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GOVERNMENTAL POWER UNDER THE FIFTH FRENCH REPUBLIC¹

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The executive power really is a governmental power. Whether it is in the hands of a President or a Prime Minister, depending on the political regime, it relates to the fundamental interests of the Nation or the State's policy. The system according to which the Parliament votes the law and the executive enforces it, is a fiction. In France, as in most parliamentary democracies, the Government or the Head of the State decides the policy of the State. It receives the legitimacy to do so from popular elections. Majority rule, let alone institutional differences, implies that the People choose who occupies the seat of executive power. The issue before us is to know who controls the executive functions of government in Western democracies. In the French system, the answer can seem ambiguous. The presidential and legislative elections of 2017 reflect the permanence of these structuring elements of the Fifth Republic.

Key words: separation of powers; government; parliament; responsibility; France.

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ПРАВИТЕЛЬСТВЕННАЯ ВЛАСТЬ В ПЯТОЙ ФРАНЦУЗСКОЙ РЕСПУБЛИКЕ

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Исполнительная власть является государственной независимо от того, в чьих руках она находится – президента или премьер-министра, – и независимо от того, касается она фундаментальных интересов нации или государственной политики. Система, при которой парламент принимает закон, а исполнительная власть его исполняет, – фикция. Во Франции, как и в большинстве демократических государств, государственную политику осуществляют правительство или глава государства, которые обретают легитимность в результате выборов. Исследуется вопрос о том, кто контролирует исполнительные функции правительства в западных демократиях. Обосновывается мысль о том, что во французской системе ответ может показаться неоднозначным: президентские и законодательные выборы 2017 г. отражают постоянство этих структурных элементов Пятой Республики.

Ключевые слова: разделение властей; правительство; парламент; ответственность; Франция.

Introduction

The executive power really is a governmental power. Whether it is in the hands of a President or a Prime Minister, depending on the political regime, it relates to the fundamental interests of the Nation or the State's policy. In practice though, the executive is never actually in charge of executing tasks.

The system according to which the Parliament votes the law and the executive enforces it, is a fiction. In France, as in most parliamentary democracies, the Government or the Head of the State decides the policy of the State. It receives the legitimacy to do so from popular elections. Majority rule, let alone institutional differences, implies that the People choose who occupies the seat of executive power. This choice can be made indirectly, by electing delegates or directly, by electing the President through direct popular vote.

To be able to conduct his policy, the executive must receive support from the Majority in Parliament. This means that the entity in charge of running the State's policy needs to be from the political family most represented in Parliament. The role of the Parliament is to assist him in his role, amend his projects, control his action and make propositions. The Parliament plays very little part in major political decision-making, and it does not usually initiate actions.

The issue before us is to know who controls the executive functions of government in Western demo-

cracies. In the French system, the answer can seem ambiguous. When the President does not receive the support of the Majority in Parliament, he lacks the support necessary to conduct his political program. In French, this is called "cohabitation". In this situation governmental power is unequally divided between the President, who has an arbitration power, and the Prime Minister, who actually conducts the policy of the Nation. Since the year 2000, presidential and parliamentary mandates have matched, which makes it less likely for cohabitation to occur. A hierarchal system, where the President, both elected by the People and supported by the Majority in Parliament, should now prevail over the diarchy of cohabitation. This way, the President receives both legitimacy from popular elections and the political means he needs to actually carry out governmental power.

The current French political system was designed by General de Gaulle in 1958 when the Fifth Constitution was drafted. The 1962 political reform that established presidential direct election by the people through direct popular vote, more fully realized the spirit of the Fifth Constitution. The 2000 reform, reducing presidential mandate to 5 years, made "cohabitation" less likely to occur. Finally the 2008 reform completed this prior evolution by subtly modifying the President's governmental function.

The distribution of governmental power

We have shown previously that both the President and the Prime Minister have governmental power in France. Now we should consider the Constitution's terms regarding this matter. The language of the Constitution creates a fiction. However, it would be very difficult for the Constitution to actually describe the reality of the system in practice.

Article 20 of the French Constitution states that "the Government shall determine and conduct the policy of the Nation", and the Prime Minister shall direct the actions of the Government (see French Constitution at art. 21 (1958)).

Article 5 of the French Constitution provides that "the President of the Republic shall ensure due respect

for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties”.

It is unquestionable that in practice, the distribution of governmental power only corresponds to the Letter of the Constitution in situations of cohabitation, which has now become exceptional.

In fact, and as it should be, the President determines the policy of the Nation and plays a role in its enforcement. The Prime Minister’s mission to conduct the policy of the Nation is limited by the extent that the President’s initiative leaves him space.

Creating a new balance between governmental and parliamentary power

Acknowledging the importance of presidential action in governmental power requires an analysis of the President’s accountability for his actions. The increase in parliamentary power instigated by the 2008 reform conforms with the spirit of a classical parliamentary regime. It gives Parliament the power to control Government’s action. In addition, presidential action is also affected by the reform.

Presidential unaccountability to Parliament. The French President is not accountable to Parliament for his actions. This principle is a traditional aspect of parliamentary regimes. However, since a lot of powers are concentrated in the hands of the French President, this unaccountability issue becomes questionable.

The fact that some of the presidential powers are not subject to countersignature by the Prime Minister renders presidential unaccountability important. Countersignature is usually a requirement in a parliamentary system. However in France, the Prime Minister is not accountable to Parliament for any the decisions the President takes without ministerial countersignature.

Those decisions the President has absolute power to take relate to actions that only he can take. The President appoints the Prime Minister, he has the right to start a procedure in Constitutional Council, and he can also decide to enforce art. 16 of the Constitution that gives him the right to exercise emergency powers when the interests of the Nation are under serious and immediate threat. The President may also declare the National Assembly dissolved, or submit a bill to a referendum upon recommendation from the Government.

Despite these particular circumstances, the President still remains accountable to the People. This aspect of presidential accountability evolved over time. General de Gaulle challenged his own legitimacy in front of the People twice, when he made use of referendum in 1962 and 1967. In 1997, President Chirac decided not to leave office after he declared the National Assembly dissolved, and voters elected a Majority from the opposite political family in Parliament.

If a modification of the constitutional text to account for the practice could be proposed: The President determines the policy of the Nation and the government the way, except to adopt a presidential regime, such a reform was likely to create serious complications in the event of cohabitation by causing conflicts. The President would still be in charge of determining the policy of the Nation even though the People indirectly denied its legitimacy. The Prime Minister would receive the People’s support through the election of the new Majority in Parliament and would be in charge of conducting the policy of the Nation, decided by a President from another political family then his.

With the possibility to run for office twice and be his own successor, the President becomes accountable to the People for his actions in the past, which will determine in part, the outcome of the elections. It may also be considered that the decision not to re-represent (as was the case for President F. Hollande) constitutes the taking into account of a popular disavowal.

The 2008 Constitutional reform allows the President to appear directly in front of Parliament and communicate with both Houses, thereby increasing direct communication between the President and members of Parliament. The 2008 reform changes traditions, but it still does not authorize Parliament to hold the President accountable to it for his political actions.

The Act adopted by the two Houses of Parliament in 2007 created a new institutional presidential responsibility, changing the criminal-law status of the President. The President can now be removed by Parliament sitting as the Hight Court when he has committed a “breach of his duties patently incompatible with him continuing in office”. This decision requires a majority of two-thirds of the members of the House involved or of the Hight Court, which makes it impossible for the President to be removed by one political group only. The decision to remove the President is not strictly speaking “criminal”.

In any event, since he was elected directly by the people through popular elections, the President can never be subrogated to Parliament.

The control of the governmental action by Parliament. The executive’s accountability to Parliament is a kind of fiction, even in traditional parliamentary regimes. The British Prime Minister and the German Chancellor, who receive support from the Majority in Parliament, really are more accountable to the political party who appointed them, than to members of Parliament. When the political majority is stable, the Government is stronger. The new major role of Parliament is his power to control the Government’s action. The old mechanism that used to allow Parliament to challenge the Government has been replaced with

subtle control techniques both more efficient and less likely to disturb political stability.

On this issue, the 2008 reform relates to 1) the framing of the presidential powers; and 2) the reinforcement of the traditional parliamentary power of control on the Government's actions.

The framing of the presidential powers. The 2008 reform allows Parliament to take part in some of the President's actions, such as the nomination of the members of the Constitutional Council, establishing thereby a direct relationship between the President and the Majority in Parliament.

The 2008 reform imposes limits on successive presidential terms, restrictions on the presidential power to grant pardons, and the President's capacity to enforce art.16 of the Constitution according to which he can use emergency powers when the country is at risk. Finally the reform does not authorize the President to be the Head of the Supreme Council of Magistracy, which is in charge of appointing magistrates and exercises the disciplinary power.

This new framing of the presidential powers shows that the increase in the President's role is followed with measures prohibiting an arbitrary use of those new powers.

The reinforcement of Parliament's powers to control the Government's actions. The spirit of General de Gaulle's Constitution of 1958 was to go against the prior Third and Fourth Republics (1870–1946) which gave a lot of power to Parliament, weakening thereby the executive.

The 2008 reform establishes back some of Parliament's powers, making the Parliament stronger at the expense of Government.

Now, bills submitted for parliamentary debate by the Government appear in public sessions as amended by the Commissions. The proposition first made by the Government is not presented in public sessions. This way, the Government loses some of his control over public sessions' agenda. The Government can only exceptionally present a text for vote in Parliament, under art. 49-3C (Parliament can then either adopt the proposed text or reject it, thereby voting Government out of office).

This increase in parliamentary power did not produce the expected results, the previous practice and the subordination of the Parliament to the executive were not, in fact, called into question.

The principle of the control of Government's action by Parliament is mainly permitted by the Constitution, and its enforcement is allowed by a newly adopted organic law. To be successful, the 2008 reform requires members of Parliament to change their way of thinking and working, so that the control of the governmental action is real and not a mere masquerade taking place on the empty benches of a careless assembly.

For these reasons, running performance test and ex post control analysis of the enforcement of the law and the efficiency of Parliament Commissions of Investigation is a prerequisite for the reform's success. The new Constitution as amended, acknowledges the role and power of the political group opposing the Majority in Parliament. It is this opposing group that will have to exercise the control over the Government's action. It seems however, that the amendment of the Constitution alone will not suffice to change the mentality and functioning of the parliament. Parliament must rethink its mission and role.

Conclusions

The Fifth Republic is now confronted with a new situation. The new President of the Republic was elected outside the traditional party system and without being guaranteed a parliamentary majority. However, it intends to restore the presidential function and to follow the logic of the Fifth Republic. On the occasion of the parliamentary elections of June 2017, the new president obtained a very large majority in

the National Assembly. A party that did not exist a few months before gained a very large number of elections with a very high rate of abstention, which shows on the one hand the preponderance of the presidential election and the importance of the voting system for the Legislative elections in the institutions of the Fifth Republic, even if this issue does not fall under the Constitution.

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