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Constitutional guarantees, Constitutional Law Council, Constitutional Court

1. In the frameworks of the Austro-Hungarian Empire the Hungarian public law literature, which has developed during the XIXth century, dealt quite a lot with the question of constitutional guarantees. The "Hungarian Law Lexicon" published at the end of the century (1898) has summarized the genenally accepted views. The terms published in this volume shows that in this period the sphere of constitutional guarantees was interpereted in quite a wide sense. Namely all those institutions "whose aim is to secure the existence of the constitution and impede the infringement and illegal modification of it "belong to the sphere of constitutional guarantees. These are the constitutional guarantees. Such guarantees were the right to resist in the old Hungarian and English constitutions assured by the Golden Bull of 1222 and the Magna Charta of England (1215), respectively. Moreover this aim was served by the letters of pledge and oaths of the heads of states, the ministerial responsibility, the people's representation, the budget rights, the right of taxation and recruiting, the freedom of the press, the right of publicity and free discussion, the right to complain and appeal, the juridicial independence, the irremovability of the judges, the oath of the military to the constitution, the more free and independent self-governments". Not much later in the time of the first great constitutional crisis of the Austro-Hungarian Monarchy (when the monarch has refused to appoint the majority party won at the election to form the government), a valuable book has been published on the constitutional guarantees.[1] The volume overlooks the whole domestic and foreign literature of this subject, at the same time it criticizes the so-called dogmatic opinion of the earlier period, which has thought that by listing certain law institutions the real existence of constitutional guarantees was proved. Instead this volume has aimed such a "functional" categorisation of the constitutional guarantees, which indicates the actual purpose of constitutional guarantees, namely to exclude the establishment of some kind ofabsolute royal power or dictatorship in the formally maintained framework of constitution and law (p. 18.). It has considered especially important the really existing and functioning constitutional guarantees among such conditions when the organisation or organisations possessing the state power "are standing under outer pressure, or when this axis of state power is guided by much stronger outside factors beyond the borders of the country". (p. 41.) Finally it regards the constitutional court as such tool which is able to give an appropriate guarantee for the concrete prevalence of the institutional guarantees of constitution. (In the given period the constitutional crisis has been finished by a compromise, therefore the establishment of the Hungarian Constitutional Court has not occurred.)

However the Hungarian public law literature between the two world wars has relatively frequently dealt with the problem of constitutional quarantees. We might say to the favour of the Hungarian scholars of public law that they have referred the particular role of consti-

[1] Imre, *Szivák:* On the constitutional guarantees. Budapest, 1906. p. 176.

tutional quarantees just against those foreign influences, which have tried to destroy the values of constitutionality by citing the German and Italian examples.

So, for instance Móricz Tomcsányi in his university textbook published in 1942 determined the guarantees of constitution starting from the category of constitutionality. He examines the constitutionality from two sides, namely from the relation of the main state organs to each other (their constitutionally established and real situation), and from the side of the freedom rights of individuals. Right on this field he determines the constitutional guarantees. Accordingly this view regards constitutional state and constitutionality such a state order, where "the private and political liberty of citizens are secured and related to these rights those institutions are regarded constitutional guarantees, which ensure the mentioned liberty of citizens towards the state power (king, ministry) against their occasional transgressions". He considers important to circumscribe precisely these constitutional guarantees and for its sake returns to the emphasis of the importance of those institutions which were regarded and recognized as constitutional guarantees at the end of the XIXth century. Consequently according to the Hungarian Constitution the most significant constitutional guarantees are "particularly the coronation (royal letter of pledge and oath), the ministerial responsibility, the budgetary rights of the Parliament, the judicial independence, the freedom of the press etc."[2]

However, Tomcsányi's views are built on the statements of Hauriou or at least similar to the viewpoint of Hauriou concerning the constitutional guarantees.

He identifies the constitutional guarantees as such tools, which provide protection for the individual citizen in case of threat against his freedom rights. He says that the freedoms of the individual can be threatened from two sides, namely from the state power and from other individuals. The function of the constitutional guarantees is to protect the freedoms of individuals against the state. The dangers appearing from the individuals are diverted by the mutuality of rights which the individuals are entitled to by itself.

Consequently the basis of constitutional guarantees is the structure, construction of the government itself, first of all the division and balance of the power branches, the division of power and the application of such checks and balances, which make possible the "moderation" of each power, starting from the fundamental principle already known by Montesquieu, that the power can be moderated only by another power. Hauriou also understands that among the conditions of the XXth century the classic division of power went through important modifications. He mentions several examples as such phenomena which were not considered by the classic division of power, however these phenomena may mean significant danger for the individual liberty in the practice. Among the examples he mentions the blending of civil and military power and emphasizes that the military police with „order-keeping" character and its oppressiveness is quite different to the civil police and oppression as far as "harshness and brutality"-are concerned. Moreover he call the attention to the fact that in case of crises and troubles there is an inclination to emphasize such characteristics of the division of power, which may weaken the effectivity of the governmental activities. Therefore such concentration of powers is stressed which render the classic constitutional guarantees insignificant in the obstruction of the appearing tyranny.[3]

We can continue the references from the literature, which all would prove according to the earlier public law literature that the classic constitutional guarantees first of all are ready to serve the protection of individual rights against the transgressions of state organs, against the illegal acts of the authorities. These guarantees have obviously their importance even today. However we should not neglect the fact that in the period following the Second

[2] Móricz, *Tomcsányi:* The public law of Hungary. IVth edition. Budapest, 1942. p. 48.
[3] *Hauriou,* Maurice: Précis du droit constitutionnel. II. Edition. Paris, 1929. p. 702 et al.

World War the active role of the state got more and more in the foreground, especially in securing the political, economic, cultural and social rights of the individual. Parallel with the extent of transformation of the constitutional "Rechtsstaat" in its classical meaning to social constitutional state the whole system of it went through significant changes indeed. Among the constitutional guarantees those institutions and organisations have acquired greater and greater role, which are able to harmonize the activities of state organs with the constitutional requirements expressing the characteristic features of a democratic social constitutional state. The Constitutional Law Council (respectively the similar entities) and the constitutional court belong to them.

2. Both the *Constitutional Law Council* and the *Constitutional Court* take place among the organisational guarantees of the protection of constitutionality. We might say that these are *special institutions for the protection of constitution* and as such cannot be listed among the classic and recognized types of state organs. Namely they are neither legislative organs, nor representative organs, they are not organs of the executive branch or public administration (in this place we would not consider these two terms as having identical contents). Moreover they cannot be listed among the organs of judicial power either, which implements the functions of justice in their classical meaning. We might say that the Constitutional Law Council and the Constitutional Court are special state organs serving the primacy of the constitution with legal measures and as such they embody a separate type of state organs. I presume that the emergence and consolidation of this new type of organs has at least as much epoch-making importance from the aspect of the historical development of the law system as the creation of the system of the contemporary representative organs in its time. Therefore e.g. today it is more and more clear that in our days the Constitutional Law Council and the Constitutional Court are essential tools of the mechanism of legislation, at least in those modern and developed countries where the state have to provide the more and more growing and different services for the citizens.

The Constitutional Law Council and the Constitutional Court as new type institutions — separately from the social system of the states — are such social values, which significantly contribute to the legal culture and in the same time the indispensable parts of the legal technique as well. It comes from the mentioned facts that the Constitutional Law Council and Constitutional Court possess several common features and functions and on these common grounds they can be examined jointly among the organisational guarantees of the protection of constitution. It is another question whether these institutions or their relation to each other can be evaluated separately from the system of the given state or its political order. Followingly it can be doubted too whether the Constitutional Law Council and the Constitutional Court should be compared at all, is it possible to set up priority between the two: whether we can say that the Constitutional Court is superior from the point of view the organisational guarantees of constitutionality than the Constitutional Law Council. It may happen that based upon the whole legal culture of some given countries the Constitutional Law Council is much more effective tool the protection of constitutionality than the Constitutional Court in another country. However the experiences of comparative law surveys lead us to the consequence that today we can say with some theoretical base that generally the institution of the Constitutional Court creates wider framework for the protection of constitutionality than the Constitutional Law Council. It is also true that ultimately the emphasis is not only on the name alone. We can not even exclude that in some cases the organs named Constitutional Law Council (Constitutional Council, Constitutional Committee) actually fulfills the functions of the Constitutional Court.

It also should not be ignored that the *different concepts of constitution* also may influence the evaulation of the Constitutional Law Council and the Constitutional Court.

It is well-know that in the course of historical development two contradicting constitu-

tional concepts have appeared. One of these concepts treats the constitution primarily as a political document instead of law regulation. Accordingly, several elements of the Constitution have legal character, but the Constitution is still much more a political program. Therefore it is not matter of interest for those applying the law, but the legislator. In other words it is such a political program, which virtually orientates the legislative organs which are authorized to implement the Constitution.

On the contrary, the other concept albeit recognizes the powerful political content of the Constitution, however, it puts the emphasis rather more on the legal character and features of the Constitution. This concept surveys the Constitution *primarily* as a law regulation to be applied directly (or mostly can be applied directly).

3. *Both concepts can be found already at the cradle of constitutions.* It is well known e.g. that in the course of the English revolution of the XVII[th] century the "Agreement of the People" which is viewed as an ansector of the written constitutions, a kind of declaration, was considered more as a political program, than a directly applicable law regulation. Although after a significant amendment this document was submitted to the Parliament, where it was debated and adopted. However, the "Agreement of the People" did not become a formal law. Simply because the leadership of this revolution regarded it as such a political program, which should be implemented in practice by separate legal rules, laws which are adopted by the Parliament. Such laws implementing the "Agreement of the People" were the laws on the abolishment of the monarchy and the declaration of the republic.

In the course of the preparation of the first Constitution of the French revolution there were debates early in the sessions of the National Assembly, later in the sessions of the Constituent National Assembly, where also the different versions of these two constitutional concepts competed with each other. Among the representatives of the National Assembly there were several such member who although supported the preparation and enactment of the Constitution, but they did not expect anything new of it. Only for the sake the consolidation of legal security they would have preferred the codification of the valid feudal public law (i.e. to put it in a comprehensive legal text). Namely the customary law rules of the feudal public law lived in a very ambivalent and uncertain way in the public common knowledge. Actually these representatives did not want any renewal. They intended merely to put the "basic law" (lex fundamentalis, loi fondamentale) in a comprehensive form — which actually was known in the feudal legal order too — they wanted to confirm it by the National Assembly, in other words confirm the existing old governmental order. Only in the course of the debate on the draft of the "Declaration on the rights of man and citizen" became clear that among the representatives the followers of the new political system possess an overwhelming majority. They voted for the inclusion of the declaration of rights into the constitution. However, even the followers of the declaration had such basic ideas in mind which later should have been translated to the language of the everyday legal practice by separate laws later on. We know such a proposal too, which, for the sake that the people should not misinterpret the principles of the declaration generally, intended to treat the declaration as a document of "confidential" nature. They proposed that it should not be made public. It is enough if the legislators know its contents. Anyway, it is the task of the representatives to prepare the laws necessary to the practical realisation of the declaration. "Conservons les principles pour nous, qui faisoê les lois et hâtons nous de donner aux autres les consequences, qui sont les lois elles mêmes" — we can read in the protocols of the Constituent National Assembly.[3/a] Afterwards in France they had treated the frequ-

[3/a] Comp.: Archives Parlamentaires de 1787 a 1860. Paris, 1875. Diary of the Constitutional National Assembly, August 1, 1789.

ently changing written constitutions in the course of decades as they rather contain beautifully written philosophical concepts, than actual law regulations.

In France almost four decades were necessary that the doctrinaires make the legal character of the constitution and constitutional law recognized as a result of the revolutionary movement fought with the slogan of the "constitutionality". Perhaps it is not insignificant if we here also refer to the fact that the doctrinaires had a periodical, which took the lion's share in the preparation of the revolution of 1830 and it was titled the "Constitutionnel". Submitted by Minister of Cultural Affairs *Guizot*, the King has signed in August 22, 1834 the decree, which gave the authorization to set up a department of constitutional law at the Law Faculty of the Paris University. The proposal of Guizot has mentioned not only the subject sphere of the new discipline to be taught, but in a certain way the methods of its scientific activities as well. We may say that in this proposal there is a comprehensive program of the development of public law science and the constitutional law as actual law. Therefore now we quote the referring part of the proposal in its totality. "The object and method of this discipline is determined by the name of the object itself; namely the Constitution, the scientific expression of those personal guarantees and political institutions which are sanctioned by the Constitution. For us this matter is not merely philosophical system, which should be determined by the disputes between men, even more it is a written and clear law, which can be and should be expressed and interpreted as the Civil Code or any other part of the legislature. Not only such a discipline which is far-sighted and appropriate in the same time, which is based on the public law of the nation and the moral of history, but is suitable to improve by comparison and through the analogies with abroad, only this can replace the mistakes of ignorance and audacity of superficial knowledge with substantial and concrete (positive) material of knowledge." [3/b]

Between the first Constitution of the French revolution and the emergence of independent constitutional law sciences the more than four decades have contributed to the enrichment of the idea of constitution significantly on other ways too. At this time they realized that the terms of constitution and charter-type constitution are not identical. That state also has a constitution where the most important rules of public law, such as the participation of citizens in the practice of power, the most significant guarantees of the citizens' freedom accepted separately in the course of historical development are transformed to written law. Bemjamin Constant was forced as early as in 1814 to prove that England also possess a constitution, although the most profund items are not collected in one single document. "Against those who permanently repeat that England does not have a constitution and despite of it lives happily, I have to say that England does have a constitution, because it possess Habeas Corpus, Bill of Rights, Magna Charta (though it is not applicable in its ancient form); the English nation has representative system, jury courts And so on."[3/c]

Benjamin Constant does not merely emphasized the analogies between the Continental and Anglo-Saxon models of public law after the French revolution, but at the same time he emphasized a certain continuity of the development of public law. Namely it is well known ...

[3/b] "L'objet et la forme cet enseignement sont détermines par son titre méme; c'est l'exposition de la Charte et des garanties individuelles comme des institutions politiques qu'elle consacre. Ce n'est plus la pour nous un simple systeme philosophique livre aux disputes des hommes; c'est une loi ecrite, reconnue, qui pent et droit être explique commentés aussi bien que la loi civile ou toute autre partie de notre législation. Un tel enseignement, à la fois vaste et précis, fondé sur le droit public national et sur les lecons de l'histoire, suspectible de s'etendre par les comparaisons et les analogies entrangères, doit substituer aux erreurs de l'ignorance et a la témérité des notions superficielles des connaissances fortes et positives." (See: Pellegrino *Rossi:* Cours de droit Constitutionnel. Paris, 1866. p. V.)

[3/c] Reflexions sur les constitutions et les garanties, publiés le mai 24, 1814. See: Cours de politique constitutionelle, Paris, 1872. Volume I. p. 265.

that the continental public law science — even before the French revolution — had stressed the importance of basic laws, namely written basic laws summarizing the most important rules of public law. Already in 1749 Achenwall wrote that the public law of a state can be learned the best way from its basic laws. Their origin, development and actual existence should be examined. Though the basic laws may contain some common law elements, but if in a state only unwritten law can be found in the field of public law, one can very safely get to the consequence that in such a state the arbitrary will of the monarch is the only basic law.[4]

The effort for continuity can be recognized in other statements of Constant in a very interesting way. For example, in his proposals aiming — at the improvement of the Constitution he aspired to construct such a separate and neutral power branch, which is able to guard with impartiality the balance of power branches, the maintenance of Constitution. (It is known that Constant generally divided the state organisation sometimes to five, other times even six different branches.) Finally Constant had seemed to find the requested neutral power in the head of state, to put it more precisely in the constitutional monarch of the given time. This constitutional king should have played a virtually passive role all the time. Almost all of his activity would be confined to fulfill the functions of supervisions, the safeguarding the constitutionality by rather broad control functions. It is easy to recognize that such a constitutionality control does not show any similarity to the activities of the pre-revolutionary French parliaments. (However, the parliaments also examined the "constitutionality" of the royal decrees, respectively their conformity, with the feudal basic laws — theoretically as the successor of the officers of the former royal court.) But it cannot be connected to the Senate of the VIIIth year either, because this institution as a whole stayed out of the legislative system, it might survey the constitutionality of laws upon the suggestion of the authorized organs. (Actually even that was not an "original" institution, as only put the draft worked out by Sieyes in the third year of revolution into reality.) Even the "constitutional monarch" safeguarding the constitutionality had a certain predecessor — mainly in the concepts of feudal public law which were generalized and prepared as "ius publicum universale". This ius publicum universale namely regarded the king not only as a participant in the legislative and executive branch, but as the possessor of the supreme power (potestas inspectoria), who in such position could examine every acts of the whole state organisation. Even the details of the virtually unlimited "potestas inspectoria" were worked out by Martini in his work titled "Allgemeine Recht der Staaten."[5]

During these years the idea get strengthened that the existence of a written constitution is not enough by itself to consider any state a constitutional state. We may talk about constitutional state (today we would talk about constitutionality) only in case the constitution of the given state contains the social values required by the age. This requirement is fixed in the Article 16 of the Declaration of 1789, when it said: "Such society, where the rights are not guaranteed institutionally and the power branches are not divided, does not have constitution". However, only after the Vienna Congress, in the course of constituent activites of some German states and the political struggles it became clear that the two camps are separated by a whole world: one of them simply put the slogan of "constitution" (Verfassung) on its banner, the other did the same with "constitutional constitution" (konstitutionelle Verfassung).

4. Returning to the double concept of "political" and "legal" constitution we have to say that for the confrontation of the two concepts a *twin concept of constitutionality was*

[4] Comp. Gottfried, *Achenwall:* Abriss der neuesten Staatswissenschaft. Göttingen, 1749. p. 17.

[5] See: Arthur *Balogh:* „Benjamin Constant és az alkotmányos állam tana" (Benjamin Constant and the concept of constitutional state). Budapest, 1915. In: Essays from the sphere of philosophy and social sciences. 1915. p. 205 et al.

formed in some historical periods of the constitutional development. One of them was regarded as a formal, the other as substantial constitutionality. The constitutionality in its formal meaning had expressed the requirement that the acts of the state/including the normative and individual acts should not infringe the constitution, i.e. such acts are null and void or should not be implemented at all. The constitutionality in substantial meaning had meant the implementation of the constitution into practice. This concept did not deny either the legal and organisational guarantees as important factors of the formal constitutionality, however, had stressed the importance of the social, economic and political means, which could support the implementation of the program contained by the constitution to the reality.

In these days we can ascertain clearly that the legal sciences of the developed countries use the term of constitutionality in such a broad meaning, which not merely combine the concepts of constitutionality in its formal and substantial meaning (material meaning) but at the same time elevates them to a higher level, institutionalize legally their guarantees in a very differentiated way. We have to say that today the term of constitutionality expresses such a claim to every acts of public power that they should be in conformity with the constitution both in formal and material meaning, as the constitution is the supreme and most powerful legal regulation above the whole legal system. It is also true that this constitutionality in its broadest sense is identical with the legality in its broades sense, however, the legality in this broad meaning already expresses that requirement too that in a constitutional state the primacy of constitution should necessarily prevail.

Based upon the uniformity of constitutionality in its formal and material meaning the specific features of the Constitutional Law Council and Constitutional Court make them suitable to have place in the mechanism of "checks and balances" of the practice of power. These specific features are due to the fact that although the activity of those organs which are authorized to control the constitutiona lity can be qualified as judical activity or even more "jurisdiction" to a certain extent, but actually it goes beyond that point. It contains such elements too, which are alien to the actual judical organs. Nolens, volens — willingly, or unwillingly they contain such political considerations which cannot be separated from the very complex processes going beyond the state organisation which practices the public power ensuring the practical implementation of the Constitution.

We have to admit that in the European legal sciences relatively early time, virtually at the beginning of the feudal public law emerging against the developing absolutism (at the end of the XVIth century, the beginning of the XVIIth century) that recognition has appeared that one should make a sharp distinction between the jurisdiction settling the legal disputes of the citizens among them on one hand and the clashes between the citizens and the state exercising the public power. We might say that Althusius already in 1603 called the attention to the difference between the so-called regular jurisdiction and the public law jurisdiction. According to him the jurisdiction has a dual character. Namely, one of them operates between the magistrate and the subjects, the other in the matters among the subjects. "Est vero administratio justitiae duplex. Una fit inter magistratum et subditos. Altera quae fit inter subditos et subditos."[6] In order to illustrate this point he mentions some historical examples as well, among others he refers to the fact that in the Roman times different judges (Judicia privata) decided the matters of private persons and other ones (Judicia publica) settled the

[6] *Althusius:* Politica methodice digesta. Herbornae Nassaviorum 1603. p. 325. Cap. XXIV. De sanctiones legum et administratione justitiae.

affairs of communal character (today we would call them public matters).[7] He even takes care to calm the powerful saying that his special "public law" jurisdiction does not decrease, but strengthen both the respect of the magistrate and the jurisdiction as well.

This separation of jurisdiction has been accepted by the practice in a rather hard way due to some historical reasons. The so-called feudal public law expressing the limits of central power took shape in the German Roman Empire, on the ground of controversies between the protestant feudal estates and the Catholic emperor.[8] In England the prevailing protestantism did not need such separation of public and private law. In some countries of the continent during the development after the French revolution partly continuing the feudal tradi- partly considering the French example and the Anglo-American institutions actually at the tions, end of the XIXth century or at the beginning of the XXth century, such system of jurisdiction has emerged which in some cases expressed the unity of the judicial organisation and power even in the legal disputes between the state and the citizens, in other cases it required considers the regular courts and the so-called public law jurisdiction to be separated quite distinctly. Parallel with this point the official state mechanism and its diversity got particularly enlarge and presented more and more variations. This fact has influenced the development of the organisation of jurisdiction as well. In the times between the two world wars we could talk not only about public law jurisdiction generally, but a whole system of public law courts as well. A very rich constitutional law literature dwells in the categorisation of the various types of public law courts and their characteristics features. The substantial work by József Szabó titled "Democracy and public law jurisdiction", which was published in 1946, deserves extra attention. In this volume he presents not only the European, but the whole inter national development process, moreover he surveys the appearance of public law jurisdiction and the different kinds of public law courts in each country. Not only due to our common past in the history, but while working on the tasks to be done in the future it is useful even today to see the informations on the Austrian development. Among the public law courts he mentions firstly the public administration court established in 1875. The separate public law court was shaped in 1919, the constitutional court (Verfassungsgerichtshof), its basic rules were built in the Constitution of 1920. The Austrian Constitution of 1934 has combined the constitutional court and the public administration court and strongly restricted the competence sphere of constitutional jurisdiction. In this narrower sphere, namely in "the remaining disputes of constitutional law character" the special senate of the public administration court operated (Verfassungssenat). Beyond the above-mentioned Szabó has listed among the public law courts the so-called special public law tribunals as e.g. the supreme audit office, the patent court, the "agrarian tribunals" (Landes-agrarsenate) which were organised in the different provinces to decide in land reform and settlement matters and their appeal forum (Oberste-Agrarsenate), furthermore the courts of social security (Versicherungsgerichte). We have to mention particularly that a 20-member committee of the National Assembly (Nationalversammlung) has also exercised public law jurisdiction. This committee had the name Staatsgerichthof.[9] Since the re-establishment (re-enactment) of the constitution

[7] „Apud Romanos, judices alii rerum privatorum, alii publicarum, constituti erant. Illorum juridicia privata horum publica dicebantur. Illi vocabuntur judices, arbitri, centumviri, decemviri, litibus judicandis et recuperatores. Hi duumviri perduellionis, Populus Romanus comitiis centuriatis, curiatis et tributis judicabat de gravissimis negotiis Repub. et regnum totum concernentibus"; *Althusius*. Ibid. p. 329.

[8] About the process of development, including the domestic analoques too. See: István *Kovács:* "Deák 'Adaléka' és a magyar közjog." (Deák "Contributio" and the Hungarian public law.) Postscript and notes. In: Ferencz Deák: "Adalék a magyar közjoghoz." (Contribution to the Hungarian public law.) Budapest, 1987. Reprint edition of the volume published in 1865.

[9] Comp. József *Szabó:* „Demokrácia és közjogi bíráskodás" (Democracy and public law jurisdiction). Budapest, 1946. p. 131. et al.

of 1920 the tasks of the Staatsgerichthof established to decide the matters of the supreme state leaders are judged once again by the constitutional courts. In case we are seeking for the categorisation of this public law jurisdiction into the power branches, we could find several disputed matters — in the Austrian literature after the Second World War. For instance Ermacora mentions three or five great state functions respectively. Starting out from formal elements, he distinguishes three state functions (legislation, executive and judicial) based on the classical division of power branches. But considering the substance of state activities and the claims to be set against the modern state he names five functions. These are: the government, the judiciary, the public administration, the economic power of the state, furthermore the propaganda and information activities.

Remaining among the frameworks of the three classic power branches: the judiciary includes actually only the regular courts mentioned by the Chapter III of the Austrian constitution. According to him those views can be strongly disputed which list the mentioned categories of public law jurisdiction, among them the constitutional court, to this category (moreover this court was regulated by the Chapter VI separately). The question becomes much simpler when ignoring the formal categorisation we count the five mentioned state functions according to the substance of the state activities. Accordingly the government (Regierung) is the supreme (dominative) leadership of the state affairs. A large segment of the activities of constitutional court unambigously belongs to this function sphere.[10]

Referring to the latest trends of the public law jurisdiction development, we have to tell that one of the most important phenomena in the legal life of the post-war Europe is the full accomplishment of the system of the independent constitutional law jurisdiction. However, this is not a new idea at all. Cappelletti has called the attention to this fact already in 1981 while analysing the constitutional court created in the sixties and seventies and the increase of their role.[11] Cappelletti has also surveyed the cause of this development. Firstly he mentions the necessity of the checks against the ever-increasing power of the executive organs and the legislation, then he calls attention to the new duties of the state due to the implementation of the declarations containing human rights. This obligation require such creative jurisdiction and judiciary, which is able to interpret and adapt independently the comprehensive international documents and those national laws, which implement them. This great task, partly political function cannot be accomplished by the regular courts, which very slowly (in the good and the bad meaning of the word) adjust themselves into a hierarchical system, and their judges as well.

Besides, the mechanism of the domestic legislation of the states also more and more get differentiated. The increasing role of the international law both in the domestic legislation and in the application of law, parallel with this the more and more complex system of domestic law makes the unambiguous determination of the legislative organs and the hierarchy of legal regulations more and more difficult. The constitutional law literature after the Second World War called the attention to this fact quite frenquently. So for instance Claus Stern while summarizing the most important statement about this fact calls the attention in the same time that the classical three grade legal order (constitution, Act and decree) today does not give satisfactory quideline to the determination of the hierarchy of laws and their validity. The international law, the "supranational law rules", obliging certain groups of states, the living or relived customary law, the legislative activities of the selfgoverning public bodies gaining more and more role, the special legislative authorizations given to the

[10] Comp. Felix *Ermacora:* Österreichische Verfassungslehre. Wien—Stuttgart, 1970. p. 148. et al.

[11] See: Mauro *Cappelletti:* Nécessité et legitimité de la justice constitutionnelle. Revue Internationale de droit comparé. 1981. No. 2. p. 625. et al.

various state entities, a special "contractual law" appearing in the so-called tariff contracts — all these elements make more and more difficult either for the legislator, or especially for the applier of the law to categorize unambiguously a legal regulation in that legal system, whose basic principle says that legal norm should contradict to another norm standing on another grade above it. The situation is getting even more complex if we consider that in some cases not only the lack of validity but the nullity follows as a consequence of the judgement on the validity of law regulations, which draws further consequences, namely the ex tunc or ex nunc nullity of the law (Das Staatsrecht der Bundesrepublik Deutschland. Band, Volume I. München, 1977. p. 86.). It is not difficult to understand that these are all such circumstances which also require the establishment of a special body at least for the consideration of constitutionality and legality of the legislation.

I guess we have to emphasize a further element, too. I think particularly about the changes which took place in France after the Second World War. After the French revolution actually until the latest decades such view prevailed that the supreme representative organ expressing the national sovereignity cannot be subjected to the control of any narrower body, containing politicians appointed to be judges or jurists qualifying as politicans or representatives. In the course of the French revolution at first in the session of the Convent at July 24, 1795 the proposal had emerged that a control of the acts of legislation should be achived through a narrower body in order to ensure the integrity of the constitution. This proposal was included in the constitutional draft of Sieyes. However, Sieyes was not a member of the constitution-drafting committee of the Convent, but he himself also presented a draft of the constitution. The draft was rejected, but its debate has given an opportunity for a member of the committee to form the idea, which gave argument in France for the next almost 170 years against the creation of every such special organ which would effectively control the constitutionality of legislation. "This terrible great power would become almighty in the state. With the intention to give a controller to the public power, we would create such a master above it, which would put it in chains in order to supervise it even easier." During the more than one and half century we heard about three anaemic attempt. One is the Senate of the Constitution of the mentioned VIII. Year (December 25, 1799). Its members were irreprocheable and independent citizens with great respect indeed. Their tasks and mandate were life-long. According to the rules of the constitution itself among the members Sieyes got a place too. This body theoretically possessed a very wide competence sphere. It was entitled to annul any act of the Tribunate and the government, moreover in the 10 day interval between the enactment and the proclamation of the law it could repeal the acts of the legislative body too for the reasons of unconstitutionality. However the Senate was so adherent to Napoleon that it did not repeal anything on the ground of unconstitutionality ever. If it had any objection or contrary opinion against the acts or drafts belonging to its competence sphere, it has informed the emperor, who — if he found it necessary — took steps to change the objected draft or measure. The direct and cordial relation with the imperial power explains why the competence of the Senate was enlargened all the time. For example it has received the right to amend the constitution, then to repeal judicial decisions in case they have impaired the state security. An amending act of the Senate (senatus consultum) made the Senate the protector of freedoms too. Two committees were created to accomplish this function, one of them for the protection of "personal freedoms", the other for the protection of the "freedom of the press". These committees have worked too. 585 arbitrary arrests were reported to the first committee, 14 of them were remedied by the committee. 8 complaint came in involving press matters, but none of them was decided.

The proclamation of Napoleon III (January 14, 1852) has repeatedly established the Senate, largely as analogy to the Senate of Napoleon I. With the regime of Napoleon III. this Senate also ceased to exist and with it every special institution of the protection of con-

stitution has disappeared from the French law.[12] Afterwards it appears only in the constitution of 1946, namely a special organ to protect constitutionality, the so-called "Comité constitutionnel". The reasons of the estabilishment of this institution, as a political body constructed according to the political power relations in the composition of the parliament was explained as an influence of the traditions of the great revolutionary periods on the French public opinion. They would still prefer to have a political body reflecting the composition of the parliament than the creation of a special judicial organ or an organ with judicial character. However in such period when the need for special organisational guarantees of the control of constitutionality have emerged, the failure of the "Comité constitutionnel" has documented the inconvenience of this organisational form too — with a theoretical edge. It has proved that such political organisation, which is an emanation and mirror image, of the parliament, cannot be suitable either for the preliminary, or for the posterior control of the constitutionality of laws. According to the nature of things such an organisation — instead of analysing and evaluating the legality of an act — necessarily repeats the political evaluation of the parliament or in better case it tries to substitute the missed work of the parliament by surveying the constitutionality of the laws. But even then it provides political and not legal activities. The international literature of constitutional law similarly evaluates the role of the "Comité constitutionnel" created by the constitution of 1946.[13] Meanwhile the "Comité" has brought only one decision during its whole operation. However its activity could be instructive for the determination of the relation of the constitutional law councils responsible to the parliament and the constitutional court to each other and their development perspectives as well.

The constitution of France, adopted in 1958 and still valid, has basically changed the needs to be raised to the control of constitutionality and adjusted the organisational guarantees of the control of constitutionality to it. Earlier principally the whole original legislative power was based on the parliament, in principle every legislative acts of the executive branch was to be created to execute the enacted law by the parliament. According to the new construction the legislative power of the parliament became limited. The parliament is entitled to legislative power only in those spheres of subjects which were designed by the constitution. Besides its rights could be transferred to the government even in these spheres. In the course of the legislative procedure the two houses of parliament, the National Assembly and the Senate conducts the dispute on the submitted proposals in the same time. In case of different opinion between the two houses the government may initiate a mediation procedure (proposing a parity arbitrage commission), afterwards it depends on the standpoint of the National Assembly whether it accepts the solutions suggested by the Senate or sticks to the solution accepted by the former. Followingly there is such an opinion that in the course of legislative procedure "the political weight of the Senate actually depends on the government, moreover it can decide whether in a given case the Senate enjoys equal stand with the National Assembly or subjected underneath the National Assembly". Namely if the government does not initiate the mediation and the set-up of an ad hoc committee in connection, eventually the dispute between the two houses goes on and on without end.

The legislation and its procedure is furthermore complicated by the fact that the French constitutional law today distinguishes several kinds of legislative pieces on the base of various-partly formal, partly material, i.e. substantial — characteristics, there are constitutional acts, laws accepted by referendum, laws promulgating international agreements, organic laws, financial laws, regular laws. Each type of these laws has a special place in the hierarchy of legal sources and even the order of amendment is particular. For instance in

[12] Comp. Francois *Luchaire:* Le Consiel Constitutionnel. Paris, 1980. p. 4—5.
[13] Comp. J. *Velu*—Ph. *Quertainmont*—M. *Leroy:* Droit public. Bruxelles, Tom. I. p. 216.

case of the so-called organic laws (organic laws are such acts which serve the direct application or practical adaptation of the constitutional rules referred by the text of the constitution itself) the order of dispute and enactment of these law drafts take place in a special way. (For their enactment the absolute majority of the parliament members is necessary and concerning these subjects the legislation cannot be delegated.) For the financial laws partly the rules referring to the organic laws, partly special procedural rules are to be applied.

The effort to separate precisely the competence spheres of the executive power and the legislative power, the differentation between the categories of legal sources and the order of procedure concerning legislation, the enlargement of the guarantees of fundamental rights have raised considerable new requirements to the control of constitutionality. The Constitutional Committee of the IVth Republic could not satisfy the needs of the increased expectations. The Constitution of the Vth Republic (1958) by creating the Constitutional Council set up a new kind of independent and permanently operating organ for supervising the constitutionality. This new organ is not a constitutional court, but neither a parliamentary committee. Its president is one of the foremost personalities of the state, ranking directly behind the prime minister. Three of its members are appointed by the president of the Republic, three by the National Assembly and three by the president of the Senate for 9—9 years. Furthermore, the former presidents of the Republic are also members of this body for lifetime. One-third of the members are reelected in every 3 years, therefore it continously exits. The government members, the parliament representatives, the members of economic and social committee (a consultative body of the government), the members of the State Council cannot be the members of this body. The members of Constitutional Council are obliged to stay away from such public activities which would involve consultation about matters concerning them, should not take in any leading positions or responsible task in any political party, which would not be compatible considering the obligation of "discretion" following from their membership in the Constitutional Council. The Constitutional Council does not have a general competence sphere, it operates explicity in those matters, which are assigned for it by the constitution and the given organic laws, more precisely those ones which are assigned by the Council for itself from them. The overview of these matters shows that the activity of the Constitutional Council goes beyond the control of the division between competence spheres among the state organs or the adherence to the constitutional rules related to the legislative hierarchy. Its role increases steadily in the field of the protection of fundamental rights, further more provides tasks similar to the election jurisdiction too. There is no place to appeal again stits decisions.

As a matter of fact, a separate Chapter of the constitution stipulates on the Constitutional Council, which has been amended several times since 1958 — according to the increasing role of the Constitutional Council. These amendments should be emphasized separately too: these are the modifications enacted in the constitutional acts of 1974 and 1976.[14] Largerly this development explains that the opinion about the Constitutional Council is not getting a uniform or at least unambiguous opinion in the French constitutional law literature. "Can we call the Constitutional Council a court ultimately or not? If the answer is positive, whether its composition, the guarantees of its impartiality and independence are adequate to those conditions which could be justly expected from an organ qualified as a court? If the answer is negative, is it to be allowed that an organ which does not receive its mandate in the course of the general elections, but comes alive quite direct way, may oppose the intentions of those organs which are created in the course of a general election..."[15]

[14] See: „Nyugat-Európa alkotmányai." (The constitutions of Western Europe). Ed. István *Kovács*, Budapest, 1988. p. 278—280.

[15] *Luchaire*, Francois: Le Conseil Constitutionnel. Paris, 1980. p. 2.

Already this short quotation also proves that in the French legal and administrative sciences (including the political literature) even today the great debate is not closed. This debate has started — seeking the effective guarantees of constitutionality — almost 200 years ago, even in the days of revolution. However, it seems that the practice outgrew these problems. It is unquestionable that the Constitutional Council of the Vth Republic today operates as a constitutional court. The quoted volume by Luchaire provides several evidences to this point. It is another question whether a special organ set up for the needs of contemporary times to control the constitutionality can be categorised into any of the three power literature However the arguments and doubts related to this sphere can be found in the legal branches. of every country. As we already have mentioned, this point supports the views saying that these organs cannot be inserted — or just a very arbitrary way — into the classical system of the division of power branches (which actually operates with three basic types of organs). We would rather agree with those ones who seek solution in some other way.

5. The pre-1945 Hungarian literature of public law regarded to be emphasized: the Hungarian constitution which was related to the development of Western European constitutions, had utilized and embraced the most important institutions which were developed during the centuries in the Western European — written — constitutions, at the same time, however, it had refielcted the existence of an independent statehood which had operated for more than a thousand years. The combination of the traditional, often centuries-old public law institutions and the new elements was significantly facilitated by the fact that the Hungarian public law before the socialist constitution of 1949 had not recognize the charter-type constitution. The most important institutions of public law were included in the so-called fundamental laws (leges cardinales) and basic regulations, which were enacted and frequently amended in the different periods of historical development and quite flexibly interpreted. Only the 5 month period of the Hungarian Republic of Councils after the First World War was an exception, when two charter-type constitutions were adapted (one temporary and one permanent constitution). However, their texts were declared null and void by the counter-revolutionary regime, which got into power after the intervention forces had defeated the Republic of Councils with the help of the great powers. They hardly left any trace in the Hungarian public law between the two world wars. Their influence to a certain extent was felt in the gradually emerging Hungatian public law ideas after 1945.

The category of leges cardinales has appeared rather early in the literature of Hungarian public law. Every author agrees that these laws limit the royal power. There is such an author who tends to seek the creation of the first fundamental law among the decrees of the first Hungarian King (Saint Stephen, 1000—1038). According to the author (unknown) of a paper published by Elzevir the Irst fundamental law of the Hungarian kingdom was the decree which contained the teaching of St. Stephen to his would — be successor about the rational rules of practice of state power.[16] However the majority of the authors even in this age of the Hungarian public law literature have mentioned the Golden Bull of King Andrew II made public in 1222 as the first fundamental law of the country.[17] The Hungarian Golden Bull of 1222 had codified the common law limits against the royal power which emerged at the first decade of the XIIIth century and the guarantees against the illegal acts of the king. The Article XXXI of this Golden Bull, which has settled the right of armed resistance, had served the public law or even more the ideological basis for the national struggles for independence during the long centuries. It is true that the Parliament of 1688 formally repealed

[16] See: Respublica et Status Regni Hungariae. Ex officina Elzeviriana. 1634. p. 154 et al.

[17] Among them the first to be mentioned: Gulielmus, *Artner:* Dissertatio politico-iuridica de Regno Hungariae. Tübingen, Anno 1624. Martin *Schödel:* Disquisitio historica politica de Regno Hungariae. Tübingen, 1629.

this Article of the Golden Bull, but the national public opinion has never accepted this resolution of the parliament of 1688, namely with the explanation that this resolution has been forced upon the nation by the Habsburg king leaning on the assembled army, with the threat of armed force. The freedom fight of Rákóczi, which began in 1701 and lasted ten years, had referred to this Article when it called the nation to arms against the measures which had threatened the independence of the state. We ought to mention that even the Hungarian public law literature between the world wars mentioned that Article ("ius resistendi") as valid law. So e.g. the university textbook by Kálmán Molnár — discussing the guarantees of constitution — defines the freedom fight "as the prevalence of righteous defence in the field of constitutional life". According to it: "The fight for freedom is justified moreover either in case there is a written rule about it in the Constitution, or not (ius resistendi: 1222. XXXI.) Vim vi repellere licet. The nation which does not adhere to its Constitution and does not possess the determination to protect its threatened Constitution, is not mature enough to be free."[18]

In the first public law works the role and continuous operation of the parliament as one of the most important guarantees of the limitation at the same time of the supervision of the royal power is also emphasized. There are some data from the XIIth century about the beginning of the feudal assemblies. However, from 1267 the active participation of the national assembly of the peers can be documented unambiguously in the legislation. This time the Estates of the Realm was named parliament (parlamentum generale sew parlamentum publicum).[19] In 1318 the ecclesiastical lords had complained to the Pope that the first king from the House of Anjou does not fulfill his duties — his basic duties — to convence the parliament. Therefore we can state with justification that at the end of the XIIIth century and the beginning of the XIVth century parliament had operated as a recognized and consolidated institution of the practice of the central state power. Since — with short and never recognized as legal interruptions — it is continuously part of the legislation. The "Tripartitum" (Threefold Book) assembled (1514) and published (1518) by Werbőczy, had registered the rule that in Hungary the right of legislation is authorized only to the king and the nation which assembled in the parliament as a deeply rooted custom of several centuries, among the customs which secure "the freedom of the whole Hungarian nation". This is referred to the official interpretation of the law too (See: Part II. Article 3. § (3). This rule was confirmed later by several written laws too. Among these rules the Act 18 of 1635 is mentioned as first.

The Act I after the crowning of 1608 the parliament consisting of two houses (House of Representatives and Upper House) had codified its already existing, non-written — common law rules regulating its composition, convening, operation and this way it prevented that the king — while manipulating arbitrary way the changes of composition, operational order of parliament — influence the activities of parliament. Several laws have declared

[18] See: Kálmán *Molnár:* "Magyar közjog" (Hungarian public law) 3rd Edition. Danubia, p. 247. — The right of resistance was recognized by the post — 1945 literature too, but in somewhat more differentiated version compared to the mentioned view of Kálmán Molnár. According to Vilmos Szontágh: "The law — if it is adequate to the formal requirements — regardless of its content, — demands unconditional obedience, because the law cannot be illegal, however the citizen owes to adhere to any other regulation, whether with ruling or with decision content, if it is lawful and final. Until it is not final, its lawfulness can be challenged and till that the citizen is not obliged to adhere it. If some authoritative organ claims obedience ot its manifest illegality, the citizen — on his own responsibility — can resist. It is similar to the freedom fight in the life of the nations." (Comp.: "A magyar közjog elemei" (The elements of constitutional law). — Guideline for the students of the worker teaching courses. Debrecen, Tudományegyetemi Nyomda, 1947. p. 30.)

[19] Comp. *Csizmadia—Kovács—Asztalos:* "Magyar állam és jogtörténet" (The history of Hungarian state and law.) 1972. p. 137—138.

the obligatory summoning of the parliamant in every three years. The parliament had never accepted the infringement of these laws. Every newly summoned parliament had protested with a theoretical edge and for reason of maintenance of law if the king had missed the three years period.

From the XIVth and XVth centuries several laws had secured the self-government rights of the counties as the territorial organs of nobility. There was a very significant and legally recognized public law guarantee that laws and royal decrees should be made public in the assemblies of the counties. The counties were obliged to implement only those decrees which were in accord with the law. This right of the counties in a certain way had operated as a legally recognized collective "ius resistendi". In the second half of the XIXth century the counties have been changed significantly on the basis of the legislation of 1848. They became gradually territorial self-governments organized on the basis of representation. However this right of resistence of theirs was further recognized by the public law literature and it was regarded as an important constitutional guarantee. It is true although that the Act XXI of 1886 on the self- government of counties and townships powerfully restricted this right to resist. Namely: only those governmental decrees and ministerial orders were taken out of the obligation of implementation, which were referring "to such tax-collection, which had not been approved yet by the parliament or the actual roll-list of the not approved recruit" (§ 20). In case of other decrees considered illegal, the self-governments were entitled merely to the "right of complaint" with delaying validity, but if the decree was repeated by the government it should have been implemented (§ 19).

The government before and after 1848 had possessed quite a few such tools which powerfully weakened the practical value of the resistance rights of the counties. For example there was a way to suspend the self-government of a disobedient county and put government commissioner above the county administration. However the circumstance that the counties could correspond with each other in nation-wide matters as well made it possible for the resisting county to protect itself against isolation. If the county resistance became widspread in the whole country, the government was forced to yield sooner or later seeking compromises. E.g. after the Napoleonic wars the Vienna Court supported by the "Holy Alliance" have infringed several times the laws prescribing the obligatory convenance of the parliament in every 3 years. The ever growing resistance of the counties, however, after 11 years of interval finnaly forced the convenance of the parliament. The parliament convened in 1823 has lasted four years. The enacted bills have initiated in Hungary the series of reforms in the society, which was finally concluded by the March laws of 1848 eliminating the feudal conditions, then the freedom war which has defended these achievements in 1848—1849. The Hungarian history literature even today calls this quarter of the century from 1823 till 1848 "reform age" and the parliamant of this period are named "reform parliaments". However, we know some examples about the resistance of the counties at the start of XXth century too. In the time of the political crisis of 1905—1906 — when the king has rejected the possibility of marking a cabinet from the coalition consisting of the opposition of parties which gained the majority of votes in the election, and Field Marschal Fejérváry, the Captain of the Royal Bodyguards has created a minority government infringing the constitutional rules requiring ministerial approval — the large majority of counties (45 out of 63) have rejected obedience and did not implement the governmental measures. In some resisting counties so-called constitution-protecting committees were set up and these committees together with the official organs of the counties have managed the local administration.[20]

[20] About the "resistance of the counties" and their political evaluation see: "Magyarország története" (The history of Hungary) 1890—1918. Akadémiai Kiadó, Budapest, 1978. Volume I. p. 549 et al.

6. Surveying the historical antecentents we have to say that virtually from 1526 (i.e. from the beginning of the Habsburg-seizure of the Hungarian throne) the struggle between the royal court seeking absolute power for the king and the parliament representing the whole nation became permanent. The overwhelming majority of the parliament was fully aware all the time that the recognition of an absolute royal power would actually mean the creation of an Austrian—German empire in the Danube Valley and the elimination of the independent Hungarian statehood.

The struggles against absolutism became armed struggles in the most critical periods. These armed uprisings — with a few exceptions — ended in defeat. However the uprisings and the passive resistance afterwards made the Vienna Court to realize that it has not enough power to create a uniform empire of the Danube Valley. Therefore the uprisings were always followed by public law bargainings. In the course of these debates the Court once and once again recognized the privileges of the Hungarian nobility, the independence of the Hungarian state and the right of the Hungarian nation to be governed according to its own laws. We are quite close to the truth by risking the assertion that in Hungary a special public law burdened by many compromises are yielded by the lost revolutions and the following passive national resistance. This is actually true about institutions of the Hungarian constitutional law hich was enacted during the freedom fight of 1848/1849, analoguos with the contemporary Western European institutions. It required 18 years after the defeat of 1848/1849, to create the compromise between the Dynasty and the nation, which ultimately recognized the validity of the March laws of 1848 and laid down the foundation of the independent constitution of Hungary in the framework of Austro—Hungarian Monarchy which has existed till 1918.

Among the national uprisings securing the independence of the Hungarian state we have to mention the uprising led by István Bocskay (1604—1606) as first. Bocskay had gained the alliance of Moravia, and the nobles of Lower and Upper Austria against the emperor and king Rudolf, who governed by the tyrannical methods of absolutism. Following the successes of the uprising the Habsburg-family itself has forced Rudolf to resign from the throne and cede it to Crown Prince Mathias in these areas and he was later crowned as Hungarian king named Mathias II. The public law conditions of the selection of king was fixed in 19 laws before the coronation in the course of a long bargaining process. Among others these laws regulate such important public law guarantees as the religious freedom of the Protestants (Act 1), the limits of royal power in the field of foreign affairs (The Act II had prohibited that the king could start a war without the consent of the parliament or bring foreign soldiers in the country). Due to the foreign royal dynasty those public law guarantees, which serve the aim that the country should never be without the head of state, were particularly important. For the sake of this condition a special law regulated that the king should stay as much time as possible in the country, in case of his absence by the authorisation given to the Palatine of Hungary he should have such a deputy "who according to the ancient customs will rule the country together with the Hungarian Council with the same full authority and administer it as he himself would reign here" (Act 16.). They have taken care that the country always have a palatine who is elected by the nobles and enjoys the turst of the country. In case of vacancy in one year period the king was obliged to summon a parliamentary session selecting the palatine and appoint candidates to this post (two Protestant and two Catholics). If the king would miss this obligation, then instead of him "with the burden of loss of honesty and position" the Lord of Privy Seal took care of the convenance of the palatinate-electing parliament (Act 3.). The Acts 5., 6. and 10. regulated the appointment of the Hungarian treasurer, chancellery and counsellors responsible only to the Hungarian king, the palatine and parliament. These laws established such important public law guarantees which ruled that the royal crown should be guarded per-

manently in the country by the responsible personalities elected by the parliament (Act 4.). This rule namely excluded the possibility that the king are crowned somewhere outside the country. However, the full royal rights were given to the monarch only after the coronation. At the occasion of the coronation Mathias II took a solem oath to respect the laws of the land. Even the text of this oath was determined by an extra bargaining. It is worth to mention that the public law literature of the first decades of the XVIIth century regarded the oath of Mathias II such a "pattern" which in case of the so-called mixed i.e. government forms mixing the aristocratic and monarchic principle has represented the limits of royal power.[21] After the coronation further 21 laws regulated some public law institutions (among them we have already mentioned the Act I after the coronation of 1608 about the order of covenance and composition of the parliament).

The examination of the public law legislature of 1608 proved that in Hungary, actually in the same time with the development taking place in the German Empire, the establishment of the feudal public law and the codification of its substantial part — regulating the limits of the royal power in details — took place. Afterwards, beside the right to resist mainly this codified public law became the legal basis of the national struggles against the royal court seeking absolutism. Even more so because the new king — while ascending to the throne — has been obliged to let him to be crowned, take the coronation oath confirm the coronation document which always once again fixed the most significant public law guarantees. This codification has greatly contributed to the fact that the coronation oath, the fact of the royal crowning itself, and the coronation document (charter) containing the most important public law guarantees are among the constitutional guarantees till the coronation of the last Hungarian king, Charles IV. (1916).

After the uprising led by Thököly the Hungarian parliament of 1681 had convened in Sopron, repeated and summarized all the accepted public law guarantees of the independent Hungarian statehood, in this case against the absolutism of Leopold I. After the defeat of the mentioned freedom fight led by Ferenc Rákóczi II (1711) the parliament of 1715 has ensured not only the umpunity of the participants of the uprising, but withdrew every illegal decrees and once again restored the earlier Hungarian public law.

In Hungary special laws entaced by the Hungarian parliament, which significantly differed from those of the hereditary provinces of the House of Habsburg, the Acts I—II of 1721 and the Act III enacted the right of succession of the female members of the Habsburg Dynasty. The first Hungarian queen from the Habsburg House, Maria Theresia was crowned and at that occasion particular fundamental laws guaranteed the independence of the country.

In the development of the Hungarian public law those laws have a peculiar place, which were enacted by the parliament of 1790—1791 in order to calm down the uprising which almost took place as an answer to the centralisation effort of Joseph II — after the death of Joseph II. These laws already were using the public law categories of the French revolution — however without eliminating the feudal privileges. The most important of these laws have been elevated to the rank of fundamental laws in the deceades before the bourgeois revolution and freedom fight of 1848—1849, in the so-called Age of Reforms. The new legal categories used by these laws have significantly contributed to the fact that these laws were approved by the revolutionary legislation of 1848 without amendment in several cases and they were built in the modernized public law of the revolution. It is possible that these laws had significant role in that the work-out of the modern public law built on the equal rights of the citizen could be done without the preparation and enactment of a charter-type constitution. There-

[21] See: Capitulationes Impretatorum et Regnum. Cum notamentis Johannis Limnaei Argentorati. 1651. Sectio IX. 8. p. 32.

fore e.g. in *Hungary* first time in these laws appeared the idea of a constitution of the contemporary meaning. The Act X of 1790—1791 while declaring that Hungary is an independent country with independent existing statehood, mentions that the country possess *its own constitution.* The Act XII on the practice of legislative and executive power (de legislativae et executivae potestatis exercitio) referring to the separation of power branches, settles the basic requirements to be expected from the constitutional state of that age. As far as the legislative power is concerned, it repeatedly confirms the concept of the Hungarian public law that in Hungary the lawfully elected king and the parliament *together* are entitled to the legislation. A comparatively new rule is the prohibition of the "government by decrees and orders". The Act XII of 1790—1791 had permited the appearance of decrees and orders "only in accordance with the law", then explicitly mentioned that "the executive power is to be exercised by the king in harmony with the law, not otherwise". The same law ruled on some important guarantees of the judicial independence. Therefore there was no obstacle that the later promulgated Act IV of 1869 on the judicial independence virtually using the words of the Act XII of 1790 endowed the judge with the right to supervise the legality of decree in the course of his sentencing practice. "The judge is obliged to act according to the decrees created and proclaimed on the basis of laws and obliged to act and sentence according to the legal customs. He cannot doubt the validity of the regularly proclaimed laws, but in the single legal case the judge decided about the legality of the decrees" (Act IV of 1869 § 19.).

The public law literature before 1945 had listed the institution of ministerial responsibilityc reated by the Act III of 1848 among the guarantees of constitutionality. Its organisational solutions were mainly similar to the prescription of the Belgian Constitution of 1831 introducing it to the Hungarian public law. The ministers could be indicted by a simple majority resolution of the House of Representatives, the right of jurisdiction belonged to the special court created by and consisted of the members of the Upper House. According to the universtity textbook Móricz Tomcsányi (1942) titled "The public law of Hungary": the actual subject and main reason of the ministerial responsibility is the infringement of the constitution, when the minister as the applier of executive power infringes the constitution itself directly" (p. 503). After 1945 the institution of the ministerial responsibility — according to the conditions of the single house-parliament — has been modified. The Act I of 1946 (The so-called Republic Act) actually by referring the Act III of 1848 has determined the possibility of calling even the president of the republic to responsibility. The special institution of ministerial responsibility was maintained in the § 27 of the Constitution of 1949, which has ruled that the mode of responsibility procedures should be regulated by a special law. Such law never was created. However, even after 1949 such opinion has existed that after the enactment of the Constitution of 1949 some rules of the Act III of 1848 should be handled as valid law.

Only in the last years of the XIXth century and in the first decade of the XXth century the debates about the so-called public law jurisdiction got settled. Threefold ideas competed with each other. The first one referring to the example of the Anglo-Saxon institutions, intended to construct the whole public law jurisdiction on the system of regular courts, the second idea intended to give a multi-grade, specially system of administrative courts the right to judge over the so-called disputed public law cases, the third concept operated instead of the disputed public law matters with a narrower category of the so-called constitutional guarantees, it wanted to authorize a separated "state court" to control the prevalence of the constitutional guarantees. In this latter sphere of subjects a separate draft law was created with quite detailed explanation.[22] In the elaboration and explantation of this draft the

[22] See Dr. Imre, *Szivák:* "Az alkotmányi biztosítékokról" (On the constitutional guarantees.) Budapest, 1906. p. 175.

concept comes out clearly that in the supervision of constitutional guarantees only a certain special organisational form could mean "a satisfactory organisational guarantee" (Ibid p. 80.). Finally the so-called state court — which is similar to the constitutional court — was not created at all.

In 1896 a single-grade public administration court was created, separately from the regular courts, organized to deal with matters defined by the law, namely the Act XXVI of 1896. Its competence sphere was extended by several supplementary laws later to the field of constitutional guarantees too. E.g. the Act LX of 1907 has authorized it to repeal ministerial decrees in case some county-level selfgovernment considers these decrees as infringement of its self-government rights and files a complaint to the court. The Act LXI of 1907 has created the competence court as another kind of public law court.

This system of public law jurisdiction has not been changed till the elimination of the public law courts. However during the years after the Second World War many followers in the public law literature supported the view which intended to develop further or reform the public law jurisdiction according to the Anglo-Saxon patterns starting from this point of the unity of judicial power.[23]

7. Today we can state unambiguously that the charter-like constitution enacted in 1949 belongs to the group of those constitutions, which can be rather considered political programs than legal documents. Even the legal guarantees of its practical implementation were absent. In this matter it hardly differed from the earlier socialist constitutions. Here we mean not merely the Stalinist constitution of 1936 or the popular democratic constitutions which followed this model. The truth is that already in the time of preparation and enactment of the first Soviet constitution it was rather problematic, whether the socialist revolution is compatible to a written constitution at all. E.g. I. P. Stuchka, who was Commissar of Justice in 1918 (later he became an author in constitutional law) has powerfully doubted that the Soviet state while fulfilling the dictatorship of the proletariate needs a written constitution at all. "Even such a famous state leader and well-known jurist as I. P. Stuchka, who was Commissar of Justice in 1918, has doubted the necessity of preparing a constitution. Mistakenly he has thought that the transfer form capitalism to communism cannot be inserted "into the framework of written fundamental law" and the dictatorship of the proletariate "would hardly harmonize with such words as written law" — we can read this view in a latest work on the history of Soviet constitution.[24] We may say that this opinion of Stuchka was not given up even after the enactment of the 1918 and 1924 constitutions either. He held the opinion that the rules of constitution among the conditions of the dictatorship of the proletariate are not legal regulations, but such "organisational norms", which virtually "represent" — openly express — the working methods of the Soviet power in the exercise of political authority. Actually he has the same view in his book titled "Concept on the state of the proletariate and peasantry and its constitution" published in 1926.[25] Some traces of this view can be found even after the death of Stalin and even the XXth Congress of the Soviet Communist Party. We can find such views in the socialist constitutional law literature too, which regarded a special method of constitutional law regulation the elimination of legal sanctions, referring to the fact that in such aspect the adaptation of certain legal concepts in the constitution means guarantee by itself for the implementation.[26]

[23] See: József, *Szabó:* "Demokrácia és közjogi bíráskodás" (Democracy and public law jurisdiction.) Budapest, 1946. p. 247.

[24] Comp. J. S. *Kukuskhin*—O. I. *Chistiakov:* Ocherk istorii sovietskoi konstitutsii. Moscow, Izd. Pol. Lit. 1987. p. 11.

[25] Uchennie o gossudarstva proletariata i kresstianstva i ego konstitutsii. SSSR — RSFSR Izd. r. Moscow, 1926. p. 291.

[26] See: V. F. *Kotok:* "A szovjet államjog tárgya" (The subject of Soviet public law.) In: "A szovjet államjog kérdései" (The questions of Soviet public law.) Budapest, 1962. Akadémiai Kiadó, p. 64.

The lack of legal guarantees of the implementation has significantly obstructed the implementation of the constitutional regulations. Although the § 70 of the constitution ruled that "the Council of Ministers is obliged to submit the draft of the law regulations required for the implementation of the Constitution", but there was no measure taken about the deadline. Therefore in some cases long years went by till each institution prescribed by the Constitution was implemented in practice. Even later there were some rules in the Constitution which did not become reality due to the lack of the proper executive orders. This can be said not only about the basic rights of the citizens, but such institutions as the plebiscite, for example. It came out only in the last months that actually the Constitution regulates the possibility of the prebiscite, however for the arrangement of plebiscite the detailed law regulation is indispensable with the rules of procedure as well. But that was missing completely.

A part of the constitutional guarantees were repealed already in the time of preparation of the Constitution while arguing that instead of them new type institutions will be applied introduced by the new constitution. For example in the first months of 1949 they abolished the Administrative Court saying the argument that the legality control of public administrative activities will be done by the new type public prosecutor's office. However the new type prosecution was established only in 1953.

The Constitution became valid in the same time with its proclamation, i.e. in August 1949. In the state practice that view prevailed that the enactment of the new constitution automatically (without creating implementation regulations) repeals the constitutional guarantees fixed by the earlier public law regulations. Consequently in the absence of the appropriate law rules the legal framework of important constitutional institutions became uncertain. We can mention the ministerial responsibility, the organisational guarantees of judicial independence, the separation of public administration and jurisdiction, the competence division between the representative and administrative organs as examples. All of this explains that in the first years after the implementation of the new Constitution primarily not the creation of constitutional guarantees, but the implementation of the valid constitution stood in the foreground.

After the death of Stalin, the political line appearing in June 1953 put the realization of the Constitution, the practical implementation of its expressed democratic achievements on its banner.

"The government in its whole operation stands on the basis of legal order and legality established by the Constitution. The basis of our popular democratic state system, economic and social life is the socialist legality, the strict adherence to the rights and duties of the citiziens prescribed by the Constitution and the laws of our People's Republic".

One can read this text in the program of the newly elected Parliament, as it was told at the session of June 1953.[27]

In the course of the continuous realization of the program of the new government in the research of legal and administrative sciences the problems related to the constitutionality and legality of legislation acquired the main importance. Even more so because parallel with the enactment of the new Constitution those rules of the earlier judicial organisational laws were repealed which authorized the judges to examine the legality of the public administrative decrees to be applied in their cases.

At the occasion of the public session of the Hungarian Academy of Sciences (May 1954) in the plenary session framework of the Academy a special conference dealt with the theoretical

[27] See in details: István, *Kovács:* "Népköztársaságunk alkotmányának következetes végrehajtásával a júniusi párthatározatok megvalósításáért" (Through the consequent implementation of the Constitution of our People's. Republic for the accomplishment of the Party decisions of june. Állam- és Igazgatás, July—August, 1953. p. 337—353.

problems of legislation. In this conference the whole problematics of the constitutionality and legality of written law, its formal and material aspects were examined. The formal aspect of legislation did not mean merely the proclamation and appearance of the legal regulations, but the whole mechanism of the preparation of laws and the too much divided hierarchical system of laws as well.

Even that claim was heard that once again that basic rule should be applied that the original legislation can be built only on aďs and their supervision should be ensured.[28]

The results of scientific research partly were used by the Law Decree 26 of 1954 implementing the constitutional rules (about the proclamation and promulgation of legal regulations) and the Decree of the Council of Ministers 1072/1954 about the implementation details. The Law Decree and the Decree of the Council of Ministers orders even some sanctions in case of infringement of the constitutional guarantees expressed in the new regulations. Namely it calls the attention of the Secretariate of the Government to pay attention to the work of legislative activity of the organs subjected to the Council of Ministers and in case of infrigement of guarantees expressed in the Decree of the Council of Ministers it should initiate at the government "the elimination of the fault" (Decree of the Council of Ministers 1072/1954, Art. 26).

This "organisational" solution which should be taken only as initial step forward at most certainly could not satisfy the increased expectations then. However, the next step was taken much later. Only after 1956 the emphasis on the legal character of the Constitution and the strengthening of the constitutionality of legislature gained ground once again.[29] The book by Lajos Szamel, titled "Legal Sources" (1958), searching for the socialist traditions of constitutionality and the legality of legislation already called attention to the fact that in the framework of the Supreme Court of the Soviet Union the so-called "konstitutionnaya kommissiya", which has operated between 1924 and 1930, has acted as a special constitutional court and had quite wide competence sphere. Imre Szabó in his essay, titled "The place of the Constitution in our popular democratic system" has examined the legal character of the Constitution and the chances of progress of the guarantees which were to consolidate the legal character of the constitution.[30] Ottó Bihari called the attention to the organisational guarantees of the constitutionality and the legality of legislation. He has proposed to authorize the Law Committee of the Parliament to examine especially the constitutionality of law decrees issued by the Presidential Council of the People's Republic.[31] Other proposals require the creation of special institutions (primarily in the framework of the Parliament as the more effective guarantees of the constitutionality of legislation.)[32] From the literature of this time dealing with the control of constitutionality the book by Kornél Pikler, titled "The bourgeois constitutional jurisdiction" deserves special attention (Budapest, 1965. p. 286). The book, while satisfying the ideological rituale of that age, criticize the Western institutions, however the claim comes out undoubtedly that we should seek the possibilities

[28] See: "MT Társadalmi-történeti osztályának közleményei" (The Publications of the Social and Historical Sciences Department of the Hungarian Academy of Sciences) (MTA) Volume V. Nr. 14. The new period and the theoretical questions of legislature. p. 215—267. — Following the session several essays dealt with the constututionality of the law sources system living in the practice too. Among them one should be mentioned particularly: the paper by Lajos, *Szamel:* "A jogforrásokról és közzétételükről" (On the legal sources and their announcement.) See: Jogtudományi Közlöny, 1954. Nr. 10. p. 442—552.

[29] Lajos, *Szamel:* "Jogforrások" (Legal sources). Budapest, 1958. p. 182.

[30] Jogtudományi Közlöny, October—November, 1959. p. 497—515.

[31] See: Ottó *Bihari:* "Alkotmány és törvényesség" (Constitution and legality). Jogtudományi Közlöny, 1960. Nr. 10. p. 513—519.

[32] See: István, *Kovács:* "A szocialista alkotmányfejlődés új elemei." (The new elements of the socialist constitutional development.) Budapest, 1962. p. 392 et al.

of the institutional development while analyzing the experiences of Western institutions. (See. Ibid Closing remarks. p. 259 et al.)

In the sixties the preparative activities of the general revision of the Constitution, the preparation of a new Constitution have started. In the course of this work concrete proposals were taking shape too. Namely: in the organisation of the Parliament a special committee should be established to control the constitutionality, largerly with the organisation and competence which later belonged to the Constitutional Law Council. The text of one of these drafts was published in the volume titled "The development of the Constitution of the Hungarian People's Republic" by István Kovács (The publication of the Institute for Legal and Administrative Sciences MTA Volume I. p. 346—347.)

In the course of the formulation of the constitutional amendment, however, this question was taken off the agenda. According to the argument it is enough that the text of the Constitution prescribes that one of the most important tasks of the Parliament is the supervision of the constitutional order of the society. Accordingly, the modified statutes of the Parliament will make arrangements about the creation of a special council which will controll the constitutionality. Therefore the special council serving the control of constitutionality did not get into the text of the amended Constitution modified by the Act I of 1972. Then in the course of the modification of the statutes of the Parliament such decision was taken that there is no need to have such a council at all. It was satisfactory if the modified statutes reminded already existing permanent committees of the Parliament that in their own competence they should do the tasks related to the supervision of constitutionality.

8. Afterwards more than ten years went by before the proposal of the Constitutional Law Council became reality. Finally the establishment of the Constitutional Law Council was ordered by the amendment of the Constitution, the Act of 1983. The basic regulations concerning the Constitutional Law Council were included in the modified § 21 of the Constitution. Consequently: "The Parliament selects the Constitutional Law Council, which controls the constitutionality of legal rules and quidelines. It can suspend the implementation of those regulations, which contradict the Constitution — with the exception of legal rules established by the Parliament and the Presidential Council and the quidelines and principles of the Supreme Court (Art 3). Everybody is obliged to make available those data which are requested by the parliamentary committees and the Constitutional Law Council and obliged to testify in front of them." (Art 4) The detailed regulations concerning the Constitutional Law Council were prescribed by the Act I of 1984. on the Constitutional Law Council (The rules of its operation were contained by the modified statutes of the Parliament). According to the Act I of 1984 the Constitutional Law Council may have 11—17 members. Its president, secretary and the majority of its members should be elected from the representatives of the Parliament, the other members may be selected from other personalities of public life. Among them the experts and professors of constitutional law got their place. In its sessions the Minister of Justice, the President of the Central Bureau of People's Supervision, the President of the Supreme Court and the Highest Prosecutor take part ex officio — with right to enter the debate. However, its authorisation is continuous in the meaning that it is terminated only by the election of the new Constitutional Law Council. Its procedure can be initiated by the Council or its members, furthermore the state and social organs mentioned by the law. *The Constitutional Law Council has started its activities in 1984.* We have to say that its work developed among considerable difficulties. This fact can be explained by several causes, among others it is due to the fact that the law has relatively restricted the sphere of the state and social organs which may initiate procedures, did not emphasize the independence of the Constitutional Law Council in the interpretation of the Constitution, did not ensure an independent staff for it etc. However, we have to mention that despite the difficulties the Constitutional Law Council adapted several important resolutions. It sus-

pended some objectionable law regulation and even more frequently used its right to determine a proper deadline for the competent organ to correct the regulation which infringed the Constitution. In the course of the planned reform of the political system and the activities of the preparation of the new Constitution it became clear that the organisational and competence frameworks of the Constitutional Law Council — regardless of the activities of the Council — did not comply with the control of constitutionality. Therefore such a new, independent, actually judicial-type organ is needed — i.e. *Constitutional Court* — which possess much wider competence than the Constitutional Law Council in order to ensure the legality of legislation. Furthermore it can be authorized with such rights which go beyond the supervision of the legality of the legislation and generally serve the consolidation of the constitutional guarantees.

The establishment of the Constitutional Court has been ordered by the Act I of 1989 enacted in January 10, 1989. The general constitutional amendment of October 18, 1989 (Act XXXI of 1989) has modified it in some places and has summarized the constitutional fundamental principles related to the Constitutional Court into a separate chapter of the Constitution (Chapter IV) and left to an Act with constituonal force to establish the detailed regulations concerning the Constitutional Court. The constitutional basic principles related to the Constitutional Court are the following: a) the Constitutional Court supervises the constitutionality of the laws. As an Act or any other law regulation is considered to be unconstitutional, it will nullify it. b) beyond the supervision of the constitutionality of legal regulations the law may delegate other tasks to the competence sphere of the Constitutional Court too. c) anybody may initiate the procedure of the Constitutional Court. d) its 15 members are elected by the representatives of the Parliament with two-third majority. e) the members of the Constitutional Court cannot be members of any party and may conduct only such political activities which are placed in the sphere of tasks to be done by the Constitutional Court.

The Parliament enacted the Act regulating the Constitutional Court in October 19, 1989 (No. XXXII. of 1989), which became valid in the day of its proclamation (October 30, 1989). At the same time the Constitutional Law Council ceased to exist, the cases under way will be decided by the Constitutional Court (§ 58). The seat of the Constitutional Court is Esztergom. It started its operations at January 1, 1990. The provisional regulations of the law include that the recent Parliament elects only 5 members of the Constitutional Court, further 5 members will be elected by the newly elected Parliament in 2 months from its initial session, the remaining five seats will be filled only after five years.

The Constitutional Court elects its President and Deputy President among its own members. Until the Constitutional Court consists of only five members, it elects only a Deputy President and he will fulfill the tasks of the President too. Furthermore, the 5 member Constitutional Court also may practice the whole competence sphere of the Constitutional Court. This competence is rather widespread. Namely, according to the § 1 of the Act the competence sphere of the Constitutional Court includes a) preliminary examination of the law drafts, the enacted, but not yet proclaimed laws, the statutes of the Parliament and unconstitutionality of some rules of international agreement; b) the posterior examination of the unconstitutionality of the law regulation and any other legal measure of the of normative character other than legal rules; c) the examination of collision of law or any other legal measure with international agreement; d) the judgement on constitutional law complaint which was submitted against an infringement of laws ensured by the Constitution; e) the elimination of unconstitutionality appearing in omission; f) the elimination of competence disputes between the state organs, furthermore between the self-government and the state organs, and between the self-governments; g) the interpretation of the constitutional regulations; h) procedure in all of those matters which are referred by law to its competence.