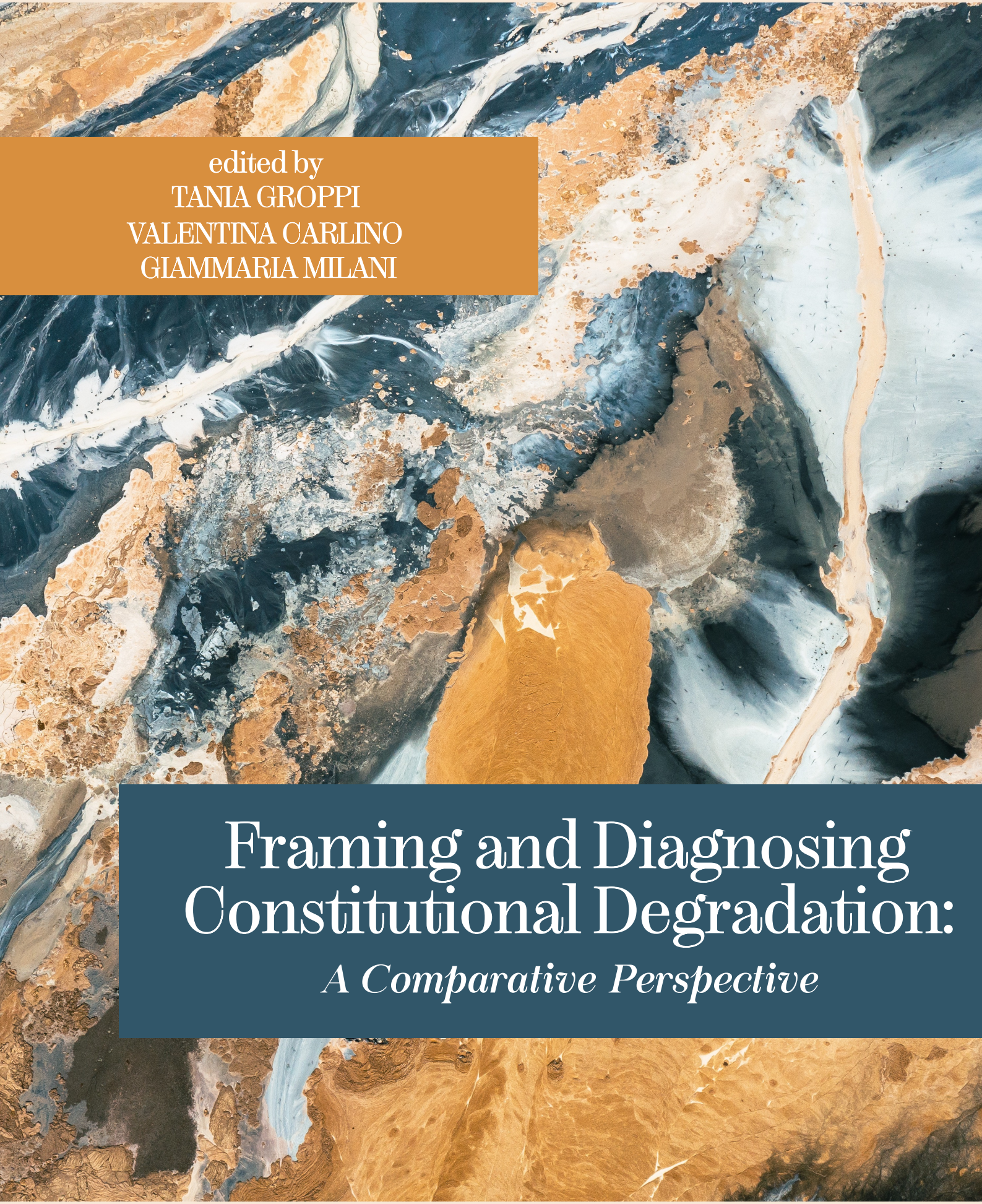
COLLANA DI STUDI
9



edited by
TANIA GROPPI
VALENTINA CARLINO
GIAMMARIA MILANI

Framing and Diagnosing Constitutional Degradation:

A Comparative Perspective

2022
CONSULTA ONLINE

Framing and Diagnosing Constitutional Degradation: A Comparative Perspective

Edited by Tania Groppi, Valentina Carlino and Giammaria Milani

Collana di studi di Consulta OnLine
9

This book collects the proceedings of the workshop "**Framing and Diagnosing Constitutional Degradation**", held at Certosa di Pontignano (Siena, Italy) on June 21st and 22nd, 2021.

Both the workshop and this book are funded within the PRIN 2017 project "**Framing and Diagnosing Constitutional Degradation**" (Principal Investigator Professor Tania Groppi).

Agosto 2022
ISBN: 978-88-945618-8-3
Editore Consulta OnLine - CF 90078670107
Via Balbi 22 - 16126 Genova
info@giurcost.org

TABLE OF CONTENTS

Ylenia Maria Citino*

Comparing Constitutional Provisions Regarding Parliamentary Opposition. An Introductory Note**

ABSTRACT: ***The current deterioration of the global liberal democratic order is unveiling the dysfunctionalities and unpreparedness of the representative institutions towards new challenges, like the spread of populism or the pandemic. Parliamentary opposition is in agony along with the marginalization of parliaments and it is not infrequent that the antagonism develops out of the institutions, in illiberal ways. In such a context, can constitutional provisions on the opposition protect and ensure a safe environment for a well-functioning democracy? This essay is an introductory note that compares all the Constitutions containing Articles related specifically to the opposition, to understand if nonwestern democracies can provide an inverted Constitutional borrowing to older democracies in crisis.***

1. *Opposition as a tool for a well-functioning democracy*

In the last few decades, the public opinion was confronted with the evidence that democracy is more and more on shaky ground[1]: with similar wording ("degradation", "corrosion", "disintegration", "erosion", "failure", "pathology", "decline" of democracy), scholars from diverse backgrounds agree on the necessity to use constitutionalism as a "battering ram" to propel against the most relevant disruptions of democracy and the rule of law[2].

Despite the widespread commitment to constitutional reforms by several countries[3], older democracies are affected by the proclivity of Governments to acquire more power in the legislative process, thus contributing to the marginalization of Parliaments. In general, the "constitutional degradation" of the liberal democratic order unveils the dysfunctionalities and unpreparedness of the representative institutions in modern times, showing that the traditional deliberative process is a hinder from passing laws in a timely manner and that the

* **Post-Doctoral Research Fellow in Constitutional Law, Luiss Guido Carli University.**

** **This work has been subjected to blind peer review. An extended version of this article will be published in *Percorsi Costituzionali*, 1/2021.**

[1] As stated by Freedom House, *Freedom in the World 2021. Democracy under siege*, Washington, 2021, countries with aggregate score declines have outnumbered countries that improved their democratic level, thus incrementing the gap. Following Schumpeter's procedural definition of democracy, this paper uses the term *democracy* to refer to any institutional arrangement that allows the acquisition of power by means of a competitive and fair election. See J.-A. SCHUMPETER, *Capitalism, Socialism and Democracy*, New York and London, 1947, 269.

[2] See L. MEZZETTI, *Corrosione e declino della democrazia*, in *Diritto pubblico comparato ed europeo*, 2019, special issue, 421 and the references in the first eleven footnotes.

[3] See, for instance, FREEDOM HOUSE, *Nations in Transit* – 2021. *The Anti-Democratic Turn*, Washington. The Report concerns progress and setbacks in democracy in 29 countries from Central Europe to Central Asia.

scrutiny of government is often weak. As it was dramatically unfolded during the pandemics, the opposition in many Western European democracies is currently under "harassment"[4].

However, democracy is rooted in sovereign parliaments, as they are designed to serve as a "common house" where their members are enabled and qualified to express their views, reflecting the interests of all the different components of society. Genuine pluralism and freedom of opinion are two of the main cornerstones of a well-functioning democracy. Moreover, a healthy opposition measures the health of democracy: as Sartori underlined in the late Sixties, opposition is a "safety valve" to give voice to minoritarian groups of society[5]. Consequently, laying down a status for the opposition can be useful to enable it to play a constructive role in the conduct of the government and avoid that changes in majorities or in regime can thwart political pluralism and accountability[6].

The idea of a responsible opposition contrasts to the anti-system side of it, resulting in various flanks of theorization: the nature of the opposition changes with respect to the target towards which it is directed, be it the government, governmental policies, the political elite or the political regime[7].

Distinguishing a responsible opposition from sterile criticism is even more important today, when the surge in rivalry politics, determined by the rise of populism and nationalism worldwide, is fostering new cleavages in society and spreading illiberal practices amid established political elites and institutions[8]. Brexit, as well as Trump and Bolsonaro's presidencies are relevant to this regard, and it is no surprise that backlashes amplified[9]. Hungary and Poland's ruling parties are openly discrediting the integrity of their institutions. The demands for change are sometimes powerful, violent and chaotic, thus shaping anti-system oppositions. If these phenomena are disregarded, they may lead, at the end of the day, to political and constitutional disintegration, even in well-established democracies.

Understanding and regulating parliamentary opposition's status in both the legislative and scrutiny processes is key not only to the consolidation of young regimes but also to tackle the erosion of liberal standards in older democracies. The lack in a performing set of rules encouraging a constructive political competition and enacting minority rights can eventually affect the quality of the political debate. However, is it true the opposite statement? Can the institutionalization of opposition rights preserve the degradation of the political debate? The answer depends on the way the opposition is designed at constitutional level. This core

[4] N. BERMEO, *On Democratic Backsliding*, in *Journal of Democracy*, 2016, 13.

[5] G. SARTORI, *Opposition and Control. Problems and Prospects*, in *Government and Opposition*, 1/1966, 149-154.

[6] Competition between political parties is a structural inextricable component of democracy. See, for example, the "two-turnover test" as a way of measuring the democratic consolidation of a country, as laid down by S.P. HUNTINGTON, *Democracy's Third Wave*, in *Journal of Democracy*, 2/1991, 12-34 and further expounded in *The Third Wave: Democratization in the Late Twentieth Century*, London, 266.

[7] N. BRACK-S. WEINBLUM, *'Political opposition': Towards a Renewed Research Agenda*, in *Interdisciplinary Political Studies*, 1/2011, 69-79.

[8] Built from classic Rokkan's theory, see at least the recent works from G. BARBIERI, *Populism, cleavages and democracy*, in *Partecipazione e conflitto*, 11/2018, 202-224 and G. MARTINICO, *The Greatest Challenge. How Populism erodes European Constitutional Democracies*, in T. MARGUERY-S. PLATON-H. VAN EIJKEN, (eds.), *The European Elections, 40 years later. Assessement, Issues and Prospects*, Bruxelles, 2020, 105-118.

[9] See, for instance, the consequences on economic insecurity and health policies: E. SPEED-R. MANNION, *The Rise of Post-truth Populism in Pluralist Liberal Democracies: Challenges for Health Policy*, in *International journal of health policy and management*, 6(5)/2017, 249-251.

concept is already part of literature insisting that conceptualizing a notion of 'opposition' can be useful, for instance, to explain the nature of Euroscepticism in political competition[10].

Besides in Italy the effort to outline an official status for the opposition failed multiple times[11], raising not only contingent political issues but also weighty theoretical problems: a) the necessity to clarify who is the beneficiary of specific rights, who can be officially recognized as "parliamentary opposition"; b) what powers shall be allocated to the subjects thus identified; c) how to ensure that the allocation of specific powers to the opposition enables sufficient stability to Governments, political legitimacy and the preservation of the constitutional institutions from illiberal 'nuisances'; d) the source that shall regulate parliamentary opposition, be it at constitutional level or at secondary level.

In this short introductory essay, after explaining the methodology, I will analyze the presence and absence of a status for the opposition starting from civil law European countries and drawing attention to some exceptions. I will then try to make a catalogue of definitions of the institutionalized opposition with special focus on common law regimes. Then, I will shed light on the definitions extracted by other group of countries in order to verify if any "constitutional borrowing" from these regimes is possible in view of addressing new or emerging threats to democracy.

2. *Countries providing a constitutional status for the opposition*

Making a comparison on the constitutional protection of the status of the opposition is a complex topic. The most obvious consideration is that we have to deal with a huge mass of legal and political data. Majority-minority relationship is a manifold subject, where law, history, as well as political and social studies are tightly embroidered[12]. This is why it is

[10] See B. CARLOTTI, *Patterns of Opposition in the European Parliament. Opposing Europe from the Inside?*, Palgrave MacMillan, 2021.

[11] See, however the last developments following the reform of the internal rules of the Italian Senate, in M. MANETTI, *Regolamenti di Camera e Senato e la trasformazione dell'assetto politico-parlamentare*, in *Federalismi.it*, 1/2018, 7 ff. Some contributions to the Italian debate on the status of the opposition can be found in G. TARLI BARBIERI, *Lo "statuto" dell'opposizione*, in P. CARETTI (ed.), *La riforma della Costituzione nel progetto della bicamerale*, Padova, CEDAM, 1998; G. DE CESARE, *Maggioranza e opposizione nell'ultimo progetto della Commissione bicamerale*, in *Nuovi Studi Politici*, 2/1999, 55 ff..; M.E. GENNUSA, *Lo "statuto" dell'opposizione*, in *Le istituzioni del federalismo*, 1/2001, 249 ff.; A. BURATTI, *Governo, maggioranza e opposizione nel procedimento legislativo e nella programmazione dei lavori parlamentari*, in *Diritto e Società*, 2/2002, 289 ff..; C. CHIMENTI, *L'opposizione parlamentare nella nostra democrazia maggioritaria*, in *Quaderni costituzionali*, 4/2002, pp. 741-748; S. SICARDI, *Maggioranza e opposizione nella lunga ed accidentata transizione italiana*, in *AIC - Il Governo : atti del XVI Convegno annuale, Palermo, 8-9-10 novembre 2001*, Padova, CEDAM, 2002, 109 ff..; A. MORRONE, *Governo, opposizione, democrazia maggioritaria*, in *Il Mulino*, 4/2003, 637-648; F. Rigano, *Per lo statuto dell'opposizione*, in *Il Politico*, 1/2004, 165-171; E. GIANFRANCESCO, N. LUPO (eds.), *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, Roma, Luiss University Press, 2007; A. ANTONUZZO, *Lo «statuto delle opposizioni» nella riforma costituzionale e le sue prospettive di attuazione, tra riforme dei regolamenti parlamentari e nuovi assetti istituzionali*, in *Amministrazione In Cammino*, 2016, 1-56; S. CURRERI, *Lo stato dell'opposizione nelle principali democrazie europee*, in *Rivista AIC*, 3/2016, 1-70; G. CAVAGGION, *Quali prospettive per lo statuto delle opposizioni? Riflessioni a partire dall'esperienza degli ordinamenti regionali*, in *Rivista AIC*, 2/2017, 30 ff.; M. CAVINO, *La necessità formale di uno statuto dell'opposizione. Nota a ord. C. Cost. 8 febbraio 2019 n. 17*, in *Federalismi.it*, 4/2019, 7 ff.; E. LONGO, *La funzione legislativa (e il rapporto maggioranza-opposizione)*, in *Rassegna di diritto pubblico europeo*, 1/2019, 15-30.

[12] The scientific debate on the opposition is huge. Concerning the social and political research under comparative perspective, reference should be made at least to O. KIRCHHEIMER, *The Waning of Opposition in Parliamentary Regimes*, in *Social Research*, 2/1957, 127-156; G. SARTORI, *Opposition and Control. Problems and*

paramount to delimit the scope of this introductory note: one shall consider only the legal institutions, rather than the vicissitudes of the political actors. To do so, all the rules of procedure and standing orders regarding the opposition in Parliament will lay on the edge of the present comparison, even if they concern substantial constitutional matter, as the method chosen requires sticking to the formal qualification of the legal source.

Opposition in trans-national regimes will not fall into the scope of the present note. However, the reader shall keep in mind the importance of the manifestations of parliamentary opposition as a means of strengthening the role of supranational representative bodies, such as the European parliament, as recognized by many scholars[13].

For the purpose of this note, *Constitute.org*[14] was the platform where two specific queries were performed: "opposition" and "minority". As a result, there was a list of 71 countries matching the desired entries. The texts referring only to racial, ethnical or regional minorities were manually excluded.

Without even trying to solve the epistemic problem originating from the difficulty of drawing an unbiased, flawless taxonomy of macrocomparative legal families[15], the States were arranged under five main groups: 1) formerly communist countries, including Balkan countries and countries formerly part of the Soviet Union[16]; 2) Lusophone countries[17]; 3) Latin-American countries[18]; 4) current Members of the Commonwealth[19]; 5) Francophone countries[20]. Besides, two states constitute a single-country group: Thailand is the only one from South-East Asia; Sweden is the sole Nordic country.

After completing the spreadsheet with useful data, I analyzed the presence or absence of some constitutional features on the opposition. Some outcome of this investigation is hereby presented: in the following paragraphs, I will enquire about the reasons of the nonappearance

Prospects. Government and Opposition, cit., 149-154; R. A. DAHL, *Political Opposition in Western Democracies*, in J. BLONDEL (ed.), *Comparative Government*, London, 1969 and Id., *Polyarchy. Participation and Opposition*, New Haven-London, 1971, *passim*; A. LIJPHART, *Patterns of democracy: Government Forms and Performance in Thirty-six Countries*, 2nd edn., New Haven-London, 2012. For some consistent Italian literature see at least A. MANZELLA, *Opposizione parlamentare*, in *Enciclopedia Giuridica Treccani*, XXI, 1990, 1-5; G. DE VERGOTTINI, *Opposizione parlamentare*, in *Enciclopedia del diritto*, XXX, 1980, 532-561; A. MEZZETTI, *Opposizione politica*, in *Digesto delle Discipline Pubblicistiche*, Torino, 1995, 347 ff.

[13] L. HELMS, *Parliamentary Opposition and its Alternatives in a Transnational Regime: The European Union in Perspective*, in *The Journal of Legislative Studies*, 1-2/2008, 212-235; C. KARLSSON-T. PERSSON, *The Alleged Opposition Deficit in European Union Politics: Myth or Reality*, in *Journal of Common Market Studies*, 4/2018, 888-905.

[14] Z. ELKINS-T. GINSBURG-J. MELTON, *Constitute: The World's Constitutions to Read, Search, and Compare*, Austin, online world Constitution database.

[15] A problem already emphasized in J. HUSA, *Classification of Legal Families Today. Is it time for a memorial hymn?*, in *Revue internationale de droit comparé*, 1/2004, 11-38.

[16] This group includes Albania, Armenia, Croatia, Georgia, Kyrgyzystan, Uzbekistan.

[17] This group includes Angola, Brazil, Cabo Verde, Guinea-Bissau, Mozambique, Portugal, Saõ Tomé and Principe, East-Timor.

[18] In this group we have Argentina, Colombia, Ecuador, Panama, Paraguay, Suriname.

[19] This group is the widest and includes Antigua and Barbuda, Bahamas, Barbados, Belize, Bhutan, Dominica, Fiji, The Gambia, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malta, Mauritius, Nepal (a candidate to Commonwealth), New Zealand, Pakistan, Papua New Guinea, Saint Kitt and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, South Africa, South Sudan, Sri Lanka, Trinidad and Tobago, Uganda, Vanuatu, Zambia, Zimbabwe.

[20] This group includes Algeria, Burkina Faso, Burundi, Chad, Comoros, Congo, Democratic Republic of Congo, France, Ivory Coast, Madagascar, Morocco, Niger, Senegal, Togo, Tunisia.

of most European countries from the list, some exceptions to that and the patterns that can be found within the few constitutional definitions of opposition[21].

3. *The absence of a status for the opposition in civil law European countries and some exceptions*

Just by simply scrolling the list of the selected countries, it is possible to suggest some preliminary findings: most of the civil law European democracies avoid addressing the issue[22]. It is no surprise that developed democracies do not officially recognize the opposition in their Constitutions nor do even merely mention it. However, the absence from the list doesn't denote a lack of constitutional protection. In some circumstances, constitutional values and principles are enshrined in the spirit of a legal system to such an extent they simply don't need to be formally declared. In others, the decision not to include the opposition in the Constitution can produce questionable consequences. Alternatively, some guarantees can be implicitly laid down through supermajorities votes, other parliamentary procedural rules at constitutional level or general principles, like the freedom of political speech, the right to form political parties, the right to pluralism and so on.

The explicit examples are very few. In Germany, while the *Grundgesetz* is silent, most of the *Bundesländer* Constitutions are equipped with their *Oppositions-Artikles*[23]. All the subsequent *Landesverfassungen* tailored their opposition rules from this very Constitution. Hence, the importance of the rules that for the first time in history make it possible for the political parties to be enshrined in a regional German charter[24].

At the national level, we have two relevant examples of Constitutions in force quoting the opposition: 1976 Portuguese Constitution and French Constitution, as amended in 2008. Art. 114 of the first states that "minorities shall possess the right to democratic opposition". It, then, proceeds to offer a definition by the means of a political criterion ("political parties that […] do not form part of the Government"). This collective entity is given "the right to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest". This provision has been implemented by Law n. 24/98 on the

[21] As to the rights and duties of the opposition, reference has to be done to the extended version of the present note.

[22] However, Colombia is on the list, being the exception that proves the rule as it is the most recent accession to the OECD, on April 28th, 2020.

[23] From the German doctrine, see at least H.P. SCHNEIDER, *Die Parlamentarische Opposition im Verfassungsrecht der Bundesrepublik Deutschland*, Frankfurt, 1974; S. HABERLAND, *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz*, Berlin, 1995; R. POSCHER, *Die Opposition als Rechtsbegriff*, in *Archiv des öffentlichen Rechts*, 3/1997, 450 ff.; K. STÜWE, *Die Opposition im Bundestag und das Bundesverfassungsgericht: das verfassungsgerichtliche Verfahren als Kontrollinstrument der parlamentarischen Minderheit*, Baden-Baden, 1997, 24 ff..; D. KUHN, *Der Verfassungsgrundsatz effektiver parlamentarischer Opposition*, Tübingen, 2019.

[24] See also Art. 23, lett. a), as incorporated in 1971, of 1952 *Hamburg Verfassung*. As to the other *Länder*, the introduction of the *Oppositions-Artikle* in their Constitutions commenced in the 1990s. See M.E. GENNUSA, *Lo "statuto" dell'opposizione*, in *Le istituzioni del federalismo*, 1/2001, 249 ff. Other European countries (Greece, Spain, Belgium and Italy) have provisions regarding the opposition at regional level, but this is not formally recognized in their Constitutions. About the opposition at the Italian regional level, see P.L. PETRILLO, *Nuovi statuti regionali e opposizione*, in *Quaderni costituzionali*, 4/2005, 829-854.

"Estatudo do Direito de Oposição", that repeals the previous version (Law n. 59/77)[25]. The new *Estatudo* adds a functional criterion, further describing the opposition as a corps of MPs committed to scrutinizing and criticizing the policy of the Government. Being a consensual democracy, it is noteworthy that another provision of this act (Art. 3.4) distinguishes the parliamentary opposition at national and local level from "the other minorities not represented in any of the above bodies".

The second example is France, which has undergone relevant political transition after 1962 referendum introducing direct presidential election. In 1958, the electoral reform that switched to majority voting system did not help to simplify a fragmented political framework. Ever since 1962, instead, the party system has gone through an intense process of "bipolarization"[26]. Pending the political debate, many asked to regulate an official statute to the opposition[27]. The reform process had an important setback in 1974, when the *Conseil Constitutionnel* invalidated an attempt to rationalize the relationship between majority and minority groups, claiming the necessity to table a formal revision of the Constitution[28]. Only in 2008 a modernization of the Constitution was possible[29]. According to the newly enclosed parts, the opposition was ripped in two components: compared to the common law notion of "Official Opposition", France didn't even try to formalize an Opposition with capital "O"[30]. Rather, Arts. 48.5 and 51.1 now distinguish between "opposition groups" and "minority groups" as two different and variable agglomerations of representatives which are entitled "one day of sitting per month" plus more specific provisions from the Rules of Procedure. In fact, as to Art. 19 of the *Assembée Nationale* rules and Art. 5 *bis* of the Senate rules, at the beginning of each ordinary session every group has to declare if it stands as an opposition or a minority group[31].

Thirdly, there is a small reference in the Swedish system: Art. 14 of the Riksdag Act establishes that "minority spokesmen for a committee" shall have the right to make an intervention during the deliberative process, but "a distinction may be made" if it is a minister or a majority spokesman speaking. This minor mention means an indirect recognition of

[25] Art. 1 was put in writing in the same terms of the Hamburg Constitution, as noted by A. RINELLA, *Materiali per uno studio comparato su lo "Statuto" costituzionale dell'opposizione parlamentare*, Trieste, 1999, 95.

[26] Cf. F. HAMON-M. TROPER, *Droit Constitutionnel*, Paris, 41st edn., 2021, 532.

[27] Notably, the alternance in French politics was scattered in 2017 by the coming to power of Emmanuel Macron and his newly founded movement, La République en Marche.

[28] Decision No. 2006-537 DC of 22 June 2006. Cf. P. AVRIL, *« L'improbable » statut de l'opposition (à propos de la décision 537 DC du Conseil constitutionnel sur le règlement de l'Assemblée nationale)*, in *Les Petites Affiches*, s.n., 2006, 7-9; S. CURRERI, *Il Conseil constitutionnel boccia la via regolamentare allo statuto dell'opposizione*, in *Quaderni costituzionali*, 4/2006, 776-778.

[29] Cf. S. CECCANTI, *Lo Statuto dell'opposizione in Francia per una nuova valorizzazione del Parlamento*, in *Federalismi.it*, 2/2009, 1-10.

[30] For the French debate, see at least P. JAN, *Les oppositions*, in *Pouvoirs*, 1/2004, 23-43; J.-P. DEROSIER (ed.), *L'opposition politique*, Paris, 2016; Y. SUREL, *L'opposition au Parlement. Quelques éléments de comparaison*, in *Revue internationale de politique comparée*, 2/2011, 115-129.

[31] J.-E. GICQUEL, *Le groupe minoritaire : le nouveau venu sur la scène parlementaire*, in *Mélanges Henry Roussillon*, Toulouse, T. 1., 2014, 381 ss. The political minorities in France are also important for they have right to referral to the *Conseil Constitutionnel* ("*saisine*"). A group of at least sixty MPs is jointly given the early scrutiny of the laws, before their promulgation, on grounds of "nonconformity to the Constitution" (Art. 61 of the Constitution). Similarly, Art. 93 of the German Constitution entitles one fourth of the members of the *Bundestag* to refer to the Federal Constitutional Court to check the compatibility with the Constitution of a law, but this control is *a posteriori*.

parliamentary minorities but cannot imply that Sweden has a full-fledged status of the opposition at constitutional level.

In Italy, failure to provide a formal status to the opposition was registered after the unsuccess of the 2016 Renzi-Boschi constitutional reform, that amended also Art. 64 of the Constitution, devoting to the Parliamentary Rules the duty to acknowledge and enact a Statute of rights for the opposition[32]. This was only the last of a number of attempts originating from an age-old debate[33].

In summary, these few examples can suggest that the above definitions of "opposition" seem more emphatic than prescriptive. It is not rare to observe *Allparteienregierungen* (all-party governments) or grand coalitions governments: they shall be considered unconstitutional in the event that the existence of an opposition was considered compulsory by the Constitution. Also, in coalition governments, it is not rare to have minoritarian governments[34]. This is the main reason why a functional definition of opposition is preferred. However, even this criterion is not flawless: in order to identify the opposition parties, in case of absence of any explicit declaration of affiliation, we have to pick from the factions that "do not support" the government. This notion can be interpretated in various manners, as the degree of "non-support" can be different. But this volatility of the notion makes it hard to ponder the important legal consequences of an opposition statute[35].

Following Dahl[36], the absence of the status of the opposition in "high-consensus European systems" creates a sort of Leviathan political elite in which the people do not identify anymore, thus leading to anti-system opposition[37]. This theoretical assumption is regrettably confirmed by the recent empirical evidence[38].

4. *Political minorities or losing parties: a catalogue of definitions*

An interesting result from the comparative model on the status of the opposition is that only ten countries have an explicit provision containing a notion of "opposition"[39]. Merely two

---

[32] Following V. LIPPOLIS, *Maggioranza, opposizione e governo nei regolamenti e nelle prassi parlamentari dell'età repubblicana*, in L. VIOLANTE (ed.), *Storia d'Italia, Annali, 17, Il Parlamento*, Torino, 2001, 655, it is paramount to amend the Constitution in order to have a politically mature opposition.

[33] Cf. *ex multis*, A. BURATTI, *Governo, maggioranza e opposizione nel procedimento legislativo e nella programmazione dei lavori parlamentari*, in *Diritto e Società*, 2/2002, 289 ff.

[34] See I. LUSTIK, *Stability in Deeply Divided Societies: Consociationalism versus Control*, in *World Politics*, 3/1979, 325-344.

[35] For other relevant countries, not directly mentioned above, see R.B. ANDEWEG-L. DE WINTER-W.C. MÜLLER, *Parliamentary Opposition in Post-Consociational Democracies: Austria, Belgium and the Netherlands*, in *The Journal of Legislative Studies*, 1-2/2008, 77-112.

[36] R.A. DAHL, *Political Opposition*, cit., 400.

[37] However, the German Constitution tries to face the phenomenon of anti-system parties in Art. 21, where it is prescribed that political parties shall not only "conform to democratic principles" but also refrain from "undermin[ing] or abolish[ing] the free democratic basic order" or endangering the existance of the Republic. To this purpose, the Federal Constitutional Court has a scrutiny on the question of unconstitutionality regarding political parties.

[38] E. SALVATI, *Opposition Parties in the European Parliament: The Cases of Syriza, Podemos and the Five Star Movement*, in *The International Spectator*, 1/2021, 126-142.

[39] Belize, Buthan, Burundi, Colombia, Fiji, Kyrgyzystan, Malta, Mauritius, Solomon Islands, Zambia. For "explicit status of the opposition" we intend a definition that is not related to any other provision, nor any notion obtainable indirectly by the one referred to the Leader of the Opposition.

out of ten are not part of the Commonwealth[40]. The first conclusion to be drawn is that a formal recognition of the opposition is more likely in a legal system with a strong British influence and, possibly, a first-past-the-post electoral system[41]. A country having an unfettered bipartisan system, assisted by a plurality electoral mechanism, will welcome a responsible idea of opposition[42]: either by referring to the constitutional position of the Leader of the Opposition or by providing an explicit definition entailing a numerical criterion, as it happens with Bhutan's Constitution.

Art. 158, indeed, states that "the party which wins the majority of seats in the National Assembly in the general election shall be declared as the ruling party and the other as the opposition party"[43]. The winner-loser dichotomy goes along with the idea of a parliamentary opposition enjoying an "institutional" function, since it is theoretically possible to alternate with the government[44]. The metaphor of the political power acting like a swinging pendulum is particularly suitable in these cases: consequently, it will be easy to distinguish the Official Opposition, whose set of rights is unequivocally enshrined in the Constitution, from the other opposition parties constituting a minor entity[45]. A peculiarity that was initiated by British parliamentary practice and after recognized by Art. 10 of the Ministers of the Crown Act.

As to the Commonwealth realms, it is possible to extract a definition from other provisions regarding the appointment of the Leader of the Opposition by the Governor-General. The wording is almost identical in all the countries that have such nomination: the Leader is chosen among those who seem able to command the "majority of the elected members of the House who do not support the Government" or, if no one appears to be in command, the Leader "of the largest single group of members of the House who do not support the Government"[46]. This notion combines a numerical and a political criterion[47]. The other Commonwealth countries relevant to this purpose adopt similar provisions: Art. 124 of the Indian Constitution

[40] This confirms the opinion that in most non-common law countries the parliamentary opposition is implicitly derived from certain procedural rules shaping the supervision, control and scrutiny of the government associated with the status of the opposition. Cf. G. DE VERGOTTINI, *Opposizione parlamentare*, 532.

[41] For the constitutional role of the British opposition, see R. BRAZIER, *The constitutional role of the opposition*, in *Northern Ireland Legal Quarterly*, 2/1989, 131-151. Regarding the American scene, scholars are discussing the benefits of granting some rules to the "Government in opposition", as a means of dividing power and "resolve the central crisis" posed by the unified American government. See D. FONTANA, *Government in opposition*, in n *Yale Law Journal*, 3/2009, 601.

[42] Even if this is clear by law, the concept is often "nebulous" in reality, as its usages encompass various phenomena. See P. NORTON, *Making Sense of Opposition*, in *The Journal of Legislative Studies*, 1-2/2008, 236-250.

[43] It continues by specifying that "in the case of casual vacancy, if the opposition party gains majority of seats in the National Assembly after the bye-election, such party shall be declared as the ruling party".

[44] G. DE VERGOTTINI talks about a "constitutional function of the opposition". See his *Diritto costituzionale comparato*, Padova, 7th edn., 2007, 496. *Contra*, R.A. DAHL, *Political Opposition*, 400, objecting to the theory of the opposition as being an autonomous function.

[45] There is also a third entity, different from Official Opposition and other opposition parties. See Art. 66 of the Constitution of Solomon Islands, distinguishing the "opposition group" as formed by MPs in opposition to the Government and the "independent group", comprising MPs who are independent both of the Government and of any opposition group.

[46] See Art. 79 of the Constitution of Antigua and Barbuda, Art. 82 of the Constitution of Bahamas, Art. 74 of the Constitution of Barbados, Art. 47 of the Constitution of Belize, Art. 66 of the Constitution of Dominica, Art. 66 of the Constitution of Grenada, Art. 89 of the Constitution of Jamaica, Art. 58 of the Constitution of Saint Kitt and Nevis, Art. 67 of the Constitution of Saint Lucia, Art. 59 of the Constitution of Saint Vincent and the Grenadines, Art. 83 of the Constitution of Trinidad and Tobago.

[47] In fact, the opposition is always a minoritarian force. However, it is not always true the opposite, i.e. a minority plays automatically the role of the opposition. Cf. A. MANZELLA, *Il Parlamento*, Bologna, 2003, 276; A. PIZZORUSSSO, *Minoranze e maggioranze*, Torino, 1993, 51.

alludes to a *de facto* Leader of the Opposition; alternatively, the office will be granted to "the Leader of single largest Opposition Party in the House of the People". In almost identical terms Arts. 90 and 73 respectively of the Constitution of Malta and Mauritius favor the Leader of the "opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party" or, otherwise, an appropriate person chosen at the discretion of the President of the Chamber. Similarly, it is for Art 92 of the Constitution of Lesotho.

While in Sch. 1.1 of the Rules of interpretation of the Constitution of Papua New Guinea, the opposition is defined by the only means of a political criterion ("those members of the Parliament who are not generally committed to support the Government"), some countries adopt a mere numerical criterion, as is the case of Art. 57 of the Constitution of South Africa (the "largest opposition party"), Arts. 149 of Gambian Constitution and 108 of Kenyan Constitution ("the second largest party or coalition of parties"), Art. 71 of the Transitional Constitution of the youngest State in the world, South Sudan ("the political party holding the second highest number of seats").

Some countries' charters mention the Leader of the Opposition, only to grant him the benefits and the privileges annexed to his status (Guyana, Nepal, Seychelles and some minor mentions in the Constitutions of Pakistan, Sri Lanka, Vanuatu, Uganda and Zimbabwe).

We can also find redundant notions, as in the case of provisions stating that the Leader of the Opposition is chosen amongst "the members of Parliament who do not belong to the Prime Minister's political party and are members of the opposition party or a coalition of opposition parties" (Art. 78, Constitution of Fiji) or "the Members of Parliament who are from the opposition" (Art. 74, Constitution of Zambia).

The other two countries that make a formal recognition of the opposition are Burundi and Kyrgyzstan. They both have relatively young Constitutions, dating respectively from 2018 and 2010, and they both use the criterion of affiliation. As to Art. 703 of the Kyrgyz Constitution, "the faction or factions which are not part of the parliamentary majority and which have announced their opposition to the latter, shall be considered as parliamentary opposition". Similarly, Art. 178 of the Constitution of Burundi requires parties or independents to "claim to adhere to the opposition in the National Assembly" as a condition to "participate of right in all parliamentary commissions". However, "a political party providing a member of Government cannot claim that it is part of the opposition".

5. *Conclusion: a necessary reversal in "constitutional borrowing"*

Constitutional borrowing, as a tendency to draft a charter «by inserting language taken from another people's governing document»[48], is carried out in a one-to-one direction, as legal history confirms: namely, from the most established regimes towards emerging democracies, interested in borrowing specific institutional designs from the constitution of

[48] N. TEBBE-R.L. TSAI, *Constitutional borrowing*, in *Michigan Law Review*, 2/2010, 462; *see* also L. EPSTEIN-J. KNIGHT, *Constitutional borrowing and nonborrowing*, ICON, 1(2), 2003, 196 ss.; M.D. ADLER, *Can Constitutional Borrowing be Justified? A Comment on Tushnet*, in *University of Pennsylvania Journal of Constitutional Law*, 1/1998, 350-357.

the previous. Nonetheless, such last point may require a desirable inversion of the direction. Older democracies shall now engage in "learning" from other experiences.

There is no doubt that common constitutional traditions shape the way the functioning of the opposition is outlined by the above examined documents. These findings make it easier to answer to the assumption made in the introduction: whether the insertion of constitutional provisions on the Constitution can be worthwhile to prevent the degradation of some democracies, in which the opposition lies powerless.

I think that the most recent developments in some EU Member States, regarding the increasing pressure – or even the blowback – on democratic institutions, require each State to take appropriate measures, without turning down a possible revision of the Constitution.

Further study should be conducted after this introductory analysis of the various Constitutions, in order to demonstrate that the lack of an explicit statute of the opposition in older democracies has various consequences: it may affect the quality of political opposition in and outside parliaments. It could be a loophole for anti-system opposition and disruptive political movements to either pave their way in the institutions and undermine democracy from the inside or to oppose to the government in further illiberal manners. Filibustering and volatility in the political affiliation of the MPs can cause the marginalization of the assembly, a defective or lacking scrutiny of the government and the ineffectiveness of the *check and balances* principle.

So, perhaps, this matter should be regulated by sources of "upgraded" level of normativity: instead of being set in parliamentary procedural rules, constitutional conventions and practice or unwritten rules, the core of the opposition status shall be set in stone at the constitutional level, where it belongs. This may yield some positive changes both in consensual democracies, by avoiding any abuse of the majority to the ordinary functioning of the system and ensuring the fairness of the political debate, and in majoritarian democracies, by allowing a more solid opposition to develop an alternative policy in a constructive way. Furthermore, the Constitution can offer a wider spectrum of protection when compared to ordinary laws or parliamentary internal rules, for the simple reason that its revision requires supermajorities or special procedures.

One may have a hard time in promoting the idea that democracy can be fostered by constitutionalizing the opposition. Yet, the existence of a status of the opposition is important *per se*. It may be a driving force for the protection of political pluralism, however illusory it may seem.