The Executive Branch: The Chief of State (1) - Comparative Study -

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Abstract: The Constitution is the essential source of law in all legal systems, and therefore of the administrative law. The fundamental act of the state establishes the institutional architecture and organizes the legal system. Many rules concerning public administration are set out in the European Union Member States Constitutions. So, any legal insight on state authority and institutions begins with the study of the Constitution. Therefore, in this article we will try to offer such a perspective on the executive branch, more precisely on the chief of state institution. The study of the executive branch based on comparative method and on the Constitutional law is divided in two parts: the Chief of State and the Government.

Keywords: separation and balance of powers; executive branch; democracy; primo-ministerial regime; mandate and legal limitations

1. Introduction

Pluralist and liberal regimes promote democracy. From an institutional perspective, democracy brings into the foreground the principle of separation and balance of powers. The degree of separation and balance of powers is the one that distinguishes between:

a) the rigid separation of powers which is characterized by the independence given to the executive and not to the legislative, and also by their cooperation through the chief of state: presidential regime. In the contemporary period, outside the United States who created and institutionalized first this regime in the constitutional doctrine, we can still find the same type of separation in Latin American countries and in some African countries.

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b) flexible separation of powers which is characterized by the collaboration of the legislative and executive branches, the former one being established with means of action and pressure: the parliamentary regime.

c) semi-presidential regime or semi-parlamentary regime is the result of combining the first two formats, such as the legislative and the executive branches emanates from the people. They are endowed with legitimacy directly from the holder of sovereignty - the people. This format does not promote the superiority of one branch to the other, but often falls far by promoting the president. The last one is called to ensure the balance of power, even if it is part of the executive branch, so most often turns into a presidential regime. France was the one who opened the semi-presidential regime by the 1958 Constitution, whose features were accentuated by the constitutional reform in 1962.

d) primo-ministerial regime: the problem of determining the form of government is a major theme in the state history. In an attempt to avoid presidentialism and parliamentarism. There appeared new hybrid forms of democracies organization. Thus, except for the four subdivisions established by Giovanni Sartori, we are looking more to the primo-ministerial regime, a variation of the parliamentary / semi-parlamentary regime. This regime is the result of contemporary political movements which highlight the government area to the detriment of the legislative one. So we discus more and more about governance and less about regulation. The lack of prompt legal act and establishing the state centre of gravity in the executive area, namely, the government, in many states the attention was given to the latter one and so this new type of regime resulted. Therefore, the technocratic one prevails in the detriment of the democratic one. (Carausan, 2012b)

2. Short Overview of the Concept of Executive Branch

The theory of separation and balance of powers has revolutionized political thinking and practice all around the world, from the late eighteenth century, and generated a process of constitutional replenishment both in Europe and in North America. The success of the theory is due to the fact that it provides an alternative to absolutist government and a safeguard against the governors' tyranny.

In the two centuries of application, the theory of separation and balance of powers has taken different forms in each regime. Basically, we cannot find two countries with identical forms of separation or distribution of state functions (powers) among the legislative, executive and judiciary. (Carausan, 2014)

Even within the historical evolution of the same state, more or less long, changes were found in the distribution of powers to one or the other, although the constitutional provisions governing the distribution of powers remained unchanged.

However, it was noted that the executive branch[1] comprises traditionally two types of bodies: the chief of state and the government, whether or not they coexist. But when they do coexist they have different functions and responsibilities. (Debbasch et al., 1990)

The executive or the executive branch is recognized as a state function which implements the law. Carrying out this function involves the exercise of the function of Chief of State, coordinating administration action to implement the law, carrying out direct actions of law enforcement or organization of law enforcement, the exercise to boost the legislative process, and the general management of the state.

Given the executive's structure we can distinguish between the single executive branch and the plural executive branch.

a. The single executive branch is characterized by the concentration of power in a single individual or in several individuals of equal rank. Contemporary the single executive branch knows the most rigid expression of the separation and balance of powers, the presidential regime. In this regime, the executive is reduced to the state president, which is responsible for the implementation or enforcement of the law.

b. The plural executive branch is a characteristic structure, primarily in the parliamentary regimes in which the executive function is entrusted to an individual and a collegial body, which perform their functions relatively autonomously. The individual acts as chief of state and the collegial body is called the ministerial cabinet. By its nature, the plural executive branch is different, from state to state and within the same state, mainly because of the constitutional relations established between the chief of state and the collegial body, but also because of their political relations. (Carausan, 2012a)

The parliamentary regimes are, by their nature, dualistic, they have a chief of state (appointed by the parliament) and the government, which has at its head a premier, who acts as chief executive. France is the one which created in 1958, this model, in which the French President exercises the supreme magistracy of the state. Along

[1] Most representatives of constitutional law, do not exclude the idea of “executive” as some administrative law authors replaced with the administrative function. (de Laubadère, 1980, p. 229)

with the President, the Government is the second element of the French executive and it cannot interfere in the President affairs.

3. Election / Appointment of Chief of State

In our analysis of all 28 European Union Member States we can point out that among them we can identify presidential, parliamentary and semi-presidential republics, and also constitutional monarchies. However, we observe that the most numerous are the republics in which the chief of state is directly elected (13 countries), which is why it enjoys legitimacy of the sovereign people, followed by other republics in which he/she is indirectly elected by the Parliament or other similar bodies and, finally, monarchies. This entitles us to say that European states are based more on the presidential or semi-presidential model where the chief of state authority, is superior to the collegial body - the government.

Table 1. The Chief of State Election/Appointment and the Mandate in EU Member States

No.	**The EU Member State**	**The Chief of State**	**Suffrage**	**Mandate** (in years or the year of reign)
1.	Austria	President of the Republic (Bundespräsident)	direct, universal	6
2.	Belgium	King Philippe	-	2013
3.	Bulgaria	President of the Republic	direct, universal	5
4.	The Czech Republic	President of the Republic	indirect, elected by the Parliament (Poslanecká Sněmovna)	5
5.	Cyprus	President of the Republic	direct, universal	5
6.	Denmark	Queen Margrethe II	-	1972
7.	Estonia	President of the Republic	indirect, secret, elected by the Estonian Parliament (Rigikogu) or by the Elector Body	5
8.	Finland	President of the Republic	direct, universal	6
9.	France	President of the Republic	direct, universal	5 (from

				2000)
10.	Germany	President of the Republic (Bundespräsident)	indirect, universal, elected by the Federal Assembly (Bundesversammlung)	5
11.	Greece	President of the Republic	indirect, universal, elected by the Parliament, more exactly by the House of Representatives	5
12.	Ireland	President of the Republic (Uachtrán-na h-Eireann)	direct, universal	7
13.	Italy	President of the Republic	indirect, secret, elected by the Parliament and a delegation of the Regional Councils	7
14.	Latvia	President of the Republic	indirect, secret, elected by the Parliament (Saeima)	4
15.	Lithuania	President of the Republic	direct, universal, secret	5
16.	Luxemburg	Grand Duke Henri	-	2000
17.	Malta	President of the Republic	indirect, elected by the House of Representatives	5
18.	United Kingdom of Great Britain and Northern Ireland	Queen Elisabeth II	Queen of United Kingdom and the other Commonwealth realms	1952
19.	The Netherlands	King Willem-Alexander	-	1980
20.	Poland	President of the Republic	direct, universal	5
21.	Portugal	President of the Republic	direct, universal	5
22.	Romania	President of the Republic	direct, secret, universal	5 (from 2003)
23.	Slovakia	President of the Republic	direct, secret, universal	5
24.	Slovenia	President of the Republic	direct, universal	5

25.	Spain	King Felipe VI	-	2014
26.	Sweden	King Carl XVI Gustaf	-	1973
27.	Hungary	President of the Republic	indirect, elected by the National Assembly (Országgyülés)	5
28.	Croatia	President of the Republic	direct, universal	5

Source: Author's own based on the EU member states Constitutions

The diversity of presidential election mechanisms used in the European Union member states shows that the mandate may be the result of direct or indirect election.

Among the 28 EU Member States seven states are hereditary monarchies: Belgium, Denmark, Spain, Luxembourg, United Kingdom, the Netherlands and Sweden. The advantage of this method of electing the chief of state is given by the unprecedented stability of the institution that is depoliticized. That does not mean that the personality of the monarch and political parties cannot print a particular political institution, only that the mandate, the throne succession is not the result of a political game, under normal conditions.

The indirect election is made through a constituency or by the Parliament. This method is used in eight EU member states: the Czech Republic, Estonia, Germany, Greece, Italy, Latvia, Malta and Hungary. (Carausan, 2012a)

The direct election by universal suffrage has the highest rate of us among EU states. Thus thirteen EU member states are republics in which the president is directly elected by the people: Austria, Bulgaria, Croatia, Cyprus, Finland, France, Ireland, Lithuania, Poland, Portugal, Romania, Slovakia and Slovenia. The last designation method of the President highlights the sovereignty of the people.

After the closure of the electoral process and before assuming office, in most EU states, the president takes the oath. In this respect, we mention the example of the German Fundamental Law which in art. 56, provides the President oath before the Parliament, with or without religious formula. Also, in some European states Constitutions the oath is not provided literally, in the case of Italy, where in art. 91 it is stated that "*oath of allegiance to the Republic and compliance with the Constitution*". Hungary, which in art. 11.6, specifies only the obligation of oath, without imposing a specific content. The Czech Republic establishes the obligation of oath (art. 55) before the Parliament and also it states clearly its content in art. 59,

but without a religious formula. The extreme situation of these examples is the French Constitution which, throughout the Title II on the President of the Republic, does not provide the oath. In contrast, we find Ireland which in art. 12.8, provides the oath obligation, and its content in which we can identify the religious formula.

4. The Mandate of the President

Within the EU member states we can observe that most of them have adopted a five-year terms for the president, whether it is directly or indirectly elected. After France, which had a term of seven years, abandoned on 24 September 2000, and adopted one of 5 years, at EU level we can distinguish that only few states have strayed from the rule of 5Y and kept different term for mandates, such as: Ireland and Italy - 7 years, Austria - 6 years, and Latvia - 4 years. (Carausan, 2012a)

The vast majority of European countries have established limitations for the chief of state mandate, with two exceptions Italy and France where there is no limit to the terms in office. Limiting the mandate is a measure established by the Constituent in order to avoid the temptation to perpetuate the occupation of office by the same person as President.

5. Ensuring the Objectivity of the President

The importance of the presidential office requires non-exercise of other functions, either public or private. This is not to prevent a conflict of interest between the position of president and some public or private functions, but for ensuring the President is impartiality and independence in exercising the arbiter role between the state powers and between state and society. In this way, the President will be able to adopt a completely objective decision to all disagreement's parties. The position of arbiter of political life has been highlighted by the vast majority of European states' constitutions. (Carausan, 2012a)

Almost all European constitutional text refers to the incompatibilities of the position of chief of state with any public or private one, e.g. Ireland - art. 12.6.3°; Germany - art. 55, para. 2; Hungary - art. 12.1; Italy - art. 84, para. 2 etc.

Another unitary aspect in the EU member states constitution is the presidential immunity. The monarchic Constitutions clearly state the personal inviolability of the King (art. 88 of the Belgian Constitution and art. 56, para. 3 Spanish Constitution), and sometimes its sacredness (§ 13 Danish Constitution). Regarding the republican constitution, it often states that the President enjoys immunity unless

he is guilty of "wilful violation of the Basic Law or of any other federal law", art. 61 German Basic Law; of "misbehaviour", art. 12.10.1° Constitution of Ireland or of "high treason", art. 90 para. 1 Italian Constitution, art. 65 para. 2 of the Czech Constitution and art. 68 Constitution of France.

6. The Executive Orders of the Chief of State

In exercising its powers, the President issues acts with an apart legal regime. In the Constitutions of EU states, the chief of state executive orders were regulated differently, and we consider, in this regard, two categories:

- the monarchies in which the acts of the King/Queen are countersigned by the President of the Government and, if appropriate, by competent ministers - art. 64 Spanish Constitution, by Ministers - art. 106 Belgian Constitution and Danish Constitution § 14;
- the republics where the President's acts are valid for certain tasks, without the countersignature of Ministers - art. 19 Constitution of France, either expressly requires them - art. 89 Italian Constitution, art. 63 Czech Constitution and art. 58 German Basic Law or states where any function or activity of the President can be exercised only with the consent of the Government - art. 13.10 Constitution of Ireland.

7. The Legal Limits of the Chief of State Powers

The democratic exercise of the chief of state duties is given, as we have seen, by constitutional regulations which establish the constitutional and legal guarantees and their consequences.

As we have mentioned above, the chief of state is inviolable in monarchical states, or enjoys immunity in republics. An important role in the liability of the chief of state - the president - is given to the Parliament *in integrum* or to one of its chambers (art. 61 German Basic Law, art. 12.10.1° Ireland Constiution, art. 13 Hungary Constitution, art. 90 para. 2 Italian Constitution, art. 65 para. 2 Czech Constitution, art. 68 French Constitution), as representative of the people who should support and endorse in certain limits, clearly defined by the constitution, the President impeachment.

The normal situation of release of function of chief of state is the end of the mandate. But to avoid any risk European countries Constitutions provide exceptional situations of failure during the term of office. Thus, both the Italian Constitution establish in art. 86: "... *in all cases in which the President cannot perform them [its functions], shall be performed by the President of the Senate*" and the French Constitution art. 7 that, in case of definitive interruption of the term of office before its ending, the interim is exercised by the President of the Senate or by the Government. In other countries, for certain tasks the interim can be exercised by the Prime Minister; it is the case of the Czech Republic - art. 66 of the Constitution. And in other ones, such as Ireland the interim is done not by another person but by a Commission composed of the Chief of Justice and the presidents of the two chambers of parliament according to art. 14.2.1°.

However, we should not be tempted to say that the vacancy of head of state is recognized only in the republic member states because that would not be true. It is also recognised in monarchical states, art. 95 of the Belgian Constitution if the vacancy of the throne occurs, the two Houses of Parliament in joint session will work to ensure regency and art. 59 para. 2 of the Spanish Constitution "*if the King is unable to exercise its authority and failure was recognized by the Parliament* [...]" will start immediately the regency.

The situations in which the vacancy of the chief of state occurs were also strictly stated in Constitutions: art. 14 Irish Constitution, art. 31 Hungarian Constitution.

8. Instead of Conclusion

Public Administration fundaments are given by the EU member states constitutions and are strictly dependent on the executive branch vectors (the chief of state and the government). The whole issue of state architecture, and especially the one of the executive branch, cannot be studied nowadays without a permanent interdisciplinary approach and without providing conceptual clarification through the comparative study. The administrative phenomenological perspective reflected in the effort to adapt the politico-administrative structures in the process of European integration are fundamental in current legal and administrative research. A legal, constitutional culture is based, on a very large extent, on the knowledge of the political systems characteristics within the European Union, so we found it necessary to undertake this task which has double folded relevance: on the one hand it presents basic knowledge of the constitutional regulations of EU member

states and on the other hand it reviews similarities and differences of the European systems.

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