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OPINION ON THE "REGULATORY CONCEPT" OF THE CONSTITUTION OF THE HUNGARIAN REPUBLIC

CHAPTER IV
PARLIAMENT

CHAPTER V
LEGISLATIVE CONCEPT

by
M A MARQUES-GUEDES
(Portugal)

Comments

The following are my comments on Chapters IV and V of the document entitled "Regulatory concept of the Constitution of the Hungarian Republic" (CDL (95) 21).

IV. Parliament

1. The constitutional tasks of parliament

The tasks assigned to the single-chamber parliament, on the basis of the principle of separation of powers and with the President of the Republic holding a special position among those powers to enable him to act cybernetically to secure and improve the balance of the system, reflect the stated intention of favouring and maintaining a "parliamentary republic" (VII.1).

However, the "Regulatory Concept" does not refer in practical terms to the specific powers that this choice means conferring on the President. In actual fact, the parliamentary system requires the government to be politically answerable to parliament and remain in office only as long as it enjoys parliament's confidence. If it loses that confidence, it is for the President (as Head of State) to settle the dispute between parliament and the executive by deciding either to dissolve the former or to request the resignation of the latter. The President performs an arbitrating role designed to safeguard the national interest and the smooth functioning of the two powers.

That the government should be answerable solely to the President is therefore not enough to make the system devised a parliamentary system, since this responsibility to the President is rather a feature of another system, the chancellor system, introduced for the first time by Bismarck under the 1871 German imperial Constitution and retained since then, in combination with the parliamentary system, by the republican Constitutions of Weimar (1919) and Bonn (1949).

While remaining a triangular system (legislative power, executive power and, standing above them in an arbitrating capacity, the Head of State), the parliamentary system nevertheless allows for two variations: the cabinet system and the assembly system. The former is practised in Great Britain; the latter is the traditional French version. Under the cabinet system, the ascendancy of the Prime Minister and the Cabinet over parliament ensures the stability of the executive, which remains in office until a new parliament is elected, while the assembly system gives pride of place to parliament and thus leaves the door wide open to the instability of the executive, which must resign immediately while parliament (whether one or two chambers) pursues its mandate. In the Constitution of the Vth Republic (1958) De Gaulle had to resort to a mixture of the parliamentary system and a barely disguised presidential system to try to remedy the major shortcoming of this variant: the lack of stability of the executive.

That is why, since the 1930s, efforts have been made throughout much of Europe to establish what Mirkin-Getsevich called the "rationalised parliamentary system", ie auxiliary devices to safeguard government stability in relation to assemblies. The French Constitution of the IVth Republic (1946) sought to introduce a few of these devices, although without success - quite the reverse. It was the Bonn Constitution that succeeded, with the so-called "constructive vote of no confidence" arrangement (Article 67); the possibility open to the Chancellor to ask the President to dissolve parliament if it passes a vote of no confidence but does not succeed in electing a new chancellor within 48 hours (Article 68); or provision for the President, if he so prefers, to declare a state of legislative emergency and promulgate the bill(s) that the Chancellor needs to pursue his policies, even if this runs counter to the will expressed by parliament (Article 81).

All this would be worth bearing in mind because political stability is essential to social harmony and progress.

2. Rules governing the election of members of parliament

a. It is admittedly a wise choice to have the Constitution lay down the basic rules on the subject and leave it to legislation to define the election machinery.

However, to enhance the legitimacy of the electoral law, it will be worth requiring that it should be adopted and amended only by a qualified majority. This will necessitate a commitment by the main political parties represented in parliament.

b. The planned continuity with regard to existing principles seems a commendable decision.

Here again, the issue is political stability, which will benefit.

c. Portugal's constitutional tradition since 1822 and those of several other countries in western Europe follow this pattern.

On the other hand, as a useful innovation which is particularly effective in balancing the results, it will be worth bearing in mind the advantages of a German-style mixed election system. It has proved its efficiency, especially in securing the harmonious composition of the parliamentary assembly.

3. Rules governing members of parliament

a. to d. No comment.

The parliamentary incompatibilities and immunities, the prior certification of status as a member of parliament and the requisite observance of the fundamental rights of elected representatives are those adopted by all democratic countries.

However, qualifications should be introduced regarding absence from voting, including allowance for justifications.

4. Rules governing the functioning of parliament

a. to c. There are no major comments to make, except on parliament's right to dissolve itself.

In relation to the traditional pattern of parliamentarianism, this is clearly an innovation. What is in fact consistent with that pattern is the right conferred on parliament to convene of its own accord under exceptional circumstances.

A body of fundamental importance such as parliament must not be allowed to evade difficulties; on the contrary, it must face them willingly.

5. The structure of parliament

Besides a federal structure or a high degree of regionalisation, there may be many reasons for having more than one chamber. Examples include the Conseil des Anciens (Council of Elders) set up by the French Constitution of the year III (1795). On the other hand, there will always be those who, like Abbe Sieyes, say that if the second chamber agrees with the first it is unnecessary (since hearing it is a waste of time) and, if it disagrees, it is a nuisance (since it may ultimately block even the best decisions).

Nowadays, the programming nature of constitutions and the welfare-securing function which is the distinctive feature of the modern state nevertheless demand that the parliamentary assembly in which political parties and forces are represented should be not only coupled with, but also supplemented by another assembly (or a council) enabling the real interests of civil society and its institutions to be represented and to make themselves heard. That is the case of the Conseil Economique et Social (Economic and Social Council), which indisputably performs a political function under the present French Constitution; it is also the case of many similar bodies provided for by a growing number of other constitutions. In the United States in 1946 consideration was even given to the idea of setting up a Third House of Congress for the purpose.

The idea was dropped, but provision was made instead for lobbies, which subsequently assumed greater importance in the actual conduct of American politics than the parties themselves. Should not this be borne in mind and a choice be made between this solution and that provided for by the French Constitution (and the basic laws of many other countries) to introduce a similar body alongside parliament?

V. The legislative process

1. The position of the provisions on the legislative process in the Constitution

Once it is accepted that several bodies may exercise prescriptive powers, it would seem logical for these powers to be considered in terms of the bodies concerned. This is the best way to respect the differences in structure and mode of operation between them.

No other comments are therefore called for.

2. Legal rules and their hierarchy

I agree that it is absolutely essential to specifically define in the Constitution not only the distinct areas of legislative competence of parliament and the government, but also parliament's inalienable right to legislate on matters exclusively reserved for it and the right it may have to authorise the government to legislate in matters exclusively reserved for parliament.

Observance of the hierarchy of legal rules also requires the Constitution to give an equally strict and precise definition of the prescriptive powers conferred at different levels on sovereign bodies and purely administrative bodies (whether central or local).

In both these areas, Articles 167, 168 and 115 of the 1976 Portuguese Constitution afford good examples of the care with which these issues can be settled.

3. Rules governing the right to initiate legislation

a. No comment.

I agree that the right of initiative should not be vested in the President. In a parliamentary system his function (as moderator and guarantor of the smooth functioning of political institutions) is confined to arbitrating between the legislative and the executive branches; he must not, therefore (as would be the case with the right of initiative), become involved in the tasks specifically assigned to those other powers.

It is only in representative monarchies that the right of initiative is sometimes conferred on the sovereign, as a survival of the unlimited powers he originally exercised. That was the case in the 1814 French Constitutional Charter.

It seems wise to allow the people to initiate legislation. This means acceptance of a feature of semi-direct democracy which is nowadays recognised as the most advanced step that can be made towards the participation of civil society in government; and it is fully consonant with the provision for referenda discussed under V.6 of the "Regulatory Concept".

b. and c. No comment.

4. Rules governing the issuing of decrees

a. to d. No comment here either - in view of my comments on the prescriptive powers of sovereign bodies and administrative bodies (whether central or local) and on the need for hierarchical co-ordination of those powers (see para. 2 above).

5. General provisions governing the legislative process

a. to e. No comment, bearing in mind those already made and the need to avoid disrupting modes of operation which prove to be legitimised by continual use and clearly comply with the openness required by democratic government.

6. Referendum

As stated under para. 3 above on the subject of provision for the right of the public to initiate legislation, the institution of the referendum tallies

with all other measures designed to ensure greater and more effective participation by civil society in government, from the perspective of the forms of semi-direct democracy that are possible in contemporary societies.

As such, however, the practice of the referendum must not be allowed when it can be used as a means of destabilising the established government and, in particular, against each of the established powers arising from it. In other words, it must not be used as a substitute for the specific mechanisms of the exercise of constituent power, the revision of the basic law, the exercise of legislative power, appraisal of the government's political responsibility and, generally speaking, budgetary, fiscal and financial acts. That would be tantamount to rejecting the authority of the established powers or even of the state itself. In a democracy other channels must be used, not those that would be formally allowed by the undue demagogical use of the referendum.

It would accordingly seem advisable to reflect on the wise restrictions placed on Article 118 of the 1976 Portuguese Constitution by the 1989 revision (see appended texts).

Armando M Marques-Guedes