Parliament in opposition

The analysis of the powers of the opposition and their impact on the legislative process

in Hungary, Germany and France

by Viktor Zoltán Kazai

LL.M. Long Thesis
Professor: Mathias Möschel, Ph.D.
Central European University
1051 Budapest, Nádor utca 9.
Hungary

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Executive Summary

The central argument of this thesis is that according to the proper interpretation of the separation of powers doctrine, the parliament has the constitutional obligation of making the most important political decisions and, for the fulfillment of this constitutional requirement, enabling the parliamentary opposition to effectively participate in the legislative process is indispensable.

In the first part of this thesis, I focus on the analysis of certain specific aspects of the separation of powers doctrine with regard to the legislative power of legislatures in parliamentary systems. I argue that it follows from the constitutionally protected separation of powers doctrine that the most important political decisions have to be made by the parliament. I will continue with highlighting those phenomena which may easily deprive the parliament from its autonomy necessary for making decisions according to its own will. I will conclude that in parliamentary systems legislatures are particularly vulnerable to the overwhelming dominance of governing majorities in the legislative process which is particularly concerning in light of the requirements of the separation of powers doctrine.

In the second half of the thesis I concentrate on the possible ways of enhancing the autonomy of the parliament, its ability to resist the will of the government. I put the parliamentary opposition into the focus of my examination and argue that granting the opposition certain powers to effectively participate in the legislative process and have an impact on the final decisions is a suitable means of strengthening the parliament vis-á-vis the government. I analyze those elements of the internal organization of the parliament which can give the parliamentary opposition a stronger position of bargaining with the governing majority: entities exercising opposition powers, second chambers, and legislative committees.

I. Introduction

This thesis focuses on the legislative power of parliament and the role of the parliamentary opposition in the legislative process in parliamentary systems. My particular interest in this topic stems from the observation that the theory of the separation of powers, its manifestation in the legal regulation of the different jurisdictions and the practice of the exercise of legislative power are really far from and do not reflect to each other sufficiently.[1] I think that ideally the separation of powers doctrine should set out certain clear and valuable goals that a polity wants to achieve. The constitution and the legal provisions implementing the constitutional principles should ensure that the organization and the actual operation of the state powers can in fact achieve the pursued goals. The actors exercising state power should carry out their tasks according to the proper interpretation of the legal provisions in light of the goals set out by the separation of powers principle. This idealistic state does not – and probably has never – existed in its pure form. There may have never been an undisputed agreement on the exact goals of the doctrine, the constitutional regulation may have never been a perfect manifestation of the theoretical foundations, and the actors exercising state power may have never respected fully the black letter law or the spirit of the constitutional structure. This constant imperfection may be natural, but it does not mean that we should give up on trying to achieve this idealistic state. Theory, legal regulation and practice should reflect to each other and my opinion is that it is the task of the lawyers is to facilitate this reflection and try to ensure that the law remains a proper mediating mechanism between theory and practice. This may only be possible if the law keeps being the manifestation of the certain valuable goals, and at the same time keeps being suitable to actually influence the behavior of the actors exercising state power. This thesis is a kind of reflection both on the theory of the separation of powers doctrine and the organization and

[1] Cf. CHRISTOF **MÖLLERS**, THE THREE BRANCHES. A COMPARATIVE MODEL OF SEPARATION OF POWERS. 1-9 (Oxford University Press 2013).

practice of the exercise of legislative power in Hungary, Germany and France. The central argument of this thesis is that according to the proper interpretation of the separation of powers doctrine, the parliament has the constitutional obligation of making the most important political decisions and enabling the parliamentary opposition to effectively participate in the legislative process is indispensable for the fulfillment of this constitutional requirement.

I start with the analysis of the separation of powers doctrine and I will point out that one of the pursued goals of this doctrine is to ensure the efficient operation of the organs exercising state powers.[2] If we concretize this goal to the parliament, it means that the legislature has the obligation of making the most important political decisions, because it is a more suitable organ for this task than the government. The suitability of this organs stems from the coexistence of its particular attributes: higher degree of political legitimacy, representative character and the ability to make decisions in a public, deliberative process.[3] I will show that this conclusion does not only follows from theoretical considerations, but it is manifested in both the black letter law and the constitutional jurisprudence of the chosen jurisdictions.

Then, I will turn to the discussion of the relationship between the parliament and the government in parliamentary systems.[4] I will emphasize that parliament does not have exclusive

[2] For a detailed discussion of the history and the different meanings of the separation of powers doctrine see e.g. W.B. **GWYN**, THE MEANING OF THE SEPARATION OF POWERS. AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION. (Tulane University 1965); MÖLLERS, *supra* note 1, at 40-50.; ANDRÁS **SAJÓ**, LIMITING GOVERNMENT. AN INTRODUCTION TO CONSTITUTIONALISM 69–102 (CEU Press 1999).

[3] ZOLTÁN **SZENTE**, BEVEZETÉS A PARLAMENTI JOGBA 24 (Atlantisz 2010); DAVID M. **OLSON**, DEMOCRATIC LEGISLATIVE INSTITUTIONS. A COMPARATIVE VIEW 4 (M.E. Sharpe 1994); Amie **Kreppel**, *Legislatures*, *in* COMPARATIVE POLITICS 121 (Oxford University Press, second edition ed. 2011); John M. **Carey**, *Legislative Organization*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 431 (Oxford University Press 2008); André **Bächtiger**, *Debate and Deliberation in Legislatures*, *in* THE OXFORD HANDBOOK OF LEGISLATIVE STUDIES 145 (Oxford University Press 2014).

[4] MÖLLERS, *supra* note 1; OLSON, *supra* note 3; Kreppel, *supra* note 3; Anthony W. **Bradley** & Cesare **Pinelli**, *Parliamentarism*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 650 (Michel Rosenfeld & András Sajó eds., Oxford University Press 2012); David **Samuels**, *Separation of Powers*, *in* THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 703 (Carles Boix & Susan C. Stokes eds., Oxford University Press 2007); Ronald J. **Krotoszynski**, Jr., *The Separation of Legislative and Executive Powers*, *in* COMPARATIVE CONSTITUTIONAL LAW 234 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar 2011); Sebastian M. **Saiegh**, *Lawmaking*, *in* THE OXFORD HANDBOOK OF LEGISLATIVE STUDIES 481 (Shane Martin et al. eds., Oxford University Press 2014)

legislative power and the government has a very important role in the legislative process, however, I will argue that the overwhelming dominance of the government in its relationship with the legislature results in the violation of the separation of powers doctrine because of the following reasons. A statute may only be considered as a decision of the parliament, if it had the necessary degree of autonomy to act according to its own will. However, due partly to the logic and structure of parliamentary systems and partly to the actual socio-political reality, the parliament may easily be deprived of its autonomy necessary for the fulfillment of its constitutional task.[5] The overwhelming dominance of the government in the legislative process together with the high degree of political pressure imposed on the majority MPs are likely to render the parliament into a merely symbolic forum of decision-making and as a result, the most important political decisions will be made by the governing political elite and will be only formally sanctioned by the deputies.[6]

In the next part of the thesis I will point out that one of the best ways to enhance the autonomy of the parliament, i.e. its ability to the resist the will of the government, is to strengthen the parliamentary opposition. This strengthening means that the parliamentary opposition should not only be entitled to express its criticism and oppose the governing majority in the classical sense, but should also be granted certain powers in order to influence the legislative process and to have an impact on the decisions.[7]

I placed the parliamentary opposition into the focus of my examination because, despite of its crucial importance in the realization and enforcement of the separation of powers doctrine,

[5] About the autonomy of the parliament its impact on its legisaltive function see Kreppel, *supra* note 3; DAVID M. **OLSON** & MICHAEL M. **MEZEY**, LEGISLATURES IN THE POLICY PROCESS. THE DILEMMAS OF ECONOMIC POLICY (Cambridge University Press 1991).

[6] SAJÓ, *supra* note 2; Kreppel, *supra* note 3; Thomas **Saalfeld** & Kaare W. **Strom**, *Political parties and legislators*, *in* THE OXFORD HANDBOOK OF LEGISLATIVE STUDIES 371 (Oxford University Press 2014); Eric M. **Uslaner** & Thomas **Zittel**, *Comparative Legislative Behavior*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 455 (Oxford University Press 2008); MÁRTA **DEZSŐ**, KÉPVISELET ÉS VÁLASZTÁS A PARLAMENTI JOGBAN (Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézete 1998).

[7] David **Fontana**, *Government in Opposition*, 119 YALE L.J., 548 (2009).

relatively little attention has been paid to the systematic analysis of the parliamentary opposition and its role in the legislative process, especially in the field of constitutional law.[8]

I will show that there are basically two ways of strengthening the opposition in the legislative process. First, the internal organization of the legislature can be designed in a way to ensure that the governing majority cannot ignore the opposition in the law-making procedure. Second, the opposition may be given certain specific rights to actively and effectively participate in the decision-making. In this thesis I will focus on the first category and analyze the following organizational solutions: entities exercising opposition powers, second chambers, and legislative committees.

The assignment and the effective exercise of opposition powers is dependent on whether there are actors acknowledged in the parliamentary law as opposition entities. I will examine which parliamentary entities are considered to play the role of the opposition in the chosen jurisdictions: individual MPs, parliamentary groups, qualified minority of deputies or the opposition as such.[9]

It is common in almost every second chamber that they function as a certain kind of control over the governing majority and sometimes as a promoter of the rights of the opposition.[10] I will examine whether the second chambers in the chosen jurisdictions also play this role and what is the relevance of their composition and their legislative power in the fulfillment of this tasks.

[8] About the parliamentary opposition see e.g. Fontana, *supra* note 7; Ludger **Helms**, *Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies*, 39 GOVERNMENT AND OPPOSITION 22 (2004); Philip **Norton**, *Making Sense of Opposition*, THE JOURNAL OF LEGISLATIVE STUDIES 236 (2008).; PÉTER **SMUK**, ELLENZÉKI JOGOK A PARLAMENTI JOGBAN 47 (Gondolat 2008).; **European Commission For Democracy Through Law**, Report on the role of the opposition in a democratic parliament, Study no 497/2008, CDL-AD(2010)025 (2010).

[9] European Commission for Democracy Through Law, supra note 8, at §§ 51-86.

[10] Kreppel, supra note 3; Márta **Dezső**, *A Politikai Képviselet És a Törvényhozó Hatalom Korlátozása*, *in* ALKOTMÁNYTAN I. 343 (István Kukorelli ed., Osiris 2007).

The vast majority of the parliamentary work has been delegated to parliamentary committees,[11] therefore it has utmost significance whether the parliamentary opposition can effectively exercise its powers in the committees. It is dependent on the following variables: whether the committees function on a permanent or an ad-hoc basis, whether they mirror the structure of the government, whether they are granted the right of influencing the decision of the plenary and whether the opposition is given committee positions.

[11] SAJÓ, *supra* note 2, at 140; OSON & MEZEY, *supra* note 5, at 14.

II. Parliament as the main legislative organ

II.1. Separation of powers and the legislative power of the parliament

The separation of powers doctrine has been developed, refined and detailed for centuries.[12] This doctrine on the exercise of state power has become very complex over time and by now numerous different concepts, terms and institutional solutions are mingled within this doctrine.[13] This thesis does not aim at a systematic analysis of this doctrine and does not discuss its every aspect. The ambition of this thesis is much more modest. I will focus only on specific issues and – instead of a deep and throughout analysis – I will lay down certain premises upon which my subsequent examination and arguments are built.

First of all, it has to be emphasized at the outset – since it determines the basic viewpoint of this thesis – that the separation of powers is a normative, rather than a simply descriptive doctrine.[14] *"[T]he concept of the separation of powers, along with its other manifestations – checks and balances, division of powers – was developed in order to highlight specific problems of political institutions and to solve them by means of organization."*[15] In other words, the separation of powers doctrine is not autotelic, it determines certain very valuable goals and requires that the distribution, organization and exercise of state power guarantee the achievement of these goals.

The separation of powers doctrine aims at the promotion of at least two goals. According to the commonly cited warning of Montesquieu: *"if the three functions of government are not exercised by different persons, the people will fear for their security and hence there will be no*

[12] For a detailed discussion of the history of the separation of powers doctrine see e.g. MÖLLERS, supra note 1, at 16–50; GWYN, supra note 2; SAJÓ, supra note 2, at 69–102.
[13] MÖLLERS, *supra* note 1, at 40–50.
[14] GWYN, *supra* note 2, at 8.
[15] MÖLLERS, *supra* note 1, at 16–17.

liberty."[16] Besides the protection of liberty however, there is another and – for the purpose of this thesis – a more important goal of the doctrine: the insurance of the efficient operation of the organs exercising state powers. This consideration has been present since the very beginning of the development of the separation of powers doctrine (as a normative concept), and can be found in current constitutional arrangements and jurisprudence as well[17] – as it will be discussed below. What I mean by efficiency will become clearer when I determine which meaning of the separation of powers doctrine is applicable within the framework of this thesis.

The separation of powers as a general concept has various different meanings. Möllers differentiates among the followimg three meanings of the doctrine. First, it can be seen as *"an organizational division of different parts of the polity"*[18], i.e. the separation of the legislative, the executive and the judicial branches. Second, it also has the meaning of *"a precept of alternating checks and balances for all institutions or offices"*[19], i.e. the system of checks and balances. These are the classic, or the most commonly cited meanings of the doctrine. However, Möllers emphasizes that the separation of powers has a third and – for the purpose of this thesis – a more suitable meaning: a ban on usurpation. According to this version, the doctrine *"assigns to the powers* [i.e. the organs exercising state power] *specific tasks or functions and prohibits the exercise of these functions through other powers."*[20] In other words, this version of the doctrine detaches the (legislative, executive and judicial) powers from the branches, and treat these powers independently, than allocates the particular elements of these powers to those branches which are the most suitable to exercise them.[21] For example, legislative power does not belong solely to the legislative branch, and shall not be treated as a homogeneous whole.

[16] The liberty concern shows up in other scholarly works as well. See e.g. GWYN, *supra* note 2, at 104; MÖLLERS, *supra* note 1, at 40–41; SAJÓ, *supra* note 2, at 73, 101.
[17] For a detailed discussion of the origins of the efficiency goal of the doctrine see GWYN, *supra* note 2, at 28–36, 66–81, 100–128; MÖLLERS, *supra* note 1, at 37, 40.
[18] MÖLLERS, *supra* note 1, at 43.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 47–49.

The legislative power have various elements, some of them are exercised by the executive branch (e.g. the government can issue decrees sometimes even without the authorization of the parliament, but subordinated administrative organs may also be entitled to adopt generally applicable regulations), others by the judiciary (it would be hard to deny that courts – especially supreme judicial organs – create law through their jurisprudence). The important thing is that these different elements of the legislative power be allocated to the branch which is the most suitable to exercise them.

Now it may be clearer that the efficient operation of the state organs (as a goal of the separation of powers doctrine) requires that the different branches exercise those elements of powers which are the most suitable for them, and the usurpation of these powers by the other branches be prevented. In this thesis I argue that the separation of powers doctrine demands that the most important political decisions be made by the parliament. At first sight, this argument may seem quite simple and almost self-evident, however, we will see that the devil lies in the different elements of this argument and that this requirement is far from being respected by the political branches. In this thesis I narrow down the scope of analysis to the relationship between the parliament and the government in the exercise of legislative power in parliamentary systems.[22]

I argue that the *parliament* has to make the most important political decisions, because it is more suitable to carry out this task than the government. This suitability of the parliament is grounded on its following three attributes: a) higher degree of democratic legitimacy, b) representative character and c) deliberative decision-making process.

Parliaments (or at least their lower chambers) are directly elected by the people. Every modern constitutional democracy rests on the principle of popular sovereignty, i.e. the exercise of every

[22] The only exception is France, which is a semi-presidential system. However, it will be seen that from the perspective of this thesis, the French semi-presidential system is not that different from an ordinary parliamentary system.

state power has to be traced back to the people[23] (or the political nation).[24] The necessary democratic legitimacy may be transferred to the state organ directly or indirectly. Since the parliament is directly elected by the people, meanwhile the government is created by the parliament, the parliament has a stronger democratic legitimacy. I think it makes much sense to allocate the power of making the most important political decisions to that state organ which has the higher degree of democratic legitimacy in light of the principle of popular sovereignty.

Parliaments are representative bodies,[25] and representation is built on the fiction that *"legislatures representing the interests of the citizens make statutes expressing the interests of the political nation."*[26] The point of the whole construction is that the decisions of the parliament can be regarded as the supreme expression of the will of the nation, as the legal norms of the highest rank (except the constitution) in a jurisdiction because they were created by an organ representing the whole political nation.[27] Representativeness is one of – if not the – most important attributes of parliaments: they are usually numerous and the diversity of the MPs as to their political affiliation, geographic origin, social class, field of profession, religion or conviction, etc. is ordinarily great. Consequently parliament is a much more suitable organ to represent the different interests, opinions, values present in the society than the government which is usually composed only of a few members whose diversity is significantly lower.

Lastly, parliaments make their decisions on the floor in an open and public debate with the participation of the MPs who are formally equal. Parliament is a special forum for political debate,[28] where the different interests, opinions and values of the society represented by the

[23] SZENTE, *supra* note 3.
[24] In this thesis I do not deal with the different concepts of the doctrine of popular sovereignty, because it has relatively little relevance.
[25] About the representative character of parliaments see OLSON, supra note 3; Kreppel, supra note 3, at 125; Carey, supra note 3, at 432.
[26] SZENTE, *supra* note 3, at 21. It is the translation of the author of this thesis based on the original Hungarian text.
[27] *Id.* at 157.
[28] About the history of the deliberative charater of parliaments see SAJÓ, *supra* note 2, at 112–21.

MPs can compete and interact with each other.[29] The formal equality of MPs ensures that every interest, opinion and value has the equal chance to become the majority opinion.[30] The parliamentary debate could guarantee that the decision of the parliament be regarded as the expression of the will of the political nation because it is formed in a deliberative process in which the *"actors justify their positions with a focus on the common good, weigh alternative arguments and positions with respect, are willing to yield to the force of the better argument, and try to find reasoned consensus on validity claims."*[31] Furthermore, this deliberative process is open to the public, so the people can scrutinize the procedure and follow the states of the debate.[32] On the contrary, decision-making within the government occurs behind closed doors, consequently neither the quality of the process, nor the considerations of the actors can be checked by the public, and only a reduced scale of interests, opinions and values are represented by the participants.

I need to emphasize at this point that I do not argue that only the parliament possess these attributes, or that the brief description of these attributes represent the reality of the political decision-making in today's legislatures. However, I do say that only the parliament possesses all of these attributes[33] and because of the mere theoretical existence of all of these attributes the parliament is a more suitable organ (than the government) to make the most important political decisions.

Now, I have to explain briefly what I mean by the *most important political decisions*. As it was mentioned earlier, legislative power does not belong solely to the parliament, today's governments exercise a considerable power of legislation either upon the authorization of the

[29] SZENTE, *supra* note 3, at 164–65; OLSON, *supra* note 3, at 8.
[30] SZENTE, *supra* note 3, at 164–65; OLSON, *supra* note 3, at 5.
[31] Bächtiger, supra note 3, at 149. This is the deliberative approach of the parliamentary debate.
[32] OLSON, *supra* note 3, at 8–9; Carey, *supra* note 3, at 432.
[33] Cf. OLSON, *supra* note 3, at 6, 7.

parliament or acting in their original power.[34] However, parliament is still considered as the centre of the most important political decision-making. From the academic literature see for example Sajó, who says that it is common in every parliament that *"they draft the primary – most important – legal statutes"*.[35] Olson argues that legislature is *"the most authoritative"*[36] source of decisions about government policy within a political system. Or to quote Carey: *"[l]egislatures are (...) the principle policy-making institutions in modern democracies."*[37] What are considered to be the most important political decisions have changed over time.[38] Within the framework of this thesis by the most important political decisions I mean – based on the analysis below – the basic rules concerning the protection of constitutional rights and the determination, organization and operation of the main state organs.

The thought that the legislature shall make the most important political decisions is not only a theoretical requirement derived from the highly abstract separation of powers doctrine, but is manifested both in the constitutional rules and the jurisprudence of the chosen jurisdictions. In the followings I will show the most visible examples[39] from the different jurisdictions which substantiate that the parliament's constitutional task is to make the most important political decisions.

In Hungary, the most visible example that parliament is – at least formally – the forum where the most important political decisions are made is the constitutional enumeration of the exclusive statutory matters. The Fundamental Law of Hungary lists among the competencies

[34] About the role of the government in the exercise of legislative power see e.g. SAJÓ, *supra* note 2, at 155, 183, 189–90; SZENTE, *supra* note 3, at 39–40; OLSON, *supra* note 3, at 6.
[35] SAJÓ, *supra* note 2, at 155.
[36] OLSON, *supra* note 3, at 6.
[37] Carey, *supra* note 3, at 431.
[38] For example the power of the purse was the core of the legislative power for a long time, but over the 20th century the parliament's role in economic policy-making has changed considerably. See OLSON-MEZEY, *supra note* 5, at 1-5.
[39] Instead of analyzing the different systems according to predetermined factors, I chose to briefly describe those rules and those elements of the jurisprudence which clearly substantiate my argument.

of the National Assembly the power to pass statutes.[40] This is a general clause which is further specified by the various other provisions of the Fundamental Law according to which certain matters shall be regulated only and exclusively by statutes. These exclusive statutory matters may be put into two broad categories: matters concerning the organization of the state and matters concerning fundamental rights. As to the first category, the Fundamental Law stipulates that e.g. the rules on parliamentary elections,[41] on the operation of the parliament,[42] on the status and remuneration of the president of the republic,[43] on the competencies, organization and operation of the Constitutional Court,[44] etc. shall be laid down in a parliamentary statute. Based on the enumeration of exclusive statutory matters it can be said that the competencies, organization and operation of the most important state organs have to be regulated by the parliament.

As to the constitutional rights, the Fundamental Law generally provides that: the rules concerning the fundamental rights and duties shall be regulated by statute.[45] Besides this general clause, the Fundamental Law contains several provisions explicitly stipulating that certain aspects of a given fundamental right must be contained in a statute, e.g. religious people have the right to establish religious communities according to rules laid down in a statue.[46] According to the well-established jurisprudence of the Constitutional Court, not every detail has to be regulated in a statute, but the parliament is obliged to determine the core of fundamental rights, establish the basic guarantees of their protection and, in addition, only the parliament is entitled to limit fundamental rights directly and to a significant extent.[47]

[40] Article 1 (2) b) of the Fundamental Law of Hungary.
[41] Article 2 (1) of the Fundamental Law of Hungary.
[42] Article 5 (8) of the Fundamental Law of Hungary.
[43] Article 12 (5) of the Fundamental Law of Hungary.
[44] Article 24 (7) of the Fundamental law of Hungary.
[45] Article I (3) of the Fundamental Law of Hungary.
[46] Article VII (2) of the Fundamental Law of Hungary.
[47] For the summary of the relevant jurisprudence of the Constitutional Court of Hungary see Fruzsina **Gárdos-Orosz**, *Alapjogok korlátozása, in* AZ ALKOTMÁNY KOMMENTÁRJA 8. §, [76]-[81] (Andárs Jakab ed., Századvég 2009).

The enumeration of the exclusive statutory matters is a guarantee and also a constitutional obligation aiming at to ensure that these matters are decided by the parliament. But the legislative power of the parliament is not restricted to these statutory matters, it has a general and absolute legislative power.[48] Although the Fundamental Law provides that the government is entitled to regulate a certain matter if it is not regulated by statute,[49] the Constitutional Court declared that the legislative power of the parliament is general, and open towards the government,[50] i.e. even if a certain matter was regulated by a government decree, the parliament is free to adopt a statute on the same matter and this legislative act will render the government decree unconstitutional (because of the norm hierarchy).

In the German jurisdiction the manifestation of the requirement that the most important political decisions have to be made by the legislature is the most visible in the jurisprudence of the Federal Constitutional Court concerning the separation of powers doctrine and the prohibition of legislative delegation principle. The separation of powers doctrine is interpreted by the Federal Constitutional Court in light of a theory of "institutional adequacy".[51] According to this theory state powers (including legislative power) should be exercised by those institutions *"which according to their organization, composition, function and procedures dispose of the best qualifications for this purpose."*[52] This means in general that the basic policy decisions should be entrusted to the parliament as a deliberative assembly[53] or as the Federal Constitutional Court put it: *"In a governmental system in which people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining*

[48] Márta Dezső, *Mégis milyen parlamentarizmust?, in* ÜNNEPI KÖTET SÁRI JÁNOS EGYETEMI TANÁR 70. SZÜLETÉSNAPJA TISZTELETÉRE 78, 80 (Márta Dezső et al. eds., Rejtjel Kiadó 2008).
[49] Article 15 (4) of the Fundamental Law of Hungary.
[50] Decision no. 53/2001. (XI. 29.) of the Constitutional Court of Hungary.
[51] WERNER HEUN, THE CONSTITUTION OF GERMANY. A CONTEXTUAL ANALYSIS 86 (Hart Publishing 2011).
[52] Quoted from the decision no. 68 BVerfGE 1 of the German Federal Constitutional Court by Heun. *Id.*
[53] DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 103 (The University of Chicago Press 1994).

the public will by weighing the various and sometimes conflicting interests." [54] It does not mean that the German legislature has exclusive legislative power. In fact Article 80 (1) of the German Basic Law expressly provides that the Federal Government, a Federal Minister or the Land (i.e. member state) may be authorized by a parliamentary statute to issue legislative regulations. However, according to the well-established jurisprudence of the Federal Constitutional Court, the delegation of legislative power is subject to strict conditions and may be exercised only to a limited extend, but cannot result in the transfer of legislative power in whole legislative areas to the government, the most important political decisions cannot be made by other state organs.[55] The Federal Constitutional Court summarized its relevant jurisprudence in the Kalkar I case as follows: *"Today our established jurisprudence makes clear that the legislature is obliged (…) to make all crucial decisions on fundamental normative areas, especially in those cases where basic rights become subject to governmental regulation."*[56]

Even in France we can say that the legislature has the power to decide on the most important political issues despite the circumstances of the naissance of the 1958 constitution and the hostility towards the legislature. The first half of the twenties century was characterized by constant governmental crises which was partly due to the fact that the French parliament was an indecisive, malfunctioning organ while it disposed very strong powers.[57] Therefore the primary aim behind the 1958 constitution was the so-called "rationalization of the parliament" which manifested mainly in the strengthening of the government vis-á-vis the legislature and

[54] Quoted from the decision no. 33 BVerfGE 125 of the German Federal Constitutional Court by Currie. *Id.* at 132.
[55] About the non-delegation principle and the proviso of legailty see HEUN, *supra* note 51, at 37–38; CURRIE, *supra* note 53, at 125–33; DONALD P. KOMMERS & RUSSEL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 175–89 (Duke University Press, Third ed. 2012); Volkmar Götz, *Legislative and Exectuive Power under the Constitutional Requirements Entailed in the Principle of the Rule of Law*, *in* NEW CHALLENGES TO THE GERMAN BASIC LAW: THE GERMAN CONTRIBUTIONS TO THE THIRD WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 141, 160–63 (Christian Starck ed., Studien und Materialien zur Verfassungsgerichtsbarkeit, Nomos, First ed. 1991).
[56] Quoted from the decision no. 49 BVerfGE 89 of the German Federal Constitutional Court (also known as the Kalkar I case) in KOMMERS & MILLER, *supra* note 55, at 178.
[57] ANDREW KNAPP & VINCENT WRIGHT, THE GOVERNMENT AND POLITICS OF FRANCE 141–42 (Routledge, fifth ed. 2006).

the limitation of the parliament's role in the policy-making.[58] Even the Constitutional Council was given the primary task of protecting the newly created structure of the separation of powers from the undue interventions of the legislature.[59] This is true that if we compare the powers of the French parliament before and after the adoption of 1958 constitution, we can observe a big difference. Most importantly, the parliament's previously unlimited legislative power was restricted to the so-called "domain of law" and everything else was allocated to the government.[60] However, we have to see that this redesign of the fields of the legislative powers is the exact manifestation of the concept of separation of powers supported in this thesis: not every legislative power belongs to the parliament any more, but the most important policy decision must be made by the direct representatives of the people. The French solution can be seen as the "ban on usurpation" concept of the separation of powers doctrine and is similar to the "institutional adequacy" theory applied in the German jurisdiction. As Gwyn observed in 1965:

> It is in France today, however, that the efficiency argument has the greatest currency. Having long complained of *government d'assemblé*, General De Gaulle and his adherents now have a constitution at least theoretically based on a distinction between a domain of law, function appropriate to an elected assembly, and a domain of government, functions appropriate to a compact executive.[61]

Article 34 of the 1958 French constitution defines the area of statutory law (domain de la loi). According to the provisions of Article 34 there are legislative matters that can be regulated by the parliament in details, e.g. civic rights, the fundamental guarantees of civil liberties, the status and capacity of persons, electoral system, etc. In the other category of legislative matters the parliament has to lay down the basic principles, the details could be regulated by the government, e.g. education, environment, property right, etc. If we look at the enumeration in

[58] JOHN D. HUBER, RATIONALIZING PARLIAMENT. LEGISLATIVE INSTITUTIONS AND PARTY POLITICS IN FRANCE 23 (Cambridge University Press 1996).
[59] MÖLLERS, *supra* note 1, at 21–22.
[60] KNAPP & WRIGHT, *supra* note 57, at 144.
[61] GWYN, *supra* note 2, at 35.

Article 34, we can see that the determination of legislative matters reserved to the parliament is quite broad and contains the most important political issues. In addition, besides Article 34, many other provisions of the constitution requires statutory implementation.[62]

The practice of Article 34 shows even better the strength of the legislative power of parliament. Ardant argues that, on the one hand, this distinction between details and principle was not really respected by the parliament nor was it enforced by the Constitutional Council, in practice the legislature can regulate the details of every statutory legislative matter.[63] He further argues that the area of statutory law is very broad, in addition, the domain of law and the domain of governmental legislation has never been strictly separated; the parliament has encroached many times to the area of government, but has never been stopped and this practice was sanctioned even by the Constitutional Council.[64] Consequently, there is no prohibited area for the parliament.[65]

II.2. Threats to the separation of powers doctrine

In the previous subchapter I laid down a premise on which the whole thesis rests: the separation of powers doctrine requires that the parliament make the most important political decisions (because it is more suitable for this task than the government). Making decisions requires a certain degree of autonomy, i.e. a certain decision can be attributed to the parliament only if it had the possibility of formulating the decision according to its own will. *"Fundamentally, the extent to which a legislature is an active and effective participant in the legislative process (…) is directly tied to the degree of autonomy it enjoys."*[66] This autonomy of decision-making of the

[62] See e.g. Article 4 on the role of political parties, Article 51-2 on committees of inquiry.
[63] PHILIPPE ARDANT & BERTRAND MATHIEU, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 449 (LGDJ, 26th ed. 2014).
[64] *Id.* at 450.
[65] *Id.*
[66] Kreppel, *supra* note 3, at 135.

parliament is assessed in a parliamentary system – usually and primarily – vis-á-vis the government.[67] (Formally, France is classified as a semi-presidential and not a parliamentary system, however – as I will discuss below – it does not make much difference with regard to the validity of the analysis and argumentation in the framework of this thesis.)

It is common in most contemporary parliamentary systems that the relationship between the parliament and the government is characterized by the cooperation of these branches, rather than by their conflict.[68] It has also become a wide-spread phenomenon over time that the government has a dominant role in determining the national political directions and the government realizes its political program (mainly) by way of parliamentary legislation, i.e. the government is the engine of the parliamentary legislative work.[69] This construction follows from the logic of parliamentary systems and is perfectly compatible with the separation of powers doctrine as long as a fragile balance[70] is struck between the powers of the parliament and that of the government. In this equilibrium the government can have the dominance in the parliamentary legislation necessary for effectively realizing its political program, but the parliament must be able to keep a certain degree of autonomy which is indispensable for making the most important political decisions according to its own will. Of course, this balance between the parliament and the government is imperfect at any point in time, because it is dynamic due to the working of the political system.[71] *"Dynamic balance means that interbranch disequilibria exists within constitutionally acceptable limits."*[72] However, if the dominance of the government becomes overwhelming and the parliament is practically deprived of its

[67] OLSON, *supra* note 3, at 74; Bradley & Pinelli, *supra* note 4, at 665–66.
[68] About the relationship between the legislature and the government in parliamentary and in presidential systems see e.g. MÖLLERS, *supra* note 1, at 113; OLSON, *supra* note 3, at 74–93; Kreppel, *supra* note 3; Samuels, supra note 4; Krotoszynski, supra note 4; Bradley & Pinelli, *supra* note 4.
[69] About the role and the prerogative of the government in the legislative process in parliamentary systems see e.g. SAJÓ, *supra* note 2, at 173–204; SZENTE, *supra* note 3, at 40; OLSON, *supra* note 3, at 84–88; Bradley & Pinelli, *supra* note 4, at 665–66; Saiegh, *supra* note 4.
[70] The requirement of a balance between the powers of the legislature and the government appears in many scholarly works. See e.g. MÖLLERS, *supra* note 1, at 113; SAJÓ, *supra* note 2, at 76.
[71] SAJÓ, *supra* note 2, at 76.
[72] *Id.*

autonomy to make the most important political decisions according to its own will, than the disequilibrium exceeds the constitutionally acceptable limits and consequently violates the separation of powers doctrine.

The autonomy of the parliament vis-á-vis the government can be assessed along certain institutional and personal factors.[73] The institutional autonomy of the parliament refers to its formal structural interaction with the government.[74]The degree of this institutional autonomy is influenced by the following three factors: a) the method of selecting the government and the partisan link between the branches, b) the method and the disadvantages of unmaking the government and c) the privileges of the government in the legislative process.[75]

In parliamentary systems the government is elected by and responsible to the parliament. Maybe counterintuitively, this construction reduces the autonomy of the parliament for the following reasons. Due to its election by the parliament, the government enjoys from the beginning of the term the support of the majority of MPs.[76] As a general rule, usually the simple majority of MPs is sufficient for the adoption of statutes, therefore the government is unlikely to face serious hurdles in making the parliament to adopt its legislative proposals. This in-built support of the government is further strengthened by the partisan link between the parliamentary majority and the external party. It is quite wide-spread among parliamentary systems that the leadership of the parliamentary faction and the elite of the external party belong to the same group and that faction members are also members of the external party.[77] Consequently the constant mediation

[73] The following analysis is based on the work of Olson and Mezey who work out a very detailed and sophisticated system of factors for the assessment of the policy-making role of legislatures. OLSON & MEZEY, *supra* note 5, at 6–20; The matrix worked out by Olson and Mezey was reconstructed to a certain extent by Kreppel. Kreppel, *supra* note 3, at 134–39.

[74] Kreppel uses the term "independence" instead of autonomy. Kreppel, *supra* note 3, at 135.

[75] The factor in point c) does not appear explicitly neither in the work of Olson and Mezey, nor in Kreppel's text, however this little modification seemed necessary for the full and correct assessment of the legislatures' autonomy. OLSON & MEZEY, *supra* note 5, at 8; Kreppel, *supra* note 3, at 135–37.

[76] OLSON & MEZEY, *supra* note 5, at 8; Kreppel, *supra* note 3, at 136; Saiegh, *supra* note 4, at 485.

[77] OLSON, *supra* note 3, at 53–54; OLSON & MEZEY, *supra* note 5, at 8, 12–13; Kreppel, *supra* note 3, at 136; Saalfeld & Strom, *supra* note 6, at 387.

between the government and the parliamentary majority through the party leaders is guaranteed. For example, according to the Rules of Procedure of the Hungarian National Assembly (hereinafter: HRoP) a parliamentary faction may be created only by those MPs who belong to the same (external) party.[78] Consequently, members of the parliamentary faction are subordinated to the leadership of both their faction and the external party.

The constant crises of parliamentary systems before World War II led to the strengthening of the position of the government vis-á-vis the parliament.[79] In theory, any parliamentary majority could dismiss the government, however the likeliness of such a scenario is usually quite low – provided that the government has a majority in the house. It is partly due to the socio-political fact that the failure of the government is likely to bring about political instability and uncertainty (or even early elections) which is detrimental for the parliamentary majority as well.[80] Consequently the majority MPs are not inclined to withdraw their support from the government. The strong position of the government follows also from the legal provisions making its dismissal a very difficult political task for it requires careful maneuvering behind the scenes and the fulfillment of certain quite strict legal conditions.[81] A good example for this is the constructive vote of no confidence which is similarly regulated in Germany and in Hungary. In Germany, the MPs may dismiss the Federal Chancellor and consequently the whole government (upon their initiation) only by way of a vote of no confidence.[82] The motion for a vote of no confidence has to be signed by one-quarter of the MPs or a parliamentary group comprising of at least one-quarter of the of MPs and voted by the majority of MPs.[83] The "constructive" part

[78] Article 1 (1) of the HRoP. However, it needs to be noted that MPs are considered to belong to the same political party if a) they are members of the external party, b) they were nominated by the external party at the general elections or 3) they were independent MPs whose application to the faction was accepted by the parliamentary group. See Article 1 (3) of the HRoP. However parliamentary group members are usually members of the external party too.
[79] SAJÓ, *supra* note 2, at 185; OLSON, *supra* note 3, at 80–81.
[80] Kreppel, *supra* note 3, at 136; Uslaner & Zittel, *supra* note 6, at 457.
[81] OLSON, *supra* note 3, at 81; Kreppel, *supra* note 3, at 136; Bradley & Pinelli, *supra* note 4, at 664.
[82] Article 67 of the German Basic Law.
[83] Rule 97 (1) of Rules of Procedure of the Bundestag (German Bundestag).

of the vote is that the successor of the Federal Chancellor has to be proposed in the motion itself and is automatically elected in case of a successful vote of no confidence.[84] Consequently, it is not enough for the opposition to persuade enough MPs from the majority to dismiss the current government, every MP voting against the current government has to agree on the successor of the Federal Chancellor as well which can be a very difficult task especially if the opposition is divided. The process is further complicated by the rule providing that forty-eight hours shall elapse between the submission of the motion and the vote,[85] which gives the MPs and their parties a "cooling down" period to reconsider their intentions and the consequences of their action.

Lastly, in contemporary parliamentary systems the government enjoys a wide range of privileges in the legislative process which give the government a dominant position vis-á-vis the other actors of the proceeding.[86] This phenomenon is in concert with the role of the government as the actor determining the main political directions, the engine of the parliamentary legislative work. However, certain privileges of the government can easily result in its overwhelming dominance in the legislative process. A perfect example for such a governmental privilege is Article 49 (3) of the French Constitution. According to this provision, the Prime Minister may make the passing of a statute an issue of a vote of confidence before the Assemblée Nationale. In such a case, if a motion of no-confidence is not submitted within twenty-four hours, the text is considered to be adopted without an actual vote on the legislative proposal.[87] Even if a motion of no-confidence is submitted in time, but is not successful, the text is also considered to be adopted.[88] What is more, only the votes cast in favour of the no-confidence resolution are counted and the latter shall not be passed unless it secures a majority

[84] Rule 97 (1) of *id.*
[85] Article 67 (2) of the German Basic Law.
[86] SAJÓ, *supra* note 2, at 173, 183–84; OLSON, *supra* note 3, at 84–85.
[87] ARDANT & MATHIEU, *supra* note 63, at 475.
[88] Article 49 (2)-(3) of the French Constitution.

of the deputies.[89] To put it simply, if the majority of the Assemblée Nationale does not vote against the legislative proposal (!) – formally in favor of the motion of no-confidence – the text is adopted. Parliamentary history shows that governments – especially those having only a slim majority – had recourse to this tool quite often; the applicability of Article 49 (3) was restricted in 2008 to only certain types of statutes.[90]

If we look at the black letter law concerning the formal structural interaction between the parliament and the government, we get the perception that the parliament dominates in this relationship because it has the right to inaugurate and dismiss the government and is entitled to have the final say on the adoption of a legislative proposal. But this perception is misleading. As Olson put it: *"[p]aradoxically, the very system intended to ensure parliament's control over the executive has led to exactly the opposite flow of control."*[91]

The constraints on the institutional autonomy of the parliament are amplified by the limitation of the personal autonomy of MPs which refers to their independence from the internal and/or external party.[92] Members of parliament have free mandate, i.e. they are responsible only to their conscience, free from external influences and exercise their rights in the interests of the whole political nation.[93] The free mandate is not only the guarantee of the individual autonomy of MPs, but also the safeguard of the institutional autonomy of parliament[94] since the decisions of the parliament are made by the individual deputies. Consequently, restricting the autonomy of MPs is equal to restricting the autonomy of the parliament as such. However, the constitutional principle of free mandate protects MPs only from legally binding

[89] Article 49 (2) of the French Constitution.
[90] ARDANT & MATHIEU, *supra* note 63, at 475; ROBERT ELGIE, POLITICAL INSTITUTIONS IN CONTEMPORARY FRANCE 170 (Oxford University Press 2004).
[91] OLSON, *supra* note 3, at 77.
[92] OLSON & MEZEY, *supra* note 5, at 7, 12–13; Kreppel, *supra* note 3, at 137–38.
[93] For a detailed analysis of the free mandate principle see SAJÓ, *supra* note 2, at 107–10; SZENTE, *supra* note 3, at 168–74; DEZSŐ, *supra* note 6, at 79–100.
[94] DEZSŐ, *supra* note 6, at 82–83.

influences/obligations, but the scope of protection does not extend to political constraints.[95] Consequently, the parliamentary faction and/or the external party uses a wide range of sticks and carrots in order to ensure the discipline among its deputies and to make sure that MPs follow the party line.

The political career of (future) deputies depends heavily on their party. It is the party which nominates the candidates before the general elections and the nominees need its support since the elections are dominated by the parties and people usually vote along party lines.[96] It is also the party which can offer the MPs a prospect in their career. Parliamentary law usually gives an important (or exclusive) role to the factions in the nomination of MPs to the different positions and offices within the parliament.[97] Another prospect for the deputy may be a higher position within the hierarchy of the party.[98] It is also quite usual that majority MPs get some kind office in the government or in the public administration parallel to or after the expiry of their parliamentary mandate.[99] Deputies are also heavily dependent on the financial support of the party, because individual MPs have usually no or very little stuff support and budget resources.[100] If MPs have any serious interest or ambition to push through some of their ideas and make the parliament adopt a legislative proposal,[101] their attempt will be hopeless unless their faction stands behind them. Also, parliamentary law allocates significant powers to the faction leaders or the factions as such, consequently for the effective exercise of their rights the MPs need the backing of the faction leaders and their fellow deputies.[102]

[95] SZENTE, *supra* note 3, at 168–74; DEZSŐ, *supra* note 6, at 83–84, 94–100.
[96] Kreppel, *supra* note 3, at 138; DEZSŐ, *supra* note 6, at 87–89.
[97] Kreppel, *supra* note 3, at 137; Saalfeld & Strom, *supra* note 6, at 374–75.
[98] Kreppel, *supra* note 3, at 137; Saalfeld & Strom, *supra* note 6, at 374–75.
[99] Kreppel, *supra* note 3, at 137; Saalfeld & Strom, *supra* note 6, at 374–75.
[100] Uslaner & Zittel, *supra* note 6, at 458.
[101] Carey, *supra* note 3, at 444–45; Saalfeld & Strom, *supra* note 6, at 383–84.
[102] SAJÓ, *supra* note 2, at 145–46; OLSON, *supra* note 3, at 41–43.

So we can see that on the one hand MPs have a wide scale of incentives to support their party and to act along the party lines. On the other hand, parties and factions can also use sticks to control their members if they try to violate the party discipline. As parties can offer carrots to their members, they can also withdraw them at any time. Besides the denial of advantages, parties can also apply negative "incentives" such as pecuniary penalties or exclusion of the members from the faction or the party.

Modern parties and factions usually have a sophisticated internal organization to ensure that the leadership can exercise control over the members, to constantly supervise their activities.[103] Consequently in a well-organized party or faction the discipline is guaranteed and MPs can deviate from the party line only with the authorization of the leadership or if they are willing to bear the negative consequences.

The free mandate protects the MPs from legally binding obligations, but not from political pressure. This is understandable on the one hand, because e.g. MPs should enjoy freedom to choose whether they want to belong to a party and to subject themselves to the strict rules or not.[104] However, on the other hand, the political pressure on MPs from their party can be so excessive that it practically renders the principle of free mandate to an illusion.[105] In such a case, the deputy has no autonomy, no independent will, he/she has only two choices: take it or leave it. We may have the perception, based on the black letter law, that MPs are important, independent actors in the political decision-making process, but the socio-political reality shows that most of the deputies are mainly simple cogs in a machine or tools in the hands of the party to realize its political program.[106]

[103] OLSON, *supra* note 3, at 43–50; Saalfeld & Strom, *supra* note 6, at 374–75; Kreppel, *supra* note 3, at 137–38.
[104] SZENTE, *supra* note 3, at 169.
[105] Cf. SAJÓ, *supra* note 2, at 145–46; DEZSŐ, *supra* note 6, at 94.
[106] SAJÓ, *supra* note 2, at 131.

In sum, the normative picture of the relationship between the parliament and the government shows us that – even though the government has considerable legislative power itself and has a dominant position in the parliamentary legislative process as well – the parliament can decide on the most important political decisions autonomously and the government cannot force the parliament legally to adopt its own will. However, those legal institutions which are aimed at the protection of both the institutional and the personal autonomy of the parliament work very differently in practice. In most cases, the reality is that the government has an overwhelming dominance in the parliamentary legislative process and is able to push its own will through the legislature without considerable resistance. As Sajó puts it: *"[i]f as a result of election, a modern party manages to draw both the legislative and the executive branches within its sphere of influence, the party leadership can 'unify' the two branches and there will be only one centre where decisions are made."*[107] Because of the above-described constraints, the government can easily undermine both the institutional and the personal autonomy of parliament on a technical or practical level together with the fragile balance between the two branches required by the separation of powers doctrine.[108] As a result, the most important decisions are made not by the parliament, but by the government or more precisely by the leadership of the party controlling both the parliamentary majority and the government. Olson reflected to this ambiguous position of the legislature as follows: even though parliaments *"are the keystones of a democratic political system (…) [they] are the most fragile components of a state, because they are particularly vulnerable to dismissal by (…) party dictatorship."*[109]

At the end of this part of the analysis I have to briefly justify the involvement of France and its categorization as a parliamentary system. It is true that formally France is a semi-presidential system, but – for the purpose of this thesis – it shows the same characteristics as a parliamentary

[107] *Id.* at 99.
[108] *Id.* at 160.
[109] OLSON, *supra* note 3, at 1.

system. The main attribute of a parliamentary system which is relevant for the present analysis is the very close cooperation or intertwining of the legislature and the government. In France the executive is two-headed ("bicéphale"): both the Prime Minister and the President can be considered as the head of the executive.[110] In addition, the executive is party elected by the people directly: the President is elected by the electorate, the Prime Minister is nominated by the President and the legislature formally has no say in the process.[111] It may happen – as it did many times – that the majority of the French National Assembly and the President do not belong to the same political camp (which is called "cohabitation").[112] However, in such cases the President has always nominated a Prime Minister who enjoyed the support of the parliamentary majority, such governments has always had a majority in the parliament and the government was in fact directed by the PM and not the President.[113] In periods of cohabitation the relationship between the President and the governing majority headed by the PM was not without conflicts, but the overall operation of the political decision-making showed a picture of a parliamentary system due to the "fait majoritaire".[114] If the President and the parliamentary majority do belong to the same political camp, the only difference is that in such a case the President is the real and powerful head of the government, not the PM and not even little conflicts emerge between the President and the governing majority.[115] In short, the French semi-presidential system – at least from the perspective of this thesis – follows the logic of a parliamentary system.[116]

[110] About the structure and organization of the French government see ARDANT & MATHIEU, *supra* note 63, at 399–423, 361–99.
[111] Articles 6 and 8 of the French Constitution.
[112] ARDANT & MATHIEU, *supra* note 63, at 383–86.
[113] *Id.* at 401–3; HUBER, *supra* note 58, at 26–28.
[114] ARDANT & MATHIEU, *supra* note 63, at 346–52, 414–15; KNAPP & WRIGHT, *supra* note 57, at 145–53; HUBER, *supra* note 58, at 23–30.
[115] ARDANT & MATHIEU, *supra* note 63, at 351.
[116] HUBER, *supra* note 58, at 26–28.

II.3. Enhancing the autonomy of parliament

To briefly summarize the previous reasoning: the functional interpretation of the separation of powers doctrine requires that the most important political decisions be made by the parliament, because it is a more suitable organ for this task than the government. A certain decision may only to be attributed to the parliament if it had the necessary degree of autonomy to make the decision according to its own will and to resist the will of the government. However, we could see that both the institutional and the personal autonomy of the parliament vis-á-vis the government is considerably reduced due to partly legal and partly non-legal (socio-political) factors. The consequence of the lack of autonomy is that the parliament becomes only a formal forum of decision-making, but the most important political decisions come from and are formulated by the government. In other words, if the parliament is not able to resist the will of the government and make its own decisions autonomously, it can be regarded only as *"a voting machine [of the government] acting on party orders."*[117] This violates the separation of powers doctrine which is not only a theoretical concern. If we accept that the parliament is rendered to a powerless and meaningless participant of the legislative process, we also give up on the advantages flowing from the attributes of the parliament compared to the government: the higher degree of its democratic legitimacy, the higher degree of its representative character and the ability to make decisions in an open and public deliberative process with the participation of the formally equal deputies representing a wide range of interests, values and opinions present in the society.

The key problem in the relationship between the parliament and the government in the legislative process which undermines the balance between the branches and violates the separation of powers doctrine is the parliament's lack of autonomy, i.e. ability to resist the will

[117] SAJÓ, *supra* note 2, at 161.

of the government. Consequently, for the re-establishment of the required equilibrium the parliament' ability to resist the will of the government and to make its own decisions autonomously needs to be enhanced. As the constraints of the parliament's institutional and personal autonomy are partly legal and partly non-legal, likewise the means of enhancing its autonomy are partly legal and partly non-legal (socio-political). It would exceed the already quite broad framework of this thesis to deal with all the relevant means, therefore I narrow down the scope of the analysis to those legal rules and institutions which are closely related to the autonomy of the parliament in the legislative process.[118] I have to emphasize at this point my opinion that legal rules and institutions, on the hand, and socio-political phenomena, on the other hand, interact with each other. To put it differently, I think that legal rules and institutions are able (to a certain extent) to bring about changes in the socio-political sphere, i.e. to influence the behavior of the actors participating in the legislative process. Denying this ability of the legal rules and institutions would amount to the denial of the function of the law as a means to regulate people's behavior.

The lack of parliament's ability to resist the will of the government flows (mainly) from the intertwining of the parliamentary majority and the government. One way to enhance the parliament's autonomy is to reduce the high degree of cohesion between the parliamentary majority and the government, the other way is to strengthen the parliamentary opposition. The success of the second way of solution seems more realistic, i.e. I think it requires less focus on socio-political factors and can be more securely based on legal means. It is because the parliamentary opposition is (or most likely is) already in disagreement with the government, it only needs legal means to effectively exercise its opposition.

[118] For example I do not deal with the regulation of the electoral system, campaign financing, parties, etc. however they have an impact on both the institutional and the personal autonomy of the parliament.

We can see – based on the analysis above – that in parliamentary systems the separation of powers doctrine does not apply (or only to very limited extent) between the parliament and the government. This follows partly from the very logic of the parliamentary system and partly from the socio-political reality. It does not and shall never mean that we should give up on the enforcement of the separation of powers doctrine. It only means that we have to carefully and creatively recalibrate the system. The first step in this process is to acknowledge that in the separation of powers doctrine we have to draw a line not only between the parliament and the government, but also between the governing majority (the parliamentary majority and the government creating one unified political power) and the parliamentary opposition. However making this observation in itself is not enough. The second step we have to take is to make this distinction part of the normative theory, i.e. the parliamentary opposition has to be regarded as a (partly) independent actor when allocating the elements of legislative power. In other words, certain legislative powers have to be allocated to the parliament as such, but others to the parliamentary opposition specifically.

III. The means of the parliamentary opposition

In the previous chapter I argued that ensuring parliament's autonomy (i.e. the ability to resist the will of the government) in making the most important political decisions is indispensable for the enforcement of the separation of powers doctrine. One of the possible and most realistic means to achieve this aim is to make a distinction between the governing majority and the parliamentary opposition. Acknowledging the importance of the distinction between the parliamentary opposition and the governing majority in the separation of powers doctrine implies that in certain cases the opposition should have a more robust role in the legislative process than acting as a minority merely expressing its concerns and disagreement (losers' powers).[119] The parliamentary opposition should be granted certain powers enabling it to exercise control over the legislative process and to influence the outcome of the decision-making (winners' powers).[120] In other words, it shall be guaranteed that the most important political decisions cannot be made solely by the governing majority completely ignoring the other MPs, but only with the active and meaningful participation of the parliamentary opposition.

In the following subchapters I will analyze some of these winners' powers already institutionalized in the different jurisdictions. Before examining the different winners' powers of the opposition it seems useful to briefly discuss the various forms of these powers based on the classification worked out by David Fontana.[121]

First, we can distinguish among winners' powers of the opposition according to *"the degree of legal or other coercion involved in the exercise of [these powers]."*[122] There are rules making the exercise of winners' powers of the opposition mandatory, regardless of the preferences of

[119] For the definition of the term "losers' powers" see Fontana, *supra* note 7, at 556–57.
[120] For the explanation of the term "winners' powers" see *id.* at 556.
[121] Fontana, *supra* note 7.
[122] *Id.* at 566.

the majority, e.g. if the opposition has to get a certain percentage of committee chair positions.[123] The second category of rules expressly encourages the application of the opposition's winners' powers, but it is not obligatory, e.g. the supermajority voting rules can incentivize the opposition to bargain with the majority.[124] Lastly, there are permissive rules which only give the possibility of exercising certain winners' powers, e.g. opposition leaders can be invited to participate in the government.[125] My opinion is that the effectiveness of the different variations of winners' powers correlate with the degree of coercion involved in their exercise.

Second, we can make a distinction between those powers generally applicable to any MP or group of MPs (regardless of their position within the parliament), but can be especially important for opposition MPs and those powers specifically allocated to members of the parliamentary opposition.[126] My opinion is that assigning certain powers specifically to the opposition creates a clearer legal basis of the exercise of these powers, thus it is a more suitable solution to achieve the aim of strengthening the parliamentary opposition.

There can be a vast amount of means to strengthen the opposition which may be put into two broad categories: one the hand the internal structure of the legislature can be designed in a way to enable the opposition to have an impact on the legislative process, on the other hand, the parliamentary opposition may be granted specific rights and opportunities to exercise influence on the decision-making. In the following subchapters I will focus on the structural means, the three most important internal organizational solutions: the parliamentary entities exercising opposition powers (in the lower chamber), the second chamber and the parliamentary committees. These organizational solutions may give a strong position for the opposition to bargain with and exercise control over the governing majority.

[123] *Id.*
[124] *Id.* at 567.
[125] *Id.* at 566.
[126] *Id.* at 570.

III.1. Parliamentary entities exercising opposition powers

Even tough parliamentary opposition is a "natural" component of every modern parliamentary democracy, it is not easy to determine which parliamentary entities can be regarded as opposition. The difficulties stem from various sources. First, the term opposition refers to certain relationships of a political nature between the different actors participating in the political decision-making process.[127] Consequently it seems that the term also has a dominantly political nature which can be particularly difficult to grasp from a legal point of view. Additionally, as the Venice Commission put it in its report on the role of the opposition in a democratic parliament: the formal regulation of the opposition has not yet reached the same "stage of evolution" as the actual functioning of the opposition in the member states.[128] Therefore – as we will see below – the regulation of the different jurisdictions say little about the term of opposition. In addition, the regulations of the parliamentary opposition in the different jurisdictions show a great variety. [129] Even though it seems difficult, we have to find the opposition entities because certain legislative powers may only be allocated to the opposition if we are able to determine the subject(s).

In my attempt to determine those parliamentary entities which can be regarded as forming the opposition, I will follow the categorization used in the report of the Venice Commission and proceed as follows: individual MPs, parliamentary groups, qualified minority, and the opposition as such.[130]

[127] Norton, *supra* note 8, at 238–41 (2008).
[128] European Commission For Democracy Through Law, supra note 8, at § 43.
[129] For the brief description of the different ways of regulating parliamentary opposition see Helms, supra note 8.
[130] European Commission For Democracy Through Law, *supra* note 8, at §§ 51–86.

Individual MPs

The Hungarian Rules of Procedure[131] (hereinafter HRoP) defines the opposition MP as follows: *"that deputy who does not belong to the faction of the governing party and not a nationality representative."* [132] It follows a contrario from this definition that opposition MPs are those who belong to a faction of an opposition party or who are independent deputies. Besides this definition, the Hungarian Act on the Parliament (hereinafter HAoP)[133] and the HRoP contain several provisions referring to opposition MPs either as deputies belonging to the opposition as such[134] or to a faction of an opposition party.[135] Even though these provisions name the MP as their subject, the powers are granted practically to the faction of the opposition party because the exercise of these powers require the decision of the parliamentary group.

The relevant provisions in the German and the French jurisdictions are fairly similar to the Hungarian one with one exception: they do not contain an express definition of opposition MPs. Even though the Rules of Procedure of the German Bundestag (hereinafter GRoP) does not define the term "opposition MP", it refers to MPs belonging to opposition parliamentary groups, e.g. Rule 126 a[136] (1) 2. provides that *"The Defence Committee shall ensure, upon the motion of all members of the committee from the opposition parliamentary groups, that a specific defence matter is made the subject of an inquiry…"* All the other provisions mentioning expressly the opposition[137] refer to MPs belonging to opposition parliamentary groups. In the

[131] Resolution of the parliament No. 10/2014. (II. 24.) on certain provisions of the rules of procedure.
[132] *Id.* at article 158 point 5.; The nationality representative is a special category of MPs. I will not deal with this special category of MPs in this thesis because this institution was introduced just recently and there are no nationality representatives in the Hungarian parliament, plus their function is to represent the interests of their nationality in the parliament provided that they were elected at the general elections as such
[133] Act XXXVI of 2012 on the parliament.
[134] For example Article 24 of the HAoP provides that the committee of inquiry examining the activities of the government shall be presided by an MP belonging to the opposition of the government.
[135] For example Article 36 of the HRoP stipulates that in the general debate speeches shall be delivered by MPs belonging to the factions of the governing party/parties and to the factions of the opposition parties in turn in decreasing order of the number of their members.
[136] Rule 126 a. on the special application of minority rights during the 18th electoral term.
[137] All these provisions can be found in Rule 126 a of the GRoP.

French jurisdiction the regulation is similar in this respect to the German one in the sense that the term "opposition MP" is not determined, but some provisions refer to deputies belonging to opposition parliamentary groups. For example Article 133 of the Rules of Procedure of the French Assemblée Nationale (hereinafter FRoP) provides that each week, half of the questions to be posed to the government shall be asked by MPs of opposition groups.

Even though the Hungarian regulation contains a definition, we can conclude that opposition MPs are determined in every jurisdiction on the basis of their belonging to a parliamentary group which is somehow categorized as an opposition faction. Consequently, in all of the three jurisdictions only those provisions can be regarded as granting certain rights to the (individual) opposition MPs which are applicable to all of the MPs (or to the independent deputies) and may be exercised individually, because otherwise their exercise is dependent either on the decision of their parliamentary faction or (as we will see below) on the participation of a qualified minority of the deputies.

Parliamentary groups

In Hungary the term parliamentary opposition refers mainly to the factions of the opposition parties. This is the approach adopted also by the Hungarian Constitutional Court which stated that the dividing line between the governing majority and the opposition can be interpreted as the relationship among the parties having a representation in the parliament (i.e. parliamentary factions).[138] This is what we find in the literature as well, e.g. Smuk defines opposition as those political parties which do not share the responsibility of governing and stand in opposition to the governing power.[139] This approach is certainly strengthened by the black letter law, since almost all of the provisions expressly mentioning the opposition refer either to MPs belonging to a faction of an opposition party or to the opposition factions as such. For example Article

[138] See Decision No. 22/1999. (VI. 30.) of the Constitutional Court of Hungary.
[139] SMUK, *supra* note 8, at 47.

122 (1) of the HRoP stipulates that *"the first round of interpellations shall be presented by the opposition parliamentary groups in decreasing order of the number of their members…".* Similarly, Article 36 (2) concerning the general order of taking the floor provides that *"[i]n the first round of speeches, speeches shall be delivered by the parliamentary groups supporting the Government and the opposition parliamentary groups in turn, in decreasing order of the number of their members."* Because of the central role of parliamentary factions in the exercise of the opposition powers, the conditions of the creation of such groups have utmost significance. In the Hungarian regulation – similarly to the German and French one as it will be discussed below – the following two requirements have to be met. First, only those MPs may create a parliamentary group who share the same political affinity, i.e. who are members of the external political party, who were nominated by the external party at the general elections or who are independent, but their application was accepted by the other faction members.[140] The regulation is quite permissive in the sense that those parties who were running at the elections together may decide to create one or separate parliamentary groups – provided that they have the required number of members.[141] The second criteria is a minimum number of members: as a general rule five MPs may create a group, however, three MPs are also allowed to exercise this right provided that they obtained their mandate from the same national list.[142] This minimum number is quite fair and enables even the smaller opposition groups to exercise those stronger opposition rights allocated to parliamentary groups.

In the German jurisdiction rights which are formulated expressly as opposition rights are granted exclusively to members of opposition parliamentary groups.[143] Besides these provisions, we can find several other rules containing rights which can be considered (also) as

[140] Article 1 (1)-(3) of the HRoP.
[141] Article 1 (1) of the FRoP.
[142] Article 2 (1)-(2) of the FRoP. The Hungarian parliamentary election system is mixed, i.e. 106 MPs are elected in individual electoral units, the remaining 93 deputies obtain their mandate from national party lists.
[143] Rule 126 a. of the GRoP.

opposition powers and they entitle the parliamentary groups and not the individual MPs to exercise these powers. For example legislative proposals submitted by Members of the Bundestag have to be signed by their parliamentary group (or five percent of the deputies).[144] Or, as Rule 42 of the GRoP stipulates: *"The Bundestag may, upon the motion of a parliamentary group (...) decide that a member of the Federal Government be summoned."* It is also a widely shared opinion in the literature that the effective exercise of opposition rights may be carried out primarily by parliamentary groups since most of the rights which can be perceived as opposition powers are allocated to the factions.[145] Consequently it has utmost importance for the opposition MPs to be able to create parliamentary groups.

Even though the Basic Law mentions the parliamentary groups,[146] it does not define them. Based on the GRoP a parliamentary group may be formed on the following two conditions: first, it shall be created by not less than five percent of the Members of the Bundestag (i.e. 32 deputies),[147] and second, these members shall belong to the same political party or to parties which do not compete with each other in any Land (i.e. having a similar political affinity).[148] The consequence of this second condition is that the number of parties represented in the Bundestag and the number of parliamentary groups are not necessarily equal: MPs belonging

[144] Rule 76 (1) of the GRoP.
[145] HEUN, *supra* note 51, at 104–5; Siegfried Magiera, *The Functions and Development of Parliament*, *in* STUDIES IN GERMAN CONSTITUTIONALISM: THE GERMAN CONTRIBUTIONS TO THE FOURTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 141, 150–51 (Christian Starck ed., Studien und Materialien zur Verfassungsgerichtsbarkeit, Nomos, First ed. 1995); Georg Ress, *The Constitution and the Requirements of Democracy in Germany*, *in* NEW CHALLENGES TO THE GERMAN BASIC LAW: THE GERMAN CONTRIBUTIONS TO THE THIRD WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 111, 123 (Christian Starck ed., Studien und Materialien zur Verfassungsgerichtsbarkeit, Nomos, First ed. 1991); Thomas Saalfeld, *L'Opposition Au Bundestag Allemand, Entre Négociation et Rhétorique*, *in* L'OPPOSITION PARLEMENTAIRE 154–58, 164–66 (Les Études de la Documentation francaise, La documentation francaise 2013); Winfried Steffani, *Parties (Parliamentary Groups) and Committees in the Bundestag*, *in* THE U.S. CONGRESS AND THE GERMAN BUNDESTAG. COMPARISONS OF DEMOCRATIC PROCESSES 273, 287 (Uwe Thaysen et al. eds., Westview Press 1990).
[146] Article 53a (1) of the German Basic Law.
[147] RUPERT SCHICK & HERMANN J. SCHREINER, THE GERMAN BUNDESTAG: FUNCTIONS AND PROCEDURES 11 (NDV, Neue Darmstädter Verlagsanstalt 2010).
[148] Rule 10 (1) of the GRoP.

to two or more parties can create one parliamentary group in certain cases.[149] The five percent threshold serves the aim of preventing the creation of a large number of parliamentary groups and then making excessive use of their considerable amount of parliamentary powers engendering the proper functioning of the Bundestag.[150] I think that none of these conditions pose a significant difficulty for the opposition to form a parliamentary faction, however these rules are less permissive than the Hungarian ones.

The French regulation is very similar to the Hungarian and the German ones. Based on the relevant legal provisions opposition means primarily opposition parliamentary groups.[151] The existence of opposition parliamentary groups is guaranteed by the French constitution itself. Article 51-1 provides that the Rules of Procedure of each House "*shall recognize that opposition groups in the House concerned, as well as minority groups, have specific rights."* In 2006 a reform plan aimed at the strengthening of the parliamentary opposition by way of amending the FRoP, however this attempt was struck down by the Constitutional Council and consequently the constitution (together with the FRoP) was modified in 2008.[152] Similarly to the Hungarian and the German way of regulation, the French provisions allocate all the powers expressly formulated as opposition powers to parliamentary groups.[153] However, the French regulation has some interesting particularities.

First, in the Hungarian and the German jurisdictions the categorization of certain parliamentary groups as opposition factions is based on their political views and behavior and consequently every parliamentary faction is considered to belong to the opposition which is not part of the

[149] For example the CDU and CSU has always formed one parliamentary faction since 1949. SCHICK & SCHREINER, *supra* note 147, at 11.
[150] *Id.* at 111.
[151] Anne Levade, *Le Statut de L'opposition Parlementaire Comme Objet Juridique*, *in* L'OPPOSITION PARLEMENTAIRE 111 (Olivier Rozenberg & Éric Thiers eds., La documentation francaise 2013).
[152] Bastien Francois, *L'impensé de L'opposition Parlementaire Sous La Ve République*, *in* L'OPPOSITION PARLEMENTAIRE 103–4 (Olivier Rozenberg & Éric Thiers eds., La documentation francaise 2013).
[153] Levade, *supra* note 151, at 110–11.

governing majority. In France, on the contrary, the opposition status is legally based;[154] a parliamentary group can expressly declare that it belongs to the opposition.[155] Groups which did not declare themselves as belonging to the opposition are considered to be minority groups, except the faction with the largest number of members.[156] Therefore, the classification of a parliamentary group as opposition faction is based on a formal declaration which has constitutive effect. The second particularity is that there is a formal distinction between opposition and minority parliamentary groups which presupposes a difference between those factions expressly opposing the government and those simply not belonging to the governing majority.

The FRoP allocates specific rights to the opposition and minority groups.[157] Although most of these specific rights are applicable to both categories, the opposition groups have certain advantages,[158] e.g. the chairman of a committee of inquiry is required to be a member of an opposition group.[159] Consequently the categorization of factions as minority or opposition group matters. In light of the difference between these two categories we can say that such a classification may be overly restrictive given the fact that a parliamentary faction may oppose the government on a permanent or on an ad-hoc basis depending on the issue at hand; therefore the regulation does not reflect the political reality and may deprive a minority group of very valuable powers.[160]

Either a minority or an opposition group, parliamentary factions dispose special opposition powers, hence the conditions of forming a group has great importance for the opposition in

[154] Guy Carcassonne, *L'opposition Parlementaire Comme Objet Juridique: Une Reconnaissance Progressive*, *in* L'OPPOSITION PARLEMENTAIRE 87 (Olivier Rozenberg & Éric Thiers eds., La documentation francaise 2013).
[155] Article 19 (2) of the FRoP.
[156] Article 19 (4) of the FRoP.
[157] PIERRE AVRIL ET AL., DROIT PARLEMENTAIRE 113–14 (LGDJ, fifth ed. 2014).
[158] Levade, *supra* note 151, at 110–11; AVRIL ET AL., *supra* note 157, at 113–14.
[159] Article 143 (2) of the FRoP.
[160] Levade, *supra* note 151, at 114–15.

France too. The formation of a parliamentary group has two requirements: the members must have the same political affinity and the group must be composed of at least fifteen members. These conditions seem fairly permissive and I did not find any relevant concern with regard to the formation of parliamentary groups in the literature either.[161]

Qualified minority

We can find several provisions in the Hungarian regulation granting certain powers to a qualified minority of deputies. These powers are not formulated as "opposition powers" but can be considered as tools primarily used by the opposition to express their views or to influence the operation of the parliament. For example Article 86 (1) of the HRoP makes it mandatory to hold a debate on a comprehensive political topic upon the motion of – inter alia – one-fifth of the deputies. Also, Article 24 (2) e) of the Fundamental Law provides that the Constitutional Court shall examine the constitutionality of adopted legislative acts upon the initiation of – inter alia – one-fourth of the deputies. Some of the opposition powers may be exercised by a qualified minority of MPs, but most of them are rather assigned to parliamentary groups.

Allocating certain "opposition powers" to a qualified minority of deputies is more widely used in the German regulation. The relevant provisions may be put in two categories. First, there are those rules which enable five percent of the Members of the Bundestag to have recourse to a certain power. The same number of MPs can form a parliamentary group, so this could be regarded as a certain alternative to obtaining the support of the whole faction. For example Rule 20 (3) of the GRoP stipulates that *"[a]fter the agenda has been adopted other items may be discussed only if no objection is raised either by a parliamentary group or by five per cent of*

[161] ARDANT & MATHIEU, *supra* note 63, at 443; AVRIL ET AL., *supra* note 157, at 116–17; Francois, *supra* note 152; Levade, *supra* note 151; Carcassonne, *supra* note 154.

the Members of the Bundestag…" Other qualified minority provisions require the united action of either one-quarter, one-third of the MPs or 120 deputies.[162]

The French regulation is closer to the Hungarian regulation than to the German one in the sense that – although we can find some provisions in the FRoP requiring the united action of a certain percentage of the members[163] – only few opposition powers are allocated to a qualified minority of MPs and most of them concern the right to turn to the Constitutional Council.[164] This way of regulating opposition powers strengthens the position of parliamentary groups vis-á-vis the grouping of MPs on any basis other than political affinity.

Opposition as such

We can find certain provisions treating the opposition as one unified entity in the Hungarian regulation, for example Article 24 (5) of the HAoP stipulates that *"[t]he chair of the committee of inquiry examining the activity of the Government (…) shall be a deputy belonging to the opposition of the Government in question."* However, almost all of the opposition powers (expressly formulated as such) are allocated either to MPs belonging to an opposition faction or to opposition factions as such. The German regulation seems to be quite similar to the Hungarian one. Those provisions expressly mentioning the opposition refer to members of opposition parliamentary groups.[165] In the French regulation we can find that opposition powers formulated as such are granted almost exclusively to opposition parliamentary groups and in some cases to MPs belonging to the opposition factions.[166]

Consequently the opposition as one unified entity has only an indirect acknowledgement in all of the jurisdictions and is not entitled specifically to exercise any opposition power. The

[162] See e.g. Rules 56 (1), 21 (2) or 126a of the GRoP.
[163] See e.g. Article 43 or 151-12 (3) of the FRoP.
[164] See Articles 11, 16, 54, 61 of the French Constitution,
[165] All of these rules can be found in Rule 126a of the GRoP.
[166] See e.g. Article 29 -1 (2), 133 (2), 143 (2), 145 (3)-(4) of the FRoP

opposition as one entity can have recourse to certain opposition powers if the deputies and factions decide to act in unison and the legal provisions make this collective exercise of a given power possible, e.g. typically in case of qualified minority powers.

III.2. Second chambers

If we look at the internal organizational structure of legislatures, one of the main factor of division is whether a given legislature is unicameral or bicameral. Within the category of bicameral legislatures we can differentiate among parliaments based on the types of the second chambers and on the relationship between the two houses.

The second chambers – as part of the legislature as a representative organ – have the following categories according to the type of representation they are designed to: they may function as the representative organ of the aristocracy (or a certain social class), the member states of a federal state or the local communities in a unitary state.[167] Second chambers may also be the duplicates of the lower chamber with a certain difference in the election system, the composition, the duration of the mandate, etc.[168] We can also mention corporative chambers as an independent subcategory.[169]

As to the relationship of the chambers we can make a distinction between symmetric and asymmetric bicameral systems. In symmetric bicameral systems the two chambers either have equally shared powers, i.e. *"both chambers exercise all legislative powers"*[170] or equally divided powers, i.e. *"both chambers have specific, but more or less equally important powers"*.[171] In asymmetric bicameral systems the power between the chambers is unequally

[167] Dezső, *supra* note 10, at 347.
[168] *Id.*
[169] *Id.*
[170] Kreppel, *supra* note 3, at 129.
[171] *Id.*

distributed, which means that *"one chamber* [typically the lower chamber] *has significantly greater powers than the other."*[172]

Even though we can observe a great variety of the bicameral systems in light of the above described categorizations, there is one thing in common in every bicameral system: the second chambers have a role in limiting the governing majority.[173] Typically second chambers do not have the power to have the final say on a certain legislative proposal, their role is rather to express their opinion, to influence the direction of the decision-making process, to protest against a decision, in general to slow down the legislative process, to promote consensus-seeking so that the final decision be well-founded and long-lasting.[174] Of course, this ability of the second chamber and the actual influence it can exercise depends on many factors, including most importantly the relationship between the two chambers,[175] but the mere existence and functioning of a second chamber can limit the power of the governing majority and therefore enhance the autonomy of the parliament. It is primarily because the second chamber has a composition different from that of the lower chamber, which means that the second chamber represents different opinions, values and interests than the lower chamber, or the same opinions, values and interests have a different proportion of representation. Consequently it is more likely that the majority of the second chamber does not share the same exact political opinion as the government, therefore it is inclined to resist the will of the government and the governing majority in the lower chamber.

Since the end of the Second World War Hungary has always had a unicameral parliament.[176] In the so-called "round-table discussions" between the socialist state-party and the democratic

[172] Kreppel, *supra* note 3.
[173] Cf. Dezső, *supra* note 10, at 344.
[174] Cf. *id.* at 346.
[175] Kreppel, *supra* note 3, at 129.
[176] András Szalai, *Ami Az Alaptörvényből Kimaradt - a Második Kamara Mint a Parlamentáris Kormányzat Ellensúlya*, PRO PUBLICO BONO - MAGYAR KÖZIGAZGATÁS 68, 73 (2013).

opposition in course of the change of regime, the idea of the reestablishment of a second chamber emerged.[177] However, the realization of this idea had no reality in practice because the reestablishment of the bicameral system was not a top priority for the socialist state-party and the democratic opposition was mistrustful as they feared that a second chamber may serve the aim of ensuring the political influence of the elite of the socialist regime even after the democratic transition.[178] The simple structure of the legislature may have been a reasonable choice because right after the change of regime the legal system had to go through a huge transformation which necessitated the adoption of a vast amount of legislation in a relatively short time.[179] However, with the lapse of time the legislative work of the parliament has not slowed down or decreased, the National Assembly has been functioning since that time like a "factory of statutes". The idea of a second chamber has emerged from time to time exactly for the purpose of slowing down the legislative process and make the legislative work of the parliament better-founded and enhance the quality of the legislation in general,[180] but neither the subsequent amendments of the 1989 constitution[181] nor the adoption of the new Fundamental Law of Hungary brought about changes in this respect.[182]

The German federal legislature is composed of two chambers: the Bundestag (the lower chamber) and the Bundesrat (the upper chamber). Meanwhile members of the Bundestag are directly elected by the electorate,[183] the Bundesrat consists of members appointed by the Land governments who hold a state office in their federal state.[184] As a default rule each Land has at

[177] *Id.* at 73–75.
[178] Szalai, *supra* note 176.
[179] Dezső, *supra* note 10, at 349.
[180] *Id.*
[181] Formally the constitution which was in force before the Fundamental Law bore the title of Act XX of 1949 on the Constitution of Hungary adopted already under the socialist regime. However, the 1949 constitution was significantly modified by the Act XXXI of 1989, and created in practice a completely new constitution. Therefore those who think that the amendments of the constitution in 1989-90 established a new constitutional system usually refer to the old constitution as the "1989 constitution".
[182] For the different opinions on whether Hungary needs a bicameral system or not see e.g. Szalai, *supra* note 176; András Jakab, *Miért Nincs Szükségünk Második Kamarára?*, POLITIKATUDOMÁNYI SZEMLE 7 (2011).
[183] Article 38 (1) of the German Basic Law.
[184] Article 51 (1) of the German Basic Law.

least three votes in the Bundesrat, but additional votes are granted to Länder based on the number of their inhabitants.[185] The votes of each Land may be cast only as a unit,[186] i.e. deputies of the same Land cannot vote in different ways. This selection method of the Members of the Bundesrat and the special voting rules can result in a different political majority in the Bundestag and the Bundesrat. In other words, if the government of certain Länder share the political affinity of the opposition in the Bundestag, and the deputies of these Länder possess the majority of the votes in the Bundesrat, the two chambers will have a different political orientation. It is a widely shared view in the literature that the position of the opposition in the Bundestag is significantly strengthened if it has a majority in the Bundesrat because it enables the opposition to exercise considerable influence in the legislative process.[187]

The Bundesrat has a strong power in the federal legislative process. If the Federal Government wants to introduce a legislative proposal, it has to be sent first to the Bundesrat which has the right to give its opinion on the proposal.[188] After the adoption by the Bundestag, federal laws have to be submitted to the Bundesrat again.[189] There are two types of federal laws according to the kind of contribution they require from the Bundesrat for their entry into force.[190] In case of approvals bills, the Bundesrat has an absolute veto power, i.e. if the Bundesrat does not give its consent on the bill it will never enter into force.[191] In case of objection bills, the Bundesrat may exercise only a suspensive veto, i.e. the rejection of the Bundesrat may be overridden by the Bundestag.[192] However, if the Bundesrat rejected the bill by a majority of at least two thirds of its votes, it may be overridden by the Bundestag by a same two-thirds majority including at

[185] Article 51 (2) of the German Basic Law.
[186] Article 51 (3) of the German Basic Law.
[187] HEUN, *supra* note 51, at 108, 123; Saalfeld, *supra* note 145, at 160–61; MANFRED G. SCHMIDT, POLITICAL INSTITUTIONS IN THE FEDERAL REPUBLIC OF GERMANY 83–84 (Oxford University Press 2003).
[188] Article 76 (2) of the German Basic Law.
[189] Article 77 (1) of the German Basic Law.
[190] HEUN, *supra* note 51, at 107–8.
[191] Article 78 of the German Basic Law.
[192] Article 78 of the German Basic Law.

least a majority of its members.[193] Those bills which require the consent of the Bundesrat are enumerated by the Basic Law, e.g. laws transferring sovereign powers to the EU,[194] or laws concerning defense.[195] The consent of the Bundesrat is needed for the adoption of a significant number of federal laws.[196] All other federal laws may enter into force despite the veto of the Bundesrat, but in such cases too, the legislative process can be significantly slowed down and the majority of the Bundestag may have troubles with ensuring the required majority to override the rejection of the Bundesrat.

The seriousness of the limitation of the governing majority's power by the Bundesrat can be well illustrated by the following case. In 2005 Chancellor Schröder had a slim majority in the Bundestag and as a result of the state and local elections, the opposition had won a majority of the votes in the Bundesrat.[197] Therefore the Federal Chancellor orchestrated a failed confidence vote and consequently the Bundestag was dissolved by the Federal President. Chancellor Schröder argued that for carrying out the serious reforms by his government, a firm majority was needed in both chambers.[198] However this was an extreme and rather unusual step. In general, the different political composition of the Bundesrat give incentives to the government and the majority in the Bundestag to find a compromise with the members of the upper chamber and the opposition in the Bundestag.[199] The official forum of such consensus-seeking discussions is the Mediation Committee which participates in the legislative process and which is composed of 32 members: 16 delegated by the Bundestag and another 16 by the Bundesrat.[200]

[193] Article 77 (4) of the German Basic Law.
[194] Article 23 (1) of the German Basic Law.
[195] Article 87b (2)
[196] Saalfeld estimated that between 2005 and 2009 about 40 percent of the federal laws needed the consent of the Bundesrat. Saalfeld, *supra* note 145, at 161.
[197] KOMMERS & MILLER, *supra* note 55, at 155–56.
[198] *Id.* at 156; The President accepted the reasoning of the Federal Chancellor, however the presidential order was challanged before the Federal Constitutional Court for violating the Basic Law. The decision no. 114 BVerfGE 121 of the Federal Constitutional Court is found *id.* at 156–61.
[199] HEUN, *supra* note 51, at 108; Saalfeld, *supra* note 145, at 161–62; SCHMIDT, *supra* note 187, at 83.
[200] See Article 77 of the German Basic Law, Rules 89-90 of the GRoP and Rule 1 of the Joint Rules of Procedure of the Mediation Committee attached to the GRoP.

The French parliament is also composed of two houses: the Assemblée Nationale (lower chamber) and the Sénat (the upper chamber). The two chambers have different roles in the political system which is manifested both in the electoral rules and their legislative powers. The Assemblée Nationale is a typical lower chamber, i.e. the representative organ of the whole nation, their members are directly elected by the people.[201] The Sénat has a specific representative character: it represents the territorial communities of the French Republic.[202] The senators are indirectly elected by an electoral college which is composed of the representatives of the different local communities.[203] Besides the difference in the composition of the electorate, the duration of the mandate of the deputies and the senators is not identical either. Meanwhile all the deputies in the Assemblée Nationale are elected at the same time and their mandate expires after five years,[204] the senators are elected for six years and half of the Sénat renews in every three years.[205] These differences in the electoral rules may guarantee that the majorities of the two houses have a dissimilar political affinity. It is observed that in periods of different political majorities, the Sénat can exercise pressure on the governing majority of the Assemblée Nationale and strengthen the position of the opposition in the lower chamber.[206] However, based on the data on the composition of the Sénat under the Fifth Republic[207] we can observe that the relative strength of the political groups compared to each other was quite consistent over time. Due to the composition of the electoral college, the Sénat had an in-built right-wing majority for a long time, mainly because the electoral college over represents the rural areas of the country having a typically conservative political affinity.[208] The very first time

[201] Article 24 of the French Constitution.
[202] Article 24 of the French Constitution.
[203] Article L279-L281 of the Code électoral.
[204] Article LO 120-122 of the Code électoral.
[205] Article LO 275-276 of the Code électoral. The electoral rules (the duration of the mandate, the number of senators, the periods of renewal, etc.) have been amended by the organic law no. 2003-696 of 30 July 2003.
[206] ELGIE, *supra* note 90, at 169–70.
[207] The composition of the Sénat according to the parliamentary groups is available: http://www.senat.fr/evenement/archives/D50/index.html (16.12.2015. 06:40)
[208] ELGIE, *supra* note 90, at 153–54.

in the history of the Fifth Republic when the Sénat had a left-wing majority was after the 2011 elections.[209] Consequently, the Sénat has functioned as a protector of the opposition powers so far vis-á-vis left-wing governing majorities.[210]

In light of Article 45 (1) of the French Constitution we may have the impression that the two chambers of the French legislature have equally shared powers, i.e. that the Sénat has the same powers in the legislative process as the National Assembly,[211] because it provides that every bill shall be considered successively in the two houses for the adoption of the bill in identical terms. However, if we take a closer look on the details of the regulation and the parliamentary practice, it becomes apparent that in fact the Sénat is subordinated to the Assemblée Nationale and that the process is dominated excessively by the government.[212] As a general rule, the government can chose to introduce the bill in the Assemblée Nationale or the Sénat.[213] Once the bill is adopted by one chamber, it travels to the another one, which may adopt the transmitted version or may amend it; in case of amendment, the amended bill goes back to the first chamber and this shuttle may go on and on forever, until the two chambers adopt the bill in identical terms.[214] This rule certainly gives the Sénat a powerful position in the legislative process, but this position is severely weakened by Article 45 (2) of the French Constitution which provides that if the two houses fail to agree on the text of the bill, the government has the right to convene a joint committee, the so-called "commission mixte paritaire" or CMP.[215] The CMP is a parliamentary commission having the role of furthering a compromise between the chambers. In accordance with this role it is a parity committee, i.e. it is composed of equal number of

[209] Levade, *supra* note 151, at 115.
[210] It is because in 2011 both the Sénat and the Assemblé Nationale had left-wing majorities.
[211] ELGIE, *supra* note 90, at 157.
[212] ELGIE, *supra* note 90.
[213] Article 39 (2) of the French Constitution. However the same provision stipulates that finance bill and social security financing bills have to be introduced in the Assemblée Nationale; bill on the organization of territorial communities, on the contrary, start before the Sénat.
[214] AVRIL ET AL., *supra* note 157, at 250.
[215] If the bill is considered in an accelerated legislative process, the government may have recourse to this possibility after the first reading by both houses. See Article 45 (2) of the French Constitution.

members from each house:[216] seven from the Sénat and another seven from the Assemblée Nationale.[217] The members appointed by the chambers shall preferably reflect the political make-up of the houses (respectively) and represent all of their members.[218] The task of the CMP is to work out a version of the bill which will probably be adopted by the two chambers. After the CMP has reached a success, the government has the right to decide whether to submit this version of the bill to the houses or not.[219] In case of a positive decision, the submitted version of the bill cannot be amended without the consent of the government.[220] However, if the chambers still fail to adopt the text elaborated by the CMP, the shuttle can start again. For the sake of effective operation of the legislative process, the constitution entitles the government to resolve the stalemate. If the CMP did not succeed in finding a compromise, or the version of the bill elaborated by the CMP was not adopted after a further reading in the two chambers, the government has the right to give the final say to the Assemblée Nationale.[221] Not only has the Assemblée Nationale the right to decide at last resort, it can also decide whether to consider the text drafted by the CMP, or the last text adopted by itself (maybe together with the suggested amendments of the Sénat).[222]

It is observed that two philosophies compete with each other behind these provisions. On the one hand, the regulation promotes the dialogue between the chambers, and consequently the enforcement of the legislative powers of the Sénat and the strengthening of the opposition in the Assemblée Nationale as its collateral effect.[223] On the other hand, the rules ultimately give preference to the prerogatives of the government and the will of the governing majority in the

[216] Article 45 (2) of the French Constitution.
[217] Article 111 1. of the FRoP.
[218] Article 111 2. of the FRoP.
[219] Article 45 (3) of the French Constitution.
[220] Article 45 (3) of the French Constitution.
[221] Article 45 (4) of the French Constitution.
[222] Article 45 (4) of the French Constitution.
[223] AVRIL ET AL., *supra* note 157, at 260.

Assemblée.[224] Consequently, even though the governing majority can push through its own will and reject the amendments of the Sénat, it is still forced to cooperate with the other chamber and the length of the proceeding resulting from the resistance of the upper chamber may give incentives to the governing majority to cooperate with the Sénat and the opposition. Quantitative data show that in fact the vast majority of the bills are adopted without having recourse to give the final say to the Assemblée Nationale.[225]

III.3. Distribution of seats and chairmanship positions in legislative committees

In its original form, parliament was one huge space where all the deputies gathered and made decisions.[226] However *"[a]s the state and law's role in social engineering increased, parliaments were forced to develop into complex organizations, enabling them to handle complex and large scale issues."*[227] Consequently, in modern parliaments a vast amount of legislative work is carried out in (legislative) committees,[228] hence they have become vital components of the legislative process.[229] The delegation of the legislative work from the plenum to the committees can be seen as a positive development with regard to the powers of the opposition[230] for the following reasons. The work in the committees is less public and *"[p]aradoxically, this less public nature of the committees enabled them to preserve something from the original value of parliamentary debates."*[231] This less public nature implies that committee members can concentrate less on the persuasion of the voters and more on the

[224] *Id.*
[225] Avril et. al. presents data according to which the Assemblée Nationale adopted the bill on the basis of Article 45 (4) of the French Constitution only in 11,39% of the cases between 1959 and 2013. However, it has to be emphasized that given the in-built right-wing majority of the Sénat, in periods of a right-wing majority in the Assemblée Nationale, the control function of the upper chamber was obviously less significant. *Id.*
[226] SAJÓ, *supra* note 2, at 140.
[227] *Id.* at 140–41.
[228] There can be several types of committees in legislatures, e.g. committee of inquiry, committee charged with the nomination of certain public dignitaries, etc. In the framework of this thesis I focus solely on legislative committees participating primarily in the legislative work of the parliament.
[229] SAJÓ, *supra* note 2, at 140; OLSON & MEZEY, *supra* note 5, at 14.
[230] Cf. Fontana, *supra* note 7, at 571–72.
[231] SAJÓ, *supra* note 2, at 141.

persuasion of the fellow MPs, in other words, professional policy considerations can play a more important role in the debate than the continuous repetition of meaningless political slogans on the floor.[232] It is also observed that partisanship and party discipline is more relaxed in committees than on the floor.[233] Consequently parliamentary committees seem to be appropriate fora for the opposition to make an impact on the decision-making process, however the degree of the influence the opposition can exercise in the committees depends on the following four factors.

First, legislative committees may operate permanently (i.e. throughout the duration of the mandate of the legislature) or on an ad-hoc basis (i.e. set up for the purpose of examining only certain legislative proposals or only for a limited period of time). Permanent committees are said to be more effective because their members have the time to acquire expertise in specific policy areas and develop contacts with the other relevant actors playing a role in the legislative process in the specific area (e.g. trade unions, representatives of the ministry in charge, etc.).[234] Consequently permanent committees can become more active and more autonomous participants in the legislative process[235] since they have the necessary expertise and contacts and rely less on the information provided by the government.

The second variable is the structure of the committee system. If the committees mirror the structure of the government, i.e. the fields of work of the different committees are related to the fields of work of the different ministries, they can exercise a more effective control over the government because MPs sitting in the competent committees will possess the necessary

[232] *Id.* at 142; OLSON, *supra* note 3, at 66, 140.
[233] OLSON, *supra* note 3, at 67.
[234] OLSON & MEZEY, *supra* note 5, at 15; Kreppel, *supra* note 3, at 131.
[235] OLSON & MEZEY, *supra* note 5, at 15; Kreppel, *supra* note 3, at 131.

knowledge and expertise to meaningfully examine the legislative proposals related to their field of work.[236]

As Olson summarized the importance of the previously mentioned two variables: *"the permanent committees that parallel the structure of the ministries have the greatest possibility for independent thought and action on legislation."*[237] However two variables have to be added if we want to assess the degree of influence that the opposition can exercise in the legislative process.

The third variable is *"the order in which proposals move between the full plenary and the committees."*[238] One the one hand, committees may function only as administrative units implementing the decisions of the plenary if the legislation is fully vetted to the plenum.[239] On the other hand, the committees can be more influential if proposals are reviewed and may be amended by them before the final vote on the floor.[240]

The fourth variable is the principles of the distribution of committee seats and chairmanship positions among the MPs. Based on the classification of Smuk, the following four principles can be mentioned: 1) parliamentary positions may be distributed according to the order of the strength of the parliamentary factions, i.e. the largest faction has the right to appoint an MP to the position; 2) the proportionality principle requires that parliamentary positions be distributed according to the size of the factions, i.e. each faction get a certain number of positions based on their relative strength; 3) the parity principle ensures that the positions are distributed between the governing majority and the opposition factions equally; 4) the equality principle means that every faction get the same number of positions regardless of their relative strength.[241]

[236] OLSON & MEZEY, *supra* note 5, at 15; Kreppel, *supra* note 3, at 131.
[237] OLSON, *supra* note 3, at 60.
[238] Kreppel, *supra* note 3, at 134.
[239] *Id.*
[240] *Id.*
[241] SMUK, *supra* note 8, at 106–9.

To sum up these four variables, for the parliamentary opposition the most advantageous (but not necessarily the most realistic or reasonable) scenario would be the application of the proportionality, the parity or the equality principle as to the distribution of committee chairmanship positions and either the parity or the equality principle as to the committee seats in a committee structure which mirrors the structure of the government and in committees functioning on a permanent basis and having the power to review and amend the legislative proposals before the final vote on the floor.

Following the four variables discussed above, the Hungarian parliamentary committee system can be analyzed as follows. First, the Fundamental Law itself stipulates that the Hungarian National Assembly shall establish standing committees – operating on a permanent basis – consisting of MPs.[242] Standing committees are organs of the National Assembly charged with – inter alia – putting forward initiatives, making proposals, and delivering opinions.[243]

Second, the Fundamental Law does not, but the HAoP does regulate the structure of the committee system. It provides that the scope of competence of the standing committees shall be aligned with the fields of competencies of the government.[244] Besides this general provision, the act stipulates that the establishment of standing committees dealing with constitutional, budgetary, foreign policy, European Union, national defense, national security and national policy issues is mandatory, otherwise the National assembly is entitled to establish, transform and abolish standing committees at any time.[245] The exact number of standing committees and their fields of competence are decided by the plenary session according to the agreement of the

[242] Article 5 (3) of the Fundamental Law of Hungary.
[243] Article 15 (1) of the HAoP; for the English formulation of the cited provisions of the HAoP I use sometimes the English translation of the HAoP which is available here: http://webcache.googleusercontent.com/search?q=cache:fe9iIPpRC28J:www.parlament.hu/documents/125505/138409/Act%2BXXXVI%2Bof%2B2012%2Bon%2Bthe%2BNational%2BAssembly/b53726b7-12a8-4d93-acef-140feef44395+&cd=1&hl=hu&ct=clnk&gl=hu (08.12.2015. 15:15)
[244] Article 16 (1) of the HAoP.
[245] Article 16 (2)-(3) of the HAoP.

faction leaders (taking into account the opinion of the independent deputies), or if such agreement has not been reached, upon the motion of the Speaker taking into account the proposals of the faction leaders.[246] Besides these standing committees, there is another permanently functioning committee participating in the legislative process: the committee on legislation which has the primary role of guaranteeing that proposals remain in accordance with the provisions of the HRoP. There are currently 13 standing committees (and the committee on legislation) operating in the Hungarian National Assembly and 10 ministries compose the government.[247] If we compare the list of the committees and that of the ministries,[248] we can see that the committee system mirrors the structure of the government only to a limited extent, some of the committees have very broad competences while others focus on very specific areas.

As to the third variable, both the standing committees and the committee on legislation have the right to review the legislative proposals and to propose their amendments before the final vote on the floor. To put it very briefly, the legislative process starts with the general debate on the floor,[249] than the legislative proposal is sent to one of the standing committees where the detailed debate takes place. The standing committee has the right to give its opinion on the proposals for amendment already submitted before the phase of the detailed debate and may also propose further amendments itself.[250] Than the proposal travels to the committee on legislation charged with assessing the opinion and the proposed amendments of the standing committee and may also propose further amendments itself.[251] The proposal, together with the opinions and the amendment proposals of the standing committee and the committee on

[246] Articles 2 (2) h) and 18 (1) of the HAoP.
[247] The number and the name of the committee are available on the official website of the Hungarian National Assembly: http://www.parlament.hu/az-orszaggyules-bizottsagai (08.12.2015. 15:30).
[248] See the official website of the government: http://www.kormany.hu/en (18.12.2015. 14:52) and the list of committees on the official website of the Hungarian National Assembly: http://www.parlament.hu/az-orszaggyules-bizottsagai (18.12.2015. 14:52).
[249] Article 34 (2) of the HRoP.
[250] Articles 44 (3) and 45 of the HRoP.
[251] Article 46 of the HRoP.

legislation gets back to the plenary for a final debate and vote.[252] Standing committees have an important, sometimes determinant influence on the decision of the plenary session of the Hungarian National Assembly, therefore the active and meaningful participation of the parliamentary opposition in these standing committees has crucial importance.[253]

As to the fourth variable, we have to examine separately the distribution of committee seats and the chairmanship positions. We can say that in general the committee seats are distributed among the MPs according to the proportionality principle.[254] According to the interpretation of the Constitutional Court of Hungary, the composition of the standing committees has to reflect the composition of the National Assembly as a whole (including the independent MPs) and not just the relative strength of the factions.[255] This is reflected in the regulation as follows. *"The number of Members from each parliamentary group acting as members in the work of a standing committee shall preferably be proportionate with the rate of the number of members of the parliamentary groups."*[256] The HAoP further provides that each MP – except those MPs who are members of the government or under-secretaries of state – shall be granted the possibility of participating in a standing committee.[257] The number of its members and the composition of the committees are decided by the plenary according to the agreement of the faction leaders (taking into account the opinion of the independent deputies), or if such an agreement has not been reached, upon the motion of the Speaker taking into account the proposals of the factions leaders.[258] As a result, in principle all the factions are represented in

[252] Article 47 of the HRoP.
[253] SMUK, *supra* note 8, at 109.
[254] It is worth mentioning that the law gives parliament the possibility of deviating from the proportionality principle and applying the parity principle, however this rule is not applied in practice. To be more precise, not applied with regard to standing committees participating in the legislative process, however e.g. the committee on parliamentary immunity and discipline is a parity committee based on Article 17 (4) of the HAoP.
[255] The jurisprudence of the Constitutional Court is analyzed by Péter Smuk, see SMUK, *supra* note 8, at 110–11.
[256] Article 17 (1) of the HAoP. The translation of the legal provision can be found here: http://webcache.googleusercontent.com/search?q=cache:fe9iIPpRC28J:www.parlament.hu/documents/125505/138409/Act%2BXXXVI%2Bof%2B2012%2Bon%2Bthe%2BNational%2BAssembly/b53726b7-12a8-4d93-acef-140feef44395+&cd=1&hl=hu&ct=clnk&gl=hu (08.12.2015. 16:27)
[257] Article 17 (2) of the HAoP.
[258] Article 18 (1) of the HAoP.

the committees, but it is not a constitutional requirement that all factions be represented in all committees if e.g. a certain faction has only a few members.[259] Given the relatively large number of standing committees (13 plus the committee on legislation), the relatively small number of deputies (199) and the huge differences in the numbers of each faction[260] the composition of the committees reflect the plenary only to a limited extent and the distribution of seats usually favors the governing majority.[261]

The proportionality principle does not apply to the distribution of chairmanship positions. The chairmen (and deputy chairmen) are elected by the plenary according to the agreement of the faction leaders (taking into account the opinion of the independent deputies), or if such an agreement has not been reached, upon the motion of the Speaker taking into account the proposals of the factions leaders.[262] According to the parliamentary custom, the chairmanship positions are filled usually with MPs from the governing majority, however certain committees are chaired by opposition MPs based either on parliamentary tradition or legal provisions.[263] It is also a long-standing practice that the plenary decides to elect more than one deputy-chairman who belong usually to the parliamentary opposition.[264]

In the German jurisdiction the relevant rules – although quite similar to the Hungarian ones – give us a somewhat different picture. First, committees of the Bundestag participating in the legislative process function on a permanent basis. As Rule 54 of the GRoP provides: *"The*

[259] Zoltán Szente, *Az Országgyűlés Belső Szervezeti Tagozódása*, *in* AZ ALKOTMÁNY KOMMENTÁRJA 21. §, [40] (András Jakab ed., Századvég 2009) Under the current regulation a parliamentary faction may be composed in certain cases only of three members whereas the number of standing committees is 13.
[260] According to the results of the 2014 general elections the smallest faction had 5 members, meanwhile the largest faction had 133 members. The data are available on the official website of the National Election Office: http://www.valasztas.hu/hu/ogyv2014/861/861_0_index.html (08.12.2015. 16:58)
[261] Cf. SMUK, *supra* note 8, at 111–12.
[262] Article 18 (1) of the HAoP.
[263] SMUK, *supra* note 8, at 111–12.; Currently 5 out of the 13 standing committees participating in the legislative process is chaired by an opposition MP (the committee on the budget, the cultural committee, the committee on the development of enterprises, the sustainable development committee and the committee on national security). The list of the committees and their members is available on the official website of the Hungarian National Assembly: http://www.parlament.hu/bizottsagok-honlapjai (08.12.2015. 17:21)
[264] Szente, *supra* note 259, at [45].

Bundestag shall set up permanent committees for the preparation of its deliberations." These committees are set up at the start of each legislative term for its whole duration.[265]

Second, in general the committees mirror the image of the government, i.e. each committee has a related ministry, however there are certain exceptions to this general rule.[266] The structure of the committee system is partly determined by law; the establishment of some permanent committees is required by the Basic Law itself – such as the committee on European Union and the committees on foreign affairs and defence –, others must be set up based on different legal provisions – such as the committee on the budget.[267] Otherwise the Bundestag is free to decide the number and the field of work of its standing committees.[268] There are currently 21 standing committees participating in the legislative process,[269] and 14 ministries in the federal government.[270] A comparison of the list of the committees and the ministries show a much clearer relationship between them than the Hungarian system.

Third, these standing committees participate actively in the legislative process. As Rule 62 of the GRoP puts it: *"As bodies responsible for preparing the decisions of the Bundestag, they shall be under a duty to recommend to the Bundestag definite decisions…"* The committees join the legislative process at the following stages[271]: after the consideration of the legislative proposal by the Bundesrat, the Bundestag follows a three reading decision-making process.[272] The first reading is a short phase, its primary purpose is to refer the proposal to a standing committee. Then, the draft bill is discussed in depth in the standing committee. At the end of the discussions the committee formulates its recommendation to the Bundestag. The committee

[265] Steffani, *supra* note 145, at 281.
[266] SCHICK & SCHREINER, *supra* note 147, at 25.
[267] Steffani, *supra* note 145, at 281.
[268] *Id.*
[269] The official website of the Bundestag: www.bundestag.de/htdocs_e/bundestag/committees (18.12.2015. 15:04)
[270] The official website of the German Federal Government: www.bundesregierung.de/Webs/Breg/EN/FederalGovernment/Ministries/_node.html (18.12.2015. 15:04)
[271] This description shows the legislative process in case of legislative proposals introduced by the government.
[272] For a comprehensive and clear description of the legislative process see HEUN, *supra* note 51, at 107–8.

may recommend that the bill be rejected or adopted; in the latter case that the bill be adopted in its original form, together with the committee amendments or in another version worked out by the committee.[273] This recommendation of the committee forms the basis of the subsequent phases of the legislative process (second and third reading).

The importance of the committees in the legislative work of the parliament is emphasized in the literature as well: *"Although the formal decisions are reserved to the plenary sessions and delegation of power is formally restricted, in practice the substance of the decisions is determined in the committees."*[274] Furthermore, it is observed that in these committees the formation of inter-party majorities and a non-partisan style of decision-making is not rare, consequently standing committees can be regarded as suitable fora for the opposition to have an impact on the legislative proposal – however it must be added that committee decisions usually reflect the will of the parliamentary majority.[275]

Fourth, as a general rule both the committee members and the chairmen are appointed according to the proportionality principle. As Rule 12 of the GRoP formulates: *"The composition of the (…) committees as well as the appointment of the chairpersons of the various committees shall be in proportion to the strength of the parliamentary groups."* The wording of this rule may give us the impression that only factions members may participate in committees. However, the Federal Constitutional Court, in its Wüppesahl case (1989) ruled that the principle of free and equal mandate requires that independent MPs be also allowed to become committee members.[276] The current version of the GRoP provides that every MP shall in principle serve in

[273] SCHICK & SCHREINER, *supra* note 147, at 98.
[274] HEUN, *supra* note 51, at 104 See also; Steffani, *supra* note 145, at 282.
[275] Saalfeld, *supra* note 145, at 167.
[276] The English translation and the analysis of the Wüppesahl case (decision no. 80 BVerfGE 188 of the Federal Constitutional Court) can be found in KOMMERS & MILLER, *supra* note 55, at 227–28.

a committee; committee members are appointed by their parliamentary groups, the independent deputies are appointed by the President of the Bundestag.[277]

The proportionality principle in the distribution of committee seats *"is intended to ensure that parliamentary committees replicate on a smaller scale the composition of the plenum in its concrete organizational form characterized by the Fraktionen."*[278] The Federal Constitutional Court acknowledged that the Bundestag has discretion in allocating committee seats so that their composition express the majority of the governing coalition if the strict application of the proportionality principle together with the equality principle resulted in a stalemate between the majority and the opposition.[279] The only exception is that independent members must be guaranteed to become a committee member but only with limited rights: they have the right to speak and to table motion, but not to vote.[280] The Federal Constitutional Court summarized the relevant principles as follows:

> "The principle of proportional representation ceases as a right to equality and protection of minority rights at the point, so to speak, where decisions are made on the substance of a matter. Only in this way can the majority of the representatives prevails so that the formation of the democratic will can manifest itself as the will of the majority. (…) Therefore also in committees, deviation from the equality principle is permitted if this is the only way to ensure to reach substantive decisions having a realistic of corresponding to the will of a political governing majority.[281]

Formally, chairpersons are appointed by the committees in accordance with the agreements of the parliamentary groups worked out in the Council of Elders.[282] The application of the proportionality principle enshrined in Rule 12 of the GRoP means that opposition factions also get chairmanship positions. The factions can agree on which

[277] Rule 57 (1)-(2) of the GRoP.
[278] Quote from the English translation of decision no. 112 BVerfGE 118 of the Federal Constitutional Court (also known as the Mediation Committee Seat Assignment Case) in KOMMERS & MILLER, *supra* note 55, at 229.
[279] *Id.* at 230.
[280] SCHICK & SCHREINER, *supra* note 147, at 27.
[281] Quote from the English translation of decision no. 112 BVerfGE 118 of the Federal Constitutional Court in KOMMERS & MILLER, *supra* note 55, at 231–32.
[282] Rue 58 of the GRoP. The Council of Elders is an organ of the Bundestag which consists of the President, the Vice-Presidents and 23 further Members appointed by the parliamentary groups; see Rule 6 of the GRoP.

committee goes to which group, or if such an agreement cannot be reached, the factions can chose according to their rank order; usually the larger factions get the most important committees and traditionally the budget committee is chaired by an MP from the largest opposition faction.[283] The deputy chairmen have to belong to another parliamentary group than that of the chairman, so even if a committee is chaired by a majority MP, the opposition certainly participate in the leadership as well.[284]

If we look at the big picture, the French regulation is roughly similar to the Hungarian and the German one, with a few differences. Such a difference comes up already with regard to the first factor to be examined. A 1958 French constitution deviated from the French parliamentary tradition in the sense that it made the participation of specialized ad hoc committees (instead of permanent committees) a general rule in the legislative process.[285] Only the 2008 constitutional reform reversed the order of these two types of committees[286] and consequently Article 43 provides that legislative proposals shall be examined by the standing committees as the principle rule, and by ad hoc committees only at the request of the government or the chamber. Second, not only have standing committees a clear constitutional basis, but also their exact number is specified by the constitution which says that it shall not exceed eight in each house.[287] The fields of competence of these committees may freely be determined by the Assemblée Nationale, however the constitution requires the set-up of a committee dealing with European Union matters.[288] We can find an exhaustive list of the permanent committees in the FRoP.[289] The number of committees fixed in the constitution and the fields of their competences fixed in the FRoP gives a certain rigidity to the system which can make it difficult for the committees

[283] Steffani, *supra* note 145, at 285.
[284] *Id.*
[285] AVRIL ET AL., *supra* note 157, at 124–25.
[286] *Id.* at 125.
[287] Article 43 (2) of the French Constitution.
[288] Artice 88-4 of the French Constitution.
[289] Article 36 of the FRoP.

to effectively carry out the duties. In addition, there are currently 16 ministries in the French government[290] which is the double of the number of committees.[291] In the Hungarian and the Germany jurisdictions – even though the committee structure does not reflect perfectly the government – there are more committees than ministries, but in France it is reversed which means that committees have very broad fields of competence.[292] This can significantly decrease the ability of the committees (and of the opposition) to effectively participate in the legislative process.

Third, the standing committees participate actively in the legislative process and can exercise influence on the content of legislative proposals. The constitution itself provides that legislative proposals shall be referred to one of the standing committees.[293] In accordance with the constitutional provision, the FRoP stipulates that every legislative proposal tabled before the Assemblée Nationale shall be referred for consideration to the relevant standing committee.[294] Although Article 44 of the French constitution entitles the individual MPs and the government to propose amendments, according to the parliamentary practice – which has never been found unconstitutional by the Conseil Constitutionnel – the committees can also exercise this right.[295] Consequently, the committees are not only entitled to discuss the substance of the bill and the amendments proposed by the MPs and the government,[296] but may also propose amendments themselves. After the examination of the text and the amendments the task of the committee is to submit a report to the plenary in which the committee shall recommend the adoption, rejection or modification of the bill.[297] The plenary may only discuss that version of the text

[290] The official website of the French Government: www.gouvernement.fr/en/composition-of-the-government (18.12.2015. 15:49)
[291] Before the 2008 constitutional revision the number of committees was maximized in six. AVRIL ET AL., *supra* note 157, at 125.
[292] ARDANT & MATHIEU, *supra* note 63, at 457.
[293] Article 43 (1) of the French Constitution.
[294] Article 83-6 (1) of the FRoP.
[295] AVRIL ET AL., *supra* note 157, at 233. However, at the later stages of the process the committees are explicitly entitled to move amendments to the text passed by the committee. Article 98 of the French Constitution.
[296] Artices 86 (6) and 88 (2) of the FRoP.
[297] Article 86 (3) of the FRoP.

passed by the committee,[298] so as a general rule the committees cannot be left out from the legislative process and they can have a significant impact on the content of the bill (especially from 2008)[299]. This is further confirmed by empirical observations stating that a significant percentage of the amendments adopted by the Assemblée Nationale is proposed by the permanent committees.[300] Thus the importance of committees for the opposition is evident.

As to the fourth variable, different principles are applicable to the distribution of committee seats and the appointment of committee chairs. Starting with the committee seats, the distribution goes as follows. The FRoP provides that *"[t]he maximum number of members of each committee shall be equal to one eight of the total number of member of the House and shall be rounded up to the nearest number."*[301] So the committees have a relatively fix number of members which is around 73.[302] Parliamentary groups are granted a number of seats in proportion to their relative strength in the plenary.[303] After the distribution of the seats among the parliamentary groups, the remaining positions are allocated to independent MPs.[304] Consequently, the committee seats are distributed according to the proportionality principle. Given the small number of committees (8) and the large number of MPs (577), it can be ensured that every faction be represented in every committee.[305]

The proportionality principle does not apply to the distribution of chairmanship positions which is in the hands of the majority.[306] Only the Finance, General Economy and Budgetary Monitoring Committee is chaired by a member of an opposition faction on the basis of Article

[298] Article 42 (1) of the French Constitution.
[299] Before the 2008 constitutional reform the plenary held the debate on the original text introduced by the government. ARDANT & MATHIEU, *supra* note 63, at 458.
[300] Between 50 and 60%. AVRIL ET AL., *supra* note 157, at 233.
[301] Article 36 (19) of the FRoP.
[302] AVRIL ET AL., *supra* note 157, at 126.
[303] Article 37-4 (2) of the FRoP.
[304] Article 37-4 of the FRoP.
[305] Even the smallest faction has 15 members. See the official website of the Assemblé Nationale: www.assemblee-nationale.fr/14/tribun/xml/effectifs_groupes.asp (18.12.2015. 17:03)
[306] ARDANT & MATHIEU, *supra* note 63, at 457.

39 (3) of the FRoP. However, the FRoP also stipulates that *"every endeavor shall be made to ensure that appointments to the bureau of each standing committee shall reflect the political make-up of the House and represent all of its members."*[307] The bureau of the committee consists of a chairman, four deputy-chairmen and four secretaries.[308] Consequently, the opposition is also allowed to participate in the leadership of the committees to a certain extent.

[307] Article 39 (2) of the FRoP.
[308] Article 39 (2) of the FRoP.

IV. Conclusion

After the analysis of the legal provisions of the different jurisdictions we can make the following remarks and assess the regulation in light of the categorization of opposition powers – worked out by David Fontana and described above – completed with the additional factors of assessment related to the given organizational solutions.

Entities exercising opposition powers

In all of the chosen jurisdictions, parliamentary law assigns certain powers expressly to opposition entities. There are some differences in the regulation, but the following general remarks can be made as to the entities specifically entitled to exercise the opposition powers.

First, the opposition as one unified entity has only an indirect acknowledgement in the chosen jurisdictions, i.e. the opposition as a homogenous political category is present in the rules but it is not regarded as an entity capable of exercising opposition powers in itself. Second, the qualified minority of MPs is given the possibility of exercising certain rights which can be regarded as opposition powers, but in fact these rules are applicable to every MP and neither the qualified minority (as an entity), nor the rights assigned to the qualified minority of MPs are expressly identified as opposition. This may seem a rather irrelevant remark, because we would presume that it is obviously the parliamentary opposition which would have recourse to a power assigned to a qualified minority of MPs and which is usually regarded as an opposition power. However, the previously described examples from Germany (orchestrated no confidence vote in 2005) and France (misuse of Article 49 (3) of the constitution) show that legal institutions can be used against their stated purpose. This is what happened in Hungary in 2009. The liberal-socialist coalition government split up and the socialists alone had only a relative majority in the parliament. In order to regain the permanent support of the liberals and to ensure that the socialists can stay in power, the socialist PM orchestrated a successful vote

of no confidence and as a result another socialist PM was elected who was more acceptable for the liberals.[309] Even though the initiation of a vote of no confidence was the power of a qualified minority and was obviously considered as an opposition power, in 2009 only socialist MPs submitted the motion.[310] Therefore, in order to avoid the misuse of opposition powers, a clear identification of the power and the entity enabled to exercise that power as opposition is necessary.

In the chosen jurisdictions only individual MPs and parliamentary factions are clearly identified as opposition entities entitled to exercise expressly opposition powers. However, independent opposition MPs are defined and/or granted certain powers only on the basis of their belonging to an opposition parliamentary group, which means that the exercise of these rights require the approval of the group. Consequently, opposition parliamentary groups can be seen as the main entities entitled to exercise opposition powers; to a lesser or greater extent, but in all jurisdictions the parliamentary groups have a privileged status and are assigned the vast majority of opposition powers.

Regarding the parliamentary groups as the primary entities enabled to exercise opposition powers may be understandable and advantageous. All of the three jurisdictions have multi-party systems, which indicate that the opposition is likely to be heterogeneous and – as a general rule – cannot be treated as one entity. The different parties in opposition may agree that they disapprove the politics of the governing majority, but may have very different goals and programs, so they could not act in unison to achieve certain common aims. Individual MPs seem to be important actors in the parliamentary decision-making, but – as it was discussed

[309] http://budapesttimes.hu/2009/03/21/pm-no-confidence/

[310] The motion for a vote of no confidence and the related documents are available on the website of the Hungarian National Assembly: http://www.parlament.hu/iromanyok-elozo-ciklusbeli-adatai?p_auth=EkzQNThv&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_irom.irom_adat%3Fp_ckl%3D38%26p_izon%3D9376 (2015. 12. 18 15:23)

above – they are usually just cogs in the legislative machine called parliament, and have little independence from their party and consequently little influence in themselves. Therefore, MPs are inclined to create groups to strengthen their position and enhance their capability of actively participating in the decision-making process. But evidently the strongest ground on which they would assemble together is their commonly shared political affinity which ensures the permanent – or at least long-term – existence of the group. The grouping of MPs on the bases of other than political opinion is much less likely and it may occur only in relation with certain political matters or for a specific political action. Furthermore, the different rules of procedure treat parliamentary groups as the primary organizational form of MPs and allocate the vast majority of rights and duties necessary for the operation of the parliament to them. So from a practical point of view, it makes much sense to assign the opposition powers to parliamentary groups. However, if the long term goal is to enhance the autonomy of the parliament, also the autonomy of MPs, i.e. their independence from the party to take actions, has to be strengthened. Consequently, the rules of procedure should ensure that certain basic opposition rights can be exercised by the individual MPs without the need of approval from their party (e.g. the right to table legislative proposals or amendments). Also, certain very valuable and strong opposition rights (e.g. the right to turn to the constitutional court) may preferably be grated to a qualified minority of MPs in order to promote the cooperation of members of different factions

If the parliamentary group is the primary entity entitled to exercise opposition powers, the conditions of the creation of factions have utmost significance. The formation of parliamentary groups is formulated as a right in every jurisdiction, not an obligation, but the opposition cannot be denied to exercise this right, and once created, the factions can have recourse to the opposition powers regardless of the will of the majority. Hence, this is a strong opposition power. However this could be emptied if the conditions of the creation were unreasonably high or complicated, which is not the case on the chosen jurisdictions.

It may be that in parliamentary practice it is quite self-evident which MPs or groups of MPs belong to the opposition. However, in order to be able to clearly allocate certain opposition powers expressly to opposition entities, it would be useful to identify these entities – preferably on a constitutional level (just like in France). This could ensure the mandatory acknowledgement of opposition entities in the rules of procedure. At the same time, the categorization of these entities should remain sufficiently flexible so that the regulation could remain in line with the changing political reality.

Second chambers

The bicameral structure of the legislatures is based on constitutional provisions, so this organizational solution cannot be disregarded by the parliamentary majority. We could also see that both in Germany and in France the second chambers have an important role in strengthening the opposition in the lower chambers, despite the fact that their powers are not expressly identified as opposition powers. However, due to the different rules on their composition and on their powers in the legislative process, the German Bundestag and the French Sénat play a different role in promoting the opposition.

The Bundesrat can be considered more effective in this respect than the Sénat, primarily for the following two reasons. First, although in both jurisdictions it may occur that the two chambers have a different political majority, the German rules seem to be more suitable to achieve this aim. The rules concerning the composition of the Bundesrat can guarantee that any majority in the Bundestag may face a different majority in the Bundesrat, i.e. it is ensured that the political make-up of the Bundesrat changes from time to time. On the contrary, the French Sénat has had for a long time an in-built right-wing majority, consequently it functioned as a protector of the opposition powers only when the Assemblée Nationale had a left-wing majority. It seems that the primary reason of this difference is that meanwhile the political affinity of the governments of the Länder changes periodically, the rural areas which are over represented in the electoral

college electing the senators in France has a constant and dominantly conservative political affinity. Of course, the exact representative function and hence the rules on the composition of the second chambers are dependent on historical reasons and on the political culture of the given jurisdiction, it should preferably be guaranteed that potentially every governing majority in the lower chamber may face a different political majority in the upper chamber which would back the opposition in the lower house.

Second, both the Bundesrat and the Bundestag have strong powers in the legislative process, but the German upper house has an even stronger position. As a general rule, a legislative proposal should be adopted in identical terms by the Assemblée Nationale and the Sénat, which gives us the impression that the two chamber have equally shared powers. But the fact that the government is entitled to give the final say to the Assemblée Nationale and ultimately to ignore the opinion of the Sénat on a draft bill favors significantly the governing majority at the expense of the opposition. In Germany, the differentiation between approval bills and objection bills guarantee that, although in certain matters the objection of the Bundesrat may be overridden by the Bundestag, in many important cases the consent of the two houses is required. This way of regulation can guarantee that also in case of objection bills the governing majority will have an incentive to actively cooperate with the Bundesrat and the opposition, otherwise the Bundesrat will not give its consent to important approval bills and the government cannot realize certain points of its political program.

I think the Hungarian legislature would definitely need a second chamber in order to be able to resist the will of the government. It is common in the Bundesrat and the Sénat that both of them can at least slow down the legislative process to a certain extent and the government cannot leave them completely out from the task of legislation. As it was mentioned above, the reestablishment of a bicameral system in Hungary has emerged since the change of regime from time to time exactly for the purpose of preventing the parliament from operating as a factory of

statutes, and to promote a more consensus-seeking type of decision-making which could ensure the adoption of long-lasting and stable political decisions. My opinion is that currently nothing can prevent that a stable majority push its will through the parliament without any considerable resistance. The only exception may be the cardinal laws, because their adoption requires a two-thirds majority of the MPs which the governing majority may not possess in itself. But the political practice shows that a consensus can rarely be achieved between a stable political majority and the opposition, hence very often cardinal laws have not been amended or adopted at all.[311]

Committee seats and chairmanship positions

In all of the jurisdictions legislative committees function on a permanent basis and the examination of legislative proposals by an ad-hoc committee is only exceptional. Both the establishment of legislative committees and their participation in the legislative process – which are important for the effective exercise of opposition powers – are based on clear legal provisions, hence the majority cannot ignore them in the legislative process. These are not formulated expressly as opposition powers, but this is quite reasonable. In the followings I will focus only on the structure of the committee system and on the distribution of committee positions, since these are more opposition specific issues.

As to the structure of the committee system, in every jurisdiction – one way or another – the committees mirror a structure of the government, but only to a limited extent. First, the purpose of this way of structuring the committee system is to enable their members to acquire the expertise and contacts necessary for the meaningful examination of government proposals originating in the different ministries. Even though neither in Germany, nor in Hungary does the committee system mirror perfectly the structure of the government, at least there are more

[311] SMUK, supra note 8, at 120-1.

committees than ministries. But if the number of the committees is less than the number of the ministries, the fields of work of the committees will necessarily be very broad preventing them from acquiring the required degree of expertise. For this reason, legislative committees (and consequently the opposition MPs) in the French parliament may face considerable difficulties in carrying out their duties.

Second, requiring the set-up of certain committees on a constitutional level certainly has a positive side, i.e. the majority cannot ignore this constitutional obligation. Therefore I think it is useful that certain committees – or at least their field of competence – are specifically mentioned in the constitutions. However, exhaustively enumerating the fields of competences of the different committees and stipulating their exact number in a legislative act would give the committee system a certain rigidity which could be expressly ineffective because the government may freely decide on the number of ministries and their fields of competences. Consequently, the parliament should enjoy freedom in structuring its own committee system which is guaranteed in every jurisdiction – with the exception that the French parliament may set up only eight committees based on a constitutional provision.

As to the distribution of committee positions, it is common in every jurisdiction that committee seats are allocated to MPs on the basis of the proportionality principle. Although this is not the most advantageous solution from the opposition's perspective, this is fairly understandable in light of the majority principle. It is much more concerning that chairmanship positions are not distributed among factions according to their relative strength. The chairman does not have the right to decide instead of the members, but he/she certainly has an important role in the working and the decision-making process of the committee. This role can potentially enable the opposition to have a stronger bargaining position vis-á-vis the governing majority. Therefore it has utmost importance whether the opposition is given the right to chair certain legislative committees. In this respect the German regulation is the most developed in the sense that the

distribution of chairmanship position among the factions according to the proportionality principle has a clear and mandatory legal basis. In Hungary, the proportional allocation of the positions is based only on parliamentary practice, which constitutes a weaker protection if parliamentary custom is not respected as much as the law. In France only the Finance, General Economy and Budgetary Monitoring Committee is chaired by an opposition MP. This legal obligation is not completed with parliamentary practice, and can be compensated only to a limited extent by the rule stipulating that the leadership of the committee should preferably mirror the composition of the plenum.

Looking forward

In this thesis I argued that one of the ways of strengthening the position of the opposition and enhancing the autonomy of the parliament vis-á-vis the government is the proper design of the internal structure of legislatures. I analyzed three organizational solutions, and it turned out that all of these solutions are suitable of furthering the powers of the opposition, and this is acknowledged to a certain extent in all of the jurisdictions. Future research could concentrate on the potential transplantation of the different solutions into the other jurisdictions.

Besides the deeper analysis of the internal organization of the legislature, I attempt to continue my research focusing on the rights that the opposition could be granted for its effective participation in the legislative process. I think that the followings rights would deserve a throughout examination: right to table legislative proposals and amendments, right to speak, right to block or to slow down the decisions-making of the majority, right to turn to the constitutional court for norm control, right to effective remedy in case of a violation of opposition rights. After the analysis of these rights, we may get a much clearer picture on the actual position of the opposition in the legislative process in parliamentary systems.

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