

Presidential Elements in Government

Introduction

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The editorial board of the *European Constitutional Law Review* has solicited a number of contributions on presidential elements in government systems in Europe. At the origin of the project are some recent sweeping interventions of heads of state in the political arena. These are notably the (suspensive) veto of the domestic Act implementing the European Arrest Warrant Framework Decision by Czech president Vaclav Klaus and the dissolution, against the will of both the government and the parliamentary majority, of the *Assembleia da República* by Portuguese president Jorge Sampaio in 2004. They excited our curiosity about the latent ingenuities of systems that we think to understand but of which we know so little.

In these times large parts of the laws of European states are converging due to harmonizing impulses, among which those of the European Union. An important part of constitutional law is not exempted from this trend – fundamental rights have been largely Europeanised on account of the European Convention on Human Rights and the jurisprudence of the European Court on Human Rights.

Remarkably, this convergence has left institutional constitutional law largely unaffected, especially when it comes to government systems properly speaking. Most European states, whether monarchy or republic, have the same basic structure, with a parliament, a government (or cabinet) and a head of state. However, the division of powers among these three institutions and their formal relationship generally differ strikingly from state to state. The differences become even more substantial when one looks at the way these political systems work in practice.

The position of presidents in republics especially deserves attention. In most European states the functions of head of state and head of government are, at least nominally, not fulfilled by one and the same person. This *executive dualism*, as it may be called (even if the head of state is not always formally part of the executive), seems to be the legacy of two stages of constitutional evolution: the Westminster parliamentary model and the '*modèle franco-britannique*'. It is a European phenomenon and, for our subject, it is the heart of the matter.

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THE WESTMINSTER MODEL

The essential difference between presidential and parliamentary systems of government concerns the relationship between parliament and the executive. In presidential systems the executive draws its own title from being directly elected and executive powers can in principle be exercised independently from parliamentary sanction. In parliamentary systems the 'acting' part of the executive, the government, is generally not elected but nominated in agreement with parliament, and executive powers can be exercised only as long as parliament, to which the government is accountable, sanctions this by its confidence. Generally, to counterbalance the parliamentary power of dismissal, the government (or the head of state) has the power to dissolve parliament.

This is the standard conceptual apparatus. In the present context however, the focus is on another feature that normally distinguishes presidential from parliamentary systems. In presidential systems, of which the United States are the prototype, executive power is, at least formally, vested in the office of one person only, who simultaneously acts as head of state and as leader of the government.¹ In contrast, a state with a parliamentary system normally has a dual executive. On the one hand there is the head of state (a president, as in Germany and Italy, or a monarch, as in the United Kingdom, Denmark, Norway, Sweden and the Netherlands). On the other hand there is the government or a cabinet of ministers. This dualism is also encountered in those European states that are said to have a semi-presidential system, such as France and Portugal.

Historically the dualism of the executive in parliamentary systems is the result of the emancipation of the advisers of the monarch assembled in the cabinet as it happened first in England. Since the Glorious Revolution (1688) the monarchical element there has slowly been pushed to the outskirts of the system, until the stage was reached where the monarch became politically marginal and full rein was given to parliament and cabinet. This is the Westminster model.

The split of the executive *office* in parliamentary systems has also led to a split in the executive *functions*. In a still powerful image the 19th century political analyst Walter Bagehot has characterized the British prime minister as the head of the *efficient parts* of the Constitution, i.e., 'those by which it, in fact, works and rules', and the British Queen as being at the head of the *dignified parts* of the Constitution.² It is an image that colours all descriptions of the parliamentary executive. This is held to consist of a political active government and a ceremonial and

¹ Art. 2(1) of the American Constitution: 'The executive power shall be vested in a President of the United States of America'.

² Walter Bagehot, *The English Constitution* (London, Fontana Press 1993; 1st edn. 1867) p. 63 et seq.

representative head of state. The prime minister and the other ministers, and not the head of state that is only nominally head of the executive, are doing the real political work: they conduct foreign affairs and defence, negotiate treaties, initiate and execute legislation, etc., in short they are political actors. It is this part of the executive that can be sent home by parliamentary vote. Its composition being partisan and its continuing existence conditioned and depending on political circumstances and therefore insecure, this acting part of the executive cannot serve as a factor of stability and unity, which is also an element every government system should provide for. Here is where the head of state comes in. The office serves as an element of government continuity and stability. In monarchies this is expressed in life tenure, while in republics it is done by giving the president a fixed term of office longer than that of parliament.

However, Bagehot's image is incomplete. To the ceremonial and representative functions of the heads of state in parliamentary systems almost everywhere some 'reserve powers' are attached. Merely symbolizing the unity of the state and its people most of the time, the head of state is expected to step into the political arena when the system on which the state is built gets stuck or is threatened. Even in British constitutional law the monarch, when it comes to the crunch, is supposed to act as a constitutional guardian or *Hüter der Verfassung*:

it may seem there is no obvious point at which the limitation of the power of the sovereign (...) should stop. That limit is reached, however, at the point at which the constitution itself, which determines the role of the head of state, appears to be under threat. At that point, it may be suggested, the sovereign has the right to exercise his or her discretion, to act as constitutional guardian, to ensure that the values which lie at the foundation of a constitutional system are preserved. (...) The doctrine that the sovereign is required to act on the advice of ministers presupposes that ministers themselves act within the framework and presumptions of constitutional government.³

THE MODÈLE FRANCO-BRITANNIQUE AND ITS VARIETIES; SEMI-PRESIDENTIALISM

The French Third Republic (1870-1940) implanted the Westminster model into a republican setting. Its president has been called by a then leading politician *un*

³ Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford, Clarendon Press 1995) p. 65; see also Lucas Prakke, 'Swamping the Lords, Packing the Court, Sacking the King' in this issue of *EuConst*: 'Imagine a Belgian or a Dutch government ever making moves to dismantle our democratic states that are based on the rule of law. Who in that case would want to deny the monarch the right to toss back his head proudly and say: *Yo, el Rey*, I, a descendant of the House of Saxe-Coburg, of Orange-Nassau, will not sign this?'

chef roi, sauf le nom et la durée,⁴ a ruling king except for the name and the life term. Elected by parliament for a seven year term, his powers indeed covered the same range as those of a monarch. He could not use them personally, for his decisions needed the countersignature of a minister, responsible to parliament. This division of executive power did not exclude the president from a substantial role in politics. In fact the constitutional laws of the Third Republic could easily be viewed as a republican replica of the *Charte constitutionnelle* of 1830, the constitution of the French July Monarchy (1830-1848). That *Charte* had given birth to what the French call a *régime parlementaire dualiste* or *orléaniste*: the cabinet for its continuing existence not only needed the confidence of parliament, but also that of the monarch, who played an active political role independently from parliament's sentiments.⁵ In fact, most parliamentary monarchies will have known such a phase, for the *régime parlementaire est né dualiste* (the parliamentary system was dualist at birth), at least in Great Britain and France.⁶

However, while under the July Monarchy the throne was not an empty chair, as one of its prime ministers put it,⁷ the seats of the presidents of the Third French Republic were quite empty. The contents of presidential decisions in fact reflected the political wishes of the countersigning ministers rather than those of the presidents'. To paraphrase Jaques Ziller, the institution of countersign, which was introduced as a check on the president, changed nature and ended up as a system in which the head of state merely monitors the government.⁸ In short, the French president played a role equivalent to that of the monarch in British constitutional law, based on personal authority and experience more than on constitutional and political power. The ensuing *modèle franco-britannique*⁹ has over the centuries been 'exported' to many other European countries, while in the process the system, *de iure* or *de facto*, was adapted to local circumstances, traditions and historical experiences.

When taking in the current situation, we still find countries in which the presidency more or less inherits its position from the Westminster model and the *modèle franco-britannique*. The German presidency is a case in point. The president sometimes vetoes legislation, for constitutional reasons, but generally his decisions are

⁴ De Broglie, quoted in Jean Gicquel, 'Essai sur la pratique de la Ve République. Bilan d'un septennat' (Paris, LGDJ 1977) p. 58.

⁵ Marcel Morabito – Daniel Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)* (Paris, Montchrestien 1991) p. 207-209.

⁶ Jean Gicquel, 'Régime parlementaire', in Olivier Duhamel and Yves Mény (eds.), *Dictionnaire constitutionnel* (Paris, PUF 2002), p. 883 at p. 885.

⁷ *Ibidem*.

⁸ Jacques Ziller, 'National Constitutional Concepts in the New Constitution for Europe. Part Two: National Constitutional Concepts Which Have Made their Way in the Constitution for Europe', *EuConst* 2005, p. 452 at p. 459

⁹ Maurice Duverger, *Echec au roi* (Paris, Albin Michel 1978) p. 28.

the expression of the political choices of the government. His 'reserve powers' are spelled out in the Constitution and restricted to well-defined situations.¹⁰ In other states the role of the presidency has been enhanced to remedy expected, real, or supposed deficiencies of the parliamentary system, without abandoning the system as such. This has been done by granting personal powers to the president and providing for direct election, as happened in France in 1958 and 1962 respectively. In the terms of Maurice Duverger countries with a directly elected president who has 'quite considerable powers' are generally labelled semi-presidential.¹¹ A semi-presidential system is, in his definition, a parliamentary system with a presidential corrective to remedy certain of its deficiencies. It is a subspecies of the pure parliamentary system.¹²

THE AGENDA

Duverger's definition has been the subject of heated debate among political scientists.¹³ The line between parliamentary and semi-presidential systems seems indeed a very thin one, nor does the concept have any predicting value when it comes to the role a president actually plays in the system. This role may be equivalent to that either of the British monarch or of the French president under the Third Republic. In other words, the procedure by which a head of state is nominated and the powers attributed to him are in themselves not decisive for his role in the system. A president elected directly may have a stronger legitimacy in wielding his powers, but does not automatically wield such powers because of his election. On the other hand, the head of the executive might also be elected by a parliamentary assembly and, on account of his 'reserve powers' or otherwise, wield powers independently from that assembly and the government, as is witnessed by the Czech president vetoing the act implementing the European Arrest Warrant.

¹⁰ See also Ulrike Heckötter and Christoph Spielmann, 'Schröder's dissolution of the *Bundestag* approved – An expression of faith in the German public', in this issue of *EuConst*.

¹¹ Maurice Duverger, *Echec au roi* (Paris, Albin Michel 1978); M. Duverger 'A new political system model: Semi-presidential government', *European Journal of Political Research* (1980), p. 165; Maurice Duverger (ed.), *Les régimes semi-présidentiels* (Paris, PUF 1986).

¹² Maurice Duverger, 'Les monarchies républicaines', 78 *Pouvoirs* (1996), p. 108-109.

¹³ An arbitrary selection: G. Sartori, *Comparative constitutional engineering: An inquiry into structures, incentives and outcomes* (Basingstoke: Macmillan 1994); H. Bahro and E. Vesser, 'Das semipräsidentielle System – "Bastard" oder Regierungsform sui generis?', *Zeitschrift für Parlamentsfragen* (1995), p. 471; H. Bahro, B.H. Bayerlein and E. Vesser, 'Duverger's concept: Semi-presidential government revisited', *European Journal of Political Research* (1998), p. 201; R. Elgie (ed.), *Semi-presidentialism in Europe* (Oxford, Oxford University Press 1999); A. Lijphart, *Patterns of democracy: Government forms and performance in thirty-six countries* (New Haven, Yale University Press 1999); Alan Siaroff, 'Comparative presidencies: The inadequacy of the presidential, semi-presidential and parliamentary distinction', *European Journal of Political Research* (2003), p. 87; Vitolino Canas, 'The Semi-Presidential System', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), p. 95.

Direct election of the prime minister, as introduced in Israel and under (permanent) discussion in the Netherlands, is a way to introduce presidential elements in a new form. In Finland and Poland on the other hand the absence of continuous parliamentary scrutiny and control on presidential powers was reason to veer back to parliament, either in the constitution itself, or by adopting different constitutional practices. De Reede's book review in this issue of *EuConst* points to it as an Eastern European trend.

All this is why we prefer using the less ambitious concept of 'presidential elements' to that of 'semi-presidentialism'. But we do consider that it covers a fascinating and promising topic for analysis. We would like to know what new forms of governmental system are being invented and developed in Europe, in what political circumstances. How do these reflect countries' governmental condition? The immanent trends of every system need explanation. These are questions that can only be addressed in concrete situations in concrete countries.

The series is opened in this issue by contributions on Portugal and Israel.

