SIXTH CHAPTER

THE UNIQUENESS OF INTERMEDIATE AND AUTHORITARIAN SYSTEMS

I. INTERMEDIATE SYSTEMS

In its initial phase, the construction of the constitutional state gave rise to the definition of dominant modalities, so that the presidential systems tended to identify themselves with the American model and, from the second half of the 19th century, with the plebiscitary presidentialism of Bonapartist matrix. In turn, the parliamentary systems received the imprint of Westminster, although in other latitudes they experienced the adjustments derived from the presence of several parties that were contending for power and that generated variants of parliamentarism less stable than the British one.

The gradual implementation among the English of a system that began to take shape with the arrival of the incipient Norman parliamentary tradition, became expressed in 1215 and slowly evolved until it was consolidated with the Petition of Rights, of 1628, with the Habeas Corpus Act, of 1679, and with the Bill of Rights, of 1689. That organization, built on the basis of numerous customs and some laws, conferred a characteristic profile on the parliamentary system and on what was identified as "constitutional monarchy" throughout the 19th century.[52] The new republics followed the presidential model and the old monarchies adapted to the English parliamentary model. The expansion of the parliamentary system is associated with the survival actions of monarchies. In a way, the parliamentarization of presidential systems follows a similar logic: to overcome a tradition of strong concentration of power.

At present, it is possible to distinguish between presidential and parliamentary constitutional systems, but there are some that are in an area that

[52] However, the forerunner example of the Swedish Constitution of 1720 should not be omitted, which gave an important decisive force to the Riksdag (Parliament) which, as in other European cases, had its roots in the Middle Ages. The word itself is striking, because literally Riksdag means "the day of the kingdom", that is, of the people. The meaning is similar to the German Reichstag voice.

is difficult to classify. Although doctrinal efforts are being made to identify some systems as semi-presidential or semi-parliamentary, the characteristic elements of these supposed forms of government have not been able to be defined in a uniform and peaceful way. The reason is simple: any combination of elements from the basic types of government (presidential or parliamentary), admits variable degrees, so that to a large extent each system ends up being unique, insofar as such a degree of originality is possible.

If we look at all the possible variations in the way the organs of power are structured and interrelated, it will be seen that each arrangement responds to different motivations, has its own characteristics, and gives the institutions a peculiar aspect. This study has seen, for example, the function of each parliamentary control instrument within systems of presidential essence, and it has been possible to identify a very high number of variants regarding each of these modalities; adaptations that are accentuated when the interaction between the set of institutions is reviewed.

In addition to the systems that can be framed in the presidential or parliamentary sphere, there are others that are difficult to classify. This happened, in the first place, with the Constitutions of Portugal, of 1911, and of Weimar and Finland, of 1919; and years later with that of France, in 1958, and with that of Portugal, in 1976. In the first three cases there was a transition from an absolute monarchical system (in the Finnish case, as part of the Russian monarchy) to a republican one and democratic; in the French case, it went from an assembly republic to a governable democracy, and in the second Portuguese case, from an autocratic republic to a parliamentary presidential one.

1. *Germany (Weimar Republic)*

The Weimar Constitution replaced the one of 1871, and this one to which the North German Confederation governed, of 1867. Many of the precepts of the monarchical Constitutions presented a great similarity; this happened in the case of the figure of the Chancellor of the Empire (Reichskanzler), who was appointed by the monarch, before whom he responded (article 15). According to the Constitution of 1871, the Diet could only be dissolved by the Federal Council, with the consent of the emperor (article 24), but the Federal Council was made up of representatives of the Prussian states, subject to the duty of obedience. towards those who designated them. The Council was also chaired by the Chancellor (articles 6 and 15). This combination allowed a reasonable use of dissolution power.

Otto von Bismarck held the Chancellery for almost 30 years, and it was up to him to design the Constitutions of 1867 and 1871. This Bismarckian model, which in a certain way was present when building the Weimar system of government, is explained from the perspective of a conservative political leader of extraordinary ability. His conception of his power did not lead him to rival that of the monarch, but to build the appropriate institutional means to consolidate his authority and thus have wide margins of action. The author of the initiative was not the chancellor, but Rudolf von Bennigsen,[53] a vigorous liberal politician in whom Bismarck found support for German unification.

For its part, the Weimar Constitution is framed by two adverse events: the ominous peace of Versailles and the tragic rise of Nazism. Furthermore, strong social and political turbulence occurred in Germany at the end of the first great war. The emergence of radical movements, the killings of Kart Eisner, Rosa Luxemburg and Kart Liebknecht, the rise of the short-lived Bavarian Soviet Republic, unprecedented inflation, coupled with the aging of a leading group eager to preserve its privileges and the transactions of the nascent Republic headed by Friederich Ebert, generated an atmosphere of suffocating tension. Under these circumstances, the Weimar Constitution was drawn up and came into force.

The constitutional project was prepared by a group of experts headed by a notable jurist, Hugo Preuss, and in which Max Weber also appeared. Preuss's memory was buried by the apparent failure of the Constitution. As for how and why the model of the parliamentary presidential system was conceived, it is usually attributed to the ideas of Preuss. It is even claimed that he was inspired by the Alsatian jurist Robert Redslob, author of a work that seems to have had an influence at the time the constituent was in session and who many years later formulated an analysis of German political leanings.

From Redslob's point of view, the dominant political vocation in Germany was oriented towards the monarchy, accompanied by the instruments that made it reasonable. The Germans, he added, had built a hybrid system that allowed the coexistence of monarchy and democracy.[54] With this same perspective, Redslob had published his central work in 1918:

[53] *Cf.* Weber, Max, "Parlamento y gobierno en una Alemania reorganizada", *Escritos Políticos*, Mexico, Folios, 1984, t. I, p. 68. Weber's father was a member of the National Liberal Party founded by Bennigsen; The two cultivated a close friendship. *Cf.* Weber, Marianne, *Max Weber. Una biografía*, Valencia, Edicions Alfons el Magnànim, 1995, p. 137.

[54] Redslob, Robert, *De l´esprit politique des allemands*, París, Librairie de Medicis, 1947, p. 44.

Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form[55] (The parliamentary government in its true form and in its false (imperfect, incorrect) form), where he put forward the thesis that a "well understood" parliamentary system could only exist if there was a balance between the organs of power, but not where one of them was imposed on the other, either by privileging the power of the assembly (parliamentary absolutism) or by ignoring the representative function of the people (monarchical absolutism). These ideas have a certain affinity with the structure of Waimer's Constitution; yet Lehnert and Mueller[56] found no quotations from Redslob in Preuss's works.

On the other hand, in the last part of the 19th century (1890), Preuss published a series of articles under the title Organization der Reichsregierung (The organization of the Reich government), where he supported the need to expand the rules of control and political responsibility. of the ministry, even limiting the powers of war and foreign policy of the monarch.[57] In 1917 Preuss wrote:

> The view has always been held among us that a rigid, well-organized authoritarian system is a prerequisite for Germany in order to retain and exercise its power, by virtue of its geographical position and the pressure on its borders. The bitter experience of the World War has begun to shake the foundations of that thesis, as it shows that, in terms of foreign policy, Germany is not strengthened by the contrast it offers when compared to all other modern states. On the contrary, Germany is weakened, and international pressure rises to unbearable levels. Experience shows that governments based on the popular will are stronger and more apt to act than authoritarian governments, whose authority is based on themselves.[58]

The observations of Lehnert and Mueller were consistent with those parliamentary theses of Preuss, who expressed great signs of sympathy for the British system. That seems to have been his original personal inclination. Although Preuss is usually credited with designing the parliamentary

[55] *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form. Eine vergleichende Studie* über *die Verfassungen von England,* Belgien, Ungarn, Schweden und Frankreich, Tubinga, 1918.

[56] Lehnert, Detlef and Mueller, Christoph, *Perspectives and Problems of a Rediscovery of Hugo Preuss*, Baden-Baden, Nomos Verlagsgesellschaft, 2000, p. 28.

[57] Cited by Lehnert and Mueller, *cit.*, Previous note, p. 22.

[58] Preuss, Hugo, "Deutsche Demokratisie-rung", *Staat, Recht und Freiheit.* Aus 40 Jahren deutscher Politik und Geschichte, Tuebingen, edited by Else Preuss, 1926, pp. 339 et seq. (reprinted 1964 by Hildesheim), cited by Lehnert and Mueller, *op. cit.*, note 56, p. 14.

presidential system, there are elements that indicate that this model was actually inspired by Max Weber.[59] There is a coincidence with a similar system adopted months later in Finland, and there are similar notes with the Portuguese system of 1911 (although the big difference is that in Portugal there was no popular election of the president until 1928), but the argument for this new way of accommodating power, which is expanding in contemporary presidential systems, corresponded to Weber.

When Hugo Preuss, a professor at the University of Berlin - a jurist respected for his brilliant intelligence, culture, democratic orientation and for his work - occupied the Ministry of the Interior and was commissioned to prepare the draft Constitution, he joined a small group of experts among who was included in Weber.[60] By then the sociologist had already published a series of essays in which he pointed out with precision the solutions that were discussed and immediately adopted by Preuss and the other members of the working group.[61]

Apparently, President Friedrich Ebert considered the possibilities of appointing Weber to head the drafting commission of the constitutional project. He leaned on Preuss out of pressure to get the project done as quickly as possible. This was a political imperative, as the country suffered from excessive tensions that could lead, as Weber himself recognized, to a civil war. In a letter to his wife, he tells her that never before has a constitution been written in such a short time. Indeed, the project was ready in a matter of a few weeks. The explanation for this fact is offered by Mommsen: in July 1917, Preuss had already presented a draft Constitution to the Supreme Command of the Army, and this Ebert knew. The presence of the lawyer as head of the drafting group guaranteed accelerated progress, which perhaps would not have happened had Weber been commissioned.

In his articles published in 1917, prior to the fall of the monarchy, Weber defined his position in favor of the parliamentary system and argued against the plebiscitary election of the head of state. This option, he said,

[59] In a letter to his wife, in December 1918, Weber tells her "The Constitution in principle is already ready, very similar to my proposals. They were days of continuous work with very intelligent people, a pleasure...", in Weber, Marianne, *Max Weber. A biography*, *cit*., note 49, p. 862.

[60] In addition to Preuss and Weber, several officials participated, including two undersecretaries, belonging to the Social Democratic Party. *Cf.* Mommsen, Hans, *The Rise and Fall of Weimar Democracy*, Chapel Hill, The University of North Carolina Press, 1996, p. 53.

[61] Weber's work on constitutional matters appeared in various newspapers in the summer of 1917 (those corresponding to "Parliament and government"), in November 1918 (grouped as "The future institutional form of Germany"), and in February 1919 ("The President of the Reich").

favors the Caesarist tendencies of the rulers.[62] Circumstances changed, and in November 1918 he addressed the challenges of building a democratic republic.[63] It was necessary, he said, to do "something new and different". Weber examined four possible ways of organizing the government:[64] with a popularly elected president, with a president elected by Parliament, with a collegiate council (as in Switzerland), or with a system that successively alternated representatives of the three länder with the greatest economic and political weight. In relation to each of these options he analyzed the advantages and disadvantages and, unlike the opinion that he had held in 1917, he opted for the plebiscite election of the president. He pointed out, however, some drawbacks that were evident in the United States during the presidential campaigns: excessive spending and division of society. The points in favor consisted of the ability to promote a socialist program, which required a solid popular implantation of the presidential authority.

In February 1919, Weber published a new article, and this time it no longer opened a range of possibilities; he aimed precisely and decisively in favor of a president of universal choice. "Only a president of the Reich supported by millions of votes could have the necessary authority to channel socialization,"[65] he said. In addition, he warned of the danger represented by the interests of the local oligarchies and the strong presence of "particularistic" tendencies that affected the unity of the country; a nationwide elected president would prevent these trends from gaining momentum. His conclusion was overwhelming:

> A Reich president elected by Parliament through an agreement of party groups and coalitions becomes a politically dead man. On the other hand, a president elected by the people who is the head of the Executive Power, of the administrative control apparatus and who has the right to a possible suspensive veto and the power to dissolve Parliament, in addition to being authorized to call a plebiscite, represents the bulwark of true democracy.[66]

Among the theses defended by Weber, the Constitution included the direct popular election of the president (article 41). His recommendation that the period be seven years was also incorporated (article 43). This last

62 "Parlamento y gobierno…", *cit.*, note 53, pp. 150 and et seq.

63 "La futura forma institucional de Alemania", *Escritos políticos*, *cit.*, note 53, t. II, pp. 253 and et seq.

64 *Ibidem*, pp. 276 et seq.

65 "El presidente del Reich", *Escritos políticos*, *cit.*, note 53, t. II, pp. 303 and et seq.

66 *Ibidem,* p. 304.

precept also incorporated the institution of the plebiscite to revoke the presidential mandate. Since 1917 Weber had pointed out that, in plebiscitary election systems, it was necessary to foresee "a peaceful form of elimination of the Caesarist dictator once he has lost the confidence of the masses", and in 1919 he reiterated that the elected should act while preserving the confidence of the masses.[67] What Weber and the members of the commission did not foresee is that, except in exceptional cases, the depositaries of popular power can achieve lasting power and very high levels of popular influence thanks to propaganda instruments and demagogic decisions.

The recall plebiscite could only be called by Parliament, with a two-thirds majority of the total votes. To inhibit the irresponsible use of this means of control, it was established that the effect of the president's victory in the plebiscite was equivalent to his re-election and the automatic dissolution of Parliament.

Another aspect that Weber insisted on was empowering Parliament to integrate investigation commissions. He had done so since his articles published in 1917 and succeeded in getting the commission to adopt his criteria, which, in the end, were consigned in the text (article 33). The right of inquiry,[68] according to Weber, was essential for the balanced functioning of a democratic system. Article 34 of the Constitution broadly developed its scope and empowered Parliament to adopt regulatory norms on this matter.

It was also up to Weber to argue in favor of the referendum as a defense instrument that the president could use in front of Parliament, either to assert his objections or to resolve the contradictions that arose between the Reichstag and the Reichsrat. In general, the Constitution offered a wide welcome to this means of direct democracy, highly valued by Weber. The convocation of citizens proceeded when, in addition to the president, it was requested by a third of the parliamentarians (right of the opposition or of the minority, also postulated by Weber), or a tenth of the registered voters. Voters could overcome parliamentary decisions, if their participation (although not the vote) was majority (articles 73, 74 and 75).

In addition to the part in whose design the influence of Weber is evident, Preuss incorporated other elements regarding the distribution and balance of power. The Reich government was deposited with the chancellor and ministers (article 52), but a nuance was introduced by imposing a double responsibility: before Parliament and before the president (articles 55 and 56). On the other hand, although it was indicated that the chancellor

[67] "Parlamento y gobierno...", *cit.*, note 53, p. 151.

[68] *Ibidem*, pp. 107 et seq.

and the ministers would be appointed and removed by the president (article 53), it was then provided that the entire government would require parliamentary confidence, and each one individually would cease their tasks if it was subject to censorship (article 54).

The combination of these precepts implied important powers: the appointment of the ministers was conditioned to the presidential and parliamentary confidence, and their removal to the decision of the Parliament or the president. This meant that the chancellor or the ministers could be censured by Parliament or removed by the president, as independent actions, resulting from the double responsibility that linked them to each of those organs of power. In this way, a relevant political weight was conferred on the president since he was given an instrument to exercise effective leadership powers over the government.

As a corollary of their parliamentary responsibility, ministers had the right to participate in plenary sessions and committees (article 33). It is difficult to understand that ministers are subject to parliamentary responsibility if they do not have free access to their deliberations. This mechanism was present in the Weimar Constitution but is frequently ignored in the constitutions that follow a presidential model with parliamentary instruments of control.

Among the powers of the President was the dissolution of Parliament, although only once for the same reason (article 25). Furthermore, to strengthen his position he was entrusted with emergency powers. The president could intervene with the security forces in the Länder and suspend fundamental rights for a time. To revoke these decisions, Parliament had to reject them by majority.

The Weimar Constitution required the presence of a president with legal capacity to enforce the social meaning of his precepts. The coincidence between Preuss and Weber was indicated by the academic and political trajectory of both. The first steps, in terms of a germinal combination of parliamentary and presidential institutions, had already been taken by Bennigsen. Preuss had been emphatic in his parliamentary vocation, in which Weber still participated before the fall of the monarchy, but the sociologist had to persuade the jurist of the functional advantages that would result from using institutions from the presidential and parliamentary systems.

The Preuss-Weber formula did not have the expected results, because many adverse factors were added to the consolidation of constitutional democracy that they had outlined, but the example remained, and a long time later it became effective again and has demonstrated its viability.

2. *Finland*

The case of Finland deserves a digression. It is a precursor state of democratic innovations, especially in two aspects: it was the first system in which women had the right to be voted to perform functions of political representation, and it was the first constitutional system that developed institutions that combined elements presidential and parliamentary. In accordance with the electoral system adopted in 1906, still during the validity of the Grand Duchy, in addition to recognizing the right of women to vote (hardly practiced in New Zealand, and with some restrictions in Australia and in two states of the American Union), it was also included the possibility that women could be nominated to join the Diet. As a result of the application of this provision in 1907, 19 of the 200 deputies, almost 10% of those elected, were women.

Regarding the constitutional system, the first republican Constitution of 1919 determined (section 32) that the president would supervise the administration of the State, so he could request information from all areas and even carry out research on its operation. This concept of internal control within the government itself was a welcome innovation. In addition, it conferred a discrete power on the president, who, although he did not directly direct the management of the administrative apparatus, could influence his decisions.

On the other hand, the Council of State was made up of the prime minister and the ministers. The Constitution provided (sections 34 and 40) that the president would make his decisions in Council, at the proposal of the prime minister. Thus, although the figures of the Head of State and the Head of Government differed, the presence of the former was maintained within the political command apparatus. This provision made the Finnish constitutional system highly versatile, as the French Constitution of 1958 has also shown.

In periods of military tension, the president played a prominent role in government management and later, during the postwar period of economic recovery, President Urho Kekkonen, who had broad parliamentary support, acted as the Executive of a presidential Republic.

The Constitution provided (articles 36, 36a and 36b) that the Council of State (cabinet) should have the confidence of Parliament, although once integrated, the president could make minor adjustments in its composition, without requiring parliamentary confidence. If it was about "significant changes", a new parliamentary consultation was necessary. The Constitu-

tion did not set the limit for these "significant changes," so it granted a margin of relative discretion to the president. In any case, the Council had to present the government program to Parliament. In addition to trust, the Constitution provided for the adoption of motions of censure, general or individual, with a binding character.

Eighty years later, a new Constitution, which came into force in 2000, emphasized the parliamentary nature of the Finnish system. However, it maintains some elements that give it a peculiar character. For example, the president can call early elections (article 26). It was also specified that there would be interpellations, the formulation of which requires the participation of at least 20 deputies; the interpellations can culminate in a motion of collective or individual censure. On the other hand, the principle that the president makes his decisions in Council is preserved, except when he decides on the dissolution of Parliament or on proposals to make appointments in the Council of State itself.

Despite the greater parliamentary emphasis of the new Constitution, the advisability of maintaining political balances for a better conduct of political affairs was taken into account. For this purpose, the president freely designates the attorney general of the Council of State for a period of five years (article 69). This attorney oversees the acts of the Council of State and the president himself, as well as the other public bodies and officials (Article 108). The president appoints the general directors of the ministries and all senior officials who do not have a specific provision for the appointment of him (article 126) and exercises direct command of the armed forces (article 128).

3. *France*

There is a long bibliography about how the French Constitution of 1958 was created, but the most relevant testimonies are those provided by Michel Debré and, of course, by Charles de Gaulle himself.

At 4:30 p.m. on May 29, 1958, General Charles de Gaulle left his residence in Colombey-les-Deux Eglises for Paris.[69] At 7:30 p.m. he was received by President René Coty.[70] This interview resulted in one of the most pronounced changes in contemporary constitutional systems. During the devastating political crisis in France, President Coty summoned the general

[69] Williams, Charles, *A Life of General de Gaulle. The Last Great Fren-Chman*, New York, John Wiley & Sons, 1993, p. 377.

[70] Samuel, Patrick, *Michel Debré. L´achitecte du Général*, Paris, Arnaud Franel, 1999, p. 158.

to take charge of what would be the last government of the Fourth Republic. As conditions to assume the leadership, the 1st. In immediate June, de Gaulle asked the president for the broadest power, the recess of Parliament and delegated powers to draw up a new Constitution. On June 3, all demands were met, and the political leader set out to undertake the task of remaking the French state.

At the end of the World War, de Gaulle had undertaken a similar task, but without achieving his objectives. In his memoirs, Michel Debré gives an account of his disquisitions, as the general's lawyer, and shows the sympathy of the military man for the presidential system, which contrasted with those of his lawyer, an admirer of the Westminster system. Looking for a meeting point, Debré wrote the first notes that synthesized the points of view of both. Since August 1945, when the draft Constitution of the Fourth Republic was prepared, the government was expected to design it. In addition, the difference between head of state and government was examined in detail. In this case, it was said in a confidential note, it was necessary to consider that the confusion of the two figures occurred when the president obtained his powers directly from the people, the powers of Parliament were limited, and the government did not depend on parliamentary trust.

Then it was added that those circumstances were "difficult to establish in France", so the Constitution had to "be oriented within the lines of the parliamentary regime".

It can be seen that, since the preparation of the 1946 Constitution, the negative effects of the parliamentary system were already noticed, it was pointed out that under the current conditions it was "difficult" to establish a presidential system, and it was decided to follow a parliamentary "orientation".[71] The new Constitution, which did not consider de Gaulle's observations, entered into force on April 19; two months later (June 19) the general delivered a speech at Bayeux, proclaiming the need for a new fundamental charter. In that speech, which he made famous, he announced what would be the 5th, 8th articles. and 9th., of the Constitution of 1958: the president exercises an arbitration function that places him above the political parties; he appoints ministers, including the premier, and presides over the Council of Ministers. All for the sake of a "strong state". With this expression, the speech concluded.

The procedure followed to prepare the current French Constitution was defined by a constitutional law of June 3, 1958. Through this law, article 90

[71] Debré, Michel, *Trois républiques pour une France*, Paris, Albin Michel, 1984, t. I, pp. 457 et seq.

of the 1946 Constitution was modified, which provided that constitutional reforms should be adopted by an absolute majority of the members of the National Assembly. The law of June 3 established, in addition, the five principles to which the constitutional review should be subject: universal suffrage as a source of the Executive and Legislative powers, the separation of these two powers, the government's responsibility before Parliament, the independence of the judges and the relationship of the Republic with associated peoples.

The same law provided how the new constitutional norms should be formulated: the government was delegated the power to elaborate a project, which it would submit to an advisory committee made up of members of the National Assembly, the Council of the Republic and the government, whose number did not would exceed 39 people. Once the project was approved by the Council of Ministers, it would be submitted to the Council of State, and everything would culminate in a referendum. In this way, a constituent congress was dispensed with, and the approval of the project was submitted to the sovereign people, in accordance with the most rigorous Roussonian tradition. The referendum, held on September 28, was a success: almost 18 million voted yes, four and a half for no and another four abstained. The Constitution was promulgated on October 4.[72]

In 1970 Charles de Gaulle published his autobiography. There, with all clarity, he specified the objectives of the constitutional system that he designed:

> For the State to be, as it should be, the instrument of French unity, of the supreme interest of the country, of the continuity of national action, he considered it necessary that the government should come not from Parliament, that is, from the parties, but, above them, a head directly appointed by the entire nation, and empowered to express its will, decide, and act.

He later he added:

> With a view to the future and before the Assembly was elected, I instituted the referendum, and made the people decide that henceforth their direct approval was necessary for a constitution to be valid; and with this I created the democratic instrument to let me sit a good one, instead of the bad one that was going to be made by and for the parties.[73]

---

[72] Pierre Mendès France pronounced "no", arguing that the Constitution established a Caesarist system, and François Mitterrand also opposed it, because the new institutions were a kind of "Luis Felipe y de Napoleón III, a la vez". Samuel, Patrick, *op. cit.*, note 70, p. 171.

[73] *Memorias de esperanza. La renovación*, Madrid, Taurus, 1970. The French edition, by Plon, appeared the same year. See pp. 14 et seq.

De Gaulle's words clear up any doubt: his intention was contrary to all understanding between the parties to define, in 1958 and later, the content of the Constitution.[74] That is why he began by demanding powers of a constituent nature; he also did not want to put the fate of the government within the reach of the parties, hence at first he did not even admit the possibility of subjecting the presidential election to the popular vote, since in this case his party affiliation was inevitable. In addition, to exercise the government, he placed the president above party arrangements.

A well-known socialist leader, Pierre Mendès France, recognized shortly after that the French parties had subordinated their convictions and programs to their circumstantial interests, with the consequent loss of prestige, but warned that without parties it was not possible to make a constitutional democracy work.[75] Likewise, he observed that in the American presidential system the true counterweight of the president was in the federal system, while in France, the Gaullist regime supported its strength in the unitary structure of the country, and in the dissolution capacity of Parliament.[76]

Another critic of the system adopted in 1958 was François Miterrand. According to his point of view, the Constitution of the Fifth Republic invested the president with such powers that he could subordinate the prime minister and the entire cabinet; by assuming political leadership supported by referendums, he also marginalized the representative system. Mitterrand identified this situation as a "permanent coup".[77]

The interpretation that led to cohabitation was much later. It emerged on the 1986 elections, and an enlightening text by Maurice Duverger was immediately published explaining the scope of political cohabitation. After France was governed under what he called a "Jacobin monarchy" established by the 1958 Constitution, the author warned that even many protagonists of French politics were unaware of the interpretative possibili-

[74] In a press interview in 1964, he stated: "It must be well understood that the indivisible authority of the State is completely entrusted to the president by the people who have elected him, and that there is no other authority, or ministries. terial, neither civil, nor military, nor judicial, that is not conferred and sustained by him". Cited by Duverger, Maurice, *Bréviaire de la cohabitation*, Paris, PUF, 1986.

[22.] This statement by de Gaulle is known as "the constituent address". *Cf.* Luchaire, François and Conac, Gérard, *La Constitution de la République Française*, Paris, Economica, 1987, p. 979.

[75] *La république moderne*, Paris, Gallimard, 1962, pp. 222 et seq.

[76] *Ibidem*, pp. 51 et seq.

[77] Mitterrand, François, *Le coup d'État permanent*, Paris, Plon, 1964, pp. 99 et seq. and 113 et seq.

ties offered by Article 5.[78] He mentioned, for example, that a former prime minister had declared in December 1965, before the electoral process, that "in the event of cohabitation, the government will govern and the president will preside",[79] which showed that he did not know the meaning of cohabitation, a term recently adapted to the then nascent French political reality, which the author himself described as follows: "cohabitation: state of a president of the Republic and of a parliamentary majority of different orientation who live in union".

Cohabitation, therefore, does not mean that the system becomes parliamentary, but only that many of the presidential powers are weakened; conversely, in the fullness of his powers, the president does not act according to the traditional presidential model either, because the presence of the cabinet and the political responsibility of the ministers remain.

One of the central themes of the new Constitution was the structure of the executive body of power and its relations with Parliament.[80] As has been said, De Gaulle favored a presidential system, while Debré favored the parliamentary system. In the end they found a compromise formula: the system would function as presidential when the president had a majority in Parliament, and as a member of parliament when that did not happen. To achieve this flexibility, it was important that the quality of parliamentarian was not required to join the cabinet; it was even established that the simultaneous performance of a function in the government and a parliamentary mandate was incompatible (article 23). With this system, tensions and the eventual blockade of a divided government were overcome. However, even if he did not have a parliamentary majority, the president retained powers of balance and control much broader than those attributed to a head of state in a parliamentary system.

As has been observed, cohabitation makes the president of France the head of the opposition compared to the prime minister, who represents

[78] Article 5 says: "The President of the Republic shall ensure respect for the Constitution and shall ensure, through arbitration, the regular functioning of the public powers, as well as the permanence of the State. He is the guarantor of national independence, territorial integrity and respect for treaties".

[79] Duverger, Maurice, *Bréviaire de la cohabitation*, Paris, PUF, 1986, pp. 45 et seq.

[80] See Maus, Didier *et al.*, *L´ecriture de la Constitution of 1958*, Paris, Economica, 1992. There is a translation into Spanish of the section corresponding to the system of government, *La escritura del Poder Ejecutivo en la Constitución francesa de 1958*, Mexico, UNAM, Institute of Legal Research, 2006. For an analysis of the relations between the government and Parliament, see Andrews, William George, *Presidential Government in Gaullist France: A Study of Executive-Legislative Relations*, 1958-1974, New York, State University of New York Press, 1982.

the majority.[81] This is an unusual situation, because the prime minister is far from having the support of the head of state, is an active rival. At this point there is an error in the French constitutional design, because while the president is considered to be a kind of arbiter above the parties, when cohabitation is installed and his party remains in the minority, he also becomes an interested part of the political process and ceases to be that impartial and balanced figure. From this perspective, it is not a limited presidential system, but a mutilated presidentialism. This problem arises because of the fact that in the future of the Constitution a distinction was introduced that de Gaulle did not want: the dichotomy between head of state and head of government.

There are numerous testimonies to the effect that de Gaulle did not think of a parliamentary system. On June 13, 1958, when the draft of the Constitution was being drafted, he proposed what would later become Article 5, with this wording:

The President of the Republic is responsible for preserving the independence of the nation and the integrity of its territory.

Assisted by the government, the president defines the general orientation of the country's domestic and foreign policy and ensures its continuity.[82]

The idea that there would be a separate government from the president, puzzled the general, then prime minister but already a candidate for the presidency. The text was corrected in the terms that now appear.

Shortly after, in January 1959, when Prime Minister Debré proposed to submit the integration of his government to the confidence of the Assembly, the President asked him if he was not returning to the errors of the previous Constitution, limiting the power of the Executive. In the end, he accepted the measure proposed by Debré, but noting that it was a "concession", imposed "by reason of circumstances". [83] Years later, when presenting his resignation as premier, Debré indicated that it he did to consider that the time had come to "change government". The president responded categorically that he did not accept that reference because he implied that "the government was independent from the president of the Republic".[84]

The French system has become presidential. At first General de Gaulle was in favor of the indirect election of the president; he had postulated it in

[81] Beaud, Olivier y Blanquer, Jean-Michel, *La responsabilité des gouver-nants*, Paris, Descartes & Cie., 1999, p. 302.

[82] See Maus, Didier, "L´institution presidentielle dans l´écriture de la Constitution of 1958", in Maus, Didier *et al.*, *L´ecriture de la Constitution of 1958*, *cit.*, note 80, p. 272.

[83] Samuel, *op. cit.*, note 70, p. 296.

[84] Debré, Michel, *Entretiens avec le géneral De Gaulle*, Paris, Albin Michel, 1993, p. 53.

his Bayeux speech and so it was established in the Constitution. From the first sessions to examine the progress of the draft Constitution, direct election was ruled out, because it would expose France "to degenerate towards a regime in which the president would have enormous power, towards a possible dictatorship".[85] assigned to an electoral college of enormous proportions (around eighty thousand members). In 1962, already president, De Gaulle modified his criteria and promoted a reform to establish direct popular election. Much later an electoral reform was applied according to which the elections to integrate the Parliament are carried out after the presidential election. The results, predictable since the reform was adopted, have allowed the newly elected president to influence the composition of Parliament, with which the parliamentary trend tends to recede in the French system.

In any case, other aspects remain that give the French system a very peculiar texture. Despite its tendency towards presidentialization, the instruments of control attenuate the authoritarian weight of the presidency. Without a doubt, it is the innovation that has had the greatest impact on other constitutional systems.

The 1958 Constitution has become a contemporary paradigm. Numerous constitutional norms of the second half of the 20th century were inspired by this model, with important results in terms of the institutional stability achieved. I do not find cases of literal adoption, outside the Francophone area; institutional rubbings are neither recommended nor useful. Institutional migration involves acclimatization processes in accordance with the system as a whole and with the cultural environment, which gives them its own characteristics.

Although the Finnish Constitution of 1919 adopted a presidential system with important parliamentary components, it did not have the resonance that, for many other reasons, the French of 1958 did. The powerful French cultural influence is also manifested due to the effects generated by its constitutional system which, among other things, has made it possible to corroborate the adaptability and flexibility of the institutions. The theses of the irreducibility of presidentialism or parliamentarism led to many misunderstandings that were overcome after the Second World War. The Bonn Constitution of 1949 started a trend that has proliferated in parliamentary systems: stabilization through the motion of constructive no-confidence. In turn, the presidential system, modified in Finland, received a new structure

[85] This is what Guy Mollet, of the drafting committee, points out in his working notes. *Cf.* Maus, Didier *et al.*, *L´ecriture de la Constitution of 1958, cit.*, note 80, p. 41.

in the French Constitution, which has become a model of contemporary constitutionalism.

Conventional classifications have been overwhelmed by the new constitutional formulas. The French example has been followed in a double sense: for the dynamic and versatile structure that it gave to the organization of power, and for having overcome the traditional schematic limitations. Not all Constitutions after 1958 have adopted the French model, but most have followed the French method. It is a method that translates into a simple lesson: what matters, in terms of constitutional designs, is to have instruments that allow democratic governance.

In the drafting of the 1958 Constitution, it was very clear that there were no limitations of a schematic nature. The objective to be achieved was not to formulate a text more based on orthodoxy, but to find an adequate balance in the functioning of the institutions. The president was assigned the task of arbitrating the processes of power, and a series of mechanisms were chosen to ensure stability in the exercise of government tasks, without diminishing the responsibilities of the incumbents and safeguarding democratic freedoms. After almost 50 years of existence, it is possible to say that this arrangement of power has been successful in France and in countries that have incorporated the same principles. As is evident, the mere translation of the French model and its reception in other constitutional systems have not been and cannot be a guarantee of success; it is required that in the construction of each system the conditions in which it will operate be considered. The text requires context.

Regarding traditional parliamentary controls, trust is not expressly included in the French Constitution, but it is considered included in the first and last two paragraphs of article 49, where the motion of censure also appears, and in article 50:

> Article 49.
>
> The Prime Minister, after discussion by the Council of Ministers, will present to the National Assembly the responsibility of the government for its program and eventually a general policy statement.
>
> The National Assembly will judge the responsibility of the government by voting on a motion of no confidence, which will only be admitted for processing if it is signed by at least one-tenth of the members of the National Assembly. The vote will take place 48 hours after its presentation. Only votes in favor of the motion of censure will be considered, which may only be approved by the majority of the members that make up the National Assembly. Except as provided in the following section, no deputy may sign more than

three motions of no confidence in the same ordinary period of sessions or more than one in the same extraordinary period of sessions.

The Prime Minister may, after discussion by the Council of Ministers, raise the responsibility of the government before the National Assembly regarding the vote on a text. In this case, this text will be considered approved, except if a motion of censure, presented within the following twenty-four hours, is approved in the manner established in the previous section.

The Prime Minister will be empowered to ask the Senate for approval of a general policy statement.

Article 50.

When the National Assembly passes a motion of censure or when it disapproves of the program or a general policy statement of the government, the Prime Minister must submit the resignation of the government to the President of the Republic.

Although a direct reference to the institution of trust was avoided, its effects are incorporated in the initial and final parts of the provision. By the expression adopted in both cases, and by the structure of articles 49 and 50, it is inferred that when the approval of a government program or a general policy statement is denied, as well as when a motion of censure is approved, the effects will be binding on the government. While the vote of confidence does not appear in those terms, French doctrine has adopted the figures of the "spontaneous" motion of censure (the traditional one), and the "provoked" (equivalent to trust). As can be seen, article 49 provides for three hypotheses: that of the first paragraph corresponds to what can be considered a question of confidence; the second, to the traditional (or "spontaneous") motion of censure, and the third, to a kind of "joint initiative of the Executive and the Legislative" (this would be the "provoked censorship").[86]

The ministers have the right to speak in the plenary session of the National Assembly and the Senate, in the following terms:

Article 31.

The members of the government will have access to the two assemblies and will be heard when they request it.

They may be assisted by government commissioners.

It should not be forgotten that cabinet members are prevented by the Constitution from simultaneously holding ministerial and representative po-

[86] Luchaire, François and Conac, Gérard, *op. cit.*, note 74, p. 971.

sitions. This explains the content of Article 31, which does not appear in Constitutions of a parliamentary nature, where the members of the government are usually members of Parliament.

According to the original text of article 18, the President communicated with Parliament through written messages that did not give rise to any debate. To compensate for this gap, ministers were given access to the rostrum at both assemblies. According to the constitutional revision of July 23, 2008, the power of the ministers subsists, but the new wording of article 18 allows the president to also speak before the full Parliament. His intervention may lead to a debate taking place without his presence, although no vote will result from it. The reform accentuates the process of presidentialization of the French system and poses potential difficulties when there is an episode of cohabitation.

To avoid the risk of antagonistic forces coexisting in the government, the electoral system provides that the election of the members of the Assembly take place a few weeks after the presidential elections. This provides an opportunity for voters to confirm or modify their political support for the president.[87] In this way, the plebiscitary or Bonapartist presidential model is ratified. The coincidence of electoral years was made easier thanks to the 2000 reform, which reduced the presidential term from seven to five years, to link it with the legislative period.

According to the Constitution (article 7), presidential elections must take place between 20 and 35 days before the presidential term expires, and legislative elections are subject to the provisions of the law. The Electoral Code establishes (articles 121 and 122) that the powers of the National Assembly expire on the third Tuesday of June of the fifth year from its election and that, with the exception of elections originated in the parliamentary dissolution, the elections must be held carried out within a period of 60 days prior to the end of the mandate. This procedure encourages the newly elected president to promote the campaigns of his sympathizers, to obtain a parliamentary majority that offers support to his government program.

The cycle can be interrupted if the dissolution of the Assembly takes place; however, a peculiar constitutional provision (article 25) allows the

[87] For example, in 2007 the presidential elections were held on April 22 and May 6 (first and second rounds, respectively) and the legislative elections were registered on June 10 and 17 (first and second rounds, respectively). mind). In 1988, the presidential elections were held on April 24 and May 8, and the legislative elections on June 5 and 12. In 1981, the presidential elections were in May and the legislative elections in June. In all three cases, the president's party had a parliamentary majority.

duration of each legislature to be defined by law, which even in the case of early elections would make the convergence of the presidential and parliamentary terms viable.

The questions were planned as follows:

> Article 48.
>
> Without prejudice to the application of the last three sections of article 28, the agenda of the assemblies will include, as a priority and in the order set by the government, the discussion of the bills presented by the government. and the proposals of law accepted by him. At least one session per week will be reserved as a priority for questions from members of Parliament and responses from the government. One session will be reserved as a priority each month to the agenda set by each assembly.

The 2008 reform adds and modifies this text, in force as of March 2009. In the part that concerns the questions, it reads as follows:

> Article 48.
>
> ...
>
> For every four weeks of sessions, one week will be reserved as a priority, in the order set by each chamber, for the control of government action and for the evaluation of public policies.
>
> ...
>
> At least one session per week, including the extraordinary period of sessions provided for in article 29, will be reserved as a priority for questions from members of Parliament and for government responses.

The initial paragraph of article 24, also a product of the 2008 reform, establishes that Parliament will henceforth carry out three functions: legislating, controlling the government and evaluating public policies. The distinction between control and evaluation, which is reflected in the transcribed paragraph of article 48, is very significant, because in addition to the traditional governmental responsibility required before Parliament, the political representative body is now empowered to adopt a position, with constitutional foundation, regarding the design and application of public policies. Only practice will give content to this new attribution, but the breadth of the terms in which it is written offers a very promising horizon for political action. The same reform added article 51.2, according to which investigation commissions may be established in each assembly, for the exercise of the powers of control and evaluation.

The parliamentary tradition of questions in France does not have a constitutional but a regulatory origin. The chambers of deputies and senators adopted this modality from the validity of the Constitution of 1875. The form of presentation of questions is not regulated by the Constitution of the Fifth Republic; this aspect is subject to the internal provisions of the Parliament itself, which distinguishes between oral questions, which are generally not followed by a debate, and questions to the government, in writing and capable of giving rise to a debate.

Regarding the dissolution, the constitutional provision indicates:

> Article 12.
>
> The President of the Republic may, after consultation with the Prime Minister and the Presidents of the Assemblies, agree on the dissolution of the National Assembly.
>
> General elections will be held between twenty and forty days after dissolution. The National Assembly will meet as a matter of law on the second Thursday following its election. If this meeting takes place outside the ordinary period of sessions, a period of fifteen-day sessions will be opened by right. There will be no new dissolution in the year following the elections.

Unlike presidential systems, which always establish the prerequisites required to dissolve Parliament, in this case the rule of parliamentary systems is followed, which do not require specifying the cause of the decision. Dissolution is therefore exercised as an instrument of political negotiation, useful to consolidate the stability of the government and guarantee the existence of a majority that supports the government programs.

On July 12, 2007, in Epinal, the same place from which De Gaulle called for institutional recovery at the end of the Second Great War, President Nicolás Sarkozy announced the start of a process of constitutional changes, for which he formed a commission of experts. Among the changes he outlined, related to the issues discussed here, were empowering the Assembly to ratify a greater number of presidential appointments; review the scope and functionality of article 49.3; specify a system of responsibilities that includes the president, in which he would set out the obligation to report personally and periodically to the Assembly, without debating with legislators; expand the instruments of direct democracy, and strengthen the representative system with the incorporation of some proportional election mechanisms. In other words, on the fiftieth anniversary of the Fifth Republic, an important revision of its constitutional structure was prepared. The reform was adopted in July 2008, as already mentioned.

4. *Portugal*

With the fall of the monarchy, on the October 1910 revolution, the Portuguese Republic was founded. The 1911 Constitution combined institutions from the presidential and parliamentary systems. The Executive Power rested with the president and ministers (article 36). The president was elected by Congress (article 38), and in turn appointed the ministers (article 47.1). Regarding the other positions, including the military, the appointment was made at the proposal of the ministers (article 47.4). The ministers, for their part, were headed by the president of the ministry (article 53). All members of the cabinet were responsible to Congress, whose sessions they had to attend. In addition to freely intervening in the debates, they answered questions and interpellations (article 52). A reform of 1919 empowered the president to dissolve Congress.

The following Constitution, of 1933, adopted a rigid corporate conception, with the institutional appearance of a parliamentary system that differentiated the heads of state and government. In addition, political practice reversed the relationship between the President of the Republic and the President of the Council of Ministers, since it was the latter who exercised the dictatorship.

In 1976 Portugal adopted a new Constitution, democratic and of high social content. Regarding its organic structure, it took up in a certain way the revolutionary experience of 1911, as it assembled a series of institutions typical of the presidential and parliamentary systems. Regarding the former, the president appointed the prime minister "listening" to the Council of the Revolution and the parties represented in the National Assembly and "considering the electoral results" (articles 136 f and 190.1);[88] the other members of the government are appointed by the president, at the proposal of the premier (article 190.2). The president can also dissolve the Assembly (article 136 e). Another significant aspect is the dual responsibility of the prime minister: before the president, who can remove him, and before the Assembly, which can censure him (article 194).

As regards parliamentary institutions, the most significant are the approval of the government program, the vote of confidence and the motion of no confidence. The government program can be rejected by an absolute majority of the total number of deputies (article 195.4). The vote of confi-

[88] This system changed in 1982, when the constitutional figure of the Council of the Revolution disappeared, thereby strengthening the decision-making capacity of the president.

dence can be requested by the government, in this case by the prime minister, in relation to a general policy statement, "or on any relevant matter of national interest" (article 196). The rejection of the plan, or the refusal to vote, forces the government to resign.

Censorship (article 197) can refer to challenges regarding the execution of the government program, or to matters relevant to the national interest; the initiative of at least a quarter of the deputies is required, and it must be discussed two days later, but not exceeding another three days. In this way, it is avoided to paralyze government work, faced with the threat of its possible censorship, to avoid prolonging a factor of political tension and to force specific debates. If censorship does not prosper, its initiators are prevented from presenting a new initiative for the same purpose, during the session. This restriction obliges legislators to act with prudence, so as not to exhaust unnecessarily an important control resource.

The president can dissolve the Assembly after it has been approved by the Council of State, and after having listened to the parties represented in it (articles 136 e), 148 and 175). The Council of State was a body created through the 1982 reform, which gave the president an important means of action. It is chaired by the Head of State himself and made up of 16 other permanent members, plus the former Presidents of the Republic who have not been dismissed. Of the 16 members, the president appoints five and the Assembly another as many, in the proportion that corresponds to the parties; the others are the President of the Assembly, the Prime Minister, the President of the Constitutional Court, the Attorney General, and the Presidents of the regional governments. This composition offers the president an area of political influence, while the Council is also the competent body to pronounce on the resignation of the government and to unburden the consultations that the president formulates. (articles 145 and 148).

The Constitution protects government stability against possible systematic harassment from the opposition and allows the president to manage the government sheltered from the variations of the majority. The sense of political preservation makes the parties calculate that the intensity of the attrition inflicted on the government does not revert to an early election, in which its political costs may rise as a consequence of having blocked the government; On the other hand, the government has to do its best to meet its objectives if it wants to avoid the risk of offering reasons to the opposition to take it to elections. The appeal to the electorate represents a greater risk for the party or group of parties that can offer the worst accounts in the context of an early call.

The characteristics of the Portuguese constitutional system have been considered as typical of a semi-presidential government. Jorge Miranda[89] considers that it is not a classic presidential system because the government is an autonomous body, nor is it a classic parliamentary system, due to the sum of powers available to the president. In a very close sense, J. J. Gomes Canotilho,[90] considers that it is a mixed parliamentary-presidential system. On this concept, it provides a useful schematization according to which instead of presidential or assembly monism, a triadic configuration was chosen: president, prime minister and Assembly, which admits four possible modalities: horizontal, balance between the three components of presidential supremacy, governmental supremacy or parliamentary supremacy. In the author's opinion, government trialism prevails. This useful scheme by Gomes Canotilho allows us to explain how constitutional design and political practice can swing presidential and governmental supremacy.

5. *Francophone Africa*

Almost all French-speaking African countries have adopted a republican organization,[91] and most of them have a parliamentary presidential system, where instruments of political control with designs like those provided by the French Constitution of 1958 are present. Reference has been made to Algeria.[92] The system of participation of ministers in parliaments, questions and interpellations, trust and censorship, are very similar in the constitutions of Benin, Burkina Faso, Burundi, Cameroon, Chad, Congo, Ivory Coast, Gabon, Guinea, Madagascar, Mali, Mauritania, Niger, Central African Republic, Democratic Republic of the Congo, Rwanda, Senegal, Seychelles, Togo and Tunisia. The fundamental difference is that some constitutions allow individual ministers to be censured.[93]

The Djibouti Constitution does not expressly prevent censorship, although it contains a very broad power for the National Assembly to adopt the proposition it deems pertinent as a result of having questioned the government (article 61).

---

89 *Derechos fundamentales y derecho electoral*, Mexico, UNAM, 2005, pp. 142 et seq.

90 *Direito constitucional*, Coimbra, Almedina, 1995, pp. 715 et seq.

91 The exception is Morocco.

92 Chapters third, fourth and fifth.

93 For example, in the Seychelles Constitution (article 74), the motion de blâme is referred to, which means "censorship", although it could also be translated as "reprobation", "reprimand" or "reproach". The effect is the removal of the minister.

The exceptions from Francophone Africa are in Comoros, Equatorial Guinea and Mauritius. In the first country, the Constitution established a conventional presidential system, which completely lacks parliamentary elements; in Equatorial Guinea there is an exacerbated authoritarian system, where the supreme rule empowers the president to suspend fundamental rights (article 41) and to declare a state of exception (article 42). Although article 53 establishes that the prime minister is the head of government, article 39 indicates that this official is freely appointed and removed by the president, who also ratifies the president and the board of the House of Representatives. Mauricio, for his part, has a parliamentary system.

The model followed by most of the countries in this area reflects the influence of the French Constitution of 1958 and the way it was adapted to the presidential systems instituted in the former French colonies. Due to various circumstances, outside the constitutional structure, a part of these republics has not been able to consolidate democratic systems; in some, even authoritarianism subsists. This phenomenon corroborates that the distance between the validity and the positivity of the norms does not depend on the norms themselves, but on their environment. Control institutions, by themselves, do not modify the general behavior of a system; but where they work, they improve the quality of democracy and contribute to governability. In conditions of precarious democratic life, the institutions of control can be used as a palliative to blur the authoritarian aspect of power and give it a less harsh appearance.

What is now worth highlighting is the adaptability of French regulations and the way in which they have been accepted by a good part of the republics of the Francophone area. In August 2008, a military coup overthrew the Mauritanian government, which was making an appreciable effort to strengthen democratic institutions in that country. The international community reacted promptly, condemning the attack. In this sense, the action of the International Organization of la Francophonie (OIF, Organization Internationale de la Francophonie), founded in 2005[94] and made up of 55 countries or nations[95] from all continents, has been relevant. The initial objective of this body, inspired by the British Commonwealth, was to mitigate the effects of decolonization. In addition to the commercial and cultural implications, the OIF has contributed to the migration of French constitutional institutions, and their adoption, with variations, by the countries of the Francophone community.

[94] Its antecedent is the Agency for Cultural and Technical Cooperation (Agence de coopération culturelle et technique), created in 1970.

[95] Some members, such as Québec, do not have country or state status.

In the same way that the former British colonies tended to incorporate the parliamentary model, in the countries of the Francophone[96] and Lusitanian areas the trend prevailed in favor of the versatile presidential / parliamentary model, inspired, depending on the case, by the French norms of 1958, and Portuguese, from 1976. For the purposes of a comparative law study, this process denotes the possibilities of miscegenation between the presidential and parliamentary systems. The Mauritanian Constitution is an example that illustrates this trend. In the matter at hand, articles 54, 69, 74 and 75 of that Constitution reproduce, literally, the provisions of articles 31, 48, 49 and 50 of the French law.[97] The same could be said of other chapters of both constitutions, and the same of the constitutions of various countries in the area. Aspects related to the political responsibility of the government and ministers present great similarities in terms of their design, although they have been the object of different forms of application. What is relevant, in any case, is that they have been functional for the governance of democratic systems, and when accidents such as the one mentioned in Mauritania have been recorded, they have led to the mobilization of the international community in favor of reestablishment of the constitutional order.

6. *Japan*

In 1889, the Meiji Emperor of Japan granted a constitutional charter whose article 1 established "that the Japanese empire would be reigned and ruled by the dynasty of emperors that extended from time immemorial"; then he added (article 3) that the emperor was "sacred and inviolable". This Constitution was in force until 1947, when the one still in force was adopted.[98]

[96] At the time of its independence, Belgium withdrew from what is now the Republic of the Congo without providing adequate preparation for its political organization; Although this country had not been colonized by France, it joined the Francophone area and adopted a system based on the 1958 Constitution. In turn, the former German colonies that came under French domination at the end of the First World War, did not followed the parliamentary model, while those that remained under the British flag did.

[97] They can be consulted in the preceding section of this chapter.

[98] The Meiji Constitution represented the latest example of a great theocratic state; Some constitutional structures of a confessional type remain, such as the case of Iran, but there are very few that relate the religious content to a monarchical system. The most representative case in force is that of Saudi Arabia, where article 6 of its fundamental rule obliges citizens to render obedience to the king, in accordance with the Koran and the tradition of the Prophet but does not confer on the monarch a divine character.

At the end of the Second World War, the occupation troops in Japan were under the command of General Douglas MacArthur, who opposed the prosecution of the monarch and members of the royal family who were involved in real or alleged war crimes; This controversial decision considered the risks of a civil war, and the latent possibility of a political triumph for the incipient Japanese communist movement. The preservation of the monarchy, therefore, was considered as a strategic necessity on the part of MacArthur.[99] To reorganize the political life of the intervened country, the military organized and chaired a working group, which did not include any Japanese jurist.[100] That prepared the current Constitution of 1947.

While the preservation of the emperor was important both to avoid a civil war and to conduct a process of extreme political difficulty, the institutional design consisted in adapting the characteristics of a republican presidential system, within a monarchy that it was only sustained in the formal. As MacArthur himself explained, he was very aware of the presidential system, so that an executive body of considerable political strength was built.

There are clear traces of American constitutionalism in the Japanese Constitution. The formula used in the preamble, "We the Japanese people...", is a good example. Another unmistakable aspect, which as seen in another section of this work transcends from medieval Europe to the Constitution of 1787, is the highly versatile institution, which is synthesized in the expression advice and consent, in the Philadelphia text, and that becomes advice and approval, of the Japanese standard. The substance, however, is in the construction of a presidential system within a parliamentary monarchy; it has even been argued that the true head of state is the prime minister, and not the emperor.[101] Apart from this controversy, what is relevant is that the prime minister appoints and removes the components of the cabinet with complete freedom (article 68), subject only to the requirement that the majority of the ministers must be chosen from among the members of the Diet, made up of the Chambers of Representatives and Councilors.

---

[99] *Cf.* Manchester, William, American Caesar, New York, Dell Book, 1979, pp. 536 et seq.

[100] *Cf.* Hook, Glenn D. and McCormack, Gavan, *Japan's Contested Constitution*, New York, Rutledge, 2001, p. 5.

[101] This is the thesis of Professor Miyazawa Toshiyoshi, arguing that article 1o. of the Constitution alludes to the emperor only as a "symbol" of the State, which would seem to be creating a new institution, in addition to the leadership itself. See Ozawa, Ichirô, "A Proposal for Reforming the Japanese Constitution", in Hook, Glenn D. and McCormack, Gavan, *op. cit.*, note 100, pp. 164 et seq.

The Executive Power rests with the cabinet (articles 65 and 66); but insofar as the prime minister presides and integrates it freely, he has a political force of considerable magnitude. Furthermore, he himself represents the cabinet (article 72). In turn, the formal appointment of the prime minister corresponds to the emperor, who only confirms the appointment made by the Diet (articles 6.1 and 67.1). Some analysts have wanted to see in this procedure an equivalent to the indirect election in the first degree of the American president; however, there is an important difference because the prime minister must be a member of the Diet. In general, the characteristics of the Japanese Constitution do not correspond to a conventional parliamentary system, among other things because it removes the government from Parliament and builds a relationship scheme between both bodies of power like that which has developed in the systems cabinet presidential elections.

MacArthur set out to design a scheme for the decentralization of power, although for strategic reasons he did not do without the imperial figure, to lead the demilitarization of the country and to implant, with the least possible resistance, political rights, the rights of the women and workers' rights.[102] At the end of the war, the imperial concept was no longer applicable to the Japanese reality, but the commander of the occupying forces considered that the preservation of the symbol was essential to avoid the collapse of power political and consequent internal conflict of unpredictable proportions.[103]

II. Authoritarian systems

There are other systems that do not fit into the concept of the constitutional state, but whose presence cannot be unknown. These are the cases of China, Korea, Cuba, the People's Republic of Korea, Taiwan, and Vietnam, which represent forms of a superstitious authoritarianism, with the apparent adoption of constitutional modalities. As will be seen, however, there are contrasting trends. For example, Korea and Taiwan have adopted parliamentary matrix measures that lead to the decentralization of power, while in China, Cuba, the People's Republic of Korea, and Vietnam very rigid structures are

[102] The considerations related to the draft Constitution appear very detailed in the military's autobiography. See MacArthur, Douglas, Reminiscenses, Anapolis, Naval Institute Press, 2001, pp. 267 et seq.

[103] *Cf.* Manchester, *op. cit.*, note 99, pp. 544 et seq.

maintained where the functioning of the state does not require nor allows the adoption of agreements as a means to govern.

1. *China*

Article 1 of the Constitution states that the People's Republic of China is a "dictatorship of the people", so that the power of the state is fully exercised by the National People's Congress (article 2). Then he reiterates that the organs of power adopt the principle of "democratic centralism" (article 3). On this basis, Congress appoints the President of the Republic (articles 62.4 and 79) and ratifies the appointment that he makes of the Prime Minister or Council of State (Article 80). He can also dismiss both officials, and the rest of the members of the Council of State (article 63).

The Congress has a Central Committee (article 66), whose president is appointed by the Congress itself. The Committee supervises the performance of the Council of State and, at the proposal of the Prime Minister, appoints the ministers when Congress is in recess (article 67). The Chairman of the Committee calls the sessions and leads it (article 68).

Vertical control over the government empowers the president of the Central Committee of Congress to request information from all other organs of the State, social organizations, and private individuals (article 71). Deputies can also ask questions of ministers (article 73), who are responsible to Congress (article 90).

The centralization of political power corresponds to a pyramidal organization that is hardly nuanced by the political circumstances of its daily exercise. It is a system of power arrangements that is based on force transactions, not on balancing mechanisms. In this case, the responsibility of ministers before Congress does not correspond to a task of control between bodies endowed with relative symmetry, but to a position of hierarchical obedience. The President of the Republic is subordinate to the Central Committee (article 80), and in turn has the Prime Minister under his command.

The concept of the "dictatorship of the people" and of the assembly government does not correspond, obviously, to the presidential or parliamentary categories of the constitutional states. The Chinese example is presented only to show the extent to which the extreme concentration of power turns controls into mere instruments of subordination, not organic cooperation.

2. *Korea (North)*

In the case of the Democratic People's Republic of Korea, the preamble to the 1998 Constitution alludes to Kim Il Sung as "the sun of the nation and the star that guides the reunification of the land of our fathers," and warns that the Constitution of Kim Il Sung "enshrines the ideology of the leader". In this context, the powers attributed to the Supreme People's Assembly (article 87), in terms of appointing the prime minister (article 91.9) and ratifying the other members of the cabinet (article 91.10) are only formal declarations. The same can be said of the constitutional provision regarding the responsibility of ministers before the Assembly (article 125).

3. *Korea (South)*

When examining the current Korean Constitution, one has the panorama of a norm that corresponds to a democratic state, with a presidential system and a cabinet government. The composition and powers of the Council of State (cabinet), always headed by the President of the Republic, are specified in the supreme charter (articles 88 and 89). Free electoral processes, the non-reelection of the president and a balanced system of political and jurisdictional controls are also recorded. But it was not always like this. Although these democratic reforms were adopted in 1987, the original text of the Constitution, of 1948, instituted a highly concentrated, authoritarian presidentialism, the effects of which worsened in later stages. Presidential reelection was allowed in 1952, and two years later the lifetime presidency. The process to reduce the effects of authoritarianism began in 1960, when the figure of the cabinet was introduced, but this reform was quickly unknown, and was left without effect the following year; the lifetime presidency was strengthened by the 1972 reform, under the aegis of President Park Chung-Hee. The assassination of this leader in 1979 led to a radical change in the organization of power, and in 1980 a cabinet system was reestablished, with a unicameral congress and a weakened presidency. This turnaround was not satisfactory either, because it affected governance.

The reforms adopted in 1987, in force since 1988, offer a different picture. The president, elected by popular vote for a period of five years, is not re-eligible (articles 67 and 70). He is, at the same time, Head of State and Government (article 66); however, in order to carry out governmental tasks, he must be assisted by a cabinet (Council of State), headed by a prime min-

ister. The prime minister is appointed by the president with the consent of the Assembly (article 86) but is freely removed (article 78). The premier is also responsible to the National Assembly and recommends to the president the appointment of the other ministers (article 87).

All ministers, including the premier, are obliged to attend the Assembly or its committees to answer questions (article 62). In addition, there may be a recommendation for removal (article 63), which must be promoted by at least one-third of the legislators and adopted by most of the members of the Assembly. If it is a recommendation, the president is at liberty to accept it; in turn, he is not empowered to dissolve the Assembly, under any circumstances.

The Korean Constitution has been an effective instrument to build a regime of freedoms and to structure a political system of reasonable flexibility. The original authoritarian conception gradually gave way, until finding an expression that articulates plural electoral procedures with a government mechanism that facilitates the configuration of a majority support for the government, with additional mechanisms of political control.

4. *Cuba*

The 1976 Cuban Constitution presents the characteristics of a supreme norm in which the power of a party prevails. The preamble to the Constitution specifies that "with the Communist Party at the forefront [it] continues with the objective of building a communist society", and in article 5, it confirms that the Party is "the leading force of society and the State". This scheme of power does not correspond to the model of the constitutional state which, by definition, is plural. On the other hand, if, apart from the prominence conferred on the Communist Party, the structure of the organs of power is taken into account, it will be noted that the National Assembly elects, from among its members, the Council of State (article 71), that it is the body that represents the Assembly when it is in recess (article 89) and that the President of this Council is both Head of State and Head of Government (article 74). In this way, the institutions of the assembly government and the presidential system are linked.

The President of the Council proposes to the Assembly the appointment and removal of the members of the Council of Ministers (article 93). On the other hand, the Council of State and the Council of Ministers are responsible to the Assembly (articles 74 and 99). These forms of responsibility are not specified, while the vertical structure of power establishes a

hierarchy that rises from the Council of Ministers, the Council of State, the National Assembly and the Communist Party. Here the controls do not reflect a system of balances, but rather a hierarchical domain.

5. *Libya*

Libya, since the assumption of power by Muammar Al-Gaddafi in 1969, has been governed by a short text called the Constitutional Proclamation, with just 37 articles, by virtue of which the Republic is established and the general lines of the organization of power are offered. Its transitory nature is established, until a "permanent Constitution" is adopted (article 37). This Proclamation prescribes that the supreme authority rests with the Council of the Revolutionary Command, which appoints the president, the prime minister, and the Council of Ministers (articles 18 and 19). The latter is responsible to the Revolutionary Council, and the resignation of the prime minister implies the resignation of all other members of the cabinet. In such a case, the control institutions have a formal presence, and that the system does not rely on holding free elections. The inclusion of the cabinet and the prime minister only obeys a functional administrative purpose, in a highly hierarchical and authoritarian structure.

6. *Taiwan*

In its original wording, from 1947, the Constitution of the Republic of China (Taiwan) identified the president as head of state (article 35), with a considerable range of powers that included the supreme command of the armed forces (article 36). A striking aspect was that it left the secondary law to determine the way to elect the president (article 46). On the other hand, the Constitution devoted Chapter V to "administration" (not government) and established that the Executive Yuan (executive body) would be "the highest administrative body of the State" (article 53). At the head of this body was a president, who was nominated before the legislative body by the President of the Republic (article 55). The other ministers were appointed by the President of the Republic, at the proposal of the President of the Executive Yuan (article 56). All members of the cabinet were accountable to Parliament, whose members could ask questions (article 57).

The Constitution has been subject to reforms (1991, 1992, 1994, 1997, 1999 and 2000), through which the presidential nature of the system has

been strengthened, while new institutions with a parliamentary matrix have been incorporated. At present, in accordance with the 10 additional articles adopted in 1994, as of 1996 the president and vice president are elected by direct popular vote (article 2), the presidential power to appoint and remove the president of the organ was reiterated. executive, with the "confirmation" of Congress, and legislators were empowered to question any of the ministers (article 3). In 1997 this precept was reformed to suppress the requirement of congressional ratification for the chief of the cabinet, but in return Congress was empowered to cast votes of no confidence in the cabinet; for this reason, the President of the Republic may dissolve the legislative body, after consulting the President of the Congress himself.

In Taiwan there is a kind of zigzag evolution, while parliamentary and presidential institutions have been combining at various scales. Although the notes of presidentialism were present from the very origin of the Constitution, they were affirmed in the course of time; for their part, the provisions for parliamentary control were expanded to the extent that the presidential system was consolidated.

7. *Vietnam*

The Vietnamese Constitution of 1992 contemplates the National Assembly as the highest organ of state power (article 83), with broad powers to appoint and remove the Prime Minister, the Ministers and, in general, all officials, including the judiciary (article 84.7). The Assembly can even revoke decisions adopted by the cabinet or by one of the ministers (article 91.5). The deputies have the power to question the president, the prime minister and the other ministers (article 98). The president, on the other hand, can attend the sessions of the Assembly (article 105), and the entire cabinet is accountable to him (article 117). Notwithstanding the foregoing, central political power resides in the Communist Party of Vietnam (article 4).