

Introduction of Exercising Constitutional Power Through the Practice of Some Archetype Countries

Csaba Cservak

Corresponding Author: Csaba Cservak

Date of Submission: 18-09-2019

Date of Acceptance: 05-10-2019

I. HISTORICAL FORMS OF GOVERNMENT IN HUNGARY

Regarding their forms of government, the various states in the world can essentially be divided into two categories: *monarchies* and *republics*.¹ Both the identity of the head of state and the type of legal status they possess play integral roles in classifying the form of a government. However, due to the governments in certain countries encompassing elements of both a monarchy and a republic, placing the leader of such a government under sole scrutiny is insufficient for ascertaining the form of government.

The general name for the head of state in a *monarchy* is "monarch". Specific monarch titles include: king, tsar, sultan, emperor, shah, emir, prince, grand duke, duke, etc. It can almost be said that there are as many titles as there are states, however, they aren't simply regional names, as they also indicate the ruler's measure of power and -- regulated by various social norms -- the source of his or her authority, i.e. an emperor is obviously a far more powerful ruler than a duke. The primary distinguishing attributes of monarchs lie in their ascension to power via succession rather than election, as well as their lifelong rule.² Due to these factors, the monarch's identity imbues this form of government with the advantages of stability and predictability, such a polity undoubtedly bearing the greater symbolic power. On the other hand, this very same rigidity demonstrates the system's disadvantage, in that the population is unable to influence the individual head of state when suffering an unpopular ruler or dynasty. Between 1920 and 1944, Hungary had a unique position amongst monarchies due to the jurisdiction of its head of state — its form of government being a kingdom, but its head of state a regent, whose ever-growing legal powers overshadowed that of a semi-presidential president but did not yet reach that of a monarch. This system is called a "kingdom without a king".

¹ The *system* of a government denotes a more complex concept, differentiating countries based on the legal relationship between their main branches of government. Accordingly, we can specify the following systems: parliamentary, semi-presidential, presidential, collegial. (Intermediate systems naturally exist.) See: Csaba CSERVÁK: Kormányzati és választási rendszer (avagy a demokratikus hatalomgyakorlás komplex rendszere nemzetközi kitekintésben). Doctoral dissertation, University of Szeged (2010), p. 13-14 (Hungarian).

² Succession can typically occur via the law of seniority, yielding the throne to the eldest member of the dynasty, or through primogeniture, leading to the eldest issue (typically, a son) of the deceased monarch taking his place. See: Barna MEZEY: *Az államfő*, (In.: MEZEY id. mű), p. 87 (Hungarian).

The head of state of a *republic* is the president, or the president of the republic. Historically, some exceptions certainly apply — the head of state in the Republic of Venice³ was the doge.⁴ In contrast with monarchs, presidents gain their office through election instead of succession, and only for a predetermined period of time.⁵ Naturally, taking a look at a variety of states provides multiple exceptions. Perhaps the most striking of these examples is Malaysia, whose king is granted a five years mandate through election by the rulers of constituent states.⁶ In the Vatican City State, the head of state -- the Pope -- is elected for a lifetime, but a case could also be made for Andorra, where one of the co-prince heads of state is the president of France, the other one being the bishop of Urgell. Therefore, neither heads of state gain their office through inheritance.

For the better part of a millennium, Hungary's form of government was that of the kingdom, led by a king. Contrary to many other medieval states, however, the ruler's power had been controlled -- to invoke a modern term -- by "checks and balances" from very early on, with the national assembly playing an important role in the field of legislation.⁷ The king was entitled to rule only after being crowned and simultaneously accepting his constitutional limits. Contrasted with contemporary states, the jurisdiction of the Hungarian national assembly towards the king was notably wide.⁸

The most important guiding principle of the historical Hungarian constitution was the Doctrine of the

Holy Crown. Under its aegis, the backbone of the nation was made up jointly by king and nobility. In other words, the king does not rule; the crown does. (This can be understood as an early prototype of the separation of powers.) As a consequence, legally speaking, the king did not own his country as private property.

³ In contrast to the elected doge, members of the Great Council inherited their offices. See: Barna MEZEY: *Képviselőt és választás a középkori Európában*, Rejtjel Kiadó, 1998. Budapest, p. 168 (Hungarian).

⁴ In the republican period of Rome, two consuls operated simultaneously, while in Napoleonic France, their number was three. Of the three, the legal powers of the First Consul were the most significant. See: Lászlóné NAGY: *A klasszikus polgári átalakulás állama és joga Franciaországban*, (In.: Általános jogtörténet I., szerk.: Horváth Pál- Révész T. Mihály, Nemzeti Tankönyvkiadó, 1994. Budapest) p. 282-283 (Hungarian). (Power-sharing could naturally be found in monarchies as well, such as with the two kings of ancient Sparta.)

⁵ During one period in Athenian democracy, the president of the Council of Five Hundred—the state premier— was elected on a daily basis. See: ISTVÁN STIPTA: *Az ókori görög állam- és jogfejlődés*, (In.: HORVÁTH- RÉVÉSZ T. id. mű) p. 39 (Hungarian).

⁶ The two Spartan kings were likewise elected for one year by the citizen assembly. See: STIPTA id. mű p. 36 (Hungarian).

⁷ KINGA BELIZNAY-BARNA MEZEY: *Az Országgyűlés* (In.: MEZEY Barna (szerk.): *Magyar alkotmánytörténet*, Osiris Kiadó, Budapest 1996.), p. 102 (Hungarian).

⁸ According to Zsolt Zetényi, also referencing the notions of Bertalan Szemere. See: Zsolt ZÉTÉNYI: *A történeti alkotmány*, Magyarországi kulturális egyesület, 2009. Budapest, p. 54 (Hungarian).

It is to be noted that *de iure*, Hungary and Bohemia were frequently in personal union. This spurred Wenceslaus III, King of Bohemia and one of the pretenders for the Hungarian throne of the eventually triumphant Charles Robert of Anjou to lay claim to parts of the country.⁹ Sigismund of Luxemburg was elected Holy Roman Emperor as the king of both Hungary and Bohemia, with later shared rulers of these countries usually inheriting both titles simultaneously.

Matthias Corvinus (r. 1458-1490) occupied parts of Bohemia and declared himself king of that country, but *de iure*, Bohemia remained intact as an independent entity. The Jagiellon kings of Hungary (Vladislaus II and Louis II) also reigned in Bohemia, thereby holding both titles themselves. In 1526, Hungary broke into three parts.¹⁰ The legitimate successors to the Kingdom of Hungary became the House of Habsburg, who also constantly bore the title of Bohemian kings.

Upon the outbreak of Rákóczi's War of Independence, Francis II Rákóczi was elected ruling prince. Even though his forces occupied a significant portion of the country, the Habsburgs still considered themselves its heads of state.¹¹

For a short time after the dethronal of the House of Habsburg during the War for Independence of 1849, Lajos Kossuth fulfilled the functions of head of state (and, in practice, the head of government) as Governor-President in what amounted to a presidential state model. After crushing the revolution and before being compelled by historical circumstances to sign the Austro-Hungarian Compromise of 1867, the Habsburgs instituted a military dictatorship. The Compromise created a real union between Austria and Hungary.¹² Interestingly, despite its historical role and economic importance, Bohemia was not made an equivalent constituent state of the Empire. **It begs the question whether a triadic rather than a dualistic state model would have proven more durable in withstanding the storms of history looming ahead...** During the period following defeat in the First World War, forms of government in Hungary followed one another as rapidly as the coups d'état that brought them about. Initially, Mihály Károlyi became president of the republic in what was intended to be a parliamentary system, followed by the 133 days of dictatorship by the Hungarian Soviet Republic. Upon the fall of the latter, the powers of head of state were taken over by Admiral Miklós Horthy, elected on

⁹ In Hungary, he reigned as Wenceslaus I, while in his native Bohemia (following the death of his father, Wenceslaus II), he was known, between 1305 and 1306, as Wenceslaus III.

¹⁰ A significant portion of the country was occupied by the Ottoman Empire, while the Principality of Transylvania practically functioned as a "second Hungary".

¹¹ Leopold I (1657-1705), Joseph I (1705-1711) and Charles III (1711-1740). It is to be noted that the latter was also known as Charles II as King of Bohemia and Charles VI as Holy Roman Emperor.

¹² Balázs ARATÓ: *Az osztrák-magyar „álladalom”*; 2014., kézirat, p. 2.

March 1st 1920 as Regent of Hungary. His jurisdiction was continuously extended and his mandate was life-long. As his legal powers over the parliament strengthened, he gained the ability to return legislation for deliberation and was granted the right to dissolve the government. He could also nominate members (more and more of them) to the second chamber of parliament. His legal powers were a peculiar "alloy" between those of a

semi-presidential president and a constitutional monarch. Horthy even attempted to pass on his powers via dynastic succession. He had his own son elected Deputy Regent who, upon meeting certain criteria, would have been able to take over the office of Regent after the death of the head of state.¹³

Following the Second World War, Act I of 1946 was accepted. Even though it was referred to by many in later times as a "Little Constitution", it did not directly declare a form of government despite reinstating the office of president of the republic.

The Communist takeover brought about Act XX of 1949 which, with significant amendments, remained the constitution of Hungary until 2012. It abolished the president of the republic's post again and made a collective body the head of state instead: the Presidential Council of the Hungarian People's Republic. While the parliament was not in session, this collective body had the power to enact statutory rules on legislative matters. (This actually happened very frequently.) On the other hand, the country's premier was neither the head of state, nor the prime minister, but the general secretary of the party, János Kádár. (Interestingly, according to various surveys, many people still regard him as the most popular Hungarian politician of the 20th century.) The form of government switched to a people's republic.

As far as **Germany** is concerned, we can speak about both "de iure" and "de facto" a sheer proportionate electoral method. (See the chapter on electoral systems in that section.) The effectiveness of governance is ensured by the strong prime ministerial system, the lack of the possibility for constructive vote of no confidence and lack of individual ministerial responsibility. In my opinion they implemented the two-chamber model in an effective way: the "two-thirds veto rule" of the second chamber can prevent the most important drafts of the government from being overthrown by the opposition, while it can hinder the adoption of legislation that reflects only the positions of those who are in power.¹⁴

¹³ See: Thomas SAKMYSTER: *Admirális fehér lovon*, Helikon Kiadó, 2001. Budapest, (transl.: Gergely Romsics), p. 255 (Hungarian). Original title: *Hungary's Admiral on Horseback: Miklos Horthy, 1918-1944*.

¹⁴ Please see CHRONOWSKI Nóra-DRINÓCZI Tímea: i.m., pp.126-127.

Germany is a classic model for chancellor democracy: the Prime Minister can only be replaced by the simultaneous nomination of an opposition candidate, and there is no place for individual vote of no confidence against the ministers. The prime minister is nominated by the head of state, then elected by the Parliament, and finally appointed by the President of the Republic.¹⁵ In addition, -and it might be an heretic thought on my part- the status of the President of the Republic – as indirectly elected by the two chambers - is not a weak post at all. The Head of State, as from his inaugural oath is derived ("I will keep and defend the fundamental laws of the Alliance") exercises control over legislation from the point of view of constitutionality. Thus, instead of being only an undersigning puppet, he can have a real and essentially absolute veto right in his arsenal. (By doing this, at least in this regard, he created a strong position. Since the aforementioned derivation veto has actually happened nine times, there can be absolutely no talk about it "not being a living legal institution".) The body of the Constitutional Court is one those ones with the highest number of members in the world today.

Overall, proportional electoral system (as a weakening factor) and a strong prime minister model can create some kind of balance, while the Second Chamber can channel other interests. The head of state does not interfere with the operation of government, but in case of its permanent malfunction, he can intervene. A strong constitutional court is a worthy guarantee of the rule of law. (I would only feel the need for the institution of a powerful referendum).

Austria established a multi-level listing system implementing the Hagenbach-Bischoff quota at regional level and the D'Hondt formula with a 4% parliamentary threshold as a compensation tool at national level. / see earlier. /

The President of the Republic, - in spite of being directly elected for 6 years-, has a protocollary role. According to the word of the Constitution, he has the right to dissolve the parliament (the only limitation is that he can do it only once for the same reason), but in real life this right has not been exercised since 1930.

The prime minister is nominated by the head of state freely, but traditionally the largest coalition party should have that power in reality. There is no need to hold a vote in the parliament; the government just introduces itself to the people's representation body. If the parliament is not in a session, the President of the Republic convenes simply¹⁶ the National

¹⁵ KATZ, Alfred: *Staatsrecht*, C. F. Müller Juristischer Verlag, Heidelberg 1994. pp.183-185.

¹⁶ KILÉNYI Géza: *Összehasonlító alkotmányjog (Comparative Constitutional Rights)*, PPKÉ Kiadvány, Budapest 2002., p.91.

Council in an extraordinary session, which is the lower house. The introduction has no constitutional consequence at all.

The bicameral system is asymmetric, the upper house (Federal Council) has only a suspensive veto right. Although the level of activism of the Constitutional Court does not reach its German counterparts, but it plays a significant role in deciding in the debates on matters of jurisdiction and in giving preliminary opinions on the amendments of the constitution (because the amendment to the constitution requires a confirmative referendum) between the provinces and the federation. In addition, its role is increasingly relevant for the assessment of individual constitutional complaints.

Comparing legal institutions, a sufficiently proportionate electoral system and a relatively stable government can bring about a balance between strengthening and weakening factors. The politically assembled second chamber and the constitutional court as the apolitical branch of power in addition to the direct exercise of power form the fundamentals of the distribution of power.

"In time of troubles", the president can intervene in an extraordinary situation, but otherwise he does not interfere in the work of government¹⁷

In France, the peculiar system of absolute majority provides the basis of the formation of a stable government.

In individual electoral districts, if the first round cannot produce an absolute winner, the first two runners in the first round will participate in the second ballot in any case, and eventually those candidates will be there who have at least 12.5% of the votes. (This model is fairer than ours because the absolute majority system would only be „abused” if the third - and perhaps even more - candidate has really substantial support and not just getting a bargaining position for "big winners". By default, it is an „absolutely absolute” system or exceptionally an „absolutely-simple” one)

The government is responsible for the parliament (too), which is not a negligible aspect. The President of the Republic (at a different time) is elected by the people according to the Constitution of the Fifth Republic, so the system is open to reflect to the changes of the public opinion during the cycle. The head of state can freely nominate the Prime Minister; no parliamentary vote is required. Only the differing attitudes of the head of state and the head of

¹⁷ Please see CHRONOWSKI Nóra–DRINÓCZI Tímea (szerk.): *Európai kormányformák rendszertana (The system of European government forms)*, HVG-ORAC Lap- és Könyvkiadó, Budapest 2007., pp.139-141.

government (cohabitation) can cause serious disturbances in the machinery. (This issue was covered in the previous chapter, as France is the home of the semi-presidential system.)

The law enforcement system of the two-headed executive is quite unique. The head of state presides over the meetings of the Council of Ministers. He also undersigns the decisions of the council (quasi government decree) here; and may live - which can lead to a political scandal because of the lack of a substantive regulation - with the right to refuse it. Meetings of Government, however, are led by the prime minister, and in that case he makes a decree in by himself, countersigned by the minister responsible for the subject that is concerned. (Of course, the refusal of the latter is unlikely, because of the fact that the career of the minister depends on the head of the government.) It is a quite interesting wheel in this legal machinery, because the otherwise "strong" semi-presidential president has only passive powers, while the otherwise weak prime minister – compared to the prime ministers of the Prime Ministerial model – is undoubtedly competitive in the field of legislation.¹⁸

A referendum cannot be held on public initiation, only in the cases defined by the Constitution. In certain cases, the head of state may start a referendum involving the public to legitimize something.

The Constitutional Council - as a quasi-constitutional court - performs only preliminary norm control. By default it verifies the so-called organic laws for compliance with their fundamental law, while does the same with the other ones by the initiation of 60 (nationwide or senate) representatives.

Along with the elements of the system, it is very likely that a stable majority will be formed after the election. But the president is more than a tool of "checks and balances". The model can be dysfunctional in case of cohabitation. If the president is also the head of the government, the model is too strong; this is somewhat offset by the second chamber. If there is a rivalry between the head of state and the head of the government, the government can still function if cooperation on truly important issues is likely to be possible, but in smaller cases, the president will not be a servant-like „stamp man”. (Dysfunctionality can really happen even if these two people hinder each other's work because of not political but for personal reasons.) **In Spain**, the relatively proportionate closed-list electoral system is balanced by a prime minister who is protected by the constructive vote of no confidence and makes the government staunch. According to the D'Hondt method, 350 seats are allocated in the 50 multi-mandate districts (although it is true that only 2 seats in some provinces, which is the antidote for

¹⁸ See about competencies: CHRONOWSKI Nóra-DRINÓCZI Tímea, i.m., pp.99-101.

proportionality), and there are two single-mandate districts. Of the 259 members of the Senate, 208 are elected with simple majority and 49 are indirectly elected by the regional legislative assemblies.

The Prime Minister is appointed by the king through the Speaker of the House after a consultation with the parliamentary parties. (And if the prime minister gets elected, the king will appoint him by another act, similarly to the German model.) Should the recommended person not be able to successfully win the confidence of the House of Representatives, a new vote must be held within 48 hours; at that time, relative majority will be sufficient. If this procedure does not result in an elected prime minister, a new person will be nominated after further consultation. Failing to produce an elected head of the government for two months, the king, with the countersigning of the House Speaker, will dissolve the parliament.

The Prime Minister can be replaced by a classical vote of no confidence. There is no individual ministerial responsibility.¹⁹ In the second chamber, local interests are expressed, although it differs from the traditional binary government / opposition representation but electing regional bodies cannot be considered as apolitical.

The Prime Minister may propose the dissolution of both the House of Representatives and the Senate; the final word in this respect is the sovereign's.

500,000 voters can propose a bill. However, the referendum has only consultative effect, and in addition, only the king can initiate it by the prime minister's proposal and with the consent of the Parliament.

The king, as a traditional head of state fulfills only a protocolary role, yet by his virtue and prestige, he can balance some of the "derailed trains of government". (as Constant said) All in all, this system seems to be harmonious, and strengthened by a constitutional court which has a relatively strong power of assessment of certain individual constitutional complaints (amparo). We might miss the institution of a slightly stronger referendum.

Lithuania has a mixed electoral system: 71 members are elected in a two-round majority model, 70 are nominated on a nationwide party list based on the Hare quota. (Trench system)

The President of the Republic nominates the Prime Minister with the consent of the Parliament and the ministers are nominated by the Prime Minister. Within 15 days after the nomination the Parliament should vote for them because of the "pretext" for the acceptance of the government program.

¹⁹ Please see about competencies: CHRONOWSKI Nóra-DRINÓCZI Tímea: i.m., p.363.

The head of state has a very specific and powerful authority to control legislature. The president does not have the right for previous norm control – but has an even stronger one ... According to this, if he pleads for the unconstitutionality of any existing law, he has the right to turn to the Constitutional Court and that body can suspend the application of that law. This is an almost unprecedented way for norm control, because it is –ad absurdum– possible for the head of state to suspend the application of a law which was passed e.g. 10 years ago. Of course, the Constitutional Court may state that the norm is constitutional, so it is weaker than an absolute veto. At the same time, it is clear, that this does not only overrule laws that were passed in the particular electoral period but can also affect cycle(s) preceding the current one. In addition, the president has a veto power (which is not legality, but also examines reasonability) with a suspensive effect.

According to the Constitution, the head of state has the right to dissolve the Parliament without any previously defined cause. Kilenyi considers this to be disproportionate, especially because there can be some misuse in terminology since there is a separate category for early elections, after which the parliament can remove the head of state with three-fifths majority. Géza Kilenyi cynically calls this the strange gratitude of Parliament in return for the winning of mandates. It is undoubtedly a good observation. In the background, however, it may be that the president is willing to take some risks: if the previous majority wins the election again, and the public opinion turns against the president because of the unnecessary and unfair dissolution then the scenario of his removal is prominent. So taking this risk is something to think over very thoroughly ...)

The former Soviet Baltic state lived under oppression for a long time established an exemplary government system. No doubt, the power of Constitutional Court and strong character of the referendum should be praised. Some provisions of the Fundamental Law can only be amended by a referendum and 300,000 voters (relatively high number) can initiate a referendum on their own. However, the weakness of the system is counterbalanced by the mixed election model. The complex system shows an interesting similarity with the Hungarian one (mixed choices, special veto-holders, referendums, constitutional courts), but it seems somewhat more favorable than ours. The election model is somewhat more proportional (due to the high magnitude of the only national list), the power of the head of state is slightly stronger and the referendum is somewhat broader. So there are several elements for weakening the government, yet the weakness does not jeopardize the efficiency of the government

Latvia employs preferential list voting with the Sainte-Lague system. To win seats in the Parliament of 100 MPs, a 5% threshold has to be reached.

The government system is the traditional parliamentary system, the government appointed by the President of the Republic and the Parliament votes for it.

The head of state is not the part of the executive branch (that is, it cannot be considered as a „half-president”), but a major factor in "checks and balances" of the separation powers.

The President of the Republic has a right to suspend the promulgation of any law for a period of two months (furthermore, it is compulsory for him to do it by the request of a third of the Members of Parliament). In the meantime, at the minimum 10% of the voters' initiation, an abrogative referendum should be held to eliminate the law.²⁰ (This is a very high number; let us just think of the 200,000 voters' request for a referendum in a country with about 8 million voters!) Required voter turnout for the referendum to be valid is 50%. (The threshold for having a valid effect is 50% of the votes.) It gives kind of a byway to the parliament if they declare a law urgent by a 2/3 vote because then there is no option to hold a referendum; the head of state must promulgate the law within 3 months. (There is, of course, a great deal of urgency, the more democratic a political culture, the less likely to have fake reasons. The two-third voting expectation is a kind of strict filter) It is similar to just ignoring a veto. There is no need for urgency even if the Parliament passes the bill by a 3/4 majority vote, because then, the text still can be modified.

It is also a characteristic element of the constitution that the head of state can autonomously hold a referendum on the dissolution of parliament.

Voters also have a direct opportunity for participation, with only one condition, that is the head of state should start the process of the referendum.

The traditional role of the constitutional court constitutes the basis of the fundamental rights, and after the German example, the possibility of an individual constitutional complaint has also been introduced.²¹

The weakness of the proportional electoral system is counterbalanced by the one-headed execution and the head of state and the possibility of referendums (in their restricted form) serve as further guarantees for the rule of law. (The antidote to excessive weakness is the lack of a unicameral parliament and the referendum initiated by the people.)

In **Estonia**, the parliament has a proportional, party-list election. (It is interesting that in the 11 multi-zone district mandates are allocated based on a simple electoral quota, but since

²⁰ Please see KILÉNYI/2002, p.11.

²¹ Please see. SZENTE/2006, p.462.

mathematically all seats cannot be distributed, the other mandates will be allocated in the second theoretical part of the distribution using a modified D'Hondt method.)

After the collapse of the Soviet Union, the President of the Republic was elected directly. Later, the constitution was modified and the head of state is elected by the Parliament. (If, however, it is not possible to elect a consensual candidate by a qualified majority in two rounds, a separate electoral college must be established – consisting mainly of delegates from local government bodies).

The formation of the government is similar to the Hungarian system. The President of the Republic nominates the Prime Minister to form a government, and after the Prime Minister's nomination, he asks for a vote of confidence from the Parliament, which, if the vote has a positive result, introduces a list of his government's nominees to the head of state, who appoints the government. The President of the Republic also has a suspensive veto right and a right of preliminary norm control – only one of the two may be exercised at a time – unlike in the Hungarian system. (Ours is optional.)

Options for referendums are moderate. The parliament can initiate a referendum and the result will be mandatory. It is a special rule that the negative outcome of the referendum question should be the cause for the extraordinary general elections.²² (So it is not really worth it for the parliament... It has a similar legitimacy function as a request for a vote of confidence) Citizens cannot force referendums by themselves.

The role of the constitutional court is provided by one of the chambers of the supreme court. A legal chancellor with relatively wide jurisdiction (a quasi-ombudsman) should examine the constitutionality and legality of municipal decrees and having right to send proposals and signals of any kind to different competent bodies.

"Checks and balances" may have a little less weight than in the other two Baltic states, but because of the proportional electoral system, at the end of the day the effect of the "strengthening factors" is not overt. (The standards of their political culture may be increased by the fact that the Estonians lived under the rule of German and Swedish knightly orders until the 1700s.)