

The Social and
Political
Foundations of
Constitutions

The Constitution of the French Fifth Republic and the Implications for the 2017 Presidential Elections

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- Turbulence in politics is nothing new, but the current situation in France means that a relatively predictable presidential election has been thrown wide open in recent months. ‘Populism’, in the form of the far right leader Marine Le Pen, is seen as the primary threat to stability in France and in Europe.
- The constitution of the French Fifth Republic could very likely become a contested issue in the near future. Presidential elections are the focus of political interest, but are not the source of authority under the constitution.
- French presidents constitutionally have no power, and an executive presidency is excluded by the definition of the president as an ‘arbiter’. Instead, the power of the presidency in the Fifth Republic derives from the National Assembly. As under other Republics, a president’s role is modest, but the political practice has made the president the focus of authority in the Fifth Republic.
- By contrast, ‘cohabitation’, in which the president faces an Assembly-opposed majority (as in 1986–88, 1993–95, and 1997–2002), reduces the presidency to its constitutional status as a largely ceremonial figure. This understanding of the constitution puts the presidential elections in context.
- Whoever wins the presidential elections, these will be followed by Assembly elections in June, and, since any president must win a majority in the Assembly, the result will remain indecisive long after the polls close in the presidential elections on 23 April. A president can choose to dissolve the Assembly and engineer a snap election, though this would have to be politically justified, and voters do not like being told to return to the polls in order to produce the ‘correct’ result.
- If, by any chance, an outsider candidate such as Macron or Le Pen won the presidential election, they would then have to mobilize for a general election, in which nobody can be guaranteed a majority.
- Any president may face a fragmented Assembly or have to rely on parties only partially committed to the new programme. As a result, agendas for radical reform most likely would only be partially implemented, or blocked in large measure. What is more, neither of the outsiders has the political experience that would indicate an ability to master the complexities of the political system.
- A favourable political situation could be engineered in which a president could obtain a majority after a dissolution. A dissolution can take place at any moment the president decides, but there cannot be another dissolution until one year has passed. Thus, Assembly elections in June may be much the most important in the sequence, and the composition of the Assembly that emerges will be crucial.

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Presidential power and constitutional restrictions

One of the misunderstandings about the French constitution is betrayed by the repeated assertion, often made by many commentators on the French political scene, that the president is all-powerful. French Republicans, alert to the threat (as they saw it) of a potential dictatorial pretension, have sought a minimal role for their presidents: to advise, to encourage, and to warn. In 1958 the Fifth Republic followed the Third Republic and the Fourth in re-establishing this modest role. Presidents are now directly elected (after the referendum, of doubtful legality, in 1962), but this popular imprimatur does not in itself convey any additional powers, and there are many directly elected presidents in Europe with only a ceremonial role. Political practice has extended the role of the president such that, in practice, it looms large as Greenland over Mercator's map projection: not a small island but a huge continent. It was de Gaulle's abilities to make political capital out of, among other events, the crisis of the Algerian War that enabled the enlargement of the institution to its position of political dominance in the modern-day Fifth Republic.

This Republican idea of the presidency was the Third Republic's reaction to the authoritarian Napoleon III, who exercised executive authority to the detriment of both the Assembly and popular liberties. In the subsequent Republics, the president was able to call on a politician to form a government and had ceremonial roles — meeting foreign heads of state and opening flower shows. There was presidential authority to advise, to encourage, and to warn, and these powers were influential in some instances, but the president could be bypassed, and frequently was. Clemenceau, prime minister in the First World War,

was contemptuous of the presidency in general ('always vote for the most stupid') and of President Poincaré in particular, and kept the Elysée entirely in the dark during his tenure. Presidents in the Third Republic were not, with a few exceptions, distinguished figures, and the institution remained a modest one. In the Fourth Republic, the Cold War and the difficulties of decolonization inevitably embroiled the president in efforts to find stable majorities in the Assembly.

Yet in constitutional terms, the office of the president of the French Fifth Republic holds no substantial power. In Article 5 of the constitution, the president is described as an 'arbiter' (or umpire), in keeping with the position of the presidency in the previous two Republics. This stipulation legally rules out the possibility of an executive president who commands one side of the party system in the Assembly. An executive presidency, it could be argued, runs counter to the constitution on a daily basis. Presidents are not responsible to the Assembly in the same way that the government is, except (under Article 61) in cases of 'high treason'. Campaigns for a Sixth Republic that restricts the excessive role of the president largely ignore the Fifth Republic constitution, which, in legal terms, does describe a very Republican and limited president.

Thus, constitutionally, the Fifth Republic head of state is no different from the Third and Fourth Republics, and the president has a similarly restricted role as a neutral figure who can call in other institutions (and the electorate in the last instance) to rebalance the politics of the Republic. Thus, the president can call an election, but (as President Chirac discovered in 1997) the ability to call an election does not guarantee a majority. Presidents are intended to ensure the smooth functioning of the system. Under

the constitution, presidents have the power to act according to their own will only in a circumscribed number of cases. It is the government (Article 21) that has control of the armed forces; the president as head of the armed forces (Article 15) does not hold an executive role. Presidents have a relatively modest staff and do not control their own budgets. Presidents have no constitutional authority to dismiss their prime minister, and can do little without the prime ministerial countersignature. Referendums, under Article 11, do not have to be countersigned, but they must be proposed by the government.

Despite these constitutional restrictions on presidential power, under the Fifth Republic, the prevailing political currents of recent decades has resulted in a kind of hyper-presidentialism, albeit that this new conception of super-presidential force is dependent on the Assembly. Public opinion has consistently returned majorities to the Assembly that support the elected presidents, and when the public has spoken, no countervailing force has challenged it (certainly not the legalism of Article 5). Thus, when the president holds a majority in the Assembly, the Elysée becomes the executive head, usurping the role that the prime minister assumes in other European countries. Clearly, this usurpation is subject to the majority's willingness to support the policies proposed, something that, as with other parliaments, cannot be assumed, and must be bargained for — sometimes with more difficulty than others.

The Assembly and 'cohabitation'

French politics is majoritarian party politics working through the Assembly, and this is fully evident during the times when the president has no majority in the Assembly ('cohabitation' as it is called, although this is not a constitutional term), namely, the periods 1986–88, 1993–95, and 1997–2002. During these times, the president was confined to a ceremonial role and the prime minister made the decisions that determined the direction of the nation, in accordance with the constitution. In fact, the periods of 'cohabitation' represent the working of the Fifth Republic as the drafters of the constitution would most likely have intended it. In their drafting of a Republican constitution, it is clear that the premier is the authority when backed by the Assembly majority.

Under 'cohabitation', the peculiar situation of the leader of the Opposition sitting as chair of the cabinet prevailed, but the formal respect for the presidency was carefully maintained (giving the impression of a unity of outlook and purpose that did not in fact exist). This amounted to a united cabinet informing the president of decisions, with no real contribution from the head of state. Moreover, the prime minister could not humiliate or ridicule the incumbent, much as they may have yearned to do so, because of the status of the institution. This placed a significant constraint on political contestation, and over-stepping the mark was politically dangerous, as M. Jospin, whose contempt for the president was fathomless, discovered to his detriment.

The particular political configuration whereby the president enjoys a majority in the Assembly has come to be seen as the normal politics of the Fifth Republic, but this is no guide to the future. Despite the associated prestige of the institution, there is little the president can do against a majority. Nuclear power is conferred only by decree (a majority could revoke that) and other powers (like the intervention to sack ministers) are unknown to the Fifth Republic constitution. Under the constitution, a president could not use Article 16, concerning emergency powers, to challenge an Opposition in the Assembly, as this is strictly reserved for crisis situations (such as when they were invoked by President de Gaulle during an attempted military coup in Algeria).

A president does, however, have the power under Article 12 to dissolve the Assembly, even after a general election. An embattled president could seek out an issue on which to rout his or her opponents and hope to see a presidential majority returned. Aside from the fact that this would be by no means guaranteed, it is not part of the Republican tradition, since an Assembly is expected to last a full five-year term, and French voters do not like being told to 'redo their homework', or return to the polling booths in order to provide a more expedient result. In 1997, President Chirac thought that a snap election would be a good idea, lost, and suffered five years 'cohabitation', with the Opposition Prime Minister Lionel Jospin exercising executive power.

Because the office of the president has accumulated a considerable prestige (largely owing to the efforts

of de Gaulle) it is not possible, politically speaking, to insult or to publicly sideline the president. However, in the 'cohabitations' (two of which comprised a left-wing president and a conservative Assembly; the other a left-wing premier and a conservative president) this is precisely what happened: without any hint of a public outcry the president was given minimal support and information and excluded from the principal decisions. There is nothing unconstitutional about this sidelining of the president: the constraints are entirely political.

'Cohabitations' are a looking glass war between the president and the leader of the Opposition at the cabinet table, notwithstanding the fact that the public expected the two offices at the top of the state to cooperate to the benefit of the country. In the three earlier 'cohabitations' there was the peculiarly uncomfortable but politically manageable spectacle in which the French delegations to international conferences would arrive with both head of state and premier in tow. In these cases, the pair worked collaboratively rather than at cross purposes, but not without some odd moments. Whether such niceties would be retained in the event of an outsider president against a conventional Assembly is moot (and could look more like the Donald Trump presidency than the restrained French head of state).

Populism, 'Penelopegate', and the rise of Le Pen

There is, currently, much turmoil in European (and American) politics, with the rise of what has come to be broadly called 'populism'. This term has been applied to the rising formations, mainly (but not exclusively) on the right, and which are characterized by flamboyant leaders, a contempt for the political class, an appeal to the 'people' and an insistent desire to clean up and to tackle the issues of real concern (as they see it). It is, of course, the spectacular rise of the far right Marine Le Pen in the polls (heading the first ballot estimations for many months) that have given this election its particular focus.

Both the presidential elections — to be held in April and May — and the general elections for the Assembly — held in June — have two rounds, the second being a run-off if no candidate receives 50 per cent of the vote. Back in November 2016 after the

primary on the conservative right, the opinion polls put the Republican candidate François Fillon ahead by a very substantial margin, and the collapse of the Socialist Party's challenge when President Hollande declined to stand for re-election threw the left into turmoil.

Before Christmas, the Republicans could have congratulated themselves on nominating an ideal candidate: experienced in the highest office, not one of the inner circle, and untouched by funding scandals (unlike the other main contenders on the conservative right). Thus, the former premier Fillon had thrust through the Republican party primaries, brushing aside former President Sarkozy and former Prime Minister Alain Juppé; in so doing, emphasizing his credentials as a scion of *France profonde*, a rural Catholic with modest family tastes, and a man of integrity free from the 'gamey' funds tapped by the other candidates. Fillon promised reform of the overbearing state and also condemned the threat, as he saw it, to Republican values posed by members of the Islamic community. It was a powerful combination: a 'clean skin', but with executive experience and capable of offering an alternative to the *Front national's* anti-immigrant rhetoric. This left Le Pen as the main challenger to Republican dominance, along with a smattering of other contenders who might have made a mark on the first ballot but who would disappear after that round. Opinion polls (unreliable but not usually very badly wrong) indicated a landslide for the Republican candidate Fillon and a burial for Le Pen on the second ballot. This is reminiscent of 2002 when the incumbent President Chirac won by a landslide with over 80 per cent vote share against Le Pen père. History, it seems, would repeat itself.

However, in January the satirical and investigative journal *Le Canard enchaîné* revealed that Fillon had put his wife Penelope and their two children on the parliamentary payroll. This kind of nepotism is a common enough practice in political life, but the scandal continued to unfurl with the revelation that his wife had apparently performed no duties in return for payment of over 500,000 euros, and that she was also employed by *la Revue des deux mondes*, for which no obvious work was completed. Mr Juppé had an employment scandal on his CV and was one of the reasons that Fillon was preferred in the primaries. Fillon's response was to deny any wrongdoing and to

go on the attack, accusing enemies of fabricating the case in order to bring him down. The scandal worsened when it emerged that Mrs Fillon, in an interview with the UK's *Daily Telegraph*, denied having been a political assistant to François Fillon and that the two children, employed as lawyers, were not qualified at the time. This left the Republicans in a situation akin to that of the members of the orchestra on the Titanic. Fillon's determination to press on with his candidacy could yet bring them down, as the public in early 2017 was widely sceptical of his explanation (over 70 per cent remained unconvinced, as measured by polls). Either way, Fillon's self-styled crusade against corruption and state waste was not easy to square with this series of revelations that had led, at the end of January, to a police investigation, if not a charge. With elections only a few months away, the Party appear to have decided that it is too late in the day to find an alternative Republican candidate.

Did 'Penelopegate' (as it was inevitably called) give impetus to the insurgent *Front national* campaign? There was some effect, but, perhaps surprising, the polls demonstrated that the *Front national* was not the major beneficiary. Le Pen's *Front national* has been campaigning for over forty years and has yet to win anything of consequence. One way to regard the *Front national* is as a very substantial failure. Whereas other far right populists in Europe have won influence in parliaments and even ministerial posts, the *Front national* has merely won a few small towns (most of which it promptly lost) and currently only has two deputies (of 577). There appears to be a certain ceiling to the *Front national* vote and, although this ceiling is slowly being raised, it still appears to be too low to enable it to win substantial positions. Without allies, it cannot make real progress, yet it is viewed by a substantial section of the electorate as toxic, and hence ruled out of contention for potential alliances with sympathetic parties. Marine Le Pen has struggled to overcome this isolation and detoxify the image of the party — thus far, it seems, without much success. Le Pen's and the *Front national*'s impact, and it is substantial, has been to skew the political agenda and to magnify political discontent. Its solutions to these various issues ('real problems, false answers') and its political programme may be incoherent, yet the party's contradictions and inconsistencies, for a disaffected fringe of the electorate, are probably not a deciding factor. The

prospect of a Trump-like insurgency in France is still, despite the meltdown of the early front runner Fillon, a distant one.

The future of the left

In fact, the political landscape could become far more complex and destabilizing than would be the case in the event of a straight *Front national* victory in the presidential elections. Emmanuel Macron, the — until recently — unknown outsider and candidate of the centre, was appointed by President Hollande as Minister of the Economy, Industry and Digital Affairs within Prime Minister Valls' cabinet. Macron's sudden popularity has some of the elements of a populist uprising; indeed, 'populist' can just as legitimately be applied to a centrist movement as it can to an extremist party, and the elements of anti-establishment, anti-political class rhetoric from Macron are in clear evidence. That said, Macron is an outsider promising reform, much as the centrist François Bayrou did in 2002, and he presents a similar threat to the two-party duopoly. Macron's platform is not fully established, his campaign having not yet started in earnest when his polling ratings began to take off, and there will be greater tests to come, when he is called on to tackle the big issues of immigration, security, Republicanism, and foreign policy, for example. He is notably vague on some issues and has backtracked on others, and although he continues to garner support, if he were to face Le Pen on the second ballot it would be a rout for the *Front national*.

For the presidential election, on the left, all is confusion. This is still relevant because Benoit Hamon, the Socialist candidate, turning left, is, in effect, in the race to save his party's position, but is faced by a practised Jean-Luc Mélenchon, who is supported by the Communist Party and other small left-wing parties, and could pick up around 15 per cent of the vote. Hamon is, in effect, in a battle with Mélenchon over the future of the left, but not in contention for the Elysée. This is not the first time the left has been absent from the run-off ballot: in 2002 the final ballot was between Chirac (neo-gaullist) and Le Pen, and in 1969, between Senator Poher (centrist) and Pompidou (Gaullist). Of course, the small parties of the left are looking to the first ballot to make an impact and to improve on their marginal position in the party system.

Presidential prospects

If the constitution is taken at face value (and to do otherwise is to enter the realms of a coup d'état) then a number of possibilities can be envisaged, none of which are without precedent in French or European politics. In Republican convention (though not law) the Assembly is expected to run its five-year term and to sort out its differences during that time. Although the president can call an election, a dissolution has to be justified to the public. If the president faces a hostile majority (likely in the case of a Le Pen victory) then the president has no arms to use against the Assembly — to use Article 16 (emergency powers) against the majority would be an abuse of power. Indeed, it has been invoked only once, in April 1961, when there was an attempted military coup in Algeria. There are minor extensions of power, deriving from the president's potential refusal to sign some decrees (under Article 38), but these could be overridden (as they were by the majority in the Assembly). Other powers, as in foreign policy, are Fifth Republic practices and could be set aside, as they were in the 'cohabitations' of 1986–88, 1993–95, and 1997–2002. A snap election would have to be politically justified, and voters do not like being told to 're-do their homework' to return the 'correct' result at the polling booths.

In the first instance, the new president could obtain an absolute majority in the Assembly. This, from a standing start, is unlikely; Le Pen more than Macron and Fillon would expect — and probably get — a full majority of Republicans in the Assembly. Of the three front runners, Macron and Le Pen would struggle to win a party majority. Macron does not have full political party backing (although there is a substantial organization) and Le Pen's *Front national* has never had a real presence in the Assembly. Under Fillon, things could continue much as before. Le Pen has only a feeble presence in the Assembly and would struggle to improve that to the extent of a majority. In 1986, the year of the *Front national's* best showing, it held thirty-five seats, but that was under the party list proportional election system, and they would not have that advantage in 2017. Counting against the *Front national* is its inability to find allies, and that would not change much in the event of a presidential victory. More interesting is the prospect of a victory by Macron. There are precedents for

surges — notably Berlusconi's *Forza Italia* which, founded in 1993, surged to 155 seats (42.8 per cent) in 1994. Macron's movement *en marche* could manage the same feat, but it would not face the same party system, nor have the same resources to draw on. Macron's movement is well organized and has resources, but the time needed to displace the party system that has functioned for fifty years or so is limited.

Secondly, the new president might have only a relative majority, meaning that the president's supporters could be outvoted at any time. This was the position, more or less, in 1988, when the Socialists won the general election after Mitterrand's re-election and had to manage an Assembly in which they were continually bargaining and finding posts for sympathizers, yet this 1988–92 government under Premier Rocard had a good record and implemented a number of important reforms. Given the stated ambition of the outsider candidates, this would be more difficult in an Assembly after June and the skills needed to manage such a situation are not evident in the untried ranks of Le Pen and Macron. Macron's programme, so far as it is articulated, would not necessarily please the left. So far, not much has been detailed, but there could be difficulties with the change to flexible markets through labour law reforms intended to give employers greater authority over the workforce with respect to hiring and firing. Such reforms have been highly unpopular politically and have always come to grief in the past, often in highly disruptive street demonstrations.

Thirdly, and this is where the future becomes unforeseeable, there is a strong possibility that the insurgent candidates could shatter the party system and find their Assembly elected in June fragmented. However, the president does have one duty that does become crucial and was exercised in the divided Assemblies of the Third and Fourth Republics. Despite these handicaps, the Fourth Republic had a number of achievements to its credit, including the winding down of the French Empire, European Union building, and exponential economic growth. A president has to find a premier who can command a majority. If a president tries to force an unwelcome prime minister on a hostile Assembly, the Elysée's choice will be rejected. If the majority is coherent, then there could be a 'strike of prime ministers', as

there was in 1924 when President Millerand tried to nominate an unwanted premier (Millerand was forced to resign). In the Fifth Republic this would be an impasse in which the president could not prevail without another election. A fragmented Assembly with an anti-Le Pen majority is one possibility, and if the 'Republican line of defence' held, it would lead to a 'cohabitation' of an anti-*Front national* Assembly and a president who would be unable to command. Nobody would expect the president to roll over and play second fiddle in these circumstances. There is no certainty as to the nature and vigour of the political gaming that would ensue or the eventual outcome, but it is not unprecedented for the Assembly to be splintered and at odds, or for the majorities to be fragmented — as they were in the Third and Fourth Republics.

Conclusions?

Fifth Republic politics has been stable because the majorities in the Assembly have been solid and coherent, a situation that did not pertain before 1958. Under the Fourth Republic, this coalition instability was almost perpetual, yet part of the party spectrum (the Communist Party) was permanently excluded. In June, the *Front national* could be in the same position with respect to coalitions: a large far-right group would destabilize the coalitions and would significantly reduce the space available to find a governing majority. A determined president could manipulate a majority out of the fragments, but it would require more political artistry than the candidates have yet shown. Current speculation about the victory of the *Front national's* Marine Le Pen in the forthcoming presidential elections means that these comments are not just abstract legal speculation. However, the assumption that if, *per*

impossible (at least on opinion poll evidence in March 2017), Le Pen were to occupy the Elysée then this would inevitably entail a de Gaulle-like hyper-presidency does not follow. For that to be the case, the *Front national* party would have to win a majority in the Assembly. A *Front national* majority could be a possibility, but the party would have a difficult task, starting from its low base of two (of 577) deputies.

Everything for the outsiders, *in fine*, depends on the forthcoming Assembly elections in June. Until recently, the general elections have usually been a sideshow, an endorsement of a choice made in the presidential elections with a solid majority, but this relatively benign situation cannot be guaranteed if either Le Pen or Macron were to win. There is a possibility, of course, of a return to the president's role as 'constitutional monarch', and a very circumscribed political role for the Elysée. There is also the prospect of a 'coupon election' in which the public would be asked to support candidates from a variety of parties who endorse the president's programme. That could be similar to the abortive attempt in 1956 to make Mendès the prime minister on the back of a wave of popular support. Or there could be a chaotic and fragmented Assembly that struggles to find a stable majority. This means that the presidential elections, the principal elections in the Fifth Republic, might not be the settlement that they have been in the past. Whoever wins the presidency will have to campaign to win a majority in the Assembly. Even were Fillon to win, the Republicans would encounter difficulties obtaining a majority in the Assembly, and thus, even when the election is over, the campaigning will only have just begun. Moreover, a victory by Macron or Le Pen would not mean game over — but game on.



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