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PROBLEMS OF CODIFICATION DURING THE AUSTRO-HUNGARIAN MONARCHY

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The study aims to discuss three topics briefly. First the individual moments of the law-making process are described by discussing the problems of law-substituting decrees, then the role of the Curia (The Supreme Court of Justice) in codification will be dealt with, and finally, the increasing role of codification in building the bourgeois state will be treated.

Keywords: codification; Curia; judicial law decisions

1. THE MECHANISM OF LAW-MAKING – THE ROYAL POWER OF PRELIMINARY ROYAL ASSENT

Preliminary assent by the King

In the bicentral Monarchy, the first phase of the legislative process was bound to the discussions of the Council of Ministers. It was this forum where the contents of the ruler's speech at the opening session of the parliament were outlines as a preparatory work. For example, such preparations for the parliament of 1869–1972 were made by the ministers at three consecutive sessions.[1]

The ruler's opening speech was to contain the list of legislative subjects on which the ruler's government wanted to submit a bill for approval by the House of Representatives and the Upper House. This royal speech served not only as a regulative register of the agenda, but also as a constitutional guarantee. This is connected with the existence of the royal *power of preliminary assent*. This topic has provoked major disputes in the legal literature. Of the Hungarian historians, Béla Sarlós, author of the monograph on *"Public Administration and Power Politics under the Dualistic Regime"*, "created a big stir" with his proposition that "the Hungarian parliamentarism could only exist within the framework of the

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1867 Compromise, nor could, however, the dualistic regime be maintained durably without parliamentarism".

This proposition of the eminent scholar of this topic is nothing but the coupling of Act III of 1848 with the right of budgeting. "Thus the government could not submit its budget to the Parliament without a preliminary consent by the king, and by this the king was granted a new power, one which the 1848 Acts had not known, one that was in sharp contrast with the provisions of Act III of 1848" (Sarlós 1976).

His conclusion drawn from the above thesis is somewhat exaggerated, and hence disputable. Namely, by this statement, the author raised *a "government-technical" pact* to the rank of constitutional theorem of the responsible government. At the same time, the author also has a feeling of uncertainty, when he mentions that in respect of parliamentary bills, the king's power of preliminary assent can in one way or another deducted from the practical application of the king's power of subsequent assent, but this does not apply to parliamentary submissions concerning the budget.

In my personal opinion, this so-called power of preliminary consent is in no way a constitutional principle. And if it is not such a principle, it should not be correlated with the budget. Submitting the annual budget for approval by the Parliament seems to be an axiom in any parliamentary democracy, since it is this way that a responsible government asks for authorisation for spendings within the bounds of the budget. The approval of the budget by the Parliament (appropriation) is virtually a vote of confidence. The Appropriation Act will be valid for one (calendar or fiscal) year. Should the Parliament reject the report on the execution of the appropriation act, the responsible government would be reduced to a state of *ex lex*. It was to avoid this situation that the so-called indemnity was introduced, an authorisation for a particular period of time, permitting the government to husband the public funds within the limits of the previous year's budget. Thus budget law is a constitutional issue as it excludes the possibility of governing without the Parliament.

The royal power of preliminary assent, then, is nothing else but a bill drafted on a subject included in the king's speech, which after having been discussed by the Council of Ministers, but before submitting it to the Parliament would be presented to the ruler through the minister *a latere* for the ruler's preliminary information; then the ruler would give his assent to the parliamentary debate *in merito* over that bill. Thus the *power of preliminary assent* can be seen as a *fiduciary covenant* between the ruler and his government, similar to the *Pragmatica Sanctio* in the 18th century. Though it was the Parliament's due right to exercise control over the whole of the executive power, the ruler – over and above the parliamentary control – would retain his "absolute" power in "three affairs". The

1723 *Pragmatica Sanctio* had not known common affairs yet, hence the ruler had been able to reign with his dicasteries, but the 1867 Compromise concretely circumscribed the content of the ruler's powers in common affairs, which, however, the ruler – regarded as a third legal entity – could only exercise through the responsible government. This limitation permitted the survival of the "decree in governmental matters", that is, the survival of the former *Pragmatica Sanctio* in the royal power of preliminary assent *(pragmatische Angelegenheiten)* (Hellbling 1956).

General and particular debate

Having been screened through the preliminary assent, the draft, now as a bill, would be presented to the competent committee of the Parliament for further scrutiny. Sent out by the House to take care of the bill during the parliamentary process, a person as *rapporteur on behalf of the central committee* was to see that all professional observations, committee proposals were properly taken into account. The bill's discussion before the Parliament was divided into a *general (first reading) and a particular debate (second reading).* During the general debate, the competent minister's statement was to give reasons for the necessity and importance of the subject to be regulated by law, completed with the related legal-policy arguments. This general debate was followed by a debate on the articles, aimed mainly to the revision or acceptance of the standard text. Thereafter the bill would be submitted to the Upper House, where, again, general and particular debates (i.e., first and second readings) were to take place. Proposals and modifications made by the Upper House had no binding effect on the House of Representatives, hence the latter were not obliged to accept them *in merito.*

Serving to sum up all what had happened during the debates in both Houses of Parliament was a *prime-ministerial summary report.* Then the bill so debated together with the summary report was submitted by the Prime-Minister and the minister *a latere* to the ruler, who would authenticate it with the usual formula: "... I endorse the submission of my Hungarian ministry with my signature and seal." So sanctioned, the bill (act) was returned in the same way both to the House of Representatives and to the Upper House where it was read before the representatives and members, respectively. The text of the act would then be sent to the *Hungarian National Archives* and to the editorial office of *National Collection of Laws*. The former made the laws available for use by historians to investigate regularities in the state's operation, while the latter published them in an official form, permitting the use and application of the texts in the legal practice.

Problems of law-substituting decrees

It is a classic principle of the balance between the legislative and the executive power that the government's independent law-making activity should be restricted to the so-called executive orders (also known as implementing statutes), issued on the basis of a law. In the development of the regulation of subjects of legislation, in addition to the *French revolutionary conception – the effects of the Austro-German solution and view of history* were also clearly marked. A detailed analysis of the interactions and development of these views, along with the systemising of the related legal literature can be found in the excellent study of István Kovács (1973).

Hungarian legal literature in the 19th century – *mutatis mutandis* – used the historical approach, going beyond even Ferenc Deák's compromisie-oriented standpoint he had taken in the so-called Lustkandl-dispute, and recognised the independent law-making powers of the ruler and his government (Deák 1822). This law-making power was based on the introduction of a new category, that of the so-called law-substituting decrees.

Deák regarded those rules as law-substituting decrees, which were issued under legal authorisation to bridge gaps in law, and also decrees issued – instead of a law – on such subjects, which needed proper legal regulation, but this had not come about yet in an ordinary legal procedure. The two latter types mean the recognition of the government's original law-making power.

However, the above-mentioned formula could be put into practice only after the turn of the century. In the slowly rising bourgeois government systems, thus in the post-1867 Hungarian development, too, a certain progressivity can be observed. It was a general phenomenon that each of these government systems tended to return to the organisational principle of the division of power. As to the phases of this process and the evaluation of the functioning of the state apparatus so developed, no uniform and unambiguous position has been taken even by the present-day legal literature. There were also views which considered the repeated 19th-century revival and implementation of Montesquieu's "triad policy" as a means "suitable to force the increasingly uncomfortable representation into the background" (Schmidt 1973). Without going into the detailed analysis of all views here referred to, we only mention that such a decisive role cannot be attributed solely to the institution of representation. The adoption of the classical principle of the division of power in building the required state organisation – with respect to political compromises between the bourgeois and feudal forces, too – originated from a rational compulsion. To strike a balance among the legislative, executive and judiciary powers was a goal only until the government system serving the interest of the ascending bourgeoisie had not become established. Then,

as a regular consequence of the concentration of power interests into party-policy interests, the relative balance would be lost – always to the advantage of the executive power. This process was characteristic of the post-1867 Hungarian development as well.

Coming to prevail in the 1860s was the view that issuing decrees on subjects which had not been regulated by law was only acceptable in case of urgency or under extraordinary circumstances. However, as a condition of the validity of these law-substituting "complementary" decrees, it was required that the government submit the Parliament a proposal for the earliest possible proper legal regulation of the subject concerned. From the 1880s onwards, especially after the turn of the century, urgency as a criterion for the government's power to issue such decrees was no longer included in the inventory of requisites for legality in a bourgeois state.[2]

2. THE ROLE OF THE CURIA IN THE CODIFICATION PROCESS

The participation of the Curia as supreme court in codification was two-directional. It proceeded on its own initiative on the one hand, and upon request of a minister on the other.

Modification of the law of civil procedure

Most important among the Curia's initiatives – in the period following its formation – was its scheme, which virtually induced a major modification of the Hungarian *code of civil procedure.* Its related submission to the ministry, written in a modest tone, gave reasons for the proposal of the freshly formed Curia for the revision of Act LIV of 1868.[3] The proposed changes affected three subjects.

First it was proposed that the *provision concerning petitions submitted after the expiration of the deadline* (Art. 282) should be made unambiguous. Namely, it was a frequent occurrence at lower courts that nullity pleas lodged with the court in due time would be rejected owing to inaccuracies in the text of the law. Initially the Court of Cassation had insisted on the literal application of law, starting out of the supposition that the incorrect practice was only a casual one, and though the plea was justifiable, yet it could not be entertained. Thus in this respect, the operation of courts of first instance was a veritable source of errors, which made further possibilities for arbitrary conduct of those forums inadmissible. Therefore the Court of Cassation decided to "place greater emphasis on the aims of the law than on its literal meaning and interpretation" – thus only

those nullity pleas would be rejected which were submitted really after the deadline. The detrimental effects of this measure, that is, appeals against judicial decisions that rejected appeals lodged really past the deadline, were thought to be eliminated by imposing considerable fines. Though Article 303 of the procedure permitted culpability, but this applied only to those who lodged a nullity plea "and" appeal against NE and the same decision and their complains was quite unfounded. But taking the opportunity of legal remedy without formal appeal, and without any good reason, entailed the culpability of those having a strong penchant for litigation for its own sake. Thus the change of this article largely served the interests of the Court of Cassation.

The second proposal encouraged the *elimination of abuses experiences in the procedure of summary courts*, and also aimed to have Articles 117, 124 and 125 of the procedure observed by a ministerial order. Some telling examples, adduced below, give a true picture of the contemporary practice of the courts concerned. Some of them are outlined below in the order of the cited articles.

Instead of clarifying the actual circumstances, the leaders of a summary court trial left this task to the litigating parties. Furthermore, they permitted the litigants to keep the records themselves of their lengthy disputes as if these had been formal oral arguments. In such summary actions, the court would not pronounce its sentence immediately, but would sent it in written form to the parties concerned. In cases of immediate delivery of judgement, the judge would not fulfil his obligation of informing the parties on the possibilities of legal remedy, but even if he exceptionally did, he would only include it in the records. "Not infrequently did cases occur when the judge, not comprehending the difference between appeal and appellation, incorrectly recorded the legal remedy required by the litigating party, thus excluding him from the its use."

The third part of the Curia's proposal expected the clarification of points 1 and 2 of Act XIX of *transitional orders concerning the judicial changes*. As to point 1, the problem to be clarified was whether or not – apart from simple police cases (misdemeanour, minor offenses) – in other cases subject to civil procedure *nullity plea can be lodged* with the Court of Cassation. Point 2 provided for the sustaining of the effect of the lend registry regulation of 15 December 1855 by adopting some of the modifications of the Provisional Rules for Judicature. While the appeal system of the new judiciary procedure knew of appeal and nullity plea, in cases regulated under Part II of the Land Registry Patent appeals against decisions should take the form of a *bill in equity.* To resolve this contradiction, the Court of Cassation introduced a practice which served in no way the interests of the litigant parties. Complaints would always be rejected by giving the claimants the instruction that complaints against decisions made in land registry cases were subject to bills in equity rather than to nullity pleas.

Stances of the classes of the Curia

The Curia played a catalysing role in eliminating the anomalies of the administration of justice, as well as in preparatory works for new legal regulations. So much so that later, as an introduction to a partial legal regulation, the Minister of Justice himself invited the two units of the Curia (namely, the Court of Cassation and the Supreme Court of Justice) to work out possible ways and means of filling up gaps existing in judicial practice.

Discussed at several council meetings, the committee reports of *courts of appeals* encourages the government, and the related summary of the Supreme Court of Justice produced a direct effect on making the mentioned laws. Prepared by the three-member committee of the Court of Cassation, a memorandum of some hundred pages practically cut the whole code of procedure to pieces, analysing it from article to article, and adding new proposals to it, finally turning it into a new document indispensable for the ongoing codification. Here we should refrain from its analysis in detail, it will suffice to emphasise that this work involving the revision of the whole field of contemporary Hungarian civil law and procedural law offered a veritable treasure-trove of possibilities.[4]

A decision made by the *cassation department of the Curia* on 21 May 1870 is another example for the Curia's creative participation in law-making. The reason underlying this decision followed, again, from the contradictions of the existing regulations. In simple police cases, the procedures in increasing numbers had to be ceased, owing partly to complaints, partly to official notifications by appellate courts. The code of procedure relegated the judgement of simple police cases (Art. 93h), subject to summary procedure, to the jurisdiction of urban magistrate or his deputy. However, Article 19 of the introductory act, the procedure for this type of cases, affirmed the related clauses of the Provisional Rules for Judicature, which prescribed the competence of the municipal police captains, the latter still in effect. This casual and haphazard application of clauses of various laws quite naturally involved massive annulments.

In its position adopted in this issue, the Court of Cassation started out of the fact that the cassation of decisions made by the municipal police captains – who were to deputise for the overburdened judges in simple cases of minor value, which require no urgency, and occurred in places far from the judge's residence – was incompatible with the actual needs of practice. Abstaining from modification, the court's decision called the minister to designate as *officio* the municipal policy captains to proceed as deputies for judges in all future simple policy cases. It was on the basis of this decision that the general order 10147 IM. of 1 June 1870 was issued. An interesting feature of this order was that the Ministry failed to send its text to the Court of Cassation, so it was only published for official use

by courts in the *Budapest Official Gazette* as an "announcement".[5] Referring to the practical significance and necessity of the Court of Cassation were also those massive municipal petitions, which also urge on the *ex officio* designation of municipal policy captains to proceed in simple police cases, and which would be all fulfilled in rapid succession by the Minister of Justice.[6]

The Curia's active role in law-making is also hall-marked – in addition to its own initiatives – by a great number of expert opinions, standpoints, proposals, etc. made on invitation by the Minister of Justice. Most of such invited advice resulted from the lack, obsolescence and contradictions of substantive and procedural rules. To the minister, who refrained from interfering with the decisions of courts, regular information had to be supplied on the practice followed in the individual cases, on the rules of law applied, as well as on the sustainability or desirable modification of those rules, or even on the proposed way of making new ones.

Of these highly extensive activities, we only mention a few types, mainly those of organisational relevance. *First of all, there is the Curia's official position, aimed primarily at the unification of the judicial practice, which defined the circle of those entitled to lodge appeal against verdicts of acquittal.* Formerly, attempts had been made to eliminate the widely different practices of criminal courts by ministerial decrees. Generally, by referring to punitive statutes and the established legal customs, the prevailing view was that the right to appeal against verdicts of acquittal was only invested with the municipal "public attorney". Notwithstanding, in certain cases, "the purity of penal judicature" made it also desirable to afford a possibility to a private accuser to appeal against a verdict of acquittal. Hidden behind this problem was the requirement to enforce the age-old principle of distributive justice. Namely, if the penal statutes and customs permitted the accused to apply to a higher court for the mitigation of a punishment he deemed injurious, then – according to the principle of distributive justice – the injured party, if suffered losses in his material interests (e.g. fees for medical care, pain award, loss of working days, damages), had equal right to legal remedy in the same way. The mentioned degree ordered the criminal courts – through the municipalities – to abide by these principles, underlining the task of municipal attorney in this matter. In case the counsel for the prosecution waives his right, because of either guilt or acquittal, the court is bound to preceed *ex officio* to meet the mentioned demands and to forward the complaint to the appellate court.[7] Though disapproving this solution, the Curia still opted for the sustaining of this decree, and warned the minister against making further partial changes – at least until new legislative measures –, because such a change would have gone hand in hand with "wavering of the judicial practice now beginning to rise and become stabilized".

Parallel existence of the old and new law

Another group of positions taken by the Curia sought to untie the entangled complex of coexisting old and new rules of law. In this case, the main effort was directed to harmonise the widely different views and approaches of such institutions as the Ministry, the Supreme Court, the Court of Cassation and the Directorate of Royal Affairs (Legal Directorate of the Treasury).

First a few comments must be made on the latter institution. As is known, initially, in the feudal age, the director of royal affairs, the "attorney of the Crown", working with the Pozsony-seated Royal Treasury, had acted as the legal representative of the treasury. In certain cases such as infidelity, high treason or counterfeiting, he had also acted as public prosecutor. In 1848, the supervision over the treasury affairs was divided into two parts. The Ministry of Finance was to represent the Treasury in matters concerning property law, while the Ministry of Justice took over its functions as public prosecutor. During the absolutistic regime, the former function was taken over by the offices of financial prosecution, and the latter by the offices of public prosecution (IM 1962; Szita 1976). The system of financial prosecution survived even after 1867. The reorganisation process was accompanied by – among other things – a remarkable event with a personal aspect, which required a certain intervention on the part of the Council of Ministers. Károly Ráth, Director of the Royal Affairs, made a grievance of the fact that the Finance Minister's proposal for the organisation of offices of the royal financial prosecution was approved without asking him as the attorney of the Crown to give opinions. Built upon a ministerial promise, he finally agreed to keep his mentioned office on the proviso that he would be appointed the head of the newly organised offices of the financial procution.

Thus the Council of Ministers could do nothing but to take over Ráth, the former *causarum regalium director*, to head the new financial prosecution-organisation, and affirm him is his due powers.

After outlining these antecedents, we return to the *disagreements among the three institutions concerning the right to commission judges*. It is important to remark it in advance that in this particular case the Curia's opinion was defeated by that of the Ministry. The controversy was virtually aroused by the question of whether or not the former legal practice followed during the *banknote counterfeiting trials* could be continued in the future. In the organisation of the old Curia, the Royal High Court of Justice occasionally acted as a commissioned court. During its existence there were several attempts – as proven by many cases – to make the practice of commissioning to conduct lawsuits a general one. But the Curia had not been able to achieve this either of the early 19th-century Reform Era, or in 1848/49, or afterwards. Although the Curia had made every effort to

achieve such an extension of its powers even by putting forward a draft statute (in 1817). (It was he the royal ordinance no. 15411 of 13 December 1817 on the establishment of the Vienna National Bank, from which the Curia learned – among other things – that proceedings against banknote counterfeiters should be stated according to the domestic laws, that is, under Articles 47 and 48 of the Statutes of the Vienna Bank.)

The Curia's endeavours were the – almost half a century later – embraced by the then director of royal affairs, who applied to the Septemvirate Court to persuade them to "commission" the Royal High Court of Justice as permanent court to conduct penal proceeding where the Treasury was the claimant. According to the related article of the Provisional Rules for Judicature, however, this was not possible. So the practice of occasional commission was continued. Except the partly different practice in the last years of the old Curia, when in proceedings against the counterfeiters of state banknotes, instead of Act 12 of 1723, Act 9 of the same year on infidelity was applied. But in such cases, the Royal High Court was to proceed, by its regular competence, not needing any special request by the Directorate of Royal Affairs. This procedure was adopted by most courts of justice. Not so the ministerial decree which continued to maintain the occasional commission of the Royal High Court of Justice in cases of banknote counterfeiting, with the only change that the Ministry arrogated the right to enforce this to itself under Article 57 of the code of procedure. In the cases of counterfeiting banknotes (of 10 crown, 1, 5 and 50 forint denominations), Act 9 of 1713 was left intact as a standard.[8]

On the other hand, to be mentioned as a negative example for reconciling the conflicting views, is the acceptance of a higher-court sentence. The Minister of Justice – acting as mediator in reconciling the controversy between the Court of Cassation and the Directorate of Royal Affairs as to the interpretation of some articles of the Press Act – found the standpoint to be accepted. As it happened, the public prosecutor started an action against Svetozar Miletić, editor of the Serb nationality periodical *Zastava*, under Art. 9 of the Press Act, when the verdict induced a nullity plea which may have been the ground for lodging a complaint against the court with the Minister of Justice. The Minister invited the President of the Court of Cassation to take the necessary measures within his own competence, "provided the complaint is well-founded". Apart from pros and cons, the Curia thought to bridge over the difficulties arising from the vague formulations of Articles 9, 10, 19 and 28 of the Press Act (Act XVIII of 1848) not by a grammatical method, but by a logical interpretation. So he dismissed the accusations of the Director of Royal Affairs, and referred to connections between the legally guaranteed periods of prescription and the filing of petitions. At the same time, he somewhat ironically remarked that when the judicial inde-

pendence should be observed and the wording of the Press Act was not accurate enough, the uniformity of judicial decisions could hardly be achieved. Then the President addressed his interpretation of the law to the complainant, accordingly, in cases coming under Art. 9 of the Press Act (violent breach of public peace), the period of prescription is six months, while in case of offences committed through the press as defined under Art. 10 (libeling authorities and bodies) it is two years. Simultaneously, a permanent press council was set up within the Court of Cassation.[9]

The judicial law-decisions

Finally, endeavours for publishing the Curia's rulings and attempts to introduce newer organisational form should be dealt with.

During its whole existence, the one-time Curia produced significant effect on the development of Hungarian law. In agreement with Ignácz Frank's statement, it is undeniable that – owing to the lack of codes and to the unregulated state of substantial law – the Curia's equal verdicts slowly grew into a customary law. The beginning of this process is marked by those 18th century rulings (or leading cases), which were connected with some questions of principles and which as *decisiones curiales* would almost be "sanctioned as law". In addition to the publication of such rulings, later there also arose a demand for that of the sentences of higher courts. The editors of the journal *Jogtudományi Közlöny* (Journal of Legal Sciences) made use of this opportunity until 1869. Since this solution could not achieve the required objectives, and as the size of the journal could not permit even the review-type presentation of sentences delivered by the new departments of the Curia, editor Sándor Dárday experimented with the official publication of decisions and verdicts accompanied by briefings and principled judicial stances. In his scientifically well-founded argumentation addressed to the President of the Supreme Court of Justice, Dárday referred to the beneficial effect of the contemporary foreign collections of this type, with special regard to the volumes of *Journal de Palais, Sammlung wichtiger Entscheidungen K. Bayerns Handelappellationsgerichtes, Sammlung von Entscheidungen K. preu. Ober-Appellationsgerichtes*. Dárday pointed out that while no special binding force is attached to the Curia's verdicts or rulings, the systematisation of principles and making those principles available for the information of lower courts may give them a good orientation in the highly involved legal system.

The publication of rulings was also justified by the fact that under the given system the councils of courts of appeal could nor follow the decisions of the individual senates with due attention. This applied particularly to the civil de-

partments. In view of the circumstances outlined above, the President of the Supreme Court of Justice supported editor Dárday's application. To implement the project, the President ordered every council to keep a book of rulings. Thus, approved by the department, the council notary recorded every ruling with the indication of the number of the given case, and then saw that these records were properly forwarded to the editor to be published in the semiannual supplement titled *Verdicts of the Royal Hungarian Curia* of the journal *Jogtudományi Közlöny.* Civil-law councils – should they take a different position in connection with a similar case – in order to make the adjudicative policy uniform for the future, were to make their decision at a joint council meeting, and forwarded their decision for publication.[10]

The other unit of the Curia introduced – without any external participation – a *Book of Rulings* for internal use only. In this book just the decisions of principle were recorded, omitting the actual circumstances. In addition, decisions of principle were also put down in special records.

It was this practice that the ministry's Department of Codification wanted to chance by undertaking to publish the rulings, each complemented with a brief statement of facts of the case. Essentially, it was only the latter which brought a novel element, which otherwise related only to the principled decisions of the Court of Cassation. Even so, the Curia's opinion of this project was negative. Both the Court of Cassation and the Supreme Court – in a somewhat fault-finding manner – criticised the project for its further burdening the judges in a way highly detrimental to the interests of judicature.[11]

It is indisputable, however, that the Department of Codification could have promoted much better the judicial practice by the official publication and systematisation of rulings.

3. DEVELOPMENT OF THE ORGANISATION OF CODIFICATION

Legal literature in Hungary has always paid close attention to the codification problems, the related theoretical questions of the discussed period, as well as to the evaluation of the main trends in codification and their representatives. An excellent synthesis, which was the last to appear in this subject, thus cited the position the contemporaries had taken in this question: "... the political reaction was flourishing, which, however, had not been preceded by an action" (Dell' Adami 1880). In addition to facts revealed through the many-sided analysis of the literature, certain connections explaining the occurrence, omission or even prevention of "actions" can also be discerned in the changes of organisational forms. This explains why we briefly take a survey – in parallel with the Curia's

above-discussed activity – over the development of the organisational framework of codification. It should be noted in advance that here only the mere outlining of the tendency is possible, and that this survey is based on the records of the Council of Ministers, and parliamentary documents as the material of archives of the Ministry of Justice has suffered serious damages.

The Department of Codification

The sharp parliamentary criticism of the functioning of the legislative department was provoked by the submitting of a credit application of 15,000 forints for codification purposes. As it appears from the reasons of this application, the minister planned to spend this amount for such purposes as the rapid completion of major legislative works, new acquisitions for the Ministry's library, as well as on sending experts abroad to study the institution of jury, and the foreign experiences of the penal administration and criminal proceedings. The required 50% increase of the previous year's budget (1869) became the subject of hot debates, when the question of the repeated revision of the legislative department's organisation was also put up. To wit, formerly, interpellations had urged on the setting up of a council of state as defined under Article 19 of Act III of 1848. (It is to be noted that several articles of Act II, thus the mentioned passage, too, were repealed by Act VII of 1867.) The negative opinions of the House of Representatives about the department's suitability in this respect can be traced back to three factors:

(1) The department's *understaffing* prevented it from meeting the codification requirements covering every branch of private law, including exchange- and commercial-law affairs, penal proceedings if press affairs, and the whole procedural law.

(2) Its bureaucratic organisation prevented it *ab ovo* from enforcing the principle of "several experts–equal authority", since it was a necessary consequence of subordination that the views of departmental counselor would be paralysed by that of a ministerial counselor, let alone the under-secretary of state.

(3) In addition to its normal professional duties, the department was overburdened with a number of other administrative tasks.[12]

This evaluation is not exaggerated, and it may be interesting even today that rules for administration, taken effect on 1 January 1870, thus defined the scope of duty of the *under-secretary of state*. First of all he was in charge of the Ministry's administration.

His further supervisory duties included:

– submissions to be presented to the ruler;
– preparatory work for legal reforms; elaboration of the principles of legal policy;
– issuing rules, orders, decrees;
– affairs which required to clarify and reconcile *in merito* disputes among departmental heads;
– budgetary and personal affairs in the judiciary branch of municipalities;
– commissioning of judges, etc.

Over and above administrative duties connected with the preparation of laws and editing the executive, members of the legislative department also participated in giving expert opinion about such issues as international treaties, agreements with legal relevance, affairs of associations, restructuring the penal administration, and the like. And what is more, one of the departmental counsels was appointed head of another department, which was in charge of the personal and substantive affairs of the land registry directorate. Although the Ministry of Justice commissioned some of the external members to participate in codification, its efforts fell short of the expectations. The lack of coordination in quests of high importance made its effect felt in the *modus precedenti.* The harmony between the editorial work and revision was also disturbed, involving many difficulties, needless re-discussions and a host of stylistic corrections.

The legislative department proved to be insufficient to carry through the legal reform. Nor was there a uniform opinion regarding the establishment of a new organisation. The only point they could agree upon was a college, composed of legal experts, judges, lawyers and scholars, to be organised on a provisional basis, best fitted to codification work.

Some held the view that the new structure could not be regarded as a bureau, therefore it should be independent of the Ministry's department. This view was represented in a motion put forward to the Parliament by Imre Hodossy.[13] He adduced the editors of the *Code Civil* (Tronchet, Malleville, Bigot, Portslis) as arguments, who were widely known to have been members of a college composed of the country's most eminent scholars and judges.

Against the advocates of the *council of state*, the government still adopted a wait-and-see policy. In principle it agreed with the setting up of a college, and held it desirable as a body made up of delegates commissioned by it through the ministers. However, it rejected the idea that this body be a coordinated authority. It did not consider the related articles of Act III of 1848 as a standard, and urged on the change of name of the new form. For the time being, it refrained from taking an official position, instead commissioned the under-secretary of state of

the Ministry (Gedeon Tanárky) to work out the organisation of the scope of authority of an organisation for codification.[14]

The first attempt at the reorganisation of the legislative department took place amidst attacks by the representatives and defense on the part of the government. In the name of the third ministerial department concerned, Boldizsár Horvát spoke in connection with the mentioned credit application for the purposes of codification. The ministerial statement was noteworthy because it evaluated the first three years of the Ministry's internal regulation process, and, relying on facts, refuted the Ministry's alleged *sine cura. The legislative department* actually consisted of *three members.* Their task – apart from what have been mentioned – included the coordination of regulatory efforts that fell within the jurisdiction of other ministries. In addition to their many-sided responsibilities, they took special care of their being well informed of trends in foreign legal systems. To study these foreign systems, they used not only a regulation-technical approach, but also traveled abroad to gain personal experiences. Between 1867 an 1870 missions for such purposes were coordinated with the codification plans. Two members of the Ministry studied the conditions of Belgian and Swiss penitentiaries in 1868, and the Irish penitentiary system in 1869. At his own expense, the minister went to Belgium to study the private prisons based on the system of "silence-and-work". In 1870, one delegate was sent to Switzerland, one to France and one to Germany, each as part of preparatory works for the civil procedure to gain direct personal experiences. Another member of the legislative department was to follow with attention the institution of jury in connection with the elaboration of proposals for the criminal procedure so that every feasible element of the procedure adopted by English juries might be taken over. As a preparation for the introduction of the institution of notary public, a member of the Pesr Bar, who had been working in Paris, was commissioned to gain experiences.

These study tours abroad were also necessitated by the fact the Ministry's special library had been incomplete, indeed, utterly defective from the outset (1867). Characteristically, not a single copy of *Corpus Juris Hungarici* could be found in the library. By 1870, during the ministry of Boldizsár Horvát, some 2000 volumes of legal works had been acquired, and 12 legal journals from various parts of Europe had been regularly received.

Codification drafts

The ministerial *summary report* gave further evidence of the concrete results and the progress of the planned legislative activities. This simultaneously answered

the question of what other fields had been regulated in addition to high-priority tasks of organic regulation. This report embraced three thematic groups:

(1) Proposed bills originated with the *Ministry of Justice* concerned: code of civil procedure; announcement of acts; abolition of usury; manumission compensation; redemption of single debts; expropriation; emancipation of Ishmaelites; abolition of corporeal punishment.

Proposals waiting for parliamentary debate concerned: conditions of socage; cleared woodlands; land lease; manorial estates; settlements; liquor license and milling license.

Within the organic regulation, proposals were made concerning: organisation of courts of first instance as part of the execution of the act on the exercise of judicial power; office of the persecution; justices of the peace, and bailiffs.

(2) *Statutes issued under authorisation* were partly made for the execution of acts, laws. These provisional measures, serving to introduce the procedure, concerned: execution of exchange bills; fee-tail; judicial administration; national penitentiaries.

On the other hand, those resulting the issue of norms affecting Transylvania concerned the land registry and socage procedure. A statute issued in the subject of *siculica haereditas* made possible that the moratorium of socage-related processes, which had been actually maintained for many years, might be finally repealed.

It is to be noted that the development of the legal system of Transylvania, which legally was in union with Hungary, but its legal and estate relations were quite different, would often impose almost insolvable tasks on the juridical administration.

(3) Finally, to the third thematic group belonged *completed proposals and those in preparation for codification*. The former included the first draft of the penal code, the Transylvanian jury procedure, while the latter consisted of drafts of certain chapters of the code of civil procedure, general procedure, and the criminal procedure based on the institution of jury, and the commercial code.[15]

The organisation of codification

The *issue of the organisation of codification* was put once more on the agenda in conjunction with a new flare-up of debates in the 1871 Parliament. In the House of Representatives, under the pretext of some demands for the setting up of a council of state, attacks were started against the Minister of Justice. Seemingly, the attackers put the emphasis on the necessity of making codification mechanism more effective, but this action in reality was politically more tendentious.

The real issue hidden behind the mentioned hot debate concerned the future fate of the bill on the organisation of courts of first instance and the marking out of their seats. As is well known, the related proposals were withdrawn on account that they had been partially rejected by the departments, and were then forwarded to the 25-member committee, commissioned by Deák's party to be commented on. However, the modifications, which had resulted from this bargaining, were delayed for a long time. Finally, three views of codification were crystallised. Firstly, the council of state, demanded by the minority, which would have been a coordinated body, secondly, a unit (possibly the re-organised legislative department) would have been subordinated to the Ministry, and thirdly, the latter would have been completed with other ministerial delegates.

The second version was supported by István Tisza, a representative of the opposition, referring to the responsibility of the minister. In his conception of "parliamentary freedom", in case of major judiciary issues when the government was outvoted, the government should draw the proper consequences from its defeat, which simply means the government's fall.[16] To avoid this, a motion put forward by the leader of the governing party embraced the third version with some modification. As a matter of fact, the government had already decided for Ferenc Deák's compromise motion, so the debate over the plan for the organisation of the committee on codification was adjourned for an unfixed term. The amount of 50,000 forints appropriated in 1871 for codification in the budget of the Ministry was then built in the budget of the prime ministry, which retained the right to distribute this amount among the other ministries.[17]

Deák managed to have the government's decision accepted in full. In his argumentation, Deák pointed out that the Ministry was unable to set up an organisation capable of making laws, codes or rules which were to regulate widely different social relations. Legislative work does not require a big apparatus, each of the ministries can meet such demands. But, he went on, *the elaboration, compilation and editing of codes, such as civil, criminal and commercial codes, already require the cooperation of different fora.* In most cases, it is justifiable to convoke a meeting of specialised bodies to solve certain problems.

The amounts appropriated to cover the expenses of codification can meet the financial needs of all ministries concerned, and it is also an advantage that there is no need to set up an organisation with paid officials.[18]

With this decision, the fate of the planned further development of well-considered legal reforms, adjusted to the liberal principles, was sealed. Thus the coherent further building of the bourgeois state organisation and legal system was made impossible. The government brought the ways and means of settling the codification problem under its own control. That occasionally the expenses of codification would be a subject of negotiations between the executive power and

the Parliament's finance committee, could not alter the face of things. Thus the budgetary appropriations for codification, without organisational basis as it were, were abruptly cancelled to be included in original budgetary amounts of the prime-ministry, serving the government's other objectives.[19]

After some changes in the government, the problem of the codification committee was also dealt with by Prime Minister Menyhért Lónyay. He urged on the formation of a body qualified to resolve contradictions in major draft bills and other legal drafts by various ministries and to submit them with other coordinated regulations to the Parliament.[20]

It was after the related scheme of the Ministry of Justice had been adopted by the Council of Ministers on 17 May 1872 that the new structure was set up with a changed name, now called codification committee, to work within the framework of the Prime Ministry. Its task was not only to prepare and revise codes of law, but also minor proposals and orders executing individual acts. This bureau consisted of six members, including a vice-president and five officials of the rank of ministerial counsel, and also auxiliaries. Committee sessions would be presided by the Minister of Justice or his special delegate. External members were invited when subjects requiring special expertise were on the agenda. The latter were delegated from among the officials of the ministry concerned. Should the specialist delegate not be the official of the institution concerned, he would be entitled to a *per diem* in the amount specially fixed for him.

Members of the codification committee would be appointed – with the ruler's assent – by the Prime Ministry.

To cover the expenses of the staff, now including that of codification, the Council of Ministers raised the annual budget to 60,000 forints for 1873.

The codification committee, endorsed by a royal resolution dated 4 June 1872, started its activity in the palace of the Hungarian Academy of Sciences.[21]

However, the government would often be thwarted in its intentions by the Parliament. At the debate over the 1873 budget, the financial committee of the House of Representatives cancelled the budgetary appropriation for the centralised organ of codification. To find a way out of its plight, the executive power revealed the parliamentary manipulation of the organisation, already confirmed by the ruler.[22]

The very enterprising Prime Minister Menyhért Lónyay, however, had no opportunity to keep his promise, he was forced to resign. Finally, the compromise the new Prime Minister, József Szlávy made with the executive did not hinder the original endeavours.

Under its resolution 2098 the House of Representatives approved the markedly cut appropriation for codification within the budget of the Council of Min-

isters under the proviso that it should not employ a staff with regular annual salaries on a permanent basis.

The Prime Minister was ready to embrace this virtual concession, and agreed with the superfluity of the codification bureau. Thus the continuation of the former great legal achievements was made the task of other ministries and the former practice of inviting external experts was continued. To re-draft and revise bills of minor importance and to harmonise and amend the mass of former legal rules, a reduced codification committee was set up with five specialists. These special officials were given office rooms in the building of the Ministry of Justice.

The former body, housed in the palace of the Academy, was dissolved on 1 August 1873. The Szlávy administration conserved the old content by a new form, and by this it determined of the organisational framework of codification for many decades to come.[23]

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NOTES

1 Hungarian National Archives (hereinafter: MOL) – Film Archives, Mtj. (Records of the Council of Ministers), 1869–1870, 17, 20, 27 MT.

2 For the historical development of types of law, and for a synthesis of new theory and system of groups of law, see Eörsi (1975: 141–144, 156–158, 166–185).

3 MOL K 620Kse 126 eln./1869.

4 MOL K 622 kiE 93 eln./1870, bundle 30.

5 MOL K 620 Kse 149 eln./1870, *Budapesti Közlöny*, no. 136 (1870).

6 MOL K 620 Kse 225, 249, 265, 275, 319, 320, 326, 353 eln./1871.

[7] MOL K 622 Kse 155 eln./1869.
[8] MOL K 622 KIE 268, 318 eln./1869 Vice-Director of Royal Affairs 1831/1869, bundle 19.
[9] MOL 620 Kse 327 eln./1870.
[10] MOL 620 Kle 70 eln./1869.
[11] MOL 620 Kse 21 eln./1871; MOL K 622 Kie 29 eln./1871.
[12] *The Journals of the House of Representatives,* 2 (1869): 308–309.
[13] *Ibid.,* 313.
[14] MOL K 275 Sz. MT/MT (Council of Ministers), 14 January 1870.
[15] *The Journals of the House of Representatives,* 2 (1869): 325.
[16] *Ibid.,* 147–152.
[17] MOL K 273. Sy. MT. 29 January 1871.
[18] *The Journals of the House of Representatives,* 13 (1869): 145–146.
[19] MOL K 27 11. Sz. MT 3 April 1871; 58. Sz. MT 4 December 1871.
[20] MOL K 27 37, St. MT 19 April 1872.
[21] MOL K 27 47, Sy. MT 17 May 1872; 50. Sz. MT 5 Juene 1872. The staff and the salaries of the codification committee were so established: vice-president: HUF 6,000/year; of the five ministerial counsels, two persons: HUF 5,000/year; second secretary as ministerial secretary: HUF 1,800/year; leading clerical officer as vice-director: HUF 1,200/year.
[22] MOL K 27 88 Sz. MT 12 November 1872.
[23] MOL K 27 38 Sz. MT 11 July 1873. The mentioned specialists were persons with proficiency in such fields as public education, finance, economics, and public administration.