

5. What is Executive Power?

READING ITEM 2

Check and Balances, Legal and Political Answerability for Executive Powers in Different Forms of Government

This Reading Item has been prepared by Márton Sulyok.

INTRODUCTION AND LEARNING OUTCOMES

The present Reading Item intends to introduce the legal and political reasons behind the choice of a form of government for the purposes of analyzing the extent and scope of presidential (executive) powers, but it will not detail how the executive body (government) is composed or made up. Executive responsibility will be described as part of the description of how different forms of government realize the answerability of the executive power or branch, depending on who is the central figure of executive, the head of state, the head of government or both.

Learning outcomes

1. Understanding the logics of accountability for executive overreach in the system of checks and balances
2. Understanding procedures of executive accountability in the different forms of government

Keywords: form of government, head of state, head of government, executive privilege and overreach, checks and balances, specialized bodies, parliamentary procedures, ethics, anti-corruption, conflict of interest

Necessary time for Independent Study: 1-2 hours

Recommended Reading

1. [Robert Elgie - Iain McMenamin: Explaining the Onset of Cohabitation Under Semi-Presidentialism](#) (2010)
2. Mark Tushnet: *Advanced Introduction into Comparative Constitutional Law*, 95-114 (The Formation of Government)
3. [Rick Staphenurst – Mitchell O'Brien: Accountability in Governance](#) (World Bank)

5.4. The Scope and Extent of Executive Powers

Traditional executive functions or powers (which may be divided among presidents as heads of state, the Prime Ministers as heads of government and their governments), are:

- initiating and participating in **legislation** (PM, Gov't, ministers), issuing **normative and legal measures**
- giving authorization to the head of state to acknowledge the mandatory effect of certain **international treaties** (adopted by bodies operating with the participation of the government)
- management of **social issues**
- management of **economy**

- management of **foreign affairs**
 - ✓ *European affairs (European Union):* Executive (government) cooperates with the Legislative power on creating a mandate to be represented in intergovernmental EU bodies.

- **enforcement of laws and budget** (*involvement also in planning*, basic function controlled by the parliament)
- **national protection/defense** (proposal and organization of national protection in case of emergency, exercise of emergency powers (head of state, President) overseen by Parliament) (so-called “commander-in-chief” powers)
- **general administration and management** (organization of central, regional, local public administration)

Regarding their scope and extent (as well as whether they are independently exercised by the executive or as shared competences), these general executive tasks can greatly vary in different forms of government:

- In the **United States**, the President has the *Executive privilege (undivided Executive Power)*, which results in his enhanced powers as sole “commander-in-chief” of the armed forces at the top of the chain of command, also instructing the Joint Chiefs of the Armed Forces. His powers are increased in defining the composition of the highest levels of the Judiciary (i.e. nominates Supreme Court justices, with the notice and consent of the Senate – Legislative). The President’s liability is also limited (impeachment), as both houses of the Legislative need to hold him liable.

- In **France**, a “two-headed” Executive (*bicéphale*) is created through the President constitutionally delegating parts of his executive powers to the Prime Minister. The President will be the “commander-in-chief”, disposing also over nuclear capabilities (with some power of the Legislative over this), as well as is also in command of overseas territories (the parliamentary representation of which is realized through senators), while the Prime Minister is going to be responsible for the management of internal administration, and the Judiciary has oversight over his and his government’s actions.

The issue of unruly roommates: Cohabitation

In cases, where the French President and the Prime Minister are not from the same political world, but still share Executive power, despite the clear division of competences between them, effective governance might still be an issue.

This is due to the fact that the policy priorities of the President and the Prime Minister might be different, which makes effective decision-making harder on certain key issues.

If there is cohabitation, meaning that the two heads of the Executive are not political allies, then the internal power balance of the Semi-presidential form of government resembles much more to Parliamentarism, with the legislative power gaining more legroom to influence governance. In case there is no cohabitation, then the internal brakes within the executive power disappear, which means that the system will resemble a Presidential exercise of executive power.

- In parliamentary republics, such as **Hungary**, the President of the Republic typically does not dispose of the above strong executive powers or privileges, though (s)he might have symbolic privileges.
 - “Commander-in-chief” powers are mostly distributed between Presidents, Prime Ministers (their Governments) and those in charge of the professional management of the Armed Forces.
 - The President might have some influence over the Judiciary (in the form of appointments), and might initiate the review of legislation on constitutional grounds (in some cases may also dissolve the parliament), but normally parliamentary heads of state remain mere ‘representatives of constitutional authority’ and guardian of democratic state operations.
 - In contrast, in many of the parliamentary republics, the Prime Minister is going to be the more influential political figure, disposing of most ‘traditional’ executive powers through the government (hence, these forms are called Prime Ministerial presidential.)

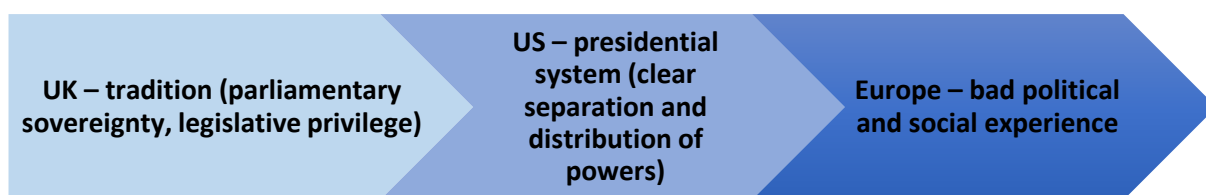
5.5. Responsibility for Executive Power – Checks and Balances

In the different forms of government, different principles of **rule of law** define institutions and processes to realize the **transparency and legal and political answerability** (responsibility or accountability) of those exercising executive power, adding to checks and balances already in place. The examination of the responsibility for the exercise of executive power can thus be examined from the points of view of (i) **ethics and anti-corruption (conflicts of interests)**, and (ii) **legislative ‘confidence’ in executive authority**.

Before we do, however, the basics of checks and balances regarding executive power should be discussed.

- ✓ In general, setting a **time limit on the term of office** and the possibility of **re-election** can serve as a check on the exercise of executive power. For example, in France, originally the term of office of the President was 7 years, which was later constitutionally limited to 5 years as considered overly excessively.
- ✓ Provisions limiting the **political involvement of the President**, ensuring a neutral status, are also desirable in parliamentary republican forms of government (where – in turn – the Prime Minister will be the one more involved politically. Other republican forms of government, like presidential or semi-presidential ones require the President to be a determinative political actor, therefore provide for more leeway in terms of political involvement. This also brings about the issue of how extensively the President (either as a head of state or as also a head of government) shall interact with the Legislative and the Judiciary. (Some jurisdictions, e.g., assign the President as the head of state with powers to have the Legislative dissolved in case a political crisis seems to stabilize
- ✓ The issue of whether actions of the President as executive require **authorization of any kind** for them to take effect is also worth considering. In parliamentary republics, members of the government (ministers) shall countersign many of the executive actions of the President, while the head of state retain more symbolic (and some very significant powers) to be exercised without countersignature (such as presence at the sessions of the Legislative, addressing them, calling the date of elections and referenda).
- ✓ Then there is the question of **autonomous political decisions** to be taken by the President, and the extent to which they exist. Obviously, in presidential or semi-presidential system the scope of these decisions is greater than in parliamentary ones.
- ✓ Lastly, adequate balances can be created by establishing **rules of accountability** for executive overreach, either by the President or by the head of government (Prime Minister). Whether executive actors should be accountable to the Legislative, the Judiciary, a special jurisdiction or a combination of these solutions, is a matter of choice and there is room for extensive comparison on this and any of the above issues in the different forms of government.

The Evolution of Checks and Balances - Motivations

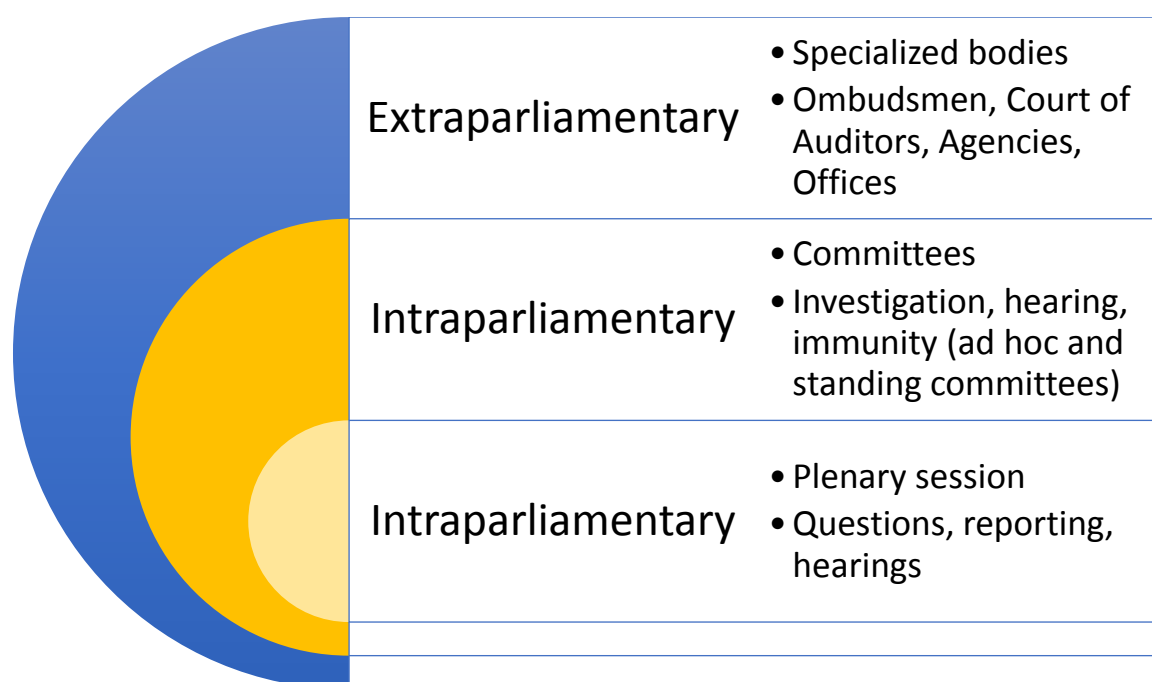


Among the above-mentioned solutions to realize the accountability of the executive power, primarily, there are intraparlimentary and extraparliamentary tools for. This means that there are institutions and processes in- and outside of the framework of the legislative branch that can be used to hold the executive accountable for any overreach.

Intraparlimentary oversight can be realized through the following means (examples):

- The **plenary session** of the parliament can hold “*question-time*” or other forms of public inquiry, where either **written or oral questions** can be addressed to the executive. The plenary session of parliament, in certain forms of government can initiate impeachment against the President upon a special vote.
- Oral proceedings are also known to the respective **committees of the legislative body**, where they can hold *hearings*, or certain committees can also be set up with the exact purpose of *investigating specific cases of alleged or suspected overreach* or abuse of power. These committees deal with *ethical and conflict of interest issues* as well.

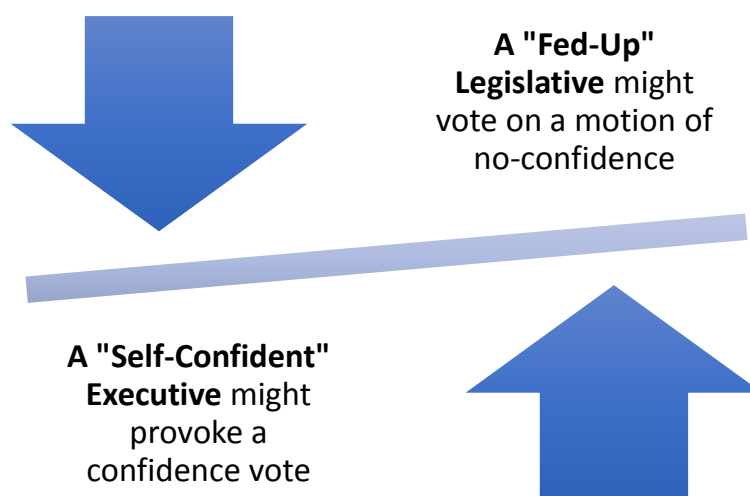
Forms of Legislative Control over the Executive



Extraparliamentary control might take shape in the creation of certain specialized bodies, operating independently of the parliament, but realizing legislative oversight. There are many fields of executive oversight, extending to all of the above areas that are covered by executive or government action.

- Among these, maybe the **financial aspect** is the most important. Institutions such as **Courts of Auditors or Audit Offices** control **government appropriations and executive spending**. The legislator can also decide to build in internal checks into the adoption of the budget through specific constitutional rules that bring other institutions to life with the above purpose.
- The exercise of executive power can also be controlled in terms of e.g. **respect of human rights during the administration, due regard to the interests of sustainable development or the rights of certain specific vulnerable groups**. Specialized institutions for this purpose are such as **ombudsmen**, who report to the legislative and can also establish links between the **national and international level of human rights protection**. *[One such example could be the 'national preventive mechanism' established by the UN Convention Against Torture, as part of which NHRIs (national human rights institutions) oversee government policies and practices in terms of penitentiary conditions.]*

The second issue to be examined here is that of **legislative 'confidence'**. Issues of confidence by the parliament in those exercising executive powers arise almost on a daily basis, this is in the nature of politics. In those critical times, however, when political crises unfold according to either of these two branches, there are **two options**, which – if successful - result in either the termination of the mandate of the government (**motion of no-confidence**) or in upholding the current exercise of executive power (**confidence vote**).



Questions for Self-Check

1. How can 'cohabitation' change the balance of powers in a semi-presidential system?
2. What types of intraparlimentary executive oversight are there?
3. How could you describe the functions and types of extraparlimentary oversight?
4. What can be the outcome of an unsuccessful motion of no-confidence?
5. If the Executive successfully passes a confidence vote, how does it affect its power?

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