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## **The Role of the Branches of Powers in Law-Making in Hungary**

**Keywords:** law-making, Hungary, Fundamental Law, branches of powers, Parliament, legislation

**Słowa kluczowe:** proces prawodawczych, Węgry, Konstytucja, organy władzy, Parlament, ustawodawstwo

### **Abstract**

In Hungary legislative power rests with the National Assembly. According to the Fundamental Law of Hungary the authority to pass legislation is vested in the National Assembly, the supreme body of popular representation. This paper gives a general overview of the role of the branches of powers in law-making in Hungary. We introduce the role of the legislative power in law-making, the role of the executive power, the role of the judicial power in law-making, and finally the role of the President of the Republic in legislation.

### **Streszczenie**

#### **Udział organów władzy w stanowieniu prawa na Węgrzech**

Na Węgrzech organem władzy ustawodawczej jest Parlament. Według regulacji Konstytucji węgierskiej kompetencję do uchwalania ustawodawstwa przysługuje Parlamentowi, najwyższemu organowi reprezentacji ludowej. Przedmiotem artykułu jest przedstawienie

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nie roli organu władzy ustawodawczej w procesie ustawodawczym. Autorzy odwołują się również do udziału innych organów władzy państwowej w stanowieniu prawa.

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## I. Introduction

This paper gives a general overview of the role of the branches of powers in law-making<sup>3</sup> in Hungary. We introduce the role of the legislative power in law-making, the role of the executive power, the role of the judicial power in law-making, and finally the role of the President of the Republic in legislation.

## II. The role of the legislative power in law-making

In Hungary legislative power rests with the National Assembly. According to the Fundamental Law of Hungary<sup>4</sup> the authority to pass legislation is vested in the National Assembly, the supreme body of popular representation<sup>5</sup>. Bills passed by the Parliament are the highest source of law in the land below the Fundamental Law<sup>6</sup>. The Parliament may expand its legislative activity to any areas previously unregulated or only partly regulated by law, and has the exclusive right to regulate in fields which are already governed by law<sup>7</sup>. Once the matter has been brought within the scope of statutory regulation by the Parliament, it may be modified or repealed only by the adoption of another

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<sup>3</sup> In the following we use the expression “law-making” as the issuing of all legal actions (including statutes/Acts of Parliament, decrees of government, ministers etc.); and we use the term “legislation” and “legislative procedure” only for the issuing of an Act of Parliament (in other words: statutes).

<sup>4</sup> The new Constitution of Hungary, adopted in 2011 and entered into force in January 1, 2012, is referred to in the following as “Fundamental Law”.

<sup>5</sup> Zs. Szabó, *Reform of the Legislative Procedure in Hungary*, “Osteuropa Recht” 2014, no. 3. [http://www.academia.edu/29098884/Reform\\_of\\_the\\_Legislative\\_Procedure\\_in\\_Hungary](http://www.academia.edu/29098884/Reform_of_the_Legislative_Procedure_in_Hungary) (15.11.2021).

<sup>6</sup> Zs. Szabó, *op.cit.*

<sup>7</sup> *Ibidem.*

law passed by the Parliament<sup>8</sup>. Apart from this, the Fundamental Law explicitly determines a number of areas that must be regulated in the form of cardinal laws. Cardinal acts have two key features that differentiate them from other laws. Firstly, as we mentioned, the Fundamental Law specifies the subject matter to be regulated in a cardinal act, and lists 35 items of that nature<sup>9</sup>. Secondly, cardinal acts are unique in that any modification requires a two-thirds majority of the Members in attendance.

However, the number of cardinal laws is far greater than the number of areas defined in the Fundamental Law, because, contrary to the logic of the previous Constitution, it is not the title of the law that counts, but the provisions containing the rule on the subject, i.e. the subjects defined in the Fundamental Law may include several laws<sup>10</sup>.

Historically, legislation is the earliest and most important function served by parliaments. This was particularly relevant for the National Assembly formed on May 2, 1990. Legislation appreciated in value and became a high priority in response to the historic effort to effect a regime change, to establish and solidify an institutional system for the rule of law and the market economy, and to re-position and continuously improve the entire legal system. The National Assembly thus became a *de facto* legislative body.

In Hungary, acts<sup>11</sup> are adopted by the National Assembly. According to the Fundamental Law, the rules for fundamental rights and obligations are determined by acts. The National Assembly adopts most of its acts by a simple majority of votes (more than half of the votes of the members present), except for the cardinal acts defined in the Fundamental Law and mentioned above, which require a two-thirds majority of votes from the present Members of the National Assembly. Cardinal acts are the exclusive vehicle for the regulation of some constitutional rights and the fundamental institutions of state administration. Like other laws, cardinal acts may not contravene the

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<sup>8</sup> Ibidem.

<sup>9</sup> <https://www.parlament.hu/documents/10181/62157/sarkalatostvekjegyzeke.pdf/afc8f54c-81c8-470e-a16f-3a5691b4c1b3> (2.12.2021).

<sup>10</sup> A. Jakab, P. Cserne, *A kétharmados törvények helye a magyar jogforrási hierarchiában*, "Fundamentum" 2001, no. 2, p. 46.

<sup>11</sup> In this paper we use the terms "Act" and "statute" as synonyms, being the product of the National Assembly/Parliament of Hungary.

Fundamental Law and must be enacted in compliance therewith and in the spirit thereof. Cardinal acts are not totally new in the Hungarian system – the Political Agreement of 1990 integrated those matters into the Constitution which required the opposition to be involved in the legislative process by supermajority vote. The Fundamental Law has only partially maintained these qualified majority topics, e.g. the right to peaceful assembly and referenda can be currently regulated by simple majority<sup>12</sup>.

The use of cardinal acts has a long tradition in Hungary; and it is to be noted that these acts are located hierarchically below the Constitution and their constitutionality, similar to any other law, may be examined by the Constitutional Court<sup>13</sup>.

According to the Fundamental Law, cardinal acts, for example, apply to: citizenship; the churches; the rights of the national minorities living in Hungary; the legal status and remuneration of Members of the National Assembly and of the President of the Republic; the Constitutional Court; the local governments; the detailed rules for the use of the coat of arms and the flag and the provisions on state decorations.

The Constitutional Court declared that cardinal acts are not on a higher level in the hierarchy of sources of law than the Acts adopted by a simple majority, in other words, cardinal statutes and “ordinary” statutes are on the same level in the hierarchy of the sources of law<sup>14</sup>. However, this thesis was criticised in Hungarian legal literature<sup>15</sup>.

The Venice Commission of the Council of Europe has, on several occasions, criticised Hungary for using cardinal acts beyond what is strictly necessary, and also in respect to detailed legislation. In other words, the Venice Commission is also critical of the detailed legislation, which has been con-

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<sup>12</sup> *The Basic (Fundamental) Law of Hungary*, eds. A.Zs. Varga, A. Patyi, B. Schanda, *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Clarus and NUPS 2015, p. 139.

<sup>13</sup> Greco, *Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Compliance Report. Hungary*. Adopted by GRECO at its 67th Plenary Meeting, Strasbourg, 23–27 March 2015, p. 10, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680969481> (2.12.2021).

<sup>14</sup> Constitutional Court Decision no. 43/2012. (XII. 20.).

<sup>15</sup> Á. Cserny, A. Téglási, *Jogrendszerünk egyes aktuális kérdései*, “Jogtudományi Közlöny” 2014, no. 1, pp. 47–53.

sidered questionable from a democratic perspective as it makes it difficult to introduce reforms in the future<sup>16</sup> (should a government have less than two-thirds majority in Parliament)<sup>17</sup>. In other words, Hungary was criticised for an extensive regulation through cardinal legislation even for matters of a less fundamental nature<sup>18</sup>.

As can be seen, in addition to its legislative power, the National Assembly is the sole body in the country with constitutive power – a number of other countries separate the two functions e.g. through a Constituent Assembly.

### III. The role of the executive power in law-making

Formally, the main difference between the law-making of the legislative and the executive power is that the former (that is the Parliament) issues acts (statutes), while the executive power issues decrees. Decrees typically require the direct authorisation of a statute (derivative law)<sup>19</sup>. However, the Fundamental Law grants the Government and local governments the right to issue original decrees, i.e. without the authorisation of a statute. Nevertheless, neither the Government's nor the local government's legislative rights may be exercised against the Parliament<sup>20</sup>.

The Fundamental Law recognises government decrees, Prime Ministerial decrees, ministerial decrees, decrees by the Governor of the National Bank of Hungary, decrees by the heads of autonomous regulatory bodies and local government decrees.

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<sup>16</sup> E.g. Venice Commission, CDL-AD(2012)009, p. 11.

<sup>17</sup> Greco Eval IV Rep (2014) 10E..., p. 10.

<sup>18</sup> Nonetheless, criticism from civil society also indicated that the current legislative system, as it has been applied in numerous situations, has lacked an appropriate level of transparency, that certain important acts (cardinal acts) have been passed without sufficient transparency nor been given the time necessary for broad consultations, in particular through systematic introduction of draft legal amendments at a late stage in the parliamentary process by individual MPs. E.g. Opinion of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary (CDL -AD(2013)012) § 129–132, etc.; Venice Commission and OSCE/ODIHR Joint Opinion on the Act on Elections of Members of Parliament of Hungary (CDL -AD(2012)012) § 52. (See: Greco Eval IV Rep (2014) 10E..., pp. 12–13.).

<sup>19</sup> L. Csink, *Sources of Law*, [in:] *The Basic (Fundamental) Law ...*, p. 69.

<sup>20</sup> *Ibidem*, p. 69.

In a state of national crisis the National Defence Council, and in a state of emergency the President of the Republic, can also issue decrees.

The Government's authority to enact decrees may be primary or based on legislative authority. The primary powers are established by Art. 15 sec. 3 of the Fundamental Law, which declares that the Government may issue decrees within its sphere of authority on any matter not regulated by an Act. No decree of the Government shall conflict with any Act. This does not restrict the powers of the National Assembly, which may consider any regulatory field under its authority.

According to the Fundamental Law and Act CXXX of 2010 on legislation, the Government may, also based on specific legislative authority, enact decrees that implement acts. Under Art. 5 sec. 1 of the Legislation Act, an authorisation to issue implementing regulations must specify the holder, subject and scope of the authority. The holder may not pass legislative authority to another party (prohibition on subdelegation).

The Government may adopt a decree in any area that is not reserved for regulation solely by the Parliament, provided that the Parliament has not already adopted a statute in the area in question<sup>21</sup>. The legislative competence of the Government is thus limited to the areas not already regulated by statute<sup>22</sup>. The Government is required to adopt a decree if the Parliament explicitly delegated the right to regulate a subject matter in a decree. In such cases, the Government is obliged to act (although there are no time limits or consequences for inaction)<sup>23</sup>.

According to the Fundamental Law, the Prime Minister can also issue decrees, e.g. appoint, by decree, a deputy prime minister from among the ministers. Prime ministerial decrees are ranked at the same level as ministerial decrees in the hierarchy of legislation.

Ministerial decrees are ranked below government decrees in the hierarchy of legislation. According to the Fundamental Law, ministers adopt decrees by authority of an Act or a government decree (issued within their original legislative competence), independently or in agreement with any other min-

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<sup>21</sup> Zs. Szabó, *op.cit.*

<sup>22</sup> *Ibidem.*

<sup>23</sup> *Ibidem.*

ister; such decrees may not conflict with any act, government decree, or decree of the Governor of the National Bank of Hungary.

Ministerial decrees serve the purpose of regulating the details of a policy area. Ministers may not adopt decrees on their own initiative; they must have the legislative power delegated to them by the Parliament or the Government. However, the Government may not subdelegate legislative power received from the Parliament. Still, ministerial decrees represent the majority of the legal system and most of the rules are detailed in ministerial decrees<sup>24</sup>. The requirements of legislative drafting for all legislative bodies are outlined in a decree by the minister responsible for jurisdiction, dating from 2009<sup>25</sup>.

Acting within his or her competence, defined by a cardinal Act, the Governor of the National Bank of Hungary may issue decrees by statutory authorisation, which may not conflict with any law.

According to Art. 23 sec. 4 of the Fundamental Law, acting within their competence defined by a cardinal Act, the heads of autonomous regulatory bodies<sup>26</sup> issue decrees by statutory authorisation, which may not conflict with any act, government decree, Prime Ministerial decree, ministerial decree or with any decree of the Governor of the National Bank of Hungary.

According to Art. 32 sec. 2 of the Fundamental Law, acting within their competences, local governments may adopt local decrees in order to regulate local social relations not regulated by an Act or by authority of an Act. Local government decrees may not conflict with any other legislation. The detailed rules on decrees to be adopted by local government representative bodies are laid down in Act CLXXXIX of 2011 on Hungary's local governments.

The Hungarian legal system includes legal instruments of state administration which, although they contain normative provisions, do not qualify as legislation. The Legislation Act (Act CXXX of 2010) defines two types of legal instruments of state administration: normative decisions and normative or-

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<sup>24</sup> Ibidem.

<sup>25</sup> 61/2009 (XII.14) Order of Ministry of Justice on Drafting Legislation; see: Zs. Szabó, *op.cit.*

<sup>26</sup> According to the Fundamental Law Parliament may establish autonomous regulatory organs by a cardinal Act for the performance of certain tasks and the exercise of certain competences belonging to the executive branch. The head of an autonomous regulatory organ shall be appointed by the Prime Minister or, on the proposal of the Prime Minister, by the President of the Republic for the term specified in a cardinal Act.

ders. These are rules of conduct that are not generally binding, i.e. not binding on everyone. They are merely internal provisions, organisational and operational rules relating solely to the issuer or subordinated bodies or persons. Normative decisions and orders cannot determine the rights and obligations of citizens. Legal instruments of state administration cannot conflict with other legislation and cannot repeat legislative provisions.

In normative decisions, the National Assembly, the Government – and other central administrative bodies – the Constitutional Court and the Budget Council<sup>27</sup> may lay down their own organisation, functioning, activities and action programmes. Local government representative bodies can also lay down their own activities and those of the bodies run by them, as well as their action programmes and the organisation and functioning of bodies run by them in normative decisions. Similarly, the representative body of national self-governments can lay down their own organisation, functioning, activities and action programmes as well as those of the bodies run by them in normative decisions.

Within their remit and as provided for in legislation, the President of the Republic, the Prime Minister, the head of central administrative bodies (with the exception of the Government), the President of the National Judicial Office, the Supreme Prosecutor, the Commissioner for Fundamental Rights, the Governor of the National Bank of Hungary, the President of the State Audit Office, the head of the metropolitan or county government office and mayors and town clerks, may lay down the organisation, functioning and activities of bodies led, run or supervised by them in normative orders. Moreover, the National Assembly, the President of the Republic, the Constitutional Court, the Commissioner for Fundamental Rights, autonomous regulatory bodies, the Prime Minister's Office and the head of the official organisation of the ministry may issue normative orders which are binding on the organisation's staff<sup>28</sup>.

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<sup>27</sup> The Budget Council is an organ supporting the legislative activity of Parliament; its main task is to examine whether the central budget is well-founded. The Budget Council takes part in the preparation of the Act on the central budget. The members of the Budget Council are the President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office.

<sup>28</sup> The Constitutional Court's decision 122/2009 CC adopted a contradictory principle that did not acknowledge the hierarchical relation between the head of government and his ministers and abolished the Prime Minister's right of normative command (order) regarding



#### IV. The role of the judicial power in law-making

According to the Fundamental Law of Hungary, the courts shall administer justice. The courts shall decide on criminal cases, private law litigations and on other matters defined by an Act. Furthermore, the courts shall decide on the legality of public administration decisions. The courts shall also decide whether a local government decree is contrary to another rule of law and on its annulment. Finally, the courts shall establish the failure of a local government to comply with its law-making obligation based on an Act.

The principal judicial organ (i.e. the highest judicial authority) in Hungary is the Curia. Regarding the jurisdiction of the Curia, it is important to mention that the Curia guarantees the uniform application of law. The decisions of the Curia on uniform jurisdiction are binding for other courts.

One of the Curia's tasks is adopting uniform decisions, which are binding for all other courts. The Curia passes decisions in cases where local government decrees violate legal rules, and in cases where the local government fails to legislate as laid down in the Act on local governments. Another important right related to the courts is that the Act on the organisation and administration of courts of Hungary has given the President of the National Judicial Office (NJO) the right to draw up in line with legal provisions – as normative instructions – all the mandatory rules and regulations applicable to courts. Furthermore he/she shall also adopt recommendations and decisions in order to perform his/her administrative tasks. Moreover, the President shall initiate legislation concerning courts, and express his/her opinion on draft legislation concerning courts – with the exception of municipal decrees – having collected and processed the

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the ministers. According to their justification, the normative order is the governing means of the administrative hierarchical legal relation. The special public-political relationship between the Prime Minister and his ministers is not a hierarchical relation, since the minister is not directly controlled by the head of government, so the Prime Minister's terms of reference can only be of a political nature. The Prime Minister, however, according to the law provided by the Constitutional Court – to define the government policy – could set duties for the ministers, which, as a matter of fact, implied the always existing power of informal command. N. Kis, Á. Cserny, *The Government and Public Administration*, [in:] *The Basic (Fundamental) Law...*, pp. 176–177; Á. Cserny, *Hungarian Governmental Operation from a European*, [in:] *Challenges and Pitfalls in the recent Hungarian constitutional development. Discussing the New Fundamental Law of Hungary*, eds. Z. Szente, F. Mandák, Zs. Fejes, Paris 2015, pp. 141–142, footnote 10.

opinions of courts through the NJO. The National Judicial Council may, however, make proposals to the President of the NJO initiating legislative activity concerning courts if it considers it necessary. Although the National Judicial Council does not have the right to make direct proposals, the Minister of Justice also participates in its meetings with consultation rights, so that legislative proposals and comments on them are also directly channelled.

In order to perform his administrative functions, the President of the NJO may issue regulations, recommendations and decisions binding on the courts by way of normative orders. The National Judicial Council exercises control over these powers by expressing opinions on the rules and recommendations issued by the President of the NJO.

## V. The President of the Republic

Among the provisions of the legislation, the Fundamental Law also regulates the contribution of the President of the Republic<sup>29</sup>. Besides that, the Head of State can be involved in several other stages of the legislative process and can play a different role in the drafting of the law, based on his or her rights and obligations under the Fundamental Law. His powers can therefore be classified in several ways, including initiating, establishing, and reviewing the law adopted, but also according to whether he has to act on his own initiative or on a mandatory basis<sup>30</sup>.

The President's initiative power includes the right to initiate legislation, a power that is primarily characteristic of transition states and a political product of democratic transition<sup>31</sup>. It is important to note that the President may also submit a proposal for the adoption and amendment of the Constitution<sup>32</sup>.

However, it can be noted that the President rarely uses his right of legislative initiative. Of the five elected Presidents of the Hungarian Republic, only

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<sup>29</sup> P. Smuk, *The Parliament*, [in:] *The Basic (Fundamental) Law ...*, p. 139.

<sup>30</sup> A. Vági, *A köztársasági elnök szerepe a törvényalkotásban*, Parlamenti Jog, Országgyűlés Hivatala 2018, p. 291.

<sup>31</sup> Z. Szente, *Bevezetés a parlamenti jogba*, Budapest 2010, p. 318.

<sup>32</sup> Although the Fundamental Law is not a law, a proposal for its enactment or amendment must be treated as a bill when it is debated.

one, Árpád Göncz, has submitted three bills to Parliament, one of which received the required majority<sup>33</sup>. During the protests that broke out between 25 and 28 October 1990 (the so-called “taxi blockade”), the bill granted public clemency to the perpetrators of certain acts that were criminal offences and misdemeanours under the laws in force, in order to ensure social peace<sup>34</sup>. Of the other two bills, one was rejected by Parliament and the other was withdrawn by the proposer<sup>35</sup>.

The President shall sign the adopted statute and order the promulgation thereof<sup>36</sup>. The President may refer the statute to the Parliament for reconsideration (“political” veto), but his or her veto may be overruled easily, by the same majority that was needed originally for passing the bill in question<sup>37</sup>. In case the President has any reservation on the constitutionality of the law passed, he or she may initiate a preliminary review by the Constitutional Court<sup>38</sup>. It is a constitutional requirement that the Parliament seriously consider the reservations of the President. Though it does not have to accept the President’s dissenting opinion, it has to allow the substantive reconsideration of such<sup>39</sup>.

**Table 1. The role of the President of the Republic in legislation**

Period	President of republic	Introduced bills	Laws was sent back to Parliament by the President	Laws referred to Constitutional Court	Number of laws
03.08.1990–02.08.1995	Árpád Göncz	3		7	10
first period					
03.08.1995–03.08.2000	Árpád Göncz		2	1	3
second period					

<sup>33</sup> A. Vági, *op.cit.*, p. 291.

<sup>34</sup> Reasoning of Act V of 1991 on exercising general amnesty.

<sup>35</sup> A. Vági, *op.cit.*, p. 291.

<sup>36</sup> P. Smuk, *op.cit.*, p. 128.

<sup>37</sup> *Ibidem*, pp. 124–125.

<sup>38</sup> *Ibidem*.

<sup>39</sup> Decision 62/2003 CC. Cited by: P. Smuk, *op.cit.*, s. 128.

Period	President of republic	Introduced bills	Laws was sent back to Parliament by the President	Laws referred to Constitutional Court	Number of laws
04.08.2000–04.08.2005	Ferenc Mádl		6	13	19
05.08.2005–05.08.2010	László Sólyom		31	16	47
06.08.2010–02.04.2012	Pál Schmitt				0
10.05.2012–09.05.2017	János Áder		28	5	33

Source: <https://www.parlament.hu/en/web/house-of-the-national-assembly/the-role-of-the-president-of-the-republic-in-legislation1> (17.11.2021).

The President of the Republic returns an average of 2–3 laws a year to the National Assembly for consideration, the most in 2013 (13). Out of 13 pieces, 7 were renegotiated and adopted by the Parliament, 1 was withdrawn. The President of the Republic sends an average of 1–2 laws a year to the Constitutional Court. The highest number of laws (5) was sent to the Constitutional Court in 2008.

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