Presidential Elements in Government

France: The Quest for Political Responsibility of the President in the Fifth Republic

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Power of state – President as state's and as people's representative – Bicephalism of government – Unity in cabinet – History – Guizot, Chateaubriand – Orleanism – President's arbitration is form of leadership – De Gaulle engaging political responsibility – Penal responsibility – Cohabitation – Constitutional amendment and referendum (1962) – President structures parliamentary majority – Weakness of Parliament – Full presidentialization? – Sixth Republic?

A juxtaposition as ambiguous, not to say oxymoronic, as that of the word 'government' with the adjective 'presidential' to describe the role of the Head of State in the current French political system, deserves some explanation. The political system of the Fifth Republic is meant to restore the 'power of State', in the words of Georges Burdeau.[1] This was first defined by General de Gaulle in his speech at Bayeux of 16 June 1946 as 'a power capable of meeting the constant demands that the nation cannot ignore for fear of ceasing to exist; a power that lies neither to the Left nor to the Right, but one that can express the will to live of the whole of France.'[2] There can be no doubt that this 'power of State' flows from the democratic will of the sovereign people. This power, however, also needs an organ – one that both represents it and is in harmony with the will of the people. In contrast to the traditional concept of representative democracy, however, this organ is not Parliament but the President of the Republic, since, as far as General de Gaulle was concerned, France was not to be confused with the French. The Head of State is thus the representative of France, in all its eternal glory, and Parliament is merely the organ representing the French in their partisan versatility and their tendency

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[1] G. Burdeau, 'La conception du pouvoir selon la Constitution française du 4 octobre 1958', in 'Naissance de la Cinquième République'. Analysis of the Constitution by *Revue française de Science politique* in 1959 (Presses de la Fondation nationale des Sciences politiques, 1990) p. 89.

[2] Ibid., p. 92.

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to 'factions': 'the government of the French is superseded by the government of France'.[3] This relationship of supercedence explains why the Parliament in 1958 lost its monopoly of representing the people and why the President of the Republic is himself also a representative of the people. In that regard he is even pre-eminent, since he alone is the representative of the people as a whole. His election by universal direct suffrage would later underscore this status.

In legal terms, this pre-eminence of the President of the Republic is confirmed by the Constitution itself, as shown by the order in which its Articles appear. After a very short Preamble and a First Chapter dedicated to sovereignty, Chapter II is dedicated to none other than the President of the Republic, not to Parliament as in the Constitution of 1946. In this second Chapter the President appears as far more than a Head of State, either in terms of a traditional parliamentary President or an executive presidential Head of State. This was accepted only progressively, however, both by jurists and by certain political currents. It is true that what is referred to as the 'presidentialisation' of the Fifth Republic, under the aegis of General de Gaulle, was helped considerably by the events linked to the war in Algeria. Indeed, from 1958 to 1962 'the indivisible authority of the State', that 'power of State' embodied by the President of the Republic, was to be exercised in the form of an emergency government, a Roman-style dictatorship where a nation in peril placed its fate in the hands of a man of Providence entrusted with resolving the crisis and restoring a state of normality. Thus, and until the Algerian question had been resolved definitively, General de Gaulle was to use all constitutional means available to him: referendum (Article 11), emergency powers (Article 16), and dissolution (Article 12). The insertion in 1962 into the Constitution of the principle of electing the Head of State by universal direct suffrage is, thus, rather to be seen as the culmination of that institutional logic, which it was thereby to perpetuate and make commonplace. There would follow a 'reorientation of the political field', 'because what was at stake in the election of the Head of State was the ability to give direction to the government'.[4] Subsequent developments, particularly the 'cohabitation', were thenceforth to fall within this outline.

It should now be specified what is meant by 'government', as well as by 'governmental power', within the meaning of the Constitution. For the first time since 1789, the present Constitution devotes a Chapter (III) to 'Government'. Article 20 of the Constitution states as follows: 'The Government shall determine and conduct the policy of the nation'. The verb 'determine' here designates the Government as an authority which is empowered to take decisions and which expresses itself in a specific location, the Council of Ministers. This is Govern-

[3] Ibid., p. 99.
[4] P. Avril, 'La nature de la Cinquième République', *Les Cahiers français*, No. 300 (2001) p. 5.

ment in the organic sense: the body that decides on the policy of the nation by the legal means conferred on it by the Constitution: drafting laws, orders and decrees. If governmental authority is exercised by two distinct organs – the single personal organ of the President of the Republic and the collective and united organ of the Prime Minister and the Ministers – this two-headed nature disappears in the Council of Ministers. This is a meeting of the Ministers and the Prime Minister, but presided over by the President of the Republic, where the policy of the nation is decided, to be implemented by the government *stricto sensu*, i.e., the Cabinet in the British sense of the word. The eventuality of 'cohabitation' (where the President and the Cabinet rest on opposed majorities) is not inconsistent with this outline, for it allows for a certain veto power for the President of the Republic, particularly in the form of his refusal to sign certain orders. During cohabitation the Council forms the arena in which this phenomenon occurs and the two parts of the executive contend with each other. Therefore, the presidential character of the French political system implies that the President of the Republic is actively involved in governmental power, in that he decides, as part of the Council of Ministers, on the policy of the country. He does not however govern in the functional sense of the term; this responsibility lies with the Cabinet of Ministers.

This unitary aspect of government expressed by the Council of Ministers is indeed at the heart of the 'governmental' character of the Fifth Republic.[5] It is supported by the fact that it falls to the President of the Republic to set the final agenda for the Council of Ministers, on the Prime minister's proposal. And the President does not shy from using this prerogative; he does remove from the agenda topics put forward by the Prime Minister. This alone is often sufficient to make of the Council of Ministers a 'body that merely records the will of the Head of State',[6] at least as long as the President enjoys the support of the majority of Parliament.

In view of the experience of cohabitation this finding needs to be considerably qualified. However, that is not to say that the Head of State in such a situation is trapped in a sort of 'passive chairmanship' of the Council of Ministers. On the contrary: he turns it into a sort of political podium, from which he can appear as the sole leader of the opposition, which is yet another way of attempting to control governmental power:

> By losing his majority, the President no longer has the means in a sovereign way to exercise his power of controlling the Council's agenda. Besides, there is no point in that, as he wants to disassociate himself from a policy that he has always

[5] Ibid., p. 4.

[6] C. Gouaud, 'Le Conseil des ministres sous la V^e^ République', *Revue du droit public* (1988) p. 456.

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> opposed (…) Of course, he can still modify the agenda, but he has little room for manoeuvre, and moreover the agenda is of no interest to him – the Council of Ministers decides on an adverse policy that he cannot prevent because such is the will of the people and because he has submitted himself to it from the start. It is more difficult for him to refuse to place on the agenda a topic, draft or communication put forward by the Prime Minister without violating the Constitution and thereby attracting the wrath of the people.[7]

This configuration of the role of the head of the executive branch is based in a French conception which itself is rooted in a historical practice and related to France's constitutional upheavals. These upheavals, as we know, occur only too often as the result of a revolution or a military defeat. This is in contrast to England, where the monarch has not presided over Cabinet or government meetings since the 18th century. One might thus be tempted to find distant origins for the Articles 9 ('The President of the Republic shall preside over the Council of Ministers') and 13 of the current Constitution ('The President of the Republic shall sign the orders and decrees deliberated in the Council of Ministers') in the provisions of the Decree of 17 February 1871:

> Mr. Thiers is appointed as Head of the Executive of the French Republic. He shall carry out his functions under the authority of the National Assembly, with the assistance of the *Ministers that he shall choose and over whom he shall preside* [emphasis added].

Even though one might/is inclined to think that this designation of 'Head of the Executive' covers both the functions of Head of State and of government, for the purposes of the present argument at least the main issue has been established: the President presides over the Council of Ministers. This was to be restated without fail in each subsequent Constitution, thereby establishing a French tradition that, as has just been mentioned, is distinguished from the English tradition.

Here is the entire ambiguity of the Constitution of 1958 and here is the difficulty of submitting it to any constitutional taxonomy. If the Fifth Republic embodies the presidential system – the Head of State, elected since 1962 by universal direct suffrage, enjoys governmental power – it also embodies the parliamentary system via the existence of a Ministerial Cabinet accountable before the National Assembly, even if this accountability remains a mere presumption. Indeed, the entire mechanism of political accountability rests on a burden of proof that falls on the members of Parliament themselves (Article 49 of the Constitution). Truth be told, the French political system is neither presidential nor parliamentary, in

[7] Ibid., p. 477.

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spite of the analyses of periods of cohabitation, nor, *a fortiori*, is it semi-presidential, a term whose sole meaning is to emphasis its hybrid character, in other words its ambiguity. The French system takes its character from itself alone, which is to say from its ambiguity: it is a fact that the French system is two things at once without being able to be classified as either, even if the political majority of the National Assembly were in favour of such a classification. At the very most one can conclude that the characteristics according to which it is usually classified (parliamentary/presidential) become more pronounced depending on the outcomes of elections. Since governmental power thus consists of an organic duality, even if there should exist no diarchy at the top, in the words of General de Gaulle, the issue is to determine exactly the place of the President of the Republic at the top and to sketch its possible evolution.

The configuration of the french presidential government

The question of the morphology of governmental power and, thereby, of knowing who it is that governs, i.e., who it is that decides, is a recurring theme in French constitutional history. It is this question that lies at the heart of the controversy regarding the interpretation of the Constitutional Charter of 1814, after the Hundred Days had elapsed. At the time, the issue at stake was the scope of the royal prerogative. The 'doctrinarians', who, being a minority in the Chamber of Deputies, appointed themselves the defenders of the royal prerogative, held on to the words of Guizot, who wrote that

> there is no reason flowing from either ministerial accountability or sovereign immunity to suppose that the King is extraneous to the acts of the Cabinet, nor that the acts of the Cabinet are extraneous to the will of the King. It is the King who wills, who acts and who alone has the right to will and the power to act. The Ministers are charged with promulgating his will (…) Without his will, they are nothing; they can do nothing; and whoever claims that he can separate the Ministers from the King is in fact merely working to divide them.[8]

Chateaubriand, in a daring pre-emptive pamphlet objected that

> nothing in the acts of government flows directly from the king; everything is the work of the cabinet, even that which is done in the name of the king and bears his signature: draft laws, orders and appointments of persons. In representative monarchy, the king is a divinity that nothing may besmirch, a divinity that is inviolable, sacred and even infallible, for if any error is made, it is an error of the

[8] F. Guizot, *Du gouvernement représentatif et de l'état actuel de la France* (1816).

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> cabinet on behalf of the king. Thus anything may be called into question without impugning the royal majesty, since everything flows from an accountable Cabinet.[9]

These statements may be compared with those of F. Berriat Saint-Prix:

> Executive power rests to some extent indivisibly in two persons: one of those persons, immutable and unable to do wrong, reigns and does not govern; the other, changeable in nature and amenable to both punishment and reward, is alone deemed to be the author of the acts of government. The hope in creating such a system was to embody both stability and progress, stability coming from the hereditary immunity of the king and progress from the mobile accountability of the ministers.[10]

We know that the question lived on in the Orleanist constitutional formula, in both its monarchic version (1830-1848) and its republican incarnation (1875-1879). As recently as 1958, Maurice Duverger discerned an 'Orleanist Republic' in the new political régime, whose creation owed as much to 'the de Gaulle problem in the context of the parliamentary system', i.e., his refusal to be answerable to Parliament in any way, as to the legal and practical impossibility of implementing a genuinely presidential system: on the one hand, the principle of political accountability of government before Parliament imposed by the Constitutional Law of 3 June 1958 forbade it; on the other hand, the preservation of a confederate association between the French Republic and its colonies abroad, the 'Community', at that time meant that electing the President of the Republic by universal direct suffrage was politically unworkable.[11] The same author also defined the term 'Orleanist', derived from the experience of Louis-Philippe (1830-1848), as referring to

> that variant of the parliamentary system where the Head of State retains a great deal of actual power, the Cabinet must enjoy his trust at the same time as the trust of the Chambers, and the ministers provide the link between him and the legislature.[12]

Orleanism therefore appears, historically, as a transitory format, unstable and ambiguous. If the political situation renders the Head of State powerful, the ex-

[9] F.R. Chateaubriand, *De la monarchie selon la Charte* (1816) Ch. IV.

[10] F. Berriat Saint-Prix, *Commentaire de la Charte constitutionnelle* (Paris, 1836) p. 95.

[11] M. Duverger, 'Les institutions de la Cinquième République', in 'Naissance de la Cinquième République'. Analysis of the Constitution by *Revue française de Science politique* in 1959 (Presses de la Fondation nationale des Sciences politiques, 1990) p. 104.

[12] Ibid., p. 103.

ecutive will find itself weakened by a deep division within itself between the Head of State and the cabinet; if it renders him wretched, it is the Parliament that will take the upper hand.

In 1958, the ambiguity in question was inherent above all in the constitutional figure of the President of the Republic, i.e., in his legal situation and his powers. Legally it shows a Head of State who as such is without political accountability, but who also is responsible for national policy as a participant in governmental power. This follows from the mission of arbitration conferred on the President of the Republic by Article 5 of the Constitution[13] and which prefigures in the Bayeux speech:

> [The Head of State] shall be responsible for acting as an arbitrator above political contingencies, whether, in normal circumstances, by lending his counsel, or, in times of great upheaval, by inviting the country to make its sovereign decision known by means of elections.

The word 'arbitrator' in the French constitutional tradition is ambivalent. On the one hand it designates an impartial judge, in the judicial and jurisdictional sense of the term. In constitutional law, this concept of a 'preserving power' – the 'neutral power' dear to Benjamin Constant – has been an object of fascination for many writers. It is not in this sense however that the word is used in the French Constitution. Indeed, in another sense, the arbitrator is the person in command of the situation, a political leader, a 'team captain'. Presidential practices under the Fifth Republic have given weight to this interpretation, thereby confining to history the myth of the President as an impartial arbitrator, as Georges Vedel wrote:

> Since 1958, most of the Heads of State we have seen have been deciders, or at least have been placed at the pinnacle of governmental authority, and have been leaders of a parliamentary majority. We have also seen, on several occasions, Presidents practising cohabitation by occupying the double role of Head of State and Leader of the Opposition, whilst simultaneously preparing a candidature that would vest them with full authority.[14]

It is definitely in this second sense that the term is used in the Constitution, to designate the powers of a political leader and not those of a judge.

[13] 'The President of the Republic shall ensure that the Constitution is respected. He shall, through his own supervision, ensure the proper operation of public authorities and the continuity of the State' (first subparagraph).

[14] G. Vedel, 'Le quinquennat contre les risques de cohabitation', *Les Cahiers Français*, No. 300 (2001) p. 33.

This trend has of course been reinforced, partially by the President's election by universal direct suffrage (1962) and partially owing to the reduction in the term of the Presidential mandate to 5 years (2000), to such an extent that it would be no exaggeration to say that the real constitutional question in France today is that of the political responsibility of the President of the Republic. We know that General de Gaulle responded to this question by creating, approximately once every three years, a sense of presidential political responsibility by holding a referendum on the basis of Article 11 of the Constitution. This accountability was not, it cannot be said often enough, founded on the exercise of the right of dissolution contained in Article 12. Granted, General de Gaulle did not lose a single legislative election, but one cannot rule out that he might have tried a government of technocrats to face a National Assembly that opposed him politically. Indeed, it must always be kept in mind that the sole rationale for the political system implemented in 1958 was to make the Government able to govern even in the absence of a parliamentary majority, in light of the distribution of the political parties in the National Assembly at that time. The Constitution of 1958 was written against the backdrop of a system of partisan politics, that of the Fourth Republic, which the authors of the new Constitution intended to conquer, at least at the beginning, by constitutional means alone. Thus, the terms of Article 49 of the Constitution make sense only in the context of the previous practice of 'calibrated voting', which would no longer be possible.[15]

We also know that the successors of the founder of the Fifth Republic did not endorse this method of engaging presidential political responsibility. The idea was criticised for fear that it would politically destabilize the presidency, but also because it went against the letter of the Constitution itself (although certainly not against its spirit), which makes the Head of State a political organ without responsibility, like any Head of State. Nevertheless, the problem surfaces again, since the reduction in the term of the presidential mandate has increased the political involvement of the President of the Republic. As the former President of the Constitutional Council Robert Badinter recently stated:

> Political accountability has disappeared in the Republic as it operates today. Outside periods of cohabitation, the President of the Republic holds powers unequalled in any democracy, and without any accountability. The Prime Minister and the government are appointed by him and are answerable, in fact, solely to

[15] This was a 'process by which, under the Fourth Republic [1946-1958], Members of Parliament, eager to dispel the risk of *dissolution*, tempered their defiance of the Cabinet by defeating it by *simple majority* rather than absolute majority (art. 51 C. 1946)' (P. Avril et J. Gicquel, *Lexique de droit constitutionnel* (PUF, 2001) p. 142). In fact, dissolution could only be triggered if, between the 18th and 36th month of the legislature, the government had been defeated on two occasions by Members of Parliament voting by absolute majority.

> him. Since 1962, no government has been defeated by the National Assembly. Parliament has abdicated its control function and, when necessary, that of recalling the government.[16]

In addition to this there is the question, which as yet has received no satisfactory answer, of his penal responsibility and its political impact. Should one adopt the solution recommended by the 'Avril Commission', so-called after the name of its chairman (Pierre Avril), which was created by a Decree of the President of the Republic on 4 July 2002?[17] This solution was endorsed by the draft constitutional revision adopted in the Council of Ministers in July 2003 but has not yet appeared on the agenda of the parliamentary assemblies: an 'impeachment' procedure as corollary of a broad presidential immunity. The Commission strove to take both the penal responsibility and the political responsibility of the Head of State into account in proposing a revision of Chapter IX of the Constitution (Articles 67 and 68). The presidential mandate should be protected by a generous presidential immunity, excluding not only penal responsibility but every judicial interference, without prejudice to the competence of the International Criminal Court, which is recognised by France under the terms of Article 53-2 of the Constitution. This immunity would cover not only acts related to and committed during office, but also make the President judicially untouchable or inviolable concerning acts committed before and outside his office. However, this immunity, which is justified by the nature of the presidency under the Fifth Republic, can not be absolute, since the presidency must also be protected against its holder. For this reason the Commission proposed to add an impeachment procedure to the Constitution, modelled on the Anglo-Saxon system, to permit the removal of the President of the Republic 'in the event of a failure to fulfil his responsibilities such as is manifestly incompatible with the performance of his mandate', in the new wording put forward for Article 68, subparagraph 1. Such a failure would be assessed by the Parliament sitting as a High Court. First a motion to impeach would have to be submitted by members of Parliament and would have to be adopted by both Assemblies (*Assemblée nationale* and *Sénat*). Once adopted, the president of the Senate would temporary replace the President of the Republic, until Parliament sitting as a High Court reaches a decision taken by secret ballot and by absolute majority of its members. If deposed, the President would again become an ordinary man subject to law. In fact, such an impeachment procedure would come close to imposing genuine political accountability on the President, by reason of the authority charged with implementing it, of the discretionary

[16] R. Badinter, 'La responsabilité politique a disparu', *Le Monde*, 20 May 2006.

[17] Cf. A. Channet, *La responsabilité du président de la République. La contribution de la Commission Avril* (Paris, L'Harmattan 2004).

nature of the assessment by which it might be employed and, above all, of the interplay of political majorities as part of which it might find itself used.

When it comes to the powers of the President of the Republic (Article 19 of the Constitution), the ambiguity lies in the distinction between the powers that require countersignature and those that do not, even if in the latter case the Head of State does not necessarily always have the initiative. Besides, it would be a simplification to analyse the former powers as implying a transfer of political accountability from the Head of State to the Prime Minister and/or the minister in question. The question is rather to find a common political standpoint on an act, which can prove very delicate during periods of 'cohabitation'. Yet, here again, the question is dealt with within the chamber of the Council of Ministers. The latter powers can be defined as 'personal' powers, some of which are akin to means of action (Articles 11 and 16 of the Constitution) and evoke the role of arbitrator mentioned above, in the sense of Article 5. As has been emphasised, this role does not refer to the President as an 'arbitrator' in the judicial sense of the word, but puts the President in command of the situation. This confirms, if confirmation is required, that the President is indeed the person to make policy and (is) not in any way the 'neutral power' imagined by Benjamin Constant. He is a policy-maker without political responsibility.

It is by this yardstick that developments in French presidential government must be measured.

The evolution of the french presidential government

One essential fact must be borne in mind, one that will determine all subsequent developments of the Fifth Republic in terms of the person and position of the President. As we have seen, from 1958 to 1962, in the context of the decolonisation of Algeria, General de Gaulle was to make full use of all powers and means of action accorded to him by the Constitution. Although the events in Algeria may have helped him considerably by providing him with the pretext to install an emergency government (another trademark of presidential rule), he also proved perfectly capable of using these events to his advantage to show, at the very moment of Algerian independence, the constitutional and political goal that underpinned his entire approach: the conquest of governmental power. This goal was to be achieved in autumn 1962, with the reform incorporating into the Constitution the principle of electing the President of the Republic by universal direct suffrage. Here General de Gaulle sought to make use of the statutory referendum procedure of Article 11 of the Constitution, rather than the Constitution's amendment procedure, under Article 89, which does also stipulate that a referendum may be held, but following a parliamentary stage. This is what he intended to

avoid. It set the scene for a major constitutional debate in France, the question being whether Article 11 can be used instead of Article 89 to amend the Constitution or whether only Article 89 can be used. Most jurists were opposed to the use of Article 11, including the Council of State. General de Gaulle, however, stood firm, and the electorate backed him up to the tune of 62.2% of the votes cast. There is no doubt that, on the face of it, making use of Article 11 of the Constitution constituted, in the strict sense of the term, an *abuse of procedure*, which, in light of the objective in 1962 of amending the Constitution, was motivated solely by a desire to side-step the anticipated opposition from Parliament, through which the amendment would have had to pass under the procedure in Article 89. The president of the Senate referred the matter to the Constitutional Council, in order to have the Council subject the referendum law passed by the people on 28 October 1962 to a test of constitutionality and censure the *abuse of procedure* by General de Gaulle. The question could be raised because the Constitution does not *a priori* exclude testing the constitutionality of statutory referenda under Article 11 of the Constitution.

The Council found itself faced with a very serious situation: although there were compelling arguments that the decision was unconstitutional, it was being asked to annul a decision taken by the people. The Constitutional Council resolved to hold that it had no jurisdiction over referendum laws.[18] In so doing it relied on two arguments: the first (more debatable) was that the constitution did not permit it to assess the constitutionality of a referendum law; the second was that it could not rule on something that represented a direct expression of national sovereignty:

> (…) the spirit of the Constitution, which made the Constitutional Council a regulatory body for the activities of public authorities, dictates that the laws that Article 61 of the Constitution was intended to cover are solely those laws passed by Parliament, not those that, having been adopted by the people following a referendum, constitute the direct expression of national sovereignty.

This decision has been heavily criticised by jurists, who have openly wondered whether its actual effect is to enable the people to breach any constitutional principle at all by means of referendum.

This procedural question, however, important though it was, concealed another question that was much more important still: that of strengthening presidential government. If it had consented to assess whether the referendum under Article 11 of the Constitution was constitutional, the constitutional authority would doubtless have checked the President's ascendancy over governmental power.

[18] Cons. const., decr. No. 62-20 DC of 6 Nov. 1962, *Rec.*, p. 27.

But the Constitutional Council was still too fragile an institution to be able to face such a political situation without fear of itself going under. Anyway, the paradoxical result of this constitutional psychodrama was the lasting appearance, for the first time in French political and constitutional history, of majority rule, which is to say the creation of a coherent, disciplined political majority following the outcome of the legislative elections of 18 and 25 November 1962. These elections were the result of the dissolution of the National Assembly on 9 October 1962, following the vote of no confidence that brought down the Pompidou government on the issue of the direct election of the President of the Republic; Parliament's intention in so voting was to show disapproval of the President's initiative.

From then onwards, and this is the essential characteristic of presidential government, the Parliamentary majority was to be defined and structured by reference to the President of the Republic, whether that majority supported him or was against him, as is the case during a 'cohabitation'. This is because the Prime Minister, who is deemed to enjoy the trust of the National Assembly, exists in law solely as a result of his appointment by the Head of State. Indeed, as Article 8 of the Constitution states, 'the President of the Republic shall appoint the Prime Minister'. It will be observed, incidentally, that this positioning (previously unheard of in comparable constitutional law) of the Parliamentary majority is the result of the emergence and the lasting implementation (also unheard of in French constitutionalism) of the *fait majoritaire,* i.e., the coinciding of the majority which has chosen the President with the Parliamentary majority (except in times of cohabitation). This causal link is clearly not without significance, since this situation has served merely to consolidate the political involvement of the President of the Republic in terms of his direction of governmental power. One might also inquire, however, as to why this *fait majoritaire* was the result of the positioning of the Parliamentary majority with regard to the Head of State, rather than with regard to the Cabinet of ministers. Is this the reappearance of a historical trend in French constitutionalism marked by Orleanism, that the supporters of a 'prime ministerial' parliamentary system would do well to consider?

It has also been said that the trend sanctioned the abolition of Parliament, for the very reason that it subordinated Parliament to a governmental power that in the future was to be directed by the President of the Republic. If Parliament has been subordinated, this is due above all to the fact that it is always at the mercy of the Head of State, who has absolute power to order dissolution, on the condition that he does not do so more than once a year (Article 12 of the Constitution). Parliament, on the other hand, has no constitutional remedies at all against the President of the Republic, due to his non-responsibility. We thus return to the question of whether presidential political accountability exists, a question that has gained in significance by very reason of the fact that the term of the presidential

mandate has been reduced. The conclusion must be that, by making the political position of the Prime Minister uncertain, this reduction has made the balance of the Constitution of 1958 lean even more towards the presidential system, by consolidating the Head of State's grip on governmental power.

Some have concluded from this that constitutional reality must be adjusted to this presidential trend and that a genuine presidential system must be established. This is the position of François Bayrou, the head of the UDF (*Union pour la Démocratie Française*), and of Nicolas Sarkozy, the leader of the UMP (*Union pour un Mouvement Populaire*). This is not a disinterested standpoint, however: the former thinks that it will accord him the means to become President without the need to worry about the composition of Parliament, which currently presents difficulties for him; the latter thinks that it will give him the means to consolidate an authority supported by the people without the need for a Prime Minister (a possible rival).

But the presidential system represents a model that has no historical equivalent in French constitutional law. At the same time the American example is hard to follow. This is because the American system is based on a dogmatic concept of the separation of powers, which can be offset only by a very pragmatic approach to the practice of government, i.e., by the existence of relationships between the organs of government. Without that and in the absence of any procedure for appealing to the people, the American political system can easily grind to a halt. At the risk of stretching the point, it might be said that French constitutionalism, on the other hand, demonstrates a very pragmatic concept of the separation of powers (as shown, moreover, by the arguments in this article), combined with an often dogmatic or even ideological approach to the practice of government. In fact, it is unsure whether the spirit of French constitutionalism, to paraphrase Montesquieu, can adapt safely to the presidential system; the experience of 1848 sheds little light on the subject, as it happened in a past too distant to be relevant.

Others refute this additional presidential authority by referring to the Parliamentary Republic, not the one that existed in France between 1879 and 1958 (the Vichy government excepted) but a parliamentary Republic where it is not the Parliament that governs, but the Prime Minister. This assumes that the Head of State takes no part at all in the exercise of governmental power, even if the President is still elected by universal direct suffrage under a preserving power. In modern terminology this is referred to as a 'prime ministerial' or parliamentary system, the contemporary equivalent of which has already been described in detail by Chateaubriand (cf. *supra*). It remains to be seen, however, whether (as has been suggested) such a system can generate a majority rule as solid as that which the current system can boast, a majority that relies, it should be remembered, on the positioning of the parliamentary majority with regard to the Head of State. French

constitutional experience has shown that the more Parliament's influence grows, the more political majorities disintegrate, to the point where governmental power itself becomes indistinct. The political and constitutional reality is that the French Parliament has shown that it would rather be subservient to a Head of State directly elected by universal suffrage than obey a Prime Minister emanating from its own ranks. In the latter scenario, it would not resist the temptation to govern via its intermediary, since the Prime Minister would not have sufficient *legitimacy* to impose his own will, except if he himself was to be directly elected by universal suffrage. On the other hand, the role of the President as laid down by the Constitution of 1958, associated with direct election by the people, keeps Parliament at a distance, even if the original esteem has turned into pure submission.

The circumstances are no coincidence: it is a fact that the conquest of governmental power by the President of the Republic, since 1962, is concomitant with the appearance of the *fait majoritaire* in France. Whatever those who created the system think, it is with regard to the Head of State, and sometimes in opposition to him, that the parliamentary political majority is fixed. When all is said and done there is nothing shocking about this, if it is considered that a parliamentary majority is always defined with regard to governmental power. The only difference is that French governmental power is dominated by the President of the Republic and not, as elsewhere in Europe, by the Prime Minister. This political and constitutional method, whose aspects were only really put into practice under the presidency of Georges Pompidou (1969-1974), can survive only if it finds its balance by resolving the question of presidential political accountability: would it not be possible to link this accountability, in addition to limiting the maximum number of terms of office, to the exercise itself of the right to dissolve Parliament, or to the result of legislative elections?

The presidential majority was different from the parliamentary majority for the first time between 1986 and 1988, then between 1993 and 1995, and finally between 1997 and 2002. These are referred to as periods of 'cohabitation'. The first two periods of 'cohabitation' occurred for solely procedural reasons, the term of the parliamentary mandate (5 years) being different from that of the presidential (7 years). The message that the electorate was sending to the respective Presidents of the Republic, by abandoning the majority that supported them, was not deemed to bring the Presidents' political accountability into play, any more than were the results of the legislative elections of 1997 which followed a dissolution pronounced by the President himself. The logic of having continuity in the presidential mandate was deemed preferable to that of the circle of trust between the people and the President (illustrated *a contrario* in 1969 by the resignation of General de Gaulle in the face of the negative outcome of the referendum he had sought). The homogeneity and political unity of the executive had thus been bro-

ken, in favour of an application of the Constitution that was closer to the letter of its provisions (Article 21: 'The Prime Minister shall direct the actions of the Government') than to the spirit in which it was conceived. The introduction of the five-year presidential term of office by the Constitutional Law of 2 October 2000 aims to prevent a recurrence of cohabitation by setting an equal length for both presidential and parliamentary mandates, with presidential elections occurring at an earlier point in time than elections to the National Assembly.

This does raise the question, however, of whether, by making the presidential term of office identical to the parliamentary term, this reform has the effect of weakening the office of President of the Republic, since it brings his status closer to that of the Prime Minister. Does not abolishing the difference between the President's longer term of office and the shorter term of office of the Prime Minister and of Parliament mean putting the President in the firing line, and reducing, by the same token, the Prime Minister's role as a 'protector' of the President? Does not synchronising political rhythms with parliamentary terms of office, chosen under the (debatable and superficial) pretext of 'modernity', amount to confusing the respective functions that each of the protagonists of the executive exercises, and to departing from the original notion of the role of the President?

Will the demand for a 'prime ministerial' Sixth Republic, in which the Prime Minister would be elected by universal direct suffrage and hold the powers currently granted to the Head of State, and in which this Head of State (who as a result would no longer need to be elected by universal direct suffrage) would serve merely as a moral magistrate (following the example of Germany, Italy or Portugal), be the final stage of the development that has thus been entered? This would demonstrate the unsustainable duality of the executive, by abolishing it, and the highly uncertain nature of Orleanism, which is forever bound to sway between being completely weighted in favour of the President (when the parliamentary majorities are in his favour) and placing the President and Prime Minister in a state of permanent conflict (cohabitation). If the intention is simultaneously to preclude an excessive degree of presidential power and any weaknesses in the Executive caused by internal divisions, the 'prime ministerial' solution is not without merit, since by its very nature it makes the occurrence of a situation of cohabitation impossible, something that the five-year term of office does not guarantee.

Its other advantage lies in the fact that it retains election by universal direct suffrage, of which the French population seems to be fond, whilst reapplying it in favour of the Prime Minister. It remains to be seen whether or not this political sidelining of the President of the Republic would make the system more closely resemble that of the former republics: instead of a Sixth Republic, would this not be a Third or a Fourth Republic revisited? In addition, the 'prime ministerial' solution raises the question of the accountability of the Prime Minister and his

government: having been elected by universal direct suffrage, would the Prime Minister be amenable to proceedings under Article 49 of the Constitution? Could he, for example, be removed from office by a hostile parliamentary majority, even though he had been directly elected by popular majority?

But why not also distance ourselves from those who created the system and plead for an internal reform of the Constitution, including the way in which it is applied, again in the name of constitutional and political stability? This was the path suggested by the Vedel Report in 1993, which cautioned against both a reinterpretation of the Constitution and a reinvention of it. It also cautioned against redefining duties, including normative ones, within governmental power in an attempt to discover a means of reconciling the initial ambiguity of the Fifth Republic with any particular institutional practice, whereas the problems are more likely to have sprung from the people in government themselves rather than from any textual inadequacies (Malraux said that men make institutions; institutions do not make men):

> experience, including that of our constitutional texts both ancient and modern, urges jurists or political scientists to caution when seeking to frame legal instruments in view of politically desirable results. Often a text initially held in high esteem dies from irrelevance; while a text deemed of incidental weight is given a high significance; and another text may end up having results completely contrary to its original intentions. It is not even unknown that by a perversion of perverse effects a text universally decried may turn out beneficial.[19]

Basically, as Robert Badinter again observes:

> what we need is an unassuming presidency in place of the current imperial presidency. The President should perform his distinguished role on the international scene, particularly in Europe. He should safeguard the handful of major choices on the basis of which he was elected. He should ensure that institutions and basic liberties are respected. As for the remainder, this should be handled by the government, under the supervision of Parliament.[20]

Not even the most well-organised institutions in the world will ever make people more virtuous than they actually are. French presidential government is no better or worse than another.[21] It is however by its capacity to endure and to adapt as

[19] Comité consultatif pour la révision de la constitution, présidé par le doyen G. Vedel, *Proposition pour une révision de la Constitution*, 15 février 1993, p. 27.

[20] R. Badinter, *supra* n. 16.

[21] Its sense of identity therefore means that the fact that some of its aspects have been borrowed is a delicate issue. Cf. W. Osiatynski, 'Paradoxes of constitutional borrowing', 1 *International Journal of Constitutional Law* (2003) p. 244-268 and A. Rinella, *La forma di governo semi presidenziale: profili metodologici e circolazione del modello francese in Europa centro-orientale* (Torino, Giappichelli 1997).

time goes on that we will best be able to judge the political maturity of a country that all too often has followed up a rigidity of its constitutional principles with the inconsistency of their application.

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