The legal status of the opposition in Poland: many clues, no clear evidence, a significant deterioration as a consequence of the rule of law crisis

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1. Introductory remarks

It may seem strange that the political-parliamentary opposition lacks a recognition of its legal status precisely in Poland, the country of the Solidarity movement, which at the end of the 1980s conquered spaces of pluralistic democracy, starting from its role of opposition protesting against the previous system, a movement which was peaceful and inclined towards parliamentary democracy and above all – as it turned out – towards a "contractual" transition negotiated with the protagonists of the previous regime[1]. Yet since 1989 Poland went through almost a decade of a provisional constitutional order, made definitive with the 1997 Constitution, which gave rise to a fairly

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[1] The entire transition was characterised by the emphasis on the role played by the opposition (Garlicki, Garlicka 2010: 391-392). The attribution of 35% of seats to *Solidarność* in the *Sejm* (lower house), according to the aforementioned article, well represented the original intent of the established order to legitimise the opposition through a sort of cooptation; while the very institution of a weak Senate, however completely freely elected, made this upper Chamber a sort of legitimate opposition, in itself, to the established order (Bożyk 2000: 31).

traditional parliamentary system of government, with only very partial innovations and peculiarities. It can therefore be said that the originality of the Polish constituent process was not valued by the established order at the outcome of that process, which was launched precisely in connection with the legal recognition of a large opposition movement.

The provisional constitutional order, which started at the Round Table agreements in April 1989, was initially quite advanced for its times but soon appeared outdated after the fall of the Berlin Wall in November 1989. It further developed through the so-called the 'Small Constitution' of 1992, and culminated, with the Charter of 1997, in a hybrid system of government, which in Poland is considered a form of highly rationalized parliamentarism, albeit with the direct election of the Head of State which could suggest an attenuated version of semi-presidentialism.

At the same time, no constitutional provision contains the explicit recognition of the notion of political opposition, either in the parliamentary arena or in other elective assemblies or in the form of direct democracy, even though the latter does exist. Legal doctrine itself, during the provisional constitutional period, did not show evident interest in this subject (and later, a theoretical and comparative analysis was produced by Kubát 2010), giving the impression of being satisfied with a regulatory system that offered the right of political opposition an unexpressed recognition between the lines[2]. More recently (in 2010) the main opposition party, Law and Justice (*Prawo i Sprawiedliwość*, PiS), proposed a *Sejm*'s 'democratic package' of reforms to the lower house's Rules of Procedure, which it has not implemented since it seized power in 2015. As recalled by Marczewski and Sześciło (2017: 4) in particular it was a question of institutionalizing the opposition through an obligation for each parliamentary group to present a declaration of support or disapproval of the government, with the recognition of certain rights in the negative case; the obligation to examine each bill no earlier than six months after its presentation; granting the oppositions the right to include at least one item on the agenda for the next session. Still more recently, in a context of deteriorated democratic environment, the case was made again for introducing a formal recognition of the opposition (Szymanek 2018;

[2] An exception to this was that of Complak (1995: 27 ff.), who unsuccessfully made the case for the provision of a robust status in favour of the parliamentary opposition along the lines of the Portuguese Constitution. Subsequently, a few publications were added, including the comparative monograph edited by Zwierzchowski (2000), with an introductory chapter of a historical-theoretical nature by the editor, and the volume, mainly oriented towards political science, edited by Łabędź (2016).

Uziębło 2018). Despite all this, there are many indications demonstrating how the role of the opposition is not only implicit but even inherent in the essence of the political regime identified by the Polish fundamental law. Traces of this can be found right from the preamble to the Constitution, with the references it makes to cooperation between public authorities, social dialogue and subsidiarity. But it is in the normative part of the Charter that one can find the main insights.

The few authors who have focused on this specific topic have indeed found a remarkable abundance of such ideas. As we explain below, reference was made to the principle of the democratic (and constitutional) rule of law. The principle of political representation was also taken into consideration, as well as the division of powers and the balance thereof. But to further delimit the field of investigation, the pluralistic principle is the one that appears best suited to recognize and enhance the concept of opposition, in particular through some of its articulations. As a preliminary point, it should be noted that even party pluralism, in itself, does not constitute a guarantee that political formations which, at the outcome of an electoral competition could result in a minority position, would be able to play the full role of political opposition. Almost all the countries that fell back into the Soviet area of influence after the Second World War had formally a plurality of parties, but it was a facade pluralism in which a single party played the dominant role, and the minor formations gathered in a common front with it, so that no opposition to the system was recognized. For this reason, countries like those who have put behind them totalitarianism of the communist type know that mere political pluralism is a necessary but not sufficient element to legitimize the existence of the opposition, albeit implicitly. So it is the nature of the political party which is identified and deemed preferable by the 1997 Constitution the one which, if anything, can be found as the best possible guarantee against authoritarian resurgences and in favour of a social dialectic prone to counter-majority elements capable of expressing themselves even in the dimension of the purely political arena, and not only in that of jurisdictional guarantees (it remains understood that a comparison between the statements contained in the legal texts and the factual reality is here the most appropriate).

Considering the above, this contribution intends first of all to underline the constitutional provisions which can constitute an indirect legitimation of the opposition (including some references to the constitutional jurisprudence, though a little lacking on this aspect), to then focus on the ordinary legislation and the parliamentary rules of procedure. Once the normative

aspect has been exhausted, we will focus on the concrete experience of the last thirty years, to detect if the opposition has been able to use all the typical functions belonging to it in a parliamentary system, i.e. the function of inspection and control, the legislative function or the confidence relationship with the executive, but also to play a role in the election of public bodies. In conclusion, a brief comment will be necessary on the illiberal degeneration that in recent years has affected Poland like some other European countries, to see if it has also concerned the *de facto* status of minorities and parliamentary oppositions. This important aspect can hardly be detected, as the changes have not been particularly evident on a strictly regulatory and formal level, but it requires a strong sensitivity in terms of effectiveness in enforcing the written rules.

2. Opposition-friendly constitutional norms

The democratic rule of law principle, which was already introduced with the December 1989 amendment to the 1952 (socialist) Constitution, and subsequently included in the 1997 Constitution (Art. 2), is considered as the first indirect legal guarantee for oppositions, since the existence of political pluralism is an indispensable corollary of the democratic form of state (Garlicki 2009: 64). This principle, combined with popular sovereignty (Art. 4) implies the possibility for all citizens to participate in the broadest possible way in the exercise, albeit indirectly, of power. Other authors have identified in the political representation (which unfolds in Articles 96-98 and 100 of the current Constitution) the source of the legitimacy of political parties (Granat 2000: 86) as if an implicit acceptance of political pluralism derived from this consequence. Indirectly beneficial to the oppositions is also the restoration of the free parliamentary mandate (Articles 104 and 108 Const.) as opposed to the imperative mandate typical of the previous communist regime. Although formally directed to prevent any conditioning by the electors of their constituency, the free mandate can also constitute some protection of members of Parliament from political power in the broadest sense, especially the party each deputy or senator is part of (Bożyk 2006: 103).

In order to favour the political opposition, the Constitution also included a reference to the traditional principle of the separation of powers (Art. 10), which has been emphasized to the extent that part of the Polish legal doctrine has criticized it for its rigidity and lack of realism (as it fails to detect the collaboration between government and parliamentary majority in a ra-

tionalised parliamentarism). But precisely the idea of the majority recalls that of the minority, which tends to be completed in the concept of opposition.

On closer inspection, this concept can take various forms, even partially unforeseen ones. Although the Polish system of government, with the direct election of the President of the Republic, does not even come close to the French version of semi-presidentialism, the Constitution still places this institution in the category of the executive power and attributes to it some autonomous powers, as proven by the fact that they are exempt from the governmental-ministerial countersignature (Art. 144.3). Some of these powers are significant, such as the early dissolution of the parliamentary Chambers – «shortening of their terms of office», according to the Constitution's wording –, although reading them should be resized in the light of the fact that the interruption of a legislature is, in turn, typified in some concrete situations that make its use extremely difficult.

There is a power that can be decisive: we refer to the faculty that belongs to the Head of State to refuse the promulgation of a law, referring it to the *Sejm* which can impose its definitive adoption only with three-fifths of the votes in the presence of the quorum (in addition to the possibility of promoting a preventive appeal on the legitimacy of a parliamentary act at the Constitutional Tribunal). The Constitution does not limit the use of this power to special circumstances and maintains it at the maximum of discretion. However, experience has shown that the most propitious occasions to make use of it are those of cohabitation between a President and a government of different orientations (this will be better examined in § 4). Almost the opposite of the French prototype of semi-presidential government, it is precisely in these situations that the strength of the President and his ability to influence on politics are most accentuated; but it is a substantially obstructive force, which makes it an effective obstacle to the political orientation of the majority, at least partially in contrast to the overall role of «supreme representative of the Republic and guarantor of the continuity of State authority» that the Constitution (Art. 126) attributes to him.

It was then argued (Bożyk 2006: 110) that the President, in such a situation, by the mere fact of being able to hinder the shared legislative program of the political majority, assumes the role of a body that strengthens and legitimizes the oppositions, reinforcing their conditioning on the majority. This has been seen on several occasions, starting with the cohabitation between President Lech Wałęsa and the left-wing SLD-PSL coalition (1993-1995), passing through the presidency of Aleksander Kwaśniewski, of the SLD, when he found himself opposed by a right of centre parliamentary

majority (1997-2001), until the coexistence that lasted two and a half years between the right-wing President expressed by the PiS Lech Kaczyński, who tragically perished in 2010, and the liberal-centrist parliamentary majority PO-PSL, led by Donald Tusk. Finally, perhaps the most traumatic case of confrontation was that between the newly elected President Andrzej Duda and the outgoing PO-PSL majority, during a few months of 2015.

In this regard, however, it should be noted that, in the first place, this should not be the purpose of an institution such as the preventive referral of laws, informally called a "veto", or this should not be the figure of the President suitably designed by the Constitution. But secondly, and on closer inspection, the not rare situations of this type are those in which it is the President himself who attracts into his/her sphere the role of opposition to the government, inevitably overshadowing the position of the parliamentary minority rather than strengthening it. The attention of public opinion, in such cases, is certainly not drawn to the opposition, which does nothing but confirm its status as a parliamentary minority which would in any case be destined to lose votes were it not for the fact that it could find an organ of the executive, more or less improperly or occasionally, to coincide with one's own positions. We would therefore be dealing with a heterogeneity of ends in the application of an institution that was originally created for very different purposes.

At this point, we arrive at a much more convincing constitutional foundation aimed at legitimizing the political opposition, and the parliamentary one in particular. It rests on the principle of political pluralism, which is enshrined in Art. 11 Const.[3] and which asserted itself in evident direct controversy with the previous system, starting with the December 1989 amendment to the 1952 Constitution, with which the reference to the role of «leading political force» of the Polish United Workers' Party was suppressed.

It is only by 1997, however, that the parties have come to be qualified starting from the freedom to found and direct them, by emphasising the voluntary nature of membership and the equality between citizens in the opportunity to choose whether or not to apply for that membership, with an additional emphasis on the democratic method which the parties should be based on to make them better suited to determine national political life.

[3] Art. 11 Const.: «1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. 2. The financing of political parties shall be open to public inspection».

The imperative of equality has been extended, in the legislative implementation of parties (especially by the Law on political parties of 27 June 1997), from the internal associative aspect to the public-state dimension, within which the public authorities are denied any legal possibility of discrimination in the treatment of each party (with regard to the equality of the parties before the law, seen as a consequence of the freedom to establish and run political parties, see S. Bożyk 2020, Wojnicki 2020). Art. 11 ends with a second paragraph providing for the publicity of the sources of financing of the parties, however leaving the law-maker the widest discretion regarding the fundamental issue of the possibility for the state to finance them or, on the contrary, the reliance on private economic means (the implementation discipline is entrusted to the 1997 Law on political parties, as regards an ordinary annual funding reserved for parties that have exceeded 3% of the national votes in the last political elections, while the 2011 Electoral Code provides for a reimbursement set on the number of seats always obtained in the last elections. In general, the legislation on parties, since 1990, has been hostile to forms of foreign financing).

The combination of the inspirations present in the constitutional status of the parties is such as to emphasize the favour for formations that assume or find themselves in a minority position, and consequently in one of opposition. That said, it should be added that the Polish constitution-makers, in the wake of other countries that suffer from a totalitarian past, have added further limits. We are talking about the prohibition (Art. 13) imposed on parties or other formations which refer in their programs to the totalitarian methods of Nazism, Fascism or Communism, and those which – even in their own activity – anticipate or admit racial and nationalist hatred, the use of violence to seize power or to influence state policy, and apply methods of secrecy of their action or membership. It is an almost all-encompassing rule from this point of view, even more articulated and demanding with respect to the quality of democratic life than what has been envisaged even in systems of more distinguished reputation in this respect, although stringent monitoring of its concrete implementation would be necessary. But what is interesting to point out here is how precisely Art. 13, rather than the one dedicated to the general regulation of parties, represents an even stronger guarantee for the right of opposition, an implicit index of the support which the Constitution offers to this democratic instrument. Indeed, it is intuitive that the legal prohibition against organizations of an authoritarian or even totalitarian nature, at least if implemented in a coherent and effective way, is the best barrier against the placing of obstacles on democratic oppositions,

intending to assume and exercise power in a peaceful way. You simply save the opposition by banning the parties that would ban it.

3. The structure of the Parliament (and of the Sejm in particular) as an indirect index of the treatment of the opposition

It is now time to move on to a more detailed examination of the status of the opposition within Parliament starting with its service apparatuses, with particular attention to the role of the *Sejm* as the clearly prevailing lower Chamber. Outside of the constitutional text, the issue can only be studied starting from the rules of procedure of the two Chambers but also from some legislative texts, which interfere a lot in parliamentary life. In the first place, it will be considered how these regulatory instruments help qualify the ability of the opposition to influence the formation and activity of the internal organs of the lower house.

The Polish Constitution, despite the reference to party pluralism, is silent on the projection of these organizations into parliamentary groups, treating deputies and senators indiscriminately. Silence on this matter has resulted in a high degree of discretion in favor of statute law and parliamentary regulations, in a way that gave rise to some controversy in Poland in the early years of democratization. An important source can be found in the Act of May 9, 1996, on the fulfillment of the mandate of deputy or senator, a regulatory act which on the one hand focuses on the relationship between representatives and the electorate, placing certain duties on the former towards the latter, and attributing to the members of Parliament certain rights of inspection and participation in the activity of public administration bodies or territorial autonomies, but on the other hand it also affects the internal life of parliamentary institutions.

According to Art. 17 of this law, adopted along the lines of another one dating back to late socialism, deputies and senators, respectively, can form groups, circles, or "teams" of a thematic nature (often intergroups) in the Chamber to which they belong according to the principles established by the respective internal regulations. On the one hand, therefore, an act of Parliament is recognised as the ideal source for legitimising the right of parliamentarians to associate in groups (and this matters because in Poland such acts have a normative rank higher than that of internal rules of procedure); on the other hand, the same act refers the determination of the criteria with which this must be done to the regulations of each assembly. And this is what

the *Sejm* Rules of Procedure (or standing orders) adopted in 1992 enforced, as well as the corresponding rules of the Senate, establishing respectively 15 deputies and seven senators as the minimum number of members to form a group, while three are enough in each of the Chambers to form a "circle", that is to say, a smaller set of representatives, distinguished by political affiliation[4], who enjoy fewer rights concerning the organization of the work of the reference assembly even if for all the remaining aspects they are placed on the same level as the other parliamentarians. Moreover, the Rules of Procedure of the *Sejm* (Art. 8) confirm the right for deputies to group together «on a political basis» even if it has been stated that this expression does not imply the obligation of a strict identification between the parliamentary group and the political party, being able to have groups – or rather circles – composed of ethnic-linguistic minorities (Czeszejko-Sochacki 1997: 162).

The number of deputies necessary to form a group continues at times to be disputed, being presented as discriminatory or restrictive of genuine pluralism. This has only some partial justification. Since 1993, Polish electoral legislation has been characterised by substantial stability, with some small variations, and since 2011 it has been condensed into a single electoral code, which for the *Sejm* continues to provide for a national access threshold set at 5% for political parties and 8% for lists representing a coalition of parties. The first of these requirements is analogous to the electoral legislation in force for the German *Bundestag*, but some significant differences must be taken into account. The rules of procedure of the *Bundestag* (Art. 10) as a condition for the formation of a parliamentary group require that this is composed of at least five percent of the effective members; it is true that the 15 deputies in Poland are less than 5% of the plenum of the *Sejm*, made up of 460 deputies. It must be kept in mind, however, that the German electoral law traditionally knows a mechanism for transforming votes into seats which reflects much more the balance of forces from an electoral point of view, while the Polish system – from 1993 to today, with a brief interruption, the d'Hondt formula applies – is more selective, so that it has often occurred that parties capable of passing the 5% threshold, even significantly, have obtained fewer than 15 deputies and therefore were not able to form a group (this was the case, in the last (IX) parliamentary term, of the rightist

[4] Constitutional case-law, already with the judgment U 10/92 of 26 January 1993, under the force of the previous Small Constitution, expressed a particular favour for the right of parties to associate also in parliamentary groups, and for the substantiation of the duty of the relative regulations to comply with this trend, to the which had constitutional status.

Konfederacja grouping). This can have some significance especially when a small party is in opposition.

An indication of respect for the oppositions can certainly be obtained starting from the influence that they can exercise in the election of the top and management bodies of a parliamentary assembly. This issue has limited constitutional recognition, where (Art. 110) it is established that the *Sejm* elects Speaker and Deputy-Speakers from among its members. The meager provision leaves much room for parliamentary regulation and practice, and the functioning of the former must be read in the light of the latter.

As regards this second aspect, the fact that a candidate for Speaker of the *Sejm* (*Marszałek Sejmu*) must be presented by at least 15 deputies (Art. 4, *Sejm* Rules of Procedure; for an updated English version, see the webpage <https://oide.sejm.gov.pl/oide/en/> in the "Polish legal acts" subsection) highlights the indirect correlation with the minimum size of the groups, so that each of them – in theory, even those from the opposition to the government – can aspire to express the highest parliamentary office. To avoid excessive fragmentation, it is foreseen that each deputy can submit only one candidate.

In general, the Polish constitutional system proves to be more concerned about power vacuums and the impossibility of completing a decision-making process than about the opposite risk, i.e. a tyranny of the majority and the consequent need for an extremely broad consensus. Uziębło (2018: 488) remarks how even the *Sejm*'s Rules of Procedure of 1992 proved to be more preoccupied with the risk of obstruction than with the imperative to grant opposition rights (a concern which, by the way, was perhaps justified during the first years of democratization, dominated by highly fragmented legislatures).

The election of the Speaker of the *Sejm* is no exception to this rule. It takes place by a majority of votes in the presence of the quorum (Art. 4.3 Rules of Procedure), which is reached in the presence of half plus one of the members; however, if more than one candidate is presented, and in the first ballot none of them obtains the prescribed majority, before any subsequent rounds, the name of the candidate who received the fewest votes is crossed out until the result is obtained. If it is still not obtained, the procedure must start over (Art. 4.5).

In practice, it should be noted that in Poland, ever since the democratic breakthrough in 1989, the orientation of the winning forces in the elections has closely coincided with a strict, literal interpretation of the normative provision, and the election of the Speaker has often been an openly competitive event marked by full partisanship, with rare concerns for goals of consensus. The practice of granting the opposition the presidency of the assembly is unknown.

The tests of impartiality and institutional correctness of each Speaker have given alternating results over time, with a declining trend, especially after 2015; but having said that, it does not cause a scandal that the President takes part in the votes and actively collaborates with the government in determining the parliamentary agenda.

It is considered normal that he or she is identified *tout court* as a leading figure of the political majority (formally also the second office of the State) a bit like the President of the Republic, who is part of the executive power although obligations are placed upon him of general representation of the nation which would imply greater impartiality. Indeed, the latter is not even expressly imposed for the speaker by the *Sejm* Rules of Procedure, if not by a systematic interpretation thereof (Art. 110.2 Const. merely provides that he presides over the discussions in the *Sejm*, safeguards its powers and represents it externally. Not even Art. 10 of the Rules of Procedure, in providing for a series of tasks and attributions, place upon him an express obligation of impartiality).

For several decades, as long as there were coalition governments, the election of the *Sejm*'s Speaker was the subject of bargaining between the main components of the majority, at least in one case by attributing the office of Prime minister to a junior partner. This form of pluralism has also decreased since 2015 with the parliamentary terms dominated by the Law and Justice party (PiS), although during the last current term, the electoral list that bore this name was in fact the expression of a coalition with two minor formations.

All these observations do not facilitate the role of the groups which are critical towards what will be, in the immediately following duties of the legislature, the government expressing the political majority. Until recently, at least, the partisan context of the election of the President, and his subsequent role during the term, was at least partially compensated – if not by the sensitivity of the officeholder and the democratic attitude of the party of reference – from the quite frequent and "civilised" changes and alternations in power.

It is worth noting that in the Chambers of the Polish Parliament it is permissible to remove the presiding officer of the assembly according to the principle of any revocable mandate. Regarding the *Sejm*, the possibility had already established itself in practice in the 1990s – it dated back to the twenty years of inter-war experience – but it has been supported more recently by the introduction of an Art. 10.a in the Rules of Procedure. At first glance, the dismissal of the Speaker could appear to be a tool to strengthen the opposition. In reality, it was designed in such a way as to appear similar to the constructive vote of no confidence in the government envisaged by Art. 158

Const. and ultimately seems to respond to the same logic aimed at safeguarding the stability of the system in a broad sense.

Corresponding to this is the fact that the motion of no-confidence to the Speaker, which must be presented by a tenth of the deputies, must simultaneously indicate the name of an alternative candidate and must be put to the vote no earlier than seven days (and no later than 45) from its filing (however, unlike the constructive no-confidence in the government, it requires the favorable vote not of the majority of the members but only of the votes cast). Since these are two completely coincident logics, one gets the impression of a tool that does nothing but reinforce the figure of the chairman of the assembly as a personality who must at least correspond, if not really identify, with the political majority that supports the executive. Politically, the dismissal of a President would not consist in a success of the opposition as such, but, more likely, in their transformation into a majority. In practice, votes of this type, which have taken place several times, have never achieved success and the codification of the faculty certainly does not strengthen its chances.

The index of greater implicit recognition for the oppositions is obtained from other organs within the *Sejm*, the first of which is the collective bureau (*Prezydium*). It only includes the Speaker with his deputies (Art. 11 Rules of procedure) without specifying how many of them there should be. It is a weakened body if only from a formal point of view, given that it is no longer recognized in the current Constitution (while it was under the force of the previous Small Constitution of 1992). In reality, the regulatory adaptations to the changed constitutional order have also transferred to the monocratic Speaker a part of the powers that previously belonged to the *Prezydium* (Kudej 1998: 9), and in particular the determination of the calendar of the subsequent immediate sessions and the agenda of each of them, thus realising a weakening of pluralism and consequently – implicitly – of the opposition (while the general planning of the works remains in the hands of the *Prezydium*, on the proposal by the *Konwent Seniorów* which will be discussed later).

Furthermore, unlike what happens in some Western legal systems, there is no express guarantee in these Polish norms for the purpose of representing the oppositions, so it is only in practice – as indeed has always happened, on the basis of informal agreements taken at the beginning of each parliamentary term – that members of the opposition have also been adequately represented in the body, which in turn is made up of a number of parliamentarians that is not determined either, but is established with an *ad hoc* resolution at the beginning of each term.

The absence of written rules is confirmed by the non-existence of a constant practice regarding both the number of Deputy Speakers and the dosage of their political affiliation between majority and minorities. In the first term (1991-1993), characterised by enormous fragmentation, it even happened that the two parties winning a plurality of the vote, the Democratic Union (one of the successors of Solidarity) and the Alliance of the Democratic Left (SLD, post-communist), were also deprived of a vice-presidency by an articulated cartel of predominantly right-wing forces. In the first fifteen years of democracy, a greater "friendliness" towards the oppositions was accepted in the terms which were dominated by forces that had their roots in the previous system, in particular the second (1993-1997) and the fourth term (2001-2005). But then a tendency has consolidated to ensure that opposition representatives have at least an equal number of Deputy Speakers compared to the majority, a trend that has persisted even in the last two terms dominated by the PiS, which were characterised by the well-known democratic-liberal backsliding. The overall number of Deputy Speakers has fluctuated between four and five.

The opposition, on the other hand, benefits from greater guarantees of representation, albeit always implicit, within another internal body, the *Konwent Seniorów* (which evokes the German *Ältestenrat* at least in its name). It has the task of facilitating collaboration between the groups in all that pertains to the activities of the *Sejm* (Art. 14 Rules of procedure). It is made up of the Speaker and all the vice-Speakers of the assembly, the chairpersons of the groups and parliamentary circles, but the criterion of proportionality of the representation of the groups envisaged in the analogous German body is not provided for. Such a composition is aimed at reproducing the pluralism of the entire assembly, making it possible for all groups, including opposition ones, to influence its work (Zubik 2003: 257). It is evident how the number of such a constituency depends on the greater or lesser fragmentation of groups present in each legislature. And it is the only internal body in which the oppositions can theoretically find themselves in the majority, even if such a paradoxical hypothesis is averted by the fact that it does not have effective decision-making powers, limiting itself (Art. 16 Rules of procedure) to expressing non-binding opinions regarding the calendar of works, the agenda and matters also of an internal administrative nature.

As in numerous other European parliamentary institutions, an important position is also recognised in the Polish ones for the standing committees responsible for subject matter. They are assigned a role on the basis of Art. 110.3 Const. which obliges the *Sejm* to set up permanent commissions

and gives it the power to set up additional commissions of an extraordinary nature, not to mention any commissions of inquiry set up under Art. 111. The Constitution adds nothing else on this point, entrusting the regulation with the determination of the number and areas of competence of the standing commissions, also delegating to them the delicate task of establishing the internal composition by groups.

From this standpoint, there is an important shortcoming, i.e. the absence, even at the level of the internal rules, not only of the imperative to adequately represent the minorities-oppositions, but also of any rule which requires the commissions to reflect on the political level the composition of the whole house (with a few recent exceptions which will be discussed later). This does not mean that a consensual practice has not been established since 1989, to stabilise a mechanism close to a proportional representation of the groups, within the limits of what is technically possible, in each commission of the *Sejm*; and this was maintained even in the most recent years, characterised by an authoritarian involution. The number of permanent commissions is instead determined by the Rules of procedure, albeit subject to some variation at each term, and is released from a strict correspondence with the number of ministries. Currently (Art. 18 Rules of procedure and Annex to it), 19 permanent commissions have been established, and it is once again the practice that the commissions are in turn divided into large, medium or small according to the number of their components.

In general, as anticipated, there is no regulatory correlation between the concept of commission and that of a parliamentary group. The few exceptions are all recent and are generally the result of successive amendments made to the 1992 regulation. The first of these is the general regulation of commissions of inquiry, introduced in part by a law on the aforementioned matter dated January 1999 and in part by Articles 136a-136i of the Rules of Procedure. In summary, the law on the commission of inquiry – Art. 2, to which Art. 136c of the Rules refers – sets the maximum number of members of each of them at eleven and imposes the presence of at least one exponent of each of the groups and circles represented in the *Konwent Seniorów*. Of course, such a low number of components is not able to ensure more than pluralism, certainly not going so far as to satisfy the requirement of even a limited proportionality. The formal guarantee of pluralism within such a body needs no justification, even taking into account the drawback that even the parliamentary commissions of inquiry cannot ultimately escape a majoritarian logic, in which the decision-making power of the oppositions

is compressed by definition. However, this guarantee remains important, considering the role of political turning point that some commissions of inquiry – thanks to members of the then opposition – were able to exercise in Poland at the debut of this institute, in the early 2000s.

Among the commissions which are peculiar by the composition criterion is the one in charge of the oversight of the security services. It comprises no more than nine deputies, whose applications can only be drawn from groups of at least 35 members. Currently the commission is made up of seven deputies, four of whom are part of the PiS majority group, and the chairman himself belongs to this group, although in the recent past the good custom had been established whereby it was chaired by the opposition, but without any stabilisation at the regulatory level also due to the difficulty of giving a legal definition of the latter (Czarny 2010; Bożek 2014: 215). Even in such a delicate area of competence for the protection of democracy, therefore, the favor for the oppositions encounters some precise limits.

The selection criterion of the committee for the "Deputies' ethics" is completely different. This committee is responsible for verifying the conduct of each elected member according to the criteria established in some related "Principles", an extremely narrow and vague code of conduct adopted back in 1998, and subject to wide interpretation, and consequently is entrusted with the possibility to reprimand deputies whose behaviour has not been compliant with the code, or to impose modest disciplinary sanctions upon them. All the provisions of the commission are adopted by majority vote, but the meaning of this norm changes since the body is composed of only one member for each group, regardless of their numerical strength. It is the only parliamentary commission in Poland that is composed according to a criterion of equality between parties, completely antithetical to the proportional one. In this sense, it can be said that, in the perspective of internal relations between members of parliament and the conduct of each of them, a decision-making criterion is in force that is contrary to that of the dominant party-majority logic, and prevailing even in the previously mentioned commission.

The last commission to which the regulation refers to differentiate the composition criteria is that for European Union affairs. In this case, the regulation states (Art. 148a) that it should proportionally reflect the representation of the groups present in the Chamber with at least 15 deputies. Since this is a large commission, currently made up of 42 members, it is clear that proportionality is not only formally ensured, but also more realistic on a substantive level.

4. The influence of the opposition in the legislative process

An important aspect under which the role accorded to the opposition deserves consideration is that of the legislative function of the Parliament. As in any democratic-plural system, the opposition undoubtedly enjoys the right to submit legislative bills, which according to the Polish Constitution (Art. 118.1) belongs «to the deputies, the Senate, the President of the Republic and the Council of Ministers» (with the addition of the popular legislative initiative, provided for by Art. 118.2, which however fails in practice to play an important role).

As in other legal systems, financial matters, and in particular those concerning the state budget, provide for a weakening of the opposition starting from the fact that the initiative in this sphere is reserved exclusively for the Council of Ministers (Art. 221). The wording of Art. 118 allows in the first place to highlight the uneven nature of Polish bicameralism with the weakening of the Senate with *vis-à-vis* the *Sejm*, which opens the way to more specific considerations that will have to be developed below: this disparity is evident starting from the fact that the deputies are entitled to submit legislative bills, without specifying their number, but not also the senators as such, since every initiative in this sense must be submitted by the Senate as such – of course, with a majority vote. This means that for a bill to be initiated in the Senate, it needs to be transmitted to the other parliamentary branch, from which the true, formal proceeding must always, invariably, start.

The 1992 Rules of Procedure interpret the right of initiative of Members in a restrictive way (Art. 32.2). In fact, they reserve the possibility of presenting bills to the standing commissions as such – and this already indicates a propensity of the system towards the parliamentary majority – as well as to at least 15 deputies, without specifying that these must correspond to a parliamentary group but again legitimising the identification between this last form of association of deputies and the exercise of one of the most important forms of participation in political life. This means that individual deputies, as well as associations between them of a smaller entity than a group, such as clubs for example, are excluded from the possibility of even trying to contribute to the formation of national legislative activity (if not, obviously, through amendments and final vote). In any case, a provision of this type, if on the one hand seems to be inspired by the will of preventing excessive inflation of legislative initiative, on the other enhances the role of parliamentarians not on an individual level but only as part of a wider community, such as – of evidently – the political party.

Empirical evidence indicates that, over the decades, Poland has been no exception to a widespread trend in democracies at a global level, whereby the percentage of purely parliamentary law bills decreases to the advantage of governmental bills, while conversely, the rate of success of the proposals coming from the executive is increasingly preponderant as opposed to bills submitted by other subjects. This cannot come as a surprise and is the effect of the majoritarian logic which ultimately inspires the legislative procedure in modern democracies. It is not from this function, in fact, that we should expect the opposition's greater capacity for effective influence. Even from this point of view, however, the illiberal backsliding of recent years presents critical aspects which will be discussed in § 6.

The analysis of the opposition's ability to influence the legislative process can best be conducted starting from some considerations regarding the nature of Polish bicameralism and the position of the President of the Republic, considerations that supposedly have nothing to do with the relationship between majority and political opposition. Indeed, a formal and arid analysis of the relations between these two Chambers would lead to the conclusion that the *Sejm* clearly prevails over the Senate both in terms of the fiduciary relationship with the government, over which it has a total monopoly, and in terms of the control or oversight function properly understood, for which a substantially analogous assessment can be made, as well as for the law-making function, where, however, there is some condition capable of allowing the upper Chamber to have an impact.

In a nutshell, in fact, the *Sejm* approves bills in three readings by a simple majority of votes in the presence of at least half plus one of the deputies, unless the Constitution prescribes special majorities (Articles 119-120). The bills approved in this way must be transmitted to the Senate, which must pronounce itself within the mandatory term of 30 days. It can choose whether to adopt a bill without amendments, amend it or reject it in its entirety. These decisions are sent back to the *Sejm*: in case of rejection or approval with amendments, the decisions of the Senate are considered final unless the *Sejm* modifies them again – and this time definitively – this time with the affirmative vote of the majority of the deputies present and voting, thus not considering those present, and abstaining, as votes implicitly in favour of the resolution.

This is a minimal procedural burden that usually has no actual practical significance unless a particular condition occurs. In other words, it is necessary that the political majorities present in the two Chambers do not coincide: it is a difficult condition to verify, given that they are elected at the

same time (Art. 98) and that this promotes the formation of homogeneous majorities or at least not openly in contrast, as in fact it always happened from 1991 to 2015. It should be noted incidentally that this eventuality almost always materialized despite the different electoral formulas used for the two assemblies: if for the *Sejm* the Constitution (Art. 96.2) provides for a proportional system – theoretically ensured by the use of the d'Hondt system, and certainly mitigated by national thresholds of 5% for parties and 8% for coalitions –, since 2011 the Senate has even been voting in one hundred single-member constituencies under a first-past-the-post system (Rakowska and Skotnicki 2014: 189-213). Despite all this, the majorities have always substantially coincided until the general election of October 2019, when in the face of the confirmed victory of the PiS in the *Sejm* (235 seats out of 460) a large cartel of democratic opposition forces achieved a narrow victory – 51 to 49 – in the upper house.

In fact, during the last term it was found that, if the opposition manages to become a majority in the weakest assembly of Parliament, then it is the latter that effectively transforms itself into the opposition to the strongest parliamentary branch. When the two majorities do not coincide, given the superior strength of one assembly over the other, one certainly cannot speak of a reciprocal and balanced capacity to hinder each other, and even less of a decision-making stalemate typical of a veto player (Tsebelis 2003), but if anything there is a situation in which the "weak" Chamber is at most capable of exerting some pressure or conditioning on the "strong" Chamber[5].

How significant this conditioning is depends exactly on the difference in political strength attributed to the two assemblies on the basis of the constitutional provisions, within each of the classic functions pertaining to the legislative. Even if the notion of opposition that is proposed here – that is, the opposition of one Chamber to the other – does not correspond to the one that currently prevails and is not in any case the most orthodox, it remains that a situation such as the one described is one in which the opposition normally understood, i.e. a parliamentary minority that opposes those who

[5] The situation was quite different between April 1989 and the Small Constitution of 1992, when a vote against by the Senate could only be overcome by the *Sejm* with two thirds of the votes. In this case we had to deal with a true veto player, who found justification in the Round Table agreements with the fact that only the Senate – in the semi-free elections of June 1989 – would be elected according to rules of full pluralism, while at the *Sejm* there was preemptive allocation of 65% of seats to the Communist Party and its then allies. See Ciemniewski 2014: 76-77. More recently, Wieciech (2020) makes the case for a total abolition of the Polish Senate.

support the government, is more valued. On the other hand, the enormous disparity in strength between the two assemblies means that, if they were to be distinguished by two contrasting political majorities, it will always be the Senate that stands in some opposition to the *Sejm*, never the other way around. The prevalence of the oppositions in the Senate in Poland is the instrument that can indirectly strengthen the position of their colleagues in the *Sejm* in a way that, in the current state of democracy in this country, could not be imagined otherwise. But by how much, concretely?

Actually, in the current Polish case, little enough. In the current term, up to the time of writing, the PiS parliamentary group which made its debut with 235 out of 460 deputies but lost seven of them in three years, has nevertheless almost always succeeded, when it comes to re-examining a bill rejected or modified by the Senate, to collect the absolute majority of valid votes to definitively confirm a text. Among the laws finally approved by the Parliament, despite the opposition of the Senate, are numerous modifications of the judicial system which have been at the centre of as many controversies with the European Union, and in particular with the Court of Justice; the special law on presidential elections of April 2020, which – due to the Covid pandemic emergency – would have allowed, by way of derogation from the electoral code, elections to be held entirely by post (this act, however, was subsequently repealed and no longer applied); the reform of the education system wanted by the education minister Czarnek; the act that would have made it possible to revoke the license of the TVN television group, owned by Warner Bros-Discovery (which, however, was vetoed by the President of the Republic Andrzej Duda in December 2021, not without pressure from the US Administration). On all these occasions, as on others, in reality, the vote against by the Senate functioned as a sort of obstruction – usually the upper house used the available month to the full to decide – and served above all to draw the attention of the national public opinion, and sometimes of foreign and supranational institutions, on the seriousness of the adopted measures.

Another peculiarity of the Polish constitutional system can help enhance the role of the opposition in the *Sejm*, and this too it is perhaps only another unintended consequence of a choice made in 1989, and then only partially attenuated since 1997. We are referring to the peculiar position of the President of the Republic, who, if on the one hand is not an authentically governing body – such as, for example, the French President in the Fifth Republic –, on the other can in certain situations prove to be a centre of power capable of influencing the political system, and not just for mere moral suasion.

The main institution that is relevant in this respect is the referral of laws to the *Sejm*, also known as the veto. With a reasoned message, the Head of State can refuse to promulgate an act and ask the *Sejm* to review it (Art. 122.5 Const.), in which case the law lapses unless the *Sejm* itself adopts it again with three fifths of the votes in presence of half plus one of its components[6]. It deserves to be noted that this power is an alternative to another relevant faculty for the Head of State, namely that of requesting a prior judgment on the law from the Constitutional Tribunal (Art. 122.4)[7]. The logic that supports the two legal institutions looks different since in the latter it seems that the constitution-makers have conferred on the Head of State an important role in activating a judgment of constitutionality which in any case does not belong to him, but concerning which he or she can only formulate a reasonable doubt. Otherwise, the referral of a law to the *Sejm* – which must be motivated but with wide discretion – can certainly contain certain constitutional concerns, but it can well respond to free and discretionary political option criteria within a possible space of indifference in terms of legitimacy. On the one hand, it would make no sense that to pursue the same basic purpose, that is to prevent an unconstitutional act of Parliament from entering into force, two completely different procedures could be activated, one of which ends with a mere (qualified) majority vote by a purely political body. On the other hand, and consequently, it seems that the President's recourse to the right of veto, based on reasons of political preference, cannot be justified with anything other than the (at least equal) level of political legitimacy of two institutions, since the President himself and the Parliament are both elected by universal suffrage.

That said, the legal design of this veto power needs to be brought into political concreteness. It is evident how it takes on different meanings depending on whether it is inserted in a "normal" and physiological situation, i.e. one in which the parliamentary majority coincides with the one that elected the President, or in that of *cohabitation*, which has occurred several times even in Poland. This is also relevant for what concerns the treatment of the opposition.

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[6] The attenuation introduced by the 1997 Constitution consists in the reduction from two-thirds to three-fifths of the quorum of votes necessary to overturn the presidential veto; as well as in the exclusion thereof for the budget law (Art. 224.1) and for the laws revising the Constitution (Art. 235.7).

[7] It should be noted that these rules, which involve both the President in the legislative process, are included in Chapter IV of the Constitution concerning the Parliament, and not in the subsequent Chapter V (Articles 126-145) dedicated to the President himself.

Contrary to appearances, there are significant cases in Poland demonstrating that the use of the presidential veto occurs even when the majorities coincide, and this is true in the most recent case under the presidency of Andrzej Duda (PiS) with a government of the same extraction. In these cases, in some respects, the presidential referral of parliamentary laws takes on an even greater value, taking on meanings that cannot be attributed to an even too obvious opposition between factions, but can assume the character of an even personal opposition between the Head of State and top figures of the reference establishment; at the same time, however, a presidential veto in the presence of this political arrangement may simply indicate a dissent on the strict merits of the law, even on important issues.

During the last two Parliament terms, and the two mandates of President Duda, referrals of this type have been made. In particular, two famous vetoes of the summer of 2017 on as many laws in the field of the judiciary should be noted. Although this did not prevent other laws on the subject from being proceeded on in a short time and eventually entering into force – with the consequence of altering the balance between powers, determining an overall constitutional retrogression of the national democratic quality, and provoking a permanent conflict with the EU –, the fact remains that the presidential decision was incisive and prevented the entry into force of norms even more repugnant to the principles of the rule of law. A similar consideration applies to the veto applied in August 2018 to the amendment of the European electoral law, which would have transformed the electoral system into an excessively punitive mechanism even for medium-sized parties, cutting them off from representation in the EP. The same goes for two laws, wanted by Minister Czarnek, regarding the reform of the education system, and one, approved in December 2021 on radio and television matters, which would have punished the private group TVN (strongly critical of the government) with the tightening of the conditions for granting emission licenses to subjects with foreign capital (on this we must remember the pressure from the American Administration, also motivated by the sale of TVN years ago to the giant Warner Bros-Discovery).

In any case, as in any situation in which a qualified majority is required, this involves an enhancement of the oppositions, direct or indirect, which is almost impossible to find otherwise in the Polish legal system, and above all in the present situation (Szmyt 2014: 140). For its part, however, cohabitation is a situation in which a particularly dysfunctional element of the system has been found. Precisely the strength of the presidential referral power highlights how, in certain circumstances, the Head of State can as-

sume the role of a true leader or in any case an inspirer of the opposition: a rather improper role, given that – it is repeated – the President is officially placed in the executive power (Art. 10.2 Const.), but that he «shall [also] be the supreme representative of the Republic of Poland and the guarantor of the continuity of the State authority» (Art. 126.1) and «shall ensure observance of the Constitution, safeguard the sovereignty and security of the State [...]» (Art. 126.2). It is already not easy to reconcile these solemn declarations, which imply a performance of national unity, with membership of the executive which in itself indicates a partisan choice. Their realisation risks becoming even more illusory when the President feels engaged in the struggle of a parliamentary minority to regain a greater electoral following. In such cases, the possibility that the Head of State can assume the role of an informal leader of the opposition is completely dysfunctional.

Still, in the context of the legislative function, there is a last institution wholly favorable to the oppositions: indeed one could certainly say that it is the main instrument placed at their disposal, or so it should be. This refers to the possibility for 50 deputies or 30 senators to apply to the Constitutional Tribunal to ask for a judgment on the constitutionality of a law (but also for the conformity of a law with an international agreement always ratified by law, or for a control of legality-constitutionality of any regulatory act issued by a state body). The faculty is recognised on the basis of Art. 191.1 Const. in combination with Art. 188. Even before the presidential veto which should have a very different nature, that of an application about the constitutionality of a legislative act of Parliament by the minorities is a decisive tool for protecting both the supreme law and the rights of the opposition. Or it should be, it must be added. During the last two terms (from 2015 until 2023) the deterioration suffered by the Polish democracy started from the Constitutional Tribunal, with a real capture from the majority political power, such that this institution has suffered an impairment that one could not yet say if definitive, but which in this moment is total. This is the factual reason why the discussion of the topic must be postponed to § 6, where a brief assessment of the overall democratic backsliding suffered by the country will be given, of which the parliamentary oppositions are among the first to suffer.

5. The parliamentary opposition in the oversight function

Thus, we move on to the control and oversight function, which should enhance the role of the opposition more than the legislative one. On a theoretical

and abstract level, control over the executive should belong to Parliament as such and not to particular fractions of it. In practice it is known that the parliamentary forms of government based on the fiduciary relation between the Assembly and the Government – and Poland is one of them – presuppose a continuous collaboration between the two branches of government, so that the parliamentary majority constitutes with the latter, essentially, a single axis. But if there must be in-depth collaboration, then the interest of the parliamentary majority in carrying out an inspection function on the government, based on the pure abstract structural otherness between the two bodies or centers of power, in today's majoritarian parliamentary democracies is reduced to physiological levels. This is why when we speak of parliamentary control, we are referring to a space that essentially belongs to the minorities who form the opposition to the executive in the legislative body (Marszałek-Kawa 2016: 330-337). But even from this point of view, especially in a legal system that has undergone a serious democratic degradation, it is necessary to distinguish between law in the books and law in action.

On the methodological level, it should be noted that a part of the Polish legal scholarship unites all types of relations between Parliament and the Government in the vast conceptual field of control or oversight, including the formation and dissolution of a fiduciary relationship, while other authors place this last type of relationship in a special function, defined as *funkcja kreacyjna* under the influence of the German doctrine of *Kreationsfunktion*. Here, for reasons of exposition speed, the two concepts are presented in the same paragraph even if appropriate distinctions will be made.

In general, all aspects of the formation of the government, as well as those concerning its term in office and the reasons for its termination, are inspired by the imperative of stability, which seems to be an almost absolute priority. As regards the formation of the Government, it is contained in Articles 154 and 155 of the Constitution and consists of three procedures, the first of which provides for the role of the President of the Republic and the *Sejm* at the same time. The former appoints the Prime Minister and, on his proposal, the ministers. This safeguards an important presidential prerogative, but one must also take into account the fact that, within fourteen days of the formation of the government, the latter is required to go to the *Sejm* to obtain its confidence, by a majority vote in the presence of at least half of the members thereof. The rationalised parliamentarism nature becomes immediately evident here. The initiative passes to the *Sejm* if it has not been possible to form the Government according to this procedure, or if it has not won the confidence vote. In this case, according to the first fallout procedure, it is

the duty of the lower house to form and vote for confidence to a Council of Ministers according to the same rules described above. Only ultimately, if the Government formation fails even according to this second procedure, the word passes back to the Head of State, who this time appoints the entire Council of Ministers according to his own intentions, while the *Sejm* votes for confidence this time by a simple majority. Assuming that even according to this last procedure the formation of the government has not been successful, the President is required to "shorten the term" of Parliament by calling early elections.

More interesting, from the point of view of the oppositions, are the methods for interrupting the confidence relation. In reality, apart from the physiological circumstance of a change of majority following parliamentary elections, the only legal way to obtain termination of a government office is also one which provides for a fourth alternative procedure for the formation of a cabinet, through the expression of a constructive vote of no confidence, provided for by the 1997 Constitution (Art. 158) similar to the model of the German Basic Law and which draws inspiration from a doctrine of the 1920s of the last century. A quality difference with the German archetype lies in the collegiality of the interruption of the confidence relationship, analogous to what happens with its establishment. The motion of no confidence must be submitted by a minimum of 46 deputies, equal to one-tenth of the Chamber, must indicate an alternative Prime Minister, and be put to the vote at least one week after its presentation. The motion can only be approved by an absolute majority of the members of the *Sejm*. The ministers of the incoming government are always indicated to the President of the Republic by the new Prime Minister. This is a provision that gives the parliamentary opposition an obvious chance to become a majority, even if this one is weakened by the significant number of deputies who must sign the motion, such as to prevent at least unrealistic operations carried out by marginal circles of the assembly, apart from the well-known limitation which imposes prior agreement on a name, and probably on an alternative government structure. Add to this a further limitation for the oppositions, not known in the original German, whereby a subsequent motion of constructive no-confidence can only be put to the vote after at least three months have elapsed from the previous one unless it is signed by at least 115 deputies (Pastuszko 2014: 29). It must also be considered that in the Polish context, the provision of an absolute majority of the members of the *Sejm* to distrust a cabinet and appoint a new one is a rather high majority. On the other hand, the week that must elapse between the filing of the motion and its putting to the vote is a further penalty for

those who want to replace the government, because it can leave the latter time available to regroup its majority and save itself.

On the one hand, what has been stated so far highlights the concern voiced by the constitution-makers for the risks of instability, on the other it certainly does not facilitate the task of the opposition[8]. At first glance, the institution seems connected to the idea of a change of majority, perhaps by a junior partner of the original coalition, as happened in Germany in 1982, but it is not sure that it must be the case, even more so within a party system which at the moment appears, for better or for worse, relatively stabilised. This is the situation in which the role of the opposition could be maximised, to the point of making them crown their desire to take power. The concrete experience of this institution, in Poland, was even less successful than elsewhere. Attempts to resort to this vote were sporadic, and only one was successful, in March 1995, even before the current system came into force and under the force of the provisional 1992 Constitution. In any case, the Government replacement was not the result of any change in the majority that concerned the opposition, but a process that took place within the centre-left SLD-PSL majority itself.

In addition to the collective constructive no confidence, there is also the individual no confidence in a Minister (Art. 159). Individual no confidence only entails the obligation of the President of the Republic to revoke the Minister who received the negative vote. Apart from the different number of subscriptions (69) to start the procedure (introduced with a last-minute amendment, without justification and in an incomprehensible way: see Mojak 2007: 587), otherwise it is very similar to the collective one concerning the Council of Ministers, including the absolute majority of deputies necessary for approval. Therefore, the considerations to be made regarding the (scarce) chances that such a provision attributes to the opposition in the *Sejm* are analogous.

In addition, criticism of the dysfunctionality of such an institution should also be taken into account, since it seems to refer to the idea of an assembly Government in which all the offices are the direct emanation of the

[8] This is highlighted by Patyra (2002: 132), who even notes that, under the Rules of procedure, during the debate on the constructive motion of no confidence the only incumbent the Prime Minister is allowed to make a speech, unlike the candidate to that post who is mentioned in the constructive motion of no confidence (unless he is himself an MP, and in that sole capacity); and concludes (139) that «in Polish practice the institution of a vote of no confidence, which is a weapon of the opposition, in enforced exclusively by the initiative of the parties establishing and formally supporting the Government».

legislative, and it is not entirely compatible with the collegiality and unity of direction of the Council of Ministers.

It can then be observed that a vote of no confidence in a single Minister, while certainly not entailing the collective fall of the Government, nevertheless can be the symptom of its incipient political decomposition. In the concrete experience, on the other hand, the individual no confidence vote is submitted much more often than the collective one, and this was also repeated in the last two terms dominated by the PiS, when the targets of this procedure were above all the Minister of justice Ziobro and the Minister of public education Czarnek. Once again, however, the said experience highlights how little the chances are for such a vote to go through, in the presence of a coalition that maintains a minimum of compactness. With numerous individual votes of no confidence, all failing regularly, the opportunity was used for a bit of political "show" by the opposition and nothing more. Conversely, the rejection of an individual vote of no confidence can reunite the Government and strengthen its stability, and above all strengthen the personal status of the affected Minister. There may be some chance of success in the event of a minority cabinet – an event which is also envisaged by the Constitution but which has not occurred in recent years – precisely because individual no confidence does not presuppose the identification of an alternative minister, it is not therefore constructive.

The Polish Constitution (Articles 198-201) has provided for a complex form of criminal-constitutional responsibility for a very vast series of subjects, including the President of the Republic – who always remains politically not responsible –, the Prime Minister and all members of the Council of Ministers. In the due distinction from political responsibility, put in place through the previously mentioned channels, the forms for activating this procedure are different, but all of them are settled by a specific body, the Tribunal of State, according to methods established by an act of Parliament originally dating back to 1982 but then almost entirely modified in the early years of democratisation.

Actions and behaviours that can lead to a possible indictment before the Tribunal of State consist in violations of the Constitution and the law, and the Tribunal of State can impose a series of sanctions which – not without skepticism in the legal scholarship – can also include prison sentences, even if only for crimes committed by convicted subjects in the exercise of their respective functions and never for common crimes. Without going into the merits of the articulated internal parliamentary procedures, to start an investigation against all the bodies indicated by the act on the Tribunal of State of

1982 – amended several times after democratization –, the latter establishes that the impeachment for the Head of State must be voted by a majority of two-thirds of the members of the National Assembly (*Sejm* and Senate in joint session) (Art. 13.1 of the law on the Tribunal of State), while for the impeachment of the Premier or of one or more ministers, a majority of three-fifths of the members of the *Sejm* alone is required (art. 13.1.b).

Polish legal scholarship is divided on the matter. If on the one hand, such an articulated form of responsibility is considered an important component of national constitutionalism, with traditions that date back at least to the interwar period, on the other hand, critical remarks are made which are the ones that most pertain to this study. The preliminary procedural obstacles and above all the required deliberative majorities – in this case truly qualified and high – further reduce the possibility that such a form of responsibility can be activated even in cases of strong alarm, to the point of forming a barrier that protects the majority from the risk to be effectively called to answer for serious constitutional crimes (Granat 2005: 141. On the other hand, it should be also considered that this form of responsibility is somewhat subsidiary to ordinary criminal procedures before the common courts).

In short, there is no getting away from the contradiction whereby the limitation and control of a majoritarian political power by an impartial judge under a fair trial can only be implemented through a majority mechanism, and indeed qualified majorities – in this case justified by the gravity of the decisions to be taken –, if imposed to act and not to resist an action, prove to be a further restriction for minorities, and therefore for the oppositions; and this precisely where their crucial role – although certainly not the ultimate judgment – should be more valued. Above all, one does not get away from the partisan connotation of decisions that should be placed above this type of controversy. The result is an institution that, at least for the time being, remains unused and appears almost relegated to oblivion, although sudden developments, even of great significance for the future, cannot be ruled out.

The procedure for impeaching members of the Government, or even the Head of State, can also start from the findings of a parliamentary commission of inquiry, which has already been mentioned. The powers of the commissions of inquiry in the Polish legal system are theoretically considerable, also given the explicit constitutional recognition (Art. 111) and there is no doubt that this activity falls fully under parliamentary control. The most sensitive part of the doctrine in Poland has long warned that since in principle all the institutions of parliamentary law are based on the majority principle, the minority must «content itself» (Banaszak 2010: 94) with the tools that the law makes

available to them, the first of which is undoubtedly this type of commission. While endowed with significant powers, its object of investigation must be limited to the general scope of parliamentary oversight of the Government, without being able to extend to aspects of social life that are not immediately provided with this characteristic. A vision that has been confirmed more than once by the Constitutional Tribunal since the early years of the current Constitution (see Constitutional Tribunal, judgments K 8/99 of April 14, 1999, in which the constitutionality of the Act on the Investigative committees was declared in general; and U 4/06 of September 22, 2006, in which, on the contrary, some attributions of a specific investigation commission on the banking system were declared illegitimate as they were too wide-ranging).

These commissions experienced great vivacity in the early 2000s (especially the "Rywin" committee, which brought about the fall of the leftist government – SLD-UP – chaired by Leszek Miller), above all thanks to the strength of the then opposition, but their impact capacity has been greatly reduced in recent years and above all since 2015, when they seemed above all a tool of the political majority to censor the activities of the previous majority, and currently the opposition.

The importance attached to the "creation" activity of the Parliament, and especially of the *Sejm*, could not be overestimated. Indeed, the legislative Assemblies of Poland, apart from the relationship with the Government, carry out many activities which allow many other public bodies to take office, or sometimes may even force them to resign. By choice of the framers many of these tasks are performed by the *Sejm* alone and – sometimes by choice of statute law – these choices take place by a mere majority of votes, which, once again, decreases the role of oppositions. Without going into too many details, and only in order to give an idea of how different systemic choices matter, all fifteen judges to the Constitutional Tribunal are elected by the *Sejm* and a mere plurality of votes is (very critically) sufficient. At the same time, the Commissioner for Citizens' Rights (or Ombudsman) is also appointed by the *Sejm*, but this vote must be confirmed by consent from the Senate (Art. 209 Const.). It follows from that in the course of a few years the Law and Justice (PiS) party monopolised all 15 positions in the Tribunal – meeting only a slight resistance from its much minor partners – whereas it could not do the same with the Ombudsman, a public office which is highly appreciated in Poland. After trying several times to force the election of its own party loyalists, PiS finally had to agree on a compromise candidate who was also acceptable to the opposition(s), as they could exercise a veto in the Senate since the end of 2019 when they won a majority there.

From a normative standpoint, the foundations for the control function in the strict sense are provided by Art. 95.2 Const., according to which «the *Sejm* exercises control over the activity of the Council of Ministers within the scope defined by the provisions of the Constitution and the laws». Beyond an abstract formality that emphasises the otherness between the Government and the parliamentary Chambers, it has been appropriately noted that it is the existence of the oppositions that gives a political nature to this control activity (Sarnecki 2014: 126).

In any case, in Poland, as in any other parliamentary democracy, difficulty has been encountered, at least in some cases, in drawing a clear line of demarcation between the control function and other functions, since some inspection activities fall within these: for example, some features of supervision of the executive can derive from a law resulting from the law-making function. The aforementioned provision mentions only the *Sejm*. Although the opinions of Polish constitutionalists are divided on this matter, most of them believe that this does not mean that even in the Senate some limited form of control over the activity of the executive is jeopardized, but that ultimately the clear distinction of the *Sejm* also in this respect it is connected to the fact that only the latter is responsible for decisions on the life of the government, which makes it clear how much control over the executive is connected to the definitive consequences in the form of political and constitutional responsibility, which only belong, as known, to the lower Chamber (see the controversy between two authors about the possible oversight powers of the Senate: Sarnecki 2002 and Garlicki 2002).

Legal doctrine distinguishes three dimensions within which the activity of control can be carried out in the broadest sense: the one which takes place in the plenary hall of the *Sejm*, the one which is carried out in the commission, and finally the possibility for each deputy to exercise such control in autonomy. But this last, subjective aspect is connected with somewhat differentiated forms of controls on the executive. It is almost intuitive how the first two dimensions, being collegial, being governed by the majority principle, make the role of the oppositions almost negligible and can only function on condition of assuming the most genuine distinction between bodies as a justification for the control of one over the other, irrespective of party lines. In the perspective that interests us here, therefore, only the control activity carried out by individual deputies remains, which is also very vast. It is primarily regulated by art. 115, which reads «1. The Prime Minister and other members of the Council of Ministers shall furnish answers to interpellations and Deputies' questions within 21 days. 2. The Prime Minister and other

members of the Council of Ministers shall furnish answers to matters raised in the course of each sitting of the *Sejm*».

The development of these provisions consists of some substantial articles of the Rules of Procedure of the *Sejm* (191-196). The most solemn form of individual control is one that consists of interpellations (Art. 192) which can be carried out on questions of fundamental importance concerning state policy. They are presented in writing and transmitted by the Speaker of the *Sejm* to the member of Government who is the recipient. The answer must be sent within 21 days, also in written form, but there are no debates in the sessions of the *Sejm* on the answers to an interpellation.

Current information is also established (Art. 194), with which an individual deputy or even a group can ask a member of the Council of Ministers for information on an issue, but they are subject to a decision, made by the Presidium of the *Sejm*, which of the submitted proposals for information is accepted and will be considered at the next sitting of the *Sejm*. This is followed by the deputies' questions (Art. 195) which may be lodged concerning matters of individual nature, and finally «questions on current issues» (Art. 196) which are to be posed orally during each sitting of the *Sejm* and directly answered during the sitting itself. The orality of the questions on current issues is the reason why they have proved to be more politically attractive for members of Parliament, given their possibility of media exploitation in search of popularity. Among these forms of parliamentary oversight, interpellation is the one that refers to a long-standing twentieth-century tradition, essentially reproducing the institution in force in the twenty years between the wars, at least until the authoritarian turn of 1935. Deputies' questions, on the other hand, were instituted in 1972, back in the socialist period. However, the use of both of these tools, before 1989, was very sporadic, and only after the Parliament elected with the semi-free elections in June of that year did their use become almost daily, proving the almost decisive connection between these means of control and the existence of an opposition, if not from a legal-formal standpoint certainly under the practical aspect.

In any case, the effectiveness of all these control tools, even more than fiduciary mechanisms or criminal-constitutional liability institutions, is entrusted to the culture and institutional sensitivity widespread in a country and also to its evolutions or involutions over time. In Poland, from this point of view, the general consideration made regarding the constitutional decay of recent years is even more valid.

6. Conclusive remarks in a context of radical deterioration

What has been said so far takes into account first of all the normative data, as it is right to do in a legal analysis with a high political value in which even judicial case law plays only a marginal role. In this concluding paragraph, however, it is essential to address the issue of constitutional degeneration that has involved Poland since 2015 up to the time of writing. It is not easy to do this, in part because the most macroscopic aspects of the democratic decay of recent years have primarily affected institutions such as the Constitutional Tribunal, the National Council of the Judiciary and the Supreme Court, in addition to striking at some aspects of civil liberties, while reverberated only indirectly on the system of government, in part because the regime change in the functioning of Parliament, and above all its qualitative consequences on the status of the opposition, took place *de facto*, due to changes in some customs and internal conventions, with negligible modifications on the constitutional, legislative, regulatory level[9], and have been as perceptible in concrete life as difficult to document (and for some reason very little covered by the legal doctrine, unlike the problems mentioned above)[10].

The methods of transformation were peculiar and different, for example, from those of Hungary. In Poland, Law and Justice did not have a qualified majority to amend the text of the Constitution or write a new one, but it was able to take advantage of regulatory flaws in the selection of judges of the Constitutional Tribunal to totally take over this institution, only to fully capture it in a way which is partially illegitimate (as regards three out of fifteen members), but otherwise is perfectly legal and indisputable. Thus, the way was opened for virtually unlimited legislative choices, but, as mentioned, the regulation of parliamentary activity is one of those that has been least affected by this change.

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[9] However, it is worth mentioning the amendment of the Rules of procedure of the *Sejm* of 20 July 2018, with the addition of Articles 20a and 20b and the change of Art. 23, which allow the Speaker of the *Sejm* to ascertain, respectively, the damage to the authority of the body due to the behaviour of a deputy, the violation of public order always by a deputy within the circles of the institution, and to impose pecuniary sanctions for such conduct – by the *Prezydium* – up to half of the total remuneration, for a period not exceeding three months: see A. Rakowska-Trela 2020: 867. The change arose following some objections from opposition MPs.

[10] But Bugarič (2019: 600) noted a greater reactivity of the oppositions in Poland as opposed to Hungary, which seems still true at the time of writing.

Some aspects on which the status of the oppositions has been mortified deserve to be briefly outlined, beyond the limited changes to the normative system[11]. In the first place, the law-making process was subjected, whenever this corresponded to the interests of those in power, to an unusual acceleration (legislative fast-tracking) also favoured by the use of a technique already consolidated in Hungary. We are referring to the submitting of a large number of bills in the form of (only formally) parliamentary initiatives, which – as already allowed by the Rules of procedure – avoided lengthening the times with committee hearings open to other institutions, non-governmental organizations, and so on. These are often technically elaborate initiatives on complex subjects, such as the organisation of the courts of justice or the prosecutor's office, in which the trace of governmental activity is evident.

In addition to this, the speaking times of deputies – it must be understood, of the opposition – have often been limited to the minimum during debates in the plenary session and in the commissions, and sometimes the chairman of some of these, especially the justice commission, has literally turned the microphone off to MPs who were critical of the bills being discussed. Among the most sensational episodes, we note one of the 8th term (2015-2019): on 16 December 2016, following some protests by the opposition in the plenary Chamber of the *Sejm* during the discussion of the budget for 2017, the works were interrupted by the Deputy Speaker and subsequently transferred to the Column Hall, where it was made difficult for some deputies to participate (and votes are counted manually, in the absence of electronic tools available in the main hall, even in doubt as to the presence of a quorum. See Rakowska-Trela 2020: 863 and Sadurski 2019, 132-135, where a massive response to claims such as those under the previous note is provided). The conflict escalated into a court case in

[11] For the sake of completeness, an opposite approach to the subject matter is presented by Machelski (2021: 234). According to this minority opinion, no problem exists since «(e)lections take place regularly, without any restrictions such as those concerning gatherings and the media or the de-legimitisation of the opposition, while the latter tries to undermine the legally established government majority by negating the acts adopted by the *Sejm* and by questioning in courts the decisions taken by the organs of administration«, adding that «(t)he opposition is concentrated on an ideological message. Despite intellectual ambitions, its programme proposal is based on stereotypes and the superficial», whereas «(t)he centre-right parliamentary majority governing after 2015 is not undermining the democratic system. It does not come forward with any conflicting postulate therewith. The Government does not suppress pluralism in the media; it does not control all aspects of governing the state; it is subject to constitutional limitations. Public institutions were not colonised by the political authority. They are not dismantled but under the process of reform».

which the judge (Igor Tuleya) was subjected to a crackdown by the executive (see Morijn 2020).

In the 9th term, however (2019-2023), the most striking cases – at least two of them – were those in which the Speaker of the *Sejm* ordered to repeat the vote, without any normative justification, after the Government lost a vote. One episode occurred in November 2019, during the election of four supplementary members of the National Council of the Judiciary (KRS), the second in August 2021 – and better known in the news at least nationally – in the vote on the so-called *lex* TVN, which has already been mentioned in § 4. Indeed, in these cases it was not about a question of macroscopic oppression of the parliamentary minority, but rather of episodes in which the governmental power, and the dominant party, exhibited their unchallenged ability to impose their will almost at whim. More generally, considering the functions of parliamentary control over the Government, as an index of the weakening of Parliament – where the oppositions are formally represented – one can also evaluate the number of days dedicated to parliamentary sessions each year, which has been decreasing significantly in the last fifteen years but with a growing trend lately[12].

An attempt was recently made to show how in recent years the status of the opposition has somehow enhanced, although paradoxically (Matuszek 2022). Even acknowledging the questionable constitutionality of certain legislative solutions, it was found that, for example, the Act on the Council for National Media (*Rada Mediów Narodowych*), of 2016, has for the first time offered to the oppositions an explicit and formal recognition, by granting them two out of five members that make up the body (the two of them must be appointed by the Head of State). Moreover, the Electoral Code was amended in 2019 in such a way as to make sure, as much as possible, that four out of nine members of the National Electoral Commission (*Państwowa Komisja Wyborcza*) – with high legal qualifications anyway – represent groups from the parliamentary opposition, by preventing the biggest party from appointing more than three. One could say that such legislation offers recognition to the opposition by freezing their minority status not only in parliamentary Assemblies, where politics triumphs but also within bodies which should respond to another logic. What is worse, in the first case it was also about doubling the tasks of an already existing institution, the National

[12] According to the statistical data processed by the official website of the *Sejm*, in the last fifteen years the number of annual plenary session days was as follows (average by legislature): VI (2007-2011), 73.5; VII (2011-2015), 73.2; VIII (2015-2019), 56.2; IX (2019-2023, excluding the current year), 52.3.

Council for Radio and Television, directly empowered by the Constitution, in which the largest single party still could not reach a dominant position (and by the way the new body paved the way for exacerbating the dominance of the ruling party in the public media system in an unprecedented way). In the case of the Electoral Commission, the amendments crushed the previous composition, dating back to the early Nineties, according to which the body consisted of nine judges, all of them taken from the highest jurisdictions, namely the Supreme Court, the Constitutional Tribunal and the Supreme Administrative Court, whereas now the judiciary appoints only two of nine members (thereby destroying a good practice of electoral administration on a comparative level). Thus, it is allowed to conclude that the involvement of the opposition was a *façade*, whose true purpose was the politicisation of important State organs which should be and remain neutral.

The clearest evidence of the conditions of compression in which the opposition has found itself ultimately comes from the very institution that seems the most appropriate to protect its role, as well as to defend the interests of those who are represented by it. We refer to the direct application to challenge the constitutionality of acts of Parliament, provided for by Art. 191.1 Const., which is also granted – as already mentioned in § 4, which would have been the most appropriate for discussing it – to a minimum of 50 deputies or 30 senators. The list of bodies entitled to make such an application under Art. 191 is very broad, and in some cases suggests a kind of opportunity which is offered primarily to State bodies who express the will of the majority.

On the other hand, even the possibility attributed to a large number of deputies or senators does not necessarily have to be traced back to the opposition as such – as demonstrated by the case of the last parliamentary term, when judgment K1/20, of November 2020, was rendered on an appeal by a group of deputies of the majority PiS party, as a move to achieve the goal of almost completely suppressing the right to abortion without risking the unpopularity of a decision based on a parliamentary vote, a decision which was instead entrusted to the quieter environments of a judicial body. All this said, and beyond instrumental uses, it remains true that an application available to a small fraction of members of Parliament is the best way to also (and above all) allow the opposition to access an abstract judgment of constitutionality on a binding legal act.

The fact is that, in the present situation, it is an outdated institution. The capture of the body entrusted with the task to control the constitutionality of statute law, which has now taken place in total form, has led, among other

things, to such distrust in the body itself, as to determine a real escape of the oppositions from the opportunity to resort to it, just at a time when the opportunities to do so would be countless. The Tribunal itself has set aside any function of protection of any type of minority through its powers since all methods of access are in fact deactivated. Apart from the occasional rubber-stamping activity for government decisions, the body itself is almost inactive.

The current status of the oppositions is somewhat compressed and yet is maintained in part thanks to a rather active public opinion and civil society, but otherwise it is entrusted to the whims of the executive, and the latter's will not to crush them completely, certainly not to its impossibility to do so. In part, the reactions of the European Union also count, through economic conditionality or the weight of some judicial decisions. But ultimately the future fate of democracy in Poland will be determined by the population itself. If the conditions of the current regime will change, then even the opposition will be returned to a status of dignity at least equal to that envisaged by the text of the Constitution and by its spirit.

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