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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE CONSTITUTIONAL AMENDMENTS PROPOSED BY THE PRINCELY HOUSE OF LIECHTENSTEIN

By

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I. Restrictions of the fundamental elements of a democratic system of government

- Art. 65 (and Art. 112 on constitutional amendment) confers a power of veto to the Prince;
- Art. 80 gives the Prince authority to dismiss the government (without the Parliament having expressed a lack of confidence in the government)

These amendments will re-introduce a sort of monarchical regime not compatible with democratic standards.

The question is whether such a monarchical regime is in contradiction to European standards. The answer to this question is made difficult because the Council of Europe treaties are concerned with individual rights and freedoms and, mostly, only indirectly address the structure and division of constitutional powers. There is no fundamental, explicit regulation of the democratic state in the treaties.

The simple (but in other respects most important) fact that individual rights and freedoms are protected does not *per se* imply that the system of government should be democratic. Logically freedom of speech, freedom of association etc. may be recognised even in societies where the government is non-democratic, e.g. monarchical. This is not only a logical possibility. Historically such a system precedes some of the later European democracies, and is especially in Norwegian history termed "opinion-governed monarchy".[1]

There are no specific regulations on democratic government and the protection of individual rights and freedoms do not logically imply democratic government, but these facts do not exclude a connection between explicitly protected individual rights and freedoms on the one hand and democratic government on the other.

The connection is established by the following arguments:

(1) Some of the individual rights do not make sense if they are not connected with democratic government. In other words, they imply democracy. This is true as regards free elections which are regulated in Protocol 1 Art. 3 where free elections are described as an obligation.[2]

Elections are the basis for a parliamentary assembly, and free elections result in what should be not only a pluralistic parliament, representing or reflecting the opinions of the voters, but an efficient parliament which decides on political matters with no internal political interference from other political bodies.[3]

(2) Democracy is not only broadly supposed as a possibility but is in a binding way the recognised system of government in which directly protected individual rights are to be effective. In the preamble to the Statute of Council of Europe, true democracy is considered as depending on individual political and personal freedom, and democracy is thereby located at the top of a model with rights and freedoms (and rule of law) as its basis. Individual rights and freedoms are considered part of a more comprehensive aspiration which encompasses democracy as well.

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[1] Seip
[2] Breitenmoser, p. 71ff, Frowein Peuker 1996
[3] Breitenmoser, p. 75

This connection is also reflected in the preamble to the Convention, 4th consideration, where the perspective is the importance of democracy as the best way to realise individual rights and freedoms.

The same line of thinking is probably the right way to understand the exceptions to Art. 8, 10-11 etc. where "democracy" is mentioned. Exception to the protections is conditioned *inter alia* that an exception can be considered necessary in a democratic society. This expression might (wrongly) be interpreted as something to be distinguished from what would be necessary in a *non-democratic* system of government - and this last type of necessity should then not be recognised. But this way of understanding these exceptions is not in harmony with the context of the regulations. It is not to be expected that the freedoms and rights are to be applied in a non-democratic society, and there is therefore no need for specific regulation of the exclusion of any exception in non-democratic societies. The connection between the exception and democracy is to be interpreted in another way: this condition is integrating the legitimacy of the exception (to some freedom or right) by seeing the exception as necessary in the process of establishing or upholding that democracy in which the freedoms and rights are (otherwise) best effectuated.

Monarchies are, if effective, not democratic. The European monarchies are in various ways reformed in such a way that they are compatible with democratic government. Basically this compatibility may be obtained in two ways:

(A) The monarch participates formally in constitutional functions

One way of preserving a monarchy compatible with democratic government is to re-interpret the constitutional text so that the authority attributed to *the Monarch* is understood as a conferment of authority to *the government*. According to the constitutional text the king takes part in law making, and the constitutional text conferring that authority to the monarch is unchanged. But the function of the monarch – especially the necessity of royal sanction of the bills voted for by the majority of the parliament – is considered a formality. The monarch's sanction is obligatory, if the sanction is recommended by the parliamentary government.

In Denmark legislative power is conferred to the "king and the parliament", (Art. 3 Constitution 1953), and the bills voted for by the parliament have to be sanctioned by the king to become law, (Art. 22). According to the text of the Constitution the king has an unlimited power of veto, and this power was originally, that is in 1849 when the Constitution was introduced, a constitutional and political reality. But the political influence of the king has of course declined in connection with introduction of a parliamentarian system of government, and in the latest textbooks on constitutional law it is assumed that the king has no authority to deny his sanction to a bill voted for by the majority of the parliament.[4] Similarly other constitutional powers conferred to the king, e.g. treaty-making powers (Art. 19), give no room for royal influence.

The Norwegian constitution (1814) characterises its system of government as "limited and hereditary monarchical", (Art. 1). Royal power – which was to be exercised in collaboration with the parliament – is regulated in several, still valid constitutional articles. "It was the supposition of the constitution that the authority which the constitution conferred to the King,

[4] Peter Germer: Dansk Statsforfatningsret 2001 p. 72 note 46, Henrik Zahle: Dansk Forfatningsret, vol. 1, 2001 p. 301

should be exercised *by him personally* in complete independence".[5] But the political and constitutional situation has changed: " … the King has stopped being a political power", a fact which has increased "his ability to stand as symbol of the unity of the nation and the authority of the state".[6] When Art. 3, for example, confers executive power to the King, it is in reality a power conferred to the government.[7]

According to the Belgian constitution "the King" is vested with several powers. These powers are not "deemed to be personal", but "are exercised by the King together with his Ministers".[8] In the extent to which the King has political power, his power is, according to Allen, only to be practised insofar as it is accepted by the Ministers and, through them, by parliament.[9] The conscientious objection of the King in 1990 to assent to a bill on abortion was handled in such a way that not only was the objection respected but the bill was assented to, and the parliamentary will was implemented.[10]

(B) The monarch is excluded from constitutional functions

The monarch has no function in relation to law making or any other constitutional function. This is basically the approach in Swedish constitutional law as it has been since the constitutional change in 1974. The Swedish King is "Chief of State", *Regeringsformen* 5 kap. (The Constitution ch. 5). According to the Constitution the King has no public power: All public power is derived from the people, RF 1:1, and since the King does not derive his position from the people " he should not have public power, and he does not have public power according to RF".[11]

The King is attributed immunity RF 5:7 which is what is left of the privileged position of the King. His main function is symbolic, representing the nation.[12]

The difference between the two models is due to differences in constitutional tradition. Some constitutions are basically unchanged since their introduction at a time when the monarch was recognised as a political important factor, and the textual continuity has called for a systematic reinterpretation of the articles which confer powers on the king. Where constitutional texts are systematically rewritten in a period where the king is and should be without power the text may be formulated so that the king is "liberated" for duties which have become merely formal. Newer constitutions may of course preserve a textual position of the monarch which corresponds with the old constitutions without aiming at another result.

Generally the monarchies are compatible with democracy only because the functions of the monarch are restricted to be symbolic as a representation of the "nation" or "state" and thereby distinguished from political affiliations and controversies.

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[5] Johs. Andenæs: Statsforfatningen i Norge 1986 p. 162
[6] Andenæs p. 162
[7] Andenæs p. 267
[8] André Allen: Treatise on Belgian Constitutional Law, 1992, p. 62
[9] Allen p. 62
[10] Allen p. 60
[11] Frederik Sterzel: Författning i utveckling 1998 p 73, cp. generally Petrén & Ragnemalm: Sveriges grundlagar 1980 p. 26ff.
[12] Sterzel p. 73

The relationship between democratic government and the still existing Nordic monarchies may be described by the following three principles. I limit my summary to Nordic monarchies:

(1) In no Nordic monarchy does the King practice an important political function.

(2) If the King participates in constitutional functions his participation is normally bound to be formal – with the effect that the political position of the King is irrelevant.

(3) When and in so far as the monarchs have preserved any relevant authority, the tendency since the establishment of the Council of Europe has been to *reduce* the still existing authorities of the King.

The same tendencies are found with other European monarchies.[13]

Against this background the amendments discussed in this section are not compatible with European standards.

II Other amendments connected with the changed distribution of power

Emergency regulation, Art. 10: The conditions for emergency regulation are not clear,[14] and there is still a possibility that there may not be any government-member to countersign. For these reasons this amendment reinforces the conclusion in section I.

Appointment of judges, Art. 96: I refer to and agree with the analysis of Pieter van Dijk p. 7-9.

House regulation, Art. 3: Laws of heredity of the throne should not be the power of the Prince.

Art. 63: No parliamentary control of the Prince.

III Possible basis for refutation

A possible refutation of criticism the proposed amendments contain some regulations which may have a specific position in the debate about the proposal as a totality:

- Right of secession, Art. 4.2;
- Abrogation of monarchy, Art. 113;
- Access to mistrust to the monarch, 13ter.

Considered in isolation these amendments are untraditional and surprising, but they do not by themselves challenge European standards, see on the right of secession Pieter van Dijk p. 2-3, and on abrogation of monarchy p. 6-7 with references.

These amendments are only interesting because they may be considered a way of avoiding the criticism of other amendments, cp. section I and II above.

[13] Frowein p. 13-15, Rhinow p. 49-50 who mentions Monaco as an exception, Batliner p. 72-73.
[14] Frowein p. 20f.

Basically these amendments open for extraordinary steps which will change the constitutional status (eventually only for the seceding municipality). But this future possibility does not influence the way the system at a certain time will have to be characterised. A monarchy introduced by referendum is still a monarchy; and a monarchy which may be abrogated is a monarchy until abrogated.

IV Other amendments

Art. 1, 3, 4.1, 7, 13-13bis, 51, 62, 66, 70, 79, 92, 102-07 (except the power of appointment in 102 and 105):

These amendments do not entitle criticism.