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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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COMMENTS

**ON THE ROLE AND LEGAL PROTECTION
OF THE OPPOSITION**

by

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I. Opposition and rights: general remarks

Although many times disregarded, the notion of opposition has to be considered as one of the main points of the contemporary Theory of State and Constitutional Law. In fact, the idea of opposition summarizes many important concepts traditionally important, but requires a new and specific consideration due to the new constraints of political democracies, that quite deeply differ from the theoretical schemes which tried to explain them.

Effectively, the idea of opposition has to do with political freedoms, such as those of beliefs, of speech, and of dissent. With the separation and the balance of powers. With social and political pluralism... All these concepts find a unitary expression in the notion of (political, first; parliamentary, after) opposition.

In fact, opposition has to be considered as a two-sided notion. On the one hand, in what could be called an objective sense, opposition is a function to be performed in the political system, and in this sense every political system has to face some kind of political opposition, be it legal or not, peaceful or violent, stronger or weaker, unitary or fragmented. Because those precisions require to have a second, subjective, side: that of the opposition as subject, as organization which can consequently be characterised as legal, peaceful, strong, fragmented... or the opposite.

In this sense, the recognition of both notions of opposition by a political regime appears as a defining difference between democracies and authoritarian systems. The former assume that citizens are free to have different beliefs, values and interests, and to express them, and to judge powers' attitudes according to them, and even to try to build new social and political majorities closer to them. Whilst dictatorships or authoritarian regimes try to fight those ideas, even by forbidding them, trying to impose a set of values, of interests, of beliefs, and to prosecute those who try to oppose them.

From this very general point of view, it is clear that the protection of the political opposition is an important feature of any democratic regime. It could even be said that there can be no democracy at all if political opposition is not guaranteed. That is the reason why democratic regimes have been described as regimes with "assured opposition", given that this guarantee makes a difference (constitutionally and politically) essential.

In this pages, we will leave aside the obvious problem posed by non-democratic regimes, which consequently do not guarantee the civil and political rights which underlie the very idea of political opposition. When those rights are not assured, there is no Constitution, according to the classical expression of the 1789 French *Déclaration des Droits de l'Homme et du Citoyen* (article 16). And there is no opposition, it could be added: when politics do not exist, there cannot be political opposition.

But, of course, this is not enough. Because political democracies may follow very different models and may adopt very different institutional arrangements. There is a common feature, according to which citizens can freely elect their representatives, who form a body in charge of debating and adopting decisions which are considered as expression of the people's will. But citizens may exercise their power in different ways, and therefore representative bodies can be elected through different systems. The Legislative power may be unicameral or bicameral. The Executive may be directly or indirectly elected... And the opposition, considered as a real institution ("The loyal Opposition" or "Her Majesty's Opposition", in the British and formally most developed model) also varies, adopting different features which depend on different variables, such as the institutional structure or the social and political map of a given society. All of them affect the way opposition (as a function) is developed, and the way opposition (as a subject) is organized.

II. Opposition and separation of powers: institutional constraints

Therefore, democratic regimes organize in very different forms, and the opposition (as a function) has to be performed within the system, thus adapting itself to its structure.

Historically, the idea of opposition emerges linked to the limitation of powers of the Monarchy. But this phenomenon develops in different ways, through different historical paths. In Britain, it leads more or less peacefully and gradually to a parliamentary system, where the Government (despite of being considered as “His/Her Majesty’s Government”) needs the support of the majority of Parliament, and both bodies are obliged to cooperate to the extent that British parliamentary regime has been described as “governing through Parliament”. In France, the idea of national sovereignty grew in opposition to King’s previous absolute power, provoking different clashes and giving new blood to the notion of “separation of powers”, which the 1789 Declaration considers another essential requirement for the existence of Constitution itself.

Nevertheless, that notion of separation of powers needs to be reviewed. In fact, it remains basically unchanged in many, and very different, Presidential systems. That may be the case of the United States of America, of Ukraine or of the French Republic in those situations called of *cohabitation*. In these political systems, the Head of State is a President, usually directly elected by the citizenship, and who –in a quite logical consequence, following democratic theory- has relevant powers. But who, according to the same theoretical framework, has to be controlled and may be challenged along institutional lines by other bodies (mainly, by the Parliament). In this sense, and in a way more or less similar to that of the Constitutional, limited Monarchies, the Parliament (one or both of its Chambers) may lead the opposition to the Head of the State, which could then be defined as an “institutional” opposition.

From a different point of view, the existence of two parliamentary chambers may also allow moments of another “institutional” clash, when they have politically different majorities: France, again, may be seen as a good example of this possibility, with a Senate frequently opposed to the National Assembly. But many other cases can be found: for instance, and in a different institutional context, the *Bundesrat* experience could also be invoked.

In those all cases, the guarantee of opposition is linked to the basic ideas of separation of powers, and of “checks and balances” among them. Nevertheless, the situation may be deeply different in parliamentary systems, where the idea of separation of powers remains formally in force, but its political, institutional and constitutional meaning has radically been transformed.

It is now evident that parliamentary systems no longer can be described and understood simply as systems of institutional opposition, although the political theory goes on speaking of separation and division of powers, and of control of the Government by the Parliament. The victory of the principle of democracy and the subsequent democratisation of the electoral systems with the implementation of the universal vote had consequences such as the development of mass political parties and the progressive organization of Parliaments along partisan lines, which oblige to re-consider classical theories. And in this context, the notion of opposition finds its more important role.

III. Majorities, minorities and opposition

According to what has been previously exposed, the protection of political opposition is a requirement of democratic regimes. And, of course, it will vary according to the institutional and constitutional context. In this sense, it may be stated that the classical guarantees of civil and political rights and of separation of powers allow social pluralism to become political dissent. Going back to the classical terms of the 1789 French Declaration, where rights are assured, and separation of powers is guaranteed, there is Constitution; that is, power is limited; in other words, there is, or at least there may be, opposition.

But it is not enough: once that general context is assured¹, the practice of contemporary democracies has to be taken into account. And it is clear that political life is nowadays mainly monopolized by political parties, so that the social pluralism usually presents itself as political debate and fight among different parties which show different faces (social, parliamentary, electoral).

Therefore, the guarantee of opposition has to consider the social and political structure of a given society, and that implies that general rules are very difficult to set up, apart from the very fundamental ones already recalled, related with fundamental rights and with the institutional framework adopted by a given democracy. The common foundations are then fundamental rights, (which allow) democratic elections, (which allow) elected bodies, within which another free debate takes place and allows to take democratic decisions.

In this sphere, many rules may be proposed as more or less general: within the Parliament, it is important to provide MPS, irrespective of their partisan membership and just as representatives of the citizens democratically elected by them, the means for fulfilling that function of representation: the right to move parliamentary motions and questions, the right to call for papers and persons, the right to take part in debates, irrespective of their nature (budgetary, legislative, general or particular, appointments...). After all, and as it has properly been said, MPS are “the first minority”, so that according to classical democratic theories they have to be granted their right to intervene in all parliamentary procedures, through which democratic decisions are adopted. The guarantee of rights for any MP has a clear structural consequence: the number of (at least, potential) parliamentary subjects increases substantially, and the plurality of social interests, values and ideologies find more channels of expression in parliamentary, democratic life.

Of course, that rules depend on some previous other rules. In fact, the right to participate in a debate, or to pose a parliamentary question, could become useless if the organization of the debate or the time dedicated to questions were exclusively decided by the majority –or the part of the Parliament that supports the majority-. Because, in that framework, the majority could allow just those debates which were interesting for them, and to release, to postpone or simply to avoid those others interesting for other political and parliamentary actors. It is evident that it is not possible to speak about guarantee of opposition if the majority of the Parliament can, for instance, set the parliamentary agenda without any agreement, so taking unilaterally the main decisions related to the proceedings (dates of the debates, time dedicated to any issue, bodies competent to decide). So that, from this point of view, it is important, on the one side, that all the different parliamentary parties and groups be represented in all parliamentary bodies (Conferences of Presidents of Parliamentary parties, Committees, and so on); and, on the other, to grant that the procedure for setting the agenda gives some place for the different groups to express their views.

Beyond that very general principles, different political and institutional systems and traditions show very different political contexts. In fact, and we said before, the term opposition may be used almost universally. But it may adopt different appearances. And it is in this perspective that we have to look at, to establish some very important categories.

Because, apart from what we have already exposed (non democratic regimes, without “assured opposition”; presidential regimes, with an “institutional opposition”), the internal political structure of parliaments rests on the distinction of different parliamentary parties, factions or groups, formed by the MPs belonging to –or elected as candidates supported by- the same political parties. This groups may be, of course, many or few; bigger or smaller; but, in strictly qualitative terms, the main distinction is that between the majority and the minority or minorities. But, in fact, and very especially in the parliamentary regimes, the main political distinction is that between the parliamentary majority, which supports the Government; and the parliamentary

¹ According to the *Code of Good Practices in Electoral Matters* (CDL-EL (2002)5), the respect for fundamental rights appears as “conditions for implementing the principles of Europe’s electoral heritage”.

opposition, which opposes it. This distinction is usually shown in an initial voting (of confidence, of investiture) about the new Government or Cabinet, in which the Parliament is split between the party (or parties, in the case of coalitions) who vote for, and those who votes against. The former has some kind of political control on the Chamber, derived from its very condition of majority which usually grants the victory of its opinions in any parliamentary vote. The latter has a different position, which may be used to control the Government and to present political alternatives to citizens.

In that framework, the functions of opposition are essential to fulfill the requirements of democratic government: if citizens are believed to govern, they have to know what Government does, and why. The Government is then obliged to explain its conduct, and to answer any question that may be relevant. And the people, the citizens, have also to know if there are alternatives to governmental decisions, because that is the only way for them to be able to judge those decisions, and the majority that supports them. In this sense, the general instruments provided by democratic regimes for controlling the Government, so assuring its responsibility (within or outside the Parliament: parliamentary questions, general debates), must grant a particular position to minorities in general, so avoiding that the Government may control the parliamentary information and criticism through the parliamentary majority.

Once that has been said, it is difficult to establish general rules which may be valid for all countries, because political and institutional cultures and contexts may be absolutely different. It may be generally said that in parliamentary regimes the Government rests on a parliamentary majority, but it may well be formed by a ruling coalition which may occasionally break. From this point of view, the idea of Governmental solidarity cannot exclude that different parties or groups forming a majority have to maintain some capacity of action.

And, of course, the same can be said with reference to the minorities. First of all, there may be (and in many countries there are) minorities which do not belong to the majority, but that can occasionally support and reinforce it. As there may, among the minorities that oppose the Government, radical differences. That is why it is possible to talk about "oppositions" as something different to "the opposition", or to set the difference between the opposition and the Opposition (with a capital O) developed especially in the British literature. This distinction is founded on a different legal status, which grants the Opposition (*Her Majesty's loyal Opposition*) with some procedural advantages, that usually take the form of priority in some debates and in the organization of the parliamentary work.

In any case, it has to be underlined that this distinction is made in a context of social acceptance of a political culture of alternatives between two parties: one, that governs; the other, that opposes. There are, in fact, other parties, but they have not succeeded –although they have tried, and continue to try- to challenge that very simple –and possibly very practical- scheme. And it has to be considered that this model (the Westminster model to use a well-known term in political science) is not the only one. In fact, it is possibly quite exceptional, in comparative terms.

In other words, and trying to summarize, democratic regimes have to guarantee – constitutionally and legally- the possibility for the different political actors (parties, MPs, parliamentary minorities) to control the (parliamentary-governmental) majority. But the idea of defining an special status for "the" opposition (or the Opposition) has to face some clear problems. The main one is that in many countries that "Opposition" does not exist. Because in many countries there are groups which do not clearly belong to the majority, nor to the opposition, and thus are not ready to accept this clear, dual cleavage, especially if it implies any kind of comparative privilege. As there are many other countries where the majority has not to face an "Opposition", but different oppositions, which try to develop different strategies. In that context, it well may happen that an opposition party or group is not ready to accept an special status for any other.

And it has to be also highlighted that these factors are not mainly defined by law. Of course, there are legal techniques (in the Constitution, in the electoral law, in the parliamentary rules) which may have consequences in the political or parliamentary structure of a given country, but social and political divisions are rarely fixed by law. In this sense, any purpose of establishing a special status for the political (namely, the parliamentary) opposition, if it intends to go further than granting all minority parties and parliamentary fractions the possibility to control the majority and to present their political alternatives, cannot neglect the possible plurality of society, and thus of the Parliament. In particular, any attempt to enact such a regulation should be basically accepted by the minorities –at least, by the main minorities-, because otherwise it could become just an instrument of the majority (who enacts the laws, including any “law on opposition”) to control the minorities, and to modify the political and parliamentary game just by deciding who must be the main actors, and who are kept out (or almost ignored) in the parliamentary arena.