The legal and political conditions of opposition parties in Central and Eastern Europe. An overview

edited by
Serena Baldin
Angela Di Gregorio

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This volume focuses on the status, functions, and role of the political opposition in the frame of government of some Central and Eastern European countries. The rules and practices reinforcing the democratic decision-making process, or the ones that risk to jeopardise political pluralism by denying the opposition's rights, are key aspects to measure the quality level of a democratic Parliament. As these are issues at the core of constitutional democracies, a number of guarantees for the opposition should be provided directly in constitutions, parliamentary rules of procedure, or other sources of law. The essays included in this volume make legal scholars and political scientists reflect on the importance of status and role of political and parliamentary opposition to better understand the dynamics affecting transition to democracy, democratic consolidation and the guarantees for pluralism, both considering the good results and the democratic backslidings occurred in some countries of this geographical area.

The volume is one of the outcomes of the research activities carried out within the project "El Estatus jurídico-político de la oposición política en las Democracias representativas", PI prof. Manuel Fondevila Marón - University of Lleida, funded by the Ministerio de ciencia e innovación of Spain (PID2020-117154GA-I00; MCIN/AEI/10.13039/501100011033), and within the project "The legal status of political opposition in the Western Balkans: a comparative analysis", PI prof. Serena Baldin, funded by the University of Trieste.

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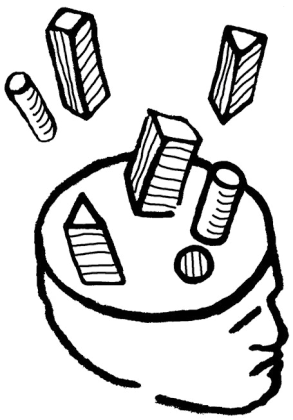

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Table of Contents

The legal and political conditions of opposition parties in Central and Eastern Europe: an introduction

SERENA BALDIN* AND ANGELA DI GREGORIO**

This book is one of the results of the research activities carried out within the framework of two projects: "El Estatus jurídico-político de la oposición política en las Democracias representativas", coordinated by prof. Manuel Fondevila Marón (University of Lleida) and funded by the Ministerio de ciencia e innovación of Spain, and "The legal status of political opposition in the Western Balkans: a comparative analysis", coordinated by prof. Serena Baldin and funded by the University of Trieste.

The political opposition is considered a qualifying and essential element of liberal democratic states, as it performs a number of fundamental functions, namely those of monitoring the activities of the majority, influencing decisions, criticising government policies and proposing alternative policies with a view to running for the leadership of the country in the next round of elections.

From a comparative legal perspective, the issues related to the parliamentary opposition, i.e. political parties that are represented in parliament

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but not in government, and the relevance of the political opposition in the public arena are not particularly focused on Central and Eastern European countries (for a constitutional framework of the countries in this geographical area, see Di Gregorio 2019). Indeed, no single volume in a *lingua franca* has provided an overview of these issues. There are no in-depth studies of the legal frameworks that can ensure that majorities do not abuse their otherwise legitimate rights simply because they have won the elections. This vacuum can be explained, at least in part, by the absence of constitutional provisions dealing with the opposition, with the exception of the constitutions of Croatia, Albania, Armenia, Georgia, Kyrgyzstan and Uzbekistan[1]. Where there is literature on the subject, it is mainly analysed through the lens of political science, looking at the electoral process and propaganda, election results, the phenomenon of clientelism and the patronage networks that threaten parliaments and other democratic institutions (Ramet, Hassenstab, Listhaug 2017; Marović, Prelec, Kmezić 2019).

The rules and practices that can guarantee democracy within the parliamentary decision-making process, or those that can jeopardise political pluralism by denying the opposition a sphere of rights, are key aspects insofar as the democratic quality within the Parliament is measured by the means available to the opposition to fulfil its tasks. As these issues are currently at the core of constitutional democracies, a number of guarantees for the opposition should be provided in constitutions, parliamentary rules or other sources of law.

In 2008, the Parliamentary Assembly of the Council of Europe provided procedural guidelines to enable the opposition to scrutinise the Government, participate in the legislative process and control the legality and constitutionality of parliamentary texts, which member states were invited to follow[2]. In 2010, the European Commission for Democracy through Law complemented the resolution with a report specifying what kind of formal rights the parliamentary opposition should have and how these could best be legally regulated and protected (Venice Commission 2010). In 2019, it further elaborated on this topic in a new report (Venice Commission 2019). The latter is closely linked to the erosion of democracy observed in several countries over the past decade. According to the Venice Commission, this worrying political trend is characterised by the

[1] See Croatia, articles 92, 121, 121A Const.; Albania, art. 147 Const.; Georgia, art. 42 Const.; Kyrgyzstan, articles 70, 74, 75, 76, 95 Const.; Uzbekistan, art. 34 Const.

[2] See PACE Resolution 1601 (2008), *Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament*, at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17626&lang=en>.

dismantling of the checks and balances that limit the power of the parliamentary majority, by the more frequent hasty adoption of laws without genuine political debate, and by the appointment and dismissal of top judges and officials of independent agencies by the majority alone. For this reason, the 2019 report outlines a framework of parameters to impose responsibilities and limits on the majority and safeguards for the opposition, based on the fundamental general principles that characterise a constitutional democracy, namely freedom, pluralism, checks and balances, loyal cooperation and respect for institutions, solidarity with society, the possibility of changing power, and effective decision-making.

In the light of the above, the purpose of examining the level of democracy through the lens of the guarantees given or denied to the opposition seems more than justified. The chapters in this volume focus on the status, functions and role of the political opposition in the system of government in some Central and Eastern European countries. The analysis of some case studies is preceded by two introductory chapters. The first one focuses on the classification of the types of opposition, which are divided into three different groups: parliamentary opposition and opposition in general; dissenting opposition and ideological opposition; external and internal opposition. The second introductory chapter focuses on the democratic method in the Parliaments of the Central and Eastern European countries, looking at Government-opposition relations as they are shaped by the distribution of procedural resources.

The country-specific case studies allow for a broad reflection, as they represent different stages of democratic consolidation. They range from EU candidate countries such as Serbia and Moldova, to newer members of the Union whose democratic stabilisation is not in doubt (the Baltic countries), or which have experienced moments of difficulty in the early stages of the transition to democracy, which they have then overcome despite some cyclical episodes of crisis (Slovakia), to countries with greater fragility in terms of political pluralism and alternation (Romania), and finally to the cases of Hungary and Poland. In these countries, despite the existence of formal guarantees, opposition forces have in recent years been all but wiped out by the overwhelming power of populist majorities, or are extremely divided, polarised and unable to use the instruments available to them under the constitutional order, if not actually paralysed by legislative or constitutional reforms that tend to stifle countervailing forces in general. First of all, it should be remembered that the countries in question are young and fragile democracies (in some of them, unfortunately, the persistence of the democratic

order is now being questioned[3]) which, at the time of the last political transition (the post-communist one, which for some countries, such as Moldova, Serbia and Slovakia, also coincided with the conquest of statehood), had to learn the practice of multi-partyism after a long period of domination by a single or hegemonic party. In some of the countries studied, the proto-parties (e.g. the national liberation fronts in the Baltic countries and Moldova, the "civic umbrella movements" in Slovakia, Poland and Hungary), protagonists of the democratic transition, gave way to a fragmented and unstable system. Therefore, before these countries could learn the role of the opposition, they had to learn multi-partyism, including the revival of pre-war parties wherever possible.

The laborious process of political stabilisation (which in some cases has not yet been achieved) has then had to face the challenge of the alternation of political forces in government (the countries in question predominantly adopt a parliamentary or weak semi-presidential system of government) and the instability caused by the introduction of electoral systems that are not very selective (with a few significant exceptions, such as Hungary) and reflect societies that are highly divided along ethnic and socio-economic fault lines. Many of these countries have recently witnessed the rise of populist forces, both in opposition and in government (with varying results), and thus strong identity polarisation (e.g. in Serbia). An increasingly important divide is also that between pro-European and Eurosceptic parties, if not openly sovereignist or pro-Russian (the case of Moldova is emblematic, but there is no shortage of pro-Russian cases, even in contexts as diverse as Hungary and Serbia). The geopolitical equilibrium, which has been disrupted and reshuffled over the past year in particular by Russia's war of aggression in Ukraine, influences the internal political dynamics and also gives rise to major political clashes.

The contributions in this volume focus mainly on the normative aspect and the guarantees of formal protection of the opposition contained in constitutional texts and parliamentary regulations (in some cases, as in Slovakia, in special laws). From this point of view, the rules of the democratic game – with the strategic importance of the opposition for the maintenance of a pluralist system and for the functioning of checks and balances – had to be

[3] See the Resolution of the European Parliament in which Hungary is considered to be a hybrid regime of electoral autocracy: European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE), at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022IP0324>.

written from scratch, often with little reference to their constitutional tradition. The chapters also contain references to the practical functioning of the political dialectic in the countries concerned, such as in the case of Serbia, which is analysed from a political science perspective.

In some cases, there are interesting points of comparison with other European countries. This is the case, for example, with Moldova and Romania, whose constitutional histories are traditionally intertwined (until relatively recent times) and even in the current constitutional order they share many common elements. Both countries are influenced by the cultural and constitutional influence of France, the traditional point of reference for these countries, even if, as far as the status of the opposition is concerned (the case of Romania is closer to that of France), there is a clear divide between the normative-formal aspect (which is already not particularly designed to protect the opposition) and political practice, which shows a limited maturation of the political culture of both the majority and the opposition. Particularly worrying is the phenomenon of parliamentary transformism, for example in the Romanian case, which weakens the dialectic between parties and the physiological logic of control and alternation between majority and opposition. Despite the existence of mechanisms similar to those in France (especially in Romania), the practical result is completely different due to the diversity of the electoral and party systems. Structural elements cannot be imported without functional ones.

It is also interesting to note the paradox of the countries that were pioneers of democratic transformation and that later proved to be vulnerable precisely because of the role of the opposition (but the degeneration occurred after about twenty years, thus confirming the democratic stabilisation before the subsequent populist drift). Among these is Poland: although it is the country that began the transition from communism precisely by recognising (and legalising) the role of the Solidarity opposition, the Polish legal system, like others in the region, lacks a solid constitutional statute for the opposition. Paradoxically, it is the PIS that has recently introduced some minority protection provisions in the regulations of the Electoral Commission and the National Media Council, following the conservative involution. In fact, in this country, more than specific mechanisms to enforce the political responsibility of the majority, an important role of the opposition should be found in the position that certain institutions could exercise in their complexity, such as the Senate or the Head of State. In this case, we are talking about specific counter-powers. However, since the capture of the Constitutional

Tribunal, there have been no significant attempts by the opposition or guarantee institutions (which are not such because they are politically aligned, such as the Head of State) to use this institution to counter the political direction of the majority.

The considerations in this volume make us reflect on the importance for legal scholars and political scientists to continue to deepen the study of the status and role of the political and parliamentary opposition in order to better understand the dynamics affecting transitions, democratic consolidation and pluralism guarantees in this geographical area and beyond.

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The protection of political minorities in the European context

MANUEL FONDEVILA MARÓN*

1. Premise

The 12th Activity Report of the Advisory Committee of the Framework Convention for the Protection of National Minorities of the Council of Europe (November 2020) alerts against the «tendency to view democracy as only creating rights for the majority together with divisive and xenophobic discourse against national minorities». The European Commission for Democracy through Law (Venice Commission) also warned of a tendency to dismantle controls that limit the power of the parliamentary majority (Opinion no. 845/2016, June 24th 2019, CDL-AD (2019)015). Reversing this trend is essential for European democracies.

This paper defends the importance of guaranteeing an adequate status to the political opposition as the only possible counterweight, in current political regimes, to majority power. The starting hypothesis is to consider the

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opposition as a determinant element of the democracy. However, since the concept of political opposition is, to a certain extent, ambiguous, it is necessary to try to delimit it by classifying the different types of opposition and indicating what are the necessary elements that must make up a statute of it. From there, what models of the legal status of the opposition can be found in European democracies and what the European Union can do to promote, in these States, adequate protection of political minorities will be explored.

The methodology followed is that of comparative law, comparing the different national systems and, also, the national provisions with the rules of the European Union and the recommendations of the Council of Europe.

2. The statute of the opposition in representative democracies

2.1. The political opposition as a determinant element of a democracy

In a strict sense, we can only speak of political opposition in democratic regimes. Obviously, in a broad sense, more political or historical than legal, it is possible to think, for example, in opposition to Franco's regime or any other autocratic or authoritarian regime. However, in this type of regime, any kind of real opposition is forced into clandestinely and conspiracy, if not directly to subversive action. This not only conditions his activity, but also deprives him of all recognition. In these cases, it is preferable to speak of resistance or dissidence (Tierno 2018: 1181), because, if in these regimes there is an opposition, it is a formal opposition, which does not really aspire to replace those who hold power, and whose presence is justified only for appearing pluralism.

In democracy, the change of perspective is remarkable, because while in a non-democratic regime the government pretends to legitimize the opposition, authorizing (or not) its exercise, in democracy it is precisely the opposition, which, because it exercises its functions freely, accepts that has been defeated in fair elections and may be victorious in the next, thereby legitimizing the government that came out of the polls (Ruipérez 2020: 231). It follows that the existence, and the free exercise of power by the political opposition is a determinant element in a democratic regime.

Despite this, the formal recognition of the opposition did not take place until the twentieth century, as the first manifestations of this phenomenon were in Great Britain the approval of the Ministers of the Crow Act of 1937, where the salary of the leader of the opposition was fixed (it is currently reg-

ulated by the *Ministerial Salaries Consolidation Act*, 1965), and in post-war Germany, the approval of the Constitution of Baden, in May 1947, which, in article 120, made an express recognition of the opposition. Today, practically all German state constitutions recognize the opposition in some way[1]. For our purposes here, it is worth highlighting article 24.1 of the Hamburg Constitution, which states that the opposition is an essential part of the parliamentary democracy.

Nevertheless, logically, before this fact took place, a series of historical conditions that can be summarized in the following milestones occurred: firstly, the development of a public opinion, which would begin with the appearance of the capitalist class in the fifteenth and sixteenth centuries (Ionescu and Madariaga 1977: 35), because, without that critical mass that began to be created in the cities, there can be no challenge to power. Secondly, the fall of the old regime and the establishment of the liberal state, because only from this moment political life begins to be organized in majorities and minorities arising from the suffrages. At this moment, the first concerns about the treatment that political minorities receive started[2]. Thirdly, and finally, the recognition of universal (male) suffrage, which meant the irruption of the working class in parliaments, as well as mass parties. With the

[1] At present, the formulas used in these Constitutions regarding opposition can be grouped into three main groups: a) formulas containing the opposition's right to exist (Bremen and Saxony); b) formulas of principle (Bavaria, Berlin, Brandenburg, Hamburg, Schleswig-Holstein, Thuringia); c) formulas defining opposition (Bavaria, Mecklenburg-Vorpommern, Lower Saxony, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein) (Fourmont 2019: 190).

[2] Without wishing to be exhaustive, can be referenced here to the fact that Immanuel Kant (2001: 55-56) stated, in the first definitive article on perpetual peace, that the fact that a majority decided for all constituted «a contradiction of the general will with itself and with freedom». Benjamin Constant (2001: 57, 491) keenly pointed out that defending the rights of minorities, given that tomorrow they may be majorities, was defending the rights of all, also indicating that, precisely because this is so, from the logical-rational point of view, it is never the majority that tyrannizes a minority, but a series of subjects in its name and with the weapons that it has provided. John Stuart Mill (2019: 180 ff.), after verifying that in representative regimes, instead of the whole people, only the majority was represented, advocated the need to adopt electoral formulas that would also guarantee their representation. Even, in particular, regarding the opposition, Alexis de Tocqueville (2005: 109-118) denounced, as a consequence of forms still typical of the absolute monarchy, the lack of tolerance regarding its right of criticism, although he also reproached it that trying to make "its own career" instead of assuming the role of obstruction and criticism that corresponds it. Lastly, Guizot (1987: 249-263) lamented that the opposition had been relegated to the rostrum without the capacity to influence politically, even warning that this could make it opt for violent means.

transformation of representative regimes into parliamentary regimes (Carré de Malberg 1998: 1054-1075) the idea that deputies represent the whole nation declines; with the idea that they represent only those who elected them, genuine oppositions of principle emerge. The lack of adequate channeling of these antagonisms led, in continental Europe, to great instability and, in the end, to fascist solutions.

It is not surprising that it happened, after the Second World War, when the value of pluralism began to be recognised and formulas of guarantee for the opposition started to be adopted. It is not, therefore, strange, that the first works on the opposition not emerge until shortly after. The first ones dated since the decade of the fifties (Burdeau 1954; Kluxen 1956; Kircheimer 1957; Basso 1958), but were compiled in a book edited by Robert Alan Dahl (1966) in the mid-sixties, which deserve, even today, to be considered a reference. To the author corresponds the merit of having dealt with this phenomenon with exhaustiveness, as well as the first attempts to define and classify the opposition. As seen above, since there are renewed concerns about the opposition as consequence the threat of democratic involutions, it is very remarkable that, focusing on the conditions that can lead to democratic transitions in countries with non-democratic regimes, he stressed the importance of the opposition being able to organize openly and legally, and the parties faced the government. He also sensed that considering only representation does not guarantee the rights of the opposition when a government is authoritarian, and itis important because even today, especially in Spain, what would be the legal status of the opposition tends to be confused with the legal status of the parliamentarian. According to him, a political system that facilitates opposition is only an "important" (not essential) facet of the democratic process, expressly denying, although without explaining it in depth, that the processes of democratization and development of the opposition are identical. In fact, the guarantee of opposition is not among the eight clauses that must be given to speak of a polyarchy (Massari 1997: 78).

Robert Dahl's theory, with purely liberal roots, ended up partially blurring the main characteristic of opposition as a dialectical negation of power and its activity (De Vega 2004: 1). Authors after him have understood this role of the opposition better, elevating it to the category of constitutional function. Among them it is worth highlighting Giuseppe de Vergottini, who proposes the concept of "guaranteed opposition form of government" as a category that would exclude those regimes that apparently assimilate to parliamentary or presidential systems (de Vergottini 1979: 8), but where there is no guarantee of political minorities, although this does not seem

to contribute anything to a well-understood idea of democracy. Because, obviously, democracy is not only about respecting the will of the majority since a majority government is only bearable when instruments for the protection of minorities are foreseen (Friedrich 2020: 51-52). What the liberal thinking of authors such as the American shows, is an undisguised fear of counter-majoritarian powers, which it understands as a potential source of instability. When the focus is placed on power, it is not strange that they raise suspicions; but, when it is understood that, as stated above, in a democracy minorities legitimize the system, the existence of these can only be considered positive. These checks and balances must not lead to a situation of ungovernability. This will depend on a good constitutional design and a loyal attitude on the part of all political actors.

The majority government has the right to govern, but it must do so without expecting cooperation in that direction from the opposition, since the function of the opposition is not to allow it to do so, but to confront it (Pasquino 1998: 31-32), and it will depend, not only, but in a very special way, on the mechanisms that it has for this and, obviously, on its willingness to enforce them, so that an authoritarian drift can be prevented.

2.2. Classification of the different types of opposition

Rethinking the concept and function of the opposition in the sense set out in the previous section, also forces us to question many of the existing classifications of the different types of opposition (among them, see Fondevila 2020: 54 ff.). According to the proposed parameters, the concept of opposition is more restricted in terms of modes and broader with respect to the actors than is usually understood by doctrine. This implies the need to deconstruct some typologies and build new ones.

Dahl defined the opposition as follows: «Suppose that A determines the conduct of some aspect of the government of a particular political system during some interval (...). Suppose that during this interval B cannot determine the conduct of government; and that B is opposed to the conduct of government by A. Then B is what we mean by 'an opposition'. Note that during some different interval, B might determine the conduct of the government, and A might be 'in opposition'» (Dahl 1966: XVIII). This is rather an unsatisfactory definition. The first thing that can be criticized in it is that the signifier is contained in the meaning. Moreover, obviously, opposition is not only "opposing" government action, nor do all oppositions aspire

to lead the government. Not even all of them have realistic options to do so. At a time when political regimes are characterized less by their properly institutional architecture than by the modalities by which the conditions of action are determined by the possibilities of blockage coming from the different actors (Rosanvallon 2007: 33), it does not seem very realistic to limit the concept of opposition, as it seems to be deduced from the definition of the Yale University professor, to the one of the parliamentary opposition parties that were losers in these last elections, but may be victorious in the following ones. Firstly, there are parties that may not seriously aspire to win elections. Secondly, there are currently many lobbies, independent agencies, etc. that oppose government action, but do not seek to replace it.

In a more synthetic, but, perhaps, more precise way, opposition can be defined as a "constructive denial of power (or government action)". The term "constructive" is a key-term, not because there have always been protest groups expressing discontent or frustration, but because of the indeterminate nature of their protests (if we can define them in these terms) of their rebellious nature, and their romanticism, they cannot be considered as a type of opposition. This was applicable, for example, to the student movement in the 70s (Tierno 2009: 454), although today the judgment regarding these probabilities must be different, especially in places like Spain, where a university movement turned out to be the germ of a political party that ended up having government responsibilities, or Chile, where students proved to have a fairly defined educational project in financial and political terms (Rifo 2013: 226).

It has also been criticized that Dahl's definition included only recognised opposition. However, this option is correct, according to everything we have been saying. In a strict legal sense, an unrecognised opposition cannot be regarded as such. Since those regimes which outlaw those forms of opposition which they find annoying cannot be regarded as democratic, as said, there can be no form of opposition in them. Therefore, to speak, of a proscribed or unrecognised opposition is, from the parameters set out here, a contradiction. Of course – it should also be made clear here – from a political point of view certain groups will be able to put forward reasons for fighting a certain regime outside the law. History will end up legitimizing or not such movements. But, in the same way that, as said, one cannot speak of opposition in an authoritarian regime, it is ridiculous, in a democratic regime, to consider opposition to illegal groups, organizations or parties. They are not because they cannot fulfill the constitutional function that corresponds to it. Also Giovanni Sartori, who, as known, classified oppositions, according to its modes, into responsible and

constitutional opposition, constitutional opposition but not responsible, and opposition neither responsible nor constitutional, affirms that the third type is residual and could not be considered as a form of opposition (Sartori 1966: 153). Moreover, to consider, for example, a form of opposition to a terrorist organization would be repugnant to democratic values and the most elementary legal logic. This refers to another problem, although closely related, more diffuse – if possible – than the one of opposition, such as the idea of "militant democracy" (Pegoraro 2013). For reasons of space, and in order not to lose sight of the object of these pages, we will not go into it, but it should be noted that this theory only fits by presupposing that, in a democracy, there are no illegalization for ideological reasons, provided that they are not organizations that justify violence or pursue their ends through means decidedly contrary to democratic principles and, especially, pluralism.

As seen above, a classification of three types of opposition is proposed in order to distinguish this phenomenon.

a) Parliamentary opposition and opposition in general. One could also, in a more classical way, speak of a distinction between parliamentary opposition and extra-parliamentary opposition. The classification refers to the scope of action. However, the term "general", also used by the Venice Commission in the above-mentioned document, being more indeterminate, seems more appropriate for two reasons.

Firstly, because the term extra-parliamentary opposition has been used in the past to describe intellectual movements with a revolutionary aesthetic (an example of this could be the writings appeared in "Kursbuch", founded by Hans Magnus Enzensberg in 1965, and collected in 1968 in a book edited by Backhaus in 1969), or even the ones being out of the law (De Vega 2004: 33-38). With this concept of extra-parliamentary opposition, no one will be surprised that some authors have pointed out its tendency to disappearance and its incardination in the parliamentary opposition (Massari 1997: 82). This could lead to confusion, because assimilating the concept of extra-parliamentary opposition to thinkers located in the dogmatic clouds, as well as to illegal or lawless movements, would be outdated in the current political regimes in which, as said, different actors are to control and obstruct government action by other different instances than the parliament.

Secondly, it should be clear that, among these groups there are some ones, which, without being, logically, part of the parliament, are, in some ways, incorporated into the work of the chambers, and registered in them (for example, lobbies, especially in countries like the United States). It also should be clear that the distinction is not as sharp as it might seem. It should be added

that it is increasingly common for political parties to transfer their disputes to areas other than the parliamentary arena. For example, they may ask a declaration of unconstitutionality to the Constitutional Court. It may also be that members of certain bodies appointed by the party in actual opposition resist government policies. This is because today the true separation of powers is not between the legislative, executive, and judicial, but, precisely, between the parties of government and opposition (Duverger 1957: 458; De Vega 2017: 516).

Within the parliamentary opposition, a distinction could be made, in turn, between institutional and non-institutional opposition. It could also be said statutory and not statutory. This sub-category refers to whether the opposition has a formal and express recognition as such or not, granting it certain rights. Within the first type could be referred, as will be seen in the next section, for example, to the opposition in Great Britain or Portugal. When the norm requires a declaration to be recognised as opposition (as, for instance, in Colombia), the category can be problematic if a party that in many occasions supports the government has declared itself in opposition or, on the contrary, if a party that is not part of the government decides not to declare itself in opposition, which can generate disinterment between some of its members (Arcilla 2021: 50. This councilor also complains about those parties that, being in government, declare themselves as opposition parties, subtracting time from the others, since it is distributed proportionally among all the opposition). Non-institutional or non-statutory opposition is one that, as in Spain, does not have express recognition and where, therefore, its legal status is confused with the parliamentarian one.

b) Dissenting opposition and ideological opposition. The former accepts the legitimacy of the system, although it opposes to the specific policies of the Government. The second one questions the political legitimacy of the regime. It is a classification based on the content of the proposals. As Maurice Duverger rightly put it, the nature of the opposition is influenced by the struggle between parties. The French author pointed out the following types: a struggle without principles, a struggle over secondary principles, and a struggle over fundamental principles. According to this author, the first type is that of the United States where one party occupies a power and another tries to strip it without ever taking on dyes of fanaticism; the second one, typical of Great Britain and Northern Europe, corresponds to a division of doctrinal and social character; the third one, which would occur in France and Italy, already affected the principles of the regime itself (Duverger 1957: 444-457).

Since, on the one hand, it seems that the differences, in the United States, between the Republican and Democratic parties are somewhat more pro-

nounced than in the fifties (when this work was published), and that, in any case, if it were not so, what would happen, as this author affirms, is that the characteristics of the opposition are blurred, this classification, used by Pedro De Vega in his work on the opposition, seems simple and sufficiently encompassing the possible types of real opposition in political regimes. It goes without saying that, for the above reasons, the ideological opposition can only be considered as a type of opposition if it respects the democratic principles and pluralism. For this reason, this dichotomy is preferable to one that distinguishes among loyal, disloyal, and semi-loyal opposition depending on its commitment to the use of legal means to achieve power and rejection of the use of force (Linz 2021: 100-124).

c) External and internal opposition. This category is also referred to, in the cited work, Maurice Duverger. Internal opposition occurs among the majority. It can be among parties of the governing coalition or the opposition that exists within the same party. External opposition occurs between the parties of the majority and the minority. Some authors include this dichotomy within the parliamentary opposition[3]. However, this only of any use if parliamentary opposition is being identified with systemic or loyal opposition, since internal opposition within the same party, as a result of voting discipline, will rarely occur in Parliament, and, likewise, that internal opposition in a coalition may or may not occur within Parliament (e.g. this will not be the case in the opposition that can exist between President and Vice President in presidential regimes).

2.3. Brief comparison of some constitutional statutes of the opposition in Europe

The existence and quality of democracy depends on the status of the opposition. However, this does not mean that the status must be explicit. Of course, the existence of a regulation of the basic aspects of the opposition at the constitutional level is very convenient, above all, because it is the best way to

[3] Philip Norton, based on Anthony King categories, identifies five "modes of relationship" in which parliamentary opposition can express itself in democratic regimes: a) "opposition mode", typical of the Westminster model; b) intra-party mode and; c) interparty mode, which are the two modes we are referring to in this paragraph; d) non-partisan mode, which includes parliamentary groupings without a formal structure; e) consensual mode, typical of Scandinavian countries and other democracies of the "consociational model" of Arend Lijphart (see Natera 2022: 298).

establish the counterweights to power, equalising the weapons between the government and the opposition. It does not mean, obviously, that there is no statute of the opposition where the Constitution is silent about the matter, since, in fact, the existence of an implicit statute is the most common option and the powers that, also in these models, the Constitution attributes to minority groups cannot be underestimated (Rinella 1999: 96-98).

Moreover, authors such as Angel José Sánchez Navarro, consider that the legal status of the opposition is made up of both written rules (which can be found in parliamentary laws and regulations) and unwritten (parliamentary practices, the place and role that is recognised to the opposition, etc.) that generate a series of rights, powers, competences, and duties that serve as instruments for the parliamentary opposition to fulfill its constitutional function (Sánchez Navarro 1997: 58).

However, it is clear that, at least at a theoretical level, the opposition is more likely to enjoy these instruments where there is an explicit constitutional status of the same, or, in other words, where its rights, powers, etc., are mentioned in the Fundamental Norm and developed in the infra-constitutional norms. In legal systems in which the Constitution does not include these guarantees (as in Spain, where, at most, it can be argued that there is an implicit statute that can be inferred from the design of parliamentarism; López Aguilar 1998: 169), it may be that the infra-constitutional norms that, it should not be forgotten, are approved by the majority, place the opposition in a relatively weak situation.

In Spain, on the one hand, the centrality of parliamentary groups in the Parliament can hinder, in some extent, the free exercise of opposition. Political parties or deputies and senators[4] who do not meet the requirements to form their own group become members of the mixed group. It is true that this group tends to divide its time among all the parties that make it up, favoring pluralism, but this does not prevent other difficulties. In this regard, it should be noted that only the parliamentary groups or a more or less significant number of deputies or senators, as well as one deputy, but with the signature of the spokesman of the parliamentary group, can submit draft laws, and the same applies to the tabling of amendments in the Congress of

[4] According to art. 126 of the Standing orders of the Congress of deputies, «Private members' bills in Congress may be adopted in the initiative of: (1) a member, with the signature of fourteen other members of the House; (2) a parliamentary group with the sole signature of its spokesman»; according to art. 108 of the Standing orders of the Senate, «Bills emanating from the own initiative of the Senators (...) shall be signed by one parliamentary group or by twenty-five Senators».

deputies (art. 110 of the Standing orders). In any case, the iron discipline of voting makes it very difficult for a bill presented by a minority group or even an amendment to succeed, except when it is presented by deputies or senators of groups that support a minority government.

On the other hand, both in legislative matters and in the control of the government, the regulations of the Chambers even allow what has been called "obstruction of the majority" (Ruiz 2018: 279). The procedure for taking into consideration draft laws provided for in art. 126 of the Rules of Procedure of the Congress of deputies and in art. 108 of the Rules of Procedure of Senate allows the majority to deny that any legislative proposal from the opposition saves this first step. There are also other advantages of the majority: firstly, in the way in which interpellations and questions are prioritised[5]; secondly, because, although commissions of inquiry can be proposed, in addition to the Government, by two parliamentary groups of the Congress or by a fifth of the members of the Senate and twenty-five senators who are not part of the same parliamentary group, the final decision is always taken by the plenary. A proper understanding of the function of the opposition would deprive these matters of the majority principle, placing their weight on the minorities (Requejo 2000: 164). Although the constructive motion of censure has been criticised in the same sense, as being affirmed by some authors such as Torres del Moral that it no longer served, the fact that the last one presented has been successful, leading Pedro Sánchez to power, shows that it maintains its full meaning, since, although it is required to be "constructive", it is not, in practice, impossible.

Finally, it is not surprising that, at the regulatory level, constitutional case law does not guarantee the rights of the opposition in a particular way. While other European Constitutional Courts, such as the German one – even if in Germany there is no any explicit constitutional status of the political opposition at federal level – identified a right to opposition as a general right of

[5] According to art. 182.2 of the Standing orders of the Congress of deputies, «Priority in the entry of interpellations in the agenda shall be given to those lodged by members of parliamentary groups or parliamentary groups themselves who, in the session in question, have not taken full advantage of the quota consisting of one interpellation for every ten members or fraction thereof belonging to a group». Likewise, the following art. 188 states that: «Questions shall be included in the agenda with priority being given to those raised by Members who have not yet submitted questions on the floor of the House in the same session». The same criterion is laid down in art. 163 of the Standing orders of the Senate.

criticism, and resistance to the power[6], they are much more reluctant, however, to recognize specific rights to the opposition (Mezzetti 1992: 50-68), the Spanish Constitutional Court has not even taken that step. Without going into too much detail now, it should be noted that the Spanish High Court: on one hand, although it has any judgment in which, at the municipal level, it establishes that the partisan affiliation of political representatives when occupying positions in the organs of the corporation must be taken into account, so that the decision of the majority cannot undermine the rights of minorities (see const. decision no. 32/1985); on the other hand, the Court has also created an abundant case law in which, starting from the equal consideration of all parliamentarians, it protects in appeal violations of the regulations that suppose a breach of this equality, but without recognizing any specific right to the opposition, and leaving a wide margin of interpretation to the governing bodies, which normally respond to the will of the majority (see, for all, const. decision no. 140/2007).

Among States with an explicit constitutional status of the opposition, it is possible to distinguish, on the one hand, cases like Portugal, whose statute contains specific rights for the opposition[7]. This precept is developed by the Statute governing the Right of Opposition (Law no. 24/98), which regulates the rights to information, hearing, public and legislative participation, to appear before parliamentary committees, and a series of guarantees of freedom of independence for the media about which the government must inform the opposition.

On the other hand, we find, in some cases, constitutional precepts that refer to a regulation by inferior norms. This is the case of France, whose Constitution, amended for this purpose by the constitutional law no. 2008-724, establishes, in its art. 51-1, that: «*Le règlement de chaque assemblée déter-*

[6] See BverfGE 2,13. This right derives from certain constitutional precepts (fundamentally, articles 5, 8, 9, 17, 21 and 38) and, also, by virtue of article 92.3 of the Criminal Code (which establishes as a constitutional principle the right to form and exercise a parliamentary opposition).

[7] According to art. 114: «1. Political parties shall hold seats in the bodies that are elected by universal, direct suffrage in accordance with their proportion of election results. 2. Minorities shall possess the right to democratic opposition, as laid down by this Constitution and the law. 3. Political parties that hold seats in the Assembly of the Republic and do not form part of the Government shall particularly possess the right to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest. Political parties that hold seats in the Legislative Assemblies of the autonomous regions or in any other directly elected assemblies shall possess the same right in relation to the respective executive, in the event that they do not form part thereof».

mine les droits des groupes parlementaires constitués en son sein. Il reconnaît des droits spécifiques aux groupes d'opposition de l'assemblée intéressée ainsi qu'aux groupes minoritaires». Apparently, it may attract attention and seem pointless to carry out a constitutional reform to make a regulatory reference, but this reform was adopted two years after the *Conseil Constitutionnel* declared unconstitutional a reform of the regulations of the National Assembly (decision no. 2006-537 DC), which classify the parliamentary groups as "majority" and "opposition", conferring to those of the second type certain specific rights (such as obtaining reports on the application of laws and the presidency or rapporteur ship of commissions of inquiry), considering that it granted unjustified unequal treatment, contrary to art. 4 of the Constitution. This reform made it possible in 2009 to finally reform the rules of the Chamber to allow the groups to declare themselves to be in opposition (see Resolution 292, of May 27th 2009).

3. The determining elements of the opposition: special reference to the checklist of the Venice Commission

The enormous diversity of legal statutes and constitutional statutes of the opposition in representative democracies obviously complicates the possibility of drawing up classifications. However, certain elements may be identified in order to verify the quality of the legal status of the opposition. The Venice Commission has drawn up a checklist with verification criteria in this regard (see the aforementioned opinion no. 845/2016). These criteria, which are based on seven principles enunciated at the beginning of the document (freedom, pluralism, checks and balances, cooperation in loyalty and respect for institutions, shared responsibility by the majority and the oppositions towards society, possibility of alternation in power, and efficient decision-making), are the following:

a. the most fundamental rules on opposition and minority rights cannot be altered by the majority at its discretion;
b. all parliamentarians, regardless of whether they are from the majority or from the opposition, have the same individual rights; party groups are established and formally recognised, respecting their autonomy and receiving resources from parliament; and a free mandate is established, with the deputy being able, in case of breaking party discipline, to be expelled from the group, but in no case this implies the

loss of the mandate, which can only be adopted for serious offenses or incompatibilities;

c. the debates are public and inclusive; members have reasonable time in the debates, and the opposition has access to working documents;
d. appointments to positions of responsibility in Parliament are made proportionately, and those of parliamentary work administrators (who must be non-partisan) are made by consensus; the opposition participates in procedural decisions within parliament; and that the committees where it is proportionally represented have sufficient powers in parliamentary functions;
e. the opposition has the capacity to convene Parliament in an extraordinary manner and to influence the agenda of debates; providing, under certain circumstances, the same time as the majority; it has the capacity to introduce amendments without any limitations other than those that may be established at the constitutional level according to the type of law in question; the amendment of parliamentary regulations, as well as other important laws, requires a qualified majority; where provided for in the constitution, the opposition has the capacity to initiate or oppose a referendum; and it may submit an appeal of unconstitutionality with the constitutional court;
f. if the government can legislate directly, the rights of the opposition should be secured by qualified majorities or by limiting the powers of the executive during states of emergency that may weaken the rights of the opposition;
g. the opposition has more right to put questions to the government in control sessions than members of the majority and may gather information outside these shifts; a qualified minority (a quarter of members) can request the establishment of a commission of inquiry and has sufficient powers with regard to witnesses;
h. all high positions are appointed by qualified majority, although mechanisms are organised to avoid blockages;
i. there are parliamentary immunities that prevent politicised charges by the opposition which, however, do not impede legitimate criminal proceedings;
j. the opposition also has a strong weight in those parliamentary bodies responsible for ensuring parliamentary order and have competence to hear sanctions for certain behaviors or comments, which in any case must be imposed by a procedure based on the principles of due process, be proportionate and not affect the essence of the parliamentary mandate.

Of course, these are not determinant elements. It is clear that several of them could be dropped (for instance, the referendum initiative, the possibility of lodging appeals of unconstitutionality, the possibility of convening Parliament in an extraordinary way or setting the agenda, ...) without making it possibile to speak of the inexistence of a legal status of the opposition. Since when talking about the legal status of the opposition is often confused with the statute of the parliamentarian – something that is very evident in the checklist of the Venice Commission –, elements more related to the proper functioning of the legislative chamber (such as the free mandate[8]) than to a statute of the opposition (although the opposition also benefits from that which is attributed to all members of a chamber) have been included.

Other aspects may be debatable: for example, the commission stresses that all parliamentarians should have the same individual rights and is content that the opposition has, in the legislative process "under certain circumstances", the same time as the majority. Although they may be sufficient conditions to guarantee a good status of the opposition, when one goes a step further, moving from the mere legal status of it (which may be, remember, implicit) to an express constitutional statute, it is normal to attribute a series of rights to the opposition different from those provided to the rest of the members of the parliament. These rights may be the right to be informed by the government of certain issues, access to documents, and, for what is now of interest, to have extra time, as established in the statute of the opposition in Colombia (art. 112 Const. and Statutory Law no. 1919 of 2018). Also debatable is the issue of immunities, which is a privilege of Members *vis-à-vis* the judiciary and does not even serve to protect minorities, as Hans Kelsen rightly stated at the time[9]. Finally, the document itself acknowledges that it

[8] On this, Hans Kelsen said that: «the imperative mandate cannot be restored in its old form; but undeniably, the tendencies which today pursue this end are capable of realization in ways compatible with the structure of the modern political mechanism» (Kelsen, 2002: 50-51). On the reason of the necessity, democratically speaking, to abandon the doctrine of the imperative mandate as understood in the Middle, see De Vega (1985: 26-30).

[9] For the founder of the Vienna school, «it is necessary to abolish or, at least, considerably restrict that irresponsibility of the deputies, called immunity, and invoked not with respect to the electorate, but before the authorities, and especially those of the judicial order, which has constantly been considered as characteristic of the parliamentary system. The fact that a deputy can only be prosecuted or arrested for a crime, when Parliament authorizes it, is a privilege that arose at the time of the State Monarchy (...) and could even be justified in a constitutional monarchy (...) but not in a parliamentary Republic, in which the government is nothing but an emanation of Parliament and is under the control of the opposition and public opinion in general, while the independence of the judiciary is no less assured than

will deal only with the parliamentary opposition, ignoring the guarantees that the opposition in general must have.

All in all, the document that contain this checklist is a great working tool to start a discussion. No one can deny that, if a gradation could be established in each of these elements, a low overall score would mean a lower level of the status of the opposition and, consequently, of the democracy. A list of determinant elements would imply to reduce this one considerably. Probably, to speak of a democratic regime where the opposition can exist and organize itself freely, it would be enough to speak – and it is not little – of: an electoral and party system that reasonably allows an alternation in power; public and transparent parliamentary debates where opposition deputies have the possibility to participate for sufficient time and to access the necessary information; that inviolability for opinions and votes expressed in the exercise of their duties be provided to opposition deputies; that the composition of Parliament's decision-making bodies follows a logic proportional to the plenary session and that the important organs and institutions of the state are appointed by qualified majority; and, that there are judicial guarantees that protect deputies against illegitimate disturbances in the performance of their duties.

However, in order to establish a constitutional status of the opposition, and assuming that, instead of guaranteeing the right of opposition, the checks and balances in current political regimes are essentially carried out within the framework of the government-opposition dialectic, including non-parliamentary forms of opposition, it would be necessary to reform the system to include the following elements.

a) Specific rights for the parliamentary opposition, perfectly distinguishing the general statute of the parliamentarian from that of the opposition. It implies, as a first corollary, a necessary declaration of the parties that are government and which are opposition, which also entails a task of conceptual delimitation. For example, the Saxony-Anhalt Constitutional Court had to clarify that belonging to the "opposition as an institution" does not mean that a certain party cannot participate in the budget or the drafting of the law (see LVG 1/96 (70)). The second corollary is that this declaration must imply a series of specific powers and rights that serve to equalize arms with

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in the constitutional monarchy, it makes no sense to try to protect Parliament against its own Government. This privilege cannot even be applied to protect minorities against the will of majorities (...) for the sole reason that such protection is not possible if the majority can agree to surrender to the authority that persecutes it» (translated from Spanish by the author) (Kelsen, 2002: 51-52).

the government: not only a right of criticism (right to opposition) must be guaranteed, in general, but also a right of financing and time in the extra social media, an adequate representation in the governing bodies of the chambers, the possibility of convening, and even chairing commissions of inquiry, which could be only from the minority, forcing appearances, etc.

b) Mechanisms for incorporating different groups in parliamentary work. The fact that there is an opposition within Parliament and another outside it does not mean that it is not possible, and convenient, to connect the latter with the chambers. Obviously, only certain types of social movements – namely those that are more organised – are likely to be incorporated into parliamentary work. It is necessary to avoid that this incorporation occurs in properly parliamentary functions and respect the autonomy of both the groups and the Chambers (Garrorena 2014: 201-205), but not because this implies incurring in corporatism, since the parties do not represent the general interests either, but because if it were to affect the representation of the citizenship that corresponds to them, there would be a reduction in democratic principles, especially majority decision-making. After the approval, in 2019, of the code of ethics, a specific regulation, in the Congress and Senate, of interest groups would be appropriate. This could include a register of people and activities, providing for sanctions and mechanisms to prevent political representatives from having an "agenda B" (Fernández Cañueto 2018: 170).

c) Creation and strengthening of independent authorities. These types of institutions provide the system with legitimacy for impartiality (Rosanvallon 2010: 113-173), since the main argument for its justification turns out to be the search for neutrality in the making of certain decisions. Precisely for this reason, they have been criticised from the point of view of the democratic principle, since it is understood that it demonstrates a lack of confidence towards politics and political parties (Salvador 2002: 379-381). Of course, many independent authorities, or a wide range of matters on which they deployed their action, would confirm the critics, by making elections to elect political leaders meaningless. Obviously, this is not the case of Spain and, in addition, all the doctrine that has dealt with these entities has highlighted the fact that they are never fully independent: government influences the issue of appointments, budget, etc. The big question, therefore, around them, is how majorities-minorities fit into the current dynamic. Bearing in mind that the vast majority is created by parliament, in order to fit better into the reconfiguration of the division of powers that has been exposed, the appointments of its authorities should be made through a distribution of quo-

tas among the parties or, as the opposition, be able to influence or veto them in some way. Otherwise, there is a risk that their autonomy from majority rule depends solely on the character of the persons appointed.

d) Strengthening constitutional justice. Despite being questioned from its inception by authors such as Edouard Lambert, Carl Schmitt, Ernst Forsthoff, and recently, above all by Jeremy Waldron, constitutional justice has succeeded, during the second half of the last century, to expand and to increase its powers in most states that can be considered democratic, with the only notable exceptions of Great Britain and the Netherlands. Naturally, it happened because, if the agencies discussed in the previous section endow the system with impartiality, constitutional justice increases the legitimacy by reflexivity of the political system (Rosanvallon 2010: 174-232). This is because with its examination of the constitutionality of the laws it multiplies the places of deliberation. Criticism of constitutional justice, with its different formulations and nuances, is reduced to a complaint that judges can overrule the action of the legislature, which represents the citizenship, and makes its decisions by majority; but when it is understood that, as said, today, the real division of powers occurs between majorities and minorities, the "counter-majoritarian objection" (Bickel 1986: 16) loses its meaning.

From this perspective, constitutional justice is the only instrument available to the opposition to prevent the majority from approving norms that violate the Constitution, assuming, therefore, the only effective brake or counterweight to a power that, eventually, was violating the constitutional pact. Instrument, but not – as some authors have argued – opposition, since constitutional judges, who are perfectly entitled to be active according to the circumstances (Barak 2006: 270), lack, on the contrary, any democratic legitimacy, imposing their criteria on the legislator (Alexy 2006: 40), to obstruct the decisions of the majority by themselves. It is different, for example, a "judicial revolution" (Ackerman 2011: 20) in which judges decide to end segregation in the classroom (the famous case Brown v. Board Education), from the position adopted by the American Supreme Court before the legislation of the New Deal. In the first case, a new right is created on the understanding that this responds to an evolution of society, in the second the creation of the right by the legislature is prevented within the framework of political discretion that the constitution grants it (Faller 1979: 56-57).

A sector of Spanish doctrine has traditionally questioned the usefulness of the constitutional challenge (Rubio 1998: 155-173) arguing that it should evolve to a jurisdiction focused on the protection of rights, being, therefore,

the interpretation of rights through the concrete control of constitutionality its main function (López Guerra 2021: 22). Leaving aside, even, the fact that they seem outdated positions, which would make constitutional justice lose all practical relevance, since the current trend in the interpretation of rights by ordinary judges and courts is to a supranational interpretation of them through mechanisms such as the control of conventionality, the question referred for a preliminary ruling and, possibly, through the advisory opinions provided for in Protocol no. 16 of the ECHR (even if Spain did not ratify it). Indeed, to eliminate the abstract review of constitutionality would open the possibility, as happened in Italy (const. decision no. 406 of 1989), to the existence of unconstitutional rules exempt from control within the legal framework. Moreover, the correct understanding of the majority-minorities dialectic in the terms set forth in these pages implies the need to create resources specifically designed for the opposition, which could be achieved, as is done in art. 63 BverGG actively legitimising it in the conflict between constitutional bodies (see BVerfGE 90, 286; and Montilla 2002: 115).

e) Establishment of mechanisms that serve to channel protests and other manifestations of opposition in general. An issue that is not only about dogmatic of fundamental rights but is also susceptible to be addressed from the perspective maintained in these pages. Obviously, the delimitation of the right to freedom of expression or its balancing with the right to honor is part of the theory of rights, but it is also possible to emphasise, that especially political representatives (see ECHR Judgment *Castells v. Spain* of 23 April 1992), but also private citizens, must be given a wide margin of criticism because they are also entitled – without prejudice to the use of legal and democratic instruments as well as without prejudice to their subjection to the constitution and the rest of the legal system (art. 9.1 Const.) – to oppose the action of the government. As the Constitutional Tribunal rightly stated, «the value of pluralism and the need for the free exchange of ideas as a substrate of the representative democratic system prevent any activity of the public powers tending to control, select, or seriously determine the mere public circulation of ideas or doctrines» (decision no. 235/2007, point 4).

Specifically, about what is being discussed here, the Constitutional Tribunal stated that «from the perspective of the right to freedom of expression, the formulation of criticisms towards the representatives of an institution or holders of a public office, however brazen, pungent or disturbing they may be, are nothing more than a reflection of the political participation of citizens and are immune to restrictions by the public power». However, it establishes a series of limits, since «this immunity is not predicable when

what is expressed, even symbolically, only reveals outrage or humiliation» (decision no. 177/2015). This is where the review exercised by the Court seems, in the light of the case-law of the ECHR (case *Stern Taulats and Roura Capellera v. Spain* of 13 March 2018, referring precisely to the case cited above), excessive, with several occasions in which the European Court corrects the actions of Spanish judges and courts[10]. Despite this, the Court seems stubborn, as shown by the const. decision no. 190/2020, in ruling against the doctrine of the ECHR. For Spain to conform to European standards in this area, it seems appropriate, therefore, to reform crimes such as those of articles 490.3, 491 and 543 of the Penal Code (see especially the individual opinion of Judge Encarnación Roca Trías).

4. The protection of political minorities by the European Union

4.1. The democratic principle and the rule of law in EU law

The importance of what has been stated in the previous section lies in the fact that the bases and principles enunciated and, especially, those derived from the checklist of the Venice Commission, can be used by the European Union to promote, and strengthen democracy in the Member States. A proper interpretation of the principles already enshrined in the Treaties would enable the Union to play an important role in the protection of political minorities.

The first thing to remember is that, according to Art. 2 TEU, «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities». These values are, as set out in the same provision below, common to the States. No State that does not respect them may join the European Union (art. 49 TEU). To achieve accession to the Union, certain criteria must be met. These criteria, known as the Copenhagen criteria, were established by the Copenhagen European

[10] Focusing only on those in which the condemnation of Spain came from the exercise of freedom of expression to exercise political criticism, we can cite the cases *Erkizia Almandoz v. Spain*, June 22, 2021; *Jimenez Los Santos v. Spain*, June 14, 2016; *Otegi Mondragón v. Spain*, March 15, 2011. In a modern democratic society, tolerance must also be extended to other state institutions, such as the judiciary (ECHR Judgment *Benítez Moriana and Íñigo Fernández v. Spain*, March 9, 2021) or the police (ECHR Judgment *Toranzo Gómez v. Spain*, November 20, 2018). All these decisions show that Spain has a problem in this respect.

Council in 1993 and subsequently reinforced by the Madrid European Council in 1995. Regarding the subject addressed in these pages, it is interesting to highlight what are known as political criteria, that are the existence of stable institutions guaranteeing democracy, the rule of law, respect for human rights and respect for and protection of minorities. This is where the Venice Commission's checklist can play a crucial role, especially in the report to be made by the Commission on compliance with the Copenhagen criteria (on these reports, and how they affected the situation of national minorities, see Ibarra 2005: 58). Interpreting European legislation in the light of the documents adopted within the Council of Europe makes perfect sense: it is a question of reconciling the efforts of both organisations – which, after all, converge in the development, in a broad sense, of integration in Europe – in the promotion of minority rights and democracy.

Undoubtedly, the European authorities are aware of the importance of the opposition in representative democracies. This is demonstrated by the countless resolutions of Parliament condemning violations of the rights of the opposition in countries such as Russia, Belarus, Turkey, Azerbaijan, Venezuela, Cuba, etc., as well as the regulations and decisions containing sanctions against countries that violate these rights. It is worth highlighting, however, the following sentence in the Communication by the Commission to the European Parliament, the European Council, the Economic and Social Committee and the Committee of the Regions on strengthening the rule of law. Proposal for action: «Political developments in several Member States have led to cases where principles such as the separation of powers, loyal cooperation amongst institutions, and respect for the opposition or judicial independence seem to have been undermined – sometimes as the result of deliberate policy choices» (COM/2019/343 final).

Regarding the normative framework, the rule of a qualified majority of votes governing Council decision-making contained in art. 16.3 TEU and, even, the blocking minority referred to in the following paragraph of that provision may, of course, constitute guarantees for a minority of States, which are those represented by that institution. However, it goes without saying, the Member States act in accordance with the will of the governing majority in them, for this reason, to assess the European institutions' treatment of political minorities within them, it is necessary to look back at the body representing the citizens, the European Parliament. It is in this institution that minority parties which have obtained sufficient votes in the various States can be represented. Its weight in European politics will prove to be very residual, since Parliament's weak position (reduced

to being a co-legislator body with much less influence than the Council and the Commission). It should be borne in mind that Parliament has no legislative initiative[11] and can control (art. 230 TFEU), and even submit, a motion of censure in respect of the Commission (art. 234 TFEU), but not respect of the Council, in a less order of the European Council, which shows the weight that the States still have in the Union (on these problems, see Sieberson 2008: 164-165).

In the institutional framework of the EU, it is impossible a real government-opposition dynamic to take place because of hackneyed topic of the democratic deficit. The EU institutional structure seeks stability through a balance between States, occupying citizens and even political parties a secondary place. Despite these negative aspects, it is also accurate to point out that it is possible to create a commission of inquiry at the request of only a quarter of the members of the Chamber (art. 226 TFEU). In addition, the practice of the system of electing Vice-Presidents and Quaestors tends to reflect the numerical weight of the political groups and takes account of the results of the election of President. Both are aspects that, as seen above, would favor, in a Parliament that occupies a central role in the institutional framework, the development of the role of political minorities.

4.2. Sanctions against regimes that do not respect the exercise of political opposition

Considering the importance that, as we have just seen, the States have in the functioning of the Union, it seems clear that the proper functioning of democracy and the rule of law in the Union will depend on how they take place in the Member States. The European Union has mechanisms to impose sanctions on those Member States in which violations of the values enshrined in Art. 2 TEU occur, and it has already had the need to implement them. These mechanisms are mainly three: a) the sanctioning mechanism of Art. 7 TEU; b) the Regulation to protect Union funds from mis-

[11] Art. 225 TFEU provides only that: «The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons».

use by states[12]; and c) the infringement procedure which the Commission may bring before the Court of Justice when a state fails to comply with European Union rules.

Of these, the one that is now interesting to highlight, and to put an end to this work, is the first. This mechanism was first put in place in 2018, when MEPs decided to ask the Council to determine whether Hungary was at risk of breaching the EU's founding values. On September 15th 2022, Parliament said that the situation in Hungary had deteriorated to such an extent that the country had become an "electoral autocracy", a constitutional system in which elections are held, but democratic norms and standards are not respected. In this resolution, violations of the rights of the opposition play an important role (European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)). Thus, it is pointed out, first, that some changes in the electoral system (alteration of constituencies and an advantage for the winner) leave opposition parties at a disadvantage; that the Central European Press and Media Foundation (KESMA), which brings together 470 media outlets, has had serious consequences in terms of reducing the space available for independent and opposition media and access to information for Hungarian citizens; in addition, that funds earmarked for public media and KESMA are used to disseminate government propaganda and discredit the opposition and non-governmental organizations; finally, that the systematic dismantling of the rule of law, democracy and fundamental rights has limited the space for opposition parties and civil society organizations, trade unions and interest groups, leaving no room for social dialogue and consultation.

[12] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. This mechanism was endorsed by the CJEU in Cases C-156/21 and C-157/21. The Parliament has repeatedly expressed its displeasure at the Commission's inaction in this regard, to the point of bringing an action for failure to act before the CJEU (see European Parliament resolutions of 21 October 2021 on the crisis of the rule of law in Poland and the primacy of Union law (2021/2935(RSP) and of 10 March 2022, on the rule of law and the consequences of CJEU decisions), but on 18 September, the Commission proposed to suspend the payment of € 7.5 billion of EU funds to Hungary on grounds of the rule of law to ensure the protection of the EU budget and the EU's financial interests. However, this measure is more focused on protecting the budget, and is problematic, as the link between the erosion of rule of law principles and the violation of the EU's financial interests will not be too direct (Köllig 2022).

5. Conclusions

Currently, there is a clear tendency in the representative democracies of the European continent to an authoritarianism of the majority. This is a corollary in weakening the checks and balances to the exercise of power, because of not having correctly focused on them. Nowadays, power is not limited because of the classic division of powers into legislative, executive, and judicial, since the party winning the elections controls or influences the appointments in all of them, but as a consequence of the dialectic between majority and political opposition forces.

The opposition becomes a determinant element of democracy, and this means that the mere possibility of organising and expressing oneself freely is not sufficient. Whether or not there is an express constitutional status of the opposition, its right and duty to criticise the government must be understood as a constitutional function leveling the exercise of power in each political regime. Thus, any democratic regime must offer, at a minimum, the following guarantees to the political opposition: an electoral and party system that reasonably allows an alternation in power; public and transparent parliamentary debates where opposition parliamentarians have the possibility to participate for sufficient time and to access the necessary information; MPs have inviolability for opinions and votes expressed in the exercise of their duties; the composition of Parliament's decision-making bodies follows a logic proportional to the plenary session and the important organs and institutions of the State are appointed by qualified majority; there are judicial guarantees to protect Members against unlawful disturbances in the performance of their duties. Ideally, however, as the opposition is always in a situation of inferiority *vis-à-vis* the government, it is the establishment of a constitutional statute for the opposition that serves to equalize arms between the two subjects, providing the opposition with extra time in debates, additional funding or, at least, guaranteeing the right to be informed by the government of relevant facts.

The constitutional function of the opposition requires a revision of some traditional classification categories. Speaking, especially, about an unrecognized or proscribed opposition, subversive, etc., may have a certain political sense, but not a legal one. This paper proposes a classification of the opposition into: a) parliamentary opposition and general opposition, distinguishing, within the parliamentary, between statutory and non-statutory opposition; b) ideological and dissenting opposition; c) internal and external opposition.

Considering this recently recognised importance of the opposition for the development of democracy and the rule of law, both the European Union and the Council of Europe adopted rules and documents to try to avoid a regression of its status in countries that are, broadly, part of European integration. The Council of Europe approved a checklist with standards that must be guaranteed to the opposition by the member states of the organization; in the European Union, for its part, there are three mechanisms by which the European institutions can act against those States where the right to opposition is not respected: a) the sanctioning mechanism of Article 7 TEU; b) the regulation to protect Union funds from misuse by States; and, c) the infringement procedure which the Commission may bring before the Court of Justice when a State fails to comply with European Union rules. The first and the second mechanisms have been used in the case of Hungary, highlighting the violation of certain rights of the opposition. In addition, the European Union has adopted numerous decisions against third countries where there are violations of those rights. However, from the internal point of view, as consequence of the importance that the States have in the institutional framework of the EU, it cannot be said that there are, in the European institutions, effective guarantees for political minorities.

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Governments and oppositions in the Parliaments of Central and Eastern European democracies

GIUSEPPE IERACI*

1. Introduction

Following the seminal works by Duverger (1980; 1986)[1], contemporary political science has accepted the formal and legal analysis of political institutions, and the reduction of the triangular relationships among parliament, president and government to three ideal-types of parliamentary, presidential, and semi-presidential. For instance, Linz (1994) distinguished parliamentarism from presidentialism, pointing out that the latter is based on a «double democratic legitimacy» directed towards the parliament and the elective presidency at the same time. Similarly, Lijphart (1999) underlined that in a parliamentary system, the prime minister and the cabinet depend on the legislature's confidence, while in presidential systems the presidents are popularly elected. In the parliamentary systems the executives are collegial bodies, while in the presidential ones they exhibit «one-person» and non-collegial traits. Lijphart

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[1] For a reappraisal of Duverger's concept of semipresidentialism, see Bahro, Bayerlein and Veser (1998).

combined these dichotomous criteria yielding eight possible models, only two of which are pure (parliamentarism and presidentialism) while the remaining six are hybrids derived from the two pure models[2]. Stepan and Skach (1994) distinguished also among «pure presidentialism», based on «mutual independence» between parliament and the head of the executive, and «pure parliamentarism», which is a system of «mutual dependence» between the executive and a parliamentary majority. In pure parliamentarian system the Head of the State may hold the power to dissolve the parliament and to call new elections. Sartori recognised the difficulty to identify parliamentary systems, because they can hardly be reduced into an homogenous class while in presidential systems the Head of the State (the President) gets the position through popular election, cannot be removed by the parliament during his mandate and directs the government or the governments nominated by himself (Sartori 1994a).

In a very influential work, Shugart and Carey (1992), who fully developed the approach based on the "index of presidential power" already sketched by Duverger (1980), classified as presidential government any system based on the direct election of the head of the executive, to whom some legislative powers are constitutionally guaranteed. In the presidential government, the mandates of the head of the executive and of the legislature have fixed durations, they are constitutionally separated, and the nomination and the direction of the government are entirely in the hands of the elective head of the executive. Nonetheless, in any presidential model the cabinet is the "President's executive" by definition, and consequently using the separation of the survival of the cabinet from the assembly as a criterion to identify the presidential system is merely tautological. Shugart and Carey simply sketched the crucial dimension of the relation between president and assembly, and took into consideration mainly the president's legislative veto power omitting to evaluate the complete array of constitutionally guaranteed powers which the president may employ in his relation with the legislature[3]. Finally, it has to be noted that the French V Republic and the Weimar Republic, both characterized by a strong popularly elective presidency, are very different from the homologous semi-presidential regimes of Finland, Ireland,

[2] Vatter (1999) applied Lijphart's classification to the analysis of the relationship between political institutions and direct democracy in the OECD countries.

[3] These properties of the presidential system have been tackled somewhere else. See Mainwaring e Shugart (1997). For a critical review of Shugart and Carey's classification, see Sartori (1994b).

Austria and Portugal, or from the newly established regimes in Central and Eastern Europe, and therefore it is possible to identify more regime types in a single class[4].

Duverger (1980: 161) underlined that in semi-presidential regimes the president (elected by popular vote) possesses considerable powers. All the definitions above reviewed underlined the particular configuration of pure presidentialism, that is the notable reciprocal autonomy of parliament and executive. On the contrary, the pure parliamentarian type exhibits a considerable degree of mutual dependency (or integration) between parliament and executive. These definitions introduce some ambiguities. Firstly, there are some parliamentary democracies where the Prime Minister occupies a dominant role in the cabinet and in the legislature, and where he/she acts almost as an elective president. Secondly, among the semipresidential case, both strong (French V Republic and Republic of Weimar) and weak presidencies (Finland, Ireland, Austria and Portugal) can be found. Thirdly, even among the presidential systems, there are cases of weak and strong directly elected presidents, and one is left with the suspicion that the popular direct election might be not an exhaustive criterion for the identification of all the presidential types.

Both in the case of presidentialism and of parliamentarism the powers at the disposal of the executive and of the legislative can greatly vary. These non-homogeneous distributions of «constitutionally guaranteed powers» (Shugart and Carey 1992) – or «considerable powers» (Duverger 1980) – point out the relevance of the relationships between the institutional roles, and the need for an analysis of the procedural resources held by the institutional roles in their interplay. Such powers should be identified, consistently attributed to president (A), parliament (B), and government (C), and measured keeping in mind the analytic distinction among three relatively autonomous dimensions: president-parliament (A-B); parliament-government (B-C); and presi-

[4] *Contra* see Elgie (1999; 1998; 1997) who does not consider it necessary to disaggregate into different types the original class of semi-presidential regimes. Elgie (1998) classifies democratic regimes resorting to two criteria, the type of election of the head of state and of the head of government, either direct or indirect, and their term in office, either fixed or flexible. On these bases, Elgie identifies parliamentary, semi-presidential and presidential regimes, with the addition of the unique cases: the Swiss directorate and the regime based on the direct election of the premier adopted in Israel during 1996-2001, following the 1992 reform of the Fundamental law.

dent-government (A-C), in a *morphological-relational* approach such the one sketched below in Fig. 1.

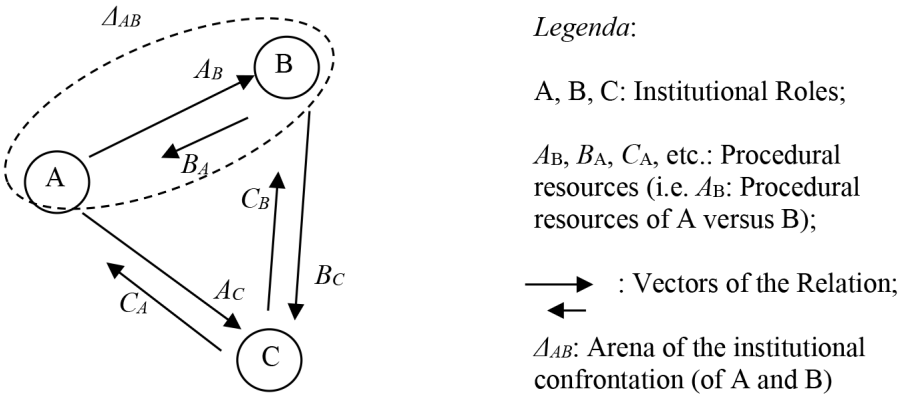


Fig. 1 - A Morphological and Relational Approach to the Assessment of the Strength of the Institutional Roles (Source Ieraci 2021: 418).

Following a different perspective (Ieraci 2003; 2021: 417-425), which enlightened the interplay in the democratic constitutional setting among institutional roles of authority[5], procedural resources attributed to such roles[6], and arenas of the institutional confrontation[7], it is possible to identify (see Tab. 1) four dominant varieties of institutional patterns among the Eastern European Democracies.

[5] The roles of authority located in the democratic regime are attributed to specific actors, who emerge from the political competition. The classifications are founded on the implicit distinction between «collegial roles of authority», such as Parliament (P) and Government (G), and «individual roles of authority», such as Head of State (HS) and Head of the Government (HG).

[6] In any institutional setting, the power to take various courses of action and counteraction is provided by constitutional attributions and/or de facto powers, which the incumbents may exploit in their interactions. These constitutional attributions and/or de facto powers are procedural and their control is in itself a source of power and influence.

[7] The complex networks of relations generate specific institutional arenas where the incumbents of the roles face each other using the resources and the formal capacities at their disposal. In the arenas of confrontation, the powers (i.e. procedural resources) attached to each role can be conceived as vectors and can be measured as such.

Patterns	Varieties		Cases
Dyadic integrated	Parliamentarian	Monocratic executives	**Czech Republic**
			Estonia
			Latvia
		Apparent dual executives (Parliamentarian-monocratic *de facto*)	**Slovakia**
			Slovenia
	Premiership	Monocratic executives	**Hungary**
		Apparent dual executives (Premiership-monocratic *de facto*)	No cases
Dyadic separate	Presidential		No cases
	Parliamentarian with president		No cases
Triadic integrated	Semi-parliamentarian		**Poland** **Bulgaria** **Lithuania** **Croatia (2000)**
	Semi-presidential		**Russian Federation** **Romania** **Croatia (1990)**
Triadic separate	Directorate		No cases

Tab.1 - Varieties of Institutional Patterns in some Eastern European Democracies (Source: Ieraci 2021: 427).

Parliamentarian systems with monocratic executives (Czech Republic, Estonia, Latvia and Hungary) belong to the dyadic integrated patterns, in which the survival of the government and parliament are interlocked, as suggested by Shugart and Carey (1992), while there is no Head of State, or it is a figure-head with ceremonial functions which occupies a marginal position in the institutional circuit (as in the Czech Republic). This classification poses the case of Hungary under Orbán's rule in the 2020's, during which the role of the Prime Minister has been *de facto* strengthen and has become dominant.

The case of Hungary nowadays is not easy to deal with from a neutral and scientific point of view if it is true that «The procedures that were originally

designed to limit executive power survive, but only as a joke, and nearly all the country's decision makers belong to the prime minister's personal clientelist network» (Krekó and Enyedi 2018: 39). The victories of Orbán's Fidesz party in 2018 (50 per cent of the vote and 133 seats out of 199) and in 2022 (54 per cent of the vote and 135 seats) fostered the extension of his personal power and patronage network. The very large parliamentary majority has granted Orbán several constitutional changes in the civil sphere and in relations with the Constitutional Court, but never in the sphere of parliament-government relations. The strengthening of the Hungarian executive was possible due to the transformation of the party system into a dominant party system (i.e. dominate by Fidesz). In such cases, as Schumpeter (1954) already warned decades ago, any democracy risks sliding dangerously towards a camouflaged form of semi-autocracy. The requirement of a constructive vote of no confidence for the legislative removal of the government in Hungary (Lento and Hazan 2022) strengthen the position of the Hungarian prime minister and his cabinet, so that the Hungarian model can be ascribed to the class of premiership (see Tab. 1).

Slovenia and Slovakia are two cases of apparent dual executives (Parliamentarian-monocratic *de facto*). They are cases of apparent triadic integrated patterns, where the third role of authority, i.e. the popularly elected Heads of State of Slovenia and Slovakia, fulfils only ceremonial functions and have no effectiveness in the institutional and decision-making circuit. This is why Slovenia and Slovakia are cases of apparent dual executives and parliamentarian-monocratic *de facto*. In these apparent dual executives, the powers of the legislature overwhelm or at least balances those of the cabinet, which very often is forced to compromise with the opposition parties over the legislative decision-making.

Finally, Poland, Bulgaria, Croatia, Lithuania, Russian Federation, and Romania are cases of triadic integrated pattern, in which the survival of government and parliament is connected but there is a third relevant role of authority, such as a popularly elected Head of State in an effectively dual structure of the executive (the Head of State is not a mere figure head or ceremonial role). The weight of the elective Head of State (the President) may vary a real lot among the cases and according to the effective distribution of procedural resource among the roles. This is way the omni-comprehensive class of semi-presidential government (Duverger 1980) seems inadequate to grasp the actual distribution of cases.

A difference can be traced between those types featuring relevant executive and legislative powers (semi-presidential systems) or limited executive

and legislative powers (semi-parliamentarian systems). The distinction between semi-parliamentarian and semi-presidential systems is designed to include this variety of cases. For instance, the French V Republic and the Weimar Republic, both characterized by a strong popularly elective presidency, are very different from the homologous semi-presidential regimes of Finland and Portugal, while Ireland and Austria, among others, are only apparent dual executives (Ieraci 2021: 428)[8]. Poland, Bulgaria, and Croatia (according to the 2000 reform) incline towards the semi-parliamentarian variety (with a relatively weak directly elected President), while Croatia (after the independence declaration in 1990), Russian Federation, and Romania are semi-presidential system either very much shaped on the French model (Romania) or with a dominant President (Russia) whose power reduce the Prime minister to an ancillary role. Similarly, to Hungary, Russia is a controversial case because of the concern about its democratic character under V. Putin's rule. Nonetheless, if one applied a formal analysis to the power distribution in the Russian institutional design according to the 1993 Constitution and its subsequent amendments, one would conclude that Russia could be labelled as a "superpresidentialism" with a maximum extension of the presidential powers *vis-à-vis* the legislature (Troxel 2003).

The procedural resources attached to the institutional roles should be evaluated and measured according to the specific contexts or relational dimension of application (i.e. Parliament-Government, Parliament-President, President-Government), rather than jumbled together as in most Indexes of Presidential Powers (IPP) so often used in literature (a complete and critical review of the IPP is offered by Zulianello 2011). The IPP are normally based on the original intuition of Duverger (1978; 1980) that the presidential powers could be counted and subsequently weighted to compare regimes with an elective President. The methodologies normally applied consist of checklists of constitutional powers which are weighed and summed to determine a score or index. These methodologies suffer two major pitfalls. Firstly, they are not analytical and do not take into consideration the underlying dimensions of the presidential powers listed. They are summations of powers in single cumulative scores, which do not discriminate between the rela-

[8] Similarly, Siaroff (2003, 307-308) distinguished among «parliamentary systems with presidential dominance» (France V Republic, Russia), «parliamentary systems with a presidential corrective» (Weimar Republic, Poland), and «parliamentary systems with figurehead presidents» (Austria, Iceland, Slovenia, Finland since 2000). Nonetheless, the latter type identifies cases which are here considered as «apparent dual executives» (see Tab. 1), and therefore they are not included in the semi-presidential varieties.

tional dimension of the listed powers, i.e. either the President-Parliament, the President-Government, or the Government-Parliament. Consequently, presidents placed in different institutional settings may hence score equal although it does make a difference whether they derive their strength from powers concerning their relationship with the legislature or with the government. Secondly, the scores attributed to the constitutional powers change, some authors assigning equal scores to each power and others ranking them according to their assumed relevance (Ieraci 2021: 416).

The complex networks of relations among the institutional roles (parliament, government and president at least) generate specific arenas of the institutional confrontation where the incumbents of the roles face each other using the resources and the formal capacities at their disposal. In the arenas of confrontation, the powers (i.e. procedural resources) attached to each role can be conceived as vectors and can be measured as such. Among the arenas of confrontations, the centrality of the parliamentary arena is a distinctive feature of most democratic regimes. The most outstanding contrast is to be found between parliamentary arenas dominated by the executive and – opposite to them – parliamentary arenas in which the executive does not control the management of the parliament business (Blondel 1973). Secondly, there is the question to which extent the fusion of powers really takes places, which is the question of the degree of integration between executive and legislature or – in the terms of Shugart and Carey (1992) here adopted – the interlocked survival of parliament and government. This type of investigation hence requires an accurate study of the configuration of the parliamentary arena. Once again, we can distinguish those parliamentary arenas in which the executive is a very special committee chosen by the parliament to direct its work, as Walter Bagehot (1963) posed it over a century ago with regard to the "English constitution", from those parliamentary arenas in which the government does not lead the working of the legislatures and it is basically a peer of the parliamentary parties with no attribution of any special status.

In the following sections, the analysis will focus on the dislocation of resources and opportunities into the parliamentary arenas of some Central Eastern European democracies. It will be argued that the capacity of government and opposition to be influential depends to a considerable extent on the procedural constraints, which are operating in each parliamentary arena, and on the variable structures of the legislatures. From this perspective, an attempt is made to present a typology of the parliamentary arenas and of the correlated government-opposition relations. The problem of the status of the opposition in democratic regimes will be therefore tackled exclusively as

the problem of the opposition into the parliamentary arena (as, for example, in King 1976 or in Beyme 1987) rather than as a basic feature of the democratic polity (Dahl 1966).

2. Parliamentary arenas and government-opposition relations. a framework for analysis

The main argument can be summarised as follows. The impact of the procedural constraints in the working of legislatures has been generally neglected. Nonetheless procedural constraints are able to generate opportunity structures and may enhance the weight of parliamentary parties in the overall party organisations, on one hand, and increase the government capacity in the parliamentary arena *vis-à-vis* the opposition, on the other hand. Moreover, the legislature structure may facilitate the centralisation of the legislative process, acting as a further causal factor in the identification of the parties with the roles of government and opposition. It will be referred to this identification as the process of institutionalisation of the government-opposition relation. As a consequence of the variable arrangements of procedural constraints and legislature structures, there are cases in which the government dominates the legislature and cases in which it undergoes major parliamentary control.

The parliament-government relationship becomes obviously crucial both in the dyadic and triadic integrated patterns (see above Tab. 1), in which parliament and government survive reciprocally in an integrated arena, and where their interplay takes the form of the majority-opposition relation. Leaving aside the details (for reference, see Ieraci 2000: 172-191), normally in such a relation the opposition exploits the opportunities offered by parliamentary rules and procedure in its attempts to hinder the executive's activities and gaining prestige and influence in the arena and over the public opinion. Democracy is indeed a permanent electoral campaign and any parliamentary party will try through the activity of its MPs to gain potential electoral support. Individual MPs, for their part, are driven to nurture the action of their parliamentary groups, because they have a vested interest in gaining prestige and climbing the party hierarchy, and presenting themselves to the electorate as pro-active MPs. Essentially these attempts to interfere with the government's activities will follow two tactics which, although closely intertwined in practice, are distinguishable for analytical purposes and presented in Tab. 2. They are the overloading of the legislative process, and/or the wasting of legislative time, which lead to the identification of four opposition tactics to hinder the government action:

a. introducing private bills and petitions;
b. amending the government bills;
c. asking questions to the government in the allotted time;
d. filibustering.

		Legislative Time Wasting	
		To hinder the Government's activities	To foster the MP's position *vis-à-vis* the party or/and the parliament
Legislative Process Overloading	To hinder the Government's activities	Introduction of amendments	Questions required to the government
	To foster the MP's position *vis-à-vis* the party or/and the parliament	Filibustering	Legislative initiative (Private Member bills and Petitions)

Tab. 2 - Opposition tactics to hinder the government action (Source: adaptation from Ieraci 2000).

Historically, in contemporary democracies and parliamentary arenas, these challenges certainly have not left the governments indifferent, and they pursued with remarkable consistency and success the objective of clearing, as far as possible, the path of their legislative initiatives from the obstacles posed by opposition, at a time when the volume of government business has constantly grown out of all proportion. For instance, if one took the case of the British House of Commons from 1837 onwards (i.e. just five years after the first enlargement of the suffrage), as an ideal-typical case (Ieraci 2000), one would discover a complex but straightforward process of transformation of the parliamentary arena and of its Standing Orders aiming at reducing substantially the guaranteed rights of the individual representative, on the one hand, and greatly strengthening the position of the executives, on the other.

Through the reformed parliamentary model of decision making, the English system evolved into a «Parliamentary State» (Judge 1993). The British cabinets of the 19th century were involved in a permanent struggle with the Private Members over the control of the time of the House. Through the extension of control over time, the government was essentially trying to gain further control over the legislative process and consequently to enlarge its management capac-

ities. The main concern of the government was to clear the way to its policies and to offer a more effective management of the growing governmental business. The response of the governments was an attempt to reform the practice of the House by Standing Orders[9]. At the peak of this development, which is reached in the early post-World War II years, the British government's capacity in the parliamentary arena grew to such an extent that Sir Ivor Jennings wrote: «Dictatorship could be introduced into the British constitutional system by a Government with a loyal majority in both houses, without any technical difficulty whatever. All this is, however, essentially theoretical» (1961: 60).

Table 3 summarize the results of the remodelling imposed on the British House of Commons, highlighting ten procedural resources/opportunities, devised to counter opposition tactics, that would allow the executives to firmly control the parliamentary arena as early as the end of the 19th century and into the 20th century.

	Opposition tactics	Resources of the government
Legislative process overloading:	a) Through legislative initiative (Private Member bills and Petitions)	**1**) Reserved policy areas (expenditure) **2**) Time restrictions on Private Members business **3**) Government business priority
	b) Through introduction of amendments	**4**) Closure **5**) Selection of amendments
Legislative time wasting:	c) Through questions required to the government	**6**) Restrictions on question time **7**) Restrictions on 'Dilatory motions'
	d) Through filibustering	**8**) Guillotine **9**) Restrictions on speech time **10**) Control over sitting time

Tab. 3 - Opposition tactics to hinder the government action and related resources of the government in the parliamentary arenas (Source: Ieraci 2000: 180).

[9] In the years from the first Reform Act to the immediate aftermath of World War II there were thirteen committees on procedure in the years 1837, 1848, 1854, 1861, 1869, 1871, 1878, 1886, 1890, 1906, 1913, 1932, and 1945-46 (Campion 1947: 39).

The process of reform of the English parliamentary arena in the 19th century led to «the identification of parties with both government and opposition, interchangeably» Clark (1980: 324). How did this identification develop? The drastic shift of procedural resources from the MPs to the government (see Tab. 2) produced an «erosion of individual parliamentary right» (Cox 1987: 46). The Private Members lost any direct capacity to influencing the legislative process and the reaction of the parliamentary parties to such a hostile environment was the growing of voting cohesion (Fair 1986). This dynamic in the English case has ultimately established the primacy of government over parliament unequivocally.

Already at the beginning of the 20th century, therefore, British executives had achieved a very high level of capacity to protect their policies – by which is meant the likelihood that government projects pass through the stages of the legislative process unamended, or at least amended only relatively marginally or to the government's liking. The procedural resources made available to the government to limit the intrusion of the opposition into its affairs (see Tab. 3) are so extensive that they effectively counteract any opposition tactics, so that the likelihood of success of government-originated legislative projects has been greatly increased.

However, there is another distinctive point about the British case that is essential to recall. The procedural reforms in the House of Commons during the 19th century alone would not have produced the transformations of the parliamentary arena that we have described if at the same time the House of Commons had not acquired a position of undisputed centrality within the British institutional configuration (Bagehot 1963). Beginning with the Reform Act of 1832, in fact, the British legislative system was rapidly transforming in an essentially unicameral sense, following the decline of the powers of the House of Lords. The transformation of the British legislature in a unicameral sense – or, if you prefer, towards a highly asymmetrical bicameralism – favoured the exercise of control by the parliamentary party organisations over the legislative process. The centrality of the House of Commons was also favoured by a relatively weak committee system, that operates was strongly penetrated by the parliamentary party organisations. We can refer to this set of institutional dynamics as a process of centralisation of the legislative process.

3. Parliamentary arenas of Central and Eastern European democracies

3.1 The Government's capacity to protect its policies

If we turn to a comparison of the British case with some cases of Central Eastern European democracies based on integrated government-parliament (either dyadic or triadic) relations and/or apparent dual executives, however, the picture becomes considerably more complicated (see Tab. 4). To what extent are the ten resources/opportunities on which the British executive can rely to counter the opposition and dominate the parliamentary arena to be found elsewhere?

Resources of the government[a]	**GB**	**HUN**	**SLV**	**RCE**	**SLO**	**ITAb**
1.	1	0	0	0	0	0
2.	1	1	1	1	0	0
3.	1	1	0	0	0	0
4.	1	1	1	0	0	0
5.	1	1	0	0	0	0
6.	1	1	1	1	0	1
7.	1	1	0	0	0	0
8.	1	1	1	0	0	0
9	1	1	1	0	1	0
10.	1	1	0	0	0	0
Scores	**10**	**9**	**5**	**2**	**1**	**1**

Government Capacity of Policies Protection

High ← → Low

Legenda: GB = Great Britain; HUN = Hungary; ITA**b** = Italy; RCE = Czech Republic; SLO = Slovenia; SLV = Slovakia.

1 = presence of the resource; 0 = absence of the resource.

[a] See tab. 3 for the nomenclature.
[b] According to 1971 Standing orders.

Tab. 4 - Resources of the government in the parliamentary arenas. A comparative sketch Sources: adaptation from Ieraci (2000: 197-198; 2003; 2010).

In Tab. 4, the case of Great Britain and Italy (according to 1971 parliamentary standing orders) are shown as respectively upper and lower benchmarks. As already pointed out, in the British case we find a cabinet that firmly control the parliamentary arena and is able to effectively counter the opposition. The British governments can count on reserved areas of policy, particularly those related to budgetary expenditure; they take advantage of the priority given to their legislative measures, while the space given to non-governmental proposal is at the same time reduced; they can also dictate the timing of the legislative agenda and force the assembly to deliberate on the acts submitted for scrutiny and they display a high capacity to protect their policies, finally, to quote Walter Bagehot, in the British case «the cabinet is the efficient secret» of the system. At the opposite pole, we have the Italian case (under the 1971 parliamentary standing orders, and thus before its reform in 1997), where the government exhibits a low capacity of policy protection. The Italian governments in this phase (1948-1997) were very instable, clearly at the mercy of the assembly, and suffering its vetoes and conditioning, which is not surprising given the consensual character (Lijphart 1988) of the Italian democracy.

Thus, if we consider the two extreme poles of Great Britain and Italy (1948-1997), the case of Hungary strikes for its similarity with Great Britain. Originally in the case of Hungary, the National Assembly was governed by a Commission, consisting of the President, the Vice-President and the leaders of the parliamentary groups, but this consensual management of the legislative agenda has been recently shattered by the introduction of some amendments to the Hungarian fundamental law and above all by the dominant position acquired by Fidesz party. According to Kazai (2015), there was a drastic reduction of the adopted legislative proposals put forward by the opposition to only three out of 533 the 2010-2014 term. The proposals for amendments by the opposition were not much more successful either:

«The governing majority has systematically used amendments in a way to make the scrutiny of legislative proposals by the opposition extremely difficult, if not impossible. It has become common practice to change the original content of the bill in the course of the legislative process for strategic purposes. Very often the originally submitted legislative proposal did not show the real intentions of the cabinet. They let the opposition scrutinize and discuss the bill and then redrafted the legislative proposal either by inserting amendments aiming at the modification of absolutely unrelated acts or by completely rewriting the original bill» Kazai (2015).

The governing majority has been able to resort to special legislative procedures to speed up the approval of its bills and decrees. Urgent procedure

«simply accelerated the decision-making by shortening the applicable deadlines, the exceptional procedure placed the debate and work on the legislative proposal from the plenary to the committees, and the exceptional urgent procedure combined the techniques of the previous two. In the 2010-2014 term 134 bills were adopted in urgent procedure and 26 in exceptional urgent procedure» Kazai (2015). Cooperation with the opposition has been entirely dismissed and the average length of the parliamentary legislative procedure dropped to 34 days between 2010 and 2014.

We can further observe that Slovakia lies around the median of the continuum, that is denoting governments with a significant capacity of policy protection. Finally, the governments of Slovenia and the Czech Republic show a low capacity for policy protection. The Slovenian case is interesting, in that, according to parliamentary regulations, the National Assembly is led by its President and the Council of the Presidency, which consists of the leaders of parliamentary groups and representatives of national communities in addition to the President and Vice-President. It is a collegial body that sets the agenda of the Assembly and on which most of the decisions on the organisation of work and the adjudication of procedural disputes depend.

4. Conclusion. A typology of the arenas of parliamentary confrontation

These observations suggest that we should delve further into the description of the arenas of parliamentary confrontation. The two salient dimensions that the analysis of the British case seems to reveal are: the executive's ability to protect its policies and the centralisation of the legislative process. Now, it is intuitive that a unicameral parliamentary structure, thus with a relatively high degree of centralisation of the legislative process, greatly facilitates the task of parliamentary party organisations, which have to control the conduct of MPs within their ranks. Conversely, a bicameral and/or considerably decentralised legislative structure favours the multiplication of opportunities for negotiation and the exercise of vetoes in the legislative process. Moreover, it should be added that in British mono-cameralism, the legislative process is further centralised due to the weakness of the committee system, so that all salient stages of the legislative process take place on the floor.

We can therefore concede that the government's ability to protect its policies may be generally reduced in those parliamentary arenas that are characterised by a high degree of decentralisation of the legislative process, as is the case where the parliamentary arena is effectively divided, and hence where there is a bicameral

set-up, and/or where there is a strong committee system capable of influencing the legislative process. The Westminster parliamentary model therefore exhibits a very high degree of centralisation of the legislative process, as unicameralism, or strongly asymmetrical bicameralism, is associated with a weak committee system. In the Westminster parliamentary arena, the centre of activity and of the legislative process is in the chamber itself; the number of committees is limited; they have no deliberative power; their degree of specialisation is low and the turnover of members is very high; the procedure for assigning a bill to committees is very variable; in some important procedural aspects – as we have seen – the constraints placed on individual conduct in the committees are similar to those in the chamber; they are, finally, dominated, like the chamber, by party organisations, which control the activities of the commissioners through whips.

Those implicitly identified are, therefore, the five dimensions along which to construct a measure of the degree of centralisation of the legislative process. Four of them concern the relative impact of the committee system (Di Palma 1977), and they are: the degree of specialisation of the committees, their degree of continuity, their degree of autonomy and their degree of decisiveness. The first dimension concerns the degree of specialisation of each parliamentary committee. Here, the system of permanent and highly specialised Italian parliamentary committees, in which recruitment tends to be based on the professional skills of MPs, contrasts with the British committee system, which is characterised by a high number of ad hoc committees and, consequently, a lower level of professionalisation. The second dimension refers to the stability or persistence of the composition of the commissions, or conversely, the extent of turnover of its members. In the Italian parliament, for example, commissions are characterised by a relative continuity of their composition over the course of legislatures, whereas the composition of British commissions is comparatively more unstable. The third dimension refers to the degree of penetration of party organisations into the committee system, the symmetry of regulations and procedures in the chamber and in the committee, and finally, the ability of committees to amend government proposals or those coming from the chamber. Unlike the British case, the commissions in the Italian parliament, for example, are weakly penetrated by party organisations and commissioners enjoy a relatively large degree of autonomy. Finally, the fourth dimension emphasises a peculiarity of the Italian committee system, namely the possibility of attributing or delegating deliberative power to the committees themselves, so that – on the basis of certain procedures – the legislative process of a given bill that has begun in the assembly can be concluded in the committee to which it was destined. In contrast, as we have said, the legislative process in the British parliament essentially takes place in the assembly.

The fifth dimension of analysis is the unicameral or bicameral character of the legislature. It is worth noting that a purely symmetrical bicameralism is found only in the Italian legislative system. In general, bicameral structures are characterised by a diversification of the functions of the upper and lower chambers and an asymmetric distribution of legislative power between the two. For instance, the veto power over legislation exercised by the upper chamber, where provided for, is normally neutralised by the lower chamber, albeit with aggravated procedures. That said, it is plausible to expect that a genuinely bicameral structure of the legislature may favour the emergence of veto powers (Rasch and Tesebelis 1995; Tsebelis and Money 1997) and generate an inconsistent legislative process.

Table 5 summarises the application this comparative framework to some Central and Eastern European democracies (for further references, see Olson and Crowther 2002; Olson and P. Norton 1996).

	EST	**BUL**	**SLO**	**SVL**	**HUN**	**LIT**	**RCE**	**POL**
Specialization of the committees	low 1	high 0	low 1	low 1	high 0	high 0	high 0	high 0
Continuity of the committees	low 1	low 1	low 1	low 1	low 1	high 0	low 1	low 1
Autonomy of the committees	low 1	low 1	high 0	high 0	low 1	low 1	high 0	high 0
Decisiveness of the committees	low 1	low 1	low 1	low 1	low 1	low 1	low 1	low 1
Bicameralism	no 1	no 1	no 1	no 1	no 1	no 1	yes 0	yes 0
Scores	**5**	**4**	**4**	**4**	**4**	**3**	**2**	**2**

Legenda: BUL = Bulgaria; EST = Estonia; HUN = Hungary; LIT = Lithuania; POL = Poland; RCE = Czech Republic; SLO = Slovenia; SLV = Slovakia;

Scores: low = 1; high = 0; Bicameralism absent or asymmetrical (no) = 1; Bicameralism present or symmetrical (yes) = 0.

Tab. 5 - Centralization of the legislative process. A Comparative Sketch. Sources: adaptation from Ieraci (2000: 197-198; 2003; 2010).

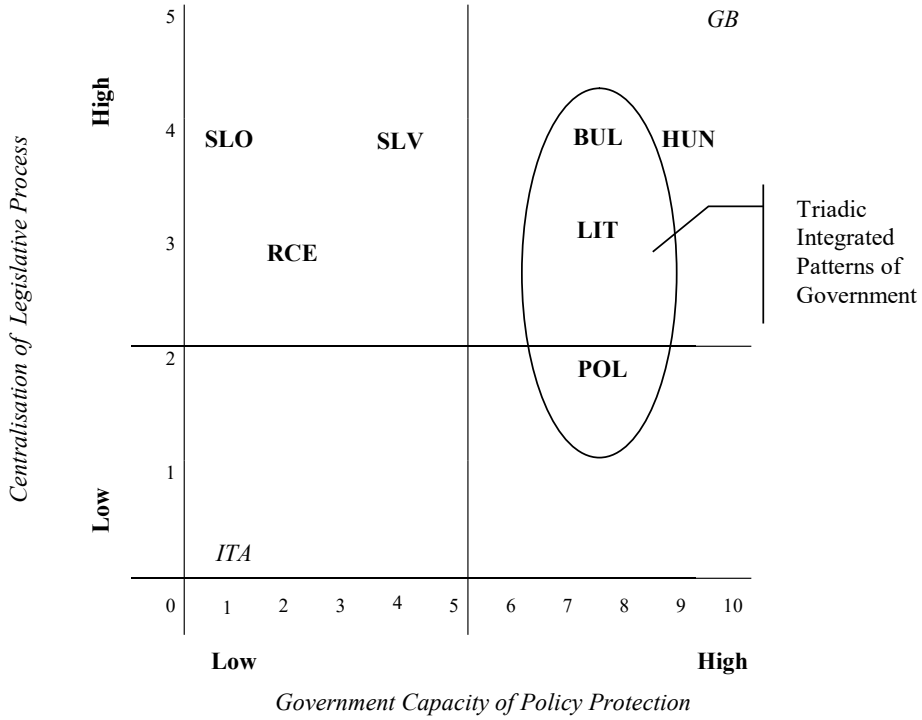
Among the dyadic integrate patterns, Estonia, Slovenia and Slovakia exhibit a high degree of centralization of the legislative process, while Czech Republic lies around the median of the continuum. Poland and Lithuania among the triadic integrated governments behave similarly to the latter two dyadic cases, while Bulgaria is a case of highly centralized legislative process. Once again Hungary poses several interpretative problems because of the transformation of its party system into a predominant party system (Sartori 1976: 192-201). According to Kazai (2015), notwithstanding that a complex system of permanent committees with significant competences developed quite early in the Hungarian National Assembly, the governing majority has dominated their work, and a high level of party discipline together with the dominant position of the government has gradually rendered the committee work merely technical. The committee system of the Hungarian National Assembly has no real autonomy from the government majority and no effective amendment and decisional capacities.

The government's ability to protect its policies and the centralisation of the legislative process are two main dichotomous variables, which can be combined given way to four ideal-typical clusters (see Fig. 2), although the Central and eastern European democracies here scrutinized combine mainly in two clusters.

In the first cluster (upper-left quadrant in Fig. 2, i.e. Slovenia, Slovakia, Czech Republic) the ability of the government to protect its policies is not high, notwithstanding that the legislative process is highly centralised, as it essentially takes place on the floor and the second chamber – if present – does not exercise veto power or interference. Here, government and opposition lean towards cooperative attitudes (Maor 1998). The committee system plays a crucial role in these cases and its influence on the final legislative decision is relevant. The triadic integrated patterns (i.e. Bulgaria, Lithuania, and Poland) lie in the second cluster (upper-right quadrant in Fig. 2), in these patterns it is indeed the presidential role which guarantees to the executives a considerable capacity to protect their own policies, regardless to the degree of centralization of the legislative process, that sometimes (like in the case of Poland) may result relatively low.

Meaningfully, Hungary lies in this quadrant too and the features of its legislative process under Orbán's rule has been above enlightened. Huber and Pisciotta (2022) have referred to the «executive aggrandisement and strategic manipulation» under Orbán's rule as two «institutional tools» favouring Hungary's democratic backsliding. Restrictions on media freedom, judicial autonomy[10]

[10] After the enforcement of a new Hungarian Fundamental Law (January 2012), the Court's judgement can now be bypassed by making it possible to enact laws that the Court deemed unconstitutional.



Legenda: BUL = Bulgaria; GB = Great Britain; HUN = Hungary; ITA = Italy (according to 1971 Standing Orders); LIT = Lithuania; POL = Poland; RCE = Czech Republic; SLO = Slovenia; SLV = Slovakia.

Fig. 2 - Parliamentary Arenas in the Dyadic and Triadic Integrated Patterns of Government of some Central and Eastern European democracies. Source: adaptation from Ieraci (2000; 2003; 2010).

and academic freedom were the most direct expression of this «executive aggrandisement», that would weaken political pluralism and party competition (Kovács and Tóth 2011). All these things are noteworthy, but the elementary fact is that Orbán has repeatedly and overwhelmingly won fourth consecutive essentially fair general elections, and the last one in 2022 by a two-thirds majority. Democratic critics of Orbán's rule tend to overlook that Fidesz has been able to take root in civil society and take hold over the state machinery (Metz and Várnagy 2021) as a consequence of the democratic political competition.

There is a very general tendency among democratic critics to base judgements on democracy by looking at the content of political decisions and the political background of the rulers of the moment. At the root of this prejudice lies the rejection of the decoupling of the democratic method from

political ends. Some critics of democracy do not accept the neutrality of the democratic method, i.e. the possibility that the most diverse ends and, why not, even the most selfish private interests can be pursued through it. The classical or 18th century illusion is maintained – in the words of Joseph A. Schumpeter – that democratic action cannot be separated from the ends to be pursued (the common good, the general interest, the *res publica*). Thus, while pointing to the action of democratic governments as the cause of many evils, these critics are also, perhaps unconsciously, fighting against the democratic method that enables that action. This contradiction of democracy today deserves attention. But here we wanted to follow a completely different path. We have dealt with the democratic method itself, looking in particular at government-opposition relations as they are shaped in the parliamentary arena by the distribution of procedural resources. Let us admit that this method can sometimes bring an evil political class to power. Well, we have tried to show how democracy as a method or instrument of government is neutral and cannot be held to account for this specific wickedness.

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Parliamentary opposition in the Baltic states' experience: problems and challenges in the face of the Westminster model

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1. Introduction

There is a general consensus on the role parliamentary opposition should play in a democracy. In fact, the opposition is viewed as an essential component of a well-functioning democracy as it provides a reliable political alternative to the majority in power by offering other policy options for public consideration. It also ensures transparency of public decision-making and efficiency in the management of public affairs, thereby safeguarding the public interest and preventing misuse and dysfunction.

Despite the widely accepted belief that an effective interplay between the parliamentary majority and opposition is crucial, the reality in many countries differs. The role of the opposition can be abused or dysfunctional in two ways: it may completely obstruct the government's and/or parliamentary majority's effective work, or it may fail to provide alternatives to their proposals, thereby remaining invisible in political debates. These negative

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effects are usually not caused by deficient legal rules governing the work of parliament and the role of the opposition, but rather stem from deeper issues within a country's political culture.

Thus, for the opposition to function effectively in a democratic system, different worldviews and political convictions present in society must be represented in Parliament. If candidates and parties lack an identifiable political profile, it becomes challenging to establish a constructive dialogue on different political options. Such a faceless party system may result in a policy of opposition, where the opposition objects persistently to every political move, or a fictitious opposition that does not provide any alternatives. It is naive to assume that this problem can be solved solely by reforming or restructuring the parliamentary system. Addressing the roots of the problem is necessary, although changes to the political culture cannot happen overnight (Garritzmann, 2017).

However, legal regulations are also essential to ensure fair play between the majority and minority in Parliament. The guidelines on the rights and responsibilities of the opposition in a democratic parliament, developed by a Parliamentary Assembly, generally speaking provide a framework to identify some open questions concerning the protection of the opposition in Parliament (Blondel 1997).

Historically, one controversial point is the legal form of protection for the opposition. In fact, at the end, there are two options: one option is to protect the opposition as a separate entity within the constitution, a specific law, or the parliamentary rules of procedure. However, this last approach - the parliamentary rules of procedure - requires a definition of the opposition and different rules for the majority and minority in Parliament because if the opposition's rights are defined in a specific law or parliamentary rules, they can be easily changed by the majority, rendering such protection ineffective.

The second option is adopting protective clauses within the constitution. These are rare but offer greater security for the opposition, as they are more difficult to change. However, a detailed set of rules is not suitable for a constitution, while general clauses may not be sufficient. In countries with long-standing parliamentary traditions, specific rules may not be necessary as long as they are accepted as customary law. In the absence of accepted traditions, non-binding guidelines may be a suitable way to establish a general consensus. In any case, it is important for the opposition to have legal means to enforce the implementation of their rights in the event of a violation.

With this conceptual framework of analysis in the background, this contribution aims to highlight the similarities and differences in the legal tradition and development of parliamentary institutions, in particular on the topic of the parliamentary opposition, regarding the Baltic States of Estonia, Latvia, and Lithuania (in general, see Di Gregorio 2019; Auers 2015; Fruhstorfer and Hein 2016; Wolchik and Curry 2007).

2. The parliamentary-legal systems and their transformations: some essentials

The Baltic States consist of Estonia, Latvia, and Lithuania, and they are situated on the eastern shores of the Baltic Sea in Northern Europe. Following their independence from the Russian Empire after World War I, the three countries were annexed by the Soviet Union from 1940 to 1944, during which time constitutional rules were established to create parliamentary regimes with legislative supremacy. Thus, the Soviet-German pact of August 1939 placed the Baltic states under Soviet influence, resulting in the establishment of pro-Soviet regimes and hindering the development of a genuinely democratic parliamentary system (in general, see Misiunas and Taagepera 1993; O'Connor 2003; Kaskla and Maurer 1997).

In the late 1980s and early 1990s, the Baltic states saw a surge in demands for independence as part of a wider movement to revive post the Soviet Union. The Baltic Council organized a peaceful political demonstration called the Via Baltica or Chain of Freedom, which was supported by the pro-sovereignty movements and involved almost two million people forming a 675.5-kilometre-long human chain across the three countries. And this demonstration marked the beginning of a national liberation movement that led to the independence of the Baltic States.

Following the Moscow coup d'état, the Baltic States were widely recognized as sovereign nations. In November 1991, the Baltic Assembly was established in Tallinn, drawing inspiration from the Nordic and Benelux countries' regional experiences, to foster Baltic cooperation. The three countries resumed their parliamentary work, which had been disrupted by Soviet annexation, and established close collaboration at both governmental and parliamentary levels, viewing themselves as a single political and geographical community.

However, each has its own particularities and, before proceeding to analyze specifically the issues relating to parliamentary opposition, it may be

useful to briefly reconstruct the essential elements of parliamentarism (and its evolution) in each of the three political-institutional systems considered (see in general, Ganino 1997; Taube 2002).

Starting from the Estonia experience, we can underline that the Provisional Assembly of Estonia, also known as *Maapaev*, was the first parliamentary representative body in the Estonian Province of the Russian Empire, operating from July 14, 1917 to April 23, 1919. It proclaimed the sovereignty of Estonia and made important decisions, including declaring itself the supreme power of the Governorate of Estonia until the convocation of a Constituent Assembly. However, the Bolsheviks disbanded *Maapaev* after this decision was made, but the Provisional Assembly continued its activities underground while the Committee of Elders of the Land Council declared the independence of Estonia.

Following this, the Salvation Committee formed and declared Estonia an independent democratic republic for the first time. The Constituent Assembly prepared and adopted several essential declarations, laws, and documents for Estonia's sovereignty, and its work was completed on December 20, 1920, when the first *Riigikogu* convened. The Parliament continued to act in a normal routine until the fifth *Riigikogu*, which started its work in June 1932, but the new Constitution entered into force in January 1934, and the activities of the *Riigikogu* were discontinued. Konstantin Pats, the Prime Minister, acted as the State Elder and declared martial law in Estonia on March 12, 1934, leading to the beginning of the Era of Silence, which ended in 1938 or with the Soviet occupation in 1940. The bicameral sixth *Riigikogu*, which represented the Estonian people from April 7, 1938 to July 5, 1940, had a minor impact due to the political situation in Estonia, remaining in the shadow of the President and the Government.

The Latvian parliamentary experience is based on the *Tautas Padome*, or People's Council, which was Latvia's first legislative institution, established from November 17, 1918, to April 30, 1920, through a mutual agreement of eight Latvian democratic parties and a representative of the *Latgale* Land Council. The Council acted as a complex political platform and adopted several important laws, such as those concerning rural local governments, Latvia's monetary system, educational institutions, citizenship, and the election of the Constitutional Assembly.

The Constitutional Assembly, Latvia's first elected legislative body, was responsible for drafting the country's supreme law, the *Satversme*, as well as other laws. The Assembly functioned from April 30, 1920, to November

7, 1922, and prepared a law on the election of the *Saeima*, Latvia's Parliament. (Sprudzs 2001).

The *Saeima*, elected for a term of three years by equal and direct elections, was responsible for continuing the legislative work begun by the Constitutional Assembly. The first *Saeima* was elected in October 1922, and subsequent elections were held every three years in the same month until the fourth *Saeima*, which focused on drafting laws, was discontinued by the May 15 coup of 1934.

The May 15 coup, also known as Ulmanis' coup, was a self-coup by Prime Minister Karlis Ulmanis against the parliamentary system in Latvia. He suspended the Constitution, dissolved all political parties and the *Saeima*, and established an authoritarian regime that lasted until the Soviet occupation of Latvia in 1940. Ulmanis' legacy still divides public opinion in Latvia. (Borejsza and Zimmer, K. 2006).

Seimas, conversely, is the supreme legislative body of the Republic of Lithuania, functioning as its Parliament. The first *Seimas* was elected in 1922 but its term was short-lived, dissolving in 1923 due to political tensions. The second *Seimas* served from 1923 to 1926 and achieved significant progress in passing fundamental laws, implementing land reform, and stabilizing the financial and economic situation of the country. The third *Seimas*, elected in 1926, revoked the Special Statutes of State Protection and signed a Non-aggression Treaty with the Soviet Union, which recognised Lithuania's rights to Vilnius. However, democratic traditions were halted by a *coup d'état* in 1926, which led to the military taking control of the state and President Kazys Grinius being forced to resign. Antanas Smetona was elected as the new President, and a new government was formed out of Nationalists, Christian Democrats, and Farmers' Party members. The fourth *Seimas*, elected in 1936, focused on preparing a new Constitution and survived until 1940 when the pro-Soviet government signed the dissolution act, citing the Constitution of 1938. The annexation of Lithuania by the Soviet Union was finalized in August 1940 when the People's Parliament declared itself the provisional Supreme Soviet of Lithuania.

Later, despite attempts by the Baltic states to protect their sovereignty against the aggressive and expansive politics of Nazi Germany and the Soviet Union, they were ultimately unsuccessful. The formation of the Baltic Alliance aimed to maintain neutrality and defense, but Estonia, Latvia, and Lithuania were eventually overrun by Soviet and Nazi troops. The last Soviet occupation marked the end of the Baltic states' independence until the collapse of the USSR in 1991. The Soviet Union's control over the Baltic states

was motivated by various reasons, including the belief that the states naturally belonged to the Union, as well as their commitment to a unitary state with a homogeneous citizenry.

One of the Soviet Union's main policies was russification, which aimed to transform the region into a Russian-oriented people through cultural suppression and changes in the ethnic composition (Steen 2000). While the Soviet Union claimed to defend internationalism, the implementation of russification was not done openly. Cultural suppression in the Baltic states included a language policy that declared Russian as the official language, making it the dominant language in major institutions and publications. The result was a weakened position for non-Russian languages, which contributed to the suppression of the region's culture.

The armed struggle of the Baltic peoples, known as "the Forest Brothers", began in 1944 as a collective partisan force against Russian rule. The resistance movement lasted until 1952 and involved approximately fifty thousand residents of the Baltic states. However, the movement was ultimately unsuccessful, and many Estonians, Latvians, and Lithuanians were imprisoned, exiled, executed, or forced to emigrate. As a result of these repressions and the transfer of Russians and other Russian-speaking people to the region, the ethnic composition of the Baltic states drastically changed, with native peoples becoming minorities in their own countries (in general, see Grigas 2012).

Therefore, immediately following the collapse of the USSR and their regained independence, significant changes occurred in the politics of the Baltic states. The Estonian SSR, Latvian SSR, and Lithuanian SSR all adopted resolutions and declarations on their national independence, which were crucial legal acts that marked the transition to the restoration of their republics and the rejection of their Soviet names. They restored their original names and became the Republic of Estonia, the Republic of Latvia, and the Republic of Lithuania. Elections were held based on the new Constitutions adopted by the Baltic states, and the main task of the first post-Soviet parliaments was to pass acts for implementing constitutional institutions and establishing a legal order based on these new Constitutions.

The accession policies to the European Union marked another stage in the politics of Estonia, Latvia, and Lithuania, with the most significant legislative acts being the Acts on the ratification of the Europe Agreement and the agreement on the withdrawal of the armed forces of the Russian Federation (Sileoni 2007; Cantarella 2008).

During the mandates of the ninth *Riigikogu*, eighth *Saeima*, and sixth *Seimas*, significant administrative, penal, and civil law reforms were carried

out, and proceedings were conducted on bills connected with the transposition of European Union directives into the Estonian, Latvian, and Lithuanian legal order, as well as necessary amendments to the Constitutions for accession to the European Union. The most important event during the mandates of the tenth *Riigikogu*, ninth *Saeima*, and seventh *Seimas* was undoubtedly membership to the EU, and legislative bodies continued their work on the path framed by EU policies, with decisions in areas such as employment, euro adoption, traffic, and security, adhering firmly to the principle of NATO countries spending 2% of GDP on defense (Jacobsson 2009; Kerikmäe, Chochia and Atallah 2018).

The formation of the Baltic Assembly (BA) had a significant impact on parliamentary institutions and regional cooperation in Estonia, Latvia, and Lithuania. The BA was formed on November 8, 1991, after trilateral cooperation between the Popular Front of Estonia, *Rahvarinne*; the Popular Front of Latvia, *Tautas Fronte*; and the reform movement of Lithuania, *Sajudis*. The aim of this cooperation was to represent Baltic interests, solve common problems, and reach common goals. The formation of the Baltic Assembly was the culmination of these trilateral political involvements (Plakans 2014).

The Baltic states determined their main courses of action in the process of development of institutional, legislative, and executive trilateral cooperation, with the most significant item on the cooperation agenda being the strengthening of independence and return to the international arena. Important treaties and agreements were signed in the sphere of trade, executive and legislative powers and the withdrawal of troops of the former USSR from the Baltic states was a crucial item on the Baltic cooperation agenda. Following the withdrawal of the Russian Federation army and the signing of Association Agreements with the European Union, a new phase of cooperation between the Baltic states began, with a purposeful process of integration into the European Union and NATO. The process culminated in complete EU membership, becoming a driving force for regional cooperation in the following years. The Baltic Assembly developed close partnerships with the Nordic and Benelux countries, strengthening cooperation and integration not just within the EU and NATO but with the whole world outside the post-Soviet area. It is noteworthy that despite their imperial Russian and Soviet past, or perhaps because of it, the Baltic states consciously refuse to be part of the Soviet-Russian legacy in any way, evident in their ongoing language and minority policies and refusal to be a member of any organization related to the post-Soviet area.

The present war in Ukraine, madly unleashed by president Putin, has further reinforced the Baltic countries' fear of being invaded by Russia again.

This is why the Baltic states consider the war in Ukraine a clear and current threat from Russia and strictly measure its implications, even though that from military support to Ukraine to the implementation of sanctions against Russia, the Baltic states are paying a high price in terms of economic and social costs. Yet they are acceptable costs because they are all based on one conscious, strong, and valid reason: the need to protect and defend their territorial sovereignty precisely from a potential new Russian invasion.

3. The parliamentary opposition in Estonia, Latvia, Lithuania between history, rules and practices

Based on this, in the Baltic states two main cleavages exist: ethnic and communist-anti-communist divides. As we have just pointed out, the societies in these countries are diverse, owing to their history of Soviet occupation. In fact, after the collapse of the Soviet Union, migration and population movement resulted in ethnic minorities, such as Russians (and Poles), residing in the Baltic countries. So, ethnic cleavage dominates both the Latvian and Estonian party systems, but in Estonia, it is related above all to the communist and anti-communist divide. The communist and anti-communist cleavage is also present in Lithuania, where it is the dominant cleavage, even if, in Lithuanian reality, anti-Russian sentiments are less marked. Trust in institutions and values of the society, alongside party systems, are the major components of political culture in the Baltic countries. The civil society's strength is portrayed in the high levels of social trust and egalitarian values.

Therefore, the three liberal democracies of Estonia, Latvia, and Lithuania – which have unicameral parliaments elected by popular vote for four-year terms (namely, *Riigikogu* in Estonia, *Saeima* in Latvia, and *Seimas* in Lithuania) – necessitate a discussion on the topic of the parliamentary opposition, which must take into consideration also regarding the elements of political and cultural pressure that have historically characterised these systems, and which pose a twofold challenge in terms of the approach taken towards parliamentary opposition, beyond the rules. This challenge involves both the methods employed and the interpretation given to the concept of opposition itself, as it concerns the meaning and the sense of democracy and its values by political actors and institutional structures engaged in government dialogue (Đorđević 2021).

In this sense, the accession of the Baltic states to the European Union was very important. They adapted and inserted themselves in an environment

that allowed both the meeting of national traditions, rules, and practices of those legal orders, as well as the traditions, rules, and practices linked to and promoted by the European Union in the light of liberal-democratic principles, thus stimulating and accelerating new forms of relations within institutions and their governance, which also – or rather, in some respects, above all – concerned the concept of opposition in Parliament.

To take a close look at the problem of political opposition in parliament, it seems necessary to focus first of all on the issue of political parties and their regulation, not least to mark the differences with the past communist regime.

3.1. Estonia

Estonia is an independent and sovereign democratic republic where ultimate power rests with the people who elect the *Riigikogu* as their Parliament. Comprising 101 members who are elected through free proportional electoral systems, the *Riigikogu* has the typical responsibilities of any Parliament, including the formulation and approval of laws and resolutions, conducting referendums, ratifying international treaties, electing the President of the Republic, authorising the Prime Ministerial candidate to form the Government of the Republic, deciding on a no-confidence vote, approving the State budget, declaring a state of emergency or war, appointing certain officials, among others.

In line with the norms of parliamentary forms, the Government also plays a role in the exercise of legislative power, with the Prime Minister leading the government and overseeing the country's domestic and foreign policies, relations with other nations, coordination of government agencies, administration of the implementation of laws, issuance of regulations, and orders to facilitate the execution of the law. The Government can also declare a state of emergency in the event of natural disasters, catastrophes, or infectious disease outbreaks, and perform other duties assigned by the Constitution and laws to the Government of the Republic, such as preparing the draft state budget and submitting it for a final vote in the *Riigikogu*.

Estonia has been recognized as the most successful former Soviet republic in terms of transforming its system after communism and was the first to initiate moderate economic reforms through the IME plan in 1987 and to assert its sovereignty over USSR laws in November 1988. The Estonian National Independence Party (ERSP) was the first anti-communist, pro-independence political party in the Soviet Union. Additionally, Estonia was

admitted to the first round of European Union (EU) accession negotiations in 1997 and became the first post-Soviet country to join the Eurozone in 2011. This rapid democratization process was only possible due to a broad reform consensus among political elites, given the altered ethnic composition of society, the presence of Soviet troops on Estonian ground until 1994, and the precarious geopolitical location.

At the same time, unlike other Eastern European countries and what most people might assume about post-Soviet developments, the Estonian party system has two notable features: the lack of strong left-wing parties and the relatively insignificant presence of ethnic parties. It may seem surprising given the diverse makeup of Estonian society, which suggests that there is ample opportunity for parties to emerge that represent ethnic minorities.

The 1991 declaration of independence and the establishment of a democratic order were rooted in the principle of legal continuity dating back to the pre-Soviet period. As a result, the Soviet occupation was never fully recognized internationally, and the Baltic states remained subjects of international law throughout the entire period of Soviet occupation. National independence was seen as a restoration of the interwar statehood rather than the establishment of a successor state to the Soviet Union. In this sense, the issue of citizenship policy became a crucial aspect of political competition between moderate and radical political forces, although all political forces recognized the national constitution as a guarantee of independent statehood, the approach of prioritizing identity politics and radical economic reforms was legitimised.

Estonia has adopted five amendments to its Constitution, with twelve failed amendment initiatives mainly submitted by the oppositional party until 2014. The "transition culture" in Estonia influenced constitutional politics and the constitutional amendment pattern in the country. The right-wing parties in Estonia combined liberal orientations with national appeal, resulting in the prioritisation of identity politics over social implications.

Constitutional politics played a significant role in the development of a stable democratic order in Estonia. The ruling political elites showed consensus in approving all three possible modes of constitutional amendments. However, protecting minority rights has mainly been reactive, rather than proactive, hindered by the notion of being a restored state ingrained in Estonia's legal principles.

In Estonia, while competitive politics and free and fair elections were introduced at the end of the Berlin clashing wall in 1989, the first law on political parties was only passed in 1994. Thus, political parties have undergone a

clear evolution from being private NGOs with fragile and weak state regulation to being considered an essential part of political life and increasingly, in a steady trend, heavily regulated.

In any case, multi-party pluralism has come to strengthen, first and foremost, within parliamentary dynamics, progressively highlighting the strategic role played by the parliamentary Rules of Procedure as a key political-institutional element of the form of government and, indeed, as an instrument for governing the dynamic dialectic between government and opposition (Panzeri 2023; Van Biezen I. and Wallace, H. 2013).

Therefore, the *Riigikogu* Rules of Procedure and Internal Rules Act governs the process of introducing and passing bills, which can be initiated by members, factions, and committees of the *Riigikogu* and the Government of the Republic. Then, the initiative legislative acts are then submitted to the chair of a plenary sitting of the *Riigikogu* before the sitting begins.

Law-making in Estonia involves collaboration between the *Riigikogu* and the Government, with the latter initiating a significant number of bills and participating in their proceedings. The opinion of the Government is also sought on bills initiated by members, factions, or committees of the *Riigikogu*. The relevant leading committee manages the proceedings of a bill in the *Riigikogu*, and passing an act usually requires three readings, except in specific cases such as the ratification of foreign treaties, where two readings suffice. Between readings, the bill is deliberated by the leading committee.

Generally, the adoption of an act requires a majority vote in favor, with most of the MPs present at the sitting voting in favor of passing the act. However, constitutional acts listed in the Constitution require the majority of the members of the *Riigikogu*, i.e. at least 51 votes in favor, to pass. After passing, the President of the *Riigikogu* signs the act, which is then sent to the President of the Republic for proclamation. The act is published in *Riigi Teataja* (the State Gazette, the public journal of the Republic of Estonia) and typically takes effect ten days after its publication unless another time is specified. In addition to that, and aside from acts, the *Riigikogu* also adopts obviously various resolutions, statements, declarations, and communications, with a slightly different procedure for their proceedings compared to bills (Hloušek, V. et al. 2013).

This typically parliamentary legislative procedure results in the construction of an opposition system that seeks and has sought over the years, to resemble as closely as possible the better-known British-style tradition. However, there is no explicit and formal recognition of the opposition in Parliament, as a statute of the parliamentary opposition, in the *Riigikogu*

Rules of Procedure and Internal Rules Act; and the only explicit provision that strictly concerns an opposition concerns art. 152, point 8, regarding the proceedings on a draft resolution of the *Riigikogu* that expresses opposition to an initiative of the European Council or a proposal of the European Commission.

Oppositions may not intervene in the organisation of parliamentary works, and thus in the agenda set by the parliamentary majority in support of the government. Therefore the agenda may be amended by request of the minority, only if none of the parliamentary groups opposes it, starting from the majority. In any case, it can be amended automatically in the cases provided for in article 56 of the parliamentary rules of procedure[1].

Historically, the Center Party was in opposition nationally, in particular between 2003 and 2016, but after the government crisis in November

[1] Art. 56, on the inclusion of additional items on the agenda, provides that «(1) After the agenda of the working week of the plenary assembly or the agenda of the additional sitting of the *Riigikogu* has been approved, only the following items may be inserted in it: 1) granting the candidate for the office of Prime Minister the authority to form the Government of the Republic, to be inserted for deliberation within fourteen days following the designation of the candidate by the President of the Republic or after the expiry of the term for the nomination of candidates for that office; 2) the motion to express no confidence in the Government of the Republic, the Prime Minister or any other minister, to be inserted for deliberation not earlier than on the second day after its introduction, unless the Government of the Republic requires the motion to be decided sooner; 3) an Act of the *Riigikogu* that the President of the Republic refused to promulgate and that has been returned to the *Riigikogu* for renewed deliberation and decision, to be inserted for deliberation at the earliest opportunity; 4) a bill to approve or repeal a decree of the President of the Republic, to be inserted for deliberation at the earliest opportunity; 5) the declaration of the state of emergency, or to be inserted for deliberation at the earliest opportunity; 6) the declaration of the state of war, mobilisation or demobilisation, and decisions related to increasing the level of military readiness, to be inserted for deliberation at the earliest opportunity; 7) a proposal from the Chancellor of Justice to bring an Act or a resolution of the *Riigikogu* into conformity with the Constitution of the Republic of Estonia or Act of the *Riigikogu*, to be inserted for deliberation at the earliest opportunity; 8) the grant of consent to bring criminal charges against a public official, to be inserted for deliberation at the earliest opportunity; 9) a political statement by the President of the Republic, the Prime Minister or other ministers, to be presented at the time agreed upon by the President of the *Riigikogu* and the presenter of the statement; 10) a political statement by a guest of the *Riigikogu*, to be presented at the time determined by the Board of the Riigikogu; 11) the oath of office, to be taken at the time determined by the President of the *Riigikogu*; 12) a draft resolution related to ensuring the financial stability of a foreign state, of the euro area or of a member state of the euro area, or to the prevention or resolution of the financial crisis referred to in the State Budget Act, to be introduced for deliberation at the earliest opportunity; (2) Items are included in the agenda at the proposal of the President of the *Riigikogu*».

2016, the Center Party joined the coalition of government, and its leader Jüri Ratas became the prime minister from 23 November 2016 to 29 April 2019. The ascent of the Center Party's leader Jüri Ratas to the office of the prime minister abated the conflicts and he realize a second cabinet government from April 2019 to January 2021 when, after the prosecutor general of Estonia suspected the Centre Party of "criminal involvement" in an influence-peddling scandal involving businessman Hillar Teder, he resigned as Prime Minister on 13 January 2021. The next Prime Minister Kallas, after including the Center Party in the governing coalition agreement, removed her junior coalition partner on June, 3 2022, as he sided with a far-right group in Parliament to vote against government reform of primary education.

Therefore the political framework in Estonia follows the features of a parliamentary government, including dominant parties within an asymmetrical and fragile bipolarism, coalition crises, and votes of no-confidence. These dynamics are recreated in Parliament regardless of the electorate's initial indications with their vote and are under the scrutiny of the President of the Republic. While there is no specific organisational set-up for parliamentary opposition, Estonia's political dynamic outlines a typical model of democracy and consensual government. However, it is unstable on the governmental side and has difficulty aligning itself along a bipolar axis. Consequently, the political address of the majority (and minority) is potentially interchangeable during the parliamentary term.

Hence, in the absence of predefined legal instruments to favor, encourage and promote the legal strengthening of the role of the political opposition in Parliament as a counterpart along the entire legislature of the government majority, the experience of the parliamentary opposition in Estonia will be not clearly defined until the political system will consolidate itself into a clear bipolar structure between center-left and center-right (Mikkel 2016).

Nevertheless, the opposition in Parliament is not the only type of opposition. Also the President of the Republic plays a crucial role in maintaining stability, but the Government sometimes sees this as opposition to their policies. Recently, there has been a controversial issue related to pension reform. During the COVID-19 pandemic, the Government remained united and did not experience many disagreements, fore and foremost with the parliamentary opposition. This may have been due to the pandemic being less severe than expected, considering that Estonia had a relatively low death rate and a modest decline in GDP growth. However, the Government's approach to budget sustainability was a contentious issue, particularly the pension reform which many experts and international organizations deemed ir-

responsible in the long term. Therefore the Government's weak ambition to return to balanced budgets after the pandemic also caused conflict with the President, who returned the pensions reform bill to the *Riigikogu*, appearing as a sort of opposition (Whyte 2020).

At the same time, over the years, civil society actors have become more involved in politics, with protesters advocating for and against issues such as the legalization of same-sex unions and science funding. However, the presence of the far-right Conservative People's Party (EKRE) in the governing coalition sparked grassroots activism, leading to the formation of the mass movement Everyone's Estonia in 2019. This movement arose in response to the toxic and xenophobic rhetoric and attempts to politicise the civil service and media by the Conservative People's Party, which had joined the governing coalition. Although Everyone's Estonia has attracted many young people and held numerous public demonstrations, it has not yet decided to seek political representation in Parliament.

In summary, due to the mobility of social arrangements and fractures that still exist in Estonian society, its political system remains based on a parliamentary consensus-type vision. As a result, Estonia is not yet ready to move towards a Westminster-type parliamentary Government, which poses challenges in structuring a clear, solid, and legally codified role for the opposition in Parliament.

3.2. Latvia

In a democratic system, as we have already pointed out, opposition parties rely on several constitutional guarantees, such as freedom of expression, assembly and association, supported by an impartial civil service and an independent judiciary. These protections prevent opponents of the government from being targeted, harassed or discriminated against. However, some constitutions go a step further by formally recognizing the role, responsibilities and powers of the opposition or legislative minority in democratic politics. This recognition stems from the idea of political pluralism, which ensures that no single party has a permanent monopoly on power and shows a commitment to democratic dialogue and decision-making that listens to all parties.

In this sense, the Latvian political-institutional system is more conscious than the Estonian one, also for the reasons of the presence of a strong Russian-speaking minority, and even provides for codified legal solutions to strengthen the role of the opposition.

As a parliamentary democratic republic, Latvian public institutions are structured, authorised and functioned according to the Constitution (*Satversme*), adopted in 1922. The Latvian people hold the supreme power of the state and elect the *Saeima*, the unicameral Parliament of 100 members.

The importance of the referendum is emphasised, with some exceptions defined in the Constitution, to the extent that even the decision to dissolve Parliament proposed by the President of the state must be followed by a national referendum. Furthermore, the people have the exclusive right to make decisions concerning the independence, sovereignty, territorial integrity, official language and public democratic system of the state, which must be subject to a national referendum.

According to the Constitution, the highest authorities of state power are the *Saeima*, the President of the State, and the Cabinet of Ministers. The *Saeima* elects the state President, who then chooses and invites the candidate for Prime Minister to form the Cabinet. The Government must then receive a vote of confidence from the *Saeima*, based on the fiduciary relationship between Government and Parliament. To obtain political representation in Parliament, which lasts four years, a party must receive at least 5% of the voters' support. The Latvian political system thus follows a typical parliamentary form.

Historically, as mentioned, Latvia has been home to large ethnic minority groups, which, of course, suffered all the vicissitudes of the two world wars and, finally, the Soviet deportations, which further impoverished the population. The post-war decades thus witnessed an intense process of Russification (about one-third of Latvia's population), with Russian speakers remaining the country's largest minority. This, after the fall of the Soviet Empire, prompted Latvian politicians to adopt a 1994 citizenship law that denied automatic citizenship to Russian speakers and their descendants who had moved to Latvia during the Soviet era, while also introducing restrictive language laws that protected the status of Latvians in public life.

Although the citizenship law was liberalised and, at the end of the 1990s, anyone who fulfilled the criteria of residence and knowledge of the country's language could become a naturalised citizen, the state continues to protect the status of the Latvian language, in a process that has been further strengthened in recent years by effectively putting an end to the Russian-language school system.

In this sense, an early and relevant form of political opposition came from the Russian-speaking Latvian population, which protested against the restrictions on the use of Russian in the public sphere, and there was

even a very divisive referendum in February 2012, supported by the largest pro-Russian party in Latvia, *Harmonia*, on whether Russian should be recognised as Latvia's second official language.

The Latvian political landscape is thus largely divided between two blocs: the "Latvian" and the "Russian" parties. While individuals can switch their vote within their chosen bloc, it is rare for Latvians to switch from one bloc to the other. Latvian parties attach great importance to the preservation of Latvian traditions and history and often align themselves with the West to achieve this, as Russian invasions and occupations have had a devastating impact on Latvians and their culture. On the other hand, Russian parties prioritize alignment with Russia and seek to elevate the status of the Russian language. This division is deeply rooted in Latvia's political history, as Latvians suffered genocide under Soviet occupation, while Russians enjoyed a privileged status. This dynamic led Russian parties to campaign for some small "concessions", effectively turning Latvia into a more "multi-ethnic" state. Historically, pan-Latvian coalitions have prevented Russian parties from entering government coalitions, but the influence of Russian parties has grown slightly as the share of Russian citizens in Latvia has remained constant due to the new generation of Russians born in Latvia who now have citizenship. Both the Latvian and Russian parties have elements of conservatism, but they differ in their approach: the Latvian parties aim to continue and restore the pre-1940 culture, while the Russian parties seek to maintain the situation of the 1940s-1990s.

In this context, the three main Christian denominations – Lutheran, Catholic and Orthodox – even though the Latvian Constitution of 1922, the *Satversme*, separates the Church from the state, still have an important weight in polarising an already very divided society; a situation that did not fail to make itself felt when, in response to a November 2020 Constitutional Court ruling that families consisting of same-sex partners should be recognised as families and that the state has an obligation to protect and financially support these families, the ruling coalition pushed for a law defining the family as consisting of only a man and a woman.

A strategic role in the democratisation and modernisation of Latvia's legal system has been played by Latvia's entry into the European Union, the structural and cohesion funds that have been granted, and which have improved the quality of this country, which has also suffered greatly from the COVID-19 pandemic and the pressure it has put on the healthcare system, even causing some healthcare services to be suspended due to the COVID-19 pandemic.

In any case, political participation shows a trend of gradual democratic learning, despite some episodes of electoral irregularities that occurred over the

years (particularly in the city of Riga). However, having overcome the difficult post-Soviet transition and its oligarchs who had grown rich in the transition from one regime to the other (Huang 2002), since the late 1990s and then in the 2000s the substantial reforms of party financing laws, the reduction in the size of private donations to parties and the substantial increase in public financing, as well as the limitation of the scope of electoral advertising, have further fostered a more solid, transparent and modern system of government.

The Latvian Constitution guarantees freedom of expression, and the Latvian judiciary, in particular the Constitutional Court, has actively defended this right, which, especially after the political polarization of recent years, has made it possible to reduce the number of people speaking out.

There is strong political polarisation, and the political-parliamentary dynamics follow exactly those typical of consensual forms of government, although over time there has been greater consolidation of the party system, which has favored greater stability of the Government. As a result, prime ministers in recent years have remained in office for two years, up from the one-year average of the 1990s and early 2000s. And this is although the role of the Latvian Prime Minister – a kind of *primus inter pares* – is much weaker than in other European democracies, as he effectively controls only his own party's ministerial portfolios, while the other coalition parties retain effective control of their ministerial fiefdoms (Pabriks and Štokenberga 2016; for a different perspective, see Kažoka 2010; Pilic 2000).

Within this framework, also as a guarantee for oppositions, the Constitutional Court remains an important check on both the executive and the legislative, regularly annulling laws when it deems them unconstitutional.

However, the Latvian Constitutional Court, which ensures that laws and administrative practices do not conflict with the Constitution, has recently annulled several important parliamentary acts. In particular, the Court's November 2020 ruling that same-sex couples are entitled to paid paternal leave (ordering Parliament to amend the law by 1 June 2022) was strongly criticised by the more conservative segment of Latvia's political spectrum, which proposed amending the Constitution so that the state would not be obliged to recognize same-sex unions. The court ruling also opened a debate on the legal challenges faced by cohabiting couples.

In any case, Latvia has certainly improved its institutions and political process, allowing the dominant political split – the ethnic one, relating mainly to the Russian-speaking population, which accounts for between a quarter and a third of the voting population – to influence the political dynamics only to a certain extent, in order to favor the interests of Russian speakers. However, as

we have repeatedly pointed out, this maintains a high level of polarization between Russian-speaking and ethnic Latvian parties (and voters). Consequently, as a rule, government coalitions comprise the "Latvian" majority parties of the political spectrum, historically divided into three main ideological groups: radical right-wing nationalists; technocratic nationalists; centrist liberals, while in recent years a fourth group of pure populists, anti-government parties have emerged, although they are organizationally weaker than the other party groups.

Structurally weak, with the lowest party memberships in Europe and with finances dependent on generous corporate donors and wealthy individuals, the political parties then, also in the dimension of confrontation between majority and opposition, still experience a complex moment, which also makes the high electoral volatility difficult to stabilise (Zinzi 2023; Clementi 2016).

Therefore, even more unlike Estonia, Latvia's radical political and economic transition to a multi-party democracy, which began with the re-adoption of the 1922 Constitution and the first post-Soviet parliamentary elections in 1993, despite seven parliamentary elections, presents an extreme multipartyism that makes government stability still too difficult to achieve, within a political confrontation that makes government alternatives less clearly distinguishable due to frequent changes in the composition of government coalitions.

What is the effect of this? The effect is that the concept of the parliamentary opposition is not codified at all, and there is no statute protecting it within the parliamentary rules of procedure; hence the hyper-assembly behavior of Latvia's political logic renders that political-institutional system still too fragile, a clear example still of a typical perspective of a consensual democracy.

In this sense, the only important instrument that can be emphasised has a higher, constitutional status. In fact, the Constitution of Latvia provides in art. 72 the rule of the referendum with a minority veto. (Köker 2017). This instrument in fact allows the President of the Republic, on his own initiative or at the request of at least one-third of the deputies, to suspend a bill for a period of two months within 10 days of its approval by parliament, possibly allowing holding a referendum on the subject if, during these two months, a public petition signed by 10% of the electorate is received, which is naturally a high threshold[2]. However, in a demographically small country like Latvia, this

[2] Read the Latvian Constitution, *ex* art. 72: « The President has the right to suspend the proclamation of a law for a period of two months. The President shall suspend the proclamation of a law if so requested by not less than one-third of the members of the *Saeima*. This right may be exercised by the President, or by one-third of the members of the *Saeima*, within ten days of the adoption of the law by the *Saeima*. The law thus suspended shall be put to a national referendum if so requested by not less than one-tenth of the electorate.

is not an impossible task, and in fact several referendums have been held under these rules, including the one on citizenship (1998) already mentioned, the one on security (2007) and the one on pensions (1999 and 2010).

To summarise, although the parliamentary opposition plays an essential role in Latvia, representing the voice of the Russian-style political minorities and contributing to the promotion of open and constructive public debate, it is clear that the geopolitical weight of the Russian presence today and the Soviet presence yesterday still weighs heavily in the Latvian party political system. Inevitably, this anti-Russian sentiment has been further strengthened, triggering even more a logic of rejection opposed to the presence of Russian-speaking political minorities in parliament since Putin's Russia's invasion of Ukraine. A fact that further strengthened the de-Russification of this order and the even stronger desire to anchor its democracy within the European political space and NATO.

3.2. Lithuania

Lithuania, which was occupied and annexed by the Soviet Union in the 1940s, underwent significant changes under Soviet rule, including its economy, resources, and population. However, Lithuania achieved its goal of becoming a free and independent state within the European community by joining the European Union and NATO in 2004. Since the establishment of a democratic republic, the political system has been stable and all political actors have accepted the democratic dynamics of power. Although there has been volatility in the electorate, with no government winning consecutive elections since 1990, the party system is fairly consolidated and has identifiable socio-demographic bases of support. Populist parties have had limited impact and have either been co-opted into the system or contained outside it.

In a semi-presidential system, whereby the ead of state, directly elected for a five-year term, oversees foreign and security policy, nominates the prime minister, cabinet and top civil servants, Lithuania has proved to be well-balanced between democratic institutions, and the validity of elections and fairness of procedures, which have never been in doubt. Therefore, despite chal-

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If no such request is received during the aforementioned two-month period, the law shall then be proclaimed after the expiration of such period. A national referendum shall not take place, however, if the *Saeima* again votes on the law and not less than three-quarters of all members of the *Saeima* vote for the adoption of the law».

lenges such as social inequality and demographic changes, Lithuania remains a substantially stable country with a strong political system.

On this basis, the nature of the parliamentary opposition in Lithuania – a semi-presidential model within a protected democracy structure – appears to be one of the best examples among the Baltic countries to foster the transformation from a consensual to a Westminster-type form of government.

In fact, not only is there an important outward opening in the legislative process, given that non-political associations are allowed to actively participate in the legislative procedure through the submission of proposals and observations (an instrument in itself however useful in pluralising the legislative debate and encouraging the emergence of all social positions, including those that do not have representation in Parliament), but above all there is the institutionalisation of the opposition in Parliament through the identification of its leader, who is even salaried according to the typical "shadow cabinet" rules in the Westminster model.

Thus, since 2013, the strongest minority political faction can constitute itself as a codified parliamentary opposition, even forming a "shadow government" in Parliament in order to publicly present itself as the counterpart of the government members holding official positions.

In this regard, particularly in 2001, although the Constitutional Court clarified that the position of an opposition leader has no legal status and does not provide any institutional rights, except the procedural rights defined by the *Seimas* (see the ruling "On the parliamentary procedures established in the Statute of the Seimas" of 25 January 2001, in the case n. 3/1999), the internal rules of the *Seimas* allow for much of what is expected from the institutionalisation of the opposition in Parliament.

Thus, when a political faction or a coalition of factions, representing more than half of the members of the parliamentary minority, officially declares its leader and the official leader of the opposition in the legislature, the latter participates in the deliberations of the *Seimas* Council, has the right to propose the agenda of the parliamentary session, as well as the right of priority during parliamentary debates once per debate, and receives additional remuneration for these extra duties (to read all the numerous provisions mentioned in detail, see the "*Seimas* Of The Republic Of Lithuania – Statute"). In addition, the person holding this position has symbolic political power, at the mandate of the majority of the opposition parties, and can be projected as a potential competitor of the incumbent Prime Minister at the next election. To summarise, this relevant choice, able to be realised in Parliament by the political parties, is creating a signif-

icant opportunity to enhance the power, influence, and acknowledgment of a parliamentary opposition institutionalized scheme in Parliament, allowing them to operate as a "government-in-waiting" within the democratic framework, which is a very important feature of Westminster-style constitutional systems.

4. Final remarks

Rather unstable to maintaining the initial government – the one that emerged from the voters' vote – for the duration of the legislature, and often unable to display clear governing alternatives along the Westminster model political tradition, the Baltic states present different visions of a parliamentary opposition as an instrument to define and foster a better democratic regime.

As we have observed, the historical presence of Russia and the Soviet Union has left deep rifts in Estonian and Latvian societies, resulting in a political-institutional system that is very different from that of Lithuania. Any attempts to strengthen parliamentary opposition in Estonia and Latvia are hampered by this reality. However, the entry of these nations into the European Union has had a positive impact on the gradual advancement of democracy, resulting in more stable and structured institutions that adhere to the principles of liberal democracy.

Lithuania, on the other hand, benefits from more effective learning of the rules that improve the vision of democracy, particularly in Parliament. Its unique social and linguistic composition, as well as its decision to adopt a strong model of protected democracy following the fall of the Soviet empire, has enabled it to stabilise its political-parliamentary dialectic more quickly and effectively. This was achieved through the institutionalisation of the parliamentary opposition through its leader, who has also established a shadow government. Although the Constitutional Court did not approve further enlargement of this opposition, the internal rules introduced into the Assembly's Rules of Procedure are still of great benefit.

In essence, it becomes apparent that the significance of the rights and duties of the opposition within a democratic parliament, whether formally established through parliamentary regulations or as part of the social and political dimension of multi-party systems, is still undervalued in terms of their potential to reinforce and stabilise democracy. This is especially true given that democratic consolidation in the Baltic states encounters a social territory that has yet to be fully reclaimed, even in collective memory, with

regards to the non-democratic practices during the long period of Soviet influence and later Russian as well.

However, it is the aggressive and invasive war by Putin's Russia against Ukraine that has proven to be a catalyst for strengthening democratic institutions and tools, including reinforcing the opposition in parliamentary regulations.

Putin's Russia is already experiencing the consequences of its choice and will continue to do so in the future, as it is bringing the Baltic states even closer to the European Union and the community of stabilised democracies. Thus it will be all the more interesting to note whether the positive Lithuanian experience will be a useful reference point for Estonia and Latvia, also within the strengthening of that Baltic Assembly that is a further element of integration towards better political-democratic standards.

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Political opposition in Slovakia: no explicit legal recognition but significative legal possibilities

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1. The constitutional system of the Slovak Republic and the opposition's role

A democratic state is unimaginable without the existence of political opposition. This is especially true in a country that went through two undemocratic regimes in the not-so-distant past (a regime with fascist elements collaborating with Nazi Germany in 1938/1939-1945 and a communist regime in 1948-1989). In the conditions of the parliamentary form of government, which also applies in the Slovak Republic (Cibulka *et al.* 2014: 223; Čič *et al.* 2012: 580; Giba *et al.* 2019: 229; Orosz, Svák and Balog 2011: 312-313)[1], the opposition represented in Parliament has the most important position. It is precisely the parliamentary opposition that is the counterweight and

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[1] Exceptionally, one can also find different opinions (especially Drgonec 2015: 1080-1081). However, the basic features of the parliamentary form of government (dependence of the compositon of the executive on the results of parliamentary election and political accountability of the executive before the parliament) are undoubtedly present.

controller of the government and of its majority in Parliament. This is certainly true in Slovakia, where after the fall of the communist regime (1989), and the establishment of an independent state (1993), the practice of coalition governments gradually established, even if they have never been supported by all political parties represented in Parliament. On the contrary, some of political parties in the Slovak Parliament, the National Council of the Slovak Republic (hereinafter referred to as "the National Council"), used to join the opposition after the elections and to oversaw the policy of the majority government, mainly through a loud criticism.

The term "opposition" is used in the daily Slovak political and constitutional discourse and there is no fundamental doubt about its content. However, the 1992 Constitution does not contain the term "opposition". At the same time it does not explicitly regulate the status of the opposition or any of its rights. Therefore, some authors conclude that the constitutional law of the Slovak Republic does not yet explicitly recognise the organisational relevance of the opposition for the state (Bröstl *et al.* 2015: 214). Nevertheless, several provisions that protect political minorities in various ways can be found in the Constitution, such as the disposition imposing to hold elections at regular periods, by which the principle of government for a limited time is expressed (Palúš and Somorová 2012: 71). The lack of an explicit regulation of the position of the opposition is also observed at the level of the statutory regulation. No existing law in the Slovak Republic, nor the 1996 Act on the Rules of Procedure of the National Council, recognises the term "opposition" and therefore does not explicitly regulate the status of the opposition. As for the legal status of the members of the National Council, it should be noted that this is a general one, meaning that, in principle, all deputies are given the same rights (Krošlák *et al.* 2016: 454). Therefore, the law does not distinguish between a deputy supporting a government and a member of the opposition.

Despite the fact that the legal order of the Slovak Republic does not explicitly recognise the opposition, it is possible to derive from its various components significant legal possibilities for the opposition, especially the parliamentary one. Finally, despite the frequent criticisms of Slovak political culture, one can agree with the statement that granting certain rights to the opposition is considered to be a part of political culture (Krošlák *et al.* 2016: 454). Some of the rights of opposition are directly derived from the legislation, others have the characteristics of legal customs.

The aim of this chapter is to identify and systematically summarise the legal possibilities that the legislation of the Slovak Republic provide for the

opposition's political forces. Our attention will be primarily focused on the activity of the National Council, since, as already indicated, this is the most important forum for opposition voices. Consequently, our attention will be on the organisation of the National Council and on the usual functions of opposition forces (2). Subsequently, the subject of interest will be the National Council rules of procedure (3), within which it is also possible to identify several intervention tools of opposition forces. Then, we will outline the opposition's ability to appeal against the legislation promoted by the government before the Constitutional Court (4), as well as the opposition's ability to take part to the State Electoral Commission (5). Then, we will examine the institute of referendum (6), which in the Slovak political practice often serves as a tool to promote opposition's interests. Finally, we will try to assess the overall position of the opposition in the Slovak Republic, considering the principles and requirements on which a democratic state and a state based on the rule of law should be based (7).

2. The organisation of the National Council and the opposition's role

As already mentioned, the most important space for the implementation of opposition policy can be found in the Parliament. Therefore, it is appropriate to deal with the organization of the National Council and the possibilities that arise from this organization to the parliamentary opposition. Before that, however, a few remarks on the National Council in general have to be made. The National Council, consisting of 150 deputies, is the supreme representative and the only legislative and constitutional-making body of the Slovak Republic. Every citizen of the Slovak Republic older than 21 years of age with permanent residence in the country can become a member of the Slovak Parliament. However, the law only allows registered political parties (or their coalitions) to submit candidate lists for the parliamentary elections. The registration of political parties is carried out by the Ministry of the Interior of the Slovak Republic. The fundaments of the internal organisation of the National Council are assumed by the constitution, the details are regulated by the Act on the Rules of Procedure of the National Council. Thus, the Slovak Parliament belongs to the group of parliaments whose internal relations are not regulated only by their own resolution, but are the subject of a law.

The analysis of the organisation of the National Council must begin considering how individual deputies, including those belonging to the oppo-

sition, can be organised within it. The Act on the Rules of Procedure provides for the creation of the so-called parliamentary groups, which are set up during the inaugural session of the parliament, i.e. practically immediately after the parliamentary elections. The basic rule is that parliamentary groups copy political parties whose candidates have won a parliamentary seat. Thus, if a deputy has been a candidate on the list of a political party, the rule is that he or she becomes a member of a parliamentary group of the same name. However, the Act on the Rules of Procedure also provides for the possibility of creating a parliamentary group on a different basis than the fact of belonging to a political party that took part in the elections. In such a case, the consent of the Plenum of the National Council is required. On the contrary, in the case of the standard creation of a parliamentary group, this creation is only taken into account by the Plenum. No consent is needed. For the sake of completeness, it should be added that the placement of deputies in one of parliamentary groups is not obligatory. However, non-attached deputies are in a slightly disadvantaged position, as the members of parliamentary groups have certain advantages in parliamentary deliberations. For example, only parliamentary groups can propose additional items to parliament agenda during a session. In turn, authorised representatives of parliamentary groups have the right to be the first to speak in the debate. Therefore, in Slovak political practice, deputies always join some parliamentary group and cease to be their member only if they resign from the political party of the same name, for example due to political disagreements.

Parliamentary groups are formed by all political parties whose candidates won mandates in the National Council, including parties that have ended up in opposition. The Act on the Rules of Procedure requires at least eight deputies to form a parliamentary group. The electoral system used for the elections to the National Council[2] generally results in the fact that each political party obtain at least the specified number of deputies and thus fulfills the conditions for setting up its own parliamentary group. The only exceptions were the first democratic and free elections held after the fall of the communist regime (1990), in which two political parties won a number of mandates

[2] Elections to the National Council are conducted through a proportional representantion system. The whole territory of the Slovak Republic form one single constituency. Exceeding the electoral threshold of 5% of all valid votes is a prerequisite for the possibility of obtaining seats in the National Council. If several political parties are running in a joint coalition, it is necessary to obtain 7 or 10% of all valid votes, depending on a number of parties forming the coalition.

lower than eight (seven and six)[3]. However, at that time the law did not provide for the creation of formalised parliamentary groups or factions. In addition, one of these political parties (*Demokratická strana*) was directly one of governing parties, the other (*Strana zelených*) acted as a government-inclined non-opposition party (Hrnko and Petranská Rolková 2018: 89). The minimum number of deputies required to form a parliamentary group must be maintained throughout the term of the National Council. If, as a result of the departure of one or more members, the number of members falls below eight, the parliamentary group shall cease to exist.

Representatives of all parliamentary groups together create the so-called Panel of Deputies (*poslanecké grémium)*, which is a kind of advisory body for the President of the National Council, with which issues of a political and procedural nature are discussed. Thus, the above-mentioned rules for the creation of parliamentary groups ensure the access to the Panel of Deputies of the opposition parties as well.

From the point of view of the organisation of the National Council, its administration or management is undoubtedly important. Both the Constitution and the Act on the Rules of Procedure presuppose that the Slovak Parliament is headed by its President. Due to the balance of power between the governing parties and the opposition, the President of the National Council always becomes a representative of one of the governing parties. However, the Vice-Presidents of the National Council are also part of the management of the parliament. Their role consists in a representantion of the President if necessary. It is precisely the position of Vice-President of the Parliament, to which the Slovak opposition has traditionally had access. In this regard, it is interesting that the Act on the Rules of Procedure does not specify any details in relation to the position of Vice-President of the National Council. The mentioned Act only presupposes that one or more Vice-Presidents are elected by all members of the Parliament in a secret ballot. Already after the first democratic and free elections (1990), the practice that the National Council has four Vice-Presidents has become established. Following the subsequent elections in 1992, the opposition also obtainted one Vice-President. Since then, in every parliamentary term the opposition has at least one Vice-President of the National Council. After the 2012 elections, when the government was formed by only one political party (in Slovak *Smer - Sociálna demokra-*

[3] The lower number of seats won in the 1990 elections was mainly due to the fact that the then electoral system contained the electoral threshold of only 3%.

cia), even two opposition parties obtained the position of Vice-President of the National Council. In the following period (elections in 2016 and 2020), there was another return to the tradition that one of four seats in the parliamentary administration belongs to the opposition, namely the strongest opposition political party. Even if only 10 parliamentary elections have taken place in Slovakia after the fall of the communist regime, the assignment of one post to the Vice-President of the Parliament for the opposition can already be described as a kind of constitutional custom, the disregard of which is very difficult to imagine.

Committees are another organisational part of the National Council. The law defines them as the initiative and control bodies of the Parliament. Each deputy becomes part of one or more committees, usually according to his or her professional orientation. The members of committees are elected by all deputies of the Parliament.

In relation to the parliamentary opposition, it should be noted that opposition deputies not only can be members of committees, but in some of the latter the Act on the Rules of Procedures explicitly stipulate that their members are elected taking into consideration the proportional representantion of all parliamentary parties. This means that in the some committees the representation of opposition parties is guaranteed by law according to the total share of their deputies. Specifically, these concern (1) the Committee on Mandates and Immunities, (2) the Committee on Incompatibilities, (3) the Committee on European Affairs, (4) the Committee for Review of the National Security Office decisions and (5) special control committees. Special control committees are set up to monitor the activities of the National Security Office, the civil intelligence service (*Slovenská informačná služba*) and the military intelligence service. With regard to the roles of the other committees, the Committee on Mandates and Immunities is responsible for verifying the validity of election of individual deputies; the Committee on European Affairs is in charge of discussing draft legally binding acts of the European Union and approving the positions of the Slovak Republic on them. The Committee for Review of the National Security Office decisions decides on appeals against non-granting security clearances. The aforementioned committees, together with the Constitutional Law Committee, can be considered the most important committees of the National Council (these committees are established on a mandatory basis). Thus, the proportional representation of the opposition in these committees guarantees the participation of the opposition in fundamental activities of the Parliament. In the case of

special control committees, it is also a question of the possibility of control of intelligence services, with the abuse of which Slovakia has already several experiences. The guaranteed proportional representation of the opposition in the Committee on Mandates and Immunities and in the Committee on Incompatibilities is intended to ensure that opposition deputies cannot be arbitrarily harassed by the government majority.

However, the proportional representation of political parties represented in the National Council, including the opposition parties, is also reflected in other committees. This is, for example, the already mentioned Constitutional Law Committee. Thus, the representation of the opposition parties in proportion to their parliamentary strength is respected in practice, notwithstanding the fact that the Act on the Rules of Procedure does not explicitly prescribe it in the case of committees other than those mentioned above. For example, the Constitutional Law Committee elected in 2020 has 12 members, 8 of whom are members of political parties supporting the government and 4 members of the opposition parties. Thus, the proportional representation of the opposition parties in this committee roughly copies the overall *ratio* of the opposition deputies to the government-supporting deputies, which in this term (at least at the beginning of it) was 55 to 95.

Another representation of the parliamentary opposition in the organisational structure of the National Council, namely the presidency in selected committees, has also the nature of a legal custom. Unlike ordinary members, the Act on the Rules of Procedure does not contain any explicit rule in relation to the function of chairperson and vice-chairperson of committees. Since the government parties have the majority, the positions of chairpersons of the individual committees are usually filled by members of political parties supporting the government. However, one can observe the constitutional custom of granting the position of chairperson in control committees to the opposition political parties. In particular, it is a presidency in committees overseeing major state security institutions headed by government nominees (Krošlák *et al.* 2016: 455). Specifically, these are the three already mentioned special control committees monitoring the activities of the National Security Office, the civil intelligence service and the military intelligence service. The fourth one is the Committee for Review of National Security Office decisions. However, also the presidency of the Committee on Incompatibilities usually belongs to the opposition, as even in the case of this committee the control function clearly predominates.

3. National Council's rules of procedure and opposition's rights

While the previous part was focused on the functions that legislation or practice confers to the opposition deputies in the Slovak Parliament, the following lines will draw attention to the opportunities offered by the National Council's rules of procedures to opposition deputies.

As the National Council is, according to the Constitution, a legislative and constitutional-making body, the negotiation of drafts of laws can be described as one of the most important processes taking place in it. That is why the possibilities that Slovak opposition deputies have in connection with the legislative process will be presented firstly. The Constitution and the aforementioned Act on the Rules of Procedure recognise the right of legislative initiative (the right to propose the adoption of a law with the parliaments's obligation to discuss this proposal) to the Government, to National Council committees and to individual deputies. In the case of the third of these elegible entities, the right of legislative initiative belongs to each of deputies separately. The minimum number of deputies who would have to sign a bill is not specified. The right to legislative initiative conferred to one sole deputy is exceptional from a comparative point of view (Pavlíček, V., Jirásková, V. *et al.* 2021: 397). The consequence of the rules set in this way is that the right of legislative initiative also belongs to opposition deputies without any further restrictions. Opposition deputies also make extensive use of the right of legislative initiative, but the fact is that a substantial part of acts actually passed are bills submitted by the Government. For example, in 2020, out of 124 acts passed, only 29 were a result of the National Council deputies initiative. In addition, a substantial number of those bills were submitted by deputies supporting the Government. In 2021, there were slightly more such laws, 66 out of a total of 168 approved acts (Štatistiky a prehľady 2022).

A specific case of legislative procedure taking place in the National Council is a vote on those legislative proposals for which a qualified majority is required. The Constitution presupposes that a majority of at least three-fifths of all deputies is required for the adoption of a constitutional act, the act with higher legal force which is usually also used to amend the Constitution[4]. This means that at least 90 members of the National Council

[4] Not every constitional act amend the Constitution. The constitutional system of the Slovak Republic also recognizes such constitutional acts which "stand" besides the Constitution and do not directly affect its text.

must vote for a constitutional act. Consequently, the need to obtain a qualified majority for voting on constitutional act, often leads the Government majority to seek support from part of the opposition. Thus, the opposition has an opportunity, at least to a certain extent, to participate in the adoption of constitutional acts as legal regulations with the highest legal force, which are decisive for the formation of the constitutional system of the Slovak Republic. At the same time, however, it should be reminded that the parliamentary elections following the 1989 transition produced some results in which the governing coalition had enough votes to implement constitutional changes on its own. It was, for example, the case of the Government formed after the 1998 elections or the one that emerged following the 2020 elections. On the other hand, it should not be forgotten that the Slovak coalition governments were and are relatively unstable and therefore seeking support from the opposition is not completely ruled out.

In addition to voting on constitutional acts, a qualified majority (three-fifths of all deputies) is required in other specific cases, such as a resolution declaring a recall referendum on the dismissal of the President of the Republic or a resolution indicting the President of the Republic for treason or intentional violation of the Constitution. However, none of these votes have ever taken place. A qualified majority, which also presupposes the involvement of the opposition, is also required if the Parliament wishes to revoke the amnesty or pardon because of their conflict with the principles of a democratic state and state based on the rule of law. Such a vote has already taken place once. Therefore, it can be concluded that the existing constitutional rules will to a large extent ensure that the opposition can participate in the most important votes that take place in the Parliament.

The traditional task of the opposition, especially in conditions of a constitutional system based on the principles of a parliamentary form of government, is to control the activities of the Government. The Slovak Republic is not an exception in this respect. The Constitution and especially the Act on the Rules of Procedure entrust deputies with several instruments for controlling the activities of the Government. Although these tools are accessible to all members of the National Council, regardless of their political affiliation, it is clear that they will be used more by the opposition deputies.

One of the most important rights of all deputies, used especially by the opposition, is the so-called interpellation right. The interpellation right is the right of a deputy to request a qualified answer to a question addressed to the Government, its member or the head of another central state administration body in matters within their competence (Giba *et al.* 2019: 176). The

submission of an interpellation question is accompanied by the obligation of the subject to which it was addressed to provide a response in writing and within 30 days. Based on the answer, a debate is then held in the National Council, which can also be linked to a vote of confidence. However, such a proposal of voting on confidence can only be made by the Government, not by the opposition deputy who tabled the interpellation. The possibility of deriving political responsibility of the Government, in the form of a possible rejection of the motion of confidence, distinguishes the interpellation right from other tools available to deputies to control the executive. The Act on the Rules of Procedure also recognises the so-called question time (held every week) in which members of the Government, as well as other executive officials, answer questions from deputies. The order in which the questions are answered is determined by a lot. Deputies, especially from the opposition, also have the opportunity to carry out the so-called a parliamentary survey to find out how the law is being complied with and enforced. The object of such a survey may be various public authorities, not just those that are part of the executive.

Another possibility provided by the Act on the Rules of Procedure is the initiative of convening a session of the Parliament, which is usually irregular (not scheduled). The President of the National Council is obliged to convene a session whenever requested by at least one-fifth of all deputies, that means at least 30 deputies. The distribution of forces between the deputies supporting the Government and those of the opposition has always been such that the opposition actually had at least 30 deputies to covening an irregular session of the Parliament. Opposition deputies usually call for an irregular session to propose a vote of no confidence or to draw attention to negative social events. Recently, the opposition has responded by convening an irregular session to discuss the serious social consequences of the sharp rise in energy and food prices (February 2022) or the executive measures taken during the COVID-19 pandemic (April 2021). However, it often happens that the irregular session proposed by the opposition actually does not take place because its agenda is not approved. The approval of the agenda requires the votes of an absolute majority of all deputies. In this way, deputies supporting the Government often block the session proposed by the opposition.

Parliamentary immunity is one of the privileges traditionally enjoyed by members of the parliament. As it is well known, the immunity primarily protects opposition deputies from various possible forms of bullying by the executive, which could be the result of criticism of the opposition against the executive. The institute of immunity protects all members of the National

Council, but traditionally is more important for the opposition's MPs. In the conditions of the Slovak Republic, there are two types of immunity. The first type is the indemnity, that means a complete and permanent irresponsibility for a certain behaviour. Specifically, the National Council deputies may not be prosecuted for voting and for statements made in the Parliament or in its bodies in the performance of their duties. The impossibility of prosecution persists even after the expiration of the parliamentary mandate. However, for a statement made in the National Council, the deputy is subject to a disciplinary accountability derived directly by the Parliament. However, the consequence of disciplinary accountability can by only the awarding of a fine or the obligation to apologise. The second form of immunity is procedural immunity, which protects the deputy against certain prosecution measures. In the past, it was not possible to prosecute a deputy without the consent of the National Council. Following the changes in the Constitution effective from 1 September 2012, the consent is only required to take a deputy into custody or to detain them. In case of detention of a deputy, for example due to a suspicion of a criminal offense, the competent authority must seek the consent of the National Council. If the consent is not given, the detained deputy must be released immediately. Another element of the protection for the National Council deputies, including those of the opposition, is the right to refuse to testify in matters which the deputy come to know in the performance of their duties. This right continues even after the person has ceased to be a deputy.

4. Appeal against the legislation promoted by the Government before the Constitutional Court

Since the acts of Parliament, as in other parliamentary systems of government, are passed by a majority of deputies, it can be stated that a substantial part of these acts is an expression of the will of the government's majority. Therefore, it can also be argued that the opposition generally disagrees with a substantial part of the approved acts. One of the opposition's most effective tool to criticise the legislation of the parliamentary majority is the possibility of filing a motion to initiate a constitutional review proceedings before the Constitutional Court of the Slovak Republic (Gajdošíková and Bröstl 2020: 89). Thus, the proceedings before the Constitutional Court of the Slovak Republic (hereinafter referred to as the "the Constitutional Court") on the compliance of legal regulations represent a special opportunity that

the constitutional system of the Slovak Republic provides to the opposition. Moreover, Slovak practice shows that proceedings before the Constitutional Court often represent not only an opportunity for a professional assessment of the adopted acts, but rather an opportunity for the continuation of political struggle between the government majority and the opposition. This is also due to the fact that the constitutional system of the Slovak Republic lacks a second chamber of the Parliament.

The basis of the proceedings on the compliance of legal regulations are contained in the Constitution, the details in the Act on the Constitutional Court (Act no. 314/2018). The purpose of legal compliance proceedings is to remove legal norms that contravene the Constitution from the legal order (Drgonec 2012: 139). The procedure most often consists of assessing the compliance of acts adopted by the National Council (*de facto* usually by the government majority) with the Constitution, constitutional acts and international treaties that have been ratified by the Slovak Republic and which take precedence over Slovak laws. However, the Constitutional Court may also assess the compliance of lower legal regulations, such as the compliance of implementing regulations issued by the Government, ministries or other state administration bodies, not only with the Constitution, constitutional acts or international treaties, but also with National Council acts.

If the Constitutional Court concludes that the challenged legal regulation is in accordance with the Constitution or another legal regulation of higher legal force, it will not grant the motion. On the contrary, if it is convinced that a contradiction exists, an unconstitutional legal regulation, either in whole or in part, declines in effect by declaring a decision of the Constitutional Court. At that moment, the author of an unconstitutional regulation, most often the National Council, has a period of 6 months to bring the problematic regulation into line with the Constitution or another legal regulation of higher legal force. If this does not happen, the challenged regulation (or a part of it) will expire, which will exclude it from the legal order of the Slovak Republic. Before deciding on the merits of the motion, the Constitutional Court may, on the motion or on its own initiative, suspend the effectiveness of the challenged legal regulation or part thereof.

The Constitutional Court cannot initiate proceedings on the compliance with legal regulations itself. On the contrary, the action will start only at the proposal of one of eligible entities. These entities are listed in an exhaustive manner in the Act on the Constitutional Court. These include, for example, the President of the Republic, the Government, the Attorney General, any court or the Public Defender of Rights. Also a group of deputies of

the National Council belongs to the entities to which the law grants the right to file a motion to initiate proceedings on the compliance with legal regulations. Thefore, the right to submit a motion does not belong to the Parliament as a whole, which would not even make sense if the proposal were directed against an act passed by the Parliament. Conversely, a petitioner have to consist of a group of deputies, which must make up at least one-fifth of all deputies of the National Council. As the National Council consists of 150 deputies, a group of at least 30 deputies may file a qualified motion to initiate proceedings before the Constitutional Court. It is irrelevant whether or not all members of such a group are members of the same parliamentary group. The minimum number of members of a group asking the Constitutional Court to start proceedings determined by law as 30 (or one-fifth of all deputies) guarantees that the opposition also has the opportunity to challenge a law before the Constitutional Court, whether it is an act ot the parliament or another law. Never in the history of Slovak democratic parliamentarism has it happened that a the opposition has less than 30 deputies. Of course, the Act on the Constitutional Court does not in any way stipulate that the right to initiate proceedings should belong only to members of the parliamentary opposition. Most often, however, it is just the opposition deputies who turn to the Constitutional Court (Ľalík and Ľalík 2019: 231). The recognition of the right of the opposition to challenge the constitutionality of an approved act can be considered an instrument of protection of a democracy and the rule of law before a parliamentary majority (Drgonec 2015: 1339).

Slovak legislation not only provides the opposition with the opportunity to challenge a law approved by the government majority, but a group of deputies of the Parliament, *de facto* a group of the opposition deputies, is in practice also the most frequent petitioner. In the first 20 years of its functioning (from 1 January 1993 to 31 August 2013), the Constitutional Court received a total of 123 motions to initiate proceedings on the compliance with legal regulations. As many as 62 of them, that is more than 50%, were submitted by groups of deputies of the National Council (Gajdošíková 2013: 5). A similar trend can be observed in the following period of the Constitutional Court's operation. For example, in 2021, the Constitutional Court received 20 motions to initiate proceedings, of which exactly a half was submitted by members of parliament (Vyhľadávanie povinne zverejňovaných podaní 2022).

Interestingly, the opposition's deputies used the compliance of legal regulations procedure not only to challenge acts passed by the govern-

ment majority, but even to challenge a constitutional act amending the Constitution submitted by the government. The Constitutional Court issued a groundbreaking decision in 2019, which defined its power to review the compliance of constitutional acts, including those amending the Constitution, with the material core of the Constitution (judgment PL. ÚS 21/2014 of 30 January 2019). The government's majority formed after the parliamentary elections in 2020 responded to this decision by proposing an amendment to the Constitution, which explicitly excluded the power of the Constitutional Court to review the compliance of constitutional acts with the Constitution.

In connection with proceedings before the Constitutional Court, it is necessary to point out another type of proceedings, which may also be initiated by a group of deputies. The Constitution also entrusts the Constitutional Court with a decision on whether a decision on a state of emergency, or a decision follow-up of that decision, was issued in accordance with the Constitution. The state of emergency, which is envisaged by the constitutional regulation as a special way of dealing with the threat to state security, was repeatedly declared and extended by the Government in 2020 and 2021 due to the COVID-19 pandemic. There was the opposition's deputies who turned to the Constitutional Court twice to examine whether the declaration of a state of emergency had been made in compliance with the conditions envisaged by the Constitution. In both cases, the Constitutional Court finally came to the conclusion that the state of emergency was declared in a constitutionally consistent manner (judgments PL. ÚS 2/2021 of 31 March 2021 and PL. ÚS 22/2020 of 14 October 2020).

5. The opposition as one of creators of the State Electoral Commission

The Electoral Code (Act no. 180/2014 Coll. on the Conditions for Exercising the Right to Vote) is probably the only legal regulation in the Slovak Republic that mentions opposition political parties. However, even in this case, the term "opposition" is not explicitly used. Instead, the Electoral Code works with terms «political parties that formed the government» and «other political parties represented in the National Council of the Slovak Republic». The second of these terms is the one to be interpreted as the political opposition represented in the Slovak Parliament. The division of parliamentary political parties into those

that formed the Government and those that remained in the opposition serves to divide the seats in the State Commission for Elections and Supervision of Political Parties Financing (hereinafter referred to as the "State Electoral Commission"). The State Electoral Commission is the supreme body of the electoral administration, the purpose of which is mainly to supervise the organisation and conduct of all types of elections existing in the Slovak Republic (elections to the National Council, elections of the President of the Republic, elections to the European Parliament and elections to self-government authorities). In addition, the competence of the State Electoral Commission also applies to the national referendum. However, as the full name of the State Electoral Commission suggests, its tasks also concern the functioning and financing of political parties operating in Slovakia.

The State Electoral Commission is composed of 14 members: 4 are appointed by the top representatives of other state bodies[5] and 10 by political parties represented in the National Council. The Electoral Code in relation to political nominees stipulates that the number of nominees of the government parties and the number of nominees of the opposition parties must be the same. Thus, the opposition should have 5 representatives in the State Electoral Commission. Also important is the provision saying that the same *ratio* of nominees of the Government and the opposition parties should be maintained throughout the whole term of the National Council. This means that if one political parties stopped supporting the Government and joined the opposition, the seats in the State Electoral Commission would have to be redistributed so that a situation of equilibrium could be restored. Of course, the opposite is also true. Each political party can remove their nominees in the State Electoral Commission at any time and replace them with others. This possibility may to some extent contradict the definition of the State Electoral Commission as an independent body, which is explicitly present in the Electoral Code (for details see Domin 2015: 1115-1116). The term of office of the members of the State Electoral Commission begins with the taking of the statutory oath and ends on the day of taking the oath of the members of new State Electoral Commission, which always occurs after the elections to the National Council. Thus, the term of office of the State Electoral Commission is

[5] One member of the State Electoral Commission is nominated each by the President of the Constitutional Court, the President of the Supreme Administrative Court of the Slovak Republic, the Attorney General and the President of the Supreme Audit Office of the Slovak Republic.

linked to the parliamentary term. If the parliamentary term is shortened, the term of office of the State Electoral Commission will also be shortened. The State Electoral Commission is headed by its President, who is elected by secret ballot in the Parliament.

But what is the significance of the parity of representantion of the opposition political forces in the State Electoral Commission? The answer to this question must be sought in connection with the powers conferred to the State Electoral Commission. Legal regulations entrust the State Electoral Commission with important powers in the exercise of which, through its nominees, the parliamentary opposition also participates. As the State Electoral Commission decides by an absolute majority of its members (7 out of 14 members), the 5 opposition votes have a relatively high weight. However, the Electoral Code even defines the cases in which a resolution of the State Electoral Commission can be adopted only by a majority of three quarters of its members (at least 11 of its members). With this method of voting, it is impossible to adopt a valid resolution without the support of at least part of the members nominated by the opposition's political parties. The vote at three-quarters majority is required when deciding that an election campaigner has violated the pre-election silence or a pre-election silence for the publication of election polls results. Voting by a three quarters majority is also required when deciding on the registration of candidate lists for the National Council elections or the European Parliament elections, as well as for deciding to remove an ineligible candidate from the list.

The composition of the State Electoral Commission, in particular the fact that the opposition nominates 5 of its members, guarantees that the Government's majority should not be able to block the registration of a candidate list of any of the opposition political parties and thus prevent its participation in elections. A similar significance of the opposition representation can also be seen in relation to decisions on violations of the pre-electoral silence, as such decisions involve considerable financial sanctions. Through the nomination of part of the members of the State Electoral Commission, the opposition also participates in the supervision of the financing of the election campaign and the financing of political parties. With regard to the supervision of the financing of political parties, a breach of the obligations supervised by the State Electoral Commission may ultimately lead to the dissolution of a political party, which may also lead to restrictions on free competition of political forces. Though, the free competition of political forces is an essential idea of political pluralism.

6. The popular referendum as an instrument for the opposition

Another possibility that political opposition can use in Slovakia to fulfill its desirable functions for a democratic society is related to the referendum. Before we look at how the opposition can use the referendum, it is necessary, at least in the basic features, to take a closer look on the referendum institute in the conditions of the constitutional system of the Slovak Republic.

The Constitution recognises several types of referendum. In the following lines, the attention will focus on the national (or nationwide) referendum, which is regulated in the fifth chapter of the Constitution entitled "Legislative Power". Not only with regard to the indicated systematic classification, but also taking into account the case-law of the Constitutional Court, the national referendum in Slovakia can be understood as a specific instrument of exercising legislative power (see also the Constitutional Court's judgments PL. ÚS 24/2014 of 28 October 2014). In this connection, the Constitutional Court also emphasises that the question submitted to a referendum should be of a normative nature and that its results are generally binding (judgment PL. ÚS 7/2021 of 7 July 2021). The referendum is called by the President of the Republic on the basis of a resolution of the National Council or at the request of at least 350,000 citizens. According to the Constitution, a referendum is to decide on an important issue of public interest, excluding fundamental rights and freedoms, taxes and the state budget. Before the President of the Republic calls a referendum, he or she may apply to the Constitutional Court to assess the constitutionality of the referendum question. If the conclusions is that the referendum question is in conflict with the Constitution, the President of the Republic will not call a referendum. The unconstitutionality of a referendum may concern the referendum as a whole or one of its questions. In the second case, it is possible to hold a referendum only on those questions that do not conflict with the Constitution. In relation to the usability of the referendum in Slovakia, it should be added that its results are valid only if an absolute majority of all eligible voters took part in the vote. Otherwise, the results of the referendum cannot produce any legal effects.

The Constitution does not explicitly stipulate that a referendum may be requested by a political party, regardless of whether it is a government's party or an opposition party. Thus, the Constitution does not explicitly stipulate that parliamentary opposition could request a referendum. However, a political party may initiate a referendum. As the request sub-

mitted by the National Council is expected to be adopted by an absolute majority of its deputies, the possibility of calling a referendum through a request of citizens is more useful. The number of signatures of citizens under the petition asking a referendum, set by the Constitution at 350,000, is not disproportionately large given the standard number of the opposition's voters. We illustrate this with a few examples. In the case of the 2020 elections, the strongest opposition party alone won more than 527,000 votes. Ten years before, in 2010, that was even more. The strongest opposition party then won more than 880,000 votes. In 2016 and 2012 elections, the two strongest opposition parties together obtained more than 602,000 and 443,000 votes respectively (Voľby a referendá 2021). Thus, in all these cases the opposition forces had sufficient electoral support to be able to initiate a popular referendum.

The said assumption is also confirmed by the practice, as a popular referendum is usually initiated by opposition political parties, although they often, quite alibistically, distance themselves from this fact. Therefore, one can unequivocally agree with the opinion that a referendum in Slovak practice usually functions as a tool for mobilising voters of the political party that initiated the referendum, alternatively also as a tool to harm the political opponents of the initiator of the referendum (Spáč and Nemčok 2019: 755-777). The initiator of a referendum is usually one or more political parties and those who are to be harmed by the referendum are usually parties that support the government. Again, several examples can be given, as several referendums, which called on the basis of a citizens' petition, were in fact initiated by the opposition political parties. Examples can be found in 1998, 2000 or 2004[6]. In the case of another referendum, the 2010 referendum, the initiator was a newly formed (until then) non-parliamentary political party (*Sloboda a Solidarita*). It is likely that thanks to this referendum, even though it was ultimately invalid due to low turnout, the said political party succeeded in the same year's elections as it won the third highest vote and even became part of the new government majority.

In the case of 2000 and 2004 referendums, citizens had to answer the question concerning the shortening of the term of the National Council and thus the early parliamentary elections. Opposition politi-

[6] So far, only a total of 8 national referendums have been held in Slovakia (1994, 1997, 1998, 2000, 2004, 2010 and 2015). The voter turnout condition, which is necessary for the results of a referendum to be valid, was met only in the case of the 2003 referendum (referendum on the accession of the Slovak Republic to the European Union).

cal parties stood behind both of these referendums, despite the fact that the request was formally submitted to the President of the Republic by a petition committee representing a group of citizens. While in 2000 it was the political party *HZDS* (the strongest party of the 1990s), in 2004 there was the new opposition political party *Smer*. Opposition political parties, namely (again) *Smer - Sociálna demokracia* (formerly *Smer*) and the new *Hlas - Sociálna demokracia*[7], were also behind the last two attempts to call a popular referendum. In May 2021, a petition committee representing a group of citizens turned to the President of the Republic to call for a referendum, which was to result in early elections to the National Council. However, unlike in previous cases, the President of the Republic turned to the Constitutional Court, which concluded that a referendum on the proposed issue would be in conflict with the Constitution. Therefore, the President of the Republic did not call the referendum. For the sake of completeness, it is necessary to add that the referendum on early elections in 2021 had to take place at a time of the ongoing COVID-19 pandemic, which would be associated with other constitutional issues and challenges (for more details on the referendum on early parliamentary elections, especially in times of pandemic crisis, see Domin 2021: 204-205). A group of citizens, backed by the two mentioned opposition political parties, asked the President of the Slovak Republic to call a similar referendum again in August 2022. Thanks to a more appropriately formulated question, which respected the case-law of the Constitutional Court, this time they succeeded. The referendum took place in January 2023 (for more information on 2022 efforts of Slovak opposition to hold a referendum see Domin 2022). However, it was not valid due to low voter turn out.

Despite the fact that the opposition failed in the 2021 and 2022 referendum initiatives, the same campaign for holding the referedum undoubtedly contributed to increasing the voters' preferences for the opposition. Thus, the events occurred in 2021 and 2022 (and 2023) once again confirmed the statement of the Slovak constitutional scholars that Slovak referendum was and still is the subject of a political struggle between the governing coalition and the opposition (Nikodým 2002: 47).

[7] *Hlas - Sociálna demokracia* political party was formed by a splitting from the then strongest opposition party *Smer - Sociálna demokracia*. It includes up to 11 out of total 38 deputies (including former Prime Minister Peter Pellegrini) elected on the candidate list of the parent party *Smer - Sociálna demokracia*.

7. Conclusions

Since 1989, when the non-democratic regime of the communist party in the then Czechoslovakia was overthrown, the legal regulation and constitutional political practice in Slovakia have undergone a fundamental development. It did not circumvent even demands placed on the position of political opposition. Today, more than 30 years after fundamental social and constitutional changes, it can be stated that the opposition represents a firmly anchored part of political life. As an evidence of a certain maturity of the democratic political system gradually built after 1989 we can consider the 2006 elections results. In those elections the communist party regained a parliamentary representation, but this situation did not jeopardise the democratic values. In the following elections, which took place four years later, the communist party did not gain enough voter support.

In this chapter, we have tried to identify and systematically summarise the possibilities that legal regulation or constitutional political practice provide to opposition forces in Slovakia. Attention was focused mainly on the activities of the National Council, as the most important forum for opposition voices can be found in the Parliament. Firstly, it was demonstrated that the opposition, not least due to political practice, has a negligible representation within the organisational structure of the National Council, especially in parliamentary committees whose role is mainly to supervise the executive. We also pointed out on the possibilities that opposition deputies have in the National Council procedures, both in legislative process and in connection with instruments enabling the supervision of the government majority. In other parts of the chapter, we stated that opposition has the opportunity to demand a review of acts passed by the Government's majority before the Constitutional Court. The legislation of the Slovak Republic also guarentees the opposition seating in the Parliament with an equal representation in the State Electoral Commission, which plays an important role in the electoral process. Finally, we also pointed out that Slovak opposition, and not only the one represented in the Parliament, often uses the institute of the referendum initiated by a petition of a group of citizens in practice.

In addition to possibilities provided by legal norms or those enshrined in constitutional political practice, we must not forget the case-law of the Constitutional Court, which regularly interprets legal norms of constitutional law and thus develops them. The Constitutional Court described the protection of parliamentary minority (the opposition) as a part of the principles of a democratic state. In this context, the Constitutional Court

added that it felt called to intervene if the legislation would interfere with the free exercise of the opposition's parliamentary mandate in the intensity that violates its essence (judgement PL. ÚS 6/2017 of 22 March 2017). As mentioned earlier, such an intervention by the Constitutional Court could come, for example, in the case of a proposal by a group of opposition deputies to initiate proceedings to comply with a (government) act with the Constitution. An act that would change the rules of parliamentary proceedings, which are contained in the Act on the Rules of Procedure, is even not excluded from the constitutional review.

If we want to assess the position of the opposition in Slovakia, we can use as evaluation criteria the requirements contained in the document called «The Role of the Opposition in a Democratic Parliament» passed by the European Commission for Democracy through Law (the Venice Commission) in 2010. In accordance with these requirements, the parliamentary opposition should have recognised (1) the right to participate in parliamentary procedures, (2) to supervise the government, (3) to block or delay majority decisions of a significant nature, (4) to demand constitutional review of acts adopted by the parliament and (5) to be protected against persecution (Venice Commission 2010). In the previous lines, it was demonstrated that the legal regulation and constitutional political practice in Slovakia provide all the outlined fundamental rights or possibilities of the opposition, especially the parliamentary one, to the necessary extent. Of course, the current legislation is far from ideal and there is still room for improvement.

We can mention two changes that would improve the role of the opposition in Slovakia. The first one concerns the possibility of convening an irregular session of the National Council, which, by its nature, is used mainly by opposition deputies. As has already been said, in parliamentary practice it often happens that such a session does not even start, as deputies supporting the government block the convening of an irregular session by not voting for its agenda. Therefore, such a change in legislation, namely the Act on the Rules of Procedure, should be considered in order to allow the opposition to present its views at irregular sessions without the need to support the approval of its agenda by an absolute majority of (present) deputies. The second possible change is related to the approval of constitutional amendments. We have stated that a qualified majority is required to approve an amendment to the Constitution, and that the government's majority often has to seek some support from the opposition, but this is not always necessary. There must not be forgotten the fact that the changes to the Constitution are approved in Slovakia quite often and at the same time often these changes are not nec-

essary. Even in the light of the Venice Commission's demands for a the right to block or delay an important majoritarian decision, making it difficult to approve constitutional changes would be worth considering. Finally, Slovak constitutional law scholars have long called for the tightening of conditions for a change in the Constitution. Of course, the two proposed changes do not represent a list of all possible changes that could be considered in connection with the improvement of the opposition's role in Slovakia.

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Opposition's rights in Hungary: constitutional framework and political practice

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1. Introductory remarks

When approaching the problematics related to the legal status of political opposition in Hungary, the first question to be asked is about the relevance of the matter. One would think that the constitutionally protected rights of the opposition are a technical or simply theoretical subject. As we intend to demonstrate in our essay, through the example of Hungary, those rights have a key-role in the functioning of a modern constitutional structure as they are contributing to the democratic exercise of political power.

In a theoretical perspective, democracy is one of the fundamental principles, one of the main pillars of modern constitutional structure. Also, in post-socialist countries like Hungary, democracy was the core-element to be defined or re-defined in constitutional transition, which, for these reasons, is

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also called – not by chance – democratic transition or, simply, democratization. Hence, there is a particular interest to discuss the democratic functioning of a constitutional regime both from a normative and practical – law in action – perspective. As will be demonstrated, in Hungarian constitutional law the rights of political opposition are strongly protected but, in practice, the absence of a decent political opposition makes the regime dysfunctional. In other words, opposition rights are ill-functioning due to the inefficiency of the political system.

However, before drawing hasty conclusions, it is worth reminding why opposition is important in a constitutional democracy that is functioning according to the principle of representation and the so-called majority rule, especially in a parliamentary regime like the Hungarian one, strongly characterized by those principles. To answer this question, one should think about the general aim and contribution of democracy in modern constitutional regimes where democracy is a fundamental constitutional principle without proper constitutional definition. It is more precisely described in political science as the modern form of public authority. However, it is up to the Constitution to ensure the conditions of its functioning by guaranteeing free and general elections and fundamental political freedoms. When the public authority gains this modern form based on a special relationship between institutions and citizens, and its functioning is guaranteed by a constitutional framework ensuring free elections and the respect of political freedom, we can start talking about a true democracy.

Nevertheless, the real contribution and the basic aim of a democracy is to bring trust into the political functioning of a regime. In a modern constitutional perspective, this trust can be gained by enabling citizens to be represented, as well as by continuously proposing political alternatives, and ultimately by providing opportunities to change or to correct political actions in case of mistrust (Jakab 2016: 118-119). Therefore, modern constitutional law fosters representative democracy because this can achieve those aims in the above-mentioned framework. Representative democracy is one of the greatest achievements of modern constitutionalism, as Hungarian constitutional development also demonstrates. It can allow public opinion to shape, to control, and to guide political actions[1] while these actions are led by institutions.

[1] Using the words of Winston Churchill in the House of Commons the 11th of November 1947: «It has been said that democracy is the worst form of government except all the others that have been tried».

However, nowadays, the general crisis of representative democracy is one of the main challenges for constitutional law. Due to a variety of factors, a general mistrust of citizens in political institutions is evident, especially in developed democracies. To solve this problem, one proposal concerns the radical reform of democracy (Rousseau 2015), in order to strengthen direct, so-called deliberative or participative democratic instruments. In our opinion, this cannot be the solution, especially not in Central Europe as the problem with the democratic functioning of the constitutional system – if there is one – is completely different. To find a solution, a good approach might be to analyse the legal status of political minorities and to evaluate the problems with representative democracy. These aspects can be fixed, without radical changes, so as to gain back the trust of citizens by making them feel they are represented and by offering them the possibility of political alternatives.

In Hungary, the feeling of being represented has been acquired. According to surveys on public opinion and the results of general and local elections, the existing political majority benefits from the trust of citizens in a huge proportion. Moreover, when asked specifically about social and political values, citizens seem to feel represented by the same majority and its political choices and actions. However, the presence of political alternatives is manifestly missing. In Hungary, the opposition is extremely weak, and it fails to play its role in the proposal of alternative political programmes not only to gain trust, but also to contribute to quality political actions and a permanent debate in public opinion.

This condition is lacking due to a more than decade-long governmental super-majority. In our opinion, Hungary does not represent a case of democratic backsliding, but rather denotes the failure of the constitutional regime due to an exceptional political context. It is worth analysing this situation, especially because of its consequences on the everyday functioning of the constitutional framework.

With democratisation, when the regime changed in Hungary following the previous socialist monolithic political structure, pluralism was the most important constitutional value to be protected (Petrétei 1991). Since the constitutional rules ensuring pluralism have remained in force, the political minority has very important and well-protected rights. Given the current political context, the protection of those rights gains special importance to avoid the return of a monolithic regime.

Previously, there was expressed general mistrust by manifestations in October 2006 which were violently repressed by the political forces that are now in opposition. The political force benefitting from a two third

majority in Parliament has been able to develop a very efficient way of exercising public power, coupled with the same efficiency in political manoeuvres (Stumpf 2015: 8-14). This phenomenon is also present in other democratic countries. However, the absence of any political force capable of going to power in place of the current majority government has made the Hungarian situation very special.

In our opinion, the lack of an effective opposition is a very important factor in terms of constitutional structure. The absence of pluralism and open debate, as political alternatives in other spheres or even inside the existing political majority and debates, have repercussions in other areas of political life. In addition, especially from a constitutional perspective, parliamentarism can be weakened leading to a huge impact on the separation of powers and the constitutional equilibrium of institutions. Even though this is clearly a matter of "law in action", the difficulty to solve this problem is due to the theoretical issues concerning the development of opposition.

The Hungarian constitutional structure has a strong parliamentary character. Given Hungary's constitutional past, parliamentarism has always been a fundamental institutional principle. In parliamentary law, the issue of political minority and its constitutional protection appeared early in its history, even in theoretical terms (Kautz 1862: 313). After the changes caused by II World War and the totalitarian socialist regime, Hungary could have return to its constitutional legacy. The constitutional reform adopted by the current political majority has preserved those elements of Hungarian constitutional law in the Fundamental Law and in the legal framework developed after its adoption.

However, in such context, it is difficult to predict how the situation might change in the future in terms of the rebalancing of constitutional values. The existing opposition is unlikely to become a majority in spite of the free elections guaranteed in Hungary. This is due to its past failures and some manoeuvres that were more about political communication than the rights of opposition. Should it win the next parliamentary elections in 2026, the qualified majority is unlikely to be obtained. Thus, the opposition rights, in this case detained by the political forces of the existing majority, would be an obstacle in the realization of an alternative political programme.

Finally – and even more hypothetically –, if the existing minority should become a super-majority like the present one, it might be questioned whether it would turn the system into its own benefit by copying the existing way of exercise of the political power. The problem does not concern the majority which, by nature, would like to preserve its political power, but the failed

opposition. The latter would be a very weak political minority which, even though constitutionally well-protected and enable to renew itself, would not be capable to use its rights and to play the constitutional role of opposition. That situation might occur in a political context where opposition rights will finally become a guarantee for the actual political majority in case of any political change. This majority would use all constitutional and political tools to guarantee its position without any self-restraint. Meanwhile, due to an exceptional dividing political discourse spread massively by means of public resources, the government would make the opposition even weaker.

Following these introductory remarks, the exact definition of opposition as political minority in Hungarian constitutional theory should lead us to a normative but complex concept allowing to determine the so-called opposition rights as they are protected against the risk of arbitrary exercising of public power (§ 2). Then these rights are observed following four categories: those related to the functioning of the National Assembly, those concerning the law-making process and the control of the executive power, and finally the specific tools used for the direct political functions in a horizontal approach of the opposition (Kukorelli 1995; § 3). In the conclusions, the trustworthiness of our introductive remarks is placed under scrutiny.

2. The definition of opposition and the opposition's rights in contemporary Hungarian constitutional law

The constitutional and legal protection, and hence, the legal and political definition of the opposition is based on the fundamental idea that the will and the action of the majority should be limited. The risk of an arbitrary exercising of the power was the core of the political thought of the Enlightenment (Montesquieu 2019) and it was, together with the ensuring the freedom of people, the main objective of modern constitutionalism[2]. The system of checks and balances or the principle of separation or division of powers is the main constitutional guarantee against the arbitrary exercising of power. But, even though judiciary is declared as independent and, as in the modern constitutionalism more sophisticated and neutral institutions

[2] As Art. 16 of the French Declaration of the Rights of Man and the Citizen (1789) states, «Any society in which the guarantee of the rights is not secured, or the separation of powers is not determined, has no constitution at all».

(such as the constitutional courts) were developed in order to ensure the correct balance of powers, it does not seem to be enough.

In a dynamic approach of analysis to the political functioning of the state, an important challenge is to find a constitutional way to protect political minority (Tocqueville 2010: 212). That would be essential for a truly democratic system as it is the gage of pluralism and hence, the only way to ensure the possibility of democratic change in government by a proper dynamic between majority and minority and their eventual alternation. The political presence and action of minority are, first, protected by a proportional electoral system not giving all to the winner. This helps political minority to be able to play a political role even though not sustained by the majority's will. Also, its opportunity to have a say in the decision-making process is protected by the respect of fundamental political freedoms contributing to its evolution, or, at least, offering a possible application.

Of course, social context remains very important for the democratic functioning of a country. Not only the openness for the debate and a capacity of making its own political opinion should be developed, but also, as the famous Hungarian scholar István Bibó repeated, the people's courage is the true foundation of a democratic regime (Bibó 1986). Only if citizens will be able to listen and to step up for their convictions, democracy can be functional with the political majority and the opposition continuously making a proper dynamic work among them.

Coming back to a more legal and constitutional approach, it is important to highlight that with constitutional reform applied for the sake of changing the regime in 1989, in Hungary, both factors were guaranteed. The minority has been protected by a mixed electoral system which really considers proportionality. After some reforms, it remains – even though the system has been simplified – such: it is interesting to remember that if the parliamentary elections were held in Hungary according to the French or the British electoral systems, the actual political majority would have even more legislative mandates and there would not be almost any opposition force in the National Assembly. Also, political freedoms were guaranteed in a very high level, as the jurisprudence of the Constitutional Court proves, not only in the 90s (Sólyom 2001: 686) but also in the new century.

At the same time, Hungarian political context has never been opened to a so-called consensual democratic functioning. Political life in Hungary has been always conflictual, and, after constitutional transition, opposing, democratic forces one to the other in political debate. In order to ensure the stability and the efficiency of government – these goals have a special

relevance in a period of constitutional changes – the Hungarian constitutional regime was defined as openly founded on the principle of majority. However, as stated above, efficient constitutional guarantees were established to protect the minority.

In our opinion, in such context, the legal or normative definition of minority is more important than the political one, in order for these constitutional guarantees to be implemented efficiently to its benefit. However, in Hungary, no legal act contains the proper definition of minority. Neither the constitution nor the basic rules of the functioning of the National Assembly offer such a definition of the opposition which would be the way for the political minority to appear in the institutional framework. On the other hand, interestingly, some legal acts refer to opposition to ensure some rights to its benefit but, once again, without giving a general definition.

In such legal context, constitutional judges should think about a normative definition of opposition so that the legal protection can be guaranteed. The Hungarian Constitutional Court had this opportunity in a case related to the application of the newly adopted legal act on media (judgement no. 22/1999 VI.30). According to the definition proposed, the opposition is mainly constituted by the members of political parties taking no responsibility in the exercise of the executive power. This means that the normative definition restricts opposition to the political forces appearing inside the parliamentary hemicycle, and the characteristic that distinguishes the opposition from the political forces of the majority is that it is not participating in the executive power because the opposition parties are not taking part in the coalition agreement.

At the same time, the key-role of the opposition is also highlighted in this constitutional judgement. According to the judgement, opposition has three kinds of political functions. Firstly, even though the current opposition holds a minority position, it could participate in the development of the political will and, once the majority is gained, accordingly, it can lead to political action. Secondly, it has a very important role to play in controlling the action of political majority. Finally, the opposition should be in the condition to present political alternatives offering the possibility of correction to the political action.

Hence, the opposition is the set of political forces having no responsibility in government but that can participate in the development of political will and control the action of the political majority. When doing so, the opposition introduces some alternative ideas and programmes in the political debate; consequently, it might efficiently take part in the political compe-

tition for power. The opposition can only be a guarantee of pluralism considering that, contrary to majority that needs to remain united in order to be efficient in exercising the political power, it remains plural with different opinions exposed in public debate. As such, opposition parties can contribute to the constitutional dynamic of pluralism which is the main purpose of political parties.

For this purpose, Hungarian constitutional and legal provisions try to ensure rights for the opposition that are formally determined in a restrictive way – because of its function and its main characteristics – but in reality, according to their interpretation, defined in an enlarged way – because of its normative definition with regards to its political functions. Of course, the rules that favour the creation and the functioning of political parties as well as the fundamental political freedoms are very important for the opposition; in our opinion, according to the above-developed definition, in Hungary opposition rights are those that ensure parliamentary political forces the efficient realisation of the mentioned three political functions. In another way, their presence in the National Assembly is guaranteed by a mixed electoral system and the efficient protection of fundamental political freedoms. In addition, their functioning as well as their existence is sustained by the rules giving constitutional importance to the role that political parties play for pluralism. These rights are the ones that enable opposition forces to develop their political will, to control the action of the political majority, and to present political alternatives in an open debate.

3. The opposition rights in Hungary

The legal status of opposition in Hungary is defined by parliamentary law. As it has been explained, according to the normative definition of opposition produced by constitutional case-law, the members of the parliamentary groups of the political parties, which are not formally part of the government, represent the opposition. Also, their functions as taking part in the articulation of political will, are parts of our first formally restrictive definition.

Hence, when their particular rights are to be described, it is no surprise that they can be found in parliamentary law. According to the above-mentioned classification of four kinds of rights, some rights are related to the functioning of the National Assembly. The most important ones concern the participation in the decision-making process and the control over the action of the majority. However, some other rights can be determined as

concerning the direct political functioning of the opposition in the everyday activity of the Hungarian Parliament and some of these are related to the institutional functioning of the National Assembly (Smuck 2007: 140-176).

As a preliminary consideration, the setting of a new assembly offers important rights to opposition forces. Essential structural questions are decided when a new parliamentary term begins, and strongly protected rights are reserved for the future opposition, namely the political minority that appears after the election. For example, once the confirmation of the mandates of deputies and the settling of the parliamentary groups is over, even though the majority can decide about the presidency of the Assembly, proportionality or even parity between government and opposition are the guiding principles to form the parliamentary commissions.

Currently, there are nine parliamentary groups. This is the highest number of political groups. The former record was held by the hemicycle resulting from the first democratic elections when eight political groups were established. Among them, only two political forces are supporting the government, with 135 members over a total of 199 parliamentary mandates. A feature of Hungarian parliamentary life is that six of the opposition groups gained their mandates in an electoral alliance. Two thirds of them were selected from a shared list of left-wing parties. This means that they benefitted mostly from the proportional formula of the Hungarian mixed electoral system. According to parliamentary law, the opposition can establish numerous parliamentary groups so that it can benefit from the rights reserved to the political minority. However, from a political perspective, they are not really separated; on the contrary, they are closely related and not only because of their former alliance during the campaign. It is true that such an alliance during an electoral campaign makes it difficult for those forces to articulate their different alternative programmes. Once the parliamentary groups have been constituted, generally the biggest political force of the opposition annexes to it the most important representatives of the others group. Even though the existence of many opposition groups might seem profitable at first, it makes them less efficient when realising their missions: formally protected rights cannot be beneficial when the political context makes the opposition unable to take advantage of these rights.

As for parliamentary commissions, according to the principle of proportionality, among the fifteen commissions that are working in the current National Assembly, five are presided by a member of the opposition. This provides the opposition with important rights to participate more efficiently in the functioning of the parliament, offering different per-

spectives. However, the super-majority of the government's parties in the hemicycle and in the commissions often weakens such capacity of the commissions led by presidents coming from the opposition. In this matter, the highly conflictual attitude of commissions presided by members of the opposition is also to be blamed. In fact, because of the small number of opposition members, presidents are mostly using their rights for communication and not to negotiate political positions with government members in a more consensual way. Therefore, they cannot produce real results in their political action even though commissions could be a place to show their visions about timely political issues.

The principle of the equality of mandate ensures equal protection for the deputies of the opposition and for the members of government political groups. However, their everlasting conflictual position has resulted in many cases in the Hungarian parliamentary hemicycle when the presidency stepped up to sanction their behaviour by reducing their salaries. Of course, immunity protects them from prosecution, but according to parliamentary law, the presidency has important disciplinary competences. The current president has often used those competencies against deputies of the opposition, sometimes sanctioning dozens of them to pay financial penalties during a single parliamentary session.

The most important right that should or would protect opposition is related to the decision-making process where a huge number of domains can only be ruled by national acts adopted with the consent of two third of the deputies. This is a particularity of the Hungarian constitutional framework that was adopted during the constitutional transition. The number of fields covered by this qualified majority remains more or less the same. However, when the 2011 Fundamental Law was adopted the relevant number of fields in which a cardinal law must be adopted was criticised. In particular, the Venice Commission (in its Opinion adopted on its 87th plenary session, on the 20th of June 2011) demanded that the majority forces achieve a compromise for some fundamental domains, without obtaining any results. The same occurs for the appointment of some important state officials such as constitutional judges, general prosecutor, etc., when the same majority applies. The everlasting conflictual approach of the opposition does not help to make, even in such context, some consensual decisions.

In the decision-making process, the members of the opposition have the right to initiate new legislative acts and modify the proposals of the majority. Legislative proposals are often introduced by members of parliament and not by those of the government. The reason is simple: when a member

of parliament is the author of a proposal, the rules are less strict for its introduction and even the adoption can be quicker and easier. Once again, it is the conflictual character of Hungarian political life that is the obstacle for an efficient use of such right by the members of opposition. As for the presidency of the commissions, this does not help them to play an effective opposition role.

The political opposition can also appear in ordinary public life and try to make real changes outside of the parliament. For example, the use of the so-called obligatory referendum (when the result of a referendum is binding for the Parliament in the adoption of a legislation) is a good opportunity for the opposition to gain attention and propose alternatives. However, the sad experience of invalid referenda discourages the opposition from the use of such instrument in the decision-making process. It is important to highlight that after the change of regime, only one referendum was successful[3]. All the others, more than a dozen, failed to attract enough voters independently of the source of their initiative. For example, the last failed referenda were proposed by the government to reinforce its political position on immigration and children's protection against so-called LGBTQI-propaganda. Clearly, it is not simple for the opposition forces to collect enough signatures for the initiative in order to organise a referendum. Then, they can be almost sure that the referendum will be valid. Naturally, the initiative can also be used for political communication as has been the case.

It is likely that the control of government activities reserves the most important rights for opposition. This is not the case of the question of confidence, due to the huge majority required that cannot be really raised. The accountability of the government before National Assembly remains one of the fundamental principles of Hungarian parliamentary regime, even when a huge majority supports the government's position. In the application of this principle, the opposition benefits of important rights. For example, the transparency of the parliamentary debate gives the opposition the opportunity to point out the errors or the dysfunctions in the action of the government. Also the right to call for a parliamentary session gives the opposition an occasion to create a space for political debate. These rights can be activated even by a small number of members of parliament.

[3] With the well-known exception of the two other valid referenda on the accession to the NATO and the EU, but in these cases the constitutional criteria were modified in order to be sure of their validity.

Concrete instruments of parliamentary control are, first and foremost, written questions, interpellations, and direct questions. About four-fifths of these instruments are used by the members of opposition, making them able to ask the members of government and also other state functionaries in their field of activity any questions. These questions and interpellations, together with the possibility to take the floor for any subjects before and after the session, offer a great opportunity for political debate that is, surely, in a very conflictual way, in use even by the current opposition. It must be said that the members of the government and even the Prime Minister are often at the disposal of the members of the opposition for this exercise which can be once again a tool for political communication but is certainly a moment of open political debate benefiting both government majority and the opposition forces depending on their ability to dispute.

A more detailed and technical method of control is the audition before parliamentary commissions. These auditions can help the opposition to control the activity of the government. On the other hand, as stated above about the presidency of commissions, the more restrictive publicity of the relative meetings, and the specific character of these sessions giving less space for exercising the conflictual political communication tools, make this instrument used less by the members of the opposition. However, when the commissions are working on matters that are more politicised or more tangible for the public opinion, they can be also an interesting control measure.

Finally, there are some rights reserved to the opposition that we can qualify as related to its direct political functions. The most important is the right to speak reserved to members of parliament. Of course, the question raises as to how to prevent the misuse of such right. Filibustering is always an important risk. However, as demonstrated by relevant case-law of the Constitutional Court (judgement no. 12/2006 VI.24), in Hungary the right to speak of the deputies, especially those belonging to the opposition, is well protected.

As stated above, this right gives the members of the opposition the opportunity to take the floor before or after the session and to participate in the definition of the agenda of the session. Even though the president of the National Assembly and the Committee of the House play the main role to define the order of the daily session, the members of the opposition can influence the calendar of the sessions. They are present in the Committee of the House which has the function of a bureau of the Parliament and decide, among others, about the proposals for the agenda, and they also have the possibility to initiate changes, or to ask for proper session, for example to debate the matter of their choice.

The transparency in the functioning of the Parliament offers the opportunity for political debate. The above mentioned conflictual attitude can also be openly played out in the use of those opportunities. These rights are often used by the present opposition. Their members are frequently taking the floor even though with its super-majority the political forces of the government are limitedly affected. These tools are mostly used for political communication, as they do not allow the opposition to realise the above listed functions.

In the Hungarian parliamentary law, the political forces of the minority have important and guaranteed rights. However, those rights become empty when, first and foremost, there is a super-majority in Parliament. The constitutional and legislative guarantees for the respect of the parliamentary character of Hungarian constitutional regime are, on the contrary, instruments for the governmental majority to satisfy its temptation in anchoring power. The rights of opposition are also empty when the political forces of the opposition renounce playing their constitutional role and simply try to benefit formally those rights without giving them the adequate content. The conflictual approach is an obstacle for substantial parliamentary work. Only the tools enabling the opposition to make its voice better heard are used in actuality by the record number of parliamentary groups of the opposition. They fight for their very existence without being able to propose real alternatives and without realising when parliamentary rights allow them some alternative political actions.

4. Conclusion

To conclude, it is to be remembered that Hungary has a constitutional legacy of strong parliamentarism. It has developed under an unwritten, historical constitution and achieved a liberal, parliamentarian, modern constitutional stage of its evolution by the end of the 19th and the beginning of the 20th century. The constitutional transformations following the First, and especially the Second World War, under the occupation of the Red Army and the rise to power of the communists, made the parliamentarian character weaker and subsequently non-existent in a monolithic, socialist regime.

When the contemporary constitutional framework was established during the democratic or constitutional transition, political pluralism became one of the foundations of the new regime. This pluralism, on one hand, wanted to be opposed to the monolithic, socialist era; on the other hand, it was also established to protect the new democracy against the risk of the return of the former regime.

This pluralism was constitutionally protected, especially with regard to political parties recognised as the main structure contributing to its existence. The free and universal elections were constitutionally guaranteed, and the protection of the political freedom gained special importance. However, the constitutional guarantees of those two main conditions were not judged as sufficient. According to the principle of the separation of powers, in addition to the independence of the judiciary, the establishment of neutral but politically influential institutions, such as the Constitutional Court, and the dynamic balancing between legislative and executive power were decided. With regards to the equilibrium between legislative and executive power, the protection of the political minority was an important matter.

Hence, even though without a proper legal definition, but with determined functions and constitutional protection, the opposition benefitted and is continuing to benefit from relevant rights. This opposition is considered to be composed by political parties that have parliamentary groups without any responsibility taken in governmental activities. Even though such a normative definition seems to be restrictive, its precise character coupled with the main functions defined also by constitutional case-law, helped to give efficient protection to the political minority, especially in parliamentary law.

The main constitutional role of the opposition is to contribute to the representation of people and hence to the conservation of citizens' trust by representing the political will of an existing minority and by developing political alternatives. Such alternatives can become an instrument of correction of the political action if the former minority becomes a present majority. Opposition functions are the participation in the articulation of political will, the control of the action of the political majority, and the promotion of the above-mentioned alternative programmes. It is for the purpose of such a constitutional role and for the realisation of these missions that opposition rights are guaranteed.

Some of these rights, such as the participation in the settling of a new assembly, and the presence in the organised internal structure of the parliament ensure a position that makes the opposition able to realise its missions. In addition, in the decision-making process and in the political control over the action of the government, these rights are protected in order to allow the development of these functions.

However, in the present political context, where for the last thirteen years the same political majority has had a super-majority in the National Assembly, the structure seems to be turned upside down. In our opinion,

this is due to some manoeuvres of the majority and to the lack of any self-retainment, and especially to the lack of action and renewal of the opposition. Indeed, the latter is not capable of playing its role and realising the above-mentioned functions: taking part in the articulation of political intentions, being able to control the actions of the political majority and introducing alternative programmes into the political debate. At the same time, it benefits – at least formally – from the so-called opposition rights frustrating their real content because they use them in a conflictual approach for the sake of political communication.

The above enumerated rights and tools provided for the political minority, the so-called opposition rights, are not able to enhance the parliamentary character of the Hungarian constitutional structure. In the presence of a super-majority, but also in the absence of a decent opposition, this structure is upside down, and, as there are no constitutional tools to sanction a democratically elected super-majority, until a strong and able opposition appears, there is no chance for rebalancing the system. Hence, the public opinion, until then, will not have the opportunity to choose between alternatives and to shape, to control, and to guide, in this way, the action of the government.

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The legal status of the opposition in Poland: many clues, no clear evidence, a significant deterioration as a consequence of the rule of law crisis

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1. Introductory remarks

It may seem strange that the political-parliamentary opposition lacks a recognition of its legal status precisely in Poland, the country of the Solidarity movement, which at the end of the 1980s conquered spaces of pluralistic democracy, starting from its role of opposition protesting against the previous system, a movement which was peaceful and inclined towards parliamentary democracy and above all – as it turned out – towards a "contractual" transition negotiated with the protagonists of the previous regime[1]. Yet since 1989 Poland went through almost a decade of a provisional constitutional order, made definitive with the 1997 Constitution, which gave rise to a fairly

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[1] The entire transition was characterised by the emphasis on the role played by the opposition (Garlicki, Garlicka 2010: 391-392). The attribution of 35% of seats to *Solidarność* in the *Sejm* (lower house), according to the aforementioned article, well represented the original intent of the established order to legitimise the opposition through a sort of cooptation; while the very institution of a weak Senate, however completely freely elected, made this upper Chamber a sort of legitimate opposition, in itself, to the established order (Bożyk 2000: 31).

traditional parliamentary system of government, with only very partial innovations and peculiarities. It can therefore be said that the originality of the Polish constituent process was not valued by the established order at the outcome of that process, which was launched precisely in connection with the legal recognition of a large opposition movement.

The provisional constitutional order, which started at the Round Table agreements in April 1989, was initially quite advanced for its times but soon appeared outdated after the fall of the Berlin Wall in November 1989. It further developed through the so-called the 'Small Constitution' of 1992, and culminated, with the Charter of 1997, in a hybrid system of government, which in Poland is considered a form of highly rationalized parliamentarism, albeit with the direct election of the Head of State which could suggest an attenuated version of semi-presidentialism.

At the same time, no constitutional provision contains the explicit recognition of the notion of political opposition, either in the parliamentary arena or in other elective assemblies or in the form of direct democracy, even though the latter does exist. Legal doctrine itself, during the provisional constitutional period, did not show evident interest in this subject (and later, a theoretical and comparative analysis was produced by Kubát 2010), giving the impression of being satisfied with a regulatory system that offered the right of political opposition an unexpressed recognition between the lines[2]. More recently (in 2010) the main opposition party, Law and Justice (*Prawo i Sprawiedliwość*, PiS), proposed a *Sejm*'s 'democratic package' of reforms to the lower house's Rules of Procedure, which it has not implemented since it seized power in 2015. As recalled by Marczewski and Sześciło (2017: 4) in particular it was a question of institutionalizing the opposition through an obligation for each parliamentary group to present a declaration of support or disapproval of the government, with the recognition of certain rights in the negative case; the obligation to examine each bill no earlier than six months after its presentation; granting the oppositions the right to include at least one item on the agenda for the next session. Still more recently, in a context of deteriorated democratic environment, the case was made again for introducing a formal recognition of the opposition (Szymanek 2018;

[2] An exception to this was that of Complak (1995: 27 ff.), who unsuccessfully made the case for the provision of a robust status in favour of the parliamentary opposition along the lines of the Portuguese Constitution. Subsequently, a few publications were added, including the comparative monograph edited by Zwierzchowski (2000), with an introductory chapter of a historical-theoretical nature by the editor, and the volume, mainly oriented towards political science, edited by Łabędź (2016).

Uziębło 2018). Despite all this, there are many indications demonstrating how the role of the opposition is not only implicit but even inherent in the essence of the political regime identified by the Polish fundamental law. Traces of this can be found right from the preamble to the Constitution, with the references it makes to cooperation between public authorities, social dialogue and subsidiarity. But it is in the normative part of the Charter that one can find the main insights.

The few authors who have focused on this specific topic have indeed found a remarkable abundance of such ideas. As we explain below, reference was made to the principle of the democratic (and constitutional) rule of law. The principle of political representation was also taken into consideration, as well as the division of powers and the balance thereof. But to further delimit the field of investigation, the pluralistic principle is the one that appears best suited to recognize and enhance the concept of opposition, in particular through some of its articulations. As a preliminary point, it should be noted that even party pluralism, in itself, does not constitute a guarantee that political formations which, at the outcome of an electoral competition could result in a minority position, would be able to play the full role of political opposition. Almost all the countries that fell back into the Soviet area of influence after the Second World War had formally a plurality of parties, but it was a facade pluralism in which a single party played the dominant role, and the minor formations gathered in a common front with it, so that no opposition to the system was recognized. For this reason, countries like those who have put behind them totalitarianism of the communist type know that mere political pluralism is a necessary but not sufficient element to legitimize the existence of the opposition, albeit implicitly. So it is the nature of the political party which is identified and deemed preferable by the 1997 Constitution the one which, if anything, can be found as the best possible guarantee against authoritarian resurgences and in favour of a social dialectic prone to counter-majority elements capable of expressing themselves even in the dimension of the purely political arena, and not only in that of jurisdictional guarantees (it remains understood that a comparison between the statements contained in the legal texts and the factual reality is here the most appropriate).

Considering the above, this contribution intends first of all to underline the constitutional provisions which can constitute an indirect legitimation of the opposition (including some references to the constitutional jurisprudence, though a little lacking on this aspect), to then focus on the ordinary legislation and the parliamentary rules of procedure. Once the normative

aspect has been exhausted, we will focus on the concrete experience of the last thirty years, to detect if the opposition has been able to use all the typical functions belonging to it in a parliamentary system, i.e. the function of inspection and control, the legislative function or the confidence relationship with the executive, but also to play a role in the election of public bodies. In conclusion, a brief comment will be necessary on the illiberal degeneration that in recent years has affected Poland like some other European countries, to see if it has also concerned the *de facto* status of minorities and parliamentary oppositions. This important aspect can hardly be detected, as the changes have not been particularly evident on a strictly regulatory and formal level, but it requires a strong sensitivity in terms of effectiveness in enforcing the written rules.

2. Opposition-friendly constitutional norms

The democratic rule of law principle, which was already introduced with the December 1989 amendment to the 1952 (socialist) Constitution, and subsequently included in the 1997 Constitution (Art. 2), is considered as the first indirect legal guarantee for oppositions, since the existence of political pluralism is an indispensable corollary of the democratic form of state (Garlicki 2009: 64). This principle, combined with popular sovereignty (Art. 4) implies the possibility for all citizens to participate in the broadest possible way in the exercise, albeit indirectly, of power. Other authors have identified in the political representation (which unfolds in Articles 96-98 and 100 of the current Constitution) the source of the legitimacy of political parties (Granat 2000: 86) as if an implicit acceptance of political pluralism derived from this consequence. Indirectly beneficial to the oppositions is also the restoration of the free parliamentary mandate (Articles 104 and 108 Const.) as opposed to the imperative mandate typical of the previous communist regime. Although formally directed to prevent any conditioning by the electors of their constituency, the free mandate can also constitute some protection of members of Parliament from political power in the broadest sense, especially the party each deputy or senator is part of (Bożyk 2006: 103).

In order to favour the political opposition, the Constitution also included a reference to the traditional principle of the separation of powers (Art. 10), which has been emphasized to the extent that part of the Polish legal doctrine has criticized it for its rigidity and lack of realism (as it fails to detect the collaboration between government and parliamentary majority in a ra-

tionalised parliamentarism). But precisely the idea of the majority recalls that of the minority, which tends to be completed in the concept of opposition.

On closer inspection, this concept can take various forms, even partially unforeseen ones. Although the Polish system of government, with the direct election of the President of the Republic, does not even come close to the French version of semi-presidentialism, the Constitution still places this institution in the category of the executive power and attributes to it some autonomous powers, as proven by the fact that they are exempt from the governmental-ministerial countersignature (Art. 144.3). Some of these powers are significant, such as the early dissolution of the parliamentary Chambers – «shortening of their terms of office», according to the Constitution's wording –, although reading them should be resized in the light of the fact that the interruption of a legislature is, in turn, typified in some concrete situations that make its use extremely difficult.

There is a power that can be decisive: we refer to the faculty that belongs to the Head of State to refuse the promulgation of a law, referring it to the *Sejm* which can impose its definitive adoption only with three-fifths of the votes in the presence of the quorum (in addition to the possibility of promoting a preventive appeal on the legitimacy of a parliamentary act at the Constitutional Tribunal). The Constitution does not limit the use of this power to special circumstances and maintains it at the maximum of discretion. However, experience has shown that the most propitious occasions to make use of it are those of cohabitation between a President and a government of different orientations (this will be better examined in § 4). Almost the opposite of the French prototype of semi-presidential government, it is precisely in these situations that the strength of the President and his ability to influence on politics are most accentuated; but it is a substantially obstructive force, which makes it an effective obstacle to the political orientation of the majority, at least partially in contrast to the overall role of «supreme representative of the Republic and guarantor of the continuity of State authority» that the Constitution (Art. 126) attributes to him.

It was then argued (Bożyk 2006: 110) that the President, in such a situation, by the mere fact of being able to hinder the shared legislative program of the political majority, assumes the role of a body that strengthens and legitimizes the oppositions, reinforcing their conditioning on the majority. This has been seen on several occasions, starting with the cohabitation between President Lech Wałęsa and the left-wing SLD-PSL coalition (1993-1995), passing through the presidency of Aleksander Kwaśniewski, of the SLD, when he found himself opposed by a right of centre parliamentary

majority (1997-2001), until the coexistence that lasted two and a half years between the right-wing President expressed by the PiS Lech Kaczyński, who tragically perished in 2010, and the liberal-centrist parliamentary majority PO-PSL, led by Donald Tusk. Finally, perhaps the most traumatic case of confrontation was that between the newly elected President Andrzej Duda and the outgoing PO-PSL majority, during a few months of 2015.

In this regard, however, it should be noted that, in the first place, this should not be the purpose of an institution such as the preventive referral of laws, informally called a "veto", or this should not be the figure of the President suitably designed by the Constitution. But secondly, and on closer inspection, the not rare situations of this type are those in which it is the President himself who attracts into his/her sphere the role of opposition to the government, inevitably overshadowing the position of the parliamentary minority rather than strengthening it. The attention of public opinion, in such cases, is certainly not drawn to the opposition, which does nothing but confirm its status as a parliamentary minority which would in any case be destined to lose votes were it not for the fact that it could find an organ of the executive, more or less improperly or occasionally, to coincide with one's own positions. We would therefore be dealing with a heterogeneity of ends in the application of an institution that was originally created for very different purposes.

At this point, we arrive at a much more convincing constitutional foundation aimed at legitimizing the political opposition, and the parliamentary one in particular. It rests on the principle of political pluralism, which is enshrined in Art. 11 Const.[3] and which asserted itself in evident direct controversy with the previous system, starting with the December 1989 amendment to the 1952 Constitution, with which the reference to the role of «leading political force» of the Polish United Workers' Party was suppressed.

It is only by 1997, however, that the parties have come to be qualified starting from the freedom to found and direct them, by emphasising the voluntary nature of membership and the equality between citizens in the opportunity to choose whether or not to apply for that membership, with an additional emphasis on the democratic method which the parties should be based on to make them better suited to determine national political life.

[3] Art. 11 Const.: «1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. 2. The financing of political parties shall be open to public inspection».

The imperative of equality has been extended, in the legislative implementation of parties (especially by the Law on political parties of 27 June 1997), from the internal associative aspect to the public-state dimension, within which the public authorities are denied any legal possibility of discrimination in the treatment of each party (with regard to the equality of the parties before the law, seen as a consequence of the freedom to establish and run political parties, see S. Bożyk 2020, Wojnicki 2020). Art. 11 ends with a second paragraph providing for the publicity of the sources of financing of the parties, however leaving the law-maker the widest discretion regarding the fundamental issue of the possibility for the state to finance them or, on the contrary, the reliance on private economic means (the implementation discipline is entrusted to the 1997 Law on political parties, as regards an ordinary annual funding reserved for parties that have exceeded 3% of the national votes in the last political elections, while the 2011 Electoral Code provides for a reimbursement set on the number of seats always obtained in the last elections. In general, the legislation on parties, since 1990, has been hostile to forms of foreign financing).

The combination of the inspirations present in the constitutional status of the parties is such as to emphasize the favour for formations that assume or find themselves in a minority position, and consequently in one of opposition. That said, it should be added that the Polish constitution-makers, in the wake of other countries that suffer from a totalitarian past, have added further limits. We are talking about the prohibition (Art. 13) imposed on parties or other formations which refer in their programs to the totalitarian methods of Nazism, Fascism or Communism, and those which – even in their own activity – anticipate or admit racial and nationalist hatred, the use of violence to seize power or to influence state policy, and apply methods of secrecy of their action or membership. It is an almost all-encompassing rule from this point of view, even more articulated and demanding with respect to the quality of democratic life than what has been envisaged even in systems of more distinguished reputation in this respect, although stringent monitoring of its concrete implementation would be necessary. But what is interesting to point out here is how precisely Art. 13, rather than the one dedicated to the general regulation of parties, represents an even stronger guarantee for the right of opposition, an implicit index of the support which the Constitution offers to this democratic instrument. Indeed, it is intuitive that the legal prohibition against organizations of an authoritarian or even totalitarian nature, at least if implemented in a coherent and effective way, is the best barrier against the placing of obstacles on democratic oppositions,

intending to assume and exercise power in a peaceful way. You simply save the opposition by banning the parties that would ban it.

3. The structure of the Parliament (and of the Sejm in particular) as an indirect index of the treatment of the opposition

It is now time to move on to a more detailed examination of the status of the opposition within Parliament starting with its service apparatuses, with particular attention to the role of the *Sejm* as the clearly prevailing lower Chamber. Outside of the constitutional text, the issue can only be studied starting from the rules of procedure of the two Chambers but also from some legislative texts, which interfere a lot in parliamentary life. In the first place, it will be considered how these regulatory instruments help qualify the ability of the opposition to influence the formation and activity of the internal organs of the lower house.

The Polish Constitution, despite the reference to party pluralism, is silent on the projection of these organizations into parliamentary groups, treating deputies and senators indiscriminately. Silence on this matter has resulted in a high degree of discretion in favor of statute law and parliamentary regulations, in a way that gave rise to some controversy in Poland in the early years of democratization. An important source can be found in the Act of May 9, 1996, on the fulfillment of the mandate of deputy or senator, a regulatory act which on the one hand focuses on the relationship between representatives and the electorate, placing certain duties on the former towards the latter, and attributing to the members of Parliament certain rights of inspection and participation in the activity of public administration bodies or territorial autonomies, but on the other hand it also affects the internal life of parliamentary institutions.

According to Art. 17 of this law, adopted along the lines of another one dating back to late socialism, deputies and senators, respectively, can form groups, circles, or "teams" of a thematic nature (often intergroups) in the Chamber to which they belong according to the principles established by the respective internal regulations. On the one hand, therefore, an act of Parliament is recognised as the ideal source for legitimising the right of parliamentarians to associate in groups (and this matters because in Poland such acts have a normative rank higher than that of internal rules of procedure); on the other hand, the same act refers the determination of the criteria with which this must be done to the regulations of each assembly. And this is what

the *Sejm* Rules of Procedure (or standing orders) adopted in 1992 enforced, as well as the corresponding rules of the Senate, establishing respectively 15 deputies and seven senators as the minimum number of members to form a group, while three are enough in each of the Chambers to form a "circle", that is to say, a smaller set of representatives, distinguished by political affiliation[4], who enjoy fewer rights concerning the organization of the work of the reference assembly even if for all the remaining aspects they are placed on the same level as the other parliamentarians. Moreover, the Rules of Procedure of the *Sejm* (Art. 8) confirm the right for deputies to group together «on a political basis» even if it has been stated that this expression does not imply the obligation of a strict identification between the parliamentary group and the political party, being able to have groups – or rather circles – composed of ethnic-linguistic minorities (Czeszejko-Sochacki 1997: 162).

The number of deputies necessary to form a group continues at times to be disputed, being presented as discriminatory or restrictive of genuine pluralism. This has only some partial justification. Since 1993, Polish electoral legislation has been characterised by substantial stability, with some small variations, and since 2011 it has been condensed into a single electoral code, which for the *Sejm* continues to provide for a national access threshold set at 5% for political parties and 8% for lists representing a coalition of parties. The first of these requirements is analogous to the electoral legislation in force for the German *Bundestag*, but some significant differences must be taken into account. The rules of procedure of the *Bundestag* (Art. 10) as a condition for the formation of a parliamentary group require that this is composed of at least five percent of the effective members; it is true that the 15 deputies in Poland are less than 5% of the plenum of the *Sejm*, made up of 460 deputies. It must be kept in mind, however, that the German electoral law traditionally knows a mechanism for transforming votes into seats which reflects much more the balance of forces from an electoral point of view, while the Polish system – from 1993 to today, with a brief interruption, the d'Hondt formula applies – is more selective, so that it has often occurred that parties capable of passing the 5% threshold, even significantly, have obtained fewer than 15 deputies and therefore were not able to form a group (this was the case, in the last (IX) parliamentary term, of the rightist

[4] Constitutional case-law, already with the judgment U 10/92 of 26 January 1993, under the force of the previous Small Constitution, expressed a particular favour for the right of parties to associate also in parliamentary groups, and for the substantiation of the duty of the relative regulations to comply with this trend, to the which had constitutional status.

Konfederacja grouping). This can have some significance especially when a small party is in opposition.

An indication of respect for the oppositions can certainly be obtained starting from the influence that they can exercise in the election of the top and management bodies of a parliamentary assembly. This issue has limited constitutional recognition, where (Art. 110) it is established that the *Sejm* elects Speaker and Deputy-Speakers from among its members. The meager provision leaves much room for parliamentary regulation and practice, and the functioning of the former must be read in the light of the latter.

As regards this second aspect, the fact that a candidate for Speaker of the *Sejm* (*Marszałek Sejmu*) must be presented by at least 15 deputies (Art. 4, *Sejm* Rules of Procedure; for an updated English version, see the webpage <https://oide.sejm.gov.pl/oide/en/> in the "Polish legal acts" subsection) highlights the indirect correlation with the minimum size of the groups, so that each of them – in theory, even those from the opposition to the government – can aspire to express the highest parliamentary office. To avoid excessive fragmentation, it is foreseen that each deputy can submit only one candidate.

In general, the Polish constitutional system proves to be more concerned about power vacuums and the impossibility of completing a decision-making process than about the opposite risk, i.e. a tyranny of the majority and the consequent need for an extremely broad consensus. Uziębło (2018: 488) remarks how even the *Sejm*'s Rules of Procedure of 1992 proved to be more preoccupied with the risk of obstruction than with the imperative to grant opposition rights (a concern which, by the way, was perhaps justified during the first years of democratization, dominated by highly fragmented legislatures).

The election of the Speaker of the *Sejm* is no exception to this rule. It takes place by a majority of votes in the presence of the quorum (Art. 4.3 Rules of Procedure), which is reached in the presence of half plus one of the members; however, if more than one candidate is presented, and in the first ballot none of them obtains the prescribed majority, before any subsequent rounds, the name of the candidate who received the fewest votes is crossed out until the result is obtained. If it is still not obtained, the procedure must start over (Art. 4.5).

In practice, it should be noted that in Poland, ever since the democratic breakthrough in 1989, the orientation of the winning forces in the elections has closely coincided with a strict, literal interpretation of the normative provision, and the election of the Speaker has often been an openly competitive event marked by full partisanship, with rare concerns for goals of consensus. The practice of granting the opposition the presidency of the assembly is unknown.

The tests of impartiality and institutional correctness of each Speaker have given alternating results over time, with a declining trend, especially after 2015; but having said that, it does not cause a scandal that the President takes part in the votes and actively collaborates with the government in determining the parliamentary agenda.

It is considered normal that he or she is identified *tout court* as a leading figure of the political majority (formally also the second office of the State) a bit like the President of the Republic, who is part of the executive power although obligations are placed upon him of general representation of the nation which would imply greater impartiality. Indeed, the latter is not even expressly imposed for the speaker by the *Sejm* Rules of Procedure, if not by a systematic interpretation thereof (Art. 110.2 Const. merely provides that he presides over the discussions in the *Sejm*, safeguards its powers and represents it externally. Not even Art. 10 of the Rules of Procedure, in providing for a series of tasks and attributions, place upon him an express obligation of impartiality).

For several decades, as long as there were coalition governments, the election of the *Sejm*'s Speaker was the subject of bargaining between the main components of the majority, at least in one case by attributing the office of Prime minister to a junior partner. This form of pluralism has also decreased since 2015 with the parliamentary terms dominated by the Law and Justice party (PiS), although during the last current term, the electoral list that bore this name was in fact the expression of a coalition with two minor formations.

All these observations do not facilitate the role of the groups which are critical towards what will be, in the immediately following duties of the legislature, the government expressing the political majority. Until recently, at least, the partisan context of the election of the President, and his subsequent role during the term, was at least partially compensated – if not by the sensitivity of the officeholder and the democratic attitude of the party of reference – from the quite frequent and "civilised" changes and alternations in power.

It is worth noting that in the Chambers of the Polish Parliament it is permissible to remove the presiding officer of the assembly according to the principle of any revocable mandate. Regarding the *Sejm*, the possibility had already established itself in practice in the 1990s – it dated back to the twenty years of inter-war experience – but it has been supported more recently by the introduction of an Art. 10.a in the Rules of Procedure. At first glance, the dismissal of the Speaker could appear to be a tool to strengthen the opposition. In reality, it was designed in such a way as to appear similar to the constructive vote of no confidence in the government envisaged by Art. 158

Const. and ultimately seems to respond to the same logic aimed at safeguarding the stability of the system in a broad sense.

Corresponding to this is the fact that the motion of no-confidence to the Speaker, which must be presented by a tenth of the deputies, must simultaneously indicate the name of an alternative candidate and must be put to the vote no earlier than seven days (and no later than 45) from its filing (however, unlike the constructive no-confidence in the government, it requires the favorable vote not of the majority of the members but only of the votes cast). Since these are two completely coincident logics, one gets the impression of a tool that does nothing but reinforce the figure of the chairman of the assembly as a personality who must at least correspond, if not really identify, with the political majority that supports the executive. Politically, the dismissal of a President would not consist in a success of the opposition as such, but, more likely, in their transformation into a majority. In practice, votes of this type, which have taken place several times, have never achieved success and the codification of the faculty certainly does not strengthen its chances.

The index of greater implicit recognition for the oppositions is obtained from other organs within the *Sejm*, the first of which is the collective bureau (*Prezydium*). It only includes the Speaker with his deputies (Art. 11 Rules of procedure) without specifying how many of them there should be. It is a weakened body if only from a formal point of view, given that it is no longer recognized in the current Constitution (while it was under the force of the previous Small Constitution of 1992). In reality, the regulatory adaptations to the changed constitutional order have also transferred to the monocratic Speaker a part of the powers that previously belonged to the *Prezydium* (Kudej 1998: 9), and in particular the determination of the calendar of the subsequent immediate sessions and the agenda of each of them, thus realising a weakening of pluralism and consequently – implicitly – of the opposition (while the general planning of the works remains in the hands of the *Prezydium*, on the proposal by the *Konwent Seniorów* which will be discussed later).

Furthermore, unlike what happens in some Western legal systems, there is no express guarantee in these Polish norms for the purpose of representing the oppositions, so it is only in practice – as indeed has always happened, on the basis of informal agreements taken at the beginning of each parliamentary term – that members of the opposition have also been adequately represented in the body, which in turn is made up of a number of parliamentarians that is not determined either, but is established with an *ad hoc* resolution at the beginning of each term.

The absence of written rules is confirmed by the non-existence of a constant practice regarding both the number of Deputy Speakers and the dosage of their political affiliation between majority and minorities. In the first term (1991-1993), characterised by enormous fragmentation, it even happened that the two parties winning a plurality of the vote, the Democratic Union (one of the successors of Solidarity) and the Alliance of the Democratic Left (SLD, post-communist), were also deprived of a vice-presidency by an articulated cartel of predominantly right-wing forces. In the first fifteen years of democracy, a greater "friendliness" towards the oppositions was accepted in the terms which were dominated by forces that had their roots in the previous system, in particular the second (1993-1997) and the fourth term (2001-2005). But then a tendency has consolidated to ensure that opposition representatives have at least an equal number of Deputy Speakers compared to the majority, a trend that has persisted even in the last two terms dominated by the PiS, which were characterised by the well-known democratic-liberal backsliding. The overall number of Deputy Speakers has fluctuated between four and five.

The opposition, on the other hand, benefits from greater guarantees of representation, albeit always implicit, within another internal body, the *Konwent Seniorów* (which evokes the German *Ältestenrat* at least in its name). It has the task of facilitating collaboration between the groups in all that pertains to the activities of the *Sejm* (Art. 14 Rules of procedure). It is made up of the Speaker and all the vice-Speakers of the assembly, the chairpersons of the groups and parliamentary circles, but the criterion of proportionality of the representation of the groups envisaged in the analogous German body is not provided for. Such a composition is aimed at reproducing the pluralism of the entire assembly, making it possible for all groups, including opposition ones, to influence its work (Zubik 2003: 257). It is evident how the number of such a constituency depends on the greater or lesser fragmentation of groups present in each legislature. And it is the only internal body in which the oppositions can theoretically find themselves in the majority, even if such a paradoxical hypothesis is averted by the fact that it does not have effective decision-making powers, limiting itself (Art. 16 Rules of procedure) to expressing non-binding opinions regarding the calendar of works, the agenda and matters also of an internal administrative nature.

As in numerous other European parliamentary institutions, an important position is also recognised in the Polish ones for the standing committees responsible for subject matter. They are assigned a role on the basis of Art. 110.3 Const. which obliges the *Sejm* to set up permanent commissions

and gives it the power to set up additional commissions of an extraordinary nature, not to mention any commissions of inquiry set up under Art. 111. The Constitution adds nothing else on this point, entrusting the regulation with the determination of the number and areas of competence of the standing commissions, also delegating to them the delicate task of establishing the internal composition by groups.

From this standpoint, there is an important shortcoming, i.e. the absence, even at the level of the internal rules, not only of the imperative to adequately represent the minorities-oppositions, but also of any rule which requires the commissions to reflect on the political level the composition of the whole house (with a few recent exceptions which will be discussed later). This does not mean that a consensual practice has not been established since 1989, to stabilise a mechanism close to a proportional representation of the groups, within the limits of what is technically possible, in each commission of the *Sejm*; and this was maintained even in the most recent years, characterised by an authoritarian involution. The number of permanent commissions is instead determined by the Rules of procedure, albeit subject to some variation at each term, and is released from a strict correspondence with the number of ministries. Currently (Art. 18 Rules of procedure and Annex to it), 19 permanent commissions have been established, and it is once again the practice that the commissions are in turn divided into large, medium or small according to the number of their components.

In general, as anticipated, there is no regulatory correlation between the concept of commission and that of a parliamentary group. The few exceptions are all recent and are generally the result of successive amendments made to the 1992 regulation. The first of these is the general regulation of commissions of inquiry, introduced in part by a law on the aforementioned matter dated January 1999 and in part by Articles 136a-136i of the Rules of Procedure. In summary, the law on the commission of inquiry – Art. 2, to which Art. 136c of the Rules refers – sets the maximum number of members of each of them at eleven and imposes the presence of at least one exponent of each of the groups and circles represented in the *Konwent Seniorów*. Of course, such a low number of components is not able to ensure more than pluralism, certainly not going so far as to satisfy the requirement of even a limited proportionality. The formal guarantee of pluralism within such a body needs no justification, even taking into account the drawback that even the parliamentary commissions of inquiry cannot ultimately escape a majoritarian logic, in which the decision-making power of the oppositions

is compressed by definition. However, this guarantee remains important, considering the role of political turning point that some commissions of inquiry – thanks to members of the then opposition – were able to exercise in Poland at the debut of this institute, in the early 2000s.

Among the commissions which are peculiar by the composition criterion is the one in charge of the oversight of the security services. It comprises no more than nine deputies, whose applications can only be drawn from groups of at least 35 members. Currently the commission is made up of seven deputies, four of whom are part of the PiS majority group, and the chairman himself belongs to this group, although in the recent past the good custom had been established whereby it was chaired by the opposition, but without any stabilisation at the regulatory level also due to the difficulty of giving a legal definition of the latter (Czarny 2010; Bożek 2014: 215). Even in such a delicate area of competence for the protection of democracy, therefore, the favor for the oppositions encounters some precise limits.

The selection criterion of the committee for the "Deputies' ethics" is completely different. This committee is responsible for verifying the conduct of each elected member according to the criteria established in some related "Principles", an extremely narrow and vague code of conduct adopted back in 1998, and subject to wide interpretation, and consequently is entrusted with the possibility to reprimand deputies whose behaviour has not been compliant with the code, or to impose modest disciplinary sanctions upon them. All the provisions of the commission are adopted by majority vote, but the meaning of this norm changes since the body is composed of only one member for each group, regardless of their numerical strength. It is the only parliamentary commission in Poland that is composed according to a criterion of equality between parties, completely antithetical to the proportional one. In this sense, it can be said that, in the perspective of internal relations between members of parliament and the conduct of each of them, a decision-making criterion is in force that is contrary to that of the dominant party-majority logic, and prevailing even in the previously mentioned commission.

The last commission to which the regulation refers to differentiate the composition criteria is that for European Union affairs. In this case, the regulation states (Art. 148a) that it should proportionally reflect the representation of the groups present in the Chamber with at least 15 deputies. Since this is a large commission, currently made up of 42 members, it is clear that proportionality is not only formally ensured, but also more realistic on a substantive level.

4. The influence of the opposition in the legislative process

An important aspect under which the role accorded to the opposition deserves consideration is that of the legislative function of the Parliament. As in any democratic-plural system, the opposition undoubtedly enjoys the right to submit legislative bills, which according to the Polish Constitution (Art. 118.1) belongs «to the deputies, the Senate, the President of the Republic and the Council of Ministers» (with the addition of the popular legislative initiative, provided for by Art. 118.2, which however fails in practice to play an important role).

As in other legal systems, financial matters, and in particular those concerning the state budget, provide for a weakening of the opposition starting from the fact that the initiative in this sphere is reserved exclusively for the Council of Ministers (Art. 221). The wording of Art. 118 allows in the first place to highlight the uneven nature of Polish bicameralism with the weakening of the Senate with *vis-à-vis* the *Sejm*, which opens the way to more specific considerations that will have to be developed below: this disparity is evident starting from the fact that the deputies are entitled to submit legislative bills, without specifying their number, but not also the senators as such, since every initiative in this sense must be submitted by the Senate as such – of course, with a majority vote. This means that for a bill to be initiated in the Senate, it needs to be transmitted to the other parliamentary branch, from which the true, formal proceeding must always, invariably, start.

The 1992 Rules of Procedure interpret the right of initiative of Members in a restrictive way (Art. 32.2). In fact, they reserve the possibility of presenting bills to the standing commissions as such – and this already indicates a propensity of the system towards the parliamentary majority – as well as to at least 15 deputies, without specifying that these must correspond to a parliamentary group but again legitimising the identification between this last form of association of deputies and the exercise of one of the most important forms of participation in political life. This means that individual deputies, as well as associations between them of a smaller entity than a group, such as clubs for example, are excluded from the possibility of even trying to contribute to the formation of national legislative activity (if not, obviously, through amendments and final vote). In any case, a provision of this type, if on the one hand seems to be inspired by the will of preventing excessive inflation of legislative initiative, on the other enhances the role of parliamentarians not on an individual level but only as part of a wider community, such as – of evidently – the political party.

Empirical evidence indicates that, over the decades, Poland has been no exception to a widespread trend in democracies at a global level, whereby the percentage of purely parliamentary law bills decreases to the advantage of governmental bills, while conversely, the rate of success of the proposals coming from the executive is increasingly preponderant as opposed to bills submitted by other subjects. This cannot come as a surprise and is the effect of the majoritarian logic which ultimately inspires the legislative procedure in modern democracies. It is not from this function, in fact, that we should expect the opposition's greater capacity for effective influence. Even from this point of view, however, the illiberal backsliding of recent years presents critical aspects which will be discussed in § 6.

The analysis of the opposition's ability to influence the legislative process can best be conducted starting from some considerations regarding the nature of Polish bicameralism and the position of the President of the Republic, considerations that supposedly have nothing to do with the relationship between majority and political opposition. Indeed, a formal and arid analysis of the relations between these two Chambers would lead to the conclusion that the *Sejm* clearly prevails over the Senate both in terms of the fiduciary relationship with the government, over which it has a total monopoly, and in terms of the control or oversight function properly understood, for which a substantially analogous assessment can be made, as well as for the law-making function, where, however, there is some condition capable of allowing the upper Chamber to have an impact.

In a nutshell, in fact, the *Sejm* approves bills in three readings by a simple majority of votes in the presence of at least half plus one of the deputies, unless the Constitution prescribes special majorities (Articles 119-120). The bills approved in this way must be transmitted to the Senate, which must pronounce itself within the mandatory term of 30 days. It can choose whether to adopt a bill without amendments, amend it or reject it in its entirety. These decisions are sent back to the *Sejm*: in case of rejection or approval with amendments, the decisions of the Senate are considered final unless the *Sejm* modifies them again – and this time definitively – this time with the affirmative vote of the majority of the deputies present and voting, thus not considering those present, and abstaining, as votes implicitly in favour of the resolution.

This is a minimal procedural burden that usually has no actual practical significance unless a particular condition occurs. In other words, it is necessary that the political majorities present in the two Chambers do not coincide: it is a difficult condition to verify, given that they are elected at the

same time (Art. 98) and that this promotes the formation of homogeneous majorities or at least not openly in contrast, as in fact it always happened from 1991 to 2015. It should be noted incidentally that this eventuality almost always materialized despite the different electoral formulas used for the two assemblies: if for the *Sejm* the Constitution (Art. 96.2) provides for a proportional system – theoretically ensured by the use of the d'Hondt system, and certainly mitigated by national thresholds of 5% for parties and 8% for coalitions –, since 2011 the Senate has even been voting in one hundred single-member constituencies under a first-past-the-post system (Rakowska and Skotnicki 2014: 189-213). Despite all this, the majorities have always substantially coincided until the general election of October 2019, when in the face of the confirmed victory of the PiS in the *Sejm* (235 seats out of 460) a large cartel of democratic opposition forces achieved a narrow victory – 51 to 49 – in the upper house.

In fact, during the last term it was found that, if the opposition manages to become a majority in the weakest assembly of Parliament, then it is the latter that effectively transforms itself into the opposition to the strongest parliamentary branch. When the two majorities do not coincide, given the superior strength of one assembly over the other, one certainly cannot speak of a reciprocal and balanced capacity to hinder each other, and even less of a decision-making stalemate typical of a veto player (Tsebelis 2003), but if anything there is a situation in which the "weak" Chamber is at most capable of exerting some pressure or conditioning on the "strong" Chamber[5].

How significant this conditioning is depends exactly on the difference in political strength attributed to the two assemblies on the basis of the constitutional provisions, within each of the classic functions pertaining to the legislative. Even if the notion of opposition that is proposed here – that is, the opposition of one Chamber to the other – does not correspond to the one that currently prevails and is not in any case the most orthodox, it remains that a situation such as the one described is one in which the opposition normally understood, i.e. a parliamentary minority that opposes those who

[5] The situation was quite different between April 1989 and the Small Constitution of 1992, when a vote against by the Senate could only be overcome by the *Sejm* with two thirds of the votes. In this case we had to deal with a true veto player, who found justification in the Round Table agreements with the fact that only the Senate – in the semi-free elections of June 1989 – would be elected according to rules of full pluralism, while at the *Sejm* there was preemptive allocation of 65% of seats to the Communist Party and its then allies. See Ciemniewski 2014: 76-77. More recently, Wieciech (2020) makes the case for a total abolition of the Polish Senate.

support the government, is more valued. On the other hand, the enormous disparity in strength between the two assemblies means that, if they were to be distinguished by two contrasting political majorities, it will always be the Senate that stands in some opposition to the *Sejm*, never the other way around. The prevalence of the oppositions in the Senate in Poland is the instrument that can indirectly strengthen the position of their colleagues in the *Sejm* in a way that, in the current state of democracy in this country, could not be imagined otherwise. But by how much, concretely?

Actually, in the current Polish case, little enough. In the current term, up to the time of writing, the PiS parliamentary group which made its debut with 235 out of 460 deputies but lost seven of them in three years, has nevertheless almost always succeeded, when it comes to re-examining a bill rejected or modified by the Senate, to collect the absolute majority of valid votes to definitively confirm a text. Among the laws finally approved by the Parliament, despite the opposition of the Senate, are numerous modifications of the judicial system which have been at the centre of as many controversies with the European Union, and in particular with the Court of Justice; the special law on presidential elections of April 2020, which – due to the Covid pandemic emergency – would have allowed, by way of derogation from the electoral code, elections to be held entirely by post (this act, however, was subsequently repealed and no longer applied); the reform of the education system wanted by the education minister Czarnek; the act that would have made it possible to revoke the license of the TVN television group, owned by Warner Bros-Discovery (which, however, was vetoed by the President of the Republic Andrzej Duda in December 2021, not without pressure from the US Administration). On all these occasions, as on others, in reality, the vote against by the Senate functioned as a sort of obstruction – usually the upper house used the available month to the full to decide – and served above all to draw the attention of the national public opinion, and sometimes of foreign and supranational institutions, on the seriousness of the adopted measures.

Another peculiarity of the Polish constitutional system can help enhance the role of the opposition in the *Sejm*, and this too it is perhaps only another unintended consequence of a choice made in 1989, and then only partially attenuated since 1997. We are referring to the peculiar position of the President of the Republic, who, if on the one hand is not an authentically governing body – such as, for example, the French President in the Fifth Republic –, on the other can in certain situations prove to be a centre of power capable of influencing the political system, and not just for mere moral suasion.

The main institution that is relevant in this respect is the referral of laws to the *Sejm*, also known as the veto. With a reasoned message, the Head of State can refuse to promulgate an act and ask the *Sejm* to review it (Art. 122.5 Const.), in which case the law lapses unless the *Sejm* itself adopts it again with three fifths of the votes in presence of half plus one of its components[6]. It deserves to be noted that this power is an alternative to another relevant faculty for the Head of State, namely that of requesting a prior judgment on the law from the Constitutional Tribunal (Art. 122.4)[7]. The logic that supports the two legal institutions looks different since in the latter it seems that the constitution-makers have conferred on the Head of State an important role in activating a judgment of constitutionality which in any case does not belong to him, but concerning which he or she can only formulate a reasonable doubt. Otherwise, the referral of a law to the *Sejm* – which must be motivated but with wide discretion – can certainly contain certain constitutional concerns, but it can well respond to free and discretionary political option criteria within a possible space of indifference in terms of legitimacy. On the one hand, it would make no sense that to pursue the same basic purpose, that is to prevent an unconstitutional act of Parliament from entering into force, two completely different procedures could be activated, one of which ends with a mere (qualified) majority vote by a purely political body. On the other hand, and consequently, it seems that the President's recourse to the right of veto, based on reasons of political preference, cannot be justified with anything other than the (at least equal) level of political legitimacy of two institutions, since the President himself and the Parliament are both elected by universal suffrage.

That said, the legal design of this veto power needs to be brought into political concreteness. It is evident how it takes on different meanings depending on whether it is inserted in a "normal" and physiological situation, i.e. one in which the parliamentary majority coincides with the one that elected the President, or in that of *cohabitation*, which has occurred several times even in Poland. This is also relevant for what concerns the treatment of the opposition.

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[6] The attenuation introduced by the 1997 Constitution consists in the reduction from two-thirds to three-fifths of the quorum of votes necessary to overturn the presidential veto; as well as in the exclusion thereof for the budget law (Art. 224.1) and for the laws revising the Constitution (Art. 235.7).

[7] It should be noted that these rules, which involve both the President in the legislative process, are included in Chapter IV of the Constitution concerning the Parliament, and not in the subsequent Chapter V (Articles 126-145) dedicated to the President himself.

Contrary to appearances, there are significant cases in Poland demonstrating that the use of the presidential veto occurs even when the majorities coincide, and this is true in the most recent case under the presidency of Andrzej Duda (PiS) with a government of the same extraction. In these cases, in some respects, the presidential referral of parliamentary laws takes on an even greater value, taking on meanings that cannot be attributed to an even too obvious opposition between factions, but can assume the character of an even personal opposition between the Head of State and top figures of the reference establishment; at the same time, however, a presidential veto in the presence of this political arrangement may simply indicate a dissent on the strict merits of the law, even on important issues.

During the last two Parliament terms, and the two mandates of President Duda, referrals of this type have been made. In particular, two famous vetoes of the summer of 2017 on as many laws in the field of the judiciary should be noted. Although this did not prevent other laws on the subject from being proceeded on in a short time and eventually entering into force – with the consequence of altering the balance between powers, determining an overall constitutional retrogression of the national democratic quality, and provoking a permanent conflict with the EU –, the fact remains that the presidential decision was incisive and prevented the entry into force of norms even more repugnant to the principles of the rule of law. A similar consideration applies to the veto applied in August 2018 to the amendment of the European electoral law, which would have transformed the electoral system into an excessively punitive mechanism even for medium-sized parties, cutting them off from representation in the EP. The same goes for two laws, wanted by Minister Czarnek, regarding the reform of the education system, and one, approved in December 2021 on radio and television matters, which would have punished the private group TVN (strongly critical of the government) with the tightening of the conditions for granting emission licenses to subjects with foreign capital (on this we must remember the pressure from the American Administration, also motivated by the sale of TVN years ago to the giant Warner Bros-Discovery).

In any case, as in any situation in which a qualified majority is required, this involves an enhancement of the oppositions, direct or indirect, which is almost impossible to find otherwise in the Polish legal system, and above all in the present situation (Szmyt 2014: 140). For its part, however, cohabitation is a situation in which a particularly dysfunctional element of the system has been found. Precisely the strength of the presidential referral power highlights how, in certain circumstances, the Head of State can as-

sume the role of a true leader or in any case an inspirer of the opposition: a rather improper role, given that – it is repeated – the President is officially placed in the executive power (Art. 10.2 Const.), but that he «shall [also] be the supreme representative of the Republic of Poland and the guarantor of the continuity of the State authority» (Art. 126.1) and «shall ensure observance of the Constitution, safeguard the sovereignty and security of the State [...]» (Art. 126.2). It is already not easy to reconcile these solemn declarations, which imply a performance of national unity, with membership of the executive which in itself indicates a partisan choice. Their realisation risks becoming even more illusory when the President feels engaged in the struggle of a parliamentary minority to regain a greater electoral following. In such cases, the possibility that the Head of State can assume the role of an informal leader of the opposition is completely dysfunctional.

Still, in the context of the legislative function, there is a last institution wholly favorable to the oppositions: indeed one could certainly say that it is the main instrument placed at their disposal, or so it should be. This refers to the possibility for 50 deputies or 30 senators to apply to the Constitutional Tribunal to ask for a judgment on the constitutionality of a law (but also for the conformity of a law with an international agreement always ratified by law, or for a control of legality-constitutionality of any regulatory act issued by a state body). The faculty is recognised on the basis of Art. 191.1 Const. in combination with Art. 188. Even before the presidential veto which should have a very different nature, that of an application about the constitutionality of a legislative act of Parliament by the minorities is a decisive tool for protecting both the supreme law and the rights of the opposition. Or it should be, it must be added. During the last two terms (from 2015 until 2023) the deterioration suffered by the Polish democracy started from the Constitutional Tribunal, with a real capture from the majority political power, such that this institution has suffered an impairment that one could not yet say if definitive, but which in this moment is total. This is the factual reason why the discussion of the topic must be postponed to § 6, where a brief assessment of the overall democratic backsliding suffered by the country will be given, of which the parliamentary oppositions are among the first to suffer.

5. The parliamentary opposition in the oversight function

Thus, we move on to the control and oversight function, which should enhance the role of the opposition more than the legislative one. On a theoretical

and abstract level, control over the executive should belong to Parliament as such and not to particular fractions of it. In practice it is known that the parliamentary forms of government based on the fiduciary relation between the Assembly and the Government – and Poland is one of them – presuppose a continuous collaboration between the two branches of government, so that the parliamentary majority constitutes with the latter, essentially, a single axis. But if there must be in-depth collaboration, then the interest of the parliamentary majority in carrying out an inspection function on the government, based on the pure abstract structural otherness between the two bodies or centers of power, in today's majoritarian parliamentary democracies is reduced to physiological levels. This is why when we speak of parliamentary control, we are referring to a space that essentially belongs to the minorities who form the opposition to the executive in the legislative body (Marszałek-Kawa 2016: 330-337). But even from this point of view, especially in a legal system that has undergone a serious democratic degradation, it is necessary to distinguish between law in the books and law in action.

On the methodological level, it should be noted that a part of the Polish legal scholarship unites all types of relations between Parliament and the Government in the vast conceptual field of control or oversight, including the formation and dissolution of a fiduciary relationship, while other authors place this last type of relationship in a special function, defined as *funkcja kreacyjna* under the influence of the German doctrine of *Kreationsfunktion*. Here, for reasons of exposition speed, the two concepts are presented in the same paragraph even if appropriate distinctions will be made.

In general, all aspects of the formation of the government, as well as those concerning its term in office and the reasons for its termination, are inspired by the imperative of stability, which seems to be an almost absolute priority. As regards the formation of the Government, it is contained in Articles 154 and 155 of the Constitution and consists of three procedures, the first of which provides for the role of the President of the Republic and the *Sejm* at the same time. The former appoints the Prime Minister and, on his proposal, the ministers. This safeguards an important presidential prerogative, but one must also take into account the fact that, within fourteen days of the formation of the government, the latter is required to go to the *Sejm* to obtain its confidence, by a majority vote in the presence of at least half of the members thereof. The rationalised parliamentarism nature becomes immediately evident here. The initiative passes to the *Sejm* if it has not been possible to form the Government according to this procedure, or if it has not won the confidence vote. In this case, according to the first fallout procedure, it is

the duty of the lower house to form and vote for confidence to a Council of Ministers according to the same rules described above. Only ultimately, if the Government formation fails even according to this second procedure, the word passes back to the Head of State, who this time appoints the entire Council of Ministers according to his own intentions, while the *Sejm* votes for confidence this time by a simple majority. Assuming that even according to this last procedure the formation of the government has not been successful, the President is required to "shorten the term" of Parliament by calling early elections.

More interesting, from the point of view of the oppositions, are the methods for interrupting the confidence relation. In reality, apart from the physiological circumstance of a change of majority following parliamentary elections, the only legal way to obtain termination of a government office is also one which provides for a fourth alternative procedure for the formation of a cabinet, through the expression of a constructive vote of no confidence, provided for by the 1997 Constitution (Art. 158) similar to the model of the German Basic Law and which draws inspiration from a doctrine of the 1920s of the last century. A quality difference with the German archetype lies in the collegiality of the interruption of the confidence relationship, analogous to what happens with its establishment. The motion of no confidence must be submitted by a minimum of 46 deputies, equal to one-tenth of the Chamber, must indicate an alternative Prime Minister, and be put to the vote at least one week after its presentation. The motion can only be approved by an absolute majority of the members of the *Sejm*. The ministers of the incoming government are always indicated to the President of the Republic by the new Prime Minister. This is a provision that gives the parliamentary opposition an obvious chance to become a majority, even if this one is weakened by the significant number of deputies who must sign the motion, such as to prevent at least unrealistic operations carried out by marginal circles of the assembly, apart from the well-known limitation which imposes prior agreement on a name, and probably on an alternative government structure. Add to this a further limitation for the oppositions, not known in the original German, whereby a subsequent motion of constructive no-confidence can only be put to the vote after at least three months have elapsed from the previous one unless it is signed by at least 115 deputies (Pastuszko 2014: 29). It must also be considered that in the Polish context, the provision of an absolute majority of the members of the *Sejm* to distrust a cabinet and appoint a new one is a rather high majority. On the other hand, the week that must elapse between the filing of the motion and its putting to the vote is a further penalty for

those who want to replace the government, because it can leave the latter time available to regroup its majority and save itself.

On the one hand, what has been stated so far highlights the concern voiced by the constitution-makers for the risks of instability, on the other it certainly does not facilitate the task of the opposition[8]. At first glance, the institution seems connected to the idea of a change of majority, perhaps by a junior partner of the original coalition, as happened in Germany in 1982, but it is not sure that it must be the case, even more so within a party system which at the moment appears, for better or for worse, relatively stabilised. This is the situation in which the role of the opposition could be maximised, to the point of making them crown their desire to take power. The concrete experience of this institution, in Poland, was even less successful than elsewhere. Attempts to resort to this vote were sporadic, and only one was successful, in March 1995, even before the current system came into force and under the force of the provisional 1992 Constitution. In any case, the Government replacement was not the result of any change in the majority that concerned the opposition, but a process that took place within the centre-left SLD-PSL majority itself.

In addition to the collective constructive no confidence, there is also the individual no confidence in a Minister (Art. 159). Individual no confidence only entails the obligation of the President of the Republic to revoke the Minister who received the negative vote. Apart from the different number of subscriptions (69) to start the procedure (introduced with a last-minute amendment, without justification and in an incomprehensible way: see Mojak 2007: 587), otherwise it is very similar to the collective one concerning the Council of Ministers, including the absolute majority of deputies necessary for approval. Therefore, the considerations to be made regarding the (scarce) chances that such a provision attributes to the opposition in the *Sejm* are analogous.

In addition, criticism of the dysfunctionality of such an institution should also be taken into account, since it seems to refer to the idea of an assembly Government in which all the offices are the direct emanation of the

[8] This is highlighted by Patyra (2002: 132), who even notes that, under the Rules of procedure, during the debate on the constructive motion of no confidence the only incumbent the Prime Minister is allowed to make a speech, unlike the candidate to that post who is mentioned in the constructive motion of no confidence (unless he is himself an MP, and in that sole capacity); and concludes (139) that «in Polish practice the institution of a vote of no confidence, which is a weapon of the opposition, in enforced exclusively by the initiative of the parties establishing and formally supporting the Government».

legislative, and it is not entirely compatible with the collegiality and unity of direction of the Council of Ministers.

It can then be observed that a vote of no confidence in a single Minister, while certainly not entailing the collective fall of the Government, nevertheless can be the symptom of its incipient political decomposition. In the concrete experience, on the other hand, the individual no confidence vote is submitted much more often than the collective one, and this was also repeated in the last two terms dominated by the PiS, when the targets of this procedure were above all the Minister of justice Ziobro and the Minister of public education Czarnek. Once again, however, the said experience highlights how little the chances are for such a vote to go through, in the presence of a coalition that maintains a minimum of compactness. With numerous individual votes of no confidence, all failing regularly, the opportunity was used for a bit of political "show" by the opposition and nothing more. Conversely, the rejection of an individual vote of no confidence can reunite the Government and strengthen its stability, and above all strengthen the personal status of the affected Minister. There may be some chance of success in the event of a minority cabinet – an event which is also envisaged by the Constitution but which has not occurred in recent years – precisely because individual no confidence does not presuppose the identification of an alternative minister, it is not therefore constructive.

The Polish Constitution (Articles 198-201) has provided for a complex form of criminal-constitutional responsibility for a very vast series of subjects, including the President of the Republic – who always remains politically not responsible –, the Prime Minister and all members of the Council of Ministers. In the due distinction from political responsibility, put in place through the previously mentioned channels, the forms for activating this procedure are different, but all of them are settled by a specific body, the Tribunal of State, according to methods established by an act of Parliament originally dating back to 1982 but then almost entirely modified in the early years of democratisation.

Actions and behaviours that can lead to a possible indictment before the Tribunal of State consist in violations of the Constitution and the law, and the Tribunal of State can impose a series of sanctions which – not without skepticism in the legal scholarship – can also include prison sentences, even if only for crimes committed by convicted subjects in the exercise of their respective functions and never for common crimes. Without going into the merits of the articulated internal parliamentary procedures, to start an investigation against all the bodies indicated by the act on the Tribunal of State of

1982 – amended several times after democratization –, the latter establishes that the impeachment for the Head of State must be voted by a majority of two-thirds of the members of the National Assembly (*Sejm* and Senate in joint session) (Art. 13.1 of the law on the Tribunal of State), while for the impeachment of the Premier or of one or more ministers, a majority of three-fifths of the members of the *Sejm* alone is required (art. 13.1.b).

Polish legal scholarship is divided on the matter. If on the one hand, such an articulated form of responsibility is considered an important component of national constitutionalism, with traditions that date back at least to the interwar period, on the other hand, critical remarks are made which are the ones that most pertain to this study. The preliminary procedural obstacles and above all the required deliberative majorities – in this case truly qualified and high – further reduce the possibility that such a form of responsibility can be activated even in cases of strong alarm, to the point of forming a barrier that protects the majority from the risk to be effectively called to answer for serious constitutional crimes (Granat 2005: 141. On the other hand, it should be also considered that this form of responsibility is somewhat subsidiary to ordinary criminal procedures before the common courts).

In short, there is no getting away from the contradiction whereby the limitation and control of a majoritarian political power by an impartial judge under a fair trial can only be implemented through a majority mechanism, and indeed qualified majorities – in this case justified by the gravity of the decisions to be taken –, if imposed to act and not to resist an action, prove to be a further restriction for minorities, and therefore for the oppositions; and this precisely where their crucial role – although certainly not the ultimate judgment – should be more valued. Above all, one does not get away from the partisan connotation of decisions that should be placed above this type of controversy. The result is an institution that, at least for the time being, remains unused and appears almost relegated to oblivion, although sudden developments, even of great significance for the future, cannot be ruled out.

The procedure for impeaching members of the Government, or even the Head of State, can also start from the findings of a parliamentary commission of inquiry, which has already been mentioned. The powers of the commissions of inquiry in the Polish legal system are theoretically considerable, also given the explicit constitutional recognition (Art. 111) and there is no doubt that this activity falls fully under parliamentary control. The most sensitive part of the doctrine in Poland has long warned that since in principle all the institutions of parliamentary law are based on the majority principle, the minority must «content itself» (Banaszak 2010: 94) with the tools that the law makes

available to them, the first of which is undoubtedly this type of commission. While endowed with significant powers, its object of investigation must be limited to the general scope of parliamentary oversight of the Government, without being able to extend to aspects of social life that are not immediately provided with this characteristic. A vision that has been confirmed more than once by the Constitutional Tribunal since the early years of the current Constitution (see Constitutional Tribunal, judgments K 8/99 of April 14, 1999, in which the constitutionality of the Act on the Investigative committees was declared in general; and U 4/06 of September 22, 2006, in which, on the contrary, some attributions of a specific investigation commission on the banking system were declared illegitimate as they were too wide-ranging).

These commissions experienced great vivacity in the early 2000s (especially the "Rywin" committee, which brought about the fall of the leftist government – SLD-UP – chaired by Leszek Miller), above all thanks to the strength of the then opposition, but their impact capacity has been greatly reduced in recent years and above all since 2015, when they seemed above all a tool of the political majority to censor the activities of the previous majority, and currently the opposition.

The importance attached to the "creation" activity of the Parliament, and especially of the *Sejm*, could not be overestimated. Indeed, the legislative Assemblies of Poland, apart from the relationship with the Government, carry out many activities which allow many other public bodies to take office, or sometimes may even force them to resign. By choice of the framers many of these tasks are performed by the *Sejm* alone and – sometimes by choice of statute law – these choices take place by a mere majority of votes, which, once again, decreases the role of oppositions. Without going into too many details, and only in order to give an idea of how different systemic choices matter, all fifteen judges to the Constitutional Tribunal are elected by the *Sejm* and a mere plurality of votes is (very critically) sufficient. At the same time, the Commissioner for Citizens' Rights (or Ombudsman) is also appointed by the *Sejm*, but this vote must be confirmed by consent from the Senate (Art. 209 Const.). It follows from that in the course of a few years the Law and Justice (PiS) party monopolised all 15 positions in the Tribunal – meeting only a slight resistance from its much minor partners – whereas it could not do the same with the Ombudsman, a public office which is highly appreciated in Poland. After trying several times to force the election of its own party loyalists, PiS finally had to agree on a compromise candidate who was also acceptable to the opposition(s), as they could exercise a veto in the Senate since the end of 2019 when they won a majority there.

From a normative standpoint, the foundations for the control function in the strict sense are provided by Art. 95.2 Const., according to which «the *Sejm* exercises control over the activity of the Council of Ministers within the scope defined by the provisions of the Constitution and the laws». Beyond an abstract formality that emphasises the otherness between the Government and the parliamentary Chambers, it has been appropriately noted that it is the existence of the oppositions that gives a political nature to this control activity (Sarnecki 2014: 126).

In any case, in Poland, as in any other parliamentary democracy, difficulty has been encountered, at least in some cases, in drawing a clear line of demarcation between the control function and other functions, since some inspection activities fall within these: for example, some features of supervision of the executive can derive from a law resulting from the law-making function. The aforementioned provision mentions only the *Sejm*. Although the opinions of Polish constitutionalists are divided on this matter, most of them believe that this does not mean that even in the Senate some limited form of control over the activity of the executive is jeopardized, but that ultimately the clear distinction of the *Sejm* also in this respect it is connected to the fact that only the latter is responsible for decisions on the life of the government, which makes it clear how much control over the executive is connected to the definitive consequences in the form of political and constitutional responsibility, which only belong, as known, to the lower Chamber (see the controversy between two authors about the possible oversight powers of the Senate: Sarnecki 2002 and Garlicki 2002).

Legal doctrine distinguishes three dimensions within which the activity of control can be carried out in the broadest sense: the one which takes place in the plenary hall of the *Sejm*, the one which is carried out in the commission, and finally the possibility for each deputy to exercise such control in autonomy. But this last, subjective aspect is connected with somewhat differentiated forms of controls on the executive. It is almost intuitive how the first two dimensions, being collegial, being governed by the majority principle, make the role of the oppositions almost negligible and can only function on condition of assuming the most genuine distinction between bodies as a justification for the control of one over the other, irrespective of party lines. In the perspective that interests us here, therefore, only the control activity carried out by individual deputies remains, which is also very vast. It is primarily regulated by art. 115, which reads «1. The Prime Minister and other members of the Council of Ministers shall furnish answers to interpellations and Deputies' questions within 21 days. 2. The Prime Minister and other

members of the Council of Ministers shall furnish answers to matters raised in the course of each sitting of the *Sejm*».

The development of these provisions consists of some substantial articles of the Rules of Procedure of the *Sejm* (191-196). The most solemn form of individual control is one that consists of interpellations (Art. 192) which can be carried out on questions of fundamental importance concerning state policy. They are presented in writing and transmitted by the Speaker of the *Sejm* to the member of Government who is the recipient. The answer must be sent within 21 days, also in written form, but there are no debates in the sessions of the *Sejm* on the answers to an interpellation.

Current information is also established (Art. 194), with which an individual deputy or even a group can ask a member of the Council of Ministers for information on an issue, but they are subject to a decision, made by the Presidium of the *Sejm*, which of the submitted proposals for information is accepted and will be considered at the next sitting of the *Sejm*. This is followed by the deputies' questions (Art. 195) which may be lodged concerning matters of individual nature, and finally «questions on current issues» (Art. 196) which are to be posed orally during each sitting of the *Sejm* and directly answered during the sitting itself. The orality of the questions on current issues is the reason why they have proved to be more politically attractive for members of Parliament, given their possibility of media exploitation in search of popularity. Among these forms of parliamentary oversight, interpellation is the one that refers to a long-standing twentieth-century tradition, essentially reproducing the institution in force in the twenty years between the wars, at least until the authoritarian turn of 1935. Deputies' questions, on the other hand, were instituted in 1972, back in the socialist period. However, the use of both of these tools, before 1989, was very sporadic, and only after the Parliament elected with the semi-free elections in June of that year did their use become almost daily, proving the almost decisive connection between these means of control and the existence of an opposition, if not from a legal-formal standpoint certainly under the practical aspect.

In any case, the effectiveness of all these control tools, even more than fiduciary mechanisms or criminal-constitutional liability institutions, is entrusted to the culture and institutional sensitivity widespread in a country and also to its evolutions or involutions over time. In Poland, from this point of view, the general consideration made regarding the constitutional decay of recent years is even more valid.

6. Conclusive remarks in a context of radical deterioration

What has been said so far takes into account first of all the normative data, as it is right to do in a legal analysis with a high political value in which even judicial case law plays only a marginal role. In this concluding paragraph, however, it is essential to address the issue of constitutional degeneration that has involved Poland since 2015 up to the time of writing. It is not easy to do this, in part because the most macroscopic aspects of the democratic decay of recent years have primarily affected institutions such as the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court, in addition to striking at some aspects of civil liberties, while reverberated only indirectly on the system of government, in part because the regime change in the functioning of Parliament, and above all its qualitative consequences on the status of the opposition, took place *de facto*, due to changes in some customs and internal conventions, with negligible modifications on the constitutional, legislative, regulatory level[9], and have been as perceptible in concrete life as difficult to document (and for some reason very little covered by the legal doctrine, unlike the problems mentioned above)[10].

The methods of transformation were peculiar and different, for example, from those of Hungary. In Poland, Law and Justice did not have a qualified majority to amend the text of the Constitution or write a new one, but it was able to take advantage of regulatory flaws in the selection of judges of the Constitutional Tribunal to totally take over this institution, only to fully capture it in a way which is partially illegitimate (as regards three out of fifteen members), but otherwise is perfectly legal and indisputable. Thus, the way was opened for virtually unlimited legislative choices, but, as mentioned, the regulation of parliamentary activity is one of those that has been least affected by this change.

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[9] However, it is worth mentioning the amendment of the Rules of procedure of the *Sejm* of 20 July 2018, with the addition of Articles 20a and 20b and the change of Art. 23, which allow the Speaker of the *Sejm* to ascertain, respectively, the damage to the authority of the body due to the behaviour of a deputy, the violation of public order always by a deputy within the circles of the institution, and to impose pecuniary sanctions for such conduct – by the *Prezydium* – up to half of the total remuneration, for a period not exceeding three months: see A. Rakowska-Trela 2020: 867. The change arose following some objections from opposition MPs.

[10] But Bugarič (2019: 600) noted a greater reactivity of the oppositions in Poland as opposed to Hungary, which seems still true at the time of writing.

Some aspects on which the status of the oppositions has been mortified deserve to be briefly outlined, beyond the limited changes to the normative system[11]. In the first place, the law-making process was subjected, whenever this corresponded to the interests of those in power, to an unusual acceleration (legislative fast-tracking) also favoured by the use of a technique already consolidated in Hungary. We are referring to the submitting of a large number of bills in the form of (only formally) parliamentary initiatives, which – as already allowed by the Rules of procedure – avoided lengthening the times with committee hearings open to other institutions, non-governmental organizations, and so on. These are often technically elaborate initiatives on complex subjects, such as the organisation of the courts of justice or the prosecutor's office, in which the trace of governmental activity is evident.

In addition to this, the speaking times of deputies – it must be understood, of the opposition – have often been limited to the minimum during debates in the plenary session and in the commissions, and sometimes the chairman of some of these, especially the justice commission, has literally turned the microphone off to MPs who were critical of the bills being discussed. Among the most sensational episodes, we note one of the 8th term (2015-2019): on 16 December 2016, following some protests by the opposition in the plenary Chamber of the *Sejm* during the discussion of the budget for 2017, the works were interrupted by the Deputy Speaker and subsequently transferred to the Column Hall, where it was made difficult for some deputies to participate (and votes are counted manually, in the absence of electronic tools available in the main hall, even in doubt as to the presence of a quorum. See Rakowska-Trela 2020: 863 and Sadurski 2019, 132-135, where a massive response to claims such as those under the previous note is provided). The conflict escalated into a court case in

[11] For the sake of completeness, an opposite approach to the subject matter is presented by Machelski (2021: 234). According to this minority opinion, no problem exists since «(e)lections take place regularly, without any restrictions such as those concerning gatherings and the media or the de-legimitisation of the opposition, while the latter tries to undermine the legally established government majority by negating the acts adopted by the *Sejm* and by questioning in courts the decisions taken by the organs of administration«, adding that «(t)he opposition is concentrated on an ideological message. Despite intellectual ambitions, its programme proposal is based on stereotypes and the superficial», whereas «(t)he centre-right parliamentary majority governing after 2015 is not undermining the democratic system. It does not come forward with any conflicting postulate therewith. The Government does not suppress pluralism in the media; it does not control all aspects of governing the state; it is subject to constitutional limitations. Public institutions were not colonised by the political authority. They are not dismantled but under the process of reform».

which the judge (Igor Tuleya) was subjected to a crackdown by the executive (see Morijn 2020).

In the 9th term, however (2019-2023), the most striking cases – at least two of them – were those in which the Speaker of the *Sejm* ordered to repeat the vote, without any normative justification, after the Government lost a vote. One episode occurred in November 2019, during the election of four supplementary members of the National Council of the Judiciary (KRS), the second in August 2021 – and better known in the news at least nationally – in the vote on the so-called *lex* TVN, which has already been mentioned in § 4. Indeed, in these cases it was not about a question of macroscopic oppression of the parliamentary minority, but rather of episodes in which the governmental power, and the dominant party, exhibited their unchallenged ability to impose their will almost at whim. More generally, considering the functions of parliamentary control over the Government, as an index of the weakening of Parliament – where the oppositions are formally represented – one can also evaluate the number of days dedicated to parliamentary sessions each year, which has been decreasing significantly in the last fifteen years but with a growing trend lately[12].

An attempt was recently made to show how in recent years the status of the opposition has somehow enhanced, although paradoxically (Matuszek 2022). Even acknowledging the questionable constitutionality of certain legislative solutions, it was found that, for example, the Act on the Council for National Media (*Rada Mediów Narodowych*), of 2016, has for the first time offered to the oppositions an explicit and formal recognition, by granting them two out of five members that make up the body (the two of them must be appointed by the Head of State). Moreover, the Electoral Code was amended in 2019 in such a way as to make sure, as much as possible, that four out of nine members of the National Electoral Commission (*Państwowa Komisja Wyborcza*) – with high legal qualifications anyway – represent groups from the parliamentary opposition, by preventing the biggest party from appointing more than three. One could say that such legislation offers recognition to the opposition by freezing their minority status not only in parliamentary Assemblies, where politics triumphs but also within bodies which should respond to another logic. What is worse, in the first case it was also about doubling the tasks of an already existing institution, the National

[12] According to the statistical data processed by the official website of the *Sejm*, in the last fifteen years the number of annual plenary session days was as follows (average by legislature): VI (2007-2011), 73.5; VII (2011-2015), 73.2; VIII (2015-2019), 56.2; IX (2019-2023, excluding the current year), 52.3.

Council for Radio and Television, directly empowered by the Constitution, in which the largest single party still could not reach a dominant position (and by the way the new body paved the way for exacerbating the dominance of the ruling party in the public media system in an unprecedented way). In the case of the Electoral Commission, the amendments crushed the previous composition, dating back to the early Nineties, according to which the body consisted of nine judges, all of them taken from the highest jurisdictions, namely the Supreme Court, the Constitutional Tribunal and the Supreme Administrative Court, whereas now the judiciary appoints only two of nine members (thereby destroying a good practice of electoral administration on a comparative level). Thus, it is allowed to conclude that the involvement of the opposition was a *façade*, whose true purpose was the politicisation of important State organs which should be and remain neutral.

The clearest evidence of the conditions of compression in which the opposition has found itself ultimately comes from the very institution that seems the most appropriate to protect its role, as well as to defend the interests of those who are represented by it. We refer to the direct application to challenge the constitutionality of acts of Parliament, provided for by Art. 191.1 Const., which is also granted – as already mentioned in § 4, which would have been the most appropriate for discussing it – to a minimum of 50 deputies or 30 senators. The list of bodies entitled to make such an application under Art. 191 is very broad, and in some cases suggests a kind of opportunity which is offered primarily to State bodies who express the will of the majority.

On the other hand, even the possibility attributed to a large number of deputies or senators does not necessarily have to be traced back to the opposition as such – as demonstrated by the case of the last parliamentary term, when judgment K1/20, of November 2020, was rendered on an appeal by a group of deputies of the majority PiS party, as a move to achieve the goal of almost completely suppressing the right to abortion without risking the unpopularity of a decision based on a parliamentary vote, a decision which was instead entrusted to the quieter environments of a judicial body. All this said, and beyond instrumental uses, it remains true that an application available to a small fraction of members of Parliament is the best way to also (and above all) allow the opposition to access an abstract judgment of constitutionality on a binding legal act.

The fact is that, in the present situation, it is an outdated institution. The capture of the body entrusted with the task to control the constitutionality of statute law, which has now taken place in total form, has led, among other

things, to such distrust in the body itself, as to determine a real escape of the oppositions from the opportunity to resort to it, just at a time when the opportunities to do so would be countless. The Tribunal itself has set aside any function of protection of any type of minority through its powers since all methods of access are in fact deactivated. Apart from the occasional rubber-stamping activity for government decisions, the body itself is almost inactive.

The current status of the oppositions is somewhat compressed and yet is maintained in part thanks to a rather active public opinion and civil society, but otherwise it is entrusted to the whims of the executive, and the latter's will not to crush them completely, certainly not to its impossibility to do so. In part, the reactions of the European Union also count, through economic conditionality or the weight of some judicial decisions. But ultimately the future fate of democracy in Poland will be determined by the population itself. If the conditions of the current regime will change, then even the opposition will be returned to a status of dignity at least equal to that envisaged by the text of the Constitution and by its spirit.

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Le statut juridique de l'opposition politique en Moldavie et en Roumanie

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1. Introduction

«La domination de la majorité, si caractéristique de la démocratie, se distingue de toute autre domination parce qu'en son essence la plus profonde, non seulement elle suppose par définition même, mais encore reconnaît politiquement et [...] protège une opposition – la minorité». C'est ainsi qu'expliquait Hans Kelsen, dans son célèbre ouvrage *La démocratie, sa nature, sa valeur* (Kelsen 1988: 22), toute la force de la démocratie libérale, qui repose sur le couple formé par la majorité, qui décide, et la minorité, qui s'oppose. L'exercice du pouvoir est ainsi leur œuvre commune (Leclercq 1971: 29), l'opposition ne devant pas être entendue comme un acte de contestation à l'égard des décisions majoritaires. Il s'agit d'une fonction exercée en vue de l'intérêt général, à travers, d'une part, la représentation des citoyens qui ne se retrouvent pas dans la politique menée par la majorité et, d'autre part, la participation active à la limitation du pouvoir, les critiques de l'opposition

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pouvant finir par infléchir la politique de la majorité[1], et de la collaboration des pouvoirs, avec notamment la participation à certaines fonctions, comme c'est le cas, par exemple, des commissions parlementaires. L'opposition n'est donc pas la conséquence de la démocratie, elle en est le critère, raison pour laquelle elle se doit d'être reconnue et dotée d'un véritable statut.

L'étendue de la capacité de l'opposition à exercer ses fonctions dans un régime politique donné peut ainsi être considérée comme l'expression de son degré de maturité démocratique. *A contrario*, lorsqu'elle n'en assume aucune, c'est le signe d'une démocratie défaillante. Si ces principes, consacrés initialement dans le modèle britannique[2] ont été intégrés, certes à des degrés différents, dans les systèmes constitutionnels des pays occidentaux depuis la fin de la Seconde Guerre mondiale, dans le cas des pays de l'Est, le défi auquel ils ont été confrontés il y a trois décennies a été double. L'alignement aux pratiques occidentales impliquait, en effet, l'existence préalable de partis politiques pouvant former l'opposition, c'est-à-dire l'établissement d'un système multipartite. En Moldavie et en Roumanie, cas d'étude de la présente recherche, les partis politiques ont été au centre des réformes effectuées dans le contexte de la fin du régime communiste.

Jusqu'à l'instauration du communisme – en 1940 pour la Moldavie[3] et en 1947 pour la Roumanie[4] – les deux pays ont connu une histoire consti-

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[1] Hans Kelsen soulignait à ce titre que «*La* volonté générale formée sur la base du principe majoritaire ne résulte nullement d'une décision dictatoriale imposée par la majorité à la minorité, mais de l'influence réciproque que les deux groupes exercent l'un sur l'autre, du choc de leurs orientations politiques antagonistes» (Kelsen 1988: 66-67).

[2] Le modèle de consécration du rôle de l'opposition se trouve en Grande-Bretagne. L'opposition y fait partie du système constitutionnel même. Son organisation est favorisée par le bipartisme. L'opposition a ainsi son leader, rémunéré par l'État, et une structure permanente, le *shadow cabinet*, qui contrôle le Gouvernement en place et prépare, dans le même temps, le programme d'un exécutif alternatif prêt à prendre la relève.

[3] À la suite de la signature du Pacte Ribbentrop-Molotov, le 23 août 1939, par lequel l'Allemagne nazie et l'URSS se sont partagé les sphères d'influence territoriale en Europe centrale et orientale, la Roumanie a reçu un ultimatum le 28 juin 1940 de la part de l'URSS, par lequel était demandée l'évacuation de l'administration civile et de l'armée roumaine de Bessarabie, dans un délai de quatre jours. Menacée d'être attaquée, comme c'était déjà le cas de la Pologne, la Roumanie a cédé ce territoire à l'URSS, ce qui a conduit à la création de la République socialiste soviétique de Moldavie. L'occupation soviétique a été brièvement interrompue en 1941, après que la Roumanie, venant en soutien de l'Allemagne, ait lancé des opérations militaires pour libérer les territoires occupés par l'URSS. Ces territoires ont finalement été réoccupés par les Soviétiques en 1944.

[4] La République socialiste de Roumanie a été créée le 30 décembre 1947 lors de l'abolition du Royaume de Roumanie et de l'abdication du roi Michel.

tutionnelle commune, au cours de laquelle se sont succédé des régimes politiques ouverts au pluralisme politique. Des formes naissantes de groupements politiques assimilables à des partis sont apparues depuis l'époque du Règlement organique, dans les Principautés roumaines de Moldavie et de Valachie. Lors de la révolution de 1848, on trouve le nom de "parti" appliqué aux groupes révolutionnaires (Kogălniceanu 1848) et, en 1857, dans la Commission de surveillance des élections pour les "divans *ad hoc*", on parlait de l'existence de deux "partis", "Le conservateur" et "Le national" (Vesmaș 2003: 171-175). Les partis politiques modernes ne sont toutefois apparus en Roumanie qu'après 1860: le Parti libéral (appelé plus tard le Parti national libéral) et le Parti conservateur sont officiellement nés, respectivement, en 1875 et en 1880. Ils furent suivis par d'autres partis (Parti national paysan, 1926; Parti social-démocrate, 1927). En 1938, a été fait le premier pas vers l'abolition du régime fondé sur le pluralisme politique: le roi Charles II a suspendu le fonctionnement de tous les partis. Ils sont réapparus après le 23 août 1944, mais seulement pour une courte période, c'est-à-dire jusqu'à l'instauration du régime communiste fondé sur le parti unique. Une situation qui restera inchangée jusqu'en 1989, année qui a marqué le retour vers le pluralisme politique dans les deux pays.

Ainsi, en Moldavie, l'établissement du système multipartite remonte-t-il à août 1989, lorsque le Présidium du Soviet suprême de la République socialiste soviétique a adopté le décret n. 3459-X du 25 août 1989 sur la procédure d'enregistrement des associations publiques de citoyens, qui légalisait l'existence de nombreux groupes de mouvements informels. Le décret a été immédiatement suivi d'une décision du Conseil des ministres de la RSSM assurant son application (décision n. 254-256 du 26 octobre 1989). Le nouveau cadre normatif marque ainsi le début de l'éloignement du Parti communiste, qui détenait tous les instruments de pression et de pouvoir, et assure les conditions favorables à l'établissement d'un régime politique admettant la concurrence politique. Immédiatement après l'entrée en vigueur de la réforme, quatre groupes politiques ont formulé une demande d'enregistrement: le Front populaire de Moldova (FPM), l'Interfront Unitatea-Edinstvo, le Mouvement populaire «Gagauz Halki» et la Société culturelle des Bulgares «Vizrojdenie» (Archives du Gouvernement, année 1989). Dans les deux années qui ont suivi cette réforme, environ cent trente nouvelles organisations sociales ont été enregistrées, dont quatorze déclaraient comme objectif immédiat la volonté de mener des actions à caractère politique, s'inscrivant ainsi dans la logique de la concurrence politique (Munteanu 2010).

Les 25 février et 10 mars 1990, ont été organisées les premières élections législatives pluralistes. Créé en 1988, le Front populaire de Moldavie représentait à l'époque la formation socio-politique d'opposition la plus cohérente et la mieux articulée, jouissant d'une grande popularité et absorbant dans ses rangs de nombreux groupes d'élites culturelles, d'étudiants, d'associations professionnelles. À l'issue du second tour, il a recueilli 30 % du nombre total de sièges au Soviet suprême de la RSSM. Les parlementaires issus de ce parti ont joué un rôle essentiel lors du processus ayant conduit à la déclaration, le 27 août 1991, de l'indépendance de la République de Moldova.

L'adoption de la loi sur les élections parlementaires de 1993[5] a marqué le début d'une nouvelle étape dans l'évolution du système pluraliste, en établissant notamment des règles destinées à faciliter la participation des différents acteurs à la vie politique[6]. Les élections législatives organisées le 27 février 1994 ont confirmé l'émergence d'une multitude d'acteurs politiques, capables d'articuler leurs programmes et de mobiliser des acteurs dans le cadre de campagnes nationales, organisées selon les principes de la compétition politique[7]. Le rôle de l'opposition parlementaire a été défini pour la première fois dans le règlement intérieur du Parlement adopté en mars 1994. Dans le contexte des réformes du cadre normatif après l'adoption, le 29 juillet 1994, de la Constitution démocratique, il a été remplacé par un nouveau règlement, toujours en vigueur (règlement du 2 avril 1996, n. 797-XIII), régissant le fonctionnement du Parlement moldave, qui est monocaméral et qui est composé de 101 députés.

En Roumanie, la garantie du pluralisme politique a été l'un des sujets privilégiés de la politique constituante du postcommunisme. Le Conseil du Front de salut national (CFSN) et, par la suite, le Conseil provisoire de l'Union nationale (CPUN), qui ont géré la mise en œuvre du processus de transition, ont appelé les différentes associations souhaitant par-

[5] Loi de la République de Moldova relative à l'élection du Parlement, n. 1609-XII, 14 octobre 1993; décision du Parlement de la République de Moldova sur la mise en œuvre de la loi sur l'élection du Parlement, n. 1613-XII, 9 octobre 1993.

[6] Elle a notamment prévu l'introduction du système proportionnel pour les élections législatives, le seuil électoral s'élevant à 4% pour les partis politiques et à 1% pour les candidats indépendants.

[7] Le Parti démocrate agraire de Moldavie a obtenu 43,18% du nombre total des suffrages (soit 56 mandats), le Bloc du Parti socialiste et le Mouvement «Unitate Edinstvo» ont recueilli environ 22% (soit 28 mandats). Avec seulement 9,21% des voix, la troisième formation politique de la nouvelle législature – le Bloc des Paysans et des Intellectuels (BȚI) – a obtenu 11 mandats, et le Partis populaire chrétien démocratique (le successeur du Front Populaire) a obtenu 7,53%, soit 9 mandats de députés.

ticiper au débat politique à se manifester spontanément «*pour* devenir le moteur d'une pluralité sociale et tourner la page du monopole détenu par le Parti communiste» (Ionescu 2009: 225-234). La réglementation relative aux partis politiques, prévoyant la liberté de créer un parti politique, la procédure d'enregistrement et les principes de fonctionnement, a fait partie des premiers actes adoptés entre le 22 et le 31 décembre 1989 par le pouvoir révolutionnaire[8]. Leur statut a été renforcé par un nouveau décret-loi, n. 92, du 14 mars 1990, portant sur les élections parlementaires et présidentielles[9]. Cette réglementation provisoire a été rapidement remplacée. La nouvelle Constitution démocratique, contenant de nombreuses dispositions visant à garantir le pluralisme politique et prévoyant la création d'un Parlement bicaméral – la Chambre des députés formée de 330 députés et le Sénat formé de 136 sénateurs – a été approuvée lors du référendum organisé le 8 décembre 1991. Plusieurs lois organiques ont été par la suite adoptées afin de garantir la mise en œuvre effective des prescriptions constitutionnelles (loi n. 68 du 15 juillet 1992 relative à l'élection de la Chambre des députés et du Sénat; loi n. 27/1996 du 26 avril 1996 portant sur les partis politiques, remplacée par la loi n. 14/2003; loi n. 334/2006 visant le financement des activités des partis politiques et des campagnes électorales).

En effet, la Roumanie est un bon exemple de régulation «prescriptive», selon le terme employé par Kenneth Janda (Janda 2005: 8), des partis politiques: les dispositions constitutionnelles et législatives forment un cadre de réglementation très détaillé, établissant le sens, les fonctions, la structure et la dynamique interne, auquel tout groupe doit correspondre pour pouvoir être admis comme parti politique dans l'espace public roumain. Ces normes ont été explicitées par la Cour constitutionnelle dans les seize décisions rendues entre 1996 et 2003 en la matière (Ionescu 2013).

La lecture des textes constitutionnels des deux pays permet toutefois de constater l'absence d'une référence explicite à l'opposition politique, comme c'est le cas en France, par exemple, depuis la révision constitution-

[8] Il s'agit du décret-loi n. 8 du 31 décembre 1989 relatif à l'enregistrement et au fonctionnement des organisations politiques et publiques en Roumanie. Les neuf autres décrets-lois portaient sur la mise en place des autorités politiques.

[9] Les premières élections présidentielles et législatives postrévolutionnaires ont eu lieu le 20 mai 1990. En concurrence avec le Parti national chrétien-démocrate paysan et le Parti national libéral, le Front du salut national dirigé par Ion Iliescu a obtenu 85% du total des suffrages exprimés et, en conséquence, les deux tiers des sièges au Parlement.

nelle du 23 juillet 2008[10]. Certes, l'existence d'une protection constitutionnelle peut être déduite de l'interdiction à tout parti politique d'exercer le pouvoir d'État en son nom propre (art. 2, al. 2, de la Constitution moldave), ou du principe d'égalité devant la loi de tous les partis (art. 41, al. 2, de la Constitution moldave; art. 8, al. 2, de la Constitution roumaine), ou encore de l'obligation de l'État d'assurer le respect des droits et intérêts légitimes des partis et autres organisations socio-politiques (art. 41, al. 3, de la Constitution moldave). De même, les procédures de contrôle pouvant être exercées par les parlementaires à l'encontre de l'action gouvernementale, qui sont établies dans les deux textes constitutionnels, impliquent des droits pour les partis d'opposition (art. 98, 103-106 de la Constitution moldave; art. 103, 109-114 de la Constitution roumaine).

Leur absence explicite des Lois fondamentales montre que l'approche retenue par les constituants roumain et moldave ne s'aligne pas totalement à la conception kelsénienne, selon laquelle la protection de la minorité ne peut se voir juridiquement garantie que si la notion d'opposition parlementaire est intégrée dans la norme suprême (Kelsen 1988: 52). La question qui se pose est donc celle de savoir quelle est la place réelle de l'opposition dans les deux pays étudiés, au regard des normes juridique la réglementant et des pratiques instaurées en trois décennies de démocratisation? L'analyse sera effectuée au regard de sa représentation au sein des organes parlementaires et des possibilités qui lui sont ouvertes pour influencer les politiques défendues par la majorité (2), mais aussi pour sanctionner l'action gouvernementale à travers les procédures d'ordre politique (3) ou par la voie juridictionnelle ouverte devant la Cour constitutionnelle (4).

2. Les outils mis à la disposition de l'opposition parlementaire pour influencer les politiques défendues par la majorité

La lecture des règlements qui organisent le fonctionnement du pouvoir législatif en Moldavie et en Roumanie permet de relever une faible présence des références à l'opposition. Dans le règlement du Parlement mol-

[10] Au titre de l'article 48 de la Constitution française, «un jour de séance par mois est réservé à un ordre du jour arrêté par chaque assemblée à l'initiative des groupes d'opposition de l'assemblée intéressée ainsi qu'à celle des groupes minoritaires». L'article 51-1 du même texte prévoit que: «Le règlement de chaque assemblée détermine les droits des groupes parlementaires constitués en son sein. Il reconnaît des droits spécifiques aux groupes d'opposition de l'assemblée intéressée ainsi qu'aux groupes *minoritaires*».

dave[11], outre l'article 4 – qui définit l'opposition parlementaire comme étant «la fraction ou les fractions qui ne font pas partie de la majorité parlementaire et qui se sont déclarées dans l'opposition de celle-ci» – seuls trois autres articles y font une mention explicite. L'article 28 prévoit la nomination d'un représentant de l'opposition en tant que Président de la sous-commission en charge de l'exercice du contrôle parlementaire sur l'activité du service de renseignement et de sécurité, qui est créée au sein de la commission de la sécurité nationale. À son tour, l'article 28.1 établit la nomination d'un représentant de l'opposition en tant que Président de la sous-commission pour l'exercice du contrôle parlementaire sur l'exécution des arrêts et décisions de la Cour européenne des droits de l'homme, ainsi que des décisions de la Cour constitutionnelle, qui est créée au sein de la Commission de la magistrature, des nominations et des immunités. Aux termes de l'article 43.1, introduit par la loi n. 194 du 28 juillet 2016 (entrée en vigueur le 9 septembre 2016), l'opposition parlementaire, formée par les fractions parlementaires de l'opposition ou par les députés de l'opposition non affiliés, bénéficie du droit prioritaire de décider de l'ordre du jour de la première réunion plénière de chaque sixième semaine à compter de la date d'ouverture de la session parlementaire, le Bureau permanent étant obligé d'en tenir compte.

Trois autres articles du règlement octroient des droits spécifiques à l'opposition sans y faire explicitement référence. Il s'agit notamment de l'article 122, qui reconnaît le droit à tout député de poser des questions (dans la limite de deux questions par député) aux membres du Gouvernement, lors de la dernière heure de travail du Parlement tous les jeudis, à l'exception du dernier jeudi du mois. En vertu de l'article 123, le député qui pose les questions est en droit d'indiquer s'il souhaite recevoir une réponse écrite ou orale. Dans le cas où est sollicitée une réponse écrite, le Gouvernement est obligé de répondre dans un délai de 15 jours. Lorsque les échanges se font à l'oral, le temps réservé pour poser la question s'élève à 2 minutes et celui de la réponse ne doit pas dépasser 3 minutes. Si l'auteur de la question n'est pas satisfait de la réponse donnée par le ministre questionné, une minute supplémentaire lui est accordée pour exprimer son point de vue.

[11] Le règlement a été adopté par la loi n. 797 du 2 avril 1996, modifiée à dix-neuf reprises. La liste des modifications est disponible à l'adresse: <https://www.legis.md/cautare/getResults?doc_id=135296&lang=ro#>.

En Roumanie, le règlement de la Chambre des députés, adopté le 24 février 1994 par la décision n. 8/1994[12], contient trois références explicites à l'opposition parlementaire. L'article 148 alinéa 3) prévoit que, lors de l'ouverture de la séance, le Président de la Chambre est assisté de deux secrétaires nommés par rotation, dont l'un, en règle générale, est issu de l'opposition. Au titre de l'article 208, dédié au temps du Gouvernement, qui prévoit l'organisation de débats entre le Gouvernement et les parlementaires tous les lundis entre 16h00 et 18h00, à l'exception du jour désigné pour l'heure du Premier ministre, les groupes parlementaires d'opposition se voient octroyer 5 minutes pour présenter le sujet du débat et 3 minutes pour des éclaircissements supplémentaires, se temps passant à 5 minutes pour le plus grand groupe d'opposition. Ce temps est réduit à une minute pour les députés non affiliés. Enfin, en vertu de l'article 209, qui prévoit l'organisation, une fois par mois – généralement le premier lundi de chaque mois civil – d'un débat sur des questions d'intérêt majeur pour la vie politique, économique et sociale entre les députés et le Premier ministre, les députés de l'opposition, s'ils sont à l'origine de la demande du débat, disposent de 5 minutes pour présenter le thème. Le Premier ministre dispose de 5 minutes pour présenter son point de vue. Les représentants des groupes parlementaires disposent chacun de 5 minutes pour l'intervention, sauf la majorité parlementaire qui disposera de 15 minutes pour l'intervention. Le représentant des députés non affiliés dispose de deux minutes. A l'issue du débat, le Premier ministre dispose de 5 minutes pour répondre aux interventions.

Le règlement du Sénat[13] octroie un statut légèrement plus protecteur. L'article 27 prévoit que l'un des deux secrétaires assistants du Président du Bureau permanent est issu de l'opposition. De même, en vertu de l'article 40, l'un des deux secrétaires du Sénat est un représentant de l'opposition. Au titre de l'article 126, l'opposition est également présente aux côtés de la majorité dans le cadre de l'exercice de la fonction de secrétaire du Président ou du Vice-président qui le remplace lors de l'ouverture de la séance du Sénat. Dans le cadre de la procédure législative, l'article 147 du règlement octroie le droit au chef de chaque groupe parlementaire de contester le vote après l'annonce des résultats du vote d'un projet ou d'une proposition de loi. L'admission du recours a pour conséquence la répétition du vote. Au niveau

[12] Republié le 17 février 2021 conformément à la décision de la Chambre des députés n. 17/2021, qui a conduit à une nouvelle numérotation des articles du règlement.

[13] Adopté le 24 octobre 2005 par la décision du Sénat n. 28/2005 et modifié par les décisions du Sénat n. 114/2022 et n. 156/2022.

du dialogue avec les membres du Gouvernement et le Premier ministre, la procédure établie aux articles 182 et 183, ainsi que le temps de parole accordé sont identiques à ceux prévus par le règlement de la Chambre des députés.

Comme nous pouvons le constater, mis à part le cas des fonctions de secrétariat lors des séances des deux Chambres et des Bureaux permanents, la présence obligatoire de représentants de l'opposition n'est prévue nulle part ailleurs, notamment à la présidence de commissions ou sous-commissions parlementaires. Le même constat peut être fait à la lecture du règlement portant sur les activités communes de la Chambre des députés et du Sénat (adopté par la décision n. 4/1992). De manière générale, ledit règlement ne contient aucune référence à l'opposition. Dans la section 2, composée des articles 4 à 10, est prévue la création de trois types de commissions: les commissions mixtes permanentes, constituées au début de chaque législature, les commissions spéciales et les commissions d'enquête parlementaire. À l'article 7, il est simplement prévu que les commissions mixtes permanentes sont composées de personnel spécialisé sur décision du Parlement. La lecture de l'article 8 laisse supposer une possible influence de la part de l'opposition au niveau de la décision de création de commissions spéciales en vue de travailler sur l'élaboration de propositions législatives ou de mener un travail conjoint sur des textes normatifs complexes. Une telle initiative peut venir de la part des deux Bureaux permanents ou d'un quart du nombre total des députés ou des sénateurs, cette dernière hypothèse impliquant bien sûr des coalitions entre les partis d'opposition. Les propositions législatives élaborées par les commissions spéciales et les rapports de ces commissions sont inscrits en priorité à l'ordre du jour des réunions communes des deux Chambres par les Bureaux permanents. L'article 9 du règlement prévoit en des termes généraux la possibilité de créer des commissions d'enquêtes conjointes lorsqu'il est nécessaire d'éclaircir les causes et les circonstances dans lesquelles des événements se sont produits en vue d'établir les responsabilités et les mesures devant être prises pour y remédier. Aucune réglementation en ce qui concerne le droit de proposer la création d'une telle commission ou le mode de nomination des membres n'est en revanche établie.

La manière dont le fonctionnement du Parlement roumain est établi par les trois règlements précités met en évidence une maîtrise quasi-totale par les majorités parlementaires de l'ensemble des actions, qu'il s'agisse de la procédure législative, des débats avec les membres du Gouvernement, ainsi que des auditions et enquêtes pouvant être menées dans des domaines d'intérêt public majeur ou en cas d'une vérification concrète d'une quelconque mesure gouvernementale. L'article 184 du règlement du Sénat constitue une

preuve supplémentaire à ce titre. Ledit article porte sur l'information du Sénat et des sénateurs. Au niveau du droit de solliciter le Gouvernement en vue d'obtenir la communication d'informations ou de documents portant sur un sujet spécifique, il est octroyé au Président du Sénat, aux Présidents des commissions permanentes, qui sont généralement issus de la majorité – aucune disposition réglementaire ou législative ne prévoyant une quelconque contrainte à ce titre – et à tout sénateur, qui doit tout de même faire la demande par l'intermédiaire du Président du Sénat ou des Présidents des commissions, tous représentants de la majorité.

Le caractère totalement défavorable du statut accordé à l'opposition parlementaire par les règlements des Parlements moldave et roumain est mis en évidence à l'issue d'une simple comparaison avec celui détenu par l'opposition au sein de l'Assemblée nationale française. Ainsi, le règlement de la Chambre basse du Parlement français confie à l'opposition la présidence de certaines instances, comme c'est le cas de la présidence de la commission des finances, de l'économie générale et du contrôle budgétaire (art. 39), de la présidence de la commission spéciale chargée de vérifier et d'apurer les comptes de l'Assemblée nationale (art. 16). S'agissant des missions d'information créées par les commissions, la règle applicable est la suivante: les missions qui sont composées de deux membres doivent comprendre un député appartenant à un groupe d'opposition; une mission composée de plus de deux membres doit s'efforcer de reproduire la configuration politique de l'Assemblée (art. 145). De même, la composition d'ensemble du comité d'évaluation et de contrôle des politiques publiques – mis en place en 2009 – assure une représentation proportionnelle des groupes politiques (art. 146-2). Son Bureau comprend au moins un Vice-président d'opposition.

Le règlement reconnaît aussi à l'opposition le droit de prendre l'initiative, voire de piloter certaines missions de contrôle et d'évaluation. Les commissions d'enquête notamment procurent de longue date à l'opposition des moyens d'information et de contrôle efficaces, en particulier grâce à l'élargissement de leurs moyens d'investigation depuis 1977 et à la publicité de leurs auditions depuis 1991. Deux étapes importantes ont ensuite été franchies, en 2009 et en 2014, afin de conférer un «droit de tirage» aux groupes d'opposition et aux groupes minoritaires en matière de créations de commissions d'enquête et de missions d'information[14]. De même, la répartition

[14] Dans un premier temps, la résolution du 27 mai 2009 a prévu que chaque président de groupe d'opposition ou de groupe minoritaire pouvait demander, une fois par session ordinaire (à l'exception de celle précédant le renouvellement de l'Assemblée), en Conférence des présidents, qu'un débat sur une proposition de résolution tendant à la création d'une

majorité-opposition est la règle dans les activités du comité d'évaluation et de contrôle des politiques publiques. Chaque groupe peut obtenir de droit, une fois par session ordinaire, qu'un rapport d'évaluation soit réalisé dans le cadre des travaux du comité d'évaluation et de contrôle des politiques publiques (CEC). Par ailleurs, le règlement prévoit que, son programme de travail ayant été arrêté, le comité désigne, parmi les membres choisis par les commissions pour participer à l'évaluation, ou parmi ses propres membres, deux rapporteurs: l'un de ces deux rapporteurs doit appartenir à un groupe d'opposition (art. 146-3). Enfin, le suivi de l'application des lois est confié à des binômes majorité-opposition[15]. Le règlement prévoit à l'article 145-7, depuis la résolution du 27 mai 2009, que le rapport sur la mise en application de la loi est présenté par deux députés et que l'un d'eux doit appartenir à un groupe d'opposition (Vidal-Naquet 2009).

Si ce type d'initiatives peut être relevé dans la pratique parlementaire moldave et roumaine, le désavantage réside dans l'absence de leur règlementation explicite, qui exige l'instauration d'une pratique permanente, plus respectueuse des droits de l'opposition, et non pas occasionnelle, celle-ci restant redevable aux visions ou fins politiques de la majorité. Une telle situation affaiblit le pouvoir d'action et d'influence de l'opposition, qui se retrouve, de ce fait, obligée d'adopter le plus souvent une démarche contes-

commission d'enquête soit inscrit d'office à l'ordre du jour d'une séance au cours de la première semaine de contrôle et d'évaluation. Une demande de création de commission d'enquête présentée dans le cadre de ce droit de tirage pouvait cependant être rejetée à la majorité des trois cinquièmes des membres de l'Assemblée. La résolution du 28 novembre 2014 a modifié et élargi ce dispositif afin de rendre plus effectif le droit de tirage dont disposent les groupes d'opposition ou minoritaires: désormais, une fois par session ordinaire – et toujours à l'exception de celle précédant le renouvellement de l'Assemblée –, la création d'une commission d'enquête ou d'une mission d'information est de droit à la demande d'un groupe d'opposition et minoritaire. Le règlement ne prévoit plus que l'Assemblée puisse s'y opposer par une décision prise à la majorité des trois cinquièmes de ses membres. Cette nouvelle prérogative est toutefois alternative: si un groupe a demandé la création d'une commission d'enquête, il ne peut demander celle d'une mission d'information au cours de la même session. De même, un groupe ne peut faire jouer son droit de tirage tant qu'une précédente commission d'enquête ou mission d'information créée, à son initiative, sur le même fondement, n'a pas achevé ses travaux.

[15] En effet, à l'issue d'un délai de six mois suivant l'entrée en vigueur d'une loi dont la mise en œuvre nécessite la publication de textes de nature réglementaire, un rapport sur sa mise en application doit être présenté à la commission compétente. Ce rapport fait état des textes réglementaires publiés et des circulaires édictées pour la mise en œuvre de ladite loi, ainsi que de ses dispositions qui n'auraient pas fait l'objet des textes d'application nécessaires.

tataire, en recourant aux moyens mis à sa disposition pour bloquer l'action du Gouvernement et de sa majorité.

3. Les mécanismes de blocage politique de l'action du Gouvernement pouvant être utilisés par l'opposition

La Constitution roumaine prévoit cinq procédures pouvant permettre aux partis d'opposition de dénoncer les politiques gouvernementales soutenues par la majorité parlementaire, voire de bloquer l'investiture ou retirer la confiance accordée au Gouvernement. Premièrement, en vertu de l'article 103 alinéa 2) de la Constitution, le candidat à la fonction de Premier ministre doit demander, dans un délai de 10 jours, le vote de confiance du Parlement sur la base du programme politique et de la liste des membres du Gouvernement. Les deux aspects sont débattus par la Chambre des députés et le Sénat réunis en séance commune. Le vote est accordé à la majorité du nombre total des parlementaires. Le refus du Parlement d'accorder la confiance au Gouvernement reste toutefois exceptionnel. Ce fut le cas, par exemple, le 20 octobre 2021, les parlementaires ayant refusé d'accorder leur confiance au Gouvernement Cioloș. Un nouveau Gouvernement, dirigé par Nicolae Ciucă, a fini par obtenir le vote de confiance le 25 novembre 2021.

La procédure des interpellations, prévue à l'article 112 alinéa 1) de la Constitution, représente le deuxième mécanisme pouvant être utilisé par les parlementaires. Les interpellations peuvent être initiées par tout membre du Parlement, par plusieurs membres ou un ou plusieurs groupes parlementaires. Elles sont faites par écrit, en indiquant leur objet, sans aucun développement, et en concrétisant la forme de la réponse demandée. Les interpellations portent sur les différents aspects de la politique interne ou externe du Gouvernement. Le délai de réponse accordé au Gouvernement est de deux semaines. Il peut être rallongé à trois semaines si le Sénat ou la Chambre des députés l'accepte.

L'article 112 alinéa 2) de la norme fondamentale roumaine octroie aux députés et aux sénateurs le droit d'adopter des motions simples pour exprimer leur position sur une question de politique intérieure et extérieure ou, selon le cas, sur une question ayant fait l'objet d'une interpellation. Les motions simples, qui représentent le troisième type de procédures mis à la disposition des parlementaires en vue de contrôler l'action du Gouvernement, doivent être initiées par au moins 50 députés ou sénateurs, être motivées et soumises au Président de séance lors d'une séance publique. Le Président

de la chambre concernée fixe la date du débat, dans un délai maximum de 6 jours à compter du dépôt et en avise le Gouvernement. Le texte de la motion ne peut faire l'objet d'aucun amendement et les élus l'ayant soulevée ne peuvent pas retirer leur soutien si la discussion a commencé. Le débat se termine par un vote, la majorité requise est une majorité simple des voix des élus présents. Elle est individuelle et est donc faite à l'encontre d'un ministre.

Au niveau des pratiques, selon les chiffres officiels fournis sur le site internet du Sénat[16], on compte quarante-six dépôts de motions simples: vingt-quatre lors de la législature 2008-2012 (dix par le Sénat et quatorze par la Chambre des députés)[17]; sept lors de la législature 2012-2016, déposées par le Sénat[18]; quatorze lors de la législature 2016-2020, déposées par le Sénat[19]; une seule déposée par le Sénat lors de la législature 2020-2024. Sur les quarante-six motions déposées, seules quatre ont fini par obtenir la majorité requise (9 juin 2020; 25 mai 2020; 18 mai 2020; 9 décembre 2019).

Le débat quant aux effets de cette procédure a été porté devant la Cour constitutionnelle roumaine, certains parlementaires réclamant la révocation du ministre ayant fait l'objet d'une motion. Par la décision n. 148/2007, la Haute juridiction a jugé conformes à la Constitution les dispositions de

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16 Voir notamment: <https://www.senat.ro/MotiuniV.aspx>.

17 Les sujets sur lesquels les motions ont porté ont été les suivants: l'incompatibilité de l'administration de l'armée roumaine avec les engagements pris sur le plan externe; la mauvaise administration mise en œuvre par le Gouvernement; l'organisation négligente du système éducatif; la non-application des politiques d'infrastructure promises; la démission du ministre de la Défense nationale; le niveau désastreux du système de santé; la politisation de l'agriculture et le manque de fonds pour la technologie; la destitution du ministre des Affaires étrangères; le faible niveau de vie de la population; l'organisation défaillante du ministère de l'Intérieur.

18 Les sujets sur lesquels les motions ont porté ont été les suivants: l'absence de stratégie concernant les fonds européens; le faible niveau des allocations prévues pour les enfants roumains; le désastre de l'administration agricole; le sous-développement du système de santé; le blocage des grands projets d'infrastructure; la démission du ministre de l'Intérieur.

19 Les sujets sur lesquels ont porté les motions ont été les suivants: le sous-développement de l'éducation et la démission du ministre de l'Éducation; la mauvaise gestion des finances publiques; le manque de programmes d'absorption des fonds européens; la politisation de l'éducation; la destitution du ministre de l'Économie, le sous-développement des infrastructures et le manque d'investissement; le manque de promotion du tourisme; le contrôle de la justice et la destitution du ministre de la Justice; la destitution du ministre des Finances publiques; la mauvaise organisation du processus électoral à l'étranger; le non-respect du programme gouvernemental; le manque d'investissements dans l'agriculture et le limogeage du ministre de Tutelle; la mauvaise gestion de la pandémie; la destitution du ministre du Travail.

l'article 157 alinéa 2) du règlement du Sénat, dans la mesure où l'adoption d'une motion simple n'oblige pas le Premier ministre à proposer la révocation d'un membre du Gouvernement dont l'activité a fait l'objet d'une motion. À cette occasion, les juges constitutionnels ont souligné l'obligation du Gouvernement et de chacun de ses membres de répondre aux questions ou interpellations formulées par les députés ou sénateurs sur le fondement des dispositions de l'article 112 de la Constitution, dans les conditions prévues par les règlements des deux Chambres du Parlement. Cependant, les règlements parlementaires peuvent prévoir les conditions dans lesquelles les réponses doivent être données, mais ils ne peuvent pas établir l'obligation du Gouvernement ou de ses membres de prendre certaines mesures concrètes, jugées nécessaires par les parlementaires. Le texte constitutionnel ne prévoit ni la possibilité pour les parlementaires d'ordonner au Gouvernement la prise de mesures obligatoires concrètes, ni celle de la révocation du ministre à l'encontre duquel la motion simple a été votée. L'introduction de telles mesures dans les règlements du Parlement serait donc contraire à la Constitution.

Pour ce qui est de la quatrième procédure, l'article 113 de la Constitution roumaine établit le droit des parlementaires d'engager une motion de censure à l'encontre du Gouvernement. La Chambre des députés et le Sénat, réunis en séance commune, peuvent retirer la confiance accordée au Gouvernement en adoptant une motion de censure, à la majorité des voix des députés et des sénateurs. Cette procédure peut être initiée par au moins un quart du nombre total des députés et des sénateurs et est communiquée au Gouvernement à la date du dépôt. La motion de censure est débattue au bout de 3 jours à compter de sa date de présentation en séance commune des deux Chambres. Si elle est rejetée, les députés et les sénateurs qui l'ont signée ne peuvent plus proposer, au cours de la même session, une nouvelle motion, à moins que le Gouvernement n'engage sa responsabilité conformément à l'article 114 de la Constitution. Si la majorité requise est obtenue, le Premier ministre doit présenter la démission du Gouvernement et le Président doit à son tour nommer un nouveau Premier ministre en vue de former un nouveau Gouvernement.

Enfin, dans le cadre de la cinquième procédure, prévue à l'article 114 de la Constitution roumaine, l'opposition peut intervenir à la suite de l'engagement de sa responsabilité par le Gouvernement sur un programme, une déclaration de politique générale ou un projet de loi, devant les deux chambres parlementaires réunies en séance commune. En cas de désaccord, les parlementaires peuvent voter une motion de censure dans les conditions prévues à l'article 113 de la norme suprême. Si le nombre de voix requis est

obtenu, le Gouvernement est démis de ses fonctions. Dans le cas contraire, le Gouvernement reste en place et le projet de loi est considéré comme adopté. S'il s'agit d'un programme ou d'une déclaration de politique générale, leur mise en oeuvre devient obligatoire pour le Gouvernement.

Cette procédure est assez régulièrement utilisée par le Gouvernement roumain, du fait notamment que l'article 114 de la Constitution ne prévoit aucune restriction en ce qui concerne la nature du projet de loi, sa structure, le nombre de projets pour lequel le Gouvernement peut engager sa responsabilité le même jour ou au cours d'une période donnée, ou encore concernant le moment où cette procédure peut être utilisée. Dans la pratique, peuvent être relevées des situations très diverses. Le Gouvernement a engagé sa responsabilité: pour des projets de loi d'approbation d'une ordonnance d'urgence (voir la décision de la Cour constitutionnelle n. 34/1998); pour un projet de loi qui contenait plusieurs objets de réglementation (décisions de la Cour constitutionnelle n. 147/2003 et n. 375/2005); pour des projets de loi qui avaient déjà été adoptés, avec des modifications, par la Chambre des députés et avaient été transmis au Sénat (décision de la Cour constitutionnelle n. 1.431/2010); sur des réglementations d'une grande complexité (Popescu 2009: 484), mais aussi le même jour sur plusieurs projets de loi (Cour constitutionnelle, décision n. 298/2006; Safta et Benke 2010: 41).

La législature au cours de laquelle le Gouvernement roumain a engagé le plus souvent sa responsabilité devant le Parlement fut celle allant de 2008 à 2012. Il s'est agi de seize projets de lois. En réponse, les parlementaires formant l'opposition ont engagé onze motions de censure, dont deux ont été adoptées: la première, le 13 octobre 2009 et la seconde, le 4 avril 2012. Au cours de la législature 2012-2016, les quatre motions de censure engagées ont été rejetées. Pendant la législature 2016-2020, trois des neuf motions de censure engagées se sont soldées par la démission du Gouvernement: celle du 21 juin 2017; celle du 10 octobre 2019; celle du 3 février 2020. Enfin, pendant la législature en cours, 2020-2024, trois motions ont été déposées par les parlementaires représentant les deux chambres, une seule ayant conduit à la démission du Gouvernement Cîțu[20].

Les procédures établies par la Constitution moldave sont quasi identiques à celles prévues en Roumanie. Au niveau de l'investiture du Gouvernement, la seule différence réside dans le délai prévu à l'article 98 de la norme suprême, au cours duquel le candidat à la fonction de Premier ministre doit obtenir le

[20] Les informations relatives aux motions engagées et aux résultats qui en sont issus sont disponibles sur le site internet du Sénat: <https://www.senat.ro/MotiuniV.aspx>.

vote de confiance des parlementaires, qui est de quinze jours et non pas de dix. C'est justement en raison de l'impossibilité d'obtenir le vote favorable des députés socialistes et communistes que Maia Sandu, élue présidente de la République de Moldova en 2020, a prononcé, par le décret n. 77-IX du 28 avril 2021, la dissolution du Parlement. À l'issue des élections de juillet 2021, le parti pro-présidentiel PAS a obtenu 63 sièges (sur un total de 101 sièges) au lieu des 14 détenus dans l'ancienne législature. Le Gouvernement Gavriliță a donc obtenu sans surprise le vote de confiance.

La motion simple est prévue à l'article 105 alinéa 2) de la Constitution. Les députés peuvent adopter une telle motion pour exprimer leur position au regard de l'objet d'une interpellation. Cette motion peut être initiée par au moins quinze députés. Au cours de l'année 2016, elle a été utilisée à sept reprises par les députés socialistes contre différents membres du Gouvernement pro-occidental[21]. Au regard de la composition actuelle du Parlement, seuls les députés formant le Bloc des communistes et des socialistes, détenant trente-et-un sièges au Parlement, peuvent engager une telle procédure. Le député indépendant et les six députés du Parti «Șor» doivent obtenir le soutien de leurs collègues communistes ou socialistes pour le faire. Étant largement minoritaires dans le Parlement actuel, les députés socialistes et communistes utilisent la motion simple comme seule arme de pression. Le 24 novembre 2022, ils l'ont notamment fait pour déclarer leur désaccord au sujet de la politique menée par le ministère de la Justice et, plus précisément, les réformes mises en œuvre au cours des derniers mois qui, selon eux, rendraient totalement dépendants du ministre de la Justice les procureurs et les juges. Ils ont de ce fait demandé l'exclusion du ministre de la Justice de la composition du Conseil supérieur de la magistrature et la réévaluation des réformes mises en œuvre pour mettre fin aux pressions politiques sur le système judiciaire. La motion a été rejetée par la majorité parlementaire.

De même, conformément à l'article 106 de la Constitution, le Parlement peut exprimer sa défiance à l'égard du Gouvernement, ce dernier devant présenter sa démission si la majorité des voix des députés est réunie. L'initiative de l'expression de la défiance est examinée trois jours après sa présentation au Président du Parlement. Un tel cas est intervenu en 2013, les parlementaires ayant exprimé leur défiance à l'égard du Gouvernement Filat en raison des révélations de conversations téléphoniques prouvant l'implication de certains ministres et du Premier ministre dans la commission d'actes de cor-

[21] Informations disponibles sur le site internet du parti: <https://socialistii.md/motiune-simpla/>.

ruption (décision du Parlement n. 28 du 5 mars 2013). Une procédure dont le résultat est donc identique à la motion de censure prévue en Roumanie, mais qui est appelée «expression de défiance». *A contrario*, le constituant moldave utilise le terme de motion de censure à l'article 106.1, qui porte sur l'engagement de sa responsabilité par le Gouvernement sur un programme, une déclaration de politique générale ou un projet de loi. Comme on peut le relever, les champs d'application sont identiques à ceux prévus dans la Constitution roumaine. Le même constat peut être fait au niveau de la procédure devant être mise en œuvre et ses effets. Dans l'histoire de la pratique institutionnelle moldave, une seule motion de censure a abouti à la suite de l'engagement de la responsabilité du Gouvernement par la Première ministre de l'époque, Maia Sandu, votée le 12 novembre 2019. Cette procédure a été moins utilisée en Moldavie qu'en Roumanie, les majorités parlementaires y ayant été plus stables. Les mécanismes d'action d'ordre politique sont *de facto* difficiles à mettre en œuvre et échouent dans leur très grande majorité, contrairement à la procédure de contrôle de constitutionnalité pouvant être déclenchée à l'encontre de l'action de la majorité.

4. Le contrôle juridictionnel de l'action de la majorité à travers la saisine de la Cour constitutionnelle

Un autre moyen de pression mis à la disposition de l'opposition est celui de la possibilité de saisir la juridiction constitutionnelle afin de contester la constitutionnalité des normes adoptées par la majorité parlementaire ou émises par le pouvoir exécutif. Le degré d'ouverture de la saisine, ainsi que les types de normes invocables déterminent le pouvoir d'influence pouvant être exercé par l'opposition parlementaire. La lecture des textes constitutionnels et législatifs portant sur la compétence des Cours constitutionnelles des deux pays permet de constater que la Moldavie octroie à l'opposition une marge d'action assez importante en la matière, celle de l'opposition parlementaire roumaine étant en revanche largement inférieure.

Dans le cas moldave, en vertu de l'article 25 de la loi n. 317 du 13 décembre 1994 portant sur la Cour constitutionnelle de la République de Moldova, tout député ou toute fraction parlementaire peut saisir la Haute juridiction en vue de demander: l'exercice du contrôle de constitutionnalité des lois, des décisions du Parlement, des décrets du Président de la République de Moldova, des décisions et ordonnances du Gouvernement et des traités internationaux auxquels la République de Moldova est partie (art.

135, al. 1, lettre a, Const.); l'interprétation d'une ou plusieurs dispositions de la Constitution (art. 135, al. 1, lettre b, Const.). Le modèle retenu par le constituant moldave octroie donc aux députés de l'opposition des pouvoirs de contrôle très étendus. En l'absence de tout quorum, un seul député peut contester la constitutionnalité non seulement d'une loi adoptée par la majorité et, généralement, à l'initiative du Gouvernement, mais également des actes réglementaires émis par le Président et le Gouvernement. L'analyse des données statistiques fournies par la Cour constitutionnelle permet de relever que les saisines déposées par les parlementaires au cours des dix dernières années constituent environ 10 % du nombre total des saisines, elles varient entre 20 et 30 chaque année, à l'exception de l'année 2020, où le nombre de saisines d'origine parlementaire s'est élevé à 64, et de la période 2013-2015, où leur nombre a été respectivement de 38, 49 et 41[22].

Le nombre de saisines parlementaires est en effet révélateur du climat politique existant dans le pays. Pendant la période 2012-2016, la majorité était détenue par la droite (avec comme Président Nicolae Timofti), les socialistes et les communistes ayant fait preuve d'un fort activisme devant la Cour constitutionnelle pour contester les politiques gouvernementales. Ensuite, en 2020, les tensions nées entre les partis proeuropéens et les partis prorusses à l'issue de l'élection de Maia Sandu à la présidence du pays ont eu une répercussion sur le nombre de saisines déposées devant la Cour constitutionnelle. De manière générale, les décrets présidentiels font l'objet de peu de contestations. Elles ont été plus nombreuses durant les premières années d'indépendance, les décrets présidentiels querellés portant sur des domaines assez variés, tels que la fiscalité immobilière, l'ouverture des représentances diplomatiques, le domaine financier, la désignation et la destitution des magistrats, les décrets de nomination dans la haute fonction publique, etc. (voir, respectivement, Cour constitutionnelle de la République de Moldova, décisions: n. 57, 21 décembre 1995; n. 112, 24 janvier 1996; n. 28, 21 février 1996; n. 16, 4 avril 1996; et décisions n. 40, 22 décembre 1997 et n. 36, 10 décembre 1998). Par la suite, les seuls décrets dont la constitutionnalité a été contestée devant la Cour ont été ceux portant désignation du candidat à la fonction de Premier ministre (décisions n. 32, 29 décembre 2015; n. 15, 8 juin 2019; n. 6, 23 février 2021; n. 10, 22 mars 2021.

[22] Les données statistiques sont disponibles dans les rapports annuels de la Cour constitutionnelle moldave: <https://www.constcourt.md/pageview.php?l=ro&idc=14&t=/Prezentare-generala/Raportul-anual>.

En ce qui concerne les saisines visant l'exercice du contrôle de constitutionnalité des lois ou d'interprétation de la Constitution déposées par l'opposition, la Cour est le plus souvent appelée à se prononcer sur des questions épineuses qui divisent la classe politique moldave, d'ordre identitaire ou concernant l'orientation Est-Ouest des politiques nationales. C'est notamment dans ce contexte que la Haute juridiction a été amenée à se prononcer à la suite des saisines individuelles déposées par trois députés de l'opposition proeuropéenne pour contester la constitutionnalité de la loi n. 57 du 23 avril 2020 portant sur la ratification de l'accord entre le Gouvernement de la Fédération de Russie et le Gouvernement de la République de Moldova sur l'octroi d'un prêt financier d'État au Gouvernement de la République de Moldova (décision n. 12, 7 mai 2020). La décision de la Cour du 21 janvier 2021, n. 4, par laquelle elle a invalidé une loi du 16 décembre 2020 octroyant un statut privilégié à la langue russe, a été, elle aussi, prononcée à la suite de trois saisines déposées par des députés de l'opposition (Danelciuc-Colodrovschi 2021: 18).

La jurisprudence rendue par la Cour constitutionnelle moldave dans le cadre de ce contentieux traite assez peu de questions strictement juridiques, entendues au sens de la technicité du droit, aspect qui revient dans les décisions prononcées sur les exceptions d'inconstitutionnalité soulevées par les justiciables. Ce constat révèle l'absence de maturité dans la culture politique des parlementaires, y compris de ceux de l'opposition. La réduction du mécanisme de contrôle de constitutionnalité au seul départage dans les querelles politiciennes en ce qui concerne les sensibilités prooccidentales ou prorusses défendues pose un problème non seulement au niveau de la santé du débat démocratique mais aussi à celui de l'attention que les parlementaires portent aux questions relatives au respect de l'État de droit, celles-ci étant en fin de compte défendues par les citoyens à travers les exceptions d'inconstitutionnalité, qui représentent 90% du nombre total des saisines.

La situation en Roumanie est sensiblement différente au niveau des questions débattues devant la Cour constitutionnelle. En ce qui concerne le droit de saisine d'abord, il est moins large que celui existant en Moldavie. À son article 146, le texte constitutionnel requiert un nombre minimal de 25 sénateurs ou de 50 députés pour la saisine de la Cour en vue de l'exercice: du contrôle de constitutionnalité *a priori* des lois (art. 146, lettre a); du contrôle de constitutionnalité des traités ou accords internationaux (art. 146, lettre b); du contrôle de constitutionnalité des règlements du Parlement, ce dernier type de contrôle étant aussi ouvert à un groupe parlementaire (art. 146, lettre c). Comme nous pouvons le relever, le champ du contrôle est,

lui aussi, plus réduit, les parlementaires roumains ne pouvant pas contester la constitutionnalité des actes réglementaires émis par le Président ou le Gouvernement, comme c'est le cas en Moldavie. La Cour constitutionnelle roumaine a adopté une interprétation stricte des conditions établies par le texte constitutionnel à ce titre. Dans ses décisions n. 73/1995 et n. 35/1996, elle a déclaré explicitement que les saisines signées par un plus petit nombre de sénateurs ou députées, ou encore celles portant sur le contrôle de constitutionnalité d'autres textes que les lois organiques ou ordinaires *stricto sensu*, avant leur promulgation, ne peuvent pas être admises. De ce fait, les lois en vigueur, les projets ou propositions de loi et les amendements ne peuvent être soumis au contrôle de constitutionnalité régi par les dispositions de l'article 146, lettre a.

Au niveau des pratiques relevées, selon les données statistiques communiquées par la Cour constitutionnelle, depuis le début de son activité, en 1992, jusqu'au 31 janvier 2023, la Haute juridiction a rendu 538 décisions dans le cadre du contrôle de constitutionnalité *a priori*[23] et 52 décisions dans le cadre du contrôle de constitutionnalité des règlements du Parlement[24]. Ces décisions représentent 2,6% du nombre total des décisions rendues par la Cour constitutionnelle dans le cadre de l'exercice de toutes ses compétences. Le chiffre peu élevé s'explique par les conditions de saisine, qui impliquent une collaboration entre les partis d'opposition pour réunir le nombre nécessaire de députés ou sénateurs en vue de saisir la Cour.

Nonobstant ce chiffre peu élevé, la Cour a joué un rôle majeur au niveau de la protection des droits de l'opposition. Elle a défendu dès le début du processus de démocratisation la place importante devant lui être octroyée. Ainsi, dans sa décision n° 1/1995, elle a précisé que le contrôle de constitutionnalité n'est pas un frein sur la voie de la démocratie, mais son outil nécessaire, car il permet à la minorité parlementaire et aux citoyens de veiller au respect des dispositions de la Constitution, constituant un contrepoids à la majorité parlementaire, au cas où elle s'écarterait de la lettre et de l'esprit de la Constitution. Les décisions de la Cour ont un effet *erga omnes* et s'imposent de ce fait à toutes les autorités publiques, aux citoyens et aux personnes morales de droit privé.

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[23] Dans 284 d'entre elles, a été constatée une inconstitutionnalité partielle ou l'inconstitutionnalité intégrale, ce qui représente un taux d'inconstitutionnalité de 52,79%.

[24] Dans 23 d'entre elles, a été établie une inconstitutionnalité partielle ou intégrale, ce qui représente un taux d'inconstitutionnalité de 44,23%.

Par des décisions ultérieures prononcées à la suite de saisines déposées par les parlementaires de l'opposition, la Haute juridiction a renforcé sa jurisprudence relative à l'obligation de la majorité de respecter son autorité. Dans la décision n. 1018 du 19 juillet 2010 notamment, les juges constitutionnels ont statué que: «l'adoption par le législateur de certaines normes contraires à celles décidées dans une décision de la Cour constitutionnelle, qui tend à préserver les solutions législatives touchées par l'inconstitutionnalité, viole la Loi fondamentale. Cependant, dans un État de droit, comme la Roumanie est proclamée à l'article 1 paragraphe 3) de la Constitution, les pouvoirs publics ne jouissent d'aucune autonomie, la Constitution établissant à l'article 16 paragraphe 2) que nul n'est au-dessus de la loi, et à l'article 1 paragraphe 5) que le respect de la Constitution, de sa suprématie et des lois est obligatoire». Ainsi, l'obligation générale, imposée à tous les sujets de droit, y compris aux autorités législatives, a été établie pour garantir que l'activité législative soit exercée dans les limites et conformément à la Loi fondamentale du pays.

Par les décisions n. 196 du 4 avril 2013 et n. 392 du 6 juin 2017, la Cour a limité encore plus la marge de manœuvre de la majorité au pouvoir, en jugeant que l'autorité de la chose jugée qui accompagne ses décisions est attachée non seulement au dispositif, mais aussi aux motifs sur lesquels ce dernier se fonde[25]. Par conséquent, tant les motifs que le dispositif des décisions sont obligatoires, conformément aux dispositions de l'article 147 paragraphe (4) de la Constitution, et s'imposent avec la même force à tous les su-

[25] Pour la Cour, l'expression «considérants» sur lesquels se fonde la décision prononcée signifie l'ensemble unitaire d'arguments, présentés dans une séquence logique, qui constituent le raisonnement juridique sur lequel la solution prononcée est fondée. Ainsi, des arguments autonomes et indépendants, ou des arguments multiples et corroborés, peuvent déterminer une construction logico-juridique selon la structure prémisse-démonstration-conclusion. En d'autres termes, les considérations d'une décision de la Cour constitutionnelle comprennent l'analyse comparative entre le texte juridique critiqué et la norme constitutionnelle, le processus logique partant de la situation de prémisse (qui implique, d'une part, l'analyse du texte juridique, et, d'autre part, l'analyse du texte constitutionnel), faisant des liens corrélatifs, inférentiels (analyse du rapport entre les deux normes) d'où découle une conclusion, conséquence de l'analyse (la solution prononcée par la Cour). Cette structure est unitaire, cohérente, l'ensemble argumentatif constituant le fondement de la conclusion finale, de sorte que l'on ne saurait retenir la thèse selon laquelle, dans le contenu d'une décision de la Cour, il pourrait y avoir des considérations indépendantes du raisonnement juridique qui convergent vers la solution prononcée et, implicitement, qui ne donneraient pas le caractère contraignant de la disposition de l'acte juridictionnel. Dès lors, puisque toutes les considérations contenues dans une décision étayent son dispositif, la Cour juge que l'autorité de la chose jugée et le caractère contraignant de la solution se reflètent dans tous les considérants de la décision.

jets de droit. Dans le prolongement de son raisonnement, la Cour roumaine a reconnu, dans la décision n. 650 du 25 octobre 2018, la force de normes constitutionnelles aux décisions qu'elle prononce.

Par une jurisprudence progressive, la Haute juridiction est parvenue à mettre fin à la résistance de la majorité qui anéantissait *de facto* le mécanisme de contrôle, déjà réduit, mis à la disposition de l'opposition. Ce soutien de la Cour en faveur de l'opposition a été aussi apporté à travers ses 52 décisions rendues dans le cadre du contrôle de constitutionnalité des règlements du Parlement. À deux reprises, elle a été appelée à contrôler la totalité des textes des règlements. Ce contrôle a conduit à la déclaration d'inconstitutionnalité de 28 dispositions du règlement de la Chambre des députés et de 39 dispositions du règlement du Sénat (décisions n. 45/1994 et n. 46/1994). L'intervention de la Cour a été sollicitée en vue de déterminer le sens de certaines notions qui étaient nouvelles dans la vie institutionnelle roumaine, tel que fut le cas dans les décisions n. 601/2005 et n. 602/2005 où, statuant respectivement sur la constitutionnalité de certaines dispositions du règlement du Sénat et de celui de la Chambre des députés, les juges constitutionnels ont été appelés à définir la notion de «configuration politique» qui est à la base de la constitution du Bureau permanent de chacune des deux Chambres du Parlement.

Le sens retenu par la Cour de cette notion a été repris dans la décision n. 1490/2010 pour établir le mode d'organisation des groupes parlementaires et l'élection des autres membres des bureaux permanents. La vie parlementaire roumaine étant caractérisée par un nomadisme permanent d'un parti politique vers un autre, d'un groupe parlementaire vers un autre[26] (Gorovei 2012: 613), les juges constitutionnels ont été appelés à interpréter les dispositions réglementaires au regard du texte constitutionnel. À cette occasion, la Cour a noté que les changements dans la structure des groupes parlementaires existants, du fait de la scission qui peut survenir au sein des partis représentés par chaque groupe ou de la migration des parlementaires d'un groupe à l'autre ou du simple départ d'un groupe ne sont pas interdits par la Constitution. Toutefois, les éventuelles mutations ne peuvent rester sans conséquences sur la représentation des groupes parlementaires au sein des Bureaux permanents. C'est la raison pour laquelle, contrairement aux Présidents des Chambres, élus pendant le mandat des Chambres, les autres membres des bureaux permanents sont élus au début de chaque session,

[26] Au cours de la législature 1996-2000, 14,83% des députés et sénateurs ont changé ou abandonné leur affiliation politique pendant le mandat. Ce chiffre s'est élevé à 10,25% entre 2000 et 2004 et à 21,63% entre 2004 et 2008.

conformément à la composition des groupes parlementaires à ce moment-là. La Cour constitutionnelle a ainsi établi que les dispositions de l'article 12 du règlement de la Chambre des députés, tel que modifié par la décision de la Chambre des députés n. 26/2010, et qui réglementait expressément la possibilité de constituer des groupes parlementaires par des députés indépendants ou devenus indépendants, ainsi que la règle selon laquelle les députés devenus indépendants au cours d'une législature pouvaient former un groupe parlementaire unique, en respectant la condition du nombre minimum de 10 députés pour la constitution, sont constitutionnels.

Il est important de noter que cette réglementation a été demandée par la Cour dans des jurisprudences plus anciennes, afin de défendre, plus spécifiquement, les droits des parlementaires de l'opposition. Dans la décision n. 47/2000, elle a notamment jugé que «*l'absence* de réglementation légale des possibilités et des conditions d'organisation en groupes parlementaires des députés qui démissionnaient d'autres groupes parlementaires représentait une omission réglementaire, qui ne pouvait être remplacée par des décisions de la Cour constitutionnelle». Elle a donc invité le législateur à remédier au vide juridique existant dans les deux règlements. Dans chacune des décisions précitées, la Cour a rappelé sa jurisprudence constante développée depuis 1993 en ce qui concerne la possibilité illimitée pour les parlementaires de passer d'un groupe parlementaire à un autre, de s'affilier à un groupe parlementaire ou de constituer un groupe composé de parlementaires indépendants, sanctionnant à chaque fois les règles limitant ce droit car jugées contraires aux dispositions de l'article 69, alinéa 2, de la Constitution, qui rejette toute forme de mandat impératif (Cour constitutionnelle, décisions n. 44/1993; n. 46/1994; n. 196/2004).

Par sa jurisprudence, la Cour constitutionnelle a certes pu imposer l'adoption de certaines réformes en vue de renforcer la place et le rôle des parlementaires de l'opposition dans la vie institutionnelle roumaine. L'incidence de ces réformes reste toutefois limitée en l'absence d'une réelle assise constitutionnelle de l'opposition, qui devrait constituer une étape supplémentaire dans le renforcement de la démocratie parlementaire.

5. Considérations finales

La présente étude met en évidence l'ambivalence de la réglementation relative au statut de l'opposition et aux droits qui lui sont octroyés, tout comme des pratiques qui ont pu être enregistrées au cours des trois décennies de

démocratisation. Le cadre normatif a connu de très nombreuses réformes, qui ont eu parfois des objectifs contradictoires, mais qui ont été nécessaires à la construction progressive de la culture du pluralisme politique. Le législateur a dû ainsi intervenir, après avoir adopté des normes encourageant le fort développement du pluralisme, pour décourager, au contraire, l'hyper-pluralisme manifesté lors des premières années de transition, lorsqu'en Roumanie, par exemple, il y avait plus de 250 partis politiques. En modifiant les conditions imposées pour l'enregistrement d'un parti politique, le seuil électoral ou encore l'échelle graduelle pour la formation des coalitions, le nombre de partis a été stabilisé, tout en permettant la représentation des différentes convictions et aspirations politiques[27].

En ce qui concerne le rôle et les fonctions de l'opposition politique en général, et de l'opposition parlementaire en particulier, la réglementation nationale n'a pas encore atteint un stade d'évolution juridique suffisamment efficace pour permettre une véritable influence dans le cadre de l'exercice des compétences prévues par les textes constitutionnels des deux pays. Les réformes du règlement du Parlement moldave, plus particulièrement, montrent que l'institutionnalisation formelle et juridique de l'action de l'opposition s'effectue selon un processus constant, mais qui reste encore insuffisamment ambitieux. La comparaison effectuée avec le règlement de l'Assemblée nationale française a permis de constater que la marge d'évolution à ce titre reste encore importante.

Étant de jeunes démocraties et donc dépourvues de traditions démocratiques qui permettent le maintien des équilibres institutionnels à travers des usages parlementaires tacites, la Roumanie et la Moldavie devraient renforcer les garanties octroyées à l'opposition, surtout parlementaire, afin de sauvegarder le bon fonctionnement du système parlementaire démocratique. La majorité a toujours tendance à tirer parti de tous les avantages que lui octroie sa position. Les garanties juridiques accordées à l'opposition sont donc indispensables, pour lui assurer une place plus importante dans le débat politique, mais aussi pour rendre possible un contrôle et, par conséquent, la sanction de leur non-respect conformément aux principes de l'État de droit.

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[27] Conformément à la loi n. 27/1996 sur les partis politiques, a été exigé le recueil de 10.000 signatures de membres fondateurs issus d'au moins 15 circonscriptions, dans chacune d'elles devant exister au moins 300 membres. De même, le seuil électoral pour accéder au Parlement a été élevé de 3% à 5% pour les partis politiques. Et une échelle graduelle a été établie pour les formations politiques ou coalitions: 8% pour deux membres de coalition, 9% pour 3 membres, 10% pour 4 ou plus.

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Opposition in Serbia: oppression, delegitimization and extra-institutional engagement

IRENA FIKET* AND DUŠAN SPASOJEVIĆ**

I. Introduction

The general elections in Serbia in 2022 finally brought the opposition back into the Parliament. For several previous years, the Serbian Parliament was more homogeneous than ever since political pluralism was introduced. It was not a place for debate, and no respect was shown for the arguments coming from the minority. The legislative initiative was almost entirely from the executive (Tepavac and Glušac 2019). Lack of pluralism in the Parliament should be observed as a part of the bigger trend of the autocratisation of Serbia that intensified since the Serbian Progressive Party became the predominant party in 2016. The decline of freedom of associations and freedom of expression, partially free and unfair elections, centralisation of power in the hands of the President, and ruling party that maintains power at all levels of government through frequent irregular elections (Kmezić

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and Bieber 2017; Pudar Draško *et al*. 2019; Kapidžić 2020) in fact, led scholars to describe Serbia as a competitive authoritarianism (Levitsky and Way 2020) or an illiberal democracy (Cassani 2014; Lührmann and Lindberg 2019; Kapidžić 2020). The report of the Freedom House (2019) regarding the state of democracy classified Serbia as a hybrid regime in 2019 and underlined that «Serbias status declined from Free to Partly Free due to deterioration in the conduct of elections, continued attempts by the government and allied media outlets to undermine independent journalists through legal harassment and smear campaigns, and President Aleksandar Vučić's *de facto* accumulation of executive powers that conflict with his constitutional role».

With the characteristics of our case study in mind, this chapter analyses the opposition's position and role in Serbia in its evolution since the introduction of pluralism and the collapse of the communist regime. We observe the opposition during the last 30 years from the two main aspects: institutional and ideational. We also provide an overview of the contextual factors to show some specificities of the post-socialist democratisation process and democratic backsliding in Serbia. The institutional elements we observed provide insight into the actors' formal position and power; they show us the main mechanisms and resources at the opposition's disposal and evaluate the possible inequalities or disbalances of powers between the actors. Conversely, the ideational aspect shows the dominant narratives and relationships between the opposition and position. These narratives reflect the understanding of democracy and the role the opposition should play in the political system. They also reflect changes over time and enable us to understand different concepts of democracy and democratisation.

The chapter is divided into four sections, corresponding to four different phases reflecting specific circumstances and dynamics. The first phase is the Milošević decade (1990-2000), which covers the initial transitional period, characterised by severe authoritarian tendencies and societal conflicts during the Yugoslav break-up process. The second phase, that of democratisation (2000-2012), starts from the Milošević defeat and initial institutional development, throughout the first troubles in the democratic transition and riffs in the ruling coalition. The third phase (2012-2020) begins with the second turnover of power and optimism about social consensus and the consolidation of democracy. However, it develops into competitive authoritarianism and almost complete annulation of pluralism. The final phase is short (so far) and ongoing – defined by the protest waves, boycotts of elections and Parliament, and the return of the opposition in the institutions.

2. The Milošević decade (1990-2000)

Although there are certain similarities with other post-communist countries' transitions, the transition to political pluralism in Serbia took place in a specific context of the dissolution of the federal state of Yugoslavia and was characterised by certain specificities of Yugoslavian communism. Those specificities shaped the development of political pluralism, the role of oppositional political parties, and the overall democratisation of the political system and society (Goati 1995).

Primarily, the one-party regime of Serbia did not collapse under the pressure of the mass protest led by political opposition. Unlike in other Eastern European countries, the communist regime in Serbia and Yugoslavia in the late '80, enjoyed social support. The support was mainly because the regime was brought by an authentic revolution of the national liberation movement and was not imposed by the Soviet Union (Stojanović 2000). Therefore, the opposition to that system was formed differently, producing somewhat ambiguous democratic outcomes (Cotta 1994).

Furthermore, in the late '80, when the transitions in other post-communist countries started, Slobodan Milošević came to power in Serbia, acting as a political opponent within the League of Communists of Serbia, and initiated what was then called an "anti-bureaucratic revolution" against the old leadership within the unique party. By occupying the space of the opposition, Milošević and the "new" leadership allowed the old regime to survive while creating the impression of significant political changes (Pavlovic 2020).

This newly strengthened League of Communists of Serbia also became the opposition to the leadership of other Yugoslavian republics, absorbing oppositional potential and ideological identity reserved for oppositional political actors. The opposition to the ruling communist regime in Serbia, with few exceptions, was mainly based on nationalistic narratives and the idea of exploitation of the Serbian nation by the communist regime (Stojanović 2000)[1].

Following the examples of Western republics of Yugoslavia (Slovenia and Croatia), the emerging opposition in Serbia, although still nor legally rec-

[1] The public opinion research done in 1990, that explored attitudes of the Serbian population towards socialism, showed that more than 40% of the population was willing to vote for, and support those actors that would offer "the real socialism". Besides, low voter turnout in the 1990 elections (less than 80%, compared with more than 90% in other Yugoslav western republics and other Eastern European countries) further confirmed the lack of willingness of the population to change the regime (Goati 2001).

ognised, pushed for democratisation and the introduction of the multi-party system. The Law on Political Organizations in Serbia[2] and the constitution were finally drafted in 1990[3], and the first multi-party elections were held in the same year[4]. Unlike in other post-communist countries, the system outlined in the new constitution was not the result of the negotiations between political parties. Although the opposition criticized the first version of the constitution and succeeded in obtaining some minor concessions, the adopted constitution, political and electoral systems were designed in such a way as to allow the maximization of the benefits for Milošević's party (Spasojević 2022). This was done through semi-presidential system including direct election of the president (opposition was divided between several options and without a popular candidate) and a first-past-the-post electoral system with a high number of electoral districts; the opposition supporters were concentrated in large cities, and parties did not have local branches throughout Serbia, in contrast to the SPS who inherited the party infrastructure of League of Communist Alliance (Jovanović 2011).

Between 1990 and 2000, Serbian parliamentary and presidential elections were held three more times[5]. However, Milošević's party (renamed to Socialist Party of Serbia - SPS) always managed to have the majority in Parliament, to form the Povernment[6] and to dictate conditions in which the political opposition acted within the Parliament. The role of oppo-

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[2] Zakon o političkim organizacijama (The Law on Political Organizations) SR Srbije, Službeni glasnik Savezne Republike Srbije, br. 37/1990, Ustav Republike Srbije. Službeni glasnik Republike Srbije, br1/1990.

[3] The Law on Political Organizations from 1990 was changed only in 2009.

[4] Although the legal conditions for political opposition to act and participate in elections were fulfilled only in 1990, some opposition political parties, of which two major parties, Democratic party (DS) and Serbian Renewal Movement (SPO), were formed already during 1989.

[5] Parliamentary elections were held in 1992, 1993 and 1997 while the presidential in 1992 and two times in 1997.

[6] In doing this, since 1992, the SPS has been supported by the Serbian Radical Party (SRS). Although SPS and SRS differed in terms of political programs, their electorate overlapped. What is relevant here to know is that, on one hand, SRS was always accepting SPS proposals and decisions in the Parliament, while on the other, they were radically oriented against all opposition. As Spoerri argues, the SRS was perceived as «Milošević's most favorable opposition» (Spoerri 2015). The rhetoric they used was very aggressive in terms of hate speech against all other nations of Yugoslavia as well as against all the political opponents. The SPS as "a favor" allowed SRS to widely use the media to promote their messages (Goati 2001).

sition parties was, in fact, very marginalised in terms of initiatives and political power (Goati 1995; Pavlovic 2020). This pushed the opposition to use extra-institutional pressure to influence the decision-making process (Vladisavljević 2016). The discussions about the relevant questions the opposition tried to open in the parliament were either ignored or aggressively blocked by the majority, which often used hate speech and defamations against representatives of the opposition (Goati 1998). The possibility of further democratisation of the political system in terms of institutional empowerment of the opposition was additionally blocked by the institutional arrangements (executive power was distributed between the directly elected president and the government) and abuses of power by Milošević (Spasojević 2022).

The institutional role of political opposition was further weakened due to the dissolution of Yugoslavia, civil wars, and the prevalence of the nationalistic rhetoric of Milošević and the ruling SPS party. The questions of national interest were prioritized by Milošević, which prevented the creation of space for discussion about the democratisation of the political system and any kind of regulation that would empower the opposition (Vladisavljević 2016). Furthermore, each attempt of the opposition to promote democratisation was framed by Milošević as an attack on the national unity of Serbia (Stojanović 2000). The opposition actors were framed as the fifth column and collaborators of the "hostile international community" that imposed several sanctions against Yugoslavia (1992-1995 and 1998-2001).

During the elections, the weak position of the opposition was especially pronounced because of numerous electoral irregularities, testified by international observers, such as falsified protocols from the polling places, pressures on employees to vote for the ruling party candidate, corrupted electoral commissions, arbitrary revocation of electoral results by courts, and arbitrary increase of the number of voters (Goati 2020). That served to Milošević to ensure a victory or to meet the legal conditions to proclaim the elections as valid. Moreover, relying on their parliamentary majority, the SPS was also changing the rules of the electoral contests before the elections in order to obtain desired results (Goati 1998).

In addition to all this, the unfavorable position of the opposition in terms of access to media was an especially relevant trigger for the opposition to initiate extra-institutional pressure that started in 1990 and that was often used as a tool for exercising political influence until 2000. There were three large waves of protest in those years: 1991-1992, 1996-1997 and 1999-2000. The

first two waves of the protests produced some results, but in most cases, the concessions Milošević made to the opposition were later withdrawn[7].

The third wave of protest, which led to the overthrow of the Milosevic regime on the 5th of October 2000, took place in a changed political context: the increasing violence of the Milošević regime in Kosovo resulted in the NATO intervention in 1999 and, finally, the end of the war with Belgrade's *de facto* loss of control over Kosovo[8]. There were many reasons for opposition to protest in that period: increased repression of the regime against the political opponents (Todosijević 2013), the almost complete de facto abolition of pluralism and freedom of media and the total abuse of power by Milošević (CeSID 2000). Still, the peak of the protest against the regime's oppression took place in 2000 and was initiated by the opposition parties because of Milošević's attempts to manipulate the results of the Yugoslav presidential elections (Vladisavljević 2014). The elections were held following the electoral law[9] made just before the elections and that allowed the direct election of the Yugoslav president (Spasojević 2022). The opposition participated in the elections gathered under The Democratic Opposition of Serbia (DOS), an electoral alliance comprising 18 parties that enjoyed the vast support of the civil society, which helped the opposition to observe the elections, and the student-led movement Otpor (Resistance) that was formed in those years. DOS presented Koštunica as a common candidate that won in the first round. When Milošević refused to accept the results, the opposition called for a massive protest and finally managed to mobilize more than 700,000 citizens in the streets of Belgrade and defeat the regime. Overthrow of the Milošević regime in Serbia on the 5th of October was perceived as a sign of radical change and hope for the future (Teokarević 2011).

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[7] In 1991, the opposition obtained the right to freedom of assembly, but during the following years there were many attempts to limit it. The concessions given in the sphere of freedom of media were later completely annulled. In 1992 Milošević accepted changing the electoral system for 1992's snap elections (Spasojevic 2022) and 1996-1997 protests enabled the opposition to achieve victory at the local level. The opposition parties also called for boycotts of the elections in 1992 and 1997.

[8] Although Serbia lost control over the Kosovo territories the pro-government media portrayed Milosevic as "the one who defeated NATO", <https://www.b92.net/info/vesti/index.php?yyyy=2008&mm=03&dd=24&nav_category=11&nav_id=290676>.

[9] Zakon o izboru i prestanku mandata predsednika SRJ, Službeni list SRJ, br. 32/00.

3. The first transitional phase (2000-2012)

The first decade can be also perceived through the process of reforms and ideological transformation of the old regime parties, i.e. new opposition parties. They started as pariahs and outcasts, and they have been partially held responsible for the consequences of Milošević regime, but gradually they made their way back into political life, institutions, and even a government.

In the first post-Milošević elections in December of 2000, the new ruling coalition won 2/3 of the votes and confirmed a significant change in the electorate. The old regime parties, the SPS and the SRS, declined dramatically, leaving the new majority without a real counterweight. However, even without pressure from the opposition, the new ruling coalition deteriorated very soon. The DOS was built as an umbrella movement against the Milošević regime, but not as a governing coalition. This means there was no clear plan or consensus on what kind of society should be built. In other words, soon after the formation of the new government, there were disputes on the scope and the pace of the transition (Spasojević 2016). The main line of dispute was between the DS and the DSS – «DS was promoting a self-image of a strongly pro-European and liberal party, while DSS was perceived as more nationalist and traditionalist» (Todosijević 2013: 532). It was also personal and conceptual dispute between Djindjić and Koštunica – while Djindjić denied legitimacy to the previous regime and worked intensively on undoing it, Koštunica insisted on following legal procedures, legitimising the previous regime by treating the 2000 election as a routine alternation in government (Dolenec 2013: 177).

The new Government faced many obstacles – although there was a success in the reintegration of Serbia into the international community and progress in the provision of essential functions (e.g., health care and education), the institution and state-building process stalled almost instantly. Although the old regime was defeated on the elections, there were significant mechanism and legacies that prevented new Government to exert the power; «The period 2000-2003 is perhaps best characterised as a state of emergency, an unstable period of non-regime [...] the continued presence of elements of the old regime even within the new structures, which created a climate of constitutional uncertainty. Corrupt elements of the old regime remained present either in, or parallel to, the new structures, opposing reforms» (Dolenec 2013: 178). Problems with these legacies just increased rivalry between the DS and the DSS and reduced capacity to develop democratic institutions that would be able to perform checks and balances.

In contrast to expectations, the new Government «continued to abuse the prerogatives of executive power to steer the legislative and judiciary branch, as well as to control the media and other state institutions» (Dolenec 2013: 180). The key issue was related to three unsuccessful presidential elections due to high threshold (turnout of 50% voters was required; elections were held in September and December of 2002, and November of 2003) and speaker of the Parliament (Nataša Mićić) took the office, following the Constitution. The DSS accused the DS for rigging the voter register and deliberately sabotaging the elections, as the Speaker was much closer to Djindjić and the DS. At the same time, oversight mechanisms, such as civil society and the media system, were much closer to new ruling parties as they shared years of fighting for democracy and, therefore, with reduced ability and willingness to react. The usual justification for these undemocratic patterns was that the legacies of the old regime were so strong that they could not be dismantled with traditional democratic means and that old parties were waiting for an opportunity to come back.

Place for opposition parties in post-Milošević was relatively narrow and we can analyse it from the political and institutional perspective. In political terms, the two main opposition parties (the SPS and the SRS) were "ostracized" to a significant extent. The SPS was held responsible for the '90s, and their representatives were trying to preserve the party and their political careers. Some notable members of the SPS have been arrested and accused, including Milošević in 2001. However, as soon as there were first splits between DOS parties, it provided some space to the Socialists party to establish pragmatic relations with majority parties[10].

On the other side, the Serbian Radical Party (SRS) acted more freely as most of the attention and blame landed on the SPS. The SRS grabbed Milošević nationalist legacy and owned it, realizing that transitional honeymoon will not last that long. Radical used the opportunity and established the SRS as the key opposition party (Spasojević 2016). However, the ideological profile of the SRS and lack of will for transformation limited their coalition potential and made them an excellent example of a party with blackmail potential. Sartori (2004) defines it as a party whose «existence, or appearance, affects the tactics of party competition and particularly when it alters the direction of the competition – by determining a switch from

[10] For example, a group of MPs around Branislav Ivković was at the government's disposal for confirmations of quorum and sometimes even for voting for the proposals and laws. The others established relations with other parts of DOS and tried to detach themselves from Milošević, who was still the party president, although in ICTY custody since June of 2001.

centripetal to centrifugal competition either leftward, rightward, or in both directions – of the governing-oriented parties». In other words, as no one was willing to make coalitions with the SRS, the party was pushed-out from the decision-making process, but it still had the potential to disrupt relations between governing parties, to affect political agenda, and to generate disaffection among the voters. Some scholars classify the SRS as an anti-systematic party or as irresponsible opposition. However, the key disruptive element in this period was a relation to democracy – a significant part of the SRS constituency supported a firm-hand and authoritarian style of governing, which was perceived as a threat to weak and unconsolidated democracy in Serbia (Stojiljković 2006). The DOS parties, especially the DS, used this threat to delegitimise the Serbian radical party and to mobilize democratic voters.

The peak of conflict with the legacies of the old regime was the assassination of Prime Minister and DS party leader Djindjic in 2003. After early parliamentary elections in December of 2003, held due to the crisis originated because of the assassination of Djindjic, the new minority Government was formed by the DSS, G17 and SPO/NS and it was supported by the SPS. It was the first sign that the position of old regime parties is gradually changing. It also meant that Serbia had bilateral opposition – «the nationalist and populist Serbian Radical Party (SRS) that took one third of the votes and became by far the most numerous party; and the pro-European, pro-modernization Democratic Party» (Teokarevic 2011: 64). This led to interesting and more dynamic parliamentary work, although it did not lead to long-term establishment of stronger democratic institutions and parliamentary practices. However, two strong opposition parties (the SRS and the DS) used institutional means to challenge the minority Government – question time (number of questions significantly rose in this period), interpellations, and parliamentary inquiries (Orlović 2012).

The position of the opposition was changed to a significant extent in this period. However, it should not be perceived as a consequence of democratisation and/or institutional development but as a circumstance based on the decision of the DSS to form a minority government and the ability of the DS and the SRS to use the available institutional mechanisms. The DS was additionally strengthened by the election of Tadić as President in 2004, which led to cohabitation between the Government and the President and intensified conflicts between the DS and the DSS. As the SRS remained in the same position as during the first post-Milošević Government, the party system was more dynamic, but the critical division of power mostly remained limited to former DOS parties.

A new development came with a new Constitution in 2006; the balance of power between the DS and the DSS enabled the parties to suddenly reach a consensus on the new Constitution. It did not change the nature of the semi-presidential political system, but it introduced certain practices of good governance such as an ombudsman's office, for example. However, according to Bochsler (2013), «some provisions were problematic with regards to the division of state powers – regarding the legislative control over the judiciary, and the possibility of the central government to resolve municipal assemblies». As the Constitution needed to be confirmed by referendum, even the SRS was included in the consultations and later in the constitutional campaign, which opened the door to a partial change of their position. However, the SRS opted to preserve its blackmail position and declined the idea of transformation.

The strong centrifugal competition imposed by the DS and the SRS led to disruptions in the center of the party system, and most of the former DOS parties joined the DS camp during the presidential elections in 2008 (narrow victory of Tadić over Nikolić in the second round), while the SPS joined the winning block after the parliamentary elections in May of 2008. As the fundamental issue of these elections was a debate between euro-centric and Kosovo-centric politics, victory of the pro-EU side led to a series of events that dramatically changed the Serbian party system: the DSS support gradually declined, and the SRS split between moderate and nationalistic wings. The moderated formed a new party, the Serbian progressive party (SNS) a moderate center-right and pro-EU party (Stojić 2018) and marked ideological transformation of both parties of the old regime which for the first time resulted in an almost universal consensus about the country's priorities (Teokarević 2011).

The 2008 elections changed the balance of power dramatically as the DS held the position of state President and the majority in the Government. It led to gradual centralization of power in the hands of Boris Tadić and «has often been criticised as being the main factor contributing to the lack of much-needed accountability in the present Serbian coalition government» (Teokarević 2011: 67). From the institutional perspective, authoritarian tendencies were not strong enough to endanger free and fair elections, but they limited the establishment of an independent judiciary system (though ongoing reform in 2009) and many oversight and regulatory institutions established in this period.

The opposition disadvantage was observable regarding media coverage and some institutional procedures. Castaldo (2020) argues that political in-

terference in media freedom persists as an issue of concern as the privatisation of public media has not been implemented. This gave an advantage to ruling parties as they could use state resources (e.g. finance for marketing) to influence media reporting. However, it does not mean that the opposition was excluded from public space as during the Milošević regime; «the news of the public broadcaster (RTS) gave a slight advantage to the ruling parties while preserving the representation of other political options. In the second round of the 2008 presidential election, RTS favored President Tadić over his challenger Tomislav Nikolić, largely thanks to coverage of his public office activities, while reporting in 2012 was mostly balanced» (Ilić 2020: 72).

In terms of institutional procedures, the most visible issue increased usage of urgent procedure in the Parliament, which limited the ability of the opposition to challenge government proposals and reduced available time for MPs. The alignment of legislation with the EU *acquis* has often been used as an explanation for the "fast track". Also, «parliament has amended its rules of procedure to restrict the possibilities of the opposition blocking the legislative process» (Teokarević 2011).

The emergence of the SNS and the Declaration of Reconciliation signed between the DS and the SPS just after the 2008 elections changed the landscape of the Serbian party system. However, regardless of significantly decreased ideological distance between the ruling parties and the SNS (as the strongest opposition party according to public opinion surveys), the DS continued with the delegitimisation campaign against the Progressives (as they did against the SRS), especially during the 2012 electoral campaign. The outcome of the elections clearly showed that this strategy could not be efficient anymore.

4. The second transformation in power (2012-2020)

Samuel Huntington (1991) wrote on the double turnover as the confirmation that democracy has been consolidated. In other words, if parties that have defeated the *ancient régime* accept the electoral loss and peacefully transform the power to a new majority, we could argue that democracy is "the only game in town". The double turnover happened in 2012 when the SNS candidate Tomislav Nikolić won the presidency by a narrow victory in the second round against the incumbent Tadić. Nikolić's victory altered coalition talks and led to an unexpected majority made of the SNS (26%), the SPS (14%), and URS (5%), who were also in the previous Government. Serbian politics took a surprising turn.

In the previous section we have described the position of the Serbian Radical Party and how it was isolated from coalition arrangements. However, the system has been significantly changed after the formation of a new party and gradual ideological transformation. The SNS-led government was not just possible but also welcomed by the international community, local experts, and analysts. The dominant perception of the SNS at the time was positive, and there were just limited concerns for the state of democracy in Serbia.

The SNS rose to power by using populist rhetoric. The predecessor party, the SRS, was also perceived as the populist and a party that introduced nationalistic populism into the political mainstream (Mudde 2003). The new Party reduced nationalism and identity-based issues (Spasojević 2019). It led a «populist electoral campaign centered on the failure of previous governments to tackle corruption and improve the economy» (Castaldo 2020: 7). Therefore, the key campaign messages were that previous governments led transition in a way that was biased to tycoons and foreign investors and that the government did not care about ordinary people who were transitional losers. The populist narrative was essential for the electoral success and ideological transformation of the Party, but also their future relations with the opposition.

The SNS continued camping against political opponents after the formation of the new Government. The main target in this period was the DS as the main rival and the party that won 24% in the 2008 elections. Since they were perceived as corrupted by a significant part of the constituency, it was an easy pick for the SNS. A significant number of DS members, former state and local officials, have been arrested and indicted (only one person has been convicted so far). The Anti-DS campaign was somewhat like anti-SPS and anti-SRS campaigns after the fall of Milošević. Similarly, state prosecution launched an investigation on Miroslav Mišković, owner of Delta company, who was perceived as the wealthiest and most influential person in Serbia and related to the DS. Mišković was arrested in December of 2012, and it was perceived as a success of the new SNS leader and vice MP Aleksandar Vučić. His rating skyrocketed after the arrest.

In contrast to this pressure on the Democrats and related tycoons, the Progressives tried to show their democratic face in most other cases. Their relationship with the media, civil society, and the international community was carefully developed. In 2013 the Government signed the Brussels agreement with Kosovo, showing its readiness to continue with the politics of cooperation established in the previous years. The government also enabled the Pride Day parade, which was a symbolic test of ideological change.

In 2014 Serbia had snap parliamentary elections. The formal rationale behind the elections was troubles in the coalition. However, it seemed that the SNS under Vučić just wanted to take advantage of the popularity and share the spoils according to votes. The SNS won, striking 49.9%, and the Socialist added 14% for the Government. The elections brought a complete change in the opposition landscape – only two lists rose above the threshold, and both were the DS related – one led by the DS and its new president and another founded just before the elections by former DS president Tadić. Both lists won around 420,000 votes, showing a decline of around 600-700,000 votes compared to 2012 elections. On the other side, around 650,000 votes for other opposition parties remained without representation and under the threshold. From the ideological perspective, it was the first Parliament without any anti-EU or euro-skeptic party.

The 2014 elections were crucial in Serbian politics as they marked the beginning of the atomization phase for opposition parties and the collapse of former ruling parties (Castaldo 2020). The opposition scene has been fragmented in many ways – between modernist pro-EU parties and traditionalist anti-EU block; between those who opt for institutional participation and occasional cooperation with the government in contrast to those who argue for non-institutional means and confrontation in all cases; between old(er) parties who had been in power before (and perceived as responsible) and the new ones, founded in recent years and without a baggage. Also, most parties had similar support – none of them was close to 10% and a first among the equals, which also stirred competition between the opposition parties (Vučićević 2016). Conversely, the regime started to narrow the space for electoral competition (Bieber 2018).

The authoritarian trends were visible from the beginning of the SNS rule, but they grew over time. In 2016 the Government called for another snap election (similar rationale as in 2014), and in 2017, Serbia held regular presidential elections. These two electoral processes received much criticism from international and domestic observers. The OSCE/ODIHR electoral monitoring mission mentioned voter intimidation, pressure on public sector employees, and undue advantage of incumbency blurring the distinction between state and party activities often called the official campaign (OSCE/ODIHR 2016). The 2017 presidential elections saw even more such violations, leading to conclusion that «unbalanced media coverage and credible allegations of pressure on voters and employees of state-affiliated structures and a misuse of administrative resources tilted the playing field in Vučić's favor» (OSCE/ODIHR 2017: 1). The playing field was so uneven that «the elections lost their essentially competitive character» (Ilić 2020: 45).

Connected election cycles «led to an intense, almost continuous campaign, which exhausted political actors with limited resources» (Ilić 2020: 47), e.g. the opposition, and enabled the SNS representatives, primarily Vučić, to have significant media exposure. Media coverage included regular presidential activities and frequent press conferences, and tv interviews. The content of these communications was dual; on one side, a talk about Serbian progress and government results, on the other, to conduct a smear campaign against the opposition.

The relationship between the SNS and the media system can be analyzed as one of the most representative characteristics of the regime under Vučić. As Vuković argues, «ever since coming to power, the SNS has been actively trying to delegitimize and wipe out the opposition, as well as the political and electoral pluralism. They have done it by conducting long and ruthless media campaigns against any individuals criticising the authorities, whether they were judges, politicians, journalists or civil activists» (Vuković 2021: 18).

A smear campaign against the opposition had several elements. The key target in this period was still the DS and parties related to the DS[11]. Of course, smear campaigns are not limited to one party and one leader. Whenever some of the opposition parties raised an important issue and attracted some public attention, the regime launched a tailored campaign against those parties or individuals.

These campaigns were not limited to opposition representatives, and they might cover any form of challenge, oversight, or checks against the SNS. For example, in 2016, the SNS launched a smear campaign against Saša Jankovic, an ombudsperson, for his investigation after the Savamala incident[12]. Similar campaigns have been launched against journalists, civil society representatives, and even some international actors.

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[11] After the 2016 elections, the main target of the regime was the former leader of the DS, the former mayor of Belgrade, and the president of the leading opposition party, the SSP (the Party of freedom and justice) Dragan Djilas. He has been pictured as a tycoon and wealthy person who stole 619 million euros while in power, among other things. The main function of the smear campaigns is to delegitimise Djilas and the SSP among voters and to justify their marginalisation from the public space.

[12] Savamala incident is related to the illegal demolition of several buildings in a Savamala quarter of Belgrade. Those buildings stood in a way to the Belgrade Waterfront project, supported by the city and state institutions. Janković was under severe pressure from the ruling party, pro-government tabloids, and analysts for several months. The cornerstone of the campaign was the suicide of Jankovic's friend happened in 1993 and had nothing to do with his performances as an ombudsperson.

The attacks against the opposition are not limited to the media sphere. After the 2016 elections, the Serbian parliamentary majority has become very antagonistic to the opposition parties. The parliamentary majority «neglect of parliamentary procedure and mechanisms (failing to include the opposition MPs' law proposal on the agenda, or abandoning the parliamentary questions on a topical subject), they misuse (as with hundreds of amendments proposed by the ruling majority, or posing "friendly" question during MP Question Time), as well as the indirect or direct violations of the Rules of Procedure (for instance by failing to discuss the reports of independent bodies in foreseen timeframe)» (Tepavac 2020: 86). Beside formal rules and procedures, position MPs often insulted the opposition representatives and limited their space by different tactics including filibustering schemes[13] that were usually used by the opposition parties. These practices led to a boycott of parliamentary sessions by the opposition; only several MPs remained in the Parliament and just for specific issues.

The marginalisation and the oppression in the Parliament led to initiatives for a boycott of the next elections. After the failure of round table talks, even with the international representatives, most opposition parties decided to boycott the 2020 parliamentary elections. The Government reacted by last-minute reduction of the threshold to 3%[14], but it failed to produce any effect. The turnout was 48% (in contrast to the usual 55-60%), and Parliament had only six opposition MPs (out of 250). After eight years in power, the SNS managed to almost reduce political pluralism completely and even to eradicate it from the Parliament.

5. The return of pluralism

While majority of the opposition decided to boycott the elections, most of the political parties that participated failed to rise above the 3% threshold, so the elections brought the most homogenous composition of the Serbian

[13] Majority MPs would submit excessive amendments to laws without genuinely relevant content, thereby restricting the speech time for the opposition MPs and trivialising the parliamentary debate. They would also ask friendly questions to government representatives during the question hours. Government representatives would also answer these questions for a very long time in order to waste time reserved for Q and A.

[14] Zakon o izboru narodnih poslanika (Law on the election of Members of Parliament) was changed in February 2020, and elections were scheduled for April (due to Covid19 outbreak, they were postponed to June 2020).

Parliament since 1990 (Tepavac and Branković 2020). From 2020 to 2022 the Parliament was a marginalised institution and although the procedures and standards of functioning of the Parliament formally existed, this institution *de facto* became the Government's service. The Government initiated the adoption of almost all laws, and the role of various committees was reduced. All the presidents and deputy presidents of the 20 committees formed belonged to the parties of the ruling majority. The whole legislative activity was characterised by a low level of transparency and an almost complete lack of participation of experts and interested citizens in the process (Center for Research, Transparency and Accountability 2021). Discussions in Parliament were not focused on issues of interest to citizens or on any kind of debate, and were very often used to harshly criticise the opposition or civil society, or to glorify President Aleksandar Vučić.

Remaining outside the Parliament, the opposition, after the boycott initiated a new wave of protest that, among other factors, allowed the 2022 elections to happen in slightly improved conditions.

Although the first protest against the institutions was initiated before the elections took place, it could be considered as a part of the same wave of protest and the same crisis that regards the lack of trust of the citizens in the institutions and the ruling SNS party. The immediate cause of the protest was the lack of transparency and information on the number of coronavirus cases and the lack of trust in the state officials and members of the crisis headquarters. Thousands of citizens took to the streets to protest the manner in which the Covid19 crisis was handled. The protest escalated into riots when the police started using excessive force on the protesters and the journalists of the non-regime-owned media (Ilić and Pudar Draško 2022). The freedom of the media was further restricted with the justification of the health crisis (Petrović 2020). Even though the protests started spontaneously, the leaders of the opposition joined the protests.

The second primary reason that led citizens and opposition actors of Serbia to protest in this period was related to the adoption of two laws: the Law on Referendum and People's Initiative and the Law on Expropriation. Those laws were related to the planned investment of Rio Tinto Company in a lithium mine in Western Serbia, tackling one of the pressing environmental issues in Serbia. Almost a complete lack of interest of the ruling party in the opposition and citizens' demands was shown by choosing to hold the plenary sessions at the same time as the protests. Even in this case, the discussion in the Parliament was used to excessively criticise the citizens' demands and political opponents and not to discuss the arguments formulated by cit-

izens. However, even if this case showed the complete lack of interest of institutions in those they were supposed to represent, it also became clear that the citizens were interested in the quality and content of legal solutions that are adopted in the Parliament (Ilić and Pudar Draško 2022).The protests that marked the whole of 2021 mainly focused on environmental issues and the incapacity and unwillingness of Serbian institutions to handle the environmental threats and protect the environment and health of the citizens. The protests escalated and when it came to the point that citizens organized blockades of the main roads, they posed a challenge to the authority of the ruling party. As a result of these protests, the Law on Expropriation was revoked (Ilić and Pudar Draško 2022).

The culmination of the environmental protest took place before the constitutional referendum, held in January 2022, which aimed to introduce constitutional changes required by the EU that were related to the judiciary system. However, the way in which those changes were drafted was criticized by the opposition, which underlined that the changes would still allow the exercise of the political influence of the ruling party over the judiciary. This issue made the opposition mobilise and many parties organised campaigns that served as an exercise for the forthcoming elections. However, although the opposition managed to attract public attention regarding this issue, the complexity of the issue itself limited the significant mobilisation of the citizens, and the changes eventually passed, obtaining a weak majority (Ilić and Pudar Draško 2022).

The increased mobilisation of the political actors and social movements in the previous period affected the participation of the social and political actors in the early parliamentary, presidential, and local elections scheduled for 2022 in the capital and 13 other municipalities (Ilić 2022)[15]. Opposition movements and parties, some of which were already focusing on environmental issues in the last five years, recognised the mobilising potential of the environmental issues and those were the focus of their election campaign. The conditions in which the elections took place slightly improved the position of the opposition due to the Inter-Party Dialogue (IPD) that was mediated by the European Parliament and the second dialogue held by the Serbian Parliament. Namely, new electoral laws were drafted and they brought changes to the structure of electoral administration and limits on political party campaign funding, extending the timeframes for dispute res-

[15] President Aleksandar Vučić already in 2020 announced that the new parliamentary elections would be held earlier.

olution and regulating the media coverage of officials. The transparency of the polling boards was also improved and some temporary measures were introduced in order to allow the non-parliamentary parties that boycotted the elections to participate in polling boards (Ilić and Pudar Draško 2022). Those modifications, however, did not substantially change the unequal position of the opposition in the elections, given that the pressures on voters and problems of non-independence of the body that regulates the media (underlined as persistent problems by the OSCE-ODIHR) were not solved. Besides, the changes occurred only two months before the elections (Ilić and Pudar Draško 2022).

The elections showed that the dissatisfaction of the opposition with the conditions was justified; the candidates during the election campaign had unequal access to the media, and the ruling majority used discretionary powers to allocate financial incentives in order to obtain the political support of particular groups of citizens (OSCE-ODIHR 2022). The position of the opposition during the elections was further weakened by the Russian invasion of Ukraine, which was getting all the media attention and allowed Vučić to present himself and his party as guarantees of stability and security. Given the pro-Russian sentiments of the majority of the Serbian population but also the negative connotations that the sanctions have in Serbia, the opposition avoided to publicly express their position regarding the war. The invasion of Ukraine further exacerbated a decline in media freedom and media pluralism, especially regarding the pressure on independent media and journalists. Besides, the final results of the parliamentary elections were announced only 93 days after the election due to the irregularity at the single polling station and the lack of willingness of the institutions to confirm this irregularity.

However, at the parliamentary elections, the ruling SNS party obtained 43% votes, and for the first time since the 2014 elections, it was not able to form the majority in the Parliament by itself. The representatives of 25 parties and movements obtained seats in the Parliament (12 lists in total), and the major novelty of the elections is that the new green-left coalition of social movements and civic initiatives Moramo ("We have to"), obtained 13 seats. In the presidential elections, Vučić won with 58.6%, and the distribution of votes for the other candidates was similar to the parliamentary elections.

Constituted only 120 days after the elections, the new Parliament, on the one hand, represents the continuation of the previous governing coalition, but on the other, with the opposition returning to institutions, pluralism was reintroduced, formally but also in terms of the debate. After many years of deinstitutionalization of politics and the use of extra-institution-

al actions and strategies by the opposition, the elections indeed opened a new opportunity for the opposition to operate within the institutions and democratise them.

Not enough time has passed since the new Parliament was constituted so it is not easy to say something conclusive and valid regarding the quality of political pluralism that could be achieved within this Parliament. However, on the negative side, it should be mentioned that members of the largest parliamentary group ("Aleksandar Vučić - Together we can do everything") already submitted many proposals for the establishment of investigative committees that would explore the actions and statements of individual members of the opposition (Otvoreni parlament 2022). Besides being proposed to continue to exercise pressure on the opposition, those committees also disrupt the normal work of the Parliament. The president of the Parliament is also abusing his power to limit the opposition's time for discussion. Additionally, in order to limit the possibility of the opposition to adequately prepare itself for the parliamentary sessions, the ruling party is abusing the abbreviated procedure for scheduling the parliamentary sessions (24 hours before the sessions) putting the opposition in an unequal position. The tradition of hate speech and defamations against representatives of the opposition also persisted in the newly elected Parliament. On the positive side, the opposition parties got more posts of presidents and deputy presidents of the committees and parliamentary delegations than in the Parliament constituted in 2016. Besides, the opposition, especially the new green left alliance, seems to be particularly active in participating by proposing various initiatives and also by reminding other actors about the democratic rules and institutional arrangements.

6. Conclusions

This chapter has sought to analyse the opposition's position and the role in Serbia in the last 30 years. We aimed to provide an overview of the contextual factors and to show the specificities of the post-socialist democratisation process and democratic backsliding in Serbia. Those contextual factors shaped how the formal and informal rules (according to which the opposition acted) were formed and influenced how the opposition was engaged in public life. In this concluding section, we wish to discuss further some of the main tendencies of those processes from the perspective of institutional rules, perceptions and narratives about the opposition used within

the Parliament, the relationship of the opposition and the media and the extra-institutional engagement of the opposition.

As already explained in the second section of this chapter, the very beginning of political pluralism in Serbia was not designed after the debate and negotiations between new and old political parties in search of an agreement. Instead, the new constitutions, laws and other rules that regulated political life were imposed by the League of Communists of Serbia. The way in which the new framework was built continued, in the next ten years (1990-2000), to be the dominant way in which the rules of the institutional game were created. The majority in the Parliament dictated the conditions in which the political opposition acted and the Parliament itself never became the place of decision-making and the opposition remained very marginaliSed (Goati 2020). Although we certainly cannot speak about direct continuity, the period from 2012-2020 was marked by similar tendencies. The authoritarian tendencies of the ruling SNS party grew over time, but they became especially visible since 2016 with the severe violations of electoral processes and the marginalisation and oppression of the opposition in the Parliament. The regime narrowed the institutional space for the opposition to act and to participate equally in electoral competition which finally resulted in the boycott of the opposition in the 2020 elections. In the period that followed (2020-2022), the Parliament itself became a marginalised institution serving exclusively to the interest of the ruling party.

Although the period in between, from 2000 to 2012, was marked by processes of democratic transition that were finally initiated, even though the old regime structures continued to obstruct the reforms, the democratisation of the institutional rules, which would enable empowerment of the position of opposition within the Parliament, did not happen. However, during this period (especially from 2004), the Parliament became a dynamic place and the elections held in that period were freer and fairer than ever before.

Despite these differences between phases, the parliamentary dynamic was always strongly marked by delegitimisation of the opposition. Still, two different narratives used by the majority could be distinguished since the introduction of political pluralism. On the one hand, there is delegitimisation that started in 1990, characterised by labeling the opposition as the enemy of the Serbian people, the enemy of national unity, or a collaborator of the enemies (international community or former Yugoslav Republics). Those narratives were often followed by defamations and hate speech directed against the opposition. When Milošević's regime was defeated, the new narratives of delegitimisation were used by the new majority focusing on the account-

ability and responsibility of opposition for the wars and total social and economic destruction of the country during the '90s. This new narrative, even though it continued to delegitimise the opposition, like the previous one, introduced the accountability and responsibility of the previous ruling majorities for the consequences of their politics. It should be noted, however that the endurance of the practice of delegitimisation of the opposition, also during the period of major democratic reforms, certainly did not help to create an institutional political environment in which the opposition could fulfill its democratic role. From 2012 until today, both narratives were used by the ruling party. Still, the growing authoritarian tendencies were followed by the increased use of labeling the opposition as the enemy of the people.

The delegitimisation of the opposition was also always done through ruthless media campaigns, and the overall trend of political interference in media freedoms has been a constant in Serbian political life since 1990. Media were always used as a powerful weapon of the majority even though, since 2000, the legal frameworks changed in the direction of improvement of media pluralism. As in the case of the narratives about the opposition within Parliament, this trend towards the delegitimisation of the opposition was partially interrupted only during the first decade of 2000. On the other side, the peak of the practice of political interference was reached with the regime of Aleksandar Vučić, which was in a continuous campaign with the goal of delegitimization and defamation of the opposition. The unfavorable position of the opposition in terms of access to media and awareness that only improvement of the media freedoms and media pluralism would allow free and fair electoral competition, but also their consolidation and growth, made the issue of media the most frequent immediate cause of the extra-institutional engagement of the opposition.

The whole history of opposition in Serbia was strongly marked by extra-institutional engagement, except for the period 2000-2012. Four large waves of protest took place in the last 30 years: 1991/1992, 1996/1997, 1999/2000 and 2021/2022. The first two waves produced some results, but in most cases, the concessions made to the opposition by the regime were later withdrawn or not respected. The third wave resulted in the conclusion of the Milošević regime and the last one allowed the 2022 elections to happen in slightly improved conditions and brought back the opposition into the Parliament. It should be noted that, although the opposition political parties from the right side of the spectrum also sometimes used extra-institutional actions, this form of engagement was and still is mainly related to the parties that are pushing for democratisation and fight against authoritarian tenden-

cies. That could be explained by the characteristic of the liberal and democratic-oriented electorate that is more interested in political life, have more positive attitudes towards democracy and it is in general more interested to participate in all types of social and political engagement (Todosijević and Pavlović 2020; Fiket and Pudar Draško, 2021). Still, even though we concluded that the Serbian democratic opposition often used extra-institutional pressure to influence the decision-making process, given that they were marginalised within institutions, it should be clarified that the last wave of protest represents some relevant differences compared to the previous waves.

Before all, the organizers of the civic protests that took place in 2021 and 2022, following the waves of protests that took place in 2018 and 2019, have refused to cooperate with political parties, indicating a lack of trust in political organisations and existing parties (Pudar Draško *et al*., 2019). Parties in Serbia are, in fact, often seen as organisations whose sole function is to serve the interest of the corrupted elite (Fiket *et al*., 2017). Not only that the perception of the intentions of political parties is questioned by the population, but also its ability to make coalitions and mobilize citizens' deep dissatisfactions with authoritarian ruling. At the same time, this mistrust in political parties opened the opportunity for civic initiatives and social movements to enter the political arena and position themselves as new political actors responding to the needs of the citizens. In the last elections, some members of the social movements and civic initiatives entered the institutions and this could certainly bring some positive changes. However, to challenge the current regime both types of engagement, institutional and extra-institutional, should be used and alliances should be built between a variety of democratic political actors.

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