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The Judiciary in Contemporary Society: Hungary

*Andras Sajo**

I. INTRODUCTORY REMARKS

The present problems of the Hungarian judiciary must be viewed in the context of social transition from state-socialism to democracy and the rule of law system. The majority of the judiciary was trained under socialism, and the structure, prestige, and formal elements of the judiciary are still related to the past regime. Some of the formal measures taken by the new Hungarian government are clearly related to the crisis in the profession created under socialism and the need to adapt to changing judicial requirements.

The judiciary appeared independent under Hungarian state-socialism. The political system under Secretary General Janos Kadar was milder than in most other communist countries and in the last two decades the judiciary was rarely employed as a means of open political repression. Alternatively, it has served as a system of maintaining some of the ruling elite's privileges.

A. *Functions of the Courts*

Court functions must be considered in order to understand the present crisis of the judiciary. For the present purposes the following functions are relevant:

- a. Supporting political power;
- b. Crime control;
- c. Safeguarding business (and economic) relations in the Weberian sense;
- d. Promoting the rule of law (in the form of judicial review in particular).

Because of the "mild dictatorship" of the communist regime under Communist Party Secretary General Janos Kadar, the Hungarian judiciary and the courts had rarely played a role in open political repression in the last two decades. Some political pressure on their activity was exerted as far as support of ruling elite privileges, judge selection, state interest protection (although already institutionalized in the substantive

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law), and protecting the private interests of the ruling political elite. However, judges required to sentence in politically sensitive cases identified themselves with the values and expectations of the regime because of their socialization and selection process. The protection of the ruling elite in criminal cases was institutionalized differently: the police and state prosecution had special instructions to investigate crimes of nomenclature only with the authorization of the communist party.

In criminal cases the courts fulfilled their traditional role in crime control. It is remarkable that a low acquittal rate existed and imprisonment was a common sentence.

The importance of the courts and the judiciary was limited to other areas of social relations and business in particular. The Hungarian judicial organization was homogeneous in the sense that they exercised jurisdiction over disputes between state-owned business entities. (In other socialist countries these disputes were left to state arbitration.) On the other hand, the judiciary had little impact on a great number of social relations under the rules of procedure. Also, because of the lack of rights, no access to the courts was available.

Judicial review of administrative decisions was unusual and in a substantive sense very limited as the courts were considered to be responsible for "socialist legality" alone. The judiciary was concerned neither with the constitutionality of legal acts and rules nor with rule of law (principled decision-making).

Consequently the judiciary held little regard for the power holders or society in general. This was reflected in professional prestige and remuneration. Since the judiciary was insufficiently paid and work itself was often very bureaucratic, a constant shortage of judges existed. The profession's demographical structure changed, judges were appointed at a very early age without proper preparation, and were recruited from poor quality law school students.

B. Consequences of Judicial Dysfunctions

Only a minor portion of the judiciary was replaced after the regime change in 1989. This was related to three facts. First, only a few judges were still active who were responsible for the political justice of the 1956-58 periods. They were older and were asked to retire based on a gentlemen's agreement.¹ Second, judiciary leaders (the provincial court

¹ In some other former socialist countries similar trends were observed. In East Germany about 10 to 15 percent of the former judges resigned (retired) based on a tacit agreement reached at the Round Table talks. A similar proportion of German judges resigned after World War Two. (Verbal communication of Professor Hubert Rottleuthner and Professor Ulrich Preuss.)

presidents and the Ministry of Justice which is administratively responsible for court personnel matters) quickly adapted to the emerging new regime. Judges asked for formal political independence which was granted by Parliament in the 1989 transition period in the form of a conflict of interest rule which prohibited membership in political parties. The existing hierarchy was saved and court presidents maintained their role and place notwithstanding prior communist party affiliation. (They were among the first to desert the communist party due to the above-mentioned law). Third, a constant need for judges existed because of a considerable lack of manpower, and new functions related to work load.

In all former communist countries a sudden increase in crime has occurred in the transition period resulting in an increased work load. Due process requirements (habeas corpus rules in particular) contribute to court workload, increasing personnel demand. As new concepts of punishment emerge along with new procedural requirements, major problems in adjustment will surface.

The increased volume of business transactions and cases where court access is granted and disputes are articulated in terms of rights represent new judicial tasks. New contractual relations reflect market considerations. These considerations are extremely complex and unfamiliar to the judges. The problem is exacerbated by the lack of proper market-oriented reforms in private law. Moreover, the difficulty is increased by stagnation in the judiciary since the judges were originally trained to promote the public interest and often identified with the interest of public authorities and government-owned enterprises. Public interest clauses still pervade the positive law and incentives to stick to old interpretations are considerable.

Notwithstanding the passive resistance of the Parliament and some complaints from the judiciary, a ruling of the Constitutional Court made the establishment of an Administrative Court imperative. Judicial review of administrative decisions on fundamental and human rights is required by the 1989 Constitution. The judiciary is experiencing adaptation difficulties due to different traditional training. New learning is hindered because judges act in the same bureaucratic organizational context which supports their "bureaucratic knowledge."²

However, in Poland, sizeable changes have occurred as Solidarity has trained a class of rule of law-oriented young lawyers who were able to replace the old and politically compromised judiciary during the last decade. In Poland, income differences between judges and other lawyers were not as great as in Hungary.

² A privacy protecting decision of the Constitutional Court was spontaneously commented upon by a judge: "then we have to work more on personal data of the culprit. It is too much of a workload already."

Resocialization is not the sole problem. The judiciary must adapt to the rule of law system employing organizational rules. A striking example of these difficulties was provided by the following case: at a national conference of provincial court (court of appeal) presidents, the presidents agreed that a president must have the right to consult with young judges in any given case pending before the judge. According to the presidents this is the only way to avoid serious mistakes with inexperienced decisionmakers. (As mentioned above, many vacancies in the courts exist and after two years of court apprenticeship one can easily be appointed judge and decide in a one-person panel at the age of twenty-five.)

Similar organizational contradictions exist in terms of self-governing judicial bodies. Although commitment to judicial self-government is present, this perpetuates the power of those who occupy key positions now as a result of the former regime. This system may result in the perpetuation of the previous value system which favors public interest over the rule of law.

II. RECRUITMENT OF JUDGES

Judges are generally recruited from the law schools and after two years of apprenticeship (clerkship) they become eligible for a bench exam. A limited number of special preparatory courses are organized for the clerks by the Ministry of Justice. After success on the exam, the President of the Republic appoints the judge on the recommendation of the Ministry of Justice. Based on a survey of the applications for clerkship of graduates from the largest Hungarian law school (1990 class) the grades were average with none in the top ten percent.

The most remarkable single feature of job applications is related to gender distribution. Only thirty-five percent of the applicants for clerkship were male. This does not explain the gender composition of the judiciary: seventy percent of the judges are women, although before World War Two all judges were male. The very high percentage of women, even if compared with the composition of entrants is the result of higher mobility for male judges. Women tend to remain in the judiciary. This may be explained by greater professional identification, a lower financial aspiration level, or by lower competitiveness of women lawyers in the more lucrative private sector. However, an additional explanation exists which seems more than speculative. Based on vacancy data, about ten percent of all women judges are on maternity leave.

Judges of a notoriously understaffed Budapest district court issued a public statement threatening to strike if the new habeas corpus rule is not accompanied with a pay increase and the assignment of new judges dealing with habeas corpus writs.

Maternity seems to fit well with the work-form at the courts, offering more opportunities to spend time with children than client-oriented private lawyering.

Difficulties of recruiting talented judges is not only related to the low social prestige of the profession and low income level. Judicial evaluation seems to favor bureaucratic character features. Evaluation is based on specific bureaucratic organizational criteria, in particular one statistical indicator identified as "unfinished cases" and another called "non-reversal" by the court of appeal. Career advancement is determined by the courts of appeal and the Ministry of Justice. Reliance on the above indicators may and does result in favoring uncritical judges who are ready to accept the guidelines and precedents of the higher courts. Critical and creative values and capacities are sacrificed. Greater homogeneity is achieved at the expense of creativity.

III. EDUCATION OF JUDGES

The modern industrial world constantly represents new challenges to judges. Although technological challenges pose recurrent problems for the judiciary, the situation in Hungary and in other post-communist societies represents another kind of intellectual challenge. The judge must adapt to a new socio-political and economic environment. New skills and information to be mastered constitute a social rather than technological nature. Technological changes are evident, particularly computerization. However, because of financial difficulties computerization is not particularly advanced. No working legal data base is employed.

Increased demands of technological knowledge are met with increased reliance on expert witnesses and forensic experts³ appointed by judges. Because of the growing demand and the restricted number of forensic experts, the lack of an expert opinion may cause serious delays in the process.

Psychological techniques are important, conflict resolution in particular. However, the Ministry of Justice, which is still responsible for professional continuing education, currently has different goals. Its present task is to provide the judges with new social *legal* continuing education. As previously mentioned the judges lack a fundamental knowledge of market society and were never exposed to concepts of liberalism and constitutionalism. Moreover, major changes in law are expected, although codification is not expected soon in areas where there is an exist-

³ Forensic experts are professionals who are registered by the Ministry of Justice on the basis of a special exam and a number of years in the profession.

ing body of law (procedure, criminal, and civil law codes). Permanent minor changes in legal texts create daily adaptation difficulties. Teaching new law is a serious task, especially because judges claim not to have enough time to participate in organized continuing education due to large case loads.

IV. TASKS OF JUDGES

Increases in court work load are related to new tasks under a rule of law system: increased access to justice, more conflict-oriented business relations, and increased criminality. Although the Ministry of Justice managed to grant a considerable increase in wages for clerks and young judges, the movement away from the courts for better paying jobs still continues.

Only estimates exist concerning case loads. Litigiousness has been rather low, stagnant since 1970 (twenty cases per 1000 inhabitants on average). A twenty-five percent reduction in the number of acting judges represents a quantitative increase in the work load. Qualitative increases appear to be more important, especially in relation to small business activities. Economic relations of small businesses with their customers are typically one-time relations which may easily result in conflicts. Building contracts constitute the most complicated cases with hundreds of pages of expert opinions dealing with engineering and accounting evaluation.

Policy decisions are highly centralized. The ruling decisions of the Supreme Court are binding on all other courts. Other precedents are not considered officially binding.⁴ The Supreme Court has made policy decisions in the past, in some extreme cases implicitly overruling statutes through judicial interpretation. The traditional technique of judicial law-making has been justified in terms of grammatical and linguistic interpretation. Legislative intent is hardly ever mentioned, although general justifications in terms of social interests are occasionally important. Policy decisions have been oriented toward uniform legal interpretation yet are sometimes coupled with criminal policy, family, or consumer protection considerations. Under state socialism, legal policy was determined officially by the Presidium of the Republic (e.g. suggesting tougher punishment in combating recidivism). Many anti-market interpretations were the results of Supreme Court interpretation. In order to reverse this trend, policy-making efforts of the Supreme Court continue. The Supreme Court is inclined to maintain that trend because Supreme

⁴ However, strong control is exerted on the courts of first instance as decisions are appealed essentially to the same panel of second instance.

Court judges believe that this is the best way to overcome transitional difficulties among traditionally trained judges.

Neutrality remains a major judicial concern and it is considered to be vital among recently acquired values. However, this refers to political neutrality and judicial independence. The institutional safeguards of intra-organizational independence (such as a system of automatic assignment of cases) have not yet been developed. Judicial criticism of laws and drafts is uncommon, and scholarly articles written by judges normally deal with minor problems of procedure. Legal policy questions (the death penalty in particular) are occasionally discussed by some judges in public. Judicial interest both in terms of external critical remarks and commentary at professional conferences concerns work conditions and court organization.

A major unresolved problem concerns judicial self-government. No noticeable polarizations along political lines (as in Italy) have yet occurred and homogeneity in terms of trade union representation is present as well. Some skepticism and passivity concerning the creation of judicial self-government has been voiced. Some judges perceive judicial self-government as a problem of insufficient interest representation. A more distant observer may retrace that to bureaucratic attitudes of judges under state socialism.

V. SOME REMARKS ON THE PROBLEMS OF THE JUDICIARY IN THE SOCIAL TRANSITION TO DEMOCRACY

Since the French revolution, a well-known phenomena of revolutionary change relates to the emerging revolutionary powers' mistrust of the judiciary. This mistrust is generally shared by large pro-revolutionary segments of society because judges and lawyers are associated with the previous regime. Such a belief may be generally justified.

The consequence of that mistrust is that the revolutionary forces attempt to replace the judiciary, and (especially at the end of revolutionary turmoil) try to subordinate the recently established and "purified" judiciary to the new laws of the regime, denying the judicial power to create law. These two approaches are generally separated by attempts at "revolutionary justice" which includes the unruly activity of justice by lay elements. These revolutionary justices defy central authority and are not tolerated by the consolidated central power at the end of the revolution.

The dramatic transformation in East Central Europe in 1989 was characterized by a deep mistrust of the new elites and the masses in the judiciary. Judges were considered to have been the means of the previous oppression. However, the emerging new regimes were committed from the beginning to a rule of law system and required a functioning

judiciary. Notwithstanding the shared mistrust of the judiciary, judges' power was increased. This was a lesser problem in Poland where a new uncompromised legal profession was available among Solidarity supporters. Nothing comparable was available in the other former socialist countries.

The reliance on the judiciary and the automatic denial of previous non-formal approaches to disputes results in an additional problem. The difficulties of formal dispute settlement through the courts is a generally acknowledged feature of Western legal systems. Adjudication, informal justice, and mediation were among suggested solutions. In the former state-socialist countries, however, lay justice⁵ became compromised and informality was considered to be a menace to the rule of law.

The above contradictions concerning the role of the judiciary in the democratic transition process are related to the unique nature of this social process. Sometimes the transition in the region is called a revolution; however, it is interesting and telling that some kind of qualification is added. For example, the Czechoslovak events were called the "velvet revolution." On the other hand important political forces from Romania to Poland have expressed their dissatisfaction with the political survival of former elites and complain about the lack of revolution. One of the points raised in that criticism concerns the lack of changes and activities in the judiciary. This dissatisfaction refers to the extremely slow court adaptation to the changes. Judicial organization and procedure have not changed. Given the bureaucratic socialization of the judiciary and the difficulties of developing a rule of law attitude, one cannot expect sufficient adaptation. The situation should change once the legislature has time to enact the necessary organizational, substantive, and procedural changes. But the judiciary appears unfit to make the necessary adjustments in the form of creative judge made-law. The consequence is a growing delay at the courts. The public feels that judges avoid decision making.

The problem is further complicated by the extreme formal inquisitorial powers of the judge in the state-socialist legal systems inherited by the new regimes. Broad investigative powers are afforded the judge. Little activity on behalf of the clients and their lawyers is required. As

⁵ Following the Soviet model in courts of first instance, sentencing is carried out by a panel composed of a professional judge sitting with lay judges. Lay judges have the same rights as professional judges and they are active for a limited period of service (e.g. one month). Lay judges are often older persons on pensions and are non-active.

In Hungary the lay justice system is still the general rule with a growing number of exceptions. Lay judges are elected by the local self-government, but recently the necessary number of lay judges could not be elected because of lack of interest and willingness. Therefore, the mandate of previously elected lay judges was extended.

judges are expected to establish the objective "truth," they are reluctant to base their decisions on simple omissions of the parties which results in extended investigation and further delays.

The identity and adaptation crisis of judiciary as it is developing in Hungary illustrates the contradictory nature of the present transition. On one hand, fundamental changes have occurred in the political structure. However, the judiciary is not a crucial part of the political structure. No doubt its importance has increased without fundamental changes so far in its social and political importance and status. Alternatively, a number of economic and social changes, notwithstanding their fundamental nature represent only the continuation of former trends. The transition is not yet accompanied by a fundamental social transformation. The old elites are sharing power with the emerging new elites to some extent. Consequently no major social pressure is exerted on the legal profession or judges in particular: they survive on the margin of the elite groups as part of the bureaucratic governmental apparatus.⁶

⁶ The activity of the Court of Register for Companies relates to this point. This Court is ready to support the economic policies of the government. Companies disliked by the economic bureaucracy of the government are often denied registration on the basis of strictly formal criteria.

