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COMMENTS

ON THE ROLE OF THE OPPOSITION

by

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Legal assessment and standards concerning the role of the opposition in democratic regimes

The Parliamentary Assembly has elaborated a comprehensive document on "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament". It is based on a comparative analysis of existing rules on the role, function and rights of the parliamentary opposition and also takes into account documents on topical discussions on new rules on this subject. Resolution No. 1601 (2008) summarizes procedural guidelines, but nevertheless stresses the necessity of a study on the role of opposition in modern democratic society by the Venice Commission.

The Venice Commission had to deal with the role of parliamentary opposition when assessing the Draft Law on the Parliamentary Opposition in Ukraine (Opinion No. 422/2006, CDL-AD(2007)015. In this opinion the Commission doubts and reserves its position on "whether it is appropriate to regulate all questions concerning the opposition in a single law and, if so, what procedural guarantees in favour of the opposition need to exist in respect of the adoption of such a law by the majority (Para. 5 of the Opinion). The Commission criticizes the "unreasonably formalised way of establishing and terminating a parliamentary opposition [that] may be difficult to reconcile with the rule that the will of Parliament is formed b deputies who in each specific case vote according to their convictions." (paragraph 29 of the Opinion).

The discussion on the subject shows that there is a broadly shared conviction on the role parliamentary opposition should play in a democracy. The opposition is seen as an "essential component of a well-functioning democracy" as it offers "a reliable political alternative to the majority in power by providing other policy options for public consideration." Furthermore it ensures "transparency of public decision and efficiency in the management of public affairs, thereby ensuring the defence of the public interest and preventing misuse and dysfunction" (Resolution 1601(2008), paragraph. 3). At the same time there is also a broad consensus on basic guidelines on the rights and responsibilities of the opposition in a democratic parliament as summarized in the Resolution.

All these standards are part of soft law. There are no binding standards on the special guarantees for the opposition in international law.

Problems in the realisation of an effective inter-play between majority and opposition in Parliament

Despite the fact that this perception is commonly accepted within the member States of the Council of Europe, political reality in many countries shows a different picture. There are two 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. 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 world views and different political convictions existing in society are represented in Parliament. If candidates and parties do not have an identifiable political profile, it is difficult to build up a constructive dialogue on different political options. Such a faceless party system might either lead to a policy of confrontation with the opposition acting as a persistent objector to every political move or to a fictive opposition not offering any alternatives. It would be naïve to expect this problem to be cured by reforming or restructuring the parliamentary system alone. It is also necessary to look at the roots of the problem, although it is clear that changes of the political culture cannot be effected overnight.

Open questions concerning the legal framework of the work of the opposition in Parliament

Nevertheless, legal rules are also necessary to bring about fair play between majority and minority in Parliament. It is not necessary to repeat the contents of the guidelines of the rights and responsibilities of the opposition in a democratic parliament elaborated by the Parliamentary Assembly. But on this basis it is possible to identify some open questions as to the protection of the opposition in Parliament.

Legal form of protection

The first controversial point is the form of protection for the opposition. One option is to protect the opposition as "opposition" either on the level of the constitution, within a specific law or within the rules of procedure of Parliament. This approach presupposes a definition of the opposition. Furthermore, it makes it necessary to define different rules for the opposition and for the majority in Parliament.

If the rights of the opposition are defined in a **specific law** or in **rules of procedure** they can be easily changed by the majority. Therefore it is doubtful if such a protection can be effective.

Protective clauses on the level of the **Constitution** are very rare. The advantage of such an approach is that it guarantees more security for the opposition as it is more difficult to change the rules. On the other hand a detailed set of rules is not appropriate for a Constitution, whereas general clauses might not be sufficient.

In countries with a long-standing parliamentary tradition it might not be necessary to fix specific rules as long as they are accepted as unwritten customary law. If there are no generally accepted traditions non-binding guidelines might be an appropriate way to fix a general consensus.

In any case it is important for the opposition to have some legal instrument to enforce the implementation of their rights in case of a violation. The most effective means is a special complaint procedure before the Constitutional Court (cf. the *Organstreitverfahren* before the *Bundesverfassungsgericht*).

Specific or general rules

This first question is intrinsically linked to the second question if it is appropriate to define special rules applying only to the opposition. It might be better to define general rules applying to all deputies (such as immunity, freedom of speech, right to ask questions etc) as well as general rules on certain quora for more specific rights (e.g. a certain quorum for a legislative initiative or for a control procedure before the Constitutional Court). Such an approach would also stabilize the rights as changes would affect both the position of the deputies in the majority as well as in the minority. They cannot be changed with the intention of reducing the role of the opposition.

Notwithstanding such general rules it might be necessary to define certain privileges for deputies adhering to the opposition (e.g. the right to ask questions first, the right to ask more questions).

Definition of the principle of "equality" in relation to the rights of the opposition

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

Conclusion

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

In light of the great variety of parliamentary systems that have been developed in European countries and of the different experiences with political parties it does not seem to be recommendable to formulate guidelines for the legal framework of the role of the opposition that go beyond what has already been summarized by the Parliamentary Assembly. It should be left to each country to decide if a special regulation on the opposition is necessary, in which form this should be realised and in how far the

opposition should be granted a privileged position in comparison to the majority.

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