

How Populism Destroys Political Representation

(Anti-)Parliamentary Reforms in Hungary after 2010

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Abstract: Come il populismo distrugge la rappresentanza politica. Le riforme (anti)parlamentari in Ungheria dopo il 2010. The basic presumption of the study is that when the system of the rule of law is dismantling in Hungary, this tendency must affect also the role of the legislature. While both the organization and parliamentary procedures are regulated in a standard European way, the practice and performance of this legislature is significantly different from other national parliaments in Europe. All the changes which have been introduced since 2010, including the abolishment of the second plenary reading of legislative bills, the block vote, the technics of speeding-up parliamentary decision-making process, as well as the parliamentary practice have aimed to open the way for the unbridled and unlimited political decision-making of the Government, and to secure the power of the governing parties. This can only be explained by authoritarian trends of the political system which makes the future of Hungarian parliamentary democracy so gloomy in a situation where no European or any other supranational mechanisms are available to counterbalance or reverse the authoritarian tendencies and the decline of Parliament.

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1. Introduction

Nowadays, it is almost a commonplace in the European political discourse that the quality of constitutional democracy has significantly declined in Hungary in the recent years. The packing almost all power institutions by the Government parties, the curtailment of the power of the Constitutional Court,¹ the restrictions on certain fundamental rights,² especially the freedom of speech and the freedom of religion are the well-known symptoms or signs of the authoritarian tendencies in this country. The backsliding of constitutional democracy has been perceived by the European institutions,³ but they have not

¹ G Halmai, 'In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíráskodás első éve' (2014) 18 *Fundamentum* (1–2); Z Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Courts 2010–2014' (2016) 1 *Constitutional Studies* 123.

² See e.g. I Vörös, 'The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law' (2014) 55 *Acta Juridica Hungarica* 1.

³ The Venice Commission (European Commission for Democracy through Law), the Council of Europe's advisory body on constitutional matters adopted a number of reports on the recent constitutional developments of Hungary, criticizing the trends of declining

been able to stop this process.⁴ In September 2018, the European Parliament launched a monitoring procedure under Article 7(1) Treaty on European Union to investigate the situation of the rule of law in Hungary.⁵

However, one cannot hear much about the institution of Parliament, though we could think that if the level of constitutional democracy is really sinking, this tendency must affect also the role of the legislature.

To fill this gap, in this study I will analyse the major institutional changes and the tendencies that have taken place in the last couple of years seeking answer the question whether or not the negative political and constitutional trends affect the legal status and the real position of the National Assembly of Hungary.

2. Political background

The Hungarian constitutional changes which have been enacted since 2010, when the general elections saw an overwhelming victory for the former opposition parties, and a new conservative government coalition, based on a two-thirds (i.e. constitution-making) parliamentary majority, started to change the constitutional landscape of the country.⁶

constitutional democracy. See www.venice.coe.int/webforms/mdocuments/?country=17&year=all.

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Since 2012, the European Parliament has adopted two general reports on the backsliding of the system of the rule of law in Hungary, see European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), and P8_TA(2018)0340 The situation in Hungary European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

⁴ Z Szente, 'Challenging the Basic Values - Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them', in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2017) 456–475.

⁵ P8_TA(2018)0340 The situation in Hungary European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

⁶ For a more detailed and critical description of this process see K Kovács and GA Tóth, 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Review* 183; M Bánkuti et al., 'Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; I Pogány, 'The Crisis of Democracy in East Central Europe: The "New Constitutionalism" in Hungary' (2013) 19 *European Public Law* 341; JW Müller, 'The Hungarian Tragedy' (2011) 58 *Dissent* 5; M Bánkuti et al., 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions', in GA Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012), 237–68.; KL Scheppele, 'Understanding Hungary's Constitutional Revolution' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015); For an apologetic presentation of the new Fundamental Law, see L Csink et al. (eds), *The Basic Law of Hungary. A First Commentary* (Clarus Press, National Institute of Public Administration 2012) and L Trócsányi, *The Dilemmas of Drafting the Hungarian Fundamental Law – Constitutional identity and European integration* (Schenk Verlag 2016).

The curious paradox of the new constitutional regulation of the exercise of public power is that while the state organization system changed only moderately, the changes introduced as a result of the introduction of the Fundamental Law have had significant political impact in practice. Interestingly however, an institutional change introduced by the new Fundamental Law has affected the responsibilities of the National Assembly, as in fact, the only new institution in the system of the public power is the Budget Council, ‘an organ supporting Parliament’s legislative activities and examining feasibility of the State Budget’. But it is not a pure advisory body, since its prior consent is required for the adoption of the state budget by the Parliament. Although the Council may refuse to give consent only in specified cases (e.g. if the budget bill would allow state debt to exceed half of the GDP), its decision may not be reviewed or annulled, so it will have a real veto right, which is an exceptional restriction of the Parliament’s budgetary power. This absolute veto power of the Budget Council might be the sword of Damocles over any future government until when the current parliamentary majority will be able to control the composition of the Council, because the President of the Republic, an unconditional supporter of the government parties has been given a new power by the Fundamental Law to dissolve the Parliament if it fails to adopt (and to get the approval of the Budget Council) the state budget for the running year by 31 March.

Despite the moderate institutional changes, since 2010 massive parliamentary reforms have been achieved.⁷ They have affected both the place of the *Országgyűlés* (National Assembly) in the system of separation of powers, and its organisation and working method.

For understanding all these changes and the trends that have existed since their introduction, it is important to know that the whole parliamentary reform since 2010 has been accomplished one-sidedly by the government parties which enjoyed a constitution-making, two-thirds majority in Parliament between 2010 and 2015, and the same coalition government gained such a majority again in 2018. Although this embodies an extraordinary electoral mandate and provides a strong political legitimacy for the Government’s policy, it is to be noted that in 2010, 46.64 percent, in 2014 44.87, and in 2018 49.27% of votes with which the government parties won the last general election, was transformed into 68.13%, 66.83% and 66.8% of parliamentary seats respectively. These were always resulted by an extremely disproportional electoral system, and unfair parliamentary elections.⁸

⁷ For a detailed description of the pre-2010 period of parliamentary law, see Z Szente, ‘Verfassung und Verfassungsmäßigkeit im ungarischen Parlamentsrecht’ (2009) *50 Jahrbuch für Ostrecht* 95.; and M Dezső et al., *Hungary* (Wolters Kluwer 2010), 118–124.

⁸ See the reports of the Organization for Security and Co-operation in Europe on the general elections in 2014 and 2018. *Hungary – Parliamentary Elections 6 April 2014 OSCE/ODIHR Limited Election Observation Mission Final Report*, Warsaw, 11 July 2014. and *Hungary – Parliamentary Elections 8 April 2018 ODIHR Limited Election Observation Mission Final Report*. OSCE–ODIHR, Warsaw, 27 June 2018.

As a result of this electoral empowerment, the Government coalition vehemently started to transform the parliamentary law. Just before we review the most controversial measures of these changes, it can be useful to describe the very basic features of the legislative power in Hungary.

3. Main characteristics of the Hungarian legislative power

In Hungary, the legislative power is exercised by the unicameral National Assembly. It has 199 members. At first glance, both its structure and political character are very typical compared to other European legislatures; its major functions are the law-making and the control of the executive power. The National Assembly has the power as usual in other EU Member States; it adopts the laws, approves the state budget, elects high-ranking public officials, decides on war and peace, and special legal order, confirms international treaties, may grant public pardon, and have the power to vote on non-confidence motions against the Government, and so on. It has a special (but not unprecedented) power of the constitution-making without approval of any other state body.

The Parliament holds sessions in a beautiful neo-gothic palace in the bank of the Danube. Its members are elected to a four-year term voting directly by secret ballot based on universal and equal suffrage. The Hungarian parliamentary election system is an extremely disproportional mixed one in which 106 MPs are elected in individual electoral districts, while 93 deputies win their mandates from party lists.

Its work is assisted standing committees (17 in 2019), and it may set up committees of inquiry for investigating any affair falling within the scope of responsibility of Government. It is a multiparty Parliament; at the moment, there are seven party factions, two for the Government parties (FIDESZ and its satellite party, the Christian Democrats), and five for the opposition parties. The Government has a political responsibility to the Parliament, which may overthrow it by a so-called constructive non-confidence vote.

Although the National Assembly normally makes its decisions by a simple majority, the Hungarian Fundamental Law specifies a number of legislative subject areas to be defined only by a two-thirds majority vote in Parliament. Referring back to the historical Hungarian public law traditions, these parliamentary acts are called ‘cardinal laws’. While the institution of special laws has been known and used under various names since the system change in 1989–1990, a real innovation of the new Constitution is the requirement of a qualified majority for policy areas such as the pension and tax system or family law, which usually falls within the ordinary power of Parliament. According to these rules, after the adoption of the new constitution, the Parliament enacted a number of cardinal laws transforming not only the whole constitutional system, but also introducing fundamental changes to economic and social policy.

In fact, the Parliament performs well, if one takes a look at its legislative work. In the recent years, it adopted more than 200 laws every year (except the

election years in 2014 and 2018), 139 in 2018, 208 in 2017, 190 in 2016, 230 in 2015, 252 in 2013, and 223 in 2013.

The chamber is the scene of heated debates on the bills, interpellations and questions or, simply on day-by-day political issues. The standing orders are dispersed in a law on Parliament⁹ and in a parliamentary decree¹⁰ on the rules of procedure. These rules are in most part as usual in any European constitutional democracy.¹¹

However, the practice and performance of this legislature is significantly different from other national parliaments in Europe. The examples presented below do not provide a general overview for all changes in parliamentary law of the recent years, but give only a selected collection of measures and reforms degrading the quality and importance of Hungarian National Assembly.

Immediately after the formation of the new Parliament in 2010, exploiting their two-thirds majority, the Government parties launched a ‘revolutionary’ law-making with most bills being introduced as individual member’s bills without a transparent preparatory stage and public debate. The Parliament’s amended standing orders enabled the governing parties to get their bills through the National Assembly in a few days, ignoring the views and proposals of the opposition. The so-called ‘extraordinary urgent procedure’, introduced in 2011, allowed the enactment of a new law the day following its introduction in Parliament; any bill could be amended fundamentally right up to the final vote: that is, after the closure of the plenary debate. Although these parliamentary contrivances were abolished in 2014, some new procedures were established instead, such as dispensing with the second reading of bills, depriving Parliament of the opportunity to debate on their detail or providing new ways of the accelerated legislative procedure. All these changes were criticized both home and abroad as opaque, unaccountable, and undemocratic, because it undermines the rights of the opposition parties to participate effectively in the law-making process, and thereby reduces the legitimacy of the enacted laws, and ultimately negatively affecting the system of checks and balances.¹²

4. Abolishment of the second plenary reading of legislative bills

One of the most unique changes was the abolishment of the second plenary reading of legislative bills. This stage of parliamentary procedure traditionally served for the discussion of details of the bills, from article to article, if necessary, and the debate on the amendment proposals. Presumably, the Hungarian

⁹ Law XXXVI of 2012 on the National Assembly.

¹⁰ Resolution 10/2014 of National Assembly on certain rules of Standing Orders.

¹¹ P Smuk, ‘On Legislative Power’ in P Smuk (ed), *The Transformation of the Hungarian Legal System 2010–2013* (Complex 2013) 113–115.

¹² See e.g. European Commission ‘Statement of the European Commission on the Situation in Hungary on 11 January 2012’ (2012) MEMO/12/9, europa.eu/rapid/press-release_MEMO-12-9_en.htm, accessed 12 October 2016; and EP, resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary P7_TA(2013)0315, AB–AF.

Parliament is the only legislature in Europe that has been blocked or prohibited to process a debate on the details of bills.¹³ In each case, a designated standing committee discusses the bills, and the powerful Committee on Legislation compiles a summary of the proposed amendments and then submits a report to the plenary session for approval. So this Committee has decision-making powers, as it has the authority to decide which of the proposed amendments will come before the National Assembly for a vote. At this point of the procedure, the whole body of Parliament has only limited opportunity to debate this general report of the Committee. The plenary sitting of the National Assembly then decides on the summary of proposed amendments.

Notably, when this innovation was discussed in Parliament in 2014, the Government parties argued for this change in a curious way claiming that according to earlier experience, the plenary debates had been useless and low-level of quality. In addition, these debates had become the scenes of political struggles between the pro-Government and the opposition MPs, rather than fruitful professional discussions. However, this kind of argumentation suffers from several different problems. First, all parliamentary debates could be set aside on the same basis, since they are notoriously overpoliticized in Hungary. This is especially true for the first reading of the bills which is a general discussion about the necessity and the basic principles of the proposed legislation (and which was not abolished). Second, the Parliament is basically a political decision-making body that engages in political debates, as it is one of the primary functions of every Parliament.

In fact, after the exile of the second reading to the committees, the publicity has been gravely restrained (as the committee debates are not open to public), but the plenary session, as the decision-making body of the National Assembly, may not discuss any details of the bills. This produces also a constitutional problem too; since the legislative power is conferred on the plenary session of the National Assembly, the Parliament must vote in every case on the final version of the bills which it never discussed earlier. The legitimacy of all parliamentary laws derives from the free and democratic debate and a lawful majority decision of Parliament as the representative body of the people. If Parliament may discuss only the necessity and the major principles of the bills, it cannot carry out its basic function.

5. The block vote

Another significant measure was the introduction of the so-called block vote in 2014. This means that the Parliament may not vote on the modifying proposals, or choose of them, but is obliged to vote *en block* on the whole summary, and then, the last version of every bill prepared by the Committee on Legislation. As

¹³ In other parliamentary systems, at most, it might be allowed the avoidance of the plenary reading before the committee stage. See L De Winter, 'Government Declarations and Law Production' in H Döring and M Hallerberg (eds), *Patterns of Parliamentary Behaviour. Passage of Legislation Across Western Europe* (Ashgate 2004) 45.

a consequence, the Parliament may not choose among the modifying proposals submitted to the bills, thereby it, as a body, is unable to realize its own preferences.

Although the block vote is not unknown in the European parliamentary tradition, it is used only in some countries and very rarely in exceptional cases (see the French *vote bloqué*).¹⁴ So parliament may only adopt or refuse the whole decision, but it does not have power to change or perfect it. This kind of parliamentary voting is quite irrational and undemocratic. Irrational for the impossibility of the improvement, and undemocratic, because it can lead to the adoption of such version of law which has not originally been preferred by any MP at all. If Parliament may say only ‘yes’ or ‘no’, the parliamentarians are interested only in minimising the damages or losses in the final version, rather than in making the best legislation. Thus, the MPs are enforced to cast so-called ‘strategic’, rather than ‘sincere’ vote in order to eliminate the worst legislative choices, rather than to promote the best one.¹⁵

6. Speed-up of parliamentary procedure

The speed-up of parliamentary procedure can be a legitimate goal of any parliamentary reform. However, in Hungary, these changes aimed at reducing the opportunities of any change or resistance of MPs. The Standing Orders contain special provisions on the so-called ‘urgent debate’, where the whole process takes only a few days, and the ‘extraordinary process’ which enables the parliamentary majority to adopt a whole law during one and a half day (except certain laws, like constitutional amendments, or budget law). In practice, the opposition MPs often do not have enough time to read the whole text of the bill. Although the number of using these special procedures is limited, these legislative techniques give absolute weight and importance to the rapidity and swiftness of law-making process overcoming any other values and considerations (like soundness and democracy).

As a matter of fact, the strategic objective of the Government parties to eliminate all possible partisan veto players from parliamentary procedure. The use of these procedures reflect the very basic approach of the Government which does not see Parliament as a real contributor in the legislative process. In fact, its role has been reduced to be a voting machine. These procedures excludes any careful preparation of the bills and can easily result in low-quality law-making which serves only for short-term political interests.

7. Curtailing opposition MPs’ rights

It is noteworthy that, apart from one or two exceptions, parliamentary disciplinary sanctions are only applied against opposition MPs in the

¹⁴ P Avril, J Gicquel, *Droit parlementaire* (3^e Montchrestien 2004) 177–178.

¹⁵ BE Rasch, ‘Parliamentary Floor Voting Procedures and Agenda Setting in Europe’ (2000) 25 *Legislative Studies Quarterly* 1, 6.

contemporary Hungarian Parliament. In particular, the imposition of fines occurs frequently against the opposition MPs punishing their political demonstrations in the floor.

But the curtailment of MPs' rights was most spectacular in an event in December 2018, when some opposition MPs entered into the headquarters of the public television with a request to publish a political statement. It is important to know that the members of Parliament have the right to enter or stay in any public institution. But the leaders of the TV were not willing to meet the MPs, and after a while, the members of security guard removed them from the building with force. However, in spite of a clear violation of the MPs' rights, the politically biased Office of the Prosecution General (the only public body having a competence in such a case) did not initiate criminal proceeding against members of the security guard, but against the opposition MPs involved in the incident, invoking their violent action. It is also worth noting that since this event, several public bodies have refused to respond even to written questions of MPs of the opposition parties, although this would be their legal obligation.

Notably, it is planned for the future to ban MPs from public institutions in order to prevent the 'abuse of MPs' rights'.

8. Parliamentary practice under the changing procedural rules

The extravagant procedural rules have often been completed by curious practice by the parliamentary majority.

One of these special features is the frequently used technique of omnibus legislation. It means that a law covers a number of diverse and unrelated legal provisions, often amending a lot of other laws. Many times these laws are large size legal packages combining highly different subjects, which make intransparent and difficult the whole legislative process. A law of 2012, for example, was itself a legal compilation modifying no less than 46 other laws by a single vote. This codification method is often used for hiding controversial provisions, and eliminating a heavy debate on them.

The principle of legal security has declined in the last years, as Parliament have ignored some well-established principles of legislation: sometimes it adopted laws with retroactive effect; it has obliterated the vested rights and has not respected the principle of legitimate expectations.¹⁶ In fact, the quality of codification is extremely low; it is demonstrated by the high proportion of the laws amending other laws adopted just in the few past years.

Another special characteristic of today's legislative practice is the personalized law-making. These laws provide privileges, exemptions or special entitlements for certain persons (usually politicians) giving loopholes and

¹⁶ See more detailed Z Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford University Press 2017) 45–475.

exceptions to the general rules. Whereas these parliamentary acts offer special advantages, reliefs or rewards for selected people on political basis, they offend the normative character of law. This legislative device is used when the desired goal cannot be reached in the normal way (e.g. by individual administrative act) but only by the intervention of the Parliament.

Standing orders were completed in 2012 with detailed disciplinary rules. It was a necessary change, as only some sketchy rules were laid down beforehand. However, the financial penalty, one of the recently introduced sanctions has been imposed only on opposition MPs so far. In practice, it is an instrument of the restriction of opposition rights.

The simplified procedures and the block voting not only reduces the legislative capacity of the Parliament, but also makes it easier to reject opposition proposals. Thus, for example, when opposition MPs submitted almost three thousand motions to the amendment of the Labour Code in 2018, the government majority rejected all of them by a single vote.

Furthermore, the work of Hungarian legislature is permeated by an anti-parliamentary spirit; the speaker of Parliament once said from its pulpit that it is a moral scandal that the Socialist opposition MPs can sit in the National Assembly; the Government majority outvotes all initiatives of the parliamentary opposition; a great part of interpellations are submitted by government party MPs, although the interpellation procedure is a traditional weapon of the opposition of the day; no committee of inquiry has been set up since 2010 which was proposed by the opposition parties, etc. The government majority is continuously blocking any parliamentary procedure proposed by the opposition. Thus, for example, the agenda of the extraordinary meetings convened at the initiative of the parliamentary minority is regularly rejected by the government majority so that such meetings cannot be held; the government party MPs do not attend meetings of the parliamentary committees whose agenda has been determined by the committee chairman belonging to the opposition. However, government-led obstruction is never followed by a parliamentary disciplinary procedure, as the Speaker of the Parliament is an extremely biased veteran politician of the leading government party.

The lack of cooperation with the opposition, the uncompromising realisation of the majority will may easily lead to ignoring formal rules of parliamentary procedure. At the end of 2018, for example, when several opposition members prevented the Speaker from occupying his seat and opening the Parliament's sitting, the Speaker opened the sitting from his own seat (as an MP) in the floor, and the whole meeting was chaired from the benches of the session room. Although this practice was unprecedented in the centuries-old history of the Hungarian Parliament and implicitly violated the rules of the National Assembly, the acts adopted in that scandalous and irregular sitting were not invalidated by the Constitutional Court.¹⁷ However, it is not surprising:

¹⁷ Decision II/258/2019. of the Constitutional Court.

what could have happened otherwise, when the Constitutional Court was packed by the executive power years ago?¹⁸

9. A balance

After all, Hungarian parliamentarianism has sinister perspectives. As far as the law and practice of Parliament is concerned, appearances are deceptive. Nothing is what it looks like. While the legislature produces a lot of new and modified laws as a law-factory, its real role in legislative process is highly insignificant. Although the Government is accountable to the Parliament, among others for preparing legislation, many controversial bills are submitted by individual MPs (in order to avoid the binding coordination procedures of law-making process). Whereas the initiation of committees of inquiry or holding extraordinary sessions are well-entrenched minority rights, no such committees have been set up, and no such sessions have been held since 2010, even if the MPs in sufficient number proposed them. Even though MPs must declare regularly their growth of wealth as an anti-corruption device, nobody controls these declarations, and they are not sanctioned at all. And so on.

Today, Parliament is a rubber stamp without any real policymaking role. All parliamentary reforms which have been introduced since 2010, have aimed to open the way for the unbridled and unlimited political decision-making of the Government, and to secure the power of the governing parties.

The future of parliamentary democracy is also gloomy because no European or any other supranational mechanisms are available to counterbalance or reverse the authoritarian tendencies and the decline of Parliament in a country where the government is formally legitimate, as it is able to maintain, this or that way, its electoral support and parliamentary majority. European institutions simply have no answer to the challenge posed by populism. Thus, the contemporary populist governments effectively break down the rule of law institutions, including parliaments, that were in the past the guarantees of liberal democracy.

As a matter of fact, Mr Viktor Orbán, Prime Minister of Hungary since 2010, announced openly still in 2009 that the strategic goal of the conservative parties is to the establishment of a ‘central political force field’ where they can be able to remain in power for a long time. After the deep transformation of the constitutional system of the country, these parties have a good chance to accomplish this political master plan, in which the efforts to make Parliament an insignificant institution is only an episode.

¹⁸ See Fn 1.