Do We Like Majority Decisions?

Aspects of the Majority Principle in Voting on the Different Levels of Political Systems

Péter Smuk[*]

Abstract

This article aims to review the constitutional justifications for majority requirements arising from the democratic principle, and to analyze some current controversial cases. Although the qualified majority requirement is not a new institution in either the national constitutional systems or the functioning of the EU institutions, the democratic legitimacy of majority voting faces several challenges. In order to present aspects that should be re-evaluated in the light of certain new political strategies, this paper analyses the majoritarian requirements in the Treaties, in the rules of procedures of the European Parliament and also case studies pertaining to the constitution-making majority in Hungary and the controversial case of voting on the Sargentini-report. On the basis of this assessment, we may confirm but also reconsider the majority principle.

Keywords: majority principle, qualified majority, voting in parliament, constitution, abstentions.

1. The Majoritarian Principle in Democracy

The simplest justification for the majority principle is that since full consensus in a community is minimal or unattainable, relying on a majority is the simplest and fairest way to resolve disputes. According to Abraham Lincoln's First Inaugural Address,

> "Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left."[1]

* Péter Smuk: professor of law, Széchenyi István University, Győr.

1 Arend Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, Routledge, 2008, p. 113.

doi: 10.5553/HYIEL/266627012022010001023

As Sajó noted, it is "truly surprising that such a basic rule of social order like majoritarianism has such poor theoretical foundations."[2] In Lijphard's words,

> "In theory, majority rule tends to be regarded as the crucial decision rule – and hence as the defining criterion – of democracy. In practice, however, strict application of majority rule is extremely rare. Especially with regard to the most important decisions and to issues that cause deep splits in societies, democracies almost uniformly deviate from majoritarian decision-making rules, to adopt mechanisms more likely to rally a broad consensus."[3]

Kis explains that, with certain restrictions, the principle supports political equality through the of one citizen-one vote principle, and meets the requirement of anonymity as well. Everyone can have an equal say in the outcome of a decision and the outcome is not known in advance, so no one can if it is their opinion that will be carried by the majority.[4] At the same time, (permanent) harm to those who remain in a permanent minority requires the elaboration of constitutional guarantees restricting the majority.

According to Sartori, majority voting before the end of the Middle Ages was rare, because officials were usually drawn, and even where the majority decision was tolerated in voting, city-states still preferred consensus. The official recognition of majority decision-making was in the ambit of decisions taken to regulate the internal operation of the monastic communities (*e.g.* the election of abbots).[5] Although one can trace the roots of majority decision-making in Aristotle's references, it nevertheless remained without theoretical foundation in earlier ages, and democracy was also perceived as a distorted form of state. However, the majority principle is not only a feature of democratic systems. For a long time, it functioned as a prerogative of the few, such as democratic life of the county's nobility or guilds; and was also applied in authoritarian and dictatorial political systems of modern times together with the manipulation of the masses. In the language of mathematics, this principle is a necessary, but not a sufficient condition for democracy. Its emergence in the text of the Peace of Westphalia marks the end of earlier (pre-Reformation) universalist thinking, the disintegration of political unity based on mistrust, and the limitations of the majority principle: according to the treaty, majority decisions are not applicable in religious matters.[6]

2 András Sajó, *Limiting Government: An Introduction to Constitutionalism,* CEU Press, Budapest, 1999, p. 57. (in footnotes). For further implications, *see* Stéphanie Novak & Jon Elster, 'Introduction', *in* Stéphanie Novak & Jon Elster (eds.), *Majority Decisions. Principles and Practices,* Cambridge University Press, New York, 2014, pp. 2-8.

3 Lijphart 2008, p. 111.

4 János Kis, *Constitutional Democracy*, Central European University Press, New York-Budapest, 2003, pp. 65-74.

5 Giovanni Sartori, *Demokrácia,* Osiris, Budapest, 1999, p. 80.

6 Martin Morlok, 'The Relationship of Majority and Minority as an Element of Constitutional Culture', *in* Miroslaw Wyrzykowski (ed.), *Constitutional Cultures,* Institute of Public Affairs, Warsaw, 2000, p. 226.

doi: 10.5553/HYIEL/266627012022010001023

In addition to deriving the general will from the majority vote, Rousseau differentiates between majority proportions required to express the general will on certain issues.

> "[…] between unanimity and a tied vote there are various degrees of inequality, each of which can be taken for the proportion in question, according to the condition and needs of the body politic. Two maxims can be used […] one is that the more important and serious the issue, the closer the deciding vote should be to unanimity; the other, that the greater the urgency of the matter, the smaller the majority required should be."[7]

It is a fairly early lesson of 18th-century US constitution-making that restricting the majority principle in modern democracies is a constitutional requirement. *Jefferson* and *Madison* intended "to impede the operation of majority rule. In few other democratic countries are there so many obstacles in the way of government by electoral and legislative majorities",[8] because the Framers intention was not to establish a pure democracy but rather a balanced republic.[9] In his classic work, Tocqueville examined the tyranny of the majority in the democracies of the US and noted:

> "I regard as impious and detestable the maxim that in matters of government the majority of a people has the right to do everything, and nonetheless I place the origin of all powers in the will of the majority."[10]

Mill has already stated that

> "when society is itself the tyrant – society collectively, over the separate individuals who compose it – its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. […] penetrating much more deeply into the details of life, and enslaving the soul itself."[11]

Finally, two theoretical reservations must be considered. *(i)* First, it should be noted that even the concept of majority is not necessarily clear. Lijphart (and Sartori) refer to the varied use of relative, absolute and qualified majorities: so "the term 'majority' is very flexible and ambiguous, consequently, 'majority rule' does not necessarily mean rule by a bare majority (50 percent plus one)."[12] *(ii)* Secondly, while we expect democratic decision-making to lead to the right

7 Jean Jacques Rousseau, *Discourse on Political Economy and The Social Contract*, Oxford University Press, Oxford, 1999, p. 138.
8 Robert A. Dahl, *Dilemmas of Pluralist Democracy,* Yale University Press, 1982, p. 190.
9 Christopher Wolfe, 'Alkotmánybíráskodás és demokrácia', *in* Péter Paczolay (ed.), *Alkotmánybíráskodás, alkotmányértelmezés,* Budapest, 1995, p. 131.
10 Alexis de Tocqueville, *Democracy in America,* University of Chicago Press, 2012, p. 240.
11 John Stuart Mill, *On Liberty,* Yale University Press, New Haven and London, 2003, p. 76.
12 Lijphart 2008, p. 112.

results, a quantitative rule in itself can hardly guarantee a high quality outcome. Epistemic considerations justify further corrections to the majoritarian principle.[13]

2. Practical Implications and the Rationale Behind Them

2.1. From Unanimity to Majority – on the International and Supranational Level

In international law,

> "the rule of unanimity has, in fact, been treated by many persons as an inevitable corollary of the theory of sovereignty, which, as it is generally understood, would subject no state to any limitation against its will."[14]

As Hill observed a century ago, "international conferences have been inclined occasionally to allow majority rule on matters of minor importance."[15] In international negotiations, decision-making can be considered a procedural problem, where sovereign states are prone to hurry negotiations in order to arrive at the final issues. At that point however, agreement cannot be reached without consent.

In international organizations, parties establish permanent bodies with their relevant rules of procedures. In the UN Charter[16] (Article 18), the two-thirds majority appears to be the general rule for decision-making, albeit only in 'important questions'. Paragraph 3 also allows for decisions on other questions (including adding new categories of questions to be decided by a two-thirds majority) to be made by a majority of the members present and voting.[17] Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members; on all other matters, decisions shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.[18] The five permanent members' right to veto, which is

13 Tamás Győrfi, *Against the New Constitutionalism*, Edward Elgar, Cheltenham, 2016, pp. 37-38. *See also* Bo Rothstein, 'Epistemic Democracy and the Quality of Government', *European Politics and Society,* 2019/1, pp. 16-31. Tocqueville's note is rather disturbing: "The moral empire of the majority is founded in part on the idea that there is more enlightenment and wisdom in many men united than in one alone, in the number of legislators than in their choice." Tocqueville 2012, p. 236.

14 Norman L. Hill, 'Unanimous Consent in International Organization', *The American Journal of International Law*, Vol. 22, Issue 2, 1928, p. 319.

15 Id. pp. 320-321.

16 Other international organizations tend also to opt majority voting, *e.g.* the Constitution of the ILO can be amended by two-thirds majority. *See* Article 36 of the Constitution, at www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

17 General Assembly Rules of Procedure Rule 86 [126] provides that "For the purposes of these rules, the phrase 'members present and voting' means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting." *See* at https://legal.un.org/repertory/art18.shtml.

18 Article 27 UN Charter.

doi: 10.5553/HYIEL/266627012022010001023

based on historical reasons, has introduced some kind of inequality.[19] Between the consensus-requirement as a default on the international level and the majoritarian principle on the national level (especially in legislatures in parliamentary democracies) we find interesting developments on the supranational level. European integration has flourished through the application of qualified majority voting on certain issues, as many have noted.[20] The Masters of the Treaties achieved a milestone with the Nice Treaty, when the differentiated weighting of Member States' votes was matched with a triple majority threshold (74 per cent of Member States' weighted votes, 62 per cent of the population of the EU, and a majority of the Member States) for adopting a legislation. It raised equality and fairness (but also legitimacy) issues, without resulting in a more efficient decision-making process. First, the Convention conceived of new qualified majority rules in the Constitutional Treaty (65 per cent of the EU's population and 55 per cent of Member States, with the caveat that the blocking minority must consist of at least 4 Member States), and these provisions were incorporated into the Lisbon Treaty.[21] Coming into force in 2014, Member States positions changed with the new qualified majority rules, favoring mainly the smaller and the bigger states.[22] Article 16(3) TEU lays down the general rule that the Council is to act by qualified majority, except where the Treaties provide otherwise (*e.g.* where the Council is to act by simple majority or by unanimity).[23]

Among the various majority requirements that apply to the decision-making of the Council, we must mention Article 354 TFEU. This applies for the purposes of Article 7 TEU to the suspension of certain rights, resulting from Union membership; the qualified majority requirements are foreseen under Article 238. (Of course, the Member State in question shall not take part in the vote.) This Article established a special majority requirement, since it prescribes the voting proportion to be achieved in the European Parliament: the EP shall act by a two-thirds majority of the votes cast, representing the majority of its constituent Members. This way, Kochenov argues, the Article provides for the potentially

19 *See* at www.un.org/securitycouncil/content/voting-system.

20 For aspects of the debate on qualified majority voting in the Council, *see* Bálint Ódor, *A kettős többség bevezetésének várható hatásai a Tanács működésére és Magyarország érdekérvényesítési lehetőségeire*, PhD Dissertation, Corvinus University, Budapest, 2013.

21 *See* Article 238 TFEU. Where it is required to act by a simple majority, the Council shall act by a majority of its component members. Where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 per cent of the members of the Council representing the participating Member States, comprising at least 65 per cent of the population of these States. Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

22 Frank Häge, *The Lisbon Treaty's change to Council voting rules will have important implications for the democratic legitimacy of the EU*, at https://blogs.lse.ac.uk/europpblog/2014/02/03/the-lisbon-treatys-change-to-council-voting-rules-will-have-important-implications-for-the-democratic-legitimacy-of-the-eu/.

23 Paul-John Loewenthal, 'The Council. Articles 237-243', *in* Kellerbauer *et al.* (eds.), *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford University Press, Oxford, 2019, p. 1730.

strictest qualified majority threshold in the Treaties. In addition, it is worth clarifying that while

> "Article 354 TFEU speaks of excluding the MS subjected to the procedure from the procedural thresholds concerning the numbers of MS required to reach Article 7 TEU decisions by the text of that provision, nothing is said in Article 354 TFEU about the population threshold counts, which are part of the QMV."[24]

Notably, the category of *passerelle clauses* is of special importance for the majoritarian principle and the development of integration. These 'bridging provisions' make it possible in specific cases to adopt a decision changing the voting arrangement from unanimity to qualified majority in the Council. The 'general' clause in Article 48(7) TEU foresees that where the Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorizing the Council to act by a qualified majority in that area or in that case. The Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members. National Parliaments are also notified. The Council can also enact a decision allowing for the adoption of special legislative acts in accordance with the ordinary legislative procedure: these special clauses amount to twenty-seven procedures in the TFEU.[25] Article 48(6) TEU provides that the European Council may even adopt a decision amending all or part of the provisions of Part Three TFEU. The approval of each Member State is necessary, and this paragraph also provides that this decision shall not increase the competences conferred on the Union in the Treaties. Potential future applications of *passerelle clauses* have yet to be explored.[26]

Co-legislation in the European Parliament also implies majority decision-making. Although the government-opposition dualism does not increase the stake of voting, the Treaties or the Rules of Procedure set forth various majority requirements. Given the high number of directly elected members, whose affiliation is not based on their nationality but their political identity, the unanimity principle characteristic of international decision-making regimes does not apply.

The Rules of Procedure of the EP establish several majority thresholds, for example for the election (or rejection) of the Commission by a *majority of the votes cast* (Rule 125.7) or when the EP elects the President of the Commission by a *majority of its component Members* (Rule 124.2). Some instances of qualified majority reflects the relevance of the issue decided upon: *(i)* The Conference of Presidents acting by a majority of three-fifths of the votes cast, representing at

24 Dimitry Kochenov, 'Articles 354-355', *in* Kellerbauer *et al.* (eds.) 2019, p. 2082.

25 Marcus Klamert, 'Article 48', *in* Kellerbauer *et al.* (eds.) 2019, p. 307.

26 Silvia Kotanidis, *Passerelle clauses in the EU Treaties – Opportunities for more flexible supranational decision-making. European Parliamentary Research Service*, 2020, at www.europarl.europa.eu/RegData/etudes/STUD/2020/659420/EPRS_STU(2020)659420_EN.pdf.

doi: 10.5553/HYIEL/266627012022010001023

least three political groups (Rule 21); *(ii)* a two-thirds majority of the votes cast, representing a majority of its component Members. (Rule 89.3, 127.7[27]); *(iii)* a majority representing four-fifths of the Parliament Members (Rule 162); *(iv)* a majority of two-thirds of the members present (Rule 221.2); *(v)* "a large majority of the committee" (Rule 214); and *(vi)* a majority of the commission's component members representing at least three political groups (Rule 235.3).

2.2. Simple and Qualified Majorities in Bodies of Legislation

The majoritarian principle in bodies of legislation,[28] mainly in parliaments and committees, is constitutionally justified by political-democratic equality, expectations surrounding procedural efficiency and responsibility of government. Supporting the majority principle also means supporting the constitutional functions of the legislative body, as this usually exercises its functions and powers through decision-making.

The equal mandate of representatives and the openness of achieving the quorum justify the application of the majority principle. A further procedural threshold is the quorum prescribed: the participation of a certain proportion or number of the members eligible to vote. Those who abstain from voting shall be calculated when considering the quorum, since they participated in the voting with their votes cast.[29]

The Fundamental Law of Hungary [Sections 5(5) and 5(6)] retained the quorum requirement of the former Constitution (Section 24), and the majority requirements was also established in the text shaped in the course of the fourth and fifth amendments:

> "The National Assembly shall have a quorum if more than half of its Members are present at the sitting. Unless otherwise provided in the Fundamental Law, the National Assembly shall make its decisions with the votes of more than half of the Members of the National Assembly present. The provisions of the Rules of Procedure may provide that a qualified majority shall be required for certain decisions to be taken."

It is clear from this provision that, in addition to the simple majority vote of the MPs present (reflecting the parliamentary form of government) there is now a constitutional basis for qualified majority requirements. The constitution or the rules of procedures shall be the legal sources in which a higher rate of democratic support can be prescribed than the simple majority for certain decisions. Based on the previous text of the Constitution, Szente argued that the majority rules of parliamentary decisions are "therefore excluded from the self-regulating powers

27 Two-thirds majority applies when adopting the Motion of censure on the Commission, notably this is a higher majority than in national parliaments at vote of no confidence. *See* Goran Marković, 'European Parliament's Control of the European Commission – Procedural Aspects', *EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 1, 2017, pp. 471-489.

28 We do not examine the majority principle in electoral context.

29 Zoltán Szente, '24. §', *in* András Jakab (ed.), *Az Alkotmány kommentárja,* Századvég, Budapest, 2009, p. 805.

of the parliament – therefore the Parliament cannot freely dispose of them"; for this reason, the imposition of special majority requirements is unconstitutional (*e.g.* many of the procedural qualified majorities required by the then House Rules).[30]

Several provisions of both the Fundamental Law and the Act on the National Assembly Chapter V/A. (Section 61/A) cover a fairly large number of qualified majority cases. Reservations made in this respect shall not be discussed here, but the core element of criticisms can be summarized as follows: the regulatory objects, policy issues underlying qualified majority requirements are rather alien to political changes in parliamentary government, the responsibility borne by a government winning a majority in elections; the excessive application of the two-thirds threshold is also likely to undermine confidence in democratic elections.[31]

From the 1990s onwards the qualified majority requirement was elaborated upon in a substantive sense, in a decision of the Constitutional Court which declared that it is "a constitutional guarantee whose essential content is a broad consensus among members of parliament".[32] This is in line with the approach of the Venice Committee to constitutional amendments:

> "The main purpose and effect of a qualified majority requirement is to *(i)* ensure broad political consensus (and thereby strengthen the legitimacy and durability of the amendment), and *(ii)* protect the interests and rights of the political opposition and of minorities."[33]

Based on the electoral system, a direct correlation exists that there is greater social support behind the higher proportion of deputies. However, the function of qualified majority seeking to replace 'ordinary' legislation in certain issues, whether because of their high politics nature or the manifestation of constitutional power, no longer works if the politically disciplined majority of the government has a qualified majority in parliament.[34]

In some constitutional systems qualified majority appears not only in a mathematical form; further lessons can be drawn from these arrangements. Beyond the default majority decision-making, there are cases in which *(i)* affirmative decisions of other entities are required for the decision of the (parliamentary) body to become effective; or *(ii)* a different voting method *(vota ponderantur, non numerantur)* is used within the body.

Another entity upholds a parliamentary decision when it is to be put to an affirmative referendum, or the other House of the bicameral legislature (possibly

30 Id. p. 807.

31 Boldizsár Szentgáli-Tóth, 'Qualified laws as actors of the separation of powers', *Hungarian Journal of Legal Studies,* Vol. 61, Issue 2, 2020, pp. 216-217; *Opinion on the new Constitution of Hungary*, adopted by the Venice Commission, CDL-AD(2011)016-e, para. 24.

32 Decision No. 1/1999. (II. 24.) AB of the Constitutional Court.

33 *Report on Constitutional Amendment,* adopted by the Venice Commission, CDL-AD(2010)001-e, para. 94.

34 *Report on the role of the opposition in a democratic Parliament*, adopted by the Venice Commission, CDL-AD(2010)025, para. 127.

doi: 10.5553/HYIEL/266627012022010001023

composed on the basis of a different principle of representation than the lower house) or in federal states a certain majority of the Member States 'contribute'. This is also the case when a decision requires confirmation by the parliament formed after the next election.[35]

A double qualified majority vote is required when the votes cast by members of the body are not only considered numerically, but also according to additional criteria. An example for this is the qualified majority rule in the capital city of Budapest. The condition for reaching a qualified majority in the General Assembly of the capital is that votes of mayors of the districts of the capital, who together account for more than half of the population of the capital, are necessary to approve a proposal.[36] But the double majority requirement of the EU, investigated above, also combines the criterion of a majority of members with the population requirement of the entities represented by the members.

Some critical comments point to the legitimacy problems raised with this voting calculation. One cannot but agree with Elster who made the following observation:

> "In weighted majority voting, decisions are taken by the majority of votes cast by the units that are present – [...] if the units cast unequal numbers of votes. Although this procedure has also been used at the individual level (plural voting), I consider only its use in voting by aggregate units. Weighted majority voting in two-tiered systems has in common with proportional representation in a one-tiered system the fact that both can be used to translate population differences into voting power. Yet the two are not equivalent. For one thing, the weights used in weighted majority voting may reflect other differences than demographic ones; for another, in weighted majority voting, individual votes are typically used only to determine the vote of an aggregate unit and are not pooled across units."[37]

2.3. Voting Strategies

Besides discussing the fundamental questions of the majority rule, one must also consider the decision-making aspects of voting. In community or board decision-making, voting aggregates preferences. In addition to the procedural legitimacy effect of the formal requirements, political science also studies the voting attitudes of MPs and their coordination. Deputies' perceptions of their roles can be extremely diverse regarding the legislative agenda. Not only can Members' resolutions on a given proposal be diverse (supporting or opposing it for different reasons, taking a position for non-rational reasons, *etc.*); but they can also be influenced by the sequence of issues on the voting agenda, and by the fact that decision-making situations that offer more than two alternatives may complicate the situation.

35 With regard of the constitution making procedures, types of these arrangements are listed in CDL-AD(2010)001.

36 Act CLXXXIX of 2011 on Local Governments in Hungary, Section 47(3).

37 Jon Elster, 'Nested majorities', *in* Novak & Elster (eds.) 2011, p. 36.

According to the rational choice theory, if individuals are not coordinated, their rational actions often lead to sub-optimal outcomes for them. However, the collective action of legislators, especially the discipline enforced by the parties, can result in a mutually beneficial co-operation on the long run. Parties in larger bodies foster the forging of compromises and long-term agreements to prevent the chaos of choosing between a greater number of alternatives.[38] Compliance with the voting syllabus adopted by political groups can obviously be followed in case the vote is open. The most important difference is clearly the secret and open voting in this respect, but voting methods can also be of additional importance (the rules for casting and counting votes, initiating and ordering roll-call votes are varied). The importance of the voting method is evident, even if a complex statistical correlation can only be shown between the voting methods and the uniform voting discipline/cohesion of the political groups.[39]

In order to meet the required majority requirements, the deputies/parties may prepare the vote in advance. In quite a few cases, the results of a consensual vote are already covered by preliminary agreements, or the likely minority simply refrains from voting against for various reasons.

It has been already noted above, that in EU Council procedures most decisions are made without opposition in the qualified majority area.

> "When the QMV procedure was created, its promoters did not intend that it would be systematically used. Instead, QMV was conceived as a way to avoid that the decision-making process be stuck. QMV was supposed to encourage participants who feared to be outvoted to soften their positions in order to find compromises. QMV is often compared to a 'deterrent weapon' or to the 'sword of Damocles': even if a formal vote is unlikely, each participant is aware that a vote is possible. This general awareness leads participants to have flexible positions."[40]

So, as Novak observes, unanimity – or the right to veto – incentivizes participants to hold out for strong demands; by contrast, when participants know that they can be outvoted, they tend to be more 'constructive'.[41]

38 Gerry Mackie, 'The reception of social choice theory by democratic theory', *in* Novak & Elster (eds.) 2011, pp. 77-102; Zsolt Enyedi & András Körösényi, *Pártok és pártrendszerek,* Osiris, Budapest, 2004, pp. 19-23; Tamás Meszerics, 'Stratégiai viselkedés és bizottsági döntés', *Közgazdasági Szemle*, Vol. 44, Issue 6, 1997, pp. 687-697.

39 Thomas Saalfeld, 'On Dogs and Whips: Recorded Votes', *in* Herbert Döring (ed.), *Parliaments and Majority Rule in Western Europe,* Campus Verlag, Frankfurt, 1995, pp. 528-565. The infamous moment of Hungarian parliamentary practice was the 'secret' vote of the head of state election on the controlled votes in 2005. The votes of each member of the opposition factions were required for the opposition candidate to be the President of the Republic – a relative majority. *See* Péter Smuk, *Magyar közjog és politika 1989-2011,* Osiris, Budapest, 2011, p. 253. *See also* Decision No. 9/2008. (I. 31.) AB of the Constitutional Court.

40 Saalfeld 1995, p. 178

41 Stéphanie Novak, 'Two effects of a high threshold of qualified majority', *in* Novak & Elster 2014, pp. 178-183, and p. 193.

doi: 10.5553/HYIEL/266627012022010001023

3. Majoritarian Voting – Case Studies

3.1. Case Study No. 1 – When Supermajority Is Not Enough or Not Necessary (?)

Generally, the Hungarian Parliament adopts its resolutions with the votes of more than half of the members present, in accordance with the axiom of parliamentarism and the classical majority principle. In the case of the adoption of the Fundamental Law, the main criticism from scholarship was that

> "although the legitimacy of formal adoption is not in question, given that a freely elected Parliament acted in it, but the one-party, rapid constitution-making was not suitable to reflect a consensus or social inclusion in the most important questions."[42]

The constitutional amendments after the 2010 parliamentary elections

> "already reflect the essence of the state philosophy of the later Fundamental Law: the principle of majority, the emphasis on popular sovereignty, the concept of a stronger state, a more capable government compared to the principle of separation of powers."[43]

The essence of the problem in question is that the formal condition for the exercise of constitutional power, qualified majority voting, by no means ensures the achievement of some kind of national, but at least broader consensus beyond the number of pro-government votes.

In the year of writing this article, perhaps the most bizarre topic of the Hungarian constitutional discourse is whether following the elections a simple majority government could abolish the constitutional and political structure established politically unilaterally in the recent decade.[44] The desperation of the opposition can certainly be inferred from this debate, given that during the adoption of the Fundamental Law and other two-thirds decisions, the numerical parliamentary majority rarely sought to achieve additional legitimacy through forging a broader political consensus.

We try to capture this historic, constitutional moment from a legal point of view. First, it is necessary to state that if the Fundamental Law was enacted in the framework of a valid procedure, its amendment and replacement by circumventing the supermajority criterion would in fact constitute revolutionary law. Such 'revolutionary law-making' did not even take place at the time of the regime change in 1989-90.

Nor would a declaration of invalidity of the Fundamental Law be entirely settled in terms of legal proceedings, but the arguments for invalidity itself are

42 István Kukorelli, *Bibó István láthatatlan alkotmánya,* Gondolat, Budapest, 2019, p. 45.

43 István Kukorelli, *Hány éves az Alaptörvény? A régi-új kérdése az Alaptörvényben,* Gondolat, Budapest, 2017, p. 54.

44 The expected win of the opposition just did not arrive in April 2022. For arguments pro and contra the 'simple majority constitution-making', *see* András Jakab, *Hibrid rezsimből jogállamba,* 2022, at https://ssrn.com/abstract=4021427.

not solid either: whether we consider the alleged four-fifths criterion of the Constitution [Section 24(5)], the Legislative Act's requirement for preliminary impact assessment, *etc.* or even the presumed 'substantive' unconstitutionality. It is an interesting idea that a conflict with EU law or international law could also provide a legal basis for simple majority constitution-making or, for annulling the Fundamental Law.

The quality of the constitutional political discourse in question is also marred by all these suggestions. Most importantly, our expectations for a consensus on constitutionality are not in the least guaranteed by 'revolutionary' ideas. This evident from the fact that many would call for a referendum to help create a new constitutional foundation.[45]

3.2. Case Study No. 2. – Abstentions (Do Not) Count?

Indirectly, the state of the Hungarian constitutional system is also at stake case. Indeed it can even be referred as an illustration of the practice of parliamentary majority voting – the 'strictest' supermajority threshold in EP, as described above. The controversy surrounding the adoption of the European Parliament's decision to initiate proceedings under Article 7 TEU against Hungary in September 2018 erupted on the question whether the (qualified) majority required for its adoption was reached or whether abstentions should also be taken into account when determining the outcome of the vote. Below, I briefly summarize and evaluate the CJEU's 2021 judgment in *C-650/18, Hungary v European Parliament* concluding the dispute.[46]

The majority criterion stipulated for the voting procedure must be clearly legible from the relevant body's rules of procedure, otherwise the result of the vote may constantly be called into question on a procedural basis by those who remain in the minority. Therefore (following questions on admissibility) the CJEU first reviewed the legal basis for voting, the counting of votes, then the number of abstentions in terms of the result of the vote, and finally the nature of the qualified (double) majority and abstentions were clarified.

Article 7 TFEU provides for the application of Article 354 TFEU to the EP's procedure, according to which the European Parliament "shall act by a two-thirds majority of the votes cast, representing the majority of its component Members." The EP Rules of Procedure Rule 178(3) provided[47] that

> "In calculating whether a text has been adopted or rejected, account shall be taken only of votes cast for and against, except in those cases for which the Treaties lay down a specific majority."

45 Id. p. 40.

46 The so called Sargentini-report [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))] has been adopted by the European Parliament by a majority that has been contested by Hungary. Representatives of Hungary alleged that the necessary QMV requirement had not been met. Judgment of 3 June 2021, *Case C-650/18, Hungary v European Parliament*, ECLI:EU:C:2021:426.

47 In EP Rules for the term 2019-2024 this provision can be found in Rule 187(3).

doi: 10.5553/HYIEL/266627012022010001023

In the vote on 12 September 2018, 448 Members supported the proposal, 197 voted against and 48 abstained. The criterion of majority of MEPs was clearly met, but a two-thirds majority of the 'votes cast' were only reached if the abstentions were not taken into account. The Chair of the sitting of the EP announced the result (resolution adopted), which Hungary subsequently challenged before the CJEU. Kochenov remarked on the relevant rules of the TFEU before the judgment was rendered, observing:

> "how to count abstentions is not entirely clear based on the wording of Article 354(4), which posed a problem during the EP vote to activate Article 7 TEU against Hungary in September 2018: following the advice from the Directorate of Legislative Acts, the EP service responsible for the procedures, abstentions were not deemed to be 'votes cast', which affected the majority required. This reading is consistent with the interpretation of 'votes case' in the context of Article 231 TFEU and is supported by Rule 178(3) of the EP Rules of Procedure. By analogy, then, the two-thirds majority of 'votes cast' required in the context of Article 354(4) TFEU is counted disregarding the abstentions."[48]

The CJEU for its part, found that

> "Since the Treaties do not define what is to be understood by 'votes cast', that autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language",

taking also into account the context and the purposes of the regulation. In the CJEU's view, the concept of 'votes cast', *in its ordinary meaning*, covers only the positive or negative votes in respect of a given proposal. Abstentions, in the usual sense, should be understood as a refusal to adopt a position on a given proposal, they cannot, therefore, be considered as a 'vote cast'.[49]

The CJEU has held that, by requiring a double majority to be reached for acts adopted by Parliament pursuant to Article 7, the drafters of the Treaty emphasized the importance of such acts, *both politically and constitutionally* – achieving this way 'a specific majority'. Abstentions may be taken into account in order to ascertain (as the fourth paragraph of Article 354 TFEU requires), that the votes in favor represent the majority of the component Members of EP. But concerning the other criteria,

> "account cannot be taken of abstentions for the purpose of determining whether a majority of two thirds of the votes cast has been attained in favor of the adoption of such an act".[50]

48 Kochenov 2019, p. 2082.
49 *Case C-650/18, Hungary v European Parliament,* paras. 83-84.
50 Id. paras. 86-87.

Abstentions were taken into account on the basis of the threshold requiring the majority of all Members, and MEPs were informed in advance that abstentions would count for determining the fulfillment the two-thirds condition. (This way, everyone could choose his/her vote with that in mind.[51])

The broader context of the significance of abstentions is also mentioned in the judgment, in response to an argument raised in the Polish intervention. As far as the four-fifths majority required in the Council is concerned, it is not possible to take abstentions into account (Article 354, first paragraph, TFEU), but it does not follow *a contrario* that in the parliamentary procedure (Article 354, fourth paragraph, TFEU) where the Treaty is silent, it is obligatory to take into account the abstentions. According to the CJEU, the purpose of removing any uncertainty in the Council's vote was that abstaining states could not block the adoption of a resolution.[52]

According to the reasoning put forward by Hungary, the value of democracy is also violated in case the abstentions of the deputies are not taken into account. However, according to the CJEU, abstentions were not completely excluded from the vote: they were included in one of the elements of the double majority criterion, namely, the quorum, and MEPs knew the consequences of their possible abstention by prior warning, so the MEPs were not deprived of exercising their prerogatives.[53]

It should be noted that having recourse to an 'ordinary meaning of the words' approach when interpreting the Rules of Procedure is, to say the least, surprising in the context of the internal debates of such a long-established institution. The EP leadership is convinced that this has always been the practice in the past, although the Article 7 procedure has not yet been voted on by the European Parliament.[54] Abstention is an existing option (button) for Members, but the question in a given vote is: when will their position be taken into account? As a means of *preventing* the adoption of the proposal or as a way to *refrain* from such a resolution?

51 In a letter of 10 September 2018, Hungary's Permanent Representative notified the Parliament's Secretary General of the Hungarian Government's position that abstentions should be taken into account in the vote on the Parliament's contested resolution, in accordance with Article 354 TFEU and Rule 178(3) of the Rules of Procedure. On 10 September 2018, the Parliament's Deputy Secretary General informed Members of the European Parliament ('MEPs') via email that, in the context of the calculation of the votes cast, only the votes cast in favor and those cast against the adoption of the resolution would be taken into account, excluding abstentions. *Case C-650/18, Hungary v European Parliament,* paras. 11-12.

52 Id. para. 92.

53 Id. para. 96.

54 As an analogue situation, a voting in the UN General Assembly took place similarly. "The UN General Assembly adopted a resolution [...] calling for Russia to be suspended from the Human Rights Council. The resolution received a two-thirds majority of those voting, in the 193-member Assembly, with 93 nations voting in favor, 24 against", 58 abstained. *See* at https://news.un.org/en/story/2022/04/1115782. As we noted above, General Assembly Rules of Procedure Rule 86 [126] provides that "For the purposes of these rules, the phrase 'members present and voting' means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting."

doi: 10.5553/HYIEL/266627012022010001023

4. Concluding Remarks

In addition to the theoretical justification and critical literature on the majority principle, I discussed the finding that owing to political responsibility and the effectiveness of parliamentary governance/decision-making, simple and qualified majority is a central element of our form of government. However, in and of itself it cannot contribute to qualitative or democratic legitimacy. This would require an appropriate standard of political culture, which has unfortunately eroded a long time ago.

Board votes are largely organized around strategic considerations. This is particularly the case for multi-divisional bodies, such as multi-party or coalition legislatures, or for states that align themselves on questions of diplomacy in international relations. As far as the latter is concerned, it is seldom possible for the resolution of a body, assembly or parliament to be appealed, therefore, EU procedures represent a particular intermediate level between the national and international dimensions of majority decision-making.