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# “The French Cohabitation, a useful experiment?”

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## **“The French Cohabitation, a useful experiment?”**

**Pr. Marie-Anne Cohendet**

The whole French constitutional history is built upon the conflicts of power between the Head of the State and the parliamentary majority. The "cohabitation" has to be understood like "the institutional coexistence between a Head of the State and an antagonist parliamentary majority"<sup>1</sup>. Indeed, the coexistence between a President and a Prime Minister with the opposite ideas is only the consequence (or one of the consequences) of the major problem which is the opposition between the Head of the State and the majority of the Parliament. The cohabitation is thus possible in any type of political regime.

It is the opposition between the King Louis XVI, misusing his right of veto, and the parliamentary majority that led the former to the scaffold. Then the cohabitation has led to different “*coups d'état*” in favor of the ones who were going to be emperors, that is Napoleon the I<sup>st</sup> and Napoleon the III<sup>rd</sup><sup>2</sup>. Thus, in France, when the regime was not

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<sup>1</sup> Marie-Anne Cohendet, *L'épreuve de la cohabitation*, Ph.D. Dissertation, Université de Lyon, 1991; *La cohabitation, leçons d'une expérience*, Paris, P.U.F. 1993 ; *Le Président de la République*, Paris, Dalloz, 2002; *Droit constitutionnel*, Paris, L.G.D.J. Montchrestien, 3<sup>ème</sup> éd. 2006, forthcoming

<sup>2</sup> Because of the opposition between the executive branch and the parliamentary majority, there were some “*coups d'état*” under the directorial regime established by the Constitution of 1795 in the year V and the year VI of the Republic that facilitated the advent of Napoleon I. Likewise, under the presidential regime of the Second Republic, when the President of the Republic – elected, Napoleon III, crowned himself as emperor,.

parliamentary, the cohabitation led to very violent conflicts and the elimination either of the Head of the State (the death of the King), or of the parliamentary majority (by the “*coups d'état*” of both Napoleons). Because the non-parliamentary regimes (in which the Government is not responsible before the Parliament) are not able to regulate this type of crisis in a country that is hardly inclined to compromise, the French often sought to adopt a parliamentary system to avoid such crises.

Throughout the history of the French parliamentary regimes, cohabitation has been a fundamental factor of evolution towards a parliamentary practice, even towards an unbalanced practice in favor of the Parliament. The French Third Republic was marked by two episodes of very painful “cohabitation” which resulted in a victory of Parliament. At the time of the crisis of May 16, 1877, the pro-monarchy French President Mac Mahon wanted to oppose the pro-Republic majority in the Parliament and carried out an abusive dissolution of the parliament. He was finally forced to resign. In the same way, Alexandre Millerand, who was head of State and directly ruled the country between 1920 and 1924, was then confronted with a new majority which launched the “strike of the Prime Ministers”: no member of the majority agreed to take part in a government as long as the President would be in power. Therefore, he was also forced to resign.

But in these regimes, the Head of the State did not have a strong popular legitimacy since he was elected by the Houses of the Parliament. The situation is quite different under the Fifth Republic, since 1962<sup>3</sup>, or in Taiwan today. In this kind of regime, where the President is directly elected by the people, the cohabitation can lead to violent conflicts

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<sup>3</sup> In 1958, the President was elected by 80.000 parliamentary and local elected officials and it is only since the constitutional revision of 1962, adopted by referendum, that the President is directly elected by the People.

between the President and the parliamentary majority. However, the experiment of the cohabitation under the Fifth Republic shows that the cohabitation can take place not only without generating any serious political crisis but even in a way more in accordance with the constitutional text than before (I.). It was a tremendous learning experience, notably because it required us to improve our instrument of analysis of the constitutional law as well as motivated us to think about constitutional revision (II.).

## **I. An experiment which reveals the nature of the regime.**

The cohabitation did not call into question the political regime of the Fifth Republic but on the contrary revealed its parliamentary nature (1.) by supporting a return to the written constitutional norm (2.).

### **I. 1. Demonstration of the parliamentary nature of the regime**

Although France had recently three cohabitations, we can speak about *one* experiment because all of them took place in a very similar way. Between 1986 and 1988 as between 1993 and 1995, we had a President of the Republic from the Left (François Mitterrand) and a Prime Minister from the Right, chosen by the parliamentary majority (Jacques Chirac then Edouard Balladur). In both cases, the cohabitation took place during the two last years of the mandate of the President. Indeed, in 1981 and 1988, the President who had been just elected (for 7 years) had carried out the dissolution of the Parliament in order to secure a friendly parliamentary majority. In both cases, the citizens had then

elected members of Parliament of his political side and who considered him as the leader of the majority (François Mitterrand, President of the Republic, was the leader of the Socialist Party). But at the end of the mandate of the representatives, after 5 years, the voters on the contrary chose a new majority opposed to the President (in 1986 and 1993). Jacques Chirac, who succeeded Mitterrand as president in 1995, wanted to avoid being in situation of cohabitation at the end of its mandate. Therefore, in 1997, he took the initiative to dissolve the Assembly which was already dominated by the Right, because opinion polls predicted a re-election of this majority. But the people elected a new majority from the Left. Contrary to the first two cases, this third cohabitation opposed a President from the Right to a parliamentary majority from the Left. It originated in a popular disavowal of the President and lasted 5 full years. However the practice was very similar in the three cases. Thus, the cohabitation which one thought as exceptional became usual. Since 1986, almost half of our political life took place in a system of cohabitation (9 years on 19).

Between 1958 and 1986, the practice of the Fifth Republic was always characterized by the preeminence of the President. Whereas the text of the Constitution was already parliamentary, it was in fact the President who directed the national policy, by having a very broad interpretation of his powers and even sometimes by violating the Constitution. Before 1986, in each legislative election, the President of the Republic made it clear to us that if we did not choose a majority from his political side, then there would be a very serious political crisis (De Gaulle) or he encouraged us to make "the right choice", recalling that the President hardly had the means to oppose to the policy laid down by the

Government which is responsible before the Parliament (V. Giscard d'Estaing). Also, in 1986, one feared a very serious political crisis, but it did not happen.

During the cohabitations, the French institutional practice was deeply modified compared to the periods when the President and the parliamentary majority were from the same political side. So much so that some considered that the cohabitation was going to cause a political crisis and to call into question our political regime. Actually, the cohabitation took place without serious crisis, even if it was not devoid of disadvantages. It especially allowed us to realize that we lived in a parliamentary system, even if it is a bi-representative parliamentary system. There were some tensions, notably about the signature of the edicts, about the right for the President to veto the agenda of the assemblies brought together in extraordinary session or about constitutional revisions. But it was only about questions which, in practice, did not have serious consequences. The President was always skilful enough to show his hostility to the policy of the Government, by using repeated criticisms and at the same time not to be seen as the one who would trigger a crisis. Indeed, in this duel at the top, some had predicted that the first who shot would be dead. Thus, both of them "kept their fists in their pockets".

## **I. 2. Broad discovery of the constitutional text**

Not only the cohabitation did not lead to the end of the Fifth Republic, but on the contrary it enabled us to rediscover and even to discover the text of the Constitution which seemed hidden under a heap of contrary practices.

Thus, according to the text of the Constitution, one noted that the President was not the chief of the executive, but only a guarantor (of the Constitution and the respect of the treaties) and a national arbiter (article 5 of the Constitution). Admittedly, in the past one had tried to make us believe that an arbiter is one who imposes his will, but then we put aside this view to a more sporting approach of the arbitration, which supposes at least that the referee is not the chief of one of the two teams (that he is not the chief of the executive)! In this way, the President cannot take advantage of his power in claiming to be able to revoke the Prime Minister (although the Constitution does not recognize him with this right) or to oppose to the promulgation of a decree other than a decree of nomination.

Finally, we realized (after almost 30 years) that it is not the President who must determine and lead the policy of the nation, but the Government led by the Prime Minister (articles 20 and 21).

We were very surprised to see that the French National Assembly can perfectly exert its competences without France being plunged into anarchy. Also, when the preliminary papers of the Constitution of 1958 were published in ... 1987, we discovered with great surprise that De Gaulle himself explained that the President does not have the capacity to revoke the Prime Minister because he is "an impartial character, who does not interfere in the political situation..."<sup>4</sup>. Contrary to Maurice Duverger, we can consider that since 1962, the direct election of the President by the people was not enough to modify the nature of his powers and transform him from an arbiter into a commandant, because only the French people would have the right to make such a change and through constitutional

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<sup>4</sup> Hearing before the Constitutional Consultative Committee, on August 8, 1958. Cf. M.-A. Cohendet, *Le président de la République, op. cit.*, p. 23

revisions. Indeed, if the meaning of the presidential powers had really been completely modified in 1962, then a return to the text would not have been possible. However each of the three cohabitations expressed a return to this text.

On the whole, during the cohabitations, the institutional practice was much more faithful to the Constitution than during the period when the President and the parliamentary majority had similar views. However, on some points there were some doctrinal divergences on the powers of the President, and we had the occasion to denounce some persistent violations of the Constitution by the President (in particular when it assumed some rights of veto and when he succeeded in co-ruling the domains of Defense and Diplomacy whereas all his powers are subjected to countersignature in both of these domains and thus should have been looked like formal and not shared powers)<sup>5</sup>.

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<sup>5</sup> A major part of the doctrine regards them as shared powers - wrongly, according to me.

## II. A tremendous learning experience.

The cohabitation led us then, on one hand, to deepen our reflection on the relationship between the constitutional norm and the constitutional practice (1.). On the other hand, it also encouraged new efforts to revise the Constitution (2.).

### II. 1. A stimulating test for constitutional reflection

The experience of cohabitation showed us that the cohabitation generated a change of institutional practice without a change of the constitutional text. The constitution is more or less respected according to the political environment, so it is a matter of understanding more precisely the factors determining the relativity of the efficiency of our constitutional norms. Therefore, we had to make a clear distinction between the political *regime* (the rule envisaged by the Constitution) and the political *system* (the institutional practice), as suggested by Olivier Duhamel. We noted that a same political regime can function with diverse political systems. The Fifth Republic operates under a presidential system (characterized by the preeminence of the President) except during the cohabitation, and under a parliamentary system (characterized by the preeminence of the Parliament for which the Government is only an instrument) during the cohabitations.

The classification of the political systems relies on the body which dominates the political life, in other terms, the one which actually rules the national policy.

On the other hand, the classification of the political regimes is made according to the constitutional rules which contain specific arrangements going with each type of regime.

To appreciate the real originality of these fluctuations, we had to compare them with those of other countries. It appeared that the usual classification of the political regimes was discussed and marked by confusions, with various criteria being mixed by the authors in a debatable and variable way. Thus, the name of "semi-presidential regime" is debatable because these regimes are parliamentary regimes (as Maurice Duverger recognizes it), they are thus a subcategory of the parliamentary regimes and not an external category of the parliamentary regimes.

Within separation-of-powers regimes, it is thus advisable first to distinguish two major criteria to classify the regimes and then assess their combinations. The first criterion is the legitimacy of the head of State; the second one is the responsibility of the government.

The criterion of legitimacy is determined by the direct universal suffrage of one or two powers at the top of the State. We call "mono-representative" the democratic regimes in which only one political body is directly elected at the top of the State by the People: the legislature (one or two houses of the Parliament).

In the bi-representative regime, the President is also directly or almost directly elected by the citizens.

The criterion of responsibility is the traditional criterion of the responsibility of the government before the Parliament.

A parliamentary regime is a regime with a separation of powers and in which the government is responsible before the Parliament. A regime that does not have this characteristic is simply described as a non-parliamentary regime.

Various combinations between these criteria are possible.

A mono-representative regime can be parliamentary, like in Great Britain, or non-parliamentary, like the directorial regime of Switzerland.

A bi-representative regime can be parliamentary, like in France or in Taiwan, or non-parliamentary, like the presidential regime of the United States. Nine of the 25 countries of the E.U. have this type of regime, including five from the Western part (Austria, Ireland, Finland, France, Portugal) and four among the new members (Lithuania, Poland, Slovakia, Slovenia), without counting two candidates to E.U. membership (Bulgaria and Romania).

In mono-representative regimes, the cohabitation does not generate important changes in the institutional practice. At least, it does not generate any change in contemporary democracies, even if in the past, as we saw, cohabitations led to important evolutions in these regimes in France. Cohabitation or not, it is always the Government, chosen and controlled by the Parliament, that determines the national policy. Indeed, the Head of State does not have enough political legitimacy to be able to resist the will of the parliamentary majority. The regime (i.e. the rules fixed by the Constitution) always functions in a system (i.e. the practice), which is parliamentary (characterized by the preeminence of the Parliament for which the government is only an instrument).

On the opposite, in the bi-representative regime, the cohabitation may lead to a change of the political system.

In the presidential regimes, like in the U.S., we can, according to the cohabitation but also to other factors (like the diplomatic and historical context, the popularity of President, etc...), observe either a presidential system (because it's the President who leads the national policy) or a congressionalist system (when the Congress dominates the political life). In the 19th century, the presidential regime of the United States generally took place within a congressionalist system. Since the Second World War, it is generally, but not always, a presidential system.

In the parliamentary bi-representative regimes, the cohabitation is often an important element in determining a change of political system. It generally results in the formation of a government that reflects the parliamentary majority (three French cohabitations) but not necessarily (Taiwan). The political system and its operation first depend on the rules of the political regime. Thus, in Ireland, where the President was never designed to be an important power and thus doesn't have any important prerogatives, he plays a formal role, during or outside the periods of cohabitation.

But it can also depend on other circumstances like the diplomatic context. Thus, in Finland, even if the government is formed largely by the parliamentary majority, during or outside the periods of cohabitation, the President played the main role in diplomatic affairs because of Finland particular geo-political situation at the border of the ex-USSR. This partial presidential primacy ended a few years after the fall of the Berlin Wall with a revision of the constitution finally adopted in 2000. We also can note that in Finland it is

because of a strong political fragmentation, caused by the proportional representation ballot, that the President is never as strong (outside the periods of cohabitation) nor never as weak (during the cohabitations) than in France, because he never get a united and disciplined majority to support him or fight against him. But since the revision of 2000, he is weaker than the French President because all his powers are subjected to counter-signature.

Generally, during the first years of life of these regimes, there is a fluctuation between presidential system and parliamentary system. But after a few years of practice and after various conflicts (and often after one or more cohabitations), the practice becomes durably parliamentary (e.g. Austria, Portugal, Finland). However, in this kind of regime, the system could become again presidential in some circumstances. And it is this possibility that distinguishes the bi-representative regimes from the mono-representative regimes (even within the category of the parliamentary regimes). Among the Western countries of the E.U., France is the only one that keeps a presidential system outside the periods of cohabitation.

It was necessary to have some tools to analyze and understand this French specificity. Therefore, I proposed the creation of the concept of "system of determining variables" to evoke the whole set of legal and extra-legal elements that differ from the constitutional requirements which, separately taken or combined, exert an influence on the interpretation and the application of the Constitution<sup>6</sup>. Among these elements we can underline: the kind of relationship between the parliamentary majority and the President

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<sup>6</sup> M.-A. Cohendet, *L'épreuve de la cohabitation*, *op.cit.*

(submission or opposition, fight or compromise...), the historical precedents, the people's perception about the powers of the President, the diplomatic and/or economic context, etc...

Accordingly, the constitutional practice results from the interactions between the political regime and this system of determining variables.

Thus, we have a framework of analysis that can help us to better understand for what reasons and how constitutional rules, which are narrowly comparable, can give rise to rather different practices. This kind of analysis enabled us, in comparing the countries from the Western part of the E.U that have the same type of regime, to show that the originality of the French situation could be especially explained by the combination of four factors<sup>7</sup>: .

- The election of the President by direct universal suffrage.
- The fact that the right of dissolution is conferred on the President and not on the Prime Minister, and that it is quasi-discretionary.
- The two-round election on a majority basis for the legislative elections
- And finally, the habitus (i.e the mental habits linked to the perception of the institutions by the citizens, the image that the citizens have of the powers of the President).

The cohabitation has thus had the advantage of encouraging us to modify our approach to the constitutional law.

## II. 2. An incentive to constitutional revisions

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<sup>7</sup> The first three factors are drawn from Olivier Duhamel analysis of the French constitutional and political systems.

Although the Left had first requested for many years the revision of the Constitution of 1958, because of its perceived shift toward stronger presidential powers, after a while, it generally adopted this Constitution and forgot about its revision. However, since the cohabitations, particularly the third one, politicians and experts openly discuss again about this issue<sup>8</sup>.

Public opinion polls showed that the citizens were far from being as dissatisfied with the cohabitation as one could have believed it. Perhaps because they all felt represented at the top of the State: the ones by the parliamentary majority, the others by the President.

But the cohabitation has had the disadvantage of giving the illusion that there was collusion between the Left and the Right at the top of the State. As a result, the Far Right could be seen, and presented itself as the only political alternative outside the “establishment”. Although this analysis is false, because the national policy was essentially directed by the government chosen by the parliamentary majority, it seemed to convince some French.

The desire to avoid a whole new constitution as well as reduce the repetition of cohabitation was, at least for a broad part of the political community, the main reason behind the revision of the Constitution in 2000 which reduced the term of the office of the President from 7 to 5 years. However, nothing guarantees that the citizens will always vote

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<sup>8</sup> Cf. M.-A. Cohendet, “Quel régime pour la VIème République ?”, *Revue du Droit Public*, n° spéc. VIème République, March 2002, pp. 172-193; Bastien François et Arnaud Montebourg, *La Constitution de la 6<sup>ème</sup> République. Réconcilier les Français avec la démocratie*, Paris, O. Jacob, 2005.

for a President and a parliamentary majority from the same political side if the elections take place at the same time. The American and Portuguese experiences show the opposite. The concordance of the mandates can also be broken in the event of dissolution or if the mandate of the President is shortened prematurely (because of his death or his resignation). Nonetheless, this revision had at least the advantage of reinforcing the (relative) responsibility of the President before the people.

However, for some authors, it would be necessary to revise again the Constitution to avoid any cohabitation or to make it at least less problematic.

The cohabitation made us aware that France can have a parliamentary practice without necessarily sinking into instability, like during the Third and the Fourth Republics. This was a discovery for us because of the twisted perception of these regimes we had for a long time. Moreover, the cohabitation underlined the imbalance of our institutions: imbalance between the President (irresponsible but generally very powerful) and the Assembly (which can be dissolved by the President, but that cannot make anything against him. Indeed, even if the Assembly throws the Government out of office, the President remains in place, as in 1962). The imbalance concerns also the President: his legitimacy and his powers are still clearly too important compared to his responsibility.

So, some authors propose the adoption of a presidential regime (like in the U.S.), which would make it possible to reduce the powers of the President and to reinforce those of the Assembly. The Assembly would be subjected to a right of veto but would not risk any more to be dissolved and all its legislative work would not be ruled any more with an iron hand by a Government, which is generally at the President's disposal.

Others considered a traditional parliamentary system and propose to give up the direct election by the People of the President. But the unpopularity of that last proposal led these authors to consider a readjustment of our institutions in favor of the Prime Minister; the President would thus revert to its role of arbiter which should always have been his (cf. A. Montebourg and B. François).

Finally, others considered that, like in Israel (at least during a few years) it is not any more the President, but the Prime Minister who has to be directly elected by the people at the head of the executive.

Whatever the selected option, it is important that its impact is evaluated as accurately as possible and above all, that it is clearly explained to the citizens who are the only ones entitled to make such a choice.

The cohabitation enabled us to rediscover the text of the Constitution and to realize that a parliamentary practice is possible in France. It encouraged the researchers in Constitutional Law to evaluate the possible incidence of a text on the practice. The reflection on the distinction between regime and system, their classification as well as the comparison between the situation in France and in other countries, helped us to better understand the reasons of this French specificity. Moreover, it promoted some evolutions of the Constitution. Lastly, this experiment could also give some insight to other countries like Taiwan.

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