

## **Comparing the Incomparable? On the Comparability of Regimes and the Double Value of Comparison**

Margit Cohn\*

All comparatists, even the greatest—and Professor Toniatti is certainly one of these selected few—are constantly aware that comparison may not be useful if the compared units are fundamentally different. In this comment I wish to suggest that arguments for incomparability are sometimes generated by anti-comparative sentiments, a sentiment which Professor Toniatti has clearly never adopted. The example offered here, that of comparing the relative powers of presidents (in presidential regimes) and prime ministers (in their parliamentary counterparts), shows that the argument of incomparability could lead to a misunderstanding, not only of the comparative exercise itself, but also of the units compared. Hence, comparison is a useful tool even for those who prefer to focus on a single system: it can clear the path for a novel consideration of the issue or arrangement discussed.

This comment draws on a study of the nature of the executive branch, which offers a distinct comparative element.<sup>1</sup> The book opens with the observation that few studies comparing the powers of the heads of executive exist; the hundreds of studies of the executive branch, both in law and political science, are almost entirely system-based. Comparative analysis, as well as the general theory of the executive branch, remain severely underdeveloped.<sup>2</sup>

The book freely compares the heads of the executives in the UK and the US. At first glance, the different structures of these two regime families should have

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\* Henry J and Fannie Harkavy Chair of Comparative Law, Faculty of Law, Hebrew University of Jerusalem. This comment is dedicated to Professor Toniatti, who kindly offered me to co-teach a three-day seminar for young scholars and doctoral students some years ago.

<sup>1</sup> This contribution draws on Chapter 1 of my forthcoming book, *A Theory of the Executive Branch: Tension and Legality* (OUP 2021).

<sup>2</sup> For comparative research and edited country surveys (limited in number but not in quality) (limited in number but not in quality) see Richard Rose and Ezra Suleiman, (eds) *Presidents and Prime Ministers* (American Enterprise Institute for Public Policy Research 1981); Ludger Helms, *Presidents, Prime Ministers and Chancellors* (Palgrave Macmillan 2005); Thomas Poguntke and Paul Webb (eds) *The Presidentialization of Politics* (OUP 2005); Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (OUP 2006). Some studies, essentially limited to the study of a single executive, dedicate a few pages to reference from abroad. Posner and Vermeule's, for example, is admittedly sketchy: Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP 2011) 170-174 (located in a chapter that is mainly concerned with the impact of international law on the US)..

deterred comparison between their respective executives.<sup>3</sup> Under the main variant of this argument for noncomparability, presidential regimes are designed to grant the head of the executive a stronger claim for power. Being directly elected by the people, presidents enjoy a unique political status and are directly accountable to the people, not to other government branches; the limited power of their removal (usually by impeachment only) further insulates presidents from the legislature and from regular politics; and, finally, presidents carry an institutional ability to direct government, which draws not only on their insulation from parliament but also on the constitutional grant of direct powers that do not need to rely on statute. In comparison, this argument usually goes, prime ministers are indirectly elected, and thus enjoy lesser political legitimacy; are reliant on parliament when introducing major policy, which renders them politically weaker; and are constantly under the threat of removal by a non-confidence vote in parliament, a force that sets an irremovable constraint on their power.

Although the recognition of differences between the two regime types is obviously not incorrect, this classic argument grants excessive attention to too few elements or variables. Essentially, the support for non-comparability focuses on two variables—election and removal of the head of the executive, although richer lists of categories have been forwarded.<sup>4</sup> Still, the degree of direct access of the executive to the legislative body has not been generally considered. Singly addressed, this factor seems at first glance to offer a second argument for non-comparability: prime ministers have direct access to parliament, rendering them politically stronger than presidents, who must rely on political channels to advance their agendas in Congress.

In fact, none of these factors should lead us to the incomparability conclusion. To demonstrate that parliamentary and presidential regimes do not fall neatly into two categories of relative executive power, I rely on George Tsebelis' influential 'veto player' theory.

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<sup>3</sup> I set aside premier-presidentialism, or semi-presidentialism, the mixed regime created in the Fifth French Republic, as unnecessary for the coming analysis, which breaks down the dichotomy on the basis of function and politics. Under the analysis offered in this section, this sub-type of presidentialism can be placed on the offered continuum of relative powers, alike 'purer' regimes, according to relative power politics. On this regime type see Maurice Duverger, 'A New Political System Model: Semi-Presidential Government' (1980) 8 *European J Political Res* 165; Matthew Soberg Shugart and John M Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (CUP 1992) 23-24.

<sup>4</sup> For some of the work see Douglas V Verney, *The Analysis of Political Systems* (Compton Printing Works 1959) 17-56; Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (Yale University Press 1984) 68-74; Shugart and M Carey, *Presidents and Assemblies* (n 2); Juan J Linz, 'Presidential or Parliamentary Democracy: Does it Make a Difference?' In Juan J Linz and Arturo Valenzuela (eds) *The Failure of Presidential Democracy: The Case of Latin America*, Vol. 2, 3, 6 (John Hopkins University Press 1994); Arend Lijphart, 'Presidentialism and Majoritarian Democracy: Theoretical Observations (1994)' in Arend Lijphart, *Thinking about Democracy* (Routledge 2008) 141.

For Tsebelis, a veto player is 'an individual or collective actor whose agreement... is required for change of policy'.<sup>5</sup> Institutional veto players, government bodies operating in the political sphere under the constitution, may affect the heads of executive branches' ability to forward their agendas. Political parties can operate as veto players: for example, in coalition governments, heads of governments must acquire the agreement of all parties that are member of the coalition before moving ahead.

The interaction between the executive and the legislature in the context of the partisan composition of both branches suffices to show that parliamentary and presidential regimes do not fall neatly into two categories. On a spectrum based on the combination of structure with partisan politics, the strongest executive would be a prime minister who enjoys an absolute, or decisive, majority in parliament. Under this political climate, the removal power by a no-confidence vote is virtually eliminated politically.

The ensured majority in parliament is but one element. Prime ministers are the heads of the largest party in parliament, and sometimes serve as members of parliament; they thus have direct access to the speaker's chair and to the ongoing business of parliament. Furthermore, no-confidence votes usually lead to the dissolution of parliament itself and are therefore less attractive than envisaged. Hence, this structure offers the executive the strongest relative power.

Second on this spectrum of relative institutional dominance stands the president governing during shared-government terms. Presidents who enjoy a majority in both houses of the legislature are often presumed to hold the strongest relative power, but the insulation of the presidency from the legislature, which serves to buttress the office from undermining legislative pressure, is also a constraint on the president's ability to directly interfere in the legislative process. Prime ministers' institutional access to parliaments, enabling them to direct parliament's agenda, is missing. Therefore, this variant should be placed second in the spectrum of relative power.

Next on this spectrum are parliamentary and presidential bicameral regimes in which the executive enjoys a majority in one of the houses. Recent examples of this variant of divided government in a presidential regime include the 112th Congress (2011-2013), during which president Obama could rely only on the Democratic majority in the Senate, and the 116th Congress (2019-January 2021), the last Trump Congress, during which the Republican majority in the Senate was twinned by a strong Democratic majority in the House of Representatives. The structural constraints emerging under this configuration depend on the relative powers held by each of the houses. In this context, presidential regimes that grant the president a veto power over an opposing house, and further, insulate the office from removal by a no confidence motion, naturally offer more relative power than regimes that lack these features or at least the first feature, as in the case of parliamentary systems.

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<sup>5</sup> George Tsebelis, 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism' (1995) 25 *Brit J Poli Sci* 289, 301. See also George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002).

Further down the line are presidents that enjoy no majority in the legislature, as in the case of Bill Clinton's presidency between 1995 and 2001 and President Obama's term during the 114th Congress (2015-January 2017). Under this configuration, the legislature(s) are active and influential veto players. The head of the executive may invoke his veto power, if this tool is available, and can still rely on the legitimacy garnered from direct elections, but his dominance is obviously hindered by the extent of negotiations required to pass most initiatives through the legislature.<sup>6</sup> At their extreme, such contingencies have led to more than twenty 'government shutdowns', gaps in the continuing appropriation of Federal funding, the longest one to date being the thirty-five day shutdown in 2018-2019, during Donald Trump's presidency.<sup>7</sup>

This configuration still offers better options for executive dominance when compared to the weakest configuration, a parliamentary set-up under which the prime minister's party, despite being the largest in parliament, has no majority, and relies on either a multi-party coalition, or, in the most extreme version, heads a minority government. In such a case, the threats of a successful no-confidence motion, and, more likely, the regularity of mundane failures in passing reforms through parliament, are compounded by the constant threat of defection by rebellious members of parliament, or one or more coalition parties. The possible absence of a wielding sanctions in such cases would derive from the endemic weakness of such a government, and, decisively, by the constant threat of the overturning of government by a no-confidence motion. In the context of the cabinet, the prime minister may have limited control over his secretaries of state or ministers, since in such government coalitions, some ministers, sometimes even

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<sup>6</sup> Compare, eg President Obama's political ability to pass reforms through Congress during the 111th, 112th and 114th Congresses. President Obama enjoyed a majority in both houses of the 111th Congress, a majority that enabled, inter alia, the passing of the health-care reform law. Although the process was far from easy, with opposition within the Democratic Party not only lengthening the process, but also transforming some of its elements, when compared to the trials the President has encountered in the current Congress, this reform practically sailed through. Four major policy crises represent the hardships facing a president who has lost the majority in one of the houses of Congress. All were resolved at the eleventh hour, or beyond, by compromising on the original programs: the passage of the six-month 2011 federal budget, the increase of the nation's public debt, the 'fiscal cliff' near-debacle, and the resolution of the October 2013 government shutdown (On these events see Sheryl Gay Stolberg & Robert Pear, 'Obama Signs Health Care Overhaul Bill, with a Flourish', NY Times (23 March 2010); Carl Hulse, 'Budget Deal to Cut \$38 Billion Averts Shutdown', NY Times (8 April 2011); Jennifer Steinhauer, 'Divided House Passes Tax Deal in End to Latest Fiscal Standoff', NY Times (1 January 2013); Jonathan Weisman, 'Republicans Back Down, Ending Crisis over Shutdown and Debt Limit', NY Times (16 October 2013). Throughout, and more so during the two-house Republican Congress, President Obama's extensive reliance on unilateral measures (executive orders, memoranda and policy statements) presents yet another twist on the complexity of power politics.

<sup>7</sup> For analysis see Clinton T Brass, 'Shutdown of the Federal Government: Causes, Processes and Effects', Congressional Research Service 2013.

the more central ones, will necessarily belong to a coalition party rather than to the main party.<sup>8</sup>

In sum, as far as structure goes, the power sources and veto points that lead to domination differ across regime types, but power configurations cut across political regimes. Structurally, presidents are indeed more insulated politically than prime ministers, and are usually granted veto powers, but prime ministers are ensured direct access to parliament and domination of its processes. Thus, comparison cannot be rejected on simple structural grounds. More sensitive analyses are required, replacing the simplistic distinction between parliamentarism and presidentialism.

This exercise shows that once challenged by an argument for incomparability, a study of compared units can shed light on two seemingly conflicting insights. First, it may be argued that even within any one of these two regimes, incomparability exists, and is dependent on the ordering of power politics, which may differ in ways that renders each of these regimes, separately, impossible to consider as a unified power structure. Under this view, generalization itself should be suspect, and without it, no comparison is possible. On the other hand, one can deduce that too much emphasis on simplistic classifications may lead to a misunderstanding of the similarities that exist despite the differences. If under both regimes, the heads of the executive branch do in fact wield power as the dominant player in their polity, then comparison is not only viable, but can lead to a better understanding of the studied arrangement or concept. Indeed, in the case discussed here, executives in both regimes have played a similar dominant role, presiding over policy decisions, despite obvious difficulties. Comparison, under this view, is to be hailed not only as a tool for understanding the units compared, but should also lead to a better informed study, here, of the executive branch.

In sum, the breaking-down of the distinction into a spectrum of power-structures, depicted above, should not lead to the final rejection of any type of comparison. The retention of comparison is justified by the findings of sufficient similarities in the politics of both regime types. The democratic climate and structure, the similar function and logic of government branch action,<sup>9</sup> and the evident phenomenon of executive dominance in both presidential and parliamentary regimes, expressed *inter alia* in titles such as 'the Blair presidency',<sup>10</sup> all justify the continuation of such comparison. My analysis of the executive branch, then, spans both regime families, with full recognition of the possible variations of relative executive power.

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<sup>8</sup> On the political dynamics of coalition veto players see Tsebelis, 'Decision Making' (n 92) 302-305; George Tsebelis, 'Veto Players and Law Production in Parliamentary Democracies', in Herbert Döring (ed) *Parliaments and Majority Rule in Western Europe* (Palgrave Macmillan 1995) 83.

<sup>9</sup> For just a few examples see Tsebelis, 'Decision Making' (n 92) 292; Christoph Möllers, *The Three Branches* (OUP 2013) 111, 114.

<sup>10</sup> See Michael Foley, *The British Presidency: Tony Blair and the Politics of Public Leadership* (Manchester: Manchester University Press, 2000); Graham Allen, *The Last Prime Minister: Being Honest About the UK Presidency*, 2nd ed (Imprint Academic 2002); Rhodes (2007) (n 73) 96. On this phenomenon in the UK and beyond see Poguntke and Webb (2005) (n 4).

On a more general level, the lessons learned here are that at least within democracies, differing structures, formal and informal arrangements, histories and cultures should not deter comparatists from the exercise of comparison. And, finally, the fruits of such an exercise may also benefit those whose main interest lies in a single system.