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(VENICE COMMISSION)

DRAFT REPORT

ON THE ROLE OF THE OPPOSITION

on the basis of the comments by

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and

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I. Introduction

1. In its Resolution 1601 (2008) on "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament" the Parliamentary Assembly of the Council of Europe (PACE) invited the European Commission for Democracy through Law (Venice Commission) to undertake a study on the role of opposition in a modern democratic society.

2. The present report has been prepared on the basis of the contributions from Mrs Nussberger and Mr Özbudun, who are appointed as rapporteurs (documents CDL-DEM (2009)001 and CDL-DEM (2009)002 respectively).

3. It also takes into account previous work done within the Venice Commission , such as the comments on the role and legal protection of the opposition, by Mr Sanchez Navarro (former substitute member on behalf of Spain), CDL-DEM (2007)002rev, the Code of Good Practice in the field of political parties and its explanatory report CDL-EL(2008)027.

II. Scope of the study

4. The Parliamentary Assembly has elaborated a comprehensive document on "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament". It is based on a comparative analysis of existing rules on the role, function and rights of the parliamentary opposition and also takes into account documents on topical discussions on new rules on this subject.

5. PACE's Resolution (2008)1601 summarises procedural guidelines, but nevertheless stresses the necessity of a study on the role of opposition in modern democratic society by the Venice Commission.

6. Dealing with the role of opposition in democracy would presuppose prior recognition and analysis 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 organisations, freedom of expression, multiplicity of political parties competing under fair and equal conditions, eligibility for public office, availability of alternative sources of information, etc…

7. However, since the Resolution (2008) 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", the current study will concentrate on questions concerning parliamentary opposition.

8. After a legal assessment of the role of the oppositions in democratic regimes the analysis will turn to the identification of the legal forms of protection that can be found in Europe.

III. Legal assessment of the role of opposition in democratic regimes

A. The notion of opposition

9. The notion of opposition has to be considered as one of the main points of the contemporary theory of State and constitutional law.

10. The idea of opposition encompasses many important concepts, but requires new and comprehensive consideration due to the new constraints of democracies.

11. In fact, the idea of opposition is thoroughly linked to political freedoms such as those of beliefs, of speech and of dissent, to the separation and balance of powers, to social and political pluralism. All these concepts find a unitary expression in the notion of political, first, and parliamentary opposition, second.

12. The recognition of an 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, to express them, and to judge attitudes to power and even to try to build new social and political majorities. However, dictatorships or authoritarian regimes try to fight those ideas, by forbidding them, trying to impose a set of values, of interests, of beliefs and even prosecute those who try to oppose them.

13. Beyond these very general principles, political and institutional systems and traditions exists in very different political contexts. In fact, the term opposition may be used almost universally, but it may have a different nature (or common various appearance).

14. 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. These 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.

15. In parliamentary regimes, the main political distinction is that between the parliamentary majority, which supports the Government; and the parliamentary opposition, which opposes it. This distinction is usually shown in an initial voting (of confidence, of investiture) on 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 vote against.

16. However, 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. Likewise, there may be, among the minorities that oppose the Government, radical differences. That is why it is possible to talk about “oppositions” as something different from “the opposition”, or to distinguish between the opposition and the Opposition (with a capital O) developed especially in British political literature.

17. This distinction is founded on a different legal status, which grants the Opposition (*Her Majesty’s loyal Opposition*) some procedural advantages, that usually take the form of priority in some debates and in the organisation of the parliamentary work.

18. 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 may be other parties, but they have not succeeded although they have tried, and continue to try- to challenge this very simple and possibly very practical-system. Furthermore, 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. This pure form may be quite exceptional, in comparative terms.

19. Therefore, since the distinction between opposition, oppositions, and minorities might be difficult to draw particularly in those countries where there is no institutionalised opposition like in the Westminster model, the term opposition will refer hereafter to all situations.

B. Opposition and separation of powers: institutional constraints

20. Because political democracies may follow different models and may adopt very different institutional arrangements, the opposition as a function has to be performed within a given system.

21. In a democracy, 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", Westminster 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 organised.

22. 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 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 the British parliamentary regime has been described as "governing through Parliament".

23. In France, the idea of national sovereignty grew in opposition to the 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 the Constitution itself.

24. Nevertheless, this notion of separation of powers needs to be reviewed. In respect of, presidential systems, the United States of America, Ukraine or France. In those situations called "*cohabitation"* exists. In these countries, the Head of State is a President, usually directly elected by the citizens, and who – in a quite logical consequence, following democratic theory - has wide powers. According to the same theoretical framework, the President 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.

25. 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, where the interest of the *Länder* and that of the federal state may be opposed.

26. In all these 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 totally 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.

27. It is now evident that parliamentary systems can no longer 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. In the late 19th and early 20th century, 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 organisation of Parliaments along partisan lines, which oblige us to re-consider classical theories.

28. Similarly, the Commission noted in its opinion on the draft law on the Parliamentary opposition in Ukraine 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."

C. The content of the role of opposition

29. In the view of Robert Dahl, 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.

30. There is a broadly shared conviction on the role parliamentary opposition should play in a democracy.

31. As stated in PACE's Resolution (2008) 1601 "a political opposition in and outside parliament is an essential component of a well-functioning democracy."[1]

32. The opposition ensures "transparency of public decision and efficiency in the management of public affairs, thereby ensuring the defense of public interest and preventing misuse and dysfunction "[2].

33. 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.

34. Furthermore, the opposition is seen as an "essential component of a well-functioning democracy" as it offers "a reliable political alternative to the majority in power by providing other policy options for public consideration.[3]" Indeed 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.

35. With regard to political parties, the Commission's Code of Good Practice in the field of political parties addresses this issue in Chapter 4 on "Performance in office and opposition" and considers that "Opposition function implies scrupulous control, scrutiny and checks on

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[1] PACE Resolution (2008) 1601, paragraph 3.

[2] PACE Resolution (2008) 1601, paragraph 3.

[3] PACE Resolution (2008) 1601, paragraph 3.

authorities' and officials' behaviour and policies. However, good governance advises that parties in opposition (as well as ruling parties) refrain from practices that may erode the democratic debate and which, could eventually undermine the trust of citizens in politicians and parties."[4]

36. The explanatory report to the Code of Good Practice is eloquent. "Political parties in the opposition play an extremely important role in a democratic society, both in general public debate and inside parliaments, presenting political alternatives and controlling the government. They enjoy a number of freedoms to conduct their activities with the ultimate aim of attaining decision-making power through the next elections".

37. A good example of formal recognition of the beneficial effect of the opposition can be found in the regulation of the rights and privileges of Her Majesty's Loyal Opposition or the Official Opposition in the United Kingdom; [5] in particular, in the practice of granting public funding to assist the opposition in carrying out its parliamentary duties as well as in developing alternative policies, encouraging them to establish a shadow programme.[6] Accordingly, the Labour Party Rule Book explicitly refers to the "Shadow Cabinet" when the party is in opposition and the Liberal Democrats' and the Conservative Party's websites present the Liberal Democrat shadow ministerial team and the Conservatives' shadow cabinet.[7] Yet, being in the opposition entails not only rights but also obligations which are rarely addressed by the national legislation.[8]

38. The main duties of parties placed in the opposition are checking and criticising, always in a responsible and constructive manner, as well as rendering the majority in power to account, since citizens have to know what government does, and why, if they are supposed to govern.[9] These duties are implicitly recognised, self-imposed and regulated in the provisions of some parties' statutes therefore embodying good practices in this area. For instance, internal party rules imposing reporting obligations to the parliamentary group so that the party can evaluate the fulfillment of the group's task of watching over the government's activity or supporting the application of the party political project when it is in government.[10] "[11].

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[4] Code of good practice in the field of political parties, CDL-AD(2009)002, paragraph 53.

[5] The British opposition constitutes the most developed or institutionalised model, according to the Venice Commission's Opinion no. 443/2007, Comments on the role and legal protection of the opposition, p. 2. Its privileges include the "Opposition days" reserved to discuss the matters of the opposition with precedence over the government business, certain powers in the agenda-setting process, among others outlined in the Standard Note SN/PC/3910 available on the website of the parliament (http://www.parliament.uk/commons/lib/research/notes/snpc-03910.pdf).

[6] The first source is exclusively available to opposition parties whereas the second (introduced by the Political Parties, Elections and Referendums Acts 2000 as the *Policy Development Grant*) is allocated between all political parties with more than two members in the House of Commons. For more details, see the abovementioned Standard Note, p. 3.

[7] See clause VIII.e of the Labour Party Rule Book. All the information on the *shadow cabinets* of the Liberal Democrats and the Conservative Party is available at http://www.libdems.org.uk/party/people/spokes.html and http://www.conservatives.com/tile.do?def=people.shadow.cabinet.page, respectively.

[8] See Mr Van den BRANDE's Report, p. 11.

[9] See the Venice Commission's Opinion on the draft law on the parliamentary opposition in Ukraine (CDL-AD(2007) 019, Comments on the role and legal protection of the opposition, p. 5.

[10] Among the parties studied, such reporting requirement is regulated in similar terms by the Belgian Socialist Party statutes (art. 49.1), the French Socialist Party statutes (art. 9.9), the Spanish Socialist Workers' Party (art. 35.e), and still in Spain, by the United Left Statutes (art. 38.k).

[11] See CDL-EL(2008)027 paragraph 142.

39. Despite the fact that this perception is commonly accepted within the member States of the Council of Europe, political reality in many countries paints a different picture.

40. There are two forms of abuse or dysfunction of the role of the opposition: Either the opposition completely blocks effective governmental work and/or effective parliamentary work, or the opposition does not offer any alternatives to the work of the government and/or to the proposals of the parliamentary majority and is therefore not visible in the political debate.

41. Such negative effects are usually not primarily caused by deficient legal rules on the work in parliament and the role of the opposition, but are due to deeper problems within the political culture of a country.

42. The prerequisite for an effective functioning of the opposition in a democratic system is that different world views and different political convictions existing in society are represented in Parliament. If candidates and parties do not have an identifiable political profile, it is difficult to build up a constructive dialogue on different political options.

43. Such a faceless party system might either lead to a policy of confrontation with the opposition acting as a persistent objector to every political move or to a fictive opposition not offering any alternatives. It would be naïve to expect this problem to be cured by reforming or restructuring the parliamentary system alone.

44. It is also necessary to look at the roots of the problem, although it is clear that changes to the political culture cannot be effected overnight.

45. It stems from the above 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.

46. That is the reason why democratic regimes have been described as regimes with "assured opposition", given that this guarantee makes a essential difference, constitutionally and politically. This protection will therefore constitute the second chapter of this analysis.

IV. Legal protection of parliamentary opposition

47. According to what has been previously exposed, the protection of parliamentary opposition is a requirement of democratic regimes and will, of course, vary according to the institutional and constitutional context.

48. However, despite such variety, the Venice Commission has already said "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 "[12].

49. 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 and opposition in general.

[12] CDL-AD(2007)015, paragraphs 4, 5.

50. Legal protection of parliamentary opposition can be classified according to two criteria: the criterion of the beneficiary and the criterion of the legal form of protection foreseen.

A. The beneficiary of the legal protection

51. The legal protection of the opposition can be dealt with through the protection of individual members of the parliament, the protection of parliamentary groups and the protection of the opposition as such.

1. The protection of individual members of the parliament

52. The legal protection of the parliamentary opposition must start with that of the individual members of parliament.

53. Within the Parliament, it is important to provide MPs, irrespective of their partisan membership and just as representatives of the citizens who democratically elected them, the means to fulfill 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…).

54. Individual members must enjoy parliamentary immunities, namely parliamentary non-liability (freedom of speech), and parliamentary inviolability (freedom from arrest).

55. In the fulfillment of their parliamentary duties and functions, parliamentarians must be able to ask oral and 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.

56. After all, 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 finds more channels of expression in parliamentary democratic life.

57. Moreover, members of parliament must not be bound by a binding instruction or mandate.

58. In this regard, in the conclusions of the report on the imperative mandate (draft report CDL-EL(2009)005), the Venice Commission recalls that "has consistently argued that losing the condition of representative because of crossing the floor or switching party is *contrary to the principle of a free and independent mandate".*

59. Even though the aim pursued by this kind of measures (i.e. preventing the "sale" of mandates to the top payer) can be sympathetically contemplated, the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism". Indeed, imperative mandate is a generally awkward concept in Western countries and constitutions of a number of countries explicitly prohibit imperative mandate[13]."

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[13] (Andorra, Article 53; Armenia, Article 66; Croatia, Article 74; France, Article 27; Germany, Article 38.1; Italy, Article 67; Lithuania, Article 59 – which refers to no restriction of representatives by other mandates; Romania, Article 69; Spain, Article 67.2). See also CDL-EL(2009)005 paragraphs 11-12.

2. The protection of parliamentary party groups

60. Certain rights can be granted specifically to only parliamentary groups and not to individual members. These rights are usually meant to ensure efficiency in the work of Parliament.

61. 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, a parliamentary inquiry by one-tenth of the total membership of the Assembly (i.e., 55 deputies).

62. Interpellations for instance are often constitutionally reserved to a group of deputies or a political party group. For instance, according to the constitution of Turkey, interpellations must be brought by at least twenty deputies or a political party group; in the Constitution of the Czech Republic, according to section 43, "A group of at least twenty Representatives may address an interpellation to the Government or to an individual Minister on a matter within the competence of the Government or the Minister"; in Lithuania according to art. 61, "At sessions of the Seimas, a group of no less than one- fifth of the Seimas members may interpellate the Prime Minister or a Minister."

63. Spokespersons for political party groups may 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 rules of procedures.

64. Moreover, constitutional guarantees can be provided for party groups to be proportionately represented in the governing bodies of parliament or in the permanent (standing) or temporary committees. The principle of proportional representation is explicetly mentioned in several constitutions . According to Aricle 55.1 of the Constitution of Austria "The National Council elects its Main Committee from its members in accordance with the principle of proportional representation"; likewise in Denmark, Art.52, "The election by the Folketing of members to sit on committees and of members to perform special duties shall be according to proportional representation"; or in Art.95 of the Constitution of Turkey ". The provisions of the Rules of Procedure shall be drawn up in such a way as to ensure the participation of each political party group in all the activities of the Assembly in proportion to its number of members...".

65. The minimum number for forming a parliamentary group varies from country to country and the level of regulation also. While the Constitution of Portugal has a specific article devoted to the parliamentary groups (Article 180[14]) other constitutions will, like the Constitution

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[14] Article 180 reads : « Parliamentary groups.

1. Deputies elected for the same party or the same alliance of parties are entitled to set up a parliamentary group.

2. Parliamentary groups have the following rights:

a. To participate in the committees of the Assembly in proportion to the number of their Deputies and to nominate their representatives;

b. To express an opinion with regard to the order of business and to have challenge the order of business adopted before the Assembly in plenary session;

c. To initiate, in the presence of the Government, debate on questions of present and urgent public interest;

of Cyprus, only specify the minimum number for forming a parliamentary group[15], some constitutions may remain silent on this issue and leave the question to the rules of procedure of the Parliament.

3. The protection of the opposition considered as a whole

66. A third and somewhat unusual option is to treat and regulate the parliamentary opposition as a single bloc, by way of specific regulation.

67. This seems to be an effort to create a "Westminster" type government-opposition relationship intended to avoid an excessive fragmentation of the legislature.

68. Malta seems to have chosen this path, since the Constitution, provides especially in its Article 90.1 that "(1) there shall be a Leader of the Opposition who shall be appointed by the President."

69. Creating a "Westminster" type government-opposition relationship was for instance the idea behind the Ukrainian draft law on the parliamentary opposition commented upon by the Venice Commission[16].

70. However, as stated in the 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"[17].

71. A similar attempt failed in France when the French Constitutional Council declared, on 22 June 2006, that the arrangements introduced by the new Rule 19 of the Rules of Procedure of the National Assembly, insofar as they require parliamentary groups to make a statement of allegiance to the Majority or Opposition and, if they object, confer decision-making power on the Bureau of the National Assembly, are at variance with Article 4.1 of the Constitution. The Constitutional Council considered that Rule 19 also leads to an unwarranted difference in treatment, to the detriment of parliamentary groups that object to declaring such an

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d. To initiate, in each legislative session, 2 debates on motions questioning the Government on matters of general or sectorial policy;

e. To request the Standing Committee to take steps for the convening of the Assembly;

f. To request the setting up parliamentary committees of inquiry;

g. To initiate laws;

h. To propose motions for the rejection of the Government's programme;

i. To propose motions of censure on the Government;

j. To be informed regularly and directly by the Government on progress in respect of major matters of public interest.

3. Each parliamentary group is entitled to a place of work at the seat of the Assembly and to specialist and administrative personnel in whom it has confidence, as shall be determined by law.

4. Deputies who are not part of parliamentary groups shall be ensured minimum rights and guarantees, in accordance with the Standing Orders."

[15] The Constitution of Cyprus provides at Art. 73 12. that "Any political party which is represented at least by twelve per centum of the total number of the Representatives in the House of Representatives can form and shall be entitled to be recognised as a political party group".

[16] CDL-AD(2007)]015.

[17] CDL-INF(2001)011, 6-7 July 2001.

allegiance, by attaching to such a statement of allegiance certain consequences in respect of the right to participate in a number of parliamentary oversight activities. The proposition was contrary to the Constitution as it would amount to an "unjustified difference" in the treatment of the various political groups. [18]

72. This approach also presupposes a definition of opposition and makes it necessary to define different rules for the opposition and for the majority in Parliament.

73. Indeed, the idea of defining a 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, or to the opposition, and thus are not ready to accept this clear, dual cleavage, especially if it implies any kind of comparative privilege. Likewise there are many other countries where the majority has not to face an "Opposition", but different oppositions, which try to develop different strategies. In this context, it may well happen that an opposition party or group is not ready to accept a special status for any other.

74. Moreover, 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.

75. 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.

B. Legal forms of the protection of opposition

1. By the constitution

76. The constitution must be regarded as the appropriate place to define general rules applying to all deputies and which would consequently also benefit those belonging to the opposition.

77. Therefore, it is no surprise that parliamentary rights, such as parliamentary non liability (freedom of speech), and parliamentary inviolability (freedom from arrest) and the right to ask question can be found in several constitutions in Council of Europe member States, since these rights constitute the core principles of a real democratic parliamentary life and work.

78. Regarding parliamentary immunity for instance, constitutional provisions can be found in almost all constitutions of the Council of Europe member States[19].

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[18] See summary and full text of the decision in CODICES, FRA-2006-2-005.

[19] For instance in the following constitutions : Austria Art. 58 and Art.96, Azerbaijan (Article 90), Croatia (Article 75), Estonia (Article 76), Finland (Article 30), Germany (Article 46), Hungary (Article 20), Montenegro (Article 86), Romania (Article 69), Russia (Article 98), Serbia (Article 103), Slovakia (Article 78), Slovenia (Article 83), Spain (Article 71), Switzerland (Article 162),"the Former Yugoslav republic of Macedonia (Article 64), Turkey (Article 83), Ukraine (Article 80).

79. Likewise, the right to put written or oral questions[20] are often to be found in the constitution of Council of Europe member States.

80. Notwithstanding such general rules it seems necessary to define constitutionally certain privileges for duties adhering to the opposition such as the right to ask questions first, or the right to ask more questions.

81. Moreover, issues which would deal with the recognition of certain specific rights such as certain quorum for legislative initiative[21], or for a control procedure before the Constitutional Court can rightly be foreseen in the Constitution, which would leave the details to the rules of procedure of the Parliament for instance. With regard to the right of legislative, the Venice Commission concluded in its study on the right of legislative initiative that "the analysis of the right of legislative initiative as well as of its exercise underscores the importance in combining efficiency of the legislative process with providing as large as possible a participation and protection of parliamentary minorities in their right to participate in this process"[22].

82. The advantage of the constitutional approach is that it guarantees more security for the opposition as it is more difficult to change the rules. On the other hand, a detailed set of rules is not appropriate for a constitution bearing in mind general clauses might not be sufficient either.

83. Even though the strongest such guarantees are those enshrined in the constitution, one must consider that it is hardly practical to regulate such a large area in detail in the constitution.

84. This can explain why targeted specific protective clauses on the parliamentary opposition at the level of the constitution are very rare. Only four member States recognise explicitly in their constitution the status of the opposition[23].

85. As presented in the Venice Commission's study on the right of legislative initiative, constitutional provisions on the order of business of the Parliament are very rare. The constitutional protection of the legislative initiative of the parliamentary minority would be guaranteed only if a certain number of yearly sessions are specifically devoted to their discussion. The recent reform of the French Constitution, which aimed *inter alia* to reinforce the powers of the Parliament, introduced specifically in its Art 48.3 that a session day per month shall be reserved for an order of business determined by each Chamber at the initiative of the opposition or minority groups of each Chamber. In this regard, the major innovation of the 1998 revision of the Constitution of France consists of a complete revision of the provisions related to the order of business of the Parliament in order to have the latter decided in principle by the Presidents of each chamber and not by the Government"[24].

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[20] For instance in the following constitutions : Armenia Article 80, Austria Article52.3, Cyprus Article 73, Finland Article37.a, Ukraine Article 134.

[21] For an analysis of the right o legislative imitative see CDL-AD(2008)035.

[22] See CDL-AD (2008)35 paragraph 155.

[23] Article 114 of the Constitution of Portugal states that "The right of democratic opposition of minorities shall be recognised on the conditions set out in this Constitution and under the law.";

The Constitution of France, provides under Article 51.1 "The Rules of Procedure of each House shall determine the rights of the parliamentary groups set up within it. They shall recognize that opposition groups in the House concerned, as well as minority groups, have specific rights.".

[24] CDL-AD(2008)035 paragraph 106.

86. However, with regard to protective clauses, a middle-way approach, or common sense approach, seems to prevail and consists of establishing 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 certain number of percentage of deputies, and leaves the details to the rules of parliamentary procedure.

87. Such an approach stabilises the basic guarantees as changes would affect both the position of the deputies in the majority as well as in the minority. They cannot be modified with the intention of reducing the role of opposition.

2. By a specific law

88. Providing 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.

89. As exposed above, this legal form of protection has also been foreseen in Ukraine. The Venice Commission had to deal with this option when assessing the Draft Law on the Parliamentary Opposition in Ukraine in its opinion No. 422/2006, CDL-AD(2007)015.

90. In this opinion the Commission raises doubts and reserves its position on "whether it is appropriate to regulate all questions concerning the opposition in a single law and, if so, what procedural guarantees in favour of the opposition need to exist in respect of the adoption of such a law by the majority.[25]

91. According to the Commission raises the "unreasonably formalised way of establishing and terminating a parliamentary opposition may be difficult to reconcile with the rule that the will of Parliament is formed by deputies who in each specific case vote according to their convictions."[26]

3. By the rules of procedure of the Parliament

92. In spite of the constitutional provisions related to the functioning of the legislative power, parliamentary work, to be more effective and well coordinated, must be regulated by provisions adopted by the Parliament. The rules of procedure are a paramount element of Assemblies' autonomy.

93. Each Parliament is the master of its own rules of procedure. The rules specify in a rational way the organization of parliamentary work and of its bodies. It constitutes a framework of references.

94. The establishment of the rules of procedure must of course be carried out in conformity with the constitution and the laws.

95. The rules of procedure will hence constitute an appropriate place to provide for the protection of the parliamentary opposition. However the drawback of this remains that if the rights of the opposition are only defined in a specific law or in rules of procedure they can be easily changed by the majority. Therefore it is doubtful whether such a protection can be effective and sufficient.

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[25] CDL-AD(2007)015, paragraph 5.

[26] CDL-AD(2007)015, paragraph 29.

96. In order to avoid this problem, a qualified majority can be foreseen. For instance, according to Article 30 of the Constitution of Austria "the Federal Law on the National Council's Standing Orders can only be passed in the presence of a half the members and by a two thirds majority of the votes cast."

4. By unwritten customary law

97. Along with parliamentary rules of procedure informal rules and understanding are of utmost importance.

98. In countries with a long-standing parliamentary tradition it might not be necessary to fix specific rules as long as they are accepted as unwritten customary law.

99. If there are no generally accepted traditions, non binding guidelines might be an appropriate way to fix a general consensus.

100. In the Parliament of the United Kingdom, for instance, much of parliamentary procedure is not written into the Standing Orders but exist as the custom and practice of Parliament. Some stem from Speaker's rulings in the House of Commons chamber, other procedures are followed because that is the way things have been done in the past, so a custom has been set.[27]

101. While it seems that the rules of procedure of the Parliament and the custom and practice may be sufficient in older and more established countries, younger one's seem to need stronger and more effective guarantees.

5. By judicial control

102. In any case it is important for the opposition to have some legal instrument to enforce the implementation of their rights in case of a violation.

103. The most effective means is a special complaint procedure before the Constitutional Court as it exists in Germany through the "*Organstreitverfahren*" before the Federal constitutional Court as provided for in article 93.1 of the Federal[28]. Constitution.

104. One may also 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 (Article 148)[29].

105. In France, the Constitutional Council has several times ruled on the rules of procedure of the Parliament and of the Senate.[30] Likewise, the Constitutional Court of Hungary examined the constitutionality of provisions relating to the duration of sittings and the time frames for parliamentary speeches. Two judges did not agree with the majority opinion which pointed to the lack of minority protection in the provisions of the Standing Orders relating to the

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[27] See Rules and customs on the website of the Parliament : http://www.parliament.uk/about/how/role/customs.cfm.

[28] Article 93.1 reads : (1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in disputes concerning the extent of the rights and obligations of a supreme federal institution or other institutions concerned who have been vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal institution.

[29] Likewise in the Constitution of France (Art.61.2), Romania (art.144.b).

[30] See also above and CODICES 2006-2-005, CODICES 1990-S-001, CODICES 1995-3-010.

right to speak.[31]

106. It is debatable, however, whether the constitutional control over the rules of Procedure can be considered as compatible with another established principle of parliamentary democracy, namely the procedural independence of parliaments.

C. Legal content of the protection

107. 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 mentioned, related to fundamental rights and to the institutional framework adopted by a given democracy.

108. The common foundations are then fundamental rights, (which allow) democratic elections, (which allow) elected bodies, within which another free debate takes place and allows the taking democratic decisions.

109. 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, 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 a 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).

Thus, from this point of view, it is important, on the one hand, 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.

1. The principle of equality

110. As mentioned in Resolution 1601 (2008) of the Parliamentary Assembly and its Explanatory Memorandum, “equal treatment of Members of Parliaments, both as individual members and as members of a political group, has to be ensured in every aspect of the exercise of their mandate and of the operations of parliament”.

111. Opposition Members should be able to exercise their mandate under the same conditions as those Members of Parliament who support the government. This applies both to the political activities (speaking time, access to committees, right to amend, right to table bills, control of the executive) and to the material, administrative and financial privileges (office space, parliamentary assistance, allowances, etc.)[32].

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[31] For a summary abd full text of the of the decision, see CODIDES, HUN-2006-1-001.

[32] Text of the Guidelines: “The rights, benefits and advantages of a political group may increase in step with the number of MPs that become member of the group concerned, applying the proportionality principle. Moreover, members of political groups may to a certain extent be treated differently from non-attached members, although those differences of treatment are only acceptable in so far as they are necessary and objectively justified for the effective operation of parliament.

112. With reference to the equality principle, the Court of First Instance of the European Communities held that "the conditions under which Members who have been democratically vested with a parliamentary mandate must exercise that mandate cannot be affected by their not belonging to a political group to an extent which exceeds what is necessary for the attainment of the legitimate objectives pursued by the Parliament through its organisation in political groups"[33].

113. The Venice Commission, for its part has also in its Code of Good Practice in the field of Political Parties recalled the necessity to respect the principle of equality[34]. As it mentioned in the explanatory memorandum "For the purpose of preserving political pluralism, as a necessary element for representative democracy to function properly, the constitutional principle of equality imposes obligations both on the states and political parties. Among the latter, the principle implies that incumbent parties should not abuse or seek advantage from their ruling position to create discriminatory conditions for other political forces but respect equality in inter-party competition".

114. However, defining the content of the principle of "equality" with regard to deputies and parties might be difficult. There are two approaches: either all deputies and parties are accorded equal right regardless of the position of their party, or all rights are accorded in relation to their political weight based on the outcome of the elections. If the second approach is favoured some minimum guarantees might be necessary for deputies of small parties.

2. The guarantees

115. As to the substance of such guarantees, the large number of recommendations in the procedural guidelines adopted by the PACE Resolution 1601 (2008) seem reasonable and worthy of consideration by national parliaments.[35]

116. Indeed, PACE Resolution (2008) 1601 shows a broad consensus on the rights and responsibilities of the opposition in a democratic parliament and reflects a number of general principles of parliamentary law that the Council of Europe member states have in common.

117. These guidelines reflect a number of general principles of parliamentary law that the Council of Europe member states have in common such as the principle of independence, equal treatment, effectiveness, freedom of expression, proportional representation and opposition rights.

118. 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".[36]

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[33] CFI, judgement of 2 October 2001, *Martinez and De Gaulle v. European Parliament,* case T-222/99, T-327/99 and T-329/99, paragraph 202.

[34] *Paragraph 51: "*The general principles inspiring this Code apply also to performance in office and to situations where parties are in opposition".

[35] See Appendix I.

[36] Report by Mr Karim Van Overmeire, Parliamentary Assembly, doc. 11465 rev., 3 January 2008, paragraph 40).

119. At the same time there is also a broad consensus on basic guidelines on the rights and responsibilities of the opposition in a democratic parliament as summarised in the Resolution.However, all these standards are part of soft law. There are no binding standards on the special guarantees for the opposition in international law.

IV. Conclusions

120. From a very general point of view, it is clear that the protection of the political opposition is an important feature of any democratic regime. One could even say that there can be no democracy at all if political opposition is not guaranteed.

121. That it the reason why democratic regimes have been described as regimes with “assured opposition”, given that this guarantee makes a constitutionally and politically essential difference.

122. Legal protection can be provided by constitution, a special law, parliamentary rules of procedures 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.

123. Both the fragmentation of the Parliament and the formation of absolutely rigid blocks might have negative effects on legislative work. Therefore the rules defined should be such as to avoid those two extremes.

124. It should be left to each country to decide if a special regulation on the opposition is necessary, in which form this should be realised and in how far the opposition should be granted a privileged position in comparison to the majority.

125. All the regulations have to be seen in the wider context of the legal system, e.g. the interaction between two chambers of Parliament, the interaction between Government, President and Parliament and the role of the Constitutional Court.

126. In light of the great variety of parliamentary systems that have been developed in European countries and of the different experiences with political parties the large number of recommendations in the procedural guidelines adopted by the PACE Resolution 1601 seem sound and commendable for consideration.

Appendix I

PACE Resolution(2008)1601

Guidelines on the rights and responsibilities of the opposition in a democratic parliament

1. Parliamentarians must exercise their mandate independently. They shall not be bound by any instruction or receive a binding mandate. One cannot blame a member of parliament for defending ideas that go against the government's official policy or that are not well received by a majority of the population.

2. National parliaments of the Council of Europe member states shall acknowledge the following rights in relation to the opposition or parliamentary minority:

2.1. freedom of expression and freedom of opinion; members of the opposition shall enjoy freedom of speech; they must be able to express their ideas freely;

2.2. the opposition shall participate in the supervision, scrutiny and control of the action and policy of the government:

2.2.1. opposition members have the right to information; opposition members and members of the majority are entitled to receive the same information from the government;

2.2.2. opposition members have the right to ask written and oral questions, and to receive replies to these questions;

2.2.3. opposition members shall be privileged during question time with the government (in particular they shall have the right to open question time and to ask more questions to the government than members of the majority);

2.2.4. opposition members have the right to interpellation (oral question with debate) and the right to move a motion of no confidence;

2.2.5. opposition members have the right to request the convening of a plenary sitting of the parliament/chamber, which should be granted if a quorum of one quarter of members is reached;

2.2.6. opposition members have the right, at regular intervals, to set the agenda of plenary sittings, and to choose subjects for debate, including bills tabled by opposition members, control of government actions and evaluation of public policies and spending; matters selected on those days shall have precedence over government business;

2.2.7. opposition members have the right to ask for debates to be held, including urgent or current affairs debates, which should be granted if a quorum of one quarter of members is reached;

2.2.8. opposition members have the right to request the setting-up of a committee of inquiry or a parliamentary mission of information and to become members thereof; this should be obtained if a quorum of one quarter of members is reached; a member of the opposition shall be appointed either chairperson or rapporteur of every

committee of inquiry or mission of information successfully requested by opposition members or political groups;

2.2.9. speaking time in plenary sittings shall be allotted at least according to the respective weight of political groups; allocation of an equal speaking time between majority and opposition, irrespective of their strength, should be privileged under certain circumstances;

2.3. the opposition shall participate in the organisation of legislative work:

2.3.1. opposition members have the right to participate in the management of parliamentary business; they shall have access to posts of vice-president and other positions of responsibility in parliament; the composition of governing bodies of parliament shall respect the principle of proportional representation and reflect the political composition of the parliament or chamber;

2.3.2. opposition members have the right to request the holding of an extraordinary session, which should be granted if a quorum of one quarter of members is reached;

2.4. the opposition shall participate in the legislative procedure:

2.4.1. opposition members have the right to table bills and motions on legislative matters;

2.4.2. opposition members have the right to speak and to vote in all debates;

2.4.3. opposition members have the right to table amendments;

2.4.4. opposition members have the right to present procedural motions (change in the proposed agenda or the adopted agenda; request to ascertain a quorum; request to refer a report back to a committee, etc.);

2.5. the opposition shall participate in parliamentary committees' work:

2.5.1. the presidency of standing/permanent committees shall be allocated among parliamentary groups on the basis of proportional representation; at least one permanent committee shall be chaired by a member of the opposition; the chairmanship of committees responsible for monitoring government action, such as the committee on budget and finance, the committee on audit, or the committee supervising security and intelligence services, should be granted to a member of the opposition;

2.5.2. any committee, permanent or not, shall be composed on the basis of proportional representation;

2.5.3. in committees, opposition members shall enjoy speaking and voting rights, the right to table amendments and to move a procedural motion; they shall have the possibility to append a dissenting opinion to a report adopted in committee or to present a minority report;

2.5.4. opposition members have the right to request the organisation of committee hearings; it should be granted if a quorum of one quarter of members is reached;

2.5.5. opposition members have the right to be appointed committee rapporteurs; in any case, rapporteurships in committees are allocated on the basis of proportional representation;

2.6. the opposition shall participate in political decisions; the opposition or parliamentary minority shall be consulted prior to any decision to dissolve parliament;

2.7. the opposition shall participate in the constitutional review of laws:

2.7.1. opposition members have the right to apply to the Constitutional Court or the appropriate legal body and to request a constitutional review of adopted laws;

2.7.2. opposition members have the right to request examination of constitutionality of draft laws or parliamentary acts by the Constitutional Court or the appropriate legal body prior to their adoption;

2.7.3. opposition members have the right to apply to the Court of Audit and to request its opinion on budgetary and finance matters.

3. National parliaments shall provide political groups or individual members of the opposition with the appropriate financial, material and technical resources and means to enable them to properly perform their functions and duties. Opposition members shall have fair access to state funds and allowances; they shall have free and fair access to media, including public radio and television channels, and sources of information.

4. The provisions of the rules of procedure concerning the rights of members of parliament and particularly of the minority should not be altered after each parliamentary election in order to adapt them to the election results.

5. The political opposition in parliament shall show political maturity and should exercise responsible and constructive opposition, by showing mutual respect, and using its rights with a view to enhance the efficiency of parliament as a whole."