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Pluralism in Post-Communist Law

Abstract. This paper discusses problems related to the incorporation of constitutional rule of law into a pluralistic legal system, primarily in post-communist Hungary. Normative pluralism was characteristic of state socialism. Is this pluralism going to shape the emerging constitution-driven law of post-communism? The paper concludes that although constitutional universalism brought a new dimension to law and in principle has helped to promote the centrality of law in the competitive world of normative orderings, it may in the long run remain an elitist tool, fundamentally ignored or circumvented by sub-legal forms of social interaction.

Keywords: constitutional law, legal pluralism, post-communist law, post-modernity

Although post-communist societies increasingly differ from each other, the case of Hungary is sufficient to highlight a normative problem of legal pluralism, which could be best described as the problem of insufficient centrality of formal law in post-communist normative orders.¹ “Universal” constitutionalism with its specific value system is best understood as a significant attempt to secure a prime position for state law. This paper points to certain immanent and social variables which limit the chances of success for creating constitutional control over law and society.

Part 1 of the paper discusses certain methodological problems of normative pluralism and the place of constitution-driven law within it. Part 2 deals with legal pluralism under state socialism. Part 3 reviews the role of universal constitutionalism in shaping a normative order of government with a new legitimacy after the collapse of socialism and its social limits. Part 4 is an analysis of various forms of legal pluralism (internal and external) and the

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¹ Although they all started with a rather rudimentary legal-administrative normative system inherited from the Soviet regime, their social, cultural, economic, and other differences (as well as history and geography) make the post Soviet Empire countries different. The applicability of the Hungarian experience is certainly greater in Poland than in Russia, not to speak of Albania or Tadjikistan. Nevertheless, given the global importance of Russia, in certain contexts I *will* refer to Russia, at least to show how different the problem of pluralism can be in various countries.

relevance of the constitutional legal system to the competition of normative orders. The paper concludes that although constitutional universalism brought a new dimension to law and in principle has helped to promote the centrality of law in the competitive world of normative orderings, it may in the long run remain an elite tool, fundamentally ignored or circumvented by sub-legal forms of social interaction.

1. Pluralism and Post-communist law

Given the multiplicity of meanings attributed to legal pluralism it is important to clarify the implications of the term as applied to post-communist law. Certain connotations of the term were developed in reference to different socio-legal realities, which do not apply in Eastern Europe. (In other words, I find legal pluralism to be a strictly contextual phenomenon.) Roderick A. Macdonald's summary of the pluralist approach claims that the relations of the various elements are relative and hence they differ from one social setting to another:

“The legal pluralist acknowledges and seeks out certain elements of inter-normative relationships. The implicit is more important than the explicit. [...] The inter-relationship of normative regimes can never be a relationship of hierarchy, close-integration and vertical discipline. The legal pluralist imagines a process of mutual construction of a normative regime[...]. There can be no exogenous standards of fairness, justness and conformity that are not first filtered through the plural normative understandings of the regimes constructed and deployed by interacting parties.”²

I am not denying that there are certain social circumstances where there can never be a relationship of hierarchy among the normative regimes. However, it seems to me that the model that best describes Eastern Europe at the moment is one where “official law” does play a central role and competing partial normative regimes are always determined in their relationship (e.g. parasitism, manipulation, distortion, etc.) to official state law. As Karl Marx argued in a different context there is always a specific dominant form of production, which determines the place of other coexisting forms of production. Likewise, in contemporary societies in transition, notwithstanding post-

² Macdonald, R. A.: *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*. *Arizona Journal of International and Comparative Law* 15 (1998): 69, 89–90. Macdonald here refers to Webber, J.: *Rapports de force, rapports de justice: La genèse d'une communauté normative entre colonisateurs et colonisés*. In: *Le Droit soluble: Contributions québécoises à l'étude de l'internormativité* (ed. Belley, J. G.). 1996. 113.

modernist claims, it is state law (with all its internal pluralism) that directly and indirectly determines the place of other unofficial legal systems, and to a lesser extent that of other normative systems.

Modern law was reintroduced in Hungary under the guidance of “universal constitutionalism”. This resulted in considerable inefficiencies. The normative structure and supervisory capacity of constitutionalized state law is not a guarantee for setting a social agenda, nor for the actual steering of social life, and its institutions (family, race relations) or other spheres of life (e.g. business).

The tensions that exist among the elements of the pluralistic legal system are partly related to the post-modern nature of state law. “If, as a conception of social organization, modernism was primarily about rationalism, universalism, certainty and order, post-modernism seems to be about empiricism, particularism, indeterminacy and disorder”.³ Obviously, these post-modern features of indeterminacy might allow the existence of competing normative systems. The particularity of post-communist law is that it was imposed as if it could actually provide the values and efficiency of modern law. The indeterminacy that was already built into the law of Western countries, which served as the model in the legal transposition, was not acknowledged in the East. It is no wonder that post-communist state law appears to have been unable to reflect the basic characteristics assumed to be the cornerstones of modernity (as listed above). In the early years of the democratic transition there was a strong emphasis on the universal dimension of the constitution, human rights, and the rule of law as a *par excellence* project of enlightenment. In reality, the law that was transposed from the “West” and then transformed and formulated increasingly at the local level was indeterminate and porous, enabling more and more local plural normative subsystems to resurface, continue to exist or be created. Transferred “modern” law contributed to the malfunctioning of the social system, to the undermining of the legitimacy of the rule of law, and to diminishing the interest in and enthusiasm for the effort to enforce the new legal system. The indeterminacy of post-modern law in post-communism enabled the operation of normative regimes that are predominantly dependent on or related to the official law. This plurality (under the guidance of the official law) enabled the *local* domination of criminal or corrupt individuals, without providing to social relations some kind non-alienation or intimacy. Some post-modernists claim that post-modern plural polymorph law can actually provide such communal values instead of rights.⁴ The co-operation

³ *Ibid.* 72.

⁴ Ironically, the spontaneous orders of post-modernism were also promised by Hayek’s minimalist rule of law.

that emerged in the distorted and parallel legal systems is hierarchical in nature or at least enables temporary dominance. One of the major shortcomings of both the official law and the competing normative systems is that at the moment neither is able to offer long term fixed relations.

The more we move away in time from the collapse of state-socialism in the Soviet Empire the less appropriate it is to use the term “post-communist” with regard to the respective new legal systems to have emerged. The legal systems are increasingly departing from their common Soviet origins. From the socio-legal perspective, which looks at law within the social system, the emerging legal systems are increasingly differentiated. Despite developing out of it, the post-communist legal system is not determined by the Soviet legal system. Even to a lesser extent was the Soviet political system and Soviet social model responsible for determining the future of the many societies formed on the former territory of the Empire. This is partly because despite the unifying umbrella of state socialism these societies were always rather different from one another.

Nevertheless, there is still a good enough reason to discuss the problem of pluralism in the East Central European legal systems, notwithstanding that they have increasingly less in common (except for the insufficiency of human resources and a sufficient social aptitude to follow closely the Western legal model that these countries imposed on themselves in the transition). This reason is clearly a normative one and is based on the following: Modern law—due to its formal qualities—represents (at least in principle and at varying social costs) a number of social and normative values such as predictability, security, impartiality, equality, and perhaps even a sense of justice. It also contributes to the establishment and functioning of the market. Modern law has a function of creating social order and—again, at a considerable social cost—it offers a kind of social peace. The centerpiece of a modern legal system founded on the rule of law is the constitution. Modern constitutions are not only tools for achieving social cohesion within a state governed by law but also offer a blueprint to circumventing governmental abuse of power. Further, they may satisfy the Kelsenian need for positivism by providing a solid hierarchy of norms and they offer a mechanism to implement the hierarchy through constitutional adjudication.

Only pompous lawyers—but no sociologist of law—could be naive or corrupt or perhaps blind enough to overlook the fact that restraints imposed by modern law on governmental oppression are at best limited. Certain forms of social domination are perhaps more civilized because of certain legal forms. These legal forms help to disguise milder cases of dominance or structural oppression by the state or other social agencies, institutions, groups, and

structures. Still, the rule of law may have a socially beneficial effect in transitional societies if it successfully penetrates into and permeates all normative structures in society, or at least if it becomes an efficient model for all normative systems developed around state law. It *is* important to have a normative system that at least has the ambition to envelope all of society and which at least promises to provide—and in certain regards actually provides—particular solutions to social conflicts and aspirations that are not arbitrary in nature. To the extent that this system can effectively limit the power of government, it will indicate or signal that power can be limited honestly and credibly.

Hence the special importance of the problem of pluralism in post-communist law. It is in this context that this article intends to determine the extent to which the values of modern law as expressed in the constitution and constitutional law actually exist in the law on the books and in the law in action. The paper also makes an attempt to show how state law permeates other normative structures which apply to the very same relations state law intends to govern, and I also try to locate the spheres which are outside of state law's reach, and to identify their various competing normative structures. In other words, even if some level of legal pluralism is likely inevitable, the normative issue for post-communist law is the examination of the extent to which the law of the state (that claims to be the depository of universal constitutional values) can maintain a central role for itself. The problem of the social impact of state law is further complicated by the constitutional mandate and mission of government and official law. After all, for reasons of legitimacy, the state tends to represent itself and its actions as being mandated or sanctioned by the constitution.

The state—which is inevitably a major social player—generates a whole agenda for itself in the name of carrying out the goals of the constitution. As a result, state enacted and enforced law has a special and often central role in modern and post-modern societies. This is not to say that the law is monolithic and thus is the only normative system determining social action. State law is just one of the various competing normative orders. It is a relatively recent phenomenon that centralized state law became the dominant normative order, or at least that it could make such a claim. In many countries state law at the level of legal theory and constitutional law was held sovereign, i.e. not only supreme but exclusive too, from an official perspective. This supremacy was never complete however, as one can already see in Max Weber's complaints about the particularist corporative order recreated at the advent of the 20th century.

Even the modern formal-rational legal system itself is subject to *internal pluralism*, as there are competing legal subsystems within it. These subsystems,

like for example the various branches of law in continental systems or the parallel enactments of competing state bodies (including branches of power and competing public administrations), are never fully harmonized, even though modern law tries to develop intellectual (substantive) and procedural means to resolve or at least control such conflicts. Internal pluralism refers to different phenomena. State law is composed of culturally different traditions and is generated by competing decision-making bodies, and to an extent these subsystems continue to resist attempts at normative and social homogenization. Note for example that even in England—a country that is seen by many as the model country for the rule of law—prisons had been beyond the reach of external judicial control until very recently. Today legal homogeneity attempts to extend judicial review to even these areas previously off-limit, but the limits of judicial and constitutional review in Hungary also designate the current limits of homogenization.

It is also important to understand the notion of pluralism from the social actor's perspective as well. Citizens have multiple—and to some extent conflicting—legal statuses. This plurality is of course partly the consequence of the existing multiplicity of competing roles of the individual who exists in a complex society. The applicability of a certain set of rules depends on the qualification of one's legal status. The alien (migrant) who spends six months at the same detention center first as an illegal entrant, then as an asylum seeker, then, after positive review as a non-resident alien, and finally as a resident alien notices enormous differences in treatment.

Legal pluralism is often used to refer to the relationship of normative orders. It is undeniable that quite often a system of norms not created or enforced by the state prevails over state law. There are important pockets of non-modernized sectors in modern societies with their own partial normative systems. It is, however, misleading to call all these normative systems as “legal” or “law”. In most of the actual cases the problem of state law is simply that it has to compete with many other forms of normative regulation. State law, and constitution driven law in particular, are often inefficient not only because of a lack of resources to guarantee that they can perform their declared function, but also because of the official value system they tend to impose on social organizations and institutions. On the other hand, the concepts of non-state-law tend to disregard the characteristics of modern law, those characteristics, which make formal and general law so important for modernity. In this context constitutional *universalia* are both formal (e.g. elements of the rule of law) and substantive (equality, rights). Constitutionalism is an attempt to structure government through checks and balances. From a societal perspective this means the

exclusion of certain means for particular social groups in their attempts to access state power.

Only some of the normative orders that compete in contemporary society have features which make them similar to state law. A normative system may compete with official law in a number of ways. Some of these competing systems show considerable similarity to law in their structure (e.g. in terms of generality, sanctions etc.) If normative systems use similar or interfering codes and signals, then the issue of coordination and primacy comes up. It is in this context that the social primacy of state law within legal pluralism becomes relevant. Successful competitors with official law dispose of one of the basic characteristics of state law, namely reliance on the use of coercion (sometimes including official enforcement), and the generality and abstractness of rules. Non-state law may rely on legitimization related to its creation. Modern state norms are very often democratically legitimized—i.e. they are *creations*—while alternative systems have their roots in traditions and/or are supported by common practice. But even in non-state (unofficial) normative systems the beginning of the existence of the norms predate decision and action, and thus societal actors are aware of these norms by default. More or less systematically they cover entire areas of social life and they are enforced partly by the use of force, partly by communal sanctions. As such these competing normative systems challenge the constitutional order which insists on the domestic applicability of its universal values and arrangements.

To the extent that local normative systems are pre-modern or post-modern in their particularism, there is a potential conflict with the modernity components of the “universalist” constitution. Actual constitutions and constitution-generated systems of norms depart from the alleged “universalism” both in the East and in the West. Some of the most obvious examples of constitutional concessions which create exceptions to universal principles of constitutionalism are the accommodations made for religious institutions or the institutionalization of the concept of the state of emergency. The acceptance of special personal, religious or ethnic legal regimes in the constitution allows for hidden adjustments in the legal system. This latter development is, however, very controversial as it may result in the extension of constitutional control to uncharted spheres of social interaction and hence may lead to new conflicts and previously unforeseen irrelevance.

The concept of legal pluralism results in a paradigm change in legal thinking. This is directed against positivist concepts of law which are based on sovereignty and exclusivity. This positivism was reinforced by the “constitutionalization” of law. Constitutionalization as one of the latest developments

of legal “universalism” means that all branches of law are destined to be subject to an increased level of constitutional review, and in addition their internal value system and even their reasoning is intended to be governed by the constitution. These trends allegedly increase homogeneity within law. The claim that these trends represent universal tendencies and even universal values adds to the legitimacy of the constitution and correspondingly to that of law because it indicates that the system meets international standards.⁵

Even if one admits the polycentricity of law one ought to take a position regarding the place of state law. The constitutional legal system has a distinguished place among the competing or coexisting normative systems. A constitutionally reinforced positive legal system has distinct roles in the shaping of the social order. The penetration of constitutional *universalia* into a legal system has contradictory consequences. Constitutional universalism does have a potential to homogenize the legal system, e.g. it extends the scope of the rights language and juridification. However, at the same time it causes new value conflicts and new institutional conflicts.

A universal value system may be imposed on existing subsystems of social action in such a way that this results in new conflicts. This might be aggravated by the institutional conflicts within the legal system: legal actors too have their own interests which might be jeopardized by universal constitutional imperialism. Hence the conflict between constitutional and other courts, hence the reluctance of ordinary judges to look at the constitution.

The constitutionalization of law is inherently a source of conflict both within and outside the legal system. At the same time it can be quite successful in creating rationally or judicially manageable frameworks for social and political conflicts. Constitutionalization may also help to increase the degree of social inclusion of certain marginal groups (at least at a symbolic level). But in cases where constitutional “resolutions”⁶ did cause the legal system to be more inclusive and thus managed to defuse social conflict, constitutional juridification also increased law’s social presence. Law exercises a certain mental control vis-à-vis other normative systems, even if it does not always succeed in determining human behavior. Pre- and post-modern social thinking will conflict with the universalistic logic of formal law made of general commands. It should be added

⁵ The universalism of recognition and the competition among sources of normative recognition is an important dimension of legitimacy and conflict among normative systems. See Sajó, A.: Rights in Post-Communism. In: *Western Rights? Post-Communist Applications* (ed.: Sajó, A.). Deventer, 1996.

⁶ The term was used by Timothy Garton Ash to describe the odd combination of revolution and reform that characterized the dismantling state-socialism.

that the contribution of modern constitutions to modern law is ambiguous. Certain values that are part of contemporary constitutionalism in some of its forms—namely welfare rights—may undermine the formal qualities of modern law to the extent that they enable material justice and (often quite arbitrary) state intervention in spheres of private life.

What is the result of the attempts of competing normative systems to minimize the influence of modern law? Do they result in the perpetuation of pre-modern structures or in a perpetual disorder of mutually exclusive competitive orders? Even where community-made or tribal normative systems prevail, or where state law is not implemented for one reason or another, new normative structures emerge and begin to function without necessarily being in open conflict with official law. New social practices are intended to hide non-state law from the state, or, alternatively to gain the state's recognition. Self-regulation as privilege is often conceded and there are many informal guarantees that the state will never monitor, take into consideration, or will turn a blind eye to whatever is happening behind its back.

2. The nature of legal pluralism in state-socialist Hungary

Pre-communist Hungary had few democratic traditions yet it was nonetheless a country with considerable official respect for the rule of law. Its legal system was under the influence of Germany but it also had considerable peculiarities due to its feudal customary law and the institutionalization of a strong independent judiciary in the Austro-Hungarian Empire. Given the demographic predominance of the peasantry within the society it is not surprising that peasant folklore survived as a competing normative system, recognized to a small extent even by the courts. Further, it was part of peasant mentality to avoid coming into contact with the law and evade it to the fullest extent possible without challenging it outright.

Under the communists the legal system copied Soviet models to a great extent. However, the more refined qualities of the pre-socialist legal structure did not disappear without a trace, although the legal system was rudimentary and allowed for nearly unlimited discretion and delegation of authority. Despite all of this, there was still a real need for some consistency and predictability, at least in order to run the public bureaucracy, even in a system where important decisions were taken at secret communist party meetings. For example, beginning with the Sixties the law stated that citizens may receive an exit visa to the West once every three years, as long as such visa would not violate the

“public interest”. The meaning of the term “public interest” was not specified in the law and judicial review of these decisions were not available. Nonetheless, the law mandated a 60 day deadline for the application to be processed. The conditions of applying and those of a refusal were promulgated in a norm accessible to the general public, although the source itself was a relatively low level administrative decree, which was easy to amend.⁷

Legal pluralism existed as part of “socialist cohabitation”, a *modus vivendi* of the middle classes that emerged under Communist Party Secretary General János Kádár from the late 1960’s. The pragmatic party leadership realized, at least to some extent, that the officially declared Soviet values and goals, if vigorously enforced in private affairs, will run into considerable social resistance, which by that time the regime was more keen on trying to avoid. So it offered certain informal compromises leading to the tolerance of private entrepreneurship—however limited in scope—among others. As part of the same attitude of compromise the Hungarian authorities required only a limited active endorsement of the regime, although organizational loyalty remained a crucial prerequisite of social advancement within the system.

At the same time, and partly irrespective of this soft attitude of the Communist Party, the individual and her few remaining personal communities (workplace relations, extended family) tried to develop creative forms and networks of cooperation that disregarded the official normative order. Although the state tried to penetrate private relations and control them—thereby undermining the social grass roots of independent normative orders—it was part of the communist strategy of domination that parallel normative orders were able to develop, in the shadow of the official yet uncertain law.

There were two important hurdles to the emergence of these parallel normative systems. One, they could not exist in open defiance of the official normative system and two, they could not become interrelated at the level of social interaction or even at the level of public opinion on a national scale. At the shop level in the factories the workers followed their own normative expectations with the complicity of the foreman or even the director (as to work safety, hourly norm, work intensity, (lack of) productivity, (lack of) efficiency in the use of raw materials, distribution of assets, income, changing/altering of product line, etc.). However, they always did so by creating sufficient paperwork to demonstrate that they observed the official norms and the expectations of the command economy. Further, it was crucial that the disguised

⁷ In 1987 the Act on lawmaking was enacted. According to the Act rights and other important matters were to be regulated by acts of parliament which then meant mostly an act of the Presidium (law-decree).

normative order remain hidden from other similarly situated actors. The regime would not tolerate the existence of a shared local experience if that attempted to emerge as a public phenomenon of some scale. By keeping the local experience hidden the authorities were not forced to confront and acknowledge the *de facto* existence of parallel norms.

Generated by economic scarcity a partially correlated structure of sub-legal (and to an extent illegal) local normative ordering, a kind of informal protocol of transactions, developed within the sphere of daily life. Scarcity of resources and their uneven distribution based on demonstration of loyalty led to the development of a system of exchange that included the bartering of anything ranging from common goods to administrative favoritism, thereby leading to a state of affairs bordering on the notion of systemic corruption. People were aware that they were committing an act of bribery in order to get a bed in a preferred hospital, or have access to certain consumer goods in short supply, or perhaps in the process of obtaining some favors (in ways that were not necessarily legally prohibited but certainly questionable by the “moral standards” of the state) when dealing with an official of the public administration, but all the while they maintained a peculiar sense of schizophrenia which allowed these illegalities and immoralities to be understood as “normal”.⁸ So, once again, with institutional and even organizational complicity of the authorities, there were parallel normative systems, partly in violation of the official law, yet at the same time enabling the functioning of the system from the perspective of practicality.

Compared to the legal system of the Soviet Union the primitive legal system of Hungary satisfied the requirements of hierarchy and predictability, a formal feature which the Slavic and Central Asian Republics located on the former Soviet territory could not master until this very day. On the other hand “socialist legality” failed to create a legal system which would have punished those who abused power to the detriment of their fellow citizens. The legal system also failed in establishing its own credibility with regard to the accountability of those holding power (including the use of force by the police). The legal system was only one of the many components of a society wide system of interdependency which also included many unwritten rules. Instead of recognizing legally enforceable rights, those who were loyal received favors. This contributed to the gradual emergence of keeping society dependent of the state, including the dependence of parallel non-state normative systems on the clemency and mercy of the state legal system. For example, state controlled farmers’ cooperatives increasingly participated in industrial activities, an activity that was

⁸ Sajó, A.: Hungarian victims’ reaction to crime. *Research Review*. 1989. 1. 97–102.

not officially fully permitted, but could continue to prosper as long as some influential socialist “boss” provided political protection resulting in non-interference by police and other authorities.

3. The system emerging after the collapse of state socialism: resources of constitutionalism

In all the post-Soviet countries of Europe the formation of the new non-communist regimes was carried out in the name of Westernization. It was especially the case with the creation of a rule-of-law legal and governmental system. The negation of the previous regime was understood—at least in the first years of the transition—as the adoption or even return to Western law and respective legal institutions. This was a legitimate goal even in the case of rampantly nationalist regimes because even these had to demarcate themselves from the inherently corrupt previous regime. Nothing seemed more credible than the adoption of those forms and institutions of government which were vehemently opposed and denounced by the communist regimes. Furthermore, in some countries there was a genuine popular discontent with the lawless oppression of the past regime. While the early legislation and constitution-making of the Nineties was essentially a rapid wholesale importation of Western laws and legal principles, the process was plagued by many misinterpretations, deliberate distortions, and a general lack of systematic implementation. The process was inevitably slowed down more and more, partly because of costs and social irrelevancy, and partly because of the increased ability to formally articulate locally emerging initiatives specific to the unique circumstances of a particular country. This genuine development was often formulated in the shape of nationalist ideology, erroneously referring to national legal traditions which, in reality, were actually often Soviet and bureaucratic traditions in origin. Such resistance to change helped to preserve the *status quo ante*.

Nevertheless, there were countries like Hungary with markets wide open to international investment, as they truly depended on foreign investment and thus could not afford economic isolation. As for the political sphere, political groups were not dependent on the monopolization of political power. This meant that the legal system continued to develop along Western lines (primarily following German models and increasingly those of the European Union as well). The drive to Westernize the legal system was also fueled by the commonly held position pronouncing the importance of entering the camp of the West institutionally, by way of joining NATO and the European Union. Western

recognition continued to play a major role in legitimating the democratically elected or established political power. Perhaps the inferiority complex of the new leaders rooted in their lack of sufficient understanding and knowledge of the Western world contributed to such needs for legitimacy. These factors might also have been supplemented by the actual dependency on foreign investors of both the country and the citizens from the very beginning.⁹

In a number of areas the current character of the legal system is reminiscent of a somewhat simplified, yet relatively modern Western European system, at least as far as the law on the books is concerned. Notwithstanding some deliberate distortions, today there are effectively functioning institutions safeguarding the implementation of an impressive new body of law. Most of the usual guarantees of independence are in place. The civil service sector is subject to law, and offers a secure long-term professional carrier opportunity. Closely related to this phenomenon is the tendency which has seen the number of lawyers on the bar increase tenfold and accordingly the number of law students admitted to university is almost one magnitude higher than the numbers registered in 1988. The Hungarian Constitutional Court initiated a vigorous campaign to protect and even to create fundamental rights. The attempts of the Constitutional Court were met by the formal acquiescence of the government. Still, even at this moment there are more than a dozen constitutional omissions which have not been remedied by the legislative branch, notwithstanding the (sometimes repeated) condemnation of the Court. Very slowly—and in a most controversial way—constitutional values and rules (including the “universalism” of the ECHR) do penetrate into the jurisprudence of lower level courts.

Nevertheless, there is growing discontent with the functioning of the legal system, and anecdotal evidence (amplified by the press and “law and order” politicians) indicates that the system is malfunctioning or that it is socially irrelevant, partly because of the efficiency limiting consequences of the rule of law. It is true that law can no longer be used as a cynical tool of monopolistic oppression. Nonetheless, it promotes the domination of the political power holders, enabling them to gain and protect personal advantages. The formalities of the rule of law helped the elite to steal the state and later to keep the booty. People believe that there is rampant corruption and that the laws are written in a way that favors the powerful, including those members of the nomenclature who managed to transform their social networking capital into power and property. Tax evasion is wide spread and systematic, and employment is often unreported in order to avoid the otherwise excessive social security contributions, and many

⁹ In Hungary even the racist party leaders expect legitimacy from being pictured in the company of Le Pen.

contracts of sale or services are not formalized at all or are finessed. The law offers limited protection against police abuse, neither does it provide safety on the streets against crime. The overall performance of law enforcement agencies is considered to be poor and the authority of the police is much less respected than in most Western European countries. At the same time most people do not expect to get meaningful protection of their property and contractual rights from courts and public administration. Private enforcement of contracts (debt-collection, including abusive enforcement) is on the rise. Consumers are less protected than ever, at least the consumer protection inspectorate thinks so when reporting that in retail trade at least half or as much as 60 per cent of products sold are defective or substandard (smaller actual weight, no warranty, poor quality, etc.). In particular those in a weaker social position expect no protection from the courts and the administrative system. Rather, they continue to perceive themselves not as rights-holders but as dependent clients of the state.

The “rule of law”, one of the fixations of the Hungarian Constitutional Court and of the emerging political and economic elite, has some perhaps unintended consequences. For example, former communists never actually had to wake up on a day of reckoning as a result of the insistence on the rule of law and personality rights, thus holding responsible former communists and secret service agents for their actions in the past has been halted, while personal dossiers of these former agents of the regime remained under the exclusive management of the government in power until at least 2003. Along the same line (i.e. rule of law), questionable privatization contracts with implicit advantages to the new owner remain in force, and other privatization and bank consolidation deals based on explicit favoritism, corruption, and embezzlement remain off limits.

4. Parallel normative systems

a) Continued illegal normative systems within the legal system (the “norm-making” power of scarce resources)

Under state socialism it was one of the preconditions of social cohabitation that no sphere—except for, to a limited extent, family relations—could claim relative independence or autonomy from the state. It is in this respect that civil society was in any way meaningful to the individual. The desire to be part of civil society simply indicated a need for spheres immune from aggressively inquisitive state oversight.

Today, the extent to which social subsystems and various spheres of social activity have gained independence from the state and the viability of their respective normative orders still remains to be seen. It is clear that in sectors where market conditions have prevailed the former scarcity based normative systems have also disappeared. Today, trivial as it may sound, no shopper is going to have to bribe a salesperson to buy a pair of blue jeans at the store. By the same token, the conduct of the salesperson is determined by the ever changing rules of the labor market and the rules set by the store management itself. However, contrast is most apparent where the state continues to be the provider of services without adequate resources, for example, in health care and education. There, scarcity prevails. This means that traditional normative structures of normalized illegality remain in place unchanged, including the necessity (on both the side of the provider and the recipient of services) of rampant corruption in exchange for rightful services or illegal favors. In these scenarios, obviously, patterns developed earlier are carried over and continue to be useful. Consequently, corruption becomes increasingly normalized with the unintended effect that it may become a model of operation even in those areas that are not affected by the scarcity of resources.

The schizophrenia of legal consciousness remains a constant, while in the meantime a highly problematic solution emerges. Cynicism seems to be the universal answer and the way out of this conundrum: it is not even perceived as immoral to be on the recipient end of and participate in cultures of corruption. This tendency may well end up undermining the legitimacy of the new constitutional democracies.¹⁰ In a way even the rule of law may contribute to shortage and scarcity and hence create new opportunities for corruption. The recent history of the land register is a telling example. Land records became crucial documents in the privatization process. The workload of the administrative agencies responsible for maintaining and updating the records increased dramatically. The state's monopoly of registration resulted in excessive delays which were not acceptable to the participants of the rapid privatization process. As a result, lawyers and other actors increasingly performed the role of the middleman in greasing the hands of the administrators in order to get expedited processing and increasingly even for falsifying the records of the land register. Immense administrative delays also lead to the evolution of a new industry operating on the currency of small favors and bribery. Volunteer experts would offer their services for adequate compensation to process requests at the speed of light.

¹⁰ See Sajó, A.: Corruption, Clientelism, and the Future of the Constitutional State in Eastern Europe. 7 *East European Constitutional Review* 2, 1998. 37.

b) Forms of internal pluralism

There is still enormous dependency on the state, and not only in the economy (70–80 per cent of which is privatized) but in all spheres of private and communal life as well. Religious exercise, non-governmental activities, local self-governments, pensions and culture all depend on a politicized central government. Until recently even broadcasting had been a state monopoly. In Hungary such dependency is “constitutionalized” in the sense that both the government and the Constitutional Court find the active promotion of constitutional welfare rights the obligation of the state.

The towering all-encompassing presence of the state, a fact of life inherited from state-socialism is, however, over. It seems to have been replaced by mutual dependence between civil society and the state, or more specifically between a clientele of service recipients and government bureaucracies. In theory, codependence of the public and private institutions is likely to lead to some kind of domination of either one or the other. Here an entirely new phenomenon emerges: the interdependent private spheres try to take over the state (see “state capture”¹¹) and determine its law.

In this struggle two predominant strategies seem to have emerged so far: (a) increasingly ambitious attempts to lobby the legislature that a private ordering of a particular segment of life be blessed as general norm (*termination of pluralism in favor of particularism*), and (b) private and non-governmental structures pressure the state to allow their own private ordering to prevail and exist “undisturbed” or even receive state sanctioning and enforcement (*exclusive private ordering*).¹²

In reality, of course, these are well known developments in neo-corporate formations. The surprising development in Hungary is that here relatively weak corporate formations are successful. In Hungary about 12 per cent of the population is actively practicing religion (many of them follow non-mainstream religions), although nominally 70 per cent of the population considers itself of “Christian origin”. In the past nine years, despite the lack of popular enthusiasm or demand for it, the politically compromised (collaborationist) leaderships of

¹¹ See for example Hellman, J.–Kaufmann, D.: Confronting the Challenge of State Capture in Transition Economies. *Finance and Development*, September 2001, Vol. 38, 3.

¹² A classic, non-post-communist example is commercial arbitration. Max Weber considered it as a reaction of business interests to the formal, anti-business rationality of state law. According to Weber arbitration is a necessity even where the private law of the state embodied market rationality, because bureaucracy and judges are unable to understand market considerations.

the traditional churches have been receiving rather generous financial support both from the socialist and the conservative governments. The ownership rights of buildings formerly belonging to the traditional (“historic”) churches were returned even in cases where there were no religious personnel to make use of them. Also, there is another tendency in moving public education closer to religion in the form of financial support to church operated schools.

Similar examples of private ordering sanctioned by the state are numerous. A weak and barely legitimate trade union movement got control of social security funds¹³ which were de-etatized and transferred to trade union controlled self-governments. All sorts of chambers of commerce have been created by legislation with public supervisory and disciplinary duties in areas where the professionals’ interests clearly prevail over consumers’ without proper oversight (i.e. trade chamber, medical chamber, the bar). Legislation has also been passed to create public foundations to perform government tasks (services) with (financial) resources transferred from the government, but without continued governmental supervision, intervention or personal accountability incorporated into the system. The bylaws of such NGOs are not subject to government approval since that would go against the ideal of creating a civil society independent of the powers that be. Quite often the boards of these public foundations are comprised of former civil servants who previously had been in charge of the very same functions, but for much lower compensation and under stricter conflict of interest rules than what is the norm at these foundations. Privatization of the state implies a private ordering that is partly immune to the normative expectations of the legal system. In Hungary, the problem is fortunately only that of scope, while in Russia, for example, private normative orders have been known to undermine central coordination. In Russia not only do the various regions and cities tend to follow their own particular legal order,¹⁴ but even larger factories and industrial conglomerates disregard central and other legal norms and follow their own normative structures as to workplace safety, taxation, salary, contractual relations, etc.

One does not even have to believe that contemporary law is fundamentally post-modern in nature (i.e. inconclusive, not well defined) to recognize that modern legal systems may contain competing normative structures, although

¹³ Repealed by the first law passed by the newly elected conservative government in 1998.

¹⁴ For example, in some Russian Republics the legislation, by failing to legislate on private land ownership, successfully disregarded that the federal constitution expressly provides for the right to private property on land. The political leadership in these republics continues to manage land and forest as state property.

admittedly with relatively settled rules or formulas for resolving possible conflicts. It is in this context that the allegedly homogeneous¹⁵ constitutional system attempts to colonize other spheres of law and it is through these constitutionalized legal branches that it attempts to introduce other institutions and interactive structures into a constitutionally devised homogeneous order.¹⁶

c) *External legal pluralism*

i) *non-inclusion*

The above mentioned interdependencies of the private normative structures and law reveal a typical tension. Other normative structures simply disregard or challenge state law, and hence in that case there is not even a chance for the rule of law and values of legal modernity to prevail.

First of all, so long as there are non-integrated communities in society there will be separate and segregated quasi legal systems. State-socialism intended to atomize its subjects and tended to include all members of society in its general network of supervision. In part these conscious and systematic attempts of atomization were due to a fear of autonomy of any sort, including autonomy of communities. Hence—at least in Hungary—very few groups managed to maintain their own self-supporting norms. The most significant example of this norm protection could be observed in the Romani (Gypsy) community, which quickly regained some of its earlier (although distorted) customs after the end of state dominance. Such increased reliance on a parallel system of norms is partly the result of increased segregation that followed the massive lay-offs after the collapse of communism, affecting disproportionately the Roma. Clan-based normative systems became vital for survival of the segregated Roma with the growing marginalization and prejudice that followed the collapse of state socialism turning increasing numbers of Roma into social outcasts. Suddenly, thousands of people¹⁷ found themselves excluded from state supported social

¹⁵ Of course, the constitution itself is a source of institutional (inter-branch) and value conflicts.

¹⁶ These phenomena are known in Germany as third party effect (*Drittwirkung*). Similar trends emerged in *New York Times v. Sullivan*.

¹⁷ There are probably 400–600,000 Roma in Hungary, although at least a third of them fully integrated into the lower working classes, and another perhaps 20–30 per cent not living in segregated communities. The isolation is more visible in Romania, where the Gypsies were hardly ever settled and where their number at least a couple of millions. Here, obviously the parallel legal system is more visible and widespread, among others because there their customs were never corrupted to the extent they were in Hungary due to the partial social integration.

networks because of segregation. The Roma could not rely on state law as a system of protection as this was increasingly denied of them. Other similar factors of growing alienation from official law include the application of legal rules which were harmful to Roma or were applied in a prejudicial way, such as relating to the due process guarantees of criminal procedures.¹⁸ Needless to say the functioning of a so-called culturally based legal pluralism is significantly more critical in multiethnic societies where ethnicity is also a designator of competing cultures. This was the case of Albanians in Yugoslavia and Macedonia, and of many Muslim and nomadic communities in Russia.

There are other examples of differentiated life-forms which tend to disregard the state without confronting it. There is of course a known sphere outside or above the law. The wealthy can afford to pay (or avoid) all the fines imposed by a weak state and conduct a life of their own disregarding the law. The wealthy are ready to pay the parking and speeding tickets, if unavoidable, and pay the penalties for building villas without a building permit where zoning regulations may be in place in order to protect an environmentally sensitive area. Or better, they use their enormous resources (financial and social) to delay enforcement, or bribe officials if it is cheaper than paying penalties. If pressured, they usually find an even weaker state to repatriate to.

ii) *legal orders attempting to take over the state legal order*
(the “criminalization of the state”)

The most important normative order competing with, challenging, and in certain countries endangering official law is the law of criminal (illegal) organizations. Sometimes these are systems of rules generated within large organizations which were created by or with complicity of the government, such as oil and gas companies. Extraction, refining, and export-import are usually licensed monopolies. These activities—often being of a criminal nature themselves—generate further criminality as the profits move into other explicitly illegal forms of investments (drug and arms). The people involved in these large sectors are operating by a set of relatively simple rules which apply to their entire conduct. People who get involved in this world usually do so without the possibility of opting out at a later time.

¹⁸ It is not the subject of the present paper to decide whether the Roma-official law conflicts are increasing because of the growing Roma-“White” conflict, or the conflict is growing because of the cultural differences among the two normative systems. This is a multi-cultural conflict which could not manifest itself under socialism as socialism oppressed all diversity, and also destroyed Roma culture through superficial integration.

A second major area where the government's legal involvement is critical in many regards is banking. In this sector, at least in Hungary, the direct involvement of organized crime with the ownership structure (although the oil industry does need banks for money transfers, that is, laundering purposes) is believed to be marginal. The law used to allow privileges, such as lack of stringent regulation of the writing off of bad debt, legalized forms of self-dealing, etc. In exchange the management of banks which were dependent on state bail outs were ready to finance government initiatives. No-interest loans were offered to government people. In this example the borderline between state law and bank generated (but officially sanctioned) practices that have the power to transform the entire national economic landscape becomes impossible to locate. The self-regulation of the banking sector partly operates as a private regulatory system that is sanctioned by government. Banking laws, like in more advanced market economies, are written to a great extent by the banking community. Further, the official regulation creates and enables a private system which has more practical influence on everyday life than direct governmental regulation itself. Banking law, or rather the law of the banks, is the result of hidden yet formally completely legalized interaction with state law, or at least with official figures in charge.

In both cases (oil and banks) official law helps to legitimize immoral and by ordinary standards very often illegal corporate behavior which then has the enormous power to shape the fundamental social and economic structures within emerging market economies. It is within this interaction, above all, where the formal structures of modern law fail to exert the much needed positive impact they are designed to bring to society. Ultimately, state law may in fact fail to properly shape elementary forms of social interaction based on equality, trust and reliance, and perhaps even a sense of justice.