

---

**POST-SOVIET TRANSFORMATION**

DOI: 10.19266/1829-4286-2015-02-05-14

**Constitutional Design and the Choice of Political Regime\***

KAARLO TUORI  
*Helsinki University, Finland*

*Among the basic values of the Council of Europe – human rights, the rule of law, democracy – constitutional design and evaluation is most difficult to carry out with respect to the latter. Addressing the issue of political regime selection whether presidential, parliamentary or semi-presidential, The Venice Commission has repeatedly stated that the choice rests on each country. Post-socialist new democracies have mainly adopted semi-presidential system, probably seeking to ensure a balanced democracy as well as manageable and stable political situation. However, within this system extra-constitutional factors (political culture, civil society including political parties) have a greater impact on the ongoing developments. Since they are specific to each country, constitutional amendments should take into account inter-institutional possible clashes this may lead to, and, thus, provide for preventive or at least problem-solving provisions.*

**Keywords**

Constitutional democracy, political regimes, semi-presidential democracy, post-socialist new democracies

**Introduction. The Political Regimes and Democracy**

A democratic *Rechtsstaat* – a constitutional democracy – is built on three main pillars: human rights, the rule of law (*Rechtsstaatlichkeit*) and democracy. These also constitute the main values of the Council of Europe, and form the basis of the Venice Commission's assessment of constitutional reforms in individual states.

However, human rights, the rule of law and democracy are generic values which require operationalisation, developing into more

---

\* This is the revised and expanded text of a paper given at the international conference, entitled "The Impact of Constitutional Processes on Post-Communist Transformation" (Yerevan, 2-3 November, 2014).

specific standards, before they can offer guidance in constitutional design and assessment. The European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) define the minimum standards for human rights. These are complemented by European soft law, to which the Venice Commission, too, has made important contributions, sometimes in cooperation with the Organization for Security and Cooperation in Europe / Office for Democratic Institutions and Human Rights (OSCE/ODHIR). In addition to ECHR provisions and ECtHR case law, crucial aspects of the requirements of the rule of law are covered by soft law documents related to the independence of the judiciary and the prosecutorial service, and the Venice Commission has produced an even more comprehensive rule-of-law checklist.

Of the three fundamental values, democracy appears to be most difficult to operationalise for the purposes of constitutional design and assessment. Human rights, democracy and the rule of law are interrelated, and some assistance in operationalisation can be received from standards specifying human rights and rule of law requirements. Thus, Article 3 of ECHR Protocol 1 enshrines the right to “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. This entails that democratic legitimacy of the legislature as obtained through free elections is critical to key standards of democracy also. Furthermore, the ECHR guarantees the political rights – freedom of assembly, association and press – which aim to establish the public autonomy of citizens. They imply a conception of democracy where civil society and its public sphere, as well as the public debate of political issues, occupy a central place; a conception of democracy which in recent debates has come to be termed *deliberative democracy*.

However, the requirements of a popularly elected legislature and fundamental political rights carving out a constitutionally defined place for a civil society, public sphere and public debate do not yet specify the political regime which constitutional design should opt for in order to secure and enhance democracy. Different types of political regimes, all fulfilling the minimum formal constitutional criteria, may be conducive to democracy. In effect, the Venice Commission has repeatedly stated

that the choice of political regime among the three principal alternatives of presidential, parliamentary and semi-presidential models is a political decision falling to the country at issue; no strict European standards limit this choice. In this presentation, my objective is not to elaborate unambiguous standards. My objectives are mainly analytical: to analyse the alternative political regimes, the considerations which affect the choice among them and the problems which the choice may engender.

In practice, democracy cannot be guaranteed by constitutional design alone. Democracy cannot be measured merely by explicit constitutional provisions. A constitution that affirms the principles of a democratic *Rechtsstaat* needs support from a robust political culture; from a developed civil society with an established party system, complemented by a network of NGOs and citizens' movements; and from a public sphere with a pluralistic media structure. The constitutionally defined institutional structure and the cultural and sociological prerequisites of deliberative democracy stand in recursive relation to each other. Constitutional design and the constitutionally defined institutional structure influence the political culture and the development of the civil society and public sphere. On the other hand, constitutional promises of a democratic *Rechtsstaat* can only be redeemed if the cultural and sociological preconditions are met. Moreover, developing standards which would specify the requirements of democracy are further complicated by the fact that democracy – complemented by its sister values of human rights and the rule of law – is not the only relevant or legitimate consideration to be heeded in constitutional design and assessment of the political regime. Another essential viewpoint is political stability. A certain degree of stability is needed for effective policy-making to be possible and for politics to produce expected policy outcomes.

## **Political Systems**

The political regimes which typically can all meet the requirements of a democratic *Rechtsstaat* are usually classified into parliamentary, presidential and semi-presidential systems. Let me briefly present the defining features of these alternative democratic regimes.

In a “pure” parliamentary democracy, the executive authority, consisting of a prime minister and cabinet (government), arises out of parliament, i.e. the legislative assembly, which can also at anytime dismiss the government by a vote of no-confidence. The constitutional rules for determining who shall form the government vary from one parliamentary system to another, but these rules must confer a decisive role on parliamentary majority. Once formed, the government stays in office only so long as there isn’t a vote of no-confidence by the parliamentary majority.

In turn, in a presidential democracy the executive is headed by a popularly elected president; the terms of the president as the chief executive and as the legislative assembly (parliament) are fixed; and the president appoints and leads the cabinet which is not dependent on the confidence by the legislative assembly (parliament). Thus, differing from a parliamentary system, the chief executive derives its authority directly from the electorate, nor is (s)he dependent on the confidence of parliamentary majority. Correspondingly, the president does not possess the power to dissolve the legislative assembly (parliament). The presidential system does not include a government as an executive body parallel to and independent from the president. The cabinet is not only subject to the president but derives its authority from the president and not from parliament, and can also be dismissed solely by the president and not by parliament.

Presidential and parliamentary democracies are often illustrated with the examples of the US and UK political systems. A parliamentary democracy with two main political parties alternating in government and opposition is often called the Westminster model. In present-day Europe, probably no constitution has adopted a “pure” presidential model. By contrast, parliamentary systems include, not only the UK, but also other Western European monarchies where the role of the monarch has been reduced to a ceremonial function.

---

## Peculiarities of the Semi-presidential System

What about, then, the third alternative for the institutional setting of democracy: a semi-presidential democracy? Arguably, this alternative is most pertinent for our present discussion as it has been for constitutional design in post-socialist new democracies in general.

The concept of semi-presidentialism was developed by the renowned French constitutionalist and political scientist Maurice Duverger, first for the analysis of the specific nature of the Constitution of the French Fifth Republic and subsequently also for purposes of comparative constitutional research.<sup>1</sup> The concept has been further elaborated by, among others, Duverger's former assistant Jean-Claude Colliard, our esteemed late colleague in the Venice Commission.<sup>2</sup> Duverger defined semi-presidentialism through the following three formal constitutional features: (1) the president is elected by popular vote; (2) the president possesses considerable powers; and (3) the regime also includes a prime minister and a cabinet (government) who also possess executive powers and who only stay in office provided that parliament does not render a vote of no-confidence in them.

Duverger himself noted a great variance in political practice in regimes which at the formal constitutional level fulfilled the criteria of semi-presidentialism. In his comparative studies, he found that in countries such as Austria and Iceland the popularly elected president has largely remained a mere figurehead in spite of the rather substantive powers granted by the constitution. In some countries, such as France, the president can be the most powerful political institution although the powers formally granted by the constitution are more restricted than in countries with a figurehead president. Finally, a third group exists where the president shares his/her power with parliament and the government dependent on it. In this group, Duverger included for instance Finland

---

<sup>1</sup> **Duverger M.**, *La Monarchie Républicaine*, Paris: Laffont, 1974; **Duverger M.**, *Échec au Roi*, Paris: Albin Michel, 1978. For a summary of Duverger's views, see **Veser E.**, Duverger's Concept: Semi-Presidential Government Revisited, *European Journal of Political Research*. 1998, 34, 201-24.

<sup>2</sup> **Colliard J.-C.**, *Les régimes parlementaires contemporains*, Paris, Presse de la Fondation Nationale des Sciences Politiques, 1978.

and Portugal.

Duverger's analysis shows that the powers the constitution confers on the president are only one of the factors determining the political reality and the factual power relations among the main constitutional bodies. On Duverger's account, other factors include, first, the combined influence of tradition and circumstance: in Austria and Iceland, where constitutional provisions grant the president extensive powers, tradition favours a figurehead president. By contrast, in France where the formally determined powers are more limited, tradition buttresses the image of a powerful president. However, in specific circumstances, a figurehead president may resort to his/her usually dormant constitutional powers, while in France *co-habitation* reduces the role of the President and enhances that of the prime minister. In addition, Duverger also pointed to the impact of the composition of the parliamentary majority and the position of the president in relation to the majority. If the party or party coalition which supports the president also possesses majority in parliament, this tends to strengthen the president's factual power position at the expense of the prime minister. Correspondingly, a situation where the party or party coalition which stands in opposition to the president holds the majority in parliament tends to enhance the role of the prime minister and reduce that of the president. This is the situation termed *co-habitation*. However, such consequences are also dependent on the position the president occupies in his/her party and only take full effect where the president is also the leader of the party.

### **Problems of Application of the Semi-presidential System**

The reasons why semi-presidentialism has been the preferred option in new democracies are myriad and likely vary from country to country. However, one may surmise that a major reason lies in the general assumption that a parliamentary system is more conducive to democracy, while presidentialism promotes political stability and governability. Thus, opting for semi-presidentialism would result from a balancing of democracy and stability considerations. In new democracies, reference is often made to the still immature and unstable

party system and frail political culture which hamper the functioning of a “pure” parliamentary system. On the other hand, under a presidential system these same factors may create space for plebiscitarian authoritarianism, hence the need for compromising between parliamentarism and presidentialism. Of course, the premise which links together parliamentarism and democracy, on the one hand, and presidentialism and stability, on the other hand, does not always hold. Western Europe provides us with several examples of stable parliamentary democracies, and US presidentialism offers examples of political deadlocks arising from political conflicts between the executive and the legislative. Recent experience has also demonstrated that authoritarian tendencies may be personified in a prime minister as well as a president, and that one and the same person may exercise strong political power both as a president and as a prime minister.

The functioning of parliamentary as well as presidential systems, are dependent on extra-constitutional factors relating to political culture and the state of civil society, including the party system. However, it is possible to propose that the factual outcome of constitutional provisions aiming to establish a semi-presidential democracy is even more difficult to predict than the consequences of clear-cut parliamentary or presidential models. The impact of extra-constitutional factors is even more crucial than it is under a parliamentary or presidential model. This sets high requirements for constitutional design and assessment, and emphasises the necessity to draw in country-specific considerations of extra-constitutional, cultural and sociological character.

What further complicates constitutional design is that opting for semi-presidentialism is only a first step which still leaves many important constitutional issues open. As Duverger already showed, even at the level of the formal constitution, great variance exists among semi-presidential regimes, for instance when it comes to the respective power position of the president and the prime minister. In political science, semi-presidential regimes have sometimes been divided into two sub-categories, termed premier-presidential and president-parliamentary. Under premier-presidentialism, the prime minister and cabinet are exclusively accountable to parliament, while under president-parliamentarism, the prime minister and cabinet are accountable to both

the president and the parliament.<sup>3</sup> It is obvious that the president's position is stronger under president-parliamentarism.

The accountability of the government is not the only issue where semi-presidential regimes display variance. Potential presidential powers can be grouped into legislative and non-legislative ones. The former include legislative veto – of which several varieties exist – power to propose referendum, legislative initiative and decree power. In turn, the most important non-legislative powers relate to the formation and dismissal of the government; dissolution of parliament; foreign policy, armed forces and declaration of a state of emergency; as well as appointment of state officials. The list could be further complemented, but the competences mentioned above should suffice to prove that there are countless possible combinations of the respective powers of the president and the government which at the level of the formal constitution ultimately specify the character of the semi-presidential regime at issue.

It is difficult, if not impossible, to derive from the general principle of democracy more precise standards which could guide countries facing a constitutional reform in their choice among parliamentary, presidential and semi-presidential regimes. In new democracies, though, balancing between the requirements of democracy and stability may be argued to point in the direction of semi-presidentialism; indeed, this has been predominantly the preferred model in these countries. It is equally difficult to develop and justify standards which could assist in solving the numerous more detailed issues concerning the exact relations among the main constitutional bodies and their respective powers.

---

<sup>3</sup> **Shugart M. S. and Carey J. M.**, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge, Cambridge University Press, 1992.



---

**Conclusion**

The analysis of the political systems peculiarities reveals that:

1. Constitutional traditions should be taken seriously but not too seriously; traditions are not cut in stone but are renewable, and constitutional reforms may well launch a cultural mutation,
2. Not only should all constitutional provisions possess a distinct rationale but they should also form a coherent whole, manifesting a coherent constitutional philosophy,
3. Constitutional design should try to identify sources for potential institutional frictions and deadlocks and provide means to prevent or at least to resolve them,
4. Semi-presidential systems possess a dual executive. The relations between the president and the government constitute a particularly conflict-sensitive area; thus, they merit special attention in constitutional design. Division of competences should be as clear as possible, and overlapping competences should be avoided. There are also more specific devices capable to reduce the risk of crippling conflicts within the executive,
5. One may surmise that a major reason in favour of semi-presidential form of government lies in the general assumption that a parliamentary system is more conducive to democracy, while presidentialism promotes political stability and governability. However, reference is often made to the still immature and unstable party system and frail political culture in those countries which hamper the functioning of a “pure” parliamentary system. Thus, opting for semi-presidentialism would result from a balancing of democracy and stability considerations,
6. Each successful case of any Political system had its own peculiarities. In the Finnish semi-presidential system even during the long reign of president Kekkonen when the president’s position approached that of de Gaulle, the

following three means had a tempering effect: (1) the president must make his/her decisions in the presence of the government; (2) the decisions of the president must be counter-signed by a minister; (3) the president is not allowed to possess a large presidential administration parallel to and potentially competing with ministerial administration.