Shaping Presidential Powers in Hungary: Convention, Tradition and Informal Constitutional Amendments

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Abstract

There was no tradition of a republican president in Hungary before the fall of communism, and the transitory constitution of 1989 was unclear about the exact role the President should play in the constitutional system of Hungary. Some provisions even resembled those of presidential or semi-presidential systems; some ambiguities were clarified during the first two decades after the transition. Conventions, however, were established to some extent and sometimes very quickly. This period gave rise to guidelines as to how the powers of the President should be exercised. Some other powers were concretized and interpreted foremost by the Constitutional Court. These conventions and judicial interpretations formed the character of the Presidency to the extent of informal constitutional change. Some of these elements have even been incorporated into and formalized by the new Fundamental Law of Hungary. The present contribution will point out how the originally broad competencies of the President have been narrowed in the practice, and what role the Constitutional Court and political actors played in this process.

Keywords

Hungary – president – institutional design – constitutional conventions – Constitutional Court
1 Introduction

It is astonishing how the wording of a constitution can differ from the actual interpretation of those very words. If one only reads the text of the Fundamental Law of Hungary (FLH) or especially the former Constitution of 1989 (CoH), an image of a powerful president may arise, and one would also dare to categorize Hungary as a semi-presidential system: the President may initiate a (binding for the National Assembly) referendum,\(^1\) bills or even an amendment to the constitution, veto any bill (once before ratifying it) or launch a preliminary constitutional review of any bills enacted by the National Assembly.\(^2\) All these powers, in essence, rather imply considerable presidential influence,\(^3\) and hence, may evoke a semi-presidential system. It is therefore also logical that the Hungarian Basic Law of 2011 and the former Constitution described the President as the guardian of the democratic operation of the State,\(^4\) like the French Constitution does,\(^5\) and designated him or her as the Commander in Chief,\(^6\) like US American Constitution does\(^7\) or the Weimar Constitution of Germany did in 1919.\(^8\) Although the Hungarian President has (at least on paper) powers and competences that even those mighty counterparts of France and

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1 Art 9 para (4) lit d) and Art 8 para (1) FLH. Similarly Art. 73 of the Weimer Constitution (WRV): “Ein vom Reichstag beschlossenes Gesetz ist vor seiner Verkündung zum Volksentscheid zu bringen, wenn der Reichspräsident binnen eines Monats es bestimmt.”


4 § 29 para. (1) CoH and identically Art. 9 para. (1) FLH.


6 § 29 para. (2) CoH and identically Art. 9 para. (2) FLH.

7 Art. 11 Sec. 2 US Constitution.

8 Art. 47. WRV: “Der Reichspräsident hat den Oberbefehl über die gesamte Wehrmacht des Reichs”.
the USA do not possess (like initiating bills or referenda), and does possess veto power, like those famous French and American colleagues, to describe Hungary as a semi-presidential system would be a gross error. Hungarian Presidents have punched below their weight over the past three decades and become among the least powerful constitutional actors in Hungary. They act less and less like “arbiters” within the system of the separation of powers, and more and more like simple representatives, holding symbolic and ceremonial roles, and in the shadow of the Prime Minister.

As Duverger conceptualized semi-presidential forms of government, he also noted that constitutional institutions cannot be understood by constitutional rules alone; political traditions, circumstances and behaviors must be taken into account, as well, because they shape how the formal rules are actually applied, and how institutions work in the real world. It is therefore more than surprising how narrow and descriptive the Hungarian literature is about the Presidency. The overwhelming majority of legal scholarship is limited to a (rather approving and reinforcing) description and summary of the Constitutional Court case-law, or – in case of political scientific analysis – to an account of the actual practice and attitudes under one specific President or another. Very few dare challenge the image of a restricted and powerless President built up by the Constitutional Court, or to contrast the normative constitution with the de facto one and offer alternative theories or explanations.

The Constitutional Court shaped the Presidency from very early on indeed, and generally, constitutional law became quite quickly equated with the actual Constitutional Court case-law. This might be explained by the

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9 Initiating bills: § 25 para (1) CoH and Art 9 para (3) lit. c) fl.H; initiating referenda Art 9 para (4) lit d) and Art. 8 para. (1) fl.H.
10 Duverger, op.cit. note 3.
11 As one of the very few exceptions see e.g., Gábor Dobos, Attila Gyulai, & Attila Horváth, “Weak but Not Powerless”, in Vit Hloušek (eds.), Presidents Above Parties? (Masaryk University, Brno, 2013), 77–100.
13 This is a phenomenon described critically in German as “Bundesverfassungsgerichtspositivismus”, which reduces the theoretical understanding and conceptualization of constitutional law as a kind of systematization of the case law of the Federal Constitutional Court. The ambit of theoretical works are therefore very limited, cf. Bernhard Schlink, “Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit” 28(2) Der Staat (1989),161–172; Bernhard Schlink, “Abschied von der Dogmatik. Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel”, 62JuristenZeitung (2013), 157–162; Christoph Schönberger, “Bundesverfassungsgerichtspositivismus: Zu einer
court’s well-earned prestige, but also by the aftermath of the centralized and authoritative communist legal culture alien to critical thinking, and especially in the case of the President due to the lack of a republican tradition, which could have otherwise served as an interpretative role-model (see next section). Nonetheless, taking into account that the Constitution of 1989 was quite blurry and fuzzy regarding the role and powers of the President, it is more than astonishing how easily it was accepted that the President should exercise rather symbolic functions and intervene into public life as little as possible. The present article is intended to show the process of these informal constitutional amendments, and the influence of constitutional politics, conventions and Constitutional Court case-law, and further to offer explanations for this development.

2 Establishing the Republican Presidency in Hungary

Besides in short periods, Hungary was not a republic until 1989. Although the Habsburg dynasty was dethroned four different times (1620, 1707, 1849 and 1921), and the idea of national republicanism touched Hungary somewhat in the 18th and 19th centuries, the main sentiment was rather for independence than for republicanism. This was arguably most obvious after the First World War, following which Hungary remained a Monarchy, even if Austria and Czechoslovakia reinvented themselves as newly born republics. After the unsuccessful democratic revolution of 1918/1919 and the fall of the Hungarian Soviet Republic in 1919, the Kingdom of Hungary, with her uncodified historical

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17 Law No. XLVII. of 1921.
constitution and monarchical traditions, was restored in 1920. Although a new king was never crowned, and such powers were exercised by a regent, all the formalities of a monarchy lingered until the end of the Second World War.

In 1946, a short-lived republic was proclaimed.\(^{18}\) The powers and status of the President were discussed, in the occupied country, and hence they were subject to political calculations and were less the result of a moderate constitutional deliberation. Due to the widespread popular support of the Independent Smallholders’ Party, its leader, Zoltán Tildy, was expected to be elected as President. Hence, the Communist Party was adamant in pushing to narrow the powers of the President, preferring a rather representative status.\(^{19}\) Even if the achieved compromise gave rather favored the communists’ interests, the President still kept some classical powers of a Head of State, e.g. to appoint (instead of merely propose) the Prime Minister. Moreover, at least formally, the President exercised the executive power via the Cabinet being responsible for the National Assembly, meaning that the President was the head of the executive branch.\(^{20}\)

The democratic republicanism held out for just over two years. As a result of the infamously manipulated “blue-ballot” elections in 1947, (along with the other Central European countries), Hungary became a communist one-party state.\(^{21}\) Tildy was forced to retire on 31st July 1948, and a new Stalinist constitution was enacted in 1949 defining Hungary as a “people’s republic” (although certainly not true to the essence of republicanism). Consequently, there was only meager practical experience with the new institutions: the President granted only one pardon and also vetoed only one legislative act.\(^{22}\)

Copying the Presidium of the Supreme Soviet, the communist constitution of 1949 introduced a new form of government with a collective Head of State,

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\(^{20}\) Varga, Patyi & Schanda, *op.cit*, note 12, at 155.


which played a crucial role in public life, amalgamating the powers of the executive and legislative branches. This aspect of communist constitutionalism had a deterrent effect after 1989, with and all those presidential powers recalling this institution being perceived skeptically and denounced as a communist holdover, not thoroughly rooted out of the democratic constitutional system. A very vivid example is the presidential power to initiate laws, which was (contrary to the Republican Constitution of 1946) indeed part of the Communist Constitution of 1949, and interestingly “survived” the democratic transition of 1989 and the enactment of the new Basic Law in 2011. This power was condemned as socialist heritage, and not made use of during the last 25 years.

During the roundtable talks in 1989, the Presidency was a point of fierce contention. Although the law of 1946 about the republican form of state was accepted as a common baseline, the actual negotiations were not conducted behind a Rawlsian veil of ignorance. The parties preferred a strong or a weak President according to their perceived chances of getting the post. This led, as in many other cases, rather to formal and less substantial compromises (“dilatatorische Formelkompromisse”). Due to a political deal between the governing coalition and the opposition in 1990, an opposition politician (Árpád Göncz) was elected as President of the Republic. This peculiar political constellation during the democratic transition culminated in several conflicts concerning the exact ambit of the powers of the President, which were delineated by several landmark decisions of the Constitutional Court between 1991 and 1992.

Interestingly, the actors (the President, the Cabinet and the Parliament) did not challenge the findings of the Constitutional Court and accepted the authority of the judicial solution about power conflicts. Nonetheless, and this is very typical to the Hungarian development of 1990–2010, the conflicts were notoriously solved by means of a so-called “abstract interpretation” of the Constitution. Although a motion for an abstract interpretation required a disagreement, the Constitutional Court had never solved the actual dispute but interpreted the Constitution and rather suggested than decided who is right in the particular situation. Nonetheless, based upon these interpretations, the contours of the Presidency were shaped and weakened step by step,

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23 Cf. §14 para. (2) of the Law XX of 1949 (the communist constitution).
24 András Jakab, Az új Alaptörvény keletkezése és gyakorlati következményei (HVG-Orac, Budapest 2011), 240. Formally, this power had also had the Monarch, but since the liberal revolution of 1848 a constitutional convention had established not to make use of it, see Gejza Ferdinandy, A királyi méltóság és hatalom Magyarországon (Kilian Frigyes, Budapest, 1895), 248–249.
25 Carl Schmitt, Der Hüter der Verfassung (Duncker&Humblot, Berlin, 1931).
and at the end of the day a narrative was built up that the President is a rather weak, powerless and merely ceremonial figurehead. This was institutionalized basically against the actual wording of the law. Very interestingly, the Presidents accepted the loss of influence without much ado and acted in the role more and more according to the expectations of the Constitutional Court and made no use of some very powerful competences that would have been incompatible with such image (e.g., initiating referenda or bills). Only László Sólyom (President from 2005–10) tried to loosen the straightjacket sewn by the Constitutional Court (and partially by him as then President of the Constitutional Court), which was perceived as a break of established conventions (see details in the next section). Most of these informal amendments during the first two decades were formalized as the Hungarian Basic Law enacted in 2011, and the essence of the case-law was absorbed into it.

3 General vs. Specific Powers – Where Lies the True Authority?

The Constitution of 1989 and the Basic Law of 2011 are very alike in many senses. One of those similarities regards the Presidency. While the German and Austrian Constitutions, for example, specify and enumerate the presidential powers, in contrast the Hungarian one includes a pompous job-description: the President is the guardian of the democratic functioning of the State, and the commander-in-chief.

Moreover, the Hungarian Constitution defined and enumerated further specific powers. The enumerated powers can be divided into legislative and non-legislative categories. The legislative powers encompass the right to attend and address sittings of the National Assembly, the right to initiate bills and even amendments to the Basic Law. The President signs Bills into


28 Art. 9 para. (3) lit b BLH.

29 These are rather untypical powers of a Head of State Cf. József Petrétei, “A köztársasági elnök alkotmányozási és törvényhozási eljárással kapcsolatos feladat- és hatáskörei I” 4(1) Kodifikáció (2013), 5–29 at 13–16. Besides those five bills submitted during the first presidential term of 1990–1995 none of these powers has been exercised, even if they could be rather influential and powerful tools in the hands of a president. It became a
laws\textsuperscript{30} and has the power to veto them either by sending an adopted bill back to the Parliament for reconsideration, or by requesting an ex-ante constitutional review before promulgation\textsuperscript{31} (even regarding Amendments to the Basic Law),\textsuperscript{32} or even combine these two kinds of veto, if the Parliament amends the Act or the Constitutional Court finds the piece of legislation to be unconstitutional. The President also may indirectly influence the legislation by initiating national referenda (the result of which is binding for the Parliament). The initiative does not require a countersignature, but an actual referendum depends on a decision of the National Assembly (Art. 9 para. (4) lit d) and Art. 8 para. (1) BLH).

The most important non-legislative power of the President is to appoint or propose some key constitutional functionaries of Hungary:\textsuperscript{33} The President however cannot act independently: either the appointment requires a proposal (in most cases from the PM) or the Parliament must vote on the candidate (like the PM who is, contrary to the constitutional tradition, not appointed but merely proposed by the President).\textsuperscript{34} Furthermore, the President sets the date for elections, convenes the constitutive sitting of the National Assembly,\textsuperscript{35} and in some limited cases is also entitled to dissolve the National Assembly. He or she may also award decorations, prizes and titles and grant individual pardons.

The relationship of the enumerated and specified powers to the rather vaguely formulated general ones was one of the first issues to solve: are the general powers a source of any new competences; are there umbrella powers including those enumerated ones; do they add anything to the character of the Presidency, or are they simply a pompous description of the Head of the State without having any normative value at all? The Constitutional Court decided the dilemma in favor of the enumeration of presidential powers, concluding that the general powers are no source of further authority (and in doing so, weakened the position of the President). The President was designated traditionally as the commander-in-chief of the armed forces, but this (at least in the Constitutional Court reading) did not give her a rank within the structure

\begin{itemize}
  \item \textsuperscript{30} Art. 6 para. (3) BLH; Petrétei, \textit{op.cit.} note 29, 16–29.
  \item \textsuperscript{31} Art. 6 para. (3) BLH see also Dobos, Gyulai and Horváth, \textit{op.cit} note 11, 83–84.
  \item \textsuperscript{32} Art. 5 para. (3) and Art. 6 para. (9) BLH.
  \item \textsuperscript{33} The long list from the PM to the Governor of the Central Bank is enclosed in Art 9 BLH.
  \item \textsuperscript{35} Within thirty days of the date of the elections, Art. 3 para. (1) BLH.
\end{itemize}
of the armed forces but rather a status outside it: being its leader but not an actual commanding officer. The ambit of the President’s governing authority over the armed forces is hence exclusively enumerated by the Constitution, and it consists of the appointment, approval and confirmation of certain officials. According to this line of interpretation, the Government, at the apex of the executive branch, has the actual commanding authority over the armed forces except for those few powers that explicitly fall within the competence of the President or Parliament. Pursuant to this line of interpretation, it was also clarified that the President is not part of the executive branch. These outcomes were nonetheless contrary to the historical Hungarian constitutional thinking, according to which the head of State had real political power. Guarding of the democratic operation of the State was also interpreted very restrictively, which according to the Constitutional Court does not create any new powers, but is to be understood as a yardstick of exercising the specific powers vested to the President. Hence, the President may refuse an appointment or a confirmation, if the proposed person would imperil the democratic functioning of the State, but cannot invoke this function to extend her constitutionally enumerated powers.

Nonetheless, the enumerated powers could have been added up to a powerful President, and in some respect to a more powerful than those of some well-known semi-presidential systems, which then again could have been serve as a pretext to interpret the general powers of the President. This aspect was completely neglected by the Constitutional Court, and an interpretation of a weak president was forced, the image of which has been imprinted also into the constitutional scholarship notwithstanding the fact that this interpretation is contrary to the actual wording. Although authority and power are proverbially not synonyms, cutting back powers of the President in the Constitutional Court case-law led to loss of the authority as well, and made it much harder to exercise even those powers that the Constitution actually contained. The President never initiated referenda, combined a political veto with an initiative of a referendum, submitted bills to the National Assembly

38 Decision of the Constitutional Court 48/1991 (IX. 26.) Ab.
39 § 13 Law Nr. I of 1946.
(except during the first term), and did not aspire to be more than a political figurehead. The expectations and their fulfillment reinforced each other, and established a constitutional convention requiring a very limited role of the President.

This became apparent as László Sólyom tried to reinvent the Presidency between 2005 and 2010. One of the striking examples was the nomination of key constitutional functionaries: the earlier Presidents used to consult the parliamentary parties before nominating candidates for the position of the Ombudsman or the President of the Supreme Court and alike. President Sólyom declined to follow this practice for which he received a very hostile reaction and a break of established conventions was alleged: the political parties denied to vote for any of those candidates proposed without consultation (irrespective of their qualifications or ideological affiliations) and refused to give any reasons whatsoever for doing so. Basically, they punished him for breaking with the established constitutional convention of political passivity. The President condemned that behavior as a serious threat to the democratic functioning of the State, but the incident showed very clearly how the political actors accustomed themselves to the invented weakness of the President and expected him to behave accordingly (irrespective of the fact which powers the then Constitution conferred on the President). Nonetheless, real difficulties arose as a more active President would have been needed to help to overcome political crisis.

4 The Absent Father of the Fatherland

The frailty of the system coined out by the Constitutional Court showed in times of real crisis, where a more active President could have effectively arbitrated a solution. This might by illustrated by two incidents.

A delicate situation occurred in 2004, as the then socialist Prime Minister, Péter Medgyessy, resigned because of the exposure of his activities as a counter-espionage officer during the communist regime. The difficulties arose because of a clear contradiction between the Constitution and an Act of Parliament on the status of members of government. According to the Constitution, the mandate of the Prime Minister (and simultaneously that of the Cabinet) terminates at the moment of his or her resignation. The mentioned Act of Parliament (which had lower rank than the Constitution) rendered a notice period of 30

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42 This might be also explained by the fact that the precise ambit of the Presidency, how strong or weak it should be, was fought upon exactly during the first term, and after that the weak position was rather accepted.
days (as if the Cabinet members were simple desk officers). The Prime Minister obliged the black letter of the Act of Parliament (which was later found to be unconstitutional), gave notice and went on holiday. This surely would not have been controversial had a more determined President less constrained by expectations of the role acted as a true guardian of the Constitution, and, by directly applying the Constitution, accepted the resignation and immediately nominated a new candidate. By doing so, he could have solved the crisis promptly but also would risk an impeachment. Nonetheless, the mainstream found the passivity (and the blind obedience to acts of parliament instead of the Constitution) to be consistent with the rule of law and the guarding the democratic functioning of the State.

The other incident occurred a few years later after the 2006 elections, as the then socialist Prime Minister Ferenc Gyurcsány admitted at a closed meeting of his party’s top officials that he willingly lied during the election campaign. After the speech was leaked, spontaneous demonstrations erupted, and many expected the President would demand a resignation of the PM. The then President, László Sólyom, was the former President of the Constitutional Court, who in that earlier capacity had cut back the powers of the President, and therefore could hardly argue for a more active role after switching the position. Hence, nothing else remained than to appeal to the parliamentary majority to restore society’s confidence, but was not in the position to require a demission. Such a demand could have been made by a true guardian of the constitution but not the mere shadow that the Constitutional Court created.

A year later (in 2007) the same controversial Prime Minister proposed several high functionaries of the former communist regime for decorations. The President held this to be contrary to the democratic foundations of the republic and wanted to refuse the decoration. The Constitutional Court approved the right to refuse as an emanation of guarding the basic constitutional values but restricted the exercise of this power to extremely exceptional cases. The
reasoning was that such a refusal has no direct influence on State organization. This was a contradictio in adiecto: allowing to defend the basic constitutional values only if that has no direct influence on the State machinery (and logically not to allow such refusal if it would). Moreover, it also shows how the narrative and image of a weak President influenced the interpretation: the exercise of his or her powers may not make too much of an impact.

5 Explanations

As it was shown, the President became (contrary to the constitutional tradition and the actual wording of the Constitution of 1989) a very weak political actor in the Hungarian constitutional system, which was carved in stone by the Basic Law of 2011. Since entry into force of the Basic Law, the President is dominated by the Prime Minister, who commands the two-thirds majority and in doing so decides on the President. The very obvious question is what could possibly explain this evolution?

As demonstrated, the main driving force was the Constitutional Court and its restrictive interpretation of the powers of the President, and hence, on a basis of political rationalism, one might logically suggest that this happened in order to maximize the influence and power of the Court. If there is only a legal guardian of the constitution and there is no (or a very weak) political one, the influence of the legal guardian (the Constitutional Court) is much greater. Because the constitutional actors submitted themselves to the arbitrage of the Constitutional Court during the transition period, it would be absolutely understandable to make use of this opportunity in order to gain maximal influence over the constitutional system (which also requires minimizing the influence of other actors). The same reasons may also explain why the Constitutional Court cut back the ambit of the referenda: because referenda are binding to the Parliament (similarly to the decisions of the Constitutional Court), and therefore they might be perceived as a rival form of control over the Parliament. If the scope and ambit of referenda are minimized, the Constitutional Court may expand its influence over the legislation and the whole constitutional and political system.48 An intended consequence was that two instruments of the checks and balances (referenda and the president) were weakened and cut back.

A further explanation might be the idealization of and the often unfiltered transfer from German constitutional thinking. The German President is indeed and intended to be weak precisely because of the experience of the Weimar Constitution and the role the President played in the Nazi grip of power. Undisputedly, the German Grundgesetz was an answer to several (real or assumed) architectural failures of the Weimar Constitution: the extended powers of the President, the referenda or the dissolution of the Reichstag, which were rooted out from the German Basic Law. So, one might also reasonably suggest that the leitmotif of a weak President stemmed from Germany; and further, it might be qualified as a less successful legal borrowing not taking into account that Hungary had no Weimar experience, had a very different constitutional tradition, and didn’t need to copy and borrow from German constitutionalism (at least in this respect).49

A further explanation might offer the fact, that the Hungarian President is not directly elected, and hence one might argue that exactly therefore the necessary authority lacks to exercise strong presidential powers. This of course might be a factor, nonetheless, if this is the true rationale behind the case-law, then it only pinpoints the fact that the Constitutional Court knowingly reframed the actual existing powers of the President in order fit into an imagined or wished purely parliamentarian political system.

Regardless as to whether the weakening of the President was intended to maximize the power of others or a poor legal borrowing, the more pressing question is, why was it accepted without much ado? The answer may be rooted in the missing Republican tradition. Republicanism, similarly to other ideas, is socially constructed; people simply perceive themselves to belong to that community and act accordingly. Contrary to other Central European countries (like Czechoslovakia or Austria), Hungary had no republican tradition, and therefore no domestic role model to imitate, no traditional image to emulate, no idea how a Republic should look and what powers a Republican President should have, how strong or how weak he or she should be. As an image of a Hungarian figure like that of Masaryk in Czechoslovakia was missing, it was hard to compare and contrast the Constitutional Court case-law with a republican ideal or a historical counterpart: there was no popular narrative but only the black letter of the law. This also made it much harder to build up

49 If the Constitution has a duty to tackle shortcomings and societal challenges (“Antwortcharakter der Verfassung”) Hungary had not had the same shortcomings and challenges as Germany after the Second World War. Cf. Paul Kirchhof “§ 273. Verfassung, Theorie und Dogmatik”, in Josef Isensee & Paul Kirchhof (eds.) Handbuch des Staatsrechts der Bundesrepublik Deutschland, Bd. XII (Cf Müller, Heidelberg, 2014), para. 19–28.
and much easier to shape the institution according to actual political needs or persuasions. Furthermore, socialist legal tradition left a heritage of non-critical thinking, which not only paved the way for autocratic legalism\footnote{Kim Lane Scheppele, “Autocratic Legalism”, 85(2) The University of Chicago Law Review (2018), 545–584.} but, in combination with the virtually missing constitutional scholarship in Hungary during the transition, also made it easier to accept the questionable Constitutional Court case-law.

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