The protection of political minorities in the European context

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1. Premise

The 12th Activity Report of the Advisory Committee of the Framework Convention for the Protection of National Minorities of the Council of Europe (November 2020) alerts against the «tendency to view democracy as only creating rights for the majority together with divisive and xenophobic discourse against national minorities». The European Commission for Democracy through Law (Venice Commission) also warned of a tendency to dismantle controls that limit the power of the parliamentary majority (Opinion no. 845/2016, June 24th 2019, CDL-AD (2019)015). Reversing this trend is essential for European democracies.

This paper defends the importance of guaranteeing an adequate status to the political opposition as the only possible counterweight, in current political regimes, to majority power. The starting hypothesis is to consider the

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opposition as a determinant element of the democracy. However, since the concept of political opposition is, to a certain extent, ambiguous, it is necessary to try to delimit it by classifying the different types of opposition and indicating what are the necessary elements that must make up a statute of it. From there, what models of the legal status of the opposition can be found in European democracies and what the European Union can do to promote, in these States, adequate protection of political minorities will be explored.

The methodology followed is that of comparative law, comparing the different national systems and, also, the national provisions with the rules of the European Union and the recommendations of the Council of Europe.

2. The statute of the opposition in representative democracies

2.1. The political opposition as a determinant element of a democracy

In a strict sense, we can only speak of political opposition in democratic regimes. Obviously, in a broad sense, more political or historical than legal, it is possible to think, for example, in opposition to Franco's regime or any other autocratic or authoritarian regime. However, in this type of regime, any kind of real opposition is forced into clandestinely and conspiracy, if not directly to subversive action. This not only conditions his activity, but also deprives him of all recognition. In these cases, it is preferable to speak of resistance or dissidence (Tierno 2018: 1181), because, if in these regimes there is an opposition, it is a formal opposition, which does not really aspire to replace those who hold power, and whose presence is justified only for appearing pluralism.

In democracy, the change of perspective is remarkable, because while in a non-democratic regime the government pretends to legitimize the opposition, authorizing (or not) its exercise, in democracy it is precisely the opposition, which, because it exercises its functions freely, accepts that has been defeated in fair elections and may be victorious in the next, thereby legitimizing the government that came out of the polls (Ruipérez 2020: 231). It follows that the existence, and the free exercise of power by the political opposition is a determinant element in a democratic regime.

Despite this, the formal recognition of the opposition did not take place until the twentieth century, as the first manifestations of this phenomenon were in Great Britain the approval of the Ministers of the Crow Act of 1937, where the salary of the leader of the opposition was fixed (it is currently reg-

ulated by the *Ministerial Salaries Consolidation Act*, 1965), and in post-war Germany, the approval of the Constitution of Baden, in May 1947, which, in article 120, made an express recognition of the opposition. Today, practically all German state constitutions recognize the opposition in some way[1]. For our purposes here, it is worth highlighting article 24.1 of the Hamburg Constitution, which states that the opposition is an essential part of the parliamentary democracy.

Nevertheless, logically, before this fact took place, a series of historical conditions that can be summarized in the following milestones occurred: firstly, the development of a public opinion, which would begin with the appearance of the capitalist class in the fifteenth and sixteenth centuries (Ionescu and Madariaga 1977: 35), because, without that critical mass that began to be created in the cities, there can be no challenge to power. Secondly, the fall of the old regime and the establishment of the liberal state, because only from this moment political life begins to be organized in majorities and minorities arising from the suffrages. At this moment, the first concerns about the treatment that political minorities receive started[2]. Thirdly, and finally, the recognition of universal (male) suffrage, which meant the irruption of the working class in parliaments, as well as mass parties. With the

[1] At present, the formulas used in these Constitutions regarding opposition can be grouped into three main groups: a) formulas containing the opposition's right to exist (Bremen and Saxony); b) formulas of principle (Bavaria, Berlin, Brandenburg, Hamburg, Schleswig-Holstein, Thuringia); c) formulas defining opposition (Bavaria, Mecklenburg-Vorpommern, Lower Saxony, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein) (Fourmont 2019: 190).

[2] Without wishing to be exhaustive, can be referenced here to the fact that Immanuel Kant (2001: 55-56) stated, in the first definitive article on perpetual peace, that the fact that a majority decided for all constituted «a contradiction of the general will with itself and with freedom». Benjamin Constant (2001: 57, 491) keenly pointed out that defending the rights of minorities, given that tomorrow they may be majorities, was defending the rights of all, also indicating that, precisely because this is so, from the logical-rational point of view, it is never the majority that tyrannizes a minority, but a series of subjects in its name and with the weapons that it has provided. John Stuart Mill (2019: 180 ff.), after verifying that in representative regimes, instead of the whole people, only the majority was represented, advocated the need to adopt electoral formulas that would also guarantee their representation. Even, in particular, regarding the opposition, Alexis de Tocqueville (2005: 109-118) denounced, as a consequence of forms still typical of the absolute monarchy, the lack of tolerance regarding its right of criticism, although he also reproached it that trying to make "its own career" instead of assuming the role of obstruction and criticism that corresponds it. Lastly, Guizot (1987: 249-263) lamented that the opposition had been relegated to the rostrum without the capacity to influence politically, even warning that this could make it opt for violent means.

transformation of representative regimes into parliamentary regimes (Carré de Malberg 1998: 1054-1075) the idea that deputies represent the whole nation declines; with the idea that they represent only those who elected them, genuine oppositions of principle emerge. The lack of adequate channeling of these antagonisms led, in continental Europe, to great instability and, in the end, to fascist solutions.

It is not surprising that it happened, after the Second World War, when the value of pluralism began to be recognised and formulas of guarantee for the opposition started to be adopted. It is not, therefore, strange, that the first works on the opposition not emerge until shortly after. The first ones dated since the decade of the fifties (Burdeau 1954; Kluxen 1956; Kircheimer 1957; Basso 1958), but were compiled in a book edited by Robert Alan Dahl (1966) in the mid-sixties, which deserve, even today, to be considered a reference. To the author corresponds the merit of having dealt with this phenomenon with exhaustiveness, as well as the first attempts to define and classify the opposition. As seen above, since there are renewed concerns about the opposition as consequence the threat of democratic involutions, it is very remarkable that, focusing on the conditions that can lead to democratic transitions in countries with non-democratic regimes, he stressed the importance of the opposition being able to organize openly and legally, and the parties faced the government. He also sensed that considering only representation does not guarantee the rights of the opposition when a government is authoritarian, and itis important because even today, especially in Spain, what would be the legal status of the opposition tends to be confused with the legal status of the parliamentarian. According to him, a political system that facilitates opposition is only an "important" (not essential) facet of the democratic process, expressly denying, although without explaining it in depth, that the processes of democratization and development of the opposition are identical. In fact, the guarantee of opposition is not among the eight clauses that must be given to speak of a polyarchy (Massari 1997: 78).

Robert Dahl's theory, with purely liberal roots, ended up partially blurring the main characteristic of opposition as a dialectical negation of power and its activity (De Vega 2004: 1). Authors after him have understood this role of the opposition better, elevating it to the category of constitutional function. Among them it is worth highlighting Giuseppe de Vergottini, who proposes the concept of "guaranteed opposition form of government" as a category that would exclude those regimes that apparently assimilate to parliamentary or presidential systems (de Vergottini 1979: 8), but where there is no guarantee of political minorities, although this does not seem

to contribute anything to a well-understood idea of democracy. Because, obviously, democracy is not only about respecting the will of the majority since a majority government is only bearable when instruments for the protection of minorities are foreseen (Friedrich 2020: 51-52). What the liberal thinking of authors such as the American shows, is an undisguised fear of counter-majoritarian powers, which it understands as a potential source of instability. When the focus is placed on power, it is not strange that they raise suspicions; but, when it is understood that, as stated above, in a democracy minorities legitimize the system, the existence of these can only be considered positive. These checks and balances must not lead to a situation of ungovernability. This will depend on a good constitutional design and a loyal attitude on the part of all political actors.

The majority government has the right to govern, but it must do so without expecting cooperation in that direction from the opposition, since the function of the opposition is not to allow it to do so, but to confront it (Pasquino 1998: 31-32), and it will depend, not only, but in a very special way, on the mechanisms that it has for this and, obviously, on its willingness to enforce them, so that an authoritarian drift can be prevented.

2.2. Classification of the different types of opposition

Rethinking the concept and function of the opposition in the sense set out in the previous section, also forces us to question many of the existing classifications of the different types of opposition (among them, see Fondevila 2020: 54 ff.). According to the proposed parameters, the concept of opposition is more restricted in terms of modes and broader with respect to the actors than is usually understood by doctrine. This implies the need to deconstruct some typologies and build new ones.

Dahl defined the opposition as follows: «Suppose that A determines the conduct of some aspect of the government of a particular political system during some interval (...). Suppose that during this interval B cannot determine the conduct of government; and that B is opposed to the conduct of government by A. Then B is what we mean by 'an opposition'. Note that during some different interval, B might determine the conduct of the government, and A might be 'in opposition'» (Dahl 1966: XVIII). This is rather an unsatisfactory definition. The first thing that can be criticized in it is that the signifier is contained in the meaning. Moreover, obviously, opposition is not only "opposing" government action, nor do all oppositions aspire

to lead the government. Not even all of them have realistic options to do so. At a time when political regimes are characterized less by their properly institutional architecture than by the modalities by which the conditions of action are determined by the possibilities of blockage coming from the different actors (Rosanvallon 2007: 33), it does not seem very realistic to limit the concept of opposition, as it seems to be deduced from the definition of the Yale University professor, to the one of the parliamentary opposition parties that were losers in these last elections, but may be victorious in the following ones. Firstly, there are parties that may not seriously aspire to win elections. Secondly, there are currently many lobbies, independent agencies, etc. that oppose government action, but do not seek to replace it.

In a more synthetic, but, perhaps, more precise way, opposition can be defined as a "constructive denial of power (or government action)". The term "constructive" is a key-term, not because there have always been protest groups expressing discontent or frustration, but because of the indeterminate nature of their protests (if we can define them in these terms) of their rebellious nature, and their romanticism, they cannot be considered as a type of opposition. This was applicable, for example, to the student movement in the 70s (Tierno 2009: 454), although today the judgment regarding these probabilities must be different, especially in places like Spain, where a university movement turned out to be the germ of a political party that ended up having government responsibilities, or Chile, where students proved to have a fairly defined educational project in financial and political terms (Rifo 2013: 226).

It has also been criticized that Dahl's definition included only recognised opposition. However, this option is correct, according to everything we have been saying. In a strict legal sense, an unrecognised opposition cannot be regarded as such. Since those regimes which outlaw those forms of opposition which they find annoying cannot be regarded as democratic, as said, there can be no form of opposition in them. Therefore, to speak, of a proscribed or unrecognised opposition is, from the parameters set out here, a contradiction. Of course – it should also be made clear here – from a political point of view certain groups will be able to put forward reasons for fighting a certain regime outside the law. History will end up legitimizing or not such movements. But, in the same way that, as said, one cannot speak of opposition in an authoritarian regime, it is ridiculous, in a democratic regime, to consider opposition to illegal groups, organizations or parties. They are not because they cannot fulfill the constitutional function that corresponds to it. Also Giovanni Sartori, who, as known, classified oppositions, according to its modes, into responsible and

constitutional opposition, constitutional opposition but not responsible, and opposition neither responsible nor constitutional, affirms that the third type is residual and could not be considered as a form of opposition (Sartori 1966: 153). Moreover, to consider, for example, a form of opposition to a terrorist organization would be repugnant to democratic values and the most elementary legal logic. This refers to another problem, although closely related, more diffuse – if possible – than the one of opposition, such as the idea of "militant democracy" (Pegoraro 2013). For reasons of space, and in order not to lose sight of the object of these pages, we will not go into it, but it should be noted that this theory only fits by presupposing that, in a democracy, there are no illegalization for ideological reasons, provided that they are not organizations that justify violence or pursue their ends through means decidedly contrary to democratic principles and, especially, pluralism.

As seen above, a classification of three types of opposition is proposed in order to distinguish this phenomenon.

a) Parliamentary opposition and opposition in general. One could also, in a more classical way, speak of a distinction between parliamentary opposition and extra-parliamentary opposition. The classification refers to the scope of action. However, the term "general", also used by the Venice Commission in the above-mentioned document, being more indeterminate, seems more appropriate for two reasons.

Firstly, because the term extra-parliamentary opposition has been used in the past to describe intellectual movements with a revolutionary aesthetic (an example of this could be the writings appeared in "Kursbuch", founded by Hans Magnus Enzensberg in 1965, and collected in 1968 in a book edited by Backhaus in 1969), or even the ones being out of the law (De Vega 2004: 33-38). With this concept of extra-parliamentary opposition, no one will be surprised that some authors have pointed out its tendency to disappearance and its incardination in the parliamentary opposition (Massari 1997: 82). This could lead to confusion, because assimilating the concept of extra-parliamentary opposition to thinkers located in the dogmatic clouds, as well as to illegal or lawless movements, would be outdated in the current political regimes in which, as said, different actors are to control and obstruct government action by other different instances than the parliament.

Secondly, it should be clear that, among these groups there are some ones, which, without being, logically, part of the parliament, are, in some ways, incorporated into the work of the chambers, and registered in them (for example, lobbies, especially in countries like the United States). It also should be clear that the distinction is not as sharp as it might seem. It should be added

that it is increasingly common for political parties to transfer their disputes to areas other than the parliamentary arena. For example, they may ask a declaration of unconstitutionality to the Constitutional Court. It may also be that members of certain bodies appointed by the party in actual opposition resist government policies. This is because today the true separation of powers is not between the legislative, executive, and judicial, but, precisely, between the parties of government and opposition (Duverger 1957: 458; De Vega 2017: 516).

Within the parliamentary opposition, a distinction could be made, in turn, between institutional and non-institutional opposition. It could also be said statutory and not statutory. This sub-category refers to whether the opposition has a formal and express recognition as such or not, granting it certain rights. Within the first type could be referred, as will be seen in the next section, for example, to the opposition in Great Britain or Portugal. When the norm requires a declaration to be recognised as opposition (as, for instance, in Colombia), the category can be problematic if a party that in many occasions supports the government has declared itself in opposition or, on the contrary, if a party that is not part of the government decides not to declare itself in opposition, which can generate disinterment between some of its members (Arcilla 2021: 50. This councilor also complains about those parties that, being in government, declare themselves as opposition parties, subtracting time from the others, since it is distributed proportionally among all the opposition). Non-institutional or non-statutory opposition is one that, as in Spain, does not have express recognition and where, therefore, its legal status is confused with the parliamentarian one.

b) Dissenting opposition and ideological opposition. The former accepts the legitimacy of the system, although it opposes to the specific policies of the Government. The second one questions the political legitimacy of the regime. It is a classification based on the content of the proposals. As Maurice Duverger rightly put it, the nature of the opposition is influenced by the struggle between parties. The French author pointed out the following types: a struggle without principles, a struggle over secondary principles, and a struggle over fundamental principles. According to this author, the first type is that of the United States where one party occupies a power and another tries to strip it without ever taking on dyes of fanaticism; the second one, typical of Great Britain and Northern Europe, corresponds to a division of doctrinal and social character; the third one, which would occur in France and Italy, already affected the principles of the regime itself (Duverger 1957: 444-457).

Since, on the one hand, it seems that the differences, in the United States, between the Republican and Democratic parties are somewhat more pro-

nounced than in the fifties (when this work was published), and that, in any case, if it were not so, what would happen, as this author affirms, is that the characteristics of the opposition are blurred, this classification, used by Pedro De Vega in his work on the opposition, seems simple and sufficiently encompassing the possible types of real opposition in political regimes. It goes without saying that, for the above reasons, the ideological opposition can only be considered as a type of opposition if it respects the democratic principles and pluralism. For this reason, this dichotomy is preferable to one that distinguishes among loyal, disloyal, and semi-loyal opposition depending on its commitment to the use of legal means to achieve power and rejection of the use of force (Linz 2021: 100-124).

c) External and internal opposition. This category is also referred to, in the cited work, Maurice Duverger. Internal opposition occurs among the majority. It can be among parties of the governing coalition or the opposition that exists within the same party. External opposition occurs between the parties of the majority and the minority. Some authors include this dichotomy within the parliamentary opposition[3]. However, this only of any use if parliamentary opposition is being identified with systemic or loyal opposition, since internal opposition within the same party, as a result of voting discipline, will rarely occur in Parliament, and, likewise, that internal opposition in a coalition may or may not occur within Parliament (e.g. this will not be the case in the opposition that can exist between President and Vice President in presidential regimes).

2.3. Brief comparison of some constitutional statutes of the opposition in Europe

The existence and quality of democracy depends on the status of the opposition. However, this does not mean that the status must be explicit. Of course, the existence of a regulation of the basic aspects of the opposition at the constitutional level is very convenient, above all, because it is the best way to

[3] Philip Norton, based on Anthony King categories, identifies five "modes of relationship" in which parliamentary opposition can express itself in democratic regimes: a) "opposition mode", typical of the Westminster model; b) intra-party mode and; c) interparty mode, which are the two modes we are referring to in this paragraph; d) non-partisan mode, which includes parliamentary groupings without a formal structure; e) consensual mode, typical of Scandinavian countries and other democracies of the "consociational model" of Arend Lijphart (see Natera 2022: 298).

establish the counterweights to power, equalising the weapons between the government and the opposition. It does not mean, obviously, that there is no statute of the opposition where the Constitution is silent about the matter, since, in fact, the existence of an implicit statute is the most common option and the powers that, also in these models, the Constitution attributes to minority groups cannot be underestimated (Rinella 1999: 96-98).

Moreover, authors such as Angel José Sánchez Navarro, consider that the legal status of the opposition is made up of both written rules (which can be found in parliamentary laws and regulations) and unwritten (parliamentary practices, the place and role that is recognised to the opposition, etc.) that generate a series of rights, powers, competences, and duties that serve as instruments for the parliamentary opposition to fulfill its constitutional function (Sánchez Navarro 1997: 58).

However, it is clear that, at least at a theoretical level, the opposition is more likely to enjoy these instruments where there is an explicit constitutional status of the same, or, in other words, where its rights, powers, etc., are mentioned in the Fundamental Norm and developed in the infra-constitutional norms. In legal systems in which the Constitution does not include these guarantees (as in Spain, where, at most, it can be argued that there is an implicit statute that can be inferred from the design of parliamentarism; López Aguilar 1998: 169), it may be that the infra-constitutional norms that, it should not be forgotten, are approved by the majority, place the opposition in a relatively weak situation.

In Spain, on the one hand, the centrality of parliamentary groups in the Parliament can hinder, in some extent, the free exercise of opposition. Political parties or deputies and senators[4] who do not meet the requirements to form their own group become members of the mixed group. It is true that this group tends to divide its time among all the parties that make it up, favoring pluralism, but this does not prevent other difficulties. In this regard, it should be noted that only the parliamentary groups or a more or less significant number of deputies or senators, as well as one deputy, but with the signature of the spokesman of the parliamentary group, can submit draft laws, and the same applies to the tabling of amendments in the Congress of

[4] According to art. 126 of the Standing orders of the Congress of deputies, «Private members' bills in Congress may be adopted in the initiative of: (1) a member, with the signature of fourteen other members of the House; (2) a parliamentary group with the sole signature of its spokesman»; according to art. 108 of the Standing orders of the Senate, «Bills emanating from the own initiative of the Senators (...) shall be signed by one parliamentary group or by twenty-five Senators».

deputies (art. 110 of the Standing orders). In any case, the iron discipline of voting makes it very difficult for a bill presented by a minority group or even an amendment to succeed, except when it is presented by deputies or senators of groups that support a minority government.

On the other hand, both in legislative matters and in the control of the government, the regulations of the Chambers even allow what has been called "obstruction of the majority" (Ruiz 2018: 279). The procedure for taking into consideration draft laws provided for in art. 126 of the Rules of Procedure of the Congress of deputies and in art. 108 of the Rules of Procedure of Senate allows the majority to deny that any legislative proposal from the opposition saves this first step. There are also other advantages of the majority: firstly, in the way in which interpellations and questions are prioritised[5]; secondly, because, although commissions of inquiry can be proposed, in addition to the Government, by two parliamentary groups of the Congress or by a fifth of the members of the Senate and twenty-five senators who are not part of the same parliamentary group, the final decision is always taken by the plenary. A proper understanding of the function of the opposition would deprive these matters of the majority principle, placing their weight on the minorities (Requejo 2000: 164). Although the constructive motion of censure has been criticised in the same sense, as being affirmed by some authors such as Torres del Moral that it no longer served, the fact that the last one presented has been successful, leading Pedro Sánchez to power, shows that it maintains its full meaning, since, although it is required to be "constructive", it is not, in practice, impossible.

Finally, it is not surprising that, at the regulatory level, constitutional case law does not guarantee the rights of the opposition in a particular way. While other European Constitutional Courts, such as the German one – even if in Germany there is no any explicit constitutional status of the political opposition at federal level – identified a right to opposition as a general right of

[5] According to art. 182.2 of the Standing orders of the Congress of deputies, «Priority in the entry of interpellations in the agenda shall be given to those lodged by members of parliamentary groups or parliamentary groups themselves who, in the session in question, have not taken full advantage of the quota consisting of one interpellation for every ten members or fraction thereof belonging to a group». Likewise, the following art. 188 states that: «Questions shall be included in the agenda with priority being given to those raised by Members who have not yet submitted questions on the floor of the House in the same session». The same criterion is laid down in art. 163 of the Standing orders of the Senate.

criticism, and resistance to the power[6], they are much more reluctant, however, to recognize specific rights to the opposition (Mezzetti 1992: 50-68), the Spanish Constitutional Court has not even taken that step. Without going into too much detail now, it should be noted that the Spanish High Court: on one hand, although it has any judgment in which, at the municipal level, it establishes that the partisan affiliation of political representatives when occupying positions in the organs of the corporation must be taken into account, so that the decision of the majority cannot undermine the rights of minorities (see const. decision no. 32/1985); on the other hand, the Court has also created an abundant case law in which, starting from the equal consideration of all parliamentarians, it protects in appeal violations of the regulations that suppose a breach of this equality, but without recognizing any specific right to the opposition, and leaving a wide margin of interpretation to the governing bodies, which normally respond to the will of the majority (see, for all, const. decision no. 140/2007).

Among States with an explicit constitutional status of the opposition, it is possible to distinguish, on the one hand, cases like Portugal, whose statute contains specific rights for the opposition[7]. This precept is developed by the Statute governing the Right of Opposition (Law no. 24/98), which regulates the rights to information, hearing, public and legislative participation, to appear before parliamentary committees, and a series of guarantees of freedom of independence for the media about which the government must inform the opposition.

On the other hand, we find, in some cases, constitutional precepts that refer to a regulation by inferior norms. This is the case of France, whose Constitution, amended for this purpose by the constitutional law no. 2008-724, establishes, in its art. 51-1, that: «*Le règlement de chaque assemblée déter-*

[6] See BverfGE 2,13. This right derives from certain constitutional precepts (fundamentally, articles 5, 8, 9, 17, 21 and 38) and, also, by virtue of article 92.3 of the Criminal Code (which establishes as a constitutional principle the right to form and exercise a parliamentary opposition).

[7] According to art. 114: «1. Political parties shall hold seats in the bodies that are elected by universal, direct suffrage in accordance with their proportion of election results. 2. Minorities shall possess the right to democratic opposition, as laid down by this Constitution and the law. 3. Political parties that hold seats in the Assembly of the Republic and do not form part of the Government shall particularly possess the right to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest. Political parties that hold seats in the Legislative Assemblies of the autonomous regions or in any other directly elected assemblies shall possess the same right in relation to the respective executive, in the event that they do not form part thereof».

mine les droits des groupes parlementaires constitués en son sein. Il reconnaît des droits spécifiques aux groupes d'opposition de l'assemblée intéressée ainsi qu'aux groupes minoritaires». Apparently, it may attract attention and seem pointless to carry out a constitutional reform to make a regulatory reference, but this reform was adopted two years after the *Conseil Constitutionnel* declared unconstitutional a reform of the regulations of the National Assembly (decision no. 2006-537 DC), which classify the parliamentary groups as "majority" and "opposition", conferring to those of the second type certain specific rights (such as obtaining reports on the application of laws and the presidency or rapporteur ship of commissions of inquiry), considering that it granted unjustified unequal treatment, contrary to art. 4 of the Constitution. This reform made it possible in 2009 to finally reform the rules of the Chamber to allow the groups to declare themselves to be in opposition (see Resolution 292, of May 27th 2009).

3. The determining elements of the opposition: special reference to the checklist of the Venice Commission

The enormous diversity of legal statutes and constitutional statutes of the opposition in representative democracies obviously complicates the possibility of drawing up classifications. However, certain elements may be identified in order to verify the quality of the legal status of the opposition. The Venice Commission has drawn up a checklist with verification criteria in this regard (see the aforementioned opinion no. 845/2016). These criteria, which are based on seven principles enunciated at the beginning of the document (freedom, pluralism, checks and balances, cooperation in loyalty and respect for institutions, shared responsibility by the majority and the oppositions towards society, possibility of alternation in power, and efficient decision-making), are the following:

a. the most fundamental rules on opposition and minority rights cannot be altered by the majority at its discretion;
b. all parliamentarians, regardless of whether they are from the majority or from the opposition, have the same individual rights; party groups are established and formally recognised, respecting their autonomy and receiving resources from parliament; and a free mandate is established, with the deputy being able, in case of breaking party discipline, to be expelled from the group, but in no case this implies the

loss of the mandate, which can only be adopted for serious offenses or incompatibilities;

c. the debates are public and inclusive; members have reasonable time in the debates, and the opposition has access to working documents;
d. appointments to positions of responsibility in Parliament are made proportionately, and those of parliamentary work administrators (who must be non-partisan) are made by consensus; the opposition participates in procedural decisions within parliament; and that the committees where it is proportionally represented have sufficient powers in parliamentary functions;
e. the opposition has the capacity to convene Parliament in an extraordinary manner and to influence the agenda of debates; providing, under certain circumstances, the same time as the majority; it has the capacity to introduce amendments without any limitations other than those that may be established at the constitutional level according to the type of law in question; the amendment of parliamentary regulations, as well as other important laws, requires a qualified majority; where provided for in the constitution, the opposition has the capacity to initiate or oppose a referendum; and it may submit an appeal of unconstitutionality with the constitutional court;
f. if the government can legislate directly, the rights of the opposition should be secured by qualified majorities or by limiting the powers of the executive during states of emergency that may weaken the rights of the opposition;
g. the opposition has more right to put questions to the government in control sessions than members of the majority and may gather information outside these shifts; a qualified minority (a quarter of members) can request the establishment of a commission of inquiry and has sufficient powers with regard to witnesses;
h. all high positions are appointed by qualified majority, although mechanisms are organised to avoid blockages;
i. there are parliamentary immunities that prevent politicised charges by the opposition which, however, do not impede legitimate criminal proceedings;
j. the opposition also has a strong weight in those parliamentary bodies responsible for ensuring parliamentary order and have competence to hear sanctions for certain behaviors or comments, which in any case must be imposed by a procedure based on the principles of due process, be proportionate and not affect the essence of the parliamentary mandate.

Of course, these are not determinant elements. It is clear that several of them could be dropped (for instance, the referendum initiative, the possibility of lodging appeals of unconstitutionality, the possibility of convening Parliament in an extraordinary way or setting the agenda, ...) without making it possibile to speak of the inexistence of a legal status of the opposition. Since when talking about the legal status of the opposition is often confused with the statute of the parliamentarian – something that is very evident in the checklist of the Venice Commission –, elements more related to the proper functioning of the legislative chamber (such as the free mandate[8]) than to a statute of the opposition (although the opposition also benefits from that which is attributed to all members of a chamber) have been included.

Other aspects may be debatable: for example, the commission stresses that all parliamentarians should have the same individual rights and is content that the opposition has, in the legislative process "under certain circumstances", the same time as the majority. Although they may be sufficient conditions to guarantee a good status of the opposition, when one goes a step further, moving from the mere legal status of it (which may be, remember, implicit) to an express constitutional statute, it is normal to attribute a series of rights to the opposition different from those provided to the rest of the members of the parliament. These rights may be the right to be informed by the government of certain issues, access to documents, and, for what is now of interest, to have extra time, as established in the statute of the opposition in Colombia (art. 112 Const. and Statutory Law no. 1919 of 2018). Also debatable is the issue of immunities, which is a privilege of Members *vis-à-vis* the judiciary and does not even serve to protect minorities, as Hans Kelsen rightly stated at the time[9]. Finally, the document itself acknowledges that it

[8] On this, Hans Kelsen said that: «the imperative mandate cannot be restored in its old form; but undeniably, the tendencies which today pursue this end are capable of realization in ways compatible with the structure of the modern political mechanism» (Kelsen, 2002: 50-51). On the reason of the necessity, democratically speaking, to abandon the doctrine of the imperative mandate as understood in the Middle, see De Vega (1985: 26-30).

[9] For the founder of the Vienna school, «it is necessary to abolish or, at least, considerably restrict that irresponsibility of the deputies, called immunity, and invoked not with respect to the electorate, but before the authorities, and especially those of the judicial order, which has constantly been considered as characteristic of the parliamentary system. The fact that a deputy can only be prosecuted or arrested for a crime, when Parliament authorizes it, is a privilege that arose at the time of the State Monarchy (...) and could even be justified in a constitutional monarchy (...) but not in a parliamentary Republic, in which the government is nothing but an emanation of Parliament and is under the control of the opposition and public opinion in general, while the independence of the judiciary is no less assured than

will deal only with the parliamentary opposition, ignoring the guarantees that the opposition in general must have.

All in all, the document that contain this checklist is a great working tool to start a discussion. No one can deny that, if a gradation could be established in each of these elements, a low overall score would mean a lower level of the status of the opposition and, consequently, of the democracy. A list of determinant elements would imply to reduce this one considerably. Probably, to speak of a democratic regime where the opposition can exist and organize itself freely, it would be enough to speak – and it is not little – of: an electoral and party system that reasonably allows an alternation in power; public and transparent parliamentary debates where opposition deputies have the possibility to participate for sufficient time and to access the necessary information; that inviolability for opinions and votes expressed in the exercise of their duties be provided to opposition deputies; that the composition of Parliament's decision-making bodies follows a logic proportional to the plenary session and that the important organs and institutions of the state are appointed by qualified majority; and, that there are judicial guarantees that protect deputies against illegitimate disturbances in the performance of their duties.

However, in order to establish a constitutional status of the opposition, and assuming that, instead of guaranteeing the right of opposition, the checks and balances in current political regimes are essentially carried out within the framework of the government-opposition dialectic, including non-parliamentary forms of opposition, it would be necessary to reform the system to include the following elements.

a) Specific rights for the parliamentary opposition, perfectly distinguishing the general statute of the parliamentarian from that of the opposition. It implies, as a first corollary, a necessary declaration of the parties that are government and which are opposition, which also entails a task of conceptual delimitation. For example, the Saxony-Anhalt Constitutional Court had to clarify that belonging to the "opposition as an institution" does not mean that a certain party cannot participate in the budget or the drafting of the law (see LVG 1/96 (70)). The second corollary is that this declaration must imply a series of specific powers and rights that serve to equalize arms with

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in the constitutional monarchy, it makes no sense to try to protect Parliament against its own Government. This privilege cannot even be applied to protect minorities against the will of majorities (...) for the sole reason that such protection is not possible if the majority can agree to surrender to the authority that persecutes it» (translated from Spanish by the author) (Kelsen, 2002: 51-52).

the government: not only a right of criticism (right to opposition) must be guaranteed, in general, but also a right of financing and time in the extra social media, an adequate representation in the governing bodies of the chambers, the possibility of convening, and even chairing commissions of inquiry, which could be only from the minority, forcing appearances, etc.

b) Mechanisms for incorporating different groups in parliamentary work. The fact that there is an opposition within Parliament and another outside it does not mean that it is not possible, and convenient, to connect the latter with the chambers. Obviously, only certain types of social movements – namely those that are more organised – are likely to be incorporated into parliamentary work. It is necessary to avoid that this incorporation occurs in properly parliamentary functions and respect the autonomy of both the groups and the Chambers (Garrorena 2014: 201-205), but not because this implies incurring in corporatism, since the parties do not represent the general interests either, but because if it were to affect the representation of the citizenship that corresponds to them, there would be a reduction in democratic principles, especially majority decision-making. After the approval, in 2019, of the code of ethics, a specific regulation, in the Congress and Senate, of interest groups would be appropriate. This could include a register of people and activities, providing for sanctions and mechanisms to prevent political representatives from having an "agenda B" (Fernández Cañueto 2018: 170).

c) Creation and strengthening of independent authorities. These types of institutions provide the system with legitimacy for impartiality (Rosanvallon 2010: 113-173), since the main argument for its justification turns out to be the search for neutrality in the making of certain decisions. Precisely for this reason, they have been criticised from the point of view of the democratic principle, since it is understood that it demonstrates a lack of confidence towards politics and political parties (Salvador 2002: 379-381). Of course, many independent authorities, or a wide range of matters on which they deployed their action, would confirm the critics, by making elections to elect political leaders meaningless. Obviously, this is not the case of Spain and, in addition, all the doctrine that has dealt with these entities has highlighted the fact that they are never fully independent: government influences the issue of appointments, budget, etc. The big question, therefore, around them, is how majorities-minorities fit into the current dynamic. Bearing in mind that the vast majority is created by parliament, in order to fit better into the reconfiguration of the division of powers that has been exposed, the appointments of its authorities should be made through a distribution of quo-

tas among the parties or, as the opposition, be able to influence or veto them in some way. Otherwise, there is a risk that their autonomy from majority rule depends solely on the character of the persons appointed.

d) Strengthening constitutional justice. Despite being questioned from its inception by authors such as Edouard Lambert, Carl Schmitt, Ernst Forsthoff, and recently, above all by Jeremy Waldron, constitutional justice has succeeded, during the second half of the last century, to expand and to increase its powers in most states that can be considered democratic, with the only notable exceptions of Great Britain and the Netherlands. Naturally, it happened because, if the agencies discussed in the previous section endow the system with impartiality, constitutional justice increases the legitimacy by reflexivity of the political system (Rosanvallon 2010: 174-232). This is because with its examination of the constitutionality of the laws it multiplies the places of deliberation. Criticism of constitutional justice, with its different formulations and nuances, is reduced to a complaint that judges can overrule the action of the legislature, which represents the citizenship, and makes its decisions by majority; but when it is understood that, as said, today, the real division of powers occurs between majorities and minorities, the "counter-majoritarian objection" (Bickel 1986: 16) loses its meaning.

From this perspective, constitutional justice is the only instrument available to the opposition to prevent the majority from approving norms that violate the Constitution, assuming, therefore, the only effective brake or counterweight to a power that, eventually, was violating the constitutional pact. Instrument, but not – as some authors have argued – opposition, since constitutional judges, who are perfectly entitled to be active according to the circumstances (Barak 2006: 270), lack, on the contrary, any democratic legitimacy, imposing their criteria on the legislator (Alexy 2006: 40), to obstruct the decisions of the majority by themselves. It is different, for example, a "judicial revolution" (Ackerman 2011: 20) in which judges decide to end segregation in the classroom (the famous case Brown v. Board Education), from the position adopted by the American Supreme Court before the legislation of the New Deal. In the first case, a new right is created on the understanding that this responds to an evolution of society, in the second the creation of the right by the legislature is prevented within the framework of political discretion that the constitution grants it (Faller 1979: 56-57).

A sector of Spanish doctrine has traditionally questioned the usefulness of the constitutional challenge (Rubio 1998: 155-173) arguing that it should evolve to a jurisdiction focused on the protection of rights, being, therefore,

the interpretation of rights through the concrete control of constitutionality its main function (López Guerra 2021: 22). Leaving aside, even, the fact that they seem outdated positions, which would make constitutional justice lose all practical relevance, since the current trend in the interpretation of rights by ordinary judges and courts is to a supranational interpretation of them through mechanisms such as the control of conventionality, the question referred for a preliminary ruling and, possibly, through the advisory opinions provided for in Protocol no. 16 of the ECHR (even if Spain did not ratify it). Indeed, to eliminate the abstract review of constitutionality would open the possibility, as happened in Italy (const. decision no. 406 of 1989), to the existence of unconstitutional rules exempt from control within the legal framework. Moreover, the correct understanding of the majority-minorities dialectic in the terms set forth in these pages implies the need to create resources specifically designed for the opposition, which could be achieved, as is done in art. 63 BverGG actively legitimising it in the conflict between constitutional bodies (see BVerfGE 90, 286; and Montilla 2002: 115).

e) Establishment of mechanisms that serve to channel protests and other manifestations of opposition in general. An issue that is not only about dogmatic of fundamental rights but is also susceptible to be addressed from the perspective maintained in these pages. Obviously, the delimitation of the right to freedom of expression or its balancing with the right to honor is part of the theory of rights, but it is also possible to emphasise, that especially political representatives (see ECHR Judgment *Castells v. Spain* of 23 April 1992), but also private citizens, must be given a wide margin of criticism because they are also entitled – without prejudice to the use of legal and democratic instruments as well as without prejudice to their subjection to the constitution and the rest of the legal system (art. 9.1 Const.) – to oppose the action of the government. As the Constitutional Tribunal rightly stated, «the value of pluralism and the need for the free exchange of ideas as a substrate of the representative democratic system prevent any activity of the public powers tending to control, select, or seriously determine the mere public circulation of ideas or doctrines» (decision no. 235/2007, point 4).

Specifically, about what is being discussed here, the Constitutional Tribunal stated that «from the perspective of the right to freedom of expression, the formulation of criticisms towards the representatives of an institution or holders of a public office, however brazen, pungent or disturbing they may be, are nothing more than a reflection of the political participation of citizens and are immune to restrictions by the public power». However, it establishes a series of limits, since «this immunity is not predicable when

what is expressed, even symbolically, only reveals outrage or humiliation» (decision no. 177/2015). This is where the review exercised by the Court seems, in the light of the case-law of the ECHR (case *Stern Taulats and Roura Capellera v. Spain* of 13 March 2018, referring precisely to the case cited above), excessive, with several occasions in which the European Court corrects the actions of Spanish judges and courts[10]. Despite this, the Court seems stubborn, as shown by the const. decision no. 190/2020, in ruling against the doctrine of the ECHR. For Spain to conform to European standards in this area, it seems appropriate, therefore, to reform crimes such as those of articles 490.3, 491 and 543 of the Penal Code (see especially the individual opinion of Judge Encarnación Roca Trías).

4. The protection of political minorities by the European Union

4.1. The democratic principle and the rule of law in EU law

The importance of what has been stated in the previous section lies in the fact that the bases and principles enunciated and, especially, those derived from the checklist of the Venice Commission, can be used by the European Union to promote, and strengthen democracy in the Member States. A proper interpretation of the principles already enshrined in the Treaties would enable the Union to play an important role in the protection of political minorities.

The first thing to remember is that, according to Art. 2 TEU, «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities». These values are, as set out in the same provision below, common to the States. No State that does not respect them may join the European Union (art. 49 TEU). To achieve accession to the Union, certain criteria must be met. These criteria, known as the Copenhagen criteria, were established by the Copenhagen European

[10] Focusing only on those in which the condemnation of Spain came from the exercise of freedom of expression to exercise political criticism, we can cite the cases *Erkizia Almandoz v. Spain*, June 22, 2021; *Jimenez Los Santos v. Spain*, June 14, 2016; *Otegi Mondragón v. Spain*, March 15, 2011. In a modern democratic society, tolerance must also be extended to other state institutions, such as the judiciary (ECHR Judgment *Benítez Moriana and Íñigo Fernández v. Spain*, March 9, 2021) or the police (ECHR Judgment *Toranzo Gómez v. Spain*, November 20, 2018). All these decisions show that Spain has a problem in this respect.

Council in 1993 and subsequently reinforced by the Madrid European Council in 1995. Regarding the subject addressed in these pages, it is interesting to highlight what are known as political criteria, that are the existence of stable institutions guaranteeing democracy, the rule of law, respect for human rights and respect for and protection of minorities. This is where the Venice Commission's checklist can play a crucial role, especially in the report to be made by the Commission on compliance with the Copenhagen criteria (on these reports, and how they affected the situation of national minorities, see Ibarra 2005: 58). Interpreting European legislation in the light of the documents adopted within the Council of Europe makes perfect sense: it is a question of reconciling the efforts of both organisations – which, after all, converge in the development, in a broad sense, of integration in Europe – in the promotion of minority rights and democracy.

Undoubtedly, the European authorities are aware of the importance of the opposition in representative democracies. This is demonstrated by the countless resolutions of Parliament condemning violations of the rights of the opposition in countries such as Russia, Belarus, Turkey, Azerbaijan, Venezuela, Cuba, etc., as well as the regulations and decisions containing sanctions against countries that violate these rights. It is worth highlighting, however, the following sentence in the Communication by the Commission to the European Parliament, the European Council, the Economic and Social Committee and the Committee of the Regions on strengthening the rule of law. Proposal for action: «Political developments in several Member States have led to cases where principles such as the separation of powers, loyal cooperation amongst institutions, and respect for the opposition or judicial independence seem to have been undermined – sometimes as the result of deliberate policy choices» (COM/2019/343 final).

Regarding the normative framework, the rule of a qualified majority of votes governing Council decision-making contained in art. 16.3 TEU and, even, the blocking minority referred to in the following paragraph of that provision may, of course, constitute guarantees for a minority of States, which are those represented by that institution. However, it goes without saying, the Member States act in accordance with the will of the governing majority in them, for this reason, to assess the European institutions' treatment of political minorities within them, it is necessary to look back at the body representing the citizens, the European Parliament. It is in this institution that minority parties which have obtained sufficient votes in the various States can be represented. Its weight in European politics will prove to be very residual, since Parliament's weak position (reduced

to being a co-legislator body with much less influence than the Council and the Commission). It should be borne in mind that Parliament has no legislative initiative[11] and can control (art. 230 TFEU), and even submit, a motion of censure in respect of the Commission (art. 234 TFEU), but not respect of the Council, in a less order of the European Council, which shows the weight that the States still have in the Union (on these problems, see Sieberson 2008: 164-165).

In the institutional framework of the EU, it is impossible a real government-opposition dynamic to take place because of hackneyed topic of the democratic deficit. The EU institutional structure seeks stability through a balance between States, occupying citizens and even political parties a secondary place. Despite these negative aspects, it is also accurate to point out that it is possible to create a commission of inquiry at the request of only a quarter of the members of the Chamber (art. 226 TFEU). In addition, the practice of the system of electing Vice-Presidents and Quaestors tends to reflect the numerical weight of the political groups and takes account of the results of the election of President. Both are aspects that, as seen above, would favor, in a Parliament that occupies a central role in the institutional framework, the development of the role of political minorities.

4.2. Sanctions against regimes that do not respect the exercise of political opposition

Considering the importance that, as we have just seen, the States have in the functioning of the Union, it seems clear that the proper functioning of democracy and the rule of law in the Union will depend on how they take place in the Member States. The European Union has mechanisms to impose sanctions on those Member States in which violations of the values enshrined in Art. 2 TEU occur, and it has already had the need to implement them. These mechanisms are mainly three: a) the sanctioning mechanism of Art. 7 TEU; b) the Regulation to protect Union funds from mis-

[11] Art. 225 TFEU provides only that: «The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons».

use by states[12]; and c) the infringement procedure which the Commission may bring before the Court of Justice when a state fails to comply with European Union rules.

Of these, the one that is now interesting to highlight, and to put an end to this work, is the first. This mechanism was first put in place in 2018, when MEPs decided to ask the Council to determine whether Hungary was at risk of breaching the EU's founding values. On September 15th 2022, Parliament said that the situation in Hungary had deteriorated to such an extent that the country had become an "electoral autocracy", a constitutional system in which elections are held, but democratic norms and standards are not respected. In this resolution, violations of the rights of the opposition play an important role (European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)). Thus, it is pointed out, first, that some changes in the electoral system (alteration of constituencies and an advantage for the winner) leave opposition parties at a disadvantage; that the Central European Press and Media Foundation (KESMA), which brings together 470 media outlets, has had serious consequences in terms of reducing the space available for independent and opposition media and access to information for Hungarian citizens; in addition, that funds earmarked for public media and KESMA are used to disseminate government propaganda and discredit the opposition and non-governmental organizations; finally, that the systematic dismantling of the rule of law, democracy and fundamental rights has limited the space for opposition parties and civil society organizations, trade unions and interest groups, leaving no room for social dialogue and consultation.

[12] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. This mechanism was endorsed by the CJEU in Cases C-156/21 and C-157/21. The Parliament has repeatedly expressed its displeasure at the Commission's inaction in this regard, to the point of bringing an action for failure to act before the CJEU (see European Parliament resolutions of 21 October 2021 on the crisis of the rule of law in Poland and the primacy of Union law (2021/2935(RSP) and of 10 March 2022, on the rule of law and the consequences of CJEU decisions), but on 18 September, the Commission proposed to suspend the payment of € 7.5 billion of EU funds to Hungary on grounds of the rule of law to ensure the protection of the EU budget and the EU's financial interests. However, this measure is more focused on protecting the budget, and is problematic, as the link between the erosion of rule of law principles and the violation of the EU's financial interests will not be too direct (Köllig 2022).

5. Conclusions

Currently, there is a clear tendency in the representative democracies of the European continent to an authoritarianism of the majority. This is a corollary in weakening the checks and balances to the exercise of power, because of not having correctly focused on them. Nowadays, power is not limited because of the classic division of powers into legislative, executive, and judicial, since the party winning the elections controls or influences the appointments in all of them, but as a consequence of the dialectic between majority and political opposition forces.

The opposition becomes a determinant element of democracy, and this means that the mere possibility of organising and expressing oneself freely is not sufficient. Whether or not there is an express constitutional status of the opposition, its right and duty to criticise the government must be understood as a constitutional function leveling the exercise of power in each political regime. Thus, any democratic regime must offer, at a minimum, the following guarantees to the political opposition: an electoral and party system that reasonably allows an alternation in power; public and transparent parliamentary debates where opposition parliamentarians have the possibility to participate for sufficient time and to access the necessary information; MPs have inviolability for opinions and votes expressed in the exercise of their duties; the composition of Parliament's decision-making bodies follows a logic proportional to the plenary session and the important organs and institutions of the State are appointed by qualified majority; there are judicial guarantees to protect Members against unlawful disturbances in the performance of their duties. Ideally, however, as the opposition is always in a situation of inferiority *vis-à-vis* the government, it is the establishment of a constitutional statute for the opposition that serves to equalize arms between the two subjects, providing the opposition with extra time in debates, additional funding or, at least, guaranteeing the right to be informed by the government of relevant facts.

The constitutional function of the opposition requires a revision of some traditional classification categories. Speaking, especially, about an unrecognized or proscribed opposition, subversive, etc., may have a certain political sense, but not a legal one. This paper proposes a classification of the opposition into: a) parliamentary opposition and general opposition, distinguishing, within the parliamentary, between statutory and non-statutory opposition; b) ideological and dissenting opposition; c) internal and external opposition.

Considering this recently recognised importance of the opposition for the development of democracy and the rule of law, both the European Union and the Council of Europe adopted rules and documents to try to avoid a regression of its status in countries that are, broadly, part of European integration. The Council of Europe approved a checklist with standards that must be guaranteed to the opposition by the member states of the organization; in the European Union, for its part, there are three mechanisms by which the European institutions can act against those States where the right to opposition is not respected: a) the sanctioning mechanism of Article 7 TEU; b) the regulation to protect Union funds from misuse by States; and, c) the infringement procedure which the Commission may bring before the Court of Justice when a State fails to comply with European Union rules. The first and the second mechanisms have been used in the case of Hungary, highlighting the violation of certain rights of the opposition. In addition, the European Union has adopted numerous decisions against third countries where there are violations of those rights. However, from the internal point of view, as consequence of the importance that the States have in the institutional framework of the EU, it cannot be said that there are, in the European institutions, effective guarantees for political minorities.

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