

Kooperationswerke Beck - Hart - Nomos

# European Constitutions Compared

Bearbeitet von  
By Prof. Dr. Albrecht Weber

1. Auflage 2019. Buch. XVII, 221 S. In Leinen

ISBN 978 3 406 72923 2

Format (B x L): 16,0 x 24,0 cm

Gewicht: 628 g

III. Functions of the Head of State

Lithuania:	<ol style="list-style-type: none"> <li>1. Art. 84 para. 4: appointment of person who puts cabinet together.</li> <li>2. Art. 84 para. 5; 92 para. 2.</li> <li>3. Art. 58 para. 2</li> </ol>
Luxembourg:	<ol style="list-style-type: none"> <li>1. Prime Minister not provided for.</li> <li>2. –.</li> <li>3. Art. 74</li> </ol>
Malta:	<ol style="list-style-type: none"> <li>1. Art. 80: with majority of Parliament.</li> <li>2. Art. 81: resolution/majority of Parliament.</li> <li>3. Art. 76: with advice of Minister President</li> </ol>
Norway:	<ol style="list-style-type: none"> <li>1. § 12.</li> <li>2. § 22 (after opinion of Council of Ministers).</li> <li>3. –</li> </ol>
Poland:	<ol style="list-style-type: none"> <li>1. Art. 154.</li> <li>2. Art. 162.4: refusal to accept resignation.</li> <li>3. Arts. 98.4, 144.3 no. 1, and 155.3: shortens parliamentary period of office and orders elections</li> </ol>
Portugal:	<ol style="list-style-type: none"> <li>1. Art. 133 f in combination with Art. 187.1: after consulting parties, and considering the election result.</li> <li>2. Art. 133 g in combination with Art. 186.4, Art. 195: dismissal on grounds of reasons of state.</li> <li>3. Art. 133 a in combination with Art. 172: after consulting parties and Council of State, except first 6 months after election, last semester of President's period of office, during siege and exceptional situation</li> </ol>
Slovakia:	<ol style="list-style-type: none"> <li>1. Art. 102.1 letter g.</li> <li>2. Art. 102.1 letter g in combination with Art. 116.6; Art. 115 after no confidence motion.</li> <li>3. Art. 102.1 letter e</li> </ol>
Slovenia:	<ol style="list-style-type: none"> <li>1. Art. 111: right of proposal.</li> <li>2. –</li> <li>3. Art. 111: if proposal unsuccessful; Art. 117: confidence motion</li> </ol>
Spain:	<ol style="list-style-type: none"> <li>1. Art. 62 letter d in combination with Art. 64.1, sentence 2: with consent of Speaker of Congress</li> <li>2. Art. 62 d).</li> <li>3. Art. 62 letter b); Art. 115 on proposal of Minister President; Art. 99.5 dissolution of Congress after 2 months if no candidate having the confidence of Congress</li> </ol>
Sweden:	–
Switzerland:	–

The Netherlands:	1. Art. 43. 2. Art. 43. 3. Art. 64
Turkey:	1. Art. 104 b in combination with Art. 109.2 (2005). 2. The same: acceptance of resignation (2005). 3. Art. 104 a: decision about new elections: Art. 116: on failure of no confidence motion, as well as when Council of Ministers cannot be set up in time, after opinion of President of Parliament (2005).

### 5. Executive Functions

548 The executive functions which are reserved to the state President traditionally include the right of pardon, appointment to the highest offices and the power of military command.

549

Overview: Right of Pardon	
Albania:	Art. 92 letter b
Austria:	Art. 65.2
Belgium:	Art. 110: except for political personnel; Art. 111: for political personnel
Bulgaria:	Art. 98 no. 11
Croatia:	Art. 97
Czech Republic:	Art. 62 g
Denmark:	§ 24: Minister, only with parliamentary consent
Estonia:	§ 78 no. 19
Finland:	Sec. 58 para. 3 (3)
France:	Art. 17
Germany:	Art. 60.2
Great Britain:	–
Greece:	Art. 47: pardon and amnesty on proposal of Justice Minister, except for ministers and political delicts
Hungary:	Art. 30a.1 letter k with countersignature of the competent Minister
Iceland:	Art. 29
Ireland:	Art. 13.6
Italy:	Art. 79: Act of Parliament necessary; Art. 87: principle

III. Functions of the Head of State

Latvia:	Art. 84 no. 23
Lithuania:	Art. 45
Luxembourg:	Art. 38: except members of the government (Art. 83)
Malta:	Art. 93.1 (para. 2 for death penalty)
Norway:	§ 20
Poland:	Art. 139: except judgements of the Tribunal of State
Portugal:	Art. 134 f
Slovakia:	Art. 102.1 letter j and para. 2: for amnesty, signature of the Minister President, competent Ministers
Slovenia:	Art. 107
Spain:	section 62 letter i: except for members of the government
Sweden:	–
Switzerland:	–
The Netherlands:	Art. 122: pardon on recommendation of competent court
Turkey:	Art. 104.2 letter b) (2005)

<b>Overview:</b> <b>1. Appointment of Highest Officers of State</b> <b>2. Judges</b>	
Albania:	Art. 92 letters i and j, partly on proposal of Minister President/Art. 154. 2. Arts. 125/136/149 (with consent of Parliament)
Austria:	1. Art. 65.2 (a). 2. Art. 134: presidents of administrative tribunals on proposal of the federal government
Belgium:	1. Art. 107:
Bulgaria:	–
Croatia:	1. Art. 98 ambassadors, Art. 99: Council for Defence of the People, Art. 106: Presidential Council. 2. Art. 118: right of proposal for President of Constitutional Court
Czech Republic:	1. Art. 62 letters j–k: Members of National Council of Control/National Central Bank. 2. Art. 62 letters e + f in combination with Art. 84.2: constitutional judges
Denmark:	1. § 27: certain categories

550

Part X. Head of State

Estonia:	§ 78 nos. 11–14
Finland:	1. – 2. § 102: ordinary judges
France:	1. Art. 13.2: civil and military agents 2. Art. 56.3: 3 judges of Constitutional Council (CC)
Germany:	1. + 2. Art. 60.1: federal agents and judges subject to statute
Great Britain:	Yes
Greece:	1. Art. 46. 2. Art. 88.1.
Hungary:	1- –, 2. Art. 29 letter k: formal appointment of constitutional judges
Iceland:	Art. 20
Ireland:	1. Art. 31: certain ministers of the Council of State. 2. Art. 35.1
Italy:	1. Art. 87.7: state officials. 2. Art. 135; 1/3 of the members of the Constitutional Court
Latvia:	1. Art. 84 nos. 10, 13 and 14. 2. No. 11 in combination with Art. 112; partly only right of proposal
Lithuania:	–
Luxembourg:	1. Art. 35 2. Art. 90
Malta:	1. Art. 109: Public Service Commission. 2. Art. 96: with opinion of Minister President
Norway:	1. § 21: after opinion of Council of Ministers
Poland:	1. Art. 144.24–27: highest officials of various institutions. 2. Art. 144.17, 20–23: the presidents of the Highest Courts; Art. 194.2: appointment of president and vice president of Constitutional Court on proposal of the plenum of constitutional judges
Portugal:	1. Art. 133 lit. m – lit. p certain high positions at the Court of Audit; chief of staff; Council of State; General Advocate
Slovakia:	1. Arts. 102.1 letter h and 150. 2. Art. 102.1 letters s and t, Arts. 134.2 and 135: Constitutional Court; Art. 141 a (1) letter a): members of Judicial Council

### III. Functions of the Head of State

Slovenia:	2. Arts. 107 and 131: Judicial Council; Art. 163: Constitutional Court; right of proposal for both
Spain:	1. Art. 62 letter f
Sweden:	–
Switzerland:	–
The Netherlands:	1. Art. 131: mayor/commissioner of King. 1. + 2. Arts. 74.2 and 77: members of Council of State and Court of Audit. 2. Art. 117 and Art. 118 (judges), partly on proposal of 2 <sup>nd</sup> Chamber of States General ( <i>Hooge Raad</i> )
Turkey:	2. Art. 104.2 letters b and c (2005); Art. 104.2: 8 of 15 judges of Constitutional Court (2017/2019)

The functions of a more executive nature, which in some states are traditionally connected with the role of the head of state, include the power of military command, which admittedly can coincide with the right to declare war but is in no sense identical to it. The power of military command belongs to the Presidents in, for instance, Austria (Art. 80 B-VG: supreme command); the monarch in Belgium (Art. 167 § 1 BelgConst); the state President in France (Art. 15 FrenchConst); Finland (§§ 58 and 128 FinConst); Greece (Art. 45 GreekConst); Ireland (Art. 13 para. 4 IrishConst); Italy (Art. 87 ItalConst); Portugal (Art. 134 letter a PortConst) as well as formally the monarchs in Spain (Art. 62 letter h SpanConst); Luxembourg (Art. 37 LuxConst); Norway (§ 25 NorwConst); whilst other constitutions take up no position on this.

551

Overview: Power of Military Command	
Albania:	Art. 92 letter e and Art. 168 no. 2
Austria:	Art. 80 (supreme command), power with competent Minister
Belgium:	Art. 167 § 1
Bulgaria:	Art. 100.1
Croatia:	Art. 99 (supreme command)
Czech Republic:	Art. 63 c
Denmark:	–
Estonia:	§ 78 no. 16 in combination with § 127
Finland:	§ 58 in combination with § 128: supreme commander, involvement of minister
France:	Art. 15
Germany:	–

552

Part X. Head of State

Great Britain:	-
Greece:	Art. 45 head of army, but command for government
Hungary:	Art. 9.2 (supreme command)
Iceland:	-
Ireland:	Art. 13.4
Italy:	Art. 87
Latvia:	Art. 140
Lithuania:	Art. 140
Luxembourg:	Art. 37
Norway:	- § 25
Poland:	Art. 134
Portugal:	Art. 134 letter a
Slovakia:	Art. 102.1 letter k: signature by Minister President/competent minister necessary for decision (Art. 102.2)
Slovenia:	Art. 102
Spain:	Art. 62 letter h
Sweden:	-
Switzerland:	-
The Netherlands:	-
Turkey:	Art. 117.2 supreme command is represented by President, commander acts in name of President (2005/2017/19)

## PART XI GOVERNMENT AND ADMINISTRATION

**Bibliography:** Brunner, *Vergleichende Regierungslehre, Vol. 1*, Paderborn 1979; Frotscher, *Regierung als Rechtsbegriff*, Berlin 1975; Hennessy, *Cabinet*, Oxford 1986; Jennings, *Cabinet Government*, London 1959; Quermonne, *Le gouvernement de la France sous la V République*, Paris 1996; Schramek, *Les cabinets ministériels*, 1997 (broché); Lorenz von Stein, *Verwaltungslehre, Teil I*, Aalen 1865

### I. Government

The concept behind the German word *Regierung* (government) is derived from the Latin word “*regere*”, which also had the meaning of reigning for the Romans (e.g. *rem publicam regere*). In Germany the word “*regieren*” was in use from the late 13<sup>th</sup> century and describes overall sovereign state leadership.<sup>410</sup> Besides the concept of *regieren* (reigning), the concept of *gubernare* (to direct or control) was also used, which is still found today in English vocabulary as government or in French vocabulary as *gouvernement*. *Regierung* or government/*gouvernement* therefore simply meant leadership of the state in the functional sense. Since the 18<sup>th</sup> century, however, the comprehensive concept of *Regierung* (from now on translated as government) has been gradually narrowed and differentiated from justice, legislation and finally administration. Lorenz von Stein was the first to work out the independence of the government from the legislature, and he describes it masterfully when he writes:

*“The government must continually not merely execute statute law but also to a certain extent fulfil it. For this very reason that is the area where the government must develop its inward autonomy. This inward autonomy is what we call the spirit of the government, and the character of a government consists in the spirit in which it understands this power in relation to statute law – fulfilling it and in part replacing it.”*<sup>411</sup>

In the constitutional monarchy the distinction between (1) functional and (2) organisational and institutional government was not yet clear. Only in the second half of the 19<sup>th</sup> century do corresponding divisions of functions begin to develop. The organisational and institutional side of the concept of “government” also evolves more strongly with the development of the parliamentary government system, in the way in which, for instance, it finds entry into the Weimar Reich Constitution. Smend’s treatise on “Political power in the state subject to the rule of law and the problem of state form” in 1923 in which he proceeds from the differing word use in the concepts of government, administration and execution, and, employing comparative law, differentiates foreign (primarily French) theory and practice, can be regarded as groundbreaking. Smend orientates the concept of government to that of the administration,

*“because both areas are together the complementary halves of the whole scope of the state function, apart from legislation and justice. From this standpoint the government*

---

<sup>410</sup> The term was first used as far as can be ascertained by Emperor Maximilian I in “Ewiger Landfrieden” of 7 Aug. 1495.

<sup>411</sup> L. von Stein (1865), 133.

*is identified as the part of the area described which falls within the realm of politics in which the state determines and asserts itself and its character. The administration, on the other hand, is identified as the part in which the state serves other purposes or only creates the technical means for its political functions*".<sup>412</sup>

- 556 On the basis of the integration doctrine Smend has then defined the government area as special state activity. He later also emphasised the meaning of government as an integration factor. This doctrine has at any rate extensively influenced German state law doctrine, but can also be recognised – so far as is discernible – in Anglo-Saxon and French doctrine in a similar form under the concepts of government or *gouvernement* as the state activity of overall management.
- 557 Whilst the German Basic Law gives no functional attributions of the concept of government, in some foreign constitutions indications of this are at least recognisable.

### 1. Embedding in Constitutional Texts

- 558 Although the Basic Law has no functional description of tasks of the “government” (VI. The Federal Government, Art. 62 f BL), the Swiss Constitution has a relatively detailed description (Art. 180 SwissConst, Government Policy, para. 1: “The Federal Council determines the goals and the means of its government policy. It plans and coordinates state activities”); further descriptions of function are to be found for legislation and implementation (Art. 182), finances (Art. 183), relationships with foreign countries (Art. 184 paras. 1–3), external and internal security (Art. 185 paras. 1–4) as well as the special performance of certain competences (Art. 187 para. 1, e.g. supervision of the federal administration, amongst other things). Furthermore the function of the government is concretised in ordinary law when for instance the Federal Council is to work towards state unity and the cohesion of the country, and preserve federal diversity (Art. 6 para. 4 Government and Administration Organisation Act). It also follows from this article that the government function has priority over the other tasks of the Federal Council (Art. 6 para. 2 Government and Administration Organisation Act).<sup>413</sup> There is a contrasting example – similar to the German Basic Law – in the Austrian Federal Constitutional Statute (B-VG) which deals with the federal government under the third chapter (“Federal Execution”, A. Administration) and thereby unambiguously conceives of the federal government as a part of a concept of the administration understood in a wide sense (besides the Federal President) (Art. 69 para. 1 B-VG).
- 559 The French Constitution of 1958 contains a short description in a constitutional text (Art. 20 para. 1: “The government determines and directs the policy of the nation. It controls the administration and the armed forces”). It is not therefore surprising that the “executive function” is treated in greater detail in the French literature on state law, which partly makes a distinction between an executive function in the narrower and wider senses. The Spanish regime has a comparable content to the French one, even if in a denser version; it emphasises the management function in relation to internal and external policy, civil and military administration, and the defence of the state as well as the executive function and the power to make regulations (Art. 97 SpanConst). The Portuguese Constitution defines the government in a briefer form as “the organ competent for the management of general policy of the country and the highest organ of the public administration” (Art. 182 Port Const).

---

<sup>412</sup> In Smend, *Staatsrechtliche Abhandlungen* (1955), 79.

<sup>413</sup> Häfelin/Haller (2016), n. 1657 *et seq.*