Lecture Five

The role of Parliaments in parliamentary systems?

Introduction

Parliaments are key institutions in European democracies, if only because they tell us a great deal about the evolution of democracy. Parliaments began as assemblies of aristocrats convened by the King to raise taxes or to fight wars. Gradually, ad hoc assemblies of aristocrats became institutionalised.. and represented a check on the absolute power pretensions of monarchs. Parliaments became symbols of revolution after the events of 1789 in Paris; and during the nineteenth century, elected parliaments became the symbol of independence in countries such as Belgium, Germany, Switzerland and Italy. With the move to democracy… parliaments represented the sovereign will of the people: but we should remember that modern parliaments by and large preceded democracy and the creation of a modern system of political parties. Parliaments have been in decline since the golden age of the nineteenth century; the development of democracy strengthened the executive- the focus on attention on behalf of mass political parties and organised interest groups. The development of modern bureaucracy, policy networks, experts…have all weakened parliamentary influence. But they have been written off a little easily and perform a number of contrasting functions that are, arguably, essential for the good health of a parliamentary regime. It is unreasonable to conclude in the decline of parliaments without considering the full range of functions they fulfil.

In the contemporary world, legislatures are widespread, but by no means ubiquitous political institutions. In any system, legislatures will serve to legitimise the regime involved. Even when they perform purely symbolic functions, a legislature is usually expected of a political regime - symbol of that regime's recognition of the importance of popular participation. This explains why so many one party systems retain a legislature.

2). Parliamentary organisation: Consistent with the Lijphart schema, we can distinguish between bicameral and unicameral chambers. Most have two chambers, with a clear ascendancy for the lower elected house. Some have powerful second chambers – most especially Germany, where the Bundesrat has a de facto right of veto over all matters that pertain to the responsibilities of the lander governments, education, culture, etc. Most second chambers are either indirectly elected (as the Senate in France) or they represent corporatist or

territorial interests: as in Germany, Italy, Austria… There are a number of single chamber parliaments in Europe: in Denmark, Sweden, Greece, Portugal, for example; if anything, the tendency is increasing, as second chambers come under threat.

All legislatures have features in common. All have formal procedures for government + private member bills to be considered and subject to amendment (law-making role); all have committees in place that consider bills/ *propositions de loi*; all attempts to exercise scrutiny over the executive branch of government, including the civil service; all have their own rules of procedure, though these will vary (e.g. over whether governments bills have priority, or whether the legislature controls its own timetable.

3). Typologies of legislatures

In 1995, Mezey distinguished between Active, Reactive, Marginal and Minimal legislatures. The Active legislature - which is strong in policy-making and actively promotes its own policy agenda - is that of the US congress, although Congress has no role in unmaking governments. A reactive Assembly is executive-dominated, but has means to influence policy-making. Most European legislatures fall into this category. Marginal and minimal legislatures are purely or mainly symbolic. They are prevalent, for example, in many African and Asian states. Bale (2005) evokes a distinction between transformational and arena legislatures. The former are rare, but drive processes of policy change; the latter are much more typical of European polities.

The notion of a parliament is that of 'an institution meeting to deliberate'. The focus of this deliberation will usually - but not always - be the processs of law-making. Legislatures often have an important **formal** role to play in the process of law-making: but it is wrong to suggest that in modern polities they are at the centre of policy-making.. In practice, the executive will usually perform the major role in both law-making and law-implementation. Major laws have their inspiration in government policy projects; policy is implemented by the civil service. Legislatures and executives are 'separate institutions sharing policy-making in different proportions in different countries'. In some countries, such as France and Italy, the State does not need parliamentary assent to pass laws in the area of regulation…in others, parliamentary

consent is required – and obtained because the government/coalition has a majority in the Assembly.

As a general rule, Parliaments are more likely to perform a deliberative nor, at best, scrutiny role than they are to be the source of legislation (law-making). In many regimes, especially of the non liberal democratic variety, the legislative (i.e. law making) function is totally absorbed by the executive. In only a handful of regimes is the legislative function genuinely the province of the legislature, or Assembly. In the European case, we would point to countries such as Denmark, where the committee system goes beyond scrutiny to propose alternative versions of government texts, as the closest equivalent to an active legislature. But the trend is one of decline…

The golden age of legislatures was in the C19, before the development of the modern party system. When the work of government was limited, the capacity of legislatures to control the actions of the executive was often considerable. The growth in government and the development of modern parties and interest groups have almost everywhere reduced the capacity of legislatures effectively to deliberate upon policy. Furthermore, the direct democratic accountability of executives (eg. through direct election of the president, or the emergence of disciplined party systems) has removed the status enjoyed by legislatures as sole repositories of popular representation. Moreover, the growing complexity of government has encouraged the development of corporatist-style governing techniques - everywhere at the expense of parliamentary control. Decision-making takes place through informal negotiations between organised interests and the state, or in tight negotiation with foreign governments rather than in formal between government and parliament. Role of policy networks important. In certain areas of policy - such as defence and foreign policy - parliamentary control has long been a fiction, even in a nation such as the US, where Congress has openly insisted on its right to influence foreign policy. And the development of the EU has followed the principle whereby EU affairs are ‘foreign’, not suitable for the deliberation of elected Assemblies. Even where there are effective EA c/ttees, the legislative branch does not have much influence on EU law.

Executives, rather than legislatures, thus generally formulate policy. Moreover, executives can often ensure that executive-formulated proposals can pass through legislatures unscathed…

trhough this depends on political circumstances and the nature of the party system. If we define parliaments as 'strong' in terms of their ability to frustrate the executive from making policy unilaterally, only three legislatures fulfil this function: US Congress, Italian and Costa Rican parliaments. And this is essentially a negative function. The early activism of parliaments in the CEE has given way to more disciplined operation of executive governments.

Most parliaments in European democracies fall into Mezey's reactive category: they react to policy initiatives coming from elsewhere. There are various reasons which explain this

1. The resources at the disposal of legislatures are limited. Even the most sophisticated c/ttees can acquire only limited information. Information is usually secret and carefully guarded by the executive (UK and France e.g.), unless - as in Sweden or the US, there is a freedom of information Act. POWERFUL LEGISLATURES HAVE POWERFUL COMMITTEES. ROLE OF SPECIAL COMMISSIONS OF ENQUIRY, INCLUDING IN WEAK PARLIAMENTS SUCH AS THAT OF FRANCE
2. In all WE democracies, Government departments are vast: they have concentrated within them vast resources and the best technical expertise in the country. Parliament is no match. Ditto for the EU (and weak linkages between national and European parliaments).
3. Parliamentary power depends, put crudely, on weak party structures, and on weak executives. Most Euro countries have strong party systems and strong executives - or one of the other. The only example consistently to contradict this used to be the Italian parliament. The Italian parliament has had a devastating negative power - that of forcing governments to resign, either directly (through votes of censure), or indirectly (by one alliance partner pulling out of a coalition). Ultimately, this negative strength of the Italian parliament reflects the fragmented nature of the Italian party system rather than anything else (over 50 separate governments since 1946). Parliament undoubtedly does perform an important role within the Italian system; no one party has an automatic majority. For this reason, 'majorities' must be constructed. Unlike in Britain, Italian elections do not produce a parliamentary majority, but merely alter the distribution of party alignments within Parliament. The process of government formation is thus largely removed from the result of a general election. This allow parliament to occupy a much more central role.
4. The effectiveness of parliamentary scrutiny of the executive depends on an efficient system of parliamentary c/ttees. This is rare - it is most obvious in the US, where powerful c/ttees

can have a major influence. In the US - majorities must be constructed around particular issues: the same coalition of forces within parliament can not always be relied upon to support different pieces of legislation. In Britain, the governing party can usually, but not always, be sure of getting its way. But c/ttees are of vital importance in understanding how important a legislature can be: in the case of the Danish parliament, for example, committees can completely rewrite governmental proposals.

5. Finally, parliament is by-passed in most E. countries, because it is not with the elected Assembly that real power lies, or at least not directly. Interest groups do not much bother with parliament, unless this is the only type of access they have. Iron triangles and policy communities. The rise of the European parliament signifies the changing status of this institution (e.g. protest over the Bolkestein directive).
6. The fundamental principle of a parliamentary democracy - the right of the elected Assembly to overturn the executive - ensures that the final power lies with parliament. But this is a blunt, nuclear option that is difficult to use.

In sum: Most liberal democratic parliaments possess modest policy-making powers - they can have some influence over policy, but the last word will usually fall to the executive. Almost without exception, legislatures possess a very weak policy-making power vis-a-vis of executives. In terms of policy-making - their 'main' function in the liberal tradition - Assemblies have lost most of their power: due to the emergence of modern party systems, and the complexity of government. Where legislatures can hope to exercise greater leeway is in terms of their 'control function' - i.e. in their scrutiny of the executive. This varies from the formal (eg question time in Britain) to the detailed and continual scrutiny (eg congressional c/ttees calling major public servants to account).

If their role is not to make the law - as implied in formal constitutional theory - they do perform a number of important roles, many of which were ignored by classical 'law-making' theories:

- *The role of representation.* Parliaments represent the interests of members of the public to the executive. In their capacity as constituency representatives, in some traditions MPs spend a considerable amount of time chasing the cases of individual constituents. This is much more the case is majoritarian systems than in proportionally based ones where there is

a less obvious link to territory. Who deputies represent is not that easy a question to answer: do they represent an electoral constituency? Or do they represent the party that selected them and ensured their election?

- *educating the electorate* on the major political choices of the day, or, at least, they do if they are doing their job. Parliaments are linkage mechanisms: between the people and the government. Opposition parties attempt to use parliament to force the government onto the defensive; government parties use parliament as a platform to justify their action. In so far as legislatures represent the broad contours of public opinion, they can pressurise executives by focussing debate on matters of public concern, esp., contentious executive policies. Almost everywhere today, parliamentary proceedings are televised – usually on specialist parliamentary channels with limited audiences. But on occasions, televised debates, or special committees of enquiry can mobilise the interest of public opinion – Hutton inquiry in Iraq, or the Outreau affair in France.

- *supervising the bureaucracy*. This is achieved more successfully in certain systems than in others. In the US, powerful laws enable Congressmen to require civil servants to appear before important congressional c/ttees. US Congress in practice have a veto over important CS nominations. Elsewhere, this is far more difficult; in most systems, it is difficult for parliament really to know what civil servants are up to. But parliaments can attempt to monitor implementation of laws; and can call departments to account for public expenditure: e.g. PAC in the UK or the LOLF in France. Cross-partisan efforts are likely to increase the influence of parliamentarians.

- *recruitment of political leaders* - a defense of parliamentary systems of government - traditionally that political talent is discovered on the floor of the House and in c/ttees. This is a valid argument in the British case, where up to one-third of the governing party might hold ministerial office, including at junior levels. It is not proved, however, that parliamentary capacities are necessarily those of holding government office. Nowadays, TV is as much a channel of political recruitment as parliament. The Mediatisation of politics is such that TV performance is critical; but parliament makes a differnce

- *maintainance of public* confidence in the regime; allowing for democratic transition. On a negative level, powerful legislatures can force governments to resign - often for their narrow institutional interest (FFF, It). Benchmark of any parliamentary system- capacity of parliament to overturn a government which has lost its majority,. As measured by this benchmark, Germany, France, Britain and Italy have all demonstrated this parliamentary control function at least once in the course of the past thirty years.
- Most effective parliamentary control occurs when a freedom of information act allows parliamentary c/ttees access to official information. Government secrecy is the most effective bar to effective scrutiny: official information jealously guarded by civil servants anxious that departmental policy is not challenged. The results of the recent Scott enquiry in the UK illustrated the limitations ... In some instances of weak parliaments- France and Spain – there has been a resurgence.

Constitutional Courts and the role of judicial/regulatory politics

One of the key trends in the past 30 years has been that of constitutionalism. The ideology of constitutionalism has become increasingly important, spilling over 'best practice' in areas of minority languages or local government. There has been a trend to judicialisation of politics across western Europe, strengthened by Europeanisation and the role of the ECJ… but most of all by the emergence of the judiciary as a powerful third arm of government… in a manner that is arguably alien to traditions of parliamentary sovereignty.

The role of the judiciary has been considerably enhanced in recent years. In the aftermath of WW2, a number of constitutional courts were set up to preserve the constitution from the ravages of parliamentary sovereignty and to prevent governments abusing their powers. Thus, the Weimar Constitution had been progressive but this did not prevent Nazism. In the post-1945 period, a number of European states thus recast their constitutional orders. The new C. Courts were intended: to ensures that legislatures and executives respected the limits of their powers; to allow for clearer regulation of the relations between state and the individual. Upgrading the role of the judiciary was the solution reached. Constitutional Courts have come to the fore. Pre WW2, the judiciary has been an insignificant part of the governmental machinery in Europe… the role of the judges was to interpret and enforce the law. But constitutional courts allow judges to perform a much more political role. Such courts were set up in a number of countries after WW2: in Austria, Germany, Italy, Portugal, France. These courts are described by Mény as hybrids: part-judicial, part-political. They are judicial bodies, insofar as they interpret the law at the highest level …. that of the constitution. They are also part political, in that thhey carry out functions of **judicial review** that are foreign to the traditions of western Europe. The courts took a long while to be

accepted by other institutions- executive, legislatures and the existing courts. They initially exercised judicial restraint, but have everywhere become more activist with time.

The creation of new CCourts was one dimension; the creation of new institutions such as the Ombudsman was another. There has also been a much greater emphasis on using international conventions and IOs to defend the rights of the individual citizen against the state. In terms of the individual rights, a number of binding conventions – such as the 1948 UN Universal Declaration of Human Rights gave rise to the European Court of Human Rights, part of the Council of Europe. There has been a standardisation of rights provision across Europe. HR principles are often contained in a country's constitution.

C.courts have emerged as the key new institutions in the post-war period. There are differences between the CCs in Europe – and some countries such as the UK still resist the innovation. We can make a number of general comments…then some distinguishing features.

In terms of their **membership**, the Courts vary. In most countries, most members are either judges or top legal specialists, but not always. In some countries, such as France, appointments are political – and the party political affiliation of judges is important. There is no need for these individuals to be professional judges – and they are usually former politicians, such as Roland Dumas, Mitterrand's foreign minister. In France they are appointed. In Germany, judges are elected indirectly by the two houses of parliament. In Spain and Italy, there is a mix of indirect election and appointment. In Spain and Italy, political elected members need two-thirds majorities…preventing the danger of purely partisan choices. In Germany, 6 of 16 members are required to be appointed from the ordinary courts. Decision-making procedures are shrouded in secrecy.

There are basically two types of **judicial review** that are undertaken by such courts: abstract review and concrete review; *concrete* judicial review: refers to challenging an existing law for its constitutionality, as a result of a court case. The CC can thus receive petitions from the ordinary courts. *Abstract* judicial review: challenges the proposed law on the grounds of principle. Abstract JR occurs before a law has been promulgated. This gives the CC a highly political role; in practice, the CC gives a bill a fourth and final reading – and the conclusions can go against the will of the elected Parliament. This is especially the case in France.

C. Courts can also **adjudicate disputes** between authorities. .. especially between central and local government, or, in federalised states – between centre and states. This is especially the case in Germany, Belgium, Austria, Spain and now Italy. C.Courts also settle disputes between the state and its citizens.

Some examples: Perhaps the most powerful is the FCC of Germany. The President of the FCC occupies the fifth position of state. The FCC has very wide powers and its judgements can not be contested. It can declare parties unconstitutional, as it did in 1952 and 1956. It has made deeply political rulings – such as that over Abortion in 1976 – which have divided Germany society and appeared to go against the will of the elected parliament.

Other courts have also developed their teeth. In the case of Italy, the CC performed a leading role, along with the magistrates, in cleaning up Italian politics and bringing an end to the 1st Republic. The CC has been very interventionist – along with the investigating magistrates – in a way that has caused deep controversy. In France, there has been a similar process. In

France, the CC became much more interventionist after 1971, when it intervened for the first time against the wishes of the executive. Since the early 1980s, the CC has been in the forefront of public controversy, taking a number of high profile stances against incumbent governments, such as over nationalisation in 1982 or Corsica in 2002. Nearly all government laws are now referred to the CC… and governments are now very careful about how they phrase bills for fear of censure from the Council. Thus, courts are **increasingly active** – including in countries such as Spain where there is little tradition of this.

Even in countries where there is a limited tradition of judicial review, the courts have begun to influence policy processes. Take the case of the UK. Courts have made rulings on issues 'unthinkable' 30 years previously, such as education policy (comprehensives), television licences, local government finance, social welfare…

Within liberal democratic states, the courts have acquired the role of interpreters of the law and defenders of individual freedom. They must safeguard the citizen from arbitrary use of executive (or legislative) power. This, in theory, differentiates them from courts in one-party states- where invariably the judiciary is used as an arm of the executive.

Despite this, there are many differences in judicial practice within liberal democratic states. The most important of these is whether there exists a constitutional council in order to interpret the constitution, and to decide whether any act exceeds the spirit of a - written or unwritten constitution. Within the US, the power the Supreme Court in the United States is exemplary in this respect. SC judgements have fundamentally altered the course of American politics in several important respects: for instance, in accelerating the civil rights movement in the 1960s; and in prefiguring the conservative moral majority reaction in the 1980s. In the US system of checks and balances, the nine judges of the SC have emerged as constitutional arbiters, between President and Congress, as well as between federal government and the states. SC at the top of the legal system; in European countries, constitutional courts are separate from the normal legal system. While the SC can consider any issue, in France the CC is only mobilised before a bill has been enacted into law.

This role of constitutional arbitration far exceeds anything seen within the UK - where the courts can review executive actions, but only to decide whether they are *ultra vires* by relation to an Act of Parliament (in other words, if the executive has overstepped the boundaries of parliamentary legislation). There is no written constitution or bill of rights in Britain to be interpreted by Judges. Moreover, executives can readily reintroduce bills into Parliament in

order to rectify the offending articles. In the US, the judicial review decision of a court can only be overturned by constitutional amendment, or by a higher court.

A number of other states have constitutional courts or councils, but none have the prestige of the Supreme court. In WE liberal democracies, constitutional courts accompany written constitutions as the norm: such courts function effectively in France, Germany and Italy, for example. In Germany, the CC determined that the Bundestag must have a vote before Germany gave up the D. Mark for the Euro; in Italy, the CC has been important in authorising referendums on social issues such as Divorce and Abortion. In France, the CC has steadily grown in prestige since its creation in 1958. The function of these CCs is to rule on the constitutionality of proposed government legislation, and to require governments to redraft bills where necessary.

The ECJ, of course, symbolises more than anything else the rise of judicial and regulatory politics in Europe: ECJ judgements eventually force compliance, however long governments attempt to avoid this. The example of British beef, and many others, demonstrate this. The judicial arena, more than any other, is testament to Europeanisation and a narrowing of the two main traditions of Roman Law and Common Law: Roman Law (codes/codified… but needs to take into account precedents as established by the ECJ); Common Law… has developed its own body of administrative law that is derived from ECJ judgements.

Apart from CCs, the **role of the judiciary** has become increasingly important in domestic European politics. At one level, the role of pan-European organisations, such as the ECHR and the ECJ has altered the ground rules in the operation of the domestic politics of most European countries.

In recent years, the role of investigating magistrates has become increasingly important in several European states. Italian politics in particular has been transformed in important respects by the affirmative presence of its judicial and quasi-judicial institutions. In the Italian case, the judiciary has become more effective in scrutinising executive abuses of

power than either parliament or the media. The role of a handful of investigating magistrates in uncovering Italy's corruption scandals in 1980s and 1990s should be signalled for particular attention - especially since these magistrates had to contend with opposition from many sitting politicians. Indeed, the new importance of judges in Euro. states might in part be explained by the fact that parliaments are no longer capable of exercising oversight.

But there are fears that this process has gone too far, that magistrates have excessive powers – and there are attempts by governments such as that of M. Berlusconi in Italy, to limit their independence.

The Fourth Estate: the role of the Mass media.

Crouch's post-democracy based in part upon the weakness of political deliberation. The function of political communication has passed from parliaments to the media. Since US presidential election campaign of 1960, it has become received knowledge that elections are won and lost in television studios, rather than on the hustings. This is debateable. It is undoubtedly the case that the advent of mass political communication has changed the nature of elections, as well as political discourse, and that it has also had an indirect impact on the nature of executive scrutiny. Lengthy parliamentary reports are reduced to 10 second sound bites on the daily new bulletin - even for a report such as the Scott report running to five volumes. Politicians have to learn to respond to aggressive interviewers in 30 second interviews, where their remarks are easily taken out of context. Election campaigns themselves are organised around the Media circus, and the need to fit into television broadcasting schedules. In most liberal democracies, the serious press is a minority pastime, with mass circulation dailes either of the tabloid variety, as in Britain and Germany, or mainly of regional interest.

As an instrument of political communication, television has become the theatre of political competition between political parties and politicians. And, in an era of concentration of ownership of the means of political communication - press, TV and now Satellite TV - one might legitimately ask who elected a R. Murdoch or a R. Hersant.

Alongside this general impact of the mass media on politics, there is a more focused form of executive scrutiny. Indeed, whatever its limitations, the measure of a democratic system lies in part in its capacity to open itself up to ongoing scrutiny on behalf of the mass media. The role peformed by television documentaires in highlighting abuses of executive power has to some extent replaced that of parliamentary oversight. The absense of a freedom of information act and government secrecy curtail genuinely investigative television journalism.

Conclusions In a context of globalisation, European integration, and international financial capitalism, even national governments can only pretend to exercise limited sovereignty. The functions of national parliaments everywhere are either in decline, or being reinvented. The raison d'être of the most parliaments is not as institutions capable of controlling the details of the policy process; but as instruments of executive scrutiny, political communication, and ultimate democractic legitimacy. Insofar as these functions are performed at all, they are shared with other institutions or actors: such as the judiciary, the mass media, and social or political movements.

1. The executive has become the central element of all political systems, whether these are presidential or parliamentary. This is because of several reasons. Firstly, executives have benefited from an enormous expansion in terms of functions, means and staffs, a far greater expansion than that experienced by the other branches of government.

2. Secondly, the nature of contemporary decision-making favours the executive. Rapid decisions are easier to take amongst a small group of political leaders than as a result of extensive parliamentary deliberations. This applies especially to foreign policy. The excuse of the need for secrecy has proved to be an additional weapon at the hands of most executives. Even in Italy, where the *centralita del Parlamento* has become the regime's motto, the power retained by parliament is largely of a negative character: the formal power of decision-making has passed to the government (which can pass law-decrees without immediate reference to parliament) and to the administration.

3. Thirdly, the reciprocal checks and balances that legislatures and executives used to be able to impose on each other have become unbalanced in favour of the latter. The controls that the executive has over the legislature have increased, in particular with the development of the party system, and with a host of mechanisms to speed up parliamentary procedure. The reverse is not true: the motion of no confidence - the strongest weapon possessed by a legislature vis-a-vis the executive - has virtually fallen into disuse.

4. Finally, the pre-eminence of party provides a bridge between the legislature and executive - but usually means that communication between a government and its supporters occurs via the mechanism of the party, rather than through the institution of parliament (eg in party caucuses, in secret meetings between party leaders and members of the government).

The constraints on executives come increasingly from the international arena, as well as by the plurality of each of the individual societies concerned, which means that change can best be incremental.