The misuse of the legislative process as part of the illiberal toolkit. The case of Hungary

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ABSTRACT
The Fidesz-KDNP coalition parties were voted into office in 2010 with a two-thirds majority in the unicameral National Assembly, which gave them significant leeway to implement their political agenda smoothly. Nevertheless, the governing coalition, driven by revolutionary zeal, was determined to put in place major legislative reforms as quickly as possible in the face of every opposition. This attitude led to the instrumentalization of parliamentary legislation which manifested itself in an increasing number of serious irregularities of the legislative process. This article argues that the procedural flaws of parliamentary law-making constitute an infringement of the rule of law principle as it is interpreted in the Council of Europe and the European Union. In order to show that the situation is much more serious in Hungary than the criticisms voiced by the European rule of law mechanisms suggest, we analyze all the constitutional review cases in which legislative acts were challenged on procedural grounds after 2010. Finally, we discuss the outcome of the cases adjudicated by the Hungarian Constitutional Court to see which irregularities were found unconstitutional.

KEYWORDS Hungary; illiberalism; rule of law; irregularities of the legislative process; judicial review of the legislative process; constitutional court

1. Introduction
The Fidesz-KDNP coalition parties were voted into office in 2010 with a two-thirds majority in the unicameral National Assembly, which gave them significant leeway to implement their political agenda smoothly. Nevertheless, the governing coalition, driven by revolutionary zeal, was determined to put in place major legislative reforms as quickly as possible and without any compromise. These legislative measures slowly undermined the basic pillars of a constitutional democracy, namely the system of checks and balances, the effective protection of fundamental rights and the rule of law principle. As a result, Hungary has been labelled as an illiberal political regime in
recent years.\(^1\) The governing majority only used the parliament for implementing its political programme in the form of statutory law. Parliamentary law-making has completely lost its value, it has become nothing more than an instrument in the hands of the government. This ‘instrumentalization of parliamentary legislation’\(^2\) manifested itself in an increasing number of serious irregularities of the legislative process.

The misconduct of the Hungarian governing majority did not escape the attention of the Council of Europe (hereinafter: CoE) and the European Union (EU). The competent bodies of these regional organisations, namely the Venice Commission, the European Commission, the European Parliament and the Council noted with concern several negative trends in the practice of parliamentary law-making in Hungary. These criticisms were framed as part of the systemic violation of the rule of law principle which is a typical feature of the Hungarian illiberal regime.

The list of their objections, however, is far from complete. In fact, the Fidesz-KDNP coalition’s misuse of the legislative process has been manifested in a much larger variety of procedural flaws. Given that this trend is relatively well-documented in the literature,\(^3\) we will turn to another aspect of this issue which has not yet received much attention, namely the analysis of the irregularities of parliamentary law-making in the jurisprudence of the Hungarian Constitutional Court.

Our study has three specific aims. First, we find it important to draw attention to an often-neglected aspect of the rule of law principle, that is the requirement to adopt parliamentary legislation in a legally correct manner.\(^4\) Our aim is to show that the Fidesz-KDNP governing coalition

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1. G. Halmai, ‘The making of “illiberal constitutionalism” with or without a new constitution: the case of Hungary and Poland’ in D. Landau and H. Lerner (eds), Comparative Constitution Making (Edward Elgar 2019); T. Drinóczi and A. Bień-Kacala, ‘Illicit constitutionalism—the case of Hungary and Poland’ (2019) 20 German Law Journal 1140–1166; L. Pech and K.L. Scheppele, ‘Illilberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3–47; R. Uitz, ‘Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary’ (2015) 13 International Journal of Constitutional Law 279–300.

2. V.Z. Kazai, ‘The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary’ (2019) 23 Jus Politicum 237–256.

3. T. Drinóczi, ‘Legislation in Hungary’ in H. Xanthaki and U. Karpen (eds.) Legislation in Europe-A Country to Country Guide (Hart, 2020); V. Z.Kazai, ‘The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary’ (2019) 23 Jus Politicum 237–256; Gy. Gajduschek, ‘A közpolitikai célok megjelenése a jogban’, in A. Jakab and Gy. Gajduschek (eds.) A magyar jogrendszer állapotában (MTA TK JTI, 2016); A. Gyulai, ‘Az Országgyűlés’ in A. Körösenyi (ed.) A magyar politikai rendszer – negyedszázad után (Osiris, 2015); Gy. Müller, ‘A második és harmadik Orbán-kormány döntései rendjének sajátosságairól’ (2014) MTA Law Working Papers 2014/62; Á. Rixer, ‘Az újabb jogalkotás jellegzetességei’ (2012) 1 Kodifikáció 37–54.

4. See in particular the works of Jemery Waldron who argues that in the relevant literature not much attention is paid to the procedural aspect of the rule of law, including the parliamentary legislative process. J. Waldron, ‘The Rule of Law and the Importance of Procedure’ in J. E. Fleming (ed.) Getting to the Rule of Law. Nomos L (New York University Press, 2011). Waldron’s more general argument about the rule of law and the legislative process should be read together with his works on the principles of parliamentary legislation. See J. Waldron, ‘Principles of Legislation’ in R. W. Bauman and
has frequently violated the rules of the law-making procedure and this misconduct was an essential part of its strategy to build an illiberal state. Second, we wish to provide an overview of all the procedural irregularities litigated before the Hungarian Constitutional Court since 2010 to demonstrate that the problem is much more serious than the opinions of the Eu and the CoE bodies suggest. Third, we discuss the outcome of the cases adjudicated by the Hungarian Constitutional Court to see which irregularities were found unconstitutional.

The analysis of the case-law of the Hungarian Constitutional Court offers an adequate means to achieve our goals given that the court’s competence extends to the exercise of procedural judicial review, i.e. the review of the constitutionality of legislative acts based solely on an examination of the enactment process, without considering the substance of the law.⁵ For the purposes of this article only those cases were selected in which (i) parliamentary acts (ii) adopted after the entry into office of the Fidesz-KDNP government (14 May 2010) were challenged (iii) on the basis of irregularities of the parliamentary legislative process (iv) regardless of the type of review procedure. Those cases in which the petitioners alleged the unconstitutionality of the enactment process of constitutional amendments⁶ were not included. The study considers only those decisions and resolutions of the Constitutional Court which were delivered between 2010 and 2019.

Two methods were employed to select the relevant cases. Firstly, we used the search engine of the Hungarian Constitutional Court’s official website and conducted a targeted research focusing on decisions and resolutions with the key term ‘közjogi érvénytelenség’ (public law invalidity, i.e. the Hungarian legal term for procedural unconstitutionality) delivered in the relevant period. To double check the results, we used a subscription-based legal database (Complex Jogtár) to find all the resolutions and decisions delivered in the relevant period mentioning the term ‘közjogi érvénytelenség’ in their reasoning. After having filtered out the manifestly irrelevant results, a total of 31 decisions and resolutions remained. In most of the selected cases multiple legislative acts (or legislative provisions) were challenged on several grounds, including alleged substantive unconstitutionality. Our analysis discusses only those parts of the decisions and resolutions which are

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⁵S. Navot, ‘Judicial Review of the Legislative Process’ (2006) 39 Israel Law Review 182–247; I. Bar-Siman-Tov, ‘The role of courts in improving the legislative process’ (2015) 3 Theory and Practice of Legislation 295–313.

⁶Decisions no. 61/2011. (VII. 13.), 45/2012. (XII. 29.) and 12/2013. (V. 24.). See also F. Gárdos-Orosz, ‘Unamendability as a Judicial Discovery? Inductive Learning Lessons from Hungary’ in R. Albert and B. E. Oder (eds), An Unamendable Constitution? Unamendability in Constitutional Democracies (Springer 2018)
directly related to the issue of procedural unconstitutionality of parliamentary legislative acts.

2. From illiberalism to the irregularities of the legislative process

It may not seem obvious at first sight that the legislative misconduct of the governing majority is strongly related to illiberalism. Nevertheless, we wish to show in the following pages that it is actually very easy to establish a logical connection. As a first step we argue that one of the common features of illiberal states is the systemic violation of the rule of law principle. Then we point out that one of the requirements stemming from the rule of law – as it is interpreted in the CoE and the EU – is the adoption of parliamentary legislation in a legally correct manner. Therefore, the frequent violations of the rules of the legislative process constitute an infringement of the rule of law and as such can be regarded as part of the political elite’s toolkit used to build an illiberal regime.

2.1. The systemic violation of the rule of law principle as a feature of illiberalism

Shortly after the entry into office of the Fidesz-KDNP governing coalition in 2010, the Hungarian National Assembly adopted a resolution declaring the establishment of a new political regime, the so-called System of National Cooperation:

The National Assembly declares that a new social contract was laid down in the April general elections through which the Hungarians decided to create a new system: the National Cooperation System. With this historical act the Hungarian nation obliged the incoming National Assembly and Government to take the helm in this endeavour, resolute, uncompromising and with deliberation, and control the construction of the National Cooperation System in Hungary.\(^7\)

The enactment of this political declaration was a clear sign of the ruling parties’ intention to fundamentally change the political system. One did not have to wait long for the implementation of major legislative and constitutional reforms, including the adoption of a new constitution, the Fundamental Law of Hungary.\(^8\) Many of these changes were strongly criticised

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\(^7\)Resolution no. 1/2010. (VI. 16.) on the Political Declaration of the National Assembly on National Cooperation. An English translation is available at: file:///C:/Users/KVZ/AppData/Local/Temp/political_declaration1.pdf

\(^8\)G.A. Tóth (ed.), ‘Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law’ (CEU Press, 2012); P. Sonnevend and A. Jakab and L. Csink, ‘The Constitution as an Instrument of Everyday Party Politics. The Basic Law of Hungary’ in A. von Bogdandy and P. Sonnevend (eds.) Constitutional Crisis in the European Constitutional Area (Hart, 2015)
by NGOs, Hungarian and foreign scholars, domestic constitutional organs and international organisations. As it is noted by Renáta Uitz, for quite a long time the Hungarian developments were treated as ‘local oddities’ and not as signs of a more general trend, namely the gradual decline of a constitutional system. However, it has become clear over time that due to the reforms put in place by the Fidesz-KDNP ruling coalition, Hungary has degenerated into a type of system which is floating somewhere between a constitutional democracy and an openly authoritarian regime.

Prime Minister Viktor Orbán made no secret of his pride in the achievement of his government when he described Hungary as an illiberal state in 2014:

[W]hat is happening today in Hungary can be interpreted as an attempt of the respective political leadership to harmonize [the] relationship between the interests and achievement of individuals – that needs to be acknowledged – [and the] interests and achievements of the community, and the nation. [...] and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc.. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.

The term ‘illiberalism’ has caught on and it has often been used as a label of the new Hungarian political regime not only in public debate but also in academic discourse. Due to the different approaches to the conceptualisation of illiberalism and its variants (‘illiberal constitutionalism’, ‘illiberal democracy’, ‘illiberal state’ and so on), a commonly accepted definition or an exhaustive list of the particular characteristics of this type of regime and its application to the Hungarian political system has not yet emerged.

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9R. Uitz, ‘Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary’ (2015) 13 International Journal of Constitutional Law 279–300.

10PM Viktor Orbán’s speech delivered on 26 July 2014 at Tusnádfürdő Summer University. The English translation is available at: <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadvurdo-of-26-july-2014/>.

11Zakaria is often credited for coining the term ‘illiberal democracy’. F. Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76 Foreign Affairs 22–43.

12This term is used by legal scholars as well as political scientists. See e.g. P. Castillo-Ortiz, ‘The Illiberal Abuse of Constitutional Courts in Europe’ (2019) 15 European Constitutional Law Review, 48–72; T. Drinóczi and A. Bien-Kacza, ‘Illiberal constitutionalism—the case of Hungary and Poland’ (2019) 20 German Law Journal 1140–1166; G. Halmai, ‘The making of “illiberal constitutionalism” with or without a new constitution: the case of Hungary and Poland’ in D. Landau and H. Lerner (eds), Comparative Constitution Making (Edward Elgar 2019); G.A. Tóth, ‘Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism’ in M. Adams, A. Meuwese, E.H. Ballin (eds), Constitutionalism and the Rule of Law. Bridging Idealism and Realism (CUP 2017) 406–414; L. Pech and K. L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3–47; Zs. Enyedi, ‘Paternalist Populism and Illiberal Elitism in Central Europe’ (2016) 21 Journal of Political Ideologies 9–25.

13What adds to the difficulty of characterizing the Hungarian system is the use of other terms and conceptual frameworks, such as ‘abusive constitutionalism’, ‘autocratic legalism’, ‘authoritarian constitutionalism’, ‘populist constitutionalism’ and so on. For a detailed discussion of the different concepts see e.g. G. A. Tóth, ‘Constitutional Markers of Authoritarianism’ (2019) 11 Hague Journal of the Rule
For example, Gábor Attila Tóth identifies four features of an illiberal constitutional system based on the Hungarian example: (i) the negation of the ideas of secular state and religious neutrality, (ii) an overly nationalistic understanding of the popular sovereignty principle, (iii) the disrespect of the prohibition of retroactive legislation and (iv) the neutralisation of effective judicial review.\textsuperscript{14} Tímea Drinóczi and Agnieszka Bień-Kacala note in their analysis of the recent Hungarian and Polish constitutional developments that ‘[i]lliberal constitutionalism is [...] a state in which the political power relativizes the rule of law, democracy, and human rights in politically sensitive cases; constitutionalizes populist nationalism; and takes advantage of identity politics, new patrimonialism, clientelism, and state-controlled corruption.’\textsuperscript{15} Finally, let us mention Gábor Halmai who argues that in an illiberal system the constitutional organs still exist, but their power is very limited, and even though fundamental rights are listed in the constitution, the guarantees of their protection and enforcement are endangered.\textsuperscript{16}

Despite the differences of scholarly analyses, what seems to be a common denominator is that the systemic violation and the deliberate misuse of the rule of law principle by the governing political elite is one of the typical features of illiberal states. The difficulty is that scholars use somewhat different conceptions of the rule of law principle and therefore they do not have a unified opinion on what constitutes an infringement of the rule of law. Illiberal political leaders are more than happy to capitalise on this diversity of opinions and use it as a justification to introduce their own perverted interpretation of the principle.\textsuperscript{17} Luckily, we do not need to synthesise the various scholarly analyses and harmonise them in order to proceed with our argument because in the following pages we will focus only on one very specific element of the rule of law, namely the requirement to adopt legislation in a legally correct manner.

\textsuperscript{14} G.A. Tóth, ‘Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism’ in M. Adams, A. Meuwese, E.H. Ballin (eds), Constitutionalism and the Rule of Law. Bridging Idealism and Realism (CUP 2017) 406–414.

\textsuperscript{15} T. Drinóczi and A. Bień-Kacala, ‘Illiberal constitutionalism–the case of Hungary and Poland’ (2019) 20 German Law Journal 1140–1166, 1141.

\textsuperscript{16} G. Halmai, ‘The making of “illiberal constitutionalism” with or without a new constitution: the case of Hungary and Poland’ in D. Landau and H. Lerner (eds), Comparative Constitution Making (Edward Elgar 2019) 322. NB Halmai does not use the term “illiberal constitutionalism” because he considers it an oxymoron.

\textsuperscript{17} Even though scholarly analysis has already shown that in the European legal space there is a common understanding of the rule of law. See L. Pech et al., ‘Meaning and Scope of the EU Rule of Law’ (2020) RECONNECT Work Package 7 – Deliverable 2, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf>
2.2. The irregularities of the legislative process as a violation of the rule of law principle

The core argument of this section is very simple: making law in accordance with the rules of the legislative process is one of the essential elements of the rule of law. It follows logically from this statement that the irregularities of parliamentary law-making constitute an infringement of this principle. To substantiate our argument we join that stream of the academic literature which situates the Hungarian illiberal trends within the rule of law backsliding witnessed in the European legal space (i.e. the European Union and the Council of Europe). Hereafter we concentrate on the decisions and opinions of those European bodies which are legally authorised to interpret the rule of law principle and to evaluate the constitutional developments in Hungary, most notably the Venice Commission, the European Parliament, the European Commission and the Council.

Given that Hungary is part of the European Union and the Council of Europe which are explicitly mandated to maintain such important values as democracy, rule of law and human rights, it is not surprising that the legislative reforms put in place by the Fidesz-KDNP coalition to build an illiberal political regime were noticed and criticised by the competent bodies of these regional organisations. Although the vast majority of their criticism targeted the substance of the legislative measures, they also raised concerns about the process in which these decisions were made. Our aim here is to briefly summarise the objections voiced by the EU and the CoE to the practice of law-making of the Hungarian ruling majority and to show that these procedural irregularities can best be framed as violations of the rule of law principle.

Let us start with the Venice Commission, the Council of Europe’s advisory body on constitutional matters that often uses the rule of law principle as a standard to evaluate the legislative reforms carried out by the national governments. In 2016 the Venice Commission adopted a very detailed checklist to provide a tool for an ‘objective, thorough, transparent and equal assessment’ of the rule of law in any given country. According to this Rule of Law checklist the legislative process complies with the requirement of being ‘transparent, accountable, inclusive and democratic’ only if one can give a satisfactory answer to the following questions:

(i) Are there clear constitutional rules on the legislative procedure?

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18See e.g. L. Pech and K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3–47; M. Smith, ‘Staring into the abyss: A crisis of the rule of law in the EU’ (2019) 25 European Law Journal 561–576; P. Bârd and B. Grabowska-Moroz (eds.) The strategies and mechanisms used by national authorities to systematically undermine the rule of law (2021) RECONNECT Work Package 8 – Deliverable 2 (forthcoming).

19Venice Commission, ‘Rule of Law Checklist’ CDL-AD(2016)007
(ii) Is Parliament supreme in deciding on the content of the law?
(iii) Is proposed legislation debated publicly by parliament and adequately justified (e.g. by explanatory reports)?
(iv) Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?
(v) Where appropriate, are impact assessments made before adopting legislation (e.g. on the human rights and budgetary impact of laws)?
(vi) Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?20

Therefore, it is clear that the disrespect of these requirements of the legislative process constitutes a violation of the rule of law principle as it is understood by the Council of Europe. Such procedural irregularities were often detected by the Venice Commission when it was invited to deliver an opinion on several very controversial legislative measures adopted by the Fidesz-KDNP coalition, including the Fundamental Law and subsequent constitutional amendments,21 the acts on the legal status and remuneration of judges and on the organisation and administration of courts,22 the reform of the electoral system,23 the re-regulation of the institutional aspect of religious freedom24 and several laws targeting human rights NGOs25 and higher education institutions.26 The relevant critical remarks show a persistent pattern of legislative misconduct manifested in the following types of procedural flaws.

20Venice Commission, ‘Rule of Law Checklist’ CDL-AD(2016)007, 13.
21Venice Commission, ‘Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary’ CDL-AD(2011)001-e, paras 14–19; Venice Commission, ‘Opinion on the Fourth Amendment to the Fundamental Law’ CDL-AD(2013)012-e, paras. 129–137.
22Venice Commission, ‘Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary’ CDL-AD(2012)001-e, para. 9; Venice Commission: Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules, CDL-AD(2019)004-e, paras. 30–31.
23Venice Commission and OSCE Office for Democratic Institutions and Human Rights: Joint Opinion on the Act on the Elections of Members of Parliament of Hungary, CDL-AD(2012)012-e, para 13.
24Venice Commission, ‘Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary’ CDL-AD(2012)004-e, para 12.
25Venice Commission, ‘Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad’ CDL-AD(2017)015-e, paras. 25–28; Venice Commission and OSCE Office for Democratic Institutions and Human Rights, ‘Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration)’ CDL-AD(2018)013-e, paras. 62, 67–69; Venice Commission and OSCE Office for Democratic Institutions and Human Rights, ‘Joint Opinion on Section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax’ CDL-AD(2018)035-e, paras. 45–46.
26Venice Commission: Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, CDL-AD(2017)022-e, paras. 52–55.
Firstly, the Venice Commission frequently noted that even some of the most important legislative measures, including so-called cardinal acts (i.e. acts that can be enacted and amended only by a qualified two-thirds parliamentary majority) were adopted by the members of the ruling parties in an expedited procedure. In some cases, the Hungarian government did not provide any satisfactory justification for the acceleration of the decision-making process. In addition, it was also pointed out that the very short time-frames prevented any adequate preparation of and genuine deliberation on the legislative proposals.

Secondly, one can find several references in the opinions to the fact that the governing majority did not offer a fair chance to the opposition parties to meaningfully participate in the legislative process. What is more, the ruling coalition deliberately misused its qualified parliamentary majority when it adopted a large number of cardinal acts (i.e. two-thirds majority acts) without any compromise, let alone consensus with the opposition MPs. This practice was criticised, on the one hand, because the very rationale of the qualified majority rule is to encourage a consensus-seeking style of decision-making and, on the other, because the scope of cardinal laws was extended to legislative matters which should have been left to ordinary legislation, such as family, social and taxation policy.

Thirdly, the poor quality of the preparation of legislative proposals was also a regular subject of concern. The Venice Commission denounced several times the lack of preliminary consultation with the relevant stakeholders, including universities and academic institutions, NGOs, interest organisations etc. and the absence of impact assessments. In particular, the opinions criticised the ruling coalition’s practice of introducing major legislative measures in the form of private members’ bills in order to circumvent the executive’s statutory obligation to ensure the adequate preparation of legislative proposals.

Let us turn now to the European Union. According to the European Commission’s consistent interpretation, certain requirements stemming from the rule of law principle apply to the legislative process as well:

The rule of law includes, among others, *principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.*

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27 Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union. State of play and possible next steps’ COM(2019) 163 final, 1 (emphasis added). This definition is built on a previous communication of the Commission. See Commission, ‘Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law’ COM(2014) 158 final, 4.
In light of this definition, it is not surprising that the parliamentary misconduct on the Fidesz-KDNP ruling coalition was criticised several times in the different rule of law mechanisms of the European Union. In September 2018 the European Parliament called on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. This parliamentary resolution echoed the concerns of the Venice Commission when it highlighted the lack of transparency of the constitution-making process, the inadequate involvement of civil society and the absence of sincere consultation.28

In 2020, the Council issued country specific recommendations to Hungary in the framework of the European Semester. This document made reference to several shortcomings of the legislative practice of the governing coalition, such as the insufficient involvement of the social partners in policy initiatives and implementation, the lack of preliminary consultations and impact assessments, the disregard of the executive’s statutory obligation to ensure the adequate preparation of the legislative proposals and the misuse of special legislative procedures (such as private members’ bills and urgent procedures).29

The European Commission formulated very similar objections in its 2020 Rule of Law report on Hungary. It noted with concern that the use of public consultations and impact assessments has diminished, and they are rather formal or symbolic.30 It repeated the criticism of the Council concerning the lack of involvement of the social partners, the quality and predictability of policy-making and the deliberate circumvention of the rules of the legislative process in order to accelerate the decision-making.31

In sum, the adoption of legislation in a legally correct manner is one of the requirements of the rule of law principle as it is interpreted in the Council of Europe and the European Union. The competent bodies of both regional organisations detected a large number of rule of law infringements in Hungary, including the misuse of the legislative process by the Fidesz-KNDP ruling coalition. These procedural irregularities include: (i) the acceleration of the legislative process without satisfactory justification, (ii) the lack of preliminary consultations and impacts assessments due to the deliberate

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28European Parliament, ‘Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))’ P8_TA(2018)0340, Annex, para. 7.

29Council, ‘Recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary’ (2020/C 282/17), para. 28.

30Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. Country Chapter on the rule of law situation in Hungary’ SWD(2020) 316 final, 17.

31Ibid.
circumvention of the executive’s statutory obligation to ensure the adequate preparation of legislative proposals and (iii) the absence of meaningful cooperation with the opposition MPs by abusing the governing parties’ two-thirds parliamentary majority. These are serious concerns, but it is not the whole story. In fact, the Fidesz-KDNP coalition’s misconduct has been manifested in a much larger variety of procedural flaws. Ever since 2010, the government only used the National Assembly for implementing its political programme in the form of statutory law, extremely rapidly and without any compromise which led to the ‘instrumentalization of parliamentary legislation’.\textsuperscript{32}

Given that this trend is relatively well-documented in the literature,\textsuperscript{33} let us turn to another aspect of this issue which has not yet received much attention, namely the analysis of the irregularities of the legislative process in the jurisprudence of the Hungarian Constitutional Court. First, we will take a quick look at the typology and frequency of procedural flaws that have been litigated before the court since 2010. Then we will discuss the outcome of these cases to see which irregularities were declared unconstitutional.

3. Typology and frequency of procedural irregularities in the case-law of the Hungarian Constitutional Court

The principle that the violation of the procedural rules of the legislative process can potentially render a parliamentary act unconstitutional regardless of its substance was established by the Hungarian Constitutional Court in 1997.\textsuperscript{34} The very first judgment striking down a law on the basis of its procedural unconstitutionality was delivered in 2003.\textsuperscript{35} The justices concluded in that case that the President of the Republic’s political veto power was rendered empty by the unwillingness of the MPs to have a genuine deliberation on the President’s concerns with regard to the bill sent back to the National Assembly for further consideration. Ever since the first invalidation of a legislative act on procedural grounds, the Constitutional Court has produced a relatively large, but not particularly activistic jurisprudence in this domain. In the following pages the analysis will focus exclusively on cases adjudicated after the entry into office of the Fidesz-KDNP coalition in 2010 (Table 1).

\textsuperscript{32}V.Z. Kazai, ‘The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary’ (2019) 23 Jus Politicum 237–256.
\textsuperscript{33}See the literature in footnote 3.
\textsuperscript{34}Decision no. 29/1997. (IV. 29.) of the Constitutional Court. The summary of the judgment in English is available at: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1997-1-003?fn=document-frameset.htm$f=templates$3.0>
\textsuperscript{35}Decision no. 63/2003. (XII. 15.)
3.1. Deficiencies of the preparation of legislative proposals

We can find many cases in which the petitioners alleged that the governing majority had failed to comply with the rules on the adequate preparation of legislative proposals. The first category of cases is related to those major structural reforms that the Fidesz government introduced shortly after its entry into office in 2010. One of these early reforms was the re-regulation of the status of government officials and public service officials. Many petitioners challenged the legislation on the ground that neither the national associations representing the interests of government and public service officials nor the National Interest Reconciliation Council was consulted before the introduction of the bill despite the government’s clear obligation.

Table 1. Typology and frequency of irregularities litigated before the Constitutional Court 2010–2019

| Pre-parliamentary phase | Deficiencies of the preparation of legislative proposals (litigated in 13 cases) |
|-------------------------|---------------------------------------------------------------------------------|
|                         | • lack of preliminary consultation                                             |
|                         | • lack of impact assessment                                                     |
| Violation of the hierarchy of norms, lack of adequate legal basis (litigated in 2 cases) |

| Parliamentary phase | The quality of parliamentary work (litigated in 4 cases) |
|---------------------|--------------------------------------------------------|
|                     | • the lack of meaningful parliamentary debate and sufficient time for work    |
| The abusive practices in respect of the lawmaking procedure (litigated in 9 cases) |
|                     | • introduction of legislative proposals as private members’ bills            |
|                     | • abusive practices in respect of exceptional and urgent procedures          |
|                     | • adoption of legislation during an extraordinary session without justification|
|                     | • irregularity of last-minute amendment                                      |
|                     | • irregularities in respect of the reconsideration of the bill after the President of the Republic’s political veto |
| The violation of technical rules of the standing orders (litigated in 4 cases) |
|                     | • irregularities in respect of presiding over the session                    |
|                     | • irregularities in respect of the work of notaries (presiding officers)     |
|                     | • irregularities of the voting procedure                                     |
|                     | • irregularities in respect of placing an item on the agenda                  |
|                     | • lack of vote on amendment                                                  |
|                     | • irregularities of committee of legislation’s proceedings                    |
| Violation of the qualified majority rule (litigated in 11 cases) |

| Post-parliamentary phase | Irregularity in respect of the exercise of the President of the Republic’s political veto (litigated in 1 case) |
|--------------------------|---------------------------------------------------------------------------------------------------------------|

36The National Interest Reconciliation Council was an institutionalized form of tripartite negotiations between the government, the trade unions and the employers’ representatives with limited decision-making and veto power in employment matters. The council was later simply replaced by the National Economic and Social Council which is a purely consultative organ.
set by law which amounted to a violation of the constitution (in conjunction with the EU Charter). 37 In another case, several members of parliament, civil society organisations and individuals initiated the constitutional review of the comprehensive reform of the media sector because they were of the opinion that the lack of public debate and preliminary consultations with the relevant organisations before the submission of the legislative proposal to parliament constituted an infringement of the constitution. 38 A similar argument can be found in the petition of those religious organisations who were deprived of their church status due to a legislative act aimed at the complete reform of the institutional aspect of religious freedom. 39 The last item in the first group of cases was the radical reorganisation of the ombuds system contested by one of the ombudspersons himself who claimed that the abolition of the position of the ‘ombudsman for future generations’ without the mandatory prior consultation with the National Environmental Protection Council was unconstitutional. 40

The second category includes those two cases in which the legislation on the integration of savings cooperative’s was challenged. The first case was initiated by a large number of individuals, banks, savings cooperatives and the National Association of Savings Cooperatives. In the second case, an ordinary judge decided to suspend its proceedings and turn to the Constitutional Court. The petitioners argued that the legislation was contrary to the constitution because the statutory rules and the provisions of the standing orders on the obligatory impact assessment and preliminary public consultations were completely ignored by the government. 41

The third category covers every petition initiating the constitutional review of the legislative acts enacted by the governing majority to tackle the negative consequences of the foreign currency loan crisis. 42 In the first case, several individuals and institutions challenged the legislation on the reimbursement of foreign currency loans on the grounds that it was unconstitutional due to the lack of an impact assessment, a preliminary public consultation with the affected organisations and a sufficiently detailed explanatory memorandum. 43 In the remaining three cases, the petitioners – individuals, legal entities and an ordinary judge – had a somewhat
different argument: the parliament had violated the constitution and EU law by adopting the legislative act on foreign currency loans without waiting for the European Central Bank to deliver its opinion in the mandatory consultation procedure.\textsuperscript{44}

Finally, we need to mention two relatively recent cases. The first was about the legislative act ending government support for the system of home savings accounts\textsuperscript{45} contested by the qualified majority of MPs on the grounds that the bill had not been made publicly available before its introduction, there had been no public consultation on the issue, no impact assessment had been prepared to evaluate the consequences of the decision and the explanatory memorandum was superficial.\textsuperscript{46} The other case concerned the introduction of a so-called solidarity contribution imposed on the municipalities of more populous cities as a sort of redistribution of the financial resources of local governments. The local government of Budaörs asked the Constitutional Court to invalidate the legislation because neither the Fiscal Council nor the State Audit Office had the opportunity to express its opinion on the issue and no impact assessment had been prepared prior to the bill’s submission to parliament.\textsuperscript{47}

### 3.2. Violation of the hierarchy of norms, lack of adequate legal basis

Certain petitions touch upon issues which are not purely procedural questions but are definitely related to the parliamentary legislative process. In the first case the Constitutional Court was requested to review a parliamentary resolution because the petitioners claimed that some of its provisions should have been adopted as part of a parliamentary act since they regulated legislative matters.\textsuperscript{48} In the other case the petitioner alleged, as a rather bold move, the unconstitutionality of several important legislative acts – on the electoral system, the organisation of the judiciary, the status of judges and the Constitutional Court – by arguing that they had been adopted on the basis of the Fundamental Law which itself had been enacted in an unconstitutional procedure.\textsuperscript{49}

### 3.3. The quality of parliamentary work

In this category of cases, the petitioners argued that one of the reasons why the contested legislative acts were unconstitutional was the low quality of the

\textsuperscript{44}Decisions no. 34/2014. (XI. 14.), 3121/2015. (VII. 9) and 3143/2015. (VII. 24.)
\textsuperscript{45}Before the adoption of this legislation act the government supplemented people’s savings accounts to facilitate the purchase of property. https://hungarianspectrum.org/tag/home-savings-accounts/
\textsuperscript{46}Decision no. 24/2019. (VII. 23.)
\textsuperscript{47}Decision no. 3311/2019. (XI. 21.)
\textsuperscript{48}Decision no 27/2017. (X. 25.).
\textsuperscript{49}Resolution no. 3120/2019. (V. 29.).
parliamentary work. Sometimes they referred to the lack of genuine deliberation or noted that the MPs were not engaged in the legislative process in general.\textsuperscript{50} Some petitions, however, pointed to more specific deficiencies, such as the lack or superficial character of committee opinions and the insufficient amount of time granted to MPs to familiarise themselves with the bill and have a meaningful debate on them.\textsuperscript{51}

3.4. The abusive use of the rules of the law-making procedure

In a relatively large number of cases the unconstitutionality of the challenged legislative acts was alleged on the grounds that even though the rules of the legislative process were formally respected, the governing majority used them contrary to their purpose, thus acted arbitrarily. The various legal bases of alleged unconstitutionality can be put in the following broad categories. The first category covers certain major legislative reforms, such as the comprehensive re-regulation of the status of government officials, the media sector, the institutional aspects of freedom of religion and significant changes in the system of home savings accounts. In these cases the petitioners argued that the parliamentary acts were introduced as private members’ bills instead of legislative proposals of the government in order to circumvent the executive’s statutory obligation to prepare a preliminary impact assessment, to publish the bill for public evaluation and to conduct public consultations with the relevant stakeholders during the preparatory phase of the legislative process.\textsuperscript{52}

The second category of cases concerned the abusive practices of the governing majority in respect of last-minute amendments introduced to significant legislative proposals, including the amendment to the act on criminal procedure, the media law, the church law, the act on national wealth and the act on the chambers of economy. It was claimed that these amendments were submitted in order to insert unrelated provisions aiming at the simultaneous modification of a variety of existing statutes (omnibus legislation) and to completely revise the original text of the bill.\textsuperscript{53} The petitioners tried to convince the Constitutional Court that this practice went contrary to the original purpose of the last-minute amendment – i.e. resolving an inconsistency within the text or a potential non-compliance with the constitution – and deprived the deputies of the opportunity to examine and have a genuine deliberation on the final version of the text prior to adoption. A very similar reason of unconstitutionality can be found in another case concerning the act on political advertisement sent back to the parliament by the

\textsuperscript{50}Resolution no. 3163/2019. (VII. 10.) and Decision no. 3311/2019. (XI. 21.).
\textsuperscript{51}Decisions no. 6/2013. (III. 1.) and 20/2014. (VII. 3.).
\textsuperscript{52}Decision no. 8/2011. (II. 18), 165/2011. (XII. 20.), 164/2011. (XII. 20.) and 24/2019. (VII. 23.)
\textsuperscript{53}Decisions no. 166/2011. (XII. 20.), 165/2011. (XII. 20.), 164/2011. (XII. 20.) and 3149/2013. (VII. 24.) and Resolution no. 3089/2013. (IV. 19.)
President of the Republic for further consideration (political veto). The petitioners claimed that the decision of the governing majority to completely revise the bill instead of considering only those issues which had been raised by the President of the Republic was unconstitutional.

The last category is comprised of cases in which those tactics of the governing majority were contested which were used to pass legislation through parliament as quickly as possible. The petitioners claimed that the legislation on the integration of savings cooperatives was not in conformity with the Fundamental Law because nothing justified the adoption of such an important law in an urgent procedure during the extraordinary session of parliament. In a similar vein, the enactment of the legislative act ending government support for the system of home savings accounts in an accelerated process was claimed to be contrary to the rationale of the relevant procedural rules due to the lack of any justification.

3.5. The violation of technical rules of the standing orders

Sometimes the petitioners referred to the violation of rather technical rules of the standing orders which did not seem to have a significant impact on the constitutionality of the whole legislative process. In two cases, however, even the technical irregularities or rather their cumulative effect seriously called into question the validity of the adopted legislation. The first case concerned the church law which was enacted so quickly that several procedural requirements were ignored: (i) after the introduction of the bill in the late hours, it was rapidly put on the agenda next morning, (ii) this move was immediately followed by the general debate, so only a few hours passed between the introduction of the bill and the closure of the general debate, (iii) the deadline for the submission of proposals for amendments expired on the very same day and (iv) the bill was considered during an extraordinary session of the parliament even though it was not listed on its original agenda.

In another case, the qualified minority of MPs challenged two laws enacted in the same procedure, namely the reform of the administrative judiciary and the amendment to the labour law introducing additional hours of overtime without full and immediate compensation. The opposition MPs tried to prevent the plenary from voting on the bills, but the governing majority defeated the obstruction. The alleged unconstitutionality was

54Decision no. 3001/2019. (I. 7.).
55Decision no. 20/2014. (VII. 3.).
56Decision no. 24/2019. (VII. 23.).
57Such as the lack of vote on amendment in Decision 166/2011. (XII. 20.) or the irregularities of committee of legislation’s proceedings in Decision 3001/2019. (I. 7.).
58Decision no. 6/2013. (III. 1.).
based on the grounds that (i) the President of the chamber acted unconstitutionally when he decided to chair the parliamentary session from the benches instead of the Speaker’s podium, (ii) the President of the chamber was assisted by two secretaries from the parties of the governing majority, contrary to the Act on the National Assembly stipulating that one of them shall be selected from an opposition PPG and (iii) the MPs were able to cast a vote without inserting their card into the voting machine, which had potentially led to the manipulation of the results.59

3.6. Violation of the qualified majority rule

In a large number of cases the alleged unconstitutionality was based on the argument that the adoption of the parliamentary act (or certain of its provisions) by the simple majority of MPs in an ordinary legislative procedure violated the qualified majority requirement of the constitution.60 The real constitutional significance of this issue can be understood only if we take into consideration its political context. Ever since their first landslide electoral victory in 2010, the Fidesz-KDNP governing parties have used their two-thirds constitutional majority in the National Assembly to entrench the most important elements of their political programme in legislative acts the adoption and amendment of which require a qualified majority of MPs. This is how they tried to tie the hands of future governing majorities having a different political affiliation. This strategy, however, backfired when the government temporarily lost its two-thirds majority in the National Assembly (February 2015 – April 2018). Important elements of the Fidesz-KDNP governing coalition’s legislative reforms enacted in the period – such as several parliamentary acts on state-owned agricultural lands, the (attempted) reorganisation of the administrative judicial system, the modification of the rules on political advertisement and the introduction of a so-called solidarity contribution imposed on the municipalities of more populous cities – were challenged on this basis.

3.7. Irregularity in respect of the exercise of the President of the Republic’s political veto

One of the grounds on which the petitioners contested the unconformity of the legislation on the integration of savings cooperatives with the constitution was the fact that the President of the Republic had sent the legislation back to parliament for further consideration (political veto) even though he

59 Decision no. 15/2019. (IV. 17.).
60 Decisions no. 3311/2019. (XI. 21.), 10/2019. (III. 22.), 3001/2019. (I. 7.), 22/2018. (XI. 20.), 3280/2017. (XI. 2.), 27/2017. (X. 25.), 3278/2017. (XI. 2.), 1/2017. (I. 17.), 24/2016. (XII. 12.), 16/2015. (VI. 5.) and Resolution no. 3331/2017. (XII. 8.).
had constitutional concerns.\textsuperscript{61} It was argued that the Fundamental Law gives priority to the exercise of constitutional veto over political veto. Therefore, the President should have referred the case to the Constitutional Court for preliminary review instead.

4. Outcome of the cases

If we look at the outcome of the analysed cases we can clearly see that most of the petitions (or parts of the petitions) were found inadmissible or got rejected by the Constitutional Court and the legislative acts were declared unconstitutional on procedural grounds only in a few cases.\textsuperscript{62} The vast majority of the petitions which successfully passed the admissibility test were rejected. It means that most of the irregularities discussed in section 3. were not declared contrary to the constitution (Table 2).

In the examined period the justices declared the legislative acts invalid on procedural grounds only in three cases: one of them was about the abusive practices in respect of last-minute amendments and the other two concerned the violation of the qualified majority requirement. In two other cases the decisions of the Constitutional Court had legal consequences other than the annulment of the challenged legislation, namely the declaration of a constitutional requirement and the declaration of a legislative omission.

The first case concerned the comprehensive reform of the institutional aspect of religious freedom. The adopted church law indiscriminately deprived religious organisations of their church status, introduced very strict criteria for the (re)registration of religious organisations as churches and delegated the competence of church registration to the National Assembly without adequate procedural safeguards. A large number of religious organisations contested the validity of the church law primarily on freedom of religion grounds, but they also mentioned the procedural irregularities of the enactment process in their submission. Firstly, the petitioners claimed that the legislation was introduced in parliament in form of a private members’ bill, instead of a legislative proposal of the government, in order to circumvent the executive’s statutory obligation to publish the bill for public evaluation and to conduct public consultations with the relevant stakeholders, i.e. the churches affected by the law. Secondly, they argued that

\begin{footnotesize}
\begin{enumerate}
\item Decision no. 20/2014. (VII. 3.).
\item For the correct evaluation of the results, we need to keep in mind that in some cases there were multiple petitioners or/and the petitioners challenged multiple legislative acts (or multiple legislative provisions) or/and they based their argument on multiple grounds of alleged unconstitutionality. Therefore, the Constitutional Court often decided the petitions submitted by different petitioners or the different parts of the same petition separately. It also needs to be emphasized that the holding of the resolutions and the decisions of the Constitutional Court does not necessarily reflect accurately the outcome of the case. We can observe that the inadmissibility of a petition (or a part of the petition) is often mentioned only in the reasoning but not in the holding. Therefore, the analysis covered the relevant resolutions and decisions in their entirety, including their holding and the reasoning.
\end{enumerate}
\end{footnotesize}
the original text of the bill was not simply amended but entirely revised right before the final vote which deprived the MPs of the opportunity to scrutinise and have a genuine deliberation on the final version of the text prior to its adoption.

In its Decision no. 164/2011. (XII. 20.) the Constitutional Court noted that the rules of the standing orders on last-minute amendments embodied such an essential guarantee of the democratic exercise of state authority and the parliamentary activities of the deputies, that in theory their violation would constitute a serious irregularity rendering the adopted law unconstitutional. The justices concluded in that specific case that the amendment was used contrary to its original purpose – i.e. the resolution of an inconsistency or a potential non-compliance with the constitution – because it completely altered the original version of the text which amounted to a violation of the constitution. The justices did not consider the other claim of the petitioners.

The decision was leaked to the press before its publication, so the government immediately submitted another legislative proposal – which essentially repeated the previous regulation – and rushed it through parliament in a chaotic process. Even though the Constitutional Court observed in its Decision no. 6/2013. (III.1.) that the parliamentary process did not guarantee the thorough consideration of the bill, the justices concluded that the law was not contrary to the constitution on procedural grounds because the irregularities did not constitute a manifest violation of the standing orders. The Constitutional Court, however, established a so-called constitutional requirement (i.e. a mandatory interpretation of the constitution) granting protection to the right of the deputies to have enough time to familiarise themselves with the text of the bill and consider it in the committee and the plenary sessions even if the bill is adopted during an extraordinary session.
After the entry into force of the Fundamental Law in 2012 the Constitutional Court found a violation of the Fundamental Law on procedural grounds only in two cases; both of them were initiated by the President of the Republic. The first case concerned the government’s very controversial plan to concentrate property control over all state-owned agricultural lands in the hands of a single government agency. Given the fact that at the material time the governing Fidesz-KDNP coalition was a few votes shy of a qualified parliamentary majority, the legislative proposal was drafted in way to achieve the original goal, but without containing any provisions requiring a qualified majority.\(^6^3\) In its Decision no. 16/2015. (VI. 5.), the Constitutional Court partially agreed with the President who claimed that the adoption of certain provisions by a simple majority vote in an ordinary legislative procedure was unconstitutional. The justices concluded that the concentration of property control over all agricultural lands, including national parcs, owned by the state in the hands of a single government agency was an essential aspect of environmental protection and national property the regulation of which required a qualified majority according to the Fundamental Law.\(^6^4\)

Similar concerns were raised by the qualified minority of MPs with regard to the legislation on the transaction and use of state-owned agricultural lands, but the Constitutional Court rejected the petition in its Decision no. 27/2017. (X. 25.). In exchange the justices offered small compensation by declaring a so-called legislative omission. The National Assembly was called upon to adopt legislation necessary for the effective protection of the aims and activities of the National Land Fund and to guarantee that the level of protection cannot be undermined by simple majority legislative acts. More than two years after the expiry of the deadline set by the Constitutional Court, the National Assembly has still not remedied the unconstitutional situation.\(^6^5\)

The violation of the qualified majority requirement was successfully argued by the President of the Republic with regard to the government’s plan to reform the administrative judicial system which was widely considered as another attack on judicial independence and the manifestation of the ruling majority’s desire to exercise strong(er) political influence over the administrative judiciary.\(^6^6\) Without the support of the necessary two-thirds majority of MPs, the government had no other choice than to pass

\(^{63}\)’Fazekas félenyomott, nincs kétharmad, földmutyi elnapolva’ (greenfo.hu, 14 April 2015), <https://greenfo.hu/hir/fazekas-felenyomott-nincs-ketharmad-foldmutyi-elnapolva/>; K. Sulyok, ‘Az Alkotmánybíróság előzetes normakontroll döntése a nemzeti park igazgatóságok vagyonyezelői jogkörének csorbitása tárgyában’ Jogesetek Magyarázata (2015), 17–8

\(^{64}\)The President challenged two more provisions on the same grounds, but the Court rejected his argument.

\(^{65}\)The list of legislative omissions available on the website of the Constitutional Court at: <https://www.alkotmanybirosag.hu/uploads/2020/07/mulasztasok_2020_julius_1.pdf>

\(^{66}\)V. Z. Kazai, ‘One Step Back, Two Steps Forward: The Hungarian judiciary’s independence is still in danger’ (Verfassungsblog, 26 November 2019), <https://verfassungsblog.de/one-step-back-two-steps-forward/>.
the legislation in an ordinary legislative procedure. In its Decision no. 1/2017. (I. 17) the Constitutional Court arrived at the conclusion that all the challenged provisions concerned essential aspects of legislative matters requiring a qualified majority by the Fundamental Law, namely the organisation of the judiciary, the jurisdiction of the courts and the legislation on media and electoral regulation.

5. Conclusion

In Hungary – which is often labelled as an illiberal political regime – the Fidesz-KDNP governing coalition has only used the parliament since 2010 to implement its political agenda in the form of statutory law as quickly as possible and in the face of every opposition. Parliamentary law-making has become nothing more than an instrument in the hands of the government which led to an increasing number of serious irregularities of the legislative process. This article argued that the procedural flaws of parliamentary law-making constitute an infringement of the rule of law principle as it is interpreted in the Council and Europe and the European Union. What is more, the Venice Commission, the European Parliament, the European Commission and the Council have often raised serious concerns about the misuse of the legislative process by the Hungarian governing majority.

This article analysed the case-law of the Hungarian Constitutional Court to show that the problem is much more serious than it is suggested by the European criticisms. Indeed, a large number and a great variety of procedural flaws were litigated in a constitutional review process. What is more, in most cases the misuse of the law-making process was related to the very same legislative reforms which formed the constitutive elements of the rule of law backsliding in Hungary and were criticised by the CoE and the EU. Therefore, the analysis shows that the systemic violation of the rules of the legislative process has been part of the Fidesz-KDNP government’s strategy to build an illiberal political regime. We can conclude that compared to the European rule of law mechanisms, the Hungarian constitutional review process brought much more irregularities to the surface.

Despite the relatively high number of cases and the seriousness of the challenged procedural irregularities the Constitutional Court remained very deferential to the political branches and has failed to stop abusive practices in respect of parliamentary law-making. Given that this article was

67In one of my previous papers, I argued that focusing more formal, procedural aspects of a challenged law’s constitutionality instead of its substantive constitutionality could be in certain circumstances a good strategy for constitutional court operating under the rule of a populist governing majority. V. Z. Kazai, ‘Le renforcement du contrôle de la procédure législative. Une stratégie proposée aux cours constitutionnelles opérant dans un système populiste’ (2018) 34 Annuaire Internationale de Justice Constitutionnelle 765–781. For a similar argument see D. Pendergrast, ‘The judicial role in protecting democracy from populism’ (2019) 20 German Law Journal 245–262.
based solely on a typological and quantitative analysis of the case-law, further research is needed to fully discover the political context of the relevant cases, to evaluate the quality of the Constitutional Court’s reasoning and to explain the reasons of the justices’ deferential attitude.\footnote{Many studies have already detected the signs of political bias in the case-law of the Hungarian Constitutional Court. See e.g. Hungarian Helsinki Committee and Eotvos Károly Policy Institute and Hungarian Civil Liberties Union, ‘Analysis of the performance of Hungary’s “one-party elected” constitutional court judges between 2011 and 2014’ (2015), <https://helsinki.hu/wp-content/uploads/EKINT-HCLUHHC_Analysing_CC_judges_performances_2015.pdf>; Z. Szente, ‘Az alkotmánybírák politikai orientációi Magyarországon 2010 és 2014 között’ (2015) 24 Politikatudományi Szemle 29–57; B. Somody, ‘Új magyar alkotmánybíráskodás. Újszerű elvi tételek a határozatokban’ (2014) 18 Fundamentum 77–80; G. Halmay, ‘In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíróság első éve’ (2014) 18 Fundamentum 38–64; B. Mátyás and Á. Kovács, ‘Mission: impossible’: alkotmánybíráskodás az alkotmányos értékek védelme nélkül’ (2014) 69 Jogtudományi Közlöny 273–284. Given the limitations of our study we cannot confirm this conclusion in this paper.} What we can conclude, however, is that even tough they detected only a much smaller set of irregularities, the European rule of law mechanisms sent a much clearer and stronger message to the Hungarian government that certain legislative practices are incompatible with the rule of law principle. We do not find any convincing justification of the Hungarian Constitutional Court’s unwillingness to enforce those requirements of the legislative process which are regarded as integral parts of the rule of law principle as interpreted in the CoE and the EU.

**Disclosure statement**

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