semi-presidential futures would, however, pose certain challenges. Several academicians and practitioners have already measured the advantages and/or disadvantages of this regime type; nonetheless, to date none has provided an absolute recommendation as to whether the adoption of a semi-presidential republic is worthwhile. This section of our analysis, however, will first define a semi-presidential regime and then discuss both the negative and positive elements of semi-presidential regimes.

Duverger, who first introduced the study of the semi-presidentialism, described it as both a 'dual executive' and as 'semi-parliamentary' system.<sup>13</sup> Freeman further described this system as a 'hybrid form of presidentialism and parliamentarianism'.<sup>14</sup> In general, three overarching features characterize the semi-presidential regime: a) the direct election of the president of the Republic, b) a president characterized by a number of important constitutional powers, and c) a separate executive office for the Prime

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<sup>12</sup> Protsyk, Oleh (2006) 'Intra-Executive Competition between President and Prime Minister: Patterns of Institutional Conflict and Cooperation under Semi-Presidentialism'. *Political Studies*, Vol. 54, (pp. 219–244), p. 244.

<sup>13</sup> Duverger in Freeman, Mark (2000) 'Constitutional Framework and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism and Semipresidentialism'. *Pace International Law Review*, Vol. 12, No. 2, (pp. 253-283), p. 263.

<sup>14</sup> Freeman, Mark (2000) 'Constitutional Framework and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism and Semipresidentialism'. *Pace International Law Review*, Vol. 12, No. 2, (pp. 253-283), p. 263.



Minister.<sup>15</sup> Note, however, these characteristics are not the same for all semi-presidential republics—the existing semi-presidential republics do have differences. As Shugart and Carey affirm, one may class these differences based upon the distribution of powers between the two executive offices—those of the president and the prime minister. According to this classification, countries in which the prime minister is vested with more executive powers ‘are labelled premier-presidential regimes, while countries in which the president wields greater authority are known as president-parliamentary regimes’.<sup>16</sup>

In general, the first model—the premier-presidential regime—remains the most accepted form of semi-presidentialism. The evidence suggests that premier-presidentialism has been more successful due, in part, to the executive power sharing mechanism it applies; and most important, because the ‘semi-presidential failures’ are more closely linked with ‘strong presidents than with more balanced arrangements within the executive’.<sup>17</sup> Kosovo, however, according to the current volume of powers vested in the Government and in the Prime Minister, and, according to the changes introduced/proposed by the Functional Constitutional Amendment Commission, could fall within the premier-presidentialism form of semi-presidentialism system. The concentration of the executive powers in the Government and the Prime Minister indicates that the upcoming constitutional regime in Kosovo would more closely match the premier-presidentialism form of semi-presidentialism, wherein the prime minister wields greater executive power *vis-à-vis* the president.

However, since the president of the republic is an important political actor and represents a key feature of the semi-presidential model, we argue that his/her political role in the semi-presidential regime in Kosovo would prove important for two reasons (see below: Table 1). First, the role and the current number of powers the President of the Republic holds would be significant in terms of inter-executive relationship and leadership tendencies. Second, the current constitutional power-sharing design of the relationship between the President and the Prime Minister of Kosovo have generated a presidential model that would serve as a balancing mechanism in relation to both the prime minister and the political majority within the parliament. That said, a president whom the people elected would, nonetheless, be keen to use the mechanisms of the office to balance the prime minister’s and political parliamentary majority’s choices rather than to apply them toward the majority to he/she belongs (as was the case with the former president of Kosovo: see Table 1). However, these assumptions are applicable as long as a directly elected president in Kosovo would not be a partisan and/or a political party preferred candidate. In addition, both the general index of electoral frauds and the increasing partisan political environment makes even harder to

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<sup>15</sup> Roper, D., Steven (2002) ‘Review Article: Are All Semipresidential Regimes the Same? A Comparison of Premier-Presidential Regimes’. *Comparative Politics*, Vol. 34, No. 3, pp. 253-272.

<sup>16</sup> Shugart and Carey in Roper, D., Steven (2002) ‘Review Article: Are All Semipresidential Regimes the Same? A Comparison of Premier-Presidential Regimes’. *Comparative Politics*, Vol. 34, No. 3, (pp. 253-272), p. 253-4.

<sup>17</sup> Elgie, Robert (2007) ‘Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies’. *Taiwan Journal of Democracy*, Vol. 3, No. 2, (pp. 53-71), p. 71.

believe that a Kosovan directly elected president would be the balance to the Prime Minister and the parliamentary political majority.

In a semi-presidential regime, the tendency to 'shift from one dominant pattern of leadership to another'<sup>18</sup> influences both the relationship and the exiting patterns of conflict between the president and the prime minister. The evidence suggests that semi-presidential systems have at least three characteristics that help explain the relationship between the president and the prime minister. First, according to other practices, one could characterize this relationship by the domination of the president over the executive, the so-called 'presidentialized semi-presidentialism'. Second, one could characterize the relationship between the president and the prime minister by cohabitation between both executive offices—in other words, a 'balanced semi-presidentialism'; third, this model can reflect a 'parliamentarized semi-presidentialism'—in other words, it has a ceremonial president who cannot balance the powers of the prime minister, and the prime minister enjoys 'the support of a parliamentary majority.'<sup>19</sup>

Duverger divides presidential powers in a semi-presidential regime into two clusters: 'decision-making powers' and 'powers of obstruction or co-decision'.<sup>20</sup> First, the presidential decision-making powers can include those powers varying from the right to veto a law and to refer questions to the Constitutional Court, to the right to nominate the candidate for the prime minister.<sup>21</sup> The decision-making powers, therefore, precondition not only the political role and power of the president in the country, but also his/her relation *vis-à-vis* the prime minister and his/her political majority within the parliament.

Second, the powers to obstruct and/or consent relate to the nomination of the ambassadors and the appointment of other executive officers and/or judges and prosecutors. As the practice from other countries suggests, presidents have extensively used these powers to 'obstruct' the choices of the political majority if those choices come from the majority in the parliament and/or the prime minister. For example, the Macedonian president refused to appoint the ambassador to Taipei 'nominated by the government, because he disapproved of the overly hasty recognition of Taiwan'.<sup>22</sup> This also could be true regarding Kosovo. In particular, we assume that the president could use his/her power to appoint ambassadors, judges, and public prosecutors coupled with

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<sup>18</sup> Elgie, Robert (2004) 'Semi-Presidentialism and Comparative Institutional Engineering' in Elgie, Robert (eds.) (2004) 'Semi-Presidentialism in Europe'. Oxford: Oxford University Press, p. 283.

<sup>19</sup> Elgie in Pasquino, Gianfranco (2007) 'The advantages and disadvantages of semipresidentialism: A West European perspective' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 16.

<sup>20</sup> Duverger in Roche –Frison, François (2007) 'Semi-presidentialism in a postcommunist context' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 63.

<sup>21</sup> Roche –Frison, François (2007) 'Semi-presidentialism in a postcommunist context' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 63.

<sup>22</sup> Roche –Frison, François (2007) 'Semi-presidentialism in a postcommunist context' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 63.

the power to appoint heads of other independent bodies and agencies as devices to reaffirm his/her leadership (as Table 1 explains). One may expect that such issues as back-door negotiations, concessions and political bargains between the president, on the one hand, and the representatives of the political majority (including the prime minister), on the other, will be utilized by both as tools that model the cohabitation of both executive offices within the framework of semi-presidentialism. Put differently, a balance between the Prime Minister and the President of the Republic in Kosovo in the semi-presidential model would change the parliamentary pattern of a predominant political role of the Prime Minister over both the Parliament and the President (see Table 1).

Overall, the direct election of the President of the Republic of Kosovo associated with the currently assigned powers would precondition a shift from one form of dominant leadership to another. Indeed, some semi-presidential countries 'have experienced a shift from one dominant pattern of leadership to another', while a further 'set of countries have failed to experience any dominant form of leadership and continue to experience a variety of political practices' (see Table 1).<sup>23</sup>

Third, according to Roche, another set of powers plays an important part in redressing the role of the president in semi-presidentialism. The so-called "peripheral powers given to presidents"—in other words, the control over the 'chairmanship of some sort of National Security Council' prove crucial in regard to the president's position within the executive.<sup>24</sup>

Although we demonstrated that the transformation from one regime model to another for Kosovo might bring a number of challenges, in the following section we explore in-depth the advantages and disadvantages of the semi-presidential model. The first argument in favour of semi-presidentialism insists that the 'dual executive' allows a 'degree of power sharing between competing forces'.<sup>25</sup> However, as we will explain, that may not always be the case. The second and third arguments are inter-related. The second argument contends that the semi-presidential model provides another set of 'checks and balances within the executive', thereby offering the president the possibility to substitute the prime minister's leadership in times of parliamentary conflicts and government majority weakness.<sup>26</sup> The third argument affirms that a directly elected president offers a political stability and increases the legitimacy of the executive, 'even if the parliament is highly fractionalized and governments are unstable'.<sup>27</sup> In addition, as

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<sup>23</sup> Elgie, Robert (2004) 'Semi-Presidentialism and Comparative Institutional Engineering' in Elgie, Robert (eds.) (2004) 'Semi-Presidentialism in Europe'. Oxford: Oxford University Press, p. 283.

<sup>24</sup> Roche –Frison, François (2007) 'Semi-presidentialism in a postcommunist context' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 63.

<sup>25</sup> Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. Taiwan Journal of Democracy, Vol. 3, No. 2, (pp. 53-71), p. 55.

<sup>26</sup> Mcmenamin, Iain (2008) 'Semi-Presidentialism and Democratisation in Poland'. Working Paper No. 2, (Working Papers in International Studies) Centre for International Studies, Dublin City University, available at: [www.dcu.ie/~cjs](http://www.dcu.ie/~cjs), p. 16.

<sup>27</sup> Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. Taiwan Journal of Democracy, Vol. 3, No. 2, (pp. 53-71), p. 55.

Kosovo's experience suggests, the coalition agreement between the main political parties have engendered a political system in which the Prime Minister leads the parliamentary majority, and the president was not able (because of the coalition agreement) to balance the dominant role of the prime minister. This brings us to the fourth argument; a semi-presidential regime can introduce a president who balances both the political dominant prime minister and his/her political majority in the parliament.

In contrast, one can make a number of arguments against semi-presidentialism. First, some argue that the direct elected president may 'encourage the personalization of the political process'.<sup>28</sup> The personalization of the political process may also stem from the 'over-presidentialisation in semi-presidential countries'—that is, 'the combination of a president' with extended constitutional powers, supported by the parliamentary majority and a 'submissive prime minister'.<sup>29</sup> This, in turn, would lessen the power of 'any checks and balances within and between the executive and legislative branches of government'.<sup>30</sup> Second, the division of the executive authority into the offices of the prime minister and the president raises the problem of a dual executive. In other words, competition between the prime minister and the president over the executive and political leadership can result in 'politicking and intrigues that may delay decision making and lead to contradictory policies due to the struggle between the president and prime minister'.<sup>31</sup>

In this regard, note that, in general, the cohabitation between the prime minister and the president 'who belonged to the same one-party or coalition majority in Parliament has been predominantly peaceful'.<sup>32</sup> Thus, as the argument goes, common political orientation lessened the conflicts and reduced the differences in terms of policy choices between the prime minister and the president.<sup>33</sup> However, the evidence suggests that having the president and the prime minister be from the same political majority in the parliament has not diminished intra-executive conflicts.<sup>34</sup> Some argue that the inter-executive conflict more often occurs in premier-presidential than in presidential-

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<sup>28</sup> Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. *Taiwan Journal of Democracy*, Vol. 3, No. 2, (pp. 53-71), p. 56.

<sup>29</sup> Elgie, Robert and Mcmenamin, Iain (2008) 'Semi-presidentialism and Democratic Performance'. *Japanese Journal of Political Science*, Vol. 9, (pp. 323-340), p. 328.

<sup>30</sup> Elgie, Robert and Mcmenamin, Iain (2008) 'Semi-presidentialism and Democratic Performance'. *Japanese Journal of Political Science*, Vol. 9, (pp. 323-340), p. 328.

<sup>31</sup> Suleiman and Linz in Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. *Taiwan Journal of Democracy*, Vol. 3, No. 2, (pp. 53-71), p. 57.

<sup>32</sup> Protsyk, Oleh (2005) 'Politics of Intraexecutive Conflict in Semipresidential Regimes in Eastern Europe'. *East European Politics and Societies*, Vol. 19, No. 2, (pp. 135-160), p. 148.

<sup>33</sup> Protsyk, Oleh (2005) 'Politics of Intraexecutive Conflict in Semipresidential Regimes in Eastern Europe'. *East European Politics and Societies*, Vol. 19, No. 2, (pp. 135-160), p. 148.

<sup>34</sup> Protsyk, Oleh (2005) 'Politics of Intraexecutive Conflict in Semipresidential Regimes in Eastern Europe'. *East European Politics and Societies*, Vol. 19, No. 2, (pp. 135-160), p. 149, and Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. *Taiwan Journal of Democracy*, Vol. 3, No. 2, (pp. 53-71), p. 57.

parliamentary models of semi-presidentialism.<sup>35</sup> The third argument holds that the dual executive nature of the government—including here the persistent conflict between the president and the prime minister—can lead to policy deadlock in those areas where the prime minister and the political majority in the parliament—on the one hand—and the president—on the other—jointly exercise the prearranged constitutional authority.<sup>36</sup> Indeed, we do assume that a president in Kosovo could create such situations (see Table 1).

The fourth argument against semi-presidentialism, according to Freeman, relates to the dual executive nature of the semi-presidential system and the impediments that it introduces regarding coalition building. In Poland, for example, the prime minister must be careful to achieve the support of both the political majority in the parliament and the president, even while the fractionized parliament had made this harder to achieve.<sup>37</sup> Moreover, some observers argue that this process also weakens the party system because the political parties within the parliament no longer serve as the sole political actors designing the future coalition government and choosing its prime minister.<sup>38</sup> This could also be the case in Kosovo, where the candidate for the prime minister should be required to obtain the support of both the president and the parliamentary majority.

The fifth argument insists that the semi-presidential regime has an effect on both policymaking and the legislative process in general. In particular, some argue that the presidents can play a role in securing policies that lie closer to the people's preferences, which, in turn, generates 'co-ordination problems and conflicts that can make it harder to achieve policy change'.<sup>39</sup> In other words, the semi-presidential regimes establish a new 'veto player', that is, the president of the republic, who derives his/her authority from a 'democratic role as executive actors who represent (and are accountable to) voters in a single national constituency'.<sup>40</sup> The assumption that the semi-presidential system introduces elements of power sharing could have the opposite effect in terms of

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<sup>35</sup> Protsyk, Oleh (2006) 'Intra-Executive Competition between President and Prime Minister: Patterns of Institutional Conflict and Cooperation under Semi-Presidentialism'. *Political Studies*, Vol. 54, (pp. 219–244), p. 222.

<sup>36</sup> Elgie, Robert (2007) 'Varieties of Semi-Presidentialism and Their Impact on Nascent Democracies'. *Taiwan Journal of Democracy*, Vol. 3, No. 2, (pp. 53-71), p. 57, and Mcmenamin, Iain (2008) 'Semi-Presidentialism and Democratisation in Poland'. Working Paper No. 2, (Working Papers in International Studies) Centre for International Studies, Dublin City University, available at: [www.dcu.ie/~cis](http://www.dcu.ie/~cis).

<sup>37</sup> Freeman, Mark (2000) 'Constitutional Framework and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism and Semipresidentialism'. *Pace International Law Review*, Vol. 12, No. 2, (pp. 253-283), p. 277.

<sup>38</sup> Mcmenamin, Iain (2008) 'Semi-Presidentialism and Democratisation in Poland'. Working Paper No. 2, (Working Papers in International Studies) Centre for International Studies, Dublin City University, available at: [www.dcu.ie/~cis](http://www.dcu.ie/~cis), p. 16-17.

<sup>39</sup> Schleiter Petra and Morgan-Jones, Edward (2009) 'Citizens, Presidents and Assemblies: The Study of Semi-Presidentialism beyond Duverger and Linz'. *British Journal of Political Science*, Vol. 39, No. 4, (pp. 871-892), p. 892.

<sup>40</sup> Schleiter Petra and Morgan-Jones, Edward (2009) 'Citizens, Presidents and Assemblies: The Study of Semi-Presidentialism beyond Duverger and Linz'. *British Journal of Political Science*, Vol. 39, No. 4, (pp. 871-892), p. 892.

'polarizing political conflicts'.<sup>41</sup> Therefore, the sixth argument against semi-presidentialism speculates that power sharing can produce a system that could enhance social cleavages and 'institutionalize political divisions', as in the case with Timor-Leste.<sup>42</sup>

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<sup>41</sup> Pasquino, Gianfranco (2007) 'The advantages and disadvantages of semipresidentialism: A West European perspective' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 32.

<sup>42</sup> Pasquino, Gianfranco (2007) 'The advantages and disadvantages of semipresidentialism: A West European perspective' in Elgie, Robert and Moestrup, Sophia (eds.) (2007) 'Semi-presidentialism outside Europe: A comparative study'. New York: Routledge, p. 32.



Assessment of Inter/Intra Branch conflict and of the President's behaviour in Parliamentary and Semi-Presidential regimes										
Current Constitutional Design										
		↓	Institution/Branch	↓	Behaviour of the President within a Government Coalition/Parliamentary context					
Shared Competences/Limits of obstruction	→	The President of the Republic			↓	↓	↓ ↓			
		1) Nomination of the candidate for the Prime Minister (art. 94); 2) Involvement in the appointment of the Kosovo Intelligence Agency key officials (art. 94); 3) Leads with the foreign policy (art. 84, 94); 4) Appoints and dismisses ambassadors and heads of diplomatic missions (84, 93);			Patterns of Inter/intra institutional Conflict (2008-2010)		Frequency in obstructing/competing the choices of the Government/Assembly			
		5) Decides the establishment of diplomatic and consular missions (art. 84); 6) Appoints and Removes the President of the Supreme Court and Chief Prosecutor (art. 103, 109);			High	→	Low	High	→	Low
		7) Appoints and Removes the judges and prosecutors (art. 84, 103); 8) Appoints the Commander of the Kosovo Security Force (art. 84); 9) Appoints the Governor of the Central Bank (84);								
		10) Appoints the Chair of CEC (art. 84); 11) Right to legislative initiative (art. 79); 12) Returns adopted laws for re-consideration (art. 80, 84); 13) Leads with Consultative Council for Communities (art. 60, 84); 14) Ratifies international agreements (art. 18); 15) Decides the State of emergency (art. 84, 65);			High	←	Low	High	←	Low
		Government/Assembly					Frequency in obstructing/competing the choices of the Government/Assembly			
		Institutions/Branch			↑ ↑		↑ ↑			
							Behaviour of the President within a Semi-Presidential context			

Table I

Last, as evidenced by Tavits, direct presidential elections had an impact in decreasing the electoral turnout in parliamentary elections up to ‘7 percentage points’ in various countries.<sup>43</sup> Thus, the introduction of semi-presidentialism in Kosovo, per the evidence, would most likely affect the general electoral turnout in both local and national elections.

### III. DRAFT-AMENDMENTS TO THE CONSTITUTION AS TO THE STATUS OF THE PRESIDENT OF THE REPUBLIC

The Functional Committee for Constitutional Amendments (FCCA), established and authorized by the Resolution of Assembly, commenced fulfilling its mission of proposing to the Assembly the draft-constitutional amendments for the appointment of the President of the Republic. The Constitution of Kosovo is a rigid constitution, requiring a double supermajority consisting of two-thirds of the entire members of parliament (MPs) and the two-thirds of the ethnic minority members of parliament in the Assembly to pass a constitutional amendment. This ensures that the entire constitutional amendment procedure gains the consent of the ethnic minority MPs, and, because of this the amendments themselves provide no bias against or lessen the rights of the ethnic minorities in Kosovo.<sup>44</sup>

The FCCA consists of members of each parliamentary group in the Assembly, ensuring that its proposals have the consent of the majority of its members. In this context, the FCCA remains a plural partisan body, reflecting the targets and aims of the political parties represented within it. However, under the leadership of Professor Arsim Bajrami – a professional constitutional specialist with much experience in constitutional drafting processes – the FCCA has embarked upon a vibrant performance in the management of the drafting process. Furthermore, the FCCA has been both transparent and open to the initiatives from and support of civil society organizations and groups. In this regard, the FCCA has assented to every request the interested civil society organizations have made to participate in the working group preparing the draft-amendments. This, in our observation, has influenced the professional discussions and proposals over partisan interests within the working group on the design and content of preliminary draft-constitutional amendments.

After six professional workshops within the framework of the Working Group, the FCCA came up with a finalized draft. This was a somewhat open and participative method of drafting constitutional amendments. Moreover, a plural—both political and non-political—and professional working group discussed and approved not only the agenda-

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<sup>43</sup> Tavits, Margit (2009) ‘Direct Presidential Elections and Turnout in Parliamentary Contests’. *Political Research Quarterly*, Vol. 62, No. 1, pp. 42-54.

<sup>44</sup> Korenica, F., & Doli, D., “Constitutional Rigidity in Kosovo: Relevance, Outcomes and Rationale” (2011) Vol. 2, 6 *Pace International Law Review* [Online Companion] 1-29; See also: Korenica, F., and Doli, D., (2010) ‘The Politics Of Constitutional Design In Divided Societies: The Case Of Kosovo’. *Croatian Yearbook of European Law and Policy*. Vol. 6, pp. 265-292.



setting process but also the content of the amendments. With this background, the FCCA has decided to initiate consultations with the citizens via public debates about the content of the draft-constitutional amendments. After receiving the citizens' input, the FCCA will reengage in reshaping the draft-amendments before submitting them officially to the Assembly. They have designed the public debates with interested citizens to increase the citizens' interest in the constitutional amendment process and to increase the transparency and openness of this process.

The FCCA, based upon the work conducted as of this writing, has identified three areas requiring constitutional amendment. These are, first, the nomination criteria for candidates for the post of President of the Republic; second, the method of appointment of the President of the Republic; and third, the provisions regulating the impeachment of the President of the Republic. We will next examine each of these issues and describe the choices the draft-constitutional amendments present.

First, as to the nomination criteria for candidates who will contend for the post of the President of the Republic, the current version of the draft-constitutional amendments sets four conditions.<sup>45</sup> First, President of the Republic nominees may be any citizen of the state at least 35 years of age. This condition appears standard, as most consider an age requirement a reasonable standard of maturity for the President of the Republic given the role that he/she should have in the context of both representing the unity of the people and exercising his/her constitutional powers.

Second, if the candidate for President of the Republic holds dual citizenship—in other words, is a citizen of another nation in addition to being a citizen of Kosovo—he/she must release the second citizenship upon appointment. The public has perceived this condition as an attempt to dismiss a category of persons from being eligible for nomination. However, it remains to be seen whether the FCCA will ultimately adopt this condition. Those sponsoring this condition generally argue that it is necessary that the President of the Republic hold only a single national citizenship—one state to which he/she responds to and belongs. However, the argument that permitting the President of the Republic to hold more than a single citizenship would disrupt and potentially corrupt his/her ability to serve only to his/her state seems poorly developed. If this were the case, this condition should be applied for every state official, and not simply and exclusively for the President of the Republic. In practical terms, every president in the world possesses state immunity, and—during his or her term of office—he/she holds immunity from any obligation and liability (civil and criminal) from third states. This means that, although the President of the Republic might hold the citizenship of another state, that other state could not call the president to duty because state immunity—an instrument of international law—protects him/her from such responsibility.

Furthermore, the Constitution of Kosovo allows dual-citizenship; therefore, it would run counter to the Constitution to ask the President of the Republic-elect to give up this fundamental constitutional right. This issue could also limit the rights of those of the Diaspora to compete for the post, and may open unnecessary partisan denigrations.

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<sup>45</sup> 'Draft-Constitutional Amendments'. Official Document Released on 20 September 2011, Assembly of Kosovo, Functional Commission on Constitutional Amendments. Art 85 (1, 2, 3, 4 & 5).

One realistic solution could recommend that the President of the Republic have a primary citizenship—as opposed to a secondary one—namely the citizenship of Kosovo, in order to be nominated for the post. This criterion of citizenship, with its exclusive nature, provokes a debate that goes beyond the practical expectations of a modern constitutional amendment process. The third condition requires that the candidate for the President of the Republic should have lived in the country for at least five years out of the last consecutive ten years. This residence condition again seems logical, as it prohibits candidates having no on-the-ground experience with recent and current reality in Kosovo from becoming president. Fourth, and most important it requires (although this is not yet fully settled) that the candidate for the President of the Republic resign from any public post at the time of nomination as a candidate, with the right to retake that public post if he/she does not win appointment. This condition seems the most relevant in terms of the endeavour to uphold the principle of the President of the Republic as a representative of the unity of the people, as enlightened in *Rrustemi v. President of the Republic*, which prohibits candidates holding public offices from interfering or influencing the electoral process. It is not yet clear, however, whether the term ‘public post’ would apply to political parties, and thereby requesting that candidates resign from partisan posts at the time of application for the post.

Second, regarding the method of presidential appointment, the current version of the draft-amendments outlines three issues.<sup>46</sup> First, the Constitution determines that the citizens directly elect the President of the Republic. Second, it requires that either political parties or citizens’ initiatives—based upon a petition of at least 15,000 qualified voters in Kosovo—nominate the candidate for President of the Republic. This requirement does not distinguish between the number of supporters of political parties and civic initiatives, and, therefore, lowers the hurdle for independent candidates to compete for the post. In practice, however, this condition may only grant those candidates with substantial voter support the opportunity to be nominated for appointment, which, in contrast, would raise the bar. This clause seems exclusive in an electorate comprised of less than 1 million voters; however, it does precondition a competition between influential candidates, who will already have a certain degree of support from the electorate. Third, to appoint the President of the Republic, the draft-amendments require that he/she win at least 50%+1 of the votes. If no candidate appears to have won this number of votes in the first round, a ballotage will be organized between the two candidates receiving the most votes in the first round. The candidate taking the most of votes in the second round becomes the President of the Republic. In general, a ballotage provides for a more inclusive election, allowing a candidate to take the post with a simple majority would contradict the mission of the President as a representative of the unity of the people. Last, the FCCA has not yet found a solution for the composition of the Electoral Commission in regard to the appointment of the President of the Republic. The basic experience so far—especially when taking into consideration that Kosovo remains a state with huge problems in election management,

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<sup>46</sup> ‘Draft-Constitutional Amendments’. Official Document Released on 20 September 2011, Assembly of Kosovo, Functional Commission on Constitutional Amendments. Art 86 (1, 2, 3 & 4).

fairness, and electoral corruption—is that the partisan composition of the Electoral Commission favours certain partisan choices and accordingly alienates the public when certain decisions seem to reflect partisan interests. Given this, we propose that the composition of the Electoral Commission be neutral and non-partisan with regard to the management of the presidential elections, as partisanship would lead to criticism and the contestation of elections.

Third, the draft-constitutional amendments outline only three grounds for the dismissal of the President of the Republic: first, if he/she has committed a criminal violation punishable at least five years in prison; second, if the President of the Republic becomes incapable of exercising his/her duty due to medical problems; and, third, if the President of the Republic seriously violates the Constitution or conducts treason against the state.<sup>47</sup> In all three circumstances, dismissal of the President of the Republic requires two-thirds of votes in the Assembly and, in order to become effective, then requires the Constitutional Court's confirmation of this vote. In this way, the Constitutional Court checks the Assembly's decision, and the President is dismissed only if the Court so rules. These conditions establish a complex method for impeaching and dismissing the President of the Republic in that they require judicial confirmation as opposed to merely the political decision of the Assembly. All told, the impeachment of the President of the Republic remains a highly complex process only possible upon three grounds. This somewhat blocks the ability of the Assembly to politically control the President of the Republic, and it, in turn, fortifies the president's position in a rather rigid way.

Last, the draft-constitutional amendments do not propose any amendment of the provisions regulating the President of the Republic's authority. Given this, Kosovo could not become a true semi-presidential regime unless the presidential powers are not expanded. Although the method of appointment of the President presents a number of possible outcomes as to his/her position in the entire political system, the constitutional powers of the President remain highly ceremonial when considered substantively. This, therefore, supports the contention that, in order to rearrange the political system of the country, the Assembly should have authorized the FCCA to propose a number of changes to the powers of the President of the Republic, in order to harmonize the method of appointment with the degree of authority that he/she has in the political system.

#### IV. THE WAY FORWARD WITH THE APPOINTMENT OF THE NEW PRESIDENT OF THE REPUBLIC: CONTESTING THE TRANSITION

As explained earlier, the main political parties, having faced the new constitutional reality after the ruling of the Constitutional Court and having failed to find a consensus on the new President of the Republic, agreed to appoint Mrs. Atifete Jahjaga as the President of

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<sup>47</sup> 'Draft-Constitutional Amendments'. Official Document Released on 20 September 2011, Assembly of Kosovo, Functional Commission on Constitutional Amendments. Art 91 (1, 2, 3, 4, 5 & 6).

the Republic until the constitutional amendments come into force. The political parties principally agreed that, upon adoption of the constitutional amendments, the direct-election of the new President of the Republic would occur. However, this raises a key problem. In order to announce the elections for the new President of the Republic—as agreed to by the key political parties—one must first address the question of what to do with the mandate of the incumbent President of the Republic, Mrs. Atifete Jahjaga. A decision must be made that addresses a situation in which Mrs. Jahjaga chooses to continue to exercise her regular mandate for an additional four years but must be removed from office in order for the amendments to take effect. The major political parties assume that, as one option, the incumbent President will resign her post after the Assembly adopts the constitutional amendments. Another option would design the constitutional amendments in a way that makes explicitly clear that not only will the mandate of the incumbent President of the Republic cease upon adoption of the constitutional amendment, but also that new elections will be announced within a few months. Both cases, we argue, generate potential problems that could implicate this transition.

Of course, the incumbent President could refuse to resign from the post, although the resignation might take the form of a request from the political parties or of an agreement between the political parties at the time when they decided to appoint Mrs. Jahjaga as the President of the Republic. Yet, turning toward the second solution—that of ending the incumbent mandate of Mrs. Jahjaga with an explicit constitutional amendment—this seems doubtful for two reasons: first, because the President of the Republic’s mandate could not end earlier than constitutionally specified, and, second, because should the incumbent President wish, the issue could be sent to the Constitutional Court, and the Court could rule the constitutional amendment ending the President’s mandate to be unconstitutional.

To address this, we refer to a similar case adjudicated by the Constitutional Court of Czech Republic. The Czech court, in *Melčák v. Parliament & President*,<sup>48</sup> had to determine whether ending the regular mandate of the parliament earlier than constitutionally guaranteed via a law was constitutional. The Czech Constitutional Court, in answering this question, ruled that ending the constitutional mandate of a state body earlier than constitutionally guaranteed violated the principle of ‘prohibition of retroactivity;’ and interfered with the ‘requirements for a democratic state governed by the rule of law’. If one applies these two standards to Kosovo’s case, then one could make the following argument: imposing retroactivity on the mandate of the President of the Republic by shortening it with a constitutional amendment is unconstitutional. One could say the same thing about the fundamental requirements of the rule of law. Furthermore, note that the Constitution does not make a provision for the dismissal of the President of the Republic based upon political accountability; in fact, the current and explicit requirements for the dismissal of the President relate to conditions arising from

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<sup>48</sup> *Melčák v. Parliament & President*, Constitutional Court of Czech Republic, Judgment, 10 September 2009. Available at: <http://www.usoud.cz/clanek/GetFile?id=4166>

criminal violations, illness, or constitutional violations on the part of the President of the Republic.

Given these arguments, there seems to be no way to remove the incumbent President of the Republic earlier than her normal mandate—should she choose not to resign from her office. In this context, the transition to a newly appointed President of the Republic based upon the new constitutional amendments—should Mrs. Jahjaga resist resigning from the post of the President of the Republic—would halt in its tracks.



Group for Legal and Political Studies  
'Rexhep Luci' str. 10/5  
Prishtina 10 000, Kosovo  
Web-site: [www.legalpoliticalstudies.org](http://www.legalpoliticalstudies.org)  
E-mail: [office@legalpoliticalstudies.org](mailto:office@legalpoliticalstudies.org)  
Tel/fax.: +381 38 227 944



Friedrich-Ebert-Stiftung  
'Mujo Ulqinaku' str. 4/App 10  
Prishtina 10 000, Kosovo  
Web-site: [www.fes-prishtina.org](http://www.fes-prishtina.org)  
Email: [contact@fes-prishtina.org](mailto:contact@fes-prishtina.org)  
Tel: +381 38 609 900, 609 901  
Fax: +381 38 609 902