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Legal sources in the system of separation of powers - norms and powers

Doctoral thesis
PhD.

Theme leader:
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Praefatio

This dissertation focuses on the study of legal philosophy issues that all practitioners have encountered in some way in their careers. However, the aim of the thesis is twofold: firstly, to dispel misconceptions about concepts and legal institutions in everyday use; secondly, to present, at a level of analysis not yet undertaken in the literature, the sources of law that are considered problematic in the Hungarian legal system. The thesis thus aims to present sources of law that have not been emphasised in the Hungarian legal source system so far, and is thus primarily written for the Hungarian legal academia, and addresses problems that can be interpreted within this framework. While the problems are presented in the light of the changing legal system, some innovative findings have been formulated, but this does not mean that the thesis relies exclusively on the domestic database.

On this basis, the dissertation presents the various sources of law created by the branches of power as bodies, and the theoretical concerns and ideas related to them. A further aim of the dissertation is to examine those sources of law that seem to be clear – more specifically, acts, government decrees, government resolutions, parliamentary decisions, case law, constitutional court decisions – in a depth that the Hungarian legal scholars has not yet done. In the process, the reader can become acquainted with the dominant forms of Hungarian legal sources, systematically organised according to the branches of power, and the dissertation also revives and completes some forgotten *material* and *formal* forms of distinction of earlier centuries.

Reasons for the choice of title: the thesis has a theoretical, normative focus, and secondarily, a legal source and codification approach. On this basis, the thesis seeks to approach legal source theory and related concepts of state functioning from both a legal philosophy and a state theory perspective, with the aim of providing both practical and theoretical utility. However, the choice of title is arbitrary, given that the dissertation does not cover all the sources of law that appear, and therefore does not include, local government decrees, ministerial decrees, instructions, regulations issued by independent regulatory bodies, or decrees issued by the Governor of the Hungarian National Bank (Magyar Nemzeti Bank).

Recommendation

Ádám Miklós Balássy's doctoral dissertation entitled Legal sources in the system of separation of powers – norms and powers deals with a question at the borderline of legal theory, legislative theory and constitutional law. His theoretical starting point is the distinction between substantive and formal concepts of law, on the basis of which he examines the problems of sources of law.

The larger, legal-theoretical part of the thesis deals primarily with normative issues, while the second, shorter part discusses the state-theoretical implications of the normative problems analysed. The latter part analyses the principles and doctrines that justify the complexity of the issue and provide its political philosophical context, in particular the rule of law and the principle of separation of powers; and phenomena at the interface of legislation and law enforcement, such as constitutionalism and administrative adjudication, and the quasi-norms and case norms (in the Kelsen sense) that emerge from them, which cannot be clearly classified in normatics.

The first part, however, is above all the novelty of the essay. In this thematic unit, the author discusses the types of norms and the substantive and formal concepts of legislation, which are essentially norms. In this section, he also analyses the types of legislation in the hierarchy of sources of law in the positive constitutional sense and the possible relationships between them, including not only laws and regulations but also normative decisions, using the concept of substantive legislation. The author effectively demonstrates that legal organisational instruments are both external acts in this sense and can also be normative in nature. Furthermore, the types of government decisions in Hungary and their actual characteristics are examined for the first time, with theoretical depth but also empirically, in order to draw conclusions that can be used in practice. In this context, the author takes a critical view of the government's decision-making practice and makes a number of proposals for changes to it, which are useful from a legal source perspective.

All in all, the draft thesis is the fruit of many years of thorough and persistent work, but even so, a number of issues identified in the course of examining the above questions (and discussed in studies published in journals) were not analysed in the final version, owing to lack of space or a looser thematic focus. What it does contain is a coherent, reasoned position, faithfully reflecting the author's own views, which is ready for academic discussion, enriches

both constitutional theory (as regards the theory of sources of law) and legal theory (as regards the theory of norms) with useful insights, and contributes to the rethinking of certain deeply rooted but no longer practically tenable positions by refuting certain established but erroneous positions.

„…” September 2023.

Zoltán J. Tóth

Structure and content of the essay

The paper starts with a foundation in legal philosophy (jurisprudential), which shows how the system of norms is closed and consistent. In this theoretical grounding, the dissertation develops the proposition that law, as a system of norms, must have both a *dynamic* and a *static* character in order for a legal norm to be interpretable to the legal practitioner and the legal philosopher as an independent phenomenon of absolute value (a legal norm must make sense in itself, independently of any other system of norms, i.e., not as a 'relative value' in the world). For the object of the study of legal philosophy is nothing other than a set of contemplations limited to the knowledge of the changing and unchanging form of legal norms.

The dissertation is structured in two major units. First, it deals with the problems of legal theory and sources of law, including the systematisation (of the legal system) and analytic definition of norms. This part of the thesis seeks to identify the sources of law – in particular, the forms of decisions (When I talk about government decisions I will use the definition of resolution) – issued by the different branches of power, and accordingly examines the legislative branch (parliamentary decisions), the executive branch (government resolutions) and the judicial branch (uniformity decision). The paper does not, however, take a position on the role of the Constitutional Court in the system of separation of powers, but given the prominent role played by the decisions of the courts in the system of sources of law, it cannot be completely ignored. Within the *chapter* on *legal theory* there are 12 titles and 56 subtitles. This section also makes the point that *there are sources of law which are considered by current scholarship to be primarily internal, but which may have an external effect in practice.* Within the *chapter on State Theory* there are 7 titles and 18 subtitles. In addition to an introduction to the key judicial and norm-revising institutions that determine the functioning of the state, the chapter also provides a detailed discussion of the systemic and state-theoretical concepts that define the functioning of the state at the level of the legal system. Accordingly, different concepts of the rule of law, the rule of law and the separation of powers are presented. In order to ensure that these concepts are also secured in practice, the powers of (self-)constraining institutions of the state are also briefly described.

The paper also presents the *materialist* and *formalist* theories of law, their common starting points, and explains two different applications of the same term, according to which the determination of *legal doctrines* and *principles* can only be done in a constitutional way, and therefore law-making can be considered a formal, codification mechanism.

The dissertation continues with an analysis of the acts that can be enacted by the legislative branch, where the *external* and *internal* nature of these acts, their enactment (and its limitations) are analysed and the Standing Ordes as a *sui generis* source of law is examined.

Moving through the system of branches of power, the paper describes the distinction between the three levels of governmental enactments. Firstly, the division according to the relationship of government decrees to laws (Acts and Fundamental Law) – *iuxta legem, intra legem, praeter legem, contra legem, sine lege, contra constitutionem* – is presented, secondly, the division according to the generalist classification – *traditional decrees, decrees with the force of a temporary law, decrees by law (aka. emergency decrees)*, – and finally, the division according to the way they are made and the powers they have – *derivative, autonomous, complex*. In the latter distinction, the author breaks with the standard dichotomous division, and also introduces the distinction of complex *autonomous and derivative provision*, which can be considered as a novelty.

The aim of this dissertation is to present the characteristics of the forms of governmental resolutions in the Hungarian legal system, including the definition of formal and substantive concepts and their placement in the (Hungarian) legal source system. A further aim is to explain the forms of government resolutions that are not known, such as the 2000, 3000 or 4000 government resolutions. According to current jurisprudence, dogmatics and practice, government resolutions are considered to be *internal* acts. In my view, however, there are also government resolutions which are *external* in nature and therefore have to be regarded as legislation in the substantive sense. In this part of the dissertation, I will also address the question of whether or not a governmental decision can be considered to be adopted by original (*autonomous*) authority (i.e. whether the power of the government to adopt governmental decisions can be derived from the Fundamental Law), and whether the *derivative/autonomous/complex* trichotomy applied to legislation can be applied.

If a government resolution can also take on an *external* character, a *further question arises as to whether a government resolution should be considered as a publication or as a promulgation* – in this context, the content of non-public government resolutions is also debatable.

In my view, there are government resolutions that have an *external* content, i.e. that affect citizens as a whole. However, this does not mean that all government resolutions are *external* or normative, because government resolutions are *internal in* their original purpose (i.e. they affect the organisation) and are mostly individual (specific). *And normative acts of an external nature cannot be regarded - by virtue of their external nature - as instruments regulating public*

law organisations, because they regulate not only the particular organisation but also a specific (non-individual) set of citizens, and so I regard them – in a material sense – as quasi-legislation. The fact that a governmental resolution contains *explicit internal* provisions does not necessarily mean that the indirect effect of that governmental resolution does not affect the citizens as a whole. That is to say, *internal* acts which impose a task on public bodies – or on their subordinate bodies – may also directly or indirectly impose obligations on other natural or legal persons. *What this means is that acts which are initially internal acts may affect the development of citizens' rights, an interference which takes place in the actual application of the law. Thus, in my view, those governmental resolutions which are external in nature must be regarded as 'quasi-legislation'.* Thus, the content of a governmental decision is transformed into quasi-legislation by virtue of its legislative form only if the content of the governmental decision can also be given effect as legislation.[1] Following the decisions made by the executive, the paper also touches on the sources that can be made by the legislature.

The paper also discusses the application of concepts used in the Anglo-Saxon legal system in order to enable the judicial branch to fully comply with its obligation to unify the law. Thus, it clarifies definitions such as *obiter dictum*, *stare decisis*, *ratio decidendi*, *overruling* and *distinguishing.* The thesis also aims to show that the system of limited precedent is not an unprecedented innovation in the Hungarian legal system, and therefore describes how it has evolved from the 19th century to the present day. It is the author's view that this obligation can be defined as a criterion of the rule of law, even if he does not attempt to define the rule of law – because it would stretch the limits of the study.

[1] Paul LABAND: *Das Staatsrecht des Deutschen Reichs.* II. Tübingen-Leipzig, J. C. B. Mohr, 1911. 170. "If the content can be effective as a legal rule."

Methods of analysis

In the words of Montesquieu “One profits much in society; one profits much in one’s private office. In one’s office, one learns to write in an orderly way, to reason accurately, and to form one’s reasonings well; the silence enables one to give coherence to what one is thinking. In society, on the other hand, one learns imagination. One runs into so many topics of conversation that one conceives of things; one sees men as pleasant and gay; one is thinking by virtue of the fact that one is not thinking—that is, that one has ideas by chance, which are often good ones. The spirit of conversation is a particular spirit, which consists in reasonings and unreasonings that are short”

In my research, I used the method of *primary* and *secondary* data collection, which helped to increase the scientific quality of the dissertation. Thus, the distinction formation as formulated in the government resolution title and the framework of emergency rule governance are also considered as primary, novelty analysis. The sections on acts and government decrees, as well as the second chapter itself, are also considered secondary data processing.

The dissertation is not quantitative – statistical in nature – but qualitative in its formulation of questions and theoretical answers, and therefore it is a kind of content analysis in legal philosophy, which creates new claims from data available to everyone, in a scientific and thorough manner.

The primary aim of my research was to provide a framework for the linguistic and logical interrelationship of different norm systems, especially legal norm systems. The primary focus was a historical analysis of the transformation of the current Hungarian administrative adjudication system. At the same time, the change in this set of norms entailed a change in the method of analysis. For this reason, I removed the changing legislative and policy layer from the analysis, and thus an analytical approach was brought to the fore in my work. In this analysis, the matrix, form and customary use of acts by the different branches of power as bodies and not as individuals was the object of study.

The historical and comparative method of the novelty (limited precedent) act of the judicial branch was applied in the course of the changes in the legal environment, and then, over time, the analysis of the new institutional practice, more specifically the analysis of the

cases and the detailed study of the legal documents, provided an opportunity to see what concrete examples and cases could serve to support or refute the theoretical analysis.

This was followed by an analysis of the acts that could be adopted by the executive branch, given the lack of a legal or literary corpus of acts in practice in Hungary. In the course of this analysis, I focused primarily on the content and form of governmental resolution forms, and then, in the light of the passage of time and external circumstances, on the legislative forms that the government may adopt in special legal orders.

The analysis of the substantive scope of the emergency decrees that the government can make led me to the third group of acts that can be made by the third branch of government: acts and parliamentary decisions. This analysis also includes empirical experience, but here comparative and constitutional theories predominate.

The main thrust of the dissertation thus focuses on the examination of the source of law nature of the decisions made by the branches of power as bodies and the laws listed in Article T) of the Hungarian Fundamental Law, complemented by an analytical philosophy of law approach to examine the 'system' nature of the legal system.

The thesis aims to provide a comprehensive overview of the normative instruments in the Hungarian legal source system, and also *proposes the elimination of the terminology of statutory vs. public law regulatory instrument, given the inconsistency of its dichotomous system.*

The first chapter of the thesis is dominated by the comparative research method, taking into account that an analysis of the Hungarian legal system and its normative instruments alone would lead to arbitrary and biased results. Thus, in the analytical analysis of the different norms, the main focus is on the systematic concept which was defined by the Germanic legal family. At the same time, in order not to limit the research to the analysis of positivist legal systems, I have included the analysis of the precedent systems established by *common law* theory. I have arrived at the propositions formulated in this thesis by means of rigorous deduction, so that each conclusion can be considered as a set of deducible propositions – without logical jumps. In the course of the primary data collection, the Hungarian and international literature, domestic and international positive law and related case law were analysed. In these primary data collections, empirical experience and legislative impulses gained in the field of ministerial legislation as head of the Legal and Codification Department of the Prime Minister's Office played an unwitting role. It was practical curiosity that led me to ask myself what we should consider certain government resolutions to be, which are so narrowly defined in the legislation, or whether there is any framework for regulating by emergency decrees. These empirical

approaches can contribute to the practical relevance of the research and to the understanding of the real effects of the legal system. In addition, the use of comparative analysis as a secondary method of analysis has also opened up the possibility of codifying the foundations of the legal system under study.

Following the discussion of all the problems formulated in the thesis hypothesis, the presentation of the legal-historical antecedents was given a greater role, but this method of analysis is only emphasised in the second half of the dissertation.

Given that the dissertation is divided into two parts, the research methodological tools are also different. In writing the second chapter of the dissertation, the main focus is on historical analysis, given that the institutional systems of state theory under study are not recent. In view of this, a primarily constitutional-theoretical systematisation has been carried out for this chapter, using a method that also allows for the emergence of academic positions and own findings.

Suppositio

I. *We need to distinguish between the objectives to be achieved when interpreting and judging the law.*

II. *Legal principles delimited by an appropriate linguistic system can, over time, legitimize themselves.*

III. *When codifying government decree, the framework of the enabling provision must be taken into account – even in the case of emergency decrees.*

IV. *If we distinguish between original (A) and derivative (B) decree-making powers, then there must necessarily be mixed (complex) decree-making powers (AB).*

V. *A problem is any temporary decrees with the force of law that contains provisions that give someone else – such as a minister – the power to make law.*

VI. *The problem arises when a decree in effect – a so-called resurrection provision that lists titles – is promulgated on Y minus 2, but the provision that keeps the emergency decrees in effect does not take effect until Y.*

VII. *As a terminus technicus, legislation is a formal definition.*

VIII. *When government resolutions are made, when they are derivative, the enabling provisions must also be taken into account.*

IX. *By means of a legal source in the form of a decision, the executive branch seeks to regulate situations in life whose form is bound by law under traditional Hungarian public law.*

X. *The numbering of non-public government resolutions should be changed.*

XI. *The resource guarantee imposed by non-public government resolutions is illegal and unconstitutional.*

XII. *In the case of government resolutions sent to the so-called "persons concerned", the signature and the time and place of signature are considered as a valid condition.*

XIII. *The term sui generis source of law does not only refer to the Fundamental Law.*

XIV. *After the electronic publication of the Hungarian Gazette, there is no conceptual difference between publication and promulgation.*

XV. *In a state governed by the rule of law, there cannot be unlimited power, so the judicial branch must also have the power to review acts issued by the executive.*

Conclusion

"Et qui publice loquitur, pati debet publice contradicentem."[2]

Hypothesis *I.*, that *we must distinguish between the goals to be achieved in interpreting the law and in adjudicating, is* confirmed, and the final conclusion is that in interpreting the law and in adjudicating, the goals to be achieved are this*:*

a) goal to achieve: *a good decision with a good reason.* For, if the decision is for the benefit of the legal entities per se, it is "good" in itself, while the justification serves as a guide for further good decisions.

b) a non-reprehensible goal: *a good decision for the wrong reason.* The "good" decision in this case is also absolute, i.e. positive, but the fallacy of the reasoning may generate bad decisions in later cases (because of its precedent character).

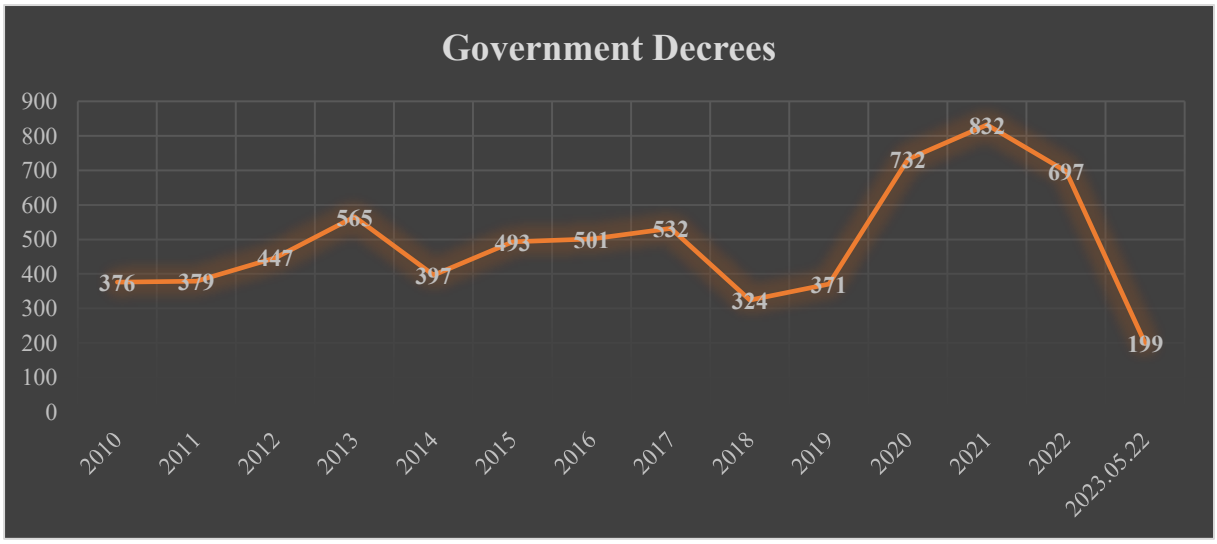
c) a defeasible purpose: *a wrong decision for the wrong reason.* If the decision is wrong and the reasoning behind it is wrong, it can be challenged and the wrong decision can be corrected, if there is a right of appeal.

d) reprehensible aim: a *bad decision with a good reason*. In case c), it could be seen that if the decision and the reasoning were wrong, it could in principle be corrected. However, in those cases where the decision is wrong but the reasoning supporting it is logically sound, its effective appealability is limited and thus the fairness of the subsequent decision and sentencing is compromised.

Hypothesis *II.*: *Legal principles delimited by an appropriate linguistic system can, over time, legitimize themselves.* I did not prove this hypothesis in the dissertation, I merely deduced and explained it, why can be acceptable. Thus, the first phase of legitimation begins with the (pseudo)scientific justification of a legal principle and continues with the construction of an 'anti-law' that can only be justified in the model defined, i.e., a system based solely on hypothetical propositions based on specific axioms. However, this justification can also be used to disprove 'real' scientific principles outside the closed system, which means nothing more than (arbitrarily) extending the internal anti-rule, thereby verifying certain fundamental legal principles.

[2] Carl Immanuel GERHARDT (ed.): *Die philosophischen Schriften von G. W. Leibniz.* Berlin, Weidmannsche Buchhandlung, 1875-1890, reprinted in Hildesheim, 1978, vol. 4, 246 (Leibniz, Letter to Honoré Fabri).

According to Hypothesis *III*, *when codifying government decree, the framework of the enabling provision must be taken into account – even in the case of emergency decrees.* The promulgation of a special legislative decree, under the conditions set out in the Constitution, as enabling provisions, provides the specified body with an unlimited regulatory discretion. In the first instance, however, when making such regulations, particular attention must be paid to the possibility of making regulations under the enabling provision – i.e. the scope of the regulation. This is because the creation of decrees is strictly purposive, and if the decree goes beyond the enabling provision, given that it derives its authority from the Fundamental Law, it is *contra constitutionem, and* so are the other sources of law derived from such enabling provisions.



Hypothesis *IV.*: *If we distinguish between original (A) and derivative (B) decree-making powers, then there must necessarily be mixed (complex) decree-making powers (AB).* The statement can be considered to be justified by the creation of Government Decree 330/2023 (19 July) on the different application of certain public procurement rules during an emergency and the amendment of the related provisions, since this Government Decree contains a section with emergency powers and a section with powers under the Public Procurement Act. One of the provisions is limited in time, while the other, constituted by an enabling provision, is not - even if the latter contains primarily 'amending' provisions.

[...] regulations can also be differentiated on the basis of the authorisation necessary for their creation, thus distinguishing between:

(a) subordinate (derivative, implementing) regulations: the creation (validity) of which is based on a legal act (statute or decree-law) higher up in the hierarchy of legal sources or on a

regulation at the same level in the hierarchy of legal sources. In other words, regulations whose creation is based on legislation and not on the Fundamental Law.

(b) autonomous (original) regulations: regulations whose creation is based on the Fundamental Law. In this case, the Government, acting within its powers, may issue regulations on matters not covered by law or on the basis of a statutory authorisation.

c) Complex (mixed) decree: some provisions (sections, chapters) of which are based on a sui generis source of law, while other provisions are based on a statute. In other words, it contains both a derivative and an original legislative power. It follows that it is the provision itself (disposition) that has the authority and not the statutory form itself, i.e. each title, subheading or section may have a different authority. A similar logic is applied to the question of the cardinality of laws, since it is not the "law" itself that is cardinal, but the individual provisions of the law.

At the same time, the power to make regulations does not mean the definition of the text, but the implementation of the legal principles it contains, i.e. the legal content of the power to make regulations is not a declaration of the choice of form or creation, but the binding authorisation of the content and the quoad posse (virtualiter) universalis will of the State behind it.

Hypothesis *V.:* A*ny decrees with temporary force of law which contains provisions that give someone else the power to legislate is problematic, is* confirmed, because we cannot speak of the limitation of the content of decrees with temporary force of law, which implies that the further granting of power (even to legislate) does not result in its invalidity (neither substantive nor formal). Secondly, if there is no prohibitive provision in the legal system prohibiting the delegation of power between the provisions of a regulation having the force of a provisional law, we are in the situation where such a provision may be formulated in a regulation having the force of a provisional law. This means that where an enabling provision (to a person or body) to make legislation – the enabling provision of which should originally be provided by act – can be made in an order having a fixed term, and that person or body makes it within that time period, then the enactment of that legislation cannot be amended by the same enabling provision after the expiry of the time-limited regulation, and a piece of legislation remains in the legal system which has been authorised by a regulation with temporary legal effect, yet the enacted legislation 'survives' the emergency decree, even abusing the purpose of the time-limited effect of the special legal order.

It is therefore proposed *de lege ferenda* that the legislative powers granted in emergency decrees should be limited.

Under Hypothesis *VI.*: a *problem arises when an effective decree – a so-called resurrection provision listing titles – is promulgated on Y minus 2, but the provision making the emergency decrees effective only takes effect on Y.* The legislative problem exists in this case. Because the listing of the title of a piece of legislation does not imply the approval of its normative content, such a legislative manoeuvre is not acceptable even in cases where the legislator wishes to keep hundreds of norms 'alive', and it is therefore proposed *de lege ferenda that the* naming of this legislative technique be restricted, at least at the level of the regulation.

Example I:.

Paragraph 1(2) of Government Decree XYZ on the entry into force and emergency measures of certain government decrees issued in the course of emergency situations declared to avert the consequences of the coronavirus pandemic:

Issued during an emergency under Government Decree 27/2021 (I. 29.) on the declaration of an emergency and the entry into force of emergency measures:

1. xx1/2022,
2. xx2/2022,
3. xx3/2022. Government Decree

with the text in force on 31 May 2022, shall enter into force on the date of entry into force of this Regulation.

§ 3 This Regulation shall enter into force on 1 June 2022.

That is, the Example I Decree will be published in the *Hungarian Gazette on* 24 May 2022. Thus, Regulation XYZ is valid but not yet in force. But on May 25, 2022, the government amends the content of Government Decree XYZ (and publishes it on the same day), so the government's effective decree published on May 24, 2022, keeps in effect the content of an emergency decree that it could not have known existed.

Example II

Government Decree 27/2021 (I. 29.) on the declaration of a state of emergency and the entry into force of emergency measures, § 4 (1):

"Issued during the state of emergency pursuant to Government Decree 478/2020 (3.11.20) on the declaration of a state of emergency [hereinafter: Government Decree 478/2020 (3.11.20) [...],

1. the Government Decree No 479/2020 (XI. 3.) on additional protection measures to be applied during an emergency,

[...]

70. the Government Decree No 31/2021 (I. 29.) on the different rules for the suspension of the use of the public utilities during an emergency pursuant to Article 49 of Act CL of 2016 on the General Administrative Procedure, with the exception of Article 4 thereof

with the text in force on 7 February 2021, shall enter into force on the date of entry into force of this Regulation.

§ 5 This Regulation shall enter into force on 8 February 2021."

Government Decree No 27/2021 (I. 29.) was promulgated on 29 January 2021. Thus, from 29 January until 7 February 2021, the Government had the possibility to change the content of the regulations to be maintained in force listed in Government Decree No 27/2021 (I. 29.), which had been validly promulgated, so that there was already a valid provision on their maintenance in force, but not yet in force.

This provision, even without the actual problem, undermines confidence in legal certainty, since at the time of the drafting of Government Decree 27/2021 (29. I.) the government could not have been aware of such basic information as, say, the amending decree that would occur between the date of promulgation and the date of entry into force.

Hypothesis *VII.*: *legislation as terminus technicus is a formal concept.* All law is an external normative act, but not all external normative acts are law – *i.e. all law is a source of law, but not all sources of law are law*. Legislation is used as an umbrella term for each type of legal source. However, this umbrella term is a formal concept which is not concerned with the

matrix of the source of law.[3] Indeed, to limit the concept of source of law to laws or regulations would be like saying that the sources of animals are horses and cats.

Hypothesis *VIII.*: When *government resolutions are made, when they are derivative, the enabling provisions must also be taken into account.* It is common and established practice that when adopting the annual development envelopes of the various operational programmes [which are normative under Article 82(2) and Article 68(4) of Government Decree No 256/2021 (18 May) *on the rules for the use of certain EU funds in the 2021-2027 programming period*], reference is made to the so-called enabling provision when adopting the annual development envelope [see: *Implementing Decree No 1362/2022.* Taking into account that these provisions are normative, but (according to the current majority scientific view) not legislation, neither the Law on Legislation nor the Ministerial Decree on the Drafting of Legislation need be applied to them, so that reference to the enabling provisions is not "necessary", but practice is contrary to this and is applied to the adoption of government decisions on the basis of customary law

So my *de lege ferenda* proposal is that when the normative government resolution – in this case the government resolution on the annual development envelope – is amended – just like the original one – then reference should be made to the so-called enabling provision:

[3] Mihály SAMU - Mihály SZOTÁCZKY: *Theory of State and Law.* Budapest, Textbook Publishing House, 1985., 492.

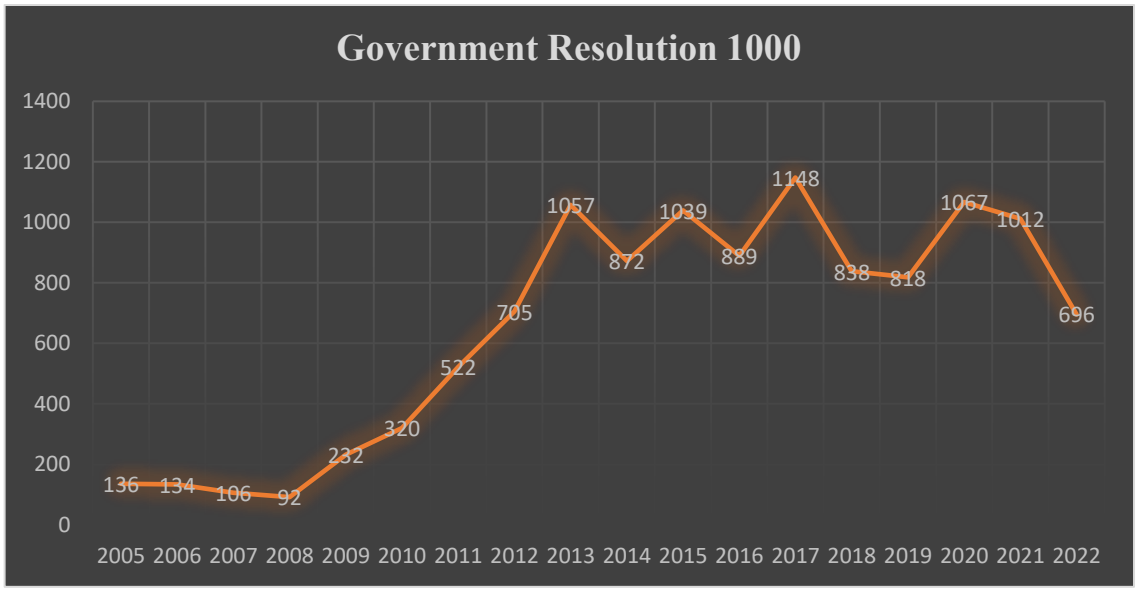
Example I:

a) Annex 1 to Government resolution No 1362/2022 (21.VII.) laying down the annual development envelope for the Operational Programme Implementation Plus (hereinafter referred to as Government resolution No 1362/2022 (21.VII.)) is amended as set out in *Annex 1.*

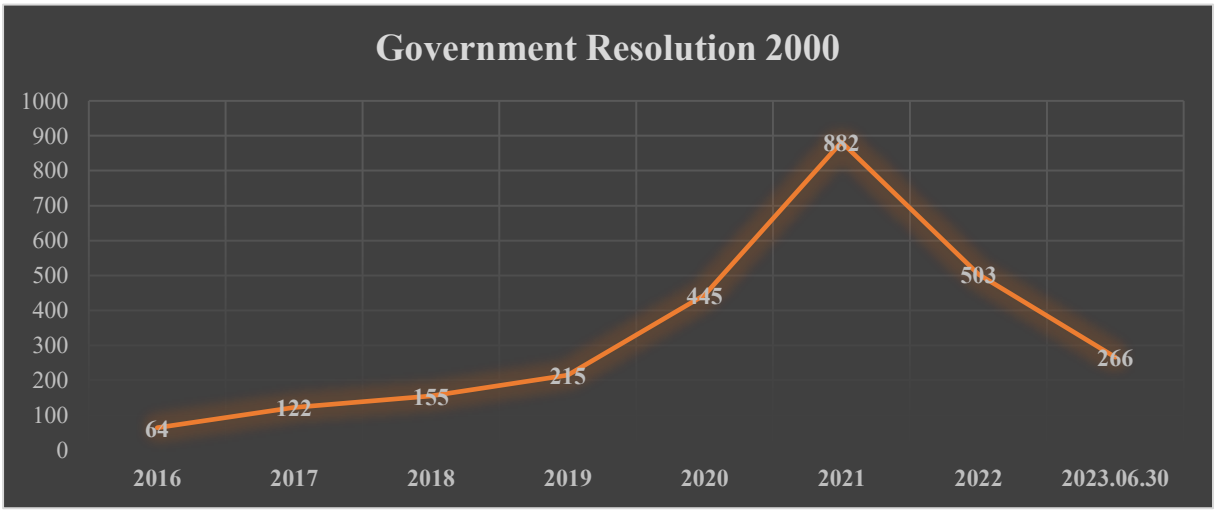
b) The table in point 1 of Annex 1 to Government resolution 1362/2022 (21.VII.).

ba) in field E:2, enter "2022." is replaced by 'Announced in November 2022,
bb) [...] text,
spleen.

Hypothesis *IX.*: the *executive power intends to regulate life situations with a source of law in the form of a decision, the form of which is bound to a statute according to traditional Hungarian public law.* As regards public government resolutions, their number has increased exponentially since 2010 and has become one of the most frequently used forms of decision-making by the executive. In my view, we can speak of an *external* government resolution when it directly or indirectly influences the actions and general behaviour of citizens, or the alternatives to deviating from them. Indeed, a governmental decision by its very nature aims at setting (calling for), motivating and influencing certain tasks, objectives and goals of human behaviour. Such government resolutions are considered "quasi-legislation" because they behave like legislation. There is no substantive difference between government decrees and government resolutions, although their logical structure and their technical legal expression differ, but there is no substantive difference between their form, their drafting and the content of external government resolutions.



Hypothesis *X.*: *the numbering of non-public government resolutions should be changed.* I consider it necessary to change the numbering of the government resolutions which are not publicised (at least from 2000). I propose that they should start from 5000, or that the year should be numbered first and then the year (e.g. 2021/2000 government resolution), since in accelerated "legislative" periods the number of public (1000) government resolutions can – and, as we have seen, does – exceed 999, so that a public 2000 government resolution can be published, thus confusing the form of government resolution sent to the "persons concerned" non-public (2000) with the public (1000) government resolution form. Taking into account that the number of government resolutions containing classified information (3000) could theoretically exceed 999, I maintain the proposal for a government resolution sent to the public (2000) for this form of government resolution.



Hypothesis *XI.*: *The resource guarantee imposed in non-public government resolutions is unlawful and unconstitutional.* If there are non-public government resolutions that provide for resources, additional resources or reallocation (*Sollen*), then those government resolutions are also contrary to the provisions of Government Resolutions 1352/2022 (21 July) and Article 39 of the Fundamental Law. If this contradiction can be established, it must be considered substantively invalid (*Sollen*), which the Constitutional Court must be competent to establish (and thus to examine) and annul the government resoltuions.

Hypothesis *XII.*: *in the case of government resolutions sent to the so-called "persons concerned", the signature, place and time of signature are considered as a valid condition.* The place and date of issue of all (and not only the original) 2000 and 4000 government resolutions must be entered as a mandatory validity requirement on the copy of the decision, regardless of its specific or normative content, in the absence of publication. Bearing in mind that the distinction between normative and individual government resolutions can only be made on the basis of a distinction of content, since no distinction is made between them in terms of their numbering, I propose that, when they are drawn up, individual government resolutions should be numbered separately from normative ones.

GOVERNMENT OF HUNGARY

Done at: 1 original and 2 copies in duplicate and ...
One copy x sheet
This is pld... number ...

You get:
members of the Government,
regular participants in government meetings,
secretaries of state for public administration,
archives

THE GOVERNMENT

2.../2022.

decision of

Address

The Government

Place and time of signature.

Prime Minister or

name of deputy prime minister s.k.,

title

Hypothesis *XIII.*: *the term sui generis source of law is not limited to the Fundamental Law.* The Standing Order is the second source of law (the first being the Fundamental Law) which, although not a law in the sense of a formal (Hungarian) source of law, nevertheless meets the requirements of a statute in terms of its form and structure (and has the formal validity of a statute) – it is divided into preamble, titles, chapters and sections, and any amendments to it are made in the manner of a statute, in accordance with the requirements of the Ministerial Decree on the Drafting of Legislation and the Law on Legislation, which implies that it behaves like any law – and that it is a prominent source of law in terms of the theory of separation of powers, and is therefore a sui generis source of law.

Hypothesis *XIV.*: *After the electronic publication of the Hungarian Gazette, there is no conceptual difference between the moment of publication and the moment of promulgation. In* the *Hungarian Gazette* there is no distinction between a government resolution being published and a government decree being promulgated. Thus, after 2011, given that the *Hungarian Gazette* must be published as an electronic public document on the government portal, no practical distinction can be made between the (elevated) moment of publication and the moment of promulgation. Thus, it can also be concluded that publication as a criterion for the validity of legislation, i.e. "publication of the legislation in the Official Gazette", is inaccurate, since the purpose of this implementing act is also to make the legislation known to all and to enable the precise content to be traced. Consequently, the distinction between publication and promulgation, i.e. the distinction between the communication to the public of legislation and of instruments of public organisation, can be eliminated.

MAGYAR KÖZLÖNY

98. szám

MAGYARORSZÁG HIVATALOS LAPJA
2023. július 4., kedd

Tartalomjegyzék

Hypothesis *XV.: In a state governed by the rule of law, there cannot be unlimited power, so the judicial branch must also have the power to review acts issued by the executive.* The assumption of self-limitation by the State also includes unconditional control over administrative acts, which implies the existence of administrative courts, which are not organised. The State as a whole, in order to be able to speak of the rule of law, must provide individuals with adequate guarantees of legal protection against the acts of the State, so that the applicable rules are not tyrannical, and this means that the State power must limit itself. The rule of law can only exist where the state limits its own will. The question of self-limitation also includes the type of guarantees that we see as being needed to ensure that this is the case - for the ultimate aim is not to enforce power, but to limit it.

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