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Tomus XXIII.

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ISTVÁN KOVÁCS

**On the problem of Act of Parliament
and Law-Decree**



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Redigunt

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Kiadja

*A Szegedi József Attila Tudományegyetem Állam- és Jogtudományi Kara
(Szeged, Lenin krt. 54.)*

Kiadványunk rövidítése

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INTRODUCTION

The overall tendency has come to prevail in the increasingly intricate law-making machinery that unlike in the customary law development it is written law which determines law-making organs, their powers, the hierarchy of law-making acts, law-making patterns but particularly the types of State acts which may contain norms equally binding on individuals, their organizations and State organs. There is no agreement on the point what should be included in the constitution from among the rules governing the entire domain of law-making, what should come under Acts of Parliament and lower-ranking statutes (e. g. government decrees). But it is a generally accepted demand that the basic institutions of the system of legal sources should be regulated in the constitution.

The 1949 socialist constitution in Hungary drew a dividing line in this field. Earlier, when unwritten constitution was prevailing several major institutions of the system of legal sources were laid down in the rules of customary law. This implied the emergence of a spontaneous practice of law-making organs in a relatively wide sphere of the law-making mechanism. After 1949 the written constitution laid down the main traits and basic institutions of the entire system of legal sources. This constitutional regulation was likewise characterized by not precluding a further growth of the system of legal sources but also by barring the way to arbitrarily introducing institutions. At least it rendered more conspicuous, marked, endeavours directed at shaping a non-constitutional practice.

On the ground of the Constitution the process of a more detailed regulation of some institutions of the system of legal sources was started at a relatively early period. First, issues more of a technical nature relating to the publication of statutes were brought under regulation.¹ But the necessity to regulate in detail problems connected with normative acts issued by central public administrative organs, their place and rank in the system of legal sources arose rather early.² A major advance was made in the regulation of that system in Law-Decree No 26 of 1954 and the concomitant Resolution of the Council of Ministers No 1074 of 1954 (IX. 4.) M. T. These statutes, utilizing experiences in the five years after the adoption of the Constitution, went beyond mere technical issues also in regard to the highest-ranking statutes, Acts of Parliament and Law-Décrees. The division between statutes bearing on civic rights and duties and other normative acts, the relationship between basic statutes and executive statutes was based on basic principles. In addition, provisions were

¹ Government Decree 4216 of 1949 (IX. 6.) M. T.; Government Resolution 2001 of 1950 (I. 7.) M. T.; Law-Decree No. 22 of 1950, Government Decree 14 of 1951 (I. 13.) M. T.

² Government Resolutions 1009 of 1951 (V. 6.), 1038 of 1951 (XII. 19.) M. T.

made on the safeguards of the legality of law-making. It may be said that in the epoch of a relatively rapid transition important questions of the system of legal sources were settled in an up-to-date manner.

This, however, did not mean as if the moulding, growth of that system had come to an end. Within the limits provided by the Constitution and the now-mentioned statutes, several enactments on some institutions of State organization (on the judiciary, on procuracy, on councils, on the standing orders of Parliament and the Presidium) and the codes in several branches of law (code of labour, Law-Decree on social insurance) have a bearing on institutions of the system of legal sources.

Subsequent upon the adoption of the 1949 Constitution several papers and monographs dealt with the system of legal sources in Hungary. The problems discussed were conditioned mainly by the branch of science-theory of law, legislative technics, constitutional law — from the angle of which law-making and its patterns were approached.

Works of a legal theoretical nature were devoted in the first place to the traits characteristic of the system of the sources of law as a whole since they discussed problems of the sources of socialist law in the setting of the theoretical problems of socialist law. In this context, their interest focussed mainly on issues of the Hungarian system of legal sources which could be dealt with on the general theoretical plane of socialist legal development. It is also true that several Hungarian works on the theory of law have won international recognition in regard to problems connected with the system of the sources of law.³

Writings on legislative technics are concerned mainly with the drafting, systematization and structure of statutes. Papers in this range serve mainly practical purposes but some of these arrive at conclusions of a theoretical nature in connections with the legislative forms i. e. the institutions of the system of the sources of law. This is the main reason why works on legislative

³ Without attempting to give a complete list the most important works on the subject will be cited: *Peschka, V.*: *Jogforrás és jogalkotás* (Source of law and law-making), Budapest, 1965. 497 p. The work starting from the fundamental questions of the concept of the source of law, after surveying the State and social elements of the legislative process, arrives at proposals on the development of the system of the socialist sources of law. The author examines in his paper: *Lenin és a szocialista jog formái* (Lenin and the forms of socialist law); *Állam- és Jogtudomány*, 1970. No. 1. pp. 25—33., the correlations between the development phases of the socialist State and the moulding of the system of the sources of law. *Szabó, I.*: *A jogszabályok értelmezése* (Interpretation of statutes), Budapest, 1960. 618 p. The author, analysing the comprehensive issues of law interpretation arrives necessarily at the examination of the major theoretical problems of the system of the sources of law. (The work was published also in Rumanian: „Interpretarea Normelor Juridice”, Bucharest, 1969. In another work of his, „A szocialista jog (Socialist law)”, Budapest, 1965. 454 p., the author devotes a chapter to the system of the sources of socialist law, the basic institutions of the system of the sources of law. (The work was published also in the Soviet Union under the title „Socialistscheskoe Pravo”. Progress ed. 1964—65. *Szabó, I.*: wrote also the chapter on the sources of law in the text-book of socialist law of the Strasbourg Comparative Law Faculty (Faculté Internationale pour l'Enseignement du Droit Comparé). cf.: *Introduction aux droits socialistes*, Akadémiai Kiadó, 1971. pp. 89—127. The text-book „Állam- és Jogelmélet” (Theory of State and Law) outlines the system of the socialist sources of law through elaborating the socialist literature on the theory of law. Budapest, 1970. pp. 463—491. (The relating Chapter was written by *Szotáczy, M.*).

technics are usually ranked among those on the theory of law.⁴ It should be noted that works on legislative technics came to be published after the adoption of the 1949 Constitution at a relatively later phase, not before the middle 'fifties. After that period, however, papers on the major problems of the legislative technique in the given phase were published practically in connection with every major codification.⁵

Works on constitutional law pay due attention to categories elaborated in the theory of state and law; they draw within their orbit of interest, by applying the comparative methods the patterns of legal sources adopted in foreign, in the first place socialist constitutions but concentrate on institutions and their growth in Hungary. In the period after the adoption of the constitutional works on constitutional law dealing with the problem, discussed mainly the system of legal sources as laid down in the Constitution and the statutes on its implementation.⁶

By the middle 'fifties the generalization of experiences, as if preparing a comprehensive statute to be issued on the system of legal sources, then after the adoption of Law-Decree No 26 of 1954, monographs on the Hungarian system of legal sources indicate the rising standards of works on constitutional law.⁷

⁴ The close relations between law theory and legislative technics are discussed in detail by *Braugye, J. L.*: A törvényhozási technika kérdései (Questions of the legislative technics), Jogtudományi Közlöny, 1958. No. 3—4. p. 113 et seq.

⁵ When surveying the Hungarian literature on problems of legislative technics the discussion on the principle of law-making organized during the 1954 Academy of Sciences Annual Meeting should be pointed out. The introductory lecture was held by Miklós Világhy. cf. MTA Társadalmi-Történeti Tudományok Osztályának Közleményei V. k. No. 1—4., Budapest, 1954. pp. 216—217. A contribution to the codification of criminal law was a paper by *Timár, I.*: A kodifikáció kérdéseiről (On the problems of codification), Állam- és Igazgatás, 1960. No. 7. pp. 401—411. At the end of the 'sixties a contribution to a more efficient law-making connected with the reform of the new system of economic management was made by *Korom, M.*: A jogszabályok és az ügyintézés egyszerűsítése (Statutes and the rationalization of administration), Állam- és Igazgatás, 1968. No. 8., p. 675 et seq. *Kampis, Gy.*: A jogszabályok mennyiségéről és a jogalkotás trendvonalairól (On the amount of statutes and the legislative trends), Állam- és Igazgatás, 1969. No. 9, p. 786 et seq. The paper contributes to assessing the legislative activity in certain periods by elaborating the figures relating to legislative activity and by comparing the amounts of various legislative levels.

⁶ *Pikler, K.*: A jogforrások az alkotmány tükrében (Sources of law in the light of the Constitution), Állam- és Közigazgatás, 1949. No Sept-Oct. pp. 337—343. The paper discusses mainly the changes resulting from the written Constitution. *Szamel, L.*: Jogszabályszerkesztésünk néhány problémája (Some problems of statute-drafting), Állam- és Közigazgatás, 1950. No. 4—5. pp. 340—345.; the paper discusses the relation between the pre-liberation and post-liberation law-making and the problem of the statutes of implementation. *Cilczér, Gy.*: Jogszabályok, kötelező erejű határozatok közzététele (The publication of statutes and binding resolutions), Állam- és Közigazgatás, 1950. No. 10—11, pp. 746—754. The author dealt, in addition to describing the system of publication, with various kinds of public administrative agencies' normative acts.

⁷ *Csizmadia, Gy.*: Törvény és törvényerejű rendelet a Magyar Népköztársaságban (Act and Law-Decree in the Hungarian People's Republic), Állam- és Igazgatás, 1954. No. 3. pp. 155—167. *Beér, J.*—*Szamel, L.*: Minisztertanácsi rendelet — minisztertanácsi utasítás (Council of Ministers' Decree — Council of Ministers' instruction), Állam- és Igazgatás, 1954. No. 6—7, pp. 401—406. *Szamel, L.*: A jogforrásokról és közzétételükről (On sources of law and their publication), Jogtudományi Közlöny, 1954. No Nov-Dec. pp. 444—452. *Szamel, L.*: A jogforrások (Sources of law), Budapest, 1958. 184 p.

Beginning with the 'sixties the number of papers pointing towards an evolution of the system of legal sources started to increase. Proposals were made to further its development by expanding the democratic legislative mechanism, i. e. by extending the role of Acts of Parliament by separating from other statutes those on civic rights and duties, by extending the safeguards of the constitutionality and legality of law-making.⁸

A number of proposals were adopted in the recent constitutional amendment, enacted by Act No. I. of 1972. Later on taking into account the new text of the Constitution, Law-Decree No. 24 of 1974. on the promulgation and coming into force of the legal rules regulated again the principal questions of our system of sources of law on the basis of experiences gained during two decades.⁹ This work will concentrate first of all upon matters concerning Acts, and Act-level legislation, i. e. Law-Decrees. But in this course, — due to their interrelation — some kindred problems of government decrees and ministerial decrees will also be discussed.

I. DEFINITION OF LEGISLATION AND LEGISLATIVE SUBJECTS

1. The problem of legislative subjects may be approached from several angles. Thus e. g. it may be examined *per se*: what should at all be the subject of legal regulation, legislation. (In other words: where is the limit in the network of social conducts and social relations beyond which the law-maker need not, must not or should not take action). The range of legislative subjects may be examined also within the context of social relations, social conducts, from the angle of differences between these relations and conducts, i. e. from the aspect of the types of legislative subjects, of how the social characteristics of these types react upon the method of regulation, sanctions, etc. Such an examination is e. g. when *legislative subjects are discussed according to the particular aspects of various legal branches*. Lastly, the range of legislative subjects may be examined on the ground of the *State's uniform legislative function*, analysing the extent of the *domain reserved* (or to be reserved) *for regulation by Acts* and the legal consequences attaching to it, within the increasingly differentiated law-making mechanism.

The approach of the problem in the latter sense, i. e. from the angle of the *State's uniform law-making function* and in this context the differentiation between „Act-law” (legislation-made written law) and „non-Act law” (non-legislation-made written law) may appear as an acceptance of the Act concept

⁸ Kovács, I.: Democracy and Legislation. Annales Univ. Scient. Budapestiensis De Rolando Eötvös Nominatae. — Sectio Juridica — Tom. VII. 1966. 37—49 pp.; Bihari, O.: A törvényhozás egységének értelme és formái a mai szocialista államban. (The purport and forms of the unity of legislation and execution in modern socialist States), Állam és Igazgatás, 1968. No. 12. 1057—1069. pp.; 1969. No. 1. 1—17. pp.; Kovács, I.: Les sources du droit de la République Populaire Hongroise. Revue internationale de Droit comparé, 1967. No. 3. 655—674. pp.; Kovács, I.: La notion de la loi, l'organisme législatif dans le système de droit actuel de Hongrie. Études en droit comparé, Budapest, 1966, 11—31. pp.; Kovács, I.: La division des attributions creatrices de droit dans le système des organes centraux de l'État, Droit hongrois — Droit comparé, Budapest, 1970. 219—233. pp.

⁹ It is the resolution of the Council of Ministers No. 1063/1974. (XII. 30.) which provides for the enforcement of the Law-Decree.

in the material sense. It is known for students of the problem that the view according to which every generally binding statute is an Act irrespective of whether it has been made by a legislative body, the executive or public administrative agencies is widespread in bourgeois literature but crops up sometimes also in socialist legal writings. It is clear that the so-called material concept of Act is used in socialist legal literature in a symbolic sense in order to demonstrate that there is no difference among statutes of various levels as regards binding force. Apart from the fact that this assumption itself oversimplifies the issue (a legal rule can never be detached from the legal system as a whole) it must not be disregarded that the material concept of Act assumes, *as regards its origins*, the recognition of two independent law-makers. To put it in other words: it is based on a pattern of the separation of powers found in the first constitutional monarchies. In this conception Parliament, the supreme representative organ, meant, as a legislator, the people, the nation in exercising legislative power. This idea was underlying its original legislative power. The Sovereign, the head of the executive had a share in the exercise of this power by its own right (or by the grace of God which is essentially only a symbolic expression of the same formula). The two parties — the Sovereign and the supreme representative organ — were juxtaposed in the exercise of legislative functions as partners with equal rights. This was the justification for placing, in principle, on the same level Acts and Decrees in the material concept of the Act. The differentiation made between legislative subjects in this pattern indicated a restriction upon or the restricted nature of the Sovereign's powers.

The problems relating to legislative subjects continued to be important, although with a completely changed content. In effect, these indicate, in the mechanism of the uniform State power, in the system of the hierarchically graded law-making organs the province of law-making allotted to the supreme representative body. This change in the assessment and importance of legislative subjects is closely tied to the expansion in the set-up of the law-making process in the past hundred years. It may unequivocally be stated by now that the pattern of exercising State power as practiced in the so-called constitutional monarchies has become obsolete *in toto*.

The doctrine which derives State power as a whole, legislative power included, from the people (electorate) has been practically generally accepted. This power is exercised, in the order laid down by the Constitution, by State organs (or in specific instances directly by the electorate). The regulation of the legislative power is always the central point in every constitution. The view that a yardstick of the democratic character of a constitutional system is the effective or potential participation and its extent in the exercise of the legislative power has been gaining ground lately. An international standard or minimum standard is now in a state of formation in this regard.⁴⁰

Parallel with this development also legislative functions underwent major changes. Law-making had increasingly become a device in the hands of the so-called active State in implementing political programmes in the economic, social, cultural, etc. domain. This development has not only widened but has also conspicuously differentiated legislative subjects.

⁴⁰ cf. Kovács, I.: A törvénykonceptió alakulása (The formation of the statute-concept), MTA IX. Osztályának Közleményei. No 1, 1966. p. 75 et seq.

The differentiation in regard to legislative subjects had to have had an impact on the law-making organization, its methods and the growth of the forms in which law appears. It should be pointed out that the traditional law-making organs, forms and methods evinced a considerable flexibility in the course of this development. It may be said that a considerable part of these became general elements of legal culture and are still capable, with relatively minor modifications, to meet contemporary demands within a wide sphere. This notwithstanding, there is a certain tension between the traditional law-making means and contemporary demand. The causes of this tension are manifold. In some instances this is rooted in the non-simultaneous emergence of new forms and methods and the changes in the functions of legal regulation. It also happens frequently that traditional means are intended to be used although these are inadequate in the given situation. It is again a frequent occurrence that a legal form is lent to the active State's measures which have, in principle, no statutory content. Such actions, being pseudo-statutes, may discredit legislation.

As a result of the diversity of the legislative material *the number and types of organs engaged in legislative activity have been considerably increasing*. We are witnessing e. g. that organs which had participated formerly in the legislative process with different grades of delegated powers — but invariably with delegated powers — achieved independent legislative status in decree-making. In this course, the legislative authority of the Head of State, the government and members of the government has become increasingly distinct. Occasionally government-controlled organs which are not ministries or, what is more, minister-controlled central public administrative agencies are vested with independent legislative powers. Besides, it is likewise a general tendency that professional organizations, interest federations have a role in the legislative process, sometimes with independent authority but mostly with binding or optional rights of consultation. The differentiation in the legislative mechanism is demonstrated by the ever-increasing range of subjects coming under local legislation. The general effort can be observed to bring legislative powers closer to the area to be regulated and to confer these on organs having more direct information on the social relationships coming under regulation.

The fact that an increasing number of professional organizations and public administrative agencies have come to participate in legislation *involves an added importance of the safeguards destined to secure the prevalence of overall interests* against group interests and the particular interests of administrative branches. Among these safeguards a very important place is occupied by the delimitation of legislative powers in the material sense, i. e. adjusted to legislative subjects and, within this, the determination of subjects which must come within the powers of the supreme legislative organs which are most capable of expressing general interests on the highest level and in a most abstract form. (It should be made clear that general interests still mean, everywhere and every time class interests with a political purport).

As regards the differentiation in legislative patterns the evolution in the course of which individual acts, general acts, abstract general acts and normative acts containing statutes have attained a separate existence is worth noting. In addition, the resolutions which are not statutes either in form or content but express a given political, economic, cultural or social programme, objective but which become, after publication part of positive law must be

taken into account when discussing legislative patterns. They are taken into consideration either by law-applying agencies or a lower-level law-making is based on them. On the other hand, the different kinds of acts, their intricate hierarchical interdependence, the practicability of several transitional patterns between general acts and abstract general acts thrust into prominence the formation of an efficient and quickly acting organization which familiar with legal requirements (and confined within its limits) is able to fully enforce political requirements in securing constitutional and lawful legislation. Such a controlling organization may work within the machinery of the supreme representative bodies, the government apparatus or in other political set-up. In accordance with national constitutions it may work through ordinary courts, constitutional courts or the procuracy. Various solutions can also be combined.

The safeguards of constitutional and lawful legislation serve, in the last analysis, the implementation of general interests even if sometimes they further group interests for the very purpose to have the delimitation of powers enforced which express the most general interests. This applies particularly to those legislative systems which took into consideration, at the outset in laying down legislative subjects or determining domains of legislation reserved for legislative organs the possibility of conflict between general interests and group interests and the resulting dangers.

It is therefore necessary to place the entire range of problems to be discussed, i. e. not only those of legislative subjects but the relationship between Acts and Law-Decrees within the general framework now set forth. When elaborating up-to-date solutions in the first place experiences in socialist countries should be taken into account.¹¹ But not forgetting the numerous problems of legislative technique relating to the issue which raise analogous problems irrespective of social systems, experiences in contemporary bourgeois law-making should not be left out the consideration.

2. In the course of the *bourgeois States' evolution* the problem of legislative subjects was or is determined essentially by three essentially different conceptions which are or were the underlying principles of legislation. One is the so-called French revolutionary conception, the second is the Austrian-German, so-called compromise solution, lastly the so-called historical conception, characteristic of the British evolution.

According to the *French revolutionary conception* every general rule of conduct should, in principle, be formulated in Acts or at least regulation must be traced back to Act through a chain of delegations. Under this conception the regulation of every social relationship is, in principle, a legislative subject.

¹¹ It is specially emphasized in recent Soviet writings on the theory of law that „in the socialist society where the State's activity is very wide" legal regulation comprises a very differentiated system of social relations. The differentiated content presupposes differentiated forms. The scientific leadership of the socialist society provides an opportunity for coupling into a close system the differentiated forms where every form of regulation is „in its proper place", in other words it may meet with the „maximum effectivity" the demands which require a legal regulation. The shaping of the most conducive forms of regulation and a determination of the forms in which social relationships should be regulated is a major task of jurisprudence. (cf.: *Marxistko—Leninskoe obsaja teorija i prava* (Osnovnoje instituti i ponyatija). Moscow, 1970. pp. 608—609.

In default of special legislative authorisation decrees may contain but technical rules of implementation.

The essence of the *Austrian—German* conception is that everything with a bearing on citizens' property or liberty comes under legislation. This tenet became widespread in the formulation that everything affecting citizens' rights and duties must be regulated in Acts. On the ground of this conception the original law-making powers of the executive comprise e. g. the regulation of the internal conditions of State organization, of State institutions, etc. Under this conception the subjects coming under regulation by decrees is also relatively wide. *An overall definition of the range of legislative subjects is always important for this conception because it marks the line of division where the independent law-making powers of the executive end.*

The so-called *Anglo-Saxon or historical conception* holds that everything once regulated by Acts must be again so regulated. Assuming the existence of a legislation looking back at a long historical past this results in an almost as wide a legislation as is the French revolutionary conception; still, it should be pointed out that the British idea of legislation recognizes — although within narrow limits — the legislative powers (prerogatives) of the Sovereign relating to colonial issues, some legal relations of civil servants, the Army and certain other, well-defined topics.¹²

In all three conceptions on legislation, besides defining legislative subjects, the so-called *exclusive legislative subjects* are of importance: this means a range of subjects to be regulated exclusively by Acts of Parliament where no decrees can be issued — not even through delegation or authorization or where authorization or delegation¹³ is exceptional and conditional, on special restrictions.

¹² The independent legislative powers of the Sovereign had appeared in the so-called Royal Prerogatives. Up to 1920 the Royal Prerogatives and Acts of Parliament were concurrent. After 1920 — by virtue of a decision of the House of Lords — if Parliament has adopted an Act in the field of Royal Prerogatives, the Act shall be governing. cf.: E. C. S. Wade—G. Godfrey Phillips: *Constitutional law*. Sixth edition. Longmans, Green and Co. Ltd., 1960. p. 175., p. 180., pp. 569—570 et seq.

¹³ *Article 34*: All laws shall be passed by Parliament. Laws shall establish the regulation concerning:

— civil rights, and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the obligations imposed by the national defense upon the persons and property of citizens;

— nationality, status and legal capacity of persons, marriage contract, inheritance and gifts;

— determination of crimes and misdemeanours as well as the penalties imposed therefore; criminal procedure; amnesty; the creation of new juridical systems and the status of magistrates;

— the basis, the rate and the methods of collecting taxes of all types; the issuance of currency.

Laws shall likewise determine the regulations concerning:

— the electoral system of the Parliamentary assemblies and the local assemblies;

— the establishment of categories of public institutions;

— the fundamental guarantees granted to civil and military personnel employed by the State;

— the nationalization of enterprises and the transfer of the property of enterprises from the public to the private sector.

Laws shall determine the fundamental principles of:

— the general organization of national defense;

Subject to the political conditions of States all three conceptions have had an impact in various periods and to varying degrees on bourgeois legislative practice. Still, the conception termed as the French revolutionary one has gained, as pointed out earlier, general acceptance. At least the overwhelming majority of constitutions do not recognize the independent legislative powers of the executive but provide for the general requirement that law-making must be based on Acts or at least on specific authorization under Acts. (By Acts always ordinary Acts are meant. Decree must not — as a matter of principle — be based directly on the Constitution).

Although the general trends of development are well-known, it will perhaps be useful to list the variants of the relationship between the legislative and executive power.

a) The government (and public administration) have, theoretically, no independent legislative authority; thus, the government (and public administration) issue, theoretically, their law-making Acts by virtue of a certain Act the authorization contained therein, and in order to implement this Act;

b) the government has independent law-making powers to regulate certain matters precisely defined by Acts;

c) excepting legislative subjects defined in the Constitution or by legislation, the government has powers to regulate matters independently in domains where regulation is lacking but it is necessary — until these subjects come to be regulated in Acts.

It is a characteristic of all three variants that the legislative powers of the supreme representative bodies are unlimited as regards legislative subjects, and decree-making is recognized to the degree and in regard to subjects not

— the free administration of local communities, the extent of their jurisdiction and their resources;

— education;

— property rights, civil and commercial obligations;

— legislation pertaining to employment, unions and social security.

The financial laws shall determine the financial resources and obligations of the State under the condition and with the reservations to be provided for by an organic law.

Laws pertaining to national planning shall determine the objectives of the economic and social action of the State.

The provisions of the present Article may be developed in detail and amplified by an organic law.

Article 37: Matters other than those that fall within the domain of law shall be of a regulatory character.

Legislative texts concerning these matters may be modified by decrees issued after consultation with the Council of State. Those legislative texts which may be passed after the present Constitution has become operative shall be modified by decree, only if the Constitutional Council has stated that they have a regulatory character as defined in the preceding paragraph.

Article 38: The government may, in order to carry out its programme, ask Parliament to authorize it, for a limited period, to take through ordinances, measures that are normally within the domain of law.

The ordinances shall be enacted in meetings of the Council of Ministers after consultation with the Council of State. They shall come into force upon their publication, but shall become null and void if the Bill for their ratification is not submitted to Parliament before the date set by the enabling Act.

At the expiration of the time-limit referred to in the first paragraph of the present Article, the ordinances may be modified only by law in those matters which are within the legislative domain.

regulated in Acts. If the state of emergency is disregarded, this is such a general trend that the solution adopted in the 1958 French Constitution which reverses this pattern must be regarded really exceptional.

Under the 1958 French Constitution it is not Parliament, the supreme representative body but the government which is regarded the depositary of the original legislative power, and the legislative authority of the former is limited to subjects defined in the Constitution. This solution appears at first sight as completely alien to bourgeois constitutional development. This accounts for its being celebrated by Gaullists as a wholly novel solution. But a closer examination will show that this solution is, in fact, but a variant of the Austrian—German conception mentioned earlier as a compromise, brought up-to-date. This is borne out by a survey of the legislative subjects laid down in the Constitution.

Three groups of legislative subjects are provided for in the Constitution: a) exclusive legislative subjects, b) legislative subjects in regard to their basic principles; c) legislative subjects specified by organic laws. All this is coupled with wide possibilities of authorization. The government may, when implementing its programme, ask for authorization to issue decrees also in respect to legislative subjects. If the exclusive legislative subjects are examined, it will be seen that excepting the creation of public institutions and the regulation of the status of civil servants may be considered legislative subjects also according to the Austrian—German conception. Legislative subjects in their basic principles include such classical domains like e. g. ownership, rights *in rem* and the whole field of civil law. It is not noteworthy that a large sphere of such a classical legislative field like civil law belongs not to the exclusive legislative subjects but only to those which belong to these only in regard to their basic principles. This conception is rooted in the *Code Napoleon*: „*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*” runs Section 544 of the Code. As is seen „decree” (réglement) was originally included in the sources of law laying down the limits of ownership. It is likewise worth noting that the demand to make a distinct category of the so-called exclusive legislative subjects is coupled with the development of the *Code Napoleon*. In the 19th century relying Acts and judicial decisions decrees first by local authorities then by central agencies were banished from fields which affected the owners' right of disposal. It was on this analogy that the scope of exclusive legislative subjects came to emerge. For a better understanding of the contemporary French system the relevant parts of the constitution will be found in the Notes.¹³

3. When discussing the general development trends in socialist countries it should be pointed out at the outset that the principle of unity of legislation and execution does not preclude the elaboration and recognition of legislative subjects. Originally the principle of unity of legislation and execution had emerged as a rejection of the separation of powers. It had meant simply a break with the conception under which efforts were made to keep apart the representative organs (bodies elected by the electorate) and public administration. This is why great emphasis had been laid from the first days of Soviet power on the full powers of elected bodies and concomitant with that, the theses that public administrative agencies are constituted by the representative bodies, it is the latter which determines the scope of authority, the

tasks of the former; it is the representative bodies which may direct and exercise control over the work of public administrative agencies and moreover, they themselves may participate in public administrative activities through their plenary meetings, members and committees. At the beginning this pattern involved an almost complete dissolution of the powers of public administrative agencies in their relationship with their superior organs. Theoretically representative bodies could deal with any matter coming within public administrative authority, although the relatively early emerging institutions of dual subordination raised more differentiated demands also in this sphere in regard to the local representative bodies.

Subsequent developments brought with them a gradual division between the competences of representative bodies and their public administrative agencies. This division came to preclude the direct intervention of representative bodies in public administrative affairs. Nonetheless, they could implement their ideas through their unlimited powers of control over and opportunities to instruct the respective public administrative agencies. (In addition a number organizational and competence safeguards continued to secure the implementation of the full powers of representative bodies.)

Whether earlier or latter stages in development are considered there will be found no pattern in which the representative agencies' powers vis-avis public administrative organs were loosened. The latter may act in matters pertaining to representative agencies exclusively by virtue of a general (i. e. statute-granted) authority or given for specified matters. There are necessarily scopes in this domain where such an authorization is precluded or dependent on particular conditions. The wider or narrower dimension of these scopes — governed by the political conditions prevailing in a given period — is important for valuating the democratic aspects of the organization.

4. At the beginning of the *Soviet development* resolute efforts are discernible to determine the scope of matters coming within the exclusive scope of authority of representative organs. Under the 1918 Constitution it was, in fact, not the Congress of Soviets but the Central Executive Committee, a permanently active legislative organ which was the „Soviet Parliament". As provided in the Constitution it was working as „a legislative, disposing and controlling organ". The Council of People's Commissars was, according to the Constitution, as an organ of general administration. The Council — the Soviet government — had very wide powers but it was bound to submit everyone of its decrees and resolutions to the Central Executive Committee; in matters of major importance it was bound to solicit its preliminary decision. It was only in cases of urgency and exceptional necessity that it had powers to act without preliminary decision (Sections 40—41). In the first constitutions — the period of war communism not excepted — the effort to define exclusive „legislative subjects" and to allow the government to act in such instances only on the ground of particular authorization is clearly discernible.¹⁴ But it is also obvious that the emergency in the first years did not favour legal or constitutional restrictions. A very flexible mechanism was

¹⁴ An interesting example is the Ukrainian Constitution adopted in March, 1919 under which the relationships among the three Supreme State organs, the Soviet Congress, the Central Executive Committee and the Council of the People's Commissars were built on the complex system of exclusive legislative subjects, authorizations and substitution.

emerging in the organization of the exercise of central power in which organs could take action as substitutes — also in the legislative domain. And as regards the problem of legislative subjects it could not arise in a clear form for a long time simply because the Act, in its today's meaning, i. e. an act of the supreme legislative organ was introduced by the 1936 Constitution into the hierarchy of Soviet legal sources.

It is also true that Soviet legal literature and judicial practice used the concept of Acts also before that date but these were meant to be the legislative acts of the supreme organs, i. e. of the Central Executive Committee, the Presidium of the Central Executive Committee and, in certain fields even of the government (the Council of People's Commissars) and in certain periods also of other bodies (like the Worker-Peasant Defence Council, then the Council of Work and Defence, etc. in the 'twenties); but this use was not widespread and no efforts were made to define a particular concept of the Act.

On the other hand conscious efforts were made when the preparatory work of the 1936 Constitution was going on to base legislation on a single organ. In accordance with the 1936 Constitution only enactments adopted by the Supreme Soviet as Acts are considered to be Acts. At the outset there was some uncertainty in this sphere. Sometimes every enactment adopted by the Supreme Soviet was regarded and termed as an Act — irrespective of whether or no it had a normative content. (Individual acts were also regarded as Acts). But the practice that only enactments adopted by the Supreme Soviet as Acts and with a normative content are regarded as such, has taken root in the past two decades.

The 1936 Constitution brought about major changes also in other respects in the ideas on legislation. Starting with 1936 the thesis has been that every public administrative organ — the supreme organ, the government included — shall not adopt statutes but on the ground of, in accordance with Acts, when taking action to implement them. (The powers of the Presidium will be dealt with subsequently). Socialist legal literature holds this constitutional principle

The Congress had exclusive powers as regards the adoption and amendment of the Constitution; the powers of the declaration of war and the conclusion of peace came likewise within the exclusive powers of the Congress with the proviso that if it is impossible to convene the Congress, these powers may be exercised also by the Executive Committee (Section 10). The overall direction of the government and State activity came also within the Central Executive Committee's powers. Its exclusive powers covered the election and dismissal of the members of government (Council of People's Commissars), the distribution of State revenue among central and local organs, the regulation of the election and organization of local organizations, changes in the boundaries of the Republic, conclusion of international treaties, the laying down of principles of socialist construction in the economic field (Section 11); the Council of People's Commissars had powers to act in matters coming within the powers of the legislation and national „general direction” only on the ground of the „general or special authorization” of the Central Executive Committee. (Such matters were, as laid down in Section 6 of the Constitution, legislation on criminal, civil and procedural law, the direction of national defense and home policy, currency and the system of State control.) In default of such authorization the resolution had to be submitted to the Central Executive Committee for approval. The Council of People's Commissars could not pass final resolutions, even if it had authorization, on matters coming within the powers of the Congress and the Central Executive Committee (Section 16). Otherwise the powers of central organs are comprehensively listed in Section 6 of the Constitution. (cf.: *Istoria Sovjetskoj Konstitucii, 1917—1956*. Moscow, 1957. pp. 193—194.)

identical with the *requirement* that original law cannot be adopted but by the supreme representative organ — at least in the meaning that every statute must point back to an Act. The same idea is expressed — although in a milder formulation — by the tenet that the basic legal regulation of social conditions in all social spheres must come within a regulation by Acts. (The limits of local law-making and of the legislative authorization of local Soviets as representative-power organs is another problem). According to these theses every subject to be regulated is, in theory, a legislative subject. Whichever conception is accepted (that original law can be created exclusively in Acts or that the basic regulation of social conditions is a matter to be regulated in Acts) the whole conception is a reasonable proposition only if the ordinary Act is meant by Act and if the requirement to regulate basic social conditions in Acts is not meant to be satisfied by claiming that the constitution, being a basic law, covers in any case, the entire network of social conditions or at any rate the most important of them.

Else, the principle that *social conditions must be basically regulated in Acts* is recognized — apart from a few exceptions — (which will be discussed subsequently) in socialist states, in part, under the effect of the Soviet Constitution and, in part, as a result of traditions in given countries and is ranged among the *democratic legislative principles*. If this conception is compared with earlier bourgeois conceptions it may be stated that it is nearest to the so-called French revolutionary idea of legislation which is held these days to be generally accepted. There are jurists in socialist countries who regard the two as identical.

It is therefore another question whether Soviet law recognizes *so-called exclusive legislative subjects* or subjects explicitly reserved for legislation. This is a matter for constitutional regulation. There is reference in Section 14 of the federal Constitution to legislative subjects which may be conceived of as being exclusive subjects of legislation. These are: „legislation on judicial organization” and on „judicial procedure”, „the criminal Code”, „the civil code”, „legislation on federal nationality”, „legislation on the rights of foreign nationals”, „the establishing of the basis of legislation on family and matrimony”, „the establishing of the basis of legislation on work”. Other domains are also pointed out in this Section (e. g. on land use, the principles of the use of forests, waters, mineral resources) without, however, using the term legislation in this context; it is therefore difficult to consider these as exclusive legislative subjects. In any case, Section 14 as a whole does not envisage the definition of legislative subjects but a division of affairs between the Union sequences. (These subjects serve as guidance not for a division of legislative powers but for the separation of scopes of authority of the Union and the Federal Republics).

There are references also in other Sections of the federal Constitution from which perhaps specific legislative subjects may be inferred. (E. g. reference to the order of recalling deputies as laid down in Acts). Taken as a whole, *Republican constitutions* take their pattern by the Federal Constitution. These include, however, certain special legislative subjects. Such is e. g. the and the Federal Republics and lists, in general terms, affairs coming within It is within this context that mention is made of the above „legislative subjects”. This framework restricts as well as delimits the attaching legal powers of the supreme Union power and public administrative organs.

-determination of the budget in general; reference to local taxation in some instances; legislation on family, matrimony, work.

Either the Union Constitution or the Republican constitutions are considered, legislation came to cover practically a much wider area than the subjects referred to in the constitutions. Accordingly, a distinction can be made also in Soviet development between categories of legislative subjects as laid down in the Constitution on the one hand and as shaped by legislative developments on the other.

5. When examining the general development trends in the constitutions of people's democratic states it may be said that legislative subjects, within these, exclusive legislative subjects have had a major role to play from the outset. This fact is not always reflected in people's democratic constitutions. Some constitutions — mainly under the impact of the 1936 Soviet Constitution — do not or hardly make mention of legislative subjects. In other constitutions — partly due to the survival of bourgeois democratic traditions — (like the 1948 Czechoslovak Constitution) the scope of legislative subjects was relatively wide. Extreme solutions are found in the 1963 and 1974 Yugoslav Constitutions where, due first to the federal nature of the State (but also in order to lend greater emphasis on the increased role and importance of the representative organs) a large number of legislative subjects are listed. Even if extreme solutions are disregarded and the general trend is kept in mind, it may be stated that constitutional developments in people's democratic states tend towards a growth in the number of legislative subjects. It is worthwhile, therefore, to discuss in more details from this angle one of the most recently adopted socialist constitutions, the 1971 *Bulgarian Constitution*. Altogether about 40—50 legislative subjects are listed in this Constitution. The figures do not, however, reflect without fail the volume of the scopes of regulation provided for. The veritable volume of the scopes of regulation is namely dependent on the codification technics applied. As regards the Bulgarian Constitution, the provision in its Section 9 (1) that „the rights, liberties and duties laid down in the Constitution shall be exercised, respectively performed directly by virtue of the Constitution unless it is provided by the Constitution that the conditions and order of their implementation shall be determined by Acts”, had an effect on increasing the number of legislative subjects. It occurs, therefore, frequently in the text of the Constitution that a subject appears in two places: once when the legal institution concerned is mentioned in a general context (e. g. the judiciary) and again when some of its elements are referred to. In given cases, however, this doubling may be conceived as an additional safeguard. The possible intention was to lay a special emphasis on exclusive legislative subjects by mentioning part-institutions. In order to facilitate a better comprehension the legislative subjects laid down in the Bulgarian Constitution are described in the Notes of this work, grouped according to their nature (economic and ownership relations, State organization, civic rights.¹⁵)

¹⁵ The overwhelming part of legislative subjects affect State organization. Accordingly, Act shall regulate the structure of the State Council (Section 78), particularly the instances when the President of the State Council may be authorized to act on behalf of the State Council (Section 96), the organization of the Council of Ministers, its tasks, the ministries, the creation of agencies of a ministry character (Section 78) the order of the election of representative organs (Section 76), the

6. In the *development* of legislation and legislative subjects in Hungary, the 1949 socialist Constitution means a clear-cut dividing line. Traditions, however, made their effect felt also on the post-1949 developments.

a) A particular legislative pattern was shaped by developments in Hungary. This trend is accounted for by the fact that the powers of Parliament representing the „nation” — against the foreign dynasty — and working without interruption became closely intertwined with the public law safeguards of the country's independence. Independent Hungarian legislation represented, to all intents and purposes independence. This was the major reason why Acts enacted jointly by king and Parliament retained their central place among the sources of written law throughout the entire feudal age. Although there were periods when the Hapsburg kings were governing by means of ordinances and when these ordinances were constantly law-infringing. Such practices were, however, always held by Parliaments and the local bodies of the ruling classes — the counties, — an abuse of power against which they were waging a consistent fight. It is therefore easy to understand why the nationalist movement counter-acting the absolutistic rule of Joseph II at the end of the 18th century was so ready to adopt (and to support with special safeguards as a foundation of „feudal constitutionality” (the institution of representative legislation which was in the center of the constitutional ideas of the French revolution. It is also known for the students of the subject that the demands of the national opposition against the rule of Joseph II were laid down in the Acts adopted in 1790—1791. It is also known that the

recall of deputies (Section 77), the rules applying in general to the Councils (Section 78), the creation of council-type local administrative organs (Section 119), the entrusting of social organs with State activity (Section 78), the overall rules on the judiciary (Section 78); in this scope public administrative matters coming under judicial supervision (Section 125), the creation of judicial organs other than courts (Section 26), the determination of matters which can be handled without the participation of lay assessors (Section 127) are singled out as special legislative subjects. Lastly, under Section 131 of the Constitution, Act shall regulate the exemption of special judicial organs from the supervision of the Supreme Court. Act shall regulate the organization and working of the Procuracy (Section 135) and the part on the administration of justice provides that crime and penalty must be regulated by Act. (Section 136). The same applies to the organization, jurisdiction, competence of the judiciary, the order of determining court districts, the procedure in court, the conditions, order and time of the election, reporting and recall of judges and lay assessors.

Many economic subjects are singled out in the Constitution: in addition to the national economic plan and budget (Section 78) the property which may be owned by social organizations and cooperatives (Section 16) is specially mentioned. The use by co-operatives and individuals of forests, pasture, waters, mineral resources (Section 178), the scope of economic activity by social organizations (Section 20), the scope of small-scale production (Section 21), the limits of personal property (Section 21), small private industrial or agricultural activity based on individual work (Section 25), expropriation and compensation (Section 28), economic activity pursued exclusively by the State (Section 29), the conditions of changing the use of agricultural land (Section 30), taxation (Section 64) (but government organs and co-operatives excepted) are all legislative subjects.

In the domain of civil rights legislative subjects are labour safety (Section 32), nationality (Section 34), the conditions of social assistance (Section 43), the conditions of free schooling (Section 45), the limits of the privacy of homes, (Section 49); the legal status and internal self-government of religious denominations (Section 53), damages by official persons and the conditions of their compensation (Section 56), military service (Section 62).

idea of modern constitutionality first appeared in these Acts. It is Act No X of 1790—1791 which uses first the term constitution: it is laid down there that Hungary is a country independent from every other people, having an existence and constitution of her own. Act XII of 1790—1791 is particularly important for legislation and legislative subjects: the initial indications of a separation of the legislative and executive powers are contained in it. Act No XII of 1790—1791 reaffirmed the important principle laid down in statutes of earlier centuries that legislative power in Hungary shall be vested jointly in the lawfully crowned king and Parliament. A novel provision of this Act is that government by „decrees or patents” shall be prohibited. Under Act No XII of 1791 the enactment of decrees or patents was restricted to „affairs in conformity with Acts” and it provided specifically: „the King shall exercise executive power not otherwise but in conformity with Acts.” The same Act also provides for some important safeguards of judicial independence. (The juxtaposition, in this sense, of the legislative, executive and judicial power indicates an initial endeavour at separating these powers). The circumstance that the safeguards laid down in the Act were not progressive institutions but were created to protect old feudal privileges does not alter the fact that they were destined, at the time, to secure the country’s independence.

This pattern of the exercise of supreme power was completely at variance with systems adopted in other areas of the Hapsburg-empire. The resulting contradictions became soon obvious. In Hungary the Acts of 1790—1791 and the system of the legislative and executive powers laid down in them provided the legal ground for the protests of the Hungarian counties in the post-Napoleon period, in the Europe of the Holy Alliance, against government by decrees. It is less well-known but worth pointing out that in the twenties of the 19th century (mainly under the impact of European movements growing in intensity as a result of the Spanish revolutionary actions) Emperor Francis I was compelled to call Parliament first in 1825 than at regular intervals because patents and decrees of no lawful foundations and running counter to Acts were regularly disobeyed. It is no exaggeration to say that it was the constitutional safeguards of legislation which compelled the Emperor to call the reform Parliaments.¹⁶ The period of the reform Parliaments was closed by the 1847—1848 Parliament and the revolutionary Acts adopted by it.

¹⁶ The emergence of the national resistance and its impact was very appropriately described in the 'sixties of the last century in Gedeon Ladányi's constitutional history. „... all the counties made petitions surprised and pained. They submitted that after the Royal Oath and the well-known great sacrifices they expected something quite different, recalling Acts No 12 of 1791 and Act No IV of 1504 (which declares the county collecting taxes levied without Parliament's consent ignoble), and that they could not comply with the decree. The Royal Court must have been aware that this was to be the next result of the decree and therefore it had made plans what to do to silence the counties. It ordered the execution in a new decree, clearly stating that in case of further disobedience it will resort to coercive measures. Both have occurred. Royal commissioners with full powers were sent to all the disobedient counties; they had military forces at their disposal; the more courageous protectors of the laws were indicted for high treason. But all this only increased the counties' resolution and upheaval in the country; the situation was becoming increasingly similar to what it had been at the end of the reign of Joseph II. The increasingly bold voice and even opposition of the nation shocked the King the more because the Greek revolution brought about a cleavage in the Holy Alliance. Under such conditions King Francis did not dare to drive the nation into revolution, he made concessions; he gave up the dangerous course and called

The Acts enacted in March, 1848 provided for a constitutional monarchy but did not repeal the Acts of 1790—1791. It was the more so because this Act provided a framework for all the institutions of the constitutional monarchy which were susceptible of meeting the new requirements of bourgeois social development. Parliament in 1848—1849 adopted no stand on the volume of legislative power. It may be inferred from the system of the exercise of power — and this was a requirement inherent in the safeguards of the country's independence — that it was nearest to the conception of Acts which was described earlier in this work as the French revolutionary idea. At least there is no indication of recognizing the independent legislative powers of the King, respectively the government. But it should be pointed out that these are mere inferences; clear, unequivocal stand was not adopted on this point. But the whole problem of legislation and legislative subjects cropped up when it came to interpreting the 1790—1791 Acts, in the constitutional debates preparatory to the Compromise of 1867 with the Hapsburgs. A central issue of Ferenc Deák's polemical essay¹⁷ on constitutional law was the contrasting of different concepts of legislation and legislative subjects. This contrasting is, of course, not conscious since in Deák's time the three conceptions were not precisely distinguished in jurisprudence.

If the whole debate is reviewed it may be said that Vencel Lustkandl's work „Das ungarische-österreichische Staatsrecht” (against which Deák wrote his polemical paper, strives to lay the ground, relying in the main on what was termed by the present author, the Austrian—German concept of Acts, for a real union in which Hungarian legislation would have been restricted to matters affecting citizens' liberty or property. On the other hand it proposed that every other subject some within the Emperor's independent legislative powers, in other words these matters should be of an imperial concern.¹⁸ But

Parliament for September 11, 1825”. (Gedeon *Ladányi*: A magyar alkotmány története, II. kiad. [History of the Hungarian Constitution], Debrecen, 1869. p. 223.). The lyrical description is also a document that the feudal class mobilized the nobility, just as in 1790—1791, to protect privileged.

¹⁷ Deák, F.: Adalék a magyar közjoghoz (Contribution to Hungarian public law), Pest, 1865. p. 188.

¹⁸ Lustkandl's work serves the theoretical grounding of such a real union in which the overwhelming majority of State affairs are „common”, imperial concern. He starts from the theoretically mistaken stand that everything which came within the „powers” of the King of Hungary is at the same time „imperial affair”. In order to substantiate his view and to be able to excessively extend the scope of imperial affairs, pre-1848 Hungarian legislation is surveyed with an unequivocal purpose. Pre-1848 „Royal” powers are extended mainly in two directions. On the one hand the so-called „regalia” (custom and excise, finances, salt monopoly, mail, mining rights etc.) and the Royal prerogatives in foreign affairs and national defense are made to appear as if they had been sovereign rights independent from Parliament; on the other hand he gives a deliberately false interpretation to Act No. XII of 1790 on the exercise of the legislative and executive power. This Act namely while imposing a ban on government by patent lays down, as a separate safeguard, that this would not in any case be accepted by Hungarian courts. From this provision he concludes — by using a *contrario* arguments — that only matters which can be brought before court can be qualified as legislative subjects (... „welche in den ungarischen judicis zur Sprache und Verhandlung kommen könnten”), next he excludes from the domain of legislative subjects the entire public law conceived in the wider sense, with the exception of criminal law, by asserting that this regulates constitutional relationships while there is no constitutional court in Hungary. In point of fact, in his view, only private law and criminal

Deák, adopting the conception termed above as historical proved, by adducing examples from the past of the several hundred years old Hungarian legislation that the concept according to which legislation is not concerned with a considerable number of State affairs was always alien to Hungarian constitutional law. He proved that under Hungarian constitutional law and the historically moulded Constitution based on it subjects once regulated by legislation continue to be legislative subjects unless legislation itself refers them to decree-making authority. By hinting at the possibility of limiting the scope of legislative subjects, Deák offered a „golden bridge” for the Compromise with the Hapsburgs without, however, explicitly recognizing the independent legislative powers either of King or government. At the end of the century and at the beginning of the 20th century many writings on constitutional law dealt with problems affecting legislative subjects. All three conceptions were reflected in literature: the French revolutionary conception (according to which the government’s independent legislative powers should be limited to issuing decrees of implementation by virtue of Acts), the Austrian—German as well as the historical conception. The official view came to be crystallised round the historical conception but went much further than what Deák’s concessions implied and recognized, within a relatively wide scope the independent legislative powers of King and government. These independent and original powers were justified by the elaboration of the category of what was called, the Act-substituting decrees. Three types of such decrees were distinguished in literature: a) decrees based on authorization by Acts; b) decrees filling gaps in Acts (aimed at fully implementing the purposes of the Acts concerned; c) decrees on subjects in place of Acts „the regulation of which is desirable but were left unregulated by Acts”. The recognition of the last two types was essentially tantamount to an acceptance of the government’s original legislative powers and was a complete break with the French revolutionary conception reflected in Act No XII of 1790—1791.

To trace the development in the literature on constitutional law in respect of the very ideas on legislative subjects between 1867 and 1914 would be extremely interesting. But we must limit ourselves to singling out only major turning points. Some of Deák’s ideas have already been described but it should be added now that his polemical paper was concentrating in the first place on refuting Lustkandl’s conception and he used mainly historical examples. It may be seen from his observations made in this course that Deák was inclined to accept the concept of Acts described as the French revolutionary one in interpreting Act No XII of 1790—1791. In his view subjects not regulated in Acts should not be regulated in decrees save in cases of urgent necessity or in a state of emergency, (or at least he did not consider the regulation in decrees of social relations not regulated in Acts as the normal course of the legislative process).¹⁹ Essentially such ideas are found in post-1867 works on constitutional law. Ferenc Bouer holds that the government

law would remain within the scope of legislative subjects, i.e. matters which affect, in the strictest meaning of the term, citizens’ property and freedom. cf.: *Lustkandl*, W.: *Das ungarisch-österreichische Staatsrecht*. Wien, 1863. p. 498. The regalia are discussed on p. 20 et seq., the interpretation on Act No XII of 1791 is given on p. 208 et seq.

¹⁹ cf.: *Deák*, F.: *Adalék a magyar közjoghoz* (Contribution to Hungarian public law), Pest, 1865. p. 154 et seq.

had no powers to take action on subjects reserved for legislation while in regard to other subjects it had powers to issue Act-substituting or Act-supplementing decrees when it is „urgently” necessary... „but the restriction must prevail also in this field that as soon as possible the government must submit the relating Bills to the legislative body”,²⁰ „the government has powers, in the public interest, to fill the gaps and deficiencies in Acts by decrees — but only when it is impossible to expect legislative action because conditions demand immediate remedying which cannot be delayed” ... says Imre Korbuly²¹ „in respect of subjects which are not covered by Acts or the Acts in force are deficient it is the government's duty to remedy deficiencies through decrees if state interests demand action brooking no delay, on account of urgency, until Acts are adopted in the required direction” says István Kiss.²² At the turn of the century Act-substituting and-supplementing decrees are regarded as parts of the normal legislative process and no „urgent necessity” is required to issue them — can be read in works on constitutional law. In other words the powers of the government to regulate subjects not regulated in Acts by decrees is recognized.²³ This view means an unequivocal break with the concept respectively requirement that, as a matter of principle, every social relationship should be regulated primarily by legislation. Concomitant with this changed concept is the emphasis on the significance of legislative subjects with the addition that these restrict the scope of Act-substituting decrees. Legislative subjects were defined at the outset unequivocally in conformity with the Austrian—German conception. „In decrees by which the government regulates subjects not regulated in Acts, new burdens which can be determined by virtue of constitutional custom only by legislation, shall not be imposed on citizens; neither shall their liberty be curtailed in government decrees by restrictions not provided for earlier by legislation.”²⁴

In the course of the public law struggles after the turn of the century constitutional issues were lent a particular emphasis. Accordingly, matters affecting the constitution came to occupy the principal place among subjects which could not be regulated by decrees. Kálmán Molnár distinguishes several groups of legislative subjects in a monograph²⁵ covering the whole area of the relating problems: a) procedūral and substantive private law; b) procedural and substantive criminal law; c) constitutional law (the last mentioned area is rather difficult to determine when unwritten constitutions are concerned. Usually it was thought to comprise rules on principal State organs, i. e. the Head of State, Parliament, government, basic institutions of local self-go-

²⁰ Bouer, F.: Magyar államjog (Hungarian constitutional law), Budapest, 1877. p. 209.

²¹ Korbuly, I.: Magyarország közjoga illetőleg a magyar államjog rendszere (The public law of Hungary or the system of Hungarian constitutional law), Budapest, 1884. p. 313.

²² Kiss, I.: Magyar közjog (magyar államjog). (Hungarian public law [Hungarian constitutional law]). Budapest, 1888. p. 20.

²³ cf.: Nagy, E.: Magyarország közjoga (államjog), III. kiad. (Public law of Hungary, constitutional law), Budapest, 1897. p. 323 et seq.; also VI. ed. Budapest, 1907. p. 355 et seq.

²⁴ cf.: Balogh, A.: A magyar államjog alaptanai (Basic doctrines of Hungarian constitutional law), Budapest, 1901. p. 289.; also in the Kmetty, K.: A magyar közjog kézikönyve (Handbook of Hungarian public law), Budapest, 1900. p. 25 et seq.

²⁵ Molnár, K.: Kormányrendeletek. Tanulmány a magyar közjogból. (Government decrees. Study on Hungarian public law), Eger, 1910. p. 185.

vernment and political rights). These areas were considered at the outset as exclusive legislative subjects and decree-making on authorization was deemed also to be restricted in these fields. Views, however, which agreed to decree-making by virtue of authorization also in these fields became soon widespread. Kálmán Molnár, in his above-cited work, made an attempt to define the main scopes of operation of the so-called Act-substituting decrees also in a positive direction.

In his view, in the first place public administrative law and the overall build-up of State organization and its uninterrupted improving were so rapidly shifting areas where government decrees must necessarily have a major role in law-making. In adopting this view he in fact, substantively justified a category of law-making acts adopted by the government within its powers to which the term „Act-substituting decree” could hardly be applied anymore.²⁶

No new elements were added to these conceptions by legislation in the inter-war period. Law-making practice resorted to the means of authorization, of state of emergency, and the Defence Act to introduce such a „flexible” law-making and legislation which was always susceptible of meeting the given demands of the ruling classes.²⁷

b) As regards matters of principle, *post-war developments in public law* did not — up to the adoption of the 1949 Constitution — affect the earlier system of legislative subjects. Essentially all subjects regulated by uninterrupted legislation prior to or after 1945 were regarded legislative ones. Authorizations granted to the government and affecting also legislation reflect also a certain differentiation among legislative subjects. In fact, the government relying on a December, 1944 Resolution of the Provisional National Assembly regarded itself to have been authorized — up to December, 1945 to adopt decrees in the entire legislative domain different from Acts in force.

Act No XI of 1945 (adopted in December, 1945) when it restricted the full authorization of the government (based on a Resolution of the Provisional National Assembly in December, 1944) excepted from the scope of authorization Acts enacted by the Provisional National Assembly and the regulation of the State's „supreme power organization and its working”. A further restriction was imposed by Act No VI of 1946 under which public law relations — not including decrees on securing budgetary balance — were excepted from the authorization. A continued differentiation of legislative subjects is reflected

²⁶ cf.: *Molnár, K.*: op. cit. p. 83 et seq.

²⁷ To support this statement let some conclusions of *Tomcsányi, M.* the „official” constitutional lawyer of the age, made in 1943, at the end of that age, be quoted. „In general, the most important matters, namely the material of constitutional law, private law and criminal law, cannot be regulated but by Act. (Legislative subjects). cf.: *Tomcsányi, M.*: *Magyarország közzoga* (Public law of Hungary), Budapest, 1943. p. 77. „The so-called Act-substitutive or Act-supplementing decree takes lastly the place of the missing Act, it is a substitute for a letter in its entirety; accordingly it may be resorted to when there is no Act but the matter must be brought under regulation and the regulation otherwise comes within the government's powers. All these are so-called law-making decrees which are unlike service instructions. The government, as has been already expounded earlier in connection with the concept of Act, has no powers to issue decree on every matter. There are matters the regulation of which is reserved under the Constitution for the legislative organ (legislative matters, legislative subjects). These matters can be regulated by government decree only by virtue of a special authorization by legislation”. op. cit. p. 82).

in Act No XVI of 1946 which imposed additional restrictions on the government's authorization in dual direction. On the one hand it allowed decree-making in the legislative scope only for certain specific purposes — „the government may, in order to secure economic order, budgetary balance and the undisturbed working of public administration, take action by decrees necessary in the exceptional situation coming otherwise within legislative powers and may adopt decrees at variance with Acts in force". On the other hand the range of subjects which should not come under decree-making powers are determined in more detail. By virtue of the authorization laid down in this Section decrees at variance with Acts adopted by the National Assembly and such of public law nature, changes in the public administrative organization, enactment of new crimes or introduction of penalties graver than those laid down in Acts shall not be allowed save in order to re-establish budgetary balance and to secure public supply."

c) *The adoption of the 1949 Constitution* caused changes in the earlier legislative system insofar as owing to the introduction of the Presidium, which is a substitute of Parliament between its sessions, legislative authorization for the government became unnecessary and certain subjects of regulation were laid down in the Constitution as exclusive legislative subjects. (These are identical with earlier legislative subjects.)

The issue to what an extent did the Constitution affect the government's earlier recognized law-making powers should be discussed as a distinct problem. It should be stated at the outset that the Constitution does not explicitly provide for the topic. Unlike other socialist constitutions it does not use the phrase that the government issues decrees by virtue of Acts, in the implementation of the latter; but it does not contain a contrary provision either. In fact it laid down a flexible system which affords possibilities to recognize the government's independent law-making powers, in the initial phase of transitory conditions, in the period of rapid social changes, at least in phases when the emerging new and rapidly shaping conditions require legal regulation but the relevant Acts are lacking. On the other hand constitutional provisions do not bar the shaping of a law-making system, in keeping with the expansion of socialist relationships (and its backing by safeguards below the constitutional level) in which social relationships should, as a matter of principle, be basically and primarily regulated by Acts.

Subsequent amendments to the Constitution did not affect the substance of these provisions. It is another question that the uninterrupted legislative activity restricts, of necessity, automatically the scope of such powers by widening the area of social relationships regulated by Acts. Statutes declaring certain subjects explicitly legislative ones point likewise to the restriction of the government's independent law-making powers. Among such statutes should be mentioned e. g. Law-Decree No 26 of 1954, Section 3 under which new crimes cannot be provided for but in Acts or Law-Decrees. Parliamentary Resolution No 1 of 1956 also widened the scope of legislative subjects by providing: „Basic issues affecting the working people as a whole shall be regulated in Acts. Accordingly, a widening of legislative activity in a sense that statutes affecting citizens' basic rights and essential duties shall be Acts is absolutely necessary.

These provisions are reaffirmed, in a somewhat changed form but essentially with identical content in Government Resolution No 2004 of 1969. There

are provisions also in other Acts which widen the range of subjects to be regulated exclusively, or as to their principles in Acts.²⁸ Among these should be mentioned Act No II of 1967 (Labour Code) Section 8, under which basic questions connected with labour relationships shall be regulated in Acts or Law-Decrees. The recent amendment to the Constitution provided for a part of the new demands.

Taking into account all what has been said on the issue the following types of legislative subjects can be distinguished now: a) legislative subjects laid down in the Constitution; b) scopes of regulation set forth in Acts or Act-level legislation explicitly as legislative subjects; c) legislative subjects shaped in the course of uninterrupted legislation; d) so-called new subjects of regulation. This is the case when social relationships regulated earlier in decrees come to be regulated by Acts. This happened e. g. when the Act on Co-operative Farms was adopted.

Legislative subjects set forth in the Constitution are grouped around three sets of issues. The definition of exclusive State ownership and of the State's exclusive economic activity in connection with the ownership and economic relations; the basic traits of enterprise organization, economic plans, budget.

Within the scope of State organization, the creation of ministries, the legal status of the members of the Council of Ministers and state secretaries, the mode of their accountability, rules on the councils as representative organs, rules on the judiciary (in this domain Chapter V of the Constitution mentions also other legislative subjects, like the establishment of special tribunals, exceptions from trial by divisions in court, the election of judges, exceptions from trial in public) rules on the procuracy. In connection with basic civic rights the Constitution mentions specially the election and recall of Parliamentary deputies and council members; it is also provided in Section 54 in general terms that rules on basic civic rights and duties shall be regulated in Acts. The content of this provision covers a wide field. It could be also so interpreted that it applies, in general, to basic rules on civic rights and duties. From the fact, however, that that provision is included in the Chapter on basic rights and duties, the unequivocal conclusion should be drawn that a detailed regulation of the rights and duties in this Chapter should be done by means of Acts.

It is a problem to be decided what consequences are involved when a subject to be regulated is declared a legislative subject by the Constitution. The proper answer in all probability is that such a subject must be held an exclusive legislative subject. Accordingly, the entire domain must be regulated by Acts. As a further consequence, the decrees of implementation relating to such Acts must be of a purely technical nature, Acts cannot authorize a lower-ranking law-maker to issue a detailed regulation. If, therefore, electoral system is regulated in Acts, the decree of implementation shall not contain Act-substituting or — supplementing provisions, not even by virtue of authorization under the Act. This is easy to understand since the electoral Act, being an ordinary piece of legislation, cannot amend the constitutional provision

²⁸ On the development of the scope of legislative subjects see: Kovács, I.: La notion de la loi, l'organisme législatif et la matière législative dans le système de droit actuel de Hongrie. Étude en droit comparé, Budapest, 1966. pp. 11—33.; Kovács, I.: La division des attributions créatrice de droit dans le système des organes centraux de l'État. Droit Hongrois-Droit Comparé. Budapest, 1970. pp. 219—236.

under which a subject must be regulated exclusively by legislation. It is another matter if not the entire range of regulation but only the relating basic institutions or principles are laid down in the Constitution as legislative subjects.

If a subject to be brought under regulation is not set forth in an explicit form as a legislative subject in the Constitution but in Acts or Act-level statutes, i. e. Parliamentary resolutions or Law-Decrees, this also involves legal consequences in respect to the detailed statutes of implementation. In such instances a general reference to the decree of implementation will not suffice; if the legislator deems the enactment of supplementary statutes in the implementation necessary authorization should be laid down in the detailed rules of the Act. In given cases namely legislative subjects defined in Acts are concerned. This is unlike the former case when the legislative subject is defined in the Constitution: in such an instance the legislator has powers to lower its authority in regard to certain details. This must, however, be stated clearly by the legislator himself. Accordingly, a general reference to the rules of implementation is inadequate.

The case is essentially similar to what has been now described when a legislative subject, not regulated earlier in an Act, comes under regulation. In such a contingency the legislator itself must make provisions if, in the decrees of implementation, provisions detailing or supplementing those of the Act are envisaged by it.

The situation is basically different as regards the so-called new subjects of regulation. A characteristic feature of such subjects is that a former Act-level statute is lacking; when a simple reference is made in such instances to the decree of implementation this involves an authorization *praeter legem* i. e. to issue decrees supplementing the Act.

II. DELIMITATION OF THE SCOPES OF REGULATION OF ACTS AND LAW-DECREES IN THE EUROPEAN SOCIALIST STATES

1. *The term Law-Decree* (its foreign equivalents included) is used in a variety of meanings. It happens e. g. that government decrees which are a substitute for Acts are termed „Law-Decrees” in legal literature.²⁹ In other

²⁹ The Hungarian literature on jurisprudence is relatively rich in works discussing, on a comparative basis, the Presidiums, their emergence, evolution and acts in socialist States. First *Ádám, A.*'s work: *A Népköztársaság Elnöki Tanácsa* (The Presidium of the People's Republic), Budapest, 1959. p. 307. should be pointed out which examines the functions of the Presidium in Hungary in the context of the socialist form of government making suggestions, generalizing the experiences of socialist constitutional evolution, to expand its forms of action, particularly to make a distinction between Act-amending Law-Decree and other Law-Decrees. Data obtained in the course of recent evolution are also elaborated. cf.: *Ádám, A.*: *Az Elnöki Tanács hatáskörének fejlődése* (The development of the Presidium's powers), *Állam és Igazgatás*, 1967. No. IV. pp. 310—323 and No. V. pp. 424—435. Theoretical issues connected with distinguishing such an activity and an organization as a distinct type of organ was examined in connection with the usually known Presidium-activities in socialist States by *Kovács, I.*: *A szocialista alkotmányfejlődés új elemei* (New elements in the evolution of socialist constitution), Budapest, 1968. p. 260 et seq. The problem is discussed in connection with the system of popular representation and the exercise of sovereignty by *Bihari, O.*: *A szocialista államszervezet alkotmányos modelljei* (The constitutional models of socialist State organization), Budapest, 1969. p. 190 et seq.

words, the decree is based directly on the Constitution and there is no ordinary Act on which the enactment of a decree could be based. In such instances it will be the decree which will contain the primary, basic regulation of the given social relations, which otherwise would come under regulation by Acts. A more widely pursued practice is that executive decrees containing, by virtue of authorization under Acts, provisions at variance with Acts in force, are also termed Law-Decrees. In like manner decrees issued by heads of States (or governments) in a state of emergency and invoking the general authorization for such a state and containing provisions at variance with Acts in force are also termed Law-Decrees. The *de facto* existence of Law-Decrees issued in a state of emergency is recognized also when the Constitution does not provide for such a state and when the head of the State (or government) assumes responsibility for issuing Law-Decrees at variance with Acts in force in a state of emergency. This was the case e. g. in the historical Hungarian Constitution at the turn of the century. Emergency decrees were an unknown institution for the Constitution while the majority of constitutional lawyers held that the possibility of *de facto* issuing such decrees could not be denied. In such a contingency, it was professed, the supreme state organs responsible for issuing such Law-Decrees could be held responsible subsequently, respectively they could be relieved of responsibility — as if substituting subsequently the authorization. Otherwise the most classic form of Law-Decree was the decree issued by the supreme representative of the executive power, head of the State, king, emperor or the president of the Republic, (as termed in the French law which had the most momentous impact on Continental laws: décret-loi). The varieties now described all concern the acts of the executive or at least a principal State organ distinct from the supreme representative body. In addition, it is not immaterial either that the majority of instances relate to forms of legal sources given rise to by special circumstances. Consequently conclusions drawn from such forms cannot, as a rule, be applied to Law-Decrees as defined in the Constitution and to the corresponding or kindred institutions of socialist countries either. This is mainly accounted for by the fact that in the given cases a) acts issued not by the government or the executive but by one of the supreme representative organs are concerned and b) this form of legal source appears not only in exceptional situations but in the normal conduct of State affairs. This is a major difference even if we are aware that the shaping of the institution was coupled also in socialist States with special conditions and a part of Law-Decrees are justified even today by the presence of special considerations.

It should also be borne in mind that this institution is not uniform in the socialist countries either. There are many common features but it may also be stated that divergences are found not only in the institution itself but also in its working in socialist countries.

The next parts of the work will discuss in detail the rise and development of this institution and its relation to the Act in the Soviet Union and the European socialist countries in general; Hungarian developments and proposals on further course will also be discussed. In the course of the whole discussion the position of the organ authorized to issue Law-Decrees in the State organization, its relation to the supreme representative organ and, sometimes its function in the political system of the given country must also be looked at. The functioning of the Law-Decrees, their role in law-making is

namely often conditioned by the development of organs authorized to issue Law-Decrees, their role in the State organization or the political mechanism as a whole.

2. In the Soviet Union the relation between Acts and Law-Decrees became apparent as late as 1936 — just because there were earlier law-makers of several grades enacting act-level statutes. This problem has already been indicated in the preceding pages. This notwithstanding, a study of earlier epochs cannot be dismissed mainly because the existence, characteristics of the Presidium's ukases particularly Act-amending ukases could not be understood without doing so.

In the Russian Federal Socialist Republic in the initial epoch after the October Revolution, the permanent legislative organ, the *Central Executive Committee* was practically permanently working. On account of its large membership and the fact that it was composed of various social strata, social organizations and their delegates made it susceptible of functioning as a veritable Soviet Parliament.³⁰ The Presidium of the practically permanently working Central Executive Committee discharged very important tasks of organization in preparing sessions, in drafting resolutions (it happened frequently that the exact wording of a resolution or statute was adopted not by the Central Executive Committee itself but the Presidium was entrusted to formulate, on the ground of the discussion and promulgate the final text). Still, the Presidium had no powers to act for the Central Executive Committee. It was only in 1919 and 1920, when the constitutional amendments were adopted during the war communism that the Presidium came to have powers to act for the Central Executive Committee without, however, making the Presidium a distinct State organ.

The first, 1924 Constitution of the Soviet Union had thus adopted an institution already shaped by then, when it laid down the substitutive powers of the Presidium of the Soviet Union's Central Executive Committee. It was concomitant with this process that the two-chamber system of the Central Executive Committee introduced by the 1924 Constitution started a process of separation between the presidential body conducting the discussions in the respective chambers on the one hand and the Presidium on the other.

The 1936 Constitution of the Soviet Union went forward in this direction and the Presidium obtained an independent standing, distinct from the officers of the two chambers of the supreme Soviet. By adopting this pattern the type of Presidium obtained an independent standing, distinct from the officers of the two chambers of the supreme Soviet. By adopting this pattern the type of Presidium which is in no part identical with the presidential bodies conducting the discussions of the supreme representative organ — even if the designation which was indicative of the earlier arrangement was retained unchanged.

When one is aware of this development it will be easy to understand that when the 1936 draft Constitution was presented the emphasis was not on the role of the Presidium as an organ securing the uninterrupted exercise of the

³⁰ It is worth pointing out that at the II Soviet Congress (November, 1917) 101, at the III Soviet Congress (January, 1918) 105, at the IV Congress (March, 1918) 200, at the V Congress (July, 1918) 207, at the VI Congress (November, 1918) 207 members and associate members were elected to the Central Executive Committee. (cf.: Sjezdii sovietov v postanovlennijach i rezoljucijach, Moscow, 1935. p 528.).

supreme power but on its being a „collective head of State”. The Presidium is so described in the rapporteur’s address on the draft Constitution: the substitutive powers of the Presidium are not even mentioned in it. Only the opposite variants of „individual head of State” or „collective head of State” were dealt with in the address, drawing the ultimate consequence that the institution of the collective head of State is more democratic because it provides guarantees for the country against the occurrence of undesirable chance happenings. This accounts also for the fact that the Constitution does not at all recognise the general substitutive powers of the Presidium but itemizes these powers and the overwhelming majority of the duties so listed remain within the limits of the functions of a head of State. The original intention that the Presidium was conceived not as „an organ securing the continuous exercise of the supreme power” but as a veritable collective head of State is borne out by the first draft of the 1936 Constitution submitted to a national discussion. Under this draft namely the Presidium had no legislative powers at all; its powers would have been limited to law interpretation: „by issuing the appropriate ukases it shall *interpret* the Acts”, — is set forth in Section 49/B of the draft.

Subsequent developments, however, did not conform to the new ideas as laid down in the draft. Already when the Constitution had been adopted the wording now mentioned was so changed that the new formulation could be so interpreted as to include independent legislative powers as well. The final wording runs: „the Presidium of the Supreme Soviet of the Soviet Union shall interpret the Acts of the Soviet Union in force, shall issue ukases”.³¹ On this ground, after the elapse of a relatively short period, immediately in the pre-war, i. e. in an undoubtedly „non-peaceful” period, a practice came to be pursued under which the Presidium was regarded to be authorized to issue independent legislative acts, going beyond interpretation — assuming a subsequent approval by the Supreme Soviet. The consequences of this practice were drawn in the amendment of the above Section in 1946 under which the powers to issue ukases and the interpretation of Acts became separated also in the arrangement of the text. As a result of the 1946 amendment the relevant part of Section 49 of the Constitution was so changed: „Section 49. The Presidium of the Supreme Soviet of the Soviet Union: a) shall convene the sessions of the Supreme Soviet, b) shall issue ukases, c) shall issue interpretation on the Acts of the Soviet Union in force . . .”

Pursuant to these constitutional provisions the practice which regarded the Presidium as an organ essentially substituting the Supreme Soviet in the general legislative domain was further widening. These substitutive powers are very extensive by now. These include not only the amending of the Acts

³¹ But the relevant part of the rapporteur’s address bears out that not even this change envisaged that the Presidium have powers to issue Acts with a force of law even with a temporary effect. The relevant part of the address runs as follows: „the next amendment relates to Article 40; in this it is proposed that the Presidium of the Supreme Soviet be given powers to issue temporary Act-type documents. In my view this amendment is inappropriate and cannot be accepted by the Congress. It is time to put an end to the state of affairs when Acts are adopted not by a specific organ but by a number of organs. This state of affairs runs counter to the principle of the stability of Acts. And we need stable Acts more today than at any time before. Legislative powers must be exercised in the Soviet Union exclusively by a single organ the Supreme Council of the Soviet Union”. *Stalin: A leninizmus kérdései* (Questions of Leninism), Moscow, 1945. p. 556.

in force but cover respectively covered in some instances also constitutional amendments.

Legal literature at the beginning simply ignored this practice.

Later, when this practice had been pursued for a considerable period and survived the post-war epoch attempts were made to justify it by theoretical arguments, to give appropriate explanation. It was mainly the emphasis on the temporary character of such statutes and on the subsequent approval (or the lending of a force of Act in the ordinary legislative process) resorting to which theory justified the constitutionality of this practice. The most comprehensive argument may be so formulated that the Presidium is the depository of supreme State power, State sovereignty between the sessions of the supreme Soviet, *de facto* and *de jure* accountable to and controlled by it. On the other hand, legal literature, when striving to lay the theoretical foundations for these general substitutive powers, always places into the foreground its limitations or at least the importance to observe these limitations.

In the next pages the issues of major importance for the subject now discussed, viz. the participation of the Presidium in the highest-level (Act-level) legislation, some forms of this participation and, in this context, the limitations of the substitutive powers (this will provide an answer in respect to the relation between the Presidium's Act-level legislative enactments and the Acts) will be dealt with separately. Lastly, the trends relating, as a consequence on substitutive powers, to the composition and working methods of the Presidium will be indicated.

Attention should be drawn in the first place to the fact that the Presidium of the Supreme Soviet participates in Act-level legislation not only by enacting ukases.

First, the *Presidium's resolutions* should be mentioned which display the Presidium's participation in the preparation of Acts. The Presidium has a part, through organs of its own, and relying on the committees of the Supreme Soviet concerned in the preparation of major Bills. It reviews the drafts before they are submitted to the Supreme Soviet and sometimes it adopts a resolution on presenting such draft for a national discussion. It authorizes the committee (or committees) concerned to include in the draft, before its submission to the Supreme Soviet, proposals summarized from such national discussion and deemed worthy of consideration. In recent years, e. g. the Presidium adopted resolutions on the draft Act on the „basis of the land-law legislation of the Soviet Union and the Federal Republics”, the draft of the basis of water-resources Act, the draft of the basis of the public health Act, on the legal status of the Soviet delegates, etc. Although the *resolutions* of the Presidium adopted in connection with the *control* of the implementation of certain Acts are not directly legislative measures, they have an indirect impact on the State's legislative activity as a whole. The Presidium namely — acting invariably within its substitutive powers for the Supreme Soviet since the Constitution does not mention such a special function of the Presidium — places periodically on its agenda the examination of the practical implementation of some important Acts. A characteristic case of such resolutions is „on the practical implementation of the basis of the family law legislation of the Soviet Union and the Federal Republics”.³²

³² cf.: Resolution No. VIII—1363 of the Presidium of the Supreme Council of the Soviet Union on the report prepared by the law-drafting committees of the two

The resolutions *connected with the Presidium's directing and supervisory functions over the local Soviets* — adopted likewise within its substitutive powers for the Supreme Soviet — are a particular type. These resolutions include explicitly legislative ones. Thus, e. g. the sample statutes of the district Soviets, urban and urban borough Soviets were adopted by a resolution of the Presidium.

Again a particular type of the Presidium's resolutions are those on the *interpretation of Acts in force, in accordance with Section 49 (c) of the Constitution*. The unequivocal view is professed in Soviet legal literature that these resolutions, after having been published, became parts of the Acts concerned. These resolutions, being acts issued within the Supreme Soviet's special powers need not be presented for approval to the Supreme Soviet. It should otherwise be pointed out that the number of resolutions explicitly on Act interpretation is very small. There are no more than 1—2 such resolutions adopted in a year. The obvious reason for this practice is that the interpretation of Acts is normally coupled with other provisions detailing, supplementing or possibly amending Acts. In such instances not resolutions but ukases (normative ukases) are adopted. (It is well-known that the overwhelming majority of the Presidium's individual acts are issued in the form of ukases. As regards their official designation there is no difference between ukases on individual cases and normative, i. e. law-making ukases. This is the reason, among others, why the term ukase cannot be translated as Law-Decree.)

The study of the Soviet legal literature and the Presidium's acts leads to distinguishing *several types of the normative ukases*. Usually, Act interpreting, Act detailing, Act concretizing, Act supplementing, Act substituting and Act amending ukases are distinguished. (Constitution-amending ukases, being not a general type, are not included deliberately.) These types, however, may be divided into two principal types depending on whether they are or are not subsequently approved in the form of Acts. *Ukases issued within the Presidium's own powers* are regarded those which do not go beyond interpreting, concretizing, detailing Acts in force, which are consequently not submitted for approval to the Supreme Soviet. These ukases are so considered in the Soviet legal literature that these „further the implementation, practical application” of the given Act. Most writers admit that in some instances such ukases contain several new norms. The complexity of the problem is increased by the lack of delimitation (or its problematic nature) between the scopes of authority not only of the Supreme Soviet and the Presidium but also the Presidium and the government in the domain of law-supplementing ukases. The latter problem is reflected in literature more in an indirect form. (The law-making functions of the government and the Presidium are frequently defined in an identical manner.) *Act supplementing, Act substituting, Act amending ukases* are always submitted to the Supreme Soviet for approval. This approval is made always in the form of Acts. In instances where the supplement or amendment introduced by the ukase is of major importance, the respective ukases are approved by Acts. (These are, as regards their form,

Houses of the Supreme Council of the Soviet Union on the practice of the application of the bases of the Soviet Union's and Federative Republics' Family Law Legislation. (Vedomosti Verhovnogo Sovieta SSSR, 1971. No. 13. p. 144).

full statutes which, in given cases, regulate entire fields of subjects in a Code-like manner.)

It is in connection with the Act substituting and Act amending ukases where the problem of the relationship between the Presidium's and the Supreme Soviet's scopes of authority arises. Some writers profess, having in mind the actual position, the unlimited nature of the Presidium's substitutive powers. The general view, however, emphasizes the limitations of these substitutive powers or at least it draws attention to the importance of these limitations on the ground that single cases should not be exaggerated, and starting from an exaggerated generalization no conclusions should be drawn on the unlimited nature of the Presidium's substitutive powers. The great majority of writers who discuss the relation between the Presidium and the Supreme Soviet adopt the view that full powers pertain only to the Supreme Soviet. The Presidium cannot exercise full powers between the sessions of the Supreme Soviet either. It was particularly in connection with the Act amending ukases where the limited nature of the Presidium's powers — compared to those of the Supreme Soviet — was elaborated. It is a general limitation on Act amending ukases that they cannot be adopted but between the Supreme Soviet's sessions. The view that such ukases cannot be adopted between meetings but only between the closing and opening of sessions — in instances when this is justified by urgency and the convening of the Supreme Soviet does not appear to be conducive — is unequivocal. It may be concluded from all what has been said that the Presidium's Act amending ukases are not regarded in Soviet legal literature as a part of the general legislative process. Those writers who justify the adoption of ukases in urgent necessity (or when the convening of the Supreme Soviet does not appear to be conducive) amending Acts in force (or, incidentally, some constitutional provisions) invariably emphasize that these are statutes issued within substitutive powers for the Supreme Soviet, which are essentially temporary (although binding), which become final Acts after approval by the Supreme Soviet. The „temporary” character of such statutes is borne out by the wording of several ukases. It happens e.g. that it is provided in the ukase: until approval of the ukase by the Supreme Soviet, earlier statutes may be applied — provided they do not contravene the ukase to be approved. (This was the case e.g. in respect of the ukases on district, urban, urban borough Soviets.) No doubt, such provisions appear to be more in the nature of furthering the execution, implementation of the statute concerned; but they also support the view on the temporary character of the statutes concerned.

It is also worth paying attention to the fact that views according to which the limitation of the Presidium's Act amending powers adjusted to subjects, through defining exclusive legislative subjects, may be inferred from the Constitution in force, are encountered in Soviet legal literature practically after the first Act amending ukase had been adopted. Proposals according to which such limitations — by appropriately interpreting the Constitution — can be introduced within the framework of the Constitution in force come also within this category. A proper appraisal of these views is made difficult by the fact that proposals, ideas connected with the interpretation of the Constitution and the limitations according to subjects which can really be inferred from the Constitution are frequently intertwined. The argument invoking the force of custom is also frequent. Such an argument is e.g. that the

budget of the Soviet Union had always been discussed in, and adopted by the Supreme Soviet; consequently this must be included within the legislative subjects *stricto sensu*. When all the relating views are compared exclusive subjects which cannot be regulated by the President's Act amending ukases may be so listed: a) amendment of the Constitution; b) admission of a new Republic into the Soviet Union; c) national economic plan; d) budget and final accounts, taxes and revenue from which federal, republican, and local budgets are financed; e) amendment of and supplement to the basis (basic principles of legislation laid down in the Constitution); f) Acts as a whole, codes, or their basic institutions. (The general view prevails that only parts of Acts can be amended); g) regulations on the elections to the Supreme Soviet; h) in addition to the subjects now listed, which appear on a Union level, there are exclusive legislative subjects in Federal Republics: adoption of codes, Acts on judicial organization, regulation of the local Soviets, rules on the elections to the Supreme and local Soviets, the fixing, in accordance with federal legislation of State and local taxes, rates, revenue.³³

If the actual legislative practices of the Presidium and the Supreme Soviet are compared, it will be clear that the Presidium has become a legislative organ by now and the volume of statutes enacted by it (even if some of these are of a temporary character until approved by the Supreme Soviet), exceeds the number of statutes adopted by the Supreme Soviet. It may be said that, as a result of developments after the 1936 Constitution the Presidium's function, its role in the State organization, has been undergoing gradual changes. Unlike the ideas at the beginning when the Presidium's head of State functions were emphasized, a supreme power organ, a narrower Parliament is unfolding, which is a substitute of the Supreme Soviet within a relatively wide scope. The principal task of the „little” or „narrower” Parliament might be so formulated that it discharges Act-level legislation (i.e. a higher level than that of government decrees) acting as a substitute for the very large and not mobile Supreme Soviet, under the latter's control so as to combine stability of statutes with a flexible legislation. If this conception is carried further consistently (and institutionalized) raising it to constitutional level this would involve the elaboration or definition of exclusive legislative subjects in the strictest meaning of the term. In other words, such a course would mean such a consciously shaped system of the highest-level legislation where only the major guarantees and basic institutions would be laid down in Acts while the Act-level legislation proper would be performed — within the limits of Acts adopted by the Supreme Soviet — by the Presidium, working as a „little Parliament”.

There have been aspects discernible in the Presidium's working methods which point, to a degree, toward a „little Parliament”. Thus e.g. the contacts between the Presidium and the organs of the Supreme Soviet have been increasing. The Presidium's meetings are attended by the presidents of the two Houses who have a right of consultation. Since the Supreme Soviet relies

³³ cf.: J. N. Kuznecov: K voprosu o juridicheskoj prirode ukaza Prezidiume Verhovnogo Sovjeta SSSR i ego sootnosanii s zakonom Voprosi sovietskogo gosudarstvennogo prava, Moscow, 1959. pp. 227—273.; Teoreticheskie voprosi sistematizacii sovietskogo zakonodatelstva. Moscow, 1962. pp. 113—132.; L. Lazarev: Sootnosennije zakona i ukaza. Sov. Gos. Pravo, 1965. No. 5. p. 65 et seq.; A. V. Micevitsch: O formje aktov Prezidiuma Verhovnogo Sovjeta SSSR Pravovedennije. Leningrad, 1967. No. 3. pp. 57—66.

on more extensive system of committees than earlier, the Presidium's role, between sessions, in coordinating, organizing and guiding the committees was repeatedly emphasized. The committee chairmen likewise attend, with a right of consultation, committee meetings. This right belongs also to the chairman of the Council of Ministers, ministers, the Procurator-General and the President of the Supreme Court. The fact that representatives of the Party Central Committee, of major organizations (e.g. the National Council of Trade Unions, Central Committee of the Komsomol) also attend the Presidium's meetings with a right of consultation considerably extended the Presidium's contacts with the political mechanism as a whole.³⁴ The relatively large number of persons attending with a right of consultation and its bearing on the Presidium's work and working methods can best be appraised if we are aware that the Presidium itself has a large membership which consists now of the President, 15 Deputy Presidents — representing 15 Federal Republics — the secretary and 20 members, altogether 37 persons. Else the tasks connected with the drafting of Acts and control over their implementation, already mentioned, indicate the „little Parliament” development of the Presidium (or its prospective development).

3. The course during which the organization securing the continuity of supreme power was particular in every *people's democratic country*. This has a bearing also on the characteristics of Law-Decrees or corresponding sources of law. This justifies, to be able to point out experience susceptible of generalization, to discuss, one by one, the solutions as they are today. It should be mentioned at the outset that with the exception of Poland and Hungary major changes occurred in all countries in the organizations of the exercise of supreme power, its functions, the role of the statutes enacted by them in the legal system; accordingly, a proper appraisal of the contemporary situation demands the pointing out of variants as they have developed.

a) *In Poland* there is a Council of State with a relatively small membership (President, 4 deputy-presidents, secretary, 12 members). Under the Constitution the President of the Sejm and his deputies may be elected to the Council of State. (This means a particular emphasis on the relationship between the Sejm and the Council of State.) The Constitution specifies the Council of State's powers in regard to: statute interpretation (Section 25/1/3); issuing Law-Decrees within its own powers (Section 24/1/4); c) issuing Law-Decrees between the Sejm's sessions (Section 26/1); The Constitution terms the Law-Decree-irrespective of whether it is issued by the Council of State in its substitutive or proper powers — as „*dekret z mocza ustawy*” — decree with the force of law. This provision is the foundation of the Council of State's powers to issue Act-amending decrees. (Such decrees must be submitted to the Sejm's next session for „approval”).³⁵ As regards Law-Decrees, their number

³⁴ The working methods of the Presidium of the Supreme Council of the Soviet Union are discussed in detail in a collective work on the structure, organization and forms of activity of the supreme representative organs. *Vissije Predstavitelniye organi o vlasti v SSSR* (Red.: D. A. Gajdukov), Moscow, 1969, pp. 113—124.

³⁵ The relationship between Acts and Law-Decrees, its evolution in the Polish People's Republic is outlined and analysed in detail by *Rozmaryn*, St.: *Ustawa w Polskei Rzeczypospolitej Ludowej*, Warsaw, 1964, pp. 122—126.; The evolution of the making of Law-Decrees and their patterns in the two decades after the war is described by *Zakrzewsky*, W.: *Dzialnosc Pravitvorca o Mocy Ustavy w Polsce Ludowej*, Cracow, 1963, pp. 7—66.

is very low (last year e.g. one Law-Decree was issued). Law-amending Law-Decrees were not issued in recent years. According to direct information this is so secured that the Sejm is convened for longer sessions — even if long period has elapsed between sessions. If Act-level legislation is needed, it is easier to convene meetings than sessions. In fact, in 1972 about 40 Acts were adopted. True, the majority of Acts do not reflect the veritable weight of legislation in law-making. There are many amending Acts and it also happens that related subjects are regulated in 2 or 3 Acts.

The institutions of the *Socialist Republic of Rumania* should be discussed in more detail.

For the subject now studied, the problem of Acts and Law-Decrees the solution in Rumania is interesting because there exists and is working parallelly a very active legislation while the number of Law-Decrees is also significant.

In Rumania the Council of State works in accordance with the 1965 Constitution, amended several times since. The 1969 amendment was particularly important. As a result of the amendments the State Council of Rumania has a relatively large membership by now: president, 4 vicepresidents, secretary, 22 members, altogether 28 members. A sharp distinction is made in the Constitution between the State Council's own and substitutive powers. The State Council has, as provided, powers to issue „norms” having the force of Acts only in its substitutive powers for the Great National Assembly. These powers are very wide. Between sessions of the Great National Assembly the State Council may amend Acts in force — constitutional amendments excepted. The views in Rumanian legal writings that the State Council has original legislative powers identical with those of the Great National Assembly are connected with this regulation. But emphasis is laid also on the differences. While the Great National Assembly acts within its „ordinary” powers when it makes original law, the State Council acts within „extraordinary” powers; the decision of the Great National Assembly means in such instances a „final legislation” or the norm-making having the force of law by the State Council is „provisional”, in other words it becomes final after approval by the Great National Assembly.³⁶ There are also other restrictions. The now-mentioned wide norm-making powers having a force of law are based on Section 64 of the Constitution. Under its provisions the State Council shall exercise the fol-

³⁶ The temporary character of the Law-Decree is very strongly emphasized in Rumanian writings on constitutional law. According to a writer e.g. Law-Decrees cannot amend Acts. Insofar a Law-Decree contains a norm at variance with an Act, this only suspends temporarily the application of the Act's norms, substituting for the suspended norm of Act a lower-ranking norm, the one contained in the Law-Decree, until the Law-Decree is approved by an Act. According to this view, this applies also to the case if the Great National Assembly refuses approval. In such a contingency namely it is unnecessary to adopt again the norm of Act repealed by the Law-Decree; the refusal of approval terminates the operation of the Law-Decree and automatically restores the suspended norm of Act. The relating views are summed up in: *Dumitrescu, A. T.: Natura juridica si efectele „decretelor cu putere de lege” in raport cu prevederile constitutionale. Revista Romana de drept, 1970. No. 10. pp. 60—66.* The recently published text-book of constitutional law does not adopt this view, adducing the argument that such a construction does not solve legal consequences following from the application of the norm „temporarily in force”, in case the Law-Decree is not approved. cf.: *Draganu, T.: Drept Constitutional, Bucharest, 1972. p. 394.*

lowing powers between the sessions of the Great National Assembly: 1. It shall convene the Great National Assembly; 2. It shall have powers to enact statutes with force of Acts (*norme cu putere de lege*) without amending the Constitution. The statutes shall be submitted, in accordance with the procedure of adopting Acts, for discussion to the first session of the Great National Assembly. The State national economic plan, the State budget and the general final accounts of the fiscal year shall not be adopted by the State Council unless, owing to extraordinary circumstances, the Great National Assembly cannot hold a session. „Otherwise the Constitution does not define or delimit the kinds of acts issued by the State Council. A very differentiated system of the State Council's acts is described in Rumanian writings on constitutional law partly on the ground of constitutional provisions, partly of the „practice evolved”. First of all distinction is made between the a) legal and b) political acts of the State Council. (By the latter political declarations, important communications on international relations are meant.) Among legal acts the following distinction is made: a) decrees, b) resolutions. Both decrees and resolutions may be normative or individual. Law-Decrees come within the domain of normative decrees.³⁷ As regards contents three groups of normative decrees are distinguished: a) decrees amending Acts. In the majority of cases Acts are amended by decrees. Also codes are amended by decrees. b) Decrees regulating legal institutions. The State Council acts also in such instances in its substitutive powers, irrespective of whether the subject coming under regulation is or is not qualified under the Constitution or other statute explicitly as a legislative subject. This also indicates that both types of the decrees now mentioned should be submitted for approval to the Great National Assembly while the next category of decrees (i.e. issued by the State Council within its proper powers) this obligation does not apply. Approval is effected by one-Section Acts — with short motivation added. The motivation is usually published. c) As follows, decrees on subjects coming within the State Council's proper powers constitute the third group of decrees. Under Section 63 of the Constitution the powers of the State Council comprise several limited and special fields as regards legislation, like e.g. the establishment of military ranks, honorary titles, ranks, the regulation of diplomatic service, etc. The fact that the obligation to submit for approval only normative decrees regulating these subjects provides also a *a contrario* argument that the primary, basic legal regulation of social relationships if regarded a legislative subject, i.e. coming within the powers of the Great National Assembly, also in the Socialist Republic of Rumania.

As regards the figures when decrees and Acts are compared — in the last three years (after the Constitutional Amendment in 1969) the following should be observed: in 1970 9 Acts, 44 Law-Decrees, in 1971 26 Acts, 77 Law-Decrees, in 1972 15 Acts, 77 Law-Decrees were adopted. (It should be noted that only enactments considered as statutes proper are included in these statistics. Accordingly Acts approving Law-Decrees consisting of one Section as well as Law-Decrees ratifying international treaties have not been included.) The area regulated directly by Acts is relatively wide. Not only constitutional amendments, subjects connected with the national economic plan and budget but also basic statutes, codes and other not major but subjects of general interests

³⁷ cf.: *Draganu, T.: Drept Constitutional, Bucharest, 1972. p. 393 et seq.*

were regulated directly in Acts. Such subjects regulated by Acts were e.g.: the control of the quality of commodities; work organization and work discipline in enterprises; the protection of certain categories of minors; the control of enterprise materials and finances; organization of work and production in agriculture; pastures and related questions; employers' messes; local council, agricultural cooperative and other cooperative — industrial organization; production and rational utilization of fodder; pensioners' mutual aid associations; organization of the social-economic Workers' Control Council etc.

All this shows that legislative subjects exceed also in the socialist Republic of Rumania the subjects as laid down in the Constitution.

Under Section 43 of the Constitution (which provides for the powers of the Great National Assembly) legislative subjects are: adoption and amendment of the Constitution; regulation of the electoral system; laying down of the national economic plan; the budget; the regulation of the organization and activity of the principal State organs; the council of ministers, the ministries and other central organs of public administration, the judiciary, the procuracy, local organs of State power, area divisions, amnesty, the promulgation and ratification of international treaties which require amendments of Acts. Under other provisions of the Constitution legislative powers comprise the loss and acquisition of nationality, labour protection, protection of youth and women, of personal property, of the right to succession, the regulation of religious organizations, the privacy of homes, the right to compensation for unlawful acts.

It is interesting that the relevant Rumanian literature, while pointing out the unlimited legislative powers of the Great National Assembly, does not regard as legally significant if certain subjects are distinguished in the Constitution as legislative subjects. Some writers hold that this fact shows merely the political, social, economic significance of the subjects concerned and can have no bearing on the law-making powers of the State Council. This is at variance with the Soviet views already mentioned, according to which under such regulation the Presidium's law-making powers are thought to be limited. But it is also a fact that the Soviet Constitution is not as clear-cut in regard to the Presidium's substitutive powers as Section 64 of the Rumanian Constitution.

It should be pointed out lastly that the close contacts between the State Council and the Committees of the Great National Assembly are emphasized in the relevant legal writings in Rumania in respect of the State Council's powers of enacting Law-Decrees. In making Law-Decrees the Committee concerned is always consulted, its chairman attends the meeting of the State Council, the committee submits a declaration to the Great National Assembly when the Law-Decree is discussed and approved, pointing out also the reasons of urgency.

d) The State Council of the *Bulgarian People's Republic* which works according to the 1971 Constitution is an institution essentially similar to the Rumanian State Council. It consists of a President, deputy-presidents, secretary and members. The number of members is not fixed in the Constitution which provides opportunity for electing into the State Council a relatively large number of the representatives of State and social organs or heads of these who, by actively participating assist the State Council in discharging its principal function as laid down in the Constitution, in combining „legislative

and executive power". It is laid down in the Constitution that the State Council is a State power organ. Literature after the adoption of the Constitution emphasizes the fact that the State Council's work goes beyond State power functions; it discharges a particular government activity which is closer to public administration.³⁸ Accordingly, it is such a particular State power organ which „belongs also to the system of public administrative organs". The State Council's powers comprise the interpretation of Acts. The principal forms of its legislative activity are: a) adoption of ukases and legal Acts on basic questions following from Acts and the resolutions of the National Assembly. Such ukases are issued within the State Council's proper powers without the obligation of subsequent approval, by virtue of Article 93 of the Constitution; b) between the sessions of the National Assembly — in urgent cases — it amends and supplements Acts by ukases; it issues ukases on matters of principle affecting the State's executive and disposing activity. (This second subject is presumably a residue or effect of the conception according to which subjects relating to State organization are not considered as legislative subjects.) Issuing of this category of ukases is based on Article 94 of the Constitution; c) under Article 95 of the Constitution under conditions of war, if convening the National Assembly is not possible the State Council has powers to issue ukases which repeal or amend Acts or regulate subjects not regulated by the legislation. Ukases issued on the two latter subjects (b) and (c) shall be submitted for approval at the next session of the National Assembly.

Starting from these constitutional provisions and the practice evolved, Bulgarian legal writings point out such limitations of the State Council which illustrate also the relationship between Acts and Law-Decrees. These limitations prevail only in the normal legislative process. Under conditions of war the State Council exercises powers identical with those of the National Assembly — constitutional amendments excepted. These limitations may be so summed up: a) the State Council has powers to amend only parts of Acts in force. This applies also to the supplements. All this means that amendments and supplements adopted by the State Council shall not affect the basic institutions of Acts adopted by the National Assembly; b) some institutions of the public administrative organization, Law-Decrees excepted, shall not contain a regulation of entire legal institutions even between the sessions of the National Assembly. Thus, e.g. codes shall not be enacted in Law-Decrees; c) Law-Decrees shall not contain primary law, at least in the sense that they shall not regulate social relationships not regulated in Acts up to that time. (This limitation is inferred *a contrario* from the provisions of Section 95 already mentioned.) It should be pointed out also in this context that the laying down in the Constitution of legislative subjects is not regarded as if it restricted the State Council's substitutive powers.

Relatively small experience is available in respect of the working of the new Constitution. As regards practice prior to the Constitution it may be interesting to point out that while the former, 1947 Constitution had been in force, it occurred, although in exceptional cases, that the government obtained authority to issue Act-amending statutes. Thus e.g. Law-Decree No. 1931 of

³⁸ cf.: *Vlkanov, V.: Dörzsavniat Soviet v Konstitutiite Na NRB, GDR PNR, i SRR* (The State Council in the Constitutions of Bulgaria, Poland, the German Democratic Republic and Rumania). Soc. Pravo, 1972. No. 5. pp. 3—9.

November 20, 1970 „confers authority on the Council of Ministers to confirm normative acts until new statutes are issued on the implementation of the economic mechanism relating to the period 1971—1975, which may depart from the statutory provisions in force”. It is also remarkable that the execution of this Law-Decree was entrusted not to the Council of Ministers but to its chairman. „The execution of this Law-Decree shall be the duty of the chairman of the Council of Ministers”. (Official Gazette, Dr. Veszt., December 1, 1970. No. 95). It is very difficult to illustrate by mere figures the relation between Acts and Law-Decrees in the highest-level legislation. Both Acts and Law-Decrees abound which are on its merits, no law-making acts. The number of Acts is e.g. considerably increased by the approval of Law-Decrees. Taking this into account the figures on the highest-level legislation in the past five years are included among the notes.³⁹

³⁹ 1968: 8 Acts (of these four Codes, the Family Law Code, Criminal Law Code, Nationality Code; Acts on patents and innovations, approval of earlier Law-Decrees) 16 *normative ukases*.

1969: 23 Acts (of these the major pieces of legislation) the 1969 Plan Act, Budget Act; on the names of ministries; on the protection of artistic monuments; Act on water resources; amendment of the Act on property insurance; amendment of the Act on the transfer of property rights; amendment of the customs Act; Act on the enforcement of penalties; lease Act; Act on the State Insurance Institute; amendment of the Act on People's Councils; Act on the amendment of the Constitution; the 1971 Plan Act; the 1970 traffic misdemeanour Code; passport Act; road Act and foreign trade Act. 19 *normative ukases*: of these the most important: the names of ministries, amendment of the Act on building repair, establishment of the order of merit; amendment of the Law-Decree on labour obligation; amendment of the distinction Act; establishment of new order of merit; development of military schools; housing; housing by the Ministry of Interior; establishment of the 25 year People's Power Jubilee Order of Merit; development of the military schools; establishment of the Jubilee Order of Merit; declaring parishes towns; amendment of the pension Act; amendment of the Law-Decree on the People's Police.

1970: 8 Acts: among these Act on public administrative procedure; maritime shipping Code; on the State Insurance Institute and the amendment of the Act on Property insurance; the 1971 Plan Act; the 1971 Budget Act; the others approve Law-Decrees (jointly or one by one). (Among these the approval of an authorization of the government to issue, in connection with the economic reform, statutes at variance with Acts in force.) 19 *normative Law-Decrees*: the cadretraining Academy is declared a college of higher education; amendment of the Law-Decree on the People's Police; amendment of the Act on standards; amendment of some provisions of the Law-Decree on the amendment of the pension Act; declaring some parishes towns; establishment of committees of quality, of standards and of meteorology attached to the Council of Ministers; on the compulsory treatment of drug addicts; approval of the disciplinary regulations of railway personnel; amendment of the Act on compulsory military service; amendment of the Law-Decree on the Bar; amendment of the Labour Code, etc. *It is a general feature in 1970 that many Act amendments are contained in ukases*, in other words, Acts are amended mainly by means of Law-Decrees. It happens infrequently that partial amendments are submitted to Parliament.

1971: 11 Acts including the Constitution, but only a minor part of these is of material significance; the Constitution itself, the five-year plan Act, the 1971 Plan Act; the 1972 Plan Act and the 1972 Budget Act. 17 *normative Law-Decrees*: amendment and supplementation of the pension Act; establishment of a secondary school; changes in the country's administrative area; amendment of the Election Act; regulation of the television and radio, opening of the military secondary school; reorganization of a college faculty; establishment of a teachers' training college; supplement to the Law-Decree on military schools; establishment of university; financial liability of military personnel; establishment of agricultural academy; approval of the plastic effigy of the arms of the nation; Dimitrov-Prize.

e) The State Council of the *German Democratic Republic* discharges essentially, like its Bulgarian and Rumanian counterparts, the functions of a „little Parliament”; at least in the sense that it strives to discharge the function of a Parliament as a political forum. This is borne out by its composition and structure. Under the 1968 Constitution the State Council consists of a president, a deputy-president, a secretary and members: the number either of its members or its officers is not fixed. The relating commentaries point out that special attention is paid that its membership should include representatives of Parliament, political parties, social organizations and important State organs. Accordingly, the chairman of the Council of Ministers, leading representatives of the parties in the Democratic block and the president of the People's Chamber — the supreme representative organ — are all *deputy chairmen* of the State Council. The chairman has special duties: he shall „direct the work of the State Council”. The State Council has close contacts with the People's Chamber and its committees; the State Council is, so to speak, the direct organizer of the plenary sessions of the People's Chamber.⁴⁰ Acts issued by the State Council are: *Erlass* (this is usually translated as Law-Decree) and *Beschluss* (Resolution). The State Council has powers under the Constitution to interpret Acts unless this is not exercised by the People's Chamber.

It regulates by Law-Decrees „all the questions which follow from the Acts and Resolutions of the People's Chamber, the highest representative body. These shall be submitted for approval to the People's Chamber”. It would follow from this provision that the State Council cannot adopt Law-Decrees but by virtue of Acts or resolutions of the People's Chamber. The fact is, however, that the „*Erlass*” appears as a distinct highest-degree legislative act — Acts excepted. It could also be inferred from the obligation to submit such enactments for approval that the „*Erlass*” may contain also Act-amending provisions. It should be pointed out that Law-Decrees issued after 1968 do not contain Act-amending provisions. This might allow the conclusion that the Constitution-maker had no intention to confer such powers on the State Council. It should also be stated that the number of Law-Decrees is very small: one or two Law-Decrees are issued annually (if Law-Decrees promulgating international treaties are not counted). Otherwise the number of Acts is also small.

f) In the *Czechoslovak Socialist Republic*, where there is a one-person head of State and where there are special types of Acts, the so-called constitutional Acts, the number of Law-Decrees is likewise low. Figures for recent

1972: 11 Acts of which the most important are: on the recall of Parliamentary deputies and council members; copyright Act; Act on motor vehicles; amendment of the income tax Act; on scientific degrees; on tourism; on civil aviation; on the national economic plan; on the budget. 19 *normative Law-Decrees*: establishment of the Press Commission attached to the Council of Ministers; establishment of a University in Plovdiv; reorganization of the branch of the Academy of Music; on State health control; establishment of a medical academy; establishment of an order of merit; pension Act; Higher Education Act; Act on compulsory military service; amendment of custom Acts; on the establishment of a housing fund; on the work and rights of medical personnel; on the police; on the fire brigade; amendment of the Law-Decree amending the pension Act.

⁴⁰ cf.: *Verfassung der Deutschen Demokratischen Republik. Dokumente Kommentar*, II. Staatsverlag der DDR. Berlin, 1969. p. 303 et seq.

years are: 1965: 24 Acts, 5 Law-Decrees; 1966: 11 Acts, 5 Law-Decrees; 1967: 14 Acts, 9 Law-Decrees; 1968: 44 Acts, 4 Law-Decrees; 1969: 22 Acts, 1 Law-Decree; 1970: 26 Acts, 3 Law-Decrees; 1971: 16 Acts, 1 Law-Decree. The possibility of issuing Law-Decrees is at present provided for in Article 58 of the constitutional Act on the federation. Under its terms measures which cannot be delayed and which would require regulation by Acts, the Presidium of the Federal Assembly enacts as Law-Decrees; these shall be signed by the President of the Republic, the President of the Federal Assembly, and the Prime Minister of the Czechoslovak Socialist Republic. Law-Decrees are promulgated in a manner identical with the promulgation of Acts.⁴¹

The number of Law-Decrees in Czechoslovakia is relatively low. This is accounted for, to an extent, by the existence in the Czechoslovak Socialist Republic of the special type of constitutional Acts beside the Constitution which limit, to a certain degree, the emergence of the form of Law-Decrees usually introduced in other socialist countries.

Legislative acts similar to our Law-Decrees had in any case a very restricted role also in the earlier development of Czechoslovak law. The position following upon the adoption of the first socialist, 1948 Constitution is worthwhile to note. Under this Constitution the possibility of enacting Law-Decrees was open. The form of government in the Czechoslovak Socialist Republic was built also under the 1948 Constitution on the institution of a one-person head of State. However, in addition to the President of the Republic, the permanently working organ of the National Assembly, its Presidium had considerable powers also in the legislative field. Members and the Presidium were elected each year. The Presidium had powers to issue binding interpretations of Acts. Besides, between the National Assembly's sessions (and in periods when the National Assembly was dissolved, its mandate came to an end or could not be convened because of war or other conditions of emergency) it could act as a substitute for the National Assembly — matters coming within the exclusive competence of the National Assembly excepted. It had no powers to amend the Constitution, constitutional Acts, it could not elect the President of the Republic or the Vice-President. In addition, it had no powers — between sessions of the National Assembly — to lengthen the duration of compulsory military service, to issue declaration of war, to raise taxes, or government expenditure for a prolonged period (cf. Section 66, 1968 Constitution). A separate provision is found in the Constitution on the Law-Decrees to be issued by the Presidium. Under this provision the Presidium was authorized to issue Law-Decrees only upon a government proposal. Law-Decrees had to be signed by the President of the Republic, the President of the National Assembly and half of the members of government.

⁴¹ Since the adoption of the Act on federation the following Law-Decrees were promulgated. (Only on federal level.) *In 1969* federal Law-Decree 99/1969. Sb. on certain temporary measures necessary to strengthen and protect public order. *In 1970* 15/1970. Sb. 1. Federal Law-Decree on the termination of the right of use of flats and evacuation of flats of nationals who are staying unlawfully outside the Czechoslovak Socialist Republic; 2. Federal Law-Decree 16/1970. Sb. on the establishment of an order of merit for strengthening comradeship-in-arms; 3. Federal Law-Decree 26/1970. Sb. on the amendment and supplement of 54/1963. Sb. Act on the Czechoslovak Academy of Sciences. *In 1971*: Federal Law-Decree 145/1971. Sb. on the amendment of the command structure of the Frontier Guard. There was no Law-Decree adopted *in 1972*.

In the event signature was refused by the President of the Republic or the Prime Minister, the Law-Decree could not be issued (Section 66/6).

In fact such Law-Decrees were not issued until 1954. This was made possible by the fact that the government was authorized, although within much narrower limits, to issue decrees at variance with Acts in force. A few months after the 1948 Constitution had been adopted, the government was authorized under Act No. 24 of 1948, Sb. z. on the five-year national economic plan to take measures, by means of decrees up to December 31, 1953, necessary for the implementation of the five-year plan which otherwise would require the adoption of an Act. Such decree must be approved by the President of the Republic, who also shall sign it. Acts relating to „constitutional relations” could not be amended under this authorization either. This authorization did not comprise approval of the budget, of credit deals, the settlement of State debt, the regulation of taxes, customs, public services, financial monopoly, and matters connected with foreign currency. The government was bound to submit its decrees issued by virtue of this authorization to the National Assembly within one month after their promulgation. Approval had to be given by the absolute majority of all deputies.

This authorization was prolonged, apart from a short period, while some minor changes were made in the subjects coming under the authorization, like e.g. Act No. 2 of 1954, Act No. 13 of 1955. The authorization is repeated, with major changes, in Act No. 63 of 1958 on the second five-year plan. Acts on the third and fourth five-year plans do not contain such an authorization. (Act No. 165 of 1960, Act No. 83 of 1966).

While the government had authorization under the enactments now mentioned to issue decrees at variance with Acts in force in respect to the system of economic management, another authorization extended this possibility to very important domains of political conditions. Constitutional Act No. 47 of 1950 Sb.z. on „the reformation of public administrative organization” authorized the government to issue decrees at variance with Acts in force on every subject coming within this field. (These decrees had likewise to be signed by the President of the Republic.) This authorization was particularly widely interpreted in practice. Reorganization of ministries, establishment of new ministries and, connected with this, rules on competences and organization formerly coming within the scope of regulation by Acts were provided for in government decrees.

After the 1960 Constitution had been adopted writings on constitutional law reverted several times to the nature of these authorizations. Usually not the fact of these authorizations was subjected to criticism but the practice evolved in their wake, as a consequence of which the role and legislative activity of the National Assembly was considerably reduced and the highest-level legislative work „was conferred to a significant extent from the National Assembly to the government and the President of the Republic”.⁴² (Ustavni Pravo, Praha, 1965. Orbis, p. 103.).

g) In *Yugoslavia* the institution of Law-Decrees underwent varied changes: both as regards its form and the organs authorized to issue such enactments. Under the 1946 Constitution the system of the supreme State organs of the Yugoslav Federal Republic was essentially modelled upon the central organs of the Soviet Union. Accordingly, the Presidium had more or less similar

⁴² Ustavni Pravo, Prague, 1965. Orbis, p. 103.

powers. „It shall issue binding explanation of federal Acts”, „it shall promulgate Acts adopted, it shall issue ukases” — is provided in Section 74 (5) and (6) of the 1946 Constitution. However, the Constitution reserved the possibility to authorize the government to issue Act-supplementing and Act-amending decrees. (Section 78 of the 1946 Constitution.) It was in the latter direction that practice has shaped the mechanism of flexible law-making. Between 1946 and 1950 345 Law-Decrees were issued by the government while 106 Acts and 42 Act-amendments were adopted by the National Assembly. Constitutional Acts adopted in 1953 introduced considerable changes in this system. The institution of a one-person head of State was established; the Federal Executive Council was constituted as the direct executive-disposing organ of the federal Skupstina. The Federal Executive Council was regarded from the outset not simply as the „supreme public administrative organ” (as it was termed in the 1949 Hungarian Constitution and other socialist constitutions), but as the supreme organ of „political implementation”. Usually a distinction was made between the organs of „political implementation” which were mainly executive-disposing organs on the one hand, and public administrative or administrative organs composed of professionals.⁴³ If the matter is somewhat simplified it might be said that the Federal Executive Council was regarded, so to speak, as an intermediary between Presidium-type supreme power organ and the councils of ministers considered as the supreme public administrative organs.

The Federal Executive Council was granted relatively wide law-making powers. These included: in addition to issuing decrees for the implementation of Acts, it had powers to issue decrees on subjects not regulated in Acts but in need of regulation. (This type of decrees was termed earlier in this work, applying the historically evolved categories of Hungarian legislation, as Act-substitutive decree.) These regulated very important questions connected with the implementation of the social plan and the federal budget and mainly the organization of public administration. [These powers correspond, more or less, to those accorded under the 1949 Hungarian Constitution to the Council of Ministers if the provision that „the government has powers to place a public administrative branch under its direct control and to establish separate organs for that purpose” (Section 40/3) is widely interpreted. This provision is interpreted now as conferring powers to reorganize the internal relationship of the government apparatus but when it is widely interpreted a certain independent law-making powers of the government may be based on it.] In addition, the Federal Executive Council was authorized, in order to harmonize the legal system with the constitutional amendment of 1953, to issue Law-Decrees. This authorization was for one year. After that it was authorized to issue Law-Decrees in the economic field on subjects which had been regulated earlier by means of Law-Decrees. This system was further changed under the 1963 Constitution. In implementing this Constitution the principle that original law (the primary regulation of social relationships) must be made only by Acts was most strictly interpreted. The institution of Law-Decrees was abolished respectively restricted to the time of war or danger of war i.e. state of emergency.

⁴³ Popović, S.: Upravno pravo — oposti deo. (Public administrative law. General part.) Belgrade, 1966. p. 188 et seq.

A strong emphasis is laid in the 1963 Constitution on the legislative powers of the Federal Skupstina, i.e. the supreme representative body; if the Constitution is strictly interpreted the Federal Executive Council could not make law unless explicitly authorized under Acts. According to Section 228 of the Federal Constitution the Federal Executive Council issues decrees, resolutions and instructions to implement federal Acts and other general enactments of the Federal Skupstina — provided it has been authorized to do so by an Act or such enactments (clause 4).

Practice has continuously widened the interpretation of this provision arriving at a solution that no concrete Act is required for authorization but the law-making powers of the Federal Executive Council are essentially so conceived that it has powers to issue statutes to implement the policy laid down by the supreme representative body. This legal possibility is particularly clearly set forth in Acts governing the Federal Executive Council's organization and activity. Already Act No. 384 (Sluzbeni List, April 21, 1965) provides that the Federal Executive Council shall be in charge of: the execution of federal Acts, the implementation of the social plan, the implementation of the federal budget and other enactments of the Federal Skupstina and the *enforcement of the policy determined by the Skupstina; for this purpose it shall make proposals, adopt statutes and take action for which it is authorized.* (Section 2).

A new Act adopted in 1971 on the same subject (Sluzbeni List, July 28, 1971) further widens law-making possibilities by using even more general terms particularly in respect to the enactments on the Federal Executive Council's authorization. It is also clear that the new terms do not go to the length either to authorize the Federal Executive Council to issue Act-amending decrees or to provide possibility for such authorization by Acts; it should be mentioned as a point of interest that the term used in the 1971 Act is very similar to the now-mentioned Section 78 of the 1946 Constitution. As pointed it was this Section on which Act-substitutive and Act-amending decrees of the government, i.e. Law-Decrees, issued under authorization had been based; but it should also be pointed out that legislative practice has shown in the past years that the Federal Executive Council's normative acts are always based on authorization in Acts. In other words, beside the relatively active and extensive legislative activity there is no problem to have the government take action as an executive organization and have its law-making activity performed by virtue of concrete Acts.⁴⁴

⁴⁴ Section 78 of the 1946 Constitution runs as follows: „The government of the Yugoslav Federal People's Republic shall work on the ground of the Constitution and Federal Statutes. The government of the Yugoslav People's Republic shall adopt decrees on the application of Acts and decrees by virtue of lawful authorization as well as binding decrees and orders on the execution of Federal Acts and shall supervise their implementation.” Constitution of the Yugoslav Federal People's Republic. Published by Magyar Szó, Novisad, 1947. (the earlier translation was deliberately left unchanged). The authorization of the government to issue Law-Decrees was based in the practice evolved after the adoption of the Constitution (and the interpretation expounded several times in legal writings) on the distinction made in this Section between decrees issued on the ground of authorization in Act and the implementation of Acts. Such or a similar duality is discernible also in the new Act on the Federal Executive Council. The first part of the Act runs as follows: „The Federal Executive Council shall attend to the implementation of the policy of the Federal Parliament, shall propose to the Federal Parliament, the laying down of policy; shall direct and coordinate the activities of Federal public administrative

The new Constitution of 1974 and the connected legal regulation are based on this development. According to the Section 347 (5) of the new Constitution the Federal Executive Council issues decrees and resolution for the enforcement of the federal Acts, other legal rules and acts of a general nature of the SFRY. From this provision of law it may appear that the Federal Executive Council has no power of original legislation. But the provision of the Act enacted for the enforcement of the Constitution is not unambiguous so much (Act No. 308 on the Federal Executive Council, Official Gazette, 1974, No. 21.) because Section 6 (1) provides: the Federal Executive Council ensures the carrying out of the points of view of the Presidium of the SFRY, concerning the implementation of the policy the enforcement of the Acts and other acts of a general nature of the Assembly of the Deputies, further, the taking of the necessary measures for the implementation of the policy, Acts and other acts of a general nature. This Section could be conceived in such a manner also that it does not exclude the so called original legislation aiming at the implementation of the policy formulated in a general way. Even more so, because the concept of „policy” appearing in the text of the Act is not circumscribed, thus it can be conceived in the widest sense of the word. It is worth mentioning that the terminology of „policy” appears in this wide sense of the word even in the Constitution, among others in the Sections concerning the competence of the Presidium of the SFRY. Accordingly, the Presidium of the SFRY has a power to take a stand on the implementation of the policy, the enforcement of the Acts and the acts of a general nature of the Assembly of the Deputies of the SFRY and it may ask the Federal Executive Council to take the necessary measures for the implementation of the policy and the enforcement of the Acts and other acts of a general nature adopted by the Assembly of the Deputies. It seems to be that *policy* appears in this Section in a too general sense, it may mean the aims set by the Skupstina (Assembly of the Deputies), but even directly the policy and resolutions of the Party as well.

III. THE RISE AND PROBLEMS OF EVOLUTION OF LAW-DECREES IN HUNGARY

1. *When the perspective of the Law-Decree in Hungary is examined* the solutions adopted in the friendly socialist countries as well as Hungarian tradition and experience should be taken into consideration.

If the Hungarian institution is compared to its counterparts in friendly socialist countries we are faced with a difficult problem. As has been pointed out in this work, each socialist country had adopted particular solutions in this very important domain of the highest-level legislation. This is otherwise clearly borne out by the detailed survey found in preceding chapters. While aware of the risks of a certain simplification it might perhaps be said that

organs and Federal organizations; shall adopt acts and shall take action to which it is authorized; it shall attend to other political-executive matters and shall bear responsibility for the implementation of policy, the execution of Federal Acts and other general acts of the Federal Parliament.” (The Official Gazette of the Yugoslav Socialist Federal Republic, July 28, 1971. Year XXVII. No. 32. Act on the Federal Executive Council, I. General Provisions. Section 1.).

the variants outlined can be classified into two principal types. One principal type is the solution where this institution does not exist or has but minor functions — at least in practice. This type comprises the variants evolved in Yugoslavia, the German Democratic Republic, Poland and — essentially — in the Czechoslovak Socialist Republic. The other principal type, i.e. the solution where the Law-Decree has a relatively important part to play in the highest-level legislation is found in the Soviet Union and Bulgaria. The Hungarian variant of Law-Decree should be included within the latter category. The Decrees in the Socialist Republic of Rumania should be ranged with this group — their numerous special characteristics notwithstanding.

This classification indicates also that experience which might be useful in Hungary should be looked for among the solutions included within the second principal category. Several elements are found in the evolution of this institution — in the Soviet Union, Bulgaria and, in part, in Rumania which may be taken into account in moulding the relationship between the Act and the Law-Decree in Hungary.

When Hungarian traditions and experience are reviewed it should first of all be taken into consideration that prior to the adoption of the 1949 Constitution the Hungarian Constitution had not known the classical form of Law-Decrees, i.e. Law-Decrees issued by the Head of State. Before World War I this institution could not strike root because of the Hapsburg rule and the uninterrupted legislative activity of Parliament — as pointed out when the related issues have been discussed in connection with Hungarian legislative traditions. As regards government Decrees issued on authorization and at variance with Acts, this institution was functioning only in a state of emergency. This must be stated even if we are aware that in the inter-war period, during the counter-revolutionary terror, when the regime was heading towards fascism, and in time of war the government had practically uninterrupted powers to issue Act-amending decrees.

In the first post-war years first reconstruction then the political and economic tasks to be performed in the first period of transition towards socialism demanded an authorization of the government which comprised also powers to issue decrees at variance with Acts in force. (The system of authorization has already been outlined. There the limitations by means of legislative subjects of law-making authorization have been described.) In this epoch it was the government which was the principal organ of the highest-level legislation.

This duty was discharged by the government under varying conditions. There were periods e.g. when parallel with the government's law-making activity the legislative work of Parliament was very extensive. (It will perhaps be not unnecessary if some figures are given: in 1945 11, in 1946 29, in 1947 35, in 1948 63, in 1949 up to the adoption of the Constitution 19, after its adoption 10 Acts were adopted by Parliament. The total number of Acts from the Liberation of the country up to the adoption of the Constitution is 157).

The government's role in law-making was strengthened by the fact that between 1945 and 1949 (up to the May, 1949 elections) the government was not only more homogeneous in comparison with Parliament but secured more direct and more favourable opportunities for political forces fighting for socialism.

The dominant position of the government in the highest-level legislation

was not impaired by the incidental (or periodical) participation of extra-parliamentary and extra-government organs in the exercise of supreme power. Students of the problem are aware that the Supreme National Council, which discharged temporarily the powers of the head of State had practically no law-making authority. (One single subject came within its powers which was connected with law-making: introduction of decorations and distinctions, of.: Act No. III of 1945, Section 2). The Political Committee of the Provisional National Assembly had also only an incidental role in the highest-level legislation. At the outset it had no legislative functions at all; later it issued, jointly with the provisional national government, a statute on the organization and working of the Supreme National Council. Also later it took action which could be regarded as normative. The Political Committee of the Provisional National Assembly is frequently mentioned in legal literature as the germ, a rudimentary form of the Presidium. No doubt, this claim has certain foundations since the Political Committee had powers to act for the Provisional National Assembly when the matter permitted of no delay, particularly in regard to the constitution of principal state organs. In addition, it had powers to exercise control over the work of the government and the entire government apparatus. But its legislative activity remained within very narrow limits. For this reason drawing a parallel between the Presidium and the Political Committee of the Provisional National Assembly appears to be somewhat exaggerated — at least as far as legislation is concerned.⁴⁵

Under Act No. I of 1946 the President of the Republic was formally the head of the Executive. „The President of the Republic shall exercise executive power through the government accountable to the National Assembly”. „Every action and measure of the President of the Republic has to be countersigned by the Prime Minister or the responsible minister concerned” — is laid down in Section 13 of the Republic Act. Theoretically, these provisions did not preclude the emergence of the legislative powers of the President of the Republic — based on the government's accountability. These powers, however, did not materialize. Although some normative acts were issued by the President of the Republic at a later period in the form of presidential resolutions — these are not significant compared to the government's law-making activity.

It may therefore be concluded on the ground of what has been expounded that the post-1945 developments do not display elements which could be conceived as the precursor of the Law-Decree. The 1949 socialist Constitution, when introducing the institution of Law-Decree made use first of all of the constitutional evolution in friendly socialist countries. By so doing, the Constitution provided an opportunity to shape, on the legislative level, within the system of the supreme representative organs, a highest-level legislative organ which secured a flexible framework during the transition towards socialism, for amending, supplementing Acts and, when necessary, for the relatively quick, Act-level regulation of new social relationships in every case when such an action was demanded by the revolutionary, rapid changes in social relationships.

⁴⁵ The Provisional National Assembly Political Committee's functions and their evolution is analysed by *Beér, J.*: *Az Ideiglenes Nemzetgyűlés, (1944—1945)* (The Provisional National Assembly, 1944—1945). *Jogtudományi Közlöny*, 1960. No. 5. p. 253 et seq.

Simultaneous with institutionalizing the wide legislative powers of the Presidium, the Constitution meant a major step toward democratizing legislative mechanism by barring the possibility of authorizing the government to issue decrees at variance with Acts in force. Such an authorization is precluded by the Constitutional provision according to which the decrees of the Council of Ministers „shall not be contrary to the Acts of the People's Republic or the decrees adopted by the Presidium of the People's Republic". (Section 25 (2) of the 1949 Constitution.) It should be noted that the constitutions of socialist countries which were adduced as examples of the functioning of government authorization after the adoption of socialist constitutions, do not contain such a provision. It is also true that they do not provide for such an extensive substitutive powers of the Presidium or similar organs to the extent as it is done in the 1949 Hungarian Constitution.

The 1972 constitutional amendment contains a new wording of the above-mentioned provision. According to the new wording: „the decree and resolution of the Council of Ministers shall not be contrary to Acts and Law-Decrees". [Section 35 (2)]. As far as the preclusion of authorization is concerned also this wording is unequivocal. Still, reference to the earlier wording is not unnecessary in this context because it better reflected the transition from the pre-constitution legislative mechanisms to the post-constitution mechanism.

The adoption of the socialist constitution, the introduction of new-type State and legal institutions obviously meant a turning point (or at least a borderline) in the legislative pattern. Under the new conditions, by strictly interpreting the 1949 wording of the Constitution, a distinction was made between *post-constitution* and *pre-constitution* Acts — and within this latter category between *pre-1945* and *post-1945* Acts. This distinction, when applied to the government's legislative powers involved consequences to the effect that government decrees amended without authorization pre-liberation Acts; but the government issued decrees at variance with Acts adopted between 1945 and 1949 only by way of exception and on the ground of special authorization. The latter category comprises e.g. decrees issued by virtue of authorization contained in Law-Decrees No. 10 of 1949 on the regulation of co-operative relationships (under Section 2 of this Law-Decree the government was authorized „to regulate by decree cooperative legal relationships — if necessary, in a manner different from the provisions of Act No. XI of 1947 and of the supplementing and amending statutes").

As it is seen, a fitting interpretation of the Constitution provides possibility for justifying in the instances mentioned, and this possibility still exists, the government's incidental authorization to amend the Acts of the „Republic" but such an authorization is precluded, as a matter of principle on the ground of explicit constitutional provisions, in regard to amending the Acts of the People's Republic and the Law-Decrees of the Presidium. In this respect the possibility and practicability of the so-called temporary or experimental authorization may be strongly argued, for the simple reason that the constitution-based legislative mechanism had not taken into account such authorization and therefore it did not set up a system of control for such contingencies.

2. All this does not amount to stating that — by now — *all the problems in regard to the mutual relationships of legislative activity of the legislation,*

the making of Law-Decrees and law-making in government decrees may be regarded as settled on the ground of constitutional provisions, their interpretation and legislative practice. The situation may be better characterized so that the structure (mechanism) of the highest-level legislative activity as laid down in the Constitution involved from the outset all the unsettled problems which have been discussed in this work in connection with the position of the Soviet Presidium. The Constitution, its interpretation and the post-constitution legislative activity failed to draw a line of division between the powers of Parliament, the Presidium of the People's Republic and the government — although it is also true that the resulting contradictions were very soon recognized. Efforts at solving the problem were made likewise very soon. The provisions of Parliamentary Resolution No. 1 of 1956 are worthwhile to quote in this context: „The legal, public administrative and judicial Committee shall, with the cooperation of the appropriate State organs, draw up a proposal for issuing State enactments to concert, to appropriately divide the spheres of activity of Parliament, the Presidium of the People's Republic and the Council of Ministers and it shall submit this proposal to Parliament not later than April 1, 1957.” (Chapter V, clause 1). This part of the Resolution has not been implemented. (It may be noted that a recent edition of the collection of statutes in force omits this part of the resolution with the comment that it contains out-of-date provisions).

This range of problems arose again in the course of the preparation of the recent constitutional amendment. The wording of the constitutional amendment, the fact that it did not alter the position and legal status of the Presidium, at least in respect to legislative powers, reflects that the institution of the Presidium has stood the test also in Hungary. Still, due to the fact that the constitutional amendment did not change the provisions adopted in 1949 the problem necessarily arises, to what an extent may a statute regulating the legislative system, go beyond earlier solutions or, to put it in other words, do the 1949 provisions provide a framework wide enough for further developing the institutions concerned for the legal formulation of the problems of a continued development. Or, should the proposals to be elaborated be conceived merely as recommendations which can continuously be implemented in the legislative policy but cannot be institutionalized in a highest-level special statute on legislative activity. It is more probable that the task to be performed is of a dual nature. There may proposals, recommendations be elaborated which may be institutionalized in statutes. (A Law-Decree eventually to be issued on the subject may have a relatively wide freedom of movement for — as has already been pointed out — the Presidium has powers, within its authority as substitute for Parliament, interpret in a Law-Decree also the Constitution. An Act-level statute might of course offer wider possibility.) On the other hand recommendations, proposals might be elaborated which might be implemented by organs in charge of legislative policy in the course of the execution of the Law-Decree.

What has been said also indicates that an abstract contrasting of Act and Law-Decree, or of legislative subjects and subjects to be regulated by Law-Decrees or government decrees will not suffice when proposals will be elaborated. Such an approach has become obsolete by now even in the legislative mechanism of bourgeois States which recognise the principle of the separation of powers. The less is it applicable in the system of institutions in the socialist

State organization which is based on the unity of State power. When the problem is raised and the answer is sought, it is the functions discharged by Parliament and the Presidium in the political mechanism as a whole and within this in the system of State organization which should be taken as a point of departure. The organizational and powers framework which concern the subject under discussion should serve the performance of these functions just as the proposals to be elaborated should contribute to a more efficient discharge of these functions. When this set of problems is examined from the general angle of the political mechanism the mistake of assuming decision-making powers on the merits of matters, formalist, wanton institutions are forced even when it is a matter of simple transmissions, will not be committed. On the other hand if the special requirements and functions of State activity are borne in mind the danger that unnecessary formalism is meant to have been discovered in instances where really the specific methods and means of State activity appear, will be averted. The more so, because in such instances aspects of the organizational and arranging function of law are often, discernible which are also the safeguards of State order, discipline and legal security. These special considerations may have a special emphasis in such a phase of socialist construction when the principal task is not the abolishing of existing institutions but the stabilizing, strengthening, consolidating of already emerged (or at least emerged in their bases) socialist-type institutions, conditions. Otherwise it should not be ignored either that in the given scope of issues such a high sphere of State activity is examined where, in several instances, processes which may appear formal at first sight may have a material import.

3. Under the recent constitutional amendment the place of the Presidium has been fixed for a long term in the State organization — at least in its principal traits. According to this amendment the socially more important function of the *Presidium* is to act as substitute for Parliament between the latter's sessions — constitutional amendments excepted. This of course does not preclude the extension of its other tasks falling within its so-called proper powers. Still, the nature of the *Presidium* is primarily determined by the fact that, under the explicit provisions of the Constitution, it embodies popular sovereignty between the sessions of Parliament, it is the depository of the exercise of supreme power. This statement also means that the role played by the *Presidium* in the political mechanism as a whole and its relationships to other elements of State organization, particularly Parliament and government should be examined not on the ground of tasks discharged within its „proper powers” but on the ground of its powers as a substitute for Parliament.

This statement will serve as a guide also in the legislative field. It is not a legislative function separated from the powers of Parliament, within the so-called head of State function (i.e. within the *Presidium's* proper powers) which should be shaped but the development perspective should be outlined having in mind the *Presidium's* substitutive powers and within this scope should be elaborated a) principles, recommendations to be observed in legislative policy, and b) institutions which may be laid down in statutes.

It should be pointed out at the outset that substitutive powers cover manifold tasks. In direct legislation e.g. at least three distinct tasks may be distinguished (distinct as to their basic traits). First, cases may be mentioned when the *Presidium* legislates in the course of the normal working of the

State — without amending Acts in force or making norms belonging explicitly to Act-making. The second group includes cases of legislation, which should be justified, when the Presidium adopts statutes, because of urgency, instead of Parliament. It amends e.g. some details of Acts in force — between sessions of Parliament. Lastly, an entirely distinct special case of the Presidium's legislative activity is when it adopts statutes in a state of emergency or in time of war. Of the three cases the first two belong to the normal legislative mechanism. Accordingly, attention should be devoted first of all to problems coming within this scope.

4. As far as *Act-amending Law-Decrees* are concerned the first problem to be dealt with is the justification of upholding this institution after the phase of rapid social changes characteristic of the initial stage of transition had come to an end. It is obviously impossible in given cases to lay down in statutes solutions contrary to the Constitution recently amended. However, in principle, the elaboration of recommendations to be implemented in legislative policy which would practically preclude the possibility of Act-amending by Law-Decrees might be conceived. This is however unnecessary. Under the present Parliamentary pattern which is based not on the continuous working of the plenary session and when the increasing of the frequency of the Parliamentary sessions is not envisaged, the rigid emphasis on a requirement that Acts must be amended always by Acts would result in an unjustified slowing down of the State's activity. It is to be feared that forcing such a solution would necessarily place into the foreground the introduction of the government's authorization. Accordingly, Act-amending Law-Decrees should in principle be upheld. On the other hand, there is possibility to define conditions that this type of Law-Decrees should not be resorted to unless a necessity really prevails.

The solution should probably be sought not in the negative but in the positive direction. The principal issue in the given case is not a restriction of the Presidium's activity but the strengthening, developing of Parliament's role. First of all the mistaken but unfortunately quite inveterate view that a Parliamentary session is such a solemn act the dignity of which would not tolerate the discharge of such part-tasks like Act-amendment must be dispelled. The fact that Parliament is such a working organ which needs not only solemn but also everyday events should be brought home. The partial amendment of Acts might be solved during these „everydays”. There is no obstacle whatever either in theory or practice to place on the agenda of a session several items of this type — perhaps in a simplified procedure. First of all, it should be made clear that amendment by Parliament is the normal procedure of Act-amending. In addition it should be indicated that Law-Decrees may amend Acts in every case when the delay would involve particular difficulties in the leadership of the State. The obligation to substantiate urgency in such cases might be provided for.

The elaboration of some principles of legislative policy connected with certain types of legislative subjects might also be conceived. It might e.g. be laid down that the most important legislative subjects (those set forth in the Constitution or the momentous Codes) should not be amended by Law-Decrees, save in exceptional cases. Some other conditions envisaging Act-amending by Parliament might be set forth in a comprehensive statute regulating problems of legislation. Particularly procedural rules which provide

for the possibility of Act-amending by Law-Decrees, within constitutional limitations, might be susceptible of containing of such provisions. A regulation e.g. that before issuing such Law-Decrees the views of the Parliamentary Committee concerned should be solicited, its Chairman and rapporteur should be invited to the relevant session of the Presidium might also be conceived. Probably, no rigid rules are needed to achieve this end. It may happen namely that in cases, the urgency of which is justified, such a regulation would involve difficulties.

There are no obstacles in principle to make a distinction between Act-amending Law-Decrees and other Law-Decrees when they are submitted to Parliament. Constitutional regulation does not preclude a special examination by the Parliamentary Committee concerned of such Law-Decrees which might be adopted separately. It is not precluded either that in such cases a one-Section Act and its motivation should contain the provision on adoption but approval by Parliamentary resolution is in principle, likewise possible.

It should also be indicated that provisions on details which are but the consequences of the amendment of merits is not invariably necessary in Parliamentary amendments. In such cases a solution that Parliament adopts only amendment of the merits leaving the details to the Presidium might also be conceivable. Thus e.g. the Presidium might law down the consolidated text of Acts.

5. Otherwise the *overwhelming majority of Law-Decrees do not amend Acts but are independent legislative acts*. The greater part of these are based on Acts, in other words they provide for the important institutions of Acts applying to the main features of a legal domain which still comes within the scope of regulation by Acts. Such are e.g. Law-Decrees providing for educational institutions or co-operative types. In such Law-Decrees new legislation and provisions on the interpretation of the underlying Act are usually amalgamated. A great number of Law-Decrees contain original law in the strictest sense (primary legislation), which are in the place of Acts *de facto* and *de iure*: they are, so to speak, substitutes for Acts. Such are for instance the Law-Decrees on the Hungarian Academy of Sciences, on the system of scientific degrees on public record offices, on expropriation etc. The probable course the development of the legal material contained in such Law-Decrees will take is that it will gradually come under regulation by Acts, at a pace commensurate with the increased legislative activity of Parliament and the pace of the consolidation of institutions provided for in such Law-Decrees. Parallel with this process the solution that the legal material regulated by a coherent category of Law-Decrees and ripe for a lasting regulation will be comprised in a Code setting forth general traits, as has been done in the Education Act or Cooperative Act and only part-rules regulating quickly changing institutions but still of a general concern will remain on the Law-Decree level. Law-Decrees on e.g. the State direction of scientific researches, the Hungarian Academy of Sciences the system of scientific degrees, scientific institutes and researchers may already be included within this category. Such and similar subjects serve as examples of such domains of regulation termed in the preceding pages, when examining legislative subjects, as legislative subjects „in their bases”. The theoretical and technical moment of this distinction will very probably be growing in the present phase of socialist development. It should also be pointed out that this is the *very legislative field where*

problems rooted in the lack of delimitation between the powers (or rather the functions) of the government and Presidium are already discernible. A survey of the development up to now may considerably contribute to outlining a solution. Only in the knowledge of the principal development trends is it possible to take a position to what an extent and under what conditions is the retention of the numerous hierarchical grades, characteristic of national legislation, justified.

a) *In Hungarian legal development (as well as in European legal development) there were no levels or grades in central legislation for a long time.* It may safely be stated that the *entire central legislation was built on a single grade: either on Acts or on decrees.* In other words, Acts or decrees were alternatives in regulating subjects coming under regulation and they were not the inferior or superior levels of regulation built upon each other. It was only in the XIXth century, or more exactly in the second half of the century (in Hungary only at the end of the XIXth century and at the beginning of the XXth century) that two grades of written sources of law, Acts *and* decrees were taking root. (Decree as a statute, implementing an Act.) The powers of Decree-making, as was the case previously, belonged unequivocally to the head of the executive, the head of the State, who exercised these powers through the minister accountable equally to him and to Parliament. It was only in exceptional cases that he acted directly but also in such instances the accountability of the responsible minister, who had to countersign the enactment, prevailed. In Hungarian literature on public law at the end of the century, the categories of royal, government and ministerial decrees are treated almost as synonymous. *The principal pattern of law-making decree based on Acts was the ministerial decree.* But the minister issued decrees not within his proper powers but „acting within the powers” of the head of State, within powers delegated by the latter. In this sense every minister was acting as an outward manifestation of the same dominant will. The homogeneity of government was secured in this system not by the collectivity of the government but by the fictitious conception that the powers of ministers are but the will of the head of State delegated in a divided form. This principle was the basis of the obligatory solidarity of ministers as well as of the unity of legislation. (It is another matter by what technique and by what methods did the government and ministries the implementation of unity in legislation in the working of ministries.

The two-grade legislation came into being only by stages. Parliamentary activity which was becoming increasingly continuous was capable, more or less, of keeping pace with the development and differentiation of social relationships. Ministerial decrees issued in the execution of Acts (if such were issued at all) contained mainly technical instructions, guidance on working methods, addressed to the public administrative organization under the direction of the minister concerned. Decrees supplementing Acts with material provisions, providing for their details, then effecting citizens' rights and obligations came into being through several transitory forms. The practice that ministers subsequently published their individual decisions deemed by them to contain matters of principle was introduced at a very early stage. By so doing, the ministers provided orientation not only for public administrative agencies under their control in regard to similar cases in the future, but served as an information also for the public. Such decisions became attached

to the norms laid down in Acts as an interpretation by the law-applying organ. In keeping with the growth of the minister-controlled public administrative organization, the emergence of their grades, this practice was expanding and the content of such publications was considerably changed. Beside individual decisions containing certain matters of principle instructions which, together with the delegation of powers, provided orientation on the mode of handling matters, although remaining within the limits of Acts (at least in the sense that not running counter to Acts) prescribed special conditions as to the application of several provisions of Acts, the individual establishment of the existence or non-existence of rights or obligations laid down in Acts, became increasingly widespread. In reality, this was still a case of interpretation by the law-applying organ which, however, was leading gradually to the issuing of Act-based new statutes.

This trend of development was furthered by the fact that minister-controlled public administrative agencies were so-called „deconcentrated” organs. In other words, they had no powers of their own laid down in statutes. They acted in all matters within quasi-ministerial powers, (delegated by the minister). This meant that the minister (or ministerial departments and their heads) could order lower agencies to make decisions concretely determined by the central authority. But direct decision-making by the central organ on individual and incidental matters where the minister has usually delegated its powers in general terms, was not precluded by considerations of principle (or of statutory provisions). This meant furthermore, that delegation did not confer independent powers on these agencies which could not have been broken through by the minister in any concrete matter. The so-called middle-grade organs had the same powers in regard to lower organs. As an example the county director of internal revenue should be pointed out who had powers to act and to decide with complete independence as far as outward appearance was concerned in many and important cases. However, he had no powers at all vis-a-vis the minister of finance within the organization of treasury administration. The minister had powers to decide on the merits of every case — e.g. the licences of village pubs. The same held for the district internal revenue office vis-a-vis the county director of internal revenue and the minister of finance. This also meant that a ministerial „decree” whether it concerned an individual matter or a law-making instruction had the nature of an unconditional order in regard to the organization under the minister’s control, just as the chiefs of offices had in regard to lower-ranking officers. On the other hand, due to the „unity” of the executive mentioned earlier, decrees issued by any of the ministers were unconditionally binding on government-controlled public administrative organs.

Also other factors contributed to the ministerial decrees becoming generally binding normative acts, statutes. Thus e.g. the characteristic trait of ministerial accountability that the minister was accountable only for law-infringing actions or omissions. In this way the issuing of decrees which remained within statutory limitations or went beyond these but were not explicitly unlawful, was not unconstitutional. These were binding on the courts and local self-government. But these were not „unconditional orders” in this field. Thus the decrees of the unified executive were implemented eventually in three, more or less distinct legislative domains. These were implemented in the deconcentrated public administrative organization in the

same manner as other service orders or instructions. Their relation to Acts could not be examined. The courts however, had powers to refuse to apply decrees if they deemed them to be contravening Acts. (It should be pointed out incidentally that these powers of the courts applied not only to decrees of implementation and were based not merely on Act No. IV of 1869 on the judiciary. These were shaped actually by customary law and were laid down as early as in Act No. XII of 1791. A particular system of decree implementation evolved in self-government administration. Parish and county town self-governments were bound to execute decrees just as unconditionally as were the deconcentrated organs — Act No. XXII of 1886, Section 30; town and county municipalities, however, had powers to examine not only the lawfulness but also the applicability to local conditions (expediency) of decrees. As a consequence, they had rights of petition — petition could be made twice with a delaying effect, and a right of complaint to the Administrative Court against decrees deemed unlawful; this action had likewise a delaying effect. If, however, an immediate execution of a decree would have jeopardized important State interests they were bound to execute it duly and could submit their observations subsequently to Parliament — Act No. XXI of 1886, Section 19; Act No. LX of 1907, Section 7).

It should be pointed out that the problem of law-making ministerial decrees and their execution was examined in so much detail now was not only because they meant at that time the second legislative level. (Thus in this, but only in this sense they were analogous to the Law-Decrees of to-day) but also because the proper interpretation of the Presidium's constitutional supervision over the powers of local councils requires a survey of some constitutional safeguards of the earlier system of self-government.

b) *The shaping of the third level of central law-making was the appearance of government decrees.* At the outset the government as the „Council of Ministers” was merely a consultative body. Though, at the end of the 19th century there was some legislation under which not only ministers but the Council of Ministers, as a body, was granted material powers. It is worth noting that government decrees are mentioned as late as at the beginning of the second decade of the 20th century (in a period after they had been issued several times and their distinction was justified) as a variant of the „simple” ministerial decree. *Kálmán Molnár* e.g. in his work, „Kormányrendeletek” (Government Decrees) uses the term government decree as a collective concept. He distinguishes three types of such decrees according to the organ issuing them: a) royal decrees, i.e. decrees signed by the king and countersigned by a minister; b) ministerial decrees issued by virtue of royal decision (decrees issued by the minister by royal order); c) simple ministerial decrees (issued by the minister on his own decision). Decrees issued jointly by several ministers are included within this category; these are different from decrees issued by a single minister insofar that „decrees issued jointly by several ministers (signed by all of them) cannot be amended or repealed but jointly by the issuing ministers”. Essentially, Council of Ministers' decrees are regarded as analogous because all ministers have a share in issuing such decrees. But it is also emphasized that Council of Ministers decrees have „distinct subjects defined in Acts”. The observation that such decrees may be issued without a special authorization under Acts of the Council of Ministers „in matters which, due to their universal import concern every ministerial department or have

an impact of the position of the government as a whole", indicate the extending practice of issuing Council of Ministers' decrees.⁴⁶

The government decree, as distinct from the ministerial decree and placed on a hierarchically higher level of the sources of law stroke root eventually as a result of authorizations connected with the state of emergency or time of war. Already Act No. LXIII of 1912 on the state of emergency conferred special powers not on single ministers, not on the head of the State, but on the government. „In time of war, and if necessary, even in case of a threat of war, when military preparations are ordered the *ministry, all of its members being responsible*, may resort to the special powers defined in this Act to the necessary extent" — runs Section I (a) of the Act. It was again the government on which the authorizations connected with the so-called economic rehabilitation in the 'twenties (Act No. IV of 1924) then the economic and financial authorizations granted continuously in the 'thirties were conferred.

The peak of authorizations was reached in Act No. II of 1939 (Defence Act) by conferring practically unlimited authorizations on the government: (the government) "may take measures by decrees coming within public administrative, private law, procedural and legislative authority, which are indispensable in defence interests in situations created by special conditions and may, for this end, lay down provisions at variance with Acts in force" — runs Section 141 (2) of the Act.⁴⁷

The government decree comprised, on the one hand, legal material coming within regulation by Acts, on the other hand it covered statutes belonging to the level of ministerial decrees in matters where, in consequence of inter-relationships, the necessity of issuing enactments at variance with Acts in force has arisen. As regards its outward form, government decree was also published as a ministerial, the Prime Minister's decree. Else the Prime Minister issued decrees within his proper powers in administrative domains where he exercised direct supervision (e.g. statistical administration).

It has already been indicated that in the post-1945 period special authorizations contributed to the widening of the government's decree-making powers. The periods of transition in which other variants, beside the known institution of the government decree, augmented government-level law-making should be pointed out. In the period between 1946 and 1948 the orders of the Supreme Economic Council, then between 1949 and 1951 some resolutions of the People's Economic Council appeared as sources of law placed between the government decree and the ministerial decree. Between 1951 and 1952, although for a short time, ministers did not issue decrees and, in principle, the functions of the ministerial decrees were taken over by government decrees. (This meant in practice a swelling in the number of both the government decrees

⁴⁶ cf.: Molnár, K.: Kormányrendeletek (Government Decrees). Eger, 1911. p. 20 et seq.

⁴⁷ The authorization precluded only the amendment of the organization of the supreme State power and the system of local governments; in addition, a special authorization was required to amend substantive criminal law provisions. Otherwise such decrees had to be submitted to the 36-Member Committee, which had right to ask the government to provide information, to propose the calling of Parliament. The Committee's decision however had no effect on the execution of the Decrees issued. (The Committee's 24 members were elected by the House of Deputies, 12 members by the Upper House, from among their respective members. It was working on the model of the House of Deputy Committees.)

and instructions.) The endeavours aimed at replacing, in given cases, by government resolutions and their publication government decrees even when the subject coming under regulation should obviously be regulated by a decree, indicate the augmentation of the forms of government-level law-making.

c) Not taking into account transitional forms and examining sources of law functioning at present it may be concluded that *over a period hardly longer than a century the originally one-level central law-making ramified essentially into a six-grade law-making.*

As it is to-day, three grades of legal sources comprise the legal material coming essentially within Act-level regulation: Act, the Law-Decree and, in part, the government decree. If the ministerial regulation drawn within the ambit of government decrees is not considered, it will be found that the field regulated earlier by ministerial decrees may be divided into at least three grades. In other words: the ministerial decree has been retained; the institution of normative instructions has survived unchanged (to simplify matters instruction by Secretaries of State are included within this category); in addition, interpretation by the law-applying organs, — i.e. the positions adopted by ministries — which is susceptible to raise doubts in respect of the actual provisions of ministerial decrees and instructions has again come to occupy its place or perhaps it is even being increasingly extended. When describing the grades, the special acts which mean the introduction of additional levels into the material of some legal branches (e.g. labour law, financial law) were deliberately omitted.

Attention should repeatedly be drawn to the fact that a differentiation of the levels and grades of law-making is essentially a necessary process and is but a consequence of the differentiation which, due to changes in the role of the State is reflected in the development of the methods and means of legal regulation. Still, the extent to which grades had been growing cannot be so unequivocally approved. It is not certain either whether the random practice in making use of various levels and grades can be justified. In respect of certain subjects one or, at most, two levels of statutes contain the directly applicable rules, while in other instances law-applying organs must take into account all the criteria of legal regulation in finding the law in force. In all probability law-making methods which make possible that the grades of regulation be diminished compared to the situation as it is to-day, in respect of a considerable majority of subjects to be regulated, can be worked out. This is particularly important in legal domains which directly affect citizens' rights and obligations.

d) In this context the *feasibility of reducing regulation levels will be dealt with only in one respect, namely the legislative activity of the Presidium and the government.* It is likely that no result can be expected from a negative approach of the problem. Accordingly, the topic to be examined is not from what forms or fields of legislation should the Presidium or the government be kept off or prohibited. Instead, having in mind the principal functions of both organs, with a view to furthering a more efficient discharge of these principal functions, the possibilities of development perspectives should be outlined.

The principal functions of the Presidium have already been dealt with. If the government's principal functions are to be formulated, the recent constitutional amendment will serve as a guide. This constitutional amendment

affected the Council of Ministers' powers and duties in several respects. Generalizing practical experience gained during the development after the adoption of the 1949 Constitution, the government is not termed as the supreme public administrative organ but the so-called governing activities are placed into the foreground of its activity. This means that the constitutional amendment strongly emphasized the difference between the government and the supreme organs of specialized administrative branches. The government is not a super-ministry under collective leadership, but the principal organ of the general management and direction of State work. The first place among its duties came to be occupied by the formulation of State policy and the securing of the realization, highest everyday direction and organization of this policy.

In the new wording of the Constitution the protection of State and social order, the securing of citizens' rights is in the first place among the Council of Ministers' duties. Under conditions in the socialist State this means not only a formal, i.e. legal securing of rights but comprises the care for material guarantees necessary for their actual realization. The constitutional amendment laid down the Council of Ministers' powers and duties already in accordance with this higher requirement. Unlike the earlier formulation, the Council of Ministers shall be responsible not merely „for the implementation of the national economic plans”, but also for the „elaboration of the national economic plans”. In addition, the Council of Ministers shall determine the trends of development in science and culture, the system of health and social services, shall attend to providing the necessary funds. The Council of Ministers' function in foreign policy is likewise emphasized as a new element in the constitutional amendment. Otherwise the leading role of the government in the elaboration of State policy is set forth in the constitutional amendment also in other respects.

By providing for [Section 19 (3)] the discussion on and approval of the government's programme as coming within Parliament's powers it imposed, although in an indirect form, the duty on the government to formulate a guiding programme for a period for the State work as a whole.

All this goes to show that the Council of Ministers has an unchanged key role in transforming the policy of the Marxist—Leninist Party into State policy in the State organization, in formulating and in elaborating concrete tasks, means, methods and processes which enable the State organization, the basic tool of socialist construction to serve best the realization of this policy. The leading role of the highest organ of the Party has of course a direct effect also on the work of Parliament and the Presidium since the possibility of direct contact between central Party organs and government-controlled State agencies is not (and cannot) be precluded. But the government's tasks as laid down in the Constitution indicate that it is the government which is the organ within the State organization with which these contacts are the closest. The Council of Ministers, when working out State policy relies, beside the Party's directives, also on information obtained from the entire field of State and social activity.

The Council of Ministers discharges its tasks following from Acts, Law-Decrees adopted by the supreme representative bodies, from their resolutions and from its own enactments obviously not directly but by relying on the entire State organization. This is done mainly by directing, coordinating and controlling its subordinate organs. In addition, the Council of Ministers takes

into account the fact that agencies not under its control discharge tasks incumbent upon them by virtue of the Constitution, Acts and other statutes observing the objectives formulated by the government. This statement applies also to the judiciary and the procuracy. The government may usually make proposals, recommendations to agencies not under its control. Besides, it may entrust organs of procuracy with the performance of specific tasks. But, usually, it may mould judicial law application periodically by laying down principles of the policy of law application. It may initiate actions with supreme representative organs in instances when the actions to be taken exceed its powers. The government, while discharging its own functions, cooperates with the social organs concerned.

The government's participation in national legislation should be placed within this framework. When the problem is so approached it becomes obvious that the government's tasks in legislation are not limited to issuing government decrees. It may be stated without exaggeration that the scope of duties discharged by the government in initiating the introduction of Bills, draft Law-Decrees, in examining such drafts and Bills and in preparing them for Parliamentary discussion is much more significant than the adoption of decrees. Otherwise the government's increased role in preparing legislative actions has become a world phenomenon by now. The overwhelming majority of Bills is prepared by the government in every State and they are adopted as proposed by the government. In socialist States it is obvious that it is only the government which has sufficient information not only for the preparation of Bills but it is in a position, during the Parliamentary discussion, to provide information, as the representative of overall social interests, on the justification of the Bill and the possible novel provisions contained in it. It is again another matter, which concerns legislative technics, to what an extent does the government rely on ministries in the preparation of Bills and motions, on its own staff, on committees working as direct government organs and the ministries specialised for preparing legislation, i.e. the Ministry of Justice.

In addition to initiating the introduction of Bills and Law-Decrees the government has significant potential powers in connection with the issuing of ministerial decrees. „The ministers head, in accordance with statutory provisions and the Council of Ministers' Resolutions the public administrative departments under their authority and direct the organs under their control” — so runs the Constitution. This means that the ministers are controlled by the Council of Ministers in their entire activity, decree-making included. The government has therefore powers to adopt a resolution in every instance when deemed necessary, on the issuing of ministerial decrees. In such instances the Council of Ministers may determine the limits or even details held essential by it of the decrees to be issued.

Lastly, it is a very important power of the Council of Ministers that it may coordinate, control the merits of the legislative activity of the entire State apparatus, the ministers included. It may examine the expediency, the legality of decrees, it may repeal, reverse such decrees. It has powers to exercise preliminary or subsequent control. (It has powers, in principle, to order the preliminary presentation of all draft ministerial decrees.)

e) After what has been expounded the *proposals on the delimitation of the legislative activities of the Presidium of the People's Republic and the Council of Ministers may be so summed up.*

The solution which emphasizes the importance of governing functions in the Council of Ministers activity appears to be the most obvious, in other words: in the domains coming within the powers of the Council of Ministers the elaboration and determination of State policy, the guidance of ministries in matters of principle, its coordination and control; in matters exceeding the government's powers, taking initiative with the supreme representative bodies for taking appropriate action. If the level of government activity would be so raised it would automatically involve a diminishing in the government's direct legislative activity. The regulation of matters of general concern would be on Act-level legislation, in accordance with the principles described before: a regulation deemed to be lasting and stable would come within the ambit of Acts; matters, qualified as pertaining to Acts but subject to more rapid changes would be regulated by Law-Decrees. Regulation not affecting general interests, i.e. of a branch significance would be performed by ministerial decrees. It is in the first place the government's initiating, directing, coordinating and controlling role which would be strengthened in the government's legislative activity. This presupposes the efficient functioning of a control mechanism — also on government level — which would be capable of securing that rules coming within regulation by Acts, Law-Decrees or government decrees should not be included in ministerial decrees.

As it is seen, all this does not mean that the possibility of issuing government decrees should be precluded. This means only the outlining of trends which may serve as an orientation for legislative policy. The retention of the possibility that the government should have powers to issue decrees in every instance when it deems it necessary to more efficiently discharge the tasks incumbent on it is fully compatible with this concept. Every idea attempting to restrict by legal or constitutional means the government in the exercise of these powers would be mistaken on a point of principle.

6. In addition to the issuing of Law-Decrees several tasks concerning central legislation come within the Presidium's powers. In the first place duties connected with the *control of constitutionality and law interpretation should be mentioned* within this scope.

a) The scope of duties relating to the *control of constitutionality* is manifold. The Presidium has in this domain substitutive and proper powers. The control of constitutionality relating to the organization and working of the councils displays special features within its proper powers.

As regards tasks coming within its substitutive powers several constitutional provisions relate to Parliament's responsibility in protecting constitutionality on the highest level. Under Section 19 (2): „Parliament shall secure the constitutional order of society”. Under Section 19 (3) (1) Parliament „shall control the observance of the Constitution, shall repeal acts of State organs violating the Constitution or infringing the interests of society”. The Presidium, acting within its proper powers, „shall guard over the implementation of the Constitution and shall repeal or reverse statutes, public administrative decisions or acts which violate the Constitution”. [Section 30 (2)].

I think it will be worthwhile to point out briefly the difference between the two constitutional provisions. Parliament's powers of supervision are wider. These comprise the entire State organization and point, in addition to the duty of observing the Constitution, to the general interests of society. The Presidium's proper powers are more restricted, since they extend only to acts

of public administrative organs and statutes and are more closely linked to the Constitution. In addition not only the „observance” of the constitution but also its „implementation” is emphasized. In other words it is not only a protection against explicit constitution-violating actions which is envisaged but protection is offered also against omissions which impede the realization, practical implementation of the Constitution. Accordingly, the Presidium is bound to attend to the enactment of all the statutes which are indispensable for the implementation of the Constitution. The government, laying down the Presidium's powers following from the constitutionality supervision over the councils, cedes the protection of the councils' rights to the Presidium. The Protection of the councils' rights means the protection of the rights of the councils as representative organs. Under this constitutional tenet the Presidium has powers to reverse or repeal a) individual acts infringing the independent powers of councils as set forth in statutes and b) every statute which annihilates or impairs the councils' powers as set forth in the Constitution and statutes. The latter right of the Presidium constitutes a part of the system of institutions protecting the constitutionality of legislation.

Several problems, which have not been clarified up to now, may be raised in connection with the Presidium's powers of supervision over the constitutionality of legislation. A few general problems will be discussed now in this context.

It should be made clear first of all whether the powers of supervision over the constitutionality of legislation with which the Presidium is vested is to be conceived a preliminary or subsequent supervision. It is obvious that this is a case of subsequent supervision; the Presidium may examine the constitutionality of a statute only after it has been enacted. The feasibility of a preliminary supervision might be raised only in one instance, in connection with draft Acts or Bills submitted to Parliament. Several socialist constitutions namely recognize such powers of organs which are similar to the Presidium. In all probability this is unnecessary in Hungary. Parliament should continue to exercise its functions relating to this task. It should be first of all the Legal Committee of Parliament which should be vested with powers of supervision over the constitutionality of Bills. In respect to other statutes the Presidium is bound, when discharging subsequent supervision, to act *ex officio* if it finds that the constitution has been infringed. It may have a knowledge of infringements of the Constitution through the channels of the Citizens' informal right of complaint or through notices of public interest. In addition, however, some procedural questions ought to be settled also in this domain. Thus, e.g. the cases when the Presidium is bound to decide on the merits and to give an answer to proposals, notices brought to its knowledge might be determined. It might be laid down e.g. that the Presidium is bound to decide on the merits of notices brought to its knowledge by the Procurator-General, the Supreme Court or its President, the centers of major social organizations and the councils acting as bodies. Its procedure might also be regulated. (The Presidium itself will examine the case or will enlist the services of experts, will form committees or will rely on the Parliamentary committee concerned or the Legal Committee.)

b) Unlike other socialist constitutions, the Hungarian Constitution does not provide for the Presidium's powers in the field of *law interpretation*. This is accounted for by the fact that the Hungarian Presidium has general

substitutive powers in the place of Parliament (constitutional amendment excluded). Accordingly its legislative powers are so wide that a particular provision on its powers in the domain of law interpretation was not deemed to be necessary. The Presidium is namely vested with the right of the binding interpretation of Acts by virtue of its proper powers respectively of its substitutive powers, without particular constitutional provisions, between Parliamentary sessions and, the right of interpreting Law-Decrees issued by itself, also during Parliamentary sessions. All this is not tantamount to stating that a high-level statute on the preparation, forms and legislative powers could not explicitly provide for the Presidium's powers in the field of Act or, in general, law interpretation. Such a regulation would contribute to the stability of Acts. It should not be ignored either that the guiding principles and decisions on matters of principle adopted and issued by the Supreme Court cannot be substitutes for such activity of the Presidium. These bind namely only the judiciary and not the State apparatus as a whole and are therefore not qualified as generally binding acts of law interpretation.

Otherwise when the Presidium's powers in law interpretation are laid down, provision on its powers on Act interpretation would suffice. A reference to the highest-level source of law would express completely the Presidium's powers in law interpretation. The question might be raised this notwithstanding, that this formulation would not cover the interpretation of the Constitution. But there is no need to formulate within such a wide scope the Presidium's law interpreting powers. The less so, because the Presidium is vested with such powers, to the extent necessary to discharge its functions within the limits of the functions devolving upon it from the protection of constitutionality. But when so acting the Presidium is not a legislator but a law-applying organ. In other words the Presidium has no powers to issue acts specially on the interpretation of the Constitution but, when deciding in concrete cases in the course of protecting constitutionality and legality it necessarily also interpretes the Constitution.

When laying down the powers in the domain of Act-interpretation certain problems of procedure should also be settled, among others the right of initiative. It is obvious that the Presidium may at any time take the initiative to issue an interpretation. In addition, this right could be secured also for the Supreme Court, the Procurator-General and the Council of Ministers. The Council of Ministers has, in fact, such powers to-day. The Council of Ministers has namely the right to initiate the preparation of Bills, which right comprises also taking initiative in Act interpretation. Furthermore, the form of interpretation might also be settled. The Presidium has the right to-day to issue interpretation in the form either of Law-Decree or normative resolution. These forms have stood the test. Whatever form is resorted to by the Presidium the generally binding law-interpreting acts should always be published.⁴⁸

Surveying the Presidium's functions in the central mechanism of legislation and prospective developments, how the problem that the wide powers the Presidium has within its substitutive authority can affect the relationship

⁴⁸ The law interpreting powers of the Presidium are discussed in detail by Szabó, I.: *A jogszabályok értelmezése* (Interpretation of statutes). Budapest, 1960. p. 494 et seq.

between Parliament and the Presidium and to what extent can these have an impact on the Presidium's relationship to the political mechanism conceived in the wider sense, should also be discussed. The question arises: by what is it accounted for that the Presidium's forms of activity have remained essentially unchanged since 1949. Its relationships to the political mechanism as a whole and Parliament (its organs working between its sessions) have not been expanding either. The question can obviously not be answered by stating simply that the Presidium or similar organs have no historical roots in the country.

When discussing the kindred institutions in people's democratic countries and the Soviet Union the more or less general trend that in these countries the recognition (or widening) of the substitutive powers was accompanied, in general, with the increased emphasis on and strengthening of relations between Presidium-type organs and the supreme representative bodies, the growing of Presidiums into some sort of small Parliaments, has already been referred to. This applies obviously not only to the organization and working methods but involves consequences as regards the forms in which this activity is discharged. When describing the work of the Supreme Soviet's Presidium it has been indicated that this development does not necessarily imply changes in earlier constitutional patterns. The Supreme Soviets' Presidium remoulded its activity without a formal constitutional amendment.

It is clear that initial steps have been made to establish closer relationships between Parliament and the Presidium. The amended standing orders of Parliament provide possibility for the Presidium to solicit the views when preparing Law-Decrees, the Parliamentary committee concerned. Still, proposals on the gradual harmonization of the Presidium's forms of activity, its working methods, with the important functions discharged by the Presidium in its substitutive powers are awaiting further elaboration.



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