

The latest constitutional reforms in France

Since the 1st written Constitution in 1791, the French legal system has been trying to draft the ideal constitution. To date, France has produced 15 Constitutions and it still seems to have failed! Due to its history of constitutional experimentation, France is sometimes referred to as a constitutional laboratory. France has experimented with all types of political regimes, from constitutional Monarchy to Republic and Empire. France has tried all forms of government too, including presidential, parliamentary and semi-presidential systems. The Fifth Republic, which started with the current Constitution, is one such semi-presidential system.

Powers are divided between the President and the Prime Minister. They are chosen separately and sometimes from rival parties. If the President and the Prime Minister come from the same party, the President is supported by the Prime Minister. But when they come from different parties, the ensuing situation is referred to as “cohabitation”. This can create an effective system of “checks and balances” during an often bitter and tense period.

The Parliament and the Courts have never counterbalanced the executive power in France. Whenever the French Parliament has overwhelmed the executive power, the regime sunk because unstable governments were formed by coalitions.

However, the current Constitution, which has been in force since 1958, has proved to be one of the most resilient, though it has been amended many times, especially recently. By their very nature, constitutions are meant to last. This means they can't be changed easily, or at least without much thinking. This is one reason why constitutions are written in general terms, the meaning of which develops gradually or evolves to meet changing circumstances. Napoleon I used to say: “*A constitution must be short and obscure (sybillin)*”.

The French Constitution has been revised so often that we can easily assume that something is wrong! No less than 24 changes in fifty years; and no less than 10 since 2000. Many of them were needed due to the increasing transfer of powers to the European Union. But even more, these changes are affecting the way of governing, especially the strong role of the President of the Republic: for example in 2000, his term was reduced from 7 years to 5 and, in 2007, he partly lost his immunity in criminal matters.

The last risky bid to rewrite France's constitutional rules on July 16, 2008 worked, but barely. This reform perhaps might allow sweeping changes to the Constitution.

Let me first say a few words on how you can change the Constitution in France. And, what the main disputes were about? And, of course, what the major changes in the Constitution were.

How can the French Constitution be changed?

The procedure for changing the Constitution in Australia is similar to the way in which it was originally made. It can only be changed by referendum. On the other hand, the French Constitution can be changed by referendum or by the Parliament. It was mostly, according to the President's choice, by the Parliament.

This procedure is set out in article 89. Amendments may be proposed either by the President of the Republic on the proposal of the Prime Minister, or by members of Parliament. The usual procedure is that the Bill which proposes an amendment must be voted by both Houses of Parliament in identical terms (the two Houses of the French Parliament are the National Assembly and the Senate). This gives either House a power of veto, if it does not approve the Bill. Once the Bill has been passed, it is then put to referendum, so the final decision is with the people.

But an alternative procedure can be followed at the request of the President. This alternative procedure, which avoids the need to put the matter to a vote by referendum, is to hold a special joint meeting of both Houses summoned by the President. They are in session in Versailles near Paris, in the Sun King's magnificent palace. In this case, the Bill will be approved, but only if it is adopted by three fifths of the votes cast.

There is a weak tradition of fairness and consensus in French political life. In the past, sweeping changes were adopted by a bare majority. The most famous case was the choice between Monarchy and Republic in 1875, which was passed by only a single vote.

The most recent change was passed by one vote more than the 538 needed to pass (539 to 357)! Sarkozy's risky bid was saved by a few last-minute defections, including one notable Socialist, former Education Minister Jack Lang, who risked being shunned by his party for helping the reform to pass!

What was the context of this constitutional change?

The problem was how to overcome the great difficulty of conducting any changes in France. The Fifth Republic brought a secure government to the French, but not a strong one! Lots of reforms failed due to people holding on to their vested rights! France now must face its debts and deficits. The introduction of the Euro has forced the State to cut back on its expenses and borrowings.

How can we change France today? Answers can usually be found either in reinforcing the power of the executives (so the President and the PM) or in strengthening the legislative power. Nicolas Sarkozy in his campaign called for a presidential system. He would have liked to be like the United States. But many in his own majority didn't support such a reform.

The final wordings of the constitutional reform, initially prepared by former Prime Minister Edouard Balladur, was a compromise between the President who wanted to vest power firmly in the presidency and the Members of Parliament, who wished to retain and strengthen parliamentary control. This latest French constitutional change has to be examined from both these points of view.

What do we find in the current constitutional change?

And, more importantly, what don't we find!

The first part of the change includes the balance of powers between the President and the Prime Minister.

General De Gaulle genuinely saw an increase of presidential powers as the only way to stop the succession of weak and unstable governments. Under the current Constitution, the President is elected by direct universal suffrage and has a real role in the government of the country, especially when he has a clear majority support from both the people and the Parliament. The Constitution indeed has kept a regime which is parliamentary, because the Prime Minister is answerable to the Parliament and may be toppled by it.

When the parliamentary majority changes during a presidency, the president has to operate with a government from a different party. This situation is known as "cohabitation". Although the President keeps control of the foreign policy and has a say in internal affairs during these times of "cohabitation", the balance of powers shifts dramatically in favour of the Prime Minister. In these odd periods of permanent conflict between the President and the Prime Minister, the Prime Minister can take over internal affairs because he has the support of a majority in the National Assembly. In the absence of "cohabitation", the President can play both roles of Head of State, as mentioned in the Constitution, and Head of Government, not expressly mentioned in the Constitution.

One expected consequence of the change of reducing the presidential term (from 7 to 5 years), to correspond to the mandate's length of the National Assembly, is that it will make it unlikely that the President and the Prime Minister will come from different parties.

These new changes have transferred power from the Prime Minister to the President. However, the position of Prime Minister has not been abolished, even though this was often claimed.

A – Presidency gained power

The most significant is the President's new ability to address a joint session of Congress (the National Assembly and the Senate together).

1) The "State of France" address

This new ground rule copies the "State of Union" in which the President of the United States outlines to the Congress his legislative proposals for the upcoming year. The Prime Minister, however, can only address the National Assembly or the Senate, and only separately. This new power reinforces the President's position.

Some concessions are given to the balance of powers.

2) Concessions to the balance of powers

For example, the President can no longer be elected more than twice. However, this has never happened, even for De Gaulle!

A second concession affects the prerogative powers of the President. Like in Australia, these powers include decisions to make peace, but in France, the declaration of war must be authorized by Parliament. Also, to send troops overseas, to grant mercy to someone who has been found guilty, or decisions to make binding agreements with other countries. These decisions can be made without the Parliament's express approval.

The presidency is now required to inform the Parliament of any troop deployment overseas, and must secure parliamentary authorization for any such deployment lasting more than 4 months. France currently has troops in countries from Afghanistan to Congo.

Another part of the change affects the powers of Parliament. The Parliament gained some powers from the reform, but lost some too. In fact, what it gained has reduced the scope of the Prime Minister and has enlarged the influence of the President.

B – Gains and losses for the Parliament

The French Parliament exercises legislative power. It acts as a check on the government's actions. The National Assembly is the most important of the Houses, reflecting the fact it is directly elected. A motion of censure can only be voted by the National Assembly.

While statutes are normally discussed and passed by both Houses of Parliament, if the Senate ultimately disagrees with the National Assembly, this doesn't create a "deadlock" like in the Australian Federal Parliament. The French Senate has only limited powers to delay the passing of a statute.

However both Houses are under hard constitutional regulations, which restrain their abilities:

- 1st example: neither the National Assembly nor the Senate can freely create committees, especially auditing or investigating committees;
- 2nd example: while in Australia Ministers are members of Parliament, French Ministers have to resign from Parliament when they are appointed. When they leave the government a by-election has to be organised;
- 3rd example: the law-making powers are shared between Parliament and government. The priority has been given to the agenda established by the government and most Bills emanate from the government itself. Further, the government can speed up the passing of Bills by requiring that measures be either vetoed or voted without amendment. This procedure is known as "*vote bloqué*" (a kind of "locked vote"). Even more draconian is the procedure of the vote of confidence under article 49.3. This simply gives Parliament the choice of vetoing the Bill, by passing a motion of censure precipitating a general election, or passing it without debate or vote. These procedures have been much used and abused by minority governments.

The recent changes affect all these regulations, giving the Parliament more freedom, but increasing the difficulties of the Prime Minister. Here are the benefits:

1) *a) The agenda*

In the first place, the legislative agenda will be established by the Parliament, through a conference of the presidents of the political groups, and no longer by the government. Nevertheless, the government can keep for its own purposes half of the agenda and one day a month is given to the Opposition.

It appears to be a small change because there is a majority in Parliament which is supposed to support the Prime Minister. But it's a major change for the balance of powers between the

Prime Minister and the President: as the Prime Minister can keep half of the agenda but the President's party gain the other half!

b) The end of by-election

Secondly, Ministers are now allowed to return to Parliament without a by-election. This is a great change. Most Ministers are former Members of Parliament, even if this isn't compulsory. The previous rule was created to prevent a risk of confusion of the two powers and to save the government from being no more than a collection of delegates from the Parliament's interest groups. But in fact, this rule prevented instability, as the President wouldn't ask unpopular Ministers to resign, which would cause a by-election which could be lost.

In the future, the President of the Republic, even more than the Prime Minister, will greatly influence the make-up of the government!

c) A fair vote of confidence

Thirdly, the Parliament can reduce the government's ability to force legislation without a vote (under s 49.3): the government will use the procedure of the vote of confidence under article 49.3 only for the State's spending Bill (the budget), the social welfare's spending Bill and "one other Bill by Parliamentary session". In fact, this a small change because it's unlikely that a government would use this "nuclear" weapon more often than three times in a session! But the threat of using it is a loss for the Prime Minister!

d) Working committees

Lastly, the Parliament's committees are given a wider role to play: the Parliament will freely create its committees, limited to 8 in each House, and these committees have been given more power in the legislative process: this is mainly the committee's ability to amend a government's proposed Bill before the 1st reading in Parliament and its ability to give political advice for major presidential appointments.

So, the Parliament seems to gain. But it has to pay a huge price with two other major changes: first of all, the change broadens the scope of the referendum. Secondly, a statute which has been passed, and then promulgated by the President (as you would say, given the "Royal Assent"), can be challenged by the Constitutional Council (which is the French Constitutional High Court).

2) ~~The losses~~ *The scope of the referendum broadened*

The referendum is a presidential power which he can carry out alone, even if he needs a formal proposal from the Prime Minister. Thus, the President may submit government Bills, dealing with a fairly wide range of matters to referendum. This scope clearly reinforces the presidential power, by giving to the President an autonomous way of making major changes without involving the Parliament.

Also, a referendum by initiative of the people now exists, although with strict conditions: the proposal must be supported by one fifth of the Parliament members and one tenth of the national electorate. This would be difficult to achieve, but would greatly influence the Parliament and the President.

b) The constitutional plea

In Australia, it is common to say that judges must apply the Constitution. This was not at all the case in France. Once a statute was promulgated by the President, it could not be subject to judicial review, even if it was alleged that it was unconstitutional. Only the President, the Prime Minister or 60 Deputies or Senators could refer it to the Constitutional Council, but only before the Bill was promulgated! It was a huge lack in the rule of law. This has finally been changed!

Anybody can now challenge a statute in legal proceedings before any judge. In France like in Australia, you need special leave to go to the High Court, that is, to have your case considered by the Constitutional Council. This leave is given by the “Conseil d’Etat” or the “Cour de Cassation”, the French highest administrative and judiciary Courts. Even if it might be difficult to access the Constitutional Council, this is a real progress for the rule of law in France. Many Deputies, however, view it as a breach of Parliament’s sovereignty!

And, last but not least, what you don’t find in the current change!

C – The omissions

During the presidential campaign of 2007, there were 3 main debates about the constitutional changes that France needed the most:

- The need for a constitutional “borrowing ban” for day to day expenditures, that is, the operating budget as opposed to the capital budget;
- The need for a constitutional ban for holding several political appointments simultaneously;
- The need to change the way Senators are elected.

I'll speak briefly about each point.

1) *The "borrowing ban"*

France is getting sick of both its debt and deficits. Once you know France has one of the highest levels of public spending and of budget deficit in the European Union, you realize how badly reforms are needed. The constitutional borrowing ban was one of these. But it failed. And France is still continuing to borrow. Every year, 4 months of the operating budget are spent without the corresponding resources!

2) *Holding of several mandates continues*

The prohibition of multiple political mandates was the main threat to the current French political system. This can't be understood without knowing that a great majority of the Representatives (85%) hold more than one mandate (especially mayors and regional councillors). Few politicians are taking up the reins for the whole country and therefore stand firmly in the way of change! Hence, giving more power to the Parliament makes no sense when there is nobody attending the sessions and doing the work!

These politicians, some of whom belonged to the President's party, thwarted Sarkozy's proposed change. This would be a major failure for the future.

3) *The untouchable Senate*

The last reform, claimed by the Socialists in return for the approval of constitutional changes, was to modify the way Senators are elected.

The voting system used to elect the Senate is proportional representation in the cities, but the French people in rural areas elect their Senators from Member electoral divisions using a two-round election by majority vote.

This electoral system, together with the old electorate divisions, still gives a lasting majority to the conservatives, including the President's party. Conservatives didn't want any change and Sarkozy didn't concede to the Socialists. That's the reason why the Socialists, except one, voted against the whole reform.

*

* *

So, these are the latest constitutional changes in France. In a few words, it is a win for the presidency, a loss for the Prime Minister and a tie for the Parliament.

Let me say a very last word. No Constitution has all the rules about the running of government clearly written into it. Also constitutional practices are important, although they are not written into the Constitution or in any laws. And you have to be lucky in politics. Some changes are unpredictable, especially for the presidency, if the economic situation takes a bad turn (goes pear-shaped!). So, *time will tell*.

Pr Mathias CHAUCHAT,

Visiting Professor, University of New Caledonia

<http://larje.univ-nc.nc> - mathias.chaucht@univ-nc.nc

*Overview***The latest constitutional change in France**

How can the French Constitution be changed?

What was the context of this constitutional change?

What do we find in the current constitutional change?

A – Presidency gained power

1) *The “State of France” address*

2) *Concessions to the balance of powers*

B – Gains and losses for the Parliament

1) *The benefits*

a) *The agenda*

b) *The end of by-election*

c) *A fair vote of confidence*

2) *The losses*

a) *Working committees*

b) *The scope of the referendum broadened*

b) *The constitutional plea*

C – The omissions

1) *The “borrowing ban”*

2) *Holding of several mandates continues*

3) *The untouchable Senate*