



Constitutional Constraints on Elective Dictatorship

in Hungary, the United States and France

by Zsuzsanna Gedeon

Zsuzsanna Gedeon
LL.M. LONG THESIS
PROFESSOR: Professor Renáta Uitz
Central European University
1051 Budapest, Nádor utca 9.
Hungary

Abstract

Elective dictatorship became a crucial problem of all types of governments due to the emergence of parties. When the same party controls the executive power and the majority of the legislative power, separation of powers, fusion of powers and other traditional checks lose their effect of securing liberty and democracy. The main focus of this research is identifying solutions to this problem, in the parliamentary Hungary, presidential US and semi-presidential France.

The main argument of the thesis is that although parliamentary systems, such as Hungary, are the most threatened by elective dictatorship, there are certain institutions and tools in such a system that are the most capable of opposing elective dictatorship. Opposition rights are analyzed through supermajority requirements and the standing right of the opposition to constitutional courts.

The main finding of the thesis is that the parliamentary Hungary is the most capable of opposing elective dictatorship through these two specific rights. This conclusion suggests that there are certain institutions in a parliamentary system, such as the theory of opposition rights, that should be used more intentionally and should be developed further to oppose elective dictatorship, instead of concentrating on the traditional checks that are not working anymore.

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To my father, Dr. Péter Gedeon.

My biggest critic and supporter.

You were, You are and always will be my main motivation.

I would be nowhere without You.

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Introduction

The separation of powers doctrine is one of the most important principles of democracies because it provides an approach to stop a political power from becoming authoritarian and acting only according to its own will. Therefore the doctrine secures liberty and democracy. However, in certain situations, such as unified government, the principle of separation of powers loses its effect and main aims, since the executive branch gains too much power. In these situations the same party controls the executive power and the legislative power, which not only leads to a strong executive, but can also easily result in an arbitrary government.

This is the situation I call elective dictatorship: when the executive power is so strong that it has dominance over legislative power, during the legislation it uses legislation as a voting machine¹, there is no real check on the executive by legislative power and the doctrine of separation of powers does not have its full and desired effect. The constitutional frameworks and rules, which used to operate well, are no longer sufficient to secure liberty and democracy. The rules and principles were created when parties did not even exist or had much less power and importance, but nowadays these parties can easily create an elective dictatorship.

¹ Lord Hailsham, *The Richard Dimbleby Lectures* (London: BBC1 October 14, 1976.): 10.

Many scholars have written about the problem of emerging parties, unified government and their effect on separation of powers.² The term, elective dictatorship was first used as early as 1971, by Lord Hailsham³, and by that time the problem had already been discussed for twenty years.⁴ Scholars seem to agree that the emergence of parties fundamentally changed the balance between the political branches and that reforms are needed to create a balance for the dangerous and powerful executive power. However, scholars propose only some institutional changes, mainly for specific countries, a comprehensive reform proposal is still absent in the literature.⁵

As described above, the principle of separation of powers is no longer capable of keeping the balance between the political branches and to stop executive power from becoming hegemonic and arbitrary. Therefore, there is a need for new institutions and regulations, which are capable of constraining executive power and minimizing elective dictatorship. In the case of the parliamentary system of Hungary, this problem is especially vivid for three reasons. First, there is no comprehensive literature about

² See e.g. in: Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, not Powers," *Harvard Law Review* (2006) 119, no. 8: 2312-2386., Thomas J. Cleary, "A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers," *Pierce Law Review* 6, no. 265 (Fall 2007): 265-297., Richard A. Epstein, "Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes," *Harvard Law Review Forum* 119, no. 202 (2006): 210-219., Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (January 2000): 633., Cindy Skach, "The 'Newest' Separation of Powers: Semipresidentialism," *International Journal of Constitutional Law* 5, no. 93 (January 2007): 94-122., Jacob E. Gersen, "Unbundled Powers," *Virginia Law Review* 96, no. 2 (April 2010): 301-358.

³ Lord Hailsham, *The Richard Dimbleby Lectures* (London: BBC1 October 14, 1976.): 10.

⁴ Aroney, Nicholas, Nethercote, J. R. and Prasser, Scott, "Restraining Elective Dictatorship," *Crawley: University of Western Australia Press* (2008). (The first complex analysis was written as early as 1964: What's Wrong with Parliament?)

⁵ In one of the newest article about opposition rights Fontana says 'Yet governments in opposition rules have received almost no attention in the academic literature.' Later he also states that even the few literature look at opposition rights as a 'random set of quirky, disconnected and largely insignificant rules', such as the works of Gerken and Vermeule. In: Fontana, David, "Government in Opposition," *The Yale Law Journal* (2009) 24 (3): 548. The difference between Fontana's and Vermeule's work is that the former not only talks about minority rules as giving the opposition blocking power, but also as giving the opposition decision making power.

the problems of the parliamentary system and elective dictatorship. Second, in 2010 at the national elections one of the parties (FIDESZ) gained a two-thirds majority in the parliament, which allowed it to create an elective dictatorship. Recent actions of the government have shown that the problem of a too strong executive power exists, such as the decision of the government to curtail the powers of the Constitutional Court after an undesired decision. Finally, the Hungarian government is in the process of proposing a new constitution, which makes the debate about the system of government, separation of powers and constitutional constraints on elective dictatorship very actual.

The purpose of this thesis is to examine the constitutional constraints on elective dictatorship in three different forms of government, through Hungary, France and the United States of America by analyzing the constitutional constraints and by identifying two factors in these systems that reduce elective dictatorship. I will argue that although parliamentary systems, such as Hungary, are the most threatened by elective dictatorship, there are certain institutions and tools in such a system that are more capable of mitigating this problem in Hungary than in France or the United States.

In order to conduct such an analysis I look at three types of government. All three types have very different views on how to secure liberty and democracy, therefore their capability to oppose elective dictatorship is also different. The American presidential system is based on the separation of powers doctrine, the Hungarian parliamentary system is based on the fusion of powers and the French semi-presidential system is a mixture of the presidential and parliamentary system. United

States and France were selected to examine presidential and semi-presidential government, because scholars look at them as the prototypes of such forms of governments.⁶

There are many ways to oppose elective dictatorship, such as rethinking the separation of powers doctrine, creating a new form of government in light of party emergence, reforming the legislative oversight of the executive power, reconsidering the law-making procedure (e.g. the role and existence of the second chambers and presidents), creating strong opposition rights and strengthening the role of civil society, the press and the constitutional courts. The main problem with parliamentary systems is that in these types of government an elective dictatorship is automatically created. This feature fundamentally questions the existence of such a type of government. However, in this thesis I will not deal with the issue of whether such systems should be replaced with another type, but focus on two institutions, which I believe are effective ways of limiting an elective dictatorship. I will analyze the system of supermajority rules and the right of the opposition to take a case to the courts and the council.

⁶ See e.g. in: Bruce Ackerman, "The New Separation of Powers.," *Harvard Law Review* (2000) 113, no. 3: 633., Cindy Skach, "The "Newest" Separation of Powers: Semipresidentialism," *International Journal of Constitutional Law* 5, no. 93 (January 2007): 94-122., Jacob E. Gersen, "Unbundled Powers.," *Virginia Law Review* 96, no. 2 (April 2010): 301-358., Thomas J. Cleary, "A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers," *Pierce Law Review* 6, no. 265 (Fall 2007): 265-297., Mark Freeman, "Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism," *Pace International Law Review* 12, no. 253 (Fall 2000): 253-283.

In the first chapter of this thesis I provide a theoretical background for elective dictatorship and for the possible solutions to oppose it. I show the parties' effect on the doctrine of separation of powers, the characteristics of the three types of government, the different powers of the political branches in divided and unified government. Furthermore, I introduce the theory of opposition rights as possible solutions for the problem of elective dictatorship. The second chapter examines the supermajority rules and the courts' role in the three types of government through the standing rights of the opposition. Finally, the third chapter includes the evaluation of the different solutions and institutions used in the three types of governments.

I. Theoretical background

The first section presents the theoretical background for elective dictatorship. It shows how the different types of government solved to secure liberty and avoid tyranny, the differences between these models in using the principle of separation of powers. In the next section the consequences and problems of emerging parties and elective dictatorship are highlighted. After defining the flaw in the systems, I show briefly some possible solutions and the theory of opposition rights more detail. Finally, a more detail theoretical background is given to the two solutions to the problem of elective dictatorship, which solutions are analyzed in the next chapter of this thesis.

A. The problem of elective dictatorship

1. The original design

The main aims of separation of power doctrine have remained the same in all liberal democracies⁷ but their realization and insurance vary in different liberal democracies.

The main goals of the separation of powers theory were to secure liberty and avoid the

⁷ The term liberal democracy is used by Helms and described as: ‘...establishing liberal democracy was very much an extended exercise in limiting the power of the government or, more precisely, the power of the executive...constitutional constraints specifically designed to check the executive...’ In: Ludger Helms, “Studying Parliamentary Opposition in Old and New Democracies: Issues and Perspectives,” *Journal of Legislative Studies* 14, no. 1/2 (March 2008): 6-19: 6.

creation of tyranny as far as possible. Instead of the will of the government, the will of people should gain effect and prevail. These are exactly the preconditions and main ideas of all liberal democracy.⁸ However, these democracies chose different ways and tools to secure their existence and these principals and aims.

The three different models of separation of powers are represented through three different types of government: parliamentary republic, presidential and semi presidential systems. All three types try to create a balance between the political branches and therefore stop either the legislative or the presidential branch from gaining too much power and becoming hegemonic.

The presidential system, represented in this paper by the United States of America, uses the principle of separation of powers to constrain all the branches. It has to be remarked that the Constitution of the United States does not advocate an absolute separation of powers, since the founding fathers were worried about the efficiency of the system.⁹ As Madison clarified and the Supreme Court highlighted they opted for a mixed system.¹⁰ The main idea of this kind of separating system is that it makes legislative and executive branches race each other; it creates a rivaling between them.¹¹

⁸ Ludger Helms, "Studying Parliamentary Opposition in Old and New Democracies: Issues and Perspectives.," *Journal of Legislative Studies* 14, no. 1/2 (March 2008): 6-19.

⁹ We can see some overlaps between the powers of the two political branches, e.g. the Vice President is the president of the Senate and in the unlikely event of tied votes in the upper house the Vice President's vote decides about the decision of the Senate. Article I Section 3.

¹⁰ Madison wrote: 'the degree of separation...essential to a free government, can never in practice, be duly maintained unless these departments be so far connected and blended, as to give to each a constitutional control over the others'. In: *The Federalist* No. 48 n. 1, 332. See also in: Richard Albert, "The Fusion of Presidentialism and Parliamentarism," *The American Journal of Comparative Law*, 2009: 531-578.

¹¹ Thomas J. Cleary, "A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers," *Pierce Law Review* 6, no. 265 (Fall 2007): 265-297.

Therefore the branches are occupied by their power maximization and they leave the people and their rights alone.

The opposite of the presidential system is the parliamentary republic. These types of government do not even try to separate the branches, but use the idea of fusion of powers and mutual dependence. There are numerous overlaps between the powers of executive and legislative branches. This kind of system focuses on the checks and balances of the branches over each other by giving them the same powers.¹² The cornerstone of the system is the way that executive power is created. Unlike in the presidential systems, in parliamentarism, the prime minister (the head of the cabinet type of government) is elected by the majority of the members of parliament. This creates the political responsibility of the executive power to the legislative power and serves as the main problem of these systems as we will see later in this chapter.

The third type of government is the semi presidential. This kind of system is in between presidential and parliamentary types and incorporates elements and characteristics from both systems.¹³ The prototype of such a government is France and the first definition for semi presidentialism was given by Duverger. His definition highlights exactly the elements taken from the two other systems. It is presidentialism in the sense that there is a popularly elected president. And it is parliamentarism

¹² The legislative oversight over the government is a very important task of the parliaments in such systems. They have many tools and institutions to monitor the government, such as the interpellation, the right to ask questions from the members of the cabinet and the system of the committees.

¹³ Richard Albert, "The Fusion of Presidentialism and Parliamentarism," *The American Journal of Comparative Law*, 2009: 531-578.

because of the politically responsible cabinet to the parliament.¹⁴ The solution therefore chosen by this third type of government is to mix the elements of the two other systems.

The differences between the solutions of the three types of governments can be easily seen. The common factor in these types of governments is the principle of securing the rights and liberties of people and to avoid any of the political branches becoming tyrannical. If we look at the logic of the systems we can see that all of them are capable of avoiding a tyrannical power in their different ways. However, something has fundamentally changed since these constitutional frameworks were created. The members of the political branches no longer want to maximize the power of their own branch. Another power has emerged that rewrites the dynamics of all liberal democracies: the political parties.

2. The flaw: defining elective dictatorship

The emergence of political parties has a huge influence on the theory of separation of powers in all three types of government.¹⁵ ‘The failure to take into account the impact of political parties and the failure to create a clearly defined and functional separation

¹⁴ Duverger states that there are three crucial elements of such a government type: the president has to be elected directly, he has to possess ‘quite considerable powers’ and there has to be a government composed of prime minister and ministers who are politically responsible to the legislative power. In: Maurice Duverger, "A New Political System Model: Semi-Presidential Government," *European Journal of Political Research*, 1980: 165-187.

¹⁵ A complex overview is given by the article Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

of powers law has had many unfortunate consequences.’¹⁶ ‘Party system working injury to the nation.’¹⁷ The original design of the presidential type of government is more capable of resisting the influence of the parties but is also affected by them.¹⁸

The existence of different political parties in a parliamentary system has a fatal effect on the idea of constrained political branches. Members of the parliament are loyal to their parties and party discipline makes this loyalty even stronger.¹⁹ Since the executive power is elected by the members of the legislative branch, members of both political branches belong to the same political party. This institutional design has two main effects. First, executive power becomes very strong and it uses legislative power as a voting machine.²⁰ The ministries do the policy-making and the drafting of the bills. Since the members of parliament belong to the same party they vote for these policies and bills, instead of acting according to the will of the people, they act according to the will of the executive power. ‘Party-government had led to the virtual extinction of the independent legislator.’²¹ Second, the most important check in the system does not work in reality. Parliament has the power to monitor the executive power, however, because of the above-mentioned political reasons it is hard to imagine that the members of the legislative branch will do their job. How can MPs be expected to vote against their own government and party?

¹⁶ Thomas J. Cleary, “A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers,” *Pierce Law Review* 6, no. 265 (Fall 2007): 284.

¹⁷ Qvortrup, Mads, “A.V. Dicey: The Referendum as the People's Veto,” *History of Political Thought* (1999) 20 (3): 543.

¹⁸ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

¹⁹ *Ibid.* 2314.

²⁰ Lord Hailsham, *The Richard Dimbleby Lectures* (London: BBC1 October 14, 1976.): 10.

²¹ Qvortrup, Mads, “A.V. Dicey: The Referendum as the People's Veto,” *History of Political Thought* (1999) 20 (3): 539.

The political parties also have an effect on the separation of powers in the presidential system.²² When the president and the legislative power belong to the same party the same questions arise as in the parliamentary systems. ‘The revival of strong, unified parties has dramatic implications for presidential power and executive-legislative relations. Indeed, two of the most important studies of presidential power were written before the renewal of strong parties.’²³ ‘At the very least, the rise of partisan politics worked a revolution in the American system of separation of powers, radically realigning the incentives of politicians and officeholders.’²⁴ Scholars call it a unified government as opposed to divided government when they come from different parties.²⁵ During divided government the original design of separation of powers work perfectly against a tyrannical power. ‘When control is divided between parties, we should expect party competition to be channeled through the branches, resulting in interbranch political competition resembling the Madisonian dynamic of rivalrous branches’.²⁶

Two notes have to be made about the presidential system in the United States. First, there are only two political parties winning either Congress or the presidential

²² Thomas J. Cleary, “A Wolf in Sheep's Clothing: The Unilateral Executive and the Separation of Powers,” *Pierce Law Review* 6, no. 265 (Fall 2007): 265-297.

²³ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2334.

²⁴ *Ibid.* 2321.

²⁵ Richard Albert, “The Fusion of Presidentialism and Parliamentarism,” *The American Journal of Comparative Law*, 2009: 558.

²⁶ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2327.

elections. Therefore, the likelihood of a unified government is quite high.²⁷ On the other hand, the elections to the House of Representatives are held every second year,²⁸ thus there is a possibility that two years after the presidential elections disillusioned people will vote for the members of the opposite party.

The political parties' effect on the semi presidential system depends on numerous factors. Besides the political view of the prime minister, his cabinet and the majority of the members of the legislative power, the president's political affiliation is also a very important factor.²⁹ There are three variations of the system according to the relationship between the president, the prime minister and the legislative majority: 'consolidated majority', 'divided majority' and 'divided minority'.³⁰ In consolidated majority the president and the prime minister belong to the same party and the majority of the legislative power.³¹ Skach describes this situation as 'full authority', when '... the likelihood that these two executives will have the same policy agenda and will cooperate to accomplish their joint agenda is maximized.'³² During divided majority the prime minister is from the party that has the majority in the legislative body but the president is not.³³ This is the situation which scholars call co-habitation.³⁴

²⁷ From 1832 to 1952 85% of the governments were unified. From 1955 through 2000 81%. In: Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, not Powers.," *Harvard Law Review* 119, no. 8 (June 2006):2330-2331.

²⁸ U.S. Constitution Article I Section 2.

²⁹ Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (January 2000): 633.

³⁰ Cindy Skach, "The "Newest" Separation of Powers: Semipresidentialism," *International Journal of Constitutional Law* 5, no. 93 (January 2007): 102.

³¹ Ibid. 28.

³² Ibid. 102.

³³ Ibid. 28.

³⁴ See e.g. in: Mark Freeman, "Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism," *Pace International Law Review* 12, no. 253 (Fall 2000): 253-283., Cindy Skach, "The "Newest" Separation of Powers: Semipresidentialism," *International Journal of Constitutional Law* 5, no. 93 (January 2007): 94-122. The likelihood of

‘In such a political party context, the design flaw of semipresidentialism, this latest and popular separation-of-powers scheme, becomes apparent.’³⁵ Finally, we can speak about divided minority when both the executive power and the president are from a different party than the majority of the legislative power.³⁶ ‘[T]he most conflict-prone subtype and, potentially, is the most dangerous for constitutionalism and fundamental rights.’³⁷ From the aspect of elective dictatorship, the worst form is when there is a consolidated majority. In this case the president and the executive power can maximize their power to a dangerous extent.

The situation when the executive power can act according to its own will, ‘the parliament had been undermined by the executive’³⁸ and it is not constrained by the other political branch in reality because they are from the same party is called elective dictatorship. ‘...rise of the party system has made a significant extraconstitutional supplement to real executive power.’³⁹ In this case the branches are not fighting with each other, and instead of representing the peoples’ will both branches follow a party policy and party discipline and maximize their power. Furthermore, there is no real check on the executive power since the members of the same party should check other members of the same party.⁴⁰ Consequently, executive power becomes very strong and

cohabitation became very low in 2001 when a constitutional amendment reduced the presidential term from 7 years to 5. In: Ludger Helms, “Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies,” ., *Government & Opposition* 39, no. 1 (Winter2004 2004): 22-54.

³⁵ Cindy Skach, “The “Newest” Separation of Powers: Semipresidentialism,” *International Journal of Constitutional Law* 5, no. 93 (January 2007): 104.

³⁶ Ibid. 28.

³⁷ Ibid. 104.

³⁸ Aroney, Nicholas, Nethercote, J. R. and Prasser, Scott, “Restraining Elective Dictatorship,” *Crawley: University of Western Australia Press* (2008):2

³⁹ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2314.

⁴⁰ Ibid. 2312-2386.

there is a chance of a tyrannical government. As David Fontana phrases the problem: ‘...constitutional democracies and the idea of checks and balances are shaken to their cores when a hugely successful political leader, elected apparently legitimately at the ballot box, captures all of the branches and powers of government.’⁴¹

As we can see, the emergence of political parties fundamentally influenced the original design of all the three different types of government to avoid tyranny and secure liberty. When the members of the political branches belong to the same party the internal checks⁴² built in the different types of governments no longer work. External checks are still working in these systems, such as the media and the voters, however their efficiency is based on many unforeseen factors.⁴³ Current constitutional frameworks and regulations did not count with strong political parties. Why should we hope that politicians and political parties would behave morally and ethically? There has to be some legal solution that is capable of constraining a tyrannical executive power and elective dictatorship.

⁴¹ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

⁴² ‘On internal checks I mean those, which are incorporated in the rules that regulate the relationship between political branches, on external checks I mean other ‘extra-parliamentary’ solutions. (Extra and intra parliamentary phrased are used by Helms in “Studying Parliamentary Opposition in Old and New Democracies: Issues and Perspectives,” *Journal of Legislative Studies* 14, no. 1/2 (March 2008): 6-19.)

⁴³ For instance whether the voters care to deal with politics or whether the media gives efficient information to the people.

B. Solutions to the problem of elective dictatorship

In the previous section I gave a short description of the problem and origin of elective dictatorship. In this chapter I review some possible solutions that could address the problem of elective dictatorship. Obviously there are many different theories and ways to minimize elective dictatorship by constraining a strong executive power. Different scholars would not only disagree which discipline should deal with the issue, but most certainly they would also disagree with my main argument about the need of a legal framework to solve this problem.⁴⁴

In the following sections first I present briefly some theories and solutions that could be useful in the battle against elective dictatorship. I chose to describe those ones that could be the most efficient. Second, I present the theory of two chosen solutions against elective dictatorship, which are analyzed in the rest of this thesis.

1. Some solutions at a glance

There are many ways how an elective dictatorship could be diminished or minimized. However, in this section I present only very few of them. I show short the idea of

⁴⁴ A section of book about denying that the political problem of strong executive power cannot be solved by legal rules: Benjamin A. Kleinerman, "'The Court Will Clean It Up': Executive power, Constitutional Contestation, and War Powers," in *Constitutionalism and Politics*, 235. Two examples of works stating that institutional and legal solutions are needed: Ludger Helms, "Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies.," *Government & Opposition* 39, no. 1 (Winter 2004): 22-54. and Nicholas Aroney, J. R. Nethercote and Scott Prasser, *Restraining elective dictatorship* (Crawley: University of Western Australia Press, 2008).

rethinking separation of powers and the battle over reforming government types. Then I present what kind of rules and institutions could be used as internal checks, such as the theory of opposition rights or the second chamber. And finally, I show the external rules that could be built in the different constitutional frameworks of liberal democracies in order to prevent a tyrannical executive power, such as the role of the constitutional courts.

One of the illnesses of all the types of government could be healed by their reform. Many scholars have written about the topic whether the presidential system should be imported to Europe.⁴⁵ They debated the advantages and disadvantages of both presidential and parliamentary systems. There are also some scholars who wrote about the reform of parliamentary systems and provided a modified type of parliamentarism. Skach was writing about the semi presidential system as a new separation of powers idea.⁴⁶ Ackerman envisions a new type of ‘constrained parliamentarism’.⁴⁷ Lijphart presents the consociationalism type of government. The reform of the different types of government and their evaluation based on different criteria seems to be an ongoing debate. What remains clear is that parliamentary systems need more urgent reforms than any other form of government, since elective dictatorship happens there after

⁴⁵ See e.g. in: Steven G. Calabresi and Kyle Bady, “Is the Separation of Powers Exportable?,” *Harvard Journal of Law & Public Policy* 33, no. 1 (Winter2010 2010): 6-16., Oona Hathaway, “The Case for Promoting Democracy through Export Control,” *Harvard Journal of Law & Public Policy* 33, no. 1 (Winter2010 2010): 17-22., Bruce Ackerman, “The New Separation of Powers,” *Harvard Law Review* 113, no. 3 (January 2000): 633., Steven G. Calabresi, “The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution,” *Constitutional Commentary* 18, no. 1 (Spring2001 2001): 51.

⁴⁶ Cindy Skach, “The “Newest” Separation of Powers: Semipresidentialism,” *International Journal of Constitutional Law* 5, no. 93 (January 2007): 94-122.

⁴⁷ Arend Lijphart, *Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

every national election, because the same party has the majority in the executive and legislative power automatically.

Another group of solutions against elective dictatorship is the category of internal solutions. By this I mean those kinds of constraints that are not dependent on any external factors, such as the ability of the media to inform public opinion. These constraints try to solve the problem of elective dictatorship directly by focusing on the power the parties represent in the constitutional design. Two ideas could be mentioned here, as a possible constraint on elective dictatorship is the theory of second chambers and the theory of opposition rights. I present the latter in a much more detailed fashion in the next section.

The final category of solution that has to be mentioned is the group of external constraints. As I already mentioned, internal constraints are the most important ways to constrain an elective dictatorship. External solutions cannot be used to substitute them, but they can have a good use in backing up the system of constitutional constraints on executive power. One of these kinds of restraints is the media and the role it plays in a liberal democracy. Voters can obtain information about the government primarily through news and other forms of media.

However, there are at least two possible flaws in the system that is grounded on the idea that people get information about the operation of their government and use it in their decisions (e.g. at elections). The first one is the belief that the media is capable of conveying relevant information to the people. The second is the view that people are

interested in this information and they evaluate it as a crucial element in their political decisions. One of the examples for this situation is the interpellation in parliamentary systems.⁴⁸ Let us imagine that the governing party alone has the required majority in the legislative body. One of the tools the legislative has to monitor the government is known to be interpellation. However, in reality if any member of the government is interpellated, the members of the parliament have to vote whether they accept the answer or not. Since the majority of the parliament belongs to the same party as the interpellated official, in most of the cases they accept the answer. This is the situation with most of the tools the parliament has to oversee the executive power in a parliamentary system. The only way how interpellation can remain a more or less effective tool is if voters can and willing to follow the sessions of parliament through the media. As we can see, this kind of external solution depends on too many factors to consider it as a primarily constraint on elective dictatorship.

There are two other institutions that can be more effective in providing a restrain for executive powers. One of them is the referendum and the other is the constitutional or supreme court. Furthermore, we can mention three other possible constraints: the bureaucratic institution⁴⁹, the careerist lower courts or the presidents in parliamentary

⁴⁸ The following example is taken from the Hungarian system, based on the rules of the Constitution and the House Rules.

⁴⁹ as a 'fourth branch' in: Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, not Powers.," *Harvard Law Review* 119, no. 8 (June 2006): 2375.

systems⁵⁰, independent agencies and institutions dealing with government accountability⁵¹ and the fragmentation of the political parties⁵².

2. The theory of opposition rights

Opposition rights, as a theory, is one of the solutions that is effectively capable of constraining elective dictatorship. In this part I present the definition and characteristics of opposition right, show why it is an effective tool as a constraint on executive power and finally give some examples of opposition rights.

Opposition rights can be found in many different systems' constitutions and house rules in different places. However, looking at them as a complex theory and an alternative to separation of power is a recent development of legal research. There are many well-known and well-respected political science analyses about the situation and characteristics of the different oppositions in different systems of governments,⁵³ but looking at these rights as a system of constraints on unified government was first done by David Fontana in his article called 'Government in Opposition'⁵⁴. He not only

⁵⁰ These solutions were mentioned by David Fontana in: "Government in Opposition. (Cover story)," *Yale Law Journal* 119, no. 3 (December 2009): 548-623. It has to be remarked that whether they can constrain elective dictatorship is very much dependant on the political, social and legal circumstances in the specific country.

⁵¹ Such as GAO in the United States. In: Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, not Powers," *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

⁵² A detailed method is given in the article by Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, not Powers," *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

⁵³ See e.g. Robert Alan Dahl, *Political Opposition in Western Democracies* (New Haven: Yale University Press, 1966).

⁵⁴ Fontana, David, "Government in Opposition. (Cover story)," *Yale Law Journal* 119, no. 3 (December 2009): 548-623.

constructs a catalogue containing the most important opposition rights, but he looks at losing political parties as ones that also have to participate in the governing process. Therefore, his theory is a new one in the field. As he describes, government in opposition is an ‘innovation’, since loser parties get winner power and winning parties get loser power as well.⁵⁵ “...when Great Britain first experimented with government in opposition rules...Lawrence Lowell called it ‘the greatest contribution of the nineteenth century to the art of government.’”⁵⁶

The term opposition rights refer to those political parties, which have institutionalized rights and participate in political decision making as the opposition to the governing power.⁵⁷ The term used by Fontana – government in opposition refers to the situation when minority political parties not only have the rights to block and hinder the government but to participate in the governing procedure.⁵⁸ This means that the existence of opposition rights creates a divided power between political parties, therefore it is a ‘...new, and alternative form of separation of powers.’⁵⁹ Some other terms Fontana uses need to be clarified. On winner power he means those political parties (single or coalition), which win at the national elections or through other legitimate elections. On *losing powers* he means those political parties that lost an above-mentioned kind of election. The third term used is *winners’ power* which is such a governing power as making decisions.

⁵⁵ Ibid. 547.

⁵⁶ Fontana, David, “Government in Opposition. (Cover story),” *Yale Law Journal* 119, no. 3 (December 2009): 550.

⁵⁷ Peter Smuk, *Ellenzéki jogok a parlamenti jogban - Pártok és Politika* (Budapest: Gondolat Kiadó, 2008). [Opposition rights in the parliamentary law]

⁵⁸ Fontana, David, “Government in Opposition. (Cover story),” *Yale Law Journal* 119, no. 3 (December 2009): 548-623.

⁵⁹ Ibid. 551.

The system of opposition rights is not only one of the tools to minimize elective dictatorship, but one of the most promising since it focuses on the problem of political parties and the separation of powers and try to give a solution to that. ‘...government in opposition rules help resolve one of the most problematic and underappreciated questions in constitutional design: how to prevent a very successful political movement from gaining too much control...’⁶⁰ The way, how these rules can be an effective constraint is that losing parties gain significant governing control, therefore they restrain the winning parties and leaders. The way this theory disperses the winning and governing power between the winner and loser political parties is a kind of separation of powers. Opposition rights constrain elective dictatorship in two ways. First by creating the above-described new separation of powers and second, because the actual winner knows they can lose at the next election and therefore arrive at the position of opposition.⁶¹

Fontana created three categories of opposition rules. The first set of rules is that which grant winner’s powers to the losing parties in every case (Fontana refers to it as a must).⁶² The second groups of rules are those, which permit losing parties to exercise certain governing power.⁶³ And the final category contains those rules that encourage opposition parties’ involvement in governing, such as supermajority rules.⁶⁴

⁶⁰ Fontana, David, “Government in Opposition. (Cover story),” *Yale Law Journal* 119, no. 3 (December 2009): 553.

⁶¹ Ibid. 585.

⁶² Ibid. 566.

⁶³ Ibid. 567.

⁶⁴ Ibid.

The following, different opposition rights can be mentioned: special powers on a committee⁶⁵ or the chairman position of certain committees,⁶⁶ compelling information from the governing political party,⁶⁷ the power to set the agenda for a certain time or participate in its setting,⁶⁸ executive positions,⁶⁹ appointments to courts,⁷⁰ standing to courts,⁷¹ tools to audit and investigate the executive power,⁷² legislation initiative,⁷³ supermajority voting rules⁷⁴ and submajority rules.⁷⁵

The theory of government in opposition and opposition rights is clearly one of the most effective solutions to the problem of elective dictatorship since it creates a new separation of powers theory by taking into consideration the political parties.⁷⁶ ‘The most notable benefit of government in opposition rules is that they provide the most effective - and permanent – constraint on power of any separation of powers regime that constitutions have ever contemplated.’⁷⁷

⁶⁵ Ibid. 571.

⁶⁶ Ibid. 572.

⁶⁷ Ibid. 574.

⁶⁸ Ibid. 575.

⁶⁹ Ibid. 575.

⁷⁰ Ibid. 579.

⁷¹ Ibid. 580.

⁷² Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

⁷³ Ludger Helms, “Studying Parliamentary Opposition in Old and New Democracies: Issues and Perspectives,” *Journal of Legislative Studies* 14, no. 1/2 (March 2008): 6-19.

⁷⁴ Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386.

⁷⁵ In: Daryl J. Levinson and Richard H. Pildes, “Separation of Parties, not Powers,” *Harvard Law Review* 119, no. 8 (June 2006): 2312-2386., Adrian Vermeule, “Submajority Rules: Forcing Accountability upon Majorities,” *Journal of Political Philosophy* 13, no. 1 (March 2005): 74-98.

⁷⁶ Fontana argues that government in opposition is the most effective solution for the problem. He overviews two other solutions: creating multiple winners and the role of the constitutional courts and bureaucratic institutions, but he says all of them are highly influenced by politics, therefore they can serve only as temporary restraints. In: David Fontana, “Government in Opposition. (Cover story),” *Yale Law Journal* 119, no. 3 (December 2009): 548-623. P. 583-584.

⁷⁷ Fontana, David, “Government in Opposition. (Cover story),” *Yale Law Journal* 119, no. 3 (December 2009): 581.

3. Supermajority rules and standing to courts

In this section I present two possible solutions to the problem of elective dictatorship. These two institutions are examined in the next chapter through the United States of America, Hungary and France. This section provides a theoretical background for the two institutions. These two solutions stand for two different ways of constraining an executive power and elective dictatorship. Supermajority rules are internal solutions to the problem; they are tools the political parties in minority have to restraint the executive power. These kinds of rules are opposition rights, such as the standing right of the opposition parties. The latter institution was chosen because it is not only an opposition right but an external solution to the problem as well. Constitutional and supreme courts and councils are very important participants in the separation of powers. If their powers are well defined they can play the vital role of a veto player.

a. Supermajority rules

Supermajority rules are one of the most important tools in the hand of the opposition to oppose elective dictatorship. If certain decisions require a qualified majority, the unified government has to compromise with the minority.⁷⁸ Besides that, in this case, the opposition participates in decisions representing their voters; they can also obstruct bills that would make the government stronger by strengthening their position. In this

⁷⁸ The importance of the assumption underlying these rules is that the government does not have a qualified majority in the legislative body. Clearly, in that case supermajority rules just make the effect of elective dictatorship worse.

section I show the pro and con arguments of supermajority rules' existence argue for their use and justification and finally provide questions for the analysis in the next chapter.

In order to see the arguments in favor and against the constitutionality of supermajoritarian rules the American literature is essential because of two reasons. First, because qualified majority rules are American innovation,⁷⁹ and therefore, the US history and usage of these rules is educational. 'Through experience, Americans came to recognize that the people, especially when acting through the decisions of a majority, needed to be constrained in order to avoid destructive political passions and encroachment upon minority interests.'⁸⁰ Second, because a large-scale debate has taken place in US in connection with the constitutionality of supermajority rules.

Among the American scholars a huge debate started on the constitutionality of supermajority rules in 1994, when a house rule was accepted in connection with a tax law.⁸¹ They dealt with the issue not only in the context of the American Constitution, but cited many arguments against and in favor of the supermajority rules in general.⁸² I summarize these latter arguments as part of other pro and con arguments of supermajority rules.

⁷⁹ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 731.

⁸⁰ Ibid.

⁸¹ King, Brett William "The indeterminate relationship of supermajority voting requirements and majority rule theory" (PhD diss. - University of Chicago, 2000)

⁸² Scholars mostly cited different reasoning from the debates between the founding fathers at the constitutional convention and used those arguments as a justification for the existence of supermajority rules. See e.g. King, Brett William "The indeterminate relationship of supermajority voting requirements and majority rule theory" (PhD diss. - University of Chicago, 2000)

Looking at the issue in the context of the American Constitution, it was argued that it is true that supermajority rules in themselves can be seen unconstitutional, however in the particular case other specific rules of the US Constitution safeguarded the three fifth requirement, serving as checks, therefore the supermajority rule was constitutional.⁸³ Furthermore it was argued that all the supermajoritarian rules contained in the US Constitution are intended to override or reinforce a decision made not by the popular sovereign Congress but a single person or institution.⁸⁴ These arguments show how important it is to look at all supermajority rules in the context of the constitution.

Looking at the supermajority rules in general, the following pro and con arguments can be made in connection with their constitutionality.

The first and basic argument for the constitutionality of supermajority rule is based on its capability to be a veto. ‘The requirement of qualified majority seems to aid in the protection of minorities’⁸⁵ by giving a veto to minority against the majoritarian rule. If there are no effective checks and balances in the system, this can be considered, as one of the only means by which the majority can be restricted.

The second argument in favor of qualified majority rule highlights the more unanimous feature of supermajority rules. Supermajority rules are closer to unanimity than simple majority rules, therefore logically better solutions from the perspective of

⁸³ McGinnis, John O, and Michael B Rappaport, "The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules," *Duke Law Journal* (1997) 47 (2): 327.

⁸⁴ King, Brett William "The indeterminate relationship of supermajority voting requirements and majority rule theory" (PhD diss. - University of Chicago, 2000)

⁸⁵ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999): 138

popular sovereignty.⁸⁶ Furthermore, a more unanimous decision is more capable of producing an efficient decision thanks to the broader agreement underlying it. Adrian Vermeule highlighted the same assumption based on a different logic. He wrote that legislative decisions should not be seen as aggregation of votes, but as a value choice.⁸⁷ From this perspective we can also see supermajority rules as resulting in a broader consensus.⁸⁸ 'Supermajority rules are a means of refining and enlarging the public will to attain the public good.'⁸⁹ In the article *Our Supermajoritarian Constitution*, a wider support of the decision was also seen as endorsing supermajority rules.⁹⁰

The third argument defending qualified majority rule looks at the moral and individual rights approach. 'We believe that supermajority rules can be defended from various different moral premises, including a Rawlsian, as well as an individual-rights approach.'⁹¹ 'Qualified majorities are intended to protect individual rights against the standing interests and passions of the majority.'⁹²

The fourth argument endorsing supermajority rule is focusing on the quality of decision-making. '...the Constitution embraces supermajority rules as a means of improving legislative decision-making in various circumstances where majority rule

⁸⁶ See the detail argument in the section of justification of the usage of supermajority rules.

⁸⁷ Vermeule, Adrian, *Mechanisms of Democracy. Institutional Design Writ Small* (New York: Oxford University Press, 2007)

⁸⁸ Ibid.

⁸⁹ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 731.

⁹⁰ Ibid.

⁹¹ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 731.

⁹² Savić, Obrad, *The Politics of Human Rights* (London: Verso, 1999): 127.

would operate poorly.’⁹³ Through enhancing the quality it ‘[prevents] the enactment of undesirable legislation.’⁹⁴

The final argument in favor of supermajority rule deals with its feature in connection with agenda setting. ‘I argue that supermajority requirements can, in fact, serve an important purpose in balancing concentrated agenda-setting power. I find that substantial supermajority requirements are optimal for legislation, if the aim is to enact policies preferred by the median voter.’⁹⁵

The first and most disturbing argument against supermajority rule claims it leads to inefficiency and instability. Supermajority rules can be used as a tool to obstruct majority decisions, therefore they do not only go against popular sovereignty, but also can result in an unstable and inefficient government.⁹⁶ The second pro argument above showed how qualified majority rules can lead to a stable and efficient government. The differing scholar opinions show that the usage of these rules have to be carefully employed and scrutinized, taking into consideration the political context and history of the specific country.

The second argument against supermajority rule highlights a practical problem and argues in favour of legal certainty. It says that it is hard to define which decisions

⁹³ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 704.

⁹⁴ Ibid. 731.

⁹⁵ Peress, Michael, "Optimal Supermajority Requirements in a Two-Party System," *The Journal of Politics*, (2009) 71 (4): 1379.

⁹⁶ Vermeule, Adrian, *Mechanisms of Democracy. Institutional Design Writ Small* (New York: Oxford University Press, 2007)

should require supermajority rules,⁹⁷ *ad hoc* changing of the rules would lead to legal uncertainty. Clearly, picking the rules requiring a qualified majority is not an easy task and as I already mentioned, needs careful evaluation, but that does not mean they should not be used. It just means that a lot of attention is needed when deciding about the usage of supermajority rules.

The third argument against supermajority rules is based on the theory of external and decision-making costs. External costs are on those, who were defeated by the decision.⁹⁸ The decision-making cost is higher, with each person who is participating in the decision, therefore they are the highest for unanimity rules.⁹⁹ Consequently, the higher the voting requirement is, the higher the decision-making cost goes.

The final argument against qualified majority rule claims that the use of supermajority rules for certain decisions can cause that the legislative body tries to avoid these decisions by enacting the certain policies in another form, not requiring qualified majority.¹⁰⁰ This can easily lead to avoiding the law by the body responsible for making the law. I think this argument should not be seriously considered, since if a country gets to the point when its legislative body uses unlawful means to avoid a constitutional restraint on it, there are clearly serious problems in the whole system of democracy.

⁹⁷ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 703.

⁹⁸ Buchanan, James McGill, and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, Michigan: University of Michigan Press, 1967)

⁹⁹ *ibid.*

¹⁰⁰ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 703.

The above-mentioned arguments defend the constitutionality and positive effects of the supermajority rule. They are not only capable of stopping a government in gaining more power and strengthening its position, but also ensure the participation of opposition in policy making and representing their voters' will. The arguments also deals with the problem of popular sovereignty, which I describe in more detail in the following, showing why popular sovereignty can be reinforced by supermajority rules.

The justification of the use of supermajority rules is based on the idea of popular sovereignty and on the danger of the majoritarian type of democracy. 'If the will of the majority prevails, there is still a danger that it will oppress the minority.'¹⁰¹ Popular sovereignty is the very core idea of democracy. In a representative government the election process transfers the sovereignty of the people, legitimizing the actions of the different powers. Representative governments can be seen as a compromise and modification of the original idea of sovereignty, since not all the people are involved in the decision making. In order to work effectively this compromise is inevitable. However, the fact that it is a compromise should not be forgotten, since that legitimizes the existence of opposition rights and for instance supermajority and submajority rules. 'Supermajority rules allowed the government to continue to derive its authority exclusively from the people, while also restraining the excesses of majority decision-making.'¹⁰² Since there are people left out from the decision making and exercising of the powers, they should still have some effect on the process in order

¹⁰¹ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

¹⁰² McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 723.

to avoid the tyranny of majority.¹⁰³ András Sajó says that ‘The rule of the majority... can only be acceptable if the minority has a chance under the prevalence of the majority rule to become part of the majority at least when it so wants, and if being in majority does not lead to the oppression of the minority.’¹⁰⁴ Therefore he claims, ‘The constitution must provide for the protection of minorities.’¹⁰⁵

The above described arguments and justifications showed that ‘...Constitution's supermajority rules are some of its most important checks and balances.’¹⁰⁶ If we take for granted that these rules are not only constitutional but also very desirable for opposing elective dictatorship, questions still remain about the desired level of regulation to minimize elective dictatorship. What kind of supermajority rules exist, which ones should a certain country use? Which should be regulated in the constitution and which in the procedural rules of the legislative bodies? Do the different types of government have any effect on the usage of these rules? The arguments in favour and against the supermajority rules have clearly showed that these questions cannot be answered without taking carefully into consideration the specific contexts of the certain countries. However, there are some common ideas about the source of regulation and the effect of the types of government that have to be noted.

Whether supermajority rules are regulated in the constitution or in the standing rules of the legislative bodies is an extremely important issue. The source of the regulation

¹⁰³ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

¹⁰⁴ Ibid. 61.

¹⁰⁵ Ibid.

¹⁰⁶ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 727.

does not only symbolize the importance of these rules, but can also give a protection to them against a tyrannical executive power, if regulated in the constitution. If these rules are in the constitution, it is harder to change them, therefore cannot be modified every time they are uncomfortable to the actual political majority.¹⁰⁷ On the other hand, if supermajority rules are in the rules of procedures they can be easily modified by a party, having majority in the legislative body. In this case, the majority can diminish this kind of restraint to strengthen its position and power, and therefore achieve the exact opposite of the goal of minimizing elective dictatorship.

The desired level of supermajority rules highly depends on the type of government. Moreover, the catalogue of these rules can also vary according to the different types of government, since there are different institutional checks in the different systems. In the case of a parliamentary republic, the same party that has the majority in the parliament forms the government, automatically. In such a constellation if these rules are not in the constitution they can be modified almost any time. Also, since this type of government is based on the fusion of powers, more checks are required than in other types. Therefore, in a parliamentary system trying to oppose elective dictatorship we should expect to find a large scale of supermajority rules, mostly regulated in the constitution.

In the case of presidential system, unified government is not automatic, it happens only when the president and the majority of the legislative body consists of the members of the same party. In such framework, the level of source does not seem to be so

¹⁰⁷ Also, *ad hoc* modification of these rules is against legal certainty and therefore the rule of law.

important as in the parliamentary system, since unified government does not happen all the time. Moreover, the party discipline is not so strong as in parliamentary systems, so the chance of modifying the procedural rules is definitely lower. Presidential system is based on the idea of separation of powers, therefore beside supermajority rules we can find many other checks built in the system.

In the case of semi-presidential system, as I already described in section 2. ‘The flaw: defining elective dictatorship’, there are three possible models of the relationship between the executive power, president and legislative power. In two models,¹⁰⁸ ‘consolidated majority’, ‘divided majority,’ we can talk about elective dictatorship and the same problems as in the case of the parliamentary system from the perspective of the level of the source and the scale of the supermajority rules.

The analysis of the arguments against and favour of supermajority rules, the justification of these rules and the description of the impact of the different types of government showed that supermajority rules could serve as one of the most important and effective checks against elective dictatorship in any kind of democracy. The issue of whether the systems of supermajority rules in Hungary, United States and France are capable to opposing elective dictatorship and if yes, to what extent, is the topic of the next chapter.

¹⁰⁸ In both models the same party has the majority in the legislative body and consists the executive power, the only difference is the political affiliation of the President, which is irrelevant from the perspectives mentioned here.

b. Opposition parties standing to the Constitutional Court, Supreme Court and Constitutional Council

Standing to the constitutional courts as an opposition right can be a very effective tool in the hands of the legislative minority because of two reasons. First, because it can be used as a threat to force the majority to change its proposed legislation. Second, because another power, not playing in the power game between the executive and legislative power, gets to say a final word on the constitutionality of the law and therefore forcing constitutional constraints¹⁰⁹ on both powers. The Venice Commission made clear in its guidelines that they are looking at this as an important opposition right: ‘...the opposition shall participate in the constitutional review of laws...to apply to the Constitutional Court or the appropriate legal body and to request a constitutional review of adopted laws... to request examination of constitutionality of draft laws or parliamentary acts... prior to their adoption.’¹¹⁰

In this section first, I describe the characteristics of the constitutional courts that make them to be able to create restraints, and show the main differences between the continental and common law types of courts. This description is indispensable for understanding the different rules on standing in the next chapter. Second, I briefly show the pro and con arguments of accommodating a constitutional court in a democracy. And finally, I provide questions for the analysis in the next chapter.

¹⁰⁹ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999): 223. ‘Constitutional theory has been particularly concerned with the utility of judicial review as a tool of enforcing constitutional constraints.’

¹¹⁰ Council of Europe: Resolution 1601 Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament (23 January 2008)

Understanding the different types of jurisdictions of the continental and common law courts is important from the perspective of standing as an opposition right because of two reasons. First, different types of reviews, such as *apriori* and *aposteriori*, concrete or abstract result in logically different types of standings. Second, the broader the review power of the court, the more powerful the opposition is. In the cases, when the members of the legislative power have standing, they can be seen as veto players and use their right to threaten the executive power and the majority and also go to the court. In the other cases, when all individuals can go to the court, their power is more symbolic, yet it is rather good for threatening the majority.

The origin of the constitutional court stems from the USA. ‘The first state to introduce constitutional control, and to use the term “constitutional court,” was the United States in the famous 1803 *Marbury vs. Madison* case, which opened a path to constitutional control for citizens.’¹¹¹

The continental, also called centralized, and the common law system, also called decentralized, differs in many perspectives, resulting in different power of the opposition in these systems. The main differences, relevant for this topic, are the following: characteristics of the decentralized and centralized courts, types of reviews and jurisdiction, and the conditions to go to the courts.

The differences between the decentralized and centralized system are the following. In the US decentralized system, ordinary judges and courts are allowed to review the

¹¹¹ Venice Commission: Study on Individual Access to Constitutional Justice, (Venice, 17-18 December 2010): 10.

constitutionality of the acts.¹¹² ‘The common law character of the American legal system...explains the introduction of a diffuse system of review...’¹¹³ ‘This is characterized by diffuse, incidental control, which offers direct access to constitutional justice for individual citizens as they can raise issues of constitutionality before the courts.’¹¹⁴

In the European centralized system, based on the Austrian model by Hans Kelsen, only the constitutional court is allowed to conduct constitutional review.¹¹⁵ ‘In a concentrated system a separate court, usually placed outside the ordinary court system, is given the power to review the constitutionality of normative acts.’¹¹⁶ The advantage of the decentralized system is the disadvantage of the centralized one, namely that there are no long proceedings in front of a constitutional court,¹¹⁷ and there is no enormous workload of a certain court. *Vica versa*, in the decentralized system there is a possibility that the same matters are brought up in front of different courts spread around the country and can easily result in different decisions and therefore legal uncertainty and incoherence,¹¹⁸ while in the centralized system that cannot happen.¹¹⁹

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Paczolay, Péter, *Alkotmánybírászkodás, Alkotmányértelmezés* (Budapest: ELTE Állam- és Jogtudományi Kar, 1995) [Constitutional adjudication, Constitutional reviews]

¹¹⁶ Venice Commission: Study on Individual Access to Constitutional Justice, (Venice, 17-18 December 2010):12.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ ‘Two main advantages can be seen in the concentrated model: i) greater unity of jurisdiction; and ii) legal security as it does not permit divergent decisions...’ Venice Commission: Study on Individual Access to Constitutional Justice, (Venice, 17-18 December 2010):12.

The differences in connection with the types of reviews are the following. The type of review a decentralized court performs is concrete review, while a centralized court can operate with concrete review and/or abstract review. Concrete review is an *aposteriori* review, since it can be done only in concrete cases. These decisions are *inter partes*, but have a precedent status.¹²⁰ Abstract reviews¹²¹ can be either *apriori* or *aposteriori*, in both instances there is no need for a case and the decision has an *erga omnes* effect.¹²² The main difference between the two types of abstract review is that ‘Abstract a priori review puts the Constitutional Court in the position of an arbiter – typically between the executive and the legislative or a parliamentary minority with standing before the Constitutional Court – and generally considered as being politically sensitive.’¹²³ However, from the perspective of opposing elective dictatorship a priori abstract review is the best one, since that affords a veto player position to the opposition.

To see the differences in the accessibility of the courts, we should look at the standing requirements and the courts’ discretion to take a case. Looking at the standing, in the cases of both concrete and abstract review we can distinguish between direct and indirect access. Direct access means, that the individual can go to the court right away, while indirect access means that ‘any individual question reaches the constitutional

¹²⁰ Paczolay, Péter, *Alkotmánybíráskodás, Alkotmányértelmezés* (Budapest: ELTE Állam- és Jogtudományi Kar, 1995) [Constitutional adjudication, Constitutional reviews]

¹²¹ ‘When a constitutional court carries out an abstract review, it examines a specific law or regulation without reference to a specific case or set of proceedings...’ Venice Commission: Study on Individual Access to Constitutional Justice, (Venice, 17-18 December 2010): 14.

¹²² Paczolay, Péter, *Alkotmánybíráskodás, Alkotmányértelmezés* (Budapest: ELTE Állam- és Jogtudományi Kar, 1995) [Constitutional adjudication, Constitutional reviews]

¹²³ Venice Commission: Study on Individual Access to Constitutional Justice, (Venice, 17-18 December 2010): 14.

court for adjudication through the intermediary of another body...^{124, 125} Direct access can be either an *actio popularis* ('...in which anyone is entitled to take action against a norm after its enactment, even if there is no personal interest;¹²⁶'), a *quasi actio popularis* ('...in which the applicant does not need to be directly affected, but has to challenge the norm within the framework of a specific case;¹²⁷) or a direct individual complaint. From the perspective of elective dictatorship, the strictest system is the decentralized, concrete review one, since there the standing requirement is an affected individual. In the next chapter I show the specific requirements of standing in US and especially the standing of members of Congress. The best type of standing to oppose elective dictatorship is the *actio popularis*, since in this case anybody can raise the issue of constitutionality of a norm.

Looking at the discretion of the court, the question is whether the court has the right to dismiss a case based on its will or based on prescribed rules or precedents. Obviously, the less discretion the court has, the more predictable the system is, affording more power to the members of opposition. These issues are examined in the next chapter through the three different countries. However, there is one issue that has to be mentioned here, that is the political question doctrine, since the difference between the three courts on this point is following from the two types of systems. The US decentralized system is based on the idea that the Supreme Court is an absolutely

¹²⁴ Ibid.16.

¹²⁵ Ibid.

¹²⁶ Ibid. 4.

¹²⁷ Ibid.

independent body from the political branches¹²⁸ and therefore it cannot participate in political decisions.¹²⁹ On the other hand, the European centralized model is claimed to be a partly political body,¹³⁰ especially when it conducts *apriori* abstract review. In these cases the courts make a decision whether a certain bill can become law, based on constitutional grounds, and therefore they are claimed to operate as a legislative chamber.¹³¹ Also, many scholars say that it prolongs the legislative debate¹³², and transforms it into a political one.¹³³ Therefore, the political question doctrine is not used by European courts.

After reviewing the characteristics of the different models, the following section contains the pro and con arguments of having a constitutional review and court in a democracy. The first argument in favour of the courts, which I already made above, is the use of review as a threat by the legislative minority. Threatening the majority can restrict its dictatorship by ensuring the debate between majority and minority and stopping majority from violating constitutional rules.¹³⁴ The second argument, endorsing the existence of constitutional review was made by Kelsen. It claims that an

¹²⁸ Although the idea of such an independent court exists in the US, it has to be noted that thanks to the controversial jurisprudence on the political question doctrine and decisions made in connection with certain political issues, seriously questions the independency of the Supreme Court. See e.g. Dworkin, Ronald, *A badly flawed election: debating Bush v. Gore, the Supreme Court, and the American democracy* (New York, New York Press, 2002)

¹²⁹ Paczolay, Péter, *Alkotmánybíráskodás, Alkotmányértelmezés* (Budapest: ELTE Állam- és Jogtudományi Kar, 1995) [Constitutional adjudication, Constitutional reviews]

¹³⁰ Ibid.

¹³¹ The whole argument is in the part of pro and contra arguments of the constitutional courts.

¹³² 'Where groups of legislators have standing to initiate abstract review, parliamentary minorities thus have a second opportunity to challenge legislation that they opposed unsuccessfully during the formal legislative process.' Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1210.

¹³³ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

¹³⁴ Ibid. 234.

independent body is needed, because the legislative power cannot be trusted to annul its own law in a case of unconstitutionality.¹³⁵ The third argument, again by Kelsen, is that ‘the precondition of a constitutional legal order is the logical unity ensured by correspondence to the constitution as the supreme law’¹³⁶ The fourth, and final argument by Kelsen, is that state organs and institutions can get into disputes with one another, making them to violate the constitution. So when the court decides, it gives an ‘efficient protection of the constitution’¹³⁷ And finally, there is a democracy argument in favour of the courts: ‘...judicial review enhances the overall democratic quality of the political process by protecting fundamental rights. To the extent that they reinforce the democratic process...’¹³⁸

The main argument against the constitutional review is the democratic deficit argument, claiming that the judges were not elected directly by the people, as opposed to the members of the parliament. Therefore, laws made by the sovereign parliament, should not be modified or reviewed by a court. This argument can be attacked from different perspectives. First, the authorization for ordinary law-making by the legislative power is not constitutional making. Since the constitution is above all other legal sources, when the legislative power makes ordinary law it can do so only in line with the constitution. Therefore, an independent body is needed to supervise whether the legislative body acts according to the constitution.¹³⁹ Second, it may seem to be undemocratic, but it is according to the intent of the founding fathers to protect

¹³⁵ Ibid.

¹³⁶ Ibid. 233.

¹³⁷ Ibid.

¹³⁸ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1210.

¹³⁹ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

minority.¹⁴⁰ Third, there are many democratic characteristics of the court: goals of the courts are democratic, judges are under the overview of public, ‘various structural provisions and procedural rules increase the overall representativeness of constitutional courts and limit their power to influence the legislative process’¹⁴¹ and judges’ power is legitimized by acquiescence.¹⁴² Another main argument against the review is the politicization of the courts, which I described above in connection with the political question doctrine.¹⁴³

The summary of the characteristics of the different constitutional courts and the arguments in favour of the reviews show that standing to the constitutional courts can be a very useful tool in the hand of the opposition and that these courts are capable of constraining the power of the majority, and therefore opposing elective dictatorship. In the next chapter I examine the question whether the particular rules, standing requirements and the jurisprudence of the courts enable these institutions to be able to oppose elective dictatorship in Hungary, France and the USA.

¹⁴⁰ Ibid.

¹⁴¹ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1210.

¹⁴² Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

¹⁴³ Scholars who argue against the review itself many times propose other checking institutions such as the president or a referendum. Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999)

II. Analysis of supermajority rules and standing to courts through Hungary, the United States of America and France

A. Supermajority rules

Supermajority rules are very important opposition rights during a unified government, if the majority of government does not exceed such a majority. As I described in the theoretical chapter, there is a lively debate going on the constitutionality and justification of such rules. It is true that such requirements can operate against efficiency and stability of a system, however, their capability to constrain elective dictatorship is much desired. As in the cases of other opposition rights, there is a cost of using such rules, but there is also a profit of these requirements.

The question is whether the application of these rules is more desired than the cost they cause. To answer this question two things have to be noted. First, the analysis of these rules alone can show the effectiveness and desired nature of these rules, however, if we want to answer this question, it is very important to examine them in the light of the whole system.¹⁴⁴ Second, the reason why these rules are capable of

¹⁴⁴ Such an overwhelming examination is not possible in this thesis due to page requirements. Therefore, the ultimate answer to this question cannot be given here, only an analysis of the actual rules.

opposing elective dictatorship without creating inefficiency is that they do not have the goal to stop a certain decision but to create consensus and time for a wider agreement among the political branches. There are big differences among the three countries in the usage of supermajority requirements, the most striking one is that France does not have any of them at all. In this chapter, first, I shortly describe the French situation. Second, I analyse those rules and their justification that both Hungary and US have. Third, the special, relevant rules of Hungary are shown, through the decisions of the Constitutional Court, with special emphasize on the supermajority rules used in the law-making process. Out of fifteen supermajority rules in the US, only six are relevant from the perspective of opposing elective dictatorship. All of them are presented in section two, since all are rules that Hungary has as well in some form. Therefore, the other nine are not topic of this thesis and are not analysed in this chapter.¹⁴⁵

1. France: lack of supermajority rules

As I noted, the most important difference between the three jurisdictions is clearly that France does not have any rules requiring a supermajority.¹⁴⁶ In the actual Constitution there are only two higher requirements than simple majority in the French system that is built on the same logic as the supermajority rules. First, the existence of organic

¹⁴⁵ These rules are the following. From the Constitution: overriding presidential vetoes (Article I, Section 7, and clause 2), holding offices after taking part in a rebellion (14th Amendment), presidential succession and inability (25th Amendment). From the House Rules: Rule XV, clause 5, Rule XIII, clause 6(a), Rule XV, clause 7(a), Rule XV, clause 7(a), Rule XXI, clause 5(b). (plus 1975 Budget Act)

¹⁴⁶ There was a proposal for instance, in front of the Senate, already accepted by the National Assembly that would have introduced a two-third majority requirement to Article 68 of the Constitution. The proposed text contained a supermajority requirement to initiate the impeachment of the President of the Republic. <<http://www.senat.fr/rap/106-194/106-19412.html>> accessed 15-07-2011

laws.¹⁴⁷ The requirements to pass a certain act in the form of organic laws are dispersed through the Constitution, there are approximately 30 topics in the current Constitution. Among these topics there is nothing about fundamental rights¹⁴⁸, but rather there are procedural guarantees. For instance, the composition of the Senate or the mandate of the members of the legislative power, which are interestingly not in the Constitution.¹⁴⁹ Since organic laws only require an absolute majority, a majority of all the members of the house, that is automatically available for the party that establishes the government after the national elections. Therefore their existence is not relevant to the topic of this thesis.

Second, according to Article 89 of the 1958 Constitution, there is a three-fifth requirement for Government Bills to be accepted in case they are not submitted to referendum. Whether such a bill is referred to referendum depends on the President, but again is not relevant to the topic of this thesis due to not requiring a supermajority. There is a lack of literature arguing for or against the introduction of such rules in the case of France. The possible pro and con arguments were already described in the chapter on the theoretical background of such rules.

¹⁴⁷ Procedure on organic laws Article 46

¹⁴⁸ That is quite understandable in the light of the existence of the block of norms.

¹⁴⁹ Kilenyi, Géza, *Az Alkotmányozás és a "Kétharmados" Törvények* (Budapest: Jogtudományi Közlöny (1994) 5. [Constitution making and the two-third acts]

2. Supermajority rules in Hungary and US, similarities

Both to the Hungarian and US systems, the institution of supermajority requirements are very familiar. However, they are quite different in the two countries. In this section, first, the main differences between the Hungarian and US supermajority rules are presented with possible explanations. Second, those six rules are presented that are similar in Hungary and US, explaining their relevance in opposing elective dictatorship and their justification. These are the following: decisions in connection with international treaties, impeachment, house rules, the members of the legislative power, law-making time and debate and constitutional amendments.

a. Main differences of the systems

The two main differences between the two countries are the following: the lack of supermajority requirement at voting on a bill in the US and the extremely different number of supermajority requirements. One of the most important opposition right is the possibility to veto a bill when it requires a supermajority. First, because it can be used as a threat to force the legislative majority and the executive power to bargain with the opposition or to create a wider consensus.¹⁵⁰ Second, because legislative

¹⁵⁰ This exact argument can be made in connection with the opposition right of standing to the constitutional court.

minority can stop highly important policies from being carried out.¹⁵¹ The existence of such voting requirement on bills is missing from the US system. The possible reasons for the differences are the following. First, the occurrence of unified government is much less likely in the US as in Hungary, where it happens automatically after a national election due to the characteristic of parliamentary systems. Following from this reason, second, the whole US system is built on the idea of separation of powers, providing therefore more, other forms of checks, making supermajority voting requirements not as necessary as in a parliamentary regime. Furthermore, the existence of the second chamber also serves as a further check. Third, as I described in the chapter on theory of supermajority rules, the legal justification and acceptance of such rules is very controversial.¹⁵²

Looking at the other types of supermajority rules, we can find in both systems such requirements for constitution making and amending, for electing certain officials and some procedural rules as well.¹⁵³ While in US there are fifteen different supermajority rules, the Hungarian catalogue is much wider, containing altogether seventy-two supermajority rules. This can be explained by the same reasons that were given to the lack of supermajority voting requirement at accepting a bill and with the historical experience of Hungary.¹⁵⁴

¹⁵¹ As in the case of standing to the Constitutional Council it can stop such policies only based on constitutional and legal grounds, in the case of supermajority rules no such bases is required, it is purely a political decision.

¹⁵² As I described in the theory chapter, there was a large scale debate about the constitutionality of supermajority rules, not even in connection with the voting requirements but other institutions.

¹⁵³ These categories are used by Holló, András and Balogh Zsolt (ed.) *Az Értelmezett Alkotmány – Alkotmánybírósági gyakorlat 1990 – 2009* (Budapest: Magyar Közlöny Lap- és Közlönykiadó, 2010) [The interpreted Constitution – The jurisprudence of the Constitutional Council 1990-2009]

¹⁵⁴ This argument is given more detailed in the next section.

b. Six similar rules

From the six rules that are similar in Hungary and the US two rules, the decisions in connection with international treaties and impeachment, are not relevant to the topic of this thesis, therefore they are presented in short. The other four rules are examples of supermajority requirements that can be an effective tool in the hand of opposition to oppose elective dictatorship.

The first supermajority requirement that is similar in Hungary and the US is in connection with international treaties. In the US two-thirds of the senators are needed to ratify a treaty¹⁵⁵ and to delay the ‘consideration indefinitely.’¹⁵⁶ In Hungary, the scope is much narrower, requiring such a majority in connection with the EU.¹⁵⁷ However, these supermajority requirements are irrelevant from the perspective of this thesis, since these issues are a matter of foreign relations.

The second rule requiring qualified majority in both countries is the decision about impeachment. ‘The impeachment supermajority rule safeguards the republic from itself and prevents a political process from becoming a source of political instability.’¹⁵⁸ In US two-third of the votes are required in the Senate to impeach federal officers, such as the President.¹⁵⁹ In Hungary two-thirds of the vote of all the

¹⁵⁵ U.S. Constitution Article II, Section 2, clause 2

¹⁵⁶ Senate Rule XXX.

¹⁵⁷ Hungarian Constitution 2/A. §

¹⁵⁸ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 750.

¹⁵⁹ US Constitution Article I, Section 3, clause 6

representatives is required to initiate the procedure of the President's impeachment.¹⁶⁰

The big difference between the two systems is that while in US the President is the executive power, in Hungary he is not even part of it.¹⁶¹ He is seen as a neutral power, safeguarding the democracy.¹⁶² The executive power in Hungary belongs to the Prime Minister and the cabinet, who can be removed through a political vote of no confidence that requires only an absolute majority.¹⁶³ However, the institution of impeachment is also not relevant for the purpose of this thesis, since it involves a different political struggle than the opposition and the unified government.

The third supermajority requirement similar in the two countries is in connection with the procedural rules of the legislative power. According to the Rules of the House and a precedent of the Senate, two-thirds of the votes are required to suspend the house and standing rules.¹⁶⁴ In Hungary, the four fifth of the representatives present is required to deviate from the House Rules.¹⁶⁵ Ensuring that the legislative majority follows house rules is extremely important, since many procedural guarantees and rights of the opposition are in this source. If these rules are not followed, the legitimacy of legislation can be questioned, at least from a formalistic point of view. Furthermore, ad hoc modification of the house rules based on daily political will is also against legal certainty.¹⁶⁶ Although the suspension of these rules are protected in the US, it has to be noted here that the existence of them are not. Any rules of the House can be modified

¹⁶⁰ Hungarian Constitution 31/A. § (3); House Rules 133. § (3)

¹⁶¹ Decision 48/1991. of the Hungarian Constitutional Court

¹⁶² Hungarian Constitution 29.§ (1),

¹⁶³ Hungarian Constitution 39/A. § (1)

¹⁶⁴ Rule XV, clause 1.

¹⁶⁵ House Rules 140. § (1)

¹⁶⁶ <http://www.mkogy.hu/fotitkar/hazszab/bev_hszab.htm> accessed 15-06-2011

by a simple majority, including those that require super-majority votes.¹⁶⁷ This is very strange in the light that from so few supermajority rules one is actually protecting the suspension but not the modification and creation. On the contrary, in Hungary, a two-third majority is required to create and modify the house rules, ensuring the rights of opposition and legal certainty.

The fourth supermajority rule that is similar in Hungary and US is in connection with the members of the legislative power. The rules are not the same in the two countries but their effect is similar: the protection of representatives from the majority. In Hungary, a two-third majority of the present MPs are required to suspend the immunity of a legislator¹⁶⁸ or declare a conflict of interest.¹⁶⁹ This regulation is not as strict as the US one, where the same majority is required to expel a member.¹⁷⁰ As Madison famously¹⁷¹ said ‘...the right of expulsion was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused.’¹⁷² A further argument for the existence of such a rule is that ‘A wrongful expulsion is more dangerous than a wrongful failure to expel because the former can silence political opposition...’¹⁷³ Even if we accept this argument, the question arises: why is it the legislative body that decides about expulsion and not the judiciary?

¹⁶⁷ Lieber, Benjamin, and Patrick Brown. 1995. "On Supermajorities and the Constitution" *The Georgetown Law Journal* (1995) 83 (6): 2347.

¹⁶⁸ Act LVI of 1990 on the Emoluments of the Members of Parliament 5. § (6); House Rules 131. § (3)

¹⁶⁹ Hungarian Constitution 20/A. § (2)

¹⁷⁰ U.S. Constitution Article I, Section 5, clause 2

¹⁷¹ The Supreme Court cited this line of argument in the *Powell v McCormack* decision.

¹⁷² Vile, John R, *The Constitutional Convention of 1787: a comprehensive encyclopedia of America's founding* (Santa Barbara, Calif. ABC-CLIO, 2005): 134.

¹⁷³ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 756-757.

Three answers can be given to this problem. First, the judiciary lacks of relevant information due to the complicated rules on conduct of the representatives.¹⁷⁴ Second, it is the usual problem of democratic deficit of the courts. It could be seen disturbing, if a non-elected court could expel a popularly elected representative. Third, if the judiciary was to decide in such a matter that could also be seen as an intrusion to the internal affairs of the legislative power. This latter argument is more relevant in the US system, since it is based on the idea of separation of powers.¹⁷⁵ Finally, a critique has to be mentioned in connection with the US system. ‘The supermajority rule for expulsion is in need of such harmonization because another provision of the Constitution allows a house to refuse to seat a member of Congress by simple majority vote.’¹⁷⁶ The Supreme Court gave a partial answer, in its *Powell v McCormack* decision.¹⁷⁷ The judges narrowed down the possibility of expulsion in this case, by requiring a ‘failure to meet qualifications,’¹⁷⁸ ‘mandated by sections 2 and 3 of Article I,’¹⁷⁹ as a condition for such an action. Overall, it can be said that supermajority requirements to protect the representatives is an essential feature of both systems.

The fifth supermajority requirement in both systems is in connection with the time for procedure and debate during law-making. In the US three-fifths of the votes are required to end a debate or a filibuster in the Senate by invoking cloture.¹⁸⁰ Although this is not a supermajority rule, it is presented because the requirement used to be two-

¹⁷⁴ Ibid. 750.

¹⁷⁵ As opposed to the parliamentary system, like Hungary, which is rather based on the idea of fusion of powers.

¹⁷⁶ McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 758.

¹⁷⁷ The decision is presented more detailed in the section on congressional standing to sue in the US.

¹⁷⁸ Ibid. 759.

¹⁷⁹ *Powell v. McCormack* 395 U.S. 486 (1969)

¹⁸⁰ Senate Rule XXII.

third till 1975¹⁸¹ and justifications given by scholars are worth to be mentioned. In Hungary there is a similar rule in effect to this one, requiring the four-fifths of the representatives present to discuss a bill in an exceptional procedure.¹⁸² The main argument for these rules is that there are certain situations when the government must be capable of acting quickly and effectively. Filibustering or the usual law making procedure can be seriously setting back in such situations. The disadvantage of these rules is the effect of constraining the time. The more time available for a debate, the more time the opposition has to consider and try to influence the law-making procedure, and also to express their opinion publicly. Publicity is important because politicians, part of the legislative majority, can be influenced through it, and also because it makes the government and law-making more transparent.

Two issues have to be mentioned in connection with the filibuster institution in the US. First, filibustering can be seen as a submajority opposition right, and therefore desired in a system. From this perspective the cloture is a tool that oppresses minority. Second, on the other hand, the negative effects of filibustering can be clearly shown. David Mayhew examined three issues in the period of 1937-1938, the anti-lynching act, the court-packing proposal and the plan of executive reorganization.¹⁸³ He described the procedures in each case, and showed the amount of time that was spent when some senators decided to filibuster. For instance, in the case of the anti-lynching act, seven

¹⁸¹ Between 1927 and 1962, the Senate tried to invoke cloture, but failed eleven times. In exchange of the reduction, three-fifths of the votes are required of all the senators and not only the ones present, as it used to be. Peress, Michael, "Optimal Supermajority Requirements in a Two-Party System," *The Journal of Politics*, (2009) 71 (4): 1379-1393.

¹⁸² House Rules 125. § (1)

¹⁸³ Mayhew, David R, "Supermajority Rule in the U.S. Senate," *Political Science and Politics* (2003) 36 (1): 31-36.

weeks passed till the Senate managed to vote a cloture.¹⁸⁴ The filibuster rule is clearly an important submajority rule and opposition right. However, there is a difference between using the time allowed to express opinions on a certain bill and when the time is spent on something else (the phenomena is well illustrated in the famous show, *The West Wing*, where a filibustering senator reads out cooking recipes). The main idea of submajority rules is not to stop a certain action of the majority but to give a voice to the minority. Furthermore, popular sovereignty could be seriously questioned¹⁸⁵ if a single obstructing senator could stop a bill that was accepted by the majority of the members of the House. After mentioning the pro and contra arguments for such rules, it can be said that the overall positive effect of these supermajority rules outweighs the problems.

The final, sixth rule that has to be mentioned is the supermajority votes required for modifying the constitutions. In fact, this is one of the most important supermajority requirements in a democratic system. Both U.S.¹⁸⁶ and Hungarian constitutions require a two-third majority for the modification of the constitution.¹⁸⁷ The supermajority requirement seems to be an adequate consensus, if it is compared to the simple majority and unanimity rule. Using the majority rule would ‘render the Constitution too mutable’.¹⁸⁸ While the application of unanimity would make the constitution rigid and ‘might perpetuate its discovered faults.’¹⁸⁹ The following reasons can be given to

¹⁸⁴ Ibid.

¹⁸⁵ Peress, Michael, "Optimal Supermajority Requirements in a Two-Party System," *The Journal of Politics*, (2009) 71 (4): 1379-1393.

¹⁸⁶ In case it is decided in the Congress and not by the state legislatures.

¹⁸⁷ U.S. Constitution Article V., Hungarian Constitution 24. § (3)

¹⁸⁸ The Federalist No. 43, at 278 (James Madison)

¹⁸⁹ Ibid.

justify supermajority requirements in the case of constitutional amendments. First, the most evident reason, the constitution is the core document of a democracy. It contains for example the fundamental rights and the political and governmental system as well. It should be based on a wide consensus and last to provide stability and legal certainty. It should not be modified on a daily basis according to the political will of the majority. ‘The main purpose and effect of a *qualified majority* requirement is to (i) ensure broad political consensus (and thereby strengthen the legitimacy and durability of the amendment)...’¹⁹⁰ Second, from the perspective of opposing elective dictatorship, supermajority requirements limit the majority by making it harder to change the constitution and forcing the majority to create a consensus, therefore take into account the will of the minority as well. Third, since the opportunity is rare when a government can change the constitution¹⁹¹, it makes them to be considerate and therefore ‘... improves the quality of the constitution.’¹⁹²

c. Summary

Looking at the four rules that require supermajority and relevant from the perspective of opposing elective dictatorship, a wide variety of rules can be found. There are rules in connection with procedural issues and constitution modification, however there are no appointment rules. There are rules from the constitutions and also from the

¹⁹⁰Venice Commission, *Report on the Role of Opposition in a Democratic Parliament* (Venice 15-16 October, 2010): 27.

¹⁹¹ Unless they won the elections by a two third majority, as it happened in Hungary in 2010. The same argument was made by Petretei, in connection with the constitution as a normative constraint. Petrétei, József, “Törvények Minősített Többséggel” *Fundamentum* (1999) 111. [Acts requiring a qualified majority]

¹⁹² McGinnis, John O, and Michael B Rappaport, "Our Supermajoritarian Constitution," *Texas Law Review* (2002) 80 (4): 787.

procedural rules of the legislative powers. There are two-third and four-fifth requirements. In the case of these four rules the Hungarian ones are the stricter. First, because they either require the same supermajority as the US rules or even more in the form of the four-fifth requirements. Second, because of the difference in the modification and acceptance of the rules of procedures. As I described above, house rules have a special importance in securing opposition rights. 'The extent to which formal rules protect parliamentary opposition and minority interests depends not only on their content, but also on which level of the legal hierarchy they are laid down. In general, if a minority interest is only regulated at a level that can be changed by a simple majority vote, then it is formally not very well protected.'¹⁹³ Even among the cited rules here, some originated from the house rules. The fact that in the US house rules can be modified by a simple majority makes the whole system of the supermajority rules and constrains much weaker. Therefore, the Hungarian rules seem to be more capable of opposing elective dictatorship.

3. Supermajority rules only in Hungary, specific voting requirement of accepting certain bills

As it was mentioned above, the catalogue of supermajority rules in Hungary is very extensive there are seventy-two supermajority requirements in the Constitution or House Rules. This system of supermajority requirements is considered to be the widest

¹⁹³ Venice Commission, *Report on the Role of Opposition in a Democratic Parliament* (Venice 15-16 October, 2010): 19.

and stricter than in other systems, in comparison to other European countries.¹⁹⁴ The reasons for the impressive list are the political and historical peculiarity of Hungary. First, the parliamentary type of government requires more checks and opposition rights than other forms of government. Second, there is a lack of confidence in the transition and in the political powers,¹⁹⁵ especially in the executive power, because of the socialist times. This distrust resulted in the desire for more guarantees than usual during the roundtable discussions and led to such a wide list of supermajority requirements. According to Peter Schmidt's opinion in the Decision 4/1993. decision, qualified majority rules were necessary to give a stronger position to the political opposition in order to maintain a peaceful transition.¹⁹⁶

These rules can be divided into three categories: first, acts concerning constitution making and modifying, most important state institutions and fundamental rights, second rules on electing certain officials; and third, rules on some procedural decision making.¹⁹⁷ In this section, first, the relevant supermajority rules are presented from the perspective of elective dictatorship that cannot be found in the US or France. Second, the supermajority requirement of the acceptance of certain bills is shown through the jurisprudence of the Constitutional Court and through statistics and examples.

¹⁹⁴ Kilenyi, Géza, *Az Alkotmányozás és a "Kétharmados" Törvények* (Budapest: Jogtudományi Közlöny (1994): 208. [Constitution making and two-third acts]

¹⁹⁵ Smuk, Péter, *Ellenzéki Jogok a Parlamenti Jogban* (Budapest: Gondolat Kiadó, 2008) [Opposition rights in the parliamentary law]

¹⁹⁶ Peter Schmidt's opinion in the Decision 4/1993 in Holló, András and Balogh Zsolt, *Az Értelmezett Alkotmány, Alkotmánybírósági Gyakorlat 1990 – 2009* (Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2010) [The interpreted Constitution, the jurisprudence of the Constitutional Court 1990-2009]

¹⁹⁷ Smuk, Péter, *Ellenzéki Jogok a Parlamenti Jogban* (Budapest: Gondolat Kiadó, 2008):133. [Opposition rights in the parliamentary law]

a. Unique supermajority rules in Hungary

There are eight rules requiring a supermajority that are relevant from the perspective of elective dictatorship and unique to the system of Hungary. Six of these rules are about the election of certain officials, one is a procedural rule and the last one is about the voting on certain acts. This latter one is presented in the next section more detailed.

The rule on the procedural issue, requiring a two third majority, is about holding the plenary session closed.¹⁹⁸ This is an important rule, because of the same reasons that were described in connection with the cloture and special procedure in the previous section. Publicity is very important in a democracy, since it ensures transparency and gives the power to the opposition to influence the majority through the opinion of the voters. Therefore, the regulation of ordering a closed session of the Parliament in the form of a supermajority rule seems to be a desired solution.

The first supermajority rule that has to be mentioned in connection with electing officials is the requirement of a two third majority during the first two rounds when electing a President.¹⁹⁹ The same type of majority is also required for the declaration of conflict of interests²⁰⁰ and responsibility²⁰¹ of the President. The election and the personality of the president are of a great significance because of the following reasons. First, he is not part of the executive power, but the ‘guardian’ of the

¹⁹⁸ Hungarian Constitution 23. § and House Rules 42. § (1)

¹⁹⁹ Hungarian Constitution 29/B. § (2)-(3)

²⁰⁰ Hungarian Constitution 31. § (2); House Rules 133. § (1) b,

²⁰¹ Hungarian Constitution 31/A. § (3); House Rules 133. § (3) c), see more detailed in the previous section

Constitution and looked at as a fourth, neutral power.²⁰² Therefore, second, his opinion matters to the people, through which politicians can be publicly pressured. Third, he is the only person who can initiate an a priori abstract review (or send back the bill for further consideration to the Parliament), which is an extremely important tool in stopping the unconstitutional decisions of the majority and therefore, constraining elective dictatorship.²⁰³ The positive effects of such a review are considered in the next chapter. These reasons show why the president can be an important check on the political branches, and therefore show the importance of such supermajority requirements to avoid a political appointment.

The other five supermajority requirements in connection with electing officials are based on the same logic as the election of the President. The election and character and impartiality of the constitutional judges²⁰⁴ are extremely important because of the constitutional reviews of the laws they are conducting, and therefore providing a check on elective dictatorship. All the arguments that could be said about the justification of the constitutional court itself could also be cited here.²⁰⁵ The same can be said about the election of the ombudsmen²⁰⁶, adding that their role is also very important from the perspective of the protection of individuals and their rights. This is true especially in

²⁰² Hungarian Constitution 29.§ (1), Decision 48/1991. of the Hungarian Constitutional Court

²⁰³ Another good example for what happens if there is an elective dictatorship by a government, holding two third of the majority of the parliament, and electing a president is the Hungarian case. The actual president declared in his appointment speech that he does not want to hinder the work of the majority. This can be only interpreted in the way that he would not like to serve as a check that is exactly the job of the president.

²⁰⁴ Hungarian Constitution 32/A. § (5)

²⁰⁵ These arguments are described in the theoretical chapter on constitutional courts.

²⁰⁶ Hungarian Constitution 32/B. § (4), Act of LXXVII. of 1993 20. § (2), Act of LIX. of 1993 2. § (1)-(2), Act of LXIII. of 1992 23. § (1)-(2)

the light of the new Hungarian Constitution that diminishes *actio popularis*,²⁰⁷ making the ombudsmen's role essential in taking the cases to the Court. The same impartiality argument can be made about the election of the President of the Audit Office²⁰⁸, the Chief Justice of the High Court,²⁰⁹ the Chief Prosecutor²¹⁰ and the members of the Media Council.^{211 212}

b. Supermajority requirement in connection with accepting certain bills through the jurisprudence of the Hungarian Constitutional Court, statistics and cases

Requiring a supermajority to accept certain acts is one of the most important tools in the hand of the opposition. As I described above, this rule can be used by the minority to threaten and force the legislative majority to bargain and make a wider consensus. Furthermore, besides political considerations, it can be actually used to stop bills and policies, initiated by the executive power and legislative majority. In this section first, the Constitutional Court's view is presented on these acts and the test it applies in examining the constitutionality. Second, empirical data and cases are presented to

²⁰⁷ More details in the next chapter on standing to the constitutional courts.

²⁰⁸ Hungarian Constitution 32/C. § (3)

²⁰⁹ Hungarian Constitution 48. § (1)

²¹⁰ Hungarian Constitution 52. § (1)

²¹¹ Act on the Media Council 124. §. (1)

²¹² The members of this Council are of high significance, because the media is essential in informing the public about the activity of the political branches, and therefore allowing public pressure on politicians.

show whether the opposition used this supermajority rule to constrain elective dictatorship.

The jurisprudence of the Constitutional Court

Two aspects have to be mentioned of the Constitutional Court's decisions. First, the view of the Court on the acts requiring a supermajority voting and second, the conditions the Court examines to declare such an act constitutional.

In the view of the Constitutional Court acts required a qualified majority to pass them are an own level of sources in the Hungarian legal system, higher than the acts passed by simple majority.²¹³ Supermajority voting cannot be required for every important act because of two reasons.²¹⁴ First, such a practice would be against main principals of the parliamentary system, effectiveness and stability.²¹⁵ Evidently, if the governing party does not have a supermajority in the legislation and every important act should be passed by such a majority, governing would be impossible, not only ineffective. Second, such a requirement for all the important acts could affect the minority badly. The idea of important act was specified in the case of acts on fundamental rights. The Court declared that the regulation of such acts with a supermajority requirement does

²¹³ Jakab, András, *A Magyar Jogrendszer Szerkezete* (Budapest, Pécs: Dialóg Campus Kiadó, 2007) [The structure of the Hungarian legal system] as opposed to the opinion of András Holló and Zsolt Balogh in Holló, András and Balogh Zsolt, *Az Értelmezett Alkotmány, Alkotmánybírósági Gyakorlat 1990 – 2009* (Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2010) [The interpreted Constitution, the jurisprudence of the Constitutional Council 1999-2009]

²¹⁴ Decision 3/1991.

²¹⁵ Ibid.

not follow from the text of the Constitution.²¹⁶ On the contrary, according to a scholar, since fundamental rights are essential part of the democracy due to their role as a guarantee against the government, they should be accepted by a wide consensus and therefore, regulated in acts requiring a qualified majority.²¹⁷ The view of the Constitutional Court is clear: acts with supermajority requirements should exist in the Hungarian Constitutional system, however, they should be exceptional.

The Constitutional Court's test of examining the constitutionality of supermajority requirements was established and clarified in the following decisions: 4/1993., 3/1997,²¹⁸ 29/1997, 1/1999, 31/2001. In these decisions the Court also defined the proper usage of supermajority requirements.

The Decision 4/1993. was made on the constitutional review of the Freedom of religion Act. In this decision the Court established the 'test of substance'²¹⁹ and therefore '... effectively included into its own competence the constitutional assessment of laws requiring a two-third majority...'²²⁰. According to the test, all aspects of a specific legislative subject, such as fundamental rights, does not have to be regulated in an act requiring a two-third majority every time.²²¹ '...the scope of

²¹⁶ Decision 4/1993.

²¹⁷ Petrétei, József, "Törvények Minősített Többséggel" *Fundamentum* (1999) 3: 113. [Acts with qualified majority]

²¹⁸ This decision is irrelevant from the perspective of this thesis, it contains the verification of the voting when a qualified majority is required. Papp, Imre, "Kétharmaddal vagy Anélkül" *Fundamentum* (1999): 3. [With or without a two-third]

²¹⁹ Paczolay, Péter and Lóránt Csink, *Twenty Years of the Hungarian Constitutional Court* (Budapest: Constitutional Court of the Republic of Hungary 2009): 111.

²²⁰ Ibid.

²²¹ Decision 4/1993

qualified legislative subjects must be determined by material characteristics.’²²² The test was based on the idea of parliamentary democracy by taking into consideration the principles of efficiency and stability. According to the Court, the requirement of a two-third majority ‘...should be assessed from the perspective of the parliamentary system as a whole.’²²³

In the Decision 29/1997. the Court invoked the idea of ‘public law invalidity.’²²⁴ It means that if the qualified majority requirement is not fulfilled, the act is unconstitutional and therefore formally invalid.²²⁵ Public law invalidity was used in many other later cases, such as Decision 52/1997, 39/1999, 63/2003 on the Hospital Act and 4/2006. on the budget act.

The Decision 1/1999. is about the Act on organized crimes. In this decision the Court stated that the repeal and modification of a two-third majority act also has to be done by a qualified majority act,²²⁶ because qualified majority is not only a formal requirement but a constitutional guarantee²²⁷. Later this stricter approach was weakened, moving again closer to the view of the 1993 decision.²²⁸ The decision, mitigating the above mentions stricter approach to two-third acts, is the Decision

²²² Paczolay, Péter and Lóránt Csink, *Twenty Years of the Hungarian Constitutional Court* (Budapest: Constitutional Court of the Republic of Hungary 2009): 111.

²²³ Ibid. and also in Papp, Imre, “Kétharmaddal vagy Anélkül” *Fundamentum* (1999): 3.

²²⁴ Paczolay, Péter and Lóránt Csink, *Twenty Years of the Hungarian Constitutional Court* (Budapest: Constitutional Court of the Republic of Hungary 2009): 111.

²²⁵ Ibid.

²²⁶ same as it was said in Decision 53/1995.

²²⁷ Fűrész, Klára and Péter Schmidt, *Ünnepi Kötet: Schmidt Péter Egyetemi Tanár 80. Születésnapja Tiszteletére* (Budapest: Rejtjel Kiadó, 2006) [Special edition for the 80. birthday of Schmidt Peter]

²²⁸ Paczolay, Péter and Lóránt Csink, *Twenty Years of the Hungarian Constitutional Court* (Budapest: Constitutional Court of the Republic of Hungary 2009) 111.

31/2001. about the act on the tax office. The Court said that 'overtaking'²²⁹ of the 'non-essential content'²³⁰ of certain topics, requiring a two-third majority can be done by a simple majority decision.

The usage of the supermajority voting requirement by the opposition to oppose elective dictatorship, in the light of statistics and cases

In this section two periods of the Hungarian history are examined from the perspective of the usage of supermajority requirement in connection with acts by the opposition to block decisions of the government and legislative minority, and therefore constrain elective dictatorship. The periods are the 1998-2002 and 2002-2006 cycles, because in both times the government did not have a qualified majority in the legislation. The two periods are good examples because opposing parties were in power during this time. The 1990-1994 period is not examined, because that was the time of transition and creation of new acts and institution, therefore many two-third required acts were accepted, so the date would not be representative. The 1994-1998 period is not examined, because the governing party had a supermajority in the legislation, therefore these rules were not only not working in constraining the legislative majority, but actually they could have made the problem of elective dictatorship even harsher. And finally, the 2006-2010 period is also not representative, because of the political situation that occurred in November 2006 that was followed by an unusual practice of

²²⁹ Ibid. 112.

²³⁰ Ibid.

the opposition. First, the period of 1998-2002 is presented, and second, the period of 2002-2006.²³¹

During the period, 1998-2002, the governing party was *Fidesz*–Hungarian Civic Union, in coalition with the Independent Smallholders Party (*Független Kisgazdapárt*) and the Hungarian Democratic Forum (*Magyar Demokrata Fórum*). Altogether they held 213 seats²³², 55, 2% of the votes.

The overall number of the decisions²³³ made by the Parliament during this time is 7930, out of that 494 required a two-third majority. 194 decisions were passed during this time, which means the governing party had a 39% success rate. This means that the opposition used supermajority requirement to block decisions.

The overall number of bills initiated is 853, out of that 637 were introduced by the governing party.²³⁴ 464 of all the bills and 459 of the bills introduced by the governing party became law. That means that during four years, only five bills became to be law that was not prepared by the government. The success rate of the governing party was 72%.

²³¹ The below presented data is based on my own calculation, based on the following homepages.

<http://www.parlament.hu/adatok/text/1998-2010ckl/3_dontesek.htm> accessed 21-07-2011

<http://www.parlament.hu/internet/plsql/ogy_egyeb.ogy_ciklusok_irom> accessed 21-07-2011

<http://www.parlament.hu/internet/plsql/ogy_egyeb.ogy_ciklusok_szav> accessed 21-07-2011

²³² <<http://valtor.valasztas.hu/valtort/jsp/t0.jsp>> accessed 10-07-2011,

²³³ Decisions contain many procedural issues, for instance acceptance of acts and house resolutions, deciding on exceptional law-making procedure etc.

²³⁴ On governing party I looked at laws initiated by the government, by representative belonging to one of the parties in the coalition and by a committee of the Parliament. The latter are incorporated under governing party, because the majority of such committees are from the parties in coalition.

During four years, 64 bills requiring a two-third majority to pass were introduced by the governing party. 17 of these bills or parts of bills were blocked by the minority. This means that the governing party had a 73% success rate in passing supermajority bills. This rate seems quite unexpected, especially with comparing the 72% success rate in all the bills introduced. These statistics show that the opposition did not use its power to block major acts, and also goes against the arguments claiming that these rules are against efficiency.

Among the 17 bills blocked by the opposition, three are worth to be mentioned and can be definitely seen as a success of the minority in constraining elective dictatorship. First, and most important, is the blocking of the bill that would have subordinated the office of prosecutors to the relevant ministry. This would have been a highly radical change in the constitutional system.²³⁵ Second, the blocking of the bill that aimed to extend the national security examination to judges and prosecutors acting in connection with cases on organized crimes.²³⁶ Third, the opposition also prevented major changes in the Act on Radio and Television.²³⁷

Finally, two important issues have to be mentioned regarding this period. First, only in 2000 45 acts requiring a supermajority to pass were accepted mainly in connection

²³⁵ <<http://www.parlament.hu/irom36/0123/0123.htm>> accessed 21-07-2011,
<http://www.parlament.hu/internet/plsql/ogy_szav.szav_lap_egy?p_szavdatum=1999.05.04.18:08:12&p_szavkepv=I&p_szavkpvcso=I&p_ckl=36> accessed 21-07-2011

²³⁶ <<http://www.parlament.hu/irom36/0249/0249.htm>> accessed 10-07-2011
http://www.parlament.hu/internet/plsql/ogy_szav.szav_lap_egy?p_szavdatum=1999.06.22.18:44:39&p_szavkepv=I&p_szavkpvcso=I&p_ckl=36

²³⁷ <<http://www.parlament.hu/irom36/1982/1982.htm>> accessed 10-07-2011
http://www.parlament.hu/internet/plsql/ogy_szav.szav_lap_egy?p_szavdatum=2000.06.20.20:00:52&p_szavkepv=I&p_szavkpvcso=I&p_ckl=36

with EU or other international treaties.^{238,239} Furthermore, the strategy of the governing party was to attach provisions to these acts, concerning internal affairs, such as the provisions on pension and the usage of the air by MALÉV.²⁴⁰ This way they forced the minority to accept the bills, otherwise the country would have looked negatively in foreign affairs. Second, such an activity of the government, as described above, was even announced by the Prime Minister in a radio interview in 2000. Viktor Orbán declared that the acts, requiring two-third majority, should not be seen as a reason to surrender, but as a problem that has to be avoided by placing such provisions into simple bills or by other means the government has. This practice was used during the four years of this government, however, the Constitutional Court consequently denied such a ‘solution’ to the ‘problem’.²⁴¹ The evaluation of this conduct of the government is definitely negative, since it was based on avoiding the laws. The clear purpose of the government was to maximize its power and decrease of check function of the Parliament.²⁴² A statement of Géza Kilényi is very relevant to describe this conduct. He wrote in an article that the attack on the checks of the system is a sole attack on democracy itself.²⁴³ He also wrote that people who do not consider or like two-third requirements, are attacking democracy.²⁴⁴

²³⁸ Magyarország politikai évkönyve, DVD, 2006 [Political yearbook of Hungary]

²³⁹ According to István Soltész, qualified majority acts, between 2006 and 1989, can be seen as a failure, because the consensus could not be carried out between the government and opposition parties, only in cases when there was an urgent need because of foreign policy. Magyarország politikai évkönyve, DVD, 2006 [Political yearbook of Hungary]

²⁴⁰ Magyarország politikai évkönyve, DVD, 2006 [Political yearbook of Hungary]

²⁴¹ Magyarország politikai évkönyve 2002 (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2002): 71. [Political yearbook of Hungary]

²⁴² Magyarország politikai évkönyve 2002 (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2002): 71. [Political yearbook of Hungary]

²⁴³ Kilényi, Géza, *Az Alkotmányozás és a "Kétharmados" Törvények* (Budapest: Jogtudományi Közlöny (1994) 5: 208. [Constitution and two-thirds acts]

²⁴⁴ Kilényi, Géza, *Az Alkotmányozás és a "Kétharmados" Törvények* (Budapest: Jogtudományi Közlöny (1994) 5: 208. [Constitution and two-thirds acts]

The second period of examination is between 2002 and 2004. During this period, the governing party was the Hungarian Socialist Party (*Magyar Szocialista Párt*), in coalition with the Alliance of Free Democrats (*Szabad Demokraták Szövetsége*). Altogether they held 199 seats²⁴⁵, 51, 6% of the votes.

The overall number of the decisions made by the Parliament during this time is 15768 (more than double of the number seen in the previous period) out of that 490 required a two-third majority. 237 decisions were passed during this time, which means the governing party had a 47% success rate. This means that the opposition did not use supermajority requirement to block decisions as much as in the previous period.

The overall number of bills initiated is 968, out of that 713 were introduced by the governing party. 573 of all the bills and 555 of the bills introduced by the governing party became law. That means that during four years, eighteen bills became to be law that was not prepared by the government. The success rate of the governing party was 78%, similar seen in the previous period.

During four years, 90 bills requiring a two-third majority to pass were introduced by the governing party. 32 of these bills or parts of bills were blocked by the minority. This means that the governing party had a 64% success rate in passing supermajority bills. This rate seems much more expected than the one seen in the previous period. The opposition seemed to use obstructing more often; however, the data still seems quite high. However, if we add that many of these acts were introduced because of the

²⁴⁵< <http://valtor.valasztas.hu/valtort/jsp/t0.jsp>> accessed 11-07-2011

accession to the EU,²⁴⁶ the data seems to show that supermajority rules were indeed used by the opposition to constrain elective dictatorship.

Finally, from the 32 bills that were blocked by the opposition, four worth to be mentioned. First, blocking of the bill, the government aimed to decide on the deadline of interim elections of representatives²⁴⁷ following the Decision of the Constitutional Court, declaring an omission of the legislative body unconstitutional.²⁴⁸ Second, opposing the bill that aimed to reorganize small region associations by modifying the Constitution.²⁴⁹ Third, blocking of the new bill on home defense.²⁵⁰ Fourth, blocking another modification of the Constitution, aiming to extend the rights of recognition and dissemination of public data to the data relevant to recognize the past.²⁵¹ And finally, many provisions of certain acts were blocked by the opposition, such as Act on Business Associations, Criminal Code and modification of the jurisdiction of the tribunals.

²⁴⁶ Magyarország politikai évkönyve 2002 (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2002) [Political yearbook of Hungary]

²⁴⁷ <<http://www.parlament.hu/irom37/4147/4147.htm>> accessed 12-07-2011

²⁴⁸ <http://www.parlament.hu/internet/plsql/ogy_szav.szav_lap_egy?p_szavdatum=2004.04.05.19:30:55&p_szavkepvsop=I&p_szavkpvcso=I&p_ckl=37> accessed 12-07-2011

²⁴⁹ Decision 51/2002.

²⁵⁰ <http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=8764> accessed 12-07-2011

<http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=8764> accessed 12-07-2011

²⁵¹ <http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=11432> accessed 12-07-2011

<http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=11432> accessed 12-07-2011

<http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=14239> accessed 12-07-2011;

<http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=37&p_izon=14239> accessed 12-07-2011

The similarity between the two periods is evident and surprising. During both periods of times more acts were passed with a two-third majority than refused. The consequence is quite evident, the opposition did not use its right to block legislation and therefore constrain elective dictatorship in many cases. Two reasons can be given that reduces the peculiarity of the numbers. First, in connection with both periods it was noted that a bigger part of these bills were on foreign affairs that usually make the majority and minority to agree. Second, the conduct of the government during the first period, namely forcing the opposition to accept certain provisions by attaching them to a bill on foreign issue, could also explain the high number. Finally, an interesting data from the last one year shows what happens to supermajority rules as check on elective dictatorship, when the governing party has a two third-majority. The current government, since last year May, accepted 77 acts that required a two-third majority. That is already more than the acts accepted during four years in the examined periods.

B. Standing of the opposition to the Constitutional Court, Supreme Court and Constitutional Council

Constitutional courts can be very effective means to create constraints on a legislative majority, executive power and elective dictatorship. First, because they are seen as independent referees, therefore their opinions are more important to the voters and therefore to the politicians. In this way pressure can be put on politicians through publicity. Second, since they maintain rule of law and democracy through reviews,

they force the political branches to act according to the constitution. Third, the opposition can use its right to go to court as a threat, therefore forcing the legislative majority to bargain with them and achieve a wider consensus. In this chapter first, the different types of reviews and standing rules are presented. Second, some empirical data, such as cases and statistics are given to show the real effectiveness of opposition to constrain elective dictatorship.

1. Types of reviews and standing rules

Besides analysing the rules and practice of the courts on the standing of the opposition, it is important to show what kind of reviews they can ask for because of two reasons. First, the broader the review, the more power the opposition has in questioning the actions of the majority. Second, the scope of standing can depend on the type of review, for instance in the case of a concrete review, when an actual case is needed, the scope of the standing is obviously narrower. In this section I compare only those types of reviews of the three countries that are relevant from the perspective of the opposition, the *apriori* abstract review on laws and the house rules, the *aposteriori* abstract review and the concrete review. The US review is basically different from the French and Hungarian ones, which differences I described above, in the chapter about the theoretical background.

a. *Apriori* abstract review

Apriori abstract review does not exist in the US, but it is conducted in Hungary and France in connection with the rules of procedure of the parliaments and laws before promulgation.²⁵² The subject of such a constitutional review is quite similar in the two countries, but the scope of petitioners is different.

The rules of procedures of the Parliament is a matter of *apriori* abstract review in both countries, in France it is a must to refer it to the Council²⁵³, while in Hungary it is the discretion of the Parliament to make such an application to the Court²⁵⁴ Since the house rules can contain very important opposition rights, the constitutional protection of this document is very important and therefore, the French system is very favourable.²⁵⁵

A more important issue from the perspective of opposing elective dictatorship is the constitutional review of the laws before promulgation. If there is an *apriori* review, the opposition can have a strong bargaining position by only threatening with going to court. This bargaining position can be seen advantageous because in this case the opposition can achieve that the opinion of the minority is taken into consideration as

²⁵² Also in connection with other matters as well, but those are not relevant for this thesis.

²⁵³ French Constitution, Article 61.

²⁵⁴ Act XXXII. of 1989. on the Constitutional Court Article 1. § b

²⁵⁵ For instance in 1999, the Hungarian Constitutional Court found a passage of house rules unconstitutional. The provision contained that the plenary session are in every three weeks. This was a new institution by the government, established in 1998, clearly a tool to diminish check on the executive power by allowing less time for questions, interpellations etc. Magyarország politikai évkönyve 2002 (Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2002) [Political yearbook of Hungary]

well and broaden the consensus behind policy decisions. *Apriori* abstract review is very different in the two countries.

In France there is a distinction between Institutional Acts and Acts of Parliament.²⁵⁶ The previous has to be referred to the Council every time, while the reference of the latter is not mandatory.²⁵⁷ Acts of Parliament can be referred to the Council by President of the Republic, President of the National Assembly and Senate, Prime Minister and sixty deputies²⁵⁸ of the National Assembly and the Senate.²⁵⁹ This right of the opposition was created in 1974 by a constitutional amendment²⁶⁰ that said to be a huge achievement in France. 'In fact, since that time, at least one opposition party in parliament has always been able to trigger review. By creating the opportunity for a new role for the Constitutional Council in French politics, the 1974 constitutional reform is one of the major changes in the working of the Fifth Republic.'²⁶¹ Furthermore, it resulted in an enormous rising of the number of the referred cases^{262, 263}. 'French parliamentary minorities frequently invoke the abstract review mechanism. They petition or threaten to petition the Constitutional Council to obstruct legislation proposed by the government and its parliamentary majority. Whether or not a

²⁵⁶ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009)

²⁵⁷ French Constitution, Article 61.

²⁵⁸ out of 577 deputies in the National Assembly and out of 346 deputies (since 2010) in the Senate

²⁵⁹ French Constitution, Article 61.

²⁶⁰ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 159.

²⁶¹ Ibid. 386-38

²⁶² See the numbers at the part of statistics.

²⁶³ 'French parliamentary opposition has become "almost the only challenger" of legislation since granted standing to challenge legislation by a 1974 constitutional amendment.' in Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1201.21. also in Antal, Ádám, *Alkotmányi értékek és Alkotmánybíráskodás* (Budapest: Osiris Kiadó, 1998) [Values of Constitution and Constitutional Adjudication]

particular statute is likely to pass constitutional muster, the legislative minority may delay its promulgation through petition to the Constitutional Council. The threat of referral limits the number of proposals the French government is willing to submit for consideration and causes the majority to amend legislation or abandon certain policy initiatives to suit the minority.²⁶⁴ These quotes show that scholars welcomed the constitutional amendment and considered it as a good step to reduce the power of the government and the legislative majority.

In Hungary, *apriori* abstract review can be conducted only on the referral of the President of the Republic, serving as a veto when the President suspects unconstitutionality.²⁶⁵ Prior to Act I in 1998²⁶⁶, the opposition (fifty members of the Parliament)²⁶⁷ had a referral right as well, but the Constitutional Council refused to practice such a review from its decision in 1991. The reasoning said that the role of the Court is not to give advice in connection with laws not yet promulgated, but to decide on the constitutionality.²⁶⁸ The judges felt that participating in an evaluation in a not yet promulgated act would be bad for the Court and the separation of powers principal.²⁶⁹ Furthermore they feared that reviewing a not already accepted bill would make the Court part of the legislation, which is clearly not its task, and force it to decide on political issues that could lead to questioning the independence of the Court. In 1997 the Court had to deal one last time with this opposition right during reviewing

²⁶⁴ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1209.

²⁶⁵ Act XXXII. of 1989. on the Constitutional Court Article 1§ a,

²⁶⁶ in fact till 1991, the decision of the Court

²⁶⁷ out of 386

²⁶⁸ Decision 16/1991.

²⁶⁹ Smuk, Péter, *Ellenzéki Jogok a Parlamenti Jogban* (Budapest: Gondolat Kiadó, 2008) [Opposition rights in the jurisprudence parliamentary law]

a proposal²⁷⁰ about diminishing the right of the fifty members of parliament to initiate such an *apriori* review. The court stated that the *apriori* review initiated by the members of the parliament is not in the constitution, only the type which is initiated by the president.²⁷¹ Since the rules are in the act on the constitutional court, which is a lower act than the constitution, the jurisdiction of the court can be modified by a bill, such as the proposed one.²⁷² They denied the statement made by the initiators that it is against the constitutional norms if the president can initiate a bill and also can ask for an *apriori* review, since that would create an unbalanced situation between the parliament and president.²⁷³ The Court also denied that the bill was against the principal of popular sovereignty, and the argument claiming that the majority in the parliament cannot give up a right belonging to the minority.²⁷⁴ And finally, they declared that the proposal is not against legal certainty, since the main rule is the *ex nunc aposteriori* review.²⁷⁵

Apriori abstract review of laws is a very enormous tool in the hand of the opposition, either when used only as a threat or when an application is really made to the courts, because in this way the majority can be stopped from enacting policies in the form of laws that are unconstitutional. About this effect, in connection with the French *apriori* abstract review, the followings were written ‘...have made Parliament much more than a simple voting machine rubber-stamping executive initiatives.’²⁷⁶ and ‘...systematic

²⁷⁰ Legislative Proposal/4328.

²⁷¹ Decision 66/1997.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Stone Sweet, Alec, "In the Shadow of the Constitutional Council: the "Juridicisation" of the Legislative Process in France," *West European Politics* (1989) 122:15.

referral of important pieces could have a crucial impact on final legislative outcomes.²⁷⁷ It is true that *aposteriori* abstract review can achieve the same goal, however from the perspective of legal certainty it is clearly better if these laws never even gain force.

There are arguments claiming that this type of review is not so desired, because it politicizes the courts, making them to be another chamber of legislation and therefore lengthens the legislative debate²⁷⁸ 'Politicians, especially those in the opposition who refer a given law to the Council, have understandably been conditioned to viewing the coming decision as the final step in the policy-making process, an ultimate effort to influence or to obstruct legislation.'²⁷⁹ On the other hand some scholars see the involvement of the Council in the political area as a positive effect. First, because it gives the Council a referee position: 'In choosing a constitutional review with a priori abstract review and restricted access, the designers of the constitution of the Fifth Republic willed that the Constitutional Council should only act as referee in judicial conflicts between the main political institutions.'²⁸⁰ Second, because it extended the jurisdiction of the Council: 'Undoubtedly, the fact that the minority may now initiate referrals has inflated their number and extended the regulatory function of the Constitutional Council beyond electoral competition to political decisions.'²⁸¹ Regardless whether we see the politicization of the courts as a positive or negative

²⁷⁷ Stone Sweet, Alec, *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992): 4.

²⁷⁸ See in the part of the theoretical background contra arguments. Bell, John, *French Legal Cultures* (London: Butterworths, 2001)

²⁷⁹ Stone Sweet, Alec, "In the Shadow of the Constitutional Council: the "Juridicisation" of the Legislative Process in France," *West European Politics* (1989) 122:14.

²⁸⁰ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 386.

²⁸¹ Ibid. 109.

effect, from the perspective of opposing elective dictatorship, allowing the opposition to stop majority decisions that seem to be unconstitutional is clearly a desired opposition right. Where parties are in the position to suggest preliminary constitutional review ‘they can be placed in a strong position’.²⁸²

b. *Aposteriori* abstract review

Aposteriori abstract review is also not conducted by the US Supreme Court and neither by the French Constitutional Council. ‘The Hungarian Court has the broadest power of abstract review; it is the only court in Central and Eastern Europe that undertakes both a priori and *aposteriori* abstract review.’²⁸³ In Hungary such a review existed in a very broad version since recent modification of the current Constitution. In the new Constitution, in effect from January 1, 2012, the scope of the petitioners was also constrained. In this section I show the three phrases of the *aposteriori* abstract review in Hungary.

Till the recent modification of the current Constitution, in effect from 19th of November, 2010,²⁸⁴ anybody²⁸⁵ could apply to the Court, asking for an *aposteriori*

²⁸² Venice Commission: *Study on Individual Access to Constitutional Justice*, (Venice, 17-18 December 2010): 17.

²⁸³ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1205.

²⁸⁴ <http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=1445> accessed 12-07-2011

²⁸⁵ Furthermore, the court itself can initiate a review in case the negligence of the legislation, ‘...Hungary has expanded the European model of Judicial review by allowing its constitutional court to invoke jurisdiction and review legislative inactivity upon its own initiative. Such standing provisions that allow constitutional courts to initiate abstract review are unprecedented among Western European

abstract review in connection with any laws.²⁸⁶ This is called *actio popularis*, which said to be special: ‘High public officials and parliamentary minorities have access to all Central and Eastern European constitutional court, but the Hungarian standing provisions are the most generous.’²⁸⁷

Since the modification in 2010,²⁸⁸ not all laws can be reviewed by the Court. In connection with topics that cannot be subject of a referenda, the Court can conduct a review only if the provisions violate right to life and human dignity, right to private data, right to idea, conscience and religion and Hungarian citizenship.²⁸⁹

The new Constitution further reduces the jurisdiction of the Court by taking away *actio popularis*. According to Article 24. § (2) e, only the government, the Ombudsman and one fourth of the members of the Parliament can ask for *aposteriori* abstract review.

Evaluating the decisions of the current government in connection with reducing the jurisdiction of the Court is not topic of this present thesis, but two remarks have to be made from the perspective of opposing elective dictatorship. First, the change made in the standing rules does not matter as much than from the perspective of individuals, since one fourth of the members can petition the Court. Second, reducing the

constitutional courts Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1205.

²⁸⁶ Act XXXII. of 1989. on the Constitutional Court Article 1. § b

²⁸⁷ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 1205, ‘most generous’ used as well in Schwartz, H, "The New East European Constitutional Courts," *Michigan Journal of International Law* (1992) 13 (4): 741.

²⁸⁸ which was an answer from the majority to a decision of the Court they unflavored

²⁸⁹ Act XXXII. of 1989. on the Constitutional Court Article 32/A. § (2)

jurisdiction of the Court, by taking away its power to review certain topics, also reduces the power of the opposition. What is really troubling of this latter change is that the government made this decision after the Court decided a case against it. This is a clear example of elective dictatorship, when the majority changes a long time tradition and the jurisdiction of such an important, independent institution because it finds the check on it disturbing.

Aposteriori abstract review is clearly a good check on the majority and a restraint on elective dictatorship and it also avoids transforming the courts into political bodies as *apriori* abstract review. By exercising such a review, the Court can retain its independent status and therefore its decisions can carry more weight in the eyes of the people and therefore to the politicians. However, as it was mentioned above, this type of review can be seen as operating against legal certainty, since these laws are invalidated only after a time being in force. Furthermore, the time and cost of implementation of these laws are already spent, so the efficiency of this type of review can also be questioned.

c. Concrete review, individual complaint

Concrete review is a type that exists in all the three countries, though in very different forms. In Hungary and US there is direct access to the Courts, while in France there is indirect access, since individual cases can get to the Council only through the referral

of either the *Cour de Cassation* or the *Conseil d'État*.²⁹⁰ The review can be seen as a special mixture between concrete and abstract review according to the Venice Commission: 'The present French system is close to the normative constitutional complaint, as the Constitutional Council is allowed to control legislative acts and it is an abstract control; if the act is declared unconstitutional, the act no longer exists in the French legal order.'²⁹¹ The France concrete review²⁹² is also restricted in the sense that only cases in connection with the infringement of constitutionally guaranteed rights and freedoms can get to the Council.²⁹³ The Hungarian regulation is broader, allowing all kind of fundamental rights infringement to reach the Court.²⁹⁴ The following was said about the French review: '...extended access is still limited when compared to countries like Hungary...'²⁹⁵

The US concrete review is the broadest, allowing all kind of 'cases and controversies'²⁹⁶ in the form of the Court's original and appellate jurisdiction. This section gives a review of the Supreme Court's jurisprudence on standing rules, leaving out the analysis of the French and Hungarian concrete review, since, as I described

²⁹⁰ French Constitution, Article 61-1.

²⁹¹ Venice Commission: *Study on Individual Access to Constitutional Justice*, (Venice, 17-18 December 2010): 22.

²⁹² 'The new Article 61-1 of the Constitution, introduced in 2008, introduces a "priority question of constitutionality"'. ' Venice Commission: *Study on Individual Access to Constitutional Justice*, (Venice, 17-18 December 2010): 15., 'In 2008, France adopted an extended constitutional reform, finally introducing review of formal parliamentary legislation a posteriori with regard to constitutional 'rights and freedoms' ²⁹² Pfersmann, Otto, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective," *European Constitutional Law Review* (2010) 6 (2): 223.

²⁹³ French Constitution, Article 61-1.

²⁹⁴ Act XXXII. of 1989. on the Constitutional Court Article 1 d,

²⁹⁵ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 104.

²⁹⁶ US Constitution Article 3 paragraph 2.

above, in these latter countries the opposition has other means to question the constitutionality of the majority's lawmaking.

To show the standing rules of the Supreme Court first, the general rules have to be presented and then the specific decisions on congressional standing to sue. From the perspective of elective dictatorship, the specific rules on the standing of the members of the Congress matters the most,²⁹⁷ therefore I describe general rules only in short.

General rules on standing

In order to show the general rules on standing first, I clarify the rules' place in the system of limitations on judicial review. Second, I show the Court's jurisprudence creating and specifying the requirements of general standing.

Standing requirements are considered to be limitations on judicial review, which means that even if the case falls in the jurisdiction of the Court, there are still many requirements that have to be satisfied to acquire a decision from the Court.²⁹⁸ 'The question of a party's standing is a threshold inquiry which, generally speaking, in no way depends on the merits of the case...' ²⁹⁹ There are constitutional limitations, policy

²⁹⁷ The long description of the specific cases on congressional standing is inevitable, since the characteristic of the common law system is that precedents are binding, and therefore, the decisions have to be seen as rules, carefully examining the statements of the Supreme Court.

²⁹⁸ 'There is significant difference between determining whether federal court has jurisdiction over subject matter and determining whether cause over which court has subject matter jurisdiction is justiciable; doctrine of separation of powers is more properly considered in determining whether cause is justiciable.' *Powell v. McCormack* 395 U.S. 486, 89 S.Ct. 1944 (U.S. Dist. Col. 1969)

²⁹⁹ 25 Fed. Proc., L. Ed. § 59:1 Federal Procedure, Lawyers Edition

limitations and specific doctrines limiting judicial review.³⁰⁰ Within the latter category we can distinguish between standing and timing requirements and subject matter litigation.³⁰¹ Standing requirements have two types: constitutional and prudential standing.³⁰² The previous is further divided to general standards, such as injury in fact, causation, and redressability, and to the standing of taxpayers and citizens.³⁰³ The latter has also two types: third party standing and associational standing.³⁰⁴ For the purpose of this thesis, I briefly present the rules of general standards, because these are the requirements that have to be fulfilled by everybody in order to go to Court. If a member of the Congress decides that he would like to attack a decision made by a majority, he either personally have to fulfil these requirements or find a person who satisfies the criteria.

‘In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues and it is founded in concern about the proper, and properly limited, role of the courts in a democratic society.’³⁰⁵ A distinction has to be made between two types of standing tests.³⁰⁶ Till 1970, the Association of *Data Processing Service Organizations v. Camp*³⁰⁷ decision, the Court used the ‘older’ common law, legal interest test,³⁰⁸ which is considered being stricter

³⁰⁰ Stephens, Otis Hammond, and John Malcolm Scheb, *American Constitutional Law* (Belmont, CA: Thomson/Wadsworth, 2008)

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ *Federal Procedural Law Edition 25*. § 59:1 Federal Procedure, Lawyers Edition

³⁰⁶ Sunstein, Cass R, "Standing and the Privatization of Public Law," *Columbia Law Review* (1988) 88 (7): 1432-1481.

³⁰⁷ *Association of Data Processing Service Organizations v. Camp* 397 U.S. 150, 153 (1970)

³⁰⁸ Sunstein, Cass R, "Standing and the Privatization of Public Law," *Columbia Law Review* (1988) 88 (7): 1432-1481.

than the ‘newer’, more liberal injury test.³⁰⁹ The basic rule to satisfy the general, ‘liberal’ standing requirement was specified in *Allen v. Wright*: ‘A plaintiff must allege a personal injury that is fairly traceable to alleged unlawful conduct by the defendant and that is redressed by the requested relief.’³¹⁰ The reason for standing was given in the same decision: ‘the law of Art. III standing is built on a single basic idea-the idea of separation of powers,’³¹¹ which was further clarified in *Lujan v. Wildlife*. In the latter case the Court said that standing rules strengthen the principal of separation of powers, especially between the executive power and the judiciary.³¹² ‘A regime in which anyone could challenge the legality of government action would excessively curtail or interfere with the President’s “Take Care” power.’³¹³

From the perspective of this thesis the important element is the ‘personal injury’ because that is the part of the rule that excludes third parties (for example members of Congress) from going to Court on behalf of somebody else. ‘Injury in fact’³¹⁴ is ‘an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent,’³¹⁵ not conjectural or hypothetical.³¹⁶ The Court focuses on two principals³¹⁷ while deciding about the fulfilment of the standing requirements, ‘the

³⁰⁹ Sunstein, Cass R, "Standing and the Privatization of Public Law," *Columbia Law Review* (1988) 88 (7): 1432-1481.

³¹⁰ *Allen v. Wright*, 468 U.S. 737 (1984)

³¹¹ *Ibid.*

³¹² Kontorovich, Eugene, “What Standing Is Good For” *University of Chicago Law School* (2007) online: <http://works.bepress.com/eugene_kontorovich/1/> accessed 12-07-2011

³¹³ *Ibid.*

³¹⁴ *Allen v. Wright*, 468 U.S. 737 (1984)

³¹⁵ ‘past wrongs do not in themselves amount to the type of real and immediate threat of injury necessary to make out a case or controversy.’ In *City of Los Angeles v. Lyons*

³¹⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)

³¹⁷ And not about the size of the injury: ‘Art. III policies [are] adequately fulfilled even though the ultimate injury is very small indeed.’

cognizability of the injury and the "real and immediate" nature of the injury.³¹⁸ The Supreme Court clarified standing requirements much more detail in many of its decision, but for the purpose of this thesis it is enough to see that even the above mentioned decisions make it clear that congressmen are not capable of asking for a judicial review in the name of their voters (or anybody as a matter of fact, except themselves).

Congressional standing to sue

There are a significant number of decisions dealing specifically with the congressional standing to sue. However, most of the cases are decided by federal courts, the Supreme Court only decided a few cases. Since the topic of this thesis is the standing requirements for the Supreme Court, the cases decided by lower courts are presented briefly, however, they are important to show the development of congressional standing to sue. It also has to be mentioned that there are two judges who wrote against the institution of congressional standing as a whole, Scalia and Burke. The following arguments were raised by them. First, the US system is about deciding individual rights, not about making the courts to be referees in the battle between the political branches.³¹⁹ Second, if the legislators are granted standing, other plaintiffs outside the legislative power but having a power to govern should be as well.³²⁰ And finally, the usual *originalist* argument, that granting standing to legislators is against the will of

³¹⁸ Kusiak, Kurt S, "Standing to Sue: A Brief Review of Current Standing Doctrine" *Boston University Law Review* (1991) 71: 667.671.

³¹⁹ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³²⁰ Ibid.

the Framers of the Constitution.³²¹ Cases presented here are the following. From the jurisprudence of lower courts: *Mitchell v. Laird*, *Kennedy v Sampson*, *Harrington v. Bush*, *Riegle v. Federal Open Market Committee*.³²² From the jurisprudence of the Supreme Court: *Massachusetts v. Mellon*, *Coleman v. Miller*, *Powell v. McCormack*, *Raines v. Byrd*, with a special emphasize on the latter one.

In 1986 a scholar wrote the following: ‘In recent years Members of the United States Congress have brought suit against the executive branch of the federal government with growing frequency.’³²³,³²⁴ Two explanations can be found for this phenomenon. First, the Data Processing case³²⁵ shifted the doctrine from the common law legal interest test to the injury in fact test.³²⁶ Second, the occurrence of unified government³²⁷, which obviously motivated the legislative minority to find ways of attacking the decisions of the unified government. The rareness of the cases and the lack of clear judicial standards show that the Supreme Court could not really decide on the principals of congressional standing to sue. Possible reasons for this hesitation could be the fear of getting involved deeply in political issues and violating the

³²¹ Ibid.

³²² These cases are representing three different tests of standing in the courts’ jurisprudence. There are many other relevant cases, not discussed here due to limits of this thesis, such as the Moore case containing Scalia’s argument of no standing, or the Barnes case containing Burke’s denial of legislative standing, or *Vander Jagt v. O’Neill*, *Chenoweth v. Clinton* and *Campbell v. Clinton* cases.

³²³ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 1.

³²⁴ ‘Despite the acceptance of legislative standing by Chief Justice Hughes in *Coleman*, it was not until the early 1970’s that congressmen attempted to resort to the federal courts in significant numbers. The initial congressional lawsuits challenged miscellaneous actions of the executive branch. However, the issue that served as the catalyst for the growing number of such lawsuits was American military involvement in Southeast Asia.’ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 5.

³²⁵ *Association of Data Processing Service Organizations v. Camp* 397 U.S. 150, 153 (1970)

³²⁶ Sunstein, Cass R, "Standing and the Privatization of Public Law," *Columbia Law Review* (1988) 88 (7): 1432-1481.

³²⁷ Weiner, David J, „The New Law of Legislative Standing,” *Stanford Law Review* (2001) 54 (1): 205-234.

doctrine of separation of powers or the fear that ‘...allowing individual legislators standing effectively creates a one-Congressman veto, far different from the majority rule envisioned by Article I.’³²⁸ The following sections show the main grounds and justifications of congressional standing to sue, first through the jurisprudence of the federal courts, and then through the cases decided by the Supreme Court. Finally, I summarize the main characteristics of the jurisprudence of both federal and Supreme Courts.

Federal courts have been more permissive on standing of congressmen than the Supreme Court, but they also dismissed ‘...all attempts made by legislators to challenge majoritarian decisions through litigation’³²⁹ by mainly using the doctrines of equitable discretion and ripeness.³³⁰ Congressmen proved to be quite inventive in trying to justify their standing with the following three theories. First, the ‘derivatively suffered’ injury by the representatives because of an injury the Congress suffered, which was only partially accepted by the federal courts, establishing serious limitations to it.³³¹ Second, based on the status of being a representative of the voters, which again was denied by the courts.³³² The problem with this argument is that representation of voters is a political representation not a legal one, furthermore, they represent different people, not the same will but many different ones.³³³ And finally,

³²⁸ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 1.

³²⁹ Dotan, Yoav, and Menachem Hofnung, "Legal Defeats-Political Wins," *Comparative Political Studies* (2005) 38 (1): 79.

³³⁰ Dotan, Yoav, and Menachem Hofnung, "Legal Defeats-Political Wins," *Comparative Political Studies* (2005) 38 (1): 79.

³³¹ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 13.

³³² *Ibid.*

³³³ *Ibid.*

based on an injury that a congressman directly suffered.³³⁴ This latter theory was accepted by the courts, clearly because it rephrases the general standing doctrine. If the first two theories were accepted, members of the congress would have such a wide standing as the members of the opposition have in France and Hungary, in connection with other types of reviews. The cases presented here can be divided into three groups, presenting the three different theories of standing of legislators.³³⁵ First, the bear upon test, presented in *Mitchell*. Second, the complete disenfranchisement test, used in *Kennedy, Harrington and Goldwater*³³⁶. Third, the circumscribed equitable discretion test, created in the *Riegle* case.

The first decision that has to be mentioned from the jurisprudence of the federal courts was decided in 1973, the *Mitchell v. Laird* case. Members of Congress filed a case ‘to challenge the constitutionality of the United States' involvement in Southeast Asia.’³³⁷ The standing of the congressmen was upheld, based on the bear upon test. ‘The legislators had standing not because of any specific injury, but because a decision by the court would "bear upon" their duties as members of Congress to decide if any legislative measures were necessary.’³³⁸ Two problems have to be noted with this decision. First, the uncertainty of the meaning ‘bear upon’ and second, that it makes

³³⁴ Ibid.

³³⁵ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³³⁶ Since this case repeats the reasoning of the previous two cases, I do not present this decision. However, it has to be noted that the case clarified the meaning of disenfranchisement in this case.

Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³³⁷ Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 5.

³³⁸ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 223.

the decision of the Court to be advisory.³³⁹ The case was overturned by the *Harrington v. Bush* decision, because the bear upon test was said to be not in line with the injury in fact requirement.³⁴⁰

The second decision that has to be mentioned is from 1974, the *Kennedy v. Sampson* case, which ‘became the seminal case on congressional standing.’³⁴¹, following the above mentioned second approach of standing tests. In this case a senator questioned the constitutionality of a pocket veto. Although the senator relied on derivative injury, the Court granted the standing, on the basis that ‘...standing requirements were satisfied by Senator Kennedy's assertion that the attempted pocket veto had "nullified" his vote in favour of the legislation in question.’³⁴² ³⁴³ Besides changing the standing test, the other reason why this decision is extremely important is that it answered the question Coleman could not. Namely, that not all the senators who voted for the bill have to go to the Court.³⁴⁴ ‘The court said that while the "full injury" is to the entire body, an individual Congressperson's effectiveness, as a member of that body, has been diminished, and thus he or she should be able to bring suit to vindicate that effectiveness.’³⁴⁵

³³⁹ Ibid. 209-282.

³⁴⁰ *Harrington v. Bush* 553 F.2d 190

³⁴¹ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 6.

³⁴² Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 7.

³⁴³ The Court cited the *Association of Data Processing Service Organizations v. Camp* case for requiring an injury in fact and a zone of interest.

³⁴⁴ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁴⁵ Ibid. 228.

The third important case is the *Harrington v. Bush* decision from 1977. The Court held that 'even though the declaratory judgment sought by Congressman Harrington would "bear upon" his congressional duties, he nevertheless lacked standing to sue.'³⁴⁶ The Court further defined the Kennedy decision, saying that the standing is valid if the issue is about nullifying a vote³⁴⁷ and highlighting that 'the technique for analyzing the interests is the same'³⁴⁸ in the case of congressmen and other litigants.³⁴⁹

The third era of standing test started with the *Riegle v. Federal Open Market Committee* decision, in 1981. The new doctrine, the Court evolved in this case, was based on the recognition that previous decisions contained two contradicting principals.³⁵⁰ On one hand, previous decisions stated that the standing of litigant and legislators should be examined in the same manner. On the other hand, the redressability requirement was used differently in the case of legislators, since in their case the injury must not be able to be redressed by their 'colleagues.'³⁵¹³⁵² In case they could obtain such a redress, the court used equitable discretion to dismiss the case.³⁵³ 'The obvious intent of the equitable-discretion standard was to prevent excessive judicial entanglement in cases that posed the greatest threat to the separation of powers.

³⁴⁶ Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 7.

³⁴⁷ *Ibid.* 5.

³⁴⁸ *Harrington v. Bush* 553 F.2d 190

³⁴⁹ The violation of federal law in the form of denial of information was the basis of the challenge. *Harrington v. Bush* 553 F.2d 190

³⁵⁰ Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 5.

³⁵¹ *Riegle v. Federal Open Market Committee* 656 F.2d 873 (D.C. Cir. 1981)

³⁵² Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁵³ Weiner, David J, „The New Law of Legislative Standing," *Stanford Law Review* (2001) 54 (1): 205-234.

What better way to protect courts than by excluding cases that could be resolved politically.³⁵⁴ The new doctrine, ‘circumscribed equitable discretion’³⁵⁵, was using the general standing requirements, adding a further condition. If there is other remedy available and a non-legislator plaintiff could sue, the courts will dismiss the case.³⁵⁶ The justification for this condition was separation of powers: ‘...standard would counsel the courts to refrain from hearing cases, which represent the most obvious intrusion by the judiciary into the legislative arena: challenges concerning congressional action or inaction regarding legislation.’³⁵⁷ As with the previous tests, concerns and problems arose in connection with the circumscribed equitable discretion test. First, the scope of injury in this case was not clarified.³⁵⁸ Second, there was no justification for using the equitable discretion doctrine.³⁵⁹ Third, ‘...the court failed to adequately explain the significance of a private individual's inability to bring suit for its decision...’³⁶⁰ Members of the Congress had some success in establishing their standing following the adoption of the Riegle test, but such suits were often dismissed on the basis of the equitable discretion doctrine.

The jurisprudence of the federal courts is definitely not clear or absolutely consistent, but at least these courts tried to clarify some doctrines as opposed to the Supreme Court, which tried to avoid such a decision for a long time. These decisions are

³⁵⁴ Ibid. 211-212.

³⁵⁵ *Riegle v. Federal Open Market Committee* 656 F.2d 873 (D.C. Cir. 1981)

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁵⁹ Ibid.

³⁶⁰ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 10.

relevant, since they can explain the few decisions of Supreme Court. In sum, the three tests used by the courts to decide about the standing of a member of a political branch are the following. The bear upon test was based on the idea that legislators have a duty to decide about the necessity of legislations. This doctrine implies the voting right (the basis of the next test), since members of the legislative branch make decisions by votes in the representative bodies. However, this test was clearly much broader than the following ones. The complete disenfranchisement test narrowed down the possible basis of standing, requiring a nullification or denial of a vote and no existence of remedy within the political process. This test made clear that in the case of the violation of any laws by members of the political branches, the standing requirements are not fulfilled. The circumscribed equitable discretion test required the fulfilment of general standing and again no available remedy through the political process. If there was available remedy and a non-legislator person could sue, the case was dismissed. Looking at the development of the standing doctrine of the federal courts the following picture seems emerge.

The general idea of concrete review is based on the individual complaint courts are protecting individual rights and not deciding about the constitutionality of laws in general. In the first two tests the courts seemed to move toward the direction of protecting the interests and political power of legislators, rather than a concrete fundamental right. The third test seems to get back to the original idea and affording protection to legislators only on the basis of an injury in their individual rights.

The Supreme Court's jurisprudence about congressional standing to sue contains much less cases than the federal courts. They were much less willing to deal with this issue, because of reasons described above, in the introduction of this chapter. Therefore, the jurisprudence of the Court is much less controversial. The theories, based on legislators tried to acquire standing, are almost the same as in the case of federal courts. One of them was the allegation of institutional injury, based on the derivative theory, which was accepted by the Court, through judges imposed strict limitations and conditions, in *Coleman* and *Raines*. The other theory is the individual injury, which the Court accepted in *Powell*.³⁶¹ The granting of standing based on this latter theory is not surprising, since it is rephrasing the general standing requirements. The fourth, *Mellon* case, presented here, is important, because of the description the Court gave about the characteristic of review and its relation to the separation of powers doctrine.

The first case when the Supreme Court was dealing with congressional standing to sue was *Massachusetts v. Mellon*³⁶² in 1923. This decision was never explicitly overruled, but some parts of it are not good law anymore. Two aspects of this decision have to be mentioned. First, the part where the Court highlighted the meaning of the judicial review, denying the general examination of laws based on separation of powers arguments. Second, where the judges declared their position on the role of the representatives and state in connection with bringing suits to the Court in the name of their voters.

³⁶¹ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁶² 262 U.S. 447, 43 S.Ct. 597, from the DC Circuit Court case: *Frontingham v. Mellon*

The Court stated that 'A litigant can question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage'³⁶³ which statement clearly denies abstract and general reviews. The judges went on saying that the unconstitutionality of a law does not automatically justify a review, there has to be a 'suffered'³⁶⁴ or 'threatening'³⁶⁵ 'direct injury'³⁶⁶ to make the case justiciable. If there is no injury, the decision would be assuming '...a position of authority over the governmental acts of another department.'³⁶⁷ The argument is relying on the separation of powers doctrine, which the Court made clear by describing the three different powers and their tasks and limits, and stating that these powers should not invade each other's territory.³⁶⁸ About the role of the representatives and state the Court said that 'While the State, under some circumstances, may sue in that capacity [of *parens patriae*] for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government.'³⁶⁹

The second decision that has to be mentioned is the *Coleman v. Miller*³⁷⁰ case from 1939. This case again was never explicitly overruled, but there are some parts that are not valid anymore. The importance of this case is that an institutional injury was alleged³⁷¹, and a Court created a test for standing. The case involved twenty members of a state legislation, all of them who voted against a resolution. They claimed that the

³⁶³ *Massachusetts v. Mellon*, 262 U.S. 447 (1923)

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Massachusetts v. Mellon*, 262 U.S. 447 (1923) '...the general rule is that neither department may invade the province of another, or control, direct, or restrain its action.'

³⁶⁹ *Ibid.*

³⁷⁰ *Coleman v. Miller*, 307 U.S. 433 (1939)

³⁷¹ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

governor's tie-breaking vote that made the resolution to be accepted was against their rights. The majority of the Court stated that the senators' votes were '...virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification.'³⁷² As to the injury the Court said that 'these senators have a plain, direct and adequate interest'³⁷³ in maintaining the effectiveness of their votes.'³⁷⁴, and therefore, the Court established the standing requirement for state legislators, namely the 'complete nullification' of their vote.³⁷⁵

There was no question about the redressability, since 'As the validity of a state statute was not assailed, the remedy by appeal was not available.'³⁷⁶ Justice Frankfurter's separate opinion³⁷⁷ has to be mentioned, which included two reasons for the denial of the standing. First, he highlighted that the claim of the senators is not a special claim of them, since all citizens of the state could have claimed the same.³⁷⁸ Although Justice Frankfurter raises a point, in my opinion, he confuses two possible grounds of the claim in this case. The one that really all citizens could have, not accepting the amendment and the other: the representatives' voting rights. This latter clearly belongs only to the legislators, because of the characteristic of indirect democracy. The majority accepted this latter one as the ground for granting standing rights. The second reason the Justice raises for denying standing is that the Court should '...leave intra-

³⁷² *Coleman v. Miller*, 307 U.S. 433 (1939)

³⁷³ also classified as 'right' and 'privilege'

³⁷⁴ *Coleman v. Miller*, 307 U.S. 433 (1939)

³⁷⁵ Stephens, Otis Hammond, and John Malcolm Scheb, *American Constitutional Law* (Belmont, CA: Thomson/Wadsworth, 2008), Bruff, Harold H, *Balance of Forces: Separation of Powers Law in the Administrative State* (Durham, N.C.: Carolina Academic Press, 2006)

³⁷⁶ *Coleman v. Miller*, 307 U.S. 433 (1939)

³⁷⁷ in which three other judges joined

³⁷⁸ Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 10.

parliamentary controversies to parliaments and outside the scrutiny of law courts³⁷⁹, which is a separation of powers argument.

Besides the critique, Justice Frankfurter made, five problems can be mentioned with this case. First, this decision involved state legislators and did not clarify whether it can have any relevance in the case of members of Congress.³⁸⁰ It is quite hard to imagine that the answer to this question was left out accidentally, most probably they avoided intentionally the answer, as I described in the beginning of this chapter. Second, in the case of state legislatures the separation of powers problem is not so evident than in the case of congressmen,³⁸¹ which can be the exact reason why the judges never said anything about whether the decision applies to federal level as well. Third, a further question remained open in the case, namely, whether all legislators have to go to the court whose votes were nullified or one applicant is enough?³⁸² The fourth problem is the lack of specification on the meaning and scope of the injury.³⁸³ And the final concern raised by scholars is that ‘the Court’s test, involving an examination of the interest that the legislators have in the effectiveness of their votes seems to invite an expansive reading’³⁸⁴ The Coleman case is clearly a milestone in the history of congressional standing to sue, however some questions remained open, the Court had to answer in later decisions despite its obvious resistance.

³⁷⁹ Ibid. 4.

³⁸⁰ Ibid. 10.

³⁸¹ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 10.

³⁸² Ibid.

³⁸³ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁸⁴ Dessem, Lawrence, “Congressional Standing to Sue: Whose Vote is This, Anyway?” *Notre Dame Law Review* (1986): 10.

The third case that has to be mentioned shortly is the *Powell v. McCormack*³⁸⁵ decision from 1969. This case was also never overruled, but some parts were affected by later decisions. The Court in this case decided about an individual injury type of standing.³⁸⁶ The challenge was brought by an elected representative, who was refused to be seated by the House.³⁸⁷ The case is an important decision, since it discussed a standing based upon an injury suffered directly by the congressman. The Court acknowledged that 'Powell had suffered a direct, personal injury due to the defendants' refusal to seat him as a representative or to pay him his congressional salary.'³⁸⁸ However, the Court denied to accept standing based on the fact that Powell could not obtain voting rights,³⁸⁹ and therefore denied to accept injury in the political power of the representative³⁹⁰. 'Thus, *Powell* provides little guidance about the most common legislator suits, which involve a claim of an institutional injury'³⁹¹ however it clarified that members of the legislative body can also go to the courts according to the general standing requirements.

And the final, ground-breaking decision of the Court is the *Raines v. Byrd* case from 1997. This was the first time the Supreme Court actually addressed federal legislator standing³⁹² in connection with an alleged institutional injury.³⁹³ The facts of the case,

³⁸⁵ 395 U.S. 486, 89 S.Ct. 1944 U.S. Dist. Col. 1969.

³⁸⁶ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁸⁷ *Powell v. McCormack* 395 U.S. 486 (1969)

³⁸⁸ Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 23.

³⁸⁹ 'The courts, however, should not accept allegations of injury premised upon the denial of a congressman's vote as sufficient for article III standing purposes.' Dessem, Lawrence, "Congressional Standing to Sue: Whose Vote is This, Anyway?" *Notre Dame Law Review* (1986): 26.

³⁹⁰ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁹¹ *Ibid.* 222.

³⁹² *Ibid.* 209-282.

the case's relationship to previous cases, the test used by the Court and the evaluation of the case is presented here. The case was filed by six Members of Congress, who voted against the Line Item Veto Act. They claimed that the act increased the power of the President, unconstitutionally³⁹⁴.³⁹⁵ The case was dismissed, because of the lack of standing of the congressmen, but the reasoning of the Court is extremely important to understand the requirements for congressional standing.

Two previous cases were mentioned by the judges in order to show the consistency in the Supreme Court's jurisprudence, the Powell and the Coleman decisions. Regarding the Powell decision, the Court stated that it is not determining, since it was about personal injury, as opposed to the current case, which is about institutional injury and the loss of political power.³⁹⁶ 'Thus, Powell's claim was personal - and therefore concrete - in sharp contrast to the abstract injury alleged in *Raines* that related to the loss of political power.'³⁹⁷ The Coleman decision was said to be determining, since an institutional injury was alleged there,³⁹⁸ therefore the complete vote nullification test applied as well.³⁹⁹ The application of the test resulted in the denial of the standing. The Court stated that '...there is a vast difference between the level of vote nullification at

³⁹³ As I already described, the other case involving institutional injury, the Coleman decision, was about state legislators and left open the question whether it could be applied to congressmen as well.

³⁹⁴ by violating bicameralism and presentment clause

³⁹⁵ *Raines v. Byrd*, 521 U.S. 811 (1997)

³⁹⁶ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

³⁹⁷ Weiner, David J., "The New Law of Legislative Standing," *Stanford Law Review* (2001) 54 (1): 214

³⁹⁸ The Court answered here the question remained after Coleman, whether this case is a precedent, although it involved state legislators, not congressmen.

³⁹⁹ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 209-282.

issue in *Coleman* and the abstract dilution of institutional legislative power⁴⁰⁰ that is alleged here.’⁴⁰¹ Moreover, in this case there was a possible redress, not like in *Coleman*.⁴⁰² The judges said that granting the standing ‘would require a drastic extension of *Coleman*. We are unwilling to take that step.’⁴⁰³

After clarifying the difference between the two cases, the Court described the injury suffered in this case and the conditions of a test, under they would have granted standing. The injury suffered in the present case was an institutional injury, ‘wholly abstract and widely dispersed,’⁴⁰⁴ the litigants ‘lacked a sufficient personal stake’ and ‘have not alleged a sufficiently concrete injury.’⁴⁰⁵ From these statements and those, made in connection with *Coleman*, it is clear that the Court would have accepted the institutional injury as a ground for standing, if there was a nullification of a vote that would have been adequate to influence the decision.⁴⁰⁶ Therefore, the Court accepted the theory of derivative injury,⁴⁰⁷ but with some limitations. First, legislators cannot challenge the implementation of laws.^{408, 409} Second, only nullification can justify

⁴⁰⁰ The Court made clear that simply losing a vote does not allow for standing. Stephens, Otis Hammond, and John Malcolm Scheb, *American Constitutional Law* (Belmont, CA: Thomson/Wadsworth, 2008)

⁴⁰¹ *Coleman v. Miller*, 307 U.S. 433 (1939)

⁴⁰² Weiner, David J., ‘The New Law of Legislative Standing,’ *Stanford Law Review* (2001) 54 (1): 211-212.

⁴⁰³ *Coleman v. Miller*, 307 U.S. 433 (1939)

⁴⁰⁴ *Coleman v. Miller*, 307 U.S. 433 (1939)

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Weiner, David J., ‘The New Law of Legislative Standing,’ *Stanford Law Review* (2001) 54 (1): 211-212.

⁴⁰⁷ ‘derivative injury theory, since the individual member’s injury is the same as the one suffered by Congress as an institution.’ Weiner, David J., ‘The New Law of Legislative Standing,’ *Stanford Law Review* (2001) 54 (1): 217.

⁴⁰⁸ If they could, that would raise serious separation of powers problems. Since the implementation of the laws is solely belong to the executive power.

⁴⁰⁹ Weiner, David J., ‘The New Law of Legislative Standing,’ *Stanford Law Review* (2001) 54 (1): 211-212.

standing, diminution cannot, because ‘the injuries are not sufficiently personal or concrete.’⁴¹⁰

The above described are the requirements of a congressional standing test according to the *Raines* Court, which evaluated its own test as ‘especially rigorous’⁴¹¹, because the decision of a court would decide about an act of another branch.⁴¹² The Supreme Court answered longstanding questions and clarified such issues with its decision in *Raines* and definitely restricted the possibility to attack executive actions. ‘...the Supreme Court viewed complete nullification as a shield to protect courts from deciding the types of cases most likely to threaten their legitimacy.’⁴¹³ However, the Court had to face many critiques, highlighting different problems with the reasoning of the Court. First, some scholars claim that the Court broke a thirty years long practice by returning from the more liberal modern injury test to the stricter legal interest test.⁴¹⁴ Second, the meaning of complete nullification was not made clear.⁴¹⁵ Third, it is uncertain what happens to the earlier decisions of the federal courts, are they overturned or are they good law at least partially?⁴¹⁶ A leading treatise suggests that the decisions of the D.C. Circuit ‘may not survive in any form’.⁴¹⁷ However, for instance in one later case the D.C. Circuit indicated that ‘*Raines*...may not overrule *Moore*’, only limits it partially. Finally, the last critique is stating that the decision creates different, stricter standing requirements to the legislators then to other litigants, by requiring the non-existence of

⁴¹⁰ Ibid. 211-218.

⁴¹¹ *Raines v. Byrd*, 521 U.S. 811 (1997)

⁴¹² Ibid.

⁴¹³ Weiner, David J, „The New Law of Legislative Standing,“ *Stanford Law Review* (2001) 54 (1): 207.

⁴¹⁴ Ibid. 211-212.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Wright, Miller, and Cooper, *Federal Practice and Procedure* § 3531.11, at p. 1 (2001 Supp.).

political redressibility.⁴¹⁸ The reason for this distinction, according to some scholars, is the application of the separation of powers doctrine.⁴¹⁹ ‘...a robust standing doctrine makes it more difficult for litigants to use the federal courts and therefore precludes their seizure of political power.’⁴²⁰ ‘In short, courts, as the only non-elected Branch of government, would be overstepping their role if they were to engage in a review of the intra- and inter-Branch disputes unless somehow such disputes affected rights of private individuals. As a consequence, even if the House or the Senate were to authorize the suit or be a party to the suit, this fundamental separation of powers concerns would remain.’⁴²¹

In sum, the Court finally clarified the standing requirements of congressmen, even if there are some problems with the decision, and made more or less clear the conditions for future decisions. It is clear that institutional injuries will be accepted by the courts and considered to be concrete and particularized, if they are caused by vote nullification, if the litigants are representatives of their legislative bodies and if no remedies are available through the political process.

The Supreme Court’s jurisprudence is much smaller on congressional standing to sue than the federal courts. In the first case, *Melton*, the Court did not give a test for standing, only explained the characteristic of the US concrete review. The first case, in

⁴¹⁸ Weiner, David J, „The New Law of Legislative Standing,“ *Stanford Law Review* (2001) 54 (1): 211-212.

⁴¹⁹ Weiner, David J, „The New Law of Legislative Standing,“ *Stanford Law Review* (2001) 54 (1): 211-212; and Notes, "Standing in the Way of Separation of Powers: The Consequences of "Raines v. Byrd," *Harvard Law Review* (1999) 112 (7): 1741-1758.

⁴²⁰ Weiner, David J, „The New Law of Legislative Standing,“ *Stanford Law Review* (2001) 54 (1): 207.

⁴²¹ Arend, Anthony Clark and Catherine B. Lotrionte "Congress Goes to Court: the Past, Present, and Future of Legislator Standing," *Harvard Journal of Law & Public Policy* (2001) 25: 281-282

which the judges clarified a test for granting standing to congressmen based on institutional injury, was in 1939 in *Coleman*. Sixty-eight years passed till the Court finally made an effort to clarify the standing requirement for institutional injury in the *Raines* decision.⁴²² The Court was consequent in these two decisions, defining the same test for congressional standing to sue, and answered the questions in *Raines* that it left open in *Coleman*. The main criteria for alleging an institutional injury by a congressmen is therefore pretty clear, which I summarized in the previous paragraph.

Comparing the jurisprudence of the federal courts and the Supreme Court, the problem of the silence of the latter one becomes even more obvious. During the sixty-eight years, between *Coleman* and *Raines*, the federal courts dealt with many cases involving the problem of legislator's standing to sue. Between 1973, the first decision in the case *Mitchell v. Laird* by a federal court, and 1997, the *Raines* decision clarifying the standing requirements, the requirements of congressional standing in the case of institutional injury were anything, but clear. During these twenty-four years the federal courts used three different tests, the bear upon one, the disenfranchisement test and the circumscribed equitable discretion test. The federal courts were consequent in these tests in a way, since there is a logical line in the three tests. The third is a modification of the second one, because of a contradiction⁴²³ found in the latter one. The first test is based on the idea of the duty of the congressmen to decide about the necessity of legislation, while the other two are based on the idea of the nullification of

⁴²² True, in between, in 1969 the Court dealt with the test in case of individual injury in the *Powell* case. However, this decision is not so relevant, than *Coleman* and *Raines*, since it just basically rephrased the general standing requirements.

⁴²³ using the same technique for non-legislator and legislator litigants, but requiring different types of redressability

'effective' vote. The logical chain between these two tests is that for a legislator to effectively fulfil its duty many things are required, such as the effectiveness of his vote. From this perspective the second test is a much narrower version of the first one. There is however a quite unclear part of the jurisprudence of the federal courts. In *Coleman* the Supreme Court made clear the 'effectiveness' and vote nullification test. Why did a federal court, thirty-four years later, started to use a much wider test? And the final, most disturbing question, why did the Supreme Court wait so long to decide on an adequate test?

d. Political question doctrine

In this section the US and European approach to political questions is presented briefly, since the usage of the doctrine can have the effect of narrowing down the minority's possibilities to go to the courts.

Political question doctrine is a principal in the US system, a type of subject matter limitation. Therefore, it is also a limitation on the power of the courts to conduct a review. Since the topic of this thesis embodies only the standing requirements to the courts, only a short description is presented about the political question limitation. The reason though, why it is important to show this doctrine, is because it is a principal that courts in US frequently use to avoid deciding certain cases. This means that even when a member of a legislative power fulfil the standing requirements, the case can be

denied, which narrows the possibilities of the members even more to constrain the executive power.

The question is whether the courts are consequent in using the political question doctrine, and therefore make their decisions predictable on this issue, or they decide arbitrary, using their discretion to avoid sensitive areas, or even worse, deciding cases because of political reasons. The justification of the existence of such a doctrine is well beyond of the topic of this thesis, the basic arguments are the separation of powers principal, the democratic deficit argument,⁴²⁴ the avoidance of the politicization of the courts, the lack of knowledge from the courts' part to decide and maintaining legal certainty.⁴²⁵ The main idea of the political question doctrine is non-interference. As Marshall phrased it in the *Marbury v. Madison* decision: 'The province of the court... not to inquire how the executive, or executive officers, perform duties in which they have discretion.'⁴²⁶ Without giving an analysis of the relevant cases, some critiques have to be mentioned, because they answer the question whether the courts use the doctrine in a consequent manner, affecting the legislative's minority ability to oppose elective dictatorship.

The first important case about the political question doctrine's content was the *Luther case*^{427 428}, which was modified by the *Baker*⁴²⁹ decision, a milestone in the history of the doctrine. It is claimed that before the decision in Baker, the Court applied the

⁴²⁴ See more details in the theory chapter

⁴²⁵ *Coleman v. Miller* 307 U.S. 433, 59 S.Ct. 972 (U.S. 1939)

⁴²⁶ *Marbury v. Madison*, 5 U.S. 137 (1803)

⁴²⁷ *Luther v. Borden*, 48 U.S. 1 (1849)

⁴²⁸ Epstein, Lee, and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* (Washington, D.C: CQ Press, 2011)

⁴²⁹ *Baker v. Carr*, 369 U.S. 186 (1962),

principal quite consequently,⁴³⁰ while after the decision, the Supreme Court became political. There is no coherent jurisprudence of the application of the doctrine; some of the decisions even depend on the political affiliation of the judges.⁴³¹ Therefore, it can be said that the way the political question doctrine is used in the US, narrows down the possibility of legislative minorities to go to courts.

In the European tradition the political question can be defined as '...that is the decisions that depend on the discretionary appreciation of the legislator, and express a political choice...'⁴³² The political question doctrine does not exist, and as a matter of fact cannot even exist in Europe, since these courts practice abstract reviews which decisions are exactly about political questions. It is true that there is a difference in the effect and characteristic of the court's decision, whether a court does *apriori* or *aposteriori* review,⁴³³ but altogether 'These notions are alien to Europeans who have created the constitutional courts for the express purpose of deciding constitutional issues, not evading them.'⁴³⁴ The '...political questions lie well within the European court's judicial authority.'⁴³⁵

⁴³⁰ Pushaw Jr, Robert J, "Panel I – Justiciability and the Political Thicket – Judicial Review and the Political Question Doctrine: Reviewing the Federalist “Rebuttable Presumption” Analysis,” North Carolina Law Review (2002) 80 (4): 1165.

⁴³¹ Ibid. and cases cited as justification in Dworkin, Ronald, *A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and the American democracy* (New York, New York Press, 2002)

⁴³² Mourtada-Sabbah, Nada, and Bruce E. Cain, *The Political Question Doctrine and the Supreme Court of the United States* (Lanham, MD: Lexington Books, 2007): 174.

⁴³³ As I describe more in-depth in the part of *apriori* abstract review, there is a fear and practice that the courts becomes to be part of the legislative procedures by conducting such a review.

⁴³⁴ Schwartz, H, "The New East European Constitutional Courts," *Michigan Journal of International Law* (1992) 13 (4): 752.

⁴³⁵ Ibid. 753.

From the perspective of opposing elective dictatorship, the broader and more certain the possibility of the legislative minority to go to Court, the better the chances to constrain the acts of executive and the legislative majority and therefore, elective dictatorship. However, in defence of the US system, if a Court is so anxious about not getting involved in the matters belonging to other branches, based on the separation of powers, we could assume that the whole system is concerned about the principal of separating the branches therefore the likelihood of the occurrence of elective dictatorship is less.

2. Empirical evidence – statistics and cases

Unfortunately finding statistics based on the initiator of the referral is very hard in case of all the three countries. In the case of U.S, no statistics are available regarding to the person who asked for judicial review, which phenomena is more understandable then in the case of the two other countries, since all the initiators are individual and would be very hard to create a category that contains individuals asked by politicians etc. However, in the case of Hungary and France the lack of information is very disturbing, since such information is a cornerstone in evaluating the effectiveness of opposition rights and the political and constitutional system. The statistics from France and Hungary, found below, are not examining the same period of time, but there is a reason why they can be still useful. In both countries the available data is from more

than twenty years, from a period following a vital reform.⁴³⁶ It also has to be noted that the statistics from Hungary is a representative one, but does not contain the review of all the applications ever made.⁴³⁷ First, the data about Hungary is presented. Second, the statistics about the French Constitutional Council are shown.

The data presented here about Hungary is in connection with the referrals made by members of the Parliament in the form of *apriori* and *aposteriori* review. The statistics used in the present evaluation are based on a master thesis⁴³⁸ in the lack of any other sources.⁴³⁹ The author of the master thesis declared that the assumptions are made based on the evaluation of 541 referrals.

Till the I Act in 1998, only nine applications were made to the Court by members of the Parliament, in the form of *apriori* abstract review. Four were successful, which means there was a 44% success rate of the applications. Two cases were referred in connection with compensation,⁴⁴⁰ both of them initiated by committees of the Parliament. A case was referred by 52 representatives, in connection with the proposed bill on referendum.^{441 442}

⁴³⁶ In the case of France the important reform is the 1974 amendment, and in the case of Hungary it is actually the establishment of the Court.

⁴³⁷ That would require to overview approximately 27 000 referrals. In defense of the lack of information in Hungary, the court's jurisdiction is much broader than the French Council's.

⁴³⁸ Csaba, Attila Krisztián, *Alkotmánybírósági Hatáskörök és az egyes Indítványozók Sikeressége*, Budapesti Corvinus Egyetem, Politikatudományi Intézet, 2010 Konzulens: Jáger, Krisztina

⁴³⁹ Special thanks to Péter Paczolay for providing me the master thesis and for further help.

⁴⁴⁰ Decision 28/1993 and 22/1996.

⁴⁴¹ Because of the lack of remedy, even in the case when an obligatory referendum would have been rejected by the Parliament.

⁴⁴² Decision 64/1997.

Between the establishment of the Court and 2010, 179 referrals were made to the Court by members of the Parliament in the form of *aposteriori* abstract review. 47 were successful, which means a 26% of success rate.⁴⁴³ Out of all the *aposteriori* abstract review referrals (could be made of anybody, since there used to be an *actio popularis*), 87% were referred by members of the Parliament or by a committee or individuals attached to parties.

Comparing the usage of referrals by members of the Parliament, 71% of the applications were in the form of *aposteriori* abstract review. However, this number might not be governing, since *apriori* abstract review existed only for eight years, while *aposteriori* has existed for twenty years.

Three conclusions can be made based on the presented data in connection with the right of the members of Parliament to go to the Hungarian Constitutional Court. First, the number of *apriori* referrals is extremely low. That can be either because the representatives were not prepared to use such a right so close to the transition times or because they could not find any constitutional ground for their applications. However, this latter reason is the opposite of the one the writer of the thesis found and that constitutes the second conclusion. Second, the success rate is so low, because the referrals were based on political reasons rather than on constitutional grounds. Third, looking at both the numbers of the referrals made and the rate of success, it has to be said that although the Hungarian Constitutional Court is used to be considered as one

of the most powerful having very broad standing requirements, the opposition clearly could not use its right extensively to constrain elective dictatorship.

The situation, based on the presented data, is the opposite in France than in Hungary. The statistics, presented here, are about *apriori* abstract review, initiated by the opposition. Three major part of the history of referrals can be distinguished, the times before 1974, between 1974 and 1981 and the times after 1981.

From the perspective of the opposition 1974 was a very important year, since a constitutional amendment was introduced, granting standing to the opposition to refer cases to the Constitutional Council, in the form of *apriori* abstract review. Before 1974, the number of referrals did not exceed five per year,⁴⁴⁴ altogether nine references⁴⁴⁵ were made. ‘Until the end of 1974, the bulk of referrals were due to the compulsory referrals of organic laws and parliamentary rules. The remaining referrals were initiated mostly by the prime minister. The president of the Senate only referred three texts in that time.’⁴⁴⁶

After 1974, there were at least ten referrals per year.⁴⁴⁷ Between 1974 and 1981 67 references⁴⁴⁸ were made to the Council, resulting 47 decisions. ‘The increase in

⁴⁴⁴ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009)

⁴⁴⁵ Rogoff, Martin A, *French Constitutional Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2011)

⁴⁴⁶ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 387-388

⁴⁴⁷ Ibid.

⁴⁴⁸ Rogoff, Martin A, *French Constitutional Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2011)

referrals has been caused by the minority's newfound power to initiate them.⁴⁴⁹ 'a weapon in the majority-opposition game.'⁴⁵⁰ The first referral was made by the left opposition on 30 December 1974 and soon, two weeks later, the right opposition attacked the abortion legislation.⁴⁵¹ 'Since then, the initiation of referrals has become a quasi-monopoly of the parliamentary opposition.'⁴⁵²

Since 1981, the average number of the referrals raised even more at least fifteen were initiated per year.⁴⁵³ Between 1981 and 1989, 135 referrals were made. '... 101 under the Socialist governments of 1981-86 (66 decisions)⁴⁵⁴ and 34 (26 decisions) under 'cohabitation', between April 1986 and May 1988.'⁴⁵⁵ During the Chirac government, at least one decision out of every three was referred to Council for review and more than half proved to be unconstitutional.⁴⁵⁶ 'What is certain is that every government since at least 1981 has practiced 'self-restraint' extensively...' ⁴⁵⁷

Looking at the data presented above, it is clear from the number of references that the opposition did not hesitate to use its standing right to try to constrain elective dictatorship. Moreover, from the number of favorable decisions it is clear that they

⁴⁴⁹ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 387-388

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Ibid. and Harrison, Martin, "The French Constitutional Council: A Study in Institutional Change," *Political Studies* (1990) 38 (4): 603-619.

⁴⁵³ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 387-388

⁴⁵⁴ 80% are by opposition in Rogoff, Martin A, *French Constitutional Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2011)

⁴⁵⁵ Harrison, Martin, "The French Constitutional Council: A Study in Institutional Change," *Political Studies* (1990) 38 (4): 607.

⁴⁵⁶ Stone Sweet, Alec, *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992)

⁴⁵⁷ Harrison, Martin, "The French Constitutional Council: A Study in Institutional Change," *Political Studies* (1990) 38 (4): 613.

succeeded in restraining the legislative majority. As a scholar noted, these referrals and decisions had a huge effect on the government. '...some, such as the 1971 freedom of association decision and the ruling on New Caledonia's electoral boundaries, are tantamount to complete rejection. The disallowing of sex quotas for local election lists, which eliminated a central feature of the Socialists' women's rights program, and of the clauses in their Press Bill aimed at the *Hersant* newspaper empire, which frustrated its central political objective, are further instances of how the invalidation of a few clauses may have substantial policy consequences.'⁴⁵⁸

Comparing both the numbers of referrals made and the succession of the members of the parliaments in Hungary and France, the result seems to be very interesting. Although the standing to the Hungarian Constitutional Court is a much better tool in the hand of the opposition than the standing to the French Constitutional Council on paper, in reality the results show that the French opposition was much more successful in using the Council to oppose elective dictatorship.

⁴⁵⁸ Harrison, Martin, "The French Constitutional Council: A Study in Institutional Change," *Political Studies* (1990) 38 (4): 608.

III. Evaluation of the solutions

The ultimate question that has to be answered in this chapter is the following. How capable are Hungary, France and the United States to oppose elective dictatorship through the supermajority rules and the standing to the Constitutional Court, Constitutional Council and Supreme Court? In order to answer this question the characteristics and positive effects of these institutions are summarized in the three jurisdictions, taking into consideration the empirical data provided. First, through the supermajority rules and second, through the standing to the courts. The evaluation presented here is based solely on the supermajority rules and standing requirements to the courts, not taking into consideration other specifics of the three types of governments.

A. Characteristics and positive effects of supermajority rules

In order to show how capable are the countries to oppose elective dictatorship through supermajority rules, each relevant rule is described, reasons are given why they are good in constraining the legislative majority and the executive power and the jurisdiction is identified that uses the specific rule. The evaluation of specific data is given where it is applicable. Finally, a sequence is established among Hungary, France and the United States based on their capability to oppose elective dictatorship. Two things have to be noted though before the evaluation. First, that France is obviously the less capable of opposing elective dictatorship from the perspective of supermajority rules, since it does not

use any such rules. Therefore the evaluation below deals only with Hungary and US, mentioning four rules and their positive effects. Second, the precondition for this evaluation is that none of the parties, or a coalition, has a two-third majority.

First, the modification and suspension of procedural rules of the legislative bodies have to be looked at. The reasons why the requirement of supermajority is a good tool against elective dictatorship are the following. First, house rules contain the rights of the opposition therefore, their protection is essential. If a majority could take away the rights of the opposition, the less power the opposition had to constrain elective dictatorship. Second, the modification of procedural rules by the majority, on an ad hoc base, according to its actual political will is exactly the creation of elective dictatorship. The Hungarian supermajority rule in connection with procedural rules is more capable of opposing elective dictatorship than the US one because of two reasons. First, the requirement of suspension is higher in Hungary. Second, in the US only a simple majority is required for the modification, while in Hungary a two-third majority.

Second, the supermajority rules, in connection with the status and expulsion of the representatives, have to be mentioned. The reasons why such a supermajority requirement can constrain elective dictatorship are the following. The harder to expel, waive the immunity or declare a conflict of interest, the less chance for a political attack against the representative. Therefore supermajority requirement protects the members of the legislative body against majority and avoid the possibility of silencing the members of opposition. The US and Hungarian solution can be evaluated as being on the same level from the perspective of opposing elective dictatorship, since in the US the supermajority

requirement only applies to expulsion, while in Hungary it only applies to waiving the immunity and the declaration of conflict of interest.

Third, the supermajority requirement on cutting the time for debate in the law-making procedure has to be noted. The reason why such a requirement is a good tool against elective dictatorship is the following. The less time is available, the less opportunity the legislators have to influence the decision either directly, through bargaining with the majority, or indirectly, through publicity and pressuring the majority. Therefore, a higher voting requirement for shortening a debate is a protection of the legislative minority against elective dictatorship. Comparing Hungary and the US, the Hungarian solution is again better from the perspective of opposing elective dictatorship, since a higher majority is required than in the US.

Fourth, the supermajority requirement of constitutional amendments has to be mentioned. The reason why such a rule is essential in opposing elective dictatorship is the following. If a majority could change this basic document with a simple majority voting, they could create the strongest elective dictatorship possible by changing the basic institutions of democracy and fundamental rights. Therefore, requiring supermajority for the modification of the constitution restrains the majority in expanding elective dictatorship. The minorities in the Hungarian and US systems have the same power in this matter.

Furthermore, there are two additional types of rules that are requiring a supermajority, only available in Hungary. First, certain officials' appointments, whose impartiality is of a high importance from the perspective of opposing elective dictatorship. Second, the groups of

acts which require a supermajority voting to be passed. There are three reasons why such a requirement is a good tool to oppose elective dictatorship. First, because it gives the opposition a strong bargaining position. Second, because it allows the opposition to threaten the majority in order to force it to take into consideration the will of the minority. Third, it makes the opposition capable of stopping disfavored policies of the governing party. Although this rule seems to be one of the most effective tools against elective dictatorship, the evaluation of the data, presented in the relevant chapter, mitigates the effectiveness of these rules in the case of Hungary. The statistics showed in both examined periods that more acts that require a supermajority are passed by the opposition than blocked. The success rate of the governing party was quite high and unexpected in both cases. However, three affecting factors have to be mentioned that explains at least partially the results. First, in both periods there were significant amount of laws that needed to be passed because of foreign affairs. Second, during the first examined period, the government tried everything to bypass such requirements, and forced the opposition to accept such bills through different tricks. Third, in both periods there were important decisions, like the subordination of the office of the prosecution, that were successfully stopped by the majority. The consequence to Hungary in the light of the statistics is that opposition did not use its exceptional right enough to oppose elective dictatorship.

From the rules described here, the conclusion is very clear. The supermajority rules in Hungary are the most capable of opposing elective dictatorship, even in the light of the empirical data. As I already noted, France is the less capable because of the lack of such norms, therefore the US system of supermajority rights places the country in the middle.

B. Characteristics and positive effects of standing to the courts

In order to show how capable are the jurisdictions to oppose elective dictatorship through the standing right of the opposition to the Constitutional Court, Constitutional Council and Supreme Court, the logic applied in the previous section is followed with some additions. Each relevant type of review is described, reasons are given to show why these reviews, available through the opposition's standing, are good tools in constraining the legislative majority and the government, and the jurisdiction is identified that allows the opposition to use the specific type of review. The evaluation of specific data is given where it is applicable. Furthermore, a summarizing analysis is given of the powers and characteristics of the Hungarian and French courts to see them as a whole in the struggle against elective dictatorship. Finally, a sequence is established among Hungary, France and the United States based on their capability to oppose elective dictatorship.

First, *apriori* abstract review has to be taken into consideration. If the opposition has standing to ask for such a review, the following reasons can be given why it makes the minority capable of opposing elective dictatorship. First, the opposition can use its possibility to refer laws to the courts as a threat, forcing the majority to avoid unconstitutional decisions, to bargain with them or simply to reconsider the proposed law. Therefore this tool can oppose elective dictatorship. Second, in case of a referral by the opposition, the majority can be stopped from enacting laws that are against the constitution. The opposition in the US cannot use this method to oppose elective dictatorship, since such a review is not carried out by the courts there. In Hungary, *apriori* abstract review exists, but cannot be asked by the opposition anymore. Till 1998, this

opposition right existed, however its effectiveness can be seriously questioned in the light of the empirical data presented in the relevant chapter. Only a few referrals were made by the members of the Parliament and not even half of these referrals were successful. The lack of use of such an important tool to constrain elective dictatorship can hardly be understood. The *apriori* abstract review works as a powerful constrain on the legislative majority and executive power clearly the best in France since the 1974 constitutional amendment, allowing the opposition to ask for such a review. Empirical data, presented about the referrals, proved that not only the opposition extensively uses the possibility of referrals, but they also succeed in opposing elective dictatorship through the favorable decisions of the Council.

Second, *aposteriori* abstract review has to be mentioned. The reason that can be given to the question why does a standing right to ask for such a review makes the opposition capable to oppose elective dictatorship is the following. Unconstitutional laws can be invalidated, and therefore elective dictatorship can be opposed. This type of review is conducted only in Hungary, but even in the case of this country, the scope of the review was narrowed down due to a constitutional modification. The empirical data, presented in the relevant chapter, showed the same interesting result as in the case of *apriori* abstract review. Although there were much more referrals made by the opposition to the Court, the success rate of these cases were even worse than in the matter of *apriori* abstract review. In this case at least we can see that the opposition tried to use its exceptional right to oppose elective dictatorship however there must be some problems with all these referrals if the Court favored the petition of the opposition only in a few cases.

Third, the concrete review has to be taken into consideration. The reason of the effectiveness of this review in opposing elective dictatorship is following from an assumption, based on the differences of the governmental systems. If only a concrete review is conducted the bases for the review is the idea of separation of powers. The claim is that the judiciary should not give advisory opinion and decide matters that belong to the province of another branch since both of these actions are intrusion in the area of other powers. The assumption is that if such a strong idea of separation of powers exists in connection with the judiciary, then it exists in the whole system. Therefore, the creation of elective dictatorship is much less likely, and even if it is created there are many checks on it because of the separation of powers. Furthermore, concrete review favors the protection of individuals, as opposed to the other two types of reviews, opposing elective dictatorship by constraining the governmental intrusion in the rights of individuals. If not only a concrete review is available in the constitutional system for the opposition, than this type of review is not used for constraining elective dictatorship, since the other two reviews are much more capable of doing so. This latter is the case in connection with Hungary and France.

The U.S. concrete review is the only way to ask the court to review the constitutionality of certain acts. Through the analysis that was given in the relevant chapter about general standing requirements and specific congressional requirements, it is clear that we cannot talk about an opposition right of opposition standing to the U.S. courts. It is true that since the *Raines* decision, institutional injuries are clearly allowed, but it is a quite new decision and as I pointed out in the relevant chapter, also contains controversial rules. In my opinion in order to be able to evaluate the opposition's capability to constrain elective dictatorship

through the Supreme Court, we have to wait for some more decisions to see clearly the jurisprudence of the Court on the issue of congressional standing. For now, it can be said that even allowing institutional injuries in the case of vote nullification is a big step and departure from the original idea of the general standing requirements, embodied in the U.S. Constitution.

The Hungarian Constitutional Court was seen as one of the most robust courts in the world that would make it a very important check on elective dictatorship because of two reasons. First, because it is a very powerful constitutional court comparing to the rest in the world⁴⁵⁹. ‘The Hungarian Court has been by far the most active one. In the last few years it has emerged as a major political force, characterized as the most powerful constitutional court in the world.’⁴⁶⁰. The period before 1998 was qualified as *courtocracy*,⁴⁶¹ because the Court ‘...through the 1990s, practically ran Hungary.’⁴⁶² ‘Whatever the issue in Hungarian politics, the Hungarian Constitutional Court practically always had the last word. As a result, it was the strongest body of state through the 1990s.’⁴⁶³ However, in 1998 and during the actual government some changes were made that annuls this kind of view of the Court. ‘Hungary had in the 1990s one of the most powerful courts in the world, though a series of new judicial appointments effectively neutralized the court as a political force

⁴⁵⁹ the reason for such a broad power was the transition and the political struggle around the roundtable discussions, ‘...the court and its powerful jurisdiction is the outcome of a struggle for political power between the communist regime and opposition parties during Hungary’s negotiated transition to democracy from 1988 to 1989.’ Schiemann, John W, "Explaining Hungary's powerful Constitutional Court: A Bargaining Approach". *European Journal of Sociology* (2001) 42 (2): 358.

⁴⁶⁰ Sajó, András, *Limiting Government, An Introduction to Constitutionalism*, (Budapest, Central European University Press, 1999): 140.

⁴⁶¹ Scheppele, Kim Lane, "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe," *International Sociology* (2003) 18 (1): 222.

⁴⁶² Ibid. 222.

⁴⁶³ Ibid. 222.

after 1998.⁴⁶⁴ ‘The new judges turned out to be unwilling to fight the new government even though the government did many things that the Sólyom Court would not have allowed’⁴⁶⁵. The changes by the recent government were already mentioned in the relevant chapter, the curtailing of the jurisdiction of the court, the *actio popularis* and finally the new rules on appointments. If we look at the Court since its establishment, it clearly lost its position as it used to have, which is an alarming situation if we look at parallel how the executive power became stronger and stronger.⁴⁶⁶ Second, because it looks like its jurisdiction was picked from the other courts all around the world, maximizing the positive characteristics of other courts. ‘The Hungarian Constitutional Court combines elements of both the French and German models to form the most original jurisdictional structure in the region.’⁴⁶⁷ The above-described loss of power of the Court definitely signs a stronger elective dictatorship. However, even with the current modifications, from the perspective of the opposition’s capability to oppose elective dictatorship, the Hungarian Constitutional Court still should be seen as a very powerful one.

In connection with the French Constitutional Council, the opposite phenomena can be seen as in the case of the Hungarian Court. Two modifications of the Constitution made the Council more and more powerful, and therefore more capable in the struggle against elective dictatorship. First, is the 1974 modification, giving standing to the opposition. ‘Thus the meaning of a constitutional veto has changed dramatically: from the protection of government against the legislative majority to the invalidation of policies supported by

⁴⁶⁴ Ibid. 220.

⁴⁶⁵ Scheppele, Kim Lane, "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe," *International Sociology* (2003) 18 (1): 227.

⁴⁶⁶ as opposed to the legislative power, which should be the stronger in a parliamentary system

⁴⁶⁷ Wright Sheive, Sarah, "Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review," *Law and Policy in International Business* (1995) 26 (4): 4.

the legislative majority and the government following the claims of a legislative minority.⁴⁶⁸ The second modification is a recent one, the introduction of indirect concrete review. However, this modification is not so relevant from the perspective of opposing elective dictatorship, since the main tool for that is clearly the *apriori* abstract review. From the perspective of opposing elective dictatorship the following conclusion can be made about the Constitutional Council. 'Indeed, it could be argued that, in a period of disciplined parliamentary subservience to the executive, it has become a check against 'elective dictatorship'. Major legislation must now be drafted in the knowledge that it is highly likely to be sent for review, leading to earnest discussions about how best the Council's likely requirements may be met (or evaded).'⁴⁶⁹

Strictly looking at the standing requirements, granted to the opposition, of the three courts, the sequence of the three jurisdictions is clear. US standing rules are the least capable of opposing elective dictatorship, while the Hungarian rules considered to be the broadest. Therefore, the French Constitutional Council is in the middle. However, if we look at this question wider and in the light of the empirical data, the sequence is not so clear anymore among Hungary and France. France has *apriori* abstract review, but no *aposteriori* abstract review, the concrete review is much more limited than in Hungary. Empirical data showed that the opposition in France used its right to refer acts to the Council more times than the Hungarian representatives. Furthermore, the success rate of the French representatives is much higher than the Hungarians'. In Hungary the opposition does not have standing to initiate *apriori* abstract reviews anymore, however the President has, whose election

⁴⁶⁸ Brouard, Sylvain, Andrew M. Appleton, and Amy Mazur, *The French Fifth Republic at Fifty: Beyond Stereotypes* (Basingstoke, England: Palgrave Macmillan, 2009): 391.

⁴⁶⁹ Harrison, Martin, "The French Constitutional Council: A Study in Institutional Change," *Political Studies* (1990) 38 (4): 613.

require a supermajority of the votes, therefore making the opposition a veto player in the decision. There is *aposteriori* abstract review and the opposition will be able to ask for it, even after the new Hungarian Constitution gains effect. Taking into consideration of all the above mentioned circumstances, the Hungarian standing requirements seem to be the most capable of opposing elective dictatorship.

Conclusion

The main aim of the paper was to show that although parliamentary systems, such as Hungary, are the most threatened by elective dictatorship, there are certain institutions and tools that are more capable of opposing elective dictatorship in comparison to a presidential system, such as the US, and a semi-presidential one, such as France. The reason for this phenomenon is that parliamentary systems need more checks and stricter rules than the two other types of systems, because of the threat.

Elective dictatorship was defined as the following. When the executive power is so strong that it has dominance over legislative power, during the legislation it uses legislation as a voting machine, there is no real check on the executive by legislative power and the doctrine of separation of powers does not have its full and desired effect.

To prove the argument, first, I discussed the reasons of the appearance of elective dictatorship. The influence of the problem of elective dictatorship was presented through the three different institutional solutions to avoid tyranny and protect fundamental rights, parliamentary systems, presidential systems and semi-presidential systems. Neither of the traditional principals used in these different types of governments, such as separation of powers, fusion of powers and other traditional checks, are capable of opposing elective dictatorship.

Consequently, possible solutions were provided briefly to the problem of elective dictatorship, highlighting opposition rights as a new, comprehensive theory of separation of powers. I chose two specific opposition rights, supermajority rules and standing to the constitutional courts, to demonstrate the capability of the Hungarian parliamentary system, the US presidential system and the French semi-presidential system to oppose elective dictatorship. Supermajority rules were to demonstrate the working of an internal check, and standing requirements were to show the restraining mechanism of a both internal and external check.

A theoretical background was provided for these specific opposition rights. In connection with the supermajority rules, I presented the pro and con arguments of the existence of such rules, argued for their use and justification and provided questions for the analysis chapter. In connection with the opposition parties' standing to the courts, the characteristic and main differences of the continental and common law types of courts were shown. Furthermore, I presented the pro and con arguments of the existence of such courts and provided questions for the analysis.

The second chapter provided the analysis of the supermajority rules and standing to the constitutional courts. In the section on supermajority rules, first the French case, the lack of supermajority rules, was presented. Second, the similar rules in Hungary and US were shown, starting with clarifying the differences between the systems and then presenting six specific rules. The conclusion of the analysis of the six rules was that the Hungarian ones are more capable of opposing elective dictatorship than the ones in US. Finally, the unique rules of the Hungarian system and the jurisprudence of the Constitutional Court were

presented, with a special emphasis on the acts requiring a supermajority to be passed. Empirical data showed that the Hungarian opposition is not using effectively its right to block legislation. It was proved that among the three systems, the Hungarian supermajority requirements are the most capable of opposing elective dictatorship, while the least capable is the French system, and the US is in the middle.

In the chapter on the standing to constitutional courts, the *apriori* abstract review, the *aposteriori* abstract review, the concrete review and the political question doctrine were presented through the regulation of the three countries, where relevant. Within the concrete review, the US general standing requirements and the specific congressional standing requirements were examined. Finally, empirical data about the Hungarian and French courts showed a surprising outcome. Namely, that the French opposition uses its standing right in a more effective way than the Hungarian, from the perspective of opposing elective dictatorship. However, altogether the analysis proved that the Hungarian opposition's standing requirements are the most capable of opposing elective dictatorship.

The linkage between the two opposition rights is that they perfectly complement each other, if both an *apriori* abstract review and supermajority requirement on passing certain bills are used. The standing to the courts makes the opposition able to stop unconstitutional governmental decisions that are the biggest threat to a democracy, while the supermajority rules enable the legislative minority to veto such decisions on political grounds. However, none of the three systems contain both opposition rights.

The aim of the research seemed to be fulfilled by the analysis provided in the above chapters. Two opposition rights were presented that are capable of opposing elective dictatorship in the Hungarian parliamentary system. However, it has to be noted that the parliamentary systems still seems to be the most vulnerable to elective dictatorship if looking at the system as a whole. The logical consequence of this statement is that there are certain institutions in a parliamentary system, such as the theory of opposition rights, that should be used more intentionally and should be developed further to oppose elective dictatorship, instead of concentrating on the traditional checks, such as the parliamentary oversight of the executive power, that are not working anymore.

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