PART II

LAW

7. Parliament in constitutional law

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Because it has been one of the central institutions of liberal and now democratic constitutional regimes since its inception, parliament is and has always been an essential object of modern constitutional law. Nevertheless, the place assigned to it in both positive law and the science of constitutional law is marked by a seal of ambiguity. Many conceptual uncertainties and grey areas continue to characterize it in these two meanings of constitutional law. They are further extended if we include in the analysis the conceptions of the actors of the constitutional system (not only ministers and members of parliament but also constitutional judge and citizens). In other words, the way of thinking about parliament in constitutional law is less simple than the fact that it is obviously at the heart of this discipline, the main purpose of which is to study the framework of political power, might suggest.

There are many reasons for this situation. In particular, it can be argued that constitutional law as a body of legal rules was born and remains essentially within a national framework (with the exception of trans- or supranational assemblies, the most notable being the European Parliament), that it is most often part of a specific, long and necessarily evolving history (Schönberger, 2016). So much so that it is protean and contingent, it is difficult to reduce it to a single scheme. In addition, the science of constitutional law itself is plural and is subject to a wide variety of approaches that affect the parliamentary institution. In short, all these uncertainties affect the very substance of Parliament's representations of legal doctrine and positive law.

This chapter will attempt to clarify some of the difficulties of the legal approach to parliament, both from the point of view of vocabulary (7.1), method (7.2), concept (7.3) and usual presentations (7.4), and finally to propose a way of analysing it from a dynamic legal point of view (7.5).

7.1 THE WORD AND THE THING

"Parliament" today refers, in a relatively confident manner, to a deliberative political assembly (or assemblies) (i.e. an institutionalized meeting of specially appointed persons), with a representative function, mainly of the people (or possibly of other social groups or territories) and endowed, at the legal and political levels, with certain specific functions and powers of leadership within a given political body (the medieval state and then the modern sovereign state, an infra-state community as a federated state, or even a *sui generis* political body as the European Union) and its constitutional order.[1] From this point of view, the thing existed before the word, but the word could also have existed before (or independently of) the thing (Lauvaux, 1993).

Many countries have historically had deliberative assemblies that were referred to by other names (council, chamber, state assembly, diet, general states, provincial states, etc.)

but those assemblies were very largely comparable to parliaments in the modern sense (some countries have retained the old name, such as the Netherlands with its *Staten-Generaal*, Iceland with its *Alpingi*, Poland with its *Sejm*: Diet). It is by reference to its English prototype, which appeared from the middle of the thirteenth century under the name of *Parlamentum* (derived from *parlare*, *parler*), which became *Parliament*, that the term *Parlement* spread in French and was then transposed into other languages (German: *Parlament*, Italian and Spanish: *Parlamento*, in particular). Moreover, specific institutions dating back to the thirteenth century, whose functions were essentially jurisdictional, but also administrative and even quasi-legislative, were once called, in France at least, under the Ancien Régime (until 1789), "parlements" (see Palonen, Chapter 5 in this volume).

Because of this last experience, the word "parliament" applied to modern deliberative assemblies remains rare in French literature or discourse after 1789, but this was also the case abroad outside England.[2] For a long time, the term was absent from the constitutional texts themselves. It is preferred to use the metonymy "legislative power" or the name of a specific institution (Council, Body, Assembly, Chamber, Chamber, Legislature, etc.) or a term specific to a particular country (*Cortes Generales* in Spain, *Vouli* in Greece) – the term "chamber" (*Kammer* in German, *Camera* in Italian) being usually preferred in monarchical systems. In France, it was not until the 1946 Constitution (Art. 5) that the term "parliament" was first mentioned in a formal constitutional text[3] (as it was in Italy in Article 55 of the 1947 Constitution). Moreover, it is not uncommon for a formal constitution to completely avoid the word (for example, the United States Federal Constitution or the German Basic Law of 1949).

Even today, the term "parliament" does not cover exactly the same legal definition everywhere. For British law, Parliament consists of the monarch, the House of Lords and the House of Commons (Blackstone, 1765, p. 149; Delolme, 1775, II, 3; Dicey, 1885, I, 1).[4] This definition has been faithfully adopted in all the Dominions of the British Crown and retained by most of them (Canada, Australia, New Zealand in particular),[5] and even transposed by those of the Dominions which have officially become republics: the Irish Constitution of 1937 provides that "The National Parliament shall consist of a President and two chambers" (Art. 15-I-1) (likewise Malta, Art. 51 of the 1974 Constitution). This terminology, as Benjamin Constant had notably pointed out,[6] is not meaningless, as we will see.

On the other hand, in Anglo-Saxon literature, there is sometimes a distinction between "parliament" and "legislature" (Verney, 1959; Laver, 2008). The second would refer to any deliberative assembly involved in the exercise of the legislative function, but highly distinguished from so-called executive bodies, while a parliament would also have the power to choose members of the government from its ranks and closely integrated into the assembly (through compatibility between the functions of minister and parliamentarian or through the right of entry and speech when ministers are not parliamentarians). Inspired by the contrasts between the British House of Commons and the US Congress, it implicitly refers to the difference between an assembly in a parliamentary system (a "parliament") and a system called presidential (a "legislature"). This distinction, which is particularly valued by some politicians, is hardly ever used by lawyers,[7] probably because it seems to lack an explicit basis in positive law, which favors parliament (or the assembly) as a formally autonomous body. It is also difficult to apply to a regime in the process of parliamentarization or to a regime practising an eclipse parliamentarism (such as the

Weimar Republic). However, it is also suggestive for a profound appreciation of the parliamentary institution (see section 7.5 below).

Moreover, in continental Europe, Asia or South America, "Parliament" refers only to the assembly or assemblies. Thus, Article 24 of the 1958 French Constitution states (in its original version of 1958) that "Parliament includes the National Assembly and the Senate".

These significant differences, related to the way in which the liberal distinction between several "powers" has been understood in each country, have possible strong implications for the understanding of parliaments, particularly in their relationship to the so-called "executive power". Nevertheless, the great diversity of national experiences does not prevent the deep unity of the parliamentary phenomenon, the largely common nature of the issues affecting it, at least if the necessary differentiations are made.

7.2 THE SPECIFICITIES OF THE LEGAL APPROACH

The study of parliaments, like any constitutional institution, is obviously not (and cannot be) the exclusive domain of lawyers alone (Wilding and Laundy, 1972). They have always drawn their thinking from the sources of history, philosophy and political doctrines *lato sensu*. However, there are one or more specific features of the legal approach.

It should be noted first of all that the legal literature on parliaments is relatively fragmented. Lawyers' analyses of parliaments are generally overwhelmed by broader studies of political regimes or by a presentation of the positive constitutional law of a state,[8] so that they are less concerned with parliament as such than with the relational game that surrounds it, or are then confined to a particular national parliament (see Dicey, 1885 or Blachèr, 2012). A somewhat surprising fact: there is no book in French that studies the parliamentary institution as such, or attempts to provide a general theory of it.[9] It is therefore only implicitly that lawyers' thoughts about parliament in general exist. It still needs to be reconstituted.

It would therefore be futile to seek a single legal method for analysing parliaments: it does not exist. In each country, the science of constitutional law is dependent on national history, with its cultural specificities and its own evolutions over time. In addition, a plurality of epistemological currents and methodological positions coexist in practically every national doctrine. At most, it will be possible to identify dominant national trends, without concealing what they may have in common (especially since lawyers sometimes draw inspiration from the work of politicians and historians, or because a particular author claims to have a dual legal and political affiliation). It is thus quite obvious, for example, that contemporary French constitutionalist legal doctrine differs from its German counterpart: where the former repels excessively theoretical constructions and readily adapts to a certain methodological eclecticism, the latter, perhaps more confident in its identity, cultivates a taste for rigour and works on concepts (Jellinek, 1960; Morlok et al., 2016).

In France, the turnaround made by the Fifth Republic from 1958 relegated (or appeared to have relegated) parliament to a secondary role and led to a drying up of the related academic work for a fairly long time. This is less true today, as studies have multiplied in recent years, at least on specific aspects of the parliamentary institution (Troper and

Hamon, 2018, p. 680). But the fact remains that one could speak of a certain intellectual laziness on the part of French lawyers when they refer to parliament. It is only when they (and in fact, a very small number of authors) have opened up to other approaches that they have advanced the understanding of it.[10]

In any case, a vision of a constitutional right locked in itself, reduced to an assembly of formal norms, cut off from its political dimension and its historical roots on which it is entirely dependent, would be too simplistic. It is therefore rather a constitutional law that renews its nature as a "political law (*droit politique*)", that is, one that is attentive to the contexts, representations and actions of legal actors, which makes it possible to apprehend parliament in a less unsatisfactory way (see below).

Nevertheless, it cannot be denied that there are particular features of the legal approach (which, however, does not boil down to the so-called "legal method (*juristische Methode*)" – narrow – claimed and disseminated in the past by the German Paul Laband). It is characterized first of all by a special attention to forms – this "formalism" is largely inherent in the object *law* itself – and therefore in the visible organization, official competences, procedures codified by texts.

However, this concern for form – which lawyers often deplore as being absent from the analyses of non-lawyers or at least neglected by them – has one drawback: that of hiding for the observer many aspects of the institutional dynamics in which parliament is almost irresistibly caught and which written law cannot fully normalize. This problem is almost invincible since the legal organization of parliaments as it results from constitutional writing is dependent on a (differentiated) history, on various contingencies (the vagueness of the mental representations of the drafters of written constitutions in particular). Consequently, some aspects of the formal legal framework of a constitution are not always fully consistent with the effective place of parliament in a constitutional system, at least not in parliamentary systems of government (Meyer, 1989; Avril, 1972). And since lawyers tend to essentialize forms, there is often a gap, even misinterpretations that are sometimes profound, between what we must call the "reality" of government systems.

7.3 MISUNDERSTANDINGS ABOUT PARLIAMENT IN THE CONTEXT OF THE DOGMA OF THE "SEPARATION OF POWERS"

Since the beginning of liberal constitutionalism, Parliament has been the subject of a serious misunderstanding among lawyers and, before them, among political elites: it is (almost) always equated with "legislative power" and, implicitly, almost reduced to it. This is the case for a very large number of former and contemporary lawyers. This is also sometimes the case with the constitutional texts themselves. This is an unfortunate mistake, a legal, political and practical error. It distorts some of the lawyers' analyses of parliament.[11]

7.3.1 The Reductive Assimilation of Parliament into "Legislative Power" by Constitutional Texts

This misinterpretation dates back to the end of the eighteenth century with the first republican constitutions in North America, which were anxious to ensure the autonomy of the

assemblies vis-à-vis the Executive. For example, the 1780 Massachusetts Constitution, which served as a model for the United States Constitution and whose Chapter I title is *The Legislative Power*, opens with a first article stating that "The department of legislation shall be formed by two branches, a Senate and House of Representatives". Thus, although the Governor has in this Constitution a veto over all resolutions (inclusive on legislative matters) of the chambers, it is a suspensive veto, which can be lifted by a two-thirds majority vote in each chamber,[12] and, moreover, the work of both chambers is not limited to the making of laws. Similarly, the 1787 Federal Constitution of the United States of America refers to Congress as the "Legislative Branch" (of the Government), despite the existence of the presidential veto (suspensive) and numerous control prerogatives for the benefit of both chambers.

The French Constitution of 1791 follows the same logic, with a variety of juxtaposed formulas: the single assembly is sometimes referred to as "the Legislative Body", sometimes as "the National Assembly", sometimes as "the National Legislative Assembly", while the King, nevertheless also referred to as a representative, has a suspensive veto. It is therefore not surprising that the radical Republican Constitution of Year I (1793) refers to the single assembly as the "Legislative Body", although it exercises powers other than the drafting of the law (see Article 55 on the governmental functions of the assembly, which it renders in the form of "decrees").[13]

In England, on the other hand, this mistake had not been made, even in the Republican era.

The 1653 *Instrument of Government* of Cromwell stated that "The supreme legislative authority of the Republic of England, Scotland and Ireland and the dominions thereunto belonging, shall be and reside in one person and the people assembled in Parliament"; it is specified that "the title of such person shall be Lord Protector", the latter having a right to sanction legislative texts voted by the assembly, but without an absolute veto (Article 24).

Subsequently, it is the constitutions of (almost) all the limited or dualistic monarchies of the nineteenth century from the French Constitutional Charter of 1814 onwards that correctly set out the division of "legislative power" between the monarch and the chambers, given that the former had the right of initiative – which was then generally denied to deputies, at least until 1830 – and the right of sanction (involving an absolute veto).[14]

A turning point occurred with the advent of republics in Europe, whose texts, in the American style, simplified the formula: thus the French Constitution of 1848 (Art. 20): "The French people delegate legislative power to a single Assembly" or even Article 1 of the (constitutional) Law of 25 February 1875: "Legislative power is exercised by two assemblies, the Chamber of Deputies and the Senate".

This inflection could be allowed because, from now on, legally, the members of the assemblies had been granted the right of legislative initiative and, in most cases, the monarch's right of sanction had not been transposed as such to the republican head of state. Only a suspensive veto remained, at best, and the power to promulgate the law, an "executive" act by nature, according to theory, was supposed to be a related power. But the misinterpretation was deeper: as the Swiss jurist Bluntschli (1881, p. 42) pointed out: "Most modern monarchies also attribute legislative power to the king and the chambers. It is different in the modern republic; the government, at least in form, does not contribute to legislation, a principle born of a false understanding of the distinction of powers, the taste of democracy for assemblies and its mistrust of any strong government".

Subsequently, the majority of republican constitutions state this assimilation of parliamentary chambers to the "legislative power" (or legislative function), even though on the one hand the government is explicitly endowed with the right to propose the law and on the other hand these assemblies were given powers other than legislative powers.

The only exception at the time was the Finnish Republican Constitution of 1919, which more accurately stated (Art. 2 (2) (2) (2): "Legislative power is exercised by the Diet jointly with the President of the Republic". The latter was granted the initiative of the laws in conjunction with the deputies and had a suspensive veto, which could be overcome after new elections. However, the formula was amended in the new version of the Constitution in 2000 in favour of reducing it to Parliament ("Legislative power is exercised by Parliament", Art. 3 (1)); the presidential veto can now be immediately overcome by a simple majority (Art. 77 and 78).

7.3.2 The Reductive Assimilation of Parliament into "Legislative Power" by Political Thinkers and Theorists

This semantic reduction is rooted in the writings of political theorists who prepared the lawyers' thinking. In this respect, it is important to note that the authors (past and present) do not always distinguish clearly between organ and function, so that the meaning of their developments is sometimes difficult to decipher.

Already Locke and Montesquieu, although both follow the principle of the balance of powers according to which the head of state, holder of the "executive power", must participate in the legislative operation,[15] sometimes use the shortcut consisting in designating the elective assembly as a "Legislature" or "Legislative" (Locke[16]) or "legislative body" (Montesquieu[17]). Rousseau is no more precise on this point. The Federalist Papers themselves are ambiguous.[18]

We know how much the French revolutionaries, from 1789 onwards, were entirely imbued with this idea, which obviously found its formulations in the 1791 Constitution (and this, even though the King had been recognized in extremis as a representative, Title III; Art. 2, 2nd para.) and the following republican constitutions. Even Monarchians like Mounier or Clermont-Tonnerre, although they are in favour of giving the King an absolute veto in legislative matters, sometimes allow themselves to use "legislative bodies" to designate the assembly.[19]

Similarly, even Necker, although being an excellent connoisseur of the English Constitution, refers to the British chambers as the "Legislative Power (or Body)", even as he devotes lengthy developments to the King's role in the exercise of the legislative function (Necker, 1792, chap. IV, p. 29). Benjamin Constant, if he speaks for a time of "representative power" to designate the chambers (Constant, 1814, Chapter IV), also uses the term "Legislative Power" (Constant, 1815), even though he admits the King's veto (absolute in the French constitutional Charter of 1814) and that he had noted the difference in the definition of Parliament between France and England (see above, section 7.1).[20]

As the French constitutional law scholar Charles Lefebvre (1882, p. 120) observed: "These expressions of legislative and executive power have become part of everyday language and constitutional style, according to Montesquieu's own distinctions. But it is curious to see how these terms have been used to the point of abuse, without remembering their definitions."

This way of thinking obviously stemmed from the passion of the men of that time for the law and their conviction that everything or almost everything could be reduced to the issue of general rules, to the point of neglecting the other tasks of a deliberative body.

But, above all, there was a tendency to give this thought an even greater princely dimension. It dates back to the beginnings of the French Revolution: Sieyès, a great dogma maker, stated that

> the public establishment is a kind of political body which, like the body of man, has needs and means and must be organised in more or less the same way. It must be endowed with the ability to want and to act. The legislative power represents the first, and the executive power represents the second of the two faculties.[21]

Translated from the function to the organ, this logic could seem unstoppable,[22] will-power coming necessarily before action. But, Lefebvre (1882, pp. 120–21) rightly objected, "there is no point in invoking the beautiful comparison of the head and arm if they are separated by placing them in separate beings. [. . .] To govern [. . .] is to lead [*Gouverner, c'est diriger*]. To lead, you have to be willing as well as able to act".

Carré de Malberg was one of the few learned jurists to devote substantial developments to Parliament within a very complex general theory of the State (and the law), based on a sophisticated theory of representation and the distinction of powers. But he builds much of his theory on a literal (and therefore distorted) analysis of the formula in Article 1 of the law of 25 February 1875 attributing to the two chambers the "legislative power".[23] He contests, for example, that the rights of legislative initiative and promulgation conferred on the President of the Republic make it possible to consider that he participate in the exercise of the legislative function (Carré de Malberg, 1984, pp. 2–3 and p. 184). Moreover, he claims to be based essentially on French positive law (of the Third Republic), so that his thesis cannot be completely generalized.

Thus, in French legal doctrine and, generally speaking, in the countries influenced by it (on the European continent or beyond), this false (because it is excessively simplistic) idea prevails to this day: parliament would be "the legislative power".

7.3.3 Why Parliament is Not "the Legislative Power"

Despite the importance of the work that has demonstrated the falsity and disadvantages of the idea that parliaments could be reduced to "legislative power" (Le Divellec, 2009), much of the legal doctrine, constitutional texts and common opinion continue, with stubborn consistency, to support it more or less openly.[24] Undoubtedly, this position is relative because everyone is obliged to agree that assemblies also exercise powers other than purely legislative powers – which must also be accounted for – and, in the best of cases, will admit – albeit with lip service– that the executive power is involved in the exercise of the legislative function (even in the United States, although under very different conditions than parliamentary systems). We are therefore dealing with a case of oversimplification, so gross in fact, that it can lead to serious errors of substantive judgment, and in particular to misunderstanding the reality of parliamentary law and life. It is based, on the one hand, on the questionable premise that all state functions could be subsumed under the legislative function on the grounds that it lays down general rules, and, on the other hand, on an essentially ideological position, expressing a mistrust, once deep, now more diffuse,

towards the bodies themselves improperly called "executive". This is why it is above all the republican constitutions that have ostensibly displayed this reductive formula . . . even though they also legally attributed competences to the government and/or the Head of State in the exercising of the legislative function.

Behind appearances and reductive speeches, it is important to reiterate that under strict law, bodies other than parliamentary assemblies are always involved in legislation. In addition to the hypothesis, made in some States, of the institutionalized intervention of the electorate (through popular initiative and referendum) to adopt the text of the law, it must be recognized that the government and/or the Head of State, through the right of initiative, through the presence (notably of ministers) in the deliberations in parliament, sometimes by their right to propose amendments[25] or by various procedural prerogatives, are in law and in fact co-legislators, and that finally the executive intervenes at the end of the parliamentary process at least in the form of promulgation, necessary for the legal perfection of the law.[26] Therefore, to claim that assemblies are the sole legal authors of the law is a figment of the imagination.

The practical evolution of liberal constitutional systems, as a result of the expansion of the role of the State, would in any case confirm the need to recognize the need for the government to play a leading role in legislation, particularly in the logic of parliamentary government (Lauvaux, 1993).

7.3.4 Parliament as a "Deliberative Power"

Maurice Hauriou, an original but isolated spirit, was one of the few authors in legal doctrine to sketch a real thought on parliament in the limited framework of a textbook. If, he explains,

> legislative power is defined as the one who makes the law, defined by its function, subordinated to it, and soon the legislative power will disappear behind the legislative function. On the contrary, if we define legislative power as the one who deliberates, we define it by its mode of operation, we recognize that it has deliberative power that is not absorbed by the function of making the law, and that power remains above the function . . . (Hauriou, 2014, p. 349)

And further:

> We say "deliberative power", not "legislative power", although in this chapter it is the Chambers or Parliament. It is because we are concerned to characterize each of the governmental powers by its mode of operation of the will. [. . .] we define Parliament as a deliberative power, because deliberation is how it operates. The common name for Parliament as legislative power is that legislation is one of its functions, but it is not good to qualify a government power as one of its functions, because they are multiple. Parliament's sole task is not only to make laws, it is also responsible for overseeing the executive branch, and the mechanism of the parliamentary system proves that its oversight function is even more important, if possible, than its legislative function; it still has constitutional functions in the form of a National Assembly, and judicial functions in the form of a High Court of Justice. (Hauriou, 2014, pp. 469–70)

This way of thinking about Parliament is original and particularly interesting; it remains relevant even if the working methods of assemblies have significantly evolved since then, in particular with the increasing role of committees (the plenary and public session being not the only place for parliamentary "deliberation"). Hauriou is also one of the few

authors to sketch a detailed reflection on parliamentary control, which cannot be reduced to the instruments for bringing the government's responsibility into play.

7.4 THE WAYS OF PRESENTING PARLIAMENT IN LEGAL DOCTRINE

As we have seen, the legal literature on parliaments is relatively fragmented from a thematic point of view. On the one hand, there are fairly descriptive elements that are purely historical (generally limited to the national framework, enriched in the best of cases by a reminder of the English "prototype", but neglecting others' important experiences such as the ancient Swedish model). On the other hand, there are essentially theoretical but somewhat abstract considerations on the question of representation and, more rarely, that of the body; descriptions and analyses of positive law, which then vary somewhat according to the country, and finally fairly classic considerations on government systems.

The notion of representation occupies an important place in classical legal literature, but here we find a new ambiguity due to the fact that Parliament is not a priori the only constitutional institution that can be qualified as a representative. Nevertheless, it is through a reflection on the notion of representation that some eminent jurists (Esmein, Duguit, Carré de Malberg and, closer to us, Pierre Avril) have been able to establish the underlying reasons for the French conception leading to "parliamentary sovereignty".

But the question of representation may not be purely theoretical. Sometimes the constitutional court relies on a demanding notion of representation to justify some of its decisions (e.g. the German Federal Constitutional Court to require the Bundestag to take a position by voting on certain federal government initiatives when no text explicitly provides for it) (Morlok et al., 2016).

Another series of developments in legal doctrine on parliaments can be found in the study of political regimes (or better: systems of government), in particular the distinction between so-called "parliamentary" and "presidential" regimes. Parliament can then be re-situated in the overall institutional arrangement, seen in a dynamic way, in particular its relations with executive bodies (Le Divellec and Baranger, 2012). But the dominant literature then struggles to make the necessary differentiations to mark the diversity of constitutional positions between types of parliaments and their implications, in particular in the intertwining between government and assemblies in the exercising of the legislative function or the forms of parliamentary control of the Executive (but there are some notable exceptions: Wittmayer, 1928; Mirkine-Guetzévitch, 1937). It is here that the distinction between "parliament" and "legislature", sometimes used by Anglo-Saxon doctrine (see above), could usefully be used. In any case, the constitutional situation of parliament differs quite radically in a parliamentary system and in a non-parliamentary system. In the first case, parliament is only imperfectly separated from the government because of the legal and political solidarity that binds the two formally distinguished bodies (the "power-sharing" model, which has a whole spectrum of intensity depending on the country); in the second case, parliament's autonomy is much more important.

While the legal literature on this issue is extensive (but also a little repetitive, including in exaggerated schematizations), it is not uncommon for it to leave out fundamental questions about the role of parliament in the state (see below).

Similarly, it should be noted that it is rare for lawyers to use the conceptual opposition between "working and talking parliaments" (*Arbeits- und Redeparlamente*), inspired by German political thinkers (Karl Marx, Max Weber) and cultivated by the political science.[27]

Quantitatively, most of the legal work on parliaments is studies, essentially descriptive of rules and procedures, of a particular (national) case (Blachèr, 2012). In a very traditional way, the question of mono- or bicameralism, the mode of election, the status and mandate of parliament (in particular immunities), the internal organization (the governing bodies: presidency, bureau, in particular, internal formations: the different types of committees, political groups) and finally the decision-making procedures are mentioned, bearing in mind that a large part of these themes (Ameller, 1966), for further study, refer to more specific parliamentary law studies.

The scope of the legislative function in relation to regulatory power is then questioned; in relation to the "vertical separation" of powers (in the case of a federal, regionalist system or a decentralized State); or its relationship with law of external origin (international law, European law).

On all these questions, lawyers discuss a number of concrete legal problems that can be described as relatively "technical" (whether the parliament or one of its internal formations had the right to adopt a particular act, whether a particular procedure was respected, whether a particular standard was in conformity with a particular higher rule, etc.). These questions are numerous and occupy a large part of the activity of lawyers (Troper and Hamon, 2018). It is true that the growing involvement of constitutional judges in this area has increased the interest of jurists in formal and procedural matters and has, in a way, reinforced the tendency to view parliament as a body separate from the executive.

But legal doctrine (the scholars as well as the judges) almost always tends to deduce (implicitly) from the legal competences of assemblies the actual "power" they exercise, as if it could be assessed independently of the government, and as if any formal competence implied its actual exercise. Hence the recurrence of a speech deploring the "loss of power" of parliaments, especially in the case of European parliamentary regimes (see below section 7.5.3). From this point of view, the (misunderstood) "theory" of the separation of powers continues to influence legal doctrine's understanding of the effective dynamic interplay of institutions.

It is not without reluctance that lawyers sometimes refer to the place of political parties (and their extension within the Assembly: the parliamentary groups: Lemaire, 2019; Morlok et al., 2016) in the study of parliaments. This has progressed under the influence of the political current (although an eminent jurist such as Kelsen devoted an important essay to it after the inter-war years) (Kelsen, 2013), but most often remains hesitant and as if it were "stuck" on traditional legal analyses. Finally, it was also late and with difficulty that the legal literature examined the problem of the parliamentary opposition; it did so only from the moment when strict law began to attempt to formally recognize it (as early as 1905 in Canada, in 1938 in the United Kingdom, and only in 2008 for France).

7.5 DETERMINING THE ROLE OF PARLIAMENT THROUGH LAW?

As we have seen above, the legal approach, beyond its variants, gives a privileged place to questions of form. Lawyers usually think in terms of formal legal competence, assigned to each body by the constitutional texts. The latter themselves today have the particularity of being essentially technical and non-literary (unlike the constitutions of the seventeenth and eighteenth centuries until about American independence), so that they attempt to organize the distribution of powers by formulating it solely in terms of organs, legal skills and procedure. This is the case with regard to parliament.[28]

In doing so, constitutional texts remain largely implicit: the *raison d'être* of a particular body, within the constitutional order and its system of government, is only rarely explained. Under these conditions, lawyers (and more broadly observers) must intellectually reformulate the concrete role of such an institution (Meyer, 1989).

7.5.1 The Question of the Functions of Parliament

Thus, when assemblies have multiple powers, the doctrine (and sometimes the judges also) tries to group them into broader "functions". In most cases, the authors identify only two: the legislative function (which, as we have seen, generally fails to specify that it is not the monopoly of assemblies) and the control function of the Executive and/or the administration (which is divided into a wide variety of legal competencies). The texts of the formal constitutions have gradually reflected this way of thinking. Thus, since 2008, Article 24 of the French Constitution stipulates that "Parliament shall pass the law. It monitors the Government's action. It evaluates public policies". But such formulas do not give a full and satisfactory account of what a parliament is supposed to do.

Originally, on the contrary, the first modern constitutional texts of a technical (and not literary) nature, devoid of the (moreover illusory) ambition of completeness, had begun by simply stating the existence of deliberative assemblies, without explaining their functions. They simply (although sometimes at length) specified their composition and set out a number of their powers. The first was inevitably their participation in the drafting of the law (including budget approval or consent to taxes), which was considered essential at the time. The approval prior to ratification of the treaties (by the Executive) could also fall to them (as in the US Federal Constitution, but only for the Senate). In addition, there were early powers of appointment by assemblies (election of the governor, sometimes of judges or other officers) in the constitutions of young American states. Similarly, these constitutions provided for the function of holding executive officers (sometimes other officers such as judges) liable in the form of a distorted transposition of the British Impeachment mechanism. It was only later that broader and more elaborate control skills emerged, including questions or surveys. Subsequent constitutions (during the nineteenth and especially in the twentieth century) became more detailed.

It was for the doctrine to develop the question of functions, which could only be understood after a broader analysis than that resulting solely from the formulas of written positive law. Here again, a clear distinction must be made between the types of systems of government: parliamentary (by far the most widespread in the free world), "presidential" (American-style) and "*directorial*" (in the case of Switzerland).

From this point of view, it is to the Englishman Walter Bagehot that the most judicious and original presentation of the functions of Parliament is given (he reasoned for the British House of Commons but his analysis is valid *mutatis mutandis* for any political assembly, at least in parliamentary systems of government). The Victorian publicist, anxious to provide a dynamic and "realistic" analysis, going beyond the apparent forms of formal law, identified five functions (Bagehot, 1867, Chap. 5): the elective function (choosing the Prime Minister); the expressive function (expressing the mind of the people on all matters which come before it); the teaching function (teaching the nation what it does not know); the informing function (disclosing information to the people); and finally the legislative function (including the budgetary dimension), which it deliberately placed at the end of the list. This catalogue combines legal and sociological (or practical) considerations. Only the first and last functions are exactly translatable into constitutional law vocabulary (Avril, 1972, p. 46), except for the fact that, on the one hand, the elective function is not always legally codified and, in this case, underestimated by some jurists, and on the other hand, which Bagehot did not expressly formulate in his catalogue of 1867, the function of control in the sense of watching and checking the work of the Executive. But his conception about parliament contains several strong ideas that remain valid; three can be retained: parliament does not only fulfil a legislative function; the control function is multifaceted and must be differentiated, particularly in parliamentary systems; parliament carries out work that is partly invisible and not entirely formalized by legal rules (Le Divellec, 2012).

Legal doctrine, particularly in France, is usually reluctant to adopt Bagehot's catalogue (albeit with adaptations). Most often, as has been said, it simply takes over the pair of legislation and control (in this order). At best, it will also refer to the function of representation (or sometimes communication), but with reluctance because it is not really expressed in the issuance of formal acts.[29] This reluctance is probably due to the concern (at best) to give priority to the exhaustive presentation of the parliament's formal competences, which the presentation in terms of "functions", more general and inclusive, technically less precise, seems to neglect.

In any case, it should be considered that a sound constitutional analysis would be well advised to draw inspiration from Bagehot. It can even be argued that this is an imperative in the case of parliamentary systems, whose logic is more subtle and the articulation with the law more complex than in non-parliamentary systems.

The "elective" function, the designation (or legitimization) of the government, is essential; it is the specific mark of parliamentary systems when they have reached maturity (Le Divellec and Baranger, 2012). This is the ultimate (and, in some respects, logical) outcome of the principle of the government's political accountability to parliament, itself derived from the oversight function: as a result of the progressive victory of elective legitimacy over traditional monarchical legitimacy, the gradual recognition of the ability of assemblies to make ministers resign in the event of political disagreements should naturally lead them to force the head of state to appoint those who can lead the country's government. Both formal constitutions have been delayed (for contingent reasons or constitutional prudence: formally respecting the king's prerogative or allowing the republican president a certain influence) in formalizing this function (Le Divellec, 2009). Some of them have sometimes done so by imposing a vote of confidence prior to the formation of the cabinet. They have definitively normalized it by prescribing the direct election of ministers (or at

least the Prime Minister) by the assembly elected by popular vote. This was the case from 1919 onwards (German Länder, Austria in 1920, Ireland in 1937, France and Japan in 1946, Germany after 1949, and many others today). In other countries, since this function is not codified by a legal procedure, it is implicit (United Kingdom, Netherlands, Austria since 1929), or it is simply hidden by the actors and the dominant legal doctrine (France of 1958). This function, "the most important of all" (Bagehot), is "the great task of Parliament, by which all its activity is measured" (Wittmayer, 1928, p 87). Undoubtedly, due to the advent of organized and disciplined political parties, this function seems to be more often than not a formality (since it ratifies the "verdict" apparently handed down by voters when a clearly defined majority is clearly designated). However, it is because this function exists constitutionally and, in some countries, legally, that it virtually confers this capacity to appoint voters. Parliament therefore remains the essential intermediary for this democratic legitimization of the government in a parliamentary system. It then has profound consequences for the dynamics of the relationship between parliament and government, both in terms of legislation and government control.

The legislative function in which parliament participates is, all things considered, no longer as fundamental in parliamentary systems: indeed, it is logically the cabinet, brought to power by the confidence of a majority in parliament, that is responsible for formulating the main legislative programme that parliament will have to discuss. As a creature of the majority, the cabinet's mission is to direct and give impetus to parliamentary work, including the preparation of draft legislation. The political solidarity that usually exists between the ministry and a fixed majority in principle stems from this institutional logic (which explains, in turn, the relevance of official recognition of the opposition), which leads to the parliament usually countersigning the projects of the government executive, sometimes after concession or compromise amendments. The logic of parliamentary government therefore makes it illusory to assume that the entire parliament works independently of the government. It must even be considered that a "(parliamentary) parliament" (as opposed to a "legislature") is in reality only imperfectly an autonomous institution, since the government executive is placed within it (as the British definition of Parliament mentioned above puts it nicely) and plays a major role (Le Divellec, 2009).

In contrast, in the American system of strong legal independence between the Executive and Congress (in particular the organic "partitioning" which implies that the agents of the Executive do not participate in the debates of the Chambers), the latter enjoys greater autonomy to legislate, even if means of reciprocal influence with the President exist (notably the veto) and play in favour of permanent negotiation (by informal means), failing which the system may be blocked. On the other hand, Congress is in a better position to actively control the administration since, in a foreign relationship with the presidency, it is not structurally linked with it. In other words, the necessary interactions between the American Executive and Congress take place essentially organ to organ, externally if you will, rather than being largely internal (especially in the relations between the cabinet and its majority) in systems that espouse the logic of parliamentary government. In a way, the logic is somewhat comparable to that of the United States operating as in Switzerland's *directorial* system, which is not based on solidarity between the Federal Council and the parliamentary chambers (even if ministers participate in parliamentary debates), with the exception that the rulers are placed under the restriction of popular votes.

7.5.2 Parliament and the Direction of State Politics

The dynamic function-based approach already provides a better understanding of Parliament's role, particularly in parliamentary systems. But we must go further and place parliament back in the overall functioning of the constitutional order.

The current presentation that parliament participates in the legislative function and controls the action of government goes back to the origins of modern representative systems but does not do justice to the true constitutional place it acquired with the advent of democracy.

Legal (republican) doctrine, of course, has sometimes been tempted to go further by affirming a dominant role for parliament within the constitutional system. Thus, for example, Kelsen stated that "Parliamentarism is the formation of the decisive state will by a collegial body elected by the people on the basis of universal and egalitarian, i.e. democratic, suffrage and taking its decisions by majority vote" (Kelsen, 2013, p. 48, my translation). And some constitutional texts go so far as to affirm that "the parliament is the supreme organ" of the State (e.g. Art. 41 of the 1946 Constitution of Japan). Such presentations are questionable, to say the least, because the relationship between legislative assemblies and government bodies cannot usefully be analysed in terms of a strict hierarchy, as can be the case within an administration (Le Divellec and Baranger, 2012). Rather, it is a complex and multifaceted cooperative relationship that characterizes these relationships, which cannot be fixed and must be assessed in a relative and variable way. The effective balance between a parliament and a government is a political, non-legal issue (Mirkine-Guetzévitch, 1937), dependent on a number of contingent factors: sometimes a parliamentary majority will succeed in imposing its views on the cabinet, sometimes it will be dominated.

In contrast to the analyses in terms of hierarchy, there is, particularly in the German legal literature, a relevant effort to redraw the problem of parliamentary assemblies. This places particular emphasis on the idea that the direction of the State is not and cannot be the monopoly of an organ but belongs to Parliament and the government in cooperation, through a shared exercise not only of the legislative function but also of other legal acts, thus establishing a kind of co-management of the direction of the State (Wittmayer, 1928; Friesenhahn, 1958).

The Federal Constitutional Court of Germany itself has clearly described (in particular in its judgments of 1982 and 2005 on the dissolution of the Bundestag) the intertwining dynamics between parliamentarians (in particular the majority) and the government. But it is rare for constitutional judges to be able to formulate such a relational dynamic, which implies going beyond the exclusively formal approach that they generally prefer.

7.5.3 The Problem of the Tension between Legal Rules and the (Concrete) Reality of Parliaments

While the science of constitutional law demonstrates a certain capacity for precision in the presentation of formal rules relating to parliaments and their competences, it has structural difficulties in grasping the essence of what is really happening in parliament. This is not only because relatively descriptive studies on assemblies, particularly in constitutional law textbooks, still dominate. But it is also because of this long-standing difficulty that

legal science has in clarifying its discourse on the nature of law and articulating it to the world of facts (Eisenmann, 2002). However, it is undeniable that most constitutional lawyers do not confine themselves to a pure description of the legal norms in force but include to a certain extent "practice" or, better still, the concrete application of the norms, even if it is often in a succinct manner. But, more deeply, the treatment by lawyers of the tension between formal legal rules and the reality of parliaments suffers from an inadequacy of concepts and theories, often based on erroneous or simplistic assumptions (cf. section 7.3 above), with their purpose, which must be the overall meaning of the constitutional order, more precisely its system of government. However, this is not reduced to a juxtaposition of organs.

Consequently, the legal literature readily repeats themes that are very commonplace: modern parliaments have become "registration chambers" for the wishes of the Executive; their function of control over the Executive is weak or even non-existent, particularly because of the discipline of majority parties; the fact that the fall of governments following the vote of a motion of censure or the rejection of a question of confidence officially raised is interpreted as a lack of political responsibility (Parodi, 1970).

On the first point, we have seen above (section 7.1) how the logic at work in all parliamentary systems irresistibly leads to placing the concrete exercise of the decision-making in the government–parliament relationship (or at least its majority). In this regard and more generally, the effective (i.e. political) balance between a government and an assembly cannot be deduced primarily and automatically from the formal "powers" (i.e. legal attributions) that the strict law confers on them respectively: it is necessarily a political question. The government's leadership (which varies in intensity) over parliamentary operations, while "natural", is only slightly or not at all formalized by law and difficult to measure for traditional legal analysis. It may be added that most of the decision-making processes have long since (if not always) shifted from the public session to the informal processes, with the result that the very legalist Kelsen himself had noted: "in modern democracies, a very important part, although not perceptible from outside, of legislative work takes place, not in parliamentary procedure, but in the government, which must not make less use of the faculty of direct and indirect initiative than in the constitutional monarchy" (Kelsen, 2013, p. 52).

On the second point, it can be argued that speeches of lamentation implicitly reduce political responsibility and control their negative and spectacular aspects. They ignore, on the one hand, the fact that any newly constituted government (after new general elections or following the resignation of the previous one) proceeds from an anticipation of responsibility and, in reality, a pure application of the elective function. And, on the other hand, they ignore the fact that the majority generally exercises co-direction and regulatory control, according to processes that are not always visible from the outside (Le Divellec, 2004). As for the discipline of a majority, it undoubtedly hinders the sanctioning of a government measure or a minister on more than one occasion, but it is precisely the support function that, in the institutional logic of parliamentarism, it is responsible for.

While constitutional law as a body of rules fulfils its essentially formalized function of supervising the parliamentary institution, it cannot claim to set in a perfectly explicit and immutable way the dynamic within which, in the interplay of multiple, above all political interactions, the very life of this institution takes place. Nevertheless, it is incumbent on

the science of constitutional law to consider this subject of study fully, sometimes even without referring entirely to the constitutional judge whose office primarily consisted in resolving concrete disputes. The importance of constitutional law in the study of parliaments is, in short, undeniable. But it is important for contemporary lawyers to deeply question their thinking about political institutions and, in particular, parliament.

NOTES

1. On the other hand, there may be particular legislative bodies that are not strictly related to the idea of a parliament while performing common or neighbouring functions, such as the German Bundesrat (Le Divellec, 2004, pp. 486 ff.) or institutions such as the Economic and Social Council.
2. Advocating for the creation of a "European Parliament", Saint-Simon was one of the first to use it in 1814 (as was the expression "parliamentary government"), but he was isolated (Saint-Simon, 1925). The famous *Staatslexikon* led by the German liberals Rotteck and Welcker (1st edn 1831, 3rd edn 1856–66) does not include a specific entry to "parliament" and refers to England and the continental notion of estates (*Stände*). The Germans Friedrich Bülau and Friedrich-Julius Stahl used it in 1833 and 1845, but they were not at the time much followed. It was rather the adjective "parliamentary" that gradually spread from 1830 onwards (see Boldt, 1978).
3. In particular, Article 5: "Parliament shall consist of the National Assembly and the Council of the Republic".
4. Undoubtedly, in the common language, a British person today will think of the House of Commons when they speak of "Parliament", but the fact remains that the trialistic definition remains the only legally correct one.
5. This does not prevent the lower house from being generally called, in these states, "Legislative Assembly" (even in Quebec until 1968 – which then adopted the very French title Assemblée nationale) and the upper house "Legislative Council".
6. Commenting on the French Charter of 1814, he observed: "Seeing the two deliberative branches of the legislature, referred to as Chambers, comparing the elevation of their role with their name, one cannot help but feel a painful disproportion. England has not adopted it curtly like us; moreover, the word which in English corresponds to our designation of the Chambers, has a broader meaning and presents a more noble image; there is even in English usage an idea of order and ensemble; because it recalls a total edifice, instead of in France we have stopped at the designation of its fraction. [. . .] In France, on the contrary, the word, the noun that expresses the union of the three powers, is entirely missing" (Constant, 1829, vol. II, chap. XI, pp. 121–2).
7. A notable exception at Carré de Malberg (see below note 23).
8. It should also be noted that in Germany, the legal literature devotes a great deal of space to the "Kommentar" (article-by-article commentary on a code or a formal constitution, in this instance the German Basic Law), which does not lend itself well to an overall analysis of Parliament as an institution but focuses on the particular points of formal status and powers.
9. The only comparative study of parliaments in the world, in French, carried out by Ameller (1966) under the leadership of the Inter-Parliamentary Union, is mainly a synthesis of legal rules, not a true critical and theoretical analysis.
10. Parliament has gradually been able to "get out of university purgatory by taking the paths of political science whose methods favour the system over the institution, functions over procedures, behaviour over norms", noted Avril and Gicquel (1988, pp. viii–ix)as a preamble to the first manual on Parliamentary Law published since the 1950s.
11. Thus, in reality, non-lawyers are involved as well: they commonly refer to *legislative elections* instead of parliamentary elections, and the Political Science has developed *Legislative Studies* devoted . . . to parliaments but not limited to their role in legislation.
12. Unlike its predecessor, the Pennsylvania Constitution of 28 September 1776, which, being "radically" democratic, did not institute a veto for the Governor and provided that "The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania". (Section 2).
13. At the same time, however, the stillborn Constitution of the Kingdom of Poland (1791) states in Chapter VI: "The Diet or the Legislative Power", but the situation is different from France when the King presides over the upper house (with the right to vote in the event of a tie), called the Senate, which exercises a suspensive veto on the legislative texts adopted by the lower House (Chamber of Deputies).

14. One exception is the Constitution of the Kingdom of Norway of 1814, which was particularly advanced for the time, Art. 49 of which states: "The people exercise legislative power through the so-called Storting diet, which consists of two chambers, the Lagting and the Odelsting".
15. So at Locke's: "In well-regulated States, where the public good is considered as it should be, the Legislative Power is placed in the hands of various persons, who duly assembled, have the power to make laws (in well ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of various persons, who duly assembled, have by themselves, or jointly with others, a power to make laws)" (Locke, 1690, chap. XII, § 143).
16. The versions differ in English. Locke seems to have used both words. "In some States where the Legislature is not always up and running, and where only one person is vested with executive power, and also has its share in the Legislature . . . (In some commonwealths, where the legislative is not always in being, and the executive is vested in a single person, who has also a share in the legislative)" (1690, chap. XIII, § 151). It should be noted that some French translations have translated the English Legislature as "legislative assembly".
17. "The legislature must not assemble itself. [. . .] It is therefore necessary that it is the executing power that regulates the time of holding and duration of these assemblies [. . .] If the executing power does not have the right to stop the enterprises of the legislative body, it will be despotic . . ." (Montesquieu, 1748, Book XI, chap. 6).
18. In particular in letter no. XLVII (Madison) (Federalist, 1788).
19. For example Mounier, Speech on Royal Assent (*Discours sur la sanction royale*), 5 September 1789 (*Archives parlementaires*, vol. VIII, pp. 554–64, cited in Furet and Halévi, 1996, pp. 390–95).
20. In the same sense: Macarel (1833) and Berriat Saint-Prix (1851, p. 346).
21. *Préliminaires de la Constitution. Reconnaissance et Exposition Raisonnée des Droits de l'homme, Juillet 1789* (Furet and Halévi, 1996, pp. 320 ff.).
22. This distinction between will and action became almost another totem. Berriat-Saint-Prix, in particular, takes this into consideration (1851, p. 338).
23. "For according to Art. 1 [of the law of 25 February 1875], there is no legislative power except in the Chambers. [. . .] the legislative power begins and ends in them" (Carré de Malberg, 1984, p. 3). And yet, he writes later: "The texts are careful not to reproduce the previous terminology which, by applying the name Legislative Body to parliamentary assemblies, implied that these assemblies have a special function of making laws. Today, when the Constitution speaks of 'Chambers', it marks, by this term which no longer refers to their functional competence, that our parliamentary assemblies are no longer only 'Legislatures', as in America, because they also have control over government activity" (Carré de Malberg, 1984, p. 198).
24. Parodi had previously noted the permanence of the conception reducing Parliament to legislative power in French doctrine and political elites (Parodi, 1970).
25. Some constitutions attribute it *ex officio* to ministers (e.g. Art. 44 (1) of the 1958 French Constitution, but not the 1946 French Constitution, nor the German Basic Law). If not, it is as a Member of Parliament that the minister, if he or she has such a mandate, can table amendments.
26. Troper and Hamon (2018, §. 117 and §. 130) are of the few (if not the only) French authors to assert that the executive body may be a "partial legislative body". However, the conditions they impose on this recognition are excessively restrictive (the Executive must have an absolute right of veto or monopoly in the legislative initiative), which does not do justice to the functioning of contemporary systems of government.
27. The "*Working Parliaments*" would be assemblies that give priority to meticulous and technical work (legislative and control of the administration), especially by their committees, while "*Speaking parliaments*" give priority to oral confrontation in plenary public sessions. This distinction (prompted by a remark by Weber, 1994), which first concerns the styles of parliaments, inspired by the contrast between the British Parliament (speech) and the American Congress (work), has been particularly noted by German doctrine but, significantly, by the doctrine of political science rather than legal science (Le Divellec, 2004).
28. Numerous recent constitutions also establish a detailed catalogue of the legal competences of their deliberative assembly. For example, the 1976 Constitution of Portugal (Art. 161–5) or those of most Central and Eastern European countries since the 1990s (e.g. Lithuania, Constitution of 1991, Art. 67; Serbia, Constitution of 2006, Art. 99).
29. German legal doctrine, on the contrary, more readily emphasizes the function of representation (Meyer, 1989; Le Divellec, 2004). Moreover, the German Constitutional Court regularly relies on Article 38 of the German Basic Law ("The deputies of the German Bundestag . . . are the representatives of the people as a whole"), extrapolating considerably, to demand the express parliamentary legitimization (through votes) of government actions.

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