CHAPTER SEVEN

THE DUALIST CHARACTER OF THE 1867 HUNGARIAN SETTLEMENT

‘A constitution’, declared Napoleon laconically, ‘should be short and ambiguous’. Had he lived long enough to witness the enactment of the Hungarian Settlement, enshrined in Law XII of 1867, he should have been satisfied if not with its length at least with its ambiguities and lacunae. The difficulties of a clear interpretation were compounded by the discrepancies and contradictions between the Hungarian Settlement Law, and the so-called Delegations-Gesetz of the imperial Dezember-Verfassung enacted in the same year. In the future, these two instruments, the Ausgleich laws, were together to order the relationship between Hungary and the Habsburg Empire in a dualist system. The term ‘dualist’ seemed appropriate because, in addition to the common, formerly imperial, institutions, ‘the kingdoms and lands represented in the Reichsrat’ (called Cisleithania) and the lands of the Hungarian crown (called Transleithania) each had a separate legal system and government. The obscurities and contradictions in the two laws provided ample fodder for divergent and contrary interpretations by generations of politicians with conflicting purposes in both halves of what in 1868 became the Austro-Hungarian Monarchy.

The jurists were as divided as the politicians: manifestly along national lines. Austrian German, Czech, Hungarian and Croatian jurists were at loggerheads on basic questions of interpretation. Even within a single
national group, no consensus on principles emerged among jurists while the Ausgleich laws were in force between 1867 and their overthrow in 1918. Since the break-up of the Habsburg Monarchy, historians have either been nonplussed by the riddles of these laws and largely ignored discussion of constitutional questions, or have merely reiterated arguments found in legal and political works written before 1918.

The legal and constitutional questions left to posterity by partisan jurists cannot be solved today. Rather than make what amount to normative inquiries into the laws of the Dualist system long after it has disappeared, normative questions should be discarded altogether if one is to explore the ideas the law-makers might possibly have had in 1867. It is feasible to re-construct the legal maxims and principles to attempt to under-stand better the 1867 Settlement's historical character rather than to try to establish its juridical nature.

So much may be plainly true. The jurists’ knowledge of the Settlement is, however, not merely unhelpful: it is an obstacle to historical reconstruction. Juristic concepts have been transmitted from the Dualist era to the present by historians who implicitly accept the assumptions of the so-called modern dogmatic law school, an outlook that became general among the Monarchy's jurists during the 1880s. The new outlook owed much to the jurisprudence of Imperial Germany, in particular, to the works of Law Professor Paul Laband. The jurists subjected the 1867 Ausgleich laws to a strictly statutory interpretation with the aim of discovering a valid constitutional law. The analysis of the statutes rested on two cognate postulates: the State, assumed to be the repository of all public law, and its corollary, legal sovereignty, understood as legally unlimited state power. Within this new modernistic conceptual frame the laws of 1867 were construed to be a Settlement or Compromise between Austria and Hungary. The jurists sought to establish whether the Dualist state was a unitary or a composite state, and whether over and above the two states of Austria and Hungary there existed a super-state (Gesamtstaat or Staatenstaat) by trying to locate legal sovereignty in the Monarchy. These concepts, the jurists' vocabulary of the State, had a lasting influence on historians, and this influence has distorted their perception of the 1867 Ausgleich. I hope to remove some of these distortions.

I shall argue that the modernistic terms and assumptions became common currency in Hungary some twenty years after the 1867 Settlement had been enacted, and that there is no solid evidence that the authors of