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SPECIAL ISSUE ARTICLE

Backsliding Democracy and the Slippery Slope of Conceptual Weakness

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Abstract
This article discusses the thin socio-legal conceptualisation of the rule of law in Hungary. Employing a culturalist perspective, it first shows how the rule of law had a thin foundation prior to the Second World War in this country. Then, the contribution demonstrates how, contrary to previous understandings, even in the most advanced stages of rule of law building in Hungary, in the early 1990s, the resulting concept had been thin mainly focusing on institutional guarantees and legal certainty. The remaining part of the contribution then critically discusses whether and to what extent it is possible to use backsliding to frame the ongoing legal changes in Hungary.

Keywords: Rule of law, constitutional court, post-communist, Hungary, backsliding, constitutional concepts

1 Introduction

The rule of law is not exactly in good shape in the world, and the number of people who cannot enjoy its benefits is increasing (World Justice Project, 2023). The democratic backsliding is particularly spectacular in some post-communist societies, where regimes openly challenging Western values are in power. The denial of constitutional values goes hand in hand with the formal maintenance of institutions, making it difficult for legal and political actors prone to formalism and institutionalism to discern the nature of the new autocracies.

There are many possible reasons for the backsliding of democracy. Little attention has been paid to the conceptual foundations that legal and political practice can bring to bear with institution-building effects. The lack of conceptual clarity about democracy and the rule of law may contribute to the practical weakness of these essential components of modern European political and legal culture. In modern constitutional systems, constitutional courts play a crucial role in interpreting freedoms and constitutional values. Political actions are more or less aligned with the established definitions of judges. Especially in legal cultures where there is little tradition of limiting power. The first formative years after the fall of the communist regime are therefore crucial for the stability of the rule of law and democracy. The undeveloped concept of the rule of law in legal theory and practice facilitates the process of autocratisation. The post-change Hungarian constitutional jurisprudence is a good example of the neglect of the concept of the rule of law.

The instrumentalist concept of law (law as a means of governing the state) is more durable than political and legal institutions (Kühn, 2011). But the cultural specificities of Eastern, Central and Eastern Europe that determine the fate of the rule of law and democracy may have deep historical roots. It would be difficult to understand the rapid demise of Hungarian democracy without looking at the sociological context of values. The fact that the voters gave political mandate to Fidesz for the fourth time in a row, which is building an autocratic regime, seems to indicate that the dominant value system in Hungarian society is coherent with autocratic political practice. Hungarian respondents attach much less importance to democratic aspirations, citizen empowerment, gender equality and

tolerance than the majority of European societies (World Values Survey). Such research on political culture does not, however, suggest that some cultural determinism is the cause of the death of democracy (Pippa and Inglehart, 2019). But the failure of institutions to function properly can reinforce the effects of inherited, long-standing cultural traits. One of the distinguished functions of judicial interpretation is to stabilise the values of the rule of law through coherent interpretation of the law. The instrumentalism and the free political use of law that prevailed throughout communist rule was incompatible with the legal restriction of the exercise of power. The legally limited exercise of power in accordance with the rule of law depends not only on the existence of institutions, but also on the preferences and intentions of the actors. The rule of law requires strong cultural reinforcement, which depends primarily on the professional practice of lawyers in the institutions.

The institution-building fervour of the first decade of democratisation and the optimism about the existence of constitutional institutions overshadowed the recognition of the culture-building function of interpretative legal work. This professional negligence later had consequences that threatened the very existence of the institutions themselves. The blind faith of three decades ago in the formative role of institutions fitted well with the neoliberal worldview of the last decade of the last century. But the consequences of this irresponsibility are clear to see (Mandel and Humphrey, 2002). They should have anticipated that the historical, social and psychological foundations for the emergence of a Western-style liberal democracy were partly missing (Henrich, 2020).

Even today, the idea of the rule of law as a culture seems subversive to the professional mainstream. The narrow conception of the rule of law led straight to an autocracy that are cheating with forms of the rule of law (Sajó, 2021). For those operating with a cultural concept that rejects the comfort of a narrow, formalistic conception of the rule of law, it is difficult to avoid the trap of cultural determinism. But suffice it to say that the transition to democracy is longer and more tortuous. Despite the ruling assumption, that all the essential legal and political steps were made at once out of nowhere, one should know, that relevant changes in social and political spheres started much earlier, and continued after the 'revolutionary' years of the 1990s (Galasinska and Krzyanowski, 2009). The building and consolidation of constitutional culture and practice is a longer process, which should be seen as part of the regime change.

But what are the factors that could bring about a change that would ensure the stability of democracy and the rule of law? What are the sources and mechanisms of cultural change? In this article, we do not go all the way from the role of institutions in shaping culture, to the recognition of the importance of education, to the significance of cultural reprogramming or the moral revolution. We will stick to the single element of the cultural foundations of the rule of law, the analysis of the evolution of concepts and symbols. The learning process of the new democracies is not worth interpreting schematically: '. . . cultural change in today's age of "global difference" and reflexive negotiation of identities between and within cores and peripheries is surely anything but a learning process' (Lash, 2002, p. 26). Cultural change is not a logic of clear and distinct ideas, discursively legitimated speech acts, but arsenal of symbols, most of the times tacit, it is, rather, rhetoric. Symbolic practices, politics of symbolic practices, are the main source of information in analysing the cultural embeddedness of rule of law.

In this article, after a theoretical and historical introduction, I examine the conceptual antecedents and interpretative attempts of the rule of law in the Hungarian legal-political field. My point of departure is the well-known context that regime-changing societies received the rule of law as a guarantee of formal institutional calculus rather than of welfare. *Rechtsstaat* is a frame of the instrumental reason, not the issue of good life. This was expressed in the symbolic environment and use of the rule of law (Kahn, 2014).

1.1 The role of ideas: 'culture matters'

We are all shocked by the language of the new autocrats who openly and energetically deny the meaning of such concepts as rule of law, human rights and liberal constitutionalism. Words and

symbols are necessary weapons in democracy building and also against it. Constructing new institutions were relatively successful in new democracies, but the worldmaking failed (Goodman, 1988). Authoritarian reversals can be successful in part because the conceptual culture of the rule of law was not maintained and developed prior to the autocratic reversals. In particular, this neglect has proved fatal for democracy in those states that lacked the experience and theoretical underpinnings of the rule of law. The chance of resisting an authoritarian regime also requires a toolkit (Swidler, 1986) that draws its strength from this conceptual grounding. The resistant practices are conditioned by the state and quality of semantic tools, it is illustrated, among few others, by the professional life of Ernst Fraenkel (Meierhenrich, 2018).

The importance of reachable constitutional arguments and symbols are also detected in the story of the unlikely resistance of judicial groups in Poland (Matthes, 2022). These legal professionals could arrange collective force, which was certainly helped by the historical proximity of the Solidarity movement.

We should not neglect the role of the individuals, despite the fact that they play little part in the usual arguments about the rule of law. Missing 'heroes' could make any changes unlikely, moral entrepreneurs, actors with cleft habitus trigger the movements necessary for enforcing change (Bourdieu and Wacquant, 1992). Without the intent to outline a comprehensive inventory of the necessary conditions of emergence of transformative or resistant forces, with the example of Hungary I demonstrate the defective development of the conceptual rule of law toolkit. For without the right actors, there can be no collective action, and the emergence of the right actors requires a specific way of thinking, a thought-collective (Fleck, 1979). Without properly invented and maintained ideas, the process comes to a standstill.

My basic claim in this analysis is that, for stabilising rule of law or efficiently resisting the autocratic regime, the conceptual elaboration and theoretical grounds are necessary. The post-communist Hungarian legal science and public intellectuals have failed to perform the intellectual work of adaptation of some key terms. The vocabulary of democracy-building, institutionalisation of the legal system, remained technocratic and narrow. This narrow-mindedness has strong historical roots and contributed to the easy destruction of the rule of law, dismantling democracy or constitutional backsliding. The primary experience of the conceptual history of the Hungarian *Rechtsstaat* is about the double burden of the theoretical deficit and political distortion on the present time.

Defining the meaning of the rule of law is an intellectual exercise, but also a political agenda. These two are interdependent: the scientific fervour for conceptualisation and interpretation reflects practical needs, while legal and political debates are framed by theoretical developments. Attempts to institutionalise and stabilise democracy are generally also practical tests of theoretical and conceptual development. At the time of the collapse of the Soviet system, there were no major works of jurisprudence that had been suppressed, banned or forgotten, ready to lay the foundations for a process of cross-fertilisation between theory and practice. The state of jurisprudence before the Second World War corresponded to the authoritarian state practices, the weak democratic traditions and the limited conditions of freedom that characterised Hungary in the first half of the twentieth century (Rady, 2015).

After the authoritarian turn in the second decade of the twenty-first century, the rule of law as a system of institutions and principles became part of the political discourse. However, this thematisation has had divisive effects as a sharp political opposition. The polar opposing interpretive starting points, explained by immediate political positions and interests, have little to do with any theoretical basis. This current political debate, in which the criteria of the rule of law have been relegated to the immediate space of power, has been reduced by the majority of actors to a confrontation between common European values and national sovereignty.

There are no serious arguments against the claim that common European values are enforced with significant institutional differences. However, three decades have proved too short a time for these values to be shared by a broad political and social consensus. The collapse of democracies

mobilises a constant pressure to reassess. However, the constant redefinition of the rule of law is not based on solid theoretical foundations, nor is it backed by collective experiences. Under these conditions, the temptation to authoritarianism is easy to find in the form of exclusionary ideology of nationalism, which is all too familiar.

The process of accession to the European Union has, by its very nature, been dominated by purely institution-centered approaches. The rule of law criteria have emerged as a regulatory, legislative issue (Ágh, 1999). There was neither the means nor the will to test whether the principles of the rule of law were firmly established. Disappointment was thus coded. At the moment, even in the face of sobering failures, we can only say that the stabilisation of the concept of the rule of law is still an ongoing process. The old democracies are also facing serious challenges and showing some signs of resilience, and a renewed transformation with the promise of democracy must take all this into account.

However, the political claim that the rule of law has no clear content and is therefore a weapon to be wielded freely in political struggles is nothing more than a dodge against criticisms of the dismantling of democracy. As the Hungarian Justice Minister stated 'Is rule of law a set of universally applicable objective criteria? No. It lacks well-defined rules and remains the subject of much debate internationally and among national constitutional bodies and academia. Concern for the rule of law should pay greater respect to the specifics of Member States and not try to impose an artificial, one-size-fits-all framework.' (Varga, 2019). For the content of the concept of the rule of law can be readily discerned from various legal and political documents. The concept must be read and interpreted, like the general concepts of democracy or freedom. Healthy communities of interpretation provide authoritative sources for this work. The European legal institutions have, so far, issued a relatively coherent interpretation (European Commission, 2014). These have shown that the rule of law, legal certainty, the prohibition of arbitrary executive power, the protection of the rights of the judiciary and the independence and impartiality of the judiciary, judicial review, respect for human rights and equality of rights are integral elements of the concept of the rule of law (European Commission, Rule of Law). The definition of meaning cannot therefore be evaded, either by reference to the mere existence of certain institutions or by referring to the general uncertainty of their content. The rule of law is a metaphor whose formal and substantive elements (norms, principles, values) are mutually reinforcing. Just as, at a higher level, the rule of law, democracy and human rights are in a similar relationship, their separation weakens each of them. The lack of legal and practical elaboration of the concept of the rule of law is directly linked to the recent failure to stabilise democracy.

1.2 Old and new authoritarianism

The shortest answer to the question of what is new in contemporary non-democracies compared to the authoritarian regimes of the past century is the excessive legalism, where the forms are hollowed out but kept, formal institutional skeleton masks the lack of rule of law values. With a new conceptual attempt 'authoritarian rule of law' (Meierhenrich, 2018). Communist rule also used Western-style institutions of public law, but the constitutional declarations did not deny the principle of unity of power and the leading role of the party.

This issue cannot be dichotomised easily as true democracies and false democracies in democratic clothes or real rule of law and cheating with forms of rule of law. We all know that law is a Janus-faced entity, the inner authoritarian seed in the law is based on the logic of command and obeying and the fact that law is the dominant tool of any power in modern societies and the major instrument of legitimacy. This makes law, continental hierarchical structure especially, open for authoritarian capturing: using legal tools for authoritarian aims does not count as extreme. And masking this shameful nature is an elementary interest in democracies. Consequently '(j)udges may participate in authoritarian uses of law by unquestioning obedience to rule and other authorities, by using stereotypical reasoning, by upholding the status quo and

hypostatising power relationships, and by taking a punishing attitude towards disobedience' (Henderson, 1991). The question is what is the size of the relative autonomy of judges working under political stress (Graver, 2015).

Uncertainty, threats, risks, fears are incentives for accepting authoritarian parenting, these emotions played a leading role during the transformation process and they are with us even now. As a consequence, authority as the dominant co-ordination device kept its legitimation by the Hobbesian social vision: law's coercive force and central power of the state is absolute necessary. The opposite theoretical side, the critical and emancipatory legal thinking and Humanitarian, responsive vision of law (non-authoritarian jurisprudence) is poor or almost non-existent in Eastern Europe. Authoritarian understandings of law and legal decision-making rest on the paradigms of obedience to authority narrowly understood. In 2018, the Fidesz government introduced punitive measures to end homelessness, which only provoked a minority of public protest. The law-and-order approach to social problems is a common expectation (Albert, 2018). The durability of authoritarian attitudes has been established by several studies (Todosijevic and Enyedi, 2008).

Authoritarianism goes global but this, most of the time and in most places, differs from old-school dictatorships (Diamond, 2016). Not just because their origins, which look like a slow deterioration instead of 'coup d'État', but because of their hypocritical characteristic. As dictators learned the election play, new authoritarians speak the language of the rule of law and keep lying about the nature of the regime. The most important feature, the dominant characteristic of the new authoritarianism is its democratic wardrobe (Tóth, 2019). Democratic institutions formally function the same way in these regimes that they do in democracies. The formal rule of law institutions and mechanisms strengthen stability by ensuring legitimacy, it protects against critics, the institutions serve as information sources, etc. Formal rule of law, the *Great Rule of Law Cheating*, the language of fake constitutionalism makes any revolt against the regime illusory and makes the process of reconstruction extremely complicated. We should know too, that hypocrisy is as old as politics (Runciman, 2008). A certain amount of pretense is part of democratic life, but there are destructive hypocrisies which should be avoided. In our post-communist case the real coercive, arbitrary nature of the regime is masked by empty formalism. With expressions of David Runciman the 'double standards of empire' in which coercion is dressed up as something different, but in the end power-holders will drop their pretences about the nature of their power; according to the usual dynamism of the masked authoritarian regimes. My statement here is that people living in non-democracies are accustomed to the overall, wholesale regime-level hypocrisies and it is hard to change for a simple political masking. Lying in the very nature of the political system is similar to the 'lies of life' (*Lebenslüge*) in everyday identities of *Homo Sovieticus*.

In East European legal tradition this fake-constitutionalism, the *Potemkin* democracy has its own place and strong antecedents, which confirms the need of historical analysis instead of pure political evaluation. Hungarian political history is full of fake elements such as 'kingdom without king', 'admiral without sea', 'people's democracy without democracy', 'elections without options', 'revolution without revolutionaries', 'constitutional question without constitutionalism'. Until the middle of the twentieth century, the issue of constitutionalism, the "'public law question"', was a defence of the privileges of the nobility against the foreign ruling house in Hungarian political and intellectual life. The division of power meant a balance between the king and the feudal orders (Péter, 2012). The country's form of government remained officially a kingdom after the dethronement of the Habsburgs and the short-lived republican era (1918–1920) until 1946. This was, in fact, led by Governor Horthy as head of state in the uniform of a rear admiral at the head of a state without a sea. Sometimes some lies, especially myths, breed creative illusions or imaginations, but in an authoritarian setting mostly serve only authoritarian aims. This is why contemporary signs of hollowing out democratic institutions in old democracies do not seem lethal, although very consequential especially for the chances of newly emerged democracies, but societies without pro-democratic and freedom-centered imaginations remain helpless against ill-intentioned authorities.

2. *Rechtsstaat* as symbolic force

The life of the rule of law as practice and idea seems to be in crises under the pressure of new waves of autocratic powers. Although rule of law proves to be tragically weak as a normative weapon against illiberal regimes, the condition and history of the rule of law concept could inform on the causes of success and legitimacy of authoritarianism.

As Dietrich Rueschemeyer argues: the views of dominant groups on some important social conditions and anticipations about future progress might have a decisive effect on constitutional change (Rueschemeyer, 2006). Theoretical frames, even ideas can play as integrative force, they can guide the normative and institutional development if some structural factors (institutions and movements of knowledge communities) help this process by protecting, conserving, nurturing concepts, ideas. There is a strong connection between the development of theory or ideas of rule of law and constitutional practice. An institutionalised, widely used, disputed theory of rule of law gives vocabulary and references for disputing and evaluating actual practices of political and legal actors.

While cheating on the real character of the institutions is the basic characteristic of the new authoritarianism, illiberal leaders speak the language of the rule of law and legality *and* not only do the opposite, but use harsh anti-liberal argumentation against the values and principles of the rule of law. Because most of the rule of law arguments work without strict formal definition, illiberal regimes cannot be unmasked easily. They seemingly behave well, *cheat only to the extent that is necessary*. The systemic critic encounters serious obstacles, because the harsh executive arbitrariness and coercive acts are not in the arsenal, at least not on the front row. 'The regime relies on the disapplication of the law and not on the application of the non-law.' (Sajó, 2019, p. 373). András Sajó refers, for example, to the practice of seriously corrupt and unjust public procurement, which is mostly following EU law, but violates the value, the inner logic of the rule of law principles. The injustices occur beyond the reach of the formalities of the law and consequently beyond critical judicial practice. Criticisms of the illiberal politics can be based on theoretical, substantive and political levels, but law is basically an uncertain tool. Rule of law is weak in legal conditionality and formal control over new authoritarian (illiberal) regimes, because they are smart enough to evade the state of open negligence of formal rules. But rule of law ideas play an important role even in non-rule of law contexts. In Germany the evolution of the *Rechtsstaat* idea was rooted in the Enlightenment as the liberal critique of the *Polizeistaat*, in which the political logic was a simple equating of law with state order. Prussian state absolutism in reality was not limited by any legal checks, but theoretical development did not have to face structural hindrances. As a consequence, despite the conservative authoritarianism after the 1848 revolution, the theory of Robert von Mohr exerted considerable effects on the thinking of the emerging professional lawyers and liberal politicians (Meierhenrich, 2018). In the Weimar era, on the basis of the Constitution a rights-based constitutionalism and the *Rechtsstaat* as a strong value-based concept easily got the scientific and public scenes. This conceptual development, which basically reshaped the German tradition of thinking on the power and state, gave the opportunity of surviving the normative aspect of the state even in the Nazi period, at least since the very end of the 1930s. The relevance of the seed of legal conceptual normativity was discovered by Ernst Fraenkel in his marvelous book, *The Dual State* (Fraenkel, 2017).

Similar to the long debates on the concept of democracy not presented here, rule of law also struggles with definitional problems which cannot be solved by institutional terms, but cultural conceptual attempts are resistant to operationalisation (Keane, 2009). Because autocrats were learning to play the election game, electoralism is an inadequate criterion for categorising regimes. The rule of law game is similarly fake. Thomas Schaffer suggests a language-centered approach: seeking the meaning of precarious concepts the proper questions are 'How local people understand their own action? How the meaning of institutions varies from place to place and time to time? What are the intensions of people who make use of the institutions?' (Schaffer, 1998, p. 9). Contrary to the traditional culturalist argument, that because of local traditions people have no

knowledge, skills, proper attitudes of democracy or rule of law, Schaffer concentrates on different ideals towards which institutions in different contexts might be oriented and asks how people use concepts, arguments, what are the semantic field of related concepts? There is no simple, clear, logical conceptualisation, but ambiguities, ambivalences and contentedness in political and non-political, everyday settings. But the existence of the rule of law concept as reference, idea or intangible ideational state could make a difference. Scientific development in theory-constructions is not hermetically separated from the everyday language and understanding. Characteristic intermediate actors are judges who can translate abstract concepts into practical normative requirements, behaviours, arguments. The changes of vocabulary and conceptual innovations by elite groups requires a constant, lively relationship between dominant 'meaning-makers'. In another context it was named 'legal complex' (Halliday, 2007).

3. Conceptual development of the rule of law in Hungary

3.1 Legal ideas before the Second World War in Hungary

The Hungarian legal sciences after their late appearance, served the national, conservative state ideology and practice by nurturing the dominant historical myth of the Holy Crown. The public law, state law, were the key legal sciences without academic institutionalisation and autonomy, thus legal sciences remained a kind of dominant ideology. The ancient historical myth of the Holy Crown, which was interpreted as a contract between the Nation and the Emperor, and the lack of written constitution, restrained the emergence of the idea of *Rechtsstaat*. According to the conservative view the idea of the nation which is embodied in the state must be served without restraint (Szabó, 1978). This autocratic public law tradition could not change into a German-type *Rechtsstaat* idea without a charter (written) constitution, while in Germany the legal dogmatic method became the main route of dealing with public relations. The interpretation of the constitution overshadowed the central role of the concept of the state, the science of public law was organised around the basic concepts of the constitution (Sólyom, 2016). In Hungary a similar theoretical progress remained impossible, even Kelsenian positivism met with rejection. The official jurisprudential position before the Second World War, the accepted, mainstream academic argument, has remained the preservation of feudalistic national traditions. Its critics have been Neo-Kantian legal theory and attempts to adapt German state law positivism. The lack of modern positivist theory and national traditionalism has facilitated the rise of Orbán's populism in the Hungarian legal world as well (Gárdos-Orosz, 2021). From the turn of the century until the end of the Second World War state efficiency (in contemporary language: good governance) was the guiding, key concept in dealing with public law and political relations. 'In contrast to some west European legal systems, in the Habsburg Monarchy, in imperial Germany and elsewhere, the presumption of the law was on the side of the state authorities: in case of conflict, the burden of proof did not rest with the official but with the plaintiff. Citizens seeking legal redress against an-alleged wrong done by the state official had to produce evidence that the law expressly protected their interests on the point at issue.' (Péter, 2012, 282). The legality principle remained critical, minority opinion, thus the cognitive and institutional grounds of developing a *Rechtsstaat* theory were tragically missing. The critical positions could not step into the Academia and official institutional setting, even legal science. At the beginning of the twentieth century the neo-Kantian natural law and historical legal theories were anachronistic: under-institutionalisation of the social sciences, the lack of theoretical conceptualisation and the weak philosophical tradition kept Hungarian legal thinking far from realising the importance of the limited state, legality and rule of law. This underdeveloped theoretical condition is one of the causes of the stubborn technical formalism of Eastern European judges and the thin, contentless meaning of the rule of law idea.

3.2 Communist legal theory: 'socialist legality' (Gesetzlichkeit)

In the period of communist rule, the instrumentality of law was further strengthened, and it was only in the second half of the period that the right of citizens as a limit to the exercise of power began to be given meaning. From the beginning of the consolidation of the Kádár era, from 1963 onwards, communist rule gradually gave way to the assertion of civil rights. The range of state decisions that could be challenged in court was extended. According to the official ideology legality can be ensured by the leading role of the Party which alone was capable of representing the interest of the whole society. Consequently division of power and other guarantees against the government were unnecessary, even hostile to the ruling basic values. Still after the tragic consequences of the first totalitarian period of Communist rule, power agents, legal institutions, jurisprudence and legal practice took some steps in the direction of legally controlled politics without reaching the standards of the *Rechtsstaat* and without its theoretical and conceptual rehabilitation.

It is widely known that prosecutors, the hierarchical, stringently controlled state officials, played a key role in socialist states. The prosecutor was seen as the guardian of legality and for this function this office had strong control measures. The history of the concept of *socialist legality* began with paradoxes: the first period is the years of 'revolutionary legality', which had no legal, only political basis, in the legal sense it remained totally arbitrary. Dictatorship committed grave lawlessness on the grounds (in the name) of socialist legality. But as early as 1953, after the death of Stalin, the official role definition of the Prosecutor's office was the liquidation of serious lawlessness ('remedies for legality grievances') of the former (Rákosi) party leadership. After the revolution of 1956 socialist legality took a schizophrenic form: on the one hand 'restoring legality' involved the meaning of restoring the order of the Party by cruel penal retorsion, on the other hand it involved a demarcation from the lawlessness of the former, pre-revolutionary period. The Communist party elite deployed the most brutal element of the law while promising the restoration of legality. According to the Party decree in December 1956 one of the causes of the counter-revolution was the brutal violation of legality by the former Rákosi regime. From this moment political documents emphasised the double side of legality: as if legal control over the powerful could defend ordinary people against the excesses of power. Right before the last retaliatory penal sentences and the general amnesty of 1963 the Communist Party Congress issued a decree on the 'results of the socialist building and the future tasks of the Party' and proudly stated:

> 'After 1956, we restored socialist legality, provided justice to the victims of the personal cult, and vigilantly guarded socialist legitimacy so that the lawlessness caused by arbitrariness would never happen again. Our people know and appreciate that everyone who does not raise their hands to the power of the people can live and work freely and peacefully in our country.'[1]

During the consolidation and economic reform from the end of the 1960s the term 'socialist legality' has retained its double meaning with different emphases and was given more detailed content such as 'the protection of the social and personal property', 'the protection of the labour, personal and family rights of the citizens', 'the simplification of the official processes'. This change in the tone in Party documents mirrored the policy of reconciliation, detente and consolidation which was based on the relative autonomy of the private sphere. Even some procedural stability was needed for the sake of economic rationality and decentralisation of the economic reform. Thus, the concept of socialist legality gradually approached a non-ideological, professional meaning. In a decree of the Party Central Committee on the enforcement of the 'legal policy guidelines' issued in 1979 the socialist legitimacy content was the procedural guarantees and

[1]MSZMP VIII. Congress 1962 November.

decentralisation of public administration powers. As for the wording of the official documents: in the beginning of the 1980s even the adjective 'socialist' was omitted from the legality. From the middle of the 1980s the phraseology of official documents shows a double character: on the one side legality had a neutral, legalistic-institutionalist content as public safety, processual rationality, fighting against bureaucratism, but on the other side the same concept can be used for elimination, the 'new undesirable phenomena' as excessive greed or parasitism. These were key markers of 'socialist entrepreneurs' from the mouths of conservative party functionaries. During the last years of Communist rule, when the crises became much more noticeable, official texts were blaming objectionable private activities, loosening of discipline, protection, corruption, unjust enrichment and wastage of public property by references to socialist legality. At the same time in 1988 the Communist Party accepted a decree on the importance of strengthening legality and building the rule of law. At the end of October 1988, people were arrested by the police for organising a commemoration of the 1956 revolution and in November, the government passed a draft law on assembly, allowing for a multi-party system. Under the leadership of Kálmán Kulcsár, the Minister of Justice, a comprehensive reform of the economic and legal system was already underway, in the spirit of the transition, to a market economy and the rule of law. Preparations are also underway for the drafting of a new constitution (Bruszt, 1990).

Since it did not exist, communist ideology did not have to reformulate the bourgeois concept of the rule of law and the internal dynamics of the system, after the recognition of the untenability of lawlessness and violent arbitrariness, led to a slow expansion of the concept of socialist legality.

3.3 Transformation: round-table 'revolution' and the rule of law

The political processes of the Round Table and the gradual transformation of the legal system led to the first democratic elections. These few months (from November 1988 to the elections in March 1990) are more narrowly referred to as the political regime change. The unprecedented 'constitutional revolution' could not rely on traditions that would have made the framework of constitution-making natural and easy. There was no traditional, well-established concept of the rule of law to fall back on. At the same time, the myth of return, especially in the self-justifying practices of the historical parties, appeared on the scene. In this sense, the modern rule of law could be an original 'creation', with all its possibilities and, above all, its limits. The limitation is related to the narrowness of the meaning of the concept. In the strategy and language of the democratic opposition before the regime change, the focus was not on the rule of law but on democracy and human rights.

The scenarios of regime change are characterised by extensive institution-building, the intention to divide and limit power, to prevent monopolisation. The constitution-making process of regime change was primarily driven by mutual fear of the outcome of the first free elections. The political forces sought to avoid leaving the constitution-making process to the new parliament, whose composition was uncertain, in order to make the process independent of the outcome of the elections (Halmai, 2000). It was in this process of negotiation that the compromise was reached: the term socialist was removed from the term rule of law and replaced by the term democratic rule of law. This constitution-making process was characterised by the institutionalisation of strong constraints on government overreach, which were then, after the first elections, significantly pruned back in favour of so-called governability. The process, consensual in nature, lasted until democratic governance was established. The new constitution of the Round Table negotiations retained its provisional character and it became clear that the attempt at constitutionalisation by consensus had failed and finally, after twenty years, the attempt to prevent a dictatorship by constitutional means and a one-party constitution also failed.

The Hungarian constitutional revolution partly failed, mainly because of these factors. Behind a constitution of uncertain status and low legitimacy, the perception of power remained retrograde. The political institutions and the political class, the constitution and the legal system as a whole,

continue to be seen as mere instruments of power. This underlying perception of power makes the development of the constitutional concept of the rule of law relative and not independent of theoretical weaknesses.

Analysing the vast volumes of texts of Round Table talks, in the decrees and reports the most conspicuous characteristic of arguments is the concentrated attention to institution-building (Bozóki, 2000). Rule of law is an institutional setting, most importantly free elections and relation between branches. It is also a strong starting point, that the political transformation must be made peacefully with legalistic tools. Thus, the rule of law has been given a stabilising role, rule of law institutions (*Rechtsstaatlichkeit*) ensure the legal methods of the transformation. With a very specific drafting: the rule of law is a process and an aim at the same time. In line with this aim, the text of the Protocols considered the regulated transition to be the content of the rule of law. All content entitlements serve to prevent the re-monopolisation of power. The dominant sentiment of the period was fear of the electoral legitimacy of communist power. A few months of institution-building through political compromise were not enough time for a detailed debate on the content of the rule of law. This became the task of the new democratic institutions with strong legitimacy.

3.4 The Constitutional Court as the engine of ideational development

Despite the outstanding and widely praised role of the first Constitutional Court in consolidating constitutional democracy in Hungary, the performance of this body remained weak from one essential perspective. Decisions of the first eight years (1990–1998), the period known as the epoch of building the 'invisible constitution', have constructed a very thin, weak concept of the rule of law (Halmai, 2018). The concept of the rule of law remains formal and concentrates purely on institutional elements and legal certainty.

The start was strong. In the decision declaring the death penalty unconstitutional, the concept of the rule of law appears in the adjectival structure of the Constitutional Court's reasoning: 'constitutional rule of law', as if the adjective 'constitutional' denoted a stronger form of the rule of law. However, the cumulation of terms is rather an indication of conceptual ambiguity. In it, the fundamental rights deriving from the unity of human life and dignity must be regulated in the service of the interests of the community and of the individual, as defined in the Constitution. This decision to define human dignity and the right to life as 'mother law' has become the starting point for the protection of fundamental rights.[2] In relation to the criminal power, this decision stresses the procedural limits of the constitutional, rule of law state: 'In a state governed by the rule of law, all forms of punishment may be imposed only for a legitimate reason and in accordance with a legitimate procedure.' The substantive elements of constitutional criminal law are part of the requirements of the rule of law, and the criminal power of the state cannot be derived from the unlimited nature of state power. In other words, the text interprets the (constitutional) rule of law as a limited state. Moreover, a further element of content is also defined when it refers to equality of rights: '. . . the principle of proportional punishment is the only possible constitutional punishment under the rule of law because it is the only one compatible with the idea of equality of rights.' Finally, the text states, in the simplest possible language, the incompatibility of the death penalty with the rule of law: 'A constitutional state governed by the rule of law does not hang!' The limitation of the criminal power of the state gave the opportunity to formulate the most important substantive element of the rule of law: the rule of law is a power limited by substantive legal principles.

Shortly afterwards, the Constitutional Court had to make a further distinction about the nature of the rule of law when it rejected the category of the social rule of law on the grounds that the constitution declares an independent, democratic rule of law. The argument is dogmatic. The Hungarian Constitution does not classify the state as a social state governed by the rule of law. Therefore, the declaration of the rule of law in Hungary is to be interpreted exclusively as a formal

[2]23/1990 (X. 31.) AB h.

rule of law, and in matters of content it refers to other, named constitutional rights. The principle of the rule of law can only be invoked directly if the Constitution does not recognise such rights in a given matter. The *formal* adjective is explicitly confirmed, without further interpretation, as a negative delimitation.[3] At the same time, another decision states: 'The rule of law is a formal declaration, but in substance it expresses the rule of law and the possible requirement of legal certainty . . . '[4] And this becomes the dominant element in the interpretation of the rule of law, it was identified with it.

A year later, the decision on the institution of local referendums contains an unusual and difficult-to-understand turn of language: 'Experiences show that the lack of legal regulation of these issues (the conditions for the validity and effectiveness of local referendums) not only creates uncertainty, but also sometimes leads to solutions that are not in line with the political democracy of the rule of law, or even explicitly violate it . . . '[5] A similar decision brings the definition of the rule of law to the characteristic interpretation of the era. 'One of the fundamental requirements of the rule of law is that bodies vested with public authority must carry out their activities within the institutional framework laid down by law, within the rules of operation established by law, within the limits of a regulatory framework which is known and predictable by law to the citizen.'[6] In substance, this formal definition becomes a repeatedly quoted definition, but it is inadequate to distinguish between the rule of law and a legally regulated dictatorship. The distinction between rule of law and rule by law is difficult to read from the decisions. The rule of law is the opposite of arbitrariness in the sense that it is based on legal regulation. It becomes clear at an early stage that the interpretation of the rule of law focuses on legal certainty, but expresses the relationship between the two in various ways: it is part of, an integral component of, a principle of, a corollary of, but sometimes rule of law and legal certainty connected by a conjunction ('rule of law certainty'). From the frequently used phrase 'one of its important components', it is generally not clear what other elements there are and how they relate to legal certainty. In several decisions, the Constitutional Court uses a 'comparative argument' on how regulation is done in other rule of law states, or in modern states in general. In this logic, some kind of unspecified empirical validity justifies the quality of the rule of law.[7]

There is an interesting link between the rule of law and democracy. The wording of the constitution, 'democratic rule of law', does not help a more precise interpretation and essentially excludes the meaning of a rule of law that restricts majoritarian democracy. The confusion is reflected in the text of a decision: 'The challenged . . . provisions do not affect the constitutional declaration of the democratic rule of law', and later: 'The democracy of the rule of law is understood to mean a functioning democracy.'[8] In other words, implicit in this peculiar possessive structure is that democracy is necessarily the rule of law, which is a clear misunderstanding, and also dysfunctional in the decision. What is even more puzzling, however, is that sometimes the conclusion is radically short-circuited: the provisions being challenged are not directly related to, and thus cannot be in contradiction with, the criteria of the declared rule of law. However, there is no indication as to what these criteria are. Nor does the following logic tell us anything about the criteria of the rule of law: 'The legislative solution does not violate the independent, democratic rule of law declared in Article 2(1) of the Constitution, it is not unconstitutional . . . '[9] There is no argumentation in the vicinity of this sentence that explains the criteria for the rule of law, i.e. the constitutionality of the challenged legal solution.

[3] 31/1990 (XII. 18.) AB h.
[4] 837/B/1990. AB h.
[5] 61/1991 (XI. 19.) AB h.
[6] 56/1991 (XI. 8.) AB h.
[7] f.e. 108/B/1992. AB h.
[8] 67/1992. (XII. 21.) AB h.
[9] 1354/B/1992. AB h.

The Constitutional Court, in the first years of its operation, repeatedly refers to the legal nature of the regime change as the creation, building of the rule of law. But these decisions do not clarify the relationship between democracy and the rule of law. We learn that the rule of law is a fundamental value which has consequences for the power of the state, namely the substantive and formal requirements for legislation. But when it comes to defining the substantive requirements, the text loses its clarity. The incitement to hatred against minority groups is in contradiction with the 'political system and values expressed in the Constitution, the constitutional tenets of democratic rule of law, equality and equal dignity of human beings, the prohibition of discrimination, freedom of conscience and religion, and the protection and recognition of national and ethnic minorities.'[10] Here, the (democratic) rule of law is equal in the list, as part of the constitutional political system. Or, since there is a comma between them, the political system and values are also part of the list. The next paragraph of the decision interprets the declaration of the rule of law in the Constitution in such a way that the content of the aforementioned list falls within the scope of democracy and not the rule of law: 'According to Article 2(1) of the Constitution, the Republic of Hungary is a democratic state governed by the rule of law. The concept of democracy is extremely complex. However, for the purposes of the question under consideration, it is important that its content means the right to diversity, the protection of minorities, and the renunciation of violence and the threat of violence as means of conflict resolution.'[11] The Constitution's declaration of the rule of law thus provided an opportunity for the substantive interpretation to slip into the interpretation of democracy, leaving the concept of the rule of law empty.

Another decision ruled that it is contrary to the rule of law if the law 'makes citizens completely vulnerable to the state.' Here again, the rule of law is a principle of constitutional law, closely linked to the principle of legal certainty (clarity, precision, comprehensibility). In the same decision, legal certainty (as an integral component, an '*indispensable element*') is interpreted within the rule of law, but it is not made clear what other elements and principles are included.[12]

A similar lack of clarity can be found in the decision on the protection of freedom of expression. 'Free criticism of the institutions of the state ... in a democratic state governed by the rule of law ... is a fundamental and subjective right of the members of society, of citizens, which is an essential element of democracy.'[13] This important argument would have provided an opportunity for a more precise explanation of the relationship between democracy and the rule of law. Although the Court refers in several decisions, including this one, to the importance of consolidating democracy and the uncertainties of the post-transformation period, it is aware that 'a civilised debate on public affairs has not yet taken root'. But it fails to take into account the need to clarify the conceptual relationship between the rule of law, democracy and constitutional rights.

The most important dilemma was formulated in a dissenting opinion, but the Constitutional Court left it unanswered, although it was aware of the need for conceptual development in the period of transition. The failure to do so on the concept of the rule of law contributed to the fulfillment of what that separate opinion had foreseen. 'Is it enough to avoid outright unconstitutionality, or is it possible to create unconstitutional law by circumventing the Constitution, "in fraudem legis", by circumventing the Constitution, even if not directly violating its words, and to what extent can these latter cases be caught, to what extent can they be challenged by the Constitutional Court?'[14] The erosion of constitutional rights, in small steps, is a constant threat, so the rule of law remains weak. Thus, years later, the Constitutional Court's interpretation of self-defence could not prevail: '... in a state governed by the rule of law, the powers of the Constitutional Court must be accorded the same constitutional protection as those of the classical

[10]30/1992. (V. 26.) AB h.
[11]Ibid.
[12]21/1993. (IV. 2.) AB h.
[13]36/1994. (VI. 24.) AB h.
[14]66/1997. (XII. 29.) AB h.

constitutional organs. In this way, it is avoided that, in the wake of the decisions of the Constitutional Court, practical governmental considerations, based on current political interests, seek the primary solution in a review of the jurisdiction of the Constitutional Court.'

So the dangers were known in time!

4. Conclusion

The blind spots in the codification of the democratic transition and the judicial interpretation of the rule of law in defining the concept in a more definite way can be traced back to a number of reasons. Among these, cultural factors play a significant role: the absence of rule of law traditions and language, the formalism of legal culture and legal education and the autocratic features of political culture. The narrow, formal conception of the rule of law provides an opportunity for autocratic state leaders to avoid the values and principles of the rule of law. The new Hungarian autocracy that emerged two decades after the Constitutional Revolution seems more stable than any democratic period in modern Hungarian history. Cultural and social factors have obviously contributed to this. Among these, the fact that the Hungarian political, legal and scientific elite did not come up with a concept of the rule of law that could have become part of the culture plays a decisive role. In a conceptual vacuum, arguments for the rule of law naturally remain unheard.

The Constitutional Court has had considerable law-making power in the period analysed above. I have tried to show that it could have filled this potential not only by constitutional control of the legal system, but also by strengthening the culture of the rule of law and by elaborating the concept of the rule of law in a more differentiated way. During the same period, the same body was also very active in elaborating the constitutional content of freedom of expression. This had an impact on judicial practice and the practical development of press freedom in later years. But of course it was unable to prevent the autocratic turn. Perhaps a more substantive concept of the rule of law could not have done so either.

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