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RIVISTA DI
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Editorial
Foreword to a study on political and legal status of opposition in Europe, the Western Balkans, and Beyond*

Roberto Louvin

Pasquale Viola

The genesis of the interest in the special issue "The Political and Legal Status of Opposition in Europe, the Western Balkans, and Beyond" is quite multifaceted and difficult to abridge in a single event, theoretical speculation or individual concern. Such a difficulty also emerged during a workshop for assessing the leading theme, the whole structure, the specific field of study, and methodology[1]; as an outcome of the presentations and the discussions, three basic issues arose: 1) it was quite impossible to address 'oppositional behaviours' uniquely through strict and formal legal studies, unless accepting the risk of limiting the object of the study and, more likely, reducing contributions to compilations of norms and rules of procedure, thus offering poor or little theoretical substance; 2) even after decades of scholarly debates, legal studies lack a conventional definition of the basic features of political systems, especially regarding the opposition (which may be, for instance, parliamentary, political, extra-parliamentary, social) and the concept of 'democracy'; 3) oppositional behaviours develop through a transversal pattern, following different perspectives depending on the strategic vision of the different political actors, especially when it comes to minorities marked by specific ethnic, religious or national features. It was quite perceptive, however, that such difficulties were just different standpoints from looking

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[1] International Workshop 'The Political and Legal Status of Opposition in Europe, the Western Balkans, and Beyond', Department of Political and Social Sciences, University of Trieste, 4 April 2024.

at contemporary issues in a more comprehensive way. Thus, interdisciplinary methodology and critical approaches are the backbones of the following pages.

As far as interdisciplinarity is concerned, although the need of relying on the comparative public law tools (especially looking at the constitutional space), contributions enclose insights on historical aspects, contemporary political phenomena, analytical evaluations on regional (supra-national) and domestic trajectories, having the manifold and multidimensional concept 'opposition' as compass. The authors' acceptance of 'opposition' as leading theme opened up to a series of scholarly evaluations on terms that are daily used in legal studies, as already mentioned, but the heterogeneity fostered new appraisals and nurtured curiosity on a 'fictitiously easy concept' to grasp with – which will be briefly discussed at the end of this Editorial.

About the structure, it is conceptually divided into three main areas: a first part on European experiences sharing a generally common tradition with regard to politics and 'oppositional practice', but with some specific features (France, Spain, Switzerland, United Kingdom); a second part encompassing cases from South-Eastern Europe that outline the transition processes towards the EU standards (Western Balkans in general, Serbia, Montenegro and Albania). The third part is less intuitive in its understanding and might be superficially addressed as the result of a 'cherry-picking mistake', but is an evidence of how the main topic of this special issue attract discussions on contemporary political issues. In looking outside Europe, and in the light of recent economic and political events, the leading role of BRICS countries suggested a further space of investigation, thus, the will of analysing the experiences of Brazil, India and South Africa, while excluding those of China and Russia due to the need to cope with the difficulties in finding a common theoretical groundwork—but also in this case problems left for chances, aiming at working, in the next future, on oppositional behaviours in authoritarian systems. Furthermore, the contributions on India and South Africa focus on minorities as founding elements of a broad concept of opposition within, respectively, the constitutional system and local governance.

The first contribution, "Opposition and minority groups in the troubled waters of the French National Assembly", critically addresses the recent recognition and the development of a proper scheme for the opposition within the French constitutional system after the 2008 constitutional amendment, with a focus on the National Assembly's rules of procedure and the role that minority groups play according to the political system, even defining some non-standard prerogatives as a symptom of an 'unstable health' of the constitutional order.

Manuel Fondevila Marón, in "The parliamentary opposition in Spain: Theory and practice", offers a general assessment on the role of the opposition in Spain. After evidencing the lack of a proper legal statute for opposition, the contribution exposes the main elements composing the 'toolbox' that frames opposition's prerogatives, especially in reference to the oversight on the government and the interconnections with the constitutional review of legislation. The subsequent part adopts a more critical

approach digging into issues arising from the lack of harmonisation between different forms of coordination, also addressing the impact of the novel arrangement of the party system and issues arising from polarisation and fragmentation within the Spanish political ground.

Nicolò Paolo Alessi's "Consociational systems and the role of opposition: The case of Switzerland" moves from a critical understanding of consociational systems (defined as oppositionless) forms of government, focusing on the lack of political alternance in Swiss politics. To this end, it moves from Lijphart's definitions of consociational and consensus democracy, based on four elements, namely 1) a grand coalition cabinet; 2) segmental autonomy; 3) mutual veto rights; 4) proportional representation. Such features provide a strong impact on plural social groups through an inclusion/exclusion logic which may undermine minorities, thus, the article addresses some 'remedies' within the Swiss system, focusing on direct democracy and the 'pluralisation' of the Swiss system.

One of the most interesting cases regards the concept of 'opposition' under subjective features. The contribution by Enrico Andreoli, "A 'variable-geometries system'. Theory and practice of opposition in the UK", analyses one of the most important experiences in reference to the opposition within a constitutional framework, mainly referring to the subjective structures and the specific institutional design. After outlining the opposition and its increasing institutionalisation in recent times, the article addresses two basic 'dimensions': 1) the status of the opposition within the constitutional architecture; 2) the 'procedural' aspects involving constitutional guarantees within a pluralistic political system. The following parts underlines the opposition as the alternative of the government within the British system and the extended (or decentralised) concept stemming from it. Within the conclusion, the metaphor of 'variable-geometries' explains two basic issues of the contemporary system in relation to the government-in-waiting and oppositional actions by extra-parliamentary forces.

In "Parliamentary opposition in the Western Balkans – A mixture of political, ethnic and religious components", Silvo Devetak offers several insights from his decades-long experience in studying, analysing and interpreting ex-Yugoslavia's selected countries, namely Bosnia and Herzegovina, Montenegro, North Macedonia, Kosovo, and Serbia. Taking into account the last two election rounds within the aforementioned systems, the contribution focuses on democratic functioning of parliamentary opposition in Western Balkans under five specific elements: a) developed democracy and efficient functioning of the political system; b) guarantees related to rights of free association and expression, avoiding forms of discrimination; c) the rule of law, d) equal access to media, e) a suitable electoral legislation allowing people to express a vote with a proper awareness.

In "Democratic functions of the political opposition in the 21st Century Serbia – Standards with tiny roots", Tamaš Korhecz analyses the trajectory of the Serbian political system and critically addresses some contemporary practices in reference to

the position and functions of opposition. Moving from the introduction of liberal democratic features (i.e., multiparty political system, political rights, separation of powers, market economy) during the Nineties, the essay explores the history of the multiparty system and the legal framework devoted to organise and regulate political opposition, with the aim of highlighting 'measures and techniques' that political parties considered and used as tools to marginalise and frustrate the political opposition: a) domination, control and exploitation of public institutions and resources; b) control over media and domination in media; c) distortion of local elections and local democracy.

The contribution "Integration and (political) opposition in the light of the EU enlargement to South-East: The cases of Montenegro and Albania" analyses the concept of 'opposition' in theoretical terms, also taking into account the EU enlargement process to the Western Balkans and the EU standards in reference to the democratic machinery. The contribution subsequently recalls the EU Commission evaluations on opposition and democratic features of Albania and Montenegro, to highlight the need of a definition of the opposition that takes into account the need to further develop its basic features in order to design a novel subject into the constitutional order.

The 'beyond Europe' (or BrIcS) part starts with the contribution "Democratic constitutionalism in Brazil: Participation, polarization and opposition in a crisis context" by Milena Petters Melo and Thiago Burkhardt. After outlining the novel and transitional setup offered by the entry into force of the 1988 Constitution (e.g., with regard to plural subjectivities, entitlement of new rights, representation, legal and political mechanisms for participation to the decision-making processes, etc.), the analysis addresses the impact of polarisation on constitutional democracy to further explain the fundamental role that dissent plays both as a dynamic element of constitutional democracy and as an expression of democratic resilience.

Domenico Amirante's "The Indian Constitution in defence of democracy and multiculturalism: Pragmatism, flexibility and hybridisation" offers tools to Western legal scholars for avoiding easy and/or superficial assessments on the Indian constitutional system and democracy, asking for an effort to go beyond a contemporary events' appraisal (India general election of 2024), for nurturing a broader portrait of the biggest—in quantitative terms—democracy in the world. The essay starts explaining the political and strategical role that India is currently undergoing through at regional and global levels, to briefly provide an account on the Indian Constitution and highlighting three features, namely pragmatism, flexibility and hybridisation, that are theoretical tools for the understanding of Indian democracy and constitutional machinery.

The contribution "Disruptive (party) politics and the constitutional environmental mandate: The case of South African municipalities" by Nonhlanhla Ngcobo highlights the interconnections amongst three subjects—i.e., local government, environment, politics. It starts introducing local governance's framework

after the entry into force of the 1996 constitution and the transitional period which affected state structures, subsequently portraying the country's environmental law framework and the relevant duties, powers and responsibilities for local governments, to further highlight the political practices that affect the capabilities for oppositional behaviours.

From this journey through a very complex topic, both a few conclusive appraisals and many insights for further investigations emerged. At first, we should underline once again that in legal studies there is no accepted, universal and valid-for-all definition of 'opposition', unless in those cases that embraces a subjective concept of it. Although references to formally recognised minority groups might suggest a common theoretical ground, the discourse always shifts towards functions that have—or should be—performed in terms of rights, duties, prerogatives, etc. Oppositional behaviours appear to be the common ground for a tentative definition of opposition that might be suitable for legal scholars, but many difficulties suggest opting for a less strict definition of it. The contributions confirm the contemporary attitude towards polarisation and a little space for interventions through constitutional apparatuses; in other words, it seems that the constitutional order (the legal space) frames oppositional behaviours (the political space) and provides little in subjective terms, nurturing and generally developing scholarship on rights and duties related to all aspects regarding opposition (i.e., oppositional behaviours). Furthermore, after the initial legal intervention, oppositional behaviours' regulation is usually left to politics, yet with a strong influence by the political system.

Our investigation has led us to seriously question the irenic view of politics and the interpretation of parties as fair means of consensus building. As Ronald Dworkin already stressed, true democracy does not exist if the members of a political community do not consider individuals as equals in a sense that goes far beyond formal political equality, since they must also express equal concern and respect for each other's autonomy. A democracy should contain in its rules and structures of government provisions that guarantee this high form of equal concern and respect, even at the cost of disempowering a majority. Rarely, however, do the forces in power consent to such self-restraint, and the dominant trend is the radicalisation of political hostility.

The opposition remains fundamentally underestimated in its role as a legitimising force of power in office, though, legal scholars remain aware that every norm is a double-edged sword that acts as both a limitation and an incentive. One of the most stimulating outcomes resulting from this study is the acceptance of a *boucle étrange* between politics and the law, between the legal and political systems; thus, further explorations are essential to provide a strong account on the legal status of opposition, especially if we look at it through the lens of different political regimes.

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About the Editors

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Rivista di
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Opposition and minority groups in the troubled waters of the French National Assembly *

Roberto Louvin

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1. *Introduction*

Parliamentary assemblies are a core element of the common constitutional tradition of European countries. Although they have developed in different ways in each country, there are considerable similarities in their dynamics and the topic of parliamentary opposition is gaining a proper space in recent legal studies[1]. Within this framework, the gradual recognition of the status and special prerogatives of parliamentary minorities in their opposition function has become a characteristic feature of the *jus publicum europaeum* of parliamentary assemblies.

The Westminster system marked Britain's consistency in strengthening a political system that established the exercise of limited power as the bedrock of constitutional government, in which Parliament itself was the guarantor of civil liberties. In continental Europe, on the other hand, although sometimes even older than the British parliament, parliaments were characterised by different features and for a long time they mainly acted as assemblies of states, expressing the particular interests of the corporations and voting according to the ancient tradition of the binding mandate. The decline of this type of parliament in absolutist continental Europe between the 17th and 18th centuries, especially in France, is very evident, despite their legislative powers.

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* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

[1] See A. Fourmont, *L'opposition parlementaire en droit constitutionnel, étude comparée*, Paris, 2019.

The traumatic break occurred in France with the fall of the *Ancien Régime* and the establishment of revolutionary institutions. The main change was the radical rejection of the imperative mandate and the exercise of constituent power by the National Assembly, which held a revolutionary constituent power in the name of the nation and established a new and legitimate regime.

Despite the centrality of the parliament in modern French history, with its multi-party system and its recurrent formulas of coalition government, France has not looked to the British model for a source of inspiration[2]. Rather, it considered as a suitable arrangement the one drafted in the United States of America.

The fluctuating French assemblies passed through the *Directoire*, the Consulate, the Empire, the Bourbon Restoration (with all due respect to Joseph de Maistre ...), the Orléanist monarchy of Louis-Philippe's Constitution of 1830, the Republic of 1848, the Second Empire and the Constitutions of the Third and Fourth Republics, with mixed fates. Throughout these events, the *Assemblée nationale* has always maintained the prestige of a legitimate representative of the nation, evolving from census to universal suffrage: the parliament and the constituency remain essential elements of the modern French form of government under the Fifth Republic, albeit with some peculiarities[3].

In contrast to the London Parliament, the French experience is constantly expressed in written form, which allows us to understand the constant oscillations of the Assemblée in the transition from autocratic rule to parliamentary forms of government. The elected parliament quickly became the absolute executor and guardian of a legality (thought to be synonymous with legitimacy) that did not tolerate external or superior control. The French response to questions of historical importance, such as the entry of the masses into parliamentary life and the claim of the welfare state, did not take the same form as the Weimar Constitution, but was expressed in the policies and government of the *Front populaire*.

In the post-war period, the crisis of the Fourth Republic revealed almost indelibly the weakening of the parliamentary opposition, in a general decline of the

[2] Montesquieu himself doubted the feasibility of these kind of legal transplant, since political and civil laws "must be so specific to the people for whom they are made, that it is a very great coincidence that those of one nation are suitable for another" (Montesquieu, *De l'esprit des lois*, 1745, L I, ch. 3). Similarly, Gunther Teubner remarks that when a foreign rule is imposed on a national culture, it acts as a strong irritant, triggering a series of new and supposed events: G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, in *Modern Law Review*, 1998, p. 12.

[3] Along the lines masterfully traced by G. Lombardi, *I Parlamenti in Europa e il costituzionalismo della democrazia, in Bibliografia italiana dei parlamenti nazionali dell'Unione europea*, Soveria Mannelli, 2003, pp. XVII-XXII.

original model that exposed the permanent instability and the difficulty of taking crucial decisions. The spectre of negative parliamentarism made it impossible to adopt the Westminster model, which requires a united and oppositional minority[4], in a political context characterized by a very high degree of factional fragmentation.

The ascendancy of the Presidency of the Republic, according to the scheme devised by General De Gaulle, obscured for many decades the role of the National Assembly, which became a mere chamber for ratifying the will of the majority gathered around the *Président de la République*, at least until the first experiences of cohabitation (Mitterrand-Chirac and Chirac-Jospin). This quickly led to a substantial 'domestication' of the parliamentary assembly and its total subordination to the executive, unlike in other neighbouring countries[5].

2. *The gradual development*

Almost seventy years after the adoption of the Gaullist Constitution, collective and individual guarantees for parliamentarians are now fully established in France. Moreover, the autonomous prerogatives of the opposition did not come immediately. A major constitutional reform was necessary because the legal regime established by the rules of procedure of the National Assembly was initially considered contrary to the Constitution[6]. It has taken many years for these guarantees to take shape, mainly thanks to the July 2008 reform by the Parliament convened for this purpose[7], with the new article 51-1, which now allows the rules of procedure of each assembly to define

4 A. Le Divellec, *Vers la fin du "parlementarisme négatif" à la française? Une problématique introductive à l'étude de la réforme constitutionnelle de 2008-2009*, in *Jus politicum*, 2011, n° 6.

5 Although all the parliaments of Western systems offer useful sources of inspiration, some authors point out that French, German, British and Italian parliaments are undoubtedly the reference parliaments: C. Vintzel, *Renforcer le Parlement français: Les leçons du droit comparé*, in *Jus Politicum*, 2017, p. 677 ff. For a broader perspective on this subject: Id., *Les armes du gouvernement dans la procédure législative : Étude comparée : Allemagne, France, Italie, Royaume-Uni*, Paris, 2011.

6 Especially to the first paragraph of Article 4 of the Constitution, as the *Conseil constitutionnel* adhered to the traditional equalitarian conception of French parliamentary law and therefore denying the legitimacy of any special status for the opposition. In the original text, dating from 1958: "Political parties and groupings contribute to the expression of suffrage. They are free to form and carry out their activities. They shall respect the principles of national sovereignty and democracy". It did not prescribe, differently from the 2008 amendment, the guarantee of the pluralistic opinion and the equal participation of all political parties and groups to the democratic life of the nation.

7 During these years, many authors spoke of a kind of "reparlementarisation" of the French political system, including J. Gicquel, *La reparlementarisation: une perspective d'évolution*, in *Pouvoirs*, 2008, p. 47 ff. and P. Avril, *Un nouveau droit parlementaire*, in *Revue du Droit Public*, 2010, p. 121 ff.

the rights of the parliamentary groups and, above all, to recognize that opposition groups can have "specific rights" for the opposition and the parliamentary groups[8]. Implementing constitutional norms has been slow and gradual[9]. Our analysis is limited here to the internal rules of the National Assembly, which in any case has some characteristics different from those of the Senate[10].

The basic idea of "A Guaranteed Place for the Opposition" at this turning point was to respond to the needs of a modern and responsible democracy[11]. It aimed to legalize the existence of a legitimate countervailing power, based on formal and written rules, regardless of the concerns of those who, paradoxically, expressed their distrust of overly detailed written guarantees that could prevent the development of a dynamic and political power such as the opposition.

However, if we look at the content of the current rights of the political groups, we must note that, behind the apparent neutrality and generality of the term "rights of the political groups", there is a wide range of specific and different rights which Art. 51 implicitly distinguishes between ordinary rights, i.e. rights granted to all groups, and specific rights granted only to the opposition and minority groups: the French doctrine has developed a classification of these differences[12]. It should not be forgotten, however, that the rules of the parliamentary assemblies must be submitted to the Constitutional Council before they can be applied, in order to verify their conformity with the Constitution. The Constitutional Council ensures that the new constitutional balance and the rights of all the political groups in the Assembly are respected. Nevertheless, the Constitutional Council has exercised self-restraint and limited its control in this matter to a minimum[13]. This caution and the reluctance of the

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[8] See A. Vidal-Naquet, *L'institutionnalisation de l'opposition. Quel statut pour quelle opposition?*, in *Revue française de Droit constitutionnel*, 2009, p. 153 ff.

[9] P. Avril, *Le statut de l'opposition: un feuilleton inachevé*, in J.-P. Camby et al. (dir.), *La révision de 2008, une nouvelle Constitution?*, Paris, 2011, p. 27 ff.

[10] J. Charruau, *Une spécificité sénatoriale: les «espaces réservés» aux groupes minoritaires et d'opposition*, in *Revue française de droit constitutionnel*, 2019, p. 285 ff.

[11] J.-L. Warsmann, Rapporteur in the National Assembly in 2008, on the constitutional bill that introduced the reform: *Rapport nº 892 fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi constitutionnelle (nº 820) de modernisation des institutions de la Ve République*, 15 May 2008, p. 54. For an assessment on the impact of the constitutional reform, see J.-L. Hérin, *Les groupes minoritaires entre droit et politique*, Pouvoirs, 2013, p. 57 ff. For further reading, see also P. Jensel-Monge, *Les minorités parlementaires sous la Cinquième République*, Bibliothèque parlementaire et constitutionnelle, Paris, 2015.

[12] A. Vidal-Naquet, *Les groupes parlementaires* (dir.), Paris, 2019.

[13] Decision No. 2009-581of 25 June 2009, Resolution amending the *Règlement de l'Assemblée nationale*.

Constitutional Court to interfere in the internal mechanisms of the Assemblée provides Parliament greater responsibility and strengthens the autonomy of the Assemblies themselves.

Since it is impossible to describe in detail the gradual changes that have taken place, the contribution simply outlines the current status of the opposition groups within the Assembly and describes the powers, in accordance with their function, to control and evaluate policies[14], in order to counterbalance the dominance of the majority (if there is one, we must add today...) at the legislative level.

3. Constitutional requirements

The premise of the rights of parliamentary minorities is Art. 4 of the Constitution: by entrusting political parties and groups with the task of expressing the will of the electorate (as an "*expression du suffrage*"), this article allows them to organize and freely operate within the principles of national sovereignty and democracy[15]. Moreover, it is also significant that this article stipulates that "the statutes must guarantee the expression of the diversity of opinions and the equal participation of political parties and groups in the democratic life of the nation". Art. 48, by establishing *de jure* a co-determination between the Government and the Houses in the setting of the agenda – two weeks out of four are reserved as a priority and in the order determined by the Government; during at least one sitting per week, including during extraordinary sittings, priority is given to questions from members of Parliament and to answers from the Government – establishes some special guarantees for the tasks of control[16], in particular for the minority and opposition groups. To this end, one day

[14] On parliamentary control in France, its emergence in constitutional history, its foundations, procedures and objectives, and in particular on the revolution in the exercise of this essential function by the constitutional amendment of 23 July 2008, see: P. Türk, *Le contrôle parlementaire en France*, Paris, 2011.

[15] Art. 4, par. 1: "Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy".

[16] One week out of every four sittings is reserved for the scrutiny of Government action and the evaluation of public policies, and at least one sitting per week, including during extraordinary sessions, is reserved as a priority for Members' questions and Government answers. It should be emphasised that the opposition minority's vocation is only very marginally legislative, which belongs to the government and (more incidentally) to those who support the government in a majoritarian parliament. In terms of oversight and monitoring, information gathering and inter-institutional dialogue, the contribution of the parliamentary opposition is likely to be more substantial: A. Fourmont, *L'opposition parlementaire, un feuilleton trop tôt achevé?*, in *Petites Affiches*, 2018, p. 24 ff.

a month is reserved for an agenda drawn up by each assembly on the initiative of the opposition groups and the minority groups. One of the tools available for the minority is the power to question the government's responsibility before the National Assembly by proposing a motion of censure signed by at least one tenth of the members of the National Assembly, as per Art. 49.3, which was much debated during the controversial reform of the pension system. In addition, any parliamentary group may issue a statement on a given subject and invite the government to submit a statement for debate[17].

A final general clause refers to the Rules of Procedure in order to precisely define the rights of the parliamentary groups set up within them, giving "specific rights to the opposition groups of the assembly concerned and to minority groups"[18].

4. A pivotal point: the referral powers (saisines) granted by the Constitution to parliamentary minorities

The different powers of referral that the Constitution reserves for qualified minorities of deputies or senators requires to be addressed in detail. The first refers to the case of exceptional measures taken by the President of the Republic to protect the republican institutions, national independence, the integrity of the territory or the fulfilment of international commitments, when they are seriously and immediately threatened, or the case of interruption of the regular functioning of the constitutional powers. Sixty Deputies or Senators may call upon the Constitutional Council to supervise if these exceptional conditions persist.[19]. The same number of members of Parliament may ask the Constitutional Council to check whether an international commitment contains clauses contrary to the Constitution or requires an amendment

[17] Constitution, Art. 50-1.

[18] This innovation was suggested by the Comité Balladur, the "*Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions*", a think-tank set up in 2007 by the President of the Republic, Nicolas Sarkozy, to propose a reform of the institutions of the Fifth Republic. The conclusions of its Report inspired the reform carried out in 2008.

[19] *Règlement de l'Assemblée nationale, Art.* 16, para. 5: «After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply»: *Règlement de l'Assemblée nationale, available at: https://www.assemblee-nationale.fr/dyn/15/divers/texte_reference/02_reglement_assemblee_nationale* (accessed on september 15, 2024).

to the Constitution[20], or even to give its preliminary opinion on the conformity with the Constitution of fundamental laws[21] or amendments to the regulations of the parliamentary assemblies[22].

A similar mechanism allows minorities to bring an action before the Court of Justice of the European Union against European legislative acts for alleged non-compliance with the principle of subsidiarity. This procedure is mandatory at the request of sixty members of the National Assembly or sixty senators.[23]. All these procedures are designed to activate external checks on the activity of the legislative body and have the indirect effect on forcing minority groups to cooperate in order to exercise these rights, thereby coordinating their action[24].

In a more active perspective within the legislative function, a referendum on a fundamental issue[25] can be held on the initiative of one-fifth of the Members of the Parliament[26], supported by one-tenth of the voters registered in the electoral roll. This is known as the 'joint initiative referendum' (a referendum can be called on the initiative of 185 deputies supported by 4.5 million voters, but this is an obviously hard task).

5. *Implementation by the National Assembly*

The Assemblée nationale rapidly took advantage of the opportunity provided by Art. 51-1 of the Constitution to strengthen the guarantees of the opposition, even if the process does not yet seem to have been completed[27]. However, the formalisation of parliamentary opposition has thus led to a composite and tricky status based on constitutional, legislative, jurisprudential and regulatory rules.

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[20] Constitution, Art. 54.

[21] It concerns government bills dealing with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which would affect the functioning of the institutions. Constitution, Art. 11.

[22] Constitution, Art. 61.

[23] Constitution, Art. 88-6.

[24] E. Thiers, *Les commissions permanentes de l'Assemblée nationale et l'élaboration de la loi de-puis 2008: une révolution très discrète*, in *Revue juridique Thémis*, 2014, p. 211 ff.

[25] *Supra*.

[26] Constitution, Art. 11, par. 3.

[27] P. Avril, *Le statut de l'opposition : un feuilleton inachevé*, cit.

It should first be noted that the Règlement de l'Assemblée nationale take up the distinction made in the French Constitution between 'opposition groups' (groupes d'opposition) and 'minority groups' (groupes minoritaires). This option was considered to be the most respectful of the freedom of each Member and rely upon a political declaration signed by the members of the group themselves: this declaration states if the group belong to the opposition. The document would then be published in the Official Journal[28] and this seems to be the best ways of informing the public in a transparent way about the political position of the group itself.

A parliamentary group may consist of no fewer than 15 members and its formal classification as an opposition group is based on an explicit declaration, which may be withdrawn at any time. The status of 'opposition group' confers many prerogatives, some can be exercised at the beginning of each parliamentary term and remain in force for the duration of that term (as in the case of appointments), while others are renewed each year at the beginning of the ordinary session. On the other hand, a minority group is a set that has not declared itself part of the opposition and does not coincide with the group with the highest number of elected members. Minority groups enjoy specific rights, some of which are the same as those granted to the opposition.

The political positions reserved for the opposition groups in the National Assembly decision-making bodies have increased and must now be granted on the basis of an agreement between the group leaders and on a vote, with the aim of maintaining a political balance of power[29].

The president of some strategically important commissions must also be a member of an opposition group in order to be elected[30] (as the president of the Special Committee for the Audit and Settlement of the Accounts of the Assembly[31]). The requirements of representativeness apply to the composition of all the bureaux of the Legislative Committees, which must reflect the general political set-up of the Assembly and ensure the representation of all its components, as well as respect for gender equality[32]. In the absence of its representatives within the bureau of the committees,

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[28] Rules of procedure of the National assembly, Art. 19, par. 2.

[29] Pursuant to Art. 146, par. 2 of the Rules of Procedure, the composition of the Presidency shall reflect the political composition of the National Assembly, and only a member belonging to a group that has declared itself to be in opposition may be appointed as the first of the Vice-Presidents in the order of precedence.

[30] Rules of procedure of the National Assembly, Art. 39, par. 3: "Only a member belonging to a group that has declared itself to be in opposition may be elected to chair the Committee on Finance, the General Economy and Budgetary Control".

[31] *Règlement de l'Assemblée nationale,* Art. 16, par. 2.

[32] *Ivi*, Art. 39, par. 2.

each political group is entitled to appoint one of its members to attend meetings without the right to vote[33].

The obligation to reflect the political composition of the assembly and to include a member belonging to an opposition group applies to all collegial bodies within the assembly, such as committees of inquiry[34] and fact-finding missions[35]. In these bodies, the functions of chairman or rapporteur are assigned to a member belonging to an opposition group, and the group that initiated the procedure is allowed to choose which of these two functions is assigned to one of its members. The opposition also has the right to take the initiative and to carry out monitoring and evaluation missions[36].

The opposition is entitled of the droit de tirage, once per ordinary session, to put a resolution on the agenda to set up a committee of inquiry or a fact-finding mission. This right is clearly linked to a practice, now widespread in European democracies, which allows political groups to trigger a classic procedure for scrutinising government action. Recently, this prerogative has been strengthened by making compulsory to set up either a committee of inquiry or a fact-finding mission at the request of an opposition or minority group. The evaluation reports of the Committee for the Evaluation and Monitoring of Public Policies (CEC) are equally divided between the political groups and one of the two rapporteurs must belong to an opposition group[37]. Minority representation is also compulsory in the appointment of the two rapporteurs on the state of implementation of laws[38] and in the presentation of the reports.

In open sessions, each opposition or minority group has the right to have its own item on the agenda for a general debate (without a vote) during the 'scrutiny week'[39] or a question time. Each week, half of the questions to the government are reserved for opposition MPs, and the first of these is reserved for an opposition or minority group to exercise its scrutiny powers. Half the time is reserved for opposition groups during general debates on government statements, during votes of confidence

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[33] *Ibidem.*

[34] The position of President or Rapporteur is automatically held by a member belonging to an opposition group: Rules of Procedure of the National Assembly, Art. 143, par. 2.

[35] *Règlement de l'Assemblée nationale,* Art. 145, par. 3, and Art. 146, par. 2.

[36] In the frame of information or assessment report provided by Articles 145-7, 145-8, 146, par. 3, and 146-3.

[37] *Règlement de l'Assemblée nationale,* Art. 146-3.

[38] *Ivi*, Art. 145, par. 7.

[39] *Ivi*, Art. 48, par. 4.

and during general policy statements[40]. One sitting day per month is reserved for debates. The agenda is drawn up on the initiative of the opposition and minority groups.

The National Assembly has also created a 'scheduled legislative time', which defines deadlines for the discussion of texts during the plenary debate to ensure that all groups, especially opposition and minority groups, have the right to speak, with a minimum amount of time allocated to each group[41]. A minimum amount of time is allocated to each group, but more time is allocated to opposition groups (60% of the additional time according to their numerical strength). The Conference of Presidents also determine the speaking time allocated to the non-attached Members, who shall be allocated a total amount of speaking time which is at least proportional to their number.

6. The ethno-national factor, a non-characteristic element for parliamentary minorities

The comparative approach shows that the French parliamentary system lacks a particular type of parliamentary opposition as per other constitutional systems. The opposition in the National Assembly is never linked to the ethno-national matrix, unlike in many other systems where this specific factor usually fosters the formation of strong permanent parliamentary minorities. In many European parliaments, members belonging to linguistic minorities enjoy specific guarantees, particularly with regard to the definition of autonomous groups or participation in internal bodies[42].

In France, the historical constitutional tendency relied upon the maintenance of the principle of equality between the representatives of the Nation, and this principle has always been an obstacle to the recognition of special rights or privileges for minorities. In accordance with this view, the jurisprudence of the Constitutional Council has always considered the recognition of different nationalities to be incompatible with the legal concept 'French people', the only one that has existed and been enshrined in constitutional texts since the Declaration of the Rights of Man and of the Citizen in 1789[43].

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[40] *Ivi*, Art. 132, par. 2.

[41] *Ivi*, Art. 49, par. 2.

[42]In Italy, they are enshrined in the Rules of Procedure of the Chamber of Deputies (Art. 14).

[43] See Decision No. 91-290 DC of 9 May 1991, according to which the Constitution recognizes only the French people without distinction as to origin, race or religion (par. 13). In this regard, the Constitutional Council points out that the preamble to the Constitutions of 1958 and 1946, as well as the Declaration of the Rights of Man and of the Citizen of 1789 and many other constitutional texts of

In order to ensure that the principle of majority is properly interpreted with regard to political minorities, distinctions based on religion, language, etc. have so far not influenced the organisation and functioning of the National Assembly. Historical identity cleavages are therefore not an influential factor in political decision-making in this context, and there are no legal safeguards for the inclusion of candidates from historical ethnic minorities in the elected chamber. However, another kind of cultural identification factor is now strongly emerging in relation to issues of discrimination against minorities: the ethnicisation of candidacies and the election of parliamentarians from contexts where large visible minorities live, but there is still no formal recognition of this phenomenon through the definition of specific rules related to the composition and functioning of the Legislative Assembly.

7. Conclusions: multiple signs of a systemic crisis

Emmanuel Macron's two presidencies have marked the disappearance of the usual bipolarism between majority and opposition, expanding the fracture lines in society and parliamentary practice. France experienced in the last short term of its National Assembly continuing polarization and seems to be now unable to define strong majorities as long to identify possible alternatives. Even after 2024 legislative election, President Macron is still managing to sustain a minority government, by resorting to the prestige of a personality like Michel Barnier, who epitomizes a kind of 'political dinosaur' having been entrenched in the circles of power for 50 years, who is clearly not representative of the address from the last votes. President Macron seeks to appease relations between political parties and to contain the social anger about the immigration policies and the pension reform, despite the traditional view that "Minority governments are not a very common feature of French politics because of the majority voting system and the predominance of presidential elections over domestic politics"[44]. It is not a surprise that the image of this President of the Republic, who aimed to break the established (but also worn-out) patterns of the old political logics, has been likened to the mythical figure of Janus, the god of passage, whose two faces simultaneously look to the past and to the future. But politics, by its very nature,

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the last two centuries, have always referred exclusively to the legal concept of "the French people", which is therefore the only one with constitutional value (par. 12).

[44] S. Bendjaballah – N. Sauger, *France: Political Developments and Data for 2023: Rediscovering Minority Government*, in *European journal of political research. Political data yearbook*, 2024.

is constantly evolving and can produce an infinite variety of nuances, making cooperative attitudes or highly competitive behaviours more feasible from time to time: the true substance of the parliamentary opposition must therefore be reaffirmed in an informal way, even before its official recognition, which codified law often formalize only a posteriori and–inevitably–in an incomplete way.

The basic issue that still arise analysing the French case still needs to be addressed: the definition of the rights of the opposition by means of special rules is also a limitation that can lead to a future restriction of opposition space. In this matter, it is crucial to take into account the legitimate concern that the Parliament should not be paralysed by minorities, and it is therefore essential to constantly work to strike a balance between the protection of the opposition and the effectiveness of Parliament. Recognizing a defined status and specific prerogatives for the opposition, France has obviously sought to make the opposition more accountable. However, these rights will only be effective if the opposition uses its prerogatives moderately and refrains from obstructionist tactics.

The text of the Règlement de l'Assemblée nationale do not fully reflect the real polymorphism of the opposition in France: in addition to groups adopting forms of adherence to the majority, there are groups functioning as fulcrums, or adopting positions of clear differentiation, strong competition and even general anti-system positions (taking also into account the presence in Assembly of parliamentarians that do not belong to any group). This framework makes the classic concept of a "close union, almost complete fusion, of the executive and legislative powers"[45] as the efficient secret at the heart of the constitutional French system essentially inapplicable.

From the very first months of President Macron's second five-year term, an unprecedented picture emerged: a kind of "majority of the opposition", which forced the (minority) government of the day, led by Elizabeth Borne, to insist on a vote of confidence, in accordance with the third paragraph of Article 49 of the Constitution. The insecurity of the consensus supporting the government has led the President of the Republic to limit the scope for dialogue with the opposition, and sometimes even with some elements of his own majority[46], to the extreme of the rupture essentially achieved over the pension reform, the point of maximum distance between the

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[45] W. Bagehot, *The English Constitution*, London, 1963, p. 72.

[46] Paola Piciacchia points out that the government does not seem to have made much effort to take into account the positions of the opposition, or even those of the minority members of its own coalition: P. Piciacchia, *Semipresidenzialismo francese e ruolo del Parlamento: dai tentativi di rivalutazione dell'istituzione parlamentare alle più recenti sfide nel contesto di trasformazione del sistema dei partiti*, in *DPCE online*, 2023, p. 992.

Executive and the National Assembly as a whole. This gap has opened an evident space in the French system of representation, creating deep institutional wounds that are unlikely to heal quickly. Nowadays, the efforts of the forces opposed to the feared success of the Rassemblement National in the run-off elections in June 2024 seemed to have regained a large majority, but in the first months of the new five-year term, new divisions are already appearing, making it difficult to imagine a clear dialogue between the majority and the opposition.

One of the peculiarities of this period was the emergence of a form of 'majority filibuster' by the government itself. While the well-known parliamentary filibuster consists of an opposing minority using all the rules of parliamentary procedure at its disposal to slow down the examination of a bill. In France the opposition denounced situations in which the government itself slowed down or obstructed debates in order to prevent a vote on a text proposed by the minority[47]. Parliamentary minorities have been thus captured by the government and its parliamentary majority and the abuse of procedural means for obstructionist purposes refers to the impossibility for the government to allow parliamentary deliberation to proceed without 'authoritarian' intervention to ensure that it always retains control of the decision, regardless of the framework. The institutional imbalance was changed several times in favour of the executive through manoeuvres carried out by the government itself, with the support of its majority, also using the right of the ministers to speak for a very long time. The government made extensive use of its own unlimited prerogative.

With the recent regulation of the special prerogatives granted to the opposition parties, the Assemblée nationale can no longer be considered a deficient parliamentary body in terms of guaranteeing the rights of political minorities, even if both the majority and the minorities do not always make proper use of their respective prerogatives. It rather can be said that the shortcomings of the first decades of the Fifth Republic have finally and completely been relieved, and that a space has been created that corresponds to the democratic potential of the opposition parties.

However, we must go further and ask whether the 'rhetoric' of group rights might not also have problematic effects, since recognising opposition rights should also imply an implicit refusal of parliamentary obstructionism in favour of constructive opposition. This is also due to the fact that there is a driving force behind the obligation for the parliamentary groups to form associations, sometimes through an unnatural

[47] See Ch. Geynet-Dussauze, *Les groupes d'opposition parlementaire n'ont pas le monopole de l'obstruction: réflexions sur la diversité des protagonistes du phénomène obstructionniste*, in *Revue française de droit constitutionnel*, 2023, p. 557 ff.

alliance between MPs with different backgrounds, with the consequence of a chronic disobedience to group rules. It is possible to apply to the French case the comments made by some scholars on the lack of accountability reported in the Italian case or the ambivalence of the Romanian parliamentary opposition[48]: what does not appear in the French case, however, are permanent internal rifts within the government, which often lead to voluntary resignations, perhaps involving openly challenging the executive. This considerations suggests to put into perspective and to make a cautious assessment of the benefits that can be gained from the migration of a logic of 'fundamental rights and freedoms' into the rights of the parliamentary groups. The situation would probably be different if the Constitutional Council offered an interpretation of these rights, in particular those of the opposition and of minority groups, on whether they constitute a right or a freedom, in particular under Article 61-1 of the Constitution.

In conclusion, the French National Assembly today presents avantgarde devices, still perfectible and in need of adequate testing, although a number of dysfunctions that cannot be fully solved through the design of formal rules.

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Abstract: In the last fifteen years, the political opposition in France has enjoyed a clear and articulated statute. This article, which recalls the different stages of the slow and ambiguous recognition of the status of the opposition in the French constitutional system, outlines the application of the principles established through the 2008 constitutional reform, and in particular the faculties granted to minority groups by the rules of procedure of the National Assembly. In the fragmented post-electoral political framework at the beginning of the very short 16th legislature of the Fifth Republic, and in the great uncertainty of the legislature that has just begun, the abnormal exercise of prerogatives by the parliamentary opposition reveals the unstable health of the constitutional regime set up by General De Gaulle at the end of the 1950s.

Keywords: National Assembly – opposition – minority groups – referral powers – ethno-national factor.

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[48] E. De Giorgi – G. Ilonszki (eds), *Opposition parties in European parliaments. Conflict or consensus?*, London and New York, 2018.

RIVISTA DI
DIRITTI COMPARATI

The parliamentary opposition in Spain: Theory and practice[*]

Manuel Fondevila Marón

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1. *The lack of a constitutional statute for the opposition in Spain.*

Unlike its neighbours France and Portugal (as well as other countries such as Colombia and Ecuador), the opposition in Spain lacks a legal statute. Only in the Autonomous Community of Catalonia is there a statute for the leader of the opposition[1]. This does not mean to say, of course, that the opposition in Spain does not enjoy constitutional-legal protection. As observed by constitutional scholar Giuseppe de Vergottini – and irrespective of whether this expression means something beyond democracy, pure and simple – Spain cannot be considered a regime with a 'guaranteed opposition'[2]. One of the higher values of the Spanish legal system, as enshrined in Article 1.1 of the Constitution, is political pluralism, and to guarantee this, both the fundamental law and the parliamentary regulations establish a number of tools and guarantees to ensure that the opposition can fulfil its function. As is characteristic

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[1] Vid. Article 77 of the Regulation of the Parliament of Catalonia.

[2] Cf. G. De Vergottini, *La forma de gobierno de oposición garantizada*, in *Teoría y Realidad Constitucional,* 9, 1979, p. 5 ff. However, it is doubtful that this supposed form of government contributes anything new to the concept of the democratic form of government. It seems more consistent to understand the guarantee of opposition as an essential element of democracy (Cf. M. Fondevila Marón, *The protection of political minorities in the European context,* in S. Baldin – A. Di Gregorio (eds), *The legal and political conditions of political parties in central and Eastern Europe,* Trieste, 2023, p. 16 ff.).

of a parliamentary regime, the Spanish Constitution establishes that the Cortes Generales control government action (Article 66), that the government is accountable to the Congress of Deputies for its political management (Article 108), that the government is subject to interpellations and questions put to them in the houses (Article 111) and that the Congress can challenge the government using a motion of no confidence (Article 113). The parliamentary regulations expand upon these and other issues, from the possibility of introducing amendments to laws to creating commissions of enquiry. Therefore, to speak of the lack of a legal statute for the opposition is to speak of the non-existence of a regulation that expressly enshrines its rights and duties. In this respect, it is very characteristic of the Spanish founding charter that the term 'opposition' as such does not appear in it.

However, all things considered, and given that the opposition does have certain recognized rights that guarantee its existence and grant it the capacity to act, it might be thought that the issue lacks real academic and political relevance, and could be reduced to a mere point of legislative technique. Indeed, few of Spain's neighbouring democracies have this express statute. This is doubtless due to the radical transformation that political regimes, and especially parliamentary regimes, underwent during the twentieth century, when governments gradually increased their political influence and power to the detriment of parliaments, few of which today can faithfully argue that they are really capable of controlling government action, let alone demanding that they be politically responsible. While in the mid-twentieth century French political scientist Maurice Duverger asserted that, along with the classic division of powers that established a series of checks and balances between the legislative, executive and judicial branches, another division of powers existed between the government and opposition parties[3]. Indeed, it was later – and correctly – asserted that the latter division of powers ended up replacing the former[4]. As such, it is difficult for the legislative branch to counteract executive action and the majority party, termed the 'modern prince' by Marxist thinker Antonio Gramsci[5], has been described as the place where political parties formalize previously adopted agreements[6]. In the current 'partitocratic state'[7], the majority party (or majority coalition) can potentially monopolize all the important positions in the state institutions. In any case, the majority party – or, rather, its leader – controls most of parliament and the executive branch and also influences judicial power through appointments. For these reasons, and because today's political party is a double agent of, on the one hand, the voters

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[3] Cf. M. Duverger, *Los partidos políticos,* Madrid, 1957, p. 438.

[4] Cf. P. De Veja García, *Obras escogidas,* Madrid; 2017, p. 516.

[5] Cf. A. Gramsci, *Notas sobre Maquiavelo, sobre política y sobre el Estado moderno,* Buenos Aires, 1971, p. 28.

[6] Cf. M. García-Pelayo, *Obras Completas,* Madrid, 2009, p. 2014.

[7] The term *Parteienstaat*, sometimes translated as 'partitocratic state', was coined by Heinrich Triepel in 1927 (Cf. H. Triepel, *La Constitución y los partidos políticos,* Madrid, 2015, p. 14).

and on the other, transnational bodies[8] that often lack democratic legitimation, it is necessary to advocate that minority parties – whether they lost the elections or won them, but were unable to form a coalition government – fulfil a significant institutional and constitutional role.

2. *An implicit constitutional statute?*

At this point, the following question arises: even if no explicit statute exists, is it possible to speak of the existence of an implicit statute? Some authors have answered this question in the affirmative, based on the ideal model of parliamentarism enshrined in the Spanish Constitution, fundamentally in Titles III, IV and V[9]. However, it is important to avoid the risk of confusing the parliamentary legal statute with a legal statute for the opposition. Usually, constitutions in parliamentary regimes, as well as parliamentary regulations – and this clearly applies to Spain – establish the rights of (all) the parliamentarians and not the specific rights of the opposition. In some cases, such as the Venice Commission Rule of Law Checklist[10] regarding the parameters that define the relationship between the parliamentary majority and the parliamentary opposition in a democracy, there is an apparent mix of both approaches, since this document contains demands relating to both types of statutes. There is no harm in this, as long as it does not produce conceptual confusion. The opposition statute must be founded upon an appropriate parliamentarian statute, with all parliamentarians allowed to ask questions and make interpellations, to present amendments, legislative proposals and the like, benefitting, a priori, the opposition members of the house above all. Furthermore, if, for example, qualified majorities are required to appoint members of constitutional bodies, while a minority has the ability to summon parliament or even, in some systems, call for a referendum, this also provides the opposition with guarantees. Finally, the possibility that a minority of deputies can lodge an appeal against unconstitutionality constitutes a guarantee for the opposition as well. However, none of this forms part of an opposition statute, as would giving the opposition more opportunities to ask questions during parliamentary debates than the

[8] Cf. J-J. Ruiz Ruiz *El gran ausente: por un estatuto de la oposición política tras 40 años de Constitución,* in *Revista de Derecho Político,* 2018, p. 275.

[9] Cf. J-F López Aguilar, *La oposición parlamentaria y el orden constitucional,* Madrid, 1988, p. 169.

[10] Vid. Opinion 845/2016 of 24 June 2019 [CDL-AD(2019)015].

majority deputies (also a component of the Vienna Commission checklist). As established by the Spanish Constitutional Court, the party affiliation of political representatives has legal – and not only political – significance[11]. The related case decided by the High Court concerned the exclusion of opposition councilmembers from most of the advisory committees in a Spanish city hall by agreement of the councilmembers from the majority party. Specifically, of the five committees created, four exclusively contained councilmembers from the majority. The Court determined that the non-proportional composition of these committees was unacceptable, that it amounted to a divided assembly and, thus, that it prevented the minority from participating in decision-making.

Given that the idea of an implicit opposition statute can be confusing, it may be preferable, in the interest of clarity, to replace it with the idea of the guarantee of opposition as a determining factor in a democracy. For instance, it is possible to speak of an implicit constitutional opposition statute in the German Constitution of 1949, with the Federal Constitutional Court (*Bundesverfassungsgericht*, or FCC) deriving a 'right to opposition' and specific rights of the opposition fundamentally from Articles 5, 8, 9, 17, 21 and 38 of the Constitution, in addition to Article 92.3 of the Penal Code[12]. The FCC, in fact, understood that freedom of opposition is a characteristic of a liberal democracy, recognizing the opposition's right of access to parliament and to give its opinion regarding the formulation of laws. It also recognized a general right on the part of the opposition to criticize the majority. However, the interpretation of both items was very limited. Firstly, this freedom was not extended to the right to parliamentary initiatives or to undertake the third reading of bills. Moreover, when the opposition complained that the speeches made in parliament by the government, combined with those of the parliamentary majority, were taking up much more time than was allotted to them, the FCC dismissed the claim for compensation, saying that the government's speeches could not be considered simply and exclusively an additional, expanded representation of the majority point of view[13]. Moreover, the German Court interpreted the rights of the opposition in a restrictive way, allowing it to freely criticize the majority, but not giving it the function of oversight, which falls solely within the scope of Parliament. Nor can it be considered an organic part of the

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[11] Vid. STC 32/1985, FJ 2º.

[12] Cf. L. Mezzetti, *Giustiza Costituzionale e oposizione parlamentare. Modelli europei a confronto,* Rimini, 1992, pp. 50-68.

[13] Vid., BverFGE 1, 44 (151) and 10, 4 (49).

parliament or exercise its own rights in this respect (a matter for parliamentary groups alone), with the *Bundesverfassungsgericht* also avoiding any clear assertion of a right to equal opportunities for the opposition with respect to the government. Clearly, it would be difficult for particular rights, different to those of other political representatives, to be derived from an – always supposed – implicit statute. This is only logical, since in no way can this be derived from the principles of parliamentarism. Accordingly, it is no surprise that the French Constitutional Council, in a decision favourable to reform by Constitutional Law 2008-724[14], declared a reform of the rules of procedure of the National Assembly unconstitutional, as it categorized the parliamentary groups as 'majority' and 'opposition', conferring on the latter certain types of specific rights (like obtaining reports on the application of laws and the presidency, and summaries from commissions of enquiry), considering that this accorded unjustified unequal status in violation of Article 4 of the Constitution of 1958.

Any legal opposition statute worthy of its name must guarantee equality of arms between the opposition and the government. This means giving opposition representatives specific rights that are, therefore, different to those of the representatives from the majority. Politically and constitutionally, the government – as enshrined in Article 97 of the Spanish Constitution (although this is true of almost all democratic governments) – directs domestic and foreign policy, civil and military administration and exercises executive and statutory authority, in addition to the possibility of legislating virtually without limits by decree and choosing which media outlets will be hired to handle institutional publicity. This gives the government a privileged position that must be counteracted by the opposition. However, the rights conferred upon the opposition cannot involve decision-making, since in a democracy, majority rule governs, and for that very reason, the minority cannot be allowed to bring government to a standstill using the filibuster. At this time of 'counter-democracy'[15], to paraphrase historian Pierre Rosanvallon, political regimes are characterized above all by the blocking options available to various actors, but this must not extend to the point of impeding reasonable governance by the majority.

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[14] Vid., *Décision* 2006-537 DC.

[15] Cf. P. Rosanvallon, *La contrademocracia: la política en la era de la desconfianza,* Buenos Aires, 2007.

3. The tools of the parliamentary opposition

3. 1. Parliamentary tools to control the government

According to the Spanish Constitution (Art. 66.2), the Cortes Generales, amongst other powers, control government action. This function is exercised through the following mechanisms: investiture (Art. 99); information requests which, according to Constitutional Court Ruling (henceforth STC) 203/2001, are embedded in the constitutional power of control attributed to the Cortes by Article 66.2; questions and interpellations (Art. 111.1)[16]; motions with and without prior interpellation and resolutions in which the house makes known its position regarding a particular matter or urges the government to act in a specific way (Art. 111.2); constructive motions of no confidence (Art. 113), motions of confidence (Art. 112) and appearances (Art. 110).

In short, these are the mechanisms of a rationalized parliamentary regime. These mechanisms are not specific to the opposition, but with controlling government action being a function of the houses, they fall to the parliamentary groups. However, the increasing importance and dominance of government vis-à-vis the houses and growing polarization have had a combined effect on several of these tools. The 11th Congress of Deputies (the shortest in Spain's constitutional history, spanning only 111 days between 16 January 2016 and 13 May 2016 after the elections of 20 December 2015) put an end to the period of two-party rule in the country, and for the first time, the Congress of Deputies was unable to invest a prime minister. After the obligatory dissolution of the Cortes provided for by Article 99.5 of the Constitution in such cases, new elections were held on 26 June 2016, producing the 12th Congress of Deputies after the constitution of the Cortes on 19 July, but with the formation of the government further delayed until 29 October of that year. In other words, for 203 days Spain had a caretaker government with restricted power[17], a consequence of being in a state of prorogation. The unusual result was this caretaker government working alongside a parliament with full powers. This raised the question of whether this temporary government should be subject to the control of the Cortes[18]. For the government, this subjection did not exist, as there was no vote of confidence (the

[16] The questions can concern any issue that rests with the government, while the interpellations affect the behaviour of the government related to overall policy and must, unlike questions, be lodged during the plenary session.

[17] Vid., Art. 21 of Law 50/97 of the Government.

[18] For an exhaustive analysis of this issue, cf. D. Delgado Ramos, *Problemas actuales del Derecho Parlamentario,* Madrid, 2018, pp. 19 and ff.

Cortes had not invested it), while for the houses, this amounted to a constitutional fraud that deprived deputies and senators who had legitimately won a seat in their election of their primary responsibilities. STC 124/2018 resolved the matter, ruling that the government criterion infringed Article 66.2 of the Constitution.

Especially in the current political climate, it is not uncommon for the government's responses to interpellations and questions to be vague, imprecise, discursive or even aggressive towards the questioner. The problem in these cases is that there is no efficient remedy. Even regarding a right like access to documents and information in the hands of the government, in accordance with recent constitutional jurisprudence, the deputies lack an effective defence in the parliament. In STC 165/2023, the Court analysed a conflict that arose from an unsatisfactory response on the part of the government to a request for information. The affected deputies requested protection from the president of the house, who rejected them, claiming that material control of the response offered by the government was not a matter for that body. When the question came before the Constitutional Court, it decided, in a 7-to-4 ruling, to dismiss the appeal brought by the opposition deputies, arguing that the Regulations of the Congress of Deputies (RCD) did not contain any provision that allowed the president to evaluate the government's response[19]. However, the particular vote for this ruling signed by the four dissenting judges argued that the majority ruling omitted the fact that the governing body of the house always has a duty to ensure the rights of the minorities. The primary impediment to this is that the presidency of the house is a majority entity, in the sense that the holder is elected by the majority of the members.

The use of the motion of no confidence has changed considerably as a consequence of the new political situation. It could be argued that before 2015, it was so difficult for this measure to be successful in practice that, strictly speaking, its role as a mechanism for political control was dubious. From 1978 to 2015, the tool was only used on two occasions: the first by then Deputy Felipe González against Prime

[19] This differs from what is provided for in the regulations for the parliaments in some autonomous communities like Catalonia (Arts. 7, 8 and 219 of the regulation), where if the president determines that the requested information should be provided, they 'must communicate their decision to the responsible authority so that it is immediately enforced', and if it is not, other types of action come into play (questions for the government, appearances by the authority who refused to provide the information, motions for resolution or even the application of the penalty system related to the transparency law). The Regulations of the Congress of Deputies, on the contrary, do not provide for any type of action by the highest authority in the house. In fact, the appeal to the president for protection made by the deputies in this case was based on a custom stemming from Article 32 of the RCD.

Minister Adolfo Suarez in 1980, and the second in 1987 by Senator Antonio Hernández Mancha against Prime Minister González. In both cases, the motions failed, but while the first launched the candidate politically – his Spanish Socialist Workers' Party, or PSOE, won a large majority of 202 (out of a total of 350) deputies in the following elections – the second motion resulted in the ostracism of the candidate. The results explain why one of the actions was enormously useful and the other political suicide: Gonzalez's motion received 152 votes in favour, 166 against and 21 abstentions, while Hernández Mancha received only 66 votes in favour, 195 against and 71 abstentions. Between 2015 and 2023, three motions of no confidence were submitted. The first was presented by Podemos Party leader Pablo Iglesias against Prime Minister Mariano Rajoy of the People's Party, or PP; the second by PSOE leader Pedro Sanchez, again against Prime Minister Rajoy; and the third by the far-right Vox party through an independent candidate against Prime Minister Sanchez. The first was only symbolically effective, with 82 votes in favour, 170 against and 97 abstentions, and did not benefit the political career of the candidate, who holds no position as of 2024. The second motion, on the other hand, was successful, with 180 votes in favour, 169 against and 1 abstention. After the victory, Pedro Sánchez called for elections, which produced the aforementioned 11th Congress of Deputies. The third motion of no confidence was a farse; the candidate chosen to present it was a nonagenarian who began his political activity in the 1950s with the Communist Party, and it was clear that, even if he had been successful, he was not a candidate for the presidency of the government. This last motion received 52 votes in favour and 298 against. Above all, these last three motions demonstrate the flimsiness of a constitutional design intended to guarantee political stability, but actually fostering the contrary: when a government does not have an absolute majority (the norm in recent years), the motion may be successful, but this in no way means that the incoming government will find it possible to govern.

Finally, the use of the motion of confidence has been described as scarce and anomalous. It has only been employed twice, once by Adolfo Suarez to counteract the motion of no confidence presented by the PSOE four months earlier, and in 1990 by Felipe González to remedy an erroneous vote for investiture during the 4th Congress of Deputies, when not all the deputies participated due to some appeals against the election results. In both cases, confidence in the government was maintained. Indeed, more than a tool of control characteristic of a model of rationalized parliamentarism,

this motion served to politically reinforce governments that had the support of the house.

3. 2. The parliamentary opposition before the Constitutional Court[20]

At national level, the two primary mechanisms available to the parliamentary opposition vis-à-vis constitutional jurisdiction are the appeal against unconstitutionality (also known as the constitutional challenge) and the appeal for protection (also known as the writ of amparo). The former is, in fact, the primary recourse accessible to political minorities to preserve their rights in a state of law where constitutional justice is exercised. Moreover, because political minorities can defend themselves from possible abuse by the majority in court proceedings, and because the Constitution is a law imposed on the governors and the governed that all jurisdictional bodies – including, ultimately, the Constitutional Court – are obliged to protect and enforce, in a democratic state, no other forms of resistance are acceptable. The corollary to this is that in a state of law, it is primarily the political minorities that, as they look after their own interests, also look after the guarantee of constitutional supremacy. For that reason, they must have standing. When in cases like, for example, Turkey, this standing is given to the principal opposition party, it forms part of a specific statute. In Spain, although standing is granted to, amongst others, 50 deputies and senators, regardless of whether they are from the government or the opposition (without, therefore, being designed as a specific right of the latter), the result is a tool primarily intended for the opposition.

In any case, the appeal against unconstitutionality is always objective in nature, as clearly supported by STCs 4/1981, 5/1981 and 17/1990. The reasons why the opposition – or in the particular case of Spain, the 50 deputies who belong to the opposition – lodge an appeal may be political. However, if only the majority bodies (prime minister, assemblies, the executive branches of the autonomous communities) could lodge such an appeal, because the Constitutional Court operates an adversarial system, the result would be entrusting the defence of the Constitution to the very individuals who have a greater interest in violating it and more opportunities to do so[21].

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[20] For a more detailed examination of this topic, see M. Fondevila Marón, '*Oposición política y justicia constitucional*' in *Anales de Derecho,* 2023, p. 91 ff.

[21] Hans Kelsen used this same argument against Carl Schmitt to oppose giving the President of the Reich custody of their country's Constitution (Cf. *La polémica Schmitt/Kelsen sobre la justicia*

There is, therefore, a predominant public interest in ensuring that the Constitutional Court perform its function of keeping the legal system up to date and removing any laws in violation of the Constitution.

Some Spanish constitutionalists since the 1990s have questioned the central role assigned to the Constitutional Court[22]. The substance of their arguments is a criticism of the possibility that the Court could serve as a tool for the minority against the majority. Using this type of argument, and asserting that the opposition had used the Court as an obstructionist tactic, Organic Law 4/1985 eliminated an earlier appeal regarding autonomy statutes and organic laws initially provided for in Spanish legislation, which was then recovered, albeit only with respect to draft bills, by Organic Law 12/2015. That argument was fallacious, in that there were seven appeals lodged and four – at least partially – estimated (including a key resolution for the Spanish legal system, STC 76/1983). Moreover, this occurred during a parliamentary term in which the dominant party filled 202 of the 350 seats in parliament, 95 more than the main opposition party. This argument was also levelled against the appeal against unconstitutionality in general, since most of these challenges in Spain have not been presented by the opposition. In fact, a true cause for criticism from the perspective of this study is the fact that Article 162.1. a) of the Constitution does not legitimize the minorities in the autonomous communities to lodge an appeal against unconstitutionality, at least with regard to the law of their respective community[23].

The appeal for protection (especially as provided for in Article 42 of the Constitutional Court Organization Act, or LOTC), in turn, has also been used as an tool by opposition parliamentarians to defend their rights. In a considerable number of rulings on this type of procedure, the Court has constructed an entire 'theory of representation'[24] around Article 23 of the Constitution. This has involved indicating,

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constitucional: el defensor de la constitución versus ¿Quién debe ser el defensor de la Constitución?, Buenos Aires, 2009, p. 293).

[22] Cf. F. Rubio Llorente, *Tendencias actuales de la jurisdicción constitucional en Europa,* in F. Rubio Llorente – J. Jiménez Campo, *Estudios sobre la jurisdicción constitucional,* New York, 1998; L-Mª López Guerra, *Los retos al Tribunal Constitucional español desde la perspectiva del "constitucionalismo politico",* in *Anuario Iberoamericano de Justicia Constitucional,* 2021.

[23] Cf. J. Ruipérez Alamillo, *La protección constitucional de la autonomía,* Buenos Aires, 1994, p. 155. This author also criticizes the limitation that Article 32.2 of the Constitutional Court Organization Act establishes for filing an appeal for unconstitutionality (only against laws or acts with the force of law 'that may affect its sphere of autonomy'), which is not found in Art. 162.1 a) of the Constitution.

[24] Cf. E. Martín Núñez, *La garantía jurídica de la democracia como derecho fundamental. Un análisis de la jurisprudencia del Tribunal Constitucional sobre la participación política*, in *Revista Catalana de Dret Públic,* 2008, p. 4.

on the one hand, that the right to access (*ius ad officium*) guaranteed in Section 2 of this article also incorporates, as an 'additional guarantee', the right of parliamentarians and their groups to exercise office on equal terms and within parliamentary law (*ius in officium*) – without which the first right would be completely undermined – and, on the other hand, the close connection between this 'additional guarantee' in Article 23.2 of the Constitution and the fundamental right of citizens to participate in public affairs via their representatives recognized in Article 23.1 (for all the rulings, STC 39/2008). With these premises, the jurisprudence of the Constitutional Court guaranteeing the equal standing of all members of parliament will hold, as a thesis, that the breach of regulations is an infringement of the second section (in relation to the first) of Article 23, revisable subject to constitutional relief. This constitutional provision is conceived by the Court as a 'legal definition', by which any right recognized by law (from creating a parliamentary group to the prohibition on prematurely dissolving a commission of enquiry, to the possibility of bringing questions, motions, requesting appearances, etc.) forms part of this *ius in officium.*

Although these constitutional processes have – without being specially designed for this purpose – helped to guarantee the role of the opposition, from the point of view of a legal statute per se, it would be useful if some of them, for instance the conflict between constitutional bodies, actively legitimized the opposition[25]. Something of this sort occurs in Germany, where in accordance with Article 63 of the Federal Procurement Act, parliamentary groups, amongst other subjects, can initiate this procedure, even before parliament, challenging the will of the majority.

3. 3. The lack of coordination mechanisms between the parliamentary opposition and the general opposition

An opposition statute does not merely involve the regulation of the parliamentary opposition. Especially at a time characterized by the existence and actions of counterweights, there is a need to regulate the non-parliamentary (or in the terms of the Venice Commission, 'general') opposition. The reasons for this are both legal and political, with the former related to the demand for transparency and the

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[25] See, in this respect, J-A Montilla Martos, *Minoría política y Tribunal Constitucional,* Madrid, 2002, p. 115.

latter to the failure of some political groups on the far left – especially Podemos – to organize their social base around their parliamentary group.

Leaving aside here questions regarding the need for a regulation that does not criminalize expressions of protest, which must be protected under the freedom of expression, there is a need to formalize channels for dialogue between the parties with parliamentary representation and social agents. Spain has no specific regulations governing lobbies and interest groups. Instead, the ethical codes of conduct for the members of the upper and lower houses contain a rather feeble regulation regarding making parliamentary agendas public[26]. This regulation, which is clearly insufficient, has not successfully eliminated suspicions about possible hidden agendas[27] and undeclared interests amongst the parliamentarians. For these reasons, it would be more than appropriate to incorporate these groups into the parliament, bringing social and parliamentary groups into contact, without merging them. This is not, as has been suggested[28], because of the risk of succumbing to corporatist temptations – since the deputies really only represent those who voted for them – but because it is one thing to build bridges between different democratic participation and discussion forums, and quite another to confuse them.

4. The change in the party system and the new government-opposition dialectic

4.1. The end of the two-party system

The Constitution and the election laws are designed to guarantee the stability of the government by laying the foundations for a party system with four national parties, where the two primary parties (the most centrist) have an advantage over the other two[29]. This was certainly the case for more than three decades, between 1982 and 2015, although the first symptoms of instability in the system could be detected at the

[26] Vid. Article 9 of the Code of Conduct for the Members of the Parliament of Catalonia and Article 6 of the Code of Conduct of the Cortes Generales.

[27] Cf. D. Fernández Cañueto, *Representación política y relación representativa en España: entre el debate tradicional y el actual* in J. Tudela et al., *Libro blanco sobre la calidad democrática en España,* Madrid, 2018, p. 170.

[28] Cf. A. Garrorena Morales, *Escritos sobre la democracia- La democracia y la crisis de la democracia representativa*, Madrid, 2014, p. 204.

[29] Cf. A. Torres del Moral, *El estado español de partidos,* in *Revista del Centro de Estudios Constitucionales,* 1991, p. 103.

beginning of the second decade, a consequence of the existence of regional nationalist parties with sufficient representation to determine the investiture of the government. When political scientist Giovanni Sartori rated Spain as a political system with a 'stable and effective' government in 1994, he did so because one party had been dominant in the country since 1982[30]. Indeed, between 1982 and 1993, the socialist PSOE enjoyed three consecutive absolute majorities. However, when the Catalan parties with representation in the government became decisive for governance in 1993, the politicians began to recant. When Prime Minister Felipe González gave 15 per cent of the personal income tax (IRPF) to the autonomous communities in exchange for their support during his investiture, the PP – which governed in a number of the autonomous communities at the time – vehemently opposed the move. However, when PP leader Jose María Aznar needed the support of the Catalan Convergence and Union (CIU) party to govern in the following legislative term, he handed over 30 per cent of the IRPF. Similarly, after the fourth absolute majority in Spain between 2000 and 2004, this time under the PP, came to an end and the PSOE won once again, Prime Minister José Luis Rodríguez Zapatero and Minister of Labour Jesús Caldera approved the return of documents and photographs from the National Historical Archive in Salamanca to Catalonia (despite Zapatero having repeatedly opposed this transfer when he was in the opposition and Caldera having participated in a public march against the move). The prime minister also promised to approve the text of any statutory reform presented to him by the Catalan parliament, with the second in command in the Republican Left of Catalonia Party threatening that if the prime minister did not keep his promise, 'he would have to go'. The result was an autonomy statute that clearly overreached the Constitution, followed by the subsequent STC 31/2010, which – despite the Court's tremendous restraint – produced not only a significant division and loss of credibility for the Constitutional Court, but also obvious discontent amongst the citizens of Catalonia. However, probably the greatest exercise in recantation occurred with Prime Minister Sánchez, when his investiture depended on the support of Catalan nationalists. Almost immediately after winning the election, Sánchez pushed for legislation that would give amnesty to a group of Catalan independence leaders, convicted as part of the procès (a pro-independence social and

[30] Cf. G. Sartori, *Ingeniería Constitucional Comparada,* Madrid, 1994, p. 126. The tripartite typology distinguishes between governments that are: a) stable and effective; b) stable and possibly effective; and c) unstable.

political movement), despite having repeatedly stated during the campaign that it would be unconstitutional.

Although Spain enjoyed four absolute majorities between 1982 and 2004, there was only one between 2004 and 2023, achieved by the People's Party in 2011. The subsequent elections, as discussed above, have produced the end of the two-party system in Spain, which transitioned from having two and a half parties to being host to a true multi-party system. While in 2011, the PP won with 186 deputies, in 2015, although the party once emerged as the winner, it only claimed 123 seats, while the PSOE had the worst result in the party's history, winning only 90 seats. That year, two new parties, the conservative-liberal Ciudadanos and the left-wing Podemos burst onto the scene with more than 40 deputies each. After the parties failed to form a government, the new election held in 2016 slightly improved the PP's results, giving the party 137 deputies, while the PSOE dropped even further, to 85 seats, and Podemos continued to rise. In April 2019, a new election – held after the vote of no confidence – saw the PSOE win 123 seats and the PP only 66, but the parties were still unable to form a government, due to the lack of an agreement between the winning party and Podemos. In November of that same year, another round of elections was called, and although the PP and far-right Vox party improved their results at the expense of Ciudadanos, which completely collapsed, the first coalition government in the history of Spanish democracy was formed between the PSOE and Podemos. In 2023, a second coalition government was formed, but for the first time, the party that received the most votes (the PP) is not a member; rather the coalition comprises the PSOE and a new left-wing group, Sumar, which initially absorbed Podemos, before the latter party broke away in December of that year.

4.2. Political polarization and fragmentation: the difficulties involved in governing from the right

The current political climate in Spain is highly unstable. On the one hand, the government coalition and the parties that support it, without formally being part of the coalition, are fragile, and there are frequent clashes between the coalition parties, as well as blackmail on the part of the nationalist parties, particularly the Catalans, who voted for the investiture. In fact, the government has been unable to pass its budgets, and in six months has only managed to bring forward one of the more than 40 laws

promised. On the other hand, there does not appear to be any solid alternative to the government. The obvious choice, the People's Party, seems to have accepted that it will either quite probably need to govern with the votes of the far-right Vox party (despite the party's political adversaries' understanding of how to capitalize on the partnership to grab votes), or bet everything on winning an absolute majority in the next election. In the short- to medium-term, reaching an agreement with political parties other than Vox looks quite difficult, given that the right-wing nationalist parties (Junts in Catalonia, the PNV in the Basque Country and the like) prioritize the nationalist over the political cleavage, and do not seem willing to negotiate with the party that applied Article 155 of the Constitution in 2017, imposing direct rule over Catalonia. This unstable climate is characterized by two elements that – although this does not have to be the case – have occurred together: political polarization and parliamentary fragmentation. As a consequence, many legal/constitutional provisions to structure the government-opposition dialectic have been altered.

Beginning with the consequences of polarization, a quite illustrative example can be seen in the General Council of the Judiciary. The requirement for a qualified 3/5 majority to appoint the members is, a priori, a very reasonable and advisable provision, and one included on the Venice Commission checklist. However, a deadlock lasting more than five years has developed. Moreover, this affects the day-to-day functioning of parliament. Government control sessions often turn into what renowned scholar Piedad García-Escudero has termed 'counter-control', where instead of the government having to face the criticism of the opposition and defend its administration, the role of the opposition is being judged by the government. It matters little, given the tone and quality of the responses, that the control function of the houses has intensified and that the government has been subjected to more questions in recent legislative terms. Additionally, as observed by García-Escudero, this 'counter-control' is materializing both in the deplorable technique of 'whataboutism' and – in a more legal respect – in commissions of enquiry, often created by the majority to investigate the previous government, in other words, the current opposition[31]. This inversion of the rules goes beyond simply bad behaviour or even low politics. In a democracy – unlike in authoritarian regimes, where the government claims to legitimize the opposition, usually allowing the existence of nominal opposition parties that do not really aspire to replace those in power – it is the opposition that legitimizes

[31] Cf. P. García-Escudero Marquez, *Prólogo,* in Jose-C Nieto-Jiménez, *Consecuencias de la fragmentación y la polarización en las Cortes Generales,* Valencia, 2024, p. 23.

the government, accepting that while today it is their turn to fill the opposition role, tomorrow they may be in government[32]. The criticism of the opposition, the constant attacks and reproaches and the permanent challenging of its role are, therefore, signs of a political culture that is closer to authoritarianism than to a democratic regime. Finally, the difficulties surrounding the investiture of government, which have damaged the image of the head of state as the individual who bears responsibility for proposing a candidate, are also a consequence of polarization (and fragmentation, although to a lesser extent)[33].

Fragmentation (primarily, although at times combined with polarization) has had a number of consequences of its own[34]. Firstly, there has been a decrease in the number of draft laws presented by the government (proyectos de ley), which do not always have the necessary support, but an increase in the number of bills presented by deputies and senators (proposiciones de ley), even at times by the group that holds the majority, since this approach dispenses with bureaucratic formalities. Secondly, the budget veto is not only used, but abused. In the third place, there has been a persistent use of fraudulent extensions to present amendments, which is really a filibuster tactic used by the majority to block the propositions of the minority. A fourth consequence is the decrease in legislative activity in the Cortes and an even greater use of executive orders, often contrary to constitutional jurisprudence (STC 61/2018). Fifth, in the lower house, there are fewer government appearances in proportion to the number of times they are required, while in the upper house, in the absence of regulations, the government only appears on its own initiative. Finally, there has been an increase in the number of motions with and without prior interpellation, many of which are passed with votes against those who support the government, but without any mechanism to control the process.

Polarization, obviously, does not occur because of the absence of a legal statute for the opposition. Its causes are social and, although in the case of Spain it has deep and ancient roots, it is aggravated as a consequence of social networks. However, the absence of such statute favours this situation, since it is much easier, in such environment, when opposition lacks formal institutionalization, to marginalize it.

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[32] Cf. J. Ruipérez Alamillo, 'Charles de Secondat on the state of parties or pluralism as a modern materialization of the principle of separation of powers, in *Teoría y Realidad Constitucional,* 2020, p. 237.

[33] Cf. for what follows, J-C Nieto-Jiménez, *op. cit.,* passim.

[34] *Ibid.*

Manuel Fondevila Marón

The parliamentary opposition in Spain: Theory and practice

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Abstract: This work analyses the government-opposition dialectic in Spain, placing particular emphasis on the second decade of the twenty-first century, during which time a change occurred that brought an end to the two-party system. This analysis is based on a study not only of the tools afforded the opposition by Spanish legislation, but also the actual use made of these tools, as well as the current possibilities of guaranteeing power switching between the two major parties.

Keywords: Opposition – Spanish Constitution – Two-Party System – Political Polarization – Political Fragmentation

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Rivista di
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Consociational systems
and the role of opposition:
The case of Switzerland*

Nicolò Paolo Alessi

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1. *Introduction*

Consociational systems[1] have been defined as oppositionless forms of government where political alternance is not an option. While these systems may create

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[1] This article will use consociational democracy and consensus democracy as interchangeable terms to describe systems that embeds institutions and practices that follow a consociational logic, i.e. that lead to cooperation and agreement among the (representatives of the) components of the (plural or diverse) society in policy-making instead of competition and majority decision; this wide definition attempts to embed the different interpretations Lijphart gave to consociationalism and the subsequent evolution of the terms in political and legal studies; it is not the aim of this study to dive into the terminological issues related to consociationalism; it suffices here to recall that consociational democracy was the term exclusively used in his less recent works, which was employed to describe empirical cases and label the normative type that was derived from them, composed of four main (behavioral and institutional elements): grand coalition governments, mutual veto rights, proportional representation and segmental autonomy (see especially A. Lijphart, *Democracy in Plural Societies: A Comparativ Exploration*, New Haven-London, 1977); subsequently, the expression consensus democracy was introduced (and juxtaposed to consociational democracy): this notion was used to frame the empirical typology of democracies following consociational rules (composed of ten indicators derived from 36 countries), which was supposed to have normative implications: the study of its democratic performance led the author to normatively support it over the model of majoritarian democracy (see A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven-London, 2012); power-sharing democracy is mainly used by Lijphart as a synonym for consociational democracy, while today the term is generally employed as an general term that describes "those rules that, in addition to defining how decisions will be made by groups within the polity, allocate decision-making rights, including access to state resources, among collectivities competing for power" (C. Hartzell – M. Hoddie, *Institutionalizing Peace: Power-Sharing and Post-Civil War Conflict Management*, in

the conditions for stabilizing democracy in plural and/or post-conflict societies, they can also be criticized for being elitist and excluding oppositions and other relevant political groups.

The debate over opposition is one over the health of a democracy. As theorized by Dahl, the existence of spaces of contestation and the guarantee of inclusiveness or participation are two of the main dimensions through which polyarchies' performance is assessed[2].

This article is based on the assumption that opposition is a lens through which one could analyze also consociational systems, which face the additional issue of exclusion/inclusion of the "others" in public decision-making structures and processes. In other words, the issue of "others" in consociational settings may be framed as a further issue concerning opposition. This standpoint – that connects the concepts of opposition and "others" – allows the observer not only to delve into the limits of consociations and their possible demise, but also to build a theoretical *pars construens* of consociational theory by comparatively focusing on existing solutions to this issue that can be of general interest.

Comparatively, Switzerland primes as a longstanding and stable democracy featuring consociational institutions. For this reason, it will be taken as a case study whose experience can add to the general debate on consociations.

The main goal of this paper is to explore the Swiss case and assess which oppositions operate, which instruments are available for them to have a voice, as well as whether and to which extent these instruments have been conducive to pluralizing the consociational arrangement by granting spaces for oppositions to emerge. The paper shows that the combination of the fundamental elements of the Swiss political system allows for several entry points for opposition and has gradually helped address – at least partially – the democratic limitations that this system potentially displays. And, among these elements that allow the Swiss political system to thrive and relatively successfully tackle the issue of oppositions (and thus the inclusion/exclusion problem), direct democracy – especially at the subnational level – may be one of the most significant also to meet the contemporary challenge of further inclusion in a society composed of twenty-five percent by non-citizens.

The article is structured as follows: firstly, it offers some considerations on the Swiss political system and the possibility of framing it as a consociational system.

American Journal of Political Science, 2003, p. 318 ff.); on this (and on some inconsistencies in the terminology used by Lijphart), see also M. Bogaards, *The Uneasy Relationship between Empirical and Normative Types in Consociational Theory*, in *Journal of Theoretical Politics*, 2000, p. 395 ff.

[2] R.A. Dahl, *Polyarchy*, New Haven-London, 1971.

Secondly, it moves the focus to Switzerland and, in particular, on how opposition emerges in terms of actors and instruments, unveiling that the concept of opposition in this (and other consociational) systems is also connected to what has been referred to as the issue of "others". In particular, the paper offers some considerations on the role of direct democracy in Switzerland, with special regard to those forms that provide channels for opposition to voice their claims, taking into account their successes and shortcomings. Finally, the last section presents some considerations on the role of direct democracy in fostering stability and continuity of the Swiss system and on the possibility to draw comparative lessons from this case study.

2. *Consociationalism and the Swiss political system*

Switzerland has been defined as a "classic case"[3] of consociationalism, although further features affecting the consociational system are generally seen as peculiar to this country, especially regarding its directorial form of government, its underlying societal structure and its system of direct democracy.

In addition, differently from most of the other countries that fall within the category of consociations, Switzerland is not defined by one most salient cleavage, but by several overlapping ones, whose political salience has changed over time. Four types of cleavages have been identified, which have informed the political arena in Switzerland. Chronologically, the first was the conflict between cities and countryside, which overlapped with the second, between Catholics and Protestants, with this leading to the separation of two cantons and to the short civil war of 1847[4]. The working class-capital owners and linguistic cleavages are the other two sources of societal rifts that still maintain a political salience[5]. For different historical and societal reasons, albeit all politically relevant, none of these cleavages has gained as much

[3] A. Lijphart, *Patterns of Democracy*, cit.; A. McCulloch, *Consociational Settlements in Deeply Divided Societies: The Liberal-Corporate Distinction*, in *Democratization*, 2014, p. 501 ff.; R. Taylor, *Introduction: The Promise of Consociational Theory*, in R. Taylor (ed.), *Consociational Democracy: McGarry & O'Leary and the Northern Ireland Conflict*, London-New York, 2009, p. 1 ff.

[4] The civil war indeed opposed conservative cantons (predominantly Catholic) and liberal cantons (predominantly Protestant), as observed by E.M. Belser, *Accommodating National Minorities in Federal Switzerland: Old Concepts Meet New Realities*, in A.G. Gagnon – M. Burgess (eds), *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities*, Leiden-Boston, 2018, p. 79 ff.

[5] S. Mueller, *The Politics of Compromise: Institutions and Actors of Power-Sharing in Switzerland*, in S. Keil – A. McCulloch (eds), *Power-Sharing in Europe: Past Practice, Present Cases, and Future Directions*, Cham, 2021, p. 67 ff.

saliency as to determine a pillarization of the Swiss society and the formation of a divided society.[6] The well-known "cross-cuttingness"[7] that features Switzerland has led to a complex societal and political setting where the different sources of societal and political tension do not overlap, thus balancing each other and easing the political conflict at (both the cantonal and) the federal level.

The many cross-cutting cleavages are settled through a mainly liberal[8] and multidimensional – as opposed to corporate[9] – version of consociational democracy. It is liberal in the sense that it represents "whatever salient political identities emerge in democratic elections, whether these are based on ethnic or religious groups, or on subgroup or transgroup identities". It can be described as multidimensional as the consociational arrangement does not provide for the accommodation of only one politically salient cleavage, but of several of them that variously combine and interact. The Swiss model of consociationalism is governed by formal rules, constitutional customs and practices, informed by a consolidated – but prone to substantive change in the last decade[10] – power-sharing culture[11] and deeply intermingled with the other

[6] On this, W. Linder – S. Mueller, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, Cham, 2021, in part. p. 31-58; S. Mueller, *The Politics of Compromise*, cit.; on the evolution of these cleavages and the reasons that led to the emergence of a mono-national but multilingual state, see P. Dardanelli, *Multi-Lingual but Mono-National: Exploring and Explaining Switzerland's Exceptionalism*, in F. Requejo – M. Caminal (eds), *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*, London-New York, 2012, p. 295 ff.

[7] S. Mueller, *The Politics of Compromise*, cit., p. 71.

[8] On this, J. McGarry – B. O'Leary, *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, in *International Journal of Constitutional Law*, 2007, p. 670 ff.; see also A. McCulloch, *Consociational Settlements*, cit., p. 506-507, who argued that Switzerland combines "liberal and corporate rules", and it "operates primarily according to liberal consociational logic – the so-called "magic formula" for Federal Council composition fluctuates with electoral support"; some (limited) corporate logic is to be found "in the provisions on group autonomy, through its cantonal structure (22 cantons are linguistically homogeneous), and its sub-state quotas in [some] multilingual cantons".

[9] Corporate consociations are those systems that feature power sharing structures among a pre-determined number of communities selected according to ascriptive criteria that are supposed to represent the entire or the majority of the society; on this, see McCulloch, *Consociational Settlements*, cit., p. 502.

[10] On the trends of Swiss democracy, which is experiencing increased party competition, the emergence of new parties, a surge in support for populism, a pro/anti EU cleavage, and new green parties, see B. O'Leary, *Consociation in the Present*, in *Swiss Political Science Review*, 2019, p. 556 ff.; R. Freiburghaus – A. Vatter, *The Political Side of Consociationalism Reconsidered: Switzerland between a Polarized Parliament and Delicate Government Collegiality*, in *Swiss Political Science Review*, 2019, p. 57 ff.; L. Helms et al., *Alpine Troubles: Trajectories of De-Consociationalism in Austria and Switzerland Compared*, in *Swiss Political Science Review*, 2019, p. 381 ff.; A. Vatter, *Switzerland on the Road from a Consociational to a Centrifugal Democracy?*, in *Swiss Political Science Review*, 2016, p. 59 ff.

[11] On the declining trajectory of what is referred to as the Swiss "spirit of accommodation", see W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 200-203; notably, the authors have also argued that,

elements of Swiss democracy. In the political institutions, the conflicting interests that feature the Swiss societal and political arena are mainly channeled by parties in the Federal Council and by parties and interest groups in the legislative process[12] within the Federal Assembly[13].

As Kelly noted commenting Lijphart's work, the elements featuring the consociational model should be seen as wide categories with manifold manifestations[14]. Accordingly, despite its peculiarity, Switzerland falls within the model of consociational and consensus democracy as portrayed by both well-known Lijphart's definitions that one can derive from his most influential works. While it cannot be described as a mono-dimensional linguistic consociation[15], the Swiss political system displays all the four main components of a consociational democracy described in *Democracies in Plural Societies* (1. A grand coalition cabinet; 2. Segmental autonomy; 3. Mutual veto rights; 4. Proportional representation). The Federal Council is a form of grand coalition cabinet that represents the variety of Swiss crosscutting segments based on the well-known "magic formula", which is a customary rule of government formation. Whereas it is true that government members are primarily linked to political

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despite this evolution, it is difficult to imagine that this political culture will be totally lost and, consequently, a profound transformation of the Swiss system into a majoritarian democracy can hardly be expected.

[12] See S. Mueller, *The Politics of Compromise*, cit., p. 76-77; on the evolving role of parties in the Swiss democracy, from a rather weak position to a more central one, while still keeping a peculiar condition compared to other Western democracies, see A. Ladner et al., *Parties and Party Systems*, in P. Emmenegger et al. (eds), *The Oxford Handbook of Swiss Politics*, Oxford, 2023, p. 317 ff.; on interest groups, and their major influence on the Swiss political system, see A. Mach – S. Eichenberger, *Interest Groups*, in P. Emmenegger et al. (eds), *The Oxford Handbook*, cit., p. 337 ff.; these more recent analyses integrate the findings of G. Lehmbruch, *Consociational Democracy and Corporatism in Switzerland*, in *Publius: The Journal of Federalism*, 1993, p. 43 ff.; interest groups' (and cantons') positions have also been formally integrated in the law-making process after the adoption of art. 147 Const., which has introduced the so-called "pre-parliamentary" consultation process; on the role of cantons within and outside the Parliament, see F. Cappelletti et al., *Let's Talk Cash': Cantons' Interests and the Reform of Swiss Federalism*, in *Regional & Federal Studies*, 2014, p. 1 ff.; J. Schnabel – S. Mueller, *Vertical Influence or Horizontal Coordination? The Purpose of Intergovernmental Councils in Switzerland*, in *Regional & Federal Studies*, 2017, p. 549 ff.; as for the role of cantons in the different phases of the legislative process, including the pre-parliamentary phase, see See W. Linder – A. Vatter, *Institutions and Outcomes of Swiss Federalism: The Role of the Cantons in Swiss Politics*, in J.E. Lane (ed.), *The Swiss Labyrinth: Institutions, Outcomes and Redesign*, London-New York, 2001, p. 143 ff.

[13] Notably, the Federal Assembly does not serve as a venue for significant cantonal interest representation; cantonal lobbying is mostly informal, and it mainly takes place in the pre-parliamentary phase of decision-making.

[14] B.B. Kelly, *Power-Sharing and Consociational Theory*, Cham, 2019, p. 22 ff.; see also A. Lijphart, *Democracy in Plural Societies*, p. 25 ff.

[15] N. Stojanović, *Consociation: Switzerland and Bosnia and Herzegovina*, in *Survey*, 2007, 49 ff.; N. Stojanović, *Democracy, Ethnoicracy and Consociational Demoicracy*, in *International Political Science Review*, 2020, p. 30 ff.

parties – thus not directly representing linguistic or religious segments – the latter are the main vehicle for the political emergence of the described cleavages. Moreover, their election is bound to art. 175 const., which prescribes that the different regions and linguistic communities must be fairly represented in the Federal Council[16]. Segmental autonomy is achieved through federalism, which allows the expression of the different segments in various combinations and their self-rule within the cantons, which are mostly linguistically (and religiously) homogeneous. Mutual veto rights are granted to government members – whose parties represent manifold combinations of the Swiss segments – as the Federal Council decisions are officially unanimous (its sessions are not public). As well, some use of direct democracy can be framed as exercise of mutual veto rights, i.e. either when optional referenda are launched or endorsed by parties within the executive[17] or when it comes to cantonal veto to constitutional amendments[18]. Proportional representation features elections both at the federal (for the National Council[19]) and at the cantonal levels[20]. Lastly, proportional representation is granted in the Federal Supreme Court.

As well, Swiss democracy represents the model that most closely reproduces the elements of the type of consensus democracy presented in *Patters of Democracy: Government Forms and Performance in Thirty-Six Countries*. Except for the criterion related to the judicial review of legislation, the Swiss system ranks highest in all the criteria that have been used to identify a consensus democracy and distinguish it from majoritarian democracy[21].

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[16] Differently from what affirmed by N. Stojanović, *How to Solve the Dilemma of Power Sharing? Formal and Informal Patterns of Representation in the Swiss Multilingual Cantons*, in *Representation*, 2008, p. 241: "no formal constitutional rule guarantees the representation of French (21%), Italian (4%) or Romansh (0,1%) speakers"; the official text of the Constitution in the different languages is ambiguous, with the German wording ("angemessen") being less constraining than the version in the Italian ("equamente") and the French version ("équitablement").

[17] Although this interpretation may be subject to contestation as direct democracy only attribute the power to stimulate a popular vote.

[18] See W. Linder – A. Vatter, *Institutions and Outcomes*, cit., p. 146-148; B. O'Leary, *Consociation in the Present*, cit., p. 569; this seems to show once more the peculiar nature of consociationalism and to prove its multidimensionality.

[19] The high chamber is instead largely elected by majoritarian rules, but this cannot be seen as a diverging element from Lijphart's model, as was suggested by N. Stojanović, *Democracy*, cit. p. 32, footnote 3, ; the election of the Council of the States follows a classic federal logic and grants the equally important representation of the cantons; this, in turn, contributes to the representation of their voices that bring other combinations of the described cleavages featuring the Swiss society.

[20] Most, but not all, cantons use proportional rules.

[21] See A. Lijphart, *Patterns of Democracy*, cit., p. 3 f.

Although some authors have observed that a de-consociation pattern is occurring in Switzerland[22] – or even affirmed that this system cannot be described as a consociation[23] –, based on the description provided above and the functioning of the Swiss system, these accounts "are not compellingly persuasive […] at least regarding its institutional arrangements"[24] and their consociational effects.

As said, the consociational arrangement is complemented by and deeply intermingled with other structural elements of the Swiss form of government.

The first is the directorial form of government, which is characterized by the separation between the collegial Federal Council and the Federal Assembly after the parliamentary election of the members of the federal government.

The second is federalism, which, as seen, is also a constitutive element of the consociational system inasmuch as it allows for a manifestation of segmental autonomy. Of course, the federal principle has much of a broader scope than simple self-rule and has informed, while variously implemented and briefly suspended, the Swiss model from its very beginning[25]. The Swiss federal system, which was characterized by an aggregative process of previous sovereign entities, contributes greatly to the phenomenon of crosscuttingness at the national level as religious, linguistic and socio-economic cleavages do not overlap with cantonal borders[26].

The third is direct democracy. The latter takes several forms and is present at the federal, cantonal and municipal levels. At the federal level, a first form of direct democracy is the initiative, which is aimed at proposing a total or partial revision of the constitution. According to art. 138 and 139 const., one hundred thousand citizens can propose, within 18 months, a total or partial revision of the constitution, which are respectively submitted to the vote of the people and of the people and the cantons. While the former is submitted in the form of a set of principles, the latter can also take the form of an already full-fledged text. In this case, the text is voted by the people and

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[22] L. Helms, M. Jenny and D.M. Willumsen, *Alpine Troubles*, cit.

[23] B. Barry, *Political Accommodation and Consociational Democracy*, in *British Journal of Political Science*, 1975, p. 477 ff.; N. Stojanović *Consociation*, cit.; R.B. Andeweg, *Consociationalism*, in J.D. Wright (ed.), *International Encyclopedia of the Social and Behavioral Sciences*, Oxford, 2015, p. 692 ff.; N. Stojanović, *Democracy*, cit.., p. 32-33, rightly opposed Lijphart's description of Switzerland as a consociation that is mainly marked by ethnic and linguistic cleavages (A. Lijphart, *The Evolution of Consociational Theory and Consociational Practices, 1965–2000*, in *Acta Politica*, 2002, p. 11 ff.); from this, the author inferred that Switzerland cannot be considered as a consociation; this reasoning does not consider the fact that a political system may not be a linguistic consociation but still be a consociation.

[24] On this, see B. O'Leary, *Consociation in the Present*, cit., p. 569.

[25] On this, see A. Vatter, *Swiss Federalism: The Transformation of a Federal Model*, London-New York, 2018.

[26] W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 39.

the cantons, but the parliament can oppose a counter-project that is voted simultaneously. In the other case, the principle is either submitted to the vote of the people (in case of rejection by the federal assembly) that will decide whether to pursue the legislative process or (in case of approval by the federal assembly) it is drafted as a legal text and voted by the people and the cantons. A second form of direct democracy at the federal level is the mandatory referendum, which is held after the adoption of constitutional amendments and important international treaties (majority of the people and majority the cantons)[27]. The third type of federal popular vote is the optional referendum, which can be proposed by fifty thousand citizens within 100 days to approve or reject most parliamentary acts or regulations within a hundred days from the publication of the act and is subject to the vote of the people[28].

Very frequently used, such instruments of direct democracy have played a fundamental role in shaping the current Swiss political system and its consociational and cooperative features to such an extent that they are considered one of the main factors favoring the emergence and consolidation of the model of *Konkordanzdemocratie*[29].

In addition, direct democracy is strictly intermingled with the federal structure of the country. Besides the fact that constitutional amendments require the dual approval of both the people and the cantons, direct democratic instruments originated from cantonal experiences[30] and are still a fundamental element of these subnational systems, where they may even have a wider scope[31]. All the cantons indeed regulate forms of cantonal and local direct democracy[32] that are similar to those described as regards the national level, and, as will be seen below, some of them provide for much inclusive regulations as concerns the right to vote.

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[27] Art. 140 const.

[28] Art. 141 const.

[29] I. Standelmann-Steffen – L. Lemann, *Direct Democracy*, in P. Emmenegger et al. (eds), *The Oxford Handbook*, cit., p. 156 ff.; M. Qvortrup, *The Paradox of Direct Democracy and Elite Accommodation: The Case of Switzerland*, in M. Jakala et al. (eds), *Consociationalism and Power-Sharing in Europe: Arend Lijphart's Theory of Political Accommodation*, Cham, 2018, p. 177 ff.; W. Linder – S. Mueller, *Swiss Democracy*, cit., pp. 119-166.

[30] H. Kriesi – A.H. Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy*, Cambridge, 2008, p. 49 ff., who, at p. 54, described the existence of a "general pattern of incremental extensions of direct democratic mechanisms at the federal level, based on earlier experiences at the cantonal level".

[31] As observed by W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 121, for instance "Some cantons hold an obligatory referendum for most laws and important acts, and referenda may also be held on specific financial decisions".

[32] Which emerged later than at the cantonal and federal level, as noted by H. Kriesi – A.H. Trechsel, *The Politics of Switzerland*, cit., p. 55.

3. Opposition in Switzerland: actors and instruments

3.1. Recurrent framings of opposition in Switzerland

Some authors have stated that the only way to be in opposition in Switzerland is to be part of the government[33]. Others have instead argued that the only opposition is the people[34]. Both depictions are valid and not mutually exclusive.

The concept of opposition is not unknown or unused as regards the Swiss context. However, it has been observed that knowledge of the dynamics of Swiss opposition is still quite limited[35]. Scholarship addressing opposition in Switzerland mainly refer to it in two ways.

Firstly, opposition is equated to Westminster-like parliamentary opposition or, more in general, parliamentary opposition that institutionally opposes governmental action and seeks to propose a clear-cut alternative to it in order to gain more governmental power. Authors have underlined its absence[36] or its extraordinary presence in the Swiss context[37]. Accordingly, it has been affirmed that, since the establishment of the "magic formula", Switzerland has witnessed a short period in which this type of opposition operated. This is the short-lived experiment of opposition by the Swiss People's Party (*Schweizerische Volkspartei*, SVP), which withdrew its support to the government after the election as federal councilor of an SVP candidate that was not supported by the party's leadership. The experiment did not last long, and SVP endorsed candidates were subsequently reincluded in the government coalition. Nevertheless, this phase has clearly shown that the patterns of opposition in Switzerland are varied and evolving, also as a consequence of an increasingly polarized political system[38].

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[33] O. Mazzoleni, *Une année difficile pour la droite nationaliste*, interview on SwissInfo, 24 December 2008.

[34] For instance, see M. Mowlam, *Popular Access to the Decision-Making Process in Switzerland: The Role of Direct Democracy*, in *Government and Opposition*, 1979, p. 182, quoting J.R. de Salis.

[35] C.H. Church – A. Vatter, *Opposition in Consensual Switzerland: A Short but Significant Experiment*, in *Government and Opposition*, 2009, p. 436.

[36] H. Kerr, *The Structure of Opposition in the Swiss Parliament*, in *Legislative Studies Quarterly*, 1978, pp. 51-62; H. Kriesi – A.H. Trechsel, *The Politics of Switzerland*, p. 97 f.; C.H. Church – A. Vatter, *Opposition in Consensual Switzerland*, cit., p. 414 f.

[37] C.H. Church – A. Vatter, *Opposition in Consensual Switzerland*, cit.; N. Stojanović, *Party, Regional and Linguistic Proportionality Under Majoritarian rules: Swiss Federal Council Elections*, in *Swiss Political Science Review*, 2016, p. 41 ff.

[38] C.H. Church – A. Vatter, *Shadows in the Swiss Paradise*, in *Journal of Democracy*, 2016, p. 166 ff.; H. Kriesi, *Conclusion: The Political Consequences of the Polarization of Swiss Politics*, in *Swiss Political Science Review*, 2015, p. 724 ff.; A. Vatter, *Swiss Consensus Democracy in Transition: a Re-Analysis of Lijphart's Concept of*

Secondly, and based on the latter consideration, the term opposition is used as a loose category to describe any form of political behavior – which echoes Dahl's concept of contestation and Helm's concept of political opposition[39] – countering or contesting the coalition government's action, which is carried out not only by parties but by numerous actors within and outside the political institutions using several instruments, some of which are peculiar to the context, such as direct democracy. Opposition is thus flexible and variable, and opposition politically salient behavior is observable on a case-to-case basis[40].

Within the political institutions, opposition consists of political parties both making up the government coalition and not included in it.

In the first case, opposition is carried out by the governing parties through opposition behavior within the executive and the parliament[41] as well as, as will be seen below, through direct democracy. Falling within the second category are parties that are (at the moment) excluded from the grand coalition. All of them may be seen as part of a (potentially) "responsible opposition" in Sartori's terms[42], as any political force that gains enough stable support for a long period of time may end up being coopted to integrate the ruling coalition. Their opposition action takes place within an increasingly polarized parliament and is also – but not exclusively – carried out through the use of direct democracy.

A last varied group of opposition consists of parties not represented in the political institutions, interest groups and groups of citizens that make use of direct democracy instruments to oppose institutional decisions or to affect its action and agenda. Although the effectiveness of their action may be different, they are all to various extents and in different ways capable of influencing the political agenda.

Democracy for Switzerland from 1997 to 2007, in *World Political Science Review*, 2008, p. 1 ff.; A. Vatter, *Switzerland*, cit.

[39] L. Helm, *Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies*, in *Government and Opposition*, 2004, p. 22 ff.

[40] For instance, see C.H. Church – A. Vatter, *Opposition in Consensual Switzerland*, cit., p. 414 and 436; R. Freiburghaus – A. Vatter, *The Political Side*, cit.; W. Linder – S. Mueller, *Swiss Democracy*, cit.; H.H. Kerr, *The Structure of Opposition*, cit.

[41] As directorial form of government allows government parties to defy the executive in the parliament, they frequently take an isolated stance, especially in those policy fields in which they claim issue-ownership: for instance, this is the case with the SVP's position on immigration; on this, see D. Traber, *Disenchanted Swiss Parliament? Electoral Strategies and Coalition Formation*, in *Swiss Political Science Review*, 2015, p. 702 ff.

[42] G. Sartori, *Opposition and Control: Problems and Prospects*, in *Government and Opposition*, 1966, p. 152.

At the cantonal level, political systems reproduce consociational traits[43] and patterns of opposition are not that dissimilar to the federal level. It is thus possible to affirm that opposition takes similar forms as at the federal level.

3.2. *The issue of the "others" in consociational systems: general considerations and their applicability to Switzerland*

This depiction of oppositions, while broad, does not seem to offer a complete picture of the Swiss situation. This section aims to show that the Swiss system includes further (potential or actual) forms of opposition in the form of the "others", i.e. those that are to different extent excluded from the consociational arrangement and/or from access to some or all the instruments that are provided for to represent dissonant political stances/voices.

3.2.1. The "others" in consociational theory and practice

Lijphart's consociationalism theory has gone through a long evolution and continuous refinement up to today[44]. Critiques and refinements have addressed its normative and predictive contents[45], some definitional aspects,[46] as well as its assessment of the consociational systems' democratic performance[47]. The normative strand of consociationalism has increasingly been connected to the issue of (and the

[43] As observed by S. Mueller, *The Politics of Compromise*, cit., p. 78: "Switzerland is definitely not the land of single-party cabinets".

[44] For a complete overview, see B.B. Kelly, *Power-Sharing*, cit.

[45] On this, on for further references, see M. Bogaards, *The Uneasy Relationship between Empirical and Normative Types in Consociational Theory*, in *Journal of Theoretical Politics*, 2000, p. 395 ff.; N.C. Bormann, *Patterns of Democracy and Its Critics*, in *Living Reviews in Relativity*, 2010, p. 1 ff.

[46] For instance, see A. Vatter, *Lijphart Expanded: Three Dimensions of Democracy in Advanced OECD Countries?*, *European Political Science Review*, 2009, p. 125 ff. on the need to add an assessment of the consensual or majoritarian effects of direct democracy; R. Freiburghaus – A. Vatter, *The Political Side*, cit., p. 357 ff., who suggested bringing in institutional venues when it comes to the analysis of the political side of consociationalism.

[47] T. Agarin – A. McCulloch, *How Power-Sharing Includes and Excludes Non-Dominant Communities: Introduction to the Special Issue*, in *International Political Science Review*, 2019, p. 3 ff. and the other articles in this issue.

literature on) transition from violent conflict and conflict resolution[48] and the management of what one can refer to as post-conflict divided societies[49].

Notably, this scholarship includes several critics of consociationalism, who have gone so far as to question some of the basic elements of Lijphart's theory, such as the fact that consociational systems are stable and not necessarily temporary forms of democracy[50]. One of the main contended issues of consociational models is related to their democratic performance. Numerous authors have pointed to the fact that consensus democracy may not ease but reinforce societal cleavages and conflicts[51]; moreover, it engenders a structural and permanent exclusion of some components of the society, the so-called "others", which are not included in the consociational arrangements. "Others" can be the constituent people that are not included in the coalition (e.g. in Bosnia and Herzegovina), parties excluded from grand coalitions (e.g. in Switzerland and South Tyrol), parties or groups that are part of the consociational agreement in a minority position (e.g. in Switzerland, Belgium, Burundi, South Tyrol) or non-citizens, especially if they represent a significant component of a society and can access channels to make their voice heard (e.g. in Switzerland and South Tyrol).

Based on this, it has been observed that consensus democracy's degree of inclusion and pluralism is – to a certain extent counterintuitively – limited compared to that liberal democracies can reach[52], especially if corporate consociations[53] are considered. Consociation "tends to sacrifice the inclusion of other groups who hold

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[48] A. Lijphart, *Power-Sharing in South Africa*, Berkeley, 1985; S. Keil – A. McCulloch (eds), *Power-Sharing in Europe*; cit.; see also P.R. Williams – M. Sterio (eds), *Research Handbook on Post-Conflict State Building*, Cheltenham-Northampton, 2020.

[49] On this, see S. Choudry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford, 2008; according to R. Taylor, *Introduction*, cit., p. 9, J. McGarry and B. O'Leary "assertively regenerated the standing of consociational theory – especially by giving added focus to the role of international involvement – so as to not only better interpret the Northern Ireland conflict, but also to significantly inform political practice there and further afield"; see J. McGarry – B. O'Leary (eds), *The Politics of Ethnic Conflict-Regulation*, London, 1993; J. McGarry – B. O'Leary, *The Northern Ireland Conflict: Consociational Engagements*, Oxford, 2004.

[50] For instance, see D.L. Horowitz, *Ethnic Groups in Conflict*, Berkeley-Los Angeles-London, 2000; N. Stojanovič, *Democracy*, cit., 33 affirmed that "consociationalism is typically seen as a 'transitional phase'"; R.B. Andeweg, *Consociationalism*, cit.; while it is true that Lijphart himself contended that in some cases consociations have evolved towards more majoritarian forms of government as the consociational arrangements became superficial due to the easing of their societal cleavages (A. Lijphart, *The Evolution of Consociational Theory and Consociational Practices, 1965–2000*, in *Acta Politica*, 2002, p. 11 ff.), in A. Lijphart, *Patterns of Democracy*, cit., the author proposed the model as a stable alternative to majoritarian democracy.

[51] For instance, see D.L. Horowitz, *Ethnic Groups*, cit.; S. Wolff, *Consociationalism: Power Sharing and Self-Governance*, in S. Wolff – C. Yakinthou (eds), *Conflict Management in Divided Societies*, London-New York, 2012, p. 23 ff.

[52] T. Agarin – A. McCulloch, *How Power-Sharing*, cit., p. 4.

[53] A. McCulloch, *Consociational Settlements*, cit.

alternative identities beyond the ethnonational divide, including but not restricted to gender, sexuality and class identities. It also tends to limit the representation and participation of very small ethnic minorities, including those that are territorially dispersed as well as internally displaced persons and other migrant communities"[54]. In sum, what this strand of literature has rightly pointed out is that consociational systems structurally encounter and need to address the issues of their inclusivity and the exclusion of oppositions, or "others", and risk being trapped in what Agarin and McCulloch refer to as exclusion-amid-inclusion dilemma (EAI)[55].

The exclusion of "others" is one of the main reasons why consociational systems are seen as temporary models mainly aimed at creating the conditions for a transition towards stable peace and democracy. In line with this literature, if consociational systems manage to unite a country and favor the creation of at least a thin sense of unity, they are then generally supposed to cease – or at least lose most of their rigid structures – and give way to more "liberal" (majoritarian) practices and institutions. As Stojanović put it, "If citizens living in a consociational regime develop over time a sufficiently strong sense of common (political and/or national) identity, then the polity becomes a democracy (i.e. demos-cracy) and that no longer requires consociational institutions"[56]. In other words, the EAI dilemma problem of oppositions/excluded groups is generally supposed to be solved through a change of democratic regime.

While the EAI dilemma literature has raised the timely issue of exclusion in consociations, it seems that it offers more of a theoretical *pars destruens* than a *pars construens*. In other words, either there is a change of regime towards liberal institutions and practices, or the problem of exclusion and the lack of pluralism is mostly irresolvable in consensus democracies. However, since all the "others" are, to different extents, excluded from power-sharing institutions or practices, and have (at least potentially) claims that divert from and directly and indirectly contest the ruling coalition's activity, they could be all considered as forms of opposition in Dahl's or Helm's terms. Accordingly, the debate around "others" in consociations is one about the existence of opposition and the channels the legal systems provide for it to express, although it has not generally been framed in these terms. When addressing opposition, the implicit theoretical reference seems to be Westminster style opposition – one or more political forces that represent the alternative to the ruling government and are

[54] T. Agarin – A. McCulloch, *How Power-Sharing*, cit., p. 4.
[55] Ivi.
[56] N. Stojanović, *Democracy*, cit., p. 32.

supposed to cyclically alternate with it – and what is generally affirmed about consociational systems, is that they do not have it[57]. While they do not display majoritarian democracies' forms of opposition, the issue of the "others" has clarified that they equally experience at least certain types of it.

Framing this as a problem related to oppositions, firstly, seems to normalize the presented issues as related to a particular type of democratic systems that is on an equal footing with majoritarian ones. Such a standpoint is based on the fact that consociations have not originally been considered as temporary systems but stable alternatives to majoritarian democracy, and that several of them are still in place and do not seem doomed to demise. Secondly and consequently, considering others as forms of (actual or potential) opposition allows one to focus on more constructive considerations that present possible existing solutions without implying a change of regime.

3.2.2. *The others and the Swiss consociational democracy*

Notably, the issue of the "others" has been strictly connected to corporate consociations. Some authors have explicitly stated – but not thoroughly demonstrated – that the EAI dilemma does not concern the so-called liberal or mixed democracies – such as Switzerland[58].

The latter clearly offer more opportunities for others to be represented and involved as they allow the governing consociational coalition to change over time based on the evolution of the population's preferences. Nevertheless, it appears too simplistic to exclude that these forms of consociations face similar problems of exclusion.[59] This will be demonstrated through two examples within the Swiss case.

The first is the exclusion of non-citizen residents. While this is not a specific issue of consociational systems, but is common to any democracy, it anyhow acquires a particular relevance in Switzerland, where a quarter of the resident population does not hold Swiss citizenship. In addition, consensus systems' need to maintain a delicate

[57] In this sense, see A. Lijphart, *The Wave of Power-Sharing Democracy*, in A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, 2002, p. 41; C.H. Church – A. Vatter, *Opposition in Consensual Switzerland*, cit., p. 415.

[58] A. McCulloch, *Consociational Settlements*, cit.; N. Stojanović, *Political Marginalization of "Others" in Consociational Regimes*, in *Zeitschrift für Vergleichende Politikwissenschaft*, 2018, p. 341 ff., in part. p. 348 and footnote 9.

[59] N. Stojanović, *Political Marginalization*, cit., p. 361, acknowledged that "further research is needed to ascertain how well (or badly) Others fare in "liberal" consociations".

balance among the components of the consociational agreement and may therefore benefit from the exclusion of non-residents, whose participation may change existing power relations and require major changes. This implies that the barriers to foreigners' inclusion in these systems, even if liberal or mixed, may be more difficult to overcome than in majoritarian democracies.

The second example is the exclusion of minority groups composed of citizens that do not possess the features that the Swiss system protects through its complex institutional system.

On the one hand, those are groupings that display linguistic and/or religious diversities that do not correspond to the diversities the Swiss system was created to manage. As Switzerland does not provide for a structured system of minority rights for the members of these groups either – despite some of which being recognized as national minorities under the Framework Convention for the Protection of National Minorities (FCNM) – they are frequently ignored by political parties and consequently not included in policymaking, nor are they represented within the political institutions. The condition of these groups seems paradoxically more difficult than in other countries as they feature minority characteristics in a setting that – albeit multicultural – is not traditionally familiar with the concept of national minority[60]. The Jewish, Yenish, Sinti and Roma minority members fall within this category[61].

On the other, in addition to those groupings, non-territorial linguistic minorities, such as the Romansch-speaking community outside the canton of Grisons, may also arguably be seen as "others". When it comes to linguistic diversity, the Swiss constitutional system establishes the principle of territoriality, according to which traditional linguistic regions – which are not totally overlapping with cantonal borders – must be respected and protected. This allows for the protection of members of minorities speaking one of the four official languages[62] in their linguistic regions, but not outside. Such a territory-based model greatly affects the lives of non-territorial linguistic communities and substantially determines their political irrelevance[63].

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[60] See E.M. Belser, *Accommodating*, cit., p. 79 ff.

[61] The first two groups are recognized as national minorities under the FCNM; further members of groups bearing other forms of diversity may gain political salience at a later stage and similarly end up being excluded by the consociational arrangement, such as LGBTQI+ people and persons with disabilities.

[62] German, French, Italian and Romansch, which is defined as a (semi-)official language as, according to Art. 70, para. 2, const., it is "an official language of the Confederation when communicating with persons who speak Romansh".

[63] On this, see E.M. Belser, *Accommodating*, cit.; R. Freiburghaus – A. Vatter, *Assessing the Effects of Amendment Rules in Federal Systems: Australia and Switzerland Compared*, in *Publius: The Journal of Federalism*, 2024, p. 283 ff.

3.3. *Instruments of opposition and the role of direct democracy at the different levels of government*

As for the instruments that the different actors of opposition employ, two main categories can be detected. The first relates to traditional opposition within the political institutions. As for the executive, the coalition parties may oppose their position in government decisions, both informally and by calling a formal vote on some issues. The latter case implies distorting the consensual nature of the institute and has been used especially during phases of stark polarization of the Swiss political system[64].

Within the parliament, ordinary opposition – through voting – is put in place by both governmental and non-governmental parties depending on the issue at stake. While coalescence had characterized long phases of the parliamentary activity, today's polarization leads to frequent oppositional behaviors especially among government parties and to a limited willingness to accept the executive's basic policy stance[65].

Secondly, direct democracy constitutes a fundamental tool for several opposition groups and one of the most impactful elements on the evolution of the Swiss democracy. Notably, not every direct democracy instrument can be effectively employed for opposition purposes. In this sense, mandatory referenda at the federal level have not been considered as genuine opposition instruments, for they are passive forms of popular vote that must be referred to the voters and whose launch is thus attributed to some specific actors[66].

Contrarily, optional referenda and initiatives have not only been framed as truly opposition tools – as they are launched to overturn the government and the parliamentary majority or circumvent them – but also among the most significant factors favoring consociational practices.

Opposition through direct democracy materializes in different ways and not only through simple launch and vote of referenda and initiatives. Naturally, direct democracy is employed as an instrument of opposition (in the broad sense accepted in this article) when an initiative or an optional referendum is launched – by a party, one or more interest groups or a group of citizens – to set the political agenda or contrast a policy. This represents the strongest employment of direct democracy as an opposition tool, as it leads to a vote that may have considerable effects on political

[64] As witnessed by the former Federal Councillor Pascal Couchepin; see P. Couchepin, *Ich glaube an die Politik: Gespräche mit Jean Romain*, Zurich, 2002, p. 40 ff.
[65] R. Freiburghaus – A. Vatter, *The Political Side*, cit., pp. 364-371.
[66] See A. Vatter, *Lijphart Expanded*, cit., p. 128.

dynamics beyond the issue voted[67]. However, even the threat to launch an initiative or, more importantly, a referendum constitutes a significant method of opposition. The very threat of a popular vote substantially influences the development of policies in the Swiss system, due to the rather easily attainable requirements to trigger it. Lastly, opposition through direct democracy, or in the framework of a popular vote, is carried out (specifically by government and non-government parties) through the support of a vote against the government position on the issue at stake. Such a dynamic has become very common in the recent decades, where it is usual to observe a disunited government coalition when it comes to popular votes[68]. Indeed, taking a differentiated stance in popular votes allows those parties to mark their position before the electorate and eventually gain political consensus[69].

The employment of these direct democracy instruments for opposition purposes produces several effects on the wider political system. Traditionally, one of the most significant consequences of using direct democracy as an opposition instrument – especially in the form of the optional referendum – has been what one may refer to as the "cooptation effect". Ever since the introduction of these type of popular vote, parties excluded from the executive that have triggered them and gained enough consensus to structurally frustrate government activity have subsequently been coopted in the government. This is the reason why direct democracy is considered one of the main – if not the main – factors that have determined the consolidation of consensus democracy in Switzerland[70]. This employment of direct democracy has first led to the replacement of a majoritarian government directed by the Liberal Radicals by a coalition government that also included the Christian Democratic party (since 1891, gaining a second seat in 1908), then the Farmers and Burghers party (*Bauern-, Gewerbe- and Bürgerpartei*, since 1928)[71] and, ultimately, the Social Democrats (since 1943, gaining a second seat in 1959). In addition, not only has direct democracy induced the establishment of the consociational system, it also has favored its consolidation. This

[67] On this, see the next paragraphs.

[68] A. Vatter, *Switzerland*, cit., p. 69-70.

[69] M. Qvortrup, *The Paradox of Direct Democracy and Elite Accommodation: The Case of Switzerland*, in M. Jakala et al. (eds), *Consociationalism and Power-Sharing in Europe: Arend Lijphart's Theory of Political Accommodation*, Cham, 2018, p. 177 ff.

[70] J. Steiner, *Amicable Agreement versus Majority Role: Conflict Resolution in Switzerland*, Chapel-Hill, 1974; Y. Papadopoulos, *How does Direct Democracy Matter? The Impact of Referendum Votes on Politics and Policy-Making*, in West *European Politics*, 2001, p. 35 ff.; W. Linder – S. Mueller, *Swiss Democracy*, cit., pp. 167-207.

[71] The Farmers and Burghers party had split off from the Liberal Radicals in 1918 and were then integrated in the government as a new member; this party is the "ancestor" of the SVP, which gained a second seat at the expense of the Christian-Democrats after the 2003 elections.

is what can be labeled as the "consensual effect" of direct democracy. Authors have indeed pointed to the fact that initiative and optional referenda, while *prima facie* majoritarian instruments, contribute to reinforcing consensual practices among government parties in decision making processes within the executive and the parliament[72]. Moreover, as Stojanović put it, direct democracy has favored the creation of a "thin" common Swiss *demos*, an element deemed fundamental to avoid the evolution of consociationalism to ethnocracy[73]. This can be framed as the "unifying effect" of direct democracy. Moreover, launching popular votes may also influence the political dynamics of the country regardless of the final result. The launch of an initiative, in particular, produces what may be called as an "agenda-setting" effect on the Swiss political system as it lures societal and political attention to political issues that are often subsequently taken into consideration by political institutions even if the initiative is not approved[74]. Contrarily, in terms of results of the popular votes, direct democracy – in the form of the optional referendum – has often had a "braking effect" on the development of policies: the history of popular votes in Switzerland indeed shows a general tendency to favour the maintenance of the status quo[75].

Lastly, and most importantly for the sake of this analysis, a generally less addressed effect of direct democracy as an opposition instrument is its (at least potential) "pluralizing effect" on the consociational arrangement, especially when it comes to its bottom-up employment by some minority groups of the civil society and parties excluded from the coalition government. Direct democracy constitutes the key to opening an otherwise rather rigid consociational system and (potentially) bringing in voices and political positions that would risk being overlooked if this tool did not exist, such as non-government parties, but especially social movements and "others" or minorities. Interestingly, at the subnational level, opportunities for opening up democratic decision-making are even broader, as some cantons have extended political

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[72] L. Neidhart, *Plebiszit und pluralitäre Demokratie*, Bern, 1970; Y. Papadopoulos, *How does Direct Democracy Matter? The Impact of Referendum Votes on Politics and Policy-Making*, in E. Lane (ed.), *The Swiss Labyrinth*, cit., p. 58 ff.; W. Linder, *Direct Democracy*, in U. Klöti et al. (eds), *Handbook of Swiss Politics*, Zurich, 2007, p. 101 ff.

[73] N. Stojanović, *Democracy*, cit., p. 39-40.

[74] H. Kriesi – A.H. Trechsel, *The Politics*, cit., p. 59-61; W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 136-137, have shown that the initiative serves four different objectives: 1. Direct success against the federal authorities; 2. Indirect success through negotiation with the authorities; 3. Mobilization of new issues and political tendencies; 4. Self-staging and mobilization for electoral success.

[75] W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 132-136.

rights to non-citizens at the cantonal and (more frequently) local level[76]. Consequently, the non-citizens "others" in Switzerland might employ direct democracy as an opposition tool at the subnational level to make their voice heard and possibly influence cantonal, but also national political dynamics, as it is in the nature of a federal structure to favor experimentation at the subnational level and its possible diffusion[77].

Such a function of direct democracy on the consensus system and, in particular, its possible role in making minority (others') voices emerge are rather underestimated in the literature dealing with the Swiss case[78]. One of the main reasons why this pluralizing effect has been generally overlooked or downsized is that the actual use of direct democracy has shown a central role of interest groups (and parties) – often variously tied to members of governing parties[79] – to the point that the Swiss system was described as a corporatist democracy. Several studies have been dedicated to the actual degree of openness of the system and to the role of interest groups. Older accounts have underlined that the system seems to favor the creation of an oligarchical model whereby interest groups are the pivot, as they are strongly connected to political party members and have more means to organize and condition the results of direct democracy[80]. In addition, it cannot be ignored that the opportunity to use direct

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[76] When it comes to political rights at the cantonal level, the cantons of Jura and Neuchâtel have extended them to foreigners, while in the cantons of Neuchâtel, Jura, Vaud and Fribourg and Geneva municipalities are authorized to extend them.

[77] This dynamic relates to the concept of laboratory federalism; on this, see: W.E. Oates, *An Essay on Fiscal Federalism*, in *Journal of Economic Literature*, 1999, p. 1120 ff.

[78] Notable exceptions are W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 186, where they have expressly affirmed that "Direct democracy, however, is a strong corrective to elitist consociationalism" and J. Steiner, *Power Sharing: Another Swiss "Export Product"?*, in J.V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies*, Lexington-Toronto, 1990, p. 107 ff., who argued for the introduction of tools of direct democracy similar to those existing in Switzerland; both contributions have paid particular attention to the fact that direct democracy allows avoiding the risk of elitist consociationalism, but they focus less on the potential beneficiaries of popular votes.

[79] On the ties that connect parties and interest groups, see A. Mach – S. Eichenberger, *Interest Groups*, in P. Emmenegger et al. (eds), *The Oxford Handbook*, cit., p. 343-344, who have observed a significant growth of MP's mandates within interest groups over the last years, which corresponds to the changing lobbying strategies in response to an increasing centrality of the parliamentary phase in decision-making processes; see also R. Erne – S. Schief. *Strong Ties between Independent Organizations*, in E. Allern – T. Bale (eds), *Le56-of-Centre Parties and Trade Unions in the Twenty-First Century*, Oxford, 2017, p. 226-245; A. Pilotti, *Entre démocratisation et professionnalisation: le Parlement suisse et ses membres de 1910 à 2016*, Zurich, 2017; D. Thomas et al., *Networks of Coordination: Swiss Business Associations as an Intermediary between Business, Politics and Administration during the 20th Century*, in *Business and Politics*, 2009, p. 1 ff.

[80] P. Schmitter, *Still the Century of Corporatism?*, in *The Review of Politics*, 1974, 85 ff.; D.E. Neubauer, *Some Conditions of Democracy*, in C.E. Cnudde – D.E. Neubauer (eds), *Empirical Democratic Theory*, Chicago, 1969, p. 225-236; M. Mowlam, *Access to the Decision-making Process in Switzerland : The Role of Direct Democracy*, in *Government and Opposition*, 1979, pp. 180-197.

democracy to further pluralize the consociational system has not been seized by these groups so far, and generally popular votes more often address the "others" (minorities and foreigners) rather than have them as proponents[81]. Compared to interest groups and parties, these groupings face bigger organizational obstacles and have relatively less economic and human resources[82]. Consequently, as regards the initiative, it has been demonstrated that it is mostly employed by political parties[83]. Concerning the optional referendum these groups face the additional risk of seeing their proposals frustrated by the "tyranny of the majority"[84].

However, today, also due to some reforms that reinforced the role (and the professionalization) of the parliament[85], the opinions revolving around direct democracy are rather less pessimistic and experience shows that direct democracy triggered by groups of the civil society can influence Swiss policymaking substantially[86]. Therefore, while it is true that interest groups (and parties) are for several reasons still far more effective than civil society groups in the use of direct democracy, this does not diminish the pluralizing potential of direct democracy as an opposition tool in this context.

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[81] For instance, the SVP's direct democracy campaigns, which have contributed to its ascent as the first political party in Switzerland, have frequently focused on issues concerning immigration; on this, see W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 119 ff.

[82] W. Linder – S. Mueller, *Swiss Democracy*, cit., pp. 129-137.

[83] On this, see N. Braun Binder et al., *Die Volksinitiative als (ausser-)parlamentarisches Instrument?*, Zurich, 2020.

[84] I. Standelmann-Steffen – L. Lemann, *Direct Democracy*, in P. Emmenegger et al. (eds), *The Oxford Handbook*, cit., p. 162; A. Vatter – D. Danaci, *Mehrheitstyrannei durch Volksentscheide? Zum Spannungsverhältnis zwischen direkter Demokratie und Minderheitenschutz*, in *Politische Vierteljahresschri*, 2010, p. 205 ff.; this risk is present at all levels of government: on the (negative) role of direct democracy in naturalization processes in Switzerland, which have been managed also through direct democracy at the municipal level for a long time, see J. Hainmueller – D. Hangartner, *Does Direct Democracy Hurt Immigrant Minorities? Evidence from Naturalization Decisions in Switzerland*, in *American Journal of Political Science*, 2019, p. 53 ff.

[85] R. Gava et al., *Legislating or Rubber-Stamping? Assessing Parliament's Influence on Law-Making with Text Reuse*, in *European Journal of Political Research*, 2020, p. 175 ff.; S. Bailer – S. Bütikofer, *Parliament*, in P. Emmeneggeret al. (eds), *The Oxford Handbook*, cit., p. 174 ff.

[86] Especially when it comes to initiatives: on this, see W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 136-137, who nevertheless, have underlined that inequalities of influence still persist; see also Y. Papadopoulos, *Analysis of Functions and Dysfunctions of Direct Democracy: Top-Down and Bottom-Up Perspectives*, in *Politics and Society*, 1995, p. 421–448.

4. *Switzerland: model or unicum?*

The last section attempted to shed light on a rather neglected effect or function of direct democracy used as an opposition tool in Switzerland. Besides its most discussed effects, direct democracy has produced a certain degree of pluralization of the consociational arrangement. Direct democracy and its different uses indeed provide the means for various forms of opposition to emerge, among which (in this moment more potentially than concretely) those diverse minority groupings that are excluded from representation in the *Konkordanzdemokratie*. In addition, the interaction between federalism and direct democracy used as an opposition tool may at least potentially lead to even further pluralization of the Swiss political system by granting entry points to a wide variety of actors.

It thus seems that the Swiss system has developed tools that show some potential in tackling the well-known democratic limitations of the consociational arrangement. In order to successfully exploit the democratic and empowering potential of these instruments, the challenge for the years to come seems to actually employ them to make marginalized voices heard as well as to investigate the reasons why these are not triggered by the latter groups and the possible solutions to improve their democratic output[87]. The history of the Swiss political system has been marked by the employment of direct democracy by several actors, with this having oriented the development of policies and the modifications of the constitution. As Kriesi and Trechsel suggested, it is not the mere existence of direct democracy tools that makes the Swiss case unique, it is their frequent use[88], which is somewhat correlated to a political culture[89] that have incorporated direct democracy as a quintessential element of the Swiss political system. It is thus not unimaginable that in the future this tool could be used to pursue the interests of new emerging actors.

In sum, direct democracy, while not exploited in all its potential, seems to be the main factor of pluralization of the consociational arrangement in Switzerland, which, albeit not a corporate consociation, anyhow faces the risk of exclusion of several types of oppositions, among which the "others". For this reason, it appears relatively odd that general theory of consociationalism has not delved into this model to find solutions to the inclusion-exclusion dilemma of consociations. In other words,

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[87] On this, see F. Cheneval – A. el-Wakil, *The Institutional Design of Referendums: Bottom-Up and Binding*, in *Swiss Political Science Review*, 2018, p. 294 ff.

[88] H. Kriesi – A.H. Trechsel, *The Politics of Switzerland*, cit., p. 66.

[89] On this, see M. Freitag – A. Zumbrunn, *The Political Culture of Switzerland in Comparative Perspective*, in P. Emmenegger et al. (eds), *The Oxford Handbook*, cit., p. 50 ff.

while there are several analyses on opposition, direct democracy and their relationships in Switzerland, what seems to be lacking is their connection to the general debate on consociations' democratic limitations and patterns of exclusion. Switzerland was one of the consociational democracies that inspired Lijphart's theory, and its experience has in several respects contributed to a better understanding of the functioning of consensus-oriented systems. Nevertheless, especially regarding direct democracy and opposition, an "exception rhetoric"[90] is still dominant when dealing with Switzerland. Accordingly, the Swiss case has been considered as a *unicum* determined by peculiar historical, societal, political and legal factors, and failed transplants of the Swiss model have reinforced this belief[91]. For these reasons, the generalization of findings from the Swiss case has been limited after Lijphart's work[92].

Consequently, studies on consociationalism have thus far limitedly explored the role of direct democracy (also for its relatively limited diffusion in consociational systems[93]) in general (normative) consociational theory. Originally, direct democracy was not even considered among the elements that may contribute to defining majoritarian or consensus democracy, thus relegating it to being an independent variable in the functioning of a democratic system[94]. A revision of this standpoint was proposed by Vatter, who observed that direct democracy should instead be seen as another dimension by which it is possible to classify consensus and majoritarian democracies[95]. As seen, according to this account, some forms of direct democracy favour consociational behaviour, while others reinforce a majoritarian one. However, even this standpoint seems to overlook an analysis of direct democracy as a general solution to pluralize consociational arrangement and, in particular, include "others".

This study has instead shown that among the conditions that allow a consociation to thrive and successfully tackle the issue of oppositions and the EAI dilemma, direct democracy may be one of the most significant. Direct democracy plays a significant role in fostering inclusion of varied and manifold forms of oppositions within and outside the consociational arrangement. In other words, direct democracy

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[90] Or "*Sonderfall* rethoric"; on the limitations of such a standpoint, see R. Freiburghaus – A. Vatter, *Switzerland: Real Federalism at Work*, in J. Kincaid – J. Leckrone (eds), *Teaching Federalism*, Cheltenham-Northampton, 2023, p. 254 ff.

[91] On the attempt to incorporate the Swiss model in Uruguay, see D. Altman, *Collegiate Executives and Direct Democracy in Switzerland and Uruguay: Similar Institutions, Opposite Political Goals, Distinct Results*, in *Swiss Political Science Review*, 2008, p. 483 ff.

[92] Two notable exceptions are R. Freiburghaus – A. Vatter, *The Political Side*, cit. and A. Vatter, *Lijphart Expanded*, cit.

[93] See M. Qvortrup, *The Paradox*, cit.

[94] On this, see A. Vatter, *Lijphart Expanded*, cit.

[95] A. Vatter, *Lijphart Expanded*, cit.

can be seen as one important unifying/stabilizing and at the same time pluralizing factors affecting a consociational system. It can not only favor the creation of a common thin national *demos* – which has been considered a fundamental element for the democratic evolution of a consociational system – but also, and most importantly, it creates entry points/opportunities for manifold forms of oppositions – including "others" – to express themselves and condition policymaking, thus increasing the level of pluralism of a consociational setting[96].

Therefore, at the end of this study, the question as to why consociational theory has not thoroughly addressed the role of direct democracy arises natural. All the more so when the most longstanding and stable consensus democracy is considered. Can this be the time for Switzerland to assume the role of a model, instead of keeping being considered as an exception that is the result of a series of fortunate circumstances[97]?

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Abstract: Consociational systems have been defined as oppositionless forms of government. While these systems may create the conditions for stabilizing democracy in plural societies, they can also be criticized for excluding oppositions and other relevant groups. Based on the assumption that opposition is a lens through which one could analyze also consociational systems – which face the additional issue of exclusion/inclusion of the "others" –, this article aims to explore the Swiss case and assess which instruments are available for oppositions to have a voice, and whether and to which extent these instruments have been conducive to pluralizing the consociational arrangement. In this sense, the article focuses on direct democracy and its contribution to the pluralization of the Swiss system. Lastly, it offers some considerations on the possibility to draw comparative lessons from this case study.

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[96] Interestingly, A. el-Wakil, *The Deliberative Potential of Facultative Referendums Procedure and Substance in Direct Democracy*, in *Democratic Theory*, 2017, p. 59 ff., also pointed to the "deliberative potential" of direct democracy, claiming that direct democracy can contribute to realize substantive deliberative democracy.

[97] W. Linder – S. Mueller, *Swiss Democracy*, cit., p. 51, have referred to the Swiss political institutions also as the outcome of "felicitous circumstances".

Keywords: Consociationalism – Opposition – "Others" – Direct Democracy – Switzerland.

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RIVISTA DI
DIRITTI COMPARATI

A 'variable-geometries system'. Theory and practice of opposition in the UK*

Enrico Andreoli

TABLE OF CONTENTS: 1. Introduction. – 2. The Opposition Between Institutional and Functional Status. – 3. The Institutionalised Opposition. – 4. The "decentralised" opposition. – 5. Conclusion.

1. *Introduction*

Within the British political system, the concept of opposition is inherent in the conduct of politics and government, and in more recent times it should be noted at how increased institutionalisation has been manifested in practical terms through state support and recognition.

The notion of opposition as an inherent feature of the political system is more sharply defined in Britain than anywhere else and has been for a far longer time[1]. In Britain, the opposition is as definitely organised as the government itself; His Majesty's Opposition is second importance to HM government, and it is officially recognised: it is HM opposition, which is given an official status, a so-called "shadow cabinet"[2].

Opposition is not only dissent to actions or policies, and criticism of those in power. It is established as "loyal" opposition[3] and it has been institutionalised for the modern electorate as the standing possibility of an alternative government to replace the one in power: "[w]hen the system works as it is expected to and produces

* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

[1] A. Potter, *Great Britain: Opposition with a Capital "O"*, in R.A. Dahl (ed.), *Political Opposition in Western Democracies*, New Haven, 1966.

[2] R.M. Punnett, *Front-Bench Opposition: The Role of the Leader of the Opposition, the Shadow Cabinet and the Shadow Government in British Politics*, New York, 1973.

[3] T.A. Hockin, *The Roles of the Loyal Opposition in Britain's House of Commons: Three Historical Paradigms*, in 25 *Parliamentary Affairs* 22 (1971). For a comprehensive insight regarding the historical evolution in the practice of "loyal" opposition see G. Webber, *Loyal Opposition and the Political Constitution*, in 37 *Oxford Journal of Legal Studies* 361 (2017).

alternation in office, this can be taken to mean that the opposition has successfully discharged political control in relation to the preceding governing party"[4].

Geometrically, it is in the House of Commons that the clearest evidence of the special role of the opposition in Britain can still be found. The physical structure of the Chamber encourages adversarial debate with government and opposition facing each other across the floor of the House[5]. And, of course, proceedings on the floor of the House continue to be dominated by the procedure of debate on a formal motion which must in principle be voted on to bring the debate to a conclusion.

Whilst the government has a decisive voice in the control of time in the House of Commons and thus in the management of public business, these powers are counter-balanced by the rights of the opposition and by the government's frequent need of some degree of opposition cooperation if it is to get its business through smoothly.

The recognition of opposition goes, however, well beyond the procedural rules of the House and the consolidation of the practices summarised has had effects far beyond the boundaries of the Parliament. That is why we have assumed the idea of a 'variable-geometries system'.

We have therefore identified two aspects that may deserve further investigation.

First, reference will be made to the politico-legal aspect regarding the opposition *in* Parliament. The practice of opposition as alternative government, indeed, imposes constraints as well as opportunities on any party.

Secondly, it will be analysed the ability to extend the concept of opposition to one not strictly bound to the parliamentary institution. The concept of opposition, in fact, seems today to expand its effects well beyond the strictly institutionalised meaning, manifesting itself as a method of political opposition sometimes capable of crossing jurisdictional boundaries. In the case of the United Kingdom, the territorial oppositional instances, for example those coming from Scotland or other devolved authorities, seem well suited to this concept of opposition.

Hence, the idea of 'variable-geometries system', in which the sharp boundaries of parliamentary opposition no longer seem sufficient to fully explain opposition in the UK constitutional system[6].

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[4] N. Johnson, *Opposition in the British Political System*, in 32 *Government and Opposition* 488 (1997).

[5] R.M. Punnett, *Front-Bench Opposition*, cit.

[6] For more on the different narratives that characterize English constitutional history see M. Nicolini, *Turning Vanity Fair into The Coelestial City: England's Legal Narratives of the Body Politic from Bunyan to Thackeray*, in 12(1) *Pólemos* 123 (2018).

2. *The Opposition between Institutional and Functional Status*

Before proceeding with the outlined analysis, it is appropriate to hint and necessary briefly outline the coordinates of the pairing between political opposition and democracy.

If there is one characteristic that distinguishes democratic regimes, it is that they are legitimised by the very existence of a political opposition: democracies are regimes of guaranteed opposition[7].

Opposition is a complex phenomenon that can be read across two dimensions[8].

The first dimension concerns the status of the opposition within the constitutional architecture.

Parliamentary opposition is not a simple parliamentary minority, but a qualified minority which opposes the policy of the majority: the principal objective of the opposition's political act is the substitution of the majority[9].

The so-called majority rule is a general starting point to understand this first dimension of the opposition. In democratic societies, majority rule is a generally accepted solution for issues discussed as it supports efficiency. The basis of this principle is that it makes impossible for a minority or a person to tyrannise society and that reaching an optimal consensus has too high costs.

It is possible to study the majority rule in more than one context[10]. At the constitutional dimension, we can observe the majority rule as the tool of the secure and predictable order of lawmaking procedures and functioning of state organs. The electoral dimension reveals the difficulties of the majority rule at the composition of representative bodies: for those who remain in minority, different electoral systems can give only limited compensation.

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[7] R.A. Dahl (ed.), *Political Opposition*, cit., 1966; S. Haberland, *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz*, Berlin, 1995; K. Von Beyme, *Die parlamentarische Demokratie. Entstehung und Funktionsweise 1789-1999*, Opladen/Wiesbaden, 1999.

[8] B. Stone, *Opposition in Parliamentary Democracies: A Framework for Comparison*, in 29 *Australian Parliamentary Review* 19 (2014); G. Webber, *Opposition*, in R. Bellamy, J. King (eds), *The Cambridge Handbook of Constitutional Theory*, Cambridge, 2024.

[9] G. De Vergottini, *Opposizione parlamentare*, in *Enciclopedia del Diritto*, XXX, Milano, 1980. See also J. Blondel, *Political Opposition in the Contemporary World*, in 32(4) *Government and Opposition* 462 (1997); P. Norton, *Making Sense of Opposition*, in 1-2 *Journal of Legislative Studies* 236 (2008).

[10] G. Sartori, *Democrazia: cos'è*, Milano, 1993, pp. 77-79.

However, in defining the status of the opposition the examination of the majority rule is somewhat insufficient. Modern democratic political systems prefer protection of the political minority even against the majority rule and the effective decision-making. As basic condition, political pluralism must be established; opposing political forces should be recognized as legitimate actors; the fact of the multi-party system should not be only tolerated but organized as well.

The second dimension regards the constitutional guarantees pertaining to political pluralism, namely a "procedural" dimension to opposition. In this sense, a direct reference to the system under examination in this contribution seems useful.

The rights of the opposition are generally defined and described in the Standing Orders, albeit in some parliamentary systems Standing Orders are only temporary documents. This is the case of the United Kingdom, where some Standing Orders are temporary and only last until the end of a session or a parliament[11].

Another interesting point about the British practice on determining and defining opposition's rights by Standing Orders is that a huge part of the parliamentary procedures is not written into the Standing Orders but exists as customs and practices of the Parliament. Some stem from the Speaker's ruling in the House, other procedures are followed because "that is the way things had been done in the past": for example, one of the most well-known practices is that bills are being read three times in both Houses.

Hinted at these two dimensions regarding the concept of opposition, however, the fact remains that the opposition as qualified minority is still an uncertain phenomenon. Since it is not possible to precisely circumscribe minorities as legal subjects, opposition appears not to be exactly a constitutional institution, but rather a function:[12]

> "The opposition's real function is to act as the responsible outlet for criticism as the incorruptible searches after scandals which need expose, the organized expression of legitimate grievances and last but not least, to act as a partly formed responsible, trained, team prepared to take office as a government when the existing administration loses the confidence of the people"[13].

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[11] I.W. Jennings, *The British Constitution*, Cambridge, 1961; W. Bagehot, *The English Constitution*, Oxford, 2001.

[12] S. Haberland, *Die verfassungsrechtliche Bedeutung der Opposition*, cit., pp. 147-149.

[13] Q. Hogg, *The Purpose of Parliament*, London, 1962, p. 87.

It is still difficult to draw conclusion regarding the specific and definite function of the opposition but there is some sort of agreement on at least some aspects:[14] to form an alternative government given an opportunity; to form autonomous public opinion on domestic and external issues; to expose the failure of the party in power to fulfil its electoral promises.

Based on what has been examined, political opposition means a disagreement with the government and its policies expressed in the public sphere, by an actor organised through different modes of action[15]. Although inevitably generic, we can assume this concept of opposition to be sufficiently inclusive to integrate the two aforementioned dimensions, although it is closer to the functional one. It also has the advantage of escaping the traditional reductionism of the literature on political opposition, which is mostly focused on the study of parliamentary opposition, as it allows room for the treatment of other types or varieties of political opposition.

3. The Institutionalised Opposition

In analysing the opposition within the British constitutional system, we will now look at the politico-legal aspect regarding the opposition *in* Parliament.

As already stated, Britain is widely known to have an official opposition with a capital "O", namely "HM Loyal Opposition". The underlying assumption of the British political system is, therefore, that the opposition is the alternative of the government and that two major political parties have alternated in office:[16]

> "The dispositions of Opposition and government members to regard each other as *constitutional* actors … are facilitated and encouraged by the swing of the pendulum. The alternation of office between two main political parties promotes the understanding that the Opposition is the government-in-waiting and … that the government is the Opposition-in-waiting"[17].

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[14] *Ex multis*, I.W. Jennings, *Parliament*, Cambridge, 1970.

[15] N. Brack – S. Weinblum, *Political Opposition. Towards a Renewed Research Agenda*, in 1(1) *Interdisciplinary Political Studies* 69 (2001); L. Helms, *Studying Parliamentary Opposition in Old and New Democracies: Issues and Perspectives*, in 14(1-2) *Journal of Legislative Studies* 6 (2008).

[16] A. King, *The Implications of One-Party Government*, in A. King (ed.), *Britain at the Polls*, London, 1992, p. 223 ff.

[17] G. Webber, *Loyal Opposition*, cit., p. 369 (emphasis in original).

It is possible to find in the House of Commons the strongest evidence of the role of the opposition in Britain. As we noted, the physical structure of the Chamber encourages adversarial debate[18].

There are numerous instruments in the parliamentary procedure that speak in favour of the institutional status of the opposition. Amongst others: since 1985, seventeen days in each session have been at the disposal of the "official" opposition when it is entitled to determine the subjects of debate, whilst a further three days are assigned to the opposition party[19]; at Prime Question Time, the leader of the opposition is by convention permitted to put up to five supplementary questions; the opposition front bench team also enjoy a privileged status when their opposite numbers in the government are answering[20].

But also, away from the House opposition has by convention other rights and privileges. For example, it can expect to have a reasonable share of Select Committee chairmanships; and some positions such as that of chairman of the Public Accounts Committee always go to a senior member of the opposition[21].

Lastly, the recognition of opposition goes beyond the parliamentary procedural conditions of the House. For example, "Short Money", introduced in 1975, is the public financial aid to all opposition parties in the Commons. Since then, the opposition leaders receive substantial sums of additional money from the government, based on a formula taking account both number of MPs a party has and the votes it has received[22].

In analysing the role of the opposition *in* Parliament, it must therefore be said that the Commons' checking function is exercised in parliamentary debate. Parliament is a "speaking place"[23] and in parliamentary debate the Speaker will recognise, in turn, a member from the government benches and a member from the opposition benches.

In carrying out the Commons' scrutiny of government legislation and administration, the opposition participates in the law-making process initiated by the government and criticises government administration: "[there is a] radical distinction between controlling the business of government, and actually doing it"[24]. This mutual

[18] See *supra*, § 1. See also R.M. Punnett, *Front Bench Opposition*, London, 1973; J.A.G. Griffith – M. Ryle, *Parliament: Functions, Practice and Procedures*, London, 1989.

[19] They are indeed called "Opposition Days".

[20] N. Johnson, *Opposition in the British Political System*, cit., p. 492.

[21] *Ibid.*

[22] R. Kelly, *Short Money*, House of Commons Research Briefing Paper SN1663, London, available at https://commonslibrary.parliament.uk/research-briefings/sn01663/

[23] G. Webber, *Loyal Opposition*, cit., p. 371.

[24] J.S. Mill, *Considerations on Representative Government*, Cambridge, 2010, p. 89.

recognition of roles between government and opposition has led part of the doctrine to consider this relationship as carried on "by agreement"[25]. *In* Parliament, Government and opposition thus facilitate the fulfilment of each other's constitutional duties to govern and to oppose[26].

The organisation of the opposition through a "shadow cabinet" is also functional for what is here defined as an institutionalised opposition.

In the late-nineteenth century it was usual for the leaders of the party defeated at an election to come together as an informal committee of former cabinet members to discuss parliamentary actions. It is to the Labour Party's opposition 1951-1964 that the practice of identifying shadow ministers as opponents to government ministers is recognised[27], but for many years the party in opposition could manage its business only in an amateur way[28]. The main problem faced when trying to organize themselves as an actor capable of mounting a concrete challenge to the government in office has always been how to find adequate financial support for the task: the position improved after 1975 with, as already outlined, the introduction of a scheme to provide a public contribution ("Short Money") to the work of the opposition, giving birth to what is called a "shadow administration"[29].

In Parliament (and in British parliamentarism), "HM Loyal Opposition" is thus recognised as a "hyphen which joins"[30]. It is an alternative government, presenting itself as such "not only at every election, but at every debate in the Commons"[31].

4. The "decentralised" opposition

We will now move on to analyse the second of the aspects briefly introduced, namely the ability to extend the concept of opposition to one not strictly bound to the analysis of the parliamentary institution.

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[25] G. Webber, *Loyal Opposition*, cit., p. 372.

[26] See J. Waldron, *Political Political Theory: Essays on Institutions*, Cambridge, 2016.

[27] "The Opposition spokesman 'shadows' her ministerial counterpart, developing expertise in the portfolio and criticising the minister for her policy decisions and indecisions": G. Webber, *Loyal Opposition*, cit., p. 380.

[28] R.M. Punnett, *Front-Bench Opposition: The Role of the Leader of the Opposition, the Shadow Cabinet and Shadow Government in British Politics*, Heinemann, 1973, p. 8.

[29] R. Brazier, *Constitutional Practice*, Oxford, 1999, p. 174.

[30] G. Webber, *Opposition*, cit., p. 10.

[31] *Ibid.*

"There is much opposition to government beyond Parliament, and a fuller account of political opposition would include the media, pressure groups, unions, the courts and the range of other actors who also exercise the critical function of holding the government to account. With the fragmenting of political authority to devolved assemblies and local administrations, some opposition may be said now to develop to any government at Westminster, rather than only or especially to the government of the day. In turn, there is much opposition to government in Parliament beyond what the Official Opposition contributes. Intra-party dissent from government backbenchers, critical reports from Select and Public Bill Committees and delaying tactics in the House of Lords all stand, in differing ways, in opposition to the government"[32].

In this perspective, the focus is mainly on what can be defined as the "decentralised" instances of opposition, i.e. those that may come from the opposition to the centre (Westminster) by the devolved authorities (Northern Ireland, Wales, and Scotland)[33].

Politically speaking, decentralisation lends greater visibility to dissenters' views, especially when the latter have the possibility to act in opposition independently. When one (devolved) group dissents by deciding, the majority (at the centre) can't just ignore them but must do something to get the policy overturned. Decentralisation thus gives dissenters the chance to shift the burden of inertia and force the majority to engage.

This relationship between centre and periphery as a (distorted) relationship between government and opposition was clearly shown in the instances deriving from one of the devolved systems in the UK, the Scottish one.

In this respect, two bills that have recently been the subject of important decisions by the UK Supreme Court should be firstly considered as examples.

In Att. Gen. and Adv. Gen. Reference[34] the Court was called upon to determine whether or not two bills were within the powers of the Scottish Parliament: the first bill sought to incorporate the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) (UNCRC) Bill into Scottish law; the second bill proposed to do the same for the European Charter of Local Self-Government (Incorporation) (Scotland) (ECLSG) Bill. While the competence of the Scottish Parliament to

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[32] G. Webber, *Loyal Opposition*, cit., 360. See also D. Denver, *Great Britain: From "Opposition with a capital 'O'" to Fragmented Opposition*, in E. Kolinsky (ed.), *Opposition in Western Europe*, Croom Helm, 1987, p. 87 ff.

[33] For an examination of the relationship between opposition and decentralization (with reference to federalism) in the US legal system see H.K. Gerken, *The Loyal Opposition*, in 123(6) *Yale Law Journal* 1958 (2014).

[34] [2021] UKSC 42.

incorporate these Treaties was not in dispute, the way they were operated was. Indeed, the Court held that the Bills went so far as to amend the Scotland Act 1998, which the Scottish Parliament clearly has no competence to do.

In Lord Advocate's Reference[35] the Scottish Government referred the legality of the Scottish Independence Referendum Bill to the Supreme Court. Again, the Court held that the bill was not within the competence of the Scottish Parliament, as it related to matters – relations between the United Kingdom and Parliament – reserved to Westminster.

Even further than the two cases just mentioned, a "territorial" opposition can be seen in the ruling Re Scottish Minister's Petition on 8 December 2023[36], by which the Outer House of the Court of Session ruled that the Secretary of State for Scotland acted rationally and within the scope of his powers under s. 35 of the Scotland Act 1998[37] in blocking the Gender Recognition Reform (Scotland) Bill (GRRB) submission for the Royal Assent[38].

The bill was intended to amend the UK Gender Recognition Act 2004[39] to supplement UK law by requiring anyone applying for a Gender Recognition Certificate (GRC) to make a declaration that they intend to live permanently in their acquired gender. The act also aimed to lower the minimum age to apply for a GRC from 18 to 16 (reducing the period required to obtain a GRC); finally, it removed the requirement for applicants to provide evidence of gender dysphoria.

Jack Alister (Secretary of State for Scotland) had declared his intention to issue an order under s. 35 referred to above, to prevent the GRRB, passed by the Scottish Parliament on 22 December 2022, from being submitted to Royal Assent and, consequently, enacted.

It should be noted that the exercise of s. 35 power is subject to the existence of certain mandatory requirements: the first relates to the presence of reasonable grounds for believing that the bill is incompatible with international obligations or with defence or national security interests; the second requirement enables the Secretary to intervene only when there is a fear that the bill might produce "modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to

[35] [2022] UKSC 31.

[36] 2023 CSOH 89.

[37] *Section* 35, § 1, *Scotland Act 1998*, available at https://www.legislation.gov.uk/ukpga/1998/46/contents.

[38] For a more in-depth analysis see E. Andreoli, Gender Recognition Reform (Scotland) Bill *e* Devolution. *Spunti di riflessione sui conflitti di competenze tra Regno Unito e Scozia*, in 2 *Stals Research Paper* 1 (2023).

[39] 2004 c. 7, available at https://www.legislation.gov.uk/ukpga/2004/7/contents.

believe would have an adverse effect on the operation of the law as it applies to reserved matters"[40].

It is the second of the above-mentioned requirements that comes into consideration: according to Westminster, the bill created a problem of overlapping jurisdiction[41]. In fact, since the subject matter of "Gender Recognition" is a devolved matter for Scotland, whereas "Equal Opportunities" is a matter reserved to the UK Parliament, the UK Government stated that the GRRB would amend the UK Gender Recognition Act 2004 in such a way as to adversely affect the operation of the Equality Act 2010[42].

The then acting First Minister of Scotland, Nicola Sturgeon, reacted by stating that the Secretary was committing a profound error, accusing him of deliberately launching a direct attack on the Scottish Parliament as an institution. He also stated that the Secretary himself had decided to act in the manner of a Governor, treating the Scottish Parliament as a subordinate body and thus carrying out a full-frontal assault on the devolution settlement[43]. An attitude that was described as colonial, such that the loyal cooperation between Westminster and the devolved areas could be undermined. Not surprisingly, it is noted that even Mark Drakeford, Welsh Prime Minister from 2018 to 2024, had condemned the decision taken by the British government as a very dangerous precedent for British devolution[44].

What appears interesting to note is that in the relationship between the centre and the periphery the Scotland Act emphasises that devolution is not intended to undermine the supremacy of Westminster[45], which is essentially presupposed. S. 28 of the Scotland Act states that "this section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland", making it clear that the

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[40] *Section* 35, § 1, *Scotland Act 1998*.

[41] C. Himsworth, *Scotland: The Constitutional Protection of a Mixed Legal System*, in J. Costa Oliveira – P. Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Berlin-Heidelberg, 2009, pp. 119-141; J.E. Pfinder – D.D. Birk, *Article III and the Scottish Judiciary*, in 124(7) *Harvard Law Review* 1613 (2011).

[42] 2010 c. 15, available at https://www.legislation.gov.uk/ukpga/2010/15/contents.

[43] *Nicola Sturgeon brands Alister Jack a 'Governor-General' for blocking Holyrood gender reforms*, Daily Record, 19 January 2023, https://www.dailyrecord.co.uk/news/politics/nicola-sturgeon-brands-alister-jack-29000602. See A. Muscatelli – G. Roy – A. Trew, *Persistent States: Lessons for Scottish Devolution and Independence*, in 260(1) *National Institute Economic Review* 51 (2022).

[44] *Gender reform: Drakeford says Scottish law block is dangerous precedent*, BBC News online, 17 January 2023, https://www.bbc.com/news/uk-wales-politics-64304540. For an in-depth analysis of the political reactions to the British government's decision to trigger s. 35, see D. Torrance – D. Pyper, *The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill*, London, pp. 31-39, available at https://commonslibrary.parliament.uk/research-briefings/cbp-9705/.

[45] M. Burgess, *The British Tradition of Federalism*, Leicester, 2012.

devolutionary mechanism is intended to preserve the sovereignty of Westminster[46]. Against this, a limitation on Westminster's freedom to legislate on devolved matters was introduced through the adoption of the so-called Sewel Convention[47], under which the British Parliament may only legislate on devolved matters in the event of prior agreement with the Scottish legislature.

The conflict shown with the cases under consideration demonstrates what is stated at the beginning of this contribution, namely that opposition in the British legal system can go far beyond the opposition in Parliament. For what appears to be quite far from a "loyal" opposition, what emerges is the existence of a "decentralised" opposition, i.e. an opposition between parliaments. It is the evidence of an opposition that seems characterised by a certain tendency to instrumentalise the draft laws of the peripheral level of government, whose political objective does not pursue the traditional dialectic in the Chamber, but increasingly seeks to overcome by judicial means the limits posed by political instruments. An opposition that is not so "loyal": hardly surprising, given that it is completely lacking the swing of the political pendulum.

5. *Conclusion*

The use of a geometric metaphor in analysing the concept of opposition within the British legal system has been used to escape the traditional reductionism of the literature, which is mostly focused on the study of parliamentary opposition.

It has been seen that this cannot disregard its construction in the terms of "HM Loyal Opposition", a concept that is rooted in a precise path of the politico-legal evolution of the constitutional order. At the same time, it may be pointed out that this notion no longer appears sufficient to account for the most recent trends in British constitutionalism, increasingly challenged by demands from outside, i.e. from the devolved legal orders such as Northern Ireland, Wales, and Scotland.

These trends are linked to a multiplicity of issues, of which the right to self-determination is the most cited but, to some extent, also the least effective. On a closer

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[46] V. Bogdanor, *Devolution: decentralisation or disintegration?*, in 70(2) *Political Quarterly* 185 (1999).

[47] G. Burgess, *The Sewel Convention – Westminster legislation in devolved areas*, in 1 *Scottish Constitutional and Administrative law and practice* 12 (2000). See also F. Rosa, *Le conseguenze parlamentari della* devolution: *la* Sewel Convention *al crocevia dei rapporti fra Parlamenti e Governi*, in A. Torre (ed.), *Processi di* devolution *e transizioni costituzionali negli Stati unitari (dal* Regno Unito *all'Europa). Atti del convegno dell'Associazione di Diritto Pubblico Comparato ed Europeo, Bologna, 24-25 novembre 2006*, Torino, 2007, p. 1011.

inspection, these are political demands (not always legitimate) that seek their potential effectiveness in the folds of legal instruments made available by the same constitutional order that these claims seek to challenge.

This results in a potential definitional short circuit. If the concept of opposition were limited to that of opposition *in* parliament, this fails to explain certain disputes that the government faces from actors other than the "loyal" opposition. If the concept of opposition were fully extended to opposition from outside parliament, it would lack the basic idea of "government-in-waiting".

The proposal adopted is that of a variable-geometry concept, capable of extending the field of observation of traditional classifications, without losing sight of the rules capable of explaining the constitutional perimeter.

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Abstract: The notion of opposition as an inherent feature of the political system is probably more sharply defined in Britain than anywhere else. Here, the opposition is as definitely organised as the government itself. At the same time, the formal recognition of opposition has also had an impact outside the boundaries of political institutions. That is why I have assumed the idea of a 'variable-geometries system'. First, reference will be made to the politico-legal aspect regarding the opposition *in* Parliament. Secondly, it will be analysed the ability to extend the concept of opposition to one not strictly bound to the parliamentary institution.

Keywords: Democratic Opposition – Political Constitutionalism – Parliament – Constitutional Design – Decentralisation

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RIVISTA DI
DIRITTI COMPARATI

Parliamentary opposition in the Western Balkans – A mixture of political, ethnic and religious components[*]

Silvo Devetak

1. This article is a general author's observation on the considered topic, based on his long-term experience in analysing political, security, ethnic and similar circumstances in the Western Balkans, as well as dealing with the EU policy towards this European region. For this occasion, the author confines the considerations to the ex-Yugoslavia's countries, due to their historical and also contemporary features, which provide suitable elements for comparison: Bosnia and Herzegovina, Montenegro, North Macedonia, Kosovo, and Serbia. As the opposition is concerned, the contribution refers to the political parties that were elected in the recent two parliamentary elections (the parties which achieved the necessary 5 or 3 percents of the electoral votes). References to scholarly literature will provide those readers who are interested to follow more profoundly the problematic with additional information and analyses on different aspects of the considered topics. The essay provides the opportunity to get reliable information and viewpoints on the relevant situation in Bosnia and Herzegovina, Kosovo, North Macedonia and Serbia.

2. The democratic functioning on equal basis concerning the parliamentary "opposition" in Western Balkans countries under consideration depends on the existence of the general political suppositions as are:

i. The developed democracy in governing one country, also including the efficient functioning on equal basis of political parties and groups.

ii. The assurance of free expression of political opinions and of political gathering, as well as freedom of organising political parties without any discrimination.

iii. The functioning of societies based on the rule of law.

iv. The existence of free mass media opened for different views and available to all political parties.

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[*] The article has been submitted to a double-blind peer review process according to the journal's guidelines.

v. The adequate electoral legislation giving the people the opportunity to freely select the political options and giving the opportunities on equal basis to all political parties.

The survey on the situation in this regard shows that various deficiencies concerning the mentioned elements in the considered Western Balkan countries exist. During the 1990s, these countries were dominated by competitive authoritarian regimes that combined multi-party elections with nationalist rhetoric and the privatisation of the state to affiliated business interests. After a move towards democratisation in the early 2000s across the region, authoritarian practices began re-appearing in the late 2000s and have now firmly taken root in many of these countries[1].

The analysis sponsored by the Friedrich Naumann Foundation for Freedom listed the following eight deficiencies of democracy in the Western Balkans countries: a) lack of pluralism, state capture and violations of human rights that undermines democratic development; b) civil society has been disempowered to serve as an agent of democratization in breaking the political capture of institutions; c) political influence, judicial pressure and disinformation that undermine professional and critical journalism; d) new waves of emigration are stripping away human capital needed for development and democratic reforms; e) the unsolved regional security architecture and revisionist narratives securitize the political discourse; f) Russian aggression tests the pro-Western orientation and resilience of the region; g) Chinese geoeconomic ambitions threaten economic stability and undermine transparent governance in the region; h) EU enlargement's loss of credibility opens space for democratic decline[2].

Practices of 'capturing' public media involve, on the one hand, appointing party members as executives (managers and editors) and employing journalists based on their party affiliation. On the other hand, they involve being awarded a part of the resources from the state budget proportional to the extent to which one bows to the demands of the ruling political elite. The 'capturing' of privately-owned media consists of making them dependent on advertising agencies for sponsorships–agencies that are, in fact, the extended arm of incumbent political parties. Likewise, the allocation of budgetary funds in 'open' calls depends on one's links to political parties from the

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[1] F. Bieber, *The Rise of Authoritarianism in the Western Balkans*, Basingstoke, 2020.

[2] P. Čermák et al., *8 Challenges for Democracy in the Western Balkans – Analysis*, Friedrich Naumann Foundation for Freedom, 2023 <https://www.freiheit.org/western-balkans/analysis-8-challenges-democracy-western-balkans> (accessed on 9.4.2024).

coalition in power[3]. The media noted some positive results concerning the judiciary in response to attacks against journalists, but underlined that proceedings are often ineffective and lack independence. The Report published by Reporters Without Borders, for instance, pointed out that of 180 countries covered by the index, Kosovo dropped 19 places over the last year to 75th amid direct attacks on journalists from political groups and physical attacks in the field. Bosnia and Herzegovina tumbled 17 places to 81st, mainly thanks to restrictions and political pressure in the predominantly Serb-populated Republika Srpska entity. Serbia dropped seven places to 98th, with Reporters Without Borders citing a polarised political climate in which journalists are targeted by politicians of the ruling Progressive Party in attacks amplified by national broadcasters[4].

3. Global State of Democracy Report of 2023 underlined that the unresolved issues from the 1990s wars, populism, ethnic tensions, secessionist threats and corrupt politicians with ties to organized crime have delayed meaningful reforms and prevented the strengthening of formal institutions such as independent judiciaries, credible elections, and regulatory agencies in these countries. Their citizens continue to live with the consequences, which threaten democratic norms and the quality of life, leading to depopulation and brain drain[5].

Similar critical evaluation of the situation in the above-mentioned areas have been also included in the reports by Freedom House, OEBS/ODIHIR and of the European Union. The recent Freedom House on Serbia report, for instance, evaluated that Serbia is a parliamentary democracy with competitive multiparty elections, but in recent years the ruling Serbian Progressive Party (SNS) has steadily eroded political rights and civil liberties, putting pressure on independent media, the political opposition, and civil society organizations[6]. Bosnia and Herzegovina (BiH) is a highly decentralized parliamentary republic whose complex constitutional regime is embedded in the Dayton Peace Agreement, which ended the 1992-95 Bosnian War.

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[3] P. Cvetičanin et al., *Captured states and/or captured societies in the Western Balkans*, in *Southeast European and Black Sea Studies*, 2020, p. 41 ff., <https://doi.org/10.1080/14683857.2023.2170202> (accessed on 26.5.2024).

[4] B. Xhorxhina, *Balkan states fall in press freedom rankings*, Pristina. BIRN. May 3, 2024. Balkan States Fall in Press Freedom Rankings | Balkan Insight (accessed on 26.5.2024).

[5] G. Gola, *Case study: Western Balkans Global State of Democracy 2023 Report*; 2023 International Institute for Democracy and Electoral Assistance, <https://www.idea.int/publications/catalogue/case-study-western-balkans-gsod-2023-report> (accessed on 9.4.2024).

[6] Freedom Hause, Nations in Transit 2024, Serbia, Report, <https://freedomhouse.org/country/serbia/freedom-world/2024> (accessed on 4.7.2024).

Political affairs are characterized by severe partisan gridlock among nationalist leaders from the country's Bosnian, Serb, and Croat communities. Political participation by citizens from other communities is extremely limited. Corruption remains a serious problem in the government and elsewhere in society[7].

Kosovo holds credible and relatively well-administered elections. Many public institutions are undermined by entrenched corruption, though there are signs that a new generation of politicians are moving to confront corrupt practices through judicial and administrative reforms. Journalists continue to face intimidation, particularly on social media. The rule of law is inhibited by interference and dysfunction in the judiciary[8]. North Macedonia is a parliamentary republic, but unstable government coalitions and early elections are common; the government continues to struggle with corruption and clientelism, while media and civil society participate in vigorous public discourse, but journalists and activists still face pressure and intimidation[9].

As per the 2024 Freedom House report on Montenegro, despite some positive hints at consensus building at the very end of the year, national democratic governance stagnated in 2023 due to the prolonged institutional and constitutional crisis, the effects of which were still active. Electoral reform has also stagnated, with deficiencies coming to the fore during the 2023 presidential election and the inability to finalize local elections in Šavnik. New high-level corruption cases continued to be opened by the Special Prosecution, but the other actors along the criminal justice chain have yet to demonstrate commitment to reforms and vigour in ensuring sustainable judicial follow-up. The government has adopted a Media Strategy, but without new and improved media legislation being adopted and implemented, progress in media independence and sustainability is still lacking[10].

The reports of OEBS-ODIHIR concerning various elections in the observed countries are of crucial importance. In its report on the preliminary parliamentary elections in Montenegro in 2023, the IEOM stated that "the legal framework provides a basis for the democratic conduct of elections, but it should be comprehensively

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[7] Freedom Hause, Nations in Transit 2024, Bosnia and Herzegovina, Report, <https://freedomhouse.org/country/bosnia-and-herzegovina/freedom-world/2024> (accessed on 4.7.2024).

[8] Freedom Hause, Nations in Transit 2024, Kosovo, Report, <https://freedomhouse.org/country/kosovo/freedom-world/2024> (accessed on 4.7.2024).

[9] Freedom Hause, Nations in Transit 2024, North Macedonia, Report, <https://freedomhouse.org/country/north-macedonia/freedom-world/2024> (accessed on 4.7.2024).

[10] Freedom Hause, Nations in Transit 2024, Montenegro, Scores and Changes in 2024, <https://freedomhouse.org/country/montenegro/nations-transit/2024> (accessed on 4.7.2024).

revised to address a number of gaps and inconsistencies"[11]. In the Statement of Preliminary Findings and Conclusions on the parliamentary elections in Serbia in 2023, the IEOM concluded that the early parliamentary elections "though technically well-administered and offering voters a choice of political alternatives, were dominated by the decisive involvement of the President, which, together with the ruling party's systemic advantages, created unjust conditions"[12].

As to the parliamentary elections in North Macedonia in 2024 that were held concurrently with the presidential second round, the IEOM stated that "in the run-up to these elections, most IEOM interlocutors referred to a generalized atmosphere of disaffection with the political establishment, citing a lack of will by both the government and opposition to address long standing calls for comprehensive reforms … The legal framework for the parliamentary and presidential elections establishes the basis for holding democratic elections; however, some provisions do not comply with international standards, and persisting inconsistencies, gaps and ambiguous formulations undermine legal certainty and merit further revision. Regrettably, the Electoral Code was recently amended through expedited processes lacking transparency and public consultation, which is not in line with international standards and OSCE commitments"[13].

The reports provided by the European Commission on the enlargement process consider more in the way of information what is the situation in the Western Balkans in the fields of the rule of law, fundamental rights, the functioning of democratic institutions, public administration reform and the economic criteria, which are known as the 'fundamentals' of the EU accession process. However, the reports do not

[11] ODIHR Election Observation Mission, Montenegro, Early Parliamentary Elections, 11 June 2023, Final Report, <https://www.osce.org/odihr/elections/montenegro/542637> (accessed on 4.7.2024). ODIHR Election Observation Mission, Montenegro, Presidential election, 19 March and 2 April 2023, Final Report, <https://www.osce.org/odihr/elections/montenegro/537026> (accessed on 4.7.2024).

[12] ODIHR Election Observation Mission, Republic of Serbia early parliamentary elections, 17 December 2023, Final Report, <https://www.osce.org/odihr/elections/serbia/556500> (accessed on 4.7.2024).

ODIHR election observation mission, Republic of Serbia – Local Elections, 2 June 2024, Statement of preliminary findings and conclusions, Preliminary conclusions, <https://www.osce.org/odihr/elections> (accessed on 4.7.2024).

[13] International election observation mission, Republic of North Macedonia – Presidential Election, 24 April 2024, Statement of preliminary findings and conclusions, Preliminary conclusions, <https://www.osce.org/odihr/elections> (accessed on 4.7.2024). International election observation mission, Republic of North Macedonia – Parliamentary Elections and, Presidential Election Second Round, 8 May 2024, Statement of preliminary findings and conclusions, Preliminary conclusions, <https://www.osce.org/odihr/elections> (accessed on 4.7.2024).

adequately consider the topics covered by this article, although these are of great importance for the achievement of the EU enlargement goals[14].

4. This part provides some general observations concerning the situation regarding the position of parliamentary opposition parties in the region. As first, it is necessary to highlight four viewpoints of general importance for the region.

4.1. First, the consequences of wars and ethnic and religious conflicts in Western Balkans strongly influence the ways, modes, and contents of political transition in the countries of the region. In the Balkans, politics is never very far from history and history never far from the politics. In the case of the history of the WWII we could illustrate this fact in regard of treating the Serbs, Jews, Gipsy and liberal Croats determination camp Jasenovac established by the pro-Nazi Independent State of Croatia in related national politics and mass media. The same refers to the evaluation of the Yugoslav national liberation movements and of similar topics that happened in the WWII in the region. Today is even most a divide factor the treatment of the recent ethnic wars not only in politics and mass media, but also in educational programs. The 'divide abusive nationalistic talk' is present also in sport and similar events. This atmosphere is, of course, present also in the activities of political parties, especially those of far right and xenophobic orientations. In some cases, there are not at all differences between the parties in power and in the opposition concerning these issues.

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[14] See Key findings in the EU reports for 2023 for BiH, Kosovo, Montenegro, North Macedonia and Serbia: Report on Bosnia and Herzegovina, Key findings of the 2023 Brussels, 8 November 2023, European Commission, <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_5613> (accessed on 9.4.2024). Report on Kosovo, Key findings of the 2023, Brussels, 8 November 2023, European Commission, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_5614> (accessed on 9.4.2024). Report on Montenegro, Key findings of the 2023, Brussels, 8 November 2023, European Commission, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_5615> (accessed on 9.4.2024). Report on North Macedonia, Key findings of the 2023, Brussels, 8 November 2023, European Commission, <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_5627> (accessed on 9.4.2024). Report on Serbia Brussels, Key findings of the 2023, 8 November 2023, European Commission <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_5628> (accessed on 9.4.2024). RFE. 2019. Montenegro passes law on religious communities amid anger, protests, Radio Free Europe, <https://www.rferl.org/a/montenegro-religious-law-serbian-orthodox-church-protest/30346778.html> (accessed 27 Dec 2019).

4.2. Second, the nature of political opposition in the Western Balkans countries has few similarities with the political opposition in other countries[15]. The divisions between the 'position' and 'opposition' parties several times consider topics that are specific for the Western Balkans region, e.g., inter-ethnic relations and the role of religion in politics.

4.2.1. *Inter-ethnic relations.* The most outstanding situation in this regard is the controversial position of Bosnians, Croat and Serbs in Bosnia and Herzegovina. The political parties of the three nations based on ethnic and religious origin of the electorate rule the politics in the two entities – Federacija Bosne i Hecegovine (Federation of Bosnia and Hercegovina) and Republika Srpska (Serb Republic). The political parties with ethnically and religious mixt members manage some local communities but have very little influence on politics of two state entities. The competent authorities have even not changed the electoral law in accordance with the decision of the ECHR of 22.12.2009 that is necessary to eliminate the situation that prohibit Rom and Jew from standing for election to the house of people of the Parliamentary Assembly and for the State Presidency what discriminate and breach their electoral rights[16]. The consequences of this situation have negative aspects not only for the development of the country and for the well-being of its people, but jeopardize the stability and peace of Bosnia and Herzegovina and the Western Balkan region as well. The role of ethnicity in political life is present in North Macedonia as an essential element of political stability. The balance between Macedonian and Albanian political parties is of paramount importance especially after the military insurgency of the Albanian population in 2001 that ended with the signature of Ohrid agreement on 22 August of the same year[17]. Both political structures, the position and opposition, include in the government also the relevant Albanian political parties. Based on the amnesty declared with the Ohrid agreement, even one of the leaders of the insurgency, the president of the newly established party, the Democratic Union for

[15] L. Helms, *Introduction: The nature of political opposition in contemporary electoral democracies and autocracies*, in *Eur Polit Sci*, 2021, p. 569 ff., <https://doi.org/10.1057/s41304-021-00323-z> (accessed on 9.4.2024).

[16] The ECHR established that this situation violates art. 14 (prohibition of discrimination) of the European Convention on Human Rights, taken together with Article 3 of Protocol No. 1 (right to free elections), and Violation of Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention.

[17] The 2001 insurgency in the Republic of Macedonia was an armed conflict that began when the ethnic Albanian National Liberation Army (NLA) insurgent group, formed from veterans of the Kosovo War and Insurgency in the Preševo Valley, attacked Macedonian security forces at the end of January 2001, and ended with the Ohrid agreement on 22 August the same year.

Integration (DUI), became an outstanding member of the government[18]. The inter-ethnic tensions erupted again after the elections in May 2024, in which the nationalistic party VMRO-DPMNE got a large majority. The new PM Mickoski opted for the DUI's rivals in the ethnic Albanian political campus, the "Vlen" [It's worth it] coalition, which won less votes than DUI. The DUI said this was an act of "ignoring the will of the Albanians", and said it was preparing for a slew of activities, including possible street protests in Autumn 2024. Miscoski declared that his political opponents were trying to mobilise people to "provoke ethnic conflict" and to "destabilise inter-ethnic harmony in Macedonia". He accused the DUI of being behind the plot. He also accused top DUI politicians, who were former senior officials in prior governments, of plotting destabilisation to protect the "huge sums of money" they accumulated over the past two decades while they were in power. Nowadays, we could not yet presume what would be the consequences of these new political confrontation between the ruling and opposition parties on ethnic basis for the stability and security of North Macedonia. The ethnic minorities parties of Montenegro usually support the government and thus sometimes created the balance of the political structure. But the main 'ethnic division' is the position of the Montenegro pro-Serbian and pro-Montenegro parties regarding not only the ethnic matters, but also the main political standpoints on crucial domestic and international issues for the development of the country. As already mentioned, the nationalistic rhetoric of most position and opposition parties in the Western Balkans countries is present in their programs and everyday political life. It is several times the main tool for obtaining the support of the electorate and for divert their responsibility from the social, economy and other grievances of the population. Their popular stand is that they are the only ones who "defend the national interests of the people".

4.2.2. *The role of religion in politics.* The role of the church as an institution is quite demanding for research, since it is traditionally closed, and comparative literature in this area is very scarce. The relations of opposition political parties, leaders or actors with representatives of the church are quite non-transparent, as opposed to the relations of the church with ruling actors[19]. The outstanding example of the

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[18] In September 2002 elections, an SDSM-led pre-election coalition won half of the 120 seats in Parliament. Branko Crvenkovski was elected Prime Minister, in coalition with the ethnic Albanian Democratic Union for Integration (DUI) party. It was formed immediately after the country's 2001 armed conflict between the National Liberation Army and Macedonian security forces. NLA founder Ali Ahmeti has been the party's president ever since.

[19] D. Gavrilović, *Religion in the transitional ex-Yugoslav countries*, in Religion in Contemporary Society = (Религия и современное общество): international scientific meeting almanac: [(Thematic conference proceedings of international significance held in Srebrno jezero (Veliko Gradiste), May 19

involvement of religion in politics has been the stand towards the role of the Serbian Orthodox Church in Montenegro in relation to the adoption of the adequate legislation[20]. The political stand of Serbia is present also in academic articles on the question of legitimacy of the Montenegro Orthodox Church[21]. Having in mind the multireligious composition, it is understandable that the impact of religion exists especially on moral issues concerning the people's life, and quite complex relations could emerge between people of different religions. In this regard, it is worthy to keep in mind that during the Balkans wars people kill each other in the name of their Gods. The direct or indirect influence of the given religion on the views and 'behaviours' of the political parties in all Western Balkan countries could be discovered by observing the practical approaches of political and religious factors especially on local communities, while is because of the reasons which we mentioned before very difficult to confirm it on the national level. Besides, we could for sure assert that religions are a factor of division and disintegration in the Balkans[22].

4.3. Third, the analysis of the situation shows that the opposition parliamentary parties in the considered Western Balkan countries have well-developed (so-called) fundamental political programs, which elaborate the entire spectrum of program commitments in various fields of politics, economy, culture, society, European integration, based on the (so-called) fundamental ideological programs.

However, most parties in practical politics do not implement their program commitments at all, which remain a 'dead letter on paper', and are only declarative, but are their usual pre-election activities mostly confined to putting forward the "excesses" of the ruling political elites and similar issues, with the aim to get the support of the electorate. In addition, the analysis of the situation in recent years has put forward the

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and 20 of 2017)]. Ed: Blagojević, Mirko and Matić, Zlatko. Institute of Social Sciences: Department of Education and Culture, Serbian Orthodox Diocese of Branicevo, Beograd; Pozarevac, p. 99 ff. <http://iriss.idn.org.rs/1039/> (accessed on 26.5.2024).

[20] RFE. 2019. Montenegro passes law on religious communities amid anger, protests, Radio Free Europe, <https://www.rferl.org/a/montenegro-religious-law-serbian-orthodox-church-protest/30346778.html> (accessed 27 Dec 2019).

[21] S.E. Hilton, *The self-proclaimed Montenegrin Orthodox Church – A paper tiger or a resurgent church?*, in Religion in Contemporary Society = (Религия и современное общество) : international scientific meeting almanac : [(Thematic conference proceedings of international significance held in Srebrno jezero (Veliko Gradiste), May 19 and 20 of 2017)]. Ed: Blagojević, Mirko and Matić, Zlatko. Institute of Social Sciences: Department of Education and Culture, Serbian Orthodox Diocese of Branicevo, Beograd ; Pozarevac, p. 31 ff. <http://iriss.idn.org.rs/1039/> (accessed on 26.5.2024).

[22] I. Cvitković, *Religions and Nations as Factors of Division and Desintegrationin the Balkans*, in D. Todorović et al. (eds), *Contemporary Religious Changes: From Desecularization to Postsecularization*, Niš and Belgrde, p. 9 ff.

question if the opposition parties' leaders in some WB countries are at all capable to comprise the formation of coalitions of these parties to confront efficiently the ruling political elite in everyday political life, both in general and in local elections. Certainly, party leaders can develop pro-democratic political programs, but coalition partnerships or pre-election calculations and pandering to the mass of voters incline them towards populism or nationalist rhetoric.

4.4. Fourth, the stand towards the recognition of the independence of Kosovo and the Serbia-Kosovo relations is a specific Western Balkans' problem. The opposition parties in the countries that recognised Kosovo in general follow the viewpoints of the government in power regarding this question[23]. The divide views concerning this issue exists in Bosnia and Herzegovina that is the only country of the former Yugoslavia (besides Serbia itself) that does not recognize Kosovo's independence. As the leaders of Serb Republic follow the policy of Belgrade regarding this question, it has been impossible that Bosnia and Herzegovina recognises Kosovo despite the positive approach of the Bosnian and Croat political structure of the country. In Serbia, of course, also the parliamentary opposition parties fully support the governmental standpoint on Kosovo. Small differences perhaps exist regarding the ways of negotiation with the Kosovo government under the sponsorship of the EU or other international factors (for instance, the previous Trump's presidency).

5. At this point of the analysis, this article should focus on what could be the conclusion and recommendations for the future. The development of values mentioned above is of course a commitment and a responsibility for the national political groups, parties, and civil societies in concerned Western Balkan countries; not neglecting in this process also the role of academia in educating the young generations in the spirit of these values.

The analysis of the present situation in the Western Balkan countries have shown that not significant efforts of political factors in this direction exist. The national governments are not interested to provide adequate legal and political circumstances for the participation of opposition parties on equal basis in the elections and in the adequate decision-making processes even on issues of primary national interest.

In the European integration process negotiations–that include also the topics addressed in this article–the influence and participation of civil society organizations has been institutionalized, but it is difficult to analyse the influence of the academic

[23]Albania, Montenegro, North Macedonia.

community, unless certain intellectuals are engaged as experts for individual negotiation chapters (the so-called negotiation clusters). Finally, many experts from civil society organizations or members of the academic community–professors, intellectuals–are personally engaged in the activities or membership of political parties (often under the label 'political councils', which do not necessarily imply membership in those parties). Based on available data, we could firmly establish that the activities of the civil societies and academia so far had no remarkable impact on the situation.

Civil society organizations in the region need to address the challenge of their delegitimization brought forth by a stalled EU accession process and illiberal governments. They need to reinvigorate their missions by expanding constituencies of people who care about democracy, reconnect to the grassroots and strengthen their leverage in contesting elements of state capture. Traditional advocacy CSOs and sporadic new grassroots issue-based movements need to develop better synergies to increase civic engagement. CSOs in the Western Balkans need to strengthen their regional cooperation and work across borders to fight on two of the major fronts in parallel. Firstly, a regional approach is essential in securing the resolution of bilateral and ethnic disputes and fighting trends of historical revisionism, as this fuels authoritarianism and holding the region back from the EU. Secondly, regional CSOs need to advocate together for common interests to convince decision-makers within the EU of the region's readiness and interest in getting closer to the EU[24].

Keeping in mind the negative trends concerning the topics reviewed within this article, the necessity exists that the enlargement policies of the EU in an adequate way stimulate the development of democracy with all the pertinent elements, including the establishment of clearer political oppositions parties role on equal basis in the political system, as one of the basic elements in the development of this European region, based on democracy and the rule of law, and of their step by step integration in the EU system.

The process of political integration into the EU of the Western Balkan countries has been extremely slow. The year 2023 marks twenty years since the EU-Western Balkan Summit in Thessaloniki, when the Western Balkan countries were promised an 'EU perspective'. Today, the announcements of the leading EU structure are very

[24] P. Čermák et al., *op. cit.*

vague[25], this is the main reason why mutual perceptions have deteriorated in recent years[26].

The EU should actively engage in the Western Balkans and restore the credibility of the EU accession process as it is the only external actor to provide the region with a viable geopolitical vision based on stability and democracy. However, the roadmap leading to the EU needs to be clearer, with specific merit-based milestones to accomplish, associated with certain 'benefits' after reaching each milestone. The EU institutions also need to make European policy towards the region more consistent and ensure that the candidate states are awarded promised progress in their accession process once they meet the criteria, while failures of regional politicians to align with the EU conditionality should be penalized.

The EU should also nurture greater unity among member states and employ its considerable leverage over the Western Balkans to facilitate the swifter resolution of bilateral and ethnic disputes, which among other things fuel authoritarianism and ethnonationalism throughout the region–especially the normalization of relations between Kosovo and Serbia. Thus, it will be necessary to elaborate novel EU approaches to these issues, also including the civil society institutions, organisations and academia.

The fact that members of the European Parliament, as well as the Parliamentary Assembly of the Council of Europe, are more and more openly engaged in promoting pro-democratic standards in the Western Balkans, especially in electoral processes, is also positive. The experts' reports on the situation in the Western Balkans are also useful. Reinhard Priebe, the retired director of the European Commission for Western Balkans, wrote in 2019 that the scope of state capture eludes regular EU reporting. State capture implies a condition of widespread corruption and exploitation of public resources for private gains, while neutralizing control mechanisms, whether by legal or illegal means. This situation spreads across sectors covered, in different degrees, in

[25] The most cited is the statement of the leaving president of the European Council, Charles Michel, that the European integration of the Western Balkans countries should be completed until 2030. However, as this issue is included in the recent political documents of the EU there are not realistic expectations that this will happen. The things are even more complicated with beginning of the integration's negotiations with Ukraine and Moldova (Georgia is momentarily on "stand by" because of adoption of the law on "foreign agents").

[26] M. Uvalić, *The Perceptions of European Union-Western Balkan Integration Prospects: Introduction and Overview*, in Id. (ed.) *Integrating the Western Balkans into the EU. New Perspectives on South-East Europe*, Cham, 2023.

separate negotiation chapters, as well as across political criteria that are more difficult to monitor and assess[27].

The international networks promoting democratic values can substantially assist the Western Balkan weak democracies by actively working on building positive pro-democracy narratives. With EU accession effectively on hold, there is currently a weaker institutional anchor for democratic reforms, which is why there is a need for more flexible forms of support for the new wave of grassroots pro-democracy groups and alternative media outlets which are disrupting the entrenched state of illiberalism. New pro-democracy narratives should also be based on evidence on the benefits of strengthening alliances with democratic actors in opposition to authoritarian regimes. Global watchdog organizations can also provide the regional CSOs, media and pro-reform political elites with the knowledge and expertise to fight corruption and enhance the role of independent media. While financial assistance from international funds does not guarantee progress in regional democratization, it can be a major element if appropriately routed and bound with purposeful and sustainable projects[28].

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Abstract: The situation concerning the parliamentary opposition in the West Balkans depends on the fact if general suppositions exist for its efficient position on equal basis with the "position" parties. The analysis of the situation shows that various deficiencies concerning these elements exist. The consequences of wars, as well as ethnic and religious conflicts, strongly influence the ways, modes, and contents of political transition in the countries of the region. Starting from the assertion that the development of democratic values and the establishment of an efficient political system is a commitment and a responsibility for national politics and civil society, the contribution offers some insights on the author's views on the role of the EU and other international organisations in these processes.

Keywords: Western Balkans – parliamentary opposition parties – civil society – European Union – international agencies promoting democracy.

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[27] R. Priebe, 'The scope of state capture eludes regular EU reporting', <https://archive.rai-see.org/priebe-report-against-state-capture-in-the-western-balkans/> (accessed on 4.7.2024).

[28] P. Čermák et al., *op. cit.*

Rivista di Diritti Comparati

Democratic functions of the political opposition in the 21st Century Serbia. Standards with tiny roots*

Tamaš Korhecz

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1. *Introduction*

This paper has the ambition to describe and analyse the position and functions of the political opposition (s) in the Republic of Serbia (hereinafter: Serbia). We try to answer the question, to which extent political opposition in Serbia has the status and legal protection inevitable to fulfil its functions in the democratic society in accordance with the existing European standards. Author of this paper argues, that despite of formally existing democratic constitutional framework from 1990, the functions and status of the political opposition are seriously blurred by the continuous efforts and techniques of major ruling political parties and their leaders aiming to extensively dominate and control all public institutions and resources of the state, as well as to rule the media. During the 33 years long history of the multiparty system in Serbia, three different periods should be distinguished, with three different ruling political parties, and three political leaders. However, these periods are linked with different but similar efforts of the ruling political elites, and political leaders, to exploit all public institutions and resources of the state to strengthen their power, to discredit and blur the political opposition, to exclude it from the decision-making processes and public resources. What makes the Serbian example more odd, are endeavours of the ruling parliamentary parties to control local self-governments, to create a local electoral system that blurs the specificities of the local communities, and makes easer for dominant political stake

* The article has been submitted to a double-blind peer review process according to the journal's guidelines.

holders in state, to gain control over all local self-governments, to erase out political plurality, to distort local democracy. The author argues that the blurred position and role of the opposition are deeply rooted in the constitutional and political culture in Serbia. It is widely shared conviction that the ideas and principles like the separation and division of powers, power-sharing, strong protection of human rights, rule of law something that weaken the governance, weaken the state, while, on the other hand, strong leadership, administrative centralization, political control over public institution and media are principles and techniques necessary for successful governance.

This paper is divided into five sections. In the first, short historical summary of democratic elections in Serbia will be elaborated, with the emphases on three distinguished historical periods, with three different ruling elites and leaders. In the second section, the functions and protection of the political opposition will be elaborated with references to the European standards. In the third section, legal regulation of the political opposition in Serbia will be elaborated and analysed. In the fourth section, those measures and endeavours of the ruling political parties will be identified which were pointed on to gain full control over all public institutions and resources in order to prevent the political opposition to effectively participate in the political life and decision-making, to disseminate its democratic functions. In this section particular attention will be granted to measures making extremely difficult to political opposition to win elections even on local level. In the fifth, and final part of this paper concluding remarks will be elaborated.

2. *History of the multiparty elections in Serbia, political majorities and political minorities*

The democratic multiparty political system, political rights, separation of powers, market economy and other principles of the liberal democracy were introduced into the political system in Serbia at the beginning of nineties of the 20-th century, such as in other European former socialist states. However, the first decade of the multiparty political system, unlike in the majority of other European former socialist states, were disturbed with the violent break-up of the federal, socialist Yugoslavia, international isolation of Serbia, sanctions, wars in the neighbourhood of Serbia, later even within Serbia. From 1990 till the end of 2023 altogether 14 multiparty elections for the National Assembly were organized[1]. Alongside with the elections for the National Assembly, elections were regularly organized as well as for the Assembly of the

[1] Between December 1990 and June 2020, 12 regular and extraordinary elections were organized, for the summary of these elections see: V. Goati, *Tri decenije višepartizma - nezavršeni proces [Three Decades of Multiparty System – Process still not Finished]*, in S. Orlović - D. Kovačević (eds.), *Trideset godina obnovljenog višepartizma u Srbiji, [Thirty Years of reestablished Multiparty System in Serbia]*, Beograd, 2020, p. 11 ff. After 2020, extraordinary parliamentary elections were organized in April 2022 and in December 2024.

Autonomous Province of Vojvodina and assemblies of local self-governments (174), however not as frequently as on the national level due to the smaller number of extraordinary elections. In this 23 years long period, deputies in the national and local assemblies were elected under different electoral rules, with participation of various political parties, with different majorities and minorities in elected assemblies. However, this period might be roughly divided in three sections, dominated for long time by three charismatic political leaders and three dominant political parties.

The first decade of the multiparty Serbia was marked with the ruling of the Serbian Socialist Party (successor of the former Communist party, hereinafter: SSP) and its undisputed leader Slobodan Milošević. Milošević formally accepted the liberal democratic system, opposition political parties were legalized, they participated on elections, however SSP and Milošević tried hard to preserve full control over public institutions, resources of the state, media, including manipulations and sometimes direct cheating on elections. From time to time Milošević used physical repression against the opposition and its leaders. The SSP and its leader were not ready to accept and respect the opposition, labelling it as traitors, foreign mercerises. The regime of Slobodan Milošević finally collapsed in October 2000, after mass demonstration of the political opposition triggered by the attempt of falsification of the results of the September 2000 presidential elections, on which Vojislav Koštunica, the candidate of the Western oriented united political opposition (hereinafter: DOS) defeated Slobodan Milošević. In December 2000 the DOS achieved massive victory on parliamentary elections in Serbia, winning more than 64% of votes and 70% of seats in the National Assembly[2]. The victory of the DOS meant the end of the international sanctions and isolations, membership of Serbia (FR Yugoslavia) in the Council of Europe, privatization and opening of the economy, beginning of the integration to the European Union, investigation of war crimes etc. Between 2001 and 2007 within the DOS coalition two political parties and their leaders competed for the dominant position, Democratic Party and Serbian Democratic party, resulting a situation without clear domination of one leader and one party. However, gradually the Democratic party, with its leader Boris Tadić, who was elected two times for the president of Serbia (in 2004 and 2008) become new undisputed political leader of Serbia. The Tadić era 2004-2012 gradually reinvented many governing techniques of the Milosević era. Mainly from 2007/8 this party had begun to control and exploit public resources, to take control over public institutions, to dominate media, endeavours to take control over all larger local self-governments in Serbia etc. Such as in Milošević era, in Tadić

[2] V. Goati, cit., p.14.

era, the ruling party endeavours to gain full control over institution, to exclude the opposition from decision-making processes, to control media, the distribution of budgetary incentives to companies, resources etc. In order to achieve domination not only on state level but also in local level, local elections were organized also upon proportional representation system with party lists, the local elections were organized on a same date as parliamentary elections. The Tadić era ended in 2012, when the presidential elections were organized on the same day with the elections for the National Assembly, Assembly of the Autonomous Province of Vojvodina, and assemblies of local self-governments. After Tadić slightly lost the presidential elections, it resulted in the collapse of the Democratic party in all levels, because the former coalition partners of the Democratic Party changed the side, and formed new majority in the National Assembly with the Serbian Progressive Party, which were formed by the fraction of the nationalist anti West Serb Radical Party. After a short transition period, and victory on 2014 year extraordinary elections, the new leader of the SPP Aleksandar Vučić, gradually became undisputed political leader of the state. In 2016, SPP achieve victory once again on the elections for the National Assembly, won the elections for the Assembly of the Autonomous province of Vojvodina, and, moreover, in April 2017 Vučić achieve triumphal victory on the presidential elections as well.. From this period Vučić, and his ruling party used all governing techniques of Tadić, but further enhanced them, and used these techniques and mechanisms to efficiently marginalize and dismantle the political opposition and strengthen its political power and influence over media and all state resources and public institutions.

3. *The functions and protection of the political opposition*

Historically, the notion of the political opposition first emerged in the course of the struggle of the British Parliament to criticise and limit the sovereign powers of the monarch. For a long period of time political science largely neglected to study political oppositions[3]. The pioneer among the authors putting opposition to the centre of the study of democratic policy was Robert Dahl[4]. Political oppositions differs from state to state, however theory emphasises some basic common functions of the opposition

[3] J. Garritzmann, *How much power do oppositions have? comparing the opportunity structures of parliamentary oppositions in 21 democracies,* in *The Journal of Legislative Studies,* 2017, p. 2 ff.

[4] L. Helms, *Studying parliamentary opposition in old and new democracies: Issues and perspectives*, in *The Journal of Legislative Studies,* 2008, p. 6 ff.

in all democracies. These are, first, to criticize, monitor and control the government actions, and second, to offer reliable political alternatives to the majority in power[5]. Scholars also emphasise that oppositions, in and outside of parliaments are crucial ingredient of the well-functioning representative democracy[6]. Authors emphasising the pivotal role of the opposition in democracy, usually neglect that besides the so called pendulum or majoritarian democracy, there are other patterns, or forms of democracy. Hendriks distinguishes four basic forms of democracy: pendulum and consensus democracy (indirect democracies) and voters and participatory democracy (direct democracies)[7]. Lijphart distinguishes two basic patterns of democracy majoritarian and consensus democracy, arguing in favour of the consensus democracy, particularly in plural societies[8]. In consensus democracy political opposition do exists, and has its distinguished role, albeit the division line between the majority and minority are less clear and permanent. The difference is that the majoritarian model of democracy is adversarial, and competitive, whereas the consensus model is characterized by inclusiveness, bargaining, and compromise[9]; or, as Kaiser defined it as "negotiation democracy"[10].

Dahl and scholars following the path of his studies tried to differentiate between oppositions in different democratic states. Authors distinguished strong and week opposition, cohesive or defuse opposition, and opposition in intensive conflict with the governing majority rejecting the Regime, and opposition having similar political goals as the ruling majority, correcting the Regime[11].

Based upon scholarly works and living practices, international organizations, primarily the bodies of the Council of Europe (hereinafter: CoE) enacted political documents, common good practices containing, guidelines and recommendations for CoE states concerning the role and functions of the political and particularly parliamentary oppositions. These guidelines, constitute standards which should be implemented by states in their legislation and political practice in order to further develop democracy in member states. Among these document we specially point on

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[5] J. Garritzmann, cit.

[6] R.B. Andeweg, *Parties in parliament: The blurring of opposition*, in W.C. Müller - H.M. Narud (eds.), *Party Governance and Party Democracy,* New York, 2013, p. 100 ff.

[7] F. Hendriks, *Vital Democracy: A Theory of Democracy in Action,* Oxford, 2010.

[8] A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries,* New Haven & London, 2011, p. 5

[9] *Ibid.*, p. 2

[10] A. Kaiser, *Types of Democracy: From Classical to New Institutionalism,* in *Journal of Theoretical Politics,* 1997, p. 434.

[11] J. Blondel, *Political opposition in the contemporary world,* in *Government and Opposition*, 1994, p. 469 ff.

the Resolution 1601 of the CoE Parliamentary Assembly[12], and two documents of the Venice commission[13] on the role of the opposition and on the relationship between parliamentary majority and opposition[14]. Recommendations in these documents call for the legal surrounding and political practice allowing free establishment and activities of political organizations, their participation on elections, and putting opposition MP-s on to equal footing with the MP-s consisting the ruling majority. Guidelines offer solutions that guarantee right to opposition deputies to effectively take part in the legislative process, to criticize and control government, to participate effectively in the activities of standing committees, to initiate inquires and debates on political issues important for the opposition, to have necessary time for participation in debates, to disseminate ideas information, to reach information necessary to monitor the activities of the government, to table various draft laws, other motions in parliament, to have a freedom and security. Besides rights of the opposition, documents emphasise responsibilities of the opposition as well, calling for constructing behaviour from the side of the opposition.

4. *Regulation of the political opposition in Serbia*

Political rights, elections, political parties and their financing, procedures of the National Assembly and other democratically elected bodies, judicial protection of constitutional rights are guaranteed and regulated extensively by the Constitution of Serbia and plenty of laws and other regulations in Serbia. All these acts and provisions constitute the legislative framework for the political oppositions, parliamentary and non-parliamentary as well in Serbia. This framework was gradually shaped within and influenced by the integration process of Serbia into the European Union, particularly after 2012 when Serbia officially received the status of candidate country. Based on the yearly progress reports of the European Commission and various reports of the CoE, the legal framework of political rights and freedoms, elections and their protection is

[12] Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, Resolution 1601 (2008).

[13] European Commission for Democracy Through Law (Venice Commission) Draft Report on the role of the opposition, Study number 497, June 2009.

[14] European Commission for Democracy Through Law (Venice Commission) Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist, Opinion no. 845/2016.

basically in accordance with the European standards, however implementation in practice often discloses shortcomings as well. In this section of the essay the relevant legislative framework determining the status and rights of the political opposition will be described, analysed only sporadically, focusing on some solutions that deserve specific attention. In this analyses we will focus on the relevant constitutional provisions, laws regulating parliamentary, provincial and local elections, party financing, media broadcasting establishment of political parties, and rules of the houses of various assemblies. In our analyses we try to evaluate this legislative framework from the point whether they put on equal footing political oppositions and political majorities, or not. Whether they guarantee equal chances to oppositions and to ruling majorities. The analyses will begin with the Constitution of Serbia. The Constitution were enacted in 2006 and it was amended in 2022[15]. The Constitution has no single provision explicitly mentioning opposition, however plenty of provisions and guarantees are protecting the position and rights of the opposition. Besides the extensive list of political rights from the universal suffrage[16], freedom of expression[17] and media[18], right to political association[19] and assembly[20] etc. Some provisions are particularly interesting for the rights of the political opposition, and required also by guidelines of the CoE. Among these, one should mention the right to every member of the National Assembly to table draft laws[21], all members enjoy material and procedural immunity from prosecution[22]. Fifty members of the national assembly out of total 250 can table interpellation[23], 60 can launch vote of no confidence against the government[24], 25 members can institute procedure for the constitutional review of any law enacted in the National Assembly[25], furthermore, one third of members can initiate constitutional review of a law prior to its promulgation[26]. The session National Assembly shall be convoked obligatory if one third of members request it, with

[15] Ustav Republike Srbije [The Constititon of the Republic of Serbia] Službeni glasnik RS br. 14/2022, [Official Gazette of the Republic of Serbia no. 98/2006, 115/2022].
[16] Constitution, Article 52.
[17] Constitution, Article 46.
[18] Constitution, Article 50.
[19] Constitution, Article 55.
[20] Constitution, Article 54.
[21] Constitution, Article 107, par 1.
[22] Constitution, Article 103.
[23] Constitution, Article 129.
[24] Constitution, Article 130.
[25] Constitution, Article 168, par. 1.
[26] Constitution, Article 169.

previously determined agenda[27]. The elections for the Serbian National Assembly, Assembly of the Autonomous province of Vojvodina, assemblies of local municipalities, and elections for the head of the state (President of the Republic), are all regulated by separate pieces of legislation[28], however these relatively fresh laws, have only few novelties and they re-enforced the already existing electoral system and they have similar procedural provisions[29]. General assessment of these laws is, that they put participating political organizations basically on equal footing creating no massive obstacles for opposition political organizations in the process of candidacy and in participation and monitoring of the electoral process. However, the common rule, that the permanent members of the electoral bodies are elected by the ruling majority, while additional members are delegated by the promulgated lists, participating on concrete election are actually advantageous for the ruling parties[30]. The Law on party financing[31] regulates in detail the financial resources of political activities in Serbia. The law defines different sources and categories of the financing, including the limits of different sources, legally permitted sources, including subsidies from the state, provincial and local budgets, as well as prohibited sources of financing. The law makes no distinction between political subjects in opposition and those in power, they are formally on equal footing. Concerning the subsidies from the budget, parties and other political organizations with small number of members in the parliament, irrespective whether they are in opposition, or they are part of the ruling majority have modest preferential

[27] Constitution, Article 106, par. 3.

[28] Zakon o izboru narodnih poslanika, [Law on the Election of the Members of the National Assembly] Službeni glasnik RS br. 14/2022 [Official Gazette of the Republic of Serbia no. 14/2022]. Pokrajinska skupštinska odluka o izboru poslanika u Skupštinu Autonomne pokrajine Vojvodine [Assembly Regulation on the Election of the members of the Assembly of the Autonomous Province of Vojvodina], Službeni list APV br. 40/2023 [Official Gazette of the Autonomous Province of Vojvodina no. 40/2023], Zakon o lokalnim izborima [Law on Local Elections], Službeni glasnik RS br. 14/2022, 35/2024 [Official Gazette of the Republic of Serbia no. 22/2022, 35/2024]., Zakon o izboru Predsednika republike [Law on the election of the President of the Republic] , Službeni glasnik RS br. 14/2022 [Official Gazette of the Republic of Serbia no. 22/2022.]..

[29] For example, deputies in assemblies, state, provincial and local are elected in proportional representation system, with party lists, and 3% electoral threshold.

[30] Decisions, and by-laws regulating in detail the operation of local electoral bodies, nomination of local electoral body members, on sheets for the collection of support signatures of citizens for voters necessary for the candidacy are all decisions made by permanent members of the electoral committees, hence the ruling majority can influence these decisions easily,. As a consequence, the ruling party can collect support signatures first, consequently, this candidate list will appear on ballot lists with number one, first. etc. After the candidacy phase is ended, the electoral process will be governed by the wider electoral committee, including the delegates of all promulgated list.

[31] Zakon o finansiranju političkih aktivnosti [Law on Financig Political Activities] Službeni glasnik RS br. 14/2022 [Official Gazette of the Republic of Serbia no.14/2022].

treatment[32]. Some of the limitations and prohibitions are indirectly favourable to the opposition, others to the ruling majority. For example the ban on donations from domestic public companies or other companies having businesses with the public sector[33] is practically restricting the ruling majority, while the prohibition to receive donations from a foreign citizen, company or organization is mainly in the interest of the ruling majority[34]. The relatively liberal rules on the individual donations from domestic individuals and companies are indirectly in favour of the ruling majority, bearing in mind that the support to the ruling majority, disposing over all public resources might be a lucrative investment, while investing into the opposition is a highly risky investment[35]. The rights and functions of the opposition to large extent depends, within constitutional guarantees, on laws regulating media broadcasting. Three major pieces of legislation in the area of broadcasting are the Law on Public Broadcasting and Media[36], the Law on Electronic Media[37], and the Law on Public Media Services[38]. Analysing them from the rights and functions of the political opposition, few concrete provisions shell be mentioned. Law on Public Broadcasting and Media declares the protection of plurality in the area of public information and prohibits and sanctions monopolies and media concentration[39]. The Law on Electronic Media empowers an independent body: Regulatory Body for Electronic Media (hereinafter: REM) with wide range jurisdiction in the area of electronic media, including monitoring and fining, enacting bylaws, distribution of broadcasting licences etc[40]. All decisions of the REM are enacted by the nine member "Council" of the REM, elected by the National Assembly, by majority vote, without special guarantees to the parliamentary opposition[41]. However, National Assembly elects members proposed by electronic media associations, associations of journalist, churches, national minority

[32] Law on Financing Political Activities, Article 17.

[33] Law on Financing Poilitical Activities, Article 12, par 3.

[34] Law on Financing Pollitical Activities, Article 12, par 1.

[35] Individuals are permitted to donate yearly maximally 10 average monthly selary, while a companies are permitted to donate yearly maximally 30 average monthly salary. Law on Financing Political Activities, Article 10.

[36] Zakon o javnom informisanju i medijima [Law on the Public Information and Media] , Službeni glasnik RS br. 92/2023 [Official Gazette of the Republic of Serbia no. 92/2023.].

[37] Zakon o elektronskim medijima [Law on Electronic Media] , Službeni glasnik RS br. 92/2023 [Official Gazette of the Republic of Serbia no. 92/2023.].

[38] Zakon o javnim medijskim servisima [Law on the Public Media Services] , Službeni glasnik RS br. 83/2014, 103/2015, 108/2016, 161/2020, 129/2021, 142/2022, 92/2023 [Official Gazette of the Republic of Serbia no. 83/2014, 103/2015, 108/2016, 161/2020, 129/2021, 142/2022, 92/2023.].

[39] Law on the Public Information and Media. Articles 6, 53-55.

[40] Law on Electronic Media, Art. 7.

[41] Law on Electronic Media, Art. 11.

self-government, universities, and various ombudsman-s[42]. This latest provision is aimed to restrict the ruling majority in the National Assembly to elect persons of their own choice. Finally, the Law on the Public Media Services regulates the status and functioning of two public media services (hereinafter: PMS), the Serbian Radio-Television and Vojvodina Radio-Television. According to the law, through its programs, among others, PMS-s are respecting and promoting the pluralism of political ideas, and makes possible the proportional confrontation of different political attitudes[43]. The rights and functions of the parliamentary opposition and oppositions in provincial and local municipal assemblies are regulated by the standing orders of these democratically elected assemblies. The Standing orders of the Serbian National Assembly[44], as a general rule, do not make any difference between members of the National Assembly who belong to the ruling majority and those part of the opposition. These rules are colour blind, however some rules are particularly important for the rights of the opposition. The rights and privileges of the members of the National Assembly are equal. The formation of parliamentary fractions require at least five members. The parliamentary fractions are represented in permanent bodies of the National Assembly proportionally to the number of their members, and they have time for discussion also proportionally to their numerical strength. The opposition has no guarantee to have presidents or vice presidents in permanent committees, and the standing orders stipulate that the parliamentary majority should have majority in all permanent committees[45]. The Standing Orders of the National Assembly regulates the question addressed by the member of the National Assembly to the Government or member of the Government in detail[46]. Standing orders of the Assembly of Autonomous Province of Vojvodina and local municipalities, are very similar to the Standing order of the National Assembly, prescribing no special rights and privileges for the opposition deputies.

[42] Law on Electronic Media, Art. 12.

[43] Law on the Public Media Services, Article 7, par 1.

[44] Poslovnika Narodne Skupštine [Standing Order of the National Assembly], Službeni glasik RS br. 20/2012 [Official Gazette of the Republic of Serbia no. 20/2012].

[45] Standing Order of the National Assembly, Article 23, par. 2.

[46] Standing Order of the National Assembly, Article 204-216.

5. *Measures and techniques of the political parties marginalizing and frustrating the political opposition*

This paper has the ambition to points on and identify those techniques and measures used in Serbia by which the ruling political elites use (and used) in order to marginalize and dismantle political oppositions. These measures and techniques have different effects on the functioning of the political system in Serbia. First, they make extremely difficult for the opposition to democratically dismiss ruling parties, second political opposition is into large extent excluded from the effective participation in decision-making processes, and prevented to fulfil functions of the political opposition in the democratic state. Finally, such situation radicalizes the political opposition toward the governing majority, in such situation escalation of the political polarisation is a consequence.

In the following, we try to identify and explain main techniques and measure used by the ruling political elite by which it protect its dominant position and marginalize and frustrate oppositions. These are domination, control and exploitation of public institutions and resources, control over media and domination in media, and distortion of local elections and local democracy.

5.1 *Domination, control and exploitation of public institutions and resources*

Slobodan Jovanović, the outstanding Serbian scholar and politician before more than a century formulated that political parties in Serbia are “machines for conquest of the state powers” and “associations for the exploitation of the state powers”[47]. The actuality of the above statement is still undeniable. Actually, the dominant ruling political parties from 1991 till nowadays tried to maximally exploit their electoral victories, to take full control over the complete public sphere, to control the entire system of public institutions, not only the administrative organizations, police, military, but the judiciary and other independent bodies, public institutions in the sphere of education, social and health care and culture etc. Like in the communist period (from 1945 till 1990) when the ruling and only permitted communist party and its leader controlled the entire society, ruling parties after 1990, to large extent try to establish similar domination in society, with the difference, that they had to take power in

[47] S. Jovanović*, O državi, Osnovi jedne pravne teorije*, Beograd, 1922, p. 370.

multiparty political environment, with competition with other parties, by the decision of the majority, tested on plural elections.

Ruling political parties after taking power, are using legally entrenched powers of ministries, the government and government bodies, to appoint or hire loyal party members, or non-party member, but loyal sympathizers in administration and different public institutions. It is widely acknowledged that in Serbia not only principals and directors of hospitals, social care institutions, schools, museums, theatres and public utility companied are appointed based on the criteria of loyalty towards the ruling party (parties), but almost all new employments in these institutions require party membership and proof of loyalty. The "Army" of such politically loyal and servile principals and other employees have to continuously prove its loyalty to the ruling party (parties) by participating in political meetings, campaigns and elections. All these persons are registered and monitored by party centres, and those, showing no loyalty and obedience, face discharge (principals, directors) or notice to quit (mainly those employees without permanent status). Besides the employment of party members in public sphere, state resources are exploited also by creating a network of private companies friendly and loyal to the ruling parties and their leaders (client system), usually successfully participating in public procurements. These companies, their employees are also reservoirs of votes for ruling political parties. By the above techniques ruling parties, with time, gradually successfully infiltrate more and more into public institutions, enlarging the number of their party members, the number of certain (safe) voters, party activists. Individuals gradually become aware, that in many professions and businesses loyalty to, and membership in a ruling party is a key for success. Hence, it is not surprising that the ruling parties (SSP in nineties, Democratic party between 2007 and 2012, and SPP from 2013 till nowadays) had enormously large number of party members, the present ruling SPP party has the membership over 800.000 adult citizens. It is the characteristic of the Serbian political system, that the membership of the dismissed, former ruling parties massively migrate into the new ruling political party without caring for ideological differences.[48] By the way of the above described technique the ruling majority gradually ensure that the members of the political opposition are excluded to large extent from the employment in public sector and management of the public institutions, and second, that they have and

[48] T. Korhecz, *Ustavno načelo podele vlasti – zakonodavna vlast,izvršna vlast i požaj političkih stranaka u Republici Srbiji [The Principle of the Division of Powers - Legislative and Executive Power and Policial Parties in the Republic of Serbia]*, in: D. Simović - E. Šarčević (eds.) *Parlamentarizam u Srbiji [Parliamentarism in Serbia],* Sarajevo, 2018, p. 132 ff.

"Army" of economically dependent loyal voters and party members, providing massive advantage on all elections.

5.2 *Control over media and domination in media*

Among the keys for the successful and long domination of the current governing majority over its political opposition is in the dominant position in media. Aleksandar Vučić, the president of Serbia, who is undisputed political leader of Serbia from 2014, formally led the ruling political party, SPP from 2012 till 2023, is clearly dominating the media stage in Serbia.

Although the public information by internet media, social networks, various influencers, self-made reporters are quickly changing the habits of media consumers in Serbia, but they are mostly popular among those under thirty years. The middle age generation, and those over 60 years of age, whose votes are decisive on elections are still, primarily informed from TV broadcasting. From four private Tv Broadcasters with licences for national frequency at least three openly endorse Vučić, and the ruling SPP party, while none of them is close to the ideas of the political opposition. The situation is less disproportionate within two public broadcasters, even these PMS broadcasters are far from objective, impartial and balanced in their programmes[49]. The Progress report on Serbia of the European Commission for 2023 identify only moderate progress in the area of media freedoms and plurality. The commission emphasises that "media pluralism and editorial independence remain to be improved" and that the "political and economic influence on the media remains a source of concern", furthermore "REM fails to demonstrate its independence in a consistent manner and to exercise its mandate to the full in safeguarding media pluralism and professional standards"[50]. The broadcasters favouring the ruling political majority spent lot of time and energy to openly discredit opposition political parties and their leaders, while they regularly omit to invite them or to ask them to defend their ideas and standings. The media and journalists critical towards the ruling majority are often abused and humiliated by ruling party leaders, facing also anonymous threats and even verbal and physical assaults for their "non-patriotic" behaviour. The influential international media NGO, the RSF "Reporters Sans Frontiers", in its most recent ranking of states ranked Serbia on 98 place among 180 states[51]. The shortcomings

[49] European Commission, *Serbia 2023 Report,* Brussels, 8.11.2023, p. 45.
[50] *Ibid.*, p. 6. and p. 44.
[51] <https://rsf.org/en/index> (visited 25.06.2024.)

regarding media freedoms of the Serbian democracy are recognized by many from the beginning, but all legislative reforms, and attempts of the international community seems to change little in this area. Today, the media domination of the ruling political parties is not ensured through the state owned and strictly directed media, like in nineties, but with sophisticated indirect financing of the friendly private media houses, buying, changing the ownership of the opposition media, careful distribution of national frequencies. etc. New elites successfully complied with the new legal circumstances, stick was often replaced with carrot, but the domination remained. The media stage in Serbia is not only dominated by the ruling political party and its undisputed political leader Vučić, but it is also deeply polarised. Balanced, fact based, and fact finding journalism is present only sporadically, mainly in some programmes of PMS-s.

5.3 *Distortion of local elections and local democracy*

Among the techniques and measures of the ruling political parties aimed to prevent political opposition to fulfil its democratic functions and to marginalize it, to prevent it to participate in political decision making processes is the distortion of local democracy in Serbia. In the Milosević era to lesser extent, in the Tadič era much more, but especially in the current Vučić era, ruling party with various measures tried to take control over local self-governments. Local self-governance means that people in local community, by their elected representatives create local policy, decides on local matters, dispose with local incomes in accordance with local needs and locally defined preferences. The ruling parties continuously had a fear that local self-governments and also provincial autonomy can diffuse the public power, they could be a ground where opposition politicians can practice leadership, prove and improve their capacities to govern. The vertical division of powers, such as the horizontal division of powers is alien to political structures with strong desire to control the entire public sector, to control the society as a whole. The option to erase out local self-government is not constitutional and even less realistic, therefore ruling political parties, particularly after 2006 first changed the electoral rules for local elections[52], and also used other techniques allowing them to distort local democracy and prevent political opposition to strengthen by taking power on local level, even in areas where they are popular and have gifted local leaders. Important legislative step in distorting local democracy had

[52] Zakon olokalnim izborima [Law on local elections], Službeni glasnik RS br. 129/2007 [Official Gazette of RS no. 129/2007].

been made with changing the local electoral system. The 2007 Law on local elections introduced proportional representation (PR) system with 5% threshold for the election of deputies in local self-government assemblies. The election of the mayor directly by citizens was replaced with the election of the mayor by majority vote in local assembly. The new local electoral system was almost the same as the electoral system for National Assembly, existing from year 2000. The result of these changes was that strong political parties, with substantial financial resources and capacities became crucial actors in local elections, although lists nominated by civil activists (groups of citizens) were not excluded from the competition, their participation become rather exception, then a rule. In an electoral system where the voter on ballot paper can read only the names of various lists, and bearers of lists, the individual capacities and reputation of candidates on party lists in local community became secondary, while the overall reputation of the party nominating the list of candidates, its presence in media, professionalism of the political campaign, available resources often proved to be decisive for the victory. Furthermore, according to the relevant provision, the bearer of the list can be anyone, including persons who are not on the list of candidates. This rule made possible to nominate lists in all local self- governments with the name of the most popular political leader, as bearer of the list. The electoral system for the members of the Vojvodina provincial Assembly was amended only in 2014[53], and after amendments, the combined electoral system was replaced with PR system like in state and local level.

Besides changing the legal framework of the local electoral system favouring major political parties and giving them crucial role in local elections, the distortion of local democracy was further enhanced by setting the date of local and provincial elections on to the same date as elections for the National Assembly. With lot of demagogy and sarcasm this step was explained with less expanses for the organization of elections. This manipulative political-tactical measure entirely changed the character of local elections. Local elections cease to be elections around local issues and local candidates, about local policy, they simply became part of, or derivative of national level political battle. The ruling party campaigned with same slogans, symbols and faces on elections for National Assembly as on local level. The victory on nation level elections guaranteed the victory on provincial and local level as well, with few exception. This way manipulations with local elections contributed further to the

[53] Pokrajinska skupštinska odluka o izboru poslanika u Skupštinu Autonomne pokrajine Vojvodina [Povincial Assembly Regulation on the Election of the Assembly of the Autonomous Province of Vojvodina], Službeni list APV br. 23/2014 [Official Gazette of the APV no. 23/2023].

control of the ruling political party over entire public sector and marginalization of the political oppositions. Local democracy become seriously distorted, today it is far from being the school of democracy, decision making and management of issues of local character by the local community and elected authentic representatives of the local community, making possible to protect local peculiarities and diversity in general. Today, the provincial government, mayors and local self-governments are simple executive branches of the central government, by local political actors being there exclusively because of their loyalty to the ruling party and its leader. Finally, these functionaries were elected exclusively because they were nominated by the party leadership and was put on the party list. Their contribution to the electoral victory is minimal, what determines the scope of liberty to act autonomously as future mayors or other local functionaries. What is even more disturbing, that the above described techniques was established already during the Tadić era, it was only developed further during the Vučić era. In deeply polarised Serbian political arena, the distortion of the local democracy do not worry the majority of political parties even within the political opposition. The opposition primarily act to dismiss replace the ruling Regime, not to change the patterns of ruling in Serbia. The ideas of division of powers, consensus and deliberative democracy, diffusion of powers, independent judiciary, federalism, strong local democracy, plurality of cultures, ideas is alien to the political culture in Serbia in general. Politicians mainly believe on strong political leadership, concentration of powers, centralized administration and public powers, majoritarian democracy. How political plurality and local democracy is understood, the statement from 25 of March, 2024 of Dragana Sotirovski, mayor of the town of Niš can illustrate well "I will leave the city of Niš and settle elsewhere if the opposition MP s will win on local elections here, it will be nonsense if the power in local level differs from the state level power, we can not have such situation"[54]. Power sharing, deliberation to reach a consensus, cooperation between the ruling majority and opposition is strange and alien idea in Serbia.

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[54] *Sotirovski kaže da će da se seli iz Niša ako pobedi opozicija - oni joj kao opciju nude Požarevac!*, in *direktno.rs*, 25. 03. 2024, available at <https://direktno.rs/vesti/srbija/517944/dragana-sotirovski-nis-opozicija-jelana-milosevic-pozarevac.html#google_vignette> (visited in 26.06.2024.)

6. *Conclusion*

In previous sections of this paper we tried to identify characteristics and specificities of the ruling majority and the opposition in Serbia. The character of the opposition is tied to the character of the government/ruling majority[55]. We concluded that the political competition in Serbia is deeply polarized continuously from the early nineties[56]. The ruling parties try hard to strongly grasp the power, to exploit political power entirely and to push political opposition to the margins, excluding it from decision-making processes. The opposition on the other hand rejects the governing majority and it is preparing to dismiss and replace the ruling majority in polling places, or even on streets. In Serbia the relationship between the ruling majority and the political opposition is functioning mainly on the pattern of the pendulum democracy (Hendriks), or the majoritarian democracy (Lijphart). Lijphart argued and offered empirical research results for his thesis that proper impetus for the development of the consensus democracy are parliamentary system (with government responsible to the legislative body) and proportional electoral system[57]. In last 25 years Serbia has, at least formally parliamentary system and PR electoral system on national level (in local level in last 17 years) however, consensus democracy is still very alien and rejected in Serbia. One of the reasons why parliamentary system and proportional representation in various democratically elected assemblies had not pushed the Serbian democracy towards consensus democracy model lays in the position of the President of Serbia. The directly elected president, particularly if he was simultaneously the president of the ruling political party, created a situation in which the popularity of the President was above his own party, and second, that the overall power and influence of the president was beyond the influence of the ruling party[58]. This situation pushed Serbia towards so called leader democracy[59] and the creation of dominant ruling and dominant opposition parties despite of many parties having seats in the national assembly. Such situation was present in all mentioned periods, in the era of Milošević, Tadić and Vučić as well[60]. In such circumstances political opposition in general, and

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[55] J. Blondel, *Political opposition in the contemporary world,* in *Government and Opposition*, 1994, p. 463.

[56] V. Goati, cit., p. 21 ff.

[57] A. Lijphart, *Patterns of democracy: Government forms and performance in thirty-six countries,* New Haven & London, 2011, p. 297.

[58] S. Orlović, *Političke institucije i partijski sistem Srbijehe [Political Institutions and Partz System in Serbia]*, in S. Orlović - D. Kovačević (eds.), *Trideset godina obnovljenog višepartizma u Srbiji*, *[Thirty Years of reestablished Multiparty System in Serbia]*, Beograd, 2020, pp. 54-56.

[59] A. Körsényi, *Political Representation in Leader Democracy*, in *Government and Opposition,* 2005, p. 358 ff.

[60] S. Orlović, cit., p. 55.

parliamentary opposition in particularly have no chance to fulfil its basic role and functions, even those characteristic for majoritarian democracies. In order to change things on the ground there is a need to elevate the level of the political culture in Serbia, to finally reject the remains of the totalitarian heritage, with strong political leaders, centralized and concentrated, unlimited state powers. Among the first steps, freedom of expression and media shell be developed and protected, and local democracy restored. These initial steps require both, consensus based political actions and legislative reforms. At least the main political actors should accept, that leader democracies, with centralized and concentrated state powers, and majoritarian decision making are not superior and more successful then consensus democracies based on inclusion of as meany people as possible in decision making, with horizontal and vertical division of powers, power sharing, independent judiciary, limited government.

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Abstract: The turbulent history of Serbia from early nineties, two decades of political reforms in post-Milosević Serbia was a period of political experiments with parliamentary democracy, last twenty years of this experiment was closely monitored by EU. In this paper we try to identify the legal framework, political and other social causes resulting in a sui generis practice of parliamentary system in Serbia. The hypotheses of this paper claims that the idea of power sharing, limited government, separation of powers, consensus building and participatory democracy is alien to the Serbian political elites and that these shortcomings made and makes almost impossible the realization of the traditional roles of the political opposition. Serbia, as many other transition states on the level of constitution formally accepted a pure, traditional model of Western parliamentary democracy even though it is not deeply rooted in its political tradition and culture.

Keywords: Serbia - political opposition - exploitation of public powers - exclusion - local democracy.

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RIVISTA DI
DIRITTI COMPARATI

Integration and (political) opposition in the light of the EU enlargement to South-East: The cases of Montenegro and Albania*

Pasquale Viola

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1. *Introduction*

The enlargement to the Western Balkans is one of the most pressing issue for the European Union, which is geographically surrounding the area. The 2020 Josep Borrell's statement "[t]he European Union is not complete without the Western Balkans" represents a clear evidence of the contemporary attitude characterising the EU geopolitical policy, which opened-up several cooperation activities and action plans to guarantee that WB countries meet with the *acquis communautaire*[1].

Based on Title V TEU (external action), art. 49 TEU, and art. 207 TFUE, the 1999 Stabilisation and Association Process (SAP, subsequently replaced by the Regional Cooperation Council in 2008) started the EU strategy in promoting peace, stability and economic development within the region, in order of increasing integration processes[2]. South-East European countries, such as Montenegro and

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[1] *HR/VP Borrell in Kosovo: the European Union is not complete without the Western Balkans*, in *European External Action Service*, 30.01.2020, <https://www.eeas.europa.eu/>.

[2] The EU enlargement process involve a considerable amount of theoretical and practical issues that cannot be ignored, but neither they may be addressed in a proper and concise way within a single article's paragraph. For instance, this matter regards the EU legal system in general and crucial political aspects, as well as theoretical issues related, for instance, to conditionality, states' responses, EU standards, common identity, etc. For such reasons, the article refers to specific scholarship on these subjects. About the general principles of the EU and the processes of integration (as well as enlargement): G. Martinico, *General principles of EU law and comparative law*, in K.S. Ziegler – P.J. Neuvonen

Albania, are currently under the spotlight also in the view of an accelerated accession process triggered by the current political crisis between Russia and Ukraine[3].

Following the independence in 2006, Montenegro gained the candidate status on December 2010. On June 2014, accession negotiations started; to date, 33 chapters have been opened, the last one on competition policy has been opened in June 2020. If compared with other WB countries and along with Serbia, Montenegro has been considered as a 'frontrunner', namely a country that is supposed to become an EU member in a short period of time; however, recent political instability is leading to a temporary stalemate[4].

After the application for the EU membership on April 2009, Albania gained the candidate status on June 2014. After several attempts, in July 2022 joint negotiations (along with North Macedonia) had been formally opened.

- V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, Cheltenham, 2022, p. 82 ff.; J.H.H. Weiler, *The political and legal culture of European integration: An exploratory essay*, in *International Journal of Constitutional Law*, 2011, p. 678 ff.; for historical and general aspects see V. Curzon Price – A. Landau – R. Whitman (eds.), *The Enlargement of the European Union: Issues and Strategies*, London-New York, 1999; H.A. Ikonomou – A. Andry – R. Byberg (eds.), *European Enlargement across Rounds and Beyond Borders*, London-New York, 2019; H. Berger – T. Moutos (eds.), *Managing European Union Enlargement*, Boston, 2004; S. Keil – Z. Arka (eds.), *The EU and Member State Building: European Foreign Policy in the Western Balkans*, London-New York, 2015. On the hypothesis of alternative cooperation and differentiated integration: M. Milenković, *Differentiated integration of the Western Balkans – emerging alternative membership options?*, in L. Montanari – A-O Cozzi – M. Milenković – I. Ristić (eds.), *We, the People of the United Europe: Reflections on the European State of Mind*, Naples, 2022, p. 235 ff.; B. Leruth – S. Gänzle – J. Trondal (eds.), *Routledge Handbook of Differentiation in the European Union*, London-New York, 2022. In reference to conditionality see at least L. Montanari, *Condizionalità ed allargamento, tra valori e politica*, in *Diritto pubblico comparato ed europeo*, 2023, p. 279 ff.; M. Dicosola, *Condizionalità, transizioni costituzionali e diritti delle minoranze negli Stati dell'ex Jugoslavia*, in *Diritto pubblico comparato ed europeo*, 2018, p. 667 ff.; A. Baraggia, *Identity and Conditionality in the European Union*, in *Diritti comparati*, 2023, p. 1 ff.; Id., *Ricatto democratico? L'utilizzo della condizionalità a protezione dello Stato di diritto*, in *Quaderni costituzionali*, 2023, p. 355 ff.; D. Kochenov, *EU Enlargement and the Failure of Conditionality*, Alphen aan den Rijn, 2008; T. Sekulić, *The European Union and the Paradox of Enlargement: The Complex Accession of the Western Balkans*, Cham, 2020.

[3] For further considerations on this crisis as a potential 'game changer' see I. Ristić, *The war in Ukraine: An additional obstacle or a new chance for the EU enlargement in the Western Balkans?*, in L. Montanari – A-O Cozzi – M. Milenković – I. Ristić (eds.), *We, the People of the United Europe: Reflections on the European State of Mind*, cit., p. 215 ff. See also K. Beshku, *Save the EU's enlargement process! Are the cases of North Macedonia and Albania undermining it?*, in ivi, p. 249 ff.

[4] <https://www.europarl.europa.eu/factsheets/en/sheet/168/the-western-balkans>. For a critical overview on the enlargement process see A. Di Gregorio, *La nuova stagione di allargamento dell'Unione europea tra dilemmi della condizionalità democratica e fragilità costituzionale dei nuovi candidati*, in L. Montanari – A-O Cozzi – M. Milenković – I. Ristić (eds.), *We, the People of the United Europe: Reflections on the European State of Mind*, cit., p. 119 ff.; Id. (ed.), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, The Hague, 2019; M. Calamo Specchia, *I Balcani occidentali: le costituzioni della transizione*, Torino, 2008. L. Montanari (a cura di), *L'allargamento dell'Unione europea e le transizioni costituzionali nei Balcani occidentali*, Naples, 2022.

According to the revised methodology, one of the fundamental pillars for the accession to the EU is the set-up of stable political machineries that guarantees the effectiveness of the democratic principles. Debates on the role of political opposition develop within this framework, in order to foster clear assessments in reference to the political systems.

Moving from the aforementioned crucial issues, this essay provides an overall account on the EU Commission's evaluation on Montenegrin and Albanian oppositional politics within their democratic machineries in the light of the *acquis communautaire*. In doing so, the first paragraph tackles the subjective and objective features of opposition (both political and parliamentary), in order to assess the EU approach and the idea of the opposition deriving from the European tradition. The second and third paragraphs, after briefly introducing the constitutional frameworks in reference to the political system and governance, analyses the EU Commission's evaluation on specific phenomena concerning the opposition in Montenegro and Albania. Conclusion will merge the evaluation of both democratic experiences in the light of the accession to the EU, addressing the question on whether the status of opposition has been considered a pivotal element (especially for the democratic machinery) or one of the weak points in meeting EU standards.

2. *Assessing the concept 'opposition' within democratic schemes*

The concept 'opposition' is multifaceted and can be approached from both subjective and objective perspectives. In the last meaning, opposition refers to resisting or challenging through force or argumentation; as a subject, in a democratic system, it is characterised for being the main institutionalised actor which expresses strong disagreement with the ruling party. In some specific cases, "The Opposition" denotes elected politicians from the largest party not in government within certain political systems, referring to a specific subject[5].

Despite the apparent functional differences between subjective and objective features, distinct phenomena have led to a diverse array of variants, encompassing both

[5] The most usual example is the one provided by the UK parliament in reference to His Majesty's Official Opposition and the role of the Shadow Cabinet within the political system. For a general introduction: I. Jennings, *Cabinet Government*, Cambridge, 1959; G. De Vergottini, *Lo «Shadow Cabinet». Saggio comparativo sul rilievo costituzionale della opposizione nel regime parlamentare britannico*, Milan, 1980. On English constitutionalism see W. Bagehot, *The English Constitution*, Glasgow, 1963 (1st ed., 1867); A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed., London, 1915; A. Torre, *Regno Unito*, Bologna, 2021. For an understanding of parliamentarism from sociological jurisprudence and the general theory of law: R. Pound, *The Spirit of the Common Law*, London-New York, 1999; G. Radbruch, *Der Geist des englischen Rechts*, Göttingen, 1958. For a comparison with the Italian experience: V. Casamassima, *L'opposizione in parlamento. Le esperienze britannica e italiana a confronto*, Milan, 2013.

official and informal legal means. This diversity highlights the convergences and differences between four fundamental standards: social, political, parliamentary, and non-parliamentary (or extra-parliamentary) opposition[6].

Sociological research suggests that opposition should be analysed in relation to the structures of public power and the dynamic aspects of political parties. Social opposition is characterised by a lack of clear definitions regarding its own characteristics, while political opposition is a phenomenon involving public power, with its characteristics varying according to the political regime[7].

The scheme elaborated in *The legal framework of political and parliamentary opposition in the light of the EU Enlargement to the Western Balkans: A comparative foreword* provides an overview of the concept 'opposition' in parliamentary systems. The analysis highlighted the complexities and nuances of opposition both in theoretical and practical terms, also in reference to democratic structures, constitutional guarantees, and the rule of law (see Fig. 1).

[6] O. Massari, *Opposizione*, in N. Bobbio – N. Matteucci – G. Pasquino (a cura di), *Il Dizionario di Politica*, Turin, 2004, p. 640. See Fig. 1, *infra*.

[7] Ivi. See also O. Massari, *Natura e ruolo delle opposizioni politico-parlamentari*, in G. Pasquino (a cura di), *Opposizione, governo ombra, alternativa*, Rome-Bari, 1990, p. 29 ff.; L. Mezzetti, *Opposizione politica*, in *Dig. Disc. Pubbl.*, vol. X, Turin, p. 347 ff. Robert Alan Dahl analyses suggest several common grounds related to democracy and the rule of law in terms of stability, maturity and tolerance, also referring to the distribution of economic and political resources and the interconnections between political cultures and legal traditions. R.A. Dahl (ed.), *Political Oppositions in Western Democracies*, New Haven, 1966; Id. (ed.), *Regimes and Oppositions*, New Haven, 1973; Id., *Poliarchia, partecipazione e opposizione nei sistemi politici*, Milan, 1980; see also G. Ieraci, *Power in office: Presidents, governments, and parliaments in the institutional design of contemporary democracies*, in *Constitutional Political Economy*, 2021, p. 413 ff. For further perspectives on this complex phenomena: G. Ionescu – I. de Maderiaga, *Opposition: Past and Present of a Political Institution*, London, 1968; A. Lijphart, *Le democrazie contemporanee*, Bologna, 1988; G. Sartori, *Democrazia e definizioni*, Bologna, 1969; Id., *Opposition and control: Problems and prospects*, in *Government and Opposition*, 1966, p. 149 ff.; Id., *Parties and Party Systems: A Framework for Analysis*, Cambridge, 1976; Id., *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, Basingstoke, 1996; M. Duverger, *I partiti politici*, Milan, 1980. With specific reference to the EU enlargement to the Western Balkans see S. Baldin – A. Di Gregorio (eds.), *The Legal and Political Conditions of Opposition Parties in Central and Eastern Europe. An Overview*, Trieste, 2023.

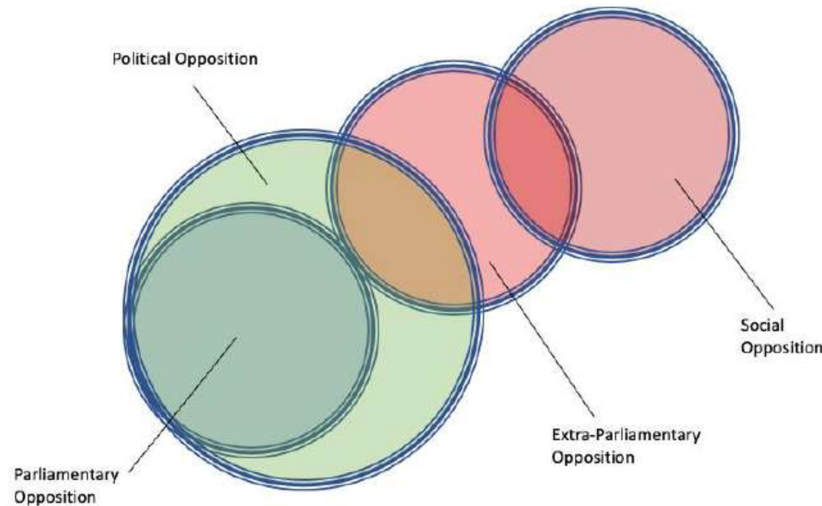

Fig. 1: four basic standards of the concept 'opposition': 1) social, 2) political, 3) parliamentary, and 4) non-parliamentary (or extra-parliamentary). Source: P. Viola, *The legal framework of political and parliamentary opposition in the light of the EU Enlargement to the Western Balkans: A comparative foreword*, in *Ordines*, 2023, p. 45 ff.

Defining the constitutional role of opposition is considered a crucial tool for democratisation, transforming political opposition into parliamentary, which is characterised by its organised, pluralistic and permanent nature. Other practices can be external to the institutional framework, such as in the case of extra-parliamentary opposition, which may seek space within democratic representation or operate outside it.

The concept of parliamentary opposition is closely tied to democratic structures, constitutional guarantees, and the rule of law. Within this framework, three fundamental aspects are crucial: functions (controlling, conditioning, influencing, and criticising the government), organisation (e.g., government-in-waiting), and structure (e.g., shadow government and parliamentary groups)[8].

In most European parliamentary systems, the government represents the majority, and the debate focuses on the rights of the political minority regarding procedures, access to information, representation, and participation. This definition is

[8] O. Massari, *Natura e ruolo delle opposizioni politico-parlamentari*, cit.; A. Rinella, *Materiali per uno studio di diritto comparato su lo "Statuto costituzionale" dell'opposizione parlamentare*, Trieste, 1999. See also S. Curreri, *Lo stato dell'opposizione nelle principali democrazie europee*, in *Rivista AIC*, 2016, p. 1 ff.

essential for a proper democratic system of government, including free elections, freedom of expression, and association. Thus, the legal aspects devoted to guaranteeing opposition cannot be ignored. Currently, opposition in Europe is typically conceived as a minority whose functions can be ensured by recognising specific rights. Institutionalising opposition requires constitutional recognition; therefore the legal status of parliamentary opposition is consequently the outcome of individual political and legal experiences influenced by cultural, political, and legal elements that foster different understandings of it. The Venice Commission notes that, in many cases, there is no direct recognition of opposition within state structures: it may be considered a label encompassing four categories of subjects within representative institutions, i.e., members of parliament (MPs as individuals), political groups, qualified minorities, and opposition (in general)[9].

The constitutionalisation of the concept of opposition is a critical aspect of liberal democracies as it defines the framework within which legal arrangements evolve. The principles that shape the legal status of opposition in liberal democracies can be summarised as accountability, pluralism, political solidarity, alternation, effective decision-making, and citizen participation[10]. Parliamentary minorities play a crucial role as the largest parliamentary group not part of government in a political system based on the vote of confidence. In other cases, they can be defined indirectly according to political and legal criteria. Furthermore, in federal systems or bicameral parliaments with different election periods for houses, minority parties in one house may have a majority in another.

In order to define opposition through a proper legal framework, the European tradition emphasises individual and group's rights and duties, rather than a proper individual subject. As first, such an approach fosters incertitude in dealing with not-well-designed subjects and functions, leaving room for a blurry definition of 'opposition'—both political and parliamentary—grounded on the general attitude towards the government; in other words, the basic means to define it is an *ex post* evaluation on the "fact of opposing" to executive's political trajectories[11].

In reference to the EU's evaluation in the light of a possible—foreseen or even expected—enlargement to the Western Balkans, the basic evaluation on the EU *acquis*

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[9] European Commission for Democracy through Law (Venice Commission), *Report on the Role of the Opposition in a Democratic Parliament*, 84th Plenary Session, Venice, 15-16 October 2010.

[10] E. Bulmer, *Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition*, International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, 2021.

[11] O. Massari, *Opposizione*, cit.; P. Viola, *The legal framework of political and parliamentary opposition in the light of the EU Enlargement to the Western Balkans: A comparative foreword*, in *Ordines*, 2023, p. 45 ff.

does not address the existence of a devoted legal and institutional space for opposition as an autonomous subject, but on the aforementioned *ex post* evaluation, while addressing functional rights—and duties—for democratically contrasting the government, especially through freedom of expression, independence of the media, minorities' rights in general. The Commission evaluation on politics' functioning of candidate states and the interconnections with the legal framework proves the aforesaid attitude, thus nurturing incertitude between functional features (e.g. freedom of expression and minorities' rights) and a proper democratic institutional set-up.

3. *Constitutional framework, governance and opposition in Montenegro*

Montenegro form of government operates under a parliamentary representative democratic republic. At the core of this system is the Prime Minister, who serves as the head of government, alongside a multi-party structure; executive power is carried out by the government, while legislative authority is shared between the government and the parliament[12].

Since the preamble, the constitution of Montenegro outlines the commitment of its citizens to fundamental values such as freedom, peace, tolerance, and respect for human rights, defining a specific constitutional order which designs a civil, democratic, and ecological state founded on social justice and the rule of law.

A key-principle guiding Montenegro's governance is the separation of powers into three distinct branches: the parliament exercises legislative power, while the government carries out executive competences. According to art. 11, this structure not only limits the power of government through constitutional constraints, but also promotes a system of mutual oversight among the branches.

About the structure and the role of the parliament, it is composed by 81 directly elected members, chosen through democratic processes. The parliament holds significant responsibilities, including the election and dismissal of the Prime Minister and government members. It operates under a mandate lasting four years, a period during which it must ensure effective governance and legislative functionality. For guaranteeing the need for accountability and prompt governance, dissolution may

[12] In 2022, the Economist Intelligence Unit categorised Montenegro as a 'flawed democracy', while Freedom House classified it as 'partly free' (69/100) under transitional or hybrid regime (46/100). Also for such reasons, the EU Commission highlighted the need of further analysis (the report refers to 'exploration') of its political dynamics.

occur in case the parliament fail to elect a government within 90 days "from the date when the President of Montenegro proposed for the first time the candidate for the position of the Prime Minister"[13]. The president is the head of the state, representing the nation both domestically and internationally, commanding the military, and proclaiming laws. The president is elected through direct and secret ballot, ensuring that the position remains accountable to the electorate. The government of Montenegro is tasked with a variety of responsibilities that encompass both internal and foreign policy management, law enforcement, and international relations. For instance, it proposes development plans and national security strategies that lay the groundwork for the country's future direction.

In reference to Montenegro's approach to political rights, art. 45 guarantees every citizen, aged at least 18, the right to vote and run for office, reflecting a commitment to general and equal electoral rights through free and direct elections conducted by secret ballot. However, this theoretical framework asks for analysis regarding how these rights are upheld in practice, especially in light of the country's classification as a flawed democracy[14]. Regarding the protection of minority rights, art. 79 ensures that individuals from minority nations can exercise their rights—either individually or collectively—and have authentic representation in parliament and local governments where they comprise a substantial portion of the population. This is an essential aspect of Montenegro's multicultural identity, promoting inclusivity and recognition of diverse communities. Furthermore, art. 80 explicitly prohibits the forceful assimilation of minority groups[15], highlighting the state's commitment to protecting cultural identities.

Montenegro has been considered, along with Serbia, a 'frontrunner' for the accession to the European Union. Following the collapse of Yugoslavia, Montenegro represent a case of no severe ethnic conflict arising from the independence, and it is not by chance that such kind of political unity is the outcome of multiple cultural social groups still striving for finding a specific Montenegrin identity[16].

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[13] Articles 84 and 92, Constitution of Montenegro. All constitutional articles have been consulted in their English text according to the official translation provided by competent offices, and also compared with those provided by Oxford Constitutions (available at <http://oxcon.ouplaw.com>) and Constitute Project (available at <https://www.constituteproject.org/>).

[14] See *supra* n. 12.

[15] Art. 80, Constitution of Montenegro.

[16] E. Cukani, *Quel che resta dello Stato. Il differenziale, territoriale e non, delle autonomie nei Balcani occidentali*, Naples, 2018. See also E. Skrebo, *Stato di diritto e Balcani occidentali: un percorso di adesione all'Unione europea in salita*, in *DPCE online*, 2023, p. 3433 ff.

The "post-socialist condition" nurtured many issues deriving from political transition, economic restructuring and social transformation, having an impact on civic engagement, associational life, and protest politics[17].

Under functionalist, normativist and structuralist methodology, Bojan Baća identifies three stages for understanding the democratisation process[18]. The first stage starts in January 1989, with mass protests against the party-state leadership, and lasts till the second half of the Nineties, leaving a "highly politicized civil society"[19] split into pro-Milošević electoral base (DPS conservative groups) and anti-Milošević coalition, the latter embracing DPS reformists, progressive opposition and liberal civil society[20]. The second stage begin with the efforts in delegitimating protest politics occurred after the "unsuccessful January 1998 uprising"[21], which almost led to civil war, ending with the 2006 independence referendum, leaving a non-contentious and institutionalised political environment that "underwent ethnopolitical narrowing based on an unusual formula: Montenegrins plus ethnonational minorities minus (pro-union) Serbs"[22]. The third stage embraces recent events (till 2020), and is characterised by a "temporary yet impactful recalibration of *demos* into *ethnos*"[23] which had a strong impact on DPS opponents and civil society opposition[24], coping with a ratio according to which the

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[17] B. Baća, *Three stages of civil society development in the Global East: Lessons from Montenegro, 1989–2020*, in *Political Geography*, 2024, 1 ff.

[18] Ivi.

[19] Ivi, p. 5.

[20] S. Darmanović, *Montenegro: The dilemmas of a small Republic*, in *Journal of Democracy*, 2003, p. 145 ff.

[21] B. Baća, *Three stages of civil society development in the Global East: Lessons from Montenegro, 1989–2020*, cit., p. 5.

[22] Ibid. In the aftermath of a socio-economic crisis and the Yugoslav war, even peace movements opposing DPS were labelled as "traitors of their country", "enemies of Yugoslavia", "treacherous and dangerous separatists", but "[t]he unintended consequence of this stigmatization was consolidation and coordination of progressive forces around key political principles rooted in the desire for democratization of the country"(Ivi, p. 4). See also E. Dabizinović, *Between resistance and repatriarchalization: Women's activism in the Bay of Kotor in the 1990s*, in *Comparative Southeast European Studies*, 2021, p. 45 ff.; F. Kovačević, *Montenegro and the politics of postcommunist transition: 1990 to 2006*, in *Mediterranean Quarterly*, 2007, p. 72 ff.

[23] B. Baća, *Three stages of civil society development in the Global East: Lessons from Montenegro, 1989–2020*, cit., p. 4.

[24] Also new technologies, such as the internet, nurtured civic participation for guaranteeing civil liberties and political rights. For instance, in 2015, against government's repressive methods and in defence of the opposition coalition's rights, 10.000 people rallied for free and fair elections. The 2019 *Resist!* (*Odupri se!*) movement provides another example of online activism. B. Baća, *Forging civic bonds "from below": Montenegrin activist youth between ethnonational disidentification and political subjectivation*, in T.P. Trošt – D. Mandić (eds.), *Changing Youth Values in Southeast Europe: Beyond ethnicity*, London-New York, 2018, p. 127 ff.; L. Camaj, *Producing anti-regime protest news in a polarized and clientelistic media system: A frame*

DPS rule was a *conditio sine qua non* for independence and Westernisation[25]. The third stage witnessed the collapse of the DPS as dominant ruling party since the introduction of the multi-party system in 1990[26].

Since 2021, due to political polarisation and instability[27], Montenegro political system had to cope with a caretaker government, which had an impact on the legislative activity of the parliament in designing the reforms requested by the EU for the accession negotiation, and the issues regarding the constitutional court, which nurtured "uncertainties and legal discrepancies"[28]. Within this scenario, the EU provided technical and financial support for meeting the rule of law requirements as per the Negotiating Framework. Specifically, the package offered EUR 30 million for the energy emergency to cope with the Russia-Ukraine crisis, and made available EUR 500 million under the Western Balkans Investment Framework.

The first session of the parliament after the 2023 elections was held on the 27th of July, but still remain issues in reference to real cooperation between majority and oppositions, forcing the adoption of laws by a simple majority (41 out of 81 seats), thus impacting participation and democratic discussions due to the boycott of several members of the parliament.

As the European Commission highlighted, the legislator failed in drafting and adopting laws on government and parliament according to the EU and the Venice Commission recommendations, thus impacting on governance's effectiveness. Other cases of absence in discussing reforms before adoption regard the parliament, the executive and independent institutions, such as in the case of a specific law on compensation that was basically defined by the Committee on Economy, Finance and

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building approach, in *Journalism*, 2023, p. 1034 ff.; A. Sartori – J. Pranzl, *Politics going civil: Contentious (party) politics in Montenegro*, in *Südosteuropa*, 2018, p. 554 ff.

[25] E. Paleviq, *Montenegro – a democracy under Siege?*, in *Der Donauraum*, 2020, p. 59 ff.; J. Dzankić – S. Keil, *State-sponsored populism and the rise of populist governance: The case of Montenegro*, in *Journal of Balkan and Near Eastern Studies*, 2017, p. 403 ff.

[26] In a very intricated period of transition initiated during the Nineties, and in spite of being currently at the opposition, the DPS still represent one of the major political forces in the country, although for some scholars the governing years marked the establishment of a hybrid regime (see *supra*). In three decades, difficulties arising from the democratisation of the country designed, according to Dimitri Sotiropoulos, a passive parliament which is far from the expected role it should assume in contemporary democracies. Id., *The Irregular Pendulum of Democracy Populism, Clientelism and Corruption in Post-Yugoslav Successor States*, Cham, 2023.

[27] Commission Staff Working Document, Montenegro 2023 Report (Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions), Communication on EU Enlargement policy, Brussels, 8/11/2023 (hereinafter 'Montenegro 2023 Report').

[28] Montenegro 2023 Report, cit., p. 3.

Budget. Furthermore, in terms of rules of procedures, the EU pointed out the absence of a uniform practice for parliamentary hearings and for discussing proposed legislation[29]. However, the legislative body tried to fulfil its commitments of openness and transparency, also in the view of a more participatory and integrated democratic machinery. In reference to this point, the parliament responded to 37 public appeals, offering means for citizens' submissions (99) and e-petitions (15)[30], while stimulating public participation in decision-making and policymaking processes through citizens' assemblies[31].

In recent years, efforts have been made for promoting women participation to politics through the cross-party Women's Club, while the Committee on Human Rights and Freedoms received no petitions for violations related to the Code of Ethics. In April 2023, the parliament adopted a decision for allowing criminal proceedings for abuse of their office regarding five members of the parliament. Though, in terms of meeting the requirements for the EU accession, there was no specific parliamentary activity and the last session (at the November 2023) of the Committee on European Integration took place on July 2022.

The EU Commission's evaluation on the Montenegrin democratic machinery and the role of opposition within the political system stressed several critical points, nurtured by 'tense and confrontational positions', an unstable majority for implementing legislative reforms, the 'blockage' of the political apparatus, little parliamentary accountability and government oversight due to the lack of effective political dialogue and constructive engagement between political parties[32].

[29] As the Montenegro 2023 Report highlights (p. 14), parliament suffered some limitations in its oversight function, as in the case occurred in reference to the PM hour, which the rules of procedure require to take place once in a month, while they took place only two times in the period covered by the 2023 report. Differently, "[p]arliamentary committees held 27 consultative and nine control hearings [… regarding] numerous reports that independent bodies submitted to the Parliament in accordance with the law".

[30] Data as per the Montenegro 2023 Report, cit. Amongst the e-petitions, one have been the object of a consultative hearing before the Committee on Health, Labour and Social Welfare.

[31] In cooperation with the EU parliament, the Montenegrin legislative body organised a Youth Parliament Session and the 'Simulation of Parliament' for high school students.

[32] Montenegro 2023 Report. As an example of difficulties in cooperation between the executive and the opposition, in November 2022 President Dukanović referred the proposed amendments to the Law on President to the Venice Commission for an urgent opinion. The Commission concluded that the amendments had been adopted by a parliamentary majority that was insufficient under the existing constitutional provisions for such revisions. Despite this assessment, the same parliamentary majority proceeded to adopt the amendments once more and provided a mandate to MP Lekic to form a new government (failing in this task). The issue intensified as controversies arose surrounding the amended law, prompting the opposition to claim that it was unconstitutional and leading to their boycott of most parliamentary sessions from October 2022 until April 2023. In June 2023, the constitutional court

Thus, in spite of suitable pre-conditions, implementation of parliament's openness, transparency, and control and supervisory functions, although promising forecasts referring to progresses towards the EU membership, the Commission pointed out the country's need for addressing corruption, ensuring accountability and transparency, and strengthening its institutions[33], considering that Montenegro's progresses are hindered by deep political polarisation and instability requiring to address its rule of law deficiencies for supporting institutions[34].

4. *Constitutional framework, governance and opposition in Albania*

Albania operates as a unitary parliamentary republic, characterised by a democratic multi-party system where the president serves as the head of state, while the Prime Minister takes on the role of head of government. This clear delineation of responsibilities underscores the effective functioning of the state, with the executive power being vested in the government and the Prime Minister, along with the cabinet. The parliament of Albania is charged with legislative power, ensuring a separation of functions that is critical for democratic governance. The judiciary, distinct from both the executive and legislature, upholds an independent system essential for guaranteeing the rule of law.

The Preamble of the Albanian constitution highlights the nation's commitment to establishing a rule of law that is both social and democratic, a pledge towards safeguarding fundamental human rights and freedoms. Art. 1 lists several basic features

unanimously repealled the contentious amendments to the Law on President. For further critical insights: D. Vuković-Ćalasan, *Montenegro in the process of EU integration. Political identity between a civic and an ethno-state*, in L. Montanari – A-O Cozzi – M. Milenković – I. Ristić (eds.), *We, the People of the United Europe: Reflections on the European State of Mind*, cit.

[33] Montenegro 2023 Report. Another case of frictions between the government and the opposition regards the parliamentary debate on the Anti-Corruption Agency (ACA) 2021 annual report. A group of MPs demanded to remove the management of the ACA, raising concerns about its impartiality and alleged bias in handling cases involving the previous political majority. In response, the parliament's Anti-Corruption Committee formed a working group aimed at proposing amendments to the Law on the Prevention of Corruption (LPC) to enhance parliamentary oversight of the ACA and hold its management accountable for any biased behaviour. The working group began its work in early 2023, while members of the parliamentary opposition and the ACA Director opted not to participate. The EU Commission considered these events as an evidence of the fact that Montenegro political framework still faces challenges in establishing strong leadership and a unified approach to revising and improving its legal and institutional machinery for combating corruption in alignment with the EU *acquis* and international standards.

[34] Montenegro 2023 Report, cit.

of the state (parliamentary republic, unitary, indivisible), it is worth to underline §3 points out that governance is grounded in the principles of free, equal, general, and periodic elections[35].

The Assembly, comprised of 140 deputies elected through a proportional system[36], plays a crucial role in the legislative process. Elections are conducted every four years[37], with the mandate of the Assembly beginning upon its first meeting. Notably, if the Assembly is dissolved before completing its term, elections must occur within 45 days, ensuring continuity in governance[38]. The president of the republic is a symbol of national unity[39], his duties include addressing the Assembly, pardon, and appointing representatives to international bodies[40].

The Prime Minister, appointed by the president based on the majority party or coalition in the Assembly, leads the Council of Ministers. However, this prime ministerial appointment is subject to parliamentary approval[41]. If rejected, the president must appoint a new candidate within ten days, with the Assembly retaining the power to elect a new Prime Minister in case of failure. As per art. 96, §4, "if the Assembly fails to elect a new Prime Minister, the President of the Republic dissolves the Assembly". One-fifth of the MPs may initiate a motion of no confidence against the Prime Minister, requiring a majority vote for approval. This mechanism is crucial for ensuring accountability within the executive branch, reflecting a commitment to democratic governance where leaders are responsible for their actions.

The principles of integrity and accountability are notably emphasised in art. 6, which prohibits individuals with compromised integrity from assuming public functions. This legal safeguard aims to protect the public trust and ensure that those in power serve with integrity and responsibility. Additionally, the constitution emphasises the importance of separating and balancing the legislative, executive, and judicial powers, a cornerstone of democratic governance[42].

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[35] Art. 1, Constitution of Albania. As in the case of Montenegro, the Economist Intelligence Unit depicts Albania as a highly vulnerable country to social unrest and political instability. Freedom House classified Albania as 'partly free' (68/100), under transitional or hybrid regime (46/100), with strong political polarisation and charismatic legitimation of the leaders.

[36] Art. 64, Constitution of Albania.

[37] Art. 65, Constitution of Albania.

[38] Art. 65, §3, Constitution of Albania.

[39] Art. 86, Constitution of Albania.

[40] Art. 92, Constitution of Albania. According to art. 89, Constitution of Albania, "The President cannot hold any other public post, be a member of a party or carry out private activities".

[41] Art. 96, Constitution of Albania.

[42] Art. 7, Constitution of Albania.

The multi-party system represent a key feature of the constitutional order: political parties may be established freely, adhering to democratic principles[43]. However, there are strict prohibitions against parties that advocate for totalitarian ideologies or engage in violence to manipulate state policies[44]. Moreover, transparency regarding political party financing is mandated, ensuring that the sources and expenditures of parties remain public knowledge.

In reference to political rights and freedoms, the constitution ensures that every citizen over the age of 18 has the right to vote and be elected; however, citizens declared mentally incapable or those conforming to criminal sentences may face restrictions[45]. The essence of suffrage is upheld through provisions that guarantee personal, equal, free, and secret voting rights[46].

The collapse of the USSR and the Yugoslavia dissolution (despite the challenging relations) did get an impact on Albania, although its trajectory towards democratic transition has been characterised by several specific factors. As first, the novel political asset did not nurture ethnic revivals, basically thanks to linguistic identity, the unitarian identity under the Ottoman Empire and a millet system, which managed to shaping a 'kin state' rather than a 'host state'[47].

The post-Enver Hoxha Albania paved the way for the first attempts of participatory democracy guaranteeing the rights to freedom of speech and assembly, which steered, since December 1990, oppositional politics in the form of students protests to accommodate the requests for a multiparty system and the emersion of opposition parties (namely 6)[48]. In spite of a communist majority as result of first multiparty elections, held on March 1991, civic participation gained, as an effect, the resignation of the Prime Minister Fatos Nano and to the formation of a coalition government[49]. In the past 33 years of consolidation processes towards deliberative

[43] Art. 9, Constitution of Albania.

[44] Ivi.

[45] Art. 45, Constitution of Albania.

[46] Art. 45, §4, Constitution of Albania.

[47] E. Cukani, *Quel che resta dello Stato. Il differenziale, territoriale e non, delle autonomie nei Balcani occidentali*, cit.

[48] V. Laska, *The role of political parties in the constitutional order in Albania*, in *Jus & Justicia*, 2023, p. 75 ff. Shifting from a single dominant party system, Albanian novel multi-party system counted 126 parties engaged in political activities. On this aspect see also A. Xhaferaj, *Which Parties Count? The Effective Number of Parties in the Albanian Party System*, in *European Journal of Social Sciences*, 2014, p. 123 ff.

[49] G. Jandot, *L'Albanie d'Enver Hoxha (1944-1985)*, Paris, 1994; E. Biberaj, *Albania in Transition: The Rocky Road to Democracy*, London-New York, 1999. As Laska (*supra*) points out, pre-1991 Albanian party system has been classified under three stages. The first, spanning from 1920 to 1924, overlaps with the establishment of the first experiences of parliamentarism (1920), and parties were characterised by a more associational attitude amongst individuals, rather than having a specific and stable elected

democracy, two parties increased their electoral base and become dominant within the contemporary political landscape: Socialist Party of Albania and the Democratic Party[50].

As far as the accession process is concerned, the first Inter-Governmental Conference took place on July 2022, on the beginning date of the screening in reference to the EU *acquis* under the revised methodology, the Stabilisation and Association Agreement, and the Negotiating Framework[51].

According to the EU Commission's Report, Albanian politics is still affected by polarisation and divisions within the opposition party, thus jeopardising the role of the parliament within the democratic machinery: "Parliamentary debates and proceedings continued to be negatively affected by harsh political rhetoric, personal attacks and disruptive behaviour in the plenary hall. Disputes between the majority and the opposition, in particular over the Prime Minister's refusal to attend most interpellations requested by the opposition, caused a temporary disruption in the normal functioning of Parliament. The Ethics Secretariat imposed several disciplinary measures, resulting in the unprecedented expulsion of 23 opposition MPs within a

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structure and organisation, with a specific programme defining activities. The second period, spanning from 1925 to 1939, marks a party-less government and the shift from republic to monarchy, in order to guaranteeing stability, rather than democratic functioning. The third phase, overlapping with the WWII (1939-1944), was characterised by military organisations with some political tasks. The fourth phase (1945-1990) marks the most relevant period in contemporary history, the one-party-dominant political system.

[50] Another relevant political actor is the Socialist Movement for Integration, currently re-named Freedom Party. A. Xhaferaj, *Incentives and Practices of Mass-Party Membership in Albania*, in S. Gherghina – A. Iancu – S. Soare (eds.), *Party Members and Their Importance in Non-EU Countries: A Comparative Analysis*, London-New York, 2018.

[51] In 2019, Albania experienced a series of significant political challenges. The political opposition, led by the Democratic Party (PD), coordinated multiple protests against the government, predominantly fuelled by the opposition's allegations of corruption and a perceived lack of transparency in the country's governance. July local elections were conducted in Albania amidst a backdrop of concerns and allegations from the opposition regarding potential violations of electoral rules. However, Albania persisted in its judicial reform process, an initiative aimed at enhancing the independence of the judiciary and bolstering the fight against corruption. This reform initiative represented one of the prerequisites established by the European Union for the initiation of membership negotiations. The relationship between the European Union (EU) and Albania was at a critical juncture, expressing a strong aspiration to accede to the EU, meeting the necessary membership criteria. N. Samkharadze, *Two Roads Toward the EU: How Differently Georgia and Albania Are Moving Forward?*, WEASA Paper, 2020; on the efforts in moving from hybrid regime to liberal democracy in cooperation with the EU and the issues Albania had to cope with in 2019: J. Gjinko – M. Bregu, *Prospects for integration and obstacles to democracy. EU's Role in the Albanian Political Crises*, in *International Journal of Religion*, 2024, p. 1113 ff. On anti-corruption measures, see at least E. Cukani, *A mali estremi, estremi rimedi:* maladministration *e misure anti-corruzione in Albania*, in *DPCE Online*, 2019, p. 322 ff.

month. Higher ethical standards in Assembly proceedings are needed to foster a more constructive political dialogue between the opposition and the majority."[52]

Another key-point regards the limited parliament's oversight on the government, and the lack of clear collaboration with opposition and independent actors. For instance, majority rejected instances made by the opposition for two committees of inquiry. Furthermore, participation and transparency still have been considered far from EU standards, although the parliament should play a pivotal role in EU integration and in the accession negotiations process. Thus, the functioning of democratic institutions and public administration reform remain a key issue in the light of the fundamentals of the accession process. It should be noted as well that, in spite of a low turnout of 38.2% and concerns regarding the misuse of state resources, pressures on categories within the electoral base (e.g., public sector workers), and claims of vote buying, international observers (especially OSCE's Office for Democratic Institutions and Human Rights – OSCE/ODIHR) assessed local election on May 2023 as conducted in a "generally calm manner"[53], well-administered and competitive, recording the participation of different political actors.

5. *Conclusion*

The analysis of the role of political opposition in the democratic frameworks of Montenegro and Albania provides an assessment on their alignment with the EU *acquis* in reference to a critical factor of democratisation (also in terms of its legal recognition), functional roles, and challenges posed by non-parliamentary activities (e.g., civil action movements).

In Montenegro, the parliamentary system is defined by the separation of powers and a commitment to democratic principles as reflected in its constitution. However,

[52] Albania 2023 Report, p. 9.

[53] Albania 2023 Report. EU Commission underlined the transition occurred within the legislature as seven MPs were replaced, five from the Democratic Party and two from the ruling Socialist Party (due to their candidacies in local elections), while the reorganization of the parliament's standing committees and other institutional bodies was not undertaken, attributable to internal conflicts within the opposition and ongoing attempts to assert control over its caucus. Moreover, parliamentary activities were suspended without a proper legal base during the electoral campaign for the 2023 local elections. Despite the establishment of an *ad hoc* committee focused on electoral reform in February 2022, there has been a conspicuous lack of progress both in the formulation of legislative texts and in effectively addressing recommendations by the Organization for Security and Co-Operation in Europe/Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission.

the effectiveness of the parliamentary opposition has been jeopardised by political polarisation and instability, leading to inadequate oversight of the parliament over the government. The EU has highlighted persistent issues such as corruption and governance challenges, which hinder the country's accession process. Albania's political system also reflects a commitment to democracy, characterised by a multi-party background and mechanisms for accountability. However, issues of polarisation and opposition dynamics have negatively affected parliamentary performance, as evidenced by disruptive legislative behaviour and a lack of collaboration between government and opposition parties. Due to this situation, according to the EU Commission, reform of democratic institutions and public administration remain paramount for Albania's EU integration aspirations.

While both countries exhibit potential for alignment with EU standards through their political and legislative frameworks, significant challenges related to the functional role of opposition, governance quality, and political stability should be addressed to facilitate their respective accession processes. Moreover, this is a further evidence of the need of a well-defined institutional space for opposition as a key-element in strengthening democratic machineries in line with EU expectations, and such a task could be better addressed through a specific legislation detailing 'opposition as a subject' within the constitutional system, through constitutional provisions and legislative rules of procedures that may facilitate the path for reaching EU standards in terms of participation to the democratic processes and compliance with the rule of law.

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Abstract: The enlargement of the European Union to the Western Balkans represents a critical geopolitical issue, stressed by regional challenges and evolving international dynamics. This essay examines the roles of political opposition in the democratic frameworks of Montenegro and Albania, and explores the subjective and objective dimensions of political opposition, drawing connections to the EU *acquis communautaire*, which emphasises the need of robust democratic institutions for accession. In doing so, the first paragraph addresses the features of opposition (both political and parliamentary), in order to assess the EU approach and the idea of the opposition deriving from the European tradition and the demand for drafting 'opposition as a subject'. The second and third paragraphs, after briefly introducing the constitutional frameworks in reference to the political system and governance, analyses the EU Commission's evaluation on specific phenomena related to the opposition in Montenegro and Albania. Conclusion merges the evaluation of both

democratic experiences in the light of the accession to the EU, in order to assess whether the status of opposition has been considered a pivotal element (especially for the democratic machinery) or one of the weak points in meeting EU standards. This part underscores the importance of institutional frameworks that recognise opposition not merely as a contrasting force but as a fundamental element of democratic stability, crucial for the EU accession process.

Keywords: EU Enlargement - Western Balkans - Albania - Montenegro - Comparative Constitutional Law.

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RIVISTA DI
DIRITTI COMPARATI

Democratic constitutionalism in Brazil: Participation, polarization and opposition in a crisis context*

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1. *Introduction*

The 1988 Constitution is the landmark of Brazilian democratic transition. This document is deeply engaged with re-democratizing republican institutions, recognizing plural subjectivities in socio-political context, by the entitlement of new rights, and guaranteeing democratic participation in a broad perspective. Indeed, there are several communities and groups that, for the very first time, found adequate constitutional representation not only regarding "fundamental rights", but also in terms of guaranties, legal and political "mechanisms" for participation exercise, either by direct or indirect – representative – means, within the scope of decision-making processes.

In this regard, Brazil has become a global reference for participatory democracy in the 1990s and early 2000s, through initiatives such as the "participatory budget" from Porto Alegre, which has inspired several other similar movements all around the world. However, in recent years, the trend of *political polarization* – which is effectively fostered by a global movement based on misinformation methods and consequent dismantling of political representative struggles – has places the constitutional provisions in constant tension. A deep political crisis has undergone since 2013, resulting in the Impeachment of the former President Dilma Rousseff and the election of the extreme right-wing party.

This development has placed Brazil at the *avant-garde* of new polarizations movements in the field of constitutional democracy, driven by a global trend that

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contrasts "moral" issues with "economic" issues. This trend triggers the reflection on the constitutional guarantee of opposition as both a "right" and a "duty". The "constitutional crisis" arising from this context, which deepened between 2019 and 2022, had several constitutional consequences for political and legal institutions. This propels the revisiting of the foundational theories and doctrines of constitutional law on this subject, highlighting the role of various institutional actors and citizen participation in a context of multifaceted and multidimensional crises.

Taking this into consideration, this article aims to provide theoretical and empirical contributions, based on the Brazilian case, for a critical reflection on constitutional democracy in contemporary Brazil, focusing particularly in the years of acute polarization, between 2016-2023. The article is methodologically inscribed in the field of constitutional theory and Brazilian constitutional dogmatics, entrenched in the comprehension of law as constitutional policy[1], and is divided into three parts: I. Constitutional democracy in Brazil and the participatory turn; II. Polarization and its constitutional consequences; III. The guarantee of dissent as a constitutive element of constitutional democracy and resilience.

2. *Constitutional democracy in Brazil and the participatory turn*

Brazil's 1988 Constitution is a legal milestone in the country's democratic transition after 21 years of military dictatorship[2]. The result of a participatory National Constituent Assembly, it laid the foundations for a democratic rule of law, based on a new typography of fundamental rights, aimed at the social inclusion and political participation of groups and collectivities, including those historically excluded from the constitutional and democratic process, which is why it was nicknamed the "citizen constitution" (*Constituição Cidadã*)[3] .

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[1] In this Regard, see: M. Petters Melo - M. Carducci (coords.), *Políticas Constitucionais Desafios Contemporâneos,* Florianópolis, 2021.

[2] L.R. Barroso, *Curso de Direito Constitucional Contemporâneo*, Belo Horizonte, 2024; L. Avritzer, *Democracy and Public Space in Latin America*, Princeton, 2002; D. McDonald, *Making the "Citizen Constitution": popular participation in Brazilian transition to democracy, 1985-1988*, in *The Americas*, 2022, p. 619 ff.

[3] Founding, by the constitutional normativity, the comprehension of citizenship as social inclusion, political participation and cultural identity. For further analysis, see: M. Petters Melo, *Cidadania: subsídios teóricos para uma nova práxis*, in R. Pereira e Silva (ed.), *Direitos Humanos como educação para a justiça*, São Paulo, 1998, p. 77 ff.; M. Petters Melo, *Direitos Humanos e cidadania*, in G. Lunardi - M. Secco (eds.), *A fundamentação filosófica dos direitos humanos*, Florianópolis, 2010, p. 175 ff. In this perspective citizenship can be understood as an "universal right" to political participation, as states E. Balibar, *Les frontières de la démocratie*, Paris, 1992.

The Constitution lays down the foundations of the Federal Republic, which is based on the notion of social, plural and participatory democracy. The adjective "participatory" has taken on a special meaning, so that it characterizes democracy by the presence of institutes of representation (*indirect* democracy), by the participation of the people through plebiscites, referendums and popular initiatives (*direct* democracy), as well as other means of participation within a space in continuous use, renewal and creation of new forms of legitimization of power and effective action by society in the control, supervision and decision-making by the state[4] .

In this sense, the design of participatory democracy in the 1988 Constitution is not limited to "semi-direct" democracy, but has a broader spectrum. It encompasses universal participation, through a series of mechanisms and legal instruments created by the Constitution itself and implemented by general laws, expanding the space for civil society to participate in all powers: in political decisions, in legal decisions, in higher courts, in acts of public administration, as well as in the legislative process, within all spheres of the complex Brazilian federation, which includes not only the Union and federal states, but also municipalities, which enjoy full autonomy[5] .

This phenomenon is also marked by the emergence of new rights and new subjects of rights[6]. Indeed, the Constitution establishes a wide range of "fundamental rights" in Articles 5 and 6, but this is not restricted to this constitutional prescriptions, as various fundamental rights are scattered throughout the analytical constitutional text[7]. In the same way, new subjects of rights are recognized, such as indigenous

[4] As L. Avritzer, *Participation in democratic Brazil: from popular hegemony to middle-class protest*, in *Opinião Pública*, 2017, p. 54.

[5] See F. Montambeault, *Uma Constituição Cidadã? Sucessos e limites da institucionalização de um sistema de participação cidadã no Brasil democrático*, in *Estudos Ibero-Americanos*, 2018, p. 261 ff.

[6] M. Petters Melo, *Cultural Heritage preservation and environmental sustainability: sustainable development, human rights and citizenship*, in K. Mathis (ed.), *Efficiency, sustainability and justice to future generations*, New York, 2011, p. 138 ff.; M. Petters Melo, *A concretização- efetividade dos direitos sociais, econômicos e culturais como elemento constitutivo fundamental para a cidadania no Brasil*, in *Revista do Instituto Interamericano de Derechos Humanos*, 2002, p. 211 ff.

[7] Fundamental rights out of the "cast", J.J.G. Canotilho, *Direito Constitucional e Teoria da Constituição*, Coimbra, 2014, p. 234.

peoples[8] and quilombolas' peoples, characterizing a plural and intercultural constitutional democracy system[9].

The formal recognition of these groups represents the first step in the process of empowerment in terms of their participation in a wide range of decision-making processes, especially decisions that directly influence certain social and cultural groups[10] . The "new social movements", such as the LGBT and feminist movements, have also recently obtained recognition of new rights through participation, especially within the constitutional jurisdiction[11], through the use, for example, of instruments such as strategic litigation[12] and the inclusion as *amicus curie* in *public audiences*[13].

The Constitution also enshrined a dialogue with international law, in particular international human rights law, by incorporating international instruments that encourage the participation of individuals and groups (such as the World Labor Organization Convention n. 69 in indigenous peoples), and new institutions, such as decision-making councils and committees, opening up the possibility of participation and representation in various areas of the state and local and national governance[14] .

The Brazilian Constitution provides for various innovative forms of participation by the society in state activities. The procedural instruments of constitutional democracy in Brazil can be divided into three types: a) instruments of representation, related to universal suffrage; b) classic instruments of direct democracy: plebiscite, referendum and popular initiative; c) innovative instruments of participatory

[8] Indigenous peoples have a specific chapter between constitutional articles 231 and 232. For deeply information regarding the Brazilian constitutional core of indigenous people's rights, see: T. Burckhart, *Direitos dos povos indígenas e justiça constitucional no Brasil*, Florianópolis, 2023; M. Petters Melo - T. Burckhart, *Direitos de povos indígenas no Brasil: o "núcleo essencial de direitos" entre diversidade e integracionismo*, in *Revista do Curso de Direito UFSM,* 2020, p. 1 ff.

[9] M. Petters Melo, *Constitucionalismo e Democracia Plural na América Latina*, in F.A. Dias - I.F. Morcilo Lixa - M. Meleu (eds.), *Constitucionalismo, democracia e direitos fundamentais*, Blumenau, 2021, p. 95-98.

[10] See S. Benhabib, *Claims of Culture: equality and diversity in the global era*, Princeton, 2002; A. Touraine, *Pourrons-nous vivre ensemble? Égaux et différents*, Paris, Fayard, 1997.

[11] Participation has played a pivotal role in the recognition of same-sex marriage and the legalization of abortion in cases of anencephalic fetuses by the Brazilian Supreme Court, in the cases: ADPF 132/2011 and ADPF 54/2012. For further analysis, see: F.P. Püschel, *Same-sex marriage in the Brazilian Supreme Court*, in *Novos Estudos*, 2019, p. 652 ff.; D. Diniz - A.C. Gonzales Vélez, *Anencefalia e razão pública no Supremo Tribunal Federal*, in *Revista Brasileira de Ciências Criminais*, 2009, p. 219 ff.

[12] In this regard, see: R. Becak - J. Lima (eds.), *The Unwritten Brazilian Constitution: Human Rights in the Supremo Tribunal Federal*, São Paulo, 2020.

[13] For further information regarding the use of this mechanisms by the Brazilian Supreme Court (Supremo Tribunal Federal), see. F. Magalhaes Costa, *Amicus curie e audiências públicas no STF*, Belo Horizonte, 2023.

[14] See L. Avritzer, *Participatory Institutions in Democratic Brazil*, Baltimore, 2009.

democracy, which consist of different institutes and forms of participation by society, as a means of legitimizing power and exercising popular sovereignty.

These instruments include: the legitimacy of any citizen to file a *Popular Action*, in defense of a diffuse right, with the aim of annulling an act harmful to public property, to the administrative morality, the environment and the historical and cultural heritage (Art. 5 LXXIII); community participation in social security actions (Art. 194, VII); collaboration of associations representing the community in municipal urban planning (Art. 29, XII). These provisions have given impetus to participatory budgeting at municipal level in several Brazilian cities; the establishment of councils for administration and remuneration policy in the various spheres of the Federation (Art. 39); the holding of public hearings by legislative commissions with civil society organizations (Art. 58, II); public hearings have also become a practice in the activity of the courts, especially in constitutional matters analyzed by the Supreme Court; collaboration of society in the promotion and encouragement of education (Art. 205) and democratic management of education (Art. 206, VI); exercise, by the community, of the duty to preserve the environment for present and future generations (Art. 225), among others[15].

It is important to point out that various instruments of participatory democracy are not directly and expressly provided for in the Constitution, but have been regulated by legislation. In this sense, the creation of Councils of Law; Councils managing public policies; Participatory Budgeting; Ombudsman's Offices; Participatory Legislation Commissions stand out. All inspired by the democratic system established by the 1988 Constitution, which opens up to the creation of new instruments, rights and guarantees to strengthen democracy[16].

In this way, Brazilian participatory democracy turned to incorporate new and modern instruments of control and participation in power into democratic practice, with an emphasis on social control mechanisms[17]. The democratic system established in the Constitution is the result of a process that demanded not only democratization,

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[15] For example: the community's collaboration with the government to protect Brazil's cultural heritage (Art. 216, §1); the participation of non-governmental entities in programs to provide comprehensive health care to children and adolescents (Art. 227, §1); promoting the activities of the Guardianship Councils for children, also regulated by the Statute of Children and Adolescents (ECA, law n. 8.069/1990); the legitimacy of citizens to initiate laws (Art. 61, §2); society's access to administrative records and information on government acts, with due regard for the provisions of Art. 5, X and XXXIII (Art. 37, §3, II), and others.

[16] See B. Wampler, *Activating Democracy in Brazil: popular participation, social justice, and interlocking institutions*, Notre Dame, 2015.

[17] E.K.M. Carrion, *About participatory democracy*, in G. Eros (ed.), *Direito constitucional: estudos em homenagem a Paulo Bonavides*, São Paulo, 2001, p. 49 ff.

but also the publicization of the state acts, and the opening for social control in five dimensions: formulation, deliberation, monitoring, evaluation and financing of public policies.

This process gave rise to innovative experiences, such as the "participatory budget" in Porto Alegre in the 1990s and early 2000s, which became a reference for several other countries around the world[18]. This has therefore contributed to what Boaventura de Sousa Santos and Leonardo Avritzer call the "*democratization of democracy*", insofar as democracy is understood as a "continuous process" that develops through a daily political-institutional practice of openness to participation, especially with regard to the dynamics of citizen participation in institutions[19] .

The development of these experiences takes place in parallel with a political system that has various idiosyncrasies and problems[20]. Several authors point to the fact that the Constitution did little to innovate in the power structures deriving from the dictatorial period, despite the formal recognition of rights in its text[21]. In a complex political system, characterized by multi-party politics and *presidencialismo de coalisão*[22], the precarious relations between civilians and the military in a country that did not undergo through Transitional Justice[23], in a social and political context deeply marked by inequalities, in which participation encounters overlapping problems due to under-integration and over-integration[24] dynamics, which are obstacles to the democratization of democracy in the country.

Despite the problems of governance and governability related to citizen effective social inclusion and political participation, it can be said that the 1988

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[18] See B.S. Santos, *Orçamento participativo em Porto Alegre: para uma democracia redistributiva*, in Id. (ed.), *Democratizar a democracia: os caminhos da democracia participativa*, Rio de Janeiro, 2002, p. 455 ff.

[19] B.S. Santos - L. Avritzer, *Introduction: opening the canon of democracy*, in B.S. Santos (ed.), *Democratizar a democracia: os caminhos da democracia participativa*, cit., p. XXXIV ff.

[20] For more details, see: D. de Fontaine - T. Stehnken (eds.), *The Political System of Brazil*, London, 2016.

[21] V.K. De Chueiri - E. Bockmann Moreira - H. Fernandes Câmara - M. Gualano De Godoy, *Fundamentos do Direito Constitucional: novos horizontes brasileiros*, Salvador, 2022; J.Z. Benvindo, *The Rule of Law in Brazil: the legal construction of inequality*, Oxford, 2022.

[22] The term "presidencialismo de coalizão", which can be loosely translated into English as "coalition presidentialism", seeks to describe the fragile balance of power between the branches of government in Brazil. In this system, the Executive branch is often constrained by the excessive fragmentation of the Legislative branch and must build a broad majority, frequently at odds with its government program – a practice typically associated with parliamentary systems. For further analysis, see the seminal text: S. Abranches, *Presidencialismo de coalizão: o dilema institucional brasileiro*, in *Dados – Revista de Ciências Sociais*, 1988, p. 5 ff.

[23] V.K. Chueiri (ed.), *Erosão Constitucional*, Belo Horizonte, 2022.

[24] M. Neves, *Entre subintegração e sobreintegraçao: a cidadania inexistente*, in *Dados Revista de Ciências Sociais*, 1994, p. 253 ff.

Constitution, at least in theory or in prospective, provided for a “participatory turn”, by disposing several instruments for citizen participation, which have been implemented throughout its more than 35 years of life, building a peculiar multifaced constitutional identity based on the “will of Constitution” [*Wille zur Verfassung*][25] and the will of democracy.

3. *Polarization and its constitutional consequences*

In recent years, however, the Brazilian public sphere has experienced a significant process of “polarization”[26]. This process began in 2013, marked by protests that initially intensified due to the increase in bus fares in the city of São Paulo, but which, due to repeated episodes of repression and police violence, took on broader contours and historic dimensions, also turning against the policies of the federal government, headed at the time by Dilma Rousseff[27]. This led to a troubled presidential election in 2014, with Rousseff being re-elected by a very small margin and the opposition contesting the result of the polls[28].

Since then, the political crisis has deepened with the hypertrophy of polarization, leading to Rousseff’s questionable impeachment process in 2016[29] and the election of Jair Bolsonaro in 2018. This process is marked by various idiosyncrasies and contradictions and is related to the emergence of a “new right” politics in Brazil[30] – as well as in several parts of the world. Political science and ethnographic studies in Brazil point to various reasons for the birth of this movement, from discontent with the economic policies of the last years of the Rousseff government, through hatred of the figure of Lula, who was associated by the media with major corruption scandals, to the coalition of social segments resentful of changes in customs and the identity agenda in various parts of society[31] .

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[25] K. Hesse, *Die normative Kraft der Verfassung: Freiburger Antrittsvorlesung*, Tübingen, 2019.

[26] L.F. Miguel, *O colapso da democracia no Brasil: da Constituição ao golpe de 2016*, São Paulo, 2016.

[27] For a political-ethnographical analysis of these movements, see: R.P. Machado, *Amanhã vai ser maior: o que aconteceu com o Brasil e possíveis rotas de fuga para a crise atual*, São Paulo, 2019.

[28] S. Fausto, *Brazil after the 2014 Elections: a bumpy road ahead*, in *Policy Brief*, 2015, p. 1 ff.

[29] For a critical analysis on the subject, see: A. G. Bahia - D. Bacha e Silva - M. A. Cattoni de Oliveira, *O impeachment e o Supremo Tribunal Federal: história e teoria constitucional brasileira*, Florianópolis, 2018.

[30] R.P. Machado - T. Vargas-Maia (eds.), *The Rise of the Radical Right in the Global South*, London, 2023.

[31] R.P. Machado - A. Freixo (eds.), *Brasil em transe: bolsonarismo, novas direitas e desdemocratização*, Rio de Janeiro, 2019. On the political crisis in Brazil, see also: B. Bianchi - J. Chaloub - P. Rangel - F.O.

This "new right", or "*cabocla right-wing*", to play with the pun in Portuguese, is difficult to designate because it is driven more by specific, particular, economic interests of certain groups, in a schizophrenic partisan conjunction, which have been coalescing in support of Bolsonaro. Under the umbrella of the *Bolsonarismo,* different groups have come together for different reasons, and they do not necessarily identify Bolsonaro as a true "leader"[32]. In this sense, Bolsonaro can be identified as a new clown mask, in which the different political positions have projected intentions and passions, and as a clown has brought joy to some and worked as a horror movie figure for others.

The *cabocla right-wing*, therefore, is heterogeneous in its organization and composition: neoliberal in the economy, neoreactionary in politics, which by adopting the politics of the enemy tends to undermine constitutionally guaranteed political pluralism at the grassroots. The new Brazilian right is contrasting in its internal and external limits because it involves agribusiness, landowners, the military, the evangelical churches (which are also different from each other), businesspeople who defend economic neoliberalism, and at the same time the country's old economic elite, opposed to social and economic progress understood as the well-being of the population. In addition, there is the middle class resentful of the frustration of their consumer expectations, citizens critical of the Labour Party's (*Partido dos Trabalhadores*) years in power and conservatives concerned about the change in customs, revisionist identity and political agendas. This new articulation gains force on a scenario of accelerated changes, many of which are incomprehensible and undermine the understanding of a "world in common" – which, as Hannah Arendt said[33] is the basis of politics –, detaching from reality the understanding of a public interest that comprehends this diversity of people and groups as a set of subjects with shared needs, rights and duties.

In this sense, the polarization of recent years is not so much a polarization between Lula and Bolsonaro, between progressives and conservatives, between right-wing and left-wing parties, but between the rule of law and the civilizing achievements of constitutionalism, on the one hand, and *barbarism* and *chaos*, on the other[34].

Wolf (eds.), *Democracy and Brazil: collapse and regression*, London, 2022; M. Nobre, *Limits of Democracy: from the June 2013 uprisings in Brazil to the Bolsonaro government*, New York, 2022; S. Mainwaring, *Democracy in Brazil: change, continuity, and crisis*, in *Latin American Research Review*, 2022, p. 936 ff.

[32] On Bolsonarism, see: C. Rocha - E. Solano - J. Medeiros, *The Bolsonaro Paradox: the public sphere and right-wing counterpublicity in contemporary Brazil*, New York, 2021; L. Avritzer, *Política e antipolítica: a crise do governo Bolsonaro*, São Paulo, 2020.

[33] As H. Arendt, *O que é política?*, Rio de Janeiro, 2022.

[34] For further analysis of this kind of antipolitics, see: G. da Empoli, *Gli ingegneri del caos: teoria e tecnica dell'internazionale populista*, Venezia, 2019; M. Nobre, *O caos como método*, in *Revista Piauí*, April 2019.

It is in this context many analysts conceive that the political crisis, held by deep-seated polarization, takes on the characterization of a multifaceted "*constitutional crisis*"[35]. The idea of a "constitutional crisis" may sound contradictory, since stability is an important condition for the effectiveness of any constitution, while various constitutions also provide for instruments to manage periods of emergency and political instability[36]. However, the constitutional crisis in this perspective follows the path of processes of "deconstitutionalization"[37], which are related at first to the rejection of the classic principles of constitutionalism, and at a second moment as a "reduction of the Constitution" to its selective application in certain contexts and its non-application in others[38], deepening the conflict between garantism and judicial activism[39].

In the Brazilian case, the constitutional tension by the political crisis has at least four main characteristics: 1) the emergence of processes that are contestable from a legal point of view; 2) the challenge to the authority of the Constitution and constitutional bodies; 3) the spread of disbelief in institutions through fake news and the challenge of the media[40]; and 4) the persecution of political opponents.

With regard to the first point, two emblematic cases can be cited: Rousseff's impeachment and Lula's imprisonment. Rousseff's impeachment was legally questionable due to the unclear presence of a crime of responsibility, as defined by Law 1079/1950, which is considered a prerequisite for political judgment by the National Congress[41]. Lula's arrest in 2018, in the midst of the electoral process, as part of the process known as "Car Wash", was later reviewed and considered suspicious by the judge who tried him by the Federal Supreme Court[42].

Regarding the second point, the challenge to the authority of the Constitution and constitutional bodies, such as the Supreme Court, has occurred several times at

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[35] S. Levinson - J. Balkin, *Constitutional crises*, in *University of Pennsylvania Law Review*, 2009, p. 707 ff.

[36] N.P. Sagüés, *La constitución bajo tension*, Ciudad de México, 2016.

[37] Ivi, pp. 97-109.

[38] Ivi, p. 99.

[39] Ivi, p. 101.

[40] J.V.S. Ozawa - J. Lukito - T. Lee - A. Varma – R. Alves, *Attacks against journalists in Brazil: catalyzing effects and resilience during Jair Bolsonaro's government*, in *The International Journal of Press*, 2023.

[41] M.A. Cattoni de Oliveira, A. Melo Franco Bahia, D. Bacha e Silva, *(I)Legitimidade do impeachment da Presidente Dilma Rousseff*, in *Revista Jurídica Consulex*, 2016, p. 30 ff.

[42] The judge who sentenced Lula to prison was later considered suspicious by the Supreme Court in the HC n. 164.493.

the instigation of the former President himself, Bolsonaro[43]. This attitude led to the engagement of political movements and groups that supported him, who sometimes called for the "closure" of the Supreme Court[44]. This extends to the field of disbelief in constitutional bonds in various sectors, such as culture[45] and the environment[46], which have suffered severe budget cuts and the dismantling of public policies, trying to give rise to the process of deconstitutionalization.

The third point is perhaps the most serious, and relates to the spread of disbelief in public institutions through fake news. This became very evident during the Covid-19 pandemic, in which former President Bolsonaro contributed to discrediting "scientific" solutions, such as the use of masks and the implementation of lockdowns, leading the country to record more than 700,000 deaths[47]. Fake news has played an important role in aggravating the psychology of polarization in various areas and topics, and has been the subject of a parliamentary inquiry, opened by the Supreme Court, to investigate crimes committed against the Supreme Court and other constitutional institutions in the country[48]. The fake news and recurring attacks on the traditional media led to disbelief in the electoral system as a whole and to Bolsonaro's supporters contesting the result of the 2022 presidential elections, which he lost, paving the way for the antidemocratic acts of January 8, 2023, with the destruction of the structures of the three branches of government in Brasilia[49].

Finally, the persecution of political opponents. In the period from 2018 to 2023, several public figures not necessarily linked to institutional politics, but also university professors and artists, had to go into self-exile due to the threat to their lives, which was largely committed by groups from the new radicalized right[50]. These emblematic

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[43] That is what the Special Rapporteur on the rights to freedom of peaceful assembly and of association of the United Nations has concluded. Human Rights Council, *A/HRC/53/38*, United Nations, 2023.

[44] G. Maia, *'Não vejo nada demais' em pedir para fechar o Congresso e STF, diz Bolsonaro*, in *Revista Veja*, 23 August 2022.

[45] In this regards, see: S. Fleury (ed.), *Social Policy Dismantling and De-democratization in Brazil: citizenship in danger*, New York, 2023; T. Burckhart, *Constitutional degradation and the protection of cultural rights in Brazil: deconstitutionalization and institutional deregulation*, in T. Groppi - V. Carlino - G. Milani (eds.), *Framing and Diagnosing Constitutional Degradation: A Comparative Perspective*, Rome, 2022, p. 93 ff.

[46] Francesco Bonelli - A.S. Araújo Fernandes - P. Cavalcante., *The active dismantling of environmental policy in Brazil*, in *Sustainability in Debate*, 2023, p. 58 ff.

[47] According to the official data collected by the Coronavirus Resource Center of the John Hopkins University, available here <https://coronavirus.jhu.edu/map.html>.

[48] This is the case of Inquérito nº 4.828.

[49] B. Meyerfeld, *In Brazil, an 'unprecedented' attack on democracy*, in *Le Monde*, January 9, 2023.

[50] This is the case of Professor Débora Dinis, ex-politician Jean Wyllys, Professor and ex-politician Marcia Tiburi, among others.

cases represent the tip of the iceberg related to the rigging of the state structure for personal and party political ends, which was visible during the 2022 elections[51], and the commission of mini-actions of persecution, practiced informally by various actors.

It can therefore be said that the polarization, as well as being a "new" fact on the Brazilian political scene, is the result of a political crisis that challenged the foundations of Brazilian democratic constitutionalism[52], which has been arduously built up over the last few decades. The polarization, therefore, has produced constitutional consequences, which have resulted in a kind of constitutional identity crisis in the country, merging old and new problems in the order of the effectiveness of the Constitution.

4. *The guarantee of dissent as a constitutive element of constitutional democracy and resilience*

In Brazilian constitutional democracy, the guarantee of dissent is understood as fundamental and constitutive elements, which is directly related to political participation. These elements guarantee citizens an active voice in participation, within the scope of participatory democracy, and the possibility of dissenting and forming groups – political parties, lobbies, and pressure groups – to defend and advance their ideals and interests.

The proper functioning of Brazilian constitutional democracy implies the guarantee of these mechanisms, which are given constitutional status in various articles of the Constitution, such as freedom of expression (Article 5), direct participation through plebiscites, referendums and popular initiatives (Article 14), and the free manifestation of thought, creation, expression and information, in any form, process or vehicle (Article 220).

Guaranteeing dissent, therefore, has important practical implications for political participation, especially with regard to social movements and the protection of the rights of ethnic, cultural and religious minorities. Likewise, it boosts the development and practice of social accountability mechanisms for the state and government, paving the way for the implementation of public transparency mechanisms and ensuring that

[51] I. Camargo - M. Falcão, *PRF descumpre ordem do TSE e para pelo menos 610 ônibus de eleitores em blitze*, in *Portal G1*, October 30 2022, available here < https://g1.globo.com/politica/eleicoes/2022/noticia/2022/10/30/prf-descumpre-ordem-do-tse-e-faz-pelo-menos-514-operacoes-de-fiscalizacao-contra-onibus-de-eleitores.ghtml >.

[52] In this regard, see: E.P.N. Meyer, *Constitutional Erosion in Brazil: progresses and failures of a constitutional project*, Oxford, 2021.

citizens can demonstrate their (in)satisfaction with the policies implemented by a given political group and advocate for change.

The dynamics of the political crisis driven by polarization, however, put both participatory democracy and the guarantee of dissent in tension and exception threat. It has been exacerbated by the confrontation between branches of government and the exercise of *chaos governance*, based on "ideological bubbles", an increase in political violence[53] and the delegitimization of the legislative process, which is reinforced by the isolation of individuals and groups, fracturing the bonds of social solidarity, and then seeking to bring them together in poles of political attraction, personalized in the figures of Bolsonaro or Lula.

The tension lies in the reduction of political debate to the logic of friend-enemy antagonism[54]. This is a political strategy that denies the opposition as a legitimate element of action in the democratic field, and sees it as an enemy to be fought. The greatest exponent of this theory is the German Carl Schmitt, whose theory is based on a vehement critique of political liberalism, and who understands the enemy as an existential threat to the political community, being the "other" whose presence and actions threaten the survival of a group[55].

What is central to Schmittian theory is the notion of sovereignty, defined as the authority to decide on the state of exception. The sovereign is the one who can suspend the established legal regime and take extraordinary measures to defend his political community. This decision is precisely crucial for defining and delimiting the groups that make up friends and enemies. Therefore, in the Schmittian notion of the friend-enemy politics, the exception plays an important role, in other words, the moment of crisis. It is at this moment that it is defined who the sovereign is, in other words, who has the capacity to decide[56].

The transposition of the notion of opposition into that of friend-enemy represents a break with the liberal principles of constitutionalism, precisely because it disregards fundamental rights and legal norms, even procedural ones, in favor of what Schmitt calls the "inevitable and existential nature of the political context". In the Brazilian case, this logic was driven especially by the mobilization of social networks by various means, also through state apparatus – by what later came to be called the

[53] J.C.C. Rocha, *Guerra Cultural e Retórica do Ódio*, Goiânia, 2021.
[54] C. Schmitt, *The concept of the political*, Chicago, 2007, p. 122.
[55] Ivi., p. 87.
[56] Ivi, p. 89.

"hate cabinet", which has been the subject of investigations by the Brazilian Federal Police[57].

These phenomena put the constitutional endurance and constitutional resilience of various countries in tension – and sometimes in check. The concept of constitutional endurance refers to the life expectancy of a constitution, i.e. how long it lasts between its adoption and its replacement by a new constitution[58], and depends umbilically on "constitutional resilience", which refers to the capacity of a constitutional system to absorb shocks, adapt to new circumstances and recover from crises, while maintaining its fundamental principles and functionality[59]. This concept is increasingly relevant in the context of modern challenges such as political polarization, economic crises and authoritarian tendencies[60].

There are several factors that can contribute to "constitutional resilience", such as the adaptability and flexibility of the constitutional system, strong and independent institutions, social and political cohesion regarding the principles of liberal constitutionalism – i.e. the political and legal culture aspect of a given people – and legal and normative procedures. Similarly, it can be said that economic stability is also a fundamental element[61], in addition to the importance of maintaining "unwritten rules"[62].

In this sense, Cass Sustein points out that constitutional design should promote deliberation and political and legal compromise, so as to be an instrument for confronting political polarization[63] – which is indeed a difficult, but not impossible, task within the democratic rule of law. Constitutional design must therefore drive and shape the political process, safeguarding rights and maintaining a satisfactory level of democratic governance through participation in this process. Constitutional design can boost the stability and resilience of constitutional and democratic systems.

The Brazilian case, despite its political and institutional fragility in some aspects, has shown itself to be a case of "success" in overcoming a context of acute polarization and the logic of friend-enemy in order to appease these political feelings and political

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[57] Which is currently under investigation by the Parliamentary Inquiry n. 4781, 4789, and 4828.

[58] J.Z. Benvindo, *Constitutional Endurance*, in R. Grote - F. Lachenmann - R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, 2023.

[59] A. Jakab, *Constitutional Resilience*, in R. Grote - F. Lachenmann - R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, cit.

[60] In this sense, see: T. Ginsburg - A.Z. Huq, *How to save a Constitutional Democracy*, Chicago, 2018.

[61] A. Przeworsk, *Democracy and Development: political institutions and well-being in the world, 1950-1990*, Cambridge, 2000.

[62] S. Levitsky – D. Ziblatt, *How democracies die*, New York, 2018.

[63] C.R. Sunstein, *Designing democracy: what constitutions do*, Oxford, 2002.

relations and consequently guarantee constitutional resilience and constitutional endurance. It achieved this by applying the Constitution itself, fundamental rights and the principles governing the democratic order. This was done in two areas: from a *macro* point of view and from a *micro point of view*.

From a *macro* point of view, three elements can be mentioned. The first is the formation of a broad front with traditional parties from the left, center-left, center-right and moderate right, which acted as a cordon sanitaire against the advance of the extreme right in the last presidential elections, with a slate headed by Lula[64]. This front was the result of in-depth dialogues between dissent groups and political leaders who saw the continuity of Bolsonaro's government as a serious danger to constitutional democracy and built a front precisely to defend it, having succeeded at the polls, albeit with a small margin of difference[65].

The second refers to the punishment and accountability of the constant attacks on the Constitution and the Democratic Rule of Law. Several inquiries have been set up to deal with the acts that Bolsonaro or his government have carried out illegally – such as the "fake news inquiry", n. 4.781, the "inquiry into anti-democratic acts" that took place on January 8, 2023, n. 4.828, the "inquiry into interference in the Federal Police", n. 4.831, and the "inquiry into the spread of false information about the elections", n. 600371, set up by the Superior Electoral Court.

Among these criminal investigative procedures, the anti-democratic acts inquiry, carried out by the Federal Supreme Court, was of great importance, resulting in temporary and preventive arrests, as well as search and seizure warrants[66]. These actions also led to a Joint Parliamentary Commission of Inquiry that investigated the involvement of a number of subjects and concluded in its final report, published in October 2023, by indicting more than 60 people directly involved in these acts[67], and Bolsonaro is among them. Bolsonaro himself has been convicted three times with the

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[64] J.P. Struck, *Com frente ampla, Lula freia a extrema-direita*, in *Deutsche Welle Brasil*, October 31, 2022, available at <https://www.dw.com/pt-br/com-frente-ampla-lula-freia-a-extrema-direita/a-63599505>.

[65] According to the Superior Electoral Tribunal, Lula was elected with 50,90% of the votes. available at <https://resultados.tse.jus.br/oficial/app/index.html#/eleicao/resultados>.

[66] More than 700 people have been arrested, according to the official: data available at <https://www.gov.br/pf/pt-br/assuntos/noticias/2023/01/prisoes-relacionadas-aos-atos-antidemocraticos>.

[67] Câmara dos Deputados, CPMI do 8 de janeiro aprova relatório que pede o indiciamento de Bolsonaro, available at <https://www.camara.leg.br/noticias/1008264-CPMI-DO-8-DE-JANEIRO-APROVA-RELATORIO-QUE-PEDE-O-INDICIAMENTO-DE-BOLSONARO>.

penalty of ineligibility for the next eight years, for misuse of the media and abuse of power[68].

The third element pertains to how constitutional design facilitated the preservation of democratic stability in specific areas and contexts during a period of intense polarization, particularly with respect to the role of the Supreme Federal Court (STF) and federalism. Regarding the STF, the Constitution assigns it the primary responsibility of safeguarding the Constitution, granting it jurisdiction over a range of actions for constitutional review (Article 102), especially in cases of profound disagreement concerning the constitutionality of a laws or administrative acts. This has led the STF to be frequently called upon to intervene in cases characterized by political conflict due to institutional instability, assuming a "protagonist" role—though not necessarily an "activist" one—in maintaining constitutional order[69]. Regarding federalism, it is noteworthy how the Brazilian system, with all its idiosyncrasies, ensured autonomy for states and municipalities, allowing federal entities to implement their own policies within their respective areas of competence. In some cases, these policies contrasted with those of the Bolsonaro administration. This strengthened political pluralism and prevented the excessive concentration of power in the federal executive[70].

From a *micro* point of view, various actions have been taken by constitutional institutions with the aim of overcoming the aforementioned polarization. This is the case of the education and transparency campaigns carried out by the Superior Electoral Court[71], awareness and education campaigns promoted by various organized civil society organizations, and the promotion of ethical journalism. These actions have gradually made it possible to "break the bubble" of the spread of fake news and unfair interference in the electoral and democratic process, providing the basis for consolidating a democratic political culture.

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[68] The last sentence came about in November 7, 2023, by the Superior Electoral Tribunal n. 0600814-85.2022.6.00.0000.

[69] On this argument, see: O.V. Vieira - R. Glezer – A.L. Pereira Barbosa, *A supremocracia e infralegalismo autoritário: o comportamento do Supremo Tribunal Federal durante o governo Bolsonaro*, in *Novos Estudos CEBRAP*, 2022, p. 591 ff.

[70] M.P. Melo - P.C.F.S. Macedo, *O federalismo sanitário cooperativo e a competência entre os entes federativos sobre as ações e serviços público de saúde no enfrentamento à pandemia de Covid-19: uma análise à luz das decisões do Supremo Tribunal Federal*, in F. Asensi – L. Manoel da Silva Cabral – N. Rúbia Zardin – R. Tremel (eds.), *Visões multidisciplinares em políticas públicas*, Rio de Janeiro, 2022.

[71] Such as the campaign "Stay by the side of democracy" (fique do lado da democracia), available at <https://www.tse.jus.br/comunicacao/noticias/2020/Novembro/tse-lanca-campanha-201cfique-do-lado-da-democracia201d-pelo-voto-consciente-e-contra-a-polarizacao>.

In this way despite the unprecedented political crisis that marked the Brazilian public sphere most emphatically between 2016 and 2023, it is possible to say that the acute moment of the crisis has passed, although reminiscences of this period in the political and constitutional system remain. It has been overcome by the application of the constitutional normativity, especially regarding participation and the guarantee of the right to opposition, and by demonstrating the shape of Brazil's political and legal institutions. It is, therefore, an interesting case for comparative constitutional law, moving from a context of constitutional erosion threats to another, marked by the affirmation of constitutional resilience and constitutional endurance.

5. *Final remarks*

The political crisis that affected Brazil most acutely between 2016-2023 had a series of direct repercussions for the country's constitutional democracy. It erupted into processes that tested the limits of democratic institutions, as well as the endurance of the 1988 Constitution, the guarantee of democratic social participation and the right of opposition. However, it demonstrated that the Brazilian democratic and judicial system could guarantee constitutional resilience through the application of constitutional normativity, instigating the overcoming of a moment of acute political polarization.

The success in overcoming the threats of a constitutional crisis has seen the judiciary, and especially the Supreme Court, playing a key role, acting as a strong protagonist in guaranteeing constitutional prescriptions. For this success also had a fundamental role the democratic participation of various groups and the guarantee of dissent, boosting for the inversion of the friend-enemy rationality in the political field. This became evident with the formation of the Broad Front that led to Lula's victory in 2022, on a ticket made up of political groups that had been antagonistic at various times in Brazilian political history.

Lula's victory reveals that democratic institutions functioned effectively, ensuring the transparency and reliability of the election. This does not imply, however, that constitutional tensions and threats have been fully resolved. Rather, it demonstrates that they have been redirected to a different level, where the crisis once again reflects the inherent democratic tensions typical of complex democracies, instead of the illegalities of the previous government.

The Brazilian experience highlights an important prism of constitutional democracy as a system that requires permanent monitoring and attentive participation. Because while on the one hand the crisis seems to have been overcome, on the other hand there are remnants of anti-democratic positions committed to lobbies from specific sectors such as the evangelical caucus and ecologically irresponsible business, which continue to be active in the national Congress and at different levels of government.

Several challenges are still latent in this field, such as the concentration of the media in the hands of a few families, systematic disinformation, as well as the strong social inequality that implies significative obstacles for democratic inclusion and political participation. These are historical problems that afflict Brazilian constitutional democracy, and which have deepened with the excessive polarization of recent years. However, it can be said that, to a large extent, Brazilian institutions have succeeded in guaranteeing the hard core of rights and protecting the principles that guide democratic life set out in the 1988 Constitution.

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Abstract: Focusing political polarization and its constitutional consequences, this article aims to provide theoretical and empirical contributions, based on the Brazilian case, for a critical reflection on contemporary constitutional democracy. It is divided into three parts: I. Constitutional democracy in Brazil and the participatory turn; II. Polarization and its constitutional consequences; III. The guarantee of dissent as a constitutive element of constitutional democracy and resilience. The conclusion highlights the constitutional resilience, driven by the strengthening of constitutional and democratic institutions at both micro and macro levels of the political-legal system.

Keywords: Constitutional democracy - Participation - Political Polarization - Constitutional resilience - Brazil.

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RIVISTA DI
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The Indian Constitution in defence of democracy and multiculturalism: Pragmatism, flexibility and hybridisation*

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1. *Introduction*

The Indian experience represents the largest expression of democratic organisation, and understanding results and making forecasts on Indian General elections is not an easy task, especially if we consider the history of the country, its ethnic and cultural features, the nature of the multi-party system and the subsequent– as defined by Sanjay Kumar–mammoth democratic exercise[1].

In recent times, the Bharatiya Janata Party and the decade-long premiership of Narendra Modi fostered some critical assessments especially within Western scholars, which pay attention to the marginal role of opposition and the increasing trend towards a supposed authoritarianism[2].

However, in the light of a comprehensive study of the Indian contemporary experience through its constitutional system, the analysis should move from some specific features and historical events that already show a robust state machinery in safeguarding democracy, while considering the role India is currently playing as an emerging (already emerged) economy and its weight on regional and global political geography.

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[1] S. Kumar, *Elections in India: An Overview*, London-New York, 2021.

[2] S. Palshikar - S. Kumar - S. Lodha (eds.), *Electoral Politics in India: The Resurgence of the Bharatiya Janata Party*, London-New York, 2017; W. Menski - M. Yousuf (eds.), *Kashmir after 2019: Completing the Partition*, London, 2020.

Moving from the aforementioned critical assumption, the essay briefly exposes three aspects that might serve as crucial points in evaluating the contemporary trajectory of the Indian experience. To this end, the first paragraph addresses the role that India assumed within the so-called BRICS, the second paragraph introduces some important features of the constitutional system, while the third paragraph explains the three pillars of the democratic and constitutional asset: pragmatism, flexibility and hybridisation.

2. *From self-sufficiency to the market economy: India and the BRICS*

Within the countries under the acronym BRICS (Brazil, Russia, India, China, South Africa), India represents one of the most rapid growth in terms of GDP, thus leading to consider its production system and institutional set-up as examples of 'winning models'–along with China–of the Global South[3].

From an institutional point of view, India unequivocally has a particularly prominent role, thanks to its consolidated political stability, which makes it a model of a democratic-social state of great reliability within the group of emerging powers that today challenge the Euro-Atlantic bloc. From this point of view, the most fruitful comparison should be made, on the one hand, with Brazil, for the strongly democratic and egalitarian connotation of the respective forms of state, and on the other hand, with South Africa, for certain structural and connotative aspects of the legal systems, which share the common law legal tradition, albeit strongly revisited and modified (particularly as regards India) in the light of specific regional problems and pre-existing legal traditions. However, with respect to both these systems (and even more with respect to China and Russia), India represents the oldest democratic system, based on a constitution drafted in the cultural horizon of post-World War II democratic constitutionalism, which came into force in 1950, and has been substantially consolidated over more than seventy years. Despite this leading role, the Indian Union remained for decades a sort of 'black hole' in political-constitutional studies (especially Italian, but generally European)[4], even after the 1947 independence and the entry into

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[3] On this aspect, see R. Orlandi (a cura di), *L'elefante sul trampolino. L'India fra i grandi della Terra,* Bologna, 2009; M. Adduci, *L'India Contemporanea. Dall'indipendenza all'era della globalizzazione*, Rome, 2009; S. Chiarlone, *L'economia dell'India*, Rome, 2008; E. Basile - M. Torri (a cura di), *Il sub-continente indiano verso il terzo millennio. Tensioni politiche, trasformazioni sociali ed economiche e mutamento culturale*, Milan, 2002; X. Xiujun (ed.), *The BRICS Studies: Theories and Issues*, London-New York, 2022; D. Monyae - B. Ndzendze (eds.), *The BRICS Order: Assertive or Complementing the West?*, London, 2021.

[4] Cf. D. Amirante, *Democrazie imperfette o "altre democrazie"? Costituzioni e qualità della democrazia nel sub-continente indiano*, in Id. (a cura di), *"Altre" democrazie, problemi e prospettive del consolidamento democratico nel*

force (1950) of one of the most complete and articulate democratic constitutions. Yet it is the 'largest democracy in the world' (at least in quantitative terms) and, above all, a system that is able to cope with the contradictions of a multi-ethnic, multi-lingual and multi-religious society through the use of law and the practice of democratic rules[5].

In recent decades, India has brilliantly achieved the transition from an economic system that tended to be self-sufficient (with strong state intervention) to an open and market economy. This transformation has entailed, along with GDP growth, a series of political and social imbalances due to the difficulty of reconciling the changes resulting from economic development with the protection of fundamental rights and the maintenance of a strongly entrenched welfare state. In fact, the 'openings' to the market economy and international trade have changed the economy structurally and have led to the gradual dismantling of the public sector, with the privatisation of banks and industries, but above all with major cuts in public spending that have inevitably reverberated on welfare, a fundamental public function in a country where large sections of the population live on the edge (or below) the poverty line.

An introductory study on India's democratic set-up and economic constitution, therefore, requires special attention to public intervention as a factor for rebalancing the inequalities typical of Indian society and history, and must also take into account its territorial dimension, evaluating the peculiar features of Indian federalism, which can be defined as atypical and *sui generis*[6]. In a historical perspective, due account must be taken of the strong role assumed in the initial phase by the Union and the clear centripetal trend in the allocation of economic and fiscal powers, which was followed by a gradual affirmation of the political, cultural and economic subjectivity of the individual member states. In order to understand today's India, it is necessary to bear in mind the varying levels of development of the 28 states and the division of powers between the Union and the states in relation to fiscal powers. Thus, the internal dynamics of the individual states in political and economic matters, as well as the compatibility of their respective economic and production systems with the guiding principles laid down in the constitution must not be overlooked. The Indian states

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sub-continente indiano, Milan, 2010, p. 15 ff. For a broader view on South Asian legal systems, especially those really close to the Indian experience, see C. Petteruti, *The Constitutional System of Sri Lanka Between: Hyper-Semi-Presidentialism and the Federal Utopia*, in D. Amirante (ed.), *South Asian Constitutional Systems*, The Hague, 2020, p. 75 ff.; L. Colella, *The Rule of Law in Bangladesh: Constitutional Challenges*, ivi, p. 137 ff.

[5] Z. Hasan - E. Sridharan - R. Sudarshan (eds.), *India's Living Constitution: Ideas, Practices, Controversies*, London, 2005.

[6] D. Amirante - P. Viola, *South Asian Constitutionalism in Comparative Perspective: The Indian "Prototype" and Some Recent Borrowings in the 2015 Nepalese Constitution*, in M.P. Singh (ed.), *The Indian Yearbook of Comparative Law 2018*, Singapore, 2019, p. 151 ff.

have considerable territorial and cultural differences among themselves: from the widely variable size, to the different presence of energy sources and raw materials, to the heterogeneity of cultural elements (religion, language, social stratification) that influence the role of minorities, oppositions, political system, and the economic system as a whole.

From a legal point of view, the Indian system is considered as an area of particular interest for comparison, as it represents a peculiar hybridisation of an original common law model (among other things with peculiar mixtures of British and American common law), with elements typical of civil law constitutions and with legal tools arising from Hindu and Muslim law, so much so as to deserve, according to some, the label 'post-modern legal system'[7]. Regarding the relative lateness of comparative studies on the subject, one may recall the caustic judgement of a prestigious scholar of comparative institutional systems, Arend Lijphart, when he stated that India "is one of the most important and interesting examples in the democratic world of judicious and effective use of many consociative practices", whereby "the fact that it has taken several decades to discover this basic feature of the Indian system shows a staggering lag in the study of the world's largest democracy from a comparative point of view"[8].

On the whole, the characteristics of originality of the Indian institutional experience, so far strongly underestimated, make it an 'institutional model' whose analytical knowledge offers important consequences about different pivotal elements: i) methodology (the broadening of the horizons and tools for comparison); ii) theoretical appraisals (the study of post-modern legal systems); institutional machinery (the analysis of a new ideal-type of multicultural and multinational state); iii) convergence between legal structures and political-economic systems (in the BRICS sphere, having a global impact)[9].

3. *A brief overview on the Indian Constitution*

The Indian Union, with its successful 70 years' experience, still remains a constitutional system substantially unexplored in comparative law studies, especially if

[7] W. Mensky, *Comparative Law in a Global Context*, Cambridge 2006.

[8] A. Lijphart, *Democratic institutions and ethnic/religious pluralism: Can India and the United States learn from each other – and from the smaller democracies?,* in K. Shankar Bajpai (ed.), *Democracy & Diversity*, *India and The American Experience*, Oxford, 2007.

[9] For a general assessment on India and its role within BRICS: P. Quercia - P. Magri (a cura di), *I BRIC-S e noi. L'ascesa di Brasile, Russia, India e Cina e le conseguenze per l'Occidente,* Milan, 2011.

we consider the mainstream Western doctrine[10]. Moreover, the Indian constitution is often considered a mere post-colonial charter, in spite of not even possessing the formal features of such texts[11]. On the contrary, this text can be comfortably located in the category of the post-WWII democratic constitutions, like the best known European models, such as the Italian or the German ones, not only for chronological reasons, but also for its content. First of all, the Indian constitution stands out for its successful mixing of the democratic method with a strong 'social' orientation, both with regards to the teleological and foundational profile of the State and to the relations between State and society, brilliantly translated into a very original bill of rights.

From a conceptual and textual point of view, an interpretative effort is required for reading a constitution acknowledged as "socialist" since the preamble[12], but particularly centred on the protection of individual rights and freedoms within an authentic set of fundamental rights with democratic and liberal roots[13]. In the early years of its existence, many foreign and national observers saw in this twofold tension of the Indian constitutional text a blatant contradiction. However, if one does not overemphasise the symbolic contents of the Constitution, it will emerge a rather original system, aimed at ensuring at the same time a substantial equality of opportunity for Indian citizens and a strict protection of their fundamental rights under the control of a powerful and independent judiciary[14].

Nevertheless, the most important aspect on which the theory and practice of the Indian constitution offers today a significant contribution is certainly the character of its institutional experience as an 'anticipatory multicultural state'[15]. The Indian Union could be considered, in fact, one of the most significant experiences of multiculturalism, accomplished through a thoughtful use of the constitutional

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[10] D. Amirante - P. Viola, cit.

[11] M.P. Singh - S. Deva, *The Constitution of India: Symbol of Unity in Diversity*, in *Jahrbuch des Öffentlichen Rechts der Gegenwart*, 53, 2005, p. 649 ff. See also M. Khosla, *The Indian Constitution*, Oxford, 2012; A.K. Thiruvengadam, *The Constitution of India: A Contextual Analysis*, London, 2017.

[12] D.D. Basu, *Introduction to the Constitution of India*, Gurgaon, 2022; D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Naples, 2019.

[13] D.D. Basu, *Introduction to the Constitution of India*, cit.

[14] On these aspects see G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford-New Delhi, 2018 (prima ed. 1966); Id., *Working a Democratic Constitution: A History of the Indian Experience*, Oxford-New Delhi, 1999; U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *Third World Legal Studies*, 1985, p. 107 ff.; Id., *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, in *Macquarie Law Journal*, 2014, p. 3 ff.

[15] D. Amirante, *The Lengthiest Constitution of the World: Basic Elements*, in Id. (ed.), *South Asian Constitutional Systems*, cit., 2020, p. 27 ff.

mechanisms as factors of aggregation of the State structure and of consolidation of the democratic institutions[16].

Since its entry into force, the Indian fundamental text had to cope with a multicultural society, grounded on deep ethnic, linguistic, cultural and religious differences of its population (in this sense it can be defined a 'genetically multicultural constitution'). The originality of the Indian constitutional approach was the awareness of having to confront a highly-variegated society. Consequently, the constitution considered diversity and minorities not a problem to solve or to contain (a social and constitutional 'pathology'), but a resource to be appreciated for building the state (thus, an element of the constitutional 'physiology' of India).

In South Asia, the Indian Constitution represents a reference point, both in terms of the institutional solutions adopted, and for the stability and longevity of its democratic institutions[17]. The Indian aptitude to achieve a balance with regard to interethnic and linguistic conflicts acquires an even greater value in comparison with the other states of the area, concerned by similar tensions and by constant potential conflicts[18]. In particular, in relation to the multi-religious character of South Asia, the Indian legal system has shaped an important model of secularism. Here, in fact, the secular character of the state, as enshrined in the Constitution in 1976 through the 42nd Constitutional Amendment Act, had already been affirmed, even if indirectly, by the Constituent Assembly. The debate over this matter was fertile and intriguing due to the presence at the same time of different positions. Nevertheless, it started from a shared principle: after the Partition from Pakistan, the only choice for the new independent Republic was secularism. As Nehru strongly stressed, India had to be "a state including people of any religion and opinion and therefore a fundamentally secular state"[19].

Indian secularism has an attitude of deep respect towards religious minorities, and is very different from the Western understanding of the term, which is

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[16] D. Amirante, *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva indiana*, Bologna, 2014.

[17] D. Amirante (ed.), *South Asian Constitutional Systems*, cit.

[18] Since the first days of Independence, the decision to build a state based on full recognition of ethnic, religious, cultural, and social diversity was in line with the social context of the federal scheme. One of the main merits ascribed to the Indian ruling class of the time, and in particular to the forces of the Congress Party within the Independence Movement, is to have always taken into account the structural elements of this social reality, beyond their political, ideological, and religious divergences. On these aspects see W. Kymlicka, *Liberal Multiculturalism: Western Models, Global Trends and Asian Debates*, in Id. - B. He (eds.), *Multiculturalism in Asia*, Oxford, 2005, p. 22 ff.; H. Bhattacharyya, *Multiculturalism in Contemporary India*, in *International Journal on Multicultural Societies*, 5, 2003, p. 152 ff.

[19] D.E. Smith, *Nehru and Democracy*, Kolkata, 1958, p. 147.

characterised by hostility towards religion and by the construction of the 'wall of separation' between State and religion. Considering this feature some scholars have defined Indian secularism as 'ambiguous', highlighting that the constitution had to pay a tribute to the specific weight of religion, especially Hinduism, in Indian society[20]. A different opinion appears more persuasive: theorising secularism is "not an exotic concept planted in India, it grew out of its past history of a wide and general movement, which emerges […] gradually from the intermingling of different groups and communities"[21].

From the legal point of view, the compromise reached by the Constituent Assembly led to a balanced outcome, denying, on the one hand, a political recognition for religious groups (in reaction to the system of differentiated election by groups declared by the British Raj), but guaranteeing, on the other hand, freedom of expression and a certain autonomy to religious communities. In this way, it was created what we could define, partly borrowing an Indian doctrine expression, a form of 'celebratory secularism'[22].

4. *Pragmatism, Flexibility and Hybridisation*

For illustrating the origins and some important features of the Indian Constitution, it is necessary to clarify my methodological proposal for understanding Indian constitutionalism. To this end, I highlight three 'keywords', which characterise the trajectory of the Indian Constitution from the Constituent Assembly until today, namely 1) pragmatism, 2) flexibility and 3) hybridisation.

Pragmatism underlines the audacious aptitude of the Indian law-makers, from the Constituent Assembly members onwards, to selectively use concepts and legal institutions borrowed from other legal systems, without showing the cultural subjection that has often characterised the legal transplants of entire institutional 'packages' of Western matrix in other geo-political contexts. This kind of pragmatism does not indicate the absence of autochthonous values and ideals (on the contrary, the

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[20] J. Chiriyankandath, *Constitutional Predilections*, Seminar No. 484, 1999, p. 2.

[21] B.L. Fadia, *Indian Government and Politics*, Agra, 2005, p. 106.

[22] On these points see R. Dhavan - F.S. Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities*, in B.N Kirpal - A.H. Desai - G. Subramanian - R. Dhavan - R. Ramchandran (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford-New Delhi, 2000, p. 266 ff.; L. Colella, *Fattore religioso, diritto e normazione in India, Pakistan e Bangladesh*, in *DPCE Online*, 2021, p. 1675 ff.

Indian Constitution has often been indicated by many interpreters as a 'manifesto' for a real social revolution)[23], but the aptitude to use inputs from comparative law and 'constitutional engineering', not on the basis of abstract models, but in relation to their usefulness and relevance to solve actual problems posed by the local context. In this perspective, it evidently appears that the legal system "is more a process of applying commonly cherished values of social conduct and control, within the larger context of culture, rather than a stand-alone structure with legal rules"[24].

'Flexibility' indicates a special attitude of the legal system to evolve (through amendments or legislation) without altering its basic structure. To give one example, we can refer to the many different procedures for constitutional revision, providing, thus, different measures according to the specific objects of the constitutional amendment. For instance, the procedure for the establishment of new member States of the Union is easier than the ordinary procedure for constitutional amendments; this has favoured the consolidation and the progressive adjustment of the Indian federal system as a whole. In fact, many regional separatist claims have been overcome through the recognition of a political subjectivity to numerous linguistic and cultural communities, through constitutional revisions creating a number of linguistic states and re-adjusting the Union's territorial spatial planning[25]. This institutional dynamic, as opposed to the rigidity of the typical territorial planning of North American federalism, is significantly illustrated by the consideration that "the Indian Union, constitutionally speaking, can be defined as an indestructible Union of destructible States.[26]"

'Hybridisation' is a frequent concept in the Indian constitutional system. In working on South Asian constitutional systems, we usually come across several 'oxymoron definitions' to identify different institutional set-up. Concerning the Indian political system, for instance, it is possible to think about a 'consensual Westminster model' with a pluralist party system recalling consensual parliamentarism. With regards to the structure of the Union, the oxymoron 'centralised federalism' better describe

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[23] M.P. Singh - N. Kumar, *Examining India's Common Law Identity: An Inquiry into India's Legal Systems and Traditions*, Oxford-New Delhi, 2019. See also N. Sundar, *'We Will Teach India Democracy': Indigenous Voices in Constitution Making*, in *The Journal of Imperial and Commonwealth History*, 2023, p. 181 ff.; J.S. Deepak, *India that is Bharat: Coloniality, Civilisation, Constitution*, London, 2021.

[24] Ivi, p. 84.

[25] See *supra*. Cf. A.K. Thiruvengadam, cit.; Y. Roznai, *Unconstitutional Constitutional Change by Courts*, in *New England Law Review*, 2017, p. 555 ff.; E.F. Delaney - R. Dixon (eds.), *Comparative Judicial Review*, Cheltenham, 2018.

[26] H. Bhattacharyya, *Federalism and Regionalism in India: Institutional Strategies and Political Accommodation of Identity*', Heidelberg Papers in South Asian and Comparative Politics, Working Paper No. 27, 2005, p. 2; M. J. Vinod et al. (eds.), *Cooperative Federalism in South Asia and Europe: Contemporary Issues and Trends*, London-New York, 2023.

the different attitudes that the state machinery assumes in reference to stimulus arising from the context. In analysing the economic Constitution, the 'socialist' Republic (which excludes private property from its Bill of Rights) embraces, after the liberal turn, the free market.

In the perspective of hybridisation, we can also recall our previous considerations about the 'mixed' character of the Indian legal system, using sources of positive law alongside religious or traditional and customary principles. In conclusion, by studying the Indian legal system, it is possible to get accustomed to the 'grammar' of institutional hybridisation, and to verify the adaptive capacity of the basic features of democratic constitutionalism to regional contexts often considered incompatible with democracy.

The main goal of the Constitution of India was to create an effective social democratic state. The Indian legal system is therefore based on a balance between significant public interventions, aimed at achieving substantive equality for Indian citizens, strict protection of fundamental rights, recognition of political opposition and democratic guarantees, defended by a significantly independent judiciary[27].

As already pointed out in other studies[28], this system is supported by three pillars: the Preamble to the Constitution, the fundamental rights (and the Public Interest Litigation/Social Action Litigation, a special procedure of direct appeal to the Supreme Court) and a corresponding list of constitutional duties[29], and the directive principles of State policy, with economic and social provisions, located in part IV of the Constitution.

The interaction between the three pillars of the Constitution was appropriately described in the formula by V.S. Deshpande, a Supreme Court judge, who pointed out that the 'democratic socialism' referred to in the Preamble and in the directive principles of State policy is meant to outline the context within which fundamental rights must be realised in practice[30]. The Preamble plays an important role in the definition of the final tasks of the legal system, and as an interpretive instrument to resolve disputes and ambiguities within the constitutional text, mostly through the intervention of judicial power.

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[27] M.P. Jain, *Indian Constitutional Law*, 6th ed., New Delhi, 2010, p. 15. See also J. Sindhu, *Public reason and constitutional adjudication in India*, in *Comparative Constitutional Studies*, 2024, pp. 140 ff.

[28] D. Amirante, *L'India al tempo dei BRICS: una potenza emergente dalle solide radici democratiche*, in L. Scaffardi (ed.), *BRICS: Paesi emergenti nel prisma del diritto comparato*, Turin, 2012, p. 55 ff. Cf. S. Zondi (ed.), *The Political Economy of Intra-BRICS Cooperation: Challenges and Prospects*, Cham, 2022. Cf. U. Baxi, cit.

[29] V.S. Deshpande, *Rights and Duties under the Constitution*, in *Journal of the Indian Law Institute*, 1973, p. 99-100; U. Baxi, cit.

[30] Ivi.

In listing the objectives of the political system, the constitution clearly shows the willingness of the constituents to reconcile the socialist orientation with a democratic perspective, assigning to social, economic, and political justice a constitutional priority. This approach also excludes, on one hand, collectivistic or authoritarian options for the achievement of the ideals of social justice and equality and, on the other hand, refuses any reference to 'organicistic' conceptions of society (i.e. through the perpetuation of the caste system).

Among the various analyses carried out by the Indian legal scholarship, R.C. Lahoti identified this attitude as the 'backbone' of the Constitution, while D.D. Basu considers it as the primary expression of the 'philosophy' of the fundamental law. Thus, three analytical keys have been offered for understanding the role of the Indian constitution and its preamble: declaratory, decisional, and programmatic[31]. Overall, the Supreme Court of India has often been involved with decisive rulings in the crucial stages of the development of Indian democracy[32].

A further issue, which prompted the constituents to particularly delineate the institutional rules of Indian democracy, was the necessity to protect the republic from deviations towards totalitarian or anti-democratic regimes (a risk that effectively occurred in the 1970s, during the state of emergency imposed by Indira Gandhi). According to Basu, this was the main reason for the considerable detail in treating extensively many aspects of the administration of the country, both from the organisational and procedural point of view: "the Constitution might be perverted unless the form of administration was also included in it"[33].

Confirming the overarching trend, observed also in Western democracies, towards the 'judicialization of politics' and the 'presidentialisation of the executive power', the Indian Supreme Court has assumed a firm position as a guardian of democracy, while remaining within the boundaries of its competences. Despite the frequent criticism raised by the majorities on the alleged excesses of judicial activism, severe institutional conflicts never occurred in the history of independent India, except for the proclamation of the Emergency by Indira Gandhi in 1975.

Indira Gandhi (daughter of Nehru, merely a namesake of "Mahatma" Gandhi) has been in charge of the Government from 1966, but adopted a very different political conduct from his father, emphasising the Prime Minister's supremacy in the

[31] R.C. Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India*, Lucknow, 2004, p. 4.

[32] D.D. Basu, *Introduction to the Constitution of India*, cit.

[33] D.D. Basu, *Comparative Federalism*, Gurgaon, 2007, p. 41. According to the author this "explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like".

government and taking personal control also of important state institutions, such as the special police corps. The centralisation of power in the hands of the Prime Minister was subsequently transformed in the proclamation of the state of emergency in 1975, requested by Gandhi, followed by a series of constitutional reforms aimed at strengthening the personal power of the Prime Minister. To this potential involution of Indian democracy both the Supreme Court, which strengthened the basic features of the Constitution through a series of decisions, and the electors stood up and, on the occasion of the 1977 elections, 'fired' the government of Indira Gandhi by voting for a coalition of small and medium parties (led by the Janata Party) that governed the country. In the political history of independent India, these elections represent a watershed and are evoked with expressions such as 'the revolution through the polls' or 'the second Indian independence'.

5. *Conclusion*

Several historical and sociological interpretations could explain the growth of 'political Hinduism' as a mass phenomenon, the BJP obtained an impressive increase in parliamentary seats within a few years, stepping into the credibility and consensus vacuum opened up by the traditional parties, in particular the Congress[34]. After the 1989 elections, the political context, the Indian form of government, and contemporary political system assumed nowadays features: from a dominant-party form of government, Indian democracy moved towards coalition governments, within which the so-called 'regional parties' assumed a significant influence. The 2014 elections determined another alternation in Indian political history, with an overwhelming victory of Narendra Modi's BJP and the rise to government of the National Democratic Alliance, thus confirming the evolution of the parliamentary form of government from a dominant party system to one based on coalition governments[35]. As a further validation of the need for broad legitimacy of the government, in this case the BJP, despite obtaining an absolute majority in the Lok Sabha, preferred a coalition government, fulfilling its commitments to a number of small and medium-sized parties. This choice guaranteed the coalition a majority also

[34] The BJP won only 2 seats in the 1984 elections, while 86 in the 1989 round, to 120 in the '91 elections (when it came very close to being able to form a government).

[35] On the evolution of the BJP party and his leader within the Indian political landscape, see at least N. Metha, *The New BJP: Modi and the Making of the World's Largest Political Party*, London-New York, 2024.

after the 2024 general election[36]. Indian democracy appears to embrace an ever greater 'political federalism', in which the capacities of the two large national parties to elaborate strategies of inclusion of the 'state' realities in their political programmes will become decisive, although the possibility of even long periods of hegemony of a single party, capable of offering a strong charismatic leadership.

This is not the first time Indian democracy is facing a strong charismatic legitimation of the Prime Minister and his/her political party, but there had been evidences of the strong attitude of the political system in avoiding chronic backlashes towards degenerations of the democratic system. The role of India within the BRICS seems to nurture a trend toward a strong executive, but the basic features of the constitution and the instruments it provides for safeguarding democracy offered evidences of the successful implementation of pragmatism, flexibility and hybridisation in order to cope with cultural diversity and authoritarian threats.

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Abstract: The essay explores the complexities of India's democratic trajectory amid its rapid economic transformation and diverse socio-cultural background. Examining the Indian experience as a prominent democratic model within the BRICS, the analysis highlights India's unique constitutional framework, which has successfully maintained a balance between democratic ideals and the socio-economic realities of a multi-ethnic society. It underscores the significant role of the Indian Constitution (often viewed through a Western lens as a merely post-colonial artifact), deserving recognition as a pioneering document that harmonises democratic governance with a robust social orientation. Key aspects of India's constitutionalism, characterised by pragmatism, flexibility, and hybridisation, are scrutinised to illustrate how legal frameworks have evolved to address contemporary challenges without compromising foundational principles. The essay introduces the rising power of the Bharatiya Janata Party (BJP) and its implications on the opposition's role, situating this within broader

[36] Available at <https://elections24.eci.gov.in>. Analyses on last Indian elections are quite wide and, for some aspects, critical in terms of evaluating the democratic asset of the country. See J. Chatterjee - G. Dutta, *A systematic literature review to understand the difference between critical factors affecting the national election and state elections in India*, in *Frontiers in Political Science*, 2024; p. 1 ff.; P. Rai - S. Chowdhury, *Indian National Congress: Demagogy, Dynasty, Disunity and Decline*, in *Journal of Asian and African Studies* (*ahead of print*). For a broader understanding of Indian politics: S. Kumar, *Elections in India: A Journey over the Last Seven Decades*, in S. Ganguli - E. Sridharan (eds.), *The Oxford Handbook of Indian Politics*, Oxford, 2024, p. 143 ff.; G. Poddar, *The Politics of Hindutva: Indian Democracy at the Crossroads*, in *Journal of Contemporary Asia*, 2023, p. 342 ff.; L. Mitchell, *Hailing the State: Indian Democracy between Elections*, Durham, 2023; D. Mistree - S. Ganguly - L. Diamond (eds.), *The Troubling State of India's Democracy*, Ann Arbor, 2024.

discussions of political Hinduism and coalition governance in the context of increasing centralisation under Prime Minister Narendra Modi. Furthermore, the contribution acknowledges the resilience of India's democratic structures against potential authoritarian drift.

Keywords: Indian Constitution - South Asia - BRICS - Democracy - Comparative Public Law.

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Rivista di Diritti Comparati

Disruptive (party) politics and the constitutional environmental mandate: The case of South African municipalities*

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1. *Introduction and methodology*

The history of South African local government is amply discussed in literature[1]. Before 1994, South Africa was governed through apartheid, a system that essentially legalised depriving most people access to much-needed resources, including cultivatable land, water, and sanitation services[2]. In terms of its governing structures, power was vested in national and provincial governments, and municipalities were considered "administrative wings" of the national and provincial governments[3]. This meant that municipalities had little to no powers and functions, including the right to govern the environment[4]. The environment was governed at a national level in a somewhat uncoordinated and reactive manner. Kidd states, for instance, that although the national government enacted a plethora of legislation on environmental conservation, this was incidental to their primary objective, which was to protect natural resources for the use and enjoyment of the privileged people[5].

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[1] See article A par. 1 of the White Paper on Local Government (9 March 1998); L. Kaywood, *Exploring the History and Development of the Local Government System in South Africa*, in *African Journal of Public Affairs*, 2021, p. 43 ff.

[2] O. Fuo, *Local Government's Role in the Pursuit of the Transformative Constitutional Mandate of Social Justice in South Africa*, PhD-dissertation North-West University, 2014, p. 78.

[3] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at par. 53.

[4] L. Kaywood, *Exploring the History and Development of the Local Government System in South Africa*, cit., p. 43 ff.

[5] M. Kidd, *Environmental Law*, 2nd ed., Cape Town, 2011, p. 12.

The Constitution of the Republic of South Africa, 1996 (the Constitution) has firstly transformed governance in South Africa by decentralising some powers and functions from the federal government to the subnational government, including the powers of local government in relation to environmental governance[6]. Secondly, the Constitution has secured political representation by placing politically elected persons as councillors and the highest decision-makers in municipalities. At the core of this restructuring was the need to create non-racial municipal institutions tasked with integrating previously racially and economically divided societies, among other things[7]. Local government's constitutional environmental mandate is designed to firstly protect the environment for its sake and secondly, safeguard the right of people to an environment that is good for their health and well-being.

Firstly, every organ of the state has a constitutional mandate to ensure that the environment is not harmful to the health or well-being of everyone and; to protect the environment for the benefit of current and future generations by taking reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development[8]. This makes local government a critical role player in the realisation of the constitutional environmental right. Secondly, municipalities have a right to govern, on their own initiative, local government affairs of their community[9]. Thirdly, a municipality's legislative and executive authority is vested in its Municipal Council, which consists of electorally elected members of political parties[10]. As a result, politics has permeated into the governing structures of a municipality and impacts decision-making on environmental governance.

While politics is generally an indispensable feature of South Africa's constitutional democracy[11], the actions of political party parties or their leaders can disrupt the environmental governance efforts of a municipality. These disruptions are described as "oppressive politics". That is, using what can be seen as "political

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[6] The transformation of governance systems in South Africa to constitutional supremacy can be found in various literature on "transformative constitutionalism". This article does not discuss transformative constitutionalism any further. See further K. Klare, *Legal Culture and Transformative Constitutionalism*, in *South African Journal of Human Rights*, 1998 p. 146 ff.; P. Langa *Transformative Constitutionalism*, in *Stellenbosch Law Review*, 2006, p. 351 ff.; O. Fuo, *The Transformative Potential of the Constitutional Environmental Right Overlooked*, in *Grootboom in Obiter*, 2013, p. 77 ff.

[7] N. Steytler - J. De Visser, *Local Government Law of South Africa*, 2nd ed., Durban, 2018, p.10.

[8] Article 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[9] Article 151(3) of the Constitution.

[10] Article 151(2) of the Constitution.

[11] Constitutional democracy is a system of governance where the power of political authority is defined and regulated by the constitution. See S. Vohito-Anyanwa, *Promoting Constitutional Democracy: Regulating Political Parties in the Central African Republic and Senegal*, in *Potchefstroom Electronic Law Journal*, 2020, p. 3 ff.

tactics"[12] to oppose or hinder environmental governance efforts. Oppressive politics speaks to the various political parties opposing views on how to govern a municipality and includes actions or acts of sabotage within a municipal council. Some of these politics which will be discussed in this article include differences in ideological beliefs in the case of coalition governments, the undue influence of national and provincial structures of a party in matters of a municipal council, and the self-enrichment tendencies of some councillors, amongst other things.

The assumption is that, if left unchecked, these political tactics within a municipality will collapse municipal efforts to govern the environment effectively. This summary is divided into four sections mainly aimed at depicting how politics can disrupt an organ of state governed by the Constitution and legislative framework. The aim is not to label politics as a disruptive feature of local government. The argument is that unless political office bearers are inclined to govern the environment effectively, their powers can be disruptive to the environment and their communities.

2. *The Status of Local Government in South Africa*

In terms of article 151(1) of the *Constitution*, the local sphere of government consists of municipalities, which must be established for the whole territory of the Republic. Political office bearers are the highest authority in municipalities. Secondly, a municipality's executive and legislative authority is vested in its Municipal Council. This council comprises councillors who are members of political parties, duly elected to office to represent their local communities. This council makes decisions concerning the exercise of all powers and the performance of all functions of a municipality. Thirdly, as the highest authority in municipalities, Municipal Councils have a right to govern, on their own initiative, the local government matters of their municipalities, subject to national and provincial legislation. Lastly, national and provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Municipal Councils are expected to (a) provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment and (e) to

[12] Political tactics can be loosely defined as involving formal and informal strategies and behaviours in order to advance personal agendas or to gain an advantage. See GeeksforGeeks, *Organisational Politics: Political Strategies and Tactics*, available at <https://www.geeksforgeeks.org/organisational-politics-political-strategies-and-tactics/,2023> (accessed 20 May 2024).

encourage the involvement of communities and community organisations in matters of local government[13]. In fulfilling their mandate, councils work hand-in-hand with the administration of a municipality. The administration consists of officials who are employed by the municipal council. The function of the administration is to deliver services to local communities and execute policies made by the municipal council.

Since the municipal council employs the administration, the structure can become vulnerable to undue influence from members of the municipal council[14]. In an ideal municipality, municipal administrations are governed by the basic values and principles of public administration, which include maintaining and promoting a high standard of professional ethics, promoting efficient, economical and effective use of resources and providing services impartially, fairly, equitably and without bias[15].

In addition to the Constitution, there are various national laws that determine the powers, functions and duties of municipal councils. These laws are broadly categorised as local government legislative framework. The framework legislation guides the conduct of councillors. For instance, the Code of Conduct for Councillors sets out that councillors must perform the functions of office in good faith, honestly and in a transparent manner[16]. Councillors are expected to act in the municipality's best interest and in such a manner that the credibility and integrity of the municipality are not compromised[17]. Opposition parties must especially tolerate one another in council meetings; as such, the Code of Conduct also sets out that councillors are expected to maintain good and orderly behaviour during meetings[18]. Councillors are not expected to act unruly, assault or threaten a municipal official or any other person present in a council sitting[19]. This is important given that a political tactic within municipal councils

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[13] Article 152 of the Constitution.

[14] Political interferences in administrative matters and strained relations between municipal officials and political office bearers are everyday occurrences in municipalities. See J. De Visser, *The Political-administrative interface in South African municipalities: Assessing the quality of local democracies*, in *Commonwealth Journal of Local Governance,* 2010, p. 86 ff and S. Mngomezulu, *Political Interference in the Administration of Service Delivery in UMLALAZI Local Municipality of KwaZulu-Natal, South Africa*, in *Journal of Economics and Behavioral Studies*, 2020, p. 39 ff.

[15] See article 195 of the Constitution.

[16] Article 3(1)(a) Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act).

[17] Article 3 (1)(b) of the Municipal Systems Act.

[18] Article 3(1)(c) of the Municipal Systems Act.

[19] Article 3(2) of the Municipal Systems Act.

may come from the sudden upsurge in political discord and municipal infightings across the Country[20].

3. *The Constitutional Environmental Mandate of Local Government*

The Constitution is the cornerstone of the Country's environmental law framework from which the relevant duties, powers and responsibilities of local government and other spheres flow[21]. This means that various aspects or provisions of the Constitution are important for environmental governance in the local government sphere.

The first provision is article 24 of the Constitution, which guarantees everyone the right to an environment that is not harmful to their health or well-being[22]. A joint reading of article 24(a), read with 7(2) and 8(1) of the Constitution, creates an obligation on municipalities to respect, protect, promote, and fulfil the constitutional right. Although not expressly duplicated, article 24(a) is reiterated in article 152(1)(d) of the Constitution, which arguably emphasises the local government's role in realising constitutional environmental rights.

Article 24(b) of the Constitution creates a mandate that local government must protect the environment for "the environment's sake". This anthropocentric mandate is aimed at allowing current and future generations to benefit from the environment. Municipal Councils must use their legislative and executive powers to regulate human activities in and around their jurisdictions in order to protect the environment. Protection of the environment means that municipalities should (i) prevent pollution and ecological degradation, (ii) promote conservation, and (iii) secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development[23].

The constitutional environmental mandate of local government further extends to Schedules 4B and 5B of the Constitution. These schedules set out the functional

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[20] See Mail and Guardian, *Ramaphosa calls for end in infighting in local government,* available at <https://mg.co.za/politics/2022-09-28-ramaphosa-calls-for-end-to-infighting-in-local-governments/>, 2007(accessed 20 May 2023).

[21] Some of the relevant legislation includes the National Environmental Management Act 107 of 1998 (NEMA), the National Water Act 36 of 1998 and the Water Services Act 108 of 1997.

[22] Article 24(a) of the Constitution.

[23] Article 24 (b) of the Constitution.

areas where local government has a right to administer bylaws for their effective functioning[24]. The legislative functions relevant to environmental governance for municipalities include air pollution, municipal health services, stormwater management systems in built-up areas, water and sanitation services limited to portable water supply systems and domestic water waste and sewage disposal systems, amongst other functions. Local government also has the right to legislate on matters that are incidental to their environmental governance functions if doing so will ensure the effective administration of the environment[25].

4. *Oppressive Politics Stemming from Political Tactics*

4.1. *Lack of political responsiveness to matters of the environment*

The first step in understanding the role of local government with regard to the environment is for municipal councillors to embrace article 24 of the Constitution and its features as imposing binding legal duties on all municipal structures. The role of municipal councils to realise the constitutional environmental right was recently reiterated in *Trustees for the time being of Groundwork Trust v Minister of Environmental Affairs*[26]. In this case, the applicant sought declaratory and mandatory relief concerning the extent of government's obligation regarding air pollution in the Highveld Priority Areas[27]. The applicant's cause of action was that the state had violated article 24(a) of the Constitution in so far as the provision affords everyone the right to an environment that is not harmful to their health and well-being[28]. The applicant argued that not all air pollution violates the right to a healthy environment; however, if air quality does not meet the National Ambient Air Quality Standard, it is *prima facie* a violation of the

[24] Article 156 (1)(a) of the Constitution.

[25] Article 156 (5) of the Constitution.

[26] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) 2022 ZAGPPHC 208.

[27] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 1. In terms of article 18(1) of the *National Environmental Management Act: Air Quality Act* 39 of 2004, the Minister or MEC may, by notice in the Gazette, declare an area as a priority area if the Minister or MEC reasonably believes that ambient air quality standards are being, or may be, exceeded in the area, or (a) any other situation exists which is causing, or may cause, a significant negative impact on air quality in the area; and (b) the area requires specific air quality management action to rectify the situation.

[28] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 8.

right[29]. The area in question covers some of the most heavily polluted towns in the country, including Middelburg, Emalahleni, Secunda, Standerton, Benoni, and Boksburg. The area has twelve of Eskom's[30] coal-fired power stations and Sasol's[31] coal-to-liquid fuels refinery. Therefore, due to its concentration of industrial pollution sources, residents experience poor and dangerous air quality[32].

The Court held that the poor air quality in the Highveld Priority Area is in breach of article 24(a) of the Constitution and that this right, like the right to basic education, is immediately realisable[33].

The immediate realisation of article 24(a) regarding the air quality in Highveld rests with local government. Collis J explained in this regard that the realisable nature of article 24(a) of the Constitution is confirmed in article 4 of the *Municipal Systems Act* where local government exercises legislative and executive authority to promote a safe and healthy environment and the duty to promote a safe and healthy environment[34].

The pronouncement by the Court that article 24(a) of the Constitution is immediately realisable may very well lead to academic and judicial scrutiny as some scholars hold the view that the constitutional environmental right is not a socio-economic right[35]. Kotzé has pointed out that article 24 reflects characteristics of both a classical fundamental right and a socio-economic right[36]. According to Werner and De Waal, this judgement should be lauded because it clarifies the state's duty regarding

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[29] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 10.

[30] Eskom is a state-owned company and South Africa's primary electricity supplier, generating approximately 90% of the electricity used in South Africa and approximately 30% of the electricity generated on the African continent. See National Government of South Africa, *Eskom Holdings SOC Ltd*, year unknown, available at <https://bit.ly/3IHn6YY> (accessed 22 May 2024).

[31] A global chemical and energy company listed on the Johannesburg Stock Exchange (JSE) and the New York Stock. See Sasol *Who are we*, 2022, available at <https://www.sasol.com/who-we-are/about-us> (accessed 22 May 2024).

[32] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 17.

[33] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 163.

[34] See article 4(2)(i) and (ii) of the *Municipal Systems Act*. Also see *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* at par. 117.

[35] See generally M. Trilsch *What's the use of socio-economic rights in a constitution? – Taking a look at the South African experience*, in *Verfassung und Recht in Übersee*, 2009, p. 552 ff.; O. Fuo, *The Transformative Potential of the Constitutional Environmental Right Overlooked*, cit., p. 91; L. Feris, *Constitutional Environmental Rights: An Under-Utilised Resource*, in *South African Journal of Human Rights,* 2008, p. 29 ff.

[36] L. Kotzé, *The application of just administrative action in the South African environmental governance sphere: An analysis of some contemporary thoughts and recent jurisprudence*, in *Potchefstroom Electronic Law Journal*, 2004 p. 60 ff.

article 24(a) and puts pressure on government to combat poor air quality[37]. The case illustrates how municipal political office bearers' lack of an immediate and meaningful response to matters of environmental governance can lead to the violation of the constitutional environmental right and disregard for the environment.

4.2. *Varied ideological beliefs in coalition governments*

Municipal infighting or opposition politics is fast becoming a norm for many South African municipalities, and although debates and fall-offs might be a regular occurrence in municipal council meetings, these might look different in the case of a coalition or hung council[38]. Coalition governments in local government are formed when different political parties choose to cooperate in the administration and regulation of a municipality, where there is no outright winner in local elections[39]. Where no single political party gains a clear majority, it is standard practice for competing parties to negotiate to work together[40]. Coalition or hung councils have made debates or squabbles less about how to better govern their municipalities and more about pursuing political parties to maintain dominance and retain or regain power over other political parties represented in municipal councils[41].

Coalition governments exercise executive and legislative authority over their municipalities[42]. This means that it requires close cooperation between coalition partners to ensure that the council's responsibilities are carried out effectively. However, the history of coalition governments in South Africa's local government

[37] M. Werner – L. De Waal, "The Deadly Air Case: How the High Court confirmed the right to a healthy environment" (2022) a <https://www.cliffedekkerhofmeyr.com/> (accessed 22 May 2024).

[38] K. L.Nelson - G.T. Gabris - T.J. Davis, *What Makes Municipal Councils Effective? An Empirical Analysis of How Council Members Perceive Their Group Interactions and Processes*, in *State of Local Government Review*, 2011 p. 4 ff.; D. Bronstein - D. Glaser, *Interventions in South African Municipalities: Dangers and Remedies*, in *The South African Law Journal,* 2023, p. 117 ff.

[39] W. Oyugi, *Coalition Politics and Coalition Governments in Africa*, in *Journal of Contemporary African Studies*, 2006, p. 53 ff.; D. Kadima, An *Introduction to the Politics of Party Alliances and Coalitions in Socially-divided Africa*, in *Journal of African Elections*, 2014, p. 2 ff. Also see generally P. De Vos, *The constitutional-legal dimensions of coalition politics and government in South Africa*, in S. Booysen (ed), *Marriages of Inconvenience: The Politics of Coalitions in South Africa,* Johannesburg, 2021, p. 235 ff.

[40] Britannica, "The context of international relations" (year unknown), available at <Britannica.com/topic/ideology-society/The-context-of-international-relations> (accessed 21 May 2024).

[41] S. Booysen, *Multiparty democracy is in trouble in South Africa – collapsing coalitions are a sure sign*, in *The Conversation*, 27.10.2022, available at <https://theconversation.com/multiparty-democracy-is-in-trouble-in-south-africa-collapsing-coalitions-are-a-sure-sign-192966>(accessed 21 May 2024).

[42] D. Kadima, *An Introduction to the Politics of Party Alliances and Coalitions in Socially-divided Africa*, in *Journal of African Elections*, 2014, p. 2 ff.

shows that such governments are unstable, and almost all get terminated before the end of a council term.

A prime example is the instability in the City of Johannesburg municipal council in 2022. In this case, Mpho Phalatse was ousted as the executive mayor of the City of Johannesburg in an extraordinary sitting of the council[43]. The events that preceded this seating included coalition partners betraying each other. The Speaker of the council stated in this regard that the downfall of the DA-led coalition was due to "a concerted campaign of subterfuge, which ultimately backfired"[44]. Phalatse was later reinstated through a court order. The Johannesburg High Court declared the extraordinary sitting and motion of no confidence against the executive mayor unlawful, unconstitutional, and invalid[45].

Different political ideologies and interests within a municipal council affect the daily operations of a municipal council, especially in so far as it relates to the development of municipal policies relating to environmental governance. This often is the case with coalition governments. Mawere and Matoane argue, for instance, that if political parties' policy agendas and governing principles are opposed, they could hamper service delivery[46]. Therefore, it is always necessary for coalition partners to understand each other's policy interests and ascertain if compromises may be reached.

4.3. *Undue influence of national and provincial government or structures of political parties*

While there is a constitutional and legislative framework that outlines the powers and functions of municipal councils, politics within and among political parties often find a way to seep into the governance of municipalities. It seems to have become the norm for national and provincial structures of a party to interfere in matters of municipal councils, sometimes by trying to pressure national and provincial structures of government to place certain municipalities under administration in terms of article 139 of the Constitution[47]. It is even more unpleasant when provincial or national

[43] *Phalatse and Another v Speaker of the City of Johannesburg and Others* 2022/26790 at par. 8.

[44] Ivi, at par. 4.

[45] Ivi*,* at par. 105. Mayor Mpho Phalatse has been ousted again as the Mayor of the City of Johannesburg following a motion of no confidence on the 26th of January 2023. See Sowetan Live, *JUST IN: Mpho Phalatse ousted as Joburg mayor again,* in *Sowetan Live*, 26 01 2023, <https://www.sowetanlive.co.za/news/south-africa/2023-01-26-just-in-mpho-phalatse-ousted-as-joburg-mayor-again/> (accessed 14 May 2024).

[46] J. Mawewe - T. Matoane, *Coalition Governance and Service Delivery in South Africa: A Case of Tshwane, Johannesburg and Ekurhuleni Metropolitan Municipality*, in *Journal of Public Administration*, 2022, p. 272 ff.

[47] See Parliamentary Monitoring Group (PMG) *Workshop on Section 139 Interventions in Municipalities and general observations*, 2019, available at <pmg.org.za/committee-meeting/29249/ >

government apply 'double standards' in enforcing article 139 intervention on a municipality led by a different political party[48]. It is common knowledge in democratic states that elected government powers should prevail over non-elected ones. However, the actions of intervention by the provincial executive are to ensure that interruption of the delivery of services is kept to a minimum or even avoided, thus maintaining the minimum standards of service rendering[49]. An unjust enforcement of article 139 of the Constitution not only blurs political and state lines, but it threatens constitutional legality and the rule of law[50]. Moreover, a biased and unjust use of article 139 may threaten the stability of a municipality[51]. It unjustly restricts the powers and functions of a democratically elected structure of a municipality, thus hindering the ability of the

(accessed 14 May 2024); M. Makoti - O. Odeku, *Intervention into Municipal Affairs in South Africa and Its Impact on Municipal Basic Services*, in *African Journal of Public Affairs*, 2018, p. 72 ff.; M. Mathenjwa, *Contemporary trends in provincial government supervision of local government in South Africa*, in *Law Democracy and Development,* 2014, p. 178 ff. Also see *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another* v *Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* 2021 (12) BCLR 1406 (CC) at par. 2, where the DA argued that the dissolution of the ANC-led provincial government was politically motivated. Also see *MEC for the Department of Co-operative Governance and Traditional Affairs v Nkandla Local Municipality and Others* 2007 (3) SA 436 (N), where the MEC in KwaZulu-Natal suspended three members of a hung council from an opposition Party, effectively placing members of his Party as the majority members of the municipal council.

[48] This was the case in UMvoti Local Municipality (an IFP-led municipality) and UMgungundlovu District Municipality (an ANC-led Municipality), where the MEC of (ANC) instituted a legal claim to dismiss an MM from the former municipality for his failure to meet the employment requirements but ignored claims that the MM of the later ANC-led municipality also did not meet the requirements for employment. See *MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa and Others* 2010 (5) SA 494 (SCA) and M. Mathenjwa *Contemporary trends in provincial government supervision of local government in South Africa*, in *Law Democracy and Development,* 2014, p. 189 ff. Also see generally *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* 2022 (1) SA 16 (CC) and *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape and Others* 2020 (3) SA 562 (ECG).

[49] O. Madumo, *An evaluation of the functioning of metropolitan municipal councils in Gauteng, South Africa*, Doctor of Administration Thesis, University of Pretoria, 2017, p. 163.

[50] The rule of law is an evolving constitutional principle enforceable by courts and closely related to the principle of legality, which, at a minimum, requires the legislative and executive in every sphere to exercise power and perform functions if authorised to do so by law and only in a rational manner. De P. Vos - W. Freedman, *Basic Concepts of Constitutional Law*, in Id. (eds), *South African Constitutional Law in Context,* Durban, 2014, p. 38 ff. Also see Kampepe J's discussion on the rule of law for the majority judgement in *Secretary of the Judicial Commission of Inquiry into Allegation of State Capture, Corruption and Fraud in the Public Sector Including Organ of State v Jacob Gedleyihlekisa Zuma* 2021 (9) BCLR 992 (CC) at par. 97.

[51] Parliamentary Monitoring Group (PMG) *Workshop on Section 139 Interventions in Municipalities and general observations*, 2019, available at < pmg.org.za/committee-meeting/29249/ > (accessed 14 May 2024).

municipality to its cardinal function to local communities, namely, to sustainably provide municipal services[52].

4.4. *Political interference in administrative matters*

Political interference[53] in the administration of a municipality is a critical issue affecting how municipal officials carry out their daily functions. Municipal councils work hand-in-hand with the administration of a municipality[54]. However, both structures have different powers, duties and functions, and no one structure should unduly interfere in the day-to-day running of the other[55]. Inappropriate political interference in administrative matters and strained relations between key political and administrative officials are everyday occurrences in municipalities[56]. While legislative and other measures might be put in place to remedy this problem, De Visser correctly states that behavioural change by political office bearers is more important than legislative intervention[57]. This means that the administrative and political leadership and structure surrounding a municipality should be acutely aware of the consequences that inappropriate political leadership and intervention have on the functioning of a municipality and, therefore, on environmental governance[58].

4.5. *Infighting in Municipal Councils*

Fight breakouts are fast becoming a trend in Municipal Council sittings. A recent event was when a council sitting disintegrated into chaos following a call for the Mayor to step down[59]. Another incident was in August 2023, when chaos broke out at the City of Tshwane's council sitting when councillors from a certain political party led a

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[52] See generally M. Makoti - O. Odeku *Intervention into Municipal Affairs in South Africa and its Impact on Municipal Basic Services*, in *African Journal of Public Affairs*, 2018, p. 68 ff.

[53] Interference in the context of this article includes the unsolicited and inappropriate involvement of councillors in the work of municipal officials and *vice versa*.

[54] See par. 2, *supra*.

[55] Schedule 5, article 11 of the *Municipal Structures Act* and Schedule 1, article 11 of the *Municipal Systems Act*.

[56] S. Mngomezulu, cit., p. 39 f.; J. De Visser, cit., 2010, p. 86 ff.

[57] J. De Visser, cit., p. 101 ff.

[58] *Ibid.*

[59] Germiston City News *WATCH: Calls for Ekurhuleni mayor to step down lead to council brawl*, 2024, available at <https://www.citizen.co.za/germiston-city-news/news-headlines/local-news/2024/02/29/calls-for-ekurhuleni-mayor-to-step-down-lead-to-council-brawl/> (accessed 14 May 2024).

protest against Mayor Cillier Brink, vowing that the Mayor would not address the sitting in the wake of the dismissal of 122 municipal workers[60]. Propelled by the conduct of councillors during council sittings, the Minister of Cooperative Governance and Traditional Affairs (Cogta), Thembi Nkadimeng, recently issued regulations on the Code of Conduct for Councillors[61]. According to the regulations, if a councillor's behaviour is unruly, including when such councillor assaults or threatens to assault an official or another councillor or another person present at the council meeting – such councillor must be ordered to leave the meeting immediately[62]. If the councillor fails to obey the order, the chairperson of the council meeting may request a law enforcement official employed by the municipality to remove the councillor from the meeting[63].

The regulations further state that where a councillor is known to or has been seen to have orchestrated with a group of members of the public or municipal staff to engage in violent protests or labour unrest, similar to those described in the incident at the City of Tshwane, against the municipality – the council must discipline such a councillor, and criminal charges must be laid with the South African Police Services (SAPS). Any loss or damage to infrastructure suffered by the municipality as a result of such protest must be recovered from the councillor[64].

While the aim of the regulations is to deter councillors from having physical altercations in municipal council sittings, political killings remain unresolved. Since July 2018, a total of 321 cases linked to politics have been reported and investigated in Kwa-Zulu Natal (KZN) predominately. These cases include 155 cases of murder, 51 cases of attempted murder, 77 for intimidation and 12 cases of conspiracy to commit murder. Police Minister Bheki Cele also confirmed that the majority of political killings were on councillors of municipalities[65]. Unsurprisingly, the majority of the cases occurred in eThekwini Metropolitan Municipality as it is the largest municipality in KZN.

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[60] IOL "EFF causes chaos at Tshwane council sitting due to dispute over fired municipal workers" (2023) <https://bitly.ws/3hMgN> (accessed 14 May 2024).

[61] Government Gazzette 48786 in Government Notice 3538 of 14 June 2023 (Code of Conduct for Councillors Regulations).

[62] Schedule 1- article 1(2)(a) of the Government Gazzette 48786 in Government Notice 3538 of 14 June 2023.

[63] Schedule 1 – article 1(2) (b) of the Government Gazzette 48786 in Government Notice 3538 of 14 June 2023.

[64] Schedule 1 – article 1(3)(a) and (b) of the Government Gazzette 48786 in Government Notice 3538 of 14 June 2023.

[65] South African Government News Agency *Cele briefs on KZN political killings,* 2023, available at <https://www.sanews.gov.za/> (accessed 21 May 2024).

5. *Conclusion and Remarks*

The governing systems in South Africa have always determined how governments react to or deal with environmental issues. While the environment was apolitical to the apartheid government, it became a focus of the constitutional democratic government post-1994 when it was crystallised as a constitutional environmental right. With this, it becomes quite clear that politics was meant to be an indispensable feature of the Constitution. This would essentially make the Constitution a political tool.

However, it could not have been envisaged that some political activities or actions could disrupt environmental governance. Should South Africa reconsider the role of politics in local government? Should local government only focus on providing municipal services to the exclusion of socio-political development? More drastically, should local government be privatised to exclude political office bearers and with that politics? These are some of the questions that could be asked at the height of environmental turmoil.

This article does not aim to obliterate the role of political office-bearers in local governance. However, it demonstrates how disruptive politics can be in the functions of a municipal council. It has also been seen from this discussion that courts deem municipal councils responsible for the current state of affairs in municipalities. Literature has also alluded to the expectations of political leadership in local government regarding the environment. For this reason, the actions, and behaviours of some of these key decision-makers should be placed under scrutiny, and perhaps a greater sanction is warranted where blatant political tactics are used to oppress governance within municipalities.

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Abstract: Politics in South Africa is complex, especially in the local government sphere. Such politics have permeated the governing structures of municipalities and often make sound decision-making incredibly difficult. It becomes even more difficult when politics affect local communities' environmental health and well-being. The Constitution of the Republic of South Africa, 1996, mandates local government to protect the environment for the benefit of current and future generations. This sphere

must use legislative and other measures to prevent pollution and ecological degradation and promote conservation, amongst other things. This duty is reiterated in section 152(1)(d) of the Constitution for municipalities. While the Constitution, coupled with local government and environmental law legislation, is quite clear on the duty of municipal councils in environmental governance, the political landscape in the Country does present some challenges, including the unstable governance of coalitions, the influence of national and provincial government in municipal matters, unsolicited intrusion of national structures of political parties in municipal governance matters and the ever-increasing infighting within municipal council meetings. This is a summary of an article submitted for publication in a South African-based legal journal. Its contribution to the Special Issue on "The Political and Legal Status of Opposition in Europe, the Western Balkans, and Beyond" is to describe political trends that compromise environmental governance in South African municipalities.

Keywords: Local government - constitutional environmental right -municipal councils - party politics - South Africa.

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REGOLAMENTO SULL'INVIO E LA VALUTAZIONE SCIENTIFICA DEI CONTRIBUTI DESTINATI ALLA "RIVISTA DI DIRITTI COMPARATI"

1. La *Rivista di diritti comparati* pubblica, con cadenza quadrimestrale, articoli sottoposti a procedura di valutazione scientifica (*peer review*), al fine di verificarne la compatibilità con i requisiti di scientificità e di trasparenza, nel rispetto del pluralismo metodologico.
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3. Gli articoli devono essere inediti e non destinati ad altra sede di pubblicazione. Non costituisce ostacolo all'accettazione la precedente pubblicazione del contributo in *Diritti comparati – Working Papers*.
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6. All'esito positivo del vaglio preliminare, gli articoli sono inviati a due revisori selezionati dall'elenco di cui al punto 4. I contributi vengono valutati nel rispetto del meccanismo *double blind*. I revisori redigono una scheda di commento dell'articolo, evidenziandone pregi e difetti riferiti unicamente alla qualità scientifica e formulando proposte di revisione o consigliando di non pubblicare l'articolo. In caso di radicale difformità di giudizio dei due valutatori la Direzione procede ad una valutazione comparativa e assume le opportune determinazioni.
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LINEE GUIDA ETICHE

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