



Strasbourg, 6 October 2010

Study no. 497/2008

CDL(2010)100*
Engl Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON THE ROLE OF THE OPPOSITION
IN A DEMOCRATIC PARLIAMENT

On the basis of comments

By

Ms Angelika NUSSBERGER (Substitute Member, Germany)
Mr Ergun ÖZBUDUN (Member, Turkey)
Mr Fredrik SEJERSTED (Substitute Member, Norway)

**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

TABLE OF CONTENTS

1. Introduction	3
2. The scope of the study	3
3. The parliamentary opposition – role and functions	6
4. Legal protection of the parliamentary opposition and minorities	9
4.1. Introduction	9
4.2. Legal protection in the wide and narrow sense	11
4.3. The subject of legal protection	12
4.3.1. Legal rights and position of the individual MPs	12
4.3.2. Legal rights and position of the party groups (factions)	14
4.3.3. Legal rights and position of qualified minorities	15
4.3.4. Legal rights and position of the opposition as such	17
4.4. The legal level and form of protection	19
5. Rules regulating the parliamentary opposition or minorities	21
5.1. Introduction	21
5.2. Participation in parliamentary procedures	22
5.3. Rights of parliamentary supervision and scrutiny of the executive	24
5.4. The right to block or delay majority decisions	26
5.5. Constitutional review of laws and other acts of parliament	27
5.6. Minority protection against persecution and abuse	28
6. Responsibilities of the opposition	30
7. Summary and conclusions	32

1. Introduction

1. On 23 January 2008 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1601 (2008) on “Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament”. The resolution emphasizes the role of the political opposition as “an essential component of a well-functioning democracy”, and in effect advocates a certain institutionalization of parliamentary opposition rights, by laying down a number of guidelines from which the parliaments of the member states are invited to draw inspiration.
2. The resolution is based on a report that gives a comprehensive overview of various forms of parliamentary opposition, recent developments and debates at the national and European level, and the many rights and responsibilities that are or may be related to opposition MPs and party groups in a democratic parliament.
3. As part of the resolution the Assembly invited the European Commission for Democracy through Law (the Venice Commission) to “undertake a study on the role of the opposition in a democratic society”.
4. On this basis the Venice Commission decided to undertake a study with the aim of producing a report further examining the subject, and thus supplementing the resolution of the Assembly.
5. The present report has been prepared on the basis of the contribution from Ms Nussberger, Messrs Ozbudun and Sejersted (CDL-DEM(2009)001, CDL-DEM(2009)002, CDL-DEM(2010)001 respectively).
6. Preliminary discussions on earlier drafts took place in the Sub commission on Democratic Institutions on 11 June 2009 and 14 October 2010. The report was adopted at the ... Plenary Session of the Commission (Venice ...).

2. The scope of the study

7. The general subject of “the role of the opposition in a democratic society” is a very wide theme, which goes to the heart of democratic theory, and which has been discussed by constitutional and political scholars for a long time. From the constitutional perspective it raises a broad range of issues, starting with the basic democratic structures of a constitution, principles of equal and universal suffrage, free and fair elections, the freedom to form and join political organizations, freedom of expression, fair and equal conditions for political parties to compete for power, access to independent media, and a number of other elements, many of which are protected both at the national constitutional level and at the European level, by the ECHR and other legally binding treaties and obligations.
8. From a political science perspective the subject raises issues of democratic stability, maturity and tolerance, of distribution of political and economic resources, and of different traditions and institutional frameworks in national political cultures.
9. The subject of Resolution 1601 (2008) of the Assembly was not political opposition in general, but the role of “the opposition in a democratic parliament” – in other words, *the parliamentary opposition*. Furthermore the resolution is primarily concerned with questions of legal and formal institutionalisation and protection of parliamentary opposition, not with the broader issues of political culture, economic resources etcetera. Even so it is still a wide subject, to which the Venice Commission will also limit its observations in the present report.

10. The Venice Commission in general endorses Resolution 1601 (2008) by the PACE, as a groundbreaking new soft law instrument on a subject of great importance for the development of democratic parliamentary procedures. The following comments are of a supporting and supplementary nature.

11. The defining characteristic of the “opposition” is that it is not in power, and that it opposes (more or less strongly) those who are. The *parliamentary* opposition then consists of those political parties that are represented in parliament, but not in government. In most (but not all) parliamentary systems the government will usually enjoy the direct support of the majority. This means that the issue of rights of the parliamentary opposition is first and foremost a question of *political minority rights*. This may typically include procedural rights of information, representation and participation, speaking and voting rights, the right to table bills and motions, rights of supervision and scrutiny of the executive, and protection against mistreatment by the majority. But it does not include the competence to adopt substantive decisions, which in a democratic system rests with the elected parliamentary majority.

12. The issue of how far the parliamentary opposition should have legal rights can therefore be seen as a question of the *balance* to be struck between legitimate majority and minority political interests represented in parliament. To the extent that the opposition is not guaranteed sufficient basic rights, then this may weaken or destroy the democratic functioning and legitimacy of the system. On the other hand, if the opposition is given broad rights and powers, then this may weaken or destroy the possibility of the majority and the government to effectively run the country.

13. Finding the best balance between parliamentary majority rule and minority rights is something that has to be done at the national level, within the national political and constitutional tradition and context. But there are questions of common comparative interest, which may be identified and discussed, as inspiration for elaborating good parliamentary regulation at the national level.

14. The basic questions in this study are what kind of formal rights the parliamentary opposition or minority should or may have and how these can best be legally regulated and protected. The underlying idea is that a certain degree of formal institutionalisation of minority rights and competences may contribute to the robustness and well functioning of democracy in Europe. This however can be done in many ways, and should be tailored to the national constitutional tradition.

15. On a general level, there is today a widespread common European model of democracy, in which the political opposition have substantial parliamentary representation, and within parliament wide opportunity for opposing and offering alternatives to the politics of the majority and the government. This model rests on a European democratic culture and tradition that has developed gradually over a long period of time, with occasional setbacks, but with great progress in the last decades, in particular in the new democracies of Central and Eastern Europe, but also in the more established parliamentary democracies of Western Europe.

16. In addition to the democratic culture, the position of the opposition is also to a considerable extent *legally* enshrined and protected, both at the European and the national level. At the European level the ECHR guarantees basic rights without which political opposition would be very difficult – such as freedom of opinion and expression, freedom of assembly and association, and the right to free and fair elections. The ECHR however does not explicitly guarantee the rights of the parliamentary opposition (or minorities) as such, and can only to a limited extent be interpreted so as to infer such rights in any detail.¹ Neither are there other

¹ There is however ECtHR case law of relevance on specific issues, such as parliamentary immunity, cf. inter alia A. v. United Kingdom, Judgment of 17 December 2002 (35373/97) and Kart v. Turkey, Judgment of 3 December 2009

binding instruments of international law that provide such regulation. On the level of soft law, the recent Resolution 1601 (2008) by the PACE is so far the most extensive and important instrument. At the national level there are some issues relevant to the position of the parliamentary opposition that are regulated in a more or less similar manner in most or many of the Member States of the Council of Europe. But other issues are regulated very differently, if at all, and there is no common model.

17. The basis for the following assessments by the Venice Commission is therefore not of a binding legal nature, and the study is rather to be seen as an attempt to formulate some common challenges, and point out how these may or have been solved at the national level. The study is to some extent comparative, in that it draws on the experience of the Venice Commission on national constitutional law. It should however be emphasized that the Commission has not had the capacity to conduct a full comparative examination on the subject.

18. The Venice Commission has not previously given any general opinion on the role of the opposition. It has however, dealt with the issue in a country-specific report "On the Draft Law on the Parliamentary Opposition in Ukraine" from 2007.² Furthermore the Venice Commission has given opinions and reports, general and country-specific, on a number of issues that are directly or indirectly of relevance for the role of the political opposition in a parliamentary democracy, including (but not exhaustive) on electoral thresholds³, the role and regulation of political parties, guidelines on prohibition and dissolution of political parties and analogous measures⁴, guidelines on legislation on political parties⁵, protection of political parties against prohibition⁶, legislative initiative⁷, imperative mandate⁸, constitutional amendment⁹ and parliamentary immunity¹⁰. These will in the following be referred to where appropriate.

19. The report will cover the following elements:

- An analysis of the role and functions of parliamentary opposition
- An overview of the different ways in which parliamentary opposition and minority rights can be legally regulated and protected
- An analysis of the main categories of parliamentary opposition and minority rights, including (i) procedural rights of participation, (ii) special powers of supervision and scrutiny, (iii) the right to block or delay majority decisions, (iv) the right to require constitutional review of laws and other parliamentary majority acts, and (iv) protection against persecution and abuse

(89175/05), see below section 4.5.; The role of members of Parliament and the opposition, see *Tanase v. Moldova*, no. 7/08, Judgment of 27 April 2010; Freedom of expression for elected representatives, see *Christian Democratic people's party v. Moldova*, no. 28793/02, Judgment of 14 February 2006; Diversity and expression of a minority view, see *Buscarini and others v. San Marino*, no. 24645/94, judgment of 18 February 1999; Parliamentary privilege, see *Demicoli v. Malta*, no. 13057/87, Judgment of 27 August 1991

² Cf. "Opinion on the draft law on the parliamentary opposition in Ukraine", CDL-AD(2007)019, adopted in June 2007, and also the earlier preliminary opinion of March 2007, CDL-AD(2007)015. In 2007 the Commission also received a report from the Spanish substitute member, Mr Sanchez Navarro "On the role and legal protection of the opposition", cf. CDL-DEM(2007)002rev.

³ i.e Code of good practice in electoral matters, CDL-AD(2002)023rev; For a compilation of the main Venice Commission texts, see *Electoral Law*, Council of Europe Publishing, ISBN 978-92-871-6424-7

⁴ Guidelines on prohibition of political parties and analogous measures, CDL-INF(2000)001; Guidelines and explanatory report on legislation on political parties: some specific issues, CDL-AD(2004)007rev.

⁵ Draft joint OSCE/ODHIR – Venice Commission guidelines on political party legislation, CDL (2010)073

⁶ See, i.e, Opinion on the constitutional and legal provisions relevant to the prohibition on political parties in Turkey, CDL-AD(2009)006

⁷ Report on legislative initiative, CDL-AD(2008)035

⁸ Report on imperative mandate, CDL-AD(2009)027

⁹ Report on constitutional amendment, CDL-AD(2010)001

¹⁰ Report on the regime of parliamentary immunity, CDL-INF(1996)007e

- A brief discussion on the duties and responsibilities of a democratic parliamentary opposition

20. The report is confined to the role of the opposition in national parliaments, and will not address issues specifically related to regional parliaments or international institutions such as the European Parliament in the EU or the Parliamentary Assembly of the Council of Europe (PACE).

3. The parliamentary opposition – role and functions

21. In Europe today the existence of organized political party opposition is by many taken as granted. This has not always been so. Even within political systems that have historically been regarded as (more or less) democratic, this did not necessarily include institutionalised opposition. In 1966 Robert Dahl remarked that:

Of the three great milestones in the development of democratic institutions – the right to participate in governmental decisions by casting a vote, the right to be represented, and the right of an organized opposition to appeal for votes against the government in elections and in parliament – the last is, in a highly developed form, so wholly modern that there are people now living who were born before it had appeared in most of Western Europe. Throughout recorded history, it seems, stable institutions providing legal, orderly, peaceful modes of political opposition have been rare. [...] Legal party opposition, in fact, is a recent unplanned invention that has been confined for the most part to a handful of countries in Western Europe and the English-speaking world. [...] The fact that a system of peaceful and legal opposition by political parties is a comparative rarity means that it must be exceedingly difficult to *introduce* such a system, or to *maintain* it, or both.¹¹

22. Since this was written, democracy has spread, not least in Europe, where organized political opposition inside and outside of parliament can be said today to function at least reasonably well in almost all the 48 member states of the Council of Europe. For many European countries this is however a very recent phenomenon, which cannot be taken for granted. Even for the old and mature democracies of Western Europe, maintaining and perfecting a well-functioning system of political opposition is a challenging and continuous task.

23. In Resolution 1601 (2008) the Parliamentary Assembly stated that the existence of “a political opposition inside and outside of parliament is an essential component of a well-functioning democracy”. The Venice Commission agrees to this, and holds that the legal and factual conditions for peaceful parliamentary opposition constitute a benchmark for assessing the democratic maturity of any given political system.

24. A parliament is by its nature not a monolithic and homogeneous institution, but a representative assembly, where the basic idea is that different interests and ideas should be represented, and where there will always be differences of opinion, and always a distinction between the majority and one or more opposing minorities. In modern parliaments this is organised along political party lines, with the basic distinction running between the governing party (or parties) and the opposition parties that are represented in parliament.

¹¹ Cf. Robert Dahl (ed.) “Political Oppositions in Western Democracies” (1966), preface page xiii-xiv. At the time, Dahl noted that of the 113 members of the United Nations, only about 30 had political systems in which full legal opposition among organized political parties had existed throughout the preceding decade. This prompted the question “Are the 30 systems that now exist merely the exotic flowers of a unique and passing historical climate? Or are they vigorous products of a long evolution, a political species now rugged enough to thrive in other, perhaps harsher, climates?”

25. The principle of majority rule, reflecting the majority popular will, is a basic formal and legal criterion of a “democracy”. Within parliament decisions are taken by the majority, and a parliamentary system of government is characterized by the fact that the government will usually (though not always) have the support of the majority.¹² The opposition is usually in minority, and the minority as a general rule does not have the competence to adopt decisions. The function of the opposition is not to rule. Instead the opposition may have other functions. How these may best be listed is arguable, but among them may be the following:

- To offer political alternatives
- To articulate and promote the interests of their voters (constituents)
- To offer alternatives to the decisions proposed by the government and the majority representatives
- To improve parliamentary decision-making procedures by ensuring debate, reflection and contradiction
- To scrutinise the legislative and budgetary proposals of the government
- To supervise and oversee the government and the administration
- To enhance stability, legitimacy, accountability and transparency in the political processes

26. The extent to which the opposition in a given parliamentary system is allowed to actually fulfil these functions can be seen as a sign of the level of democratic maturity. If none of them are fulfilled, then this will be a sign of a dysfunctional democracy.

27. The functions listed are supplementary and to some extent interrelated. Which ones are the most important differ between parliamentary systems, and may also differ over time within a given system, and between opposition parties. Some opposition parties may choose to present alternative proposals to those of the government, while others choose to support it. Some conduct strict scrutiny of government actions, while others do not. Whether or not an opposition party may realistically aspire to government power after the next elections will impact the way in which it perceives and fulfils its opposition role. Whether it is large or small is another important factor. Opposition parties at the outer ends of the political spectrum will often behave quite differently from those in the centre. While a large and well-established opposition party may typically concentrate on formulating an alternative policy for governing the country after the next elections, many small opposition parties without government aspirations often define their parliamentary role quite differently, as watchdogs, emphasizing supervision and scrutiny.

28. The term “opposition” may cover both opposition as a function and the opposition as a subject. Opposition as function covers all arguments and activities that oppose the policies of the majority and the government. The “opposition” as one or more subjects is usually defined as those political parties not holding government power. The two concepts are normally overlapping, but not necessarily. An opposition party may choose to support the governing faction, on a permanent or case-to-case basis. On the other hand, it is in some parliaments not altogether uncommon that backbencher members of the governing party sometimes join the opposition parties in voting against the proposals of their government.

¹² A distinction here is between positive and negative parliamentarism. Positive parliamentarism means that the government must have the explicit support of the majority in parliament, usually through a vote of support or confidence (investiture). Negative parliamentarism means that the government can sit as long as it does not have the explicit distrust of the majority, as expressed in a vote of non-confidence. Systems with negative parliamentarism are more likely to have periods of minority government. But minority government can also occur in systems with positive parliamentarism, if one or more of the opposition parties vote for the government.

29. The nature and strength of the parliamentary opposition in any given country depends on the electoral system. In systems with proportional representation, which is the dominant model in Europe, the opposition will usually have far better parliamentary representation than in systems based on first past the post, as in the UK Westminster model. Proportional representation will also tend to foster more political parties of some size and significance.¹³ The electoral threshold is another important element deciding the number and size of opposition parties. This varies in Europe, with the main model around 5 %, which usually ensures a certain number of opposition parties representation in parliament.¹⁴

30. The Venice Commission holds that ensuring the political opposition reasonable representation in parliament is in itself of great importance for fostering stable and legitimate democracy, as pointed out by the rapporteurs to the Council of Europe Forum for the Future of Democracy in 2007:

11. The lack of a strong opposition in parliament may lead to a form of extra-parliamentary opposition in which protests may be expressed in violent forms on the streets, thus diminishing the quality and relevance of the parliamentary debate and affecting the decision-making process as a whole. One means of avoiding situations in which opposition is essentially extra-parliamentary is to lower the thresholds for parliamentary representation. In a developed democracy, thresholds should be low, in order for the rights of all citizens and all political views and interests to be represented in parliament.¹⁵

31. Based on the national political context and the electoral rules, a parliament may have anything from one to a large number of opposition parties.¹⁶ These may belong to “blocks”, or they may be split, often with opposition parties at both ends of the political spectrum in relation to the governing faction. The traditional (UK) Westminster model, with only two major parties, is today very rare in Europe. The old and simple distinction between the governing majority party and the Opposition as a single entity with a capital “O” (and a permanent “shadow cabinet”) is thus far from the political reality in most European countries. At the same time, even in parliaments with many opposition parties represented, one or more of them may form a block that is the only realistic alternative to win government power after the next elections, and which therefore functions as the dominant “Opposition”.

32. In a parliamentary system, the government will often have the explicit support of a parliamentary majority, normally consisting of its own party, or parties if there is a government coalition. The opposition, in consequence, will be in minority. But this is not always the case. Many European countries have extensive experiences with “minority governments” – that is, governments by political parties that do not by themselves have a parliamentary majority. Such governments may have an agreement with one of the opposition parties, providing a stable

¹³ At the same time, a system based on first past the post may tend to produce a more homogeneous and less fragmented opposition, with only one or two main opposition parties represented in parliament, thus making it easier to create a “shadow cabinet”.

¹⁴ Among the member states of the Council of Europe Turkey has the highest threshold, at 10%, followed by Liechtenstein at 8%, and the Russian Federation and Georgia at 7%. A third of the states impose a 5% threshold and 13 of them have chosen a lower figure. The other member states do not use thresholds. Moreover, in several systems the thresholds are applied only to a restricted number of seats. In case *Yumak and Sadak v. Turkey* of 8 July 2008 the ECtHR accepted the Turkish 10 % clause as not violating ECHR First Protocol Article 3. In its Report on electoral law and electoral administration in Europe, of 12 June 2006, the Venice Commission accepted that “One electoral system might concentrate more on a fair representation of the parties in parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in Parliament”.

¹⁵ Cf. Conclusions by the General Rapporteurs (MM. Gross, Whitmore and Tarschys) to the Forum for the Future of Democracy meeting in Stockholm/Sigtuna in June 2007, paragraph 11.

¹⁶ In some parliaments there are also traditions for independent MPs, without party affiliation, who will then fulfil a particular form of opposition, “between the factions”. Whether or not this is possible depends inter alia on the electoral system.

majority, but they may also be without regular support, depending on support from one or the other of the opposition parties on a case-to-case basis. Periods of minority government will per definition be characterised by the fact that the majority in opposition is not able to agree on an alternative government. But this does not mean that the opposition parties cannot agree on other issues, for example on supervising and criticizing the government or even on adopting majority decisions contrary to the preferred policies of the government. Examples are Denmark in the 1980s and Norway in the 1990s, which both experienced long periods during which the parliamentary opposition was able in effect not only to supervise but even to instruct minority governments on a number of issues.

33. The “opposition” is primarily a concept used in parliamentary systems. The context is different in political systems where the head of the executive – usually the president – is directly elected, and not dependent upon parliament. In presidential systems, such as the USA, or semi-presidential, such as France, there may be periods in which the same party has both the president and the majority in parliament, but there will also be periods in which it does not – in France often referred to as “cohabitation”. During such periods the concept of a political “opposition” is different from that in parliamentary systems, and the picture is rather that of two opposing organs of state, representing a particular form of separation of powers – or “institutional opposition” as it is sometimes called.

34. Another form of political division is found in bicameral parliaments in which the two chambers are elected or chosen on different criteria, and in which different parties may hold the majority in each chamber – with the opposition in one having the majority in the other. This also reflects a form of separation of power, with “checks and balances”, rather than the dichotomy of position/opposition. Even so, there may also in such systems still be other smaller parties, which are not part of the majority in either chamber, and in “opposition” in the traditional sense.

35. The distinction between the ruling faction and the opposition, and the role of parliamentary minority groups, may also differ in regional parliaments, as well as in institutions such as the European Parliament (of the EU) or international parliamentary assemblies such as the PACE.

36. The following comments will primarily be related to national parliamentary systems, and to the main situation, in which the opposition parties are in minority, and therefore in need of some level of protection in order to fulfil the basic legitimate opposition functions that are necessary in order to ensure effective and sustainable democracy.

4. Legal protection of the parliamentary opposition and minorities

4.1. Introduction

37. When assessing the strength and position of the parliamentary opposition in any given country, the legal situation is only one of several factors. More important is the overall national political context and culture, which is formed by a number of factors in addition to the legal constitutional framework. In mature and stable democracies, with traditions of political tolerance, the opposition can thrive without legal guarantees, while in other political systems the opposition may be severely restricted even if it enjoys a high degree of formal protection.

38. In a political system where there is from time to time a change of government, enlightened self-interest on the part of the incumbent ruling party will often serve as a basic guarantee for the protection of the opposition. The governing party will know that it may well find itself in opposition after the next elections, and if it is rational it will treat the present opposition accordingly.

39. Resources are another factor. Even if the axiom formulated by political scientist Stein Rokkan that “votes count, resources decide” is a bit too absolute, the economic and other

resources available to an opposition party may matter more to it than the legal framework within which it operates. Parliamentary resources are part of this. In Europe there are wide differences between the administrative and organizational set-up of national parliaments. Some parliaments have large administrations, providing support and research staff and other facilities to MPs and party groups, including the opposition. In other parliaments there is very little administrative support, which makes parliamentary opposition more difficult.¹⁷

40. Legal regulation of opposition and minority rights still matters, in different ways. For the daily running of parliamentary politics it can matter a lot to the opposition how the procedures are regulated, and whether or not they give the opposition reasonable participation and influence. On a deeper level, ensuring the opposition legal protection can give it a secure basis for its activities, and may contribute to forming a political culture of tolerance for opposing opinions. This can be of particular importance in countries that are still in the process of developing and cementing their democratic and parliamentary traditions.

41. Legal regulation is a way of *institutionalising* the role of the political and parliamentary opposition. As pointed out by political scientist Robert Dahl, this is one of several factors that may determine democratic robustness and drive up “the cost of coercion” by the governing party:

Finally, once a system that permits peaceful party opposition is highly institutionalized and surrounded with legal protections, the cost of destroying it are likely to be extremely high. For a government can destroy the opposition only by destroying the constitutional system. At this stage of evolution, to destroy the opposition requires a revolution. And the costs of revolution often run high.¹⁸

42. In recent decades democracy has spread in Europe, and reached a “stage of evolution” where the political conditions for parliamentary opposition can be said to function very well in a majority, and reasonably well in most of the others, of the member states of the Council of Europe. However, the formal regulation of the role of the opposition has not reached the same stage. As pointed out by the Venice Commission in a 2007 opinion, the degree of formal institutionalization of the parliamentary opposition varies greatly in Europe:

43. The legal status of the opposition in a given national Parliament varies greatly from country to country. A specific law on the opposition is exceptional in international comparison. 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 regulation entrenched in the Constitution.¹⁹

44. On this basis, the Venice Commission holds that European democracy has now reached a stage of development where it is appropriate and interesting to explore the ways and means by which the role and functions of the parliamentary opposition can be formally better regulated and protected. This is the core issue in Resolution 1601(2008) by the Parliamentary Assembly, and it applies equally to the old and the new democracies of Europe. The following is an attempt to contribute further to such a process, by analyzing common basic principles and

¹⁷Parliamentary administrative support systems may in effect often primarily function as an instrument for the opposition, and as a kind of counter-expertise to the administrative resources of the government and the administration, to which the governing party (faction) has access. Here again it is a question of finding a balance, between on the one hand giving the parliamentary opposition the necessary resources to fulfil its legitimate function in a constructive manner, and on the other hand not overloading the system by creating another administrative structure to compete with that of the executive.

¹⁸Cf. Robert Dahl (ed.) “Political Oppositions in Western Democracies” (1966), preface page xvi.

¹⁹Cf. the preliminary opinion on the parliamentary opposition in Ukraine of March 2007, CDL-AD(2007)015, paragraph 4.

challenges, as well as legal categories and techniques for regulating parliamentary opposition and minority rights and competences.

4.2. Legal protection in the wide and narrow sense

45. A basic feature of the European democratic parliamentary tradition is that the role of the opposition is legally better protected than it might seem at first glance. This is not primarily done by regulating opposition rights explicitly, but in a more indirect manner, both at the constitutional and other levels.

46. Most constitutions consist mainly of two sets of norms and rules – (i) on state institutions and machinery of government, and (ii) on fundamental rights of the individual. Both sets of norms can in a wider sense function so as to protect and foster political opposition, inside and outside of parliament. A number of basic human rights, including freedom of expression and opinion, freedom of association, protection against arbitrary arrest and torture, access to court, and others, are indispensable for the development of democratic opposition to the ruling power.²⁰

47. The same applies to the basic constitutional rules on the electoral system and the state institutions. Even if this is not explicitly stated, such rules often in effect protect opposition and minority rights and interests, by laying down procedures that the majority cannot ignore or circumvent, even when that would have been more comfortable. This is particularly clear as regards electoral rules.²¹ But it also applies to all those procedures that prescribe parliamentary participation and debate – as these will always bring the cases to the attention of the opposition and open up a possibility for critical examination. The basic democratic principle that laws and budgetary decisions have to be adopted by parliament is in effect a way of ensuring opposition participation in the basic political decision-making. When the constitution demands that certain government decisions have to be approved by parliament, or certain government documents presented, the effect is that these are subjected to opposition supervision, scrutiny and potential criticism.

48. The same applies to parliamentary procedures. When the rules of procedure for example state that cases have to be sent to the committees for scrutiny, and then debated in the plenary before adoption, then this is in itself a guarantee for the opposition that it will be included in the political process.

49. That constitutionalism in itself serves to protect the political opposition by laying down procedures that the majority cannot easily change was pointed out by the Venice Commission in its 2009 Report on Constitutional Amendment:

²⁰ An important example is Article 11 ECHR on freedom of association and assembly, which is interpreted so as to protect the existence and activities of political parties, outside and inside of parliament. Many European constitutions have rules on prohibition of political parties, which may also effect the party factions represented in parliament. But if such rules are invoked, then this will be a restriction under Article 11 (1) ECHR, which must be justified under 11 (2). It has been held by the ECtHR in several cases that due to the importance of political parties for the functioning of democracy, the ECHR requires a particularly strong justification in such cases. Protection of political parties against illegitimate dissolution has been considered by the Venice Commission in its 1999 general “Guidelines on prohibition and dissolution of political parties and analogous matters”, and recently in detail in the 2009 “Report on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey”, cf. CDL-AD(2009)006. See below section 4.6.

²¹ The degree to which electoral rules are regulated at the constitutional level varies considerably in Europe. The Venice Commission should stress the importance of constitutionally protecting the basic principles of the national electoral system, in such a way that a simple majority can not easily change or circumvent them.

Many of the constitutional rules on governance also serve to protect the political opposition, ensuring representation and voice, and thereby guaranteeing the opportunity for the opposition to compete for majority power in future elections.²²

50. In short, a constitutional democracy, where the elections and the exercise of state power by government and parliament are regulated through constitutionally protected procedures that the majority cannot set aside at its own discretion, is in itself the best guarantee for the existence of effective political opposition. Given this basis, and a political culture based on democratic tolerance and respect for legitimate disagreement, opposition interests can be well protected even if there are no provisions or norms explicitly addressing the issue.

4.3. The subject of legal protection

51. In all European constitutional systems, there are however also provisions that more explicitly confer rights or even competences to parliamentary entities other than that of the majority – and thus directly or indirectly also to the opposition. The subject, or beneficiary, of such rules can be:

- The individual member of parliament (MP)
- The political party groups represented in parliament (factions)
- A qualified minority of MPs
- The “opposition” as such

52. Of these, the two first categories are usually the most important for the functions of the parliamentary opposition, while the third is more rare, and the last one very rare or non-existent in most European countries.

4.3.1. Legal rights and position of the individual MPs

53. In most European countries the individual member (MP) is from a formal point of view one of the main legal entities in parliament, often *the* main legal entity. A parliament is an assembly of elected representatives, each from their own constituency, and a number of formal rights and obligations are usually attached to the individual MP. This applies regardless of whether the MP belongs to the government faction or the opposition. But the actual importance of the formal standing will be greater for minority MPs, and may determine to what extent they are able to fulfil opposition functions effectively.

54. In most European parliaments there is an explicitly or implicitly recognized basic principle of equal treatment of representatives. An MP is an MP, whether in opposition or not. In Resolution 1601 (2008) of the Parliamentary Assembly it is emphasized in paragraph 5 that “Equal treatment of members of parliament has to be ensured in all their activities and privileges”.

55. A number of basic rights and competences of the individual MP are widespread in Europe, as part of a common parliamentary tradition. These typically include:

- The right to vote (on legislation, budgets and etcetera)
- The right to table bills and motions
- The right to speak in debates (often modified)

²² Cf. “Report on constitutional amendment” of December 2009, CDL-AD(2010)001 para 78.

- The right to ask oral or written questions to the government
- The right to participate in committee work
- The right to receive information and documents presented to parliament
- Parliamentary immunities, such as parliamentary non-liability (freedom of speech) and parliamentary inviolability (freedom from arrest)
- Freedom of political opinion, including protection from “imperative mandate” and the right to change party allegiance
- The right to initiate cases before the Constitutional Court

56. Not all MPs enjoy all of these rights and competences, and not all of them are absolute. Some are basic, such as the right to vote. Others are more relative, and there are often exemptions, usually for the sake of efficiency. Thus the right to speak in debates is usually strictly regulated and in many countries allocated only to the party groups, not to the individual MPs. And though there may in many countries be a right to participate in committee work, there is seldom or never the right for the MP to choose committee. Some rights may not necessarily correspond to obligations for others – for example an MP may have the right to ask questions to the minister but this does not mean that the minister is necessarily obliged to answer.

57. In most European parliaments the individual representative has a right of political initiative, including a right of legislative initiative and the right to ask questions. This ensures that the opposition is able to put issues on the parliamentary agenda, even if it does not have the majority to get the proposals adopted. In the great majority of European parliaments the individual MPs have a general right of legislative initiative, though sometimes restricted for specific kinds of proposals that are reserved for the party groups or a qualified minority.²³

58. A common European parliamentary tradition is to give the representatives special protection or “immunity”, which is usually laid down in the national constitution. This typically includes a particular level of freedom of speech (non-liability), but may also to varying degrees cover immunity from civil and/or criminal prosecution. Such rules may function both as a collective protection for parliament as an institution, and as individual protection for the MPs, against the executive, the legislature or the parliamentary majority – as was pointed out by the Venice Commission in its 1996 “Report on the regime of parliamentary immunity”.²⁴

59. Another basic right for the individual MP that has been assessed by the Venice Commission is the freedom not to be bound by an “imperative mandate”, but to be able to freely form opinions or even change party allegiance. In a 2009 opinion the Commission emphasized the importance of a free and independent mandate for members of parliament, and held 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*. 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.²⁵

²³ Cf. “Report on legislative initiative” of December 2008, CDL-AD(2008)035.

²⁴ CDL-INF(96)7. Parliamentary immunity as such is not protected by the ECHR, but there are several cases in which the Court has had to assess the scope of such rules in relation to other basic rights, in particular the right to a fair trial under Article 6, cf. for example *Kart v. Turkey*, 3 December 2009 (8917/05). See below section 4.6.

²⁵ Cf. “Report on the imperative mandate and similar practices” CDL-AD(2009)027 paragraph 39. Prohibitions against imperative mandate are to be found in the constitutions of Andorra, Article 53; Armenia, Article 66; Croatia, Article 74; France, Article 27; Germany, Article 38.1; Italy, Article 67; Lithuania, Article 59 – which refers

60. In most democratic parliaments the rights attached to the individual MPs constitute an important part of the legal basis and protection of the parliamentary opposition. The Venice Commission in general supports the principle of formal recognition and empowerment of the individual MP as a cornerstone of democratic parliamentary procedures.

4.3.2. Legal rights and position of the party groups (factions)

61. With the emergence of modern party politics in Europe in the 20th century, the most important entity in parliamentary procedures from a practical point of view has long since become the party groups (factions). In most parliamentary systems this is formally recognized if not in the constitution then at least in the parliamentary rules of procedure, which often regulate a number of issues using the party groups as the basic entity.²⁶ This typically includes procedural rights of participation, such as representation in committees and other parliamentary organs, the right to demand debates, speaking time in debates and etcetera. Such provisions seldom distinguish between the governing party and the opposition, but they are of particular importance for the latter, and function as minority rights and competences.

62. To the extent that parliamentary procedures are regulated along party lines, then the criteria for forming a “party group” become important. In some parliaments there are a minimum number of MPs required, and this may be a problem for small opposition parties with only a few seats. If the threshold for forming a party group is high, then this may constitute a democratic problem.²⁷

63. For opposition party groups a particularly important principle is that of *proportional representation* – in the parliamentary committees, the allocation of positions, speaking time, distribution of administrative and financial resources, and etcetera. This is a principle that can be found in most parliaments, although of varying strictness. Some parliaments apply proportionality to all the important allocations, while others only reserve it to some.

64. There is also great variety as to how the principle of proportional representation is formally recognised. In a few countries it is explicitly regulated in the constitution. This includes Article 52 of the Constitution of Denmark, which states that “The election by the Folketing of members to sit on committees and of members to perform special duties shall be according to proportional representation”, and Article 95 of the Constitution of Turkey that “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...”.²⁸ In other parliamentary systems the principle may only be regulated on a lower

to no restriction of representatives by other mandates; Romania, Article 69; Spain, Article 67.2). See also CDL-EL(2009)005 paragraphs 11-12. Another interesting example is Article 2 of the Rules of Procedure of the European parliament, which states that MEPs shall exercise their mandate independently, shall not be bound by any instructions and shall not receive a binding mandate.

²⁶ Sometimes the parliamentary party groups are mentioned in the constitution, as in Article 180 of the Constitution of Portugal, or Article 73 of the Constitution of Cyprus, which states 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”. But more often the national constitutions do not regulate the position of the party groups, which is then left to the parliamentary Rules of Procedure.

²⁷ In the Rules of Procedure of the European Parliament (of the EU) the position of the “party groups” is strong, and there is the requirement that a “political group” must have members from more than one Member State, and that the groups must be comprised according to “political affinities”. This was challenged in 1999 by a number of independent MPs who wanted to form a “technical” party group in order to operate more effectively, even if they did not share any political affiliation. This was rejected by the plenary, and the Court of First Instance upheld the refusal, cf. Martinez and De Gaulle v. European Parliament, case T-222/99, T-327/99 and T-329/99, judgment of 2 October 2001, European Court Reports 2001 p. II-02823.

²⁸ See also Article 55 of the Constitution of Austria, that “The National Council elects its Main Committee from its members in accordance with the principle of proportional representation”.

level, usually in the rules of procedure, or not at all – but still acknowledged as a “convention”, which the majority will usually respect.²⁹

65. The new PACE guidelines on the rights of the opposition laid down in Resolution 1601 (2008) have several points on proportional representation, including:

- speaking time in plenary sittings shall be allotted at least according to the respective weight of political groups [...] (2.2.9)
- the presidency of standing/permanent committees shall be allocated among parliamentary groups on the basis of proportional representation [...] (2.5.1)
- any committee, permanent or not, shall be composed on the basis of proportional representation (2.5.2)

66. The Venice Commission holds that party groups constitute an important basic entity in democratic parliamentary procedures, and endorses the principle of proportional representation as an important instrument for ensuring opposition and minority rights.

4.3.3. Legal rights and position of qualified minorities

67. The main principle in parliaments is that decisions are taken by simple majority voting. There are however two exemptions. The first are rules requiring a *qualified majority* in order to adopt a decision. The second are rules giving a *qualified minority* decision-making competence. The two categories are related, but there are differences. A qualified majority rule means giving the minority the negative power to block decisions, and this is most often used for decisions of particular importance, such as constitutional amendment, delegation of sovereignty etcetera. A qualified minority rule in contrast gives the minority a positive competence to itself initiate and adopt a decision. This is most often used for procedural issues, or issues related to parliamentary oversight and scrutiny.³⁰

68. Parliamentary rules on qualified majority or minority in effect means giving rights and competences to the opposition, but only to opposition groups of a certain size. Sometimes a large opposition party will by itself have enough MPs to exercise the competence, but it may also be that no single party group has enough, so that it requires cooperation between opposition groups.

69. Parliamentary qualified minority rules are to be found either as a particular number of MPs, for example 10 or 20 – or as a percentage of the overall number of MPs, for example 1/5, 1/4 or 1/3, in the plenary or in a committee. The exact threshold will often be the result of careful assessment, aiming to achieve a balance between majority rule and perceived legitimate minority interests, and tailored to the national political culture and context.

70. Rules giving qualified parliamentary minorities procedural rights and competences are relatively widespread in Europe, though there is no clear pattern or common model. Most of the examples are related matters such as the right to request that sessions and debates are held, to raise interpellations, to table certain kinds of motions, and etcetera. Such provisions are

²⁹ In Norway the principle of proportional representation is only laid down in the ordinary rules of procedure of the parliament, which can formally be changed by the majority at any time. In practice, however, there is a well established convention protecting the principle, and the political threshold for denying a party group proportional representation is very high. This does not mean that it cannot happen. One example occurred in 1948, when parliamentary procedures for consulting with the government on issues on foreign affairs and security were circumvented in order to keep out the substantial pro-Soviet Communist Party Group, in order that they should not have access to sensitive information given to the other opposition parties.

³⁰ Rules on qualified minority are sometimes referred to as “submajority rules”. For an analysis of the rationale behind such rules, cf. Adrian Vermeule “Submajority Rules: Forcing Accountability upon Majorities”, Chicago Law School Working paper 2004.

usually to be found in the national parliamentary rules of procedure, though there are examples that they are also laid down in the constitution or in statutory law.³¹

71. Rules requiring a qualified majority to end debates (cloture) are in effect another example of a qualified minority right, enabling a minority of a certain size the possibility to delay or even block parliamentary procedures by dragging out the debates (“filibustering”).³²

72. In some parliaments a qualified minority may have the right to *delay* majority decisions, for example by calling for extra hearings, or periods of reflection. According to Article 41 of the Danish constitution a minority of 2/5 of the MPs can demand that the third and last hearing on legislative proposals is delayed by up to 12 days, in order to give the minority the possibility to initiate public debate.

73. Qualified minority rights may be found in the general parliamentary procedures, or in special procedures for particular issues, most commonly in procedures for *parliamentary oversight and scrutiny* of the executive. Here there are examples to be found that a certain minority percentage of the MPs have the competence to actually adopt decisions – for example to call a hearing or establish a committee of inquiry. In the German constitution, for example, Article 44 gives 1/4 of the MPs the right to demand the establishment of a parliamentary commission of inquiry. In the Norwegian parliament, 1/3 of the members in the Oversight Committee can initiate inquiries and call public hearings. In Resolution 1601 (2008) the PACE advocates introducing qualified minority rights for 1/4 of the MPs in a number of rules on supervision, scrutiny and control. More on this below in section 4.3.

74. Another widespread competence is the right of a qualified minority of MPs to request constitutional review of legislative and other majority acts from the national constitutional court or other such institutions. More on this below in section 4.5.

75. The most widespread rules on qualified majority to be found in European parliaments are rules on *constitutional amendment*, which in most countries require a procedure involving a decision by qualified majority in parliament. The most common threshold is a 2/3s majority requirement, but 3/5, 3/4 and 5/6 is also used.³³ Such provisions in effect give a minority (opposition) of a certain size a parliamentary veto. More on this below in section 4.4.

76. The Venice Commission holds that parliamentary rules on qualified majority or minority constitute an instrument that may effectively and legitimately protect opposition and minority interests, both when it comes to procedural participation, powers of supervision and certain particularly important decisions. At the same time, this is an instrument that restricts the power of the democratically elected majority, and which should therefore be used with care, and tailored specifically to the national constitutional and political context.

³¹ For example, 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 Republic of Macedonia according to Article 72 by a minimum of five representatives; in the Constitution of the Czech Republic, according to Article 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 Article 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.”

³² A well known example is the rule in the United States Senate that a senator or a series of senators are permitted to speak for as long as they wish and on any topic they choose, unless “three-fifths of the Senators duly chosen and sworn” (60 out of 100) brings debate to a close by invoking cloture under Senate Rule XXII. This in effect gives a minority of 2/5 of the Senate the competence to block majority decisions, a power that has been used (or threatened) on a number of occasions.

³³ This was assessed by the Venice Commission in its “Report on constitutional amendment” of December 2009, CDL-AD(2010)001. See below section 4.4.

4.3.4. Legal rights and position of the opposition as such

77. Giving rights to individual MPs, the party groups and qualified minorities is by far the most common way of conferring formal rights on the parliamentary opposition in European countries. Provisions giving legal rights to the “opposition” as such are more rare – though there are examples to be found.

78. Attaching formal rights to the opposition as such is first and foremost a concept applicable in Westminster Style parliaments, based on first-past-the-post electoral rules, which promotes a system with only two major parliamentary factions – the governing party and the “opposition”. In the British tradition this is sometimes emphasized by referring to the main parliamentary opposition faction with a capital “O”, and even as “The loyal Opposition”, or “Her Majesty’s Opposition”. In the UK Parliament there are a number of conventions and provisions on procedure based on the concept of the “opposition”.

79. There are also some other European parliaments that operate with a institutionalized concept of the “opposition” as such, to a larger or smaller degree. One example is Malta, where the Constitution states in Article 90 that “there shall be a Leader of the Opposition who shall be appointed by the President”. Another example is Portugal, where there is a special law on the opposition.³⁴

80. But apart from these examples, references to the “opposition” as a legal concept are rare in European parliamentary systems. The main reason for this is that the “opposition” in most parliaments is not a single entity, but consists of several party groups, sometimes quite a few, and usually with contradictory interests, opinions and strategies. The degree to which the opposition parties actually oppose the government may also differ, with some supporting it explicitly or tacitly, either in general or on a case-to-case basis, and others in strong and permanent opposition. Providing the opposition party groups with legal rights as a single block is therefore not possible or at least not constructive. And giving one or more of them (for example the largest one) a special privileged status as the “Opposition” is contrary to the principle of equality of MPs and may be bitterly resented by the others.

81. In its “Opinion on the Draft Law on the Parliamentary Opposition in Ukraine”³⁵ of June 2007 the Venice Commission advised against adopting a special law on the “opposition” as such – arguing that this did not correspond to the constitutional and political context in the Ukrainian parliament:

5. Neither the term “Parliamentary Opposition” nor the concept of “Oppositional Activity” is currently used in the Ukrainian Constitution and legislation. Hence the scope of rights and immunities of MPs, which is defined by the Constitution, the Law on the Status of People’s Deputies of Ukraine and the Rules of Procedure of the Verkhovna Rada of Ukraine, does not depend on their affiliation with any parliamentary faction.

6. By its specific nature as a general law and its bipolar character resulting from its definitions listed in Article 1, the Draft Law builds on a very strong division between ruling coalition and opposition. Approving a special status for the opposition and entrenching it in a special law can make sense when this is meant to reinforce the

³⁴ Law no. 24/98 of 26 May 1998. Here the concept of “opposition” is defined in article 2 as a function: “Opposition shall be understood to be the activity of monitoring, supervising and criticising the political guidelines followed by the Government...”. The rights listed in the statute include the right to prior consultation (article 5), rights of participation in general (article 6) and in legislation in particular (article 7), the right to make depositions (article 8) and guarantees of freedom and independence of media (article 9).

³⁵ Cf. CDL-AD(2007)019, adopted in June 2007, and also the earlier preliminary opinion of March 2007, CDL-AD(2007)015. Was the Ukrainian law stopped after the criticism of the Venice Commission?

political and institutional position of the strongest opposition party, which may become tomorrow's majority. This may be the case in systems based on majority rule, where the opposition consists of the most important minority party in Parliament, which is ready to succeed the Government when it has resigned (Westminster model). The two main political parties usually alternate as Government and Opposition in a majority system, which is often bipolar.

7. The Ukrainian Parliament has so far been rather characterized by a plurality of political parties, blocs, factions and independent MPs. Political and institutional life change regularly, as do numerical majorities in the Verkhovna Rada as a result of MPs switching parties. Under such circumstances, the Venice Commission considers that it can be very difficult – and in some cases problematic from the non-discrimination viewpoint – to introduce rigid rules, especially when they tend to give specific powers to some political actors to the detriment of other, equally legitimate to speak as representatives of the citizens.

8. As the Commission already pointed out in its preliminary opinion, the rigidity of the procedure chosen to establish and terminate the "Parliamentary Opposition" raises concerns since it can have adverse impacts on the freedom and independence of the mandate of the deputies which would result from such a cementing of parliamentary adhesion and loyalties of a majority group.

82. In France the Constitutional Council declared on 22 June 2006 that arrangements introduced by the new Rule 19 of the Rules of Procedure of the National Assembly, which required parliamentary groups to make a statement of allegiance to the Majority or Opposition and, if they objected, to confer decision-making power on the Bureau of the National Assembly, were incompatible with Article 4.1 of the Constitution. The Council considered that Rule 19 led to an unwarranted difference in treatment, to the detriment of parliamentary groups that object to declaring such an 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.³⁶

83. In Norway the Parliament in 2009 considered and to some extent adopted a number of proposals to strengthen parliamentary minority rights, but it did not make use of the concept of "opposition".³⁷

84. Even if formal institutionalization of the "Opposition" as a single entity is not advisable in other parliaments than those belonging to the Westminster tradition, this does not mean that the term "opposition" cannot be used constructively when discussing parliamentary procedures. In the Guidelines laid down in Resolution 1601(2008) the Parliamentary Assembly consistently refers to the rights that "opposition members" should have. The underlying premise in most of the text is that these are rights that all members will normally have, but that it is particularly important to emphasize this with regard to members of the opposition. It is also useful to talk about certain parliamentary functions that the "opposition" should be particularly concerned about, such as supervision and scrutiny, which the government MPs will not have the same incentive to conduct.

85. In France the new Article 51-1 of the Constitution (added in 2008) states that the Rules of Procedure of the two houses of parliament "shall recognize that opposition groups in the House concerned, as well as minority groups, have specific rights". There is also a rule in Article 48 (5) giving "the opposition groups" the right to set the agenda for one day of sitting each month.

³⁶ See summary and full text of the decision in CODICES, FRA-2006-2-005.

³⁷ Cf. Committee Report No. 235 (2008-2009).

But apart from that, the rights and competences are related to the party groups and to qualified minorities, not to the “opposition” as a legal entity.

86. In some parliaments there is a rule or convention that certain positions should be reserved for opposition members.³⁸ This in particular applies to the chairmanship of committees responsible for supervision and scrutiny of government activities, based on the idea that parliamentary oversight of the executive is first and foremost a function that the opposition parties can be relied on to exercise.³⁹ In some political systems, however, there is a tradition that even MPs belonging to the ruling party may in effect supervise the government quite strictly.

4.4. The legal level and form of protection

87. The extent to which formal rules protect parliamentary opposition and minority interests depends not only on their content, but also on which level of the legal hierarchy they are laid down. In general, if a minority interest is only regulated at a level that can be changed by a simple majority vote, then it is formally not very well protected. The actual level of protection may be better, as there will often be unwritten norms and conventions stopping the majority from altering the rules of the game. But in situations where it really needs minority protection, the opposition can not necessarily rely on such self-restraint by the majority.

88. As a general principle, the basic rules on parliamentary opposition and minority rights should therefore preferably be regulated in a form that the majority cannot alter or amend at its own discretion, at least not without some delay.

89. From a comparative perspective, national rules on legal rights of parliamentary opposition and minority interests are to be found in many forms and at all levels of the legal hierarchy:

- The constitution
- Statutory law
- The parliamentary rules of procedure
- Unwritten customary law or convention

90. As pointed out, a number of provisions normally found in national constitutions can be said indirectly to protect the role of the political opposition in general and the parliamentary opposition in particular. This applies both to fundamental rights and to rules on the state machinery and procedures, which the majority has to respect, even when it would prefer not to. Almost all constitutions also have rules on constitutional amendment that require a qualified parliamentary majority and thus provide a minority (the opposition) with the right of veto.

91. Provisions that more explicitly regulate parliamentary opposition or minority rights are not that common in national constitutions, though there are usually some. This primarily depends

³⁸ In Malta, for example, the post of Deputy Speaker is traditionally reserved for a member of the opposition.

³⁹ In Resolution 1601(2008) paragraph 2.5.1 the Assembly recommends that the opposition should chair all “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”. This is an example of the resolution going quite far, as compared to what is usual in national parliaments. It also illustrates the difficulties of comparative constitutional law. In many countries, the parliamentary committees responsible for budget and finance would not be considered (merely) as “monitoring” committees. In the Norwegian Parliament, for example, the standing Committee on Finance (Finanskomiteen) is not regarded as a monitoring committee, but as a committee for substantive decision-making. Consequently, the committee is by tradition often chaired by an MP from the government faction, in contrast to the standing Oversight Committee (Kontrollkomiteen), which is usually chaired by the opposition according to unwritten convention.

on the level of detail of the national constitution, which differs a lot, and in particular on the extent to which parliamentary procedures are regulated in the constitution. Most constitutions only regulate the most basic elements of parliamentary life, leaving the details to a special Law on Parliament, or (more often) to Rules of Procedure adopted by parliament itself. This means that most of the issues related to opposition rights in parliamentary proceedings are normally not protected at the constitutional level.

92. One issue that is regulated at the constitutional level in most European countries is that of parliamentary immunity for the MPs, which is discussed below in section 4.6. As for other rules on opposition and minority rights, there appears to be wide variance between national constitutions. There are for example some constitutions that state the right of MPs to ask questions,⁴⁰ but in most countries this is regulated in the Rules of Procedure. Only a few constitutions explicitly refer to the concept of the “opposition” as such.⁴¹ The principle of proportional representation in parliamentary procedures is protected in a few constitutions, such as the Danish constitution Article 52, but in most countries this is only regulated in the Rules of Procedure, if at all.

93. As for ordinary statutory law it appears that this is rarely used for regulating the position of parliamentary opposition and minorities. There are however some countries that have a special Law on Parliament, such as in “the Former Yugoslav Republic of Macedonia”, which may to some extent cover opposition and minority rights. In Portugal there is a special law on the opposition as such.⁴²

94. Most provisions regulating parliamentary opposition and minority rights are to be found in the Rules of Procedure of the national parliaments. This is natural, and reflects the procedural autonomy of parliament, which is a basic principle in most constitutional systems. The drawback from a minority perspective is that Rules of Procedure are usually adopted by simple majority, and can thus be altered by simple majority, providing rather weak formal protection for minority interests.

95. This is however not always the case. In some countries the constitution states that the parliamentary Rules of Procedure must be adopted by qualified majority. This applies for example in Austria, where according to Article 30 of the Constitution “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 third majority of the votes cast.” According to Article 8:6 of the Swedish Constitution the Rules of Procedure of the Parliament (Riksdagsordningen) can only be changed either according to the procedures for constitutional amendment or by a 3/4 majority.⁴³

96. In most parliaments the written Rules on Procedure are supplemented by unwritten norms and conventions. In some parliaments this forms a large part of the procedural norms, such as

⁴⁰ For example in the constitutions of Armenia (Article 80), Austria (Article 52.3), Cyprus (Article 73), Finland (Article 37), and Ukraine (Article 134).

⁴¹ Those who do include the constitution of Portugal which in Article 114 states that “The right of democratic opposition of minorities shall be recognized on the conditions set out in this Constitution and under the law”, and the constitution of France, which in 51.1 state that “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”. The recent 2008 reform of the French Constitution, which aimed inter alia to reinforce the powers of the Parliament, also introduced 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.

⁴² Law no. 24/98 of 26 May 1998

⁴³ Another variant is the one found in Denmark and Norway, where the rules of procedure are adopted by Parliament by simple majority, but with provisions stating that they can not be derogated from in individual cases except by a qualified majority vote (3/4 of the MPs in Denmark, 2/3 in Norway). In other words, a majority in parliament is at any time free to alter the rules of procedure in a general manner, but not to derogate from them in specific cases. This kind of self-binding is not strictly logical, but it functions quite well in practice, and provides a high degree of actual protection for opposition and minority interests.

the “custom and practice” of the UK parliament, many of which are written down in the form of “Standing Orders”.⁴⁴ But even in parliaments that have adopted extensive rules of procedure, these will often be supplemented or even altered by unwritten custom. This can be of great importance for the actual position of parliamentary minorities. A common feature of democratically mature parliaments is that the interests of the opposition and minority groups are often far better respected by way of custom and convention than what the formal rules indicate, as pointed out by March and Olsen:

“Even beyond specific rules, democracy presumes an ethic of voluntary self-restraint on the part of legitimate authority, a residual rule of democratic humility. [...] Majorities voluntarily yield to minorities in some circumstances. Not all possible advantages within the rules are supposed to be taken, or are actually taken.”⁴⁵

97. The fact that parliamentary opposition and minority interests are formally protected through provisions in the Rules of Procedure does not automatically mean that the opposition will have the possibility of recourse to judicial review in cases of dispute. In many countries there will not be any procedural possibility for judicial review of disputes over the interpretation and application of the parliamentary rules of procedure, and this would as a matter of principle be regarded as contrary to the procedural independence and autonomy of the parliament.

98. In other constitutional systems there is legal remedy. In the German constitution there is a special complaint procedure before the Federal Constitutional Court called “*Organstreitverfahren*” as provided for in Article 93.1 of the constitution. In the Turkish constitution Article 148 allows for judicial review of constitutionality over the rules of parliamentary procedure (Standing orders). In France the Constitutional Council has several times ruled on the rules of procedures of both houses of parliament.⁴⁶ Likewise, the Constitutional Court of Hungary in 2006 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 right to speak.⁴⁷

99. There is no common European model when it comes to regulating parliamentary opposition and minority rights, and the Venice Commission does not consider it necessary or appropriate to try to formulate one. The Commission would however emphasize that on closer analysis most national constitutions implicitly and indirectly protects the opposition far better than what they appear to do. The Commission furthermore holds that the most important thing is not the form in which this is done, but that the basic legal requirements for effective parliamentary opposition are protected in such a way that it can not be overruled or set aside by a simple majority at its own whim.

5. Rules regulating the parliamentary opposition or minorities

5.1. Introduction

So far this study has mainly looked at the legal-technical aspects of regulating the role of the parliamentary opposition – directly or indirectly, using different kinds of legal subjects and different levels of the legal hierarchy. Another question is the more material one – what are the substantive opposition and minority rights and competences that are or should be legally guaranteed?

⁴⁴ A number of these can be found at <http://www.parliament.uk/about/how/role/customs.cfm>

⁴⁵ Cf. March and Olsen, *Democratic Governance* (1995) p. 127.

⁴⁶ See CODICES 2006-2-005, CODICES 1990-S-001, CODICES 1995-3-010.

⁴⁷ For a summary and full text of the decision, see CODIDES, HUN-2006-1-001.

100. The main principle in any parliamentary democracy is that decisions are taken by majority vote. However, the minority should always be allowed to participate. Most rules on parliamentary opposition and minorities are therefore of a procedural nature. Sometimes, however, minorities are given more than just rights of participation, and may even have the competence to adopt or at least influence substantive decisions.

101. In political theory a distinction is sometimes drawn between positive and negative power. Positive power to adopt decisions should in a democracy rest with the elected majority. But the minority (opposition) may enjoy some degree of *negative power* – to scrutinize, supervise, delay or even block the exercise of majority rule. The concept of “negative power” is a useful instrument for understanding how opposition and minority interests may or should be regulated.

102. The proper balance between democratic majority rule and legitimate opposition and minority rights and interests – and between positive and negative power – is not an easy one, and depends to a large extent on the national political and constitutional culture. There is no single general formula, much less any clear common European standard. But there are still common elements of interest. On closer analysis there appears to be some main substantive categories where special opposition or minority rights are to be found in some or most European parliamentary systems:

- Rules guaranteeing minority participation in parliamentary procedures (4.2)
- Rules giving a minority special rights to supervise and scrutinize government policy (4.3)
- Rules giving a minority the right to block or delay majority decisions (4.4)
- Rules giving a minority the right to demand constitutional review of laws (4.5)

103. These are rules giving the parliamentary opposition and minorities rights and competences. In addition come rules protecting opposition parties and MPs against persecution and abuse (4.6).

5.2. Participation in parliamentary procedures

The basic idea of a parliament is that of a representative assembly which should reflect different opinions and which should discuss – the very word “parlement” in French means discussion. Even if the basic principle is that the majority decides, it is not the majority that constitutes the parliament. The parliament as an institution consists of all the representatives, and they are all entitled and obliged to participate in the procedures, whether in majority or minority. It is therefore not surprising that most of the provisions that are to be found relating to individual MPs, party groups, qualified minorities and (more rarely) the “opposition” are concerned with *procedural* issues, ensuring the minority rights of *participation*, but not decision.

104. A succinct way of putting this is that “The principle underlying parliamentary procedure is that the minority should have its say and the majority should have its way”.⁴⁸ The minority should have its say, in the sense that it should have the right to participate in the procedures, the committee work, and the debates. And then at the end of the day there is a vote, which the minority loses. The debate may still have improved the outcome, and even if it was not, still the participation of the opposition will have added openness and transparency to the political processes, increasing transparency, accountability and legitimacy.

⁴⁸ Cf. Philip Laundy, *Parliaments in the Modern World* (1989) p. 95.

105. It is also important that the minority should have a say in setting the agenda – deciding which cases should be debated, the dates of the debate, the timeframe, and etcetera. It is not conducive to effective and legitimate parliamentary democracy if the majority is able to decide the agenda alone, allowing only those debates with which they are comfortable and delaying or blocking others.

106. In most national parliaments there are numerous provisions in the Rules of Procedure that ensures procedural participation, whether regulated in relation to the individual MP, the party groups, qualified minorities or the “opposition” as such.

107. A basic principle of parliamentary procedure, which is seldom explicitly stated in the national constitutions, but which is nevertheless often to be found by way of interpretation, is that of *equality of the representatives*. As stated, a parliament is an institution consisting of the elected representatives, with the representative as a main legal entity, based on the idea that they should in principle all have the same rights and obligation, whether belonging to the governing party or the opposition.

108. This principle of equality is stated in Resolution 1601 (2008) of the Parliamentary Assembly: “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”. 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.⁴⁹

109. Under EU law the principle of equality of the members of the European Parliament (MEPs) have been judicially recognized by the Court of First Instance, which in 2001 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”.⁵⁰

110. To the extent that the principle of equality of MPs is exempted from, then that is normally for the sake of efficiency, since it would in many cases be impossible to get decisions adopted in an assembly with equal rights of procedural participation for all members. The normal thing is therefore to adjust the principle of equality of MPs with regard to procedural issues into a principle of proportional representation and participation by the party groups.

111. As for the more concrete and detailed rights of procedural participation there are a large number of issues that merit attention, corresponding to the many functions and procedures of a modern parliament. This is reflected in Resolution 1601 (2008), where the Parliamentary Assembly has laid down an extensive and detailed list of procedural rights that should be guaranteed for opposition members. The main categories include:

- Participation in the “supervision, scrutiny and control” function, through a number of specified procedural rights (2.2.1 to 2.2.9)
- Participation in the organization of legislative work (2.3.1 and 2.3.2)
- Participation in the legislative procedures (2.4.1 to 2.4.4)

⁴⁹ Cf. para 51: “The general principles inspiring this Code apply also to performance in office and to situations where parties are in opposition”. This is elaborated 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”.

⁵⁰ CFI, judgment of 2 October 2001, Martinez and De Gaulle v. European Parliament, case T-222/99, T-327/99 and T-329/99, paragraph 202.

- Participation in parliamentary committees' work (2.5.1 to 2.5.5)
- Participation in political decisions (2.6)
- Participation in the constitutional review of laws (2.7)

112. The Venice Commission recommends the Parliamentary Assembly for having identified this list of procedural rights vital for democratic and legitimate parliamentary decision-making, and reiterates that these should be implemented by national parliaments in the member states of the Council of Europe.

5.3. Rights of parliamentary supervision and scrutiny of the executive

113. Of the basic functions that almost all parliaments fulfil besides adopting laws and budgets, one of the most important is that of supervision and scrutiny of the government and the administration (the executive) – sometimes also referred to as parliamentary oversight, inquiry or control.⁵¹

114. In constitutional theory, oversight is conducted by parliament as an institution. In reality, this is first and foremost a function for the opposition. The real adversaries are not parliament and the government, but the opposition and the government party (or parties). Sometimes oversight can take place in a parliamentary atmosphere of consensus. But more often it is a process of political controversy, with the opposition attacking the government ministers and the government MPs defending them. When parliamentary oversight leads to exposure of faults and failures, this can result either in ministers being held accountable, which is the more dramatic outcome, or in parliament trying to redress the problem by passing new legislation, amending the budget or by other means. Oversight cases are often of public interest, with the activities of the opposition followed and supplemented by the media.

115. Effective oversight requires that parliament has the power and competence to inquire into the actions of the government and the administration, by demanding information and documents, calling hearings, setting up commissions of inquiry, and etcetera. Most parliaments have special standing committees on oversight and control, and in many countries there are also external control institutions reporting directly to parliament, such as parliamentary ombudsmen, auditors and others.⁵²

116. The inherent challenge (and paradox) of oversight in parliamentary systems is that the government can usually rely on the support of a majority of members of the very same

⁵¹ Although this basic function is common to all democratic parliaments, the terminology varies. In some parliaments, such as the Scandinavian ones, the concept is "parliamentary control", but the word "control" is then applied in a more narrow sense than usual in English, covering only (or mostly) ex post supervision and inquiry (not ex ante influence). In the US Congress the term is "oversight" (or "congressional oversight"), which is often used in international literature on the subject, sometimes as "legislative oversight". In the UK the same function is at least partly covered by the concept of parliamentary "scrutiny". The term "parliamentary control" can be used in a number of different ways (inspect, scrutinize, examine, debate, approve, challenge, censure, influence), cf. Gregory "Parliamentary Control and the Use of English", *Parliamentary Affairs* 1990 p. 75. The function of parliamentary "control" is closely tied to the concepts of ministerial responsibility and accountability.

⁵² The originally Swedish invention of an "ombudsman" for handling complaints against the administration has in modern times been copied by most European countries (as well as the EU), and in most systems this is a parliamentary institution, reporting directly to Parliament. As for the audit of the government and the administration, there are different traditions in Europe, with some countries having special "Courts of Auditors", and others "Auditor Generals", which may belong constitutionally either to the legislative or the executive branch. But in many countries the audit institution is directly or indirectly attached to parliament, reporting directly to it, as an integral part of the parliamentary oversight system. In such systems, it may be of great importance to what extent the audit institution is dependent or independent of the parliamentary majority, and to what extent a parliamentary minority can ask or instruct it to inquire into particular cases. In some countries there are also special external parliamentary bodies for oversight of the secret services (in others this is done within the executive branch and/or by parliament itself through special committees).

institution that under the constitution is supposed to supervise and hold it accountable. And this majority will often have little or no interest in uncovering politically controversial and sensitive cases. For this reason, it is often held that parliamentary opposition and minority rights are of particular importance with regard to the oversight function (ex post supervision and control).

117. In most parliaments a basic element of the oversight function is the right of any MP to ask questions to the ministers, and to table motions and voice criticism. This, however, is a low-intensive form of oversight. To the extent that oversight is conducted through established procedures that the majority cannot circumvent, then this also ensures a certain level of control. If for example there are procedures requiring that the government report to parliament on certain issues, or that the reports of the auditor general and the ombudsman shall be subject to parliamentary scrutiny, then this may provide the opposition with a way of addressing government faults and failures that the majority cannot easily block. In an open society it can also be politically difficult for the majority government faction to refuse demands for parliamentary inquiries into matters that are publically known – though this depends on the political culture and the power of the independent media.

118. For more intensive parliamentary oversight of specific cases, however, there remains in most parliaments the problem that launching inquiries, demanding information, calling hearings and other important measures require a majority decision, which in effect means agreement with the government faction.

119. For this reason there are some political systems in which the parliamentary opposition, usually in the form of a certain qualified minority, have been granted not only rights of procedural participation, but also the legal competence to adopt decisions to initiate inquiries, demand information, set up special committees or commissions etcetera. This is not a common European tradition. There are many parliaments without such instruments, and for those that have it, it is regulated in different ways. But there are important examples. One of the oldest and best known is Article 44 of the German Constitution, which gives 1/4 of the representatives of the Bundestag the right to demand a commission of inquiry.⁵³ Other examples include Article 115 of the Finish Constitution, which gives ten members of the Constitutional Committee the right to demand an inquiry into the conduct of a government minister, and a recent reform of the Rules of Procedure of the Norwegian Parliament, which gives 1/3 of the members of the Committee on Constitutional Control the right to initiate inquiries and call hearings. According to Article 76 of the “The former Yugoslav Republic of Macedonian” Constitution a proposal for setting up a commission of inquiry may be submitted by 20 representatives (out of 120).

120. In Resolution 1601(2008) the Parliamentary Assembly has taken inspiration from systems giving special oversight competences to parliamentary minorities, and recommends that a qualified minority of 1/4 of the representatives should have the legal competence to demand the following measures:

- A plenary sitting (2.2.5)
- A debate on a specific issue (2.2.7)

⁵³ Cf. Article 44 (1) that “The Bundestag shall have the right, and on the motion of one quarter of its Members the duty, to establish a committee of inquiry, which shall take the requisite evidence at public hearings”. A seemingly similar provision is found in the rules on the European Parliament in Article 226 of the Treaty on the Functioning of the European Union (formerly Article 193 ECT), which states that “In the course of its duties, the European Parliament may, at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law...”. There is however the crucial difference that the request of 1/4 of the MEPs does not mean that the EP is obliged to set up an inquiry, as this still has to be decided by the plenary by ordinary majority vote. Unlike Article 44 of the German Constitution, Article 226 TFEU is in other words not designed to confer rights on the minority.

- The setting-up of “a committee of inquiry or a parliamentary mission of information and to become members thereof” (2.2.8)
- An extraordinary session (2.3.2)
- Committee hearings (2.5.4)

121. The Venice Commission in principle endorses the idea of giving a qualified minority of MPs special powers of inquiry with regard to the oversight function of parliament. At the same time, it should be pointed out that there is no common European tradition for this, that such rules are still relatively rare, and that the threshold of 1/4 recommended by the Assembly in most political systems would be regarded as rather low. The exact reach and contents of such rules should be carefully tailored to the national constitutional and political tradition and context.

5.4. The right to block or delay majority decisions

122. A different kind of opposition (minority) right, but arguably the most profound, is the right of a parliamentary minority to block or delay certain particularly important majority decisions. This is the ultimate example of “negative power” – which functions not only as a guarantee for the minority groups in parliament, but also for the interests and groups represented by them – as their protection against what is sometimes referred to as the “tyranny of the majority”.

123. The most basic and widespread of these rights is the competence of a parliamentary minority to block constitutional amendment. In all European countries constitutional amendment is subject to special requirements, the most common of which is a qualified majority vote in parliament. In its 2009 “Report on Constitutional Amendment” the Venice Commission examined amendment clauses in the constitutions of all the member states of the Council of Europe, and found that the most widespread requirement is a 2/3 majority in parliament, though there are also examples of 3/5, 3/4, 4/5 and 5/6.⁵⁴ When assessing these rules, the Venice Commission held, inter alia, that:

94. The main purpose and effect of a *qualified majority* requirement is to (i) ensure broad political consensus (and thereby strengthen the legitimacy and durability of the amendment), and (ii) protect the interests and rights of the political opposition and of minorities. Such a requirement in effect gives a minority (of a certain size) a veto on constitutional amendment.

124. Rules on qualified majority for constitutional amendment will usually serve to protect the interests of the parliamentary opposition (and can also give it a certain bargaining leverage in other cases), as long as the government party (or parties) does not have the “supermajority” required to pass amendments by itself.

125. In addition to constitutional amendments, there are some constitutions that require a qualified majority also for certain other parliamentary decisions of particular importance. One example, which is mentioned above, is the requirement in some parliaments of a qualified majority for changing the rules of procedure. Another example is the requirement of a qualified majority for parliamentary decisions involving transfer of national sovereignty to international organizations. This is to be found, inter alia, in Article 93 of the Norwegian Constitution, which states that such decisions require a 3/4 majority, and in Article 20 of the Danish Constitution, which states that they require either a 5/6 parliamentary majority or a popular referendum (with

⁵⁴ Cf. “Report on Constitutional Amendment” adopted in December 2009, CDL-AD(2010)001. The requirement of a qualified majority in parliament is usually supplemented by one or more other hurdles, such as a special time delay or a popular referendum. In its final conclusions the Venice Commission held in paragraph 241 that “A good amendment procedure will normally contain (i) a qualified majority in parliament, which should not be too strict, and (ii) a certain time delay, which ensures a period of debate and reflection”.

strict requirements). Latvia, Poland and Slovenia also provide for a 2/3 majority in their constitutions.⁵⁵

126. Some constitutions have provisions that provide a qualified minority with the right not to block but to *delay* majority decisions. An example is Article 41 (3) of the Danish Constitution, which gives a qualified minority of 2/5 the right to demand that the third and final hearing on legislative proposals should be postponed up to 12 days, in order to give the opposition time to raise a public debate. A more radical provision is Article 42 of the same constitution, which gives a qualified minority of 1/3 the right to demand that a statute passed by parliament must be put to a public referendum before it can be enacted. This competence has only been used once (1963), but its existence is still argued to have a certain political effect.

127. The Venice Commission concludes that qualified majority requirements (with corresponding qualified minority rights) are to be considered an important tool for certain basic parliamentary decisions, in particular constitutional amendment, but that apart from this it should be used with great care, so as not to override the basic principle of legitimate majority rule.⁵⁶

5.5. Constitutional review of laws and other acts of parliament

128. The rules on constitutional review of laws (and other acts of parliament) differ in the member states of the Council of Europe – with variations inter alia as regards when review can be done (before or after adoption), which institutions can request review, which institutions conduct the review, the criteria and intensity of the review, and a number of other factors.⁵⁷

129. A widespread model in Europe, however, is that a parliamentary minority can demand constitutional review of laws, either before or after adoption, usually from the Constitutional Court.⁵⁸ This is a competence that gives the opposition (of a certain size) the chance to bring the laws and other acts of the parliamentary majority before an independent judicial authority. This competence can in itself give the minority a certain political leverage, and may slow down the adoption or enactment of new (majority) legislation. Whether it actually stops such legislation depends on the contents of the law, the strictness of the constitution, and the will, composition and traditions of the national Constitutional Court.

130. The qualified minority required for requesting constitutional review of laws differs. In some parliaments it is 1/3 of the members (Austria, Slovenia), or 1/4 (Germany),⁵⁹ or 1/5 (Albania, Bulgaria, Lithuania, Slovakia and Turkey). In others it is a fixed number, such as in France (60 deputies or 60 senators), in Poland (50 deputies or 30 senators) or in Spain (50 deputies or 50 senators).

⁵⁵ See Article 90 of the Latvian Constitution, Article 68 of the Polish Constitution and Article 3a of the Slovenian Constitution.

⁵⁶ An infamous historical example of minority veto rights going (much) too far is the power of veto given to any single Polish nobleman in the national assembly (the Sejm) in the 17th and 18th century. This led to great political problems, and has later given rise to the expression “Polish parliament” (Swedish and Norwegian *Polisk riksdag*, Danish *Polisk rigsdag*, German *Polnischer Reichstag*) as a term describing an assembly in which no real decisions can be made.

⁵⁷ In some countries there is no such review at all except by Parliament itself, such as in the Netherlands. If the Dutch Parliament reaches the conclusion, sometimes against the opinion of the Council of State, that a Bill is in conformity with the Constitution, and adopts the law, it is sacrosanct, unless a court holds it to be in violation of an international self-executing obligation.

⁵⁸ In Sweden, constitutional review (ex ante) of draft laws is done by a special “Council on Legislation” at the request of a parliamentary committee or at least 5 of its members.

⁵⁹ Under the German Constitution the requirement used to be 1/3, but this was changed to 1/4, thus strengthening minority rights.

131. In some countries there is a tradition of the opposition referring a great number of parliamentary acts for constitutional review. One example in France, where the low threshold of 60 members out of the 577-member assembly (or 60 senators out of 348) has led to a practice under which any act of legislation of a certain importance and controversy is likely to be referred to the Constitutional Council, which in this way functions to a considerable extent as an institution for assessing the objections of the parliamentary opposition.

5.6. Minority protection against persecution and abuse

132. So far the report has examined what (positive) rights and competences are or may be given to parliamentary opposition or minority interests. An assessment of the legal status of the opposition in a democratic parliament is however not complete without also covering rules on *special legal protection* of the parliamentary minority against majority persecution and abuse. Here there is a fairly common European tradition that ensures particular formal protection for:

- Political parties (against prohibition and dissolution)
- Individual MPs (“parliamentary immunity”)

133. Such rules are not reserved for the opposition but cover all political parties and MPs. However, they function first and foremost as a minority guarantee against the political majority, both in government and in parliament.⁶⁰ Both sets of rules have previously been extensively examined by the Venice Commission, and reference is made to the 1996 “Report on the Regime of Parliamentary Immunity” and the 1999 “Guidelines on prohibition and dissolution of political parties and analogous measures”, which was further elaborated by the Commission in a 2009 report on prohibition of political parties in Turkey.⁶¹

134. Special protection against prohibition of (opposition) parties is guaranteed both at the European and in many countries at the national level. Under ECHR Article 11 the Court has recognized the special nature and democratic functions of political parties and stated that they should enjoy particular protection and may only be prohibited in exceptional cases and respecting strict criteria. Supplementing this with reference to European democratic standards, the Venice Commission in its guidelines on the subject has held that political parties may only legitimately be prohibited if they resort to or threaten with violence. This applies of course to political parties both inside and outside of parliament.

135. Special protection of individual MPs in the form of rules on “parliamentary immunity” is not as such regulated at the European level.⁶² However, this is so widespread at the national constitutional level as to form a common parliamentary tradition, which dates back to notions of sacrosanctity of representative office in the Roman Republic (tribunes) through the 1689 UK Bill of Rights and the French Revolution all the way to modern parliaments.

⁶⁰ In 2008 the Public Prosecutor in Turkey launched a prohibition case against the governing majority AK Party, which only fell one vote short of being accepted by the Constitutional Court. Other than that, there are probably no examples in modern democratic European political history of political parties with a parliamentary majority being under threat of prohibition. For all practical purposes this is an opposition and minority issue.

⁶¹ Cf. Report on the Regime of Parliamentary Immunity, CDL-INF (96) 7, adopted in June 1996; Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, CDL-INF(2000)001, adopted in December 1999; and Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey”, adopted in March 2009, CDL-AD(2009)006.

⁶² Although parliamentary immunity as such is not regulated or protected in the ECHR, there are a number of cases in which the ECtHR has had to assess national rules on parliamentary immunity against fundamental rights laid down in the Convention, such as Article 6. In some of these cases, the Court has included comparative overviews and made comments on the institution of national parliamentary immunity, cf. inter alia cases A. v. the United Kingdom; Cordova (no. 1); Cordova (no. 2) and Tsalkitzis, C.G.I.L. and Cofferati v. Italy, no. 46967/07, Judgment of 24 February 2009, and Kart v. Turkey no 89175/05, Judgment of 3 December 2009.

136. Today rules on parliamentary immunity for MPs are to be found in various forms in the parliaments of all the member states of the Council of Europe, usually regulated in the constitutions themselves. Such rules may serve both as collective protection of parliament as an institution (against the executive) and as protection of the individual MPs against both the executive and the parliamentary majority.

137. The 1996 Venice Commission report “On the Regime of Parliamentary Immunity” is based on a full comparative analysis of such rules in all European countries.⁶³ In the report, the Commission identifies two main types of immunity, which are complementary:

- Parliamentary non-liability (freedom of speech)
- Parliamentary inviolability (freedom from arrest)

138. Of these, parliamentary non-liability in the form of a specially protected freedom of speech for MPs is fairly uniform and undisputed in the great majority of European countries, though there are from time to time debates on the reach of the non-liability inter alia with regard to racist utterances. As pointed out by the Venice Commission in 1996, such rules provide not only protection against the executive and harassment by private parties, but also “an additional surety for parliamentarians vis-à-vis the majority opinion expressed in parliament itself”. As representatives of their constituents, minority MPs may voice their opinions, even if these are very much against those of the majority.⁶⁴

139. Immunity in the form of parliamentary inviolability (against civil and/or criminal prosecution) is a much more complex and controversial issue, where there are a greater variety of rules in European countries – ranging from systems with very wide immunity against all sorts of prosecution to countries with no such particular protection of MPs at all. The challenge is to find a balance, under which legitimate opposition interests are protected, while at the same time respecting the rule of law and not unnecessarily obstructing the course of justice. If parliamentary freedom from arrest is taken too far, then this might be misused in order to escape justice, which has been a problem in several European countries in modern times.

140. Parliamentary immunity may serve as an important part of democracy, but it sometimes has to be weighted against other basic principles. This has been a subject in several cases under the ECHR, inter alia in the recent 2009 case of *Kart v. Turkey* where the Court held, inter alia, that:

141. The Court has already acknowledged that the long-standing practice for States generally to confer varying degrees of immunity on parliamentarians pursues the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary (...). Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention system, particularly where they protect the autonomy of the legislature and the parliamentary opposition.

142. In its 1996 report, the Venice Commission pointed out that “in certain countries a tendency to regulate in law the conditions for lifting parliamentary immunity can be observed, or else an effort to define fixed, objective criteria as far as possible. This trend is prompted by concern for stricter application of the principles of rule of law and by the demands of safeguarding fundamental freedoms”.

⁶³ Cf. Report on the Regime of Parliamentary Immunity, CDL-INF (96) 7, adopted in June 1996.

⁶⁴ In some countries parliamentary non-liability is absolute. In others there may be modifications, or it may be lifted by a decision of parliament itself, but then subject to a requirement of qualified majority, which still to some extent may protect the opposition.

143. The Venice Commission in general endorses the basic principle that special legal protection should exist for the exercise of legitimate opposition functions of the parliamentary minority, both in the form of protection against prohibition of parties and in the form of parliamentary immunity for the individual MPs. This should however not go further than required in order to protect legitimate political opposition and minority interests, and should not be used as an instrument in order to obstruct justice.

6. Responsibilities of the opposition

144. When analysing the rights and competences of the parliamentary opposition it is also necessary to ask whether this could or should correspond with certain particular responsibilities and obligations.

145. A basic obligation of the political opposition is to conduct its functions within the framework of the law, including the national constitution, ordinary civil and criminal law and parliamentary rules of procedure. Opposition parties may advocate changes to the law, but as long as these are not passed, they are obliged to respect the law, like everybody else. Subject to the modifications of parliamentary immunity, the opposition may be held accountable for any unlawful activity, like any other organizations and individuals. Most parliaments also have disciplinary internal sanctions for party groups and MPs breaking the rules of procedure, and this is appropriate as long as they are legitimately justified and proportionate. Many countries have special rules on prohibition of political parties, and the Venice Commission has acknowledged that this may be legitimate if a political (opposition) party uses or threatens to use violent and undemocratic means to undermine a democratic regime.⁶⁵

146. Apart for the self-evident duty to respect the law, it is difficult to establish any particular legal obligations for the opposition. It is, however, not uncommon to speak of certain opposition “responsibilities” or “obligations”, which are inherent in the notion of a “loyal” opposition, and which are of a political and moral nature. The basic idea is that political opposition should be conducted in a constructive manner, which fulfils the legitimate functions of the opposition, *inter alia* to present real political alternatives and to supervise the executive (see section 2).⁶⁶

147. In a well-functioning parliamentary democracy there is a balance between the majority and the minority, which creates a form of inter-play that ensures effective, democratic and legitimate governance. This cannot be taken for granted, and there are many countries also within Europe that present a different picture. There are at least two main forms of abuses 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.

148. 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. The prerequisite for an effective work of the opposition in a democratic system is that different worldviews 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. Such a faceless party system might either lead to a policy of confrontation with the opposition acting as a

⁶⁵ Cf. “Guidelines on prohibition and dissolution of political parties and analogous measures” adopted by the Venice Commission in December 1999, CDL-INF(2000)001, and “Opinion on the Constitutional and legal provisions relevant to the prohibition of political parties in Turkey”, adopted in March 2009, CDL-AD(2009)006.

⁶⁶ The borderline between what is constructive or not may of course in itself be disputable, and “The “determined opposition” of one group can easily be seen as “irresponsible obstruction” by another”, as pointed out by Philip Laundry, cf. *Parliaments in the Modern World* (Dartmouth 1989) p. 93.

persistent objector to every political move or to a fictive opposition not offering any alternatives. Such problems cannot be solved by legal reform alone, and must also be confronted by going to the roots of the problem. But creating a good legal framework within which parliamentary politics can develop and mature is never a bad idea and may often contribute substantially to the development of a democratically sound national political culture.

149. The Venice Commission holds that there is a certain link between granting the opposition formal rights, and expecting in return a degree of constructiveness and responsibility. In systems where the position of the parliamentary opposition rests mainly on political traditions and conventions (and the implicit self-restraint of the majority), the question of oppositional legal rights and competences is arguably not so important – since any misuse by the opposition can be sanctioned by the majority. But to the extent that the opposition (minority) is given explicit legal rights, then this may arguably also entail certain moral (non-legal) responsibilities. If for example a quarter of the representatives have the competence to call a public hearing or set up a parliamentary commission of inquiry, then this should be done only in important cases where there are real indications of wrongdoing – and not used as a tool for harassing and obstructing legitimate majority government.

150. In its 2009 Code of Good Practice in the Field of Political Parties the Venice Commission pointed out the balance between the rights and responsibilities of opposition parties:

53. [...] Opposition function implies scrupulous control, scrutiny and checks on 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.⁶⁷

151. In the Explanatory Report to the Code, the Venice Commission further elaborated how good practices for responsible and constructive opposition can be laid down in the party statutes:

152. 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. 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 fulfilment 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.

153. Furthermore, some parties present good models of organisational structures which could promote active and sound political opposition through constant work on the different policy areas which constitute the party (shadow) programme, and which help keep the machinery of the party functioning as an alternative (shadow) government always ready to replace the party in public office. Examples of such structures can be found in Spain, in the Sectorial Organisations and Secretariats of the Spanish Workers' Socialist Party, the Executive Secretariats regulated by the People's Party and some bodies within the United Left, as well as in the Standing Committees for policy development of the Green Party in Ireland.

154. In their report to the Council of Europe Forum for the Future of Democracy in 2007 on the subject of "The role and responsibilities of the opposition" the general rapporteurs pointed out that:

⁶⁷ Cf. CDL-AD(2009)021.

10. Both the majority and the opposition have every interest to keep in mind that no one belongs to the majority or to the opposition for ever and that a majority will sooner or later be part of the opposition and vice versa. Hence, it is in the interest of the majority not to take decisions before the opposition has had the opportunity to scrutinise proposals and put forward alternatives. Conversely, the opposition should not perceive its role as a mere mechanism of obstruction and should contribute substantially to the decision-making process.⁶⁸

155. The balance between rights and responsibilities is also reflected in the last paragraph of Resolution 1601 (2008) where the Parliamentary Assembly after laying out in great detail the rights of the opposition briefly concludes by emphasizing also that:

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

156. On this basis the Venice Commission holds that the more formal rights and competences the opposition (minority) is given within a constitutional and parliamentary system, the greater the responsibility of the same opposition not to misuse these powers, but to conduct their opposition in a way loyal to the basic system and the idea of legitimate and efficient democratic majority rule. This however, is not an issue that can be legally regulated, or perceived as any form of formal “responsibility”, but is rather to be seen as a political and moral obligation.

7. Summary and conclusions

157. Democracy is today stronger in Europe than ever before in history. The democratic political structures and traditions of Western Europe have after the Second World War consolidated and matured, and have in the two last decades spread to Central and Eastern Europe. From a political point of view Europe has reached a reasonably advanced stage of democratic development. From a legal point of view basic democratic principles are fairly well protected both in the national constitutions and in common European legal systems, such as the ECHR and EU law.

158. The formal and legal institutionalisation of democracy is however a continuous process, which can always be improved. As regards the role and functions of the political opposition in general – and the parliamentary opposition in particular – this has not legally reached the same stage of evolution as it has politically. There are few common European rules or standards that protect the parliamentary opposition and minorities as such, and many national constitutional systems do not really regulate these issues in an adequate manner.

159. The Venice Commission holds that European democracy has now reached a stage where it is appropriate and interesting to explore the ways and means by which the role of the parliamentary opposition can be formally better regulated and protected. Such institutionalisation may serve to improve parliamentary procedures and to strengthen the democratic robustness of the national political systems.

160. On this basis the Venice Commission welcomes and endorses Resolution 1601(2008) by the Parliamentary Assembly as a groundbreaking new soft law instrument for inspiring and developing formal rules on the rights and competences of the parliamentary opposition in the member states of the Council of Europe.

⁶⁸ Cf. Conclusions by the General Rapporteurs (MM. Gross, Whitmore and Tarschys) to the Council of Europe Forum for the Future of Democracy meeting in Stockholm/Sigtuna in June 2007, paragraph 10.

161. The Venice Commission also welcomes the trend pointed out by the Assembly that there seems in many European countries to be greater interest in the role and function of the parliamentary opposition and minorities, and stands ready to participate in these processes if called upon to do so.

162. The Venice Commission considers that although there neither is nor should be any single European model for the more detailed regulation of parliamentary opposition and minority rights, there is still a common European tradition and culture of tolerant and liberal parliamentary politics, which normally allows the opposition wide room of manoeuvre. A democratic parliamentary system presumes an ethic of self-restraint on the part of the majority, with respect for minority rights and interest. Not all possible advantages should be taken, nor are they taken in mature parliamentary systems. In parliaments where such a political culture exists, often with “unwritten” parliamentary conventions, the need for legal opposition and minority guarantees is less. In new democracies, without such democratic traditions, the need for formal rules protecting the opposition may often be stronger.

163. The Venice Commission would also point to the distinction between direct and indirect (explicit and implicit) legal protection of the interests of the political (and parliamentary) opposition, and between protection in the wider and the more narrow sense. In most member states of the Council of Europe there are only a few (if any) legal provisions directly and explicitly regulating parliamentary opposition and minority rights and interests. There is however a number of legal provisions both at the European and national level that in a wider sense implicitly or indirectly serve to protect (parliamentary) opposition interests. Thus these interests are legally far better protected than what they may appear at first sight.

164. The basic protection for the parliamentary opposition is guaranteed at the ECHR level by the fundamental rights to free and fair elections, freedom of expression and opinion, freedom of assembly and a number of other basic principles. These rights are in most European countries also protected at the national constitutional level. To some extent the constitutional protection also covers more issues more directly related to parliamentary minorities, such as parliamentary immunity.

165. The more explicit and detailed legal regulation of parliamentary opposition and minority rights is usually related to the individual MPs, the party groups (factions) or to a qualified minority of representatives. The Venice Commission holds that this is in most cases a better form of regulation than conferring rights on the “opposition” as such, since this is a difficult concept, with wide differences between the parties concerned and between national traditions.

166. The Venice Commission considers that there are certain categories of parliamentary opposition and minority rights that are of particular important and should be generally recognised. These are (i) procedural rights of participation, (ii) special rights of supervision and scrutiny of the government, (iii) rights of veto or delay for certain decisions of a particularly fundamental character, (iv) the right to demand constitutional review, and (v) protection against persecution and abuse.

167. In each of these categories the national constitutional system should recognise and guarantee parliamentary minorities a certain level of legal and actual protection.

168. The existence of the Venice Commission is based on the idea that democracy can and should be promoted and protected “through law”. Legal recognition of certain parliamentary opposition and minority rights is a core issue in this regard. At the same time, the most important element for ensuring good parliamentary democracy is a tolerant and mature political tradition and culture, under which the governing faction does not abuse its power in order to suppress the opposition, and the opposition for its part engages actively and constructively in the political processes.