

## § 2 Classical questions of executive-legislative relations

### I. Who is and who determines the head of the executive branch?

- preliminary remark: the distinction between the *gubernative* and the *administrative* sub-branch of the executive branch

#### 1) In parliamentary governing systems

- The head of the executive is the *prime minister* (in some countries called *chancellor*) in his function as *head of government*. Within the government, he acts as *primus inter pares* or as hierarchical superior who determines the government policy. In contrast, the head of state (president, monarch) has mainly representative and certifying ("state notary") functions.
- The prime minister/chancellor is elected by the parliament; other cabinet members are chosen by him (e.g. in Germany) or elected by parliament.

#### 2) In presidential governing systems

- The head of the executive is the *president*. He may be the head of government (as in the U.S.A.) or, in some countries, the supervisor of a prime minister appointed by him.
- The president is elected by the people. Other cabinet members are appointed by him (in the U.S.A. with approval of the Senate).

#### 3) In semi-presidential governing systems

- There may be a *dual leadership* by the *president* (as head of state, with own executive competences) and the *prime minister* who directs the work of the government (as in France; so-called *cohabitation*).
- The president is elected by the people. The prime minister may be appointed by the president but not be responsible to him (as in France).

### II. Can the head of the executive branch be removed and by whom and under which conditions?

#### 1) In parliamentary governing systems (→ vote of no confidence)

- In most systems, the prime minister as head of the executive branch can be removed at any time, under no special legal requirements, by a purely political vote of no confidence of the parliament, adopted by the majority of its members.
- With regard to the instability experienced during the Weimar Republic (1918 to 1933) art. 67 of the German Basic Law of 1949 only allows a *constructive vote of no confidence* against the chancellor, that means by the way of electing a successor who will form a new government. Thus, the risk of chaotic "government-free" times is avoided.  
- In 2018 this concept kept Chancellor Angela Merkel in power at a time where most members of the German Bundestag would have liked to overthrow her but could not agree on a successor.

#### 2) In presidential and semi-presidential governing systems (→ impeachment)

##### a) The concept of impeachment

- The directly elected president can be removed from office for serious reasons only, in a special impeachment procedure.
- The term refers literally to the indictment but is also used in a wider sense for the whole proceedings.

- impeachment one of the most sensitive topics in these systems
  - the need to respect the high democratic legitimacy of the directly elected president versus the need to stop him from abusing his powerful position
  - the *high risk of abuse* (examples: USA [against Bill Clinton], Brazil [against Dilma Rouseff])
  - the unclear nature: quasi-criminal procedure or predominantly political instrument?

## b) The impeachment procedure

- aa) *impeachment inquiry* (preparation of the impeachment)
  - investigation by lower house of parliament
- bb) *impeachment proper* (formal indictment)
  - USA: by simple majority in House of Representatives (→ adoption of "articles of impeachment")
  - Brazil: by 2/3 majority in Chamber of Deputies
  - France: each house can propose by 2/3 majority that both houses convene as "High Court"
- cc) *impeachment trial* (formal investigation)
  - with - often little - new taking of evidence
  - USA: in Senate, presided by Chief Justice
  - Brazil: before Supreme Federal Court or in Federal Senate, presided by Chief Justice
  - France: in "High Court" (both houses sitting together)
- dd) *impeachment decision* (vote to acquit or remove from office)
  - in some countries, president can also be disqualified from holding public office in future
  - USA: conviction with 2/3 majority in Senate
  - Brazil: conviction with 2/3 majority
  - France: decision with 2/3 majority in "High Court"

## c) The grounds of impeachment

- often vague and open for abuse
- *criminal offences* and *political or moral offences* committed in the function or misusing the position as president
  - in particular intentional violation of the constitution
  - U.S.A.: "treason, bribery, or other high crimes and misdemeanors"
  - Indonesia: "has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and/or ... no longer meets the qualifications to serve..."
  - Philippines: "culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust"
  - France: "breach of his duties clearly incompatible with the exercise of his mandate"
- problem: removing a directly elected president from office for *immorality*? The need to separate law and morality in a state based on the rule of law
  - what if the voters stand behind the still legal but "immoral" acting of the president?

## d) Special problems

- the *role of the judiciary*: involvement of the constitutional or supreme court in a largely political process? (example: art. 7B Indones. Constit. 1945)
  - courts are functionally legitimised to monitor compliance with formal and procedural requirements, and with substantial requirements if designed as legal criteria, but must not be misused for a political function
  - decisions based on political or moral grounds ("misdemeanor", "moral turpitude") are by nature *non-justiciable political decisions*; these grounds are unsuitable for judicial review
- the problem of the *removal of the prime minister* in semi-presidential systems
  - e.g. in France: only by vote of no confidence of the parliament

## 3) Latest: The two impeachments of U.S. President Donald Trump

### a) The first impeachment: the Ukraine scandal

- impeachment for *abuse of power and obstruction of Congress* (as "high crimes and misdemeanors") by
  - soliciting the Ukrainian Government to interfere in the 2020 presidential election by publicly announcing investigations into his opponent Joe Biden
  - defying the House of Representative's subpoenas in the investigation of the affair by directing officials not to comply with them
- impeachment inquiry in autumn 2019 with numerous hearings of the House of Representatives, often obstructed by White House orders to officials not to testify or cooperate

- impeachment by Articles of Impeachment Against Donald Trump adopted by House of Representatives on 19.12.2019
- impeachment trial before the Senate in January 2020 with few further hearings
- acquittal by the Senate on 05.02.2020 with votes sharply divided along party lines

#### **b) The second impeachment: the incitement to storm the capital**

- impeachment for *incitement of insurrection* (as "high crimes and misdemeanors") by addressing a crowd in a park in Washington, reiterating false claims that he had won the presidential election and urging them to "fight like hell", thus encouraging a mob to storm the Capitol, endangering the lawmakers and the Vice-President and interfering with a Joint Session to certify the election results
- rejection of a request to declare Trump unable to discharge his powers and duties under the 15<sup>th</sup> amendment of the constitution by Vice-President *Mike Pence* on 12.01.2021
- impeachment by Article of Impeachment adopted by the House of Representatives on 13.01.2021, 8 days before the end of Trump's term, with a majority including 10 Republicans
- impeachment trial before the Senate in February 2021, after the end of Trump's term
- acquittal by the Senate on 13.02.2021; Majority leader Mitch McConnell voted for acquit but stated that there is "no question that President Trump is practically and morally responsible" for provoking the riots

### **III. Who can dissolve the parliament and under which conditions?**

#### **1) In parliamentary governing systems**

- *Usually the president* can dissolve the lower house (in some systems under certain conditions even the upper house) *in case of a political crisis* making it impossible to establish or maintain a stable government with parliamentary support  
- e.g. in Germany, if German Bundestag proves unable to elect chancellor with absolute majority or does not support a motion of the chancellor for a vote of confidence.
- Often the president may only dissolve on proposal of the prime minister and/or after consultation with the speakers of the chambers. In few countries the lower house has the right to dissolve itself.

#### **2) In presidential governing systems**

- Usually, with regard to the more distinct separation of powers, the constitution does not allow the dissolution of the parliament (e.g. in U.S.A., Brasil).

#### **3) In semi-presidential governing systems**

- In France, the president is free to dissolve the National Assembly without any conditions but not again in the following year.

### **IV. The distribution of regulative powers**

#### **1) Has the executive branch originary regulative powers under the constitution?**

- a wide range of different kinds of executive regulations and a heterogeneous terminology ("executive order", "ordinance", "statutory instrument", "règlement", "Rechtsverordnung" etc.)
- In some parliamentary systems (e.g. Germany, see art. 80 BL), the executive branch does not have any originary regulative power under the constitution (except the power to organise itself) but needs a special and precise legal basis for every executive regulation.
- In presidential systems, the president has a far-reaching originary regulative power. In the *U.S.A.* the President issues *executive orders*.
- The semi-presidential system of *France* provides the *prime minister* in art. 37(1) of the Constitution of 1958 with a *comprehensive originary regulative power*, limiting even the regulative power of the legislator:  
"Les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire." ["Matters other than those coming under the scope of statute law [see art. 34] shall be matters for regulation."]

**2) When does the principle of statutory reservation apply?**

- in particular in the field of *fundamental rights*: no encroachment on f.r. without *legal basis*  
- the most important principle in administrative law

**3) Does the legislative power extend to all fields of regulation or are there domains reserved to executive regulation?**

- In the parliamentary system of *Britain*, due to the doctrine of the *sovereignty of the parliament*, it is virtually unlimited. By contrast, in the parliamentary system of Germany, the constitutional principle of separation of powers is understood as guaranteeing an absolute protection of the *core area* of each power (e.g. the power of the government to decide about the creation or dissolution of ministries).
- In the semi-presidential system of *France*, the *scope of statute law* is *exhaustively defined* in the enumeration of art. 34 of *Constit. 1958*.

**4) Can the legislator override executive regulation?**

- usually no problem in parliamentary systems
- however, not in the semi-presidential system of France, if the scope of the regulation is outside the scope of statute law as defined in art. 34
- In the presidential system of the *U.S.A.* the President's *executive orders* can be neutralised by the Congress by new legislation (if it is not prevented by presidential veto, see *infra*, V.3) and, often, by cutting funds.

**V. The role in the legislative process**

**1) Who can and who usually does initiate legislation?**

- In parliamentary governing systems, usually the *government* and *members of parliament* but usually not the president can initiate legislation. For initiatives of members of parliament, sometimes a quorum (e.g. 5%) is required. In some countries, the legislative process can also be initiated by a *people's initiative*. *In practice*, in almost all countries by far the most of the legislation is initiated by the *government*, profiting from the concentrated *expert power* in the ministries (for which there is no counterpart in the parliament).
- In federal states, usually also the *federal institution* representing the federated states can initiate legislation. This institution can be part of the parliament (as the U.S. Senate) but can also represent the federated states' governments (as the German Bundesrat). In the latter case, it profits from the concentrated expert power in the states' ministries, an important counterpart to that of the federal government.
- In the semi-presidential system of France, the prime minister and the members of (both chambers of the) parliament can initiate legislation. However, the *president* can, on proposal of the government, *by-pass* the parliament and submit bills on certain topics to a referendum.
- In presidential systems, often (e.g. in the USA) the executive may draft laws but cannot initiate the legislative procedure itself. The bill must be formally introduced by a member of the parliament.
- In the *European Union*, *only* the *European Commission* but neither the Council of the European Union neither the European Parliament can initiate legislation.

**2) How is the government and/or the president usually involved in the legislative process?**

- very heterogeneous, sometimes detailed regulation in the constitutions
- usually a close but often informal cooperation; usually, government members must always be heard in the parliament

- In some systems (e.g. France) the executive can influence the agenda in the legislature or by-pass the parliament by initiating a referendum.

### 3) Does the president have a (political) veto power against legislation?

#### How can a veto be overridden?

- In parliamentary governing systems, the role of the president in the legislative process is often reduced to that of a "state notary" who certifies and promulgates the law. He may have the right and even duty to refuse this last step in the legislative procedure if he considers the law unconstitutional. However, this decision may be challenged before the constitutional court.
  - In Germany, the details are disputed - a frequent topic for exams... According to the prevailing opinion the president may only refuse if he considers the law evidently and seriously unconstitutional.
- In some parliamentary systems (in particular in East Europe, e.g. Moldova) the president has the right to send back a law for reconsideration for political reasons (*suspensive veto*); in this case a new vote of the parliament is necessary to pass the law.
- In the presidential systems, the president usually has a *power of veto*, which the parliament can only override with a qualified majority (in the U.S.A: 2/3 majority). Usually (as in the U.S.A. on the federal level) the president can only veto the law as a whole. In some U.S. states the governor also has the right of *line-item veto* (against individual parts of the law).
- In semi-presidential systems, the president may also have a right of veto but the parliament can usually override it with absolute majority (e.g. in Lithuania, Czech Republic). In Poland, a 3/5 majority is required. In France, the president can only require the parliament to reopen debate on the act or any sections thereof.
- Only in few countries and in rare cases the president may have an *absolute veto power* that cannot be overridden (e.g. in India).
- FURTHER READING: *Elliot Bulmer*, Presidential Veto Powers, International IDEA Constitution-Building Primer 14, 2015, <https://www.idea.int/sites/default/files/publications/presidential-veto-powers-primer.pdf>

## VI. The distribution of powers in the fields of foreign and defence policy

- In presidential and semi-presidential systems (in particular in the U.S.A. and France), these powers are usually concentrated with the president. However, even in these systems, international treaties involving legislation need to be ratified by the parliament.
- In the German parliamentary system, every deployment of the army outside the German territory needs the approval of the German Bundestag - but the decision itself is taken by the Federal Government. Thus, only the executive and the legislative branch together can achieve the deployment of the army.
- A sensitive problem: Can the executive branch, by virtue of its prerogatives in the field of foreign policy, *terminate without approval of the parliament the membership in international organisations* that are essential for the situation of the country in the world (e.g. UN, EU, ASEAN, NATO)?

## VII. How do the branches cooperate and how do they control each other?

- very heterogeneous regulation even within the three categories of government systems
- a question not only of the prevailing law but of the developing - and changing - *political culture* in the country

### **VIII. What is the role of the political parties within the institutional system and how does it affect their work?**

- much more influence of political parties and more party discipline in parliamentary systems
- the role of political parties as *intermediary between society and state* in parliamentary systems
- the risk of the degeneration of political parties in presidential or semi-presidential systems into presidential fan clubs without own profile (the recent examples of the U.S.A. and France)

### **IX. Executive-legislative relations and supranational integration: deparliamentarisation and governmentalisation in the European Union**

- the gain of power of the governments of the member states (represented in the Council of the European Union) and the loss of power of the parliaments of the member states (only partly compensated by the limited gain of power of the European Parliament) in the process of supranational European integration
- the solution to the problem: strengthening of the European Parliament, re-strengthening of the parliaments of the member states, limiting of supranational integration or transition to a European federal state with classical separation of powers?

### **X. Discussion: From democratic presidency to presidential dictatorship: Putin, Duterte, Erdogan, Trump & Co. and the temptation of authoritarianism**

- the rise of populism and authoritarian regimes in the 2010s
- the new way to dictatorship: destroying the free and democratic constitutional order, separation of powers and rule of law from inside - after having been democratically elected
- are presidential regimes more susceptible to fall into authoritarianism?