The French Premiership Saga

Constitutional Grey Area or Executive Aggrandizement?

Cyprien Fluzin

07.10.2024 doi: 10.59704/3e2d3a818f2882c4

Four months in, France's political roller-coaster has gone from confusing to confounding: from the shock of the far-right National Rally's (RN) victory in the European Parliament election in early June, followed by President Emmanuel Macron's risky decision to call a snap election for France's lower house of parliament (National Assembly), things got blurrier after the unexpected (relative) victory of the left – united behind the banner of a "new popular front" (NFP) – that triggered weeks of infighting as to who should take the reign of government, culminating with the (surprise) appointment of Michel Barnier – a well-known right-wing figure known for his role as EU chief Brexit negotiator, but also a member of the Republican (LR) party that had only come in fifth in the election. The designation, two weeks later, of a cabinet even further to the right has done little to appease tensions: some on the left have called it a "denial of democracy", the result of a "stolen election" and thousands of protesters rallied across France.

While the situation is still unfolding and could bring more surprises, what is certain is that the political saga of this past summer is already "one for the books" – perhaps especially the constitutional law ones, as another post recently pointed out.

Following a previous post in July, and taking a step back from the latest developments, this post looks back to some of the constitutional tensions the events of this summer have exposed. It argues that Emmanuel Macron's actions following the snap election, under the pretext of protecting institutional stability, have relied on a distorted reading of the French constitution. In addition to raising serious legal questions, these actions have also set worrying precedents that arguably fit in a pattern of "executive aggrandizement".

From electoral surprises to political impasse

The results of the July snap election took many by surprise and reshuffled the political landscape. While a hung parliament was expected, the RN's failure to earn a relative majority made some previously anticipated scenarios irrelevant – most notably, the prospect of mainstream parties uniting against the far-right and rallying behind a grand-coalition-style "national unity government" or a more "technical" government. As to the prediction that the election could herald a new era in France, with a stronger and more influential parliament, it seems more uncertain than ever.

Instead, following its surprisingly good results, and after six years in opposition, the left quickly ruled out joining any grand-coalition and claimed the premiership. Meanwhile, Macron's allies' stronger-than-expected performance gave them hope of retaining power, paving the way for a standoff between the two forces. As to President Macron, rather than appearing as a defeat, this showdown allowed him to position himself as a figure of reason and stability amidst the chaos of party-politics.

In retrospect, it increasingly seems that Emmanuel Macron's risky gamble and his uncompromising confidence may have paid off and that he – alongside future Presidents –could be the real winner. Most conspicuously because he seems to have gotten away with picking a Prime Minister and a cabinet much more in line with his beliefs and political agenda than a left-wing or RN one would have been. But perhaps more significantly because Emmanuel Macron's actions, and his justifications, have gone further in the interpretation of the powers the Constitution grants the President.

Constitutional "grey areas" and presidential discretion

After the election resulted in a hung parliament, Macron quickly observed that it was the demonstration that "no one won": not a single political force could claim the support of a majority of French voters, and any government other than a coalition would be a minority one.

In this context, even though the left had won the most seats by a fair margin (195 seats vs. 168 for Macron's "Ensemble" alliance and 125 for the RN) and claimed the right to have one of its own appointed as head of government – namely economist Lucie Castet – Macron disagreed. Pointing to the vague language of the constitution and the lack of historical precedent, the President made the argument that he had large discretion in picking the Prime Minister – and therefore in deciding the country's political direction.

In the absence of any prospect for a coalition backed by a majority in parliament, the practice in other parliamentary regimes lent credence to the left's argument that, as the largest faction, it should at least be the first to be called on to form a minority government. Most recently, this was what king Felipe VI did in Spain following the 2023 and 2019 elections.

However, in France, the matter fell in somewhat of a grey area. As already pointed out elswhere, the President was under no legal obligation to comply with the left's demand. Article 8 of the constitution notably only says that the President "shall appoint the Prime Minister" but provides no additional conditions, timeline, or guidance on whom to appoint.

Article 8 is similarly silent on the conditions surrounding the resignation of the cabinet, as well as on transition periods and "caretakers" governments. This is what allowed Macron to initially decline his cabinet's resignation, maintaining it with full prerogatives for a whole week. The President ultimately accepted Prime Minister Attal's resignation on July 16, after which his cabinet continued to handle the "day-to-day" business – a vague concept that is defined neither by the constitution nor any statute, therefore leaving the cabinet a wide margin of appreciation, which it has made liberal use of so far.

"Institutional stability" vs. democracy?

Emmanuel Macron pushed his interpretation of the President's role even further when, in late August, he explicitly declined to appoint the NFP's candidate Lucie Castets, and instead urged political parties to form a coalition that would, *de facto*, revolve around his own troops. To justify the decision, the President claimed that a cabinet led by Lucie Castets would immediately be censured by the National Assembly, thereby jeopardizing "institutional stability".

In his statement, the President invoked his role as "arbitrator" and guarantor of "institutional stability" to justify his refusal to appoint a left-wing Prime Minister, which intentionally echoed the constitution's Article 5 outlining the prerogatives of the President:

> *"The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State."*

When some saw his move as an attempt at keeping control over the cabinet at any cost, Emmanuel Macron, for his part, framed the matter as a constitutional one: in fulfilling his prerogative under Article 8 to appoint a Prime Minister, he implied, he needed to account for his duties under Article 5.

This argument was supported by some constitutional law scholars, while others pointed out that the constitution did not explicitly contradict him. The latter reasoning, however, is problematic: it suggests that the silence or the ambiguity of the constitution can justify anything insofar as it is not explicitly prohibited. By this token, Emmanuel Macron or his successors could, for instance, maintain a government that has been forced to resign for as long as they wish. Maintaining a "caretaker" cabinet that is unaccountable would certainly promote "institutional stability", but how about democracy?

Emmanuel Macron's decision, ultimately, to appoint right-wing Michel Barnier was similarly problematic. Barnier, though a personality perhaps more

prominent, experienced, and consensual than Lucie Castets, was not one who had been put forward by any party in Parliament. The new PM also belonged to a political force that had only won less than 8% of the National Assembly's seats (45). Though allegedly motivated by the calculation that Barnier's minority government could count on more support than a left-wing one (234 MPs in the best-case scenario, vs. 195 for the left), and the RN's unspoken consent not to (immediately) support a vote of no-confidence, Macron's top-down approach undoubtedly exceeded his role as "arbitrator".

Additionally, by ensuring that the government would stay on a center-right course, even though a majority of voters – whether they supported the left or the far-right – had evidently called for a change in power, the President may have further weakened popular confidence in France's democracy, jeopardizing, in the long term, the regime as a whole.

The constitution's different shades of grey (areas)

In reality, the presence of ambiguities or gaps in a constitution, as much as it may create "grey areas", does not imply that anything is permissible. In this case, I argue that both a literal and a holistic reading of the 1958 constitution suggest that the President's action may actually have breached France's basic law.

First, although Article 5 did give the President a role of an "arbitrator", its wording made it clear that it was merely a means to an end: that of ensuring the "proper functioning of public authorities" and the "continuity of the State". As such, these must be in jeopardy for the President's "arbitrator" role to kick in: he is not made a permanent "arbitrator" of Parliament's politics or of the choices made by voters. Additionally, and in any case, when he declined to appoint Lucie Castets, Emmanuel Macron was not "arbitrating" between two or more options; he was ruling out the only one put forward and instead seeking to impose his own.

Second, the August statement refers to "institutional stability" while the Constitution speaks of "continuity of the State". While the former is certainly a key element of the latter, both expressions are not synonymous. In fact, before it was incorporated in Article 5, the concept of "continuity of the State" originated in a principle of French law that related to situations where the continuity of essential public services or public order were at stake. Yet, none of this was involved here: even a rapid collapse of a left-wing government would not have caused mayhem in the country, it would have only returned to the prior situation of a caretaker cabinet.

Third, while Article 8 does grant the President wide discretion, the provision must be interpreted within the broader framework of the Constitution. Consequently, when he was delaying the appointment of a Prime Minister and a cabinet for two months even though the constitution entrusts them – not the President – to "determine and conduct the policy of the Nation" (Art. 20), lead the public administration and the armed forces, and organize France's "national defence" (Art. 21), Emmanuel Macron was, in fact, the one jeopardizing the very "continuity of the State", therefore failing his duty under Article 5.

Fourth, while a limited period of transition was most certainly warranted – and not unusual in other regimes – by maintaining the outgoing cabinet for two months, longer than ever before in the Fifth Republic, the President was *de facto* shielding it from any form of accountability before Parliament since the National Assembly could not dismiss a cabinet that had already been dismissed. In addition to tarnishing the legitimacy of some acts taken in that period, this situation could have arguably been said to violate Articles 20 and 24 according to which the action of the government is carried out under the control of Parliament.

Finally, by relying on the claim that the left would have been unable to survive a vote of no-confidence to justify his refusal to appoint its candidate, the President was speculating on a purely hypothetical vote and therefore exceeding his constitutional prerogatives and encroaching on that of the National Assembly to decide for itself whether or not to dismiss a new government. This way of speaking for Parliament while depriving it of the opportunity to express itself was perhaps the most problematic part of Emmanuel

Macron's reasoning, and a serious challenge to the principle of separation of powers.

Executive aggrandizement in disguise

Ultimately, it would be dishonest to claim that the situation France found itself in after the snap-election was an easy one, or that the left-wing NFP enjoyed an undisputable mandate to rule the country. However, conversely, it would be unreasonable to consider that the vague language of the constitution or the absence of explicit rules regarding the appointment of the Prime Minister gave Emmanuel Macron full discretion.

The best course of action, most respectful of the 1958 Constitution and of democratic principles, would have been for the President to appoint, first, the candidate put forward by the NFP, even if there was a risk that a cabinet led by Lucie Castets could collapse. In this respect, one could also point out that, if Emmanuel Macron was genuinely concerned with "institutional stability", nothing prevented him from urging his supporters in Parliament to refrain from backing a no-confidence motion against an NFP minority government, and instead encouraging them to oppose its policies through ordinary legislative tools. In such a scenario, a left-wing cabinet would have been forced to compromise in Parliament but could have remained in office and ensured sufficient stability.

More importantly, Macron's determination and justifications in dragging-out the appointment of a Prime Minister – whether it was motivated by a misinterpretation of the constitution or by political motives – and in maintaining a caretaker cabinet for as long as he did, as well as, ultimately, his decision to appoint Barnier, have set a precedent that could easily be weaponized in the future by an illiberal President faced with another hung parliament.

Overall, even though, on the surface, he hardly resemble the likes of Donald Trump or Viktor Orbán, Macron's actions increasingly seem to fit in a pattern of what political scientists call "executive aggrandizement" – i.e. the gradual expansion of its powers by the executive at the expense of other branches of government, and the weakening of institutional checks and balances as well as democratic safeguards – an early-warning sign of democratic backsliding. The fact that the French President has consistently justified his actions in the name of the Constitution only makes it more dangerous.

ABOUT THE AUTHOR

Cyprien Fluzin

Cyprien Fluzin is a researcher in Geneva, Switzerland, and adjunct lecturer at Sciences Po in Paris where he teaches international law and French law.

SUGGESTED CITATION

Fluzin, Cyprien: The French Premiership Saga: Constitutional Grey Area or Executive Aggrandizement?, Verfassungsblog, 07.10.2024, doi: 10.59704/3e2d3a818f2882c4.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20241008-010206-0.