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## The Instrumentalization of Parliamentary Legislation and its Possible Remedies Lessons from Hungary

The constitutional reform of 1989-1990, which marked the transition from a socialist dictatorship to a liberal constitutional democracy, brought about important institutional changes placing the Hungarian National Assembly (*Országgyűlés*) at the centre of political decision-making again. The constitutional framework has not changed much since then. Nevertheless, the National Assembly's role and functions have undergone a significant transformation, especially its relationship with the government.<sup>1</sup> A semi-strong coordinate legislature has degenerated into a subordinate organ operating under the excessive dominance of the cabinet.<sup>2</sup>

This transformation of the National Assembly followed more or less the general patterns observed in parliamentary democracies. That is, the development of a strong party system, the formation of a parliamentary elite, and the increase of executive powers at the expense of the parliament's legislative function. However, two particular characteristics of this transformation need to be emphasized. First, the weakening of the parliament's legislative function has not been counterbalanced by strong scrutiny powers.<sup>3</sup> Second, since 1990 the cabinet (be it a single party or a coalition government) could always rely on the firm support of the parliamentary majority and its strong position was not put at risk even in the case of mid-term cabinet formations.<sup>4</sup> This political environment facilitated the increase of the government's dominance vis-à-vis the legislature in a political system which had already been characterised as a "chancellor democracy".<sup>5</sup>

After the 2010 general elections the character of the political system has fundamentally changed. There is a growing consensus in the mainstream literature that

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<sup>1</sup> In this article the term government is used according to the European terminology and refers to the group of ministers (cabinet) heading the executive branch.

<sup>2</sup> G. ILONZKI, "From Minimal to Subordinate. A Final Verdict? The Hungarian Parliament, 1990-2002", *The Journal of Legislative Studies*, 1, 2007, pp. 38-39.

<sup>3</sup> *Ibid.*, pp. 40-43.

<sup>4</sup> A. GYULAI, "Az Országgyűlés", in A. KÖRÖSÉNYI (dir.), *A magyar politikai rendszer – negyedszázad után*, Budapest, Osiris, 2015, pp. 136 sqq.

<sup>5</sup> J.W. SCHEMANN, "Hungary. The Emergence of Chancellor Democracy", *The Journal of Legislative Studies*, 10/2-3, 2004, pp. 128-141.

Hungary is no longer a liberal constitutional democracy,<sup>6</sup> although it has not turned into an authoritarian system either. It is floating somewhere between the two, thus belongs to a third type of political regime, often labelled as illiberal or populist.<sup>7</sup> The illiberal trends starting in 2010 had an enormously negative impact on parliamentary legislation. Even though some institutional reforms were put in place gradually from as early as 2010, this negative impact stemmed primarily from the style and techniques of the exercise of political power by the winning governing majority (Fidesz-KDNP government).<sup>8</sup> The following section will focus on the anomalies of the practice of parliamentary legislation, while changes of the normative framework will be addressed in the last part of the article.

### THE PATHOLOGICAL SYMPTOMS OF LEGISLATION UNDER IN THE SYSTEM OF NATIONAL COOPERATION

The disease which attacked the legislative function of the National Assembly in 2010 could be called the *radical instrumentalization of parliamentary legislation*.<sup>9</sup> In other words, the government only used the parliament for implementing its political program in the form of statutory law, extremely rapidly and without any compromise. Although governments usually dominate the legislative procedure in parliamentary systems, and Hungary is not an exception, it is remarkable how parliamentary law-making has completely lost its value. It has become nothing more than an instrument in the hands of the cabinet. The radical instrumentalization of parliamentary legislation has manifested itself mainly in the following three phenomena.

#### *Legislative hyperinflation*

The 2010 general elections meant a landslide victory for the Fidesz-KDNP coalition. Not only because the outgoing socialist government suffered an historical defeat, but the incoming Christian-conservatives also won a two-thirds constitutional majority in the unicameral legislature. This electoral success was interpreted by the soon-to-be prime minister, Viktor Orbán as a “revolution in the polling

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<sup>6</sup> R. URTZ, “Can You Tell When an Illiberal Democracy is in The Making? An Appeal to Comparative Constitutional Scholarship from Hungary”, *International Journal of Constitutional Law*, 13/1, 2015, pp. 279-300; A. ÁGH, “The Decline of Democracy in East-Central Europe”, *Problems of Post-Communism*, 63/5-6, 2016, pp. 277-287; A. BATORY, “Populists in government? Hungary’s ‘system of national cooperation’”, *Democratization*, 23/2, 2016, pp. 283-303; B. BUGARIC and A. KUHELJ, “Varieties of Populism in Europe: Is the Rule of Law in Danger?”, *Hague Journal on the Rule of Law*, 10/1, 2018, pp. 21-33; G. HALMAI, “Is There Such Thing as ‘Populist Constitutionalism’? The Case of Hungary”, *Fudan Journal of the Humanities and Social Sciences*, 11/3, 2018, pp. 323-339.

<sup>7</sup> For an excellent review of the relevant literature see G.A. TÓTH, “Constitutional Markers of Authoritarianism”, *Hague Journal on the Rule of Law*, 11/1, 2018, pp. 37-61.

<sup>8</sup> G. MÜLLER, “A második és a harmadik Orbán-kormány döntési rendjének sajátosságairól”, *MTA Law Working Papers*, 62, 2014, p. 1.

<sup>9</sup> Although with a different focus but Tímea Drinóczi also emphasizes the instrumental use of domestic legislation related to illiberal trends in the context of the Hungarian political regime’s noncompliance with the European Rule of Law standards. See T. DRINÓCZI, “The European Rule of Law and Illiberal Legality In Illiberal Constitutionalism: The Case of Hungary”, *MTA Law Working Papers*, 16, 2019.

booths”. The National Assembly quickly declared the establishment of a new political regime, the System of National Cooperation:

The National Assembly declares that a new social contract was laid down in the April general elections through which the Hungarians decided to create a new system: the National Cooperation System. With this historical act the Hungarian nation obliged the incoming National Assembly and Government to take the helm in this endeavour, resolute, uncompromising and with deliberation, and control the construction of the National Cooperation System in Hungary.<sup>10</sup>

The governing majority did not wait long to take action and start the implementation of major constitutional, social and economic reforms.<sup>11</sup> Consequently, the Hungarian legal system witnessed an unprecedented legislative inflation.

Although the Hungarian National Assembly has always been a very “productive” legislature since the change of regime (the number of adopted acts varying between 400 and 600 in each term), the 2010–2014 parliament produced no less than 859 acts.<sup>12</sup> This was a new world record – as announced so proudly by the Speaker of the House (also MP of Fidesz) in a radio interview in 2014.<sup>13</sup> To be able to cope with this incredibly heavy workload, the governing majority did everything imaginable to accelerate the legislative procedure at the expense of the adequate preparation, of public consultation on legislative proposals and of meaningful cooperation with the parliamentary opposition.

### ***Acceleration at the expense of public consultation***

The government, that is the ministers, have the legal obligation to make sure that their legislative proposals submitted to the parliament are well-prepared. This obligation implies the duties – *inter alia* – to carry out a preliminary impact assessment, to publish the bill for public evaluation and to conduct public consultations. Unfortunately, the preparatory phase of parliamentary legislation has always been rather formal and superficial, a pattern that has continued after 2010.<sup>14</sup> However, in addition to this trend the new governing majority came up with a range of ideas to shorten or to even avoid altogether the time-consuming preparatory phase.

One of the techniques employed by the cabinet was to systematically ignore the traditional and legally regulated forms of legislative preparation which aimed to guarantee the involvement of professional organizations, civil society groups and interest organizations in the pre-parliamentary legislative phase. Instead, much

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<sup>10</sup> 1/2010. (VI. 16.) Political Declaration of the National Assembly on National Cooperation. An English translation is available at: [[http://www-archiv.parlament.hu/irom39/00047/00047\\_e.pdf](http://www-archiv.parlament.hu/irom39/00047/00047_e.pdf)] (last accessed: June 03, 2018)

<sup>11</sup> Including the adoption of a whole new constitution. See A. JAKAB and P. SONNEVEND, “Une continuité imparfaite: la nouvelle Constitution hongroise”, *Jus Politicum*, 8, 2012 [<http://juspoliticum.com/article/Une-continue-imparfaite-la-nouvelle-Constitution-hongroise-558.html>]

<sup>12</sup> A. GYULAI, “Az Országgyűlés”, *op. cit.*, p. 143.

<sup>13</sup> “Kövér László: A csalás a baloldal vérében van”, *hirado.hu*, January 01, 2014 [<https://www.hirado.hu/2014/01/26/kover-laszlo-a-csalas-a-baloldal-vereben-van/>] (last accessed: June 3, 2018).

<sup>14</sup> As noted by Tímea Drinóczi, the lack of a sufficiently high quality of the preparation of legislative proposals stem from, on the one hand, the Constitutional Court’s unwillingness to enforce the requirements of rational law-making and, on the other, the political elite’s ignorance of this issue. T. DRINÓCZI, “A részvétel és a konzultáció elmélete és gyakorlata”, *JURA* 1, 2013, p. 13.

more emphasis was put on the use of new and unregulated means of public participation.<sup>15</sup> The most notable example being the so-called *national consultation*.

In the framework of a national consultation campaign, the government mails questionnaires with multiple-choice questions to every citizen. The people are then free to return the questionnaire with their responses to the Office of the Prime Minister. National consultations were held on various topics, including the Fundamental Law of Hungary (the new constitution), the household utility charges, the relocation and resettlement of immigrants among others. It is clear that the purpose of these national consultation campaigns has been to mobilize the voters of the governing parties in order to demonstrate the electorate's support for very sensitive political and very problematic legal decisions. One example from a relatively recent national consultation on the so-called "Soros plan":<sup>16</sup>

George Soros wants Brussels to resettle at least one million immigrants per year onto European Union territory, including in Hungary. Do you support this point of the Soros-plan?<sup>17</sup>

The governing majority – who has adopted a very strong anti-immigration rhetoric – used the results of this campaign to introduce the so-called "Stop Soros" legislative package which constitutes another frontal attack on human rights NGOs.<sup>18</sup>

Moreover, the government transformed or even abolished some important fora of pre-legislative negotiation. For example, the National Interest Reconciliation Council, the institutionalized form of tripartite negotiations between the government, the trade unions and the employers' representatives with limited decision-making and veto power in employment matters, was simply replaced by the National Economic and Social Council, a purely consultative organ.<sup>19</sup>

The law imposes – at least formally – a strict obligation on the government to carry out a thorough preparation of legislative proposals. This heavy burden, however, does not rest on the shoulders of ministers if the bill is submitted by an ordinary member of parliament (or a member of government in his/her capacity as parliamentary representative), i.e. a private members' bill. It was a surprising phenomenon of the 2010–2014 parliamentary term that the number of private mem-

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<sup>15</sup> Á. RIXER, "Az újabb jogalkotás jellegzetességei", *Kodifikáció*, 2, 2012, pp. 44-45.

<sup>16</sup> George Soros is a Hungarian-born American businessman and philanthrope whose Open Society Foundation finances the operation of thousands of human rights NGOs worldwide, which makes him the number one enemy of populist and authoritarian political leaders.

<sup>17</sup> For the English translation of the questionnaire see B. NOVÁK, "Here are the Soros plan national consultation questions!", *The Budapest Beacon*, September 28, 2017 [<https://budapestbeacon.com/soros-plan-national-consultation-questions/>] (last accessed: June 3, 2018).

<sup>18</sup> The European Commission has initiated an infringement procedure against Hungary because of the adoption of the Stop Soros legislative package. On 24 January 2019, a reason opinion was sent to the Hungarian Government. See the press release of the European Commission [[http://europa.eu/rapid/press-release\\_IP-19-469\\_en.htm](http://europa.eu/rapid/press-release_IP-19-469_en.htm)] (last accessed: March 30, 2019). For further information about the Stop Soros legislative package see V.Z. KAZAI, "Stop Soros Law Left on the Books – The Return of the Red Tail?", *VerfBlog*, March 5, 2019 [<https://verfassungsblog.de/stop-soros-law-left-on-the-books-the-return-of-the-red-tail/>].

<sup>19</sup> Á. RIXER, "Az újabb jogalkotás jellegzetességei", *op. cit.*, p. 46.

bers' bills skyrocketed. 31 percent of the adopted acts originated from MPs belonging to the parliamentary majority, and their legislative proposals achieved a very high 74 percent success rate.<sup>20</sup>

These figures may give the impression that individual MPs decided to take matters in their own hands which led to an increasingly independent decision-making process of the National Assembly. However, that would be a misinterpretation of the situation. The subject of bills introduced by majority MPs touched upon legally complicated and politically controversial policy matters, areas where the government is normally required to take action. Moreover, members of the cabinet in their capacity as parliamentary representatives and other prominent members of the governing Fidesz-KDNP groups submitted the vast majority of successful private members' bills which were in general completely unrelated to their political portfolio.<sup>21</sup>

It was obvious from the beginning that these complex bills were aimed at the implementation of the government's political program. It was an open secret that they were drafted by experts of the cabinet, of the political party or by law-firms.<sup>22</sup> Formally the government did not violate the law, but this practice constituted an abuse of procedural rules. This way the cabinet could accelerate the legislative procedure at the expense of public participation in legislative preparation. Even though this legislative practice has been challenged before the Constitutional Court many times, the judges have refused to review the pre-parliamentary phase of the legislative process, thus failed to stop the constant violation of the procedural rules.<sup>23</sup>

### *Acceleration at the expense of cooperation with the opposition*

The two-thirds of the seats in the unicameral legislature gave the governing parties the opportunity to implement their political program without facing any major obstacles in parliament. Driven by a revolutionary zeal, however, the cabinet wanted to put in place major constitutional, social and economic reforms as rapidly as possible and without any compromise. For this reason, the parliamentary majority employed every possible technique to side-line the opposition.

Ever since the change of regime, the adoption of some parliamentary acts has required a qualified two-thirds majority of the representatives (called cardinal laws according to the terminology of the Fundamental Law). The Constitutional Court of Hungary clarified as early as 1993 that the purpose of this rule was to ensure that in certain, particularly important matters concerning constitutional organs and fundamental rights, the governing majority cannot make a decision alone, without the minimal support of the opposition.<sup>24</sup> In line with the letter, but contrary to the

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<sup>20</sup> Zs. SZABÓ, "Hozzáadott érték benyújtás és elfogadás között: viták és módosító javaslatok az Országgyűlésben 2006-2016 között", *Parlamenti Szemle*, 2, 2017, p. 34.

<sup>21</sup> G. MÜLLER, "A második és a harmadik Orbán-kormány döntési rendjének sajátosságairól", *op. cit.*, pp. 2-3.

<sup>22</sup> *Ibid.*, p. 4.

<sup>23</sup> From this period, see in particular Decision 8/2011. (II. 18.) and Decision 165/2011. (XII. 20.). The summary of Decision 8/2011. (II. 18.) in English is available at: [[http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-2-003?fn=document-frameset.htm&f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2011-2-003?fn=document-frameset.htm&f=templates$3.0)] (last accessed at March 30, 2019).

<sup>24</sup> Decision 4/1993 (II. 12.) of the Constitutional Court of Hungary.

spirit of this rule, the governing coalition refused to exercise any self-restraint. It did not attempt to find compromise, let alone consensus, with the opposition before the adoption and amendment of cardinal laws. What is more, with the entry into force of the Fundamental Law, the scope of cardinal laws was extended to legislative matters which should have been left to ordinary legislation, such as family, social and taxation policy. This was severely criticized by the Venice Commission for cementing the political preferences of the current governing majority and tying the hands of future governments (who will not necessarily enjoy the support of a qualified majority).<sup>25</sup>

A sophisticated system of permanent committees with significant competences developed quite early in the National Assembly. They had every potential to turn into fora of meaningful political negotiations between the majority and opposition and become influential actors of the legislative procedure. However, since the composition of the committees has mirrored the plenary, the governing majority has dominated their work.<sup>26</sup> This fact combined with a high level of party discipline and the powerful position of the government has gradually rendered the committee work merely technical. Consequently, this has served the aim of incorporating the amendments of the majority in the legislative proposals and filtering out the initiatives of the opposition. Minority MPs have introduced a high number of bills and they have constantly proposed amendments to important bills. Many of them have tried to adopt a constructive role, but almost every minority initiative died at the committee stage. Only three out of 533 legislative proposals by the opposition were adopted in the 2010–2014 term, and their proposals for amendments were not much more successful either.<sup>27</sup>

Many of the rights of the opposition are actually prerogatives of parliamentary political groups (PPGs). Therefore, the possibility to constitute a faction has the utmost importance for minority MPs. Changes in the relevant regulation have restricted the conditions of group formation, which did not concern the parties entering parliament after the 2010 elections, but prevented the representatives leaving their original PPG from forming a new group.<sup>28</sup> The 2010–2014 term witnessed the split of two parliamentary parties: the Democratic Coalition (DK) seceded from the Hungarian Socialist Party (MSZP) and the Dialogue for Hungary (PM) left the Politics Can Be Different (LMP). Their representatives become independent members without any hope of becoming able to exercise faction prerogatives.<sup>29</sup>

The governing majority has systematically used amendments in a way to make the scrutiny of legislative proposals by the opposition extremely difficult, if not impossible. It has become common practice to change the original content of the bill in the course of the legislative process for strategic purposes. Very often the originally submitted legislative proposal did not show the real intentions of the cabinet. They let the opposition scrutinize and discuss the bill and then redrafted the legislative proposal either by inserting amendments aiming at the modification

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<sup>25</sup> Venice Commission, Opinion n° 621/2011 on the New Constitution of Hungary, June 20, 2011.

<sup>26</sup> A. GYULAI, “Az Országgyűlés”, *op. cit.*, p. 144.

<sup>27</sup> Z. SZABÓ, “Hozzáadott érték benyújtás és elfogadás között...”, *op. cit.*, pp. 35, 44.

<sup>28</sup> A. GYULAI, “Az Országgyűlés”, *op. cit.*, p. 141.

<sup>29</sup> For a comprehensive table showing the PPGs in every parliamentary term since 1990 see: [<http://www.parlament.hu/a-partok-kepviselecsoportjai-es-a-fuggetlen-kepviselek-1990->].

of absolutely unrelated acts or by completely rewriting the original bill.<sup>30</sup> Many of these amendments were introduced right before the final vote on the bill which made thorough scrutiny and discussion of the final version of the proposals unrealistic. One good illustration is the Bill No. T/2224 introduced by two majority MPs. The original version intended to amend one paragraph of the act on the remuneration of members of parliament. Four months after the introduction of the bill and only one day before the final vote, the Committee of Constitutional Affairs submitted a 12-pages-long amendment inserting provisions modifying several energy related acts.<sup>31</sup> It needs to be emphasized that this was not an isolated example, this was common practice which was found unconstitutional in an early decision of the Hungarian Constitutional Court,<sup>32</sup> even though the judges usually adopted a rather lenient approach in their exercise of review of the legislative process.<sup>33</sup>

When parliamentary legislation was not fast and easy enough, despite all the above-mentioned techniques, the governing majority had recourse to special legislative procedures. While the urgent procedure simply accelerated the decision-making by shortening the applicable deadlines, the exceptional procedure placed the debate and work on the legislative proposal from the plenary to the committees, and the exceptional urgent procedure combined the techniques of the previous two. In the 2010–2014 term 134 bills were adopted in urgent procedure and 26 in exceptional urgent procedure.<sup>34</sup>

The parliamentary majority employed every technique to accelerate the legislative procedure at the expense of cooperation with the opposition quite successfully. Consequently, it further strengthened some negative trends of parliamentary legislation. While the average length of the parliamentary legislative procedure (from the introduction of the bill until the final vote) was 76 days in the 1998–2002 term, and 50 days in the following two terms, it dropped to 34 days between 2010 and 2014. What is even more spectacular is the growing number of acts whose adoption took less than ten days: it was six in the 1998–2002 parliamentary term,

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<sup>30</sup> Z. SZABÓ, “Hozzáadott érték benyújtás és elfogadás között...” , *op. cit.*, p. 37.

<sup>31</sup> Every information related to the parliamentary procedure of the bill is available at the official website of the National Assembly: [[http://www.parlament.hu/iromanyok-elozo-ciklusbeli-adatai?p\\_auth=qhek1gFK&p\\_p\\_id=pairproxy\\_WAR\\_pairproxyportlet\\_INSTANCE\\_9xd2Wc9jP4z8&p\\_p\\_lifecycle=1&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_col\\_id=column-1&p\\_p\\_col\\_count=1&pairproxy\\_WAR\\_pairproxyportlet\\_INSTANCE\\_9xd2Wc9jP4z8\\_pairAction=%2Finternet%2Fcpql%2Fogy\\_irom.irom\\_adat%3Fp\\_ckl%3D39%26p\\_izon%3D2224](http://www.parlament.hu/iromanyok-elozo-ciklusbeli-adatai?p_auth=qhek1gFK&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcpql%2Fogy_irom.irom_adat%3Fp_ckl%3D39%26p_izon%3D2224)] (last accessed: June 3, 2018).

<sup>32</sup> The Hungarian Constitutional Court found this practice unconstitutional and declared that the violation of the standing orders’ rules on last minute amendments can lead to unconstitutionality. See Decision n° 164/2011. (XII. 20.) of the Hungarian Constitutional Court.

<sup>33</sup> For a comprehensive overview of the relevant jurisprudence of the Constitutional Court see V.Z. KAZAI, “Le renforcement du contrôle de la procédure législative. Une stratégie proposée aux Cours constitutionnelles opérant dans un système populiste”, *Annuaire International de Justice Constitutionnelle*, 2018, pp. 776-781.

<sup>34</sup> All the relevant data concerning legislative procedures in previous terms of the National Assembly are available at: [<http://www.parlament.hu/iromanyok-elozo-ciklusbeli-adatai>] (last accessed: 3 June 2018).

35 and 37 in the following two terms, and 104 legislative acts were adopted in less than ten days between 2010 and 2014.<sup>35</sup>

### *(Un)foreseen complications*

The instrumentalization of the legislative procedure satisfied the short-term political interests of the governing majority very well, since every major reform was successfully put in place in a spectacularly short time. However, this success came at a price. While the negative consequences did not manifest themselves immediately to the governing majority, they certainly had a negative impact on the work of the National Assembly and on the Hungarian legal system in general.

Unsurprisingly, the lack of adequate preparation and comprehensive plans led to hasty and unprofessional legislative processes.<sup>36</sup> Consequently, the quality of parliamentary legislation deteriorated dramatically. One clear sign of this was the steady growth of amendments of freshly adopted legislation. For example, one third of the acts adopted in 2011 were amended within one year. Furthermore, eighteen legislative acts adopted in December 2011 were amended in the same month.<sup>37</sup> There was an increasing need to correct newly adopted acts before their entry into force because the government noticed major mistakes in the acts only after the final vote. This led to a chaotic situation which severely endangered legal security and made the preparation for the application of new legislation very difficult.<sup>38</sup>

In addition, by systematically avoiding meaningful public consultations and negotiations with the opposition, the government generated a lot of conflict with domestic and international organizations. The European Commission has initiated numerous infringement proceedings against Hungary since 2010, the Venice Commission has strongly criticized many of the major legislative packages of the government, the European Court of Human Rights has found several violations of the European Convention stemming from the newly adopted legislative measures and so on. Other European states, even the (supposedly) more developed constitutional democracies violate international standards quite often. This is not extraordinary. What is concerning however is that most of these conflicts could have been avoided had the Hungarian government been willing to conduct the necessary consultations before the introduction and adoption of legislative acts. The following example illustrates many anomalies of the legislative practice of the examined period.

Act no. CXXXIV of 2012 brought about a major reform to the tobacco industry. The original bill was submitted by eleven members of the Fidesz-KDNP coalition (not the government) and was quickly put on the agenda of an extraordinary session of the National Assembly. Surprisingly, the governing majority was willing to

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<sup>35</sup> B. ORBÁN, “Pillanatkép az Országgyűlés törvényalkotási tevékenységéről – 2014”, *Pro Publico Bono*, 4, 2014, p. 67.

<sup>36</sup> As Gajduschek notes, the lack of evidence-based rational preparation has always characterized the Hungarian legislative practice, after 2010 it has become prohibited to contradict the government’s decision. Gy. GAJDUSCHEK, “Előkészítetlenség és utólagos hatásvizsgálat hiánya”, in A. JAKAB and Gy. GAJDUSCHEK (dir.), *A magyar jogrendszer állapota*, MTA TK JTI, 2016, p. 820.

<sup>37</sup> Z. SZABÓ, “Hozzáadott érték benyújtás és elfogadás között...”, *op. cit.*, p. 31.

<sup>38</sup> I. PAPP, “Sarkalatos átalakítások. A régi és az új jogalkotási törvény összehasonlítása”, *MTA Law Working Papers*, 11, 2015.



wait for the opinion of the European Commission before the final vote. Even though the Commission did not raise any concerns regarding the reform, the interest organization of tobacco retailers vehemently advocated the amendment of the bill, but to no avail. The act was adopted only by the representatives of the Fidesz-KDNP majority in face of strong opposition from the minority groups. Subsequently, the European Court of Human Rights found a violation of the right to property of a tobacco retailer.<sup>39</sup> Following this came the amendment of this legislative act a little less than six months after its promulgation. Bill no. T/10881 was introduced again by individual MPs, including János Lázár, the then chief of the Fidesz PPG and state-secretary heading the Office of the Prime Minister. The proposal was pushed through parliament in roughly a month in the face of strong opposition from minority groups. Sick and tired of being systematically ignored by the majority, some opposition MPs relied on rather unconventional means of parliamentary communication and carried into the centre of the floor a large banner displaying the words “Here Operates the National Tobacco Mafia”. The representatives were fined for having gravely disrupted parliamentary proceedings. These fines constituted a violation of their freedom of expression according to the European Court of Human Rights.<sup>40</sup>

#### DIAGNOSIS:

#### RECONCEPTUALISATION OF PARLIAMENT’S LEGISLATIVE FUNCTION

The practice of parliamentary legislation in Hungary after 2010 shows a picture which raises serious constitutional concerns. Nevertheless, it is important to realize that the Hungarian example is – in many respects – only the culmination and aggregation of several general patterns observed in many parliamentary regimes based on the majoritarian model of democracy. Although, it is undeniable, that the Hungarian case also shows the symptoms of an illiberal regime. According to black-letter constitutional law the parliament usually occupies a central place in the political decision-making and its legislative power is protected by constitutional safeguards. On certain occasions, even empirical figures can create the impression that legislatures do exercise strong legislative power. Such as the high number of bills introduced by individual MPs, the extent to which parliamentary committees amended the government proposals, and the number of initiatives by the opposition that made their way to the floor. However, the constitutional framework and the couple of promising figures serve only as camouflage hiding the real character of the system.

The underlying problem of parliamentary regimes based on the majoritarian model<sup>41</sup> of democracy lies within the extremely reduced decision-making autonomy of the legislature, which can easily result in the instrumentalization of the

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<sup>39</sup> *Vékony v. Hungary*, Appl. n° 65681/13, Judgment of 13 January 2015.

<sup>40</sup> *Karácsony and Others v. Hungary* [GC], Appl. nos 42461/13 and 44357/13, Judgment of 17 May 2016. See also V.Z. KAZAI, “La liberté d’expression des députés et l’autonomie parlementaire en Hongrie. Un rapport conflictuel”, *JP Blog*, March 23, 2018 [<http://blog.juspoliticum.com/2018/03/23/la-liberte-dexpression-des-deputes-et-lautonomie-parlementaire-en-hongrie-un-rapport-conflictuel-par-victor-zoltan-kazai/>] (last accessed: June 4, 2018).

<sup>41</sup> This description of the majoritarian model is heavily influenced by the seminal work of Arend Lijphart. See A. LIJPHART, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven, London, Yale University Press, 2012.

legislative function by a majority government. The law-making procedure is meant to be a process of parliamentary will-formation while the final decision is supposed to represent the autonomous will of the legislature as an independent institution. Thus, the parliament can carry out its legislative function adequately only if it is able to distance itself to a sufficient degree from external actors, most importantly from the government. Obediently following the will of an external actor cannot be qualified as autonomous decision-making. Similarly, the unconditional implementation of the political program of the cabinet cannot be considered as parliamentary legislation. The parliament's legislative power is closely connected to its decision-making autonomy. "Fundamentally, the extent to which a legislature is an active and effective participant in the legislative process [...] is directly tied to the degree of autonomy it enjoys".<sup>42</sup>

The decision-making autonomy of the parliament in the field of law-making is dependent on the following three factors: the institutional autonomy of the legislature, the personal autonomy of the MPs and the dominance of the majority in the legislative procedure. The first and second ones stem from the institutional design of parliamentary regimes and the character of developed party systems.<sup>43</sup> The third factor follows from a specific interpretation of the parliamentary legislative function. As far as the first factor is concerned, the constitutional framework of parliamentary regimes ensures that the cabinet usually enjoys the support of the parliamentary majority who shares the same political affiliation. Not supporting the government would amount to political suicide which contradicts the basic logic of the exercise of political power. As to the second factor, it is common knowledge that the free mandate of the deputies does not protect them from strong party pressure. In a developed party system, the deputies need to join PPGs if they want to exercise their rights effectively and have a political career, but consequently they have to submit to the party leadership. "Delegates who do not belong to a party faction are lost souls. Those who belong to a faction are soulless and still without a personal voice".<sup>44</sup>

The third factor stems from the generally accepted interpretation of the legislative function in a parliamentary system. It is usually noted without any surprise that in parliamentary regimes the government dominates the legislative work of parliament which is often summarized in the 90 percent rule: 90 per cent of the bills are tabled by the cabinet and 90 per cent of those bills are adopted.<sup>45</sup> This strong cohesion between the majority and the cabinet in the field of law-making is considered to be an inherent characteristic of parliamentary systems. It is acknowledged that the opposition plays an important role in other functions of the legislature (most notably the representative and the control functions), but legislation is primarily reserved for the majority.

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<sup>42</sup> A. KREPPPEL, "Legislatures", in D. CARAMANI (dir.), *Comparative Politics*, Oxford, Oxford University Press, 2011, p. 135.

<sup>43</sup> Here I rely on the work of Amie Kreppel who distinguishes between institutional autonomy (the independence of the legislature from the government) and partisan autonomy (the independence of the parliamentarian from the political party): A. KREPPPEL, "Typologies and Classifications", in S. MARTIN, T. SAALFELD and K.W. STRØM (dir.), *The Oxford Handbook of Legislative Studies*, Oxford University Press, 2014, pp. 92 *sqq.*

<sup>44</sup> A. SAJÓ and R. UITZ, *The Constitution of Freedom*, Oxford, Oxford University Press, 2017, p. 238.

<sup>45</sup> *Ibid.*, p. 257.

In sum, the decision-making autonomy of the parliament is very limited in parliamentary regimes because (1) there is a strong cooperation between the parliamentary majority and the cabinet (institutional autonomy), (2) the deputies are submitted to the political pressure of their parties (partisan autonomy) and (3) the legislative function is usually considered to belong to the majority. If all these factors are united and combined with a majoritarian model of democracy, the parliament can easily find itself completely deprived of its decision-making autonomy. Moreover, the entry into office of illiberal political leaders will most certainly strip the legislature of any meaningful role in the legislative process. These factors cannot be changed easily, so any radical alteration of them in the near future is unrealistic. Nevertheless, the identification of these factors can show the direction of future reforms to avoid or reverse the instrumentalization of parliamentary legislation.

First, the parliament's legislative function needs to be reinterpreted and this reconceptualization needs to be generally accepted in parliamentary regimes. On the one hand, it should become more widely accepted that the different functions of parliament are strongly interrelated. On the other hand, the opposition and minority groups should be granted a more important role in law-making. Modern legislatures carry out various functions, legislation being only, and often not even the most dominant, one of them. Regarding the reinterpretation of parliamentary law-making, the representative and the control functions are most relevant. Parliaments are numerous and plural institutions, because they are meant to represent the values, interests and opinions of different social groups. Exactly because of this representative capacity, the legislature is an ideal forum of political debate on the most important political issues concerning the whole society. Legislatures are also designed to exercise political control over the government and call to account the members of the cabinet if they stray too far from the interests of the society.

Even though it is theoretically possible to make a distinction between the different functions of parliament, it needs to be noted that the legislature does not cease to be a representative institution and does not stop being responsible for controlling the government even when it exercises its legislative function. On the contrary, the law-making procedure provides an excellent opportunity to closely scrutinize the legislative proposals of the government and make sure that the ministers carry out their responsibilities in conformity with the political interests of the society. In this sense, the parliamentary law-making could be seen as a sort of *ex ante* control (contrary to the traditional *ex post* parliamentary control). In addition, the legislative debate is a perfect forum to show the real plural character of parliament and let all the political values, opinions and interests be voiced on the floor and in the committees.

It goes undisputed that parliamentary minority and opposition play a very important role in the representative and control functions. Consequently, if it becomes accepted that the legislative, representative and control functions of the parliament are closely intertwined, it should follow that the majority cannot enjoy uncontested dominance in the legislative procedure anymore, while the opposition is relegated to the area of control and representation. Majority and opposition have to exercise the legislative function together with reasonable differences regarding their rights.

Second, enhancing the institutional autonomy of the parliament in the field of law-making implies a higher degree of independence from the government. If it results from the institutional design of parliamentary systems that the majority

and the cabinet constitute one fused political power centre, then the logical solution is to strengthen the rights of the opposition and the minority to effectively participate in and influence the outcome of the legislative procedure. In this sense, empowering the opposition means enhancing the institutional autonomy of parliament.<sup>46</sup>

Third, the decision-making autonomy of the parliament can be increased if individual MPs are ready to work with each other along specific political issues regardless of their political affiliation. Such cross-party cooperation is imaginable only if MPs are not tied to their PPGs exclusively, but are allowed to work independently to a certain extent. This requires, on the one hand, the diversification of the MPs' identity, that is, to identify themselves not only as members of a political party, but also as advocates of women's rights, environmental protection and other important political issues. On the other hand, the cross-party cooperation needs to be supported by institutional means which give MPs the opportunity to effectively exercise certain rights collectively even outside a PPG (non-party parliamentary groups).

In sum, the instrumentalization of the parliamentary legislative function can be avoided or reversed if steps are taken in the following directions. First, the reconceptualization of the legislative function and its merging with the representative and control functions. Second, the enhancement of parliamentary institutional autonomy *vis-à-vis* the government by strengthening the opposition. Third, the liberation of MPs from the yoke of their PPGs and the creation of an adequate institutional framework for cross-party cooperation.

#### REMEDIES: SOME PROPOSALS FOR REFORM

Many legislative reforms in the past few years from Greece through Ireland to France were driven by the purpose of strengthening the legislative function of the parliament.<sup>47</sup> The employed solutions included the restriction of government's agenda powers, the empowerment of the opposition and minority groups, providing more opportunities for cross-party cooperation among others. Even though such comprehensive institutional reforms do not occur very often, parliamentary rules, i.e. "the set of formal rules that govern the conduct of politics in the parliamentary arena, including parliament's relation with other bodies and the public" are subject to frequent and massive changes.<sup>48</sup> Despite the fact that parliaments have to cope with more or less similar difficulties, a great variety of parliamentary

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<sup>46</sup> Beyme also noted that the degree of parliamentary autonomy is dependent on the share of the opposition in parliamentary legislation. K. VON BEYME, *Parliamentary Democracy. Democratization, Destabilization, Reconsolidation, 1789-1999*, Houndmills, Macmillan, 2000, p. 92.

<sup>47</sup> See for example P. FOUNDETHAKIS, "The Hellenic Parliament. The New Rules of the Game", *The Journal of Legislative Studies*, 9/2, 2003, pp. 85-106; C. LYNCH *et al.*, "Dáil Reforms Since 2011: Pathway to Power for the 'Puny' Parliament?", *Administration*, 65/2, 2017, p. 37-57; J.-É. GICQUEL, "Les effets de la réforme constitutionnelle de 2008 sur le processus législatif", *Jus Politicum*, 6, 2011 [<http://juspoliticum.com/article/Les-effets-de-la-reforme-constitutionnelle-de-2008-sur-le-processus-legislatif-384.html>].

<sup>48</sup> U. SIEBERER *et al.*, "Mapping and Explaining Parliamentary Rule Changes in Europe. A Research Program", *Legislative Studies Quarterly*, 41/1, 2016, pp. 63-64.

rules can be observed in the different jurisdictions.<sup>49</sup> Nevertheless, the directions of parliamentary reforms can be identified. Using the terminology of Sieberer *et al.*, efficient changes serve parliament as such, including all actors of the decision-making (e.g. gaining more power in EU legislation). Distributive changes allocate more rights and opportunities to some actors of the parliamentary procedure at the expense of others along the following dimensions: majority – minority, parliament – government, party leaders – backbenchers.<sup>50</sup> This very brief glimpse on the change of parliamentary rules suggests that advocating institutional reforms is not a completely hopeless endeavour.

Indeed, even in Hungary parliamentary reforms were put in place gradually from 2010, bringing about some positive changes as well. A new act on legislation and a separate act on public consultation were adopted in 2010.<sup>51</sup> The Fundamental Law of Hungary (the new constitution) entered into force in 2012 which did not change significantly the constitutional position of the legislature. A completely new act on the National Assembly<sup>52</sup> was adopted in 2012 which introduced a new, statutory level of parliamentary rules. Certain subject matters, such as the internal organization of the National Assembly, its operation and sessions, the status and remuneration of MPs and so on, moved to the level of statutory law, while all the other, mostly procedural, issues were left in the Rules of Procedure until 2014 when it was replaced by a new one.<sup>53</sup> The adoption of the new Rules of Procedure is seen as a step in the direction of consolidation and normalization of the practice of parliamentary legislation.<sup>54</sup> In the following few pages the article presents the broad contours of some reform proposals to remedy and avoid future instrumentalization of the legislative procedure. The relevant changes brought about by the new regulation will be briefly discussed where necessary.

### ***Normalization of legislative production***

As a reaction to the dominance of decree regulation during the socialist dictatorship, after 1990 the scope of parliamentary legislation was extended to a large extent.<sup>55</sup> As the workload of the National Assembly was increasing, efficiency requirements started to dominate the parliamentary work at the expense of careful examination and deliberation of legislative proposals. Hasty and superficial legislative procedures produce low-quality acts which require continuous amendment and “maintenance” of the legal system leading to further increase of the workload. This is a vicious circle.

According to the long-standing practice and interpretation, the National Assembly’s legislative power is general and open, meaning that every matter can be

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<sup>49</sup> C. MÜLLER and U. SIEBERER, “Procedure and Rules in Legislatures”, in S. MARTIN, T. SAALFELD and K.W. STRØM (dir.), *The Oxford Handbook of Legislative Studies*, Oxford, Oxford University Press, 2014, p. 315.

<sup>50</sup> U. SIEBERER *et al.*, “Mapping and Explaining Parliamentary Rule Changes in Europe. A Research Program”, *op. cit.*, p. 72.

<sup>51</sup> Act CXXX of 2010 on legislation and Act CXXXI of 2010 on the public participation in the preparation of legislation.

<sup>52</sup> Act XXXVI of 2012 on the National Assembly.

<sup>53</sup> Resolution 10/2014 (II. 24.) on certain provisions of the Rules of Procedure.

<sup>54</sup> Z. SZABÓ, “A parlamenti jog változásai”, *MTA Law Working Papers*, n° 25, 2014.

<sup>55</sup> Á. RIXER, “Az újabb jogalkotás jellegzetességei”, *op. cit.*, p. 37.

subject of parliamentary legislation even if it was previously regulated by the government. As a result, parliamentary acts are full of technical issues which could be left to the government to regulate without any concern. The high quality of the legislative procedure can only be guaranteed if the legislature can dedicate enough time and attention to the legislative proposals. However, this is impossible if every minor detail is regulated by the parliament.

This is why, even if it sounds paradoxical at first,<sup>56</sup> the scope of the parliamentary legislative power has to be strictly limited for the protection of parliament's legislative function itself.<sup>57</sup> It has to extend to every major political decision concerning the society as a whole. All the other issues, however, must be delegated to the regulatory competence of other organs. Article 15 of the Fundamental Law provides that "Government [...] shall exercise all the functions and powers which are not expressly conferred by the Fundamental Law or the law on other organs." With careful interpretation this provision could be the basis for positive changes, keeping the right to decide on the most important political matters in the hands of the parliament, but allocating everything else to the government and other regulatory organs.

Of course, adequate democratic control and judicial review over such regulations are and will always be necessary. Nevertheless, this solution could be beneficial to both political branches; the legislature could conduct more detailed and careful legislative procedures and the government would have enough flexibility and room to implement many elements of its political program without parliamentary authorisation. Thus, a new form rationalisation of the parliamentary legislative power is needed.

### *The reanimation of public consultations*

The new acts on legislation and public consultation adopted in 2010 put much emphasis on the preparation of bills. As it was discussed already above, despite these seemingly positive normative changes, the government systematically avoided the involvement of the public in the preparation of legislative proposals. The techniques were to simply ignore the legally regulated forms of public consultation and employ unregulated means (e.g. national consultation) and to submit the bill to the parliament through individual MPs. The following two solutions may be offered to remedy the anomalies of this practice.

First, the government's obligation to prepare and submit to parliament legislative proposals should be extended to every major institutional, economic and social reform. It may be argued that theoretically the government's entitlement to initiate legislation is problematic in light of the separation of powers principle.<sup>58</sup> However, it needs to be acknowledged that the regulation of some matters, especially major reforms requires such a comprehensive planning and detailed preparation which

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<sup>56</sup> This suggestion may be counterintuitive, especially in light of negative experiences with extensive delegation, if not abdication, of parliamentary legislative power between the two world wars and the subsequent constitutional reforms for example in Germany and France. See Lindseth. But a healthy balance needs to be found between two extremes.

<sup>57</sup> See P. SMUK, "Az Országgyűlés hatáskörgyakorlása az Alaptörvény hatalommegosztási rendszerében", *Iustum Aequum Salutare*, XII/4, 2016, p. 79.

<sup>58</sup> A. SAJÓ and R. UITZ, *The Constitution of Freedom*, *op. cit.*, p. 287.

only the government and the public administration are able to carry out. In addition, the law itself puts much responsibility on the shoulders of the government to conduct a thorough preparation before the introduction of bills, namely to make a preliminary impact assessment, to publish the bill for public evaluation and to conduct public consultations.

The Fundamental Law already expressly stipulates that the Government shall submit the legislative proposals required for the implementation of the Fundamental Law to the National Assembly.<sup>59</sup> Moreover, the Constitutional Court raised concerns as early as 2011 regarding the practice of introducing major legislative packages by individual MPs for their lack of capacity to conduct an adequate preparation, suggesting that it was the duty of the government to submit such proposals.<sup>60</sup> It follows logically then that the next step could be the constitutional obligation of the government to prepare and submit to the parliament every major institutional, economic and social legislative package.

Second, even if the government manages somehow to circumvent its legal obligation, it should be ensured that some form of public participation can take place in the course of the parliamentary procedure. This would serve the interests of the legislature for the following reasons. First, individual MPs could acquire a lot of useful information from a wide range of participants, such as experts, scholars, representatives of civil society organizations and the business sector and so on, which would mitigate the information asymmetry between parliamentarians and the government. Second, external participants who approach the legislative proposals from a different perspective, could contribute to the close scrutiny of bills, especially if submitted by the cabinet<sup>61</sup>. Third, channelling public participation into the parliamentary procedure may potentially bring parliament and the people closer to each other as a sort of response to the critiques of representative democracy.<sup>62</sup>

Within the legislature the most adequate and most common venue for public participation are the committees (or subcommittees).<sup>63</sup> Standing committees play an important role in the legislative procedure, because they have the right to scrutinize and deliberate on legislative proposals, modify their content to a lesser or greater degree and influence the direction of the subsequent phases of the procedure. Therefore, it is of no surprise that committee public hearings exist in many jurisdictions already.

The new Rules of Procedure of the National Assembly has redesigned the legislative procedure and further enhanced the role of the committees. One of the major changes is that the detailed debate on the bills was moved from the plenary to the standing committees who retained the right to scrutinize and propose amendment to the bills. In addition, standing committees are entitled to discuss any matter falling within the ambit of their competence and submit an opinion to the plenary.

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<sup>59</sup> Point 4 (closing provisions) of the Fundamental Law of Hungary.

<sup>60</sup> Decision 61/2011. (VII. 13.) of the Constitutional Court of Hungary.

<sup>61</sup> K. STRØM, "Parliamentary Committees in European Democracies", *The Journal of Legislative Studies*, 4/1, 1998, p. 54.

<sup>62</sup> P. MIKULI and G. KUČA, "The Public Hearing and Law-Making Procedures", *Liverpool Law Review*, 37/1, 2016, p. 6.

<sup>63</sup> *Ibid.*, p. 8.

Even though only MPs can be committee members, the chair have the right to invite experts to the sessions (also upon the initiative of the members). So public hearing as such is not regulated, let alone prescribed, by the parliamentary rules, some sort of public participation is still possible in the law-making procedure.

Future parliamentary reforms should institutionalize the public committee hearings in the legislative procedure with a special focus on the following guarantees. Public hearings should be mandatory in every case when the government introduces a major legislative package or/and a qualified minority of MPs so request. It has to be ensured that the participants of the public hearing represent a great variety of different interests, opinions and have the necessary expertise. Minority and opposition MPs should be entitled to invite a certain number of participants as well. Based on the negative experience of other countries, every step needs to be taken to avoid the domination of these public hearings by a narrow group of influential associations (the so-called elite capture).<sup>64</sup>

### *The revival of cooperation with the opposition*

The Hungarian parliamentary rules give some important rights to the opposition which can be exercised independently of or even contrary to the will of the majority. However, the vast majority of these rights are related to the control function of the parliament.<sup>65</sup> As far as the opposition's opportunities to participate in the legislative procedure are concerned, some of their rights can be exercised by every individual MP, such as the right to initiate a bill or the right to propose amendments. Others are allocated to the parliamentary factions, for example the leader of the parliamentary group is entitled to ask the plenary to consider a limited number of amendments which did not win support in the standing committees. Opposition factions enjoy a couple of additional prerogatives, mainly related to the debate. The most powerful guarantees protecting the minority in the law-making procedure are those rules which are based on the logic of qualified majority decision, such as the two-thirds majority requirement for the adoption of cardinal laws or the application of urgent legislative procedure.

The underlying problem is that most of these rights and guarantees are not legally defined as opposition prerogatives, even though it is widely acknowledged that they serve the protection of the minority from the oppression of the majority and the effective participation of the opposition in the decision-making procedure. Consequently, these rights and guarantees can easily be rendered meaningless by the majority. For example, opposition legislative proposals and amendments are filtered out by the majority representatives in the standing committees without any difficulty. Also, if the governing parties win two-thirds of the seats in the Hungarian National Assembly, qualified majority requirements lose their function. As it was discussed above, the Fidesz-KDNP coalition did not shy away from abusing its

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<sup>64</sup> D. HALPIN, I MACLEOD and P. MCLAVERTY, "Committee Hearings of the Scottish Parliament: Evidence Giving and Policy Learning", *The Journal of Legislative Studies*, 18/1, 2012, pp. 1-20; R. EISING and F. SPOHR, "The More, the Merrier? Interest Groups and Legislative Change in the Public Hearings of the German Parliamentary Committees", *German Politics*, 26/2, 2017, pp. 314-333.

<sup>65</sup> P. SMUK, "Az Országgyűlés hatáskörgyakorlása az Alaptörvény hatalommegosztási rendszerében", *op. cit.*, p. 81.



power at the expense of the minority by relying on its very strong parliamentary support.<sup>66</sup>

It is true that the new Rules of Procedure of the National Assembly introduced some positive changes which have the potential to normalize the practice of law-making in the long run. In general, the regulation has become more sophisticated and the legislative procedure, as a whole, more complex. The role of the committee stage has been enhanced by moving the detailed debate to the standing committees and charging them with the examination of the compatibility of the bill with constitutional and international standards. MPs have got a little more time to submit amendments. Some guarantees were introduced to prevent the misuse of amendments (i.e. redrafting the whole bill before the final vote). The application of special legislative procedures (exceptional and urgent procedures) have been limited. Overall, many changes point in the direction of consolidation. (N.B. the new Rules of Procedure was adopted at the end of the first term of the Fidesz-KDNP government when most of their major reforms were already put in place and the general elections were coming.)

These positive changes however did not remedy the underlying problem, namely, that the majority, especially a two-thirds majority, can easily render all the rights and guarantees of the opposition meaningless. Therefore, as a first step, some of the of the rights and guarantees protecting the position of the minority in the legislative procedure need to be clearly identified as opposition prerogatives<sup>67</sup>. The Hungarian regulation already contains a short definition of opposition<sup>68</sup> and certain rights are expressly allocated to opposition MPs and factions, but they do not cover the most important rights which could guarantee the effective participation of the minority in the law-making procedure. As a second step, the logic of the regulation of minority rights should shift from a formal/mathematical to a substantive approach.<sup>69</sup> That is, the opposition should remain able to exercise some of its most important prerogatives even if the governing parties have a qualified majority. For example, it could be stipulated that the requirement of a two-thirds majority for adoption of cardinal laws change automatically to three-fourth if the governing parties have enough representatives to adopt the law alone. Alternatively, the Constitutional Court may also adopt a more robust interpretation of the qualified majority requirements and strike the down the law if the governing majority abuses its dominant position.

It is important to emphasize that strengthening the position of the minority in the legislative process does not question the right of the majority to implement its political program as the winner of the elections. It is only about creating some distance between the parliament and the government. Empowering the opposition in the law-making procedure can lead to the increase of parliament's institutional autonomy. Also, it is definitely not argued that the opposition should be free to

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<sup>66</sup> See also J. PETRÉTEI, "A kétharmados parlamenti többség hatása a törvényhozásra", *Jog, állam, politika*, 3, 2011; Z. POZSÁR-SZENTMIKLÓSY, "Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary", *Hungarian Journal of Legal Studies*, 58/3, 2017.

<sup>67</sup> By building ont he French or the German examples.

<sup>68</sup> Opposition Member: a Member who does not belong to a parliamentary group supporting the Government and who is not a nationality Member. Article 158 (5) of the Rules of Procedure.

<sup>69</sup> Z. POZSÁR-SZENTMIKLÓSY, "Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary", *op. cit.*

obstruct the work of the parliament and block the implementation of the government's legislative program – not that it would be a realistic threat in light of the practice of legislation.<sup>70</sup> However, a healthy balance can certainly be found between the two extremes: a chaotic parliament dominated by an obstructionist opposition and the law-making factory operating as a subsidiary of the cabinet.

Theoretical and empirical research suggest that granting the opposition meaningful opportunities of participation can actually enhance the cooperation between the majority and minority and the smooth functioning of the parliament.<sup>71</sup> On the contrary, systematically ignoring and side-lining the opposition can create frustration among the minority groups leading to grave and frequent disruptions of the of parliamentary process – as the Hungarian example shows very well.<sup>72</sup>

The other way to revive the cooperation with the opposition is to promote non-party and cross-party forms of cooperation which do not see opposition as conflict. Instead, they encourage individual MPs and PPGs to work together along certain political issues regardless of their political affiliation.<sup>73</sup> Parliamentary rules usually grant some rights to individual MPs or a qualified minority which representatives can exercise collectively regardless of their political affiliation. For example, in the Hungarian National Assembly nothing prevents an opposition and a majority MP from introducing a bill together. However, as long as individual MPs are closely tied to their parliamentary groups, they will not have any incentive to cooperate with representatives from the other side of the hemicycle.

MPs without a parliamentary group are usually powerless. This is why the opportunity of independent MPs to effectively participate in the law-making process is very limited. As it was mentioned above, the 2010–2014 term witnessed the split of two parliamentary parties: the Democratic Coalition (DK) seceded from the Hungarian Socialist Party (MSZP) and the Dialogue for Hungary (PM) left the Politics Can Be Different (LMP). Between 2014 and 2018 four parties (PM, DK, Liberals and Together) could not form a PPG. Their representatives were independent members without any hope of becoming able to exercise faction prerogatives. Consequently, there was an increasing gap between parliamentary groups and political

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<sup>70</sup> See e.g. the successful adoption of the administrative judicial reform despite the opposition's efforts to obstruct the legislative process. V.Z. KAZAI, "Administrative Judicial Reform in Hungary: Who Gives a Fig about Parliamentary Process?", *VerfBlog*, May 1, 2019 [<https://verfassungsblog.de/administrative-judicial-reform-in-hungary-who-gives-a-fig-about-parliamentary-process/>]. See also footnote 36.

<sup>71</sup> U. SIEBERER and W.C. MÜLLER, "Explaining Reforms of Parliamentary Minority Rights. The Theoretical Framework with Case Study Application", *West European Politics*, 38/5, 2015, pp. 1005, 1011; P. NORTON, "Making Sense of Opposition", *The Journal of Legislative Studies*, 14/1, 2008, p. 246; in the Hungarian context see: J. PETRÉTEI, "A kétharmados parlamenti többség hatása a törvényhozásra", *op. cit.*, p. 9; Although we can find counterarguments as well, for example Vidal-Naquet concludes that despite the 2008 constitutional reform the opposition in the French National Assembly did not manage to adopt a more constructive role. See A. VIDAL-NAQUET, "Le renouveau de l'opposition", *Pouvoirs*, 146, 2013, pp. 133-147.

<sup>72</sup> V.Z. KAZAI, "The Emerging Trend of Parliamentary Performance: Freedom of Expression in the Hungarian National Assembly", *VerfBlog*, February 2, 2018, available at: [<https://verfassungsblog.de/the-emerging-trend-of-parliamentary-performance-freedom-of-expression-in-the-hungarian-national-assembly/>].

<sup>73</sup> P. NORTON, "Making Sense of Opposition", *op. cit.*, pp. 240-241.

parties whose members were elected to parliament.<sup>74</sup> This is very unfortunate, because even if they cannot identify themselves with any parliamentary political group,<sup>75</sup> their contribution to the legislative process could still be very valuable.

Therefore, institutionalized forms of non-party and cross-party cooperation should be introduced providing opportunities for individual MPs to work together along certain political issues regardless of their political affiliation and to exercise some rights independently of or even contrary to the will of the PPGs. The Rules of Procedure of the Hungarian National Assembly makes it possible for members to form groups for purposes related to their activities, but they do not qualify as parliamentary groups. Further regulation does not exist, so these groups fall completely outside the parliamentary decision-making.<sup>76</sup> The Hungarian legislator should take a look at the relevant regulation of different jurisdictions to see how they tried to diversify the political landscape of the hemicycle.

### CONCLUSION

After the 2010 general elections the radical instrumentalization of parliamentary legislation could be observed in Hungary. The government only used the parliament for implementing its political program in the form of statutory law, extremely rapidly and without any compromise. Parliamentary law-making has completely lost its value, it has become nothing more than an instrument in the hands of the cabinet. This negative phenomenon stemmed primarily from the style and techniques of the exercise of political power by the winning governing majority.

Even though some institutional reforms were put in place gradually from as early as 2010 and some changes in the regulation point in the direction of consolidation, the basic anomalies of the system have not been remedied. The article argues that further reforms are needed in order to prevent future instrumentalization of the parliamentary legislative procedure. First, the legislative production of the National Assembly has to be normalized. Second, steps should be taken for the purpose of reviving public participation in the law-making process. Third, institutional changes need to be adopted to encourage the cooperation between the majority and the opposition.

Of course, any positive institutional reform depends on the political will of the governing majority to remedy the shortcomings of the existing system and to take steps in the direction of a more meaningful and inclusive parliamentary legislative process. This political will is missing right now in Hungary where the governing Fidesz-KDNP coalition, even after the third consecutive electoral success in 2018, shows no sign of self-restraint or cooperative attitude. Therefore, the author of this paper has no illusions that the proposals formulated in these pages will not find support in the current illiberal political regime. Having said that, no matter how entrenched a political trend may seem, history teaches us that governments come

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<sup>74</sup> A. GYULAI, “Az Országgyűlés”, *op. cit.*, p. 141.

<sup>75</sup> N.B. a large number of French members of the Parliamentary Assembly of the Council of Europe are independent representatives because politicians coming from La République en Marche (LREM) cannot identify themselves with any political group.

<sup>76</sup> J. PETRÉTEI, “A Magyar Országgyűlésre vonatkozó szabályozás alaptörvényi, törvényi és házszabályi szinten”, *Kodifikáció*, 2, 2014, p. 26.

and eventually go. But the academic discourse on how to improve the functioning of the political decision-making transcends these phases of democratic backsliding.

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