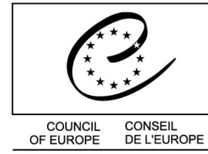

Strasbourg, 25 May 2009

CDL-DEM(2009)001*
Or. Engl.

Study no. 497

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE ROLE OF THE OPPOSITION

by

Mr Ergun ÖZBUDUN (Member, Turkey)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

This document will not be distributed at the meeting. Please bring this copy.
www.venice.coe.int

It is self-evident that "a political opposition in and outside parliament is an essential component of a well-functioning democracy." If one of the main functions of the opposition "is to offer a reliable political alternative to the majority in power by providing other policy options for public consideration," another is the "overseeing and criticising the work of the ruling government" thereby ensuring transparency and efficiency in the management of public affairs (Resolution of the Parliamentary Assembly, 1601, 23 January 2008). Indeed, in the view of Robert Dahl, one the leading political theorists of our time, participation and public contestation are the two main dimensions of contemporary democracies (or "polarities" as he prefers to call them). The public contestation dimension clearly refers to the extent to which political opposition, within and outside parliament, can function freely and under appropriate constitutional and legal guarantees.

Obviously, an analysis of the role of the opposition in democracies cannot be limited to the parliamentary sphere. To be able to speak about the role of the parliamentary opposition presupposes the prior recognition of a large number of other fundamental rights and liberties, such as free and fair elections based on equal and universal suffrage, freedom to form and join organizations, freedom of expression, multiplicity of political parties competing under fair and equal conditions, eligibility for public office, availability of alternative sources of information, etc. However, since the Resolution 1601 of the Parliamentary Assembly inviting the Venice Commission to undertake a study on the subject concentrates on the "guidelines on the rights and responsibilities of the opposition in a democratic *parliament*," in this report, I shall deal only with questions concerning parliamentary oppositions.

As correctly stated in the Assembly Resolution referred to above, "differences exist in the degree of institutionalisation of the opposition in the parliaments of Council of Europe member states, ranging from informal recognition in the parliamentary rules of procedure when granting rights to the parliamentary minority to formal recognition of the opposition in the constitution of the state" (paragraph. 8). Similarly, the Venice Commission notes that "the legal status of the opposition in a given national Parliament varies greatly from country to country… The concrete solutions are determined by the constitutional framework, the electoral system and other historical, political, social and cultural factors. Hence the degree of institutionalisation of the opposition differs from largely unwritten, conventional recognition to formal recognition entrenched in the Constitution." The Venice Commission adds, however, that despite such variety, "there is at least a general requirement to provide the parliamentary opposition with fair procedural means and guarantees. This is the condition sine qua non for the opposition to be able to fulfil its role in a democratic system (CDL-AD [2007]015, 16-17 March 2007, paras. 4,5).

Different European systems concerning the legal protection of parliamentary oppositions can be classified according to two criteria: who are the beneficiaries of such protection, and how such protection is provided for. As regards to the former, we can distinguish among forms of protection for individual members of parliament, for political party groups, and for the opposition as a whole. With regard to the latter, a distinction can be made among recognition by the constitution, by a special law, by the formal parliamentary rules of procedure, and by informal rules and practices.

The legal protection of the parliamentary opposition must start with the individual members of parliament. They must not be bound by a binding instruction or mandate. They must enjoy parliamentary immunities, namely parliamentary non-liability (freedom of speech) and parliamentary inviolability (freedom from arrest). They must be able to ask oral or written questions, to table bills and motions on legislative matters, to speak and to vote in all debates, and to participate in parliamentary committees' work.

To ensure efficiency in the work of parliaments, certain rights are granted not to individual members, but to parliamentary party groups. The minimum number for forming a

parliamentary group varies from country to country. For example, under the Turkish Constitution and the Standing Orders of the Grand National Assembly, while oral or written questions can be asked by every individual member, motions for oral questions with debate or for parliamentary investigations can be tabled only by at least twenty deputies, for interpellations by at least twenty deputies or a political party group, for a parliamentary inquiry by the one-tenth of the total membership of the Assembly (i.e., 55 deputies). Spokespersons for political party groups enjoy a constitutionally guaranteed right to speak, sometimes longer than the individual members, on a large number of questions specified in the Constitution or the Standing Orders. Again, constitutional guarantees can be provided by the constitution for party groups to be proportionately represented in the governing bodies of parliament or in the permanent (standing) or temporary committees (e.g., Turkish Constitution, art. 95). Certain constitutions may grant party groups, or a certain number or percentage of members to apply to the Constitutional Court to request a constitutional review of adopted laws (e.g., Turkish Constitution, art. 150).

A third and somewhat unusual way is to treat and regulate the parliamentary opposition as a single bloc by way of a special legislation. This seems to be an effort to artificially create a Westminster type government-opposition relationship intended to avoid an excessive fragmentation of the legislature. This was the idea behind the Ukrainian draft law on the parliamentary opposition commented upon by the Venice Commission (CDL-AD [2007]015). However, as rightly stated in our Commission's opinion, such a model "may raise problems when put into practice in a different context" and "conflicts with the rule that the will of parliament is formed by deputies who in each specific case vote according to their convictions" (CDL-INF[2001]11, 6-7 July 2001). A similar attempt failed in France when the French Constitutional Council declared on 22 June 2006 that the proposition was contrary to the Constitution as it would amount to an "unjustified difference" in the treatment of the various political groups (Report by Mr Karim Van Overmeire, "Procedural guidelines on the rights and the responsibilities of the opposition in a democratic parliament," Parliamentary Assembly, Doc. 11465 rev., 3 January 2008).

With regard to the second criterion, legal protection for parliamentary opposition can be provided by the constitution, a special law, parliamentary rules of procedures (Standing Orders), or by informal rules and understandings. While the latter two may be sufficient in older and more established democracies, younger democracies seem to need stronger and more effective guarantees. Of course, the strongest such guarantees are those entrenched in the constitution. On the other hand, it is hardly practical to regulate such a large area in detail in the constitution. Probably a middle-of-the-road, common sense approach would be to establish certain basic guarantees in the constitution, such as the principle of proportional representation in participation in the work of parliament and the recognition of certain rights of initiative to party groups or a certain number or percentage of deputies, and leave the details to the rules of parliamentary procedure. To further strengthen such guarantees, one may consider the possibility of introducing the judicial review of constitutionality over the rules of parliamentary procedure (Standing Orders) such as in the case of the Turkish Constitution (Art. 148). It is debatable, however, whether this would be compatible with another established principle of parliamentary democracy, namely the procedural independence of parliaments.

Finally, to provide legal protection and guarantees to parliamentary opposition by way of a specific law is exceptional. Currently, the only example seems to be a special law of 1998 in Portugal. The most common approach seems to be regulation partly in the constitution and partly in the rules of parliamentary procedure.

As to the substance of such guarantees, the large number of recommendations in the procedural guidelines adopted by the PACE resolution 1601 seem reasonable and worthy of consideration by national parliaments. In such efforts, however, "a balance has to be struck between, on the one hand, the legitimate will of the majority to go forward to bring about the

program on the basis on which they were elected, and, on the other hand, the possibility for the opposition to express its views on the bills tabled by the government – and also on other governmental action- in a way that allows them to influence the texts that are to be adopted" (Report by Mr Karim Van Overmeire, Parliamentary Assembly, doc. 11465 rev., 3 January 2008, paragraph. 40).