

Out of and Into Authoritarian Law

Edited by
András Sajó

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CONTRIBUTORS

Baer, Susanne

Professor of Law, Humboldt University, Berlin

Boraine, Alex

New York University School of Law and Vice-Chairman, South African Truth and Reconciliation Commission, Cape, South Africa

Dimitrijević, Nenad

Professor of Political Science, Central European University, Budapest

Galligan, Denis J.

Professor of Law, Director of the Centre for Socio-Legal Studies, Wolfson College, Oxford

Garlicki, Leszek Lech

Justice, Constitutional Tribunal of Poland

Halmai, Gábor

Professor of Law, Széchenyi University, Győr, Hungary

Krygier, Martin

Professor of Law, The University of New South Wales, Sydney

Morvai, Krisztina

Associate Professor, Eötvös Loránd University, Budapest

Pildes, Richard, H.

Professor of Law, The University of Michigan Law School

Sajó, András

Professor of Law, Central European University, Budapest

Szikinger, István

Lawyer (constitution law), Budapest, Hungary

Tamás, G.M.

Professor of Philosophy, Hungarian Academy of Sciences

Teitel, Ruti

Professor of Law, New York Law School

van Zyl, Paul

Program Director of the International Center for Transitional Justice,
New York

Vashkevich, Alexander

Director, Belarusian Center for Constitutionalism and Comparative
Legal Studies

EROSION AND DECLINE OF THE RULE OF LAW IN POST-COMMUNISM: AN INTRODUCTION

András Sajó

Modern constitutional systems and constitutions presuppose some form of working democracy. There are only scattered provisions in most constitutions that would safeguard a robust democracy. On the other hand, fundamental rights and the various forms of checks and balances provide only limited protection against turning a democratically elected government into an illiberal mechanism. Fareed Zakaria, in a hotly contested article,¹ claimed that democracy works only where it evolves within a preexisting liberal constitutional system. The debate on “illiberal democracies” concentrates on sequencing, i.e., whether liberalism has to precede democracy or vice versa.² There is also a discussion regarding the sources of illiberal democracy and the socio-political conditions needed to overcome the illiberal elements of democracies. However, liberal constitutional theory is at loss to answer the following simple question: how is constitutionalism possible if genuine fair elections result in the expression of popular authoritarianism? (J.S. Mill, for example, had a simple answer: if such an uncivilized popular view is to prevail there is no place for democratic procedures.)

Perhaps even less attention is devoted to the legal-normative dimension of the issue. Are there specific constitutional rules that help to prevent unfettered democracy (other than fundamental rights and separation of powers)? Are there shortcomings with the traditional constitutional recipes? For example, public order in the guise of compelling state interest is traditionally accepted

1 F. Zakaria observes that an increasing number of democratically elected governments are abusing their powers and repressing civil rights. “The Rise of Illiberal Democracy,” *Foreign Affairs*, Vol. 76, No. 6 (November/December 1997) 22-43.

2 The problem is discussed in this volume in chapters 5 (Dimitrijevic) and 13 (Krygier).

as a ground for rights restriction. Public order as a restrictive concept is determined in the democratic process. On the other hand, given the many abuses of the democratic process, and elections in particular, isn't it a duty of constitutionalism to suggest constitutional safeguards against formal-electoral democracy? This is easier said than done. Perhaps in the long run democracy (and well-developed media) can limit authoritarianism and more progressive laws will become the norm. After all, police misconduct is exposed in many cities, sometimes resulting in reshaping the police. Nevertheless, some people would say that such exposures have a long history and hardly ever result in eliminating these pockets of institutional authoritarianism. Tax inspectors' manners have not changed throughout history.

The practical relevance of these issues is obvious for post-communist and post-authoritarian countries. Authoritarianism in democracy, and in rule of law based legal systems, however, remains a major intellectual puzzle for constitutional theory, as it is very difficult to identify the specific factors of authoritarianism and illiberalism in the constitutional-legal systems. The residual (and reproduced) authoritarianism of specific organizations (police, immigration, tax inspection) still causes tensions in the West, too. Churches with authoritarian structures remain not only constitutionally protected; the authoritarian elements of their religious practices are often endorsed by the state. This is a constitutional anomaly in many liberal countries. National identity protection throughout the democratic process tends to add to the difficulties of constitutionalism everywhere. In Eastern Europe we simply do not have sufficient knowledge of the process and techniques of this slide towards democratic authoritarianism.

The collapse of oppressive regimes in Eastern Europe raised high hopes. It was believed that the strong desire to get rid of communist authoritarianism and the wish to enjoy the advantages of a market economy would result in new societies committed to the rule of law and constitutionalism. It was also believed that the emerging societies would create institutions that would undo past injustices and be concerned about preventing the development of new injustices. Skeptics, on the other hand, argued that the social and economic conditions require a process of transition that does not favor such noble improvement, and that the cultural and structural traditions of these societies are not favorable to the rule of law and market fairness, nor are they sympathetic to human rights.

At the turn of the millennium, the legal systems of the societies coming out of authoritarianism show trends of illiberalism and even authoritarian traits mixed with rule of law elements; moreover, the differences are enormous between the countries that previously belonged to the same, apparently mono-

lithic, Soviet bloc.³ In some of the countries, non-democratic trends seem to prevail, elsewhere authoritarianism remains at the level of sporadic phenomena with a potential to degenerate in a partial suspension of the rule of law. Rule of law and constitutionalism are disregarded by those in power in the name of order and efficiency,⁴ democracy,⁵ or communalism.

There are a number of clearly troubling phenomena. Some of these are related to the democratic “component” of constitutional democracy: the results of the electoral process might undermine constitutionalism, or government through plebiscite may establish irreversibly oppressive solutions and regimes. These are, to some extent, the *external* sources of the authoritarian shift. These political mechanisms established by the liberal constitutional system may bring in (or perpetuate) an authoritarian ruler or regime. A second set of events results in the *internal* erosion of the constitutional regime. Here the internal operations of the constitutional system (courts and legislation) result in an increasingly systematic departure from the rule of law, including a considerable disregard of human rights, at least in certain less visible areas of social life. The erosion is the result of the interplay among constitutional institutions. For example, certain divisions of the executive (president, chancellor, police, secret police) first penetrate parliament, then perhaps the prosecution; the judiciary fails to stop additional extensions of illegal power, then public opinion (the press) is tamed, and so on. Of course, the external and internal processes might be interrelated: an internal erosion of the rule of law may create an electoral institutional system (including the control of the media and of the opposition) that makes one-party rule through free elections possible.

3 See e.g., the Country and Territory Reports of Freedom House.

<<http://www.freedomhouse.org/research/freeworld/2000/countries.htm>>

4 Chapters 5 (Dimitrijevic) and 11 (Galligan) contain reasons why “the efficiency demand cannot be recognized as an independent criterion of the governmental process – only the demand for the legitimacy of limited government can be recognized as legitimate.” (Dimitrijevic) Szikinger in chapter 10 describes how in the Hungarian Police Act of 1994 “both the separation of powers and the priority of human rights over operational requirements of the state were weakened for the sake of perceived police effectiveness.”

5 The anti-constitutionalist impact of democratic legitimization is exemplified by Szikinger in chapter 10: “The issue of the democratization of the police was absorbed by the question of reforming the general state structure. As the head of the ministry unit responsible for policing, László Korinek, put it: ‘The police is only a part of this, and if the state itself is democratic, its police should be the same. It does not depend on what organizational principles determine the police being created.’ [László Korinek, “Modernization of Police,” – *Rendészeti Szemle*, 10 Special issue in English (1992) 3–14.] As a consequence, the police survived the change of the political system basically intact.”

What are the flaws in the legal system that we label “authoritarian”? The powers of the executive branch increase without proper checks and balances, delegated legislation prevails without adequate legislative guidance, and the budget is increasingly less controlled by parliament. All these are normal phenomena of cabinet dictatorships; however, when the prerogatives of parliamentary opposition are disregarded, parliamentary inquiry committees are not established, etc., the deterioration might become irreversible. It is argued by those interested in unfettered government power that separation of powers is considered outdated in the West and that the parliamentarianism that prevails in Western Europe is “based on the principle of the unity of power” (this position is quoted in Halmai’s chapter 14). Free speech is restricted in the name of “personality rights.” More and more public authorities are granted investigative powers, including secret surveillance. Preliminary detention and incarceration are increasingly used as punishment, to the extent that the per capita incarceration rate exceeds the percentages registered during communism. Constitutional courts have mixed records. Even where these courts try to breathe a liberal meaning into the constitution in line with the prevailing European trends, this is disregarded by ordinary courts and often by parliament as well. Ordinary courts rubberstamp requests for pretrial detention and secret surveillance. In the Czech Republic and Romania, ordinary courts are reluctant to enforce limits on pretrial detention, notwithstanding contrary findings of constitutional courts. Courts continue with narrow, unprincipled interpretations of rights provisions in clear disregard of the constitutional meaning of legal texts. Courts often fail to provide adequate and efficient remedies against abuses of discretionary power by administrative agencies and against various forms of discrimination. The integrity of the judiciary and prosecution are questioned because of scandals, among other reasons. The police and the revenue service are sometimes used to silence the political opponents, critics, and even business competitors of those in political power. The recommendations of the ombuds-person and even court rulings are simply disregarded in the name of distorted or blatantly misleading cynical interpretations of fundamental constitutional principles. The authorities collect more and more private data, which can be abused. Data collected (falsified) by communist secret services was not destroyed and is now used in political conflicts and for governmental and private blackmail. The executive makes attempts either to stay above the law or shape the law in such a way as to grant the executive and its clients “lawful”

privileges. The situation is further aggravated by rampant corruption.⁶ A further complication is that radical and extremist nationalism has become not only popular and *Salonfähig*, but also to some extent part of governmental policies, endorsed by legislation. Official non-interference in racist and other discriminatory private practices is becoming normal. This apparently liberal non-interventionism contributes to the consolidation of authoritarianism in society – a phenomenon that is endorsed by emerging authoritarian political movements.

Notwithstanding the above faults, one should not disregard the constitutional achievements of transition democracies. In most post-communist countries the fundamental structures of rule of law based legal systems were established: the problem is that the forms were not always filled with proper content, and further legislation and implementation of laws after the formative years tended to move away from the promises of the constitutions and early laws. Again, the trend is not without exceptions: for example, because the fundamental institutions of democracy were kept in a working condition, the trend was reversed at the polls in Slovakia. The European Commission finds that in the case of the European Union candidate countries the fundamentals of the rule of law and democracy are in place. (Criticism is voiced regarding judicial independence.)

At least in Central Europe, important constitutional and institutional safeguards were built into the law to resist authoritarian attempts, including electoral authoritarianism⁷ and populist dictatorship. The judiciary in particular (see chapter 11 by Galligan and chapter 8 by Pildes) provides legal self-defense against inherent and external authoritarianism. In chapter 6 Justice Garlicki of the Polish Constitutional Tribunal argues that the new democracies have been able to use such self-defense mechanisms of constitutionalism. President Walesa's attempt to create a system based on his personal charisma was derailed by the Constitutional Court and other institutions; attempts to destabilize the system in favor of a populist plebiscite regime were thwarted in Poland and Hungary by referendum threshold rules and, in the case of Hungary, by the firm rejection of referendum initiatives by the Hungarian Constitutional Court. Where referendum was used to reshape the separation of powers or destabilize

6 I have described the emerging regimes as clientelistic regimes where political power is used for extortion. See *The Political Corruption in Transition: A Sceptic's Handbook* in S. Kotkin and A. Sajó (eds.), Budapest: Central European University Press (2002, forthcoming).

7 In electoral authoritarian regimes multi-party elections and referenda are reinforcing the personal rule of a given group "[B]y utilizing the democratic procedures, ... [t]he end result might consist in bringing to power – legally and democratically – parties and politicians whose views of democracy and pluralism might be rather far from the standards of the beginning of the 21st century". (Chapter 6, Garlicki).

institutions, the legitimacy of government and constitutionalism suffered (see e.g., Ukraine and Moldova). In Belarus it was through referendum that the separation of powers was undermined. It should be noted, however, that the possibilities of the legal system and of courts in particular are limited in protecting liberal democracies against authoritarian trends. As Pildes points out in chapter 8, in many states of the U.S., courts (and other branches of power) were unable to combat one-party democracy.⁸ The resistance of courts to electoral authoritarianism is limited as long as courts are interested in rights and not in structural problems of democratic electoral competition.

The first step in constructing anti-authoritarian constitutional doctrine to deal with the distinct issues in cases involving the structuring of democratic institutions, then, is for courts to recognize that it is the structural features of the electoral system, not the intrinsic rights of individuals, that such cases are best conceived as presenting. Rights-adjudication is a vehicle for bringing these structural issues to the constitutional courts, but the rights at stake are instrumental toward constructing appropriately democratic structures as a whole. (Pildes)

The structural imbalances are those that might perpetuate the rule of those in power through elections.

In the case of countries like Belarus, authoritarian or even dictatorial elements prevail and law shows little evidence of the rule of law, though the legal system differs fundamentally from the communist one. As Vashkevich's analysis demonstrates in chapter 15, even the Belarusian legal system makes attempts to resemble Western law. It seems that even in post-communist despotic regimes there is a need for legal formalities to be observed. Law and its interpretation are used to overcome the dictates of the rule of law that would frustrate the attempts of power holders to manipulate society to their advantage. Exceptions, tricks, and obviously unfair legislation are the means used. In other words, even in blatantly dictatorial post-Soviet regimes lip service is paid to Western legal ideals. Only in extreme cases is brutal force used to repress opposition. But contrary to communism, these new European authoritarian systems are not keen to create a system based on ideological loyalty.

8 One-party democracy is a form of electoral authoritarianism where the electoral system is shaped in such a way that it perpetuates the rule of the incumbents. One-party democracy was probably the dream of most political leaders in East Central Europe. Nevertheless, in the first ten years after the collapse of communism in the overwhelming majority of the non-Soviet post-communist countries no incumbent won national elections. (President Kwasniewski, who seemed to be very inclusive, is the exception that proves the point.)

One could argue that the cluster of negative developments in many post-communist countries points towards more systems like that in Belarus. Given the social, historical, economic, and geopolitical level of integration of East Central European countries with the West this is an unlikely scenario. However, the potential similarities make one think about the nature of the problem. Are the above phenomena (still far from the Belarus extreme) elements of authoritarianism? Do these developments reflect authoritarian rule and, consequently, authoritarian law?

Authoritarianism and authority are some of the most confusing concepts in political science. As Galligan states in chapter 11: "the concept of authoritarianism, while clearly pejorative in its connotations, is not a term that is used with any precision; indeed, amongst political scientists and lawyers, it is not a term that is widely used at all."

Authority, in the sense Hannah Arendt uses the term, refers to reliance on (unquestioned) inherited wisdom. "Against the egalitarian order of persuasion stands the authoritarian order."⁹ In authoritarian government, authority "is filtered down from above."¹⁰ It seems that in all the cases of legal mischief referred to above the formal supremacy of the rule of law is questioned and the supremacy of the executive and those who enjoy the protection of the executive (the clientele) is recognized. Decisions are based on authority filtered down from above. The ruler's legitimacy, often quite shaky, is based on conservative values. The government departs from the formalities of the law in the name of conservative values, promising public order or efficiency. Denial of the rights of criminals and the accused in the name of their unequal status ("unworthiness") or in the name of efficiency is a denial of equality among citizens and is justified by the assumption that the police and other authorities know the solution "better." These tendencies fit the concept of authoritarianism that is commonly understood as implying the rule of an individual, or a group of persons, "who arrogate themselves power and monopolize that power in the state."¹¹ Modern authoritarianism does not rule out a formal democratic legitimation – the leaders govern at least on behalf of and for the majority or the community, though the specific decisions might be justified by the specific knowledge or other personal characteristics of the decision-maker. This is not a matter to be taken lightly: the majority of democracies are illiberal. Needless to say, the impersonality of the rule of law cannot coexist with authoritarian

9 H. Arendt, *Between Past and Future, Eight Exercises in Political Thought*, London: Penguin Books (1977) 93.

10 H. Arendt, *On Revolution*, New York: Viking Press (1963) 282.

11 *Academic American Encyclopedia*, Danbury, CT: Grolier, Inc., (1997) 802.

rule, as authoritarian rule presupposes and requires the disregard of neutral, preexisting rules applicable to all. It is clear that in an authoritarian arrangement the limiting function of government is seriously imperiled, though the negative impact on most individual rights is neither clear nor inevitable.

Alternatively, one could argue that concepts like “authoritarian elements in law” or “law conducive to authoritarianism” are not grasping the problem described above: what matters in Eastern Europe is that the law shows elements of illiberalism, this being part of a drift towards becoming illiberal democracies. One could argue that there is a prevailing conservative mood that influences the legal system. The mood stems from premodern values like primordial tribal values and denial of secularism. Such premodern conservatism is by definition illiberal and antiliberal; therefore, to the extent that these values determine law and its interpretation, law itself will become a tool of antiliberal restrictions.

If one understands the liberalism deficit, or illiberalism, as a situation in which individual liberties as rights are curtailed, then the term “illiberal law” might be more adequate than “authoritarian law.” However, the restrictions on individual freedom might be quite legitimate in view of other democratically determined or otherwise construed social value systems. As long as such restrictions on rights remain reasonable in a given society (and not primarily dictated by premodern concerns), the restrictions might be acceptable and even necessary without undermining constitutionalism. After all, the accommodation of religion in public life and public support to churches might result in limiting liberty. But as long as this is not affecting equality in the public domain and is not resulting in irreversible limits on value choices it might remain within the frame of constitutional democracy. The problem is not simply that liberal values and rights are disregarded. In the language of the socio-legal analyst (Krygier in chapter 13), the state attempts to penetrate civil society. The state acts as a police state.

The term ‘police state’ is generally used to describe repressive systems. However, one has to emphasize that the expression is somewhat misleading, as in a police state not only the police themselves but the whole power structure tends to keep social currents and phenomena in strict order. A democratic state based on the rule of law is maintained and determined by society. In a police state, the political and administrative leadership wants to shape and control the population. This does not always mean repression. Providing people with services and even goods can well be part of the police state approach. The concepts of ‘police state’ and ‘welfare

state' certainly have something in common. At the same time, it is beyond doubt that the exposure of the individual and communities to public power prevails in a police state. This is the rule of men instead of the rule of law. Even if a police state is not understood as a system ruled by the police organization, law enforcement can contribute significantly to the destruction of constitutional values by substituting them with 'emergency measures' deviating from the democratic ideal by referring to the extraordinary needs of the fight against crime. (Szikinger, chapter 10)

The essays in this volume discuss the deconstructing of the oppressive (communist) law and the undoing of injustices perpetuated under communist law.¹² Further, the papers discuss the replacement of communist law with a normative order. The central problem discussed in the papers is how and to what extent illiberal traits emerged.

Law has an inherent tendency to be oppressive, illiberal, and even authoritarian, even if constrained by the rule of law and ideas of constitutionalism. "Authoritarianism is an inherent structural tendency of democratic regimes" (Pildes, chapter 8). The study of post-communist illiberalism has made it clear that in many respects the illiberal (freedom-reducing) phenomena are also present in Western (democratic) legal systems: it is quite often the application of these "Western" solutions that exposes, or perhaps even causes, the illiberal trends of the law in post-communism.

However, in established democracies constitutional institutions, constitutional actors, and large segments of the society have enough independence, resources, and constitutional culture to resist these attempts to authoritarianism. The erosion of human rights has its limits. These societies have a level of social self-defense that Baer (chapter 9) and Krygier (chapter 13) both call civility. These elements are less effective in the post-communist countries, hence the increased concern. For example, the often arbitrary and capricious Kafkaesque investigations and unchecked investigative powers of revenue services are known in most democracies, and are seen as indicia of authoritarianism, or at least etatism running amok. This is certainly a troubling but "normal" matter if it occurs in Italy or the United States. ("Normal" in the sense that sooner or later the judiciary or the electorate or some other authority will restrict it, and it certainly will not become part of an oppressive political system.) Given the lack of established patterns of rule of law behavior in East European

¹² The papers in this volume were originally presented at the 8th and 9th annual conferences of Central European University's "The Individual vs. The State" series in Budapest in 1999 and 2000. Financial support was granted by the Open Society Institute, Budapest.

countries and given their history, similar phenomena of illiberalism are to be evaluated differently in these transition societies. Krygier (chapter 13) argues that post-communist societies operate without "tolerant pluralism," as the prevailing communitarian attachments are hostile to such activity.

One of the theoretically most interesting aspects of the emerging and identified illiberal trends of law in the post-communist countries is that it offers an opportunity to look at the illiberal elements of Western legal systems. Because authoritarian elements are common in Western law, irrespective of the maturity of democracy, we have included a number of essays in the volume that deal with Western experiences or discuss authoritarianism in Western law in a comparative (transition democracies vs. mature democracies) perspective. Very often the legal rules and practices departing from the rule of law are not different in Eastern and Western Europe. However, such departure is perceived as being less dramatic and less systemic in Western Europe than in Eastern Europe. It remains a matter of future research and actual future developments as to what extent the illiberal potential will manifest itself in the countries emerging from communism and underdevelopment.

What are the causes of these illiberal phenomena in post-communism? The essays in this volume offer a number of explanations: some are mutually exclusive, others are not. One possible reason is that past (primarily communist) injustices were not remedied, and without a resurrection of morals it is impossible to move away from the authoritarian past. Lack of cleansing allows the repetition of history. Using less moralistic (or social-psychological) language, one could argue that because past injustices were not remedied, the social actors who were part of the system of injustice continued to operate along patterns that can be traced back to authoritarianism. Moreover, without such changes, institutional continuity will occur, and if a country inherits its oppressive police and other agencies these will be inclined to perpetuate previous authoritarian elements (see the case study on the Hungarian police by Szikinger in chapter 10).

In South Africa the social and economic legacy of apartheid is causing "unfinished business" that "has to be tackled; otherwise it will be impossible to sustain the miracle [of peaceful transition]" and "consolidate democracy" (Boraine, chapter 3). This was not the prevailing mood or understanding in Eastern Europe. Of course, "transitional societies invariably confront considerable political and practical difficulties in attempting to prosecute perpetrators" (not to speak of the difficulties of and social conflicts related to restitution of properties and paying adequate compensation for past injustices). "An approach to dealing with the past cannot ignore this reality and must seek to encourage credible alternatives" (Van Zyl, chapter 4). Ironically, as Morvai in chapter

2 demonstrates, in most post-communist societies the justice claim was rejected in the name of the rule of law. The Hungarian Constitutional Court stated: "the certainty of the law based on *objective and formal principles* is more important than necessarily *partial and subjective justice*." Of course, the Czech Constitutional Court was of a different opinion. It upheld the law that declared (ex post) that the statute of limitations was not applicable in the case of communist crimes. However, this was the exception in Eastern Europe. Even where there was no personal continuity among past and present political and cultural elites, the patterns remained legitimate and therefore easily adaptable by the new elites. Halmai in chapter 14 argues that even new democratically legitimated elites might choose conservative and authoritarian paths, following dictates of power.

There might be social, political, and historical reasons for the East European reluctance to deal with the totalitarian past. The reasons range from negotiated transition processes to lack of resources and too many accomplices and beneficiaries of past injustices. But perhaps the lack of a justice-based refutation of the past and a moral foundation for the new society through reparative and retributive justice is not a matter of deliberate choice. Imperfect justice pertains to the nature of transitional justice. Transitional justice cannot replace a revolution or some other act of collective liberation. Transition itself, as well as the "past" that transition is supposed to transcend, are not given "facts": as Teitel points out in chapter 1, these are matters of competing and developing narratives. The claim to justice is a liberal narrative; communal and other narratives may offer different versions of the past. The insistence on transitional justice based on restitution and punishment of "bad guys" might have been a Western liberal expectation and not a genuine East European concern. If Teitel is right, and trials "are well suited to the representation of historical events in controversy" and are "needed in periods of radical flux" then perhaps there was no *radical flux* in Eastern Europe (radical regarding the past). It is important to put transition and the reaction of the transition democracies to their immediate past into context: this is not a matter to be assumed but is rather subject to historical development. "The region's transitional accounts commence with the story of invasion and popular resistance; with the foe represented as foreign outsider, progressing to the ever more troubling discovery of collaboration closer to home and pervasive throughout the society" (Teitel). It should be noted, however, that even in regard to collaboration regarding ethnic and racist persecution that occurred before, during, and after World War II, there is no full recognition of national responsibility.

A second possible explanation for the occurrence of authoritarian traits in law is that the authoritarian features of the legal system and of government in general follow from the lack of democratic traditions. Perhaps more im-

portantly, powerful interests exist that need a non-transparent legal system. Lack of transparency and departure from the rules helps in procuring the spoils of transition (the “state capture” or “extortion regimes” approach).¹³ I have argued elsewhere¹⁴ that the state becomes a machine of extortion of bribes: the law will be applied or disregarded depending on the interests of the briber. G.M. Tamás argues in chapter 12, that the rule of law is undermined because the political power holders create dependencies outside the law: power offers the privilege of being outside and above the law. This occurs in the process of refeudalizing the society, where one’s social status depends on the privileges granted outside state and law. This, of course, presupposes that the public bureaucracy is successfully forced to disregard the applicable rules. Where the bureaucrats depend existentially on the political power holders they will not operate neutrally and independently.¹⁵

Irrespective of one’s specific approach regarding the use of government power in post-communism, it is clear that a departure from the rule of law is essential for those in control of political power. However, restrictions on individual rights do not directly follow from these trends, except in regard to regime criticism. For this reason, only those fundamental rights that have a direct impact on power, like free speech, access to information, and certain elements of privacy, are restricted.

An alternative perspective considers the authoritarian erosion of the rule of law in a topographical manner. The collapse of the rule of law occurs in certain areas of society and the state. We are confronted here with a dual state. Authoritarianism is limited to a well-defined domain or dimension of the state and its law. The dual state was a key concept used by Fraenkel in describing Hitler’s regime (see in this volume G. M. Tamás’ essay in chapter 12). In the

13 D. Kaufmann, “Corruption: The Facts,” *Foreign Policy*, (Summer 1997) 114; also see Kotkin and Sajó.

14 See Sajó, “Clientelism and Extortion: Corruption in Transition” in Kotkin and Sajó.

15 Ironically, even rule-following public bureaucracy, that great remedy against the departure from the rule of law, has its own authoritarian elements. “The administrative system appears to contain within itself a tendency towards authoritarianism that, although driven by its own internal forces, at the same time is likely to aggravate any authoritarian elements already contained in the laws and policies it implements. Administrative bureaucracies are naturally governed by procedural rigidity and a disregard for individualized differences; efficiency and self-interest prevail over fairness, and secrecy militates against explanation and justification. If authoritarian means the exercise of authority in a manner that is unacceptable to those subject to it, because of certain kinds of defects within it, then administrative bureaucracies would seem to be presumptively authoritarian. The result may be that authoritarian elements present in the laws and policies of the day will be augmented in the hands of the administration responsible for their implementation” (Galligan).