Zoltán Fleck

Changes of the Judicial Structure in Hungary – Understanding the New Authoritarianism

I. Introduction

In 2018 the populist right-wing authoritarian *Fidesz*, after eight years of dismantling the rule of law and democracy, won the parliamentary election by two-thirds. This election was greatly unfair. The release from authoritarianism through elections organized by the authoritarian forces is unlikely. Hungarian voters, although in a seriously distorted environment, gave the non-democratic political forces a free hand to kill the remnants of autonomies. The Prime Minister has announced shortly after the election, without any details, some new institutional modification. Democracy, the rule of law, the constitutional values are proved to be irrelevant; even the systematic corruption of the leading political group was not enough to divert voters from giving a new mandate. The official ideology of the governing party is openly illiberal; the identity of the Hungarian state is based on the denial of the liberal constitutionalism and individual rights. Considering the new super-majority arisen due to among many factors, the unfair system, only extra-parliamentary tools remain for democratic argumentation. Checks of the governmental authority are systematically dismantled, partly by changing the authorities of the institutions, partly by appointing loyal persons to the key positions. For the moment there is no effective counterbalance for the government. This political situation will undoubtedly affect judiciary, as well as the entire construction of the rule of law from several perspectives.

A widely held evaluation of the judiciary as the third branch is that it remained the only "island" of the rule of law in an autocracy state. This political opinion is misleading, since it does not take into account the peculiarities (the general working conditions) of the judiciary, and oversimplifies one important factor in the process of the post-communist transition. This factor is the often neglected institutional culture. Democracy and the rule of law are weak not only because of the lack of general cultural attributes; legal organizations themselves are suffering from the cultural shortages.

There are independent judges and brave decisions, what is more there are relevant successes of the liberal rights-centered argumentations in the courthouses. It is not negligible that for example the freedom of speech issues or the cases of public data are handled by judges most of the time in accordance with the rule of law values. The lack of judicial independence is never complete. Even in an authoritarian system politically important sphere of adjudication can be intact from the political influence. These facts could not redraw the picture of the judicial system as part of the authoritarian power, a temporary patch on the injured body of the rule of law. Lawyers, not only judges, tend to overestimate the signs of a relative independence, and they can hardly be condemned for this. It is not expected from them to evaluate the uselessness

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of their own activities. Even the highly critical legal professionals are reluctant to withdraw the legitimacy from their own working field.

Nevertheless, the protracted crises of the post-communist democracies, and at least the grave condition of the Hungarian rule of law needs deeper understanding, what is impossible without interpreting the social processes behind the legal, political and institutional surface.

II. Naming the system

We live in a turbulent age: the former cornerstones that were thought to be solid, melted into the air, institutions collapsed, formerly stabile constitutional ground is broken. For these situations social sciences formulated numerous descriptions, concepts like different kind of authoritarianism, populism, illiberal democracy or other democracies with adjectives. The proliferation of descriptive conceptualization could not substitute the attempts of scientific explanations. New concepts are effective for formulating the questions and tensions; they are naturally seeking the way out of the perplexity.[1] From the wide web of analytic concepts, some seem conducive from the perspective of grasping the gap between the rule of law ideal and reality. When concentrating on the methods and processes of building authoritarianism in the post-communist countries, especially in Hungary and partly in Poland, the most demanding task is the ambiguity, the double-face character of making non-democracy. The formal legal checking of institutional existence is simply misleading.[2]

Before we think about how we get out of this mess, at least two basic questions should be answered. *How*, with which mechanisms has the non-rule of law situation been made? And what were the *reasons* for this perplexing situation?

Crises or death of the rule of law as new phenomenon activated an original *why*-question, but we are standing without enough explanation, we have poor cultural theories of constitutional change and we are standing confused, watching the dismantled democracy and the rule of law. Behind this tragic intellectual impotence there is a more general inability of understanding the social change. We are quite good in analysing, depicting the regime, we have even strong normative tools for evaluating. Yet scientific literature hesitates to formulate the why-questions, to seek the causal explanations.

The post-communist intellectuals and the Western friends of liberal constitutionalism are now shocked by the Polish and Hungarian political turns back to authoritarianism. This blindness is due to the dominant institutional optimism, a technocratic voluntarist approach, the free design ideology. As *Martin Krygier* warned: the rule of

1 Some examples of known description of the regime: Authoritarianism (*Kornai*), Competitive authoritarianism (*Steven Levitsky*), Hybrid regime – externally constrained (*Bozóki, Hegedűs*), Democratic authoritarianism (*Dawn Brancati*), Abusive constitutionalism (*David Landau*), Populist constitutionalism (*Paul Blokker*), Populist antipluralism (*J-W. Müller*), Mafia-state (*Magyar Bálint*), Frankenstate (*Scheppelle*).

2 *Kim Lane Scheppelle*, The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work, Governance: An International Journal of Policy, Administration, and Institutions, 26. No. 4, 2013, pp. 559-562.

law is *"not a grand rationalist program of institutional design"*, but pursuit of the existing traditions. Without solid social basis and traditions of limited power, without experiences with individual rights, the rule of law cannot be grounded. Constitutional design should count with the deeply pessimistic starting point: *"not every locus has a genius for the rule of law"*.[3]

The old fashioned cultural pessimists, with a well-based historical knowledge warned about the well-known social mechanism of the path-dependency. The path-dependency suggests that the institutional legacies of the past limit the range of the current possibilities and options in the institutional innovation. The freedom for innovation in a country, even in the moments of extremely changing periods, is limited. The big transformations are spotted by remnants of the old, there is no clean slate. After two decades it has turned out that democratic, open society is a rare flower and grows very slowly in those countries where the soil is not favorable. From the perspective of institutionalism: informal institutions, which are necessary for proper functionality of democracy cannot be redesigned freely, their changes are slow, incremental, and the technically driven programs are inoperable.

After a constant and self-conscious overusing of the term of the rule of law, we must face the fact that we have missed the real understanding of its micro-foundations. The profound instability of the constitutional values, the failure of the transitional hopes is not so surprising, if the basic question is transformed as such: "*How is the rule of law established in an environment that currently lacks it?*"[4] During the transformation process the low level of reflexivity, the underdeveloped socio-cultural analysis limited the scope of the experts; the process was unavoidably institution-centered. Thus, the concept of the rule of law behind the process of making institutions was undertheorized; it presumed an unproved connection to several social values, as justice, material wealth and social development.[5] The purely legal viewpoint, based on the moral qualities of law by *Fuller* and *Raz*, overstressed the good institutional features and the formal rationality. Taking into account the courts, a critical standpoint said:

> By focusing on the judiciary as the key institution responsible for implementing the rule of law, scholars invariably ignore the reality that long-term stability of the rule of law requires not only establishing the right legal institutions, but also embedding the legal system in the right way within the larger political system so that the latter can sustain the former.[6]

As opposed to the American science, in Europe judiciary and courts do not count as a social science topic, lawyers consequently ignore the political context, the professional connections, the social structure of institutions. Judiciary is analysed solely from the perspective of some constitutional values, primarily independence or autonomy.

3 *Martin Krygier*, The Rule of Law: Legality, Teleology, Sociology, in: Palombella and Walker (eds), Re-locating the Rule of Law, Hart Publishers, Oxford 2008.

4 *Gillian K. Hadfield*/*Barry Weingast*, Microfoundations of the Rule of Law, The Annual Review of Political Science, 2014, 17:21-42.

5 *Rodriguez*/*McCubbins*/*Weingast*, The Rule of Law Unplugged, Emory Law Journal, 2010 (59), pp. 1455-1494.

6 Ibid., fn. 5, p. 1469.

Empirical studies are mostly of a formal nature. But for a better understanding of the social basis of the rule of law the complex connections among legal professions, the prevailing judicial philosophy, the methods of adjudication, judicial role-conceptions should be empirically analysed.

A rejoicing development in contemporary legal science is that sociological aspects have emerged in dealing with the constitutional subjects: sociology of constitutions[7] or sociology of human rights[8] gained a new impetus from the deep crises of implementation. The impotency of the politically motivated and/or institutionalist checklist-analysis, which often could not step out from the sheer monitoring and collecting data from official sources and empirical studies, is apparent. It is not suitable for grasping the nature of the new post-communist authoritarianism.

After the hopeful years of post-communism, one of the well-known historical lessons of the 20th century has become an everyday experience again: formal legality often produces evil laws. Common social and cultural acceptance of the basic values and attitudes of the rule of law is necessary for stability, without a "widely shared orientation that the law should rule" institutions are built on a shaky basement.[9] Beside the general social background, a robust professional environment is also necessary, since it could give an everyday appearance of the logic of the rule of law, and transform abstract norms into common experience. Socialisation, values, traditions and organizational culture of lawyers give actual shape to the legal system. Almost all depend on legal professions, however political decision makers sometimes appear as the most important and only factor in determining the rule of law. Unfortunately, the rule of law as a legitimating ideal provides language for political cynicism, where lip service hides the routine violation of the norms and principles of the rule of law. Thus, a profound understanding of certain social and cultural factors seems unavoidable, despite the limited capacity and openness of the legal sciences.

The project of the rule of law is not to introduce law but to modify the operation of existing normative social orders – by expanding the scope of a relevant community or behaviors or changing the classification institution. Moreover, this is not just a matter of building institutions, it requires the achievement of a shift in common-knowledge systems of beliefs.[10]

The hardships and backsliding of the rule of law project in the post-communist environment justify all the demands and warnings formulated by culturalists.

III. The general peculiarities of the new Hungarian authoritarianism

Separation of powers as the most important institutional principle of the rule of law system has a well-defined institutional environment. Any weakening of this principle in a working constitutional system goes along with corrupting some other virtues ne-

7 *Chris Thornhill*, A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective, Cambridge University Press 2011.

8 *Mark Frezzo*, The Sociology of Human Rights, Polity Press 2015.

9 *Tamanaha*, A Concise Guide to the Rule of Law, in: Palombella, Walker (ed.): Relocating Rule of Law, Hart 2008.

10 *Hadfield*/*Weingast*, fn. 4, p. 24.

cessary for the rule of law. From the perspective of the judicial power these corruptions seriously destroy the elementary working conditions of autonomous judiciary. To put it more precisely: the open denial of liberal constitutionalism blocks the learning process of judicial independence. With a widely populist political background, the governing power has reactivated historical ghosts from the non-democratic past. Because Hungary, like other post-communist societies, has no explicit democratic traditions, these ghosts proved to be rather lively. Two decades of institutional attempts were not enough for the judiciary to be able to counterbalance the consequent destruction of constitutionalism. We can also guess that – even with coherent and stabile institutional reforms –, this time-frame is scarce, as judicial autonomy is a slow-growing fruit of constitutional culture. However, this promising period after the peaceful expiration of the communist dictatorship cannot be depicted as a successful learning process.

It is difficult to measure the real level of judicial autonomy, and evaluating the state of independence also causes methodological dilemmas.[11] But we know for sure, that both autonomy and independence are complex expectations which presuppose some institutional and cultural components. We can only *enumerate* the elements of political and legal environment of the non-democratic present that are relevant for the judicial independence. It is also difficult to *evaluate* the story of judicial transformations during the transition period, which after 2010 turned backward. My argument here is that the story of institutional reforms (changes, modifications) of judiciary could only constitute an institutional basis of a half-hearted autonomy. The mentality, the habitus of judgeship and the organizational culture are very similar to the pre-transitional structures. That does not mean that all of the judges and all decisions are old-fashioned and dependent remnants of the past. It does not mean even that the Hungarian judiciary did not step out from the status of political sub-ordination. The half-hearted autonomy means strong continuity of the institutional and professional culture that cannot be altered without conscious efforts. The efforts during the past two decades fell into the trap of political amateurism, oligarchic interests and authoritarian inclinations.

1. The basic nature of Hungarian authoritarianism

The following six basic peculiarities of the governmental structure after 2010 in Hungary are well-known characteristics of the authoritarian political systems. The list is far from complete, and there are some overlaps among the elements below, selected for the analysis of the judicial independence. All these aspects are somehow connected to the essential environment of the judicial authority.

11 *Zoltán Fleck*, How to Measure? An Essay on the Social Context of Measuring Quality, in: Mátyás Bencze, Gar Yein Ng (Eds.): How to Measure the Quality of Judicial Reasoning, Springer, 2018, pp. 43-55.

a) Majoritarianism

One of the main enemies in the official and informal texts emanating from the ruling political forces is liberalism. By "liberal" they understand liberal constitutionalism, checks and balances and liberties. The sheer majority, the interest of the people, the public wants to simply overwrite any individual right and non-elected limits of the governmental power. The "sovereignty argument", despite its tragically bitter aftertaste, fits well into the populist ideology of the political right. (It is not only a superfluous balancing to diagnose similar anti-liberalism at the left side of the political scene.) The judicial autonomy and the judicial verdicts, if not amicable with the ruling ideology, cannot expect any acceptance. The anti-judicalism became a natural ally of popular majoritarianism; all the non-majoritarian constitutional institutions that could control government are handled with suspicion. In Hungary, the political attack against judicial power is much lighter than in Poland, where the conflict between judiciary and government is coarsened.[12] As in some other spheres of politics, Hungarian leadership uses more sophisticated, legalized tools for diminishing autonomies. However, the populist ideology does influence judicial practice: the anti-migration campaign and political context admittedly distorted the legal logic of the trumped terrorist case of *Ahmed H.*[13] Judges are inclined to accept the suggestions of the political context despite the clear humanitarian and the rule of law logic.

The post-communist decline of the constitutionalism is a consequence of deeper social and cultural changes and some institutional mistakes.[14] Mistakes, ill-defined institutions and badly designed regulations concerning the courts during the transitional period gave wide opportunity for authoritarian government to curtail judicial autonomy. As for the more complicated cultural precondition of constitutionalism: open society, tolerance, human rights, right-consciousness – are openly and fiercely attacked by the ruling ideology (and narrow-minded political figures). Despite the tragic shallowness of this argumentation, they serve as a constant battle against the checks and balances. Majoritarian arguments equate democracy with the populist vote and deny constitutional guaranties. However, these are the natural ally of modern democracy.

b) Illiberalism

Neglecting individual rights as official state ideology is a deadly danger for the judicial prestige, since one of the judiciary's most important functions in a democracy is defending rights. Human rights according to the governing ideology are only unwanted and foreign ideological elements of the Western impotency. Civil legal protection organizations are inner enemies of the Hungarian people, financed from abroad. The battle against civil organizations was "dressed in legal clothes;" however its source is

12 http://www.iustitia.pl/informacje/2066-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements-at-the-meeting-with-foreign-journalists-on-january-10th-2018.

13 http://neweasterneurope.eu/2018/03/19/trials-ahmed-h/.

14 https://www.ceu.edu/article/2017-11-07/andras-sajo-constitutionalism-closing-societies-october-17-2017, *Sajó András*, Alkotmányosság bezárkózó társadalmakban. Közjogi Szemle.

a deep dictatorial inclination to sweep out the checks over executive power. The message must be heard also by the judges: one essential element of the legal complex, the human rights expert and attorney are officially labeled as objectionable and as enemy of the people.

c) Unity of power

The Leninist concept of power is gradually revived. As a natural consequence of the majoritarian logic, the relationships among constitutional institutions were re-conceptualized. While the constitutional surface kept the declaration of separation of power, the everyday practice of the regime curtailed the relevance of the separateness and checks. Even the constant and stable political ideology of the ruling party, which was codified into the basic law, is based on the old-fashioned "democratic centralism". In day-to-day judicial work, the unity-principle can be felt by overvaluing state-prosecution. In the collective memory of the judiciary, the state prosecutor who politically controls the legal process and even the reliability of judges is still lively. But the most adequate reflection of the unity of power for the judiciary is the court administration itself. The President of the National Judicial Office is elected by the Parliament with a two-thirds majority, which provides him with high political legitimacy, but no inner professional legitimacy. The political logic crushed any other aspects. This is why the Council of Judges is designed as a weak control institution, so it could not counterbalance the one-person leadership elected by popular votes.

d) Etatism

Etatism is traditionally strong in the Hungarian society; the expectations that the central state will solve existential, cultural and any other problems, and create safety and order are a fertile soil for the populist argumentations against various enemies. The conscious political practice of neglecting rights and hostile manipulation of individual rights are without social remonstrance in an etatist culture where fears are constantly induced. Even the judicial decisions must serve the state and its social mission to defend collectivity. In such a collective hysteria, judges could feel themselves defenseless, and the traditional role of being the guarantor of rights has faded away.

e) Anti-intellectualism

When the institutional selection system is reshaped for the political, ideological and personal loyalty, professional values swiftly fade away. After 2010, the Hungarian state apparatus was openly rearranged; with a large-scale systematic change, the governing party enforced political loyalty. Lack of loyalty is at the moment a legal option for the administrative leaders to get rid of the "suspicious" employees. This method of selection in its brutal form is not workable in the judicial field; however, a personal loyalty-system is not alien for the judiciary. The President of the National Judicial Office, who is elected by the Parliament, exercises hardly controlled authori-

ty over the selection of judges. All the court leaders today were appointed by the President of the Office. With this mechanism the judicial administration took a form of personal subordination. It does not mean that the entire judiciary works in a dependent status, but it means that a strong channel of potential influence is institutionalized by the system of selection. All distorted selection systems, breaking with meritocratic logic, are accompanied by the weakening of professional values. It is especially consequential in the Hungarian political culture where intellectual values in the political sphere are systematically expelled. The language, the forefront and the faces of the ruling force are brutally anti-intellectual, and the arguments used in public are deeply primitive.

f) Legalism

Technically the best tool for authoritarian governments is using legal forms. Originally the term was used for depicting a massive professional ideology and a public argument, that the rule-following behavior is, in any context, a moral good.[15] Preserving legal formality in the law-making and legal practices does not limit conceptual reshaping, which hollows out the constitutional institutions. Authoritarian regimes preserve the legal institutions, because legal forms play legitimating roles. This political simulation is an inherent part of the Eastern legal history: Western-style institutions on the surface gave a comforting picture and make democratic criticism difficult. Another strong Eastern tradition is legal instrumentalism, the illusory hope that by law and legal regulation, social problems will simply be solved.

These general characteristics of the new Hungarian authoritarianism serve to reassure the superficial observers, who disregard the real practices and informal norms, and can be satisfied by the sheer existence of some constitutional institutions or some independent decisions. The "conscious blindness" at home and by foreign experts can be easily constructed by showing that formal institutions and political abuses have solid legal basis. However, modernization in Hungary (as in other post-communist countries) can be successful while institutions of the European Union before the accession exerted control by monitoring rule of law. The West European influence was effective until the accession; the formal criteria and external limits from abroad during that period have had a serious impact. While Hungary is (claims to be) a full member of the democratic family of European states, the informal rules that evade the essence of public law and constitutional values are the everyday practice of government. While the formal norms can remain intact seemingly, the imitation of constitutional limits gave the government a wide route for diminishing its controls.

It is a serious historical puzzle, whether these peculiarities of the post-communist Hungarian state – etatism, voluntarism, textualism, unity of power and national sovereignty as utmost argument against constitutional values – are historical remnants or mental residues, and to what extent?

15 *Judith Shklar*, Legalism, Harvard University Press, 1986.

2. Authoritarianism reloaded

The Hungarian authoritarian system now is nothing new, it reloaded the well-known non-democratic destruction of liberties, autonomies and guarantees. With the phrase of *János Kornai*, Hungary made a complete U-turn:[16] systematic destruction of the fundamental institutions of democracy and the rule of law. With the help of a two-third majority in the Parliament, the Prime Minister effectively controls the legislative branch. The Parliament has become a law factory, where there is no preparation of bills, and if needed bills are altered for actual or personal causes. The basic constitutional institutions (the Constitutional Court, the State Audit Office, the Fiscal Council, the Competition Authority, the Ombudsman's Office, and the Central Statistical Office) were packed by the "reliable" staff. Political loyalty became the most important element in the selection process again. The new constitution (Fundamental Law) was drafted by a small group of politicians without any public discussion; the bill that modified the constitution was pushed through the Parliament. Three dozen cardinal laws have also been passed that changed the entire system of public sphere. Today there is no effective limit of the one-party rule-making and administration.

From the perspective of the justice administration, the status of the Chief Prosecutor is fundamental. The prosecution service in theory (legally) is independent from the governmental control, but in practice the chief prosecutor, a former member of the governing party, was chosen by the executive, and only then appointed by the Parliament. But the Parliament has no authority to control him. Investigations are used for the political aims, while corruption scandals of the ruling party are being ignored. The ruling party with the two-thirds majority has dismissed the President of the Supreme Court, who was also the president of the National Council of Judiciary before his mandate expired. Later the ECHR held that Hungary violated the article 6 1§ and article 10 of the ECHR.[17] The new Act on the judicial administration created a centralised administration and the Act on the status of judges lowered the mandatory retirement age from 70 to 62. Later it was overturned by the European Court of Justice. But the original positions of the retired judges cannot be reinstated by this decision.[18]

Centralization is strong all over Hungary: in education, health-care, local administration or culture. Autonomies were cut back, a governmental fight initiated against the independent civil organizations.

The official state ideology institutionalized in the Fundamental Law is central (literally: central power-field), which practically means the pure personal decisions of the Prime Minister.

Law in non-democratic systems functions perversely. The centralization and diminishing the rule of law changed the nature of the legal system: law can be changed for the party's or personal aims, there is no effective barrier for the political instru-

16 *János Kornai*, Hungary's U-Turn: Retreating From Democracy, Journal of Democracy, July 2015, Vol. 26, No. 3, pp. 34-48.

17 https://strasbourgobservers.com/2016/07/12/baka-v-hungary-judicial-independence-at-risk-in-hungarys-new-constitutional-reality/.

18 *Gábor Halmai*, The Early Retirement Age of the Hungarian Judges, in: F. Nicola & B. Davies (eds.), EU Law Stories: Contextual and Critical Histories of European Jurisprudence (Law in Context, pp. 471-488), Cambridge, Cambridge University Press.

mentalism.[19] The very essence of the "democratic authoritarianism" is that the regimes adopt nominally democratic institutions in order to protect themselves against potential threats from both within the regime and within the society at large. On the surface there is the Constitutional Court, but staffed with loyal judges; freedom of the press is declared but newspapers are bought by friends; judicial independence is guaranteed, but the administrative system of judiciary is politized. What is more, as a consequence of the Patomkin-constitutionalism the inner rationality, logic or morality of law is broken. If one takes *Lon Fuller's* classic (The Morality of Law, especially the chapter titled: "The morality that makes law possible") seriously, none of the points formulated as the basic elements of rule of law is fulfilled.

IV. The Nature of Legal Change

According to the momentous work of *Harold Berman*, the constant change of the legal tradition can be depicted as a slow, organic and continuous process.[20] Thanks to the ongoing character of the tradition, revolutions are rare and belong to the category of the unnatural type of change. After these abrupt changes specific problems emerge: actors must develop fresh legitimacy for the new sources and allocation of sources, institutions and their staff must alter their skills and change the knowledge systems. Thus, institutions try to limit revolutionary changes, and usually strong institutional tools are activated for maintaining the incremental changes and hindering radicalism.

It comes also from the *Berman's* fundamental work that despite the deep crises of the modern, there are still resistant features of the Western legal tradition. Every analysis of the legal change in the post-communist states should be based on the following stabile characteristics of the Western traditions:

1. Law has a relative autonomy from foreign logics; it must be differentiated from politics, religion and other types of social spheres. When the post-communist governments fiercely blurred the neutrality principle and the new Fundamental Law of Hungary looks like a religious and nationalistic confession, the autonomy of the legal system is compromised. Because the state staff must be loyal to the governing party and this ideological loyalty is continually controlled, ideology has infiltrated the legal mechanisms.

2. Law is in the hands of the professional legal specialists (legislators, judges, lawyers, professors). Professional rationality and arguments dominate lawmaking and law application. Nowadays Hungarian lawyers are full of serious complaints saying, that even the basic stability of the norms is not ensured, the political and the ideological openness of the text (*corpus juris*) has reached a tragic level.

3. Professionalism is bred by an autonomous legal training. Legal education is based on the freedom of teaching and the institutional autonomy. The autonomy of the universities was curtailed by implementing the position of the Chancellor who is di-

19 *Zoltán Fleck*, Law under the Mafia State, in: Magyar – Vásárhelyi (eds.), Twenty-five Sides of a Post-communist Mafia State, CEU Press, 2017.

20 *Harold Berman*, Law and Revolution, The Formation of the Western Legal Tradition, Harvard University Press, 1983.

rectly responsible to the Prime Minister and has all the financial competencies, and who has full financial authority (which means, elected leaders of the universities have no say in financial issues).

4. There is a significant system of meta-law, a coherent *corpus juris*, belief in the development of law, law as the relevant answer to the social challenges, instrument of the state, homogenous, central system, no particularism. There is no lawmaking for the personal aims, and stable generality of the norms is present. Today there is no effective limit of modification of any element of the legal system for the personal or party interests.

5. Finally, an additional element that could also be read out from *Berman*, for the law and society perspective: the right-consciousness of the society. As *András Sajó* argues in connection to the constitutional sentiments: *"A social system where individuals operate with a right consciousness is certainly different from one where this is not a fundamental assumption. It is a characteristic feature of modern society that its citizens operate with the shared assumption that they have the right to will."*[21] Recently, results of a narrative study of legal consciousness were published, in which the most important statement is that while the personal stories are full of rights-relevance, harms, injuries, the idea of claiming in front of a legal institution is almost non-existent.[22]

Despite these assumptions the dominant language of the social sciences dealing with the transformations in the post-communist regimes remained dichotomous. The dichotomous model of political and institutional change is based on the core concepts of democratisation and breakdown, the in-between successful or failed consolidation. According to this simplified model, the causes of failure are also dichotomous, depending on the implicit theory of the institutional change. The culturalists or structure-based theories are arguing that traditions, or lack of traditions, make the necessary changes difficult, and the path-dependence has deterministic effects. On the other side, agency-centered understanding tries to explain wrong political choices with the evil human decisions. The initial belief that once the structural and institutional bases of democracy are created, then the democratic system is likely to remain enduring, has proved to be false. Consolidation of democracy needs much more efforts, a constant institution-building, a continuous development of institutional rationality and learning. As the transformations after the breakdown of the communist rule were not completely similar, there is no single path and universal single theory of explanation. We should drop the dichotomies for a more complex set of different mechanisms. It is obvious, that the present agony of the post-communist democracy is not a hidden death, but a slow dismantling, a step-by-step weakening.[23] Thus, turning to gradualism and incremental changes can be fruitful.

After realizing that the path-dependent lock-ins and critical breaks, junctures are rare, even during the big historical transformative epochs like the breakdown of communism, concepts and models of gradual institutional change should emerge as analytic tools. Important, consequential changes often take place incrementally, gradual-

21 *András Sajó*, Constitutional Sentiments, Yale University Press, 2011, p. 34.
22 *Zoltán Fleck et al*, A jogtudat narratív vizsgálata, ELTE Eötvös Kiadó, 2018.
23 *David Runciman*, How Democracy Ends, Profile Books, 2018.

ly, slowly, by small adjustments. Sometimes behind the seemingly big transformations, old institutional settings remain almost intact. *"Critical junctures are rare events in the developments of an institution: the normal state of an institution is either one of stability or one of constrained, adaptive change. Moreover, transformative change is not necessary the result of a critical juncture; it can also be the result of an incremental process."*[24] For detecting the nature of the process a longer time-frame of analysis is necessary, where sequencing is crucial. Therefore I attempt to give an outline of the most important changes of the judiciary with the help of some concepts from the institutional analysis.

V. Changes of Judicial Structures in Hungary

It soon turned out that the construction of an independent, competent, trustworthy, accountable judiciary is a long process, like the consolidation of democracy. International standards do not generally work as expected, they depend on the local context, a set of beliefs, cultural values, the status and importance of the autonomies and rights. This shocking recognition could lead to a deterministic cultural interpretation and evaluation of the possible futures of the judicial independence. Meanwhile the administration of the judiciary effectively shapes the judicial culture and the everyday practice of the judicial independence and the judicial cultural history also has influence on the institutional factors.

The story of the model-seeking is illustrative. Naming the mechanisms that shaped the judicial culture during the last several decades might shed some light on the nature of the post-communist transformative processes. This short recapitulation of the collective memory concentrates on the nature of the changes during the historically short period of the modern Hungarian judiciary.

In this analysis time-frame, sequencing is decisive, since the path-dependence, the slow-moving processes, the importance of the starting point are equally relevant beside the critical ruptures or junctures. The elements of a deep equilibria are constructed by the fact of late and distorted democratization with the tradition of a low-level autonomy.

An overall picture of the periods of the Hungarian judiciary warns us about the importance of sequencing: the consecutive epochs have peculiar relations to each other. Negation, formal opposition, revolutionary or reform intentions and strong compulsion for adaptation on staff. This institutional story, as all other building processes of the rule of law system in Hungary can be characterized as continuous failure, periodic setbacks. The general lesson is that building an independent, competent, trustworthy, accountable judiciary is a long process. The administration of judiciary effectively shapes the judicial culture and the everyday practice of judicial independence and the judicial cultural history also has influence on the institutional factors. Now I am not satisfied with the formal periodization, I attempt to seek the dominant mechanisms of transitions, because these mechanisms have character-forming effects

24 *G. Capoccia*, *D. Kelemen*, The Study of Critical Junctures. Theory, Narrative, and Counterfactuals in Historical Institutionalism, World Politics, 2007 (59), pp. 341-369, p. 349.

for the institutions. At the same time these mechanisms have shaped judicial culture during the last several decades, formed the professional collective memory.

The path-dependence, the slow-moving processes, the long-durée perspective are the most manifest interpretative tools in the history of the judicial system. The importance of the historical starting point, is without doubt essential. Late and distorted democratization with a low-level autonomy has formed a deep equilibria, a standard logic of dynamism, a fragmented evolution, where political setbacks strongly pull back any evolution of autonomy. However, the transitional mechanisms and the basic environments are strongly different. It is therefore important to briefly look at the most important system changes, revolutionary steps, big reforms, overall periods and the nature of the transitions among them.

The starting point of the modern court system is a relatively late development, before the modernization period of the last decades of the 19th century, Hungary had no independent judiciary.

1. The process of establishing a modern judiciary and consolidation of judiciary could not have lasted long, since the communist took power (1869–1948). The declaration of the judicial independence and a modern organizational structure were an essential part of the modernization after the consolidation. The so-called "Compromise" between Austria and Hungary, the Settlement of 1867 as a limited *Rechtsstaat*, was built on the idea and practice of a strong executive discretionary power, authoritarian state and weak autonomies. *"The untrammeled discretionary powers of the government laid the foundations of the authoritarian state and consolidated procedures, social habits and expectations that debilitated society and made it an easy target for communist takeover after the Second World War."*[25] This institutional solution could not serve as a solid basis for emerging a tradition of judicial independence. The feudal remnants exerted considerable effects even in the modernized state structure: the nobility-jurists dominated the scene, the absence of the legal equality and the limited rights were signs of a "half-hearted modernization". As for the administration: bureaucracy kept its limited, distorted, formal, rational logic and practice. The lack of democratic traditions, weak urbanization and strong noble strata made Western modernization partly illusory or distorted, the western model for modernization had no inner social backing.[26]

The transition of this period was abrupt and swift as of the middle of the 20th century. After a short period of slow democratization, the under-institutionalized judiciary had to face a new dictatorial power. This *historical juncture* began with a massive political selection of the legal professions.

2. The totalitarian epoch (1948–1963) was a sheer and direct copy of the Soviet institutions. The Leninist "unity of power" served as a general principle for reconstructing the state structure. Courts and judges had no institutional and personal autonomy. The political selection at the beginning of the period made the climate totally ideological and controlled, the new communist system communicated a total ne-

25 *László Péter*, Hungary's Long Nineteenth Century. Constitutional and Democratic Traditions in a European Perspective. Collected Studies, Ed: Miklós Lojkó, Brill, 2012, p. 11.

26 *Jenő Szűcs*/*Julianna Parti*, The Three Historical Regions of Europe: An outline, Acta Historica Academiae Scientiarum Hungaricae, Vol. 29, No. 2/4 (1983), pp. 131-184.

gation of the previous development, openly intervened politically, but the most important influencing factor was the general political-legal environment.

After the revolution of 1956 and the retorsions, the Kádárist political consolidation has again changed the institutional environment of the judiciary. This transition process was rather a *displacement,* where despite the stability on the surface, slow changes have altered the everyday working of the authority and the state structure. As *Streeck* and *Thelen* evaluate this kind of evolution: *"change occurred not through explicit revision or amendment of existing arrangements, but rather through shifts in the relative salience of different institutional arrangements within a field or a system."*[27] In Hungary from 1963 a slow depolitization of the judicial field has taken place; the basic texts of the "legal policy" were reformulated. After ending political retorsion of revolution and the political amnesty, the professional elements in the judicial system became more important, parallelly to the economic reform, which was based on the legal regulation, formal rationality instead of political command.

The soft dictatorship (1963–1989/90) remained officially a one-party dictatorship, but the system showed a kind of dynamism: considerable steps toward a relative judicial independence, where there is no "telephone justice" (direct political command), where judges could defend themselves against political and personal influences, where a low esteem and salary were compensated by this relative autonomy. A solid culture of independence could not emerge, due to the low salary and prestige contraselection and the fluctuation hindered the stabilization of the professional values.

1989 was a new historical break, although after this transition there were no forced retirements or staff-change. From the perspective of the present situation the nature of this transition is essential. This is a *new historical juncture* point, but with strong institutional stability, it is rather a *conversion* where judiciary was redirected to new goals, functions, purposes, *"inherited institutions were adapted and fitted to changes in their social, economic, and political environment."* Or *path departure*: a gradual adaptation through partial renewal, reopening alternatives by significant changes in the environment (between the path-dependent lock-in and a radical change).

Institutionally, a long hesitations and model-seeking (1990–1997) began after the political transition. After democratisation, during the last few years before the reform process (the first half of the 1990 s), the external (ministerial) court administration became weak because its operation was riddled with political conflicts and the Ministry of Justice wanted to free itself of this burden. In this vacuum the traditionally strong presidents of regional and county courts have been further strengthened. This development culminated in the establishment of the codification committee organized by the Ministry, which was composed mainly of the county court presidents. Therefore, no efficient means of controlling the traditionally strong middle (county) level administration emerged even during the planning of the new organisational structure. During the law-making process of the 1997 Judicial Act, there was a strong political pressure to build a new administrative system in the field of justice. In the 1990's a populist argumentation on the rising crime rate emerged, and in the eyes of the socia-

27 *W. Streeck/ K. Thelen*, Introduction: Institutional Change in Advanced Political Economies, in: Streeck and Thelen (eds.), Beyond Continuity: Institutional Change in Advanced Political Economies, Oxford University Press, 2005.

list government the institutional reform seemed relevant answer to the public claim. Another factor which pushed the political decision maker toward a full-scale judicial reform was the escape from the conflicts between judiciary and the executive. At the first half of the 1990's judges (some young, active members of the judiciary) and judicial bodies criticized the Ministry of Justice because of the practice of nominating county court presidents. Judges had voted for the nominees, but the Minister had selected those, who had been ranked lower by the judges. Before the first democratic election, the last communist government rewrote the legal system almost completely; the Minister of Justice *Kálmán Kulcsár* abolished the general supervisory authority of the Ministry over the courts. He had the idea, that the autonomy of judges is one of the most important elements of the rule of law. As a sociologist he believed in the professional self-development and in the cultural shift towards independence. Traditionally the middle-level court administration – the county court presidents were the most powerful figures. This is why the first conservative government resisted appointing to this posts the judges, who had been presidents during the communist regime, despite the fact that in some places they have gained the majority votes from the judiciary. In 1992 the court executives have been changed, none of the former presidents could remain in position. Because of the relative vacuum in the ministerial (central) administration, the position of the county court president became more important. Realizing that the central administration is weak, the newly appointed presidents organized a regular, but informal collaboration. Sociologically this group of judges with their middle-level administrative authority occupied the functions of the central administration. Consequently, the classical ministerial administration of courts had been emptied and destroyed years before the administrative reform. Moreover, some of these judges played a decisive role in the preparation of the codification process. The 1997's judicial reform was entirely prepared by the court administrators that enjoyed legitimacy stemming from the appointment by the first democratic government. However, these figures were socialized in the same mental environment. The terrible mistakes of the council model were the consequence of these factors.

The new council model was a *radical institutional (model) change* by a political decision, but the active institutional design was based on the old interests, made by the old institutional actors. This is why it was rather a *path switching*: a radical intervention ends the self-reinforcement process; it gives way to a new institution. However, the deep persistence of the cultural factors, habitus and the role-set of the judiciary limited the desired results.

After a long hesitation the council model was set up in Hungary in 1997. The National Judicial Council became the central organ of the court administration. It consisted of 15 members: two-thirds elected judges (elected by a two round, delegation system), the President of the Council was the President of the Supreme Court. One-third of the Council were the *ex-officio* external members: the Chief Prosecutor, the President of the Bar, two members of the Parliament and the Minister of Justice. Every decision of the Council was made by a sheer majority, thus the external members could not exert any control, the more so because the elected judicial members were the court presidents (7 of 9 members), whose administrative activity should have been controlled by the Council. Thus, the Council was not interested to exert any effective control and the corporate interest dominated the system. The court presidents control-

led themselves. This system could not function effectively, it had to face administrative failures, and it was not transparent and accountable.[28] The Hungarian experiment with the council model gave serious arguments for the authoritarian turn.

The political reaction of the right-wing government was a strong centralization and changing the relevant positions by their trustworthy leaders. Institutionally it was a new *layering:* an introduction of new rules on top of the existing system, changing the ways, in which old rules were applied, not entirely new institutions, but small changes that led to a big change over the longer run.

This long-run consequence was the abandoning of the self-government and building a centralized judicial structure. After the right-wing *Fidesz* step into power, they subverted the judicial administration: the Council was disbanded; the autonomous model with its corporate mistakes after one and a half decade has died. Similar to the state structure and the general Hungarian political climate, the court administration became centralised and through the one-person structure, open for the political influence. As of 2012 the President of the National Office for the Judiciary exercises all the authorities of the central administration. The President is elected by the Parliament among judges by two-thirds majority for nine years. The Government appointed, and the Parliament elected the wife of a *Fidesz* Member of European Parliament, one of the leading figures of the party.

The President as the central administrator is responsible for the strategic planning of the court administration; she can also adopt binding guidelines and recommendations for the courts. Her most important competence is to appoint the presidents of the regional courts and the regional courts of appeal and supervise their activity. From 2012 until present the entire administrative staff was changed, the complete change was facilitates by the Act on the Status of Judges, which modified the compulsory retirement age of judges. This complete personal change gave wide opportunity for the politically elected President of the Office to enforce her administrative "philosophy". After fierce critics, *Handó's* powers were cut, but the essence did not change: it depends on her, who can be an administrative leader even a judge. After the international reproach (opinion of the Venice Comission)[29] and the Hungarian Constitutional Court's decision on the ruling of the President (of the Office) the Judicial Council had been given a veto power but the practice did not change much: *Handó* still has the right to appoint those whom she wants. The most important way of evading the control of the Council is to declare the applications ineffective, annulling and restarting the application process. The Council normally does not use its veto power, thus the President can evade the objective rank during the selection and application process.

Officially the National Committee of Justices (Council) functions as the supervisory body over the activity of the President of the National Office for the Judiciary. This Council is composed of 15 members (president of the Curia *ex officio*, others elected by judges) The Council determines the principles to be applied by the President of the Office in selecting judges and exercises the right of consent regarding the appointment of the court leaders who did not receive the approval of the reviewing

28 *David Kosar*, Perils of Judicial Self-Government in Transitional Societies, Cambridge University Press, 2016.

29 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.

board. It also decides on the approval to the renewal of the appointments of presidents and deputies of the courts, if the president has already served two terms in the office. It appoints the service court and its president.

The weakness of the Council stems from certain sociological facts: it has no separate administration, the preparatory work is organized by the Office, led by the President whose work is controlled by the Council. There is no strong leadership, since it operates in rotation every six months. The administrative superior of all members (except the President of the Curia) of the Council is the President of the Office.

In 2018, the judiciary elected a new Council, composed of judges who are critical about the administration. The inner tensions are therefore exacerbating: the newly elected Council started monitoring the administrative activity of the Office. As a consequence, harsh conflict broke out between the Head of the Office and the Council, and the judicial body started to exert real control over the activities of the Office and issued a resolution, in which it rejected the practice of nomination process of the court presidents. This open conflict could be a good possibility for the governmental majority to alter the administration. Fears are growing after establishing the special Administrative Court above which all the administrative authorities belong to the Justice Minister. With this new model, at the moment applicable only to the administrative and labor courts, Hungary is moving back to the ministerial model. Is it a new layering after the conscious weakening of the Council? The question is still partly open, but all the experiences signed here serve as a well-grounded basis for a new wave of losing autonomy.

Characteristic of the period	Time-frame	Dominant mechanisms of change
Building the modern judiciary	1869-1948	historical juncture
Totalitarianism	1948-1963	displacement
Soft dictatorship	1963-1989/90	historical juncture point, but conversion
Model-seeking	1989-1997	radical model change, path switching
Distorted council model	1997-2012	layering
Centralised political model	2012	
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