II.
Constitutional Issues

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How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland*

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"*The time is out of joint: O cursed spite,*
That ever I was born to set it right!"
Shakespeare, Hamlet I.5.

Since 2010, the rule of law and democracy have been continuously eroding in Hungary. The following paper is based on the *hypothetical* situation that the united opposition achieves simple majority during the next general elections, but they do not receive enough votes to achieve a two-thirds constitution-amending majority in the Hungarian Parliament. The question would then be, how they could deal with the new situation, as most of the supposedly independent institutions (such as the Constitutional Court,

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the prosecutorial services etc.) are and will be in fact captured institutions protected by two-thirds majority rules,[1] and there would be a danger that they would act as a deep state of the *ancien régime* countering the new government.[2] Also certain constitutional provisions and qualified majority (cardinal) statutes would need to be amended, as they express one-sidedly the political rhetoric and policy preferences of the current government. The present paper discusses constitutional, political science, sociological and ethical issues of this hypothetical Hungarian transition process. As the Hungarian opposition has (yet again) lost the 2022 general elections, this hypothetical scenario is unlikely to become a reality in the near future. The dilemmas of this hypothesis are, however, also of theoretical interest, and certain conclusions are relevant also for other countries, *inter alia* for Poland.

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1 Amendments to the Fundamental Law 2011 require the support of two-thirds of *all* MPs [Article S(2) of the Fundamental Law], whereas amendments to cardinal laws require the support of two-thirds of MPs *present* [Article T(4) of the Fundamental Law]. In a politically tight situation (which is the hypothetical context of this paper), it can be expected that *all* MPs will be in fact *present* during the voting, therefore in practice the two-thirds of MPs *present* will mean the two-thirds of *all* MPs.

2 By *deep state* I mean those high-ranking public officials who cannot be legally removed by the simple parliamentary majority and the government, and who, according to the legal system, should be independent of party politics, but based on their activities so far, it can reasonably be feared that they would in fact rather sabotage the program of a new government along the lines of party politics.

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I. The Nature of the Hungarian Hybrid Regime

By now, according to most democracy indices, Hungary is not a fully-fledged (well-functioning, consolidated, embedded) democracy – but not a dictatorship either.[3] It is something in-between in the grey zone: an "electoral autocracy" (V-Dem), a "partly free" country (Freedom House) or a "defective democracy" (Bertelsmann Transformation Index). In the following, I am going to use the expression "hybrid regime", as this seems to be the most generic, fitting and widespread terminology for such cases.[4]

I avoid the terms "autocracy" and "authoritarian regime" in this paper, because in certain conceptualisations they are used as synonyms of "dictatorship", while in others they are defined more broadly (i.e. considering dictatorship as its worst case), and in some cases, they are even explicitly distinguished from it (i.e. in a graded category system, a regime one degree less oppressive than dictatorship). Unfortunately, the multiplicity of definitions of "autocracy" and "authoritarian regime" also allows some authors to alternate different meanings even within a single writing.[5] Using the name "hybrid regime" makes it easier to avoid such conceptual misunderstandings, which will hopefully contribute to the transparency of my argument.

3 Simplistic binary descriptions about Hungary (democracy vs dictatorship) are unsuitable for analytical purposes. For sophisticated evaluations you need graded systems, such as rule of law indices or democracy indices, see András Jakab and Lando Kirchmair 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way', German Law Journal 22 (2021), 936–955.

4 For further references on the terminological debate see András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', Democratization 25 (2018), 1173–1189. They characterise the Hungarian hybrid regime with 'the presence of one-sided and unfair political competition as well as the formal existence of a liberal constitution but with serious deficiencies in its actual functioning.'

5 For this reason I am not using the term "authoritarian enclave" either, and instead I am using the more generic term "deep state". On authoritarian enclaves in the Chilean context see Andrew Arato, 'Democratic legitimacy and forms of constitutional change', Constellations (2017), 447–455.

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1. The role of law: formality vs. informality

An essential feature of the Hungarian regime is "plausible deniability",[6] i.e. it is not using open and brutal methods of oppression, and also legal rules in most cases remain within the limits of Western constitutionalism (with a few exceptions →III.1.a) ix., which only explain a minor fraction of the erosion). There is no legal rule which would explicitly exclude the opposition from winning the elections, but a series of nasty and mostly illegal tricks (biased application of campaign finance laws, State-run propaganda machine, using the secret services to spy on opposition politicians, gerrymandering, etc.) make the playfield uneven and unfair.[7]

The nature of the regime cannot be understood based on its legal rules. Although there are indeed some problems with certain laws (and with certain provisions of the Fundamental Law),[8] the suffocating nature of the regime is not a direct and necessary consequence of its written laws, but rather stems from their application and from *de facto* practices by various officials, e.g., law enforcement agencies do not (or extremely slowly and incompetently) apply existing criminal laws to obvious corruption cases if they happen in the environment of politically shielded personalities.[9] The blatantly arbitrary disciplining practices of the Speaker of the Parliament applied to MPs,[10] or certain tax authority raids on political and economic opponents can also be cited as examples. Chasing away the Central Euro-

6 Erica Frantz and Andrea Kendall-Taylor, 'The Evolution of Autocracy: Why Authoritarianism Is Becoming More Formidable', Survival (2017/5), 57–68.

7 Or to put it differently, the elections are "free but not fair", see (without using the expression explicitly but describing in detail the phenomenon along these lines) e.g., Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights, *Limited Election Observation Mission Final Report on the Parliamentary Elections in Hungary 8 April 2018* (Warsaw, 27 June 2018).

8 For an overview of these problems see András Jakab and Eszter Bodnár, 'The Rule of Law, Democracy, and Human Rights in Hungary: Tendencies from 1989 until 2019' in: Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (New York: Routledge 2020), 105–118; András Jakab and Eszter Bodnár, 'Agonie eines jungen Verfassungsstaates. Die ungarische Verfassung 1989 bis 2019' in: Ellen Bos and Astrid Lorenz (eds), *Das politische System Ungarns* (Berlin: Springer 2020), 55–70.

9 See e.g. Erdélyi Katalin, 'Elszabotált nyomozások: 20 fontos ügy, ami megakadt az ügyészségen', 16 September 2021 <https://atlatszo.hu/kozpenz/2021/09/16/elszabotalt-nyomozasok-20-fontos-ugy-ami-megakadt-az-ugyeszsegen/> (22.03.2023).

10 Zoltán Szente, 'The Twilight of Parliament – Parliamentary Law and Practice in Hungary in Populist Times', International Journal of Parliamentary Studies (2021), 127–145.

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pean University was also carried out predominantly with such means (i.e. it did not follow from the text of the law itself that the university had to leave the country, but from the way of its application and from the political context it already did).[11] The Hungarian hybrid regime is – in addition to the concentration of financial resources – mostly about a combination of creative, occasionally illegal (selective) law enforcement, as well as informal, extra-legal (i.e. not legally prescribed, sometimes illegal) practices.[12] Compared to these, the problems that can be discovered in written laws are *relatively* minor.[13] The character of the regime as a whole is therefore not primarily determined by formal (legal) norms, but by informal practices.[14]

We can observe a growing gap between written laws and legal reality: the normativity of formal legal norms is slowly deteriorating in Hungary (especially in politically sensitive legal areas)[15] and informal extra-legal practices become stronger and stronger, often also contrary to existing laws. Specifically in the field of constitutional law, this means that the gap between constitutional law and constitutional reality is constantly growing: the normativity of Hungarian constitutional law is gradually fading. The

11 For a detailed example of how this works at the Constitutional Court through failure to act see Nóra Chronowski and Attila Vincze, 'The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied: Decision of the Hungarian Constitutional Court of 6 July 2021 and the Judgment of the ECJ of 6 October 2020, Case C-66/18', European Constitutional Law Review (2021), 1–19.

12 See convincingly Beáta Bakó, 'Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary', Heidelberg Journal of International Law (2022), 223–254 (250).

13 See e.g., Zoltán Szente, 'The myth of populist constitutionalism in Hungary and Poland', International Journal of Constitutional Law (2023), 1–29 (27): 'the system of the separation of powers and the catalogue of basic rights of the Fundamental Law differ only slightly from the old Constitution - in fact, most problems stem from authoritarian constitutional practice.'

14 András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary', American Journal of Comparative Law 68 (2020), 760–800; on the role of formal legal rules see Kim Lane Scheppele, 'Autocratic Legalism', University of Chicago Law Review (2018), 545–583.

15 The situation is similar with regard to the Russian Constitutional Court, which is doing a decent work in politically irrelevant cases, but in politically important cases it is always a submissive servant of the Putin regime. See Alexei Trochev and Peter H Solomon, 'Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state', Communist and Post-Communist Studies 51 (2018), 201–214.

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forms are still there, but in practice they are slowly being hollowed out: liberal (or at least largely liberal) formal rules mask strongly illiberal everyday practices.[16] Captured institutions (such as the Constitutional Court or the prosecutorial services) are independent on paper, but in fact they act along with the wishes of the current government.[17] This behaviour can be manifested not only in formal acts (in their content and in the choice of decision-making form),[18] but also in deliberately failing to act,[19] and even in informal acts such as press releases, which can be assumed to have been created specifically on government orders, or at least with prior consultation with the government.[20]

For these situations, the classical black letter (doctrinal) methods of legal scholarship can only be applied to a very limited extent. It can also be observed in Hungarian legal scholarship that classical doctrinal works are losing popularity, and instead empirical, sociological or complex institutional analyses emerge.[21] If the legal system is gradually losing its normativity, then doctrinal analysis is gradually also becoming futile.[22] The admittedly mixed genre of the present paper also fits into this trend.

16 András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge: Cambridge University Press 2021), 154, 255.

17 On the steps leading to the currently very strong correlation between the opinion of the government and the opinion of the Constitutional Court, see Zoltán Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014', Constitutional Studies 1 (2016), 123–149 with detailed empirical data. On the prosecuting services see above n 9.

18 A central and strong competence of any constitutional court is the annulment statutes. The Hungarian Constitutional Court still has this competence, but in practice its use became very rare. Instead, the Constitutional Court tends to use softer competences (such as declaring that the legislature omitted to act, and obliging the legislature to act within a deadline).

19 About various techniques delaying, avoiding or hollowing out decisions, applied by the Constitutional Court itself, to justify its own failures to act, see Petra Lea Láncos, 'Passivist Strategies Available to the Hungarian Constitutional Court', Heidelberg Journal of International Law (ZaöRV) 79 (2019), 971–993.

20 See e.g., the open letter by the President of the Hungarian Constitutional Court published on 14 December 2021 <https://www.alkotmanybirosag.hu/kozlemeny/az-alkotmanybirosag-elnokenek-allasfoglalasa-a-jogallamisag-vedelmeben>.

21 András Jakab and Miklós Sebők (eds), *Empirikus jogi kutatások* (Budapest: Osiris 2020).

22 András Jakab, 'Bringing a Hammer to the Chess Board: Why Doctrinal-Conceptual Legal Thinking is Futile in Dealing with Autocratizing Regimes', Verfassungsblog, 25 June 2020, <https://verfassungsblog.de/bringing-a-hammer-to-the-chess-board/>.

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2. The regime's hyper-pragmatism: adhocism and ideological agnosticism

In 2010, there was no detailed roadmap or systematic planning on how to build up the Hungarian hybrid regime. The end result is much more the result of a series of improvised decisions than the realisation of a systematic plan.[23] The only consistent pattern of behaviour of the regime has always been its trying to solve quickly and efficiently the power-politically most pressing current problems. The rest are narratives constructed only after the fact (i.e. *ad hoc*, for the specific task). Ideology is only an interchangeable 'political product'[24] for the regime.[25]

The regime also has a clear preference for innovations and norm-violations for their own sake (in fact, the latter is actually considered as a sign of charisma), which in the end constantly and necessarily erodes the rule of law.[26] This is only accompanied by some vague long-term visions, which would be an exaggeration to call a plan: e.g., "national sovereignty",[27] which in fact mostly means the PM's own personal sovereignty (i.e. it is rather the projection of the character of the main decision-maker onto politics). Of course, the fact that a single person's personality trait becomes one of the characteristics of the entire regime – although it can also be seen as evidence of his charisma – also says a lot about the nature of this regime.

The characteristic ideological elements only serve to enthuse the regime's own followers and to deliberately provoke the opposition (and thereby to increase polarisation, and as a result, to consciously damage the rational public discourse that would be necessary for effective democratic accountability). Despite the officially Christian rhetoric, the pro-government

23 On this style of politics, see Tilo Schabert, *Boston Politics. The Creativity of Power* (Berlin/New York: Walter de Gruyter 1989).

24 Explicitly so by an influential pro-government ideologue, public intellectual and journalist Gábor G. Fodor, '"A rendszer igazságait védem" – Interjú G. Fodor Gáborral', <https://magyarnarancs.hu/belpol/a-rendszer-igazsagait-vedem-93802>.

25 It is not simply "thin" ideologically (as populist politics in general), see Ben Stanley, 'The Thin Ideology of Populism', Journal of Political Ideologies (2008), 95–110, but its loud ideological elements are a self-contradictory bunch of *interchangeable* elements – none of which are actually meant substantively by the apex of the regime.

26 For more details see András Körösényi, Gábor Illés and Attila Gyulai, *The Orbán Regime. Plebiscitary Leader Democracy in the Making* (London: Routledge 2020).

27 See e.g., 'Orbán Viktor: A nemzeti szuverenitás ma is harcban áll a birodalmi törekvésekkel', <https://mandiner.hu/cikk/20210503_belfold_orban_viktor_lengyelorszag>.

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press regularly scolds and mocks the Pope.[28] The sovereigntist rhetoric is not disturbed by long-term indebtedness towards Russia or China with unfavourable conditions.[29] Despite the smear campaign against international capitalism, the government concludes so called strategic partnership agreements with the largest multinational companies,[30] whereby it provides them with privileges and the legal nature of the agreements is not clear.[31] While the government conducts the anti-Soros propaganda campaign with anti-Semitic overtones,[32] it allies itself with the populist Israeli right wing.[33] Even with official anti-immigration, the system of settlement bonds (financially benefitting cronies near to the government and allowing criminal and/or secret service elements from Russia and Arabic countries to acquire Schengen status) is maintained.[34] Illiberalism seems to be mixed with the language of liberal fundamental rights, and more recently, even the protection of sovereignty is derived from human dignity.[35] They mingle Marxist egalitarian statements with conservatism. They talk about the Ten

28 See Zsolt Bayer, 'A pápa esze', Mandiner, 2 August 2016, <https://kereszteny.mandiner.hu/cikk/20160802_bayer_zsolt_a_papa_esze>; Balázs Bozzay, 'Bencsik András: Ferenc pápa keresztényellenes, meg akarta alázni Magyarországot', telex, 8 June 2021, <https://telex.hu/belfold/2021/06/08/bencsik-andras-ferenc-papa-meg-akarta-alazni-magyarorszagot-es-keresztenyellenesen-viselkedik>.

29 See Bálint Ablonczy, 'Ezermilliárdos kínai adósság: a magyar szuverenitást veszélyezteti a Fudan és a Belgrád-vasút', 21 April 2021, <https://www.valaszonline.hu/2021/04/21/fudan-egyetem-kina-magyarorszag-adossag-geopolitika-elemzes/, https://www.napi.hu/magyar-gazdasag/paks-ii-hitel-orosz-hitel-tartozas-suli-janos.674586.html>.

30 As of today, there are officially 93 strategic partnership agreements; see the government website <https://kormany.hu/kulgazdasagi-es-kulugyminiszterium/strategiai-partnersegi-megallapodasok>.

31 See eg the analysis by Transparency International <https://transparency.hu/wp-content/uploads/2016/03/A-v%C3%A1llalatok-%C3%A9s-a-korm%C3%A1ny-k%C3%B6z%C3%B6tti-strat%C3%A9giai-meg%C3%A1llapod%C3%A1sok-Magyarorsz%C3%A1gon-Tanulm%C3%A1ny-a-lobbiz%C3%A1sr%C3%B3l.pdf>.

32 Lily Bayer, 'Hungary to take down controversial Soros posters', <https://www.politico.eu/article/hungary-to-take-down-controversial-soros-posters/>.

33 This included secret service help by Netanjahu against Hungarian journalists and opposition politicians, see Panyi Szabolcs and Pethő András, 'Hungarian journalists and critics of Orbán were targeted with Pegasus, a powerful Israeli cyberweapon', <https://www.direkt36.hu/en/leleplezodott-egy-durva-izraeli-kemfegyver-az-orban-kormany-kritikusait-es-magyar-ujsagirokat-is-celba-vettek-vele/>.

34 For concrete examples see 'Letelepedési kötvény-biznisz', <https://adatbazis.k-monitor.hu/adatbazis/cimkek/letelepedesi-kotveny-biznisz>.

35 The result is doctrinally quite confusing, but the aspiration is clear, see the decision of the Hungarian Constitutional Court 32/2021. (XII. 20.) AB. For a smart analysis, see

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Commandments in public, but behind the scenes they trample on all Ten Commandments (especially the Seventh and Eighth).[36] They pose as the international defenders of Western Christianity while openly bashing the West, regularly sabotaging its international (EU) institutions from within in line with Russian and Chinese interests,[37] and reproaching with the Christian-persecuting Chinese and Islamist Turkish regimes.[38] And of course, the all-pervasive cronyism[39] and systemic corruption (which, according to one of their ideologues, is their main policy)[40] best demonstrate the extreme pragmatism of the regime. Rhetoric and actual government action have little to do with each other: that is, they typically say something different than what they actually do. Those critics of the regime, who still treat the regime's occasionally deliberately provocative rhetoric and ideological fragments at face value (the specific *purpose* of which is to divert attention from the real government performance by provoking angry reactions), after thirteen years have still not understood the regime's profound cynicism.

That is why the use of labels such as "fascist", "Christian fundamentalist" or "nationalist" is fundamentally mistaken. With such categories, some

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Nóra Chronowski and Attila Vincze, 'Full Steam Back', Verfassungsblog, 15 December 2021, <https://verfassungsblog.de/full-steam-back/>.

36 See e.g. Reuters Staff, 'Hungarian ex-Olympic champion and mayor resigns over sex tape', Reuters, 6 November 2019, <https://www.reuters.com/article/us-hungary-fidesz-mayor-idUSKBN1XG1L8>; Nick Thorpe, 'Jozsef Szajer: Hungary MEP quits after allegedly fleeing gay orgy', BBC News, 1 December 2020, <https://www.bbc.com/news/world-europe-55145989>.

37 See e.g. Ariel Cohen, 'Viktor Orban's Goulash Energy Policy Makes Hungary Putin's Trojan Horse in Europe', Forbes, 17 May 2022, <https://www.forbes.com/sites/arielcohen/2022/05/17/viktor-orbans-goulash-energy-policy-makes-hungary-putins-trojan-horse-in-europe/>; Wilhelmine Preussen, 'Orbán backs China's Ukraine peace plan', Politico, 27 February 2023, <https://www.politico.eu/article/viktor-orban-hungary-ukraine-china-peace-plan-russia-invasion/>.

38 David A Andelman, 'Opinion: Putin's useful allies are throwing a wrench in the works', CNN, 18 May 2022, <https://edition.cnn.com/2022/05/16/opinions/putin-allies-orban-erdogan-europe-andelman/index.html>; Tamás Koncz, 'A kínai kereszténydözésről kérdezték a kormányt, erre ledobták a Niedermüller-bombát', <https://nepszava.hu/3085730_a-kinai-keresztenyuldozesrol-kerdeztek-a-kormanyt-erre-ledobtak-a-niedermuller-bombat>.

39 See 'Viktor Orbán strengthens his crony state capitalism', Financial Times, 24 August 2022, <https://www.ft.com/content/41e3294c-60f8-4c9f-b58f-fddb61c86c8c>.

40 András Lánczi, 'Viccpártok színvonalán áll az ellenzék', Magyar Idők, 21 December 2015, <https://www.magyaridok.hu/belfold/lanczi-andras-viccpartok-szinvonalan-all-az-ellenzek-243952/>, 'What they call corruption is practically the most central policy of Fidesz.'

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authors increase the tempers in government-critical opinion bubbles and strengthen their status in their own discursive microcosm. Such agitation, at the same time, increases the level of hatred towards the regime in the opposition and towards the opposition in the pro-government camp. In other words, they are not simply incorrect in terms of content, but they also increase *polarisation* (they tease their own camp, insult the other camp), and thereby unwittingly strengthen the socio-psychological infrastructure of the regime →IV.3. Thus, paradoxically, those who shout "fascism" at the Hungarian hybrid regime actually become the regime's unintended helpers.[41]

The ideological elements used by the regime are in fact eclectic, inconsistent, contingent and essentially irrelevant. They are not held together by consistent ideological foundations, but only by the person of the PM: by his consciously nurtured personal charisma, by his inexhaustible energy, by his network of domestic and international contacts, by his three-decade-old political brand, by his immeasurable wealth controlled through his cronies and family members, and by the fact-resistant adoration of a significant mass of voters.[42]

3. Reasons explaining the formation of the regime

As with complex political changes in general, the formation of the Hungarian hybrid regime can best be understood as the result of several factors (and not just one single cause).[43] The erosion of democracy and the rule of law is a global phenomenon,[44] the general (economic, sociological, communication technology, geopolitical, etc.) causes of which cannot be discussed

41 Such regimes are especially embarrassed if we refuse their tribal-polarised logic. See the Istanbul mayoral election as an example Melvyn Ingleby and F. Michael Wuthrich, 'The Pushback against Populism: Running on "Radical Love" in Turkey', Journal of Democracy 31 (2020), 24–40.

42 On the person see the recent book by Zsuzsa Szelényi, *Tainted Democracy. Viktor Orbán and the Subversion of Hungary* (London: Hurst Publishing 2022).

43 For a literature overview see Katalin Fábián, 'Why Did Hungarian Politics Become Authoritarian? A Review of Competing and Complementary Responses', Hungarian Studies Review 2 (2021), 216–237.

44 See the sobering World Justice Project, 'Rule of Law Index 2022', <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf>, 8, 'The results in this report show that adherence to the rule of law fell in 61 % of countries over the past year.'

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here.[45] But it is necessary to address why the Hungarian deterioration was dramatically worse than the "average" deterioration.

(1) One of the reasons is a concretely identifiable error in Hungarian constitutional law, which arose from the interplay of two norms. The constitutional order before 2010 (a) included a disproportionate electoral system (for the sake of government stability), which (b) together with the comparatively low (two-thirds) constitution-amending majority, opened the legal door for unilateral amendments to the Constitution. However, the constitutional rules alone never explain the erosion of democracy and the rule of law, because they exert their effect together with sociological-political-cultural factors.[46] This does not mean that rules would not matter. But for a constitutional error (in our case: the combination of the disproportionate electoral system and the easily circumvented constitutional amendment procedure) to be really damaging, you need some unfortunate interplay with other factors.

(2) One of the key risk factors for Hungarian constitutionalism has been the legal political culture that failed to stop the erosion. The cultural context in all former socialist countries made the ice thin, which then broke both in Poland and in Hungary (due to specific political constellations).

Empirical surveys have also been carried out about this question, which have established that the Hungarian population is characterised by an

45 For further details see András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law', Constitutional Studies 6 (2020), 5–34, (8–12), with literature references.

46 The US Constitution, for example, has been a stable and functioning Constitution for 230 years now and withstood severe crises (even a civil war). It was, however, translated into Spanish and became the Argentine Constitution of 1853, under which Argentina was turned very quickly into a dictatorship. Or another example: according to one of the usual explanations, an error in the Weimar Constitution strongly contributed to the fall of the Weimar Republic: Article 48 of the Weimar Constitution gave the *Reichspräsident* very strong emergency decree powers, which was then used to undermine democracy. This provision was, however, later adopted by the French Fifth Republic in 1958, it became the Article 16 of the French Constitution – but the French Constitution has been working quite well, for more than 60 years. An even more fitting example is the current Austrian Constitution, adopted in 1920. This miserably failed in 13 years: by 1933/34, Austria has already become a fascist State (i.e. already before the *Anschluss*). Literally the same Constitution was then re-established in 1945, and since then Austrian democracy and the rule of law have been one of the strongest in the world.

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ambivalent (i.e. partially self-contradictory) attitude towards the law.[47] Citizens do not trust the State and the legal system, but at the same time they still expect the State and the legal system to solve all their problems. On the one hand, they want very detailed and strictly enforced regulations, but if it is specifically about them, they would rather find a smart way to evade the laws and expect privileged treatment. Their attitudes towards the law were embedded in a generally pessimistic, cynical and anomic social culture. The research also established that there is a lack of coherence concerning values in a large part of society, even in terms of the most basic principles. The interviewers asked, for example, whether fundamental rights should be made conditional on the fulfilment of obligations. Then, three questions later, the same question was asked in a slightly different way, and the vast majority of respondents contradicted their previous answers. There are characteristics that can be considered a legacy of socialism in Hungarian legal culture: for example, openness to paternalism or the general feeling of being a victim in an unjust world. There are also some that perhaps go back even earlier, e.g., the sociologically established fact that the average citizen does not dare to question the official action even in the case of obvious abuse indicates a much older lack of democratic values and the rule of law traditions. In other words, what we now consider to be the legal culture of the current Hungarian hybrid regime is only partially its own; rather, it is an inherited legal culture from which the current regime can feed as a breeding ground.[48] This cultural problem is of course also true for other former socialist countries, so it is no coincidence that the EU's so called "rule of law crisis" broke out in former socialist countries.

Unfortunately, healing from such cultural problems is difficult and slow (and in addition to the consensus of the domestic elite, external support is usually required). This is often described as some kind of path dependency, or more pessimistically, "institutional alcoholism".[49] Historical experience shows that cultural progress is possible, but there is always a significant

47 See György Gajduschek, 'Wild East and Civilised West? Some Indicators of Legal Culture in Hungary, Serbia and the Netherlands. An Empirical Comparative Assessment', Jahrbuch für Ostrecht 60 (2019), 165–184; György Gajduschek, 'Jogtudat és értékvilág – mint a magyar jogrendszer környezete' in: András Jakab and György Gajdruschek (eds), *A magyar jogrendszer állapota* (Budapest: MTA TK 2016), 95–115.

48 Péter Tölgyessy, 'Politika mindenekelőtt. Jog és politika Magyarországon' in: Jakab and Gajduschek (n. 47), 17–42 (32–33).

49 András Jakab, 'Institutional Alcoholism in Eastern Europe and the Cultural Elements of the Rule of Law' in: Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe* (Oxford: Bloomsbury 2019), 203–241.

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chance of falling back. There are also sad episodes of backsliding in the history of today's successful democracies that were explained by formerly unfortunate cultural factors. The cultural explanation is actually one of the usual explanations (among other factors) why constitutional democracy has failed in Austria or Germany between the two world wars ("democracies without democrats"). Therefore, one of the dangers in the case of Hungary is that even if the current hybrid regime were to end suddenly, unfortunately, it could easily happen that another hybrid regime of a similar nature (with different actors, possibly even using antipathy towards Orbán) would be created after it.

(3) And the third factor is the specific people who made political decisions that led to the current situation.[50] Therefore, these people bear at least a moral and historical responsibility. However, the human quality of individual people can never be separated from the cultural environment. Certain persons (due to the centralised nature of the Hungarian hybrid regime, mostly a single person, Viktor Orbán)[51] may have some influence on how that cultural environment develops (i.e. they can make it a little bit even worse), but the general framework is pre-defined also for them by the legal and political culture of the population. In other words, ultimately, the probability that voters or officials will behave in one way or another can be calculated with relative certainty from those cultural characteristics (hierarchy-accepting, paternalistic, forgiving corruption and nepotism, tribal-polarised →IV.3., viewing the world as unfair, seeing yourself as a

50 For the role of political entrepreneurs (i.e. someone who takes advantage of the opportunity offered by the political context) see Marianna Kneuer, 'Unravelling democratic erosion: who drives the slow death of democracy, and how?', Democratization 2021, 1442–1462. The fact that our deterioration of the rule of law and democracy is even more significant compared to other countries in the region resulted from the interplay of specific domestic political actors (esp. Viktor Orbán) and strong polarization (which is stronger than in the rest of the region) →IV.3. In addition, unfortunate coincidences also played a role (e.g., the economic crisis of 2008, global political changes in the 2010s) – or to put it differently: there were many worrying signs, but even compared to them, Hungary just got really unlucky to experience such a strong deterioration that we have seen.

51 The permanent volatility of the Hungarian regime (its instability and gradual deterioration) can largely be explained by the Prime Minister's personality traits. It is disputed in the literature whether by nature all hybrid regimes are necessarily unstable (and represent an unsustainable transitional stage between dictatorship and democracy). For the discussion, see e.g., Joakim Ekman, 'Political Participation and Regime Stability: A Framework for Analyzing Hybrid Regimes', International Political Science Review (2009), 7–31.

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victim but without the willingness to do something about it except for complaining), which can be empirically measured at the level of society.[52] This cultural profile characterises not only the supporters of the Hungarian hybrid regime, but the entire Hungarian society *on average* (i.e. to a large extent also opposition voters). Improvement is possible (if there is an elite consensus, international conditions are favourable, smartly designed formal institutions operate and the population experiences economic success), but it is always a slow process that takes decades.

The three factors listed above can only be meaningfully interpreted in relation to each other or in connection with each other. It was not fate that Hungary ended up in today's situation, but in medical terms, the "risk factors" were present. Moreover, with the EU accession, the instruments of effective external pressure (often called accession conditionality) also disappeared,[53] which supported the democratic constitutional system of 1989. The supporting scaffolding has disappeared, and parts of the building have unfortunately collapsed due to various inputs.[54]

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52 For more details see István György Tóth, 'Turánbánya? Értékválasztások, beidegződések és az illiberalizmusra való fogadókészség Magyarországon' in: András Jakab and László Urbán (eds), *Hegymenet. Társadalmi és politikai kihívások Magyarországon* (Budapest: Osiris 2017), 37–50.

53 Formally, there are (and always have been) legal instruments in the hands of the EU against hybrid(ising) regimes, but these always depend on political discretion at some point in the procedure (e.g., the Commission has no legal obligation to initiate infringement procedures), and since Hungary is already an EU member, its support was often needed in the internal EU decision-making mechanisms (in completely different matters). In other words, a skilfully manoeuvring Member State (e.g., with veto blackmail, supporting votes in other matters, etc.) can avoid the strict enforcement of EU law for a long time. See more on the topic András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press 2017); András Jakab, 'Three misconceptions about the EU rule of law crisis', Verfassungsblog, 17 October 2022, <https://verfassungsblog.de/misconceptions-rol/>. The Hungarian hybrid regime has now run out of options to manoeuvre, mostly thanks to developments in Poland and the Russian aggression against Ukraine →VI.

54 Paradoxically, EU accession was *harmful* (!) even beyond this to the state of the Hungarian rule of law and democracy: (a) a significant part of the politically active citizens who are more sensitive to the values of constitutionalism migrated to the western part of the EU (and thus in the domestic democratic processes they are less present), (b) and the uncontrolled EU financial support essentially increased the public acceptance of the Hungarian hybrid regime, and helped to get over the erosion of the rule of law, and at the same time strengthened inherited the corrupt practices. See R. D. Kelemen, 'Appeasement, ad infinitum', Maastricht Journal of European and Comparative Law (2022), 177–181.

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II. A Realistic and Responsible Scenario for the Return to Constitutional Democracy (Preferably without Breaking Legal Continuity)

There is a way out of Orbán's 'constitutional prison'[55] without a revolution in the legal sense (i.e. without breaking the legal continuity),[56] but it is long, tiring, without theatrical grandstanding, difficult to sell as a campaign slogan, and moreover, it does not satisfy the emotions accumulated against the Orbán regime. However, from the point of view of the public good, this is still the way to go.

1. Three stages

Restoring constitutional democracy can legally be done in three stages. It is not necessary to suspend the two-thirds majority rules, cohabiting with them is possible. Overall, in terms of social benefits and risks, this scenario seems more appropriate – considering the currently existing legal framework (i.e. existence of two-thirds majority rules), the nature of the regime (i.e. hybrid regime) and the social context (i.e. strong polarisation).

a) First stage: things that can also be done with a simple majority

When the new government takes office, the use of the central state administration for party political purposes can cease (as an important element of this, new leaders can be appointed to head the tax authority, the police and the secret services, as a result of which the investigative authorities can investigate corruption cases of the Orbán Government). The new parliamentary majority can also create simple majority laws reforming the school system or the healthcare system. The arbitrary financial dependence of small villages (which can often extort almost full support for the incumbent governing parties in elections) can also be corrected immediately. The

55 Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', Verfassungsblog, 21 December 2021, <https://verfassungsblog.de/escaping-orbans-constitutional-prison/>.

56 In more detail, with additional references to the (Kelsenian) concept of a 'revolution in the legal sense', see Horst Dreier, 'Revolution und Recht', Zeitschrift für öffentliches Recht 2014, 805–853; András Jakab (ed), *Methoden und theoretische Grundfragen des österreichischen Verfassungsrechts. Eine Einführung für Fortgeschrittene* (Wien–Baden-Baden: Verlag Österreich – Nomos 2021), 62–70.

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new government can immediately disclose materials about the secret (and most likely corrupt) deals of the Orbán regime. The country can take a more EU and NATO-friendly foreign policy direction (instead of serving Russian and Chinese interests). And, of course, it is possible to stop the embezzlement of EU and national funds (which mostly happens through centrally distributed overpriced public procurements).

The possibilities of the new government would indeed be smaller than they should be under normal democratic conditions (for example, regarding the administration of most universities), but still very wide →III.1.c)ii. If there is a change of government, Fidesz will no longer be able to use the central state administration to win municipal or European Parliament elections (the maintenance of the propaganda machine is actually very expensive, the resources controlled by the deep state are insufficient).[57] Unless the new government overthrows itself (internal fights, etc.), then the rest of Orbán's power machinery awaits slow withering.

Officials close to Fidesz are often portrayed as fanatics, but it is rational to assume that a big part of them are *fallible* weak people who make bad compromises. Most of the Fidesz appointees will presumably only want to survive ("strategic defectors" →III.1.c)ii.), therefore their informal loyalty will also weaken over time (step by step, especially with each new – municipal, European Parliament etc – electoral defeat of Orbán's forces). Some of them will perhaps even be relieved to be able to do their jobs, while others will be cautious in their self-interest with further helping Fidesz (and working against the new government).[58] And maybe there will be those who actually want to sabotage the new government. We cannot know the exact numbers and ratios, but I think the problem will be of a much smaller calibre than the current opposition fears (more →III.3.f)). But even if this were an excessively optimistic expectation (I don't think it is), then at least the non-revolutionary way of transition *should be tried first* →II.2.

The new government must make it clear that it does not expect a "swap" or a "betrayal" from the officials appointed by Fidesz (in independent institutions and ministries), but "only" the performance of their legally

57 See Karácsony Gergely, 'A NER lebontásának programja', <https://web.archive.org/web/20220401073514/https://kilencvenkilenc.hu/a-ner-lebontasanak-programja/>.

58 Some deep state officials are what is called in behavioural ethics 'situational wrongdoers' who were morally weak, see Yuval Feldman, *The Law of Good People* (Cambridge: Cambridge University Press 2018), 61, and there is a good chance they could be useful officials of a new constitutional democracy as well. By threatening them in advance, they will be unnecessarily alienated.

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required work in *good faith* (the latter is always implied in legal duties anyway). The goal cannot therefore be to reflect the abuses of the Orbán regime on Orbán's officials, the Schmittian (us vs. them) logic would be very unfortunate. The new government owes it not to the officials of the Orbán regime, but to itself and the country, to be better than the Orbán regime (which, of course, does not exclude prosecution for the illegal acts of the Orbán regime, in fact, it should be explicitly strived for, but the nasty toolkit of informal practices and abuses experienced so far should not be used →I.1).

b) Second stage: achieving two-thirds majority in order to change two-thirds majority rules

As a second stage (probably only after yet another parliamentary election), a new two-thirds majority against the Orbán regime can be formed, thus making it possible to amend the Constitution (and to amend the cardinal laws). Transitional justice measures (including the recovery of assets obtained through corruption) can be partially taken already in the first stage or (in cases where the Fundamental Law or cardinal laws need to be amended) in this second stage.

The replacement of those officials (protected by two-thirds majority rules) can also take place in this stage, who during the first stage were proved not to have exercised their powers in good faith. If there is no explicit possibility of replacement by a two-thirds majority, then such rules can be created with the appropriate procedural guarantees (although the position of some officials is still protected by EU and international legal rules, which must be respected – see the condemnation of the measures of the Orbán regime for removing the Data Protection Commissioner and the President of the Supreme Court).[59]

59 For references see below III.1.a)ix.

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c) Third stage: adopting a new Constitution (timing, procedural steps and key provisions)

Finally, as a third stage (probably after yet a few more years), it is worth beginning to make a new Constitution. This must be done legally and involve all major political actors (possibly with the real and broad support of Fidesz or other future right-wing parties and right-wing voters). As long as this kind of joint work does not seem possible, the issue of the new Constitution should not be forced. With constitutional amendments (see the second stage →II.1.b) above) and reinterpretations, it is possible to change any constitutional *content* (both substantively or symbolic parts, such as the preamble), as we saw in Hungary in 1989 and after. However, the adoption of the new Constitution is a big symbolic act, the final touch in the process of restoring the rule of law. Forcing the issue at the beginning of the transition is counterproductive. Or to put it a little more poetically: the new Constitution is the fruit of a successful transformation process, one of the last steps, and not a means of dismantling the Orbán regime.[60]

Procedurally, it is worthwhile to consider various forms of popular participation (although the international experiences of popular participation in constitution-making processes do not typically carry the promise of success),[61] but there should be no haste, and it is also worth adopting the text by political consensus and a national referendum ritual. Direct popular participation mechanisms can only function meaningfully if they are supported or at least accepted by all relevant political forces (otherwise, the whole process will only generate further polarisation and/or a significant number of voters will abstain due to hostile feelings for the entire process).[62]

60 For more details of my argument see András Jakab, *When the Time is Not Ripe for Constitution-Making: Recommended Procedural Steps and Their Ideal Timing for Maximizing the Legitimacy of a New Constitution* (manuscript on file with the author).

61 Justin Blount, 'Participation in Constitutional Design' in: Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 40; Devra C. Moehler, *Distrusting Democrats. Outcomes of Participatory Constitution Making* (Ann Arbor: University of Michigan Press 2008); Alexander Hudson, *The Veil of Participation. Citizens and Political Parties in Constitution-Making Processes* (Cambridge: Cambridge University Press 2021).

62 Philipp Dann et al., 'Lessons Learned from Constitution-Making: Processes with Broad Based Public Participation', Democracy Reporting International 20 (2011), (2, 5).

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When considering the ideal content of a new Constitution, it is worth determining in what political environment and culture the given norms will operate, taking into account the Hungarian experience.[63] If we approach the question in this way, we have to think about what has gone wrong with Hungarian politics →I.3: what are the key problems in Hungarian legal and political culture for which formal rules could potentially offer a remedy, or at least some kind of support. The first such point, in my opinion, is the excessive acceptance of hierarchy, i.e. the fact that the population does not demand or require autonomy to the necessary extent. There are constitutional solutions to weaken the acceptance of hierarchy and to strengthen the demand for autonomy, e.g., in the form of personnel guarantees in public administration. Furthermore, it is very important to ensure the internal democracy and pluralistic structure of the political parties. We often talk about the danger that one party would dominate or homogenise the entire political landscape of the country, but the problem starts earlier when a party is internally homogenised by one single person. You need to nip this in the bud before the symptoms become overwhelming for the entire country. There are established, tried and tested legal rules for this, which were invented exactly for post-dictatorship situations in Germany.

The issue of transparency in party financing is also very important, which drives both corruption and oligarchisation (i.e. the back-and-forth transformation of political and economic power in the hands of a few). A further central topic is decentralisation through reinforcing local governments or even introducing federalism. It is interesting to compare the situation of democracy in Pakistan and India after British rule. Pakistan has tumbled from one military dictatorship to another, and India has been (until recently) more or less a functioning democracy. This is explained, among other things, by the fact that the constitutional structure in India has been federal, but not in Pakistan. If the constitutional structure is more unitary-homogeneous (i.e. not federal), it is much easier to establish centralised authoritarian regimes. In other words, the constitutional guarantee of the fragmentation of power is also a key issue.

63 For more details, with literature references supporting the suggestions mentioned here (and even more suggestions), see András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law', Constitutional Studies 6 (2020), 5–34 (18–21). For a complete draft of a new Constitution, see András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-ORAC 2011), 70–163.

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Another suggestion would be to introduce a proportional electoral system, which would be useful for two reasons. It makes difficult for any political force to obtain even a simple majority on its own, much less a constitution-amending majority. But it is equally important that the culture of finding compromises is strengthened in proportional electoral systems, quite simply because you have to think in coalitions. If we see that one of the problems of a country is excessive polarisation, then we have to look for institutions that motivate political actors (and voters) to think in terms of compromises. Preferential (where the voter can rank candidates with numbers) or negative (where the voter can express both opposition as well as support) voting systems both favour compromise-seeking parties and reduce polarisation. (By the way, the large number of two-thirds majority laws – or with their current name: cardinal laws – does not help the search for a compromise, once the political space is already polarised. These cardinal laws only weaken government accountability when there is no two-thirds majority.)

There are further several detailed rules that could reinforce the guarantees of division/separation of powers. For example, many interpret judicial independence as the independence of the judicial branch from the government. But this is not really the key question, but how the individual judge can be independent even from his/her own court administration system in a concrete given case. This should also be strengthened.

2. When and how might still be forced the new parliamentary majority to abandon the current legal system?

If Orbán's deep state illegally tries to overthrow the new government (e.g., via the Fiscal Council's budget veto →III.l.c)i., or if the President of the Republic unconstitutionally refuses to sign the new laws), then Orbán's deep state loses the legality argument, and the deep state itself opens up the revolutionary path for the new government. The lawful possibilities of overthrowing the new government by the deep state are actually very narrow (despite all kinds of urban legends and constitutional misunderstandings →III.l.c)i.). If they did attempt an *unlawful overthrow* of the new government (essentially a coup – i.e. a minor illegality by a deep state official or body would not qualify), then the responsibility for breaking legal continuity (and for the likely ensuing physical violence) would clearly fall on Orbán's deep state. Moreover, beyond a certain point, the actions of Orbán's deep state would probably also qualify as crimes according to the

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Criminal Code (mirroring the scenarios analysed below →III.2.b),–II.2.c)), and this can also be applied to deep-state-officials *after* a possible failed coup.

Such a scenario cannot be completely ruled out, but I believe (and hope) that it is much less likely than many on the opposition side fear. If it were to occur, the response should be proportionate and gradual (e.g., a Fiscal Council veto does not justify actions against the Chief Prosecutor), because it is always easier to escalate the situation than to de-escalate it.

3. Objections

The above stage-by-stage, gradual recovery plan is not new,[64] and various objections have been raised against it.[65] Some of these also raise very exciting preliminary questions in constitutional theory, which I will examine in what follows.

a) "This is formalism"

One objection that sometimes comes up is that the above three-stage proposal would actually be "formalism". This is, however, a pejorative label that is conceptually mistaken in this context.

According to the usual jurisprudential terminology, there are no formalists in this debate. Opponents of breaking legal continuity (including me) are typically *realists*, because they argue/I argue that, taking into account the socio-political circumstances, the revolution either fails from the outset or leads to chaos. Formalist is a curse word in legal theory (especially for

64 András Jakab, 'How to Return from a Hybrid Regime to Constitutionalism in Hungary', Verfassungsblog, 11 December 2021, <How to Return from a Hybrid Regime to Constitutionalism in Hungary – Verfassungsblog>. In Hungarian: Jakab András and Dull Szabolcs, 'A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum!', telex, 17 Oktober 2021, <https://telex.hu/belfold/2021/10/17/jakab-andras-alkotmanyjogasz-interju-feles-tobbseggel-alkotmanyozas-alaptorveny-semmis-polgarhaboru>; Jakab András and Ónódy-Molnár Dóra, 'Ne borítsuk fel az asztalt előre, rizikós dolog a jogállami forradalom', Jelen, 20 May 2021, <https://jelen.media/interju/ne-boritsuk-fol-az-asztalt-rizikos-dolog-a-jogallami-forradalom-1797/>.

65 See below n. 78. At certain points, I further improved the objections because my goal was not the documentation of the complex discourse, but mainly the analysis of the abstract questions raised, see below on the approach →III.1. at the beginning of that chapter.

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implicit models of judicial decision-making),[66] mostly Langdell's conception of law at the end of the 19th century was branded as such by American legal realists (Hart also adopts this terminology in The Concept of Law).[67] However, the arguments against the revolution are distinctly realistic: considering the social context and the likely costs, it is *not worth* breaking legal continuity from the point of view of the public good.

The current debates cannot be well reconstructed along the formalist vs. realist frame,[68] because it is basically used to categorise approaches to legal argumentation (interpretation), and this question is not central here. The debates here can be reconstructed much more along the natural law vs. positivism frame →III.1.b). Using the latter frame, the approach of this paper is *positivist*. There are positivists who are also formalists (Otto Mayer, Paul Laband, Robert Walter), but the connection is by no means necessary (HLA Hart or Michel Troper, e.g., are anti-formalist positivists, just like the author of these lines). A formalist is, therefore, not someone "who believes that formal law must always be observed" (by the way, this is the statement of a specific extreme branch of positivism that I do not subscribe to in this form myself either →II.3.c)). The term "formal law" can best be used meaningfully in contrast to informality in this discourse →I.1.

Formalism is therefore a *theory of interpretation* (more precisely, an extreme theory of interpretation that completely denies the subjective factor),[69] but the current questions revolve around the *validity* (and/or binding force) of the law. The use of the word "formalist" in this debate is therefore conceptually mistaken.

66 Formalism as a syllogistic-deductive model of adjudication (and possibly a political attitude supporting it): Scott Veitch et al, *Jurisprudence* (London: Routledge 2007), 95–96.

67 Brian H. Bix, *A Dictionary of Legal Theory* (Oxford: Oxford University Press 2004), 69–70; formalism is sometimes used a synonym of either textualism or *Begriffsjurisprudenz*.

68 On the debate between realism and formalism see Michael D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001), 799–800; Brian Bix, *Jurisprudence* (4th edn, Sweet and Maxwell 2006), 179–180, with further references.

69 Raymond Wacks, *Understanding Jurisprudence* (Oxford: Oxford University Press 2005), 356: 'Formalism treats law like mathematics or science. Formalists believe that a judge identifies the relevant legal principles, applies them to the facts of the case, and logically deduces a rule that will govern the outcome of the dispute.'

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b) "This is legalism"

It is also said by the supporters of breaking the legal continuity that the rejection of the revolution would be "legalism". However, this label is also inaccurate. By legalism (according to Judith Shklar) we mean a *moral attitude* that attributes self-worth to following the law (regardless of the content of the law).[70] This is a characteristic that can be observed sociologically all over the world among lawyers (especially in hierarchical legal organizations).[71]

In other words, a legalist looks at the law without its social context, because this helps him/her to escape from personal moral responsibility (as a law enforcer, as a lawyer or as a citizen).[72] However, this cannot be applied to my three-stage proposal either. My proposal is primarily based on the social context, and it does indeed recommend maintaining legality, but not as a moral attitude, but based on weighing and balancing of costs and benefits in the light of the public good and the social context. So the debate here is not about legalism or legalists in the usual sense of legal theory.

c) "This is blindness to the moral content of the legal system"

It has also been suggested that my three-stage plan is actually "blindness to the moral content of the legal system". This is a misunderstanding. My plan reflects a clear position condemnation of certain legal rules, and also a moral condemnation of certain informal practices. But this is not the same as accepting revolutionary natural law.

On the one hand, the expected social costs associated with a revolution are morally unacceptable in the Hungarian context →III.2.e). This is the logic of the so-called ethical positivism (so the justification of positivism is not methodological, but *moral* in the interest of the public good).[73] It is possible to imagine a situation where revolutionary natural law would be

70 Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press 1986).

71 Scott Veitch et al, *Jurisprudence* (London: Routledge 2007), 37–38.

72 Veitch (n. 71), 38.

73 Tom D Campbell, *The Legal Theory of Ethical Positivism* (London: Routledge 1996); Niel MacCormick, 'A Moralistic Case for A-Moralistic Law', Valparaiso University Law Review 20 (1985), 1–41; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press 1999). For a more detailed explanation of my theoretical ap-

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the appropriate moral choice, but the current Hungarian hybrid regime is not one of these situations →I.1.

Lawyer can translate moral aspects into legal terms in general – and specifically in today's Hungarian situation – through legal interpretation (conceptualised as objective teleological interpretation) and not through the concept of validity (which would be natural law).[74] The concept of the rule of law, for example, in the contemporary German understanding also includes a minimum degree of justice (i.e. it could be understood as a requirement of the rule of law that laws be interpreted in such a way that transitional justice measures are effective).[75] But to set aside the validity of a constitutional system by simply referring to the requirements of justice is a natural law argument: such arguments are mostly used after the end of dictatorships, so I consider this kind of answer as disproportionate. In my opinion, this cannot be called moral "blindness".

d) "Legal positivism is untenable: the Nazis also legally introduced the dictatorship"

The argument has already been made, according to which "positivism is outdated, because the Nazis came to power in Germany legally, and the Nazi lawyers were also positivists". However, these claims are factually false.

Contrary to urban legends, the Nazis came to power in Germany through a revolution in the legal sense (the *Ermächtigungsgesetz* violated the Weimar Constitution both in terms of its content and its adoption

proach with further references to the academic literature see András Jakab, 'Begriffe und Funktionen des Rechts' in: Jakab (note 56), 5–36.

74 Methodologically, this was one of the most important doctrinal achievements of the Sólyom Court compared to the period before it: it used creative objective-teleological reasoning, avoiding the two extremes of both the textualist approach of socialist normativism and the natural law approach resulting in legal uncertainty. See more details Jakab András and Kazai Viktor Zoltán, 'A Sólyom-bíróság hatása a magyar alkotmányjogi gondolkodásra' in: Győrfi Tamás, Kazai Viktor Zoltán and Orbán Endre (eds), *Kontextus által világosan: a Sólyom-bíróság antiformalista elemzése* (Budapest: L'Harmattan 2022), 115–137.

75 See the critique of the decision of the Hungarian Constitutional Court 11/1992. (III. 5.) AB with further references András Jakab, 'Decision 11/1992. (III. 5.) AB – Retroactive Transitional Justice' in: Fruzsina Gárdos-Orosz and Kinga Zakariás (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court* (Baden-Baden: Nomos 2022), 85–102.

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procedure).[76] Nazi jurists tended to be anti-positivists (e.g., Ernst Forsthoff, Ernst Rudolf Huber, Karl Larenz, Carl Schmitt, Otto Koellreutter, Herbert Krüger, Ernst von Hippel), and contemporary positivists tended to be democrats (e.g., Richard Thoma, Gerhard Anschütz, Hans Nawiasky, Hans Kelsen).[77] The legend about the positivism of the Nazis was born in West Germany after the Second World War: the jurisprudential narrative that the doctrine of positivism was responsible for Nazi crimes was much more convenient for German legal academia than looking for personal moral responsibility amongst themselves.

e) "Why are we so sure that the deep state will not sabotage the newly elected democratic government?"

Of course, nothing can be predicted with absolute certainty. However, legal rules not only prescribe, but also usually show behavioural probabilities. It is, therefore, much more likely that the prosecutor's office and the Constitutional Court will take action against the *illegal* revolutionary measures than that the prosecuting services and the Constitutional Court will take action against the *legal* measures of the new government. Of course, such predictions are subjective to a certain degree, and even express optimistic hopes →IV.4., but they also reflect realism (inferred from the polarised public life and the perceived determination of some political actors so far). The above three-stage proposal is based on perceived probabilities and risks →III.2.e).

76 Christoph Guys, *Die Weimarer Reichsverfassung* (Tübingen: Mohr 1997), 161. This constitution-ranked law empowered the government to adopt statutes and, with certain limitations, even to amend the *Reichsverfassung*.

77 See e.g., Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (München: Beck 1994); Kathrin Groh, *Demokratische Staatsrechtslehrer in der Weimarer Republik* (Tübingen: Mohr 2010); Mandred Gangl (ed), *Die Weimarer Staatsrechtsdebatte. Diskurs- und Rezeptionsstrategien* (Baden-Baden: Nomos 2011).

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f) "If we wait until the deep state check mates the new government, it will be too late"

I am going to refute this objection in detail below when I discuss the arguments "the country will be ungovernable" →III.1.c)ii. and "we have to act quickly" →III.1.c)iii.

g) "A fascist regime does not deserve to follow its rules"

This objection is unconvincing for several reasons. First, the Orbán regime is not a fascist regime: it is not a dictatorship →I.1 nor is it ideological →I.2. Second, the problem is not primarily with the legal order, but with the informal practices →I.1. And third, it is not the legal order (or the Orbán regime) that should "deserve" the observance of the rules, but in the light of the consideration of social benefits and risks, it would be wrong from the point of view of the public good to break legal continuity →III.2.e).

h) "There is no rule of law here, as the recent case X shows, so we don't have to follow the legal rules in force"

This objection wrongly implies a binary separation between the rule of law/democracy and dictatorship, even though it is actually a multi-grade scale. Indices are used to measure the rule of law precisely so that they can aggregate a lot of data (I talked about all of this in more detail above at the very beginning of chapter →I.).

III. Radical Scenarios of Breaking Legal Continuity (i.e. Organising a Revolution in a Legal Sense)

If the democratic opposition wins with a simple majority, then the issue of the governability of the country can be a real problem and the behaviour of Orbán's deep state is a real risk (although the probability and weight of this risk can be judged differently). However, the various revolutionary (meaning: breaking legal continuity, i.e. revolutionary in the legal sense) solutions are wrong answers. These proposals are not simply illegal (i.e.

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they disregard two-thirds majority rules), but their practical feasibility is also questionable (as well as there is a good chance they would involve violent acts), and they also cause long-term damage (both to the political context by further strengthening polarisation and to the legal culture by creating a precedent of illegal regime change). They certainly cannot be implemented as easily and smoothly as it appears from various statements. And they are *not worth* it and, therefore, should not be carried out brutally and violently, since all things considered, in the long run they cause more trouble than they solve (cf. the grim Hungarian joke: "the surgical intervention was successful, but the patient died").

Revolutions are very expensive from the perspective of the public good, and by their very nature, they can only be planned to a very limited extent. Or to put it differently: the interruption of legal continuity (i.e. a revolution in the legal sense) is a legal nuclear bomb – such a weapon does exist, but its deployment should be avoided if possible, because it would cause much more social and economic destruction than the supporters of the idea see or want to see. The application of the revolutionary method is thus disproportionately harsh compared to the problem to be solved, and the collateral damage would be most likely too great – both in the short and the long term.

1. Arguments for revolutionary solutions

In the following, I will present the most important arguments in favour of a revolution (in the legal sense), some of which also raise exciting, sometimes rarely discussed preliminary questions in constitutional theory. My aim is *not* to reconstruct who said what when in the Hungarian debates (some participants of the debate have changed their opinions during the debates), because the focus here is not on the history of the Hungarian political and constitutional discourse. Instead, I tried to reproduce the arguments expressed in various formulations in a way that reflects the essence and in their best form (i.e. wherever I could, I even further refined the pro-revolutionary arguments), because in this context the *content of the arguments in their possibly best form* matters.[78] Therefore, I am not going to attribute

78 For a correct summary of the pro and con arguments in the debate, with precise references to the authors, see Viktor Z. Kazai, 'Restoring the Rule of Law in Hungary. An Overview of the Possible Scenarios', Osservatorio sulle Fonti 3 (2021), <https://www.osservatoriosullefonti.it/archivi/archivio-saggi/fascicoli/3-2021/1675-restoring-t

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the various revolutionary arguments to specific statements or interviews of specific politicians, public intellectuals or scholars in the past: the purpose is here merely to test arguments for future use.

a) "Written (positive) law allows two-thirds majority rules to be disregarded"

According to the first group of arguments that were used in the debates, positive law allows two-thirds majority rules to be disregarded. If the positive legal arguments were correct, breaking two-thirds majority rules would not entail a break in legal continuity (revolution) – however, since these arguments are in fact legally all mistaken, acting on them would lead to a revolution in the legal sense; therefore I will call the arguments in favour of them as "revolutionary arguments". There is only one exception to this (arguments under EU law and international law →III.1.a)ix.), which is doctrinally correct (that's why I won't even use the term "revolutionary"), but its scope is in fact very narrow.

i. "The 'right to resist' authorises action against the Fundamental Law"

Revolutionary argument: *"Certain two-thirds majority rules can be disregarded because they contradict the prohibition of acting with the aim of exercising exclusive power, and anyone has the right (and even the duty)*

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he-rule-of-law-in-hungary-an-overview-of-the-possible-scenarios/file>. Kazai quotes the arguments of Andrew Arato, Zoltán Fleck, Gábor Halmai, András Jakab, Dániel Karsai, Balázs Majtényi, László Majtényi, László András Pap, Balázs M. Tóth, András Sajó, Tibor Sepsi, Attila Gábor Tóth and Imre Vörös. From the Hungarian debates, I also included in the analysis Attila Antal, Péter Bárándy, Imre Forgács, Péter Hack, János Kis, Domokos Lázár, Zoltán Miklósi, Péter Róna, György Péter Rózsa, András Schiffer, László Seres, Richard Nagy Szentpéteri, Renáta Uitz and Vincze Attila's opinions. The following special issue of the *Verfassungsblog* also provides a good summary of the various arguments see <https://verfassungsblog.de/category/debates/restoring-constitutionalism/>. The special issue was initiated and organised by Andrew Arato and András Sajó, and is not only about the Hungarian transition, but discusses more general theoretical questions as well. In addition to the already mentioned authors, Beáta Bakó, Rosalind Dixon, Csaba Győry, Johanna Fröhlich, Gábor Halmai, Bogdan Iancu, David E. Landau, Sanford V. Levinson, Michael Meyer-Resende, László Pap András, Kim Lane Scheppele, Luke Dimitrios Spieker, Mark Tushnet, Renáta Uitz and Armin von Bogdandy contributed. For a summary of the *Verfassungsblog* special issue see András L Pap, 'Constitutional restoration in hybrid regimes: The case of Hungary and beyond', Intersections EEJSP 8 (2022), 191–207.

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to resist/take action against it." The provision on the right to resist was Article 2(3) of the Constitution 1989[79] and Article C(2) of the Fundamental Law 2011.[80] Sometimes we also find a reference (presumably to strengthen the authority of the argument) to the medieval *ius resistendi* known from Hungarian legal history. In its best form, the argument does not simply refer to the prohibition of exercising exclusive power, but to the fact that, according to the text of the norm, it is also prohibited to "act with the aim" to achieve it (that is, the possible election victory of the opposition would not in itself deny that this right can be triggered).

Rebuttal: First of all, it is worth pointing out that this provision does not have a direct origin in Hungarian legal history. The *ius resistendi* existed indeed from the Golden Bull of 1222 (with interruptions) until 1687, when the Hungarian estates, in their joy over the expulsion of the Turks, renounced this together with their right to freely elect a monarch.[81] But since 1687, such a thing has not existed in the Hungarian legal system. In the text of the 1989 Constitution, the relevant Article 2(3) was mostly inspired by Article 20(4) of the German *Grundgesetz*. The wording was also more similar to the German model (although the Hungarian version additionally includes the restriction that it is only possible to act "in a lawful way") than to the ancient Article 31 of the 1222 Golden Bull. The 1989 provision was then adopted essentially unchanged (with slight stylistic polishing) as Article C(2) of the 2011 Fundamental Law.

The dominant position in the German legal literature is that Article 20(4) of the *Grundgesetz* is only a symbolic provision, a quasi-testament on the part of the Constitution: it could only be applied if the basic law had already failed and lost its normativity.[82] However, if it already has lost its normativity, then it does not matter legally what is in the text anyway. In other words, no substantive practical legal consequences can be linked to the provision. The Hungarian legal literature argued similarly, already

79 Formally, it was the Act XX of 1949, but in 1989 it was entirely re-codified into a democratic Constitution (its content changed entirely, only the structural shell remained), therefore I call it Constitution 1989.

80 Text currently in force: 'No one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way.'

81 Alajos Degré, 'Az ellenállási jog története Magyarországon' in: Alajos Degré, *Válogatott jogtörténeti tanulmányok* (Budapest: Osiris 2004), 61–69.

82 See e.g., Michael Sachs (ed), *Grundgesetz. Kommentar* (3rd edn, München: C.H.Beck 2003), 866, with further references.

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in connection with the 1989 constitutional text.[83] The meaning (interpretation) of certain words of a constitutional provision and the normative status (applicability) of the given provision are two different things. The 'right to resist' in the Hungarian legal system has never had a directly applicable legal consequence on its own, it can be used as an aid to legal interpretation at most (emphasising the principle of separation of powers).[84] But even if it were a directly applicable provision (NB it is not!), the clause "in a lawful way" in the text would expressly exclude it from being the basis for breaking legal continuity.

By the way, it is worth noting that violating the two-thirds procedural rules with a simple majority would itself be close to aiming at exercising power "exclusively", i.e. the provision could be a double-edged sword if it were actually activated. It could therefore even be used against revolutionary plans on the part of Orbán's deep state, if this provision was considered as a directly applicable rule of action (but it is not!) – in fact, it could be used even against the losing opposition formation by Orbán, if revolutionary ideas are considered as "aiming" at exclusive power.

ii. "The adoption of the Fundamental Law 2011 violated the four-fifth majority rule"

Revolutionary argument: *"Law XLIV of 1995 inserted into the text of the 1989 Constitution a four-fifths majority requirement [as Article 24(5)] for the adoption of a new Constitution.*[85] *However, since there was not a four-fifths majority in 2011, the new Fundamental Law is procedurally invalid, and therefore the various two-thirds requirements prescribed by the Fundamental Law can also be disregarded."*

Rebuttal: This argument is flawed on two counts. First of all, the aforementioned four-fifths rule was no longer in force in 2011.[86] It is true that such a

83 Tamás Győrfi et al, '2. § [Constitutional principles, right to resist]' in: Jakab András (ed.), *Az Alkotmány kommentárja* (2nd edn, Budapest: Századvég 2009), para. 341–368.

84 In constitutional texts, there can be norms that cannot be applied directly on their own (e.g., state goals), see for more details András Jakab, *A magyar jogrendszer szerkezete* (Budapest–Pécs: Dialóg Campus 2007), 131.

85 'The adoption of the parliamentary resolution on the detailed rules for the preparation of a new Constitution requires the vote of four-fifths of MPs.'

86 In his textbook published in 2002, József Petrétei also claims that the provision is out of force, see Petrétei József et al, *Magyar alkotmányjog I.*, Volume 1 (Budapest–Pécs: Dialóg Campus 2002), 67. The issue was not even discussed in the Hungarian consti-

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constitutional provision did exist from 1995 until 1998. Law XLIV of 1995 inserted a new Article 24(5) into the 1989 Constitution, and its § 2 stipulated that "this law [...] shall expire upon the termination of the mandate of the Parliament elected in 1994". It is also true that the repeal of the amending Act does not repeal the amendment itself.[87] Therefore, we could argue in a formalistic way that Law XLIV of 1995 itself was repealed with effect from 18 June 1998, but Article 24(5) of the Constitution introduced by it was not. However, this argument would ignore the fact that the purpose of the new Article 24(5) of the Constitution was the self-restraint of the two-thirds majority coalition at the time (also according to the official explanatory notes). Therefore, the term "this law" in § 2 of Law XLIV of 1995 must be interpreted purposively and broadly, including also Article 24(5) of the Constitution. That is why Article 24(5) of the Constitution was no longer in force after 1998. The confusion was only caused by the fact that in 2009 the 1989 Constitution was 're-published with the current text in force' by the Ministry of Justice and Home Affairs in the Hungarian Gazette *(Magyar Közlöny),* and in this Article 24(5) was wrongly stated as being in force.[88] The two-thirds majority in 2010 was so frightened by this that 'just in case', they once again repealed (with a two-thirds majority) Article 24(5) of the Constitution.[89] In my opinion, this was unnecessary overkill; although it did not have a harmful legal effect, in any case, the uncertainty that might have existed concerning the requirement of a four-fifths majority was eliminated by the summer of 2010 at the latest.

The other problem with this revolutionary argument is that the content of the four-fifths rule did not refer to the need for a four-fifths majority to adopt the new Constitution, but rather to adopt the detailed procedural rules for the adoption of the new Constitution. In other words, for possible additional detailed rules of procedure, the absence of which is not an obstacle to the adoption of a new Constitution (since in such cases the general rules of procedure for adopting a new Constitution can be applied).

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tutional literature for a long time, because it was tacitly and unanimously considered out of force until 2009. I am not aware of any opinion prior to 2009 that said it was valid or even doubted the issue. Kukorelli marked it as an uncertain question in 2009, see István Kukorelli, 'Húsz éve alkotmányozunk', Közjogi Szemle 3 (2009), 1–10.

87 Jakab (n. 84), 120 (n. 386).

88 Magyar Közlöny 2009/50 (23 October 2009). Re-publication with the current text in force has no binding force or any legal consequences; it is only informative (just like a restatement of the law in a common law country).

89 Article 2(2) of the 5 July 2010 amendment to the Constitution: 'Article 24(5) of the Constitution shall be repealed.'

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By the way, I note that if there had been a procedural error resulting in invalidity during the adoption of the Fundamental Law (which, I emphasise: in my opinion, it did not happen), then the entire Fundamental Law would be invalid, and it would not be possible to distinguish among the provisions according to which provision is considered democratic and which is not (as is sometimes done by some authors supporting a revolution in a legal sense).

iii. "The adoption procedure of the Fundamental Law did not comply with the Act of Legislation in force at the time"

Revolutionary argument: *"§ 1 (3) of the Law CXXX of 2010 on the legislation (the Act of Legislation at the time) provided that the Act's provisions regarding the preparation of the legislation shall also be applied to the new Fundamental Act, and these (e.g., concerning the preparation of an impact assessment) were not observed. Accordingly, the Fundamental Law is actually invalid, and therefore the two-thirds majority rules it imposes can also be disregarded."*

Rebuttal: This argument is mistaken. In fact, the named rule has always been a *lex imperfecta* (i.e. a norm, for the violation of which there is no punishment foreseen). The obligation to prepare an impact assessment existed in the case of motions by individual MPs (the Fundamental Law itself was submitted as a motion by individual MPs), but it was no longer an obligation to present it (it is not known that an impact assessment was prepared, meaning that the violation of the Act of Legislation probably really occurred). But according to the longstanding case-law of the Constitutional Court, a violation of a *generic* obligation by the Act of Legislation in itself (in the absence of a violation of an express procedural provision of the Constitution, which was here not the case) never resulted in the invalidity of the legislation.[90]

Each legal system regulates itself (for example, through the case-law of its Constitutional Court and/or relevant legislative rules) what the legal consequences of legislative errors are. This is what we call *Fehlerkalkül*,[91] of

90 See e.g., 38/2000. (I. 31.) AB decision of the Hungarian Constitutional Court (ABH 2000, 303, 313).

91 See Walter Antoniolli and Friedrich Koja, *Allgemeines Verwaltungsrecht* (3rd edn, Wien: Manzsche 1996), 559–560, based on the work of Adolf Merkl, *Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff* (Leipzig-Wien: Deuticke 1923). The *Fehlerkalkül* contains the minimum conditions for legislation (i.e. those under which

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which strongly simplified, the following categories can be distinguished according to the traditional (i.e. pre-hybrid-regime) Hungarian constitutional doctrine:[92] (1) There are errors for which there is no sanction (for example, general consultation obligations according to the Act of Legislation, the violation of which has no legal effect on the validity of the resulting norm). (2) There are errors that can be easily corrected (for example, typographical errors in the Hungarian Gazette), which can be corrected without repeating the legislative procedure (in the example mentioned: via reprinting the text correctly in the Hungarian Gazette). (3) There are errors of medium weight (e.g., more significant procedural errors or, in the case of statutes, substantive unconstitutionality), which make acts open to challenge (in this case, the Constitutional Court can typically annul them). (4) And finally, there are errors so gross that in their case the norm cannot even be challenged (a typical example of this is the failure to publish), and in such cases, we simply consider the norm as non-existent ("null and void") (that is, not even worthy of annulment).

iv. "The Fundamental Law (or a part of it) is substantively unconstitutional"

Revolutionary argument: "*The Fundamental Law (or a part of it) is unconstitutional substantively (i.e. not procedurally, but concerning its content), and therefore the unconstitutional provisions of the Fundamental Law (which require two-thirds majority voting) can simply be disregarded.*"

Rebuttal: Such arguments are doctrinally unconvincing. We speak of unconstitutionality when e.g., a legal provision – which is below the Constitution in the hierarchy of norms – is contrary to the Constitution. However, in the Hungarian legal system, the Fundamental Law is at the level of the Constitution, i.e. it is the Hungarian Constitution, so in terms of content, it cannot be unconstitutional. It is conceptually impossible to claim that the standard itself does not meet the standard. The Hungarian Constitution has never been a multi-layered Constitution. The situation is different regulations in other legal systems: in Germany, e.g., the so-called eternity clause

the legal act still exists) and the maximum conditions (under which the legal act is completely flawless), see Rainer Lippold, *Recht und Ordnung. Statik und Dynamik der Rechtsordnung* (Wien: Manz 2000), 407–420.

92 In more detail with additional references and additional subcategories, see e.g., Jakab (n. 84), 69–71; 99–101.

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states which provisions cannot be changed and constitutional amendments contrary to this are unconstitutional [Article 79(3) *Grundgesetz*]. Or, in the Austrian Constitution, the basic principles of the Constitution can only be changed with an additional referendum [Article 44(3) *B-VG*]. In principle, this constitutional supra-layer could even be created by judicial practice (like in India),[93] but this has never happened in Hungary.[94]

v. "The Fundamental Law is null and void"

Revolutionary argument: *"The Basic Law (or any of its provisions) is null and void, and therefore the two-thirds decision rules prescribed by it can be disregarded."*

Rebuttal: This kind of argument is doctrinally mistaken. Being null and void is an exceptionally serious, special form of unconstitutionality (see above *Fehlerkalkül*→III.1.a)iii.). Substantive unconstitutionality cannot be null and void; this can specifically only apply to special cases of formal (procedural) errors. We are talking about those cases when such a serious, almost absurd procedural error was made during the creation of the norm that it cannot even be challenged or annulled. This is the case, for example, if a law is not promulgated. Such a law would not even exist (i.e. it is not actually a 'law'), so it could not even be challenged in the Constitutional Court, because it would simply not exist ('null and void').

However, the constitutional provisions that are currently targeted by revolutionary ideas (i.e. those prescribing cardinal laws and concerning personnel questions) are not unconstitutional (neither procedurally nor

93 Richard Albert and Bertil Emrah Oder (eds), *An unamendable constitution?* (Berlin: Springer 2018).

94 This has been an unbroken case-law of the Hungarian Constitutional Court since 1994 (see order AB 293/B/1994, ABH 1994, 862), but the question arose also after 2010, e.g., in the Decision 61/2011. (VII. 13.) AB, which, referring back to the previous 1994 case, with similar result. Those who would say that the 2011 decision was already made by a captured institution should consider the following facts: the petition was judged by eight Constitutional Court Judges elected before 2010, one before 2010 but re-elected after 2010 (Bihari) and one after 2010 (Stumpf) (and only three out of ten judges dissented from the decision). The Hungarian Constitutional Court has only ever reviewed constitutional amendments from a formal-procedural point of view (i.e. mainly whether two-thirds was present). The question was raised a year later, in the Decision 45/2012 (XII. 29.) AB as well, for a critical analysis of this 2012 decision (also quoting further Hungarian literature), see Zoltán Szente, 'Az Alkotmánybíróság döntése Magyarország Alaptörvényének Átmeneti rendelkezései alkotmányosságáról', Jogesetek Magyarázata 2 (2013), 11–21.

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substantively), as we have already established. And the particularly serious case of unconstitutionality, being null and void, is even less the case for them. By the way, since being null and void can only be for a procedural reason, it would not be possible to speak meaningfully about certain provisions of the Fundamental Law being null and void in the first place, but only about the entire Fundamental Law (or one of its amendments) being null and void.

Once a legal act has been published in the Hungarian Gazette,[95] it will not be null and void just by a political announcement or a public outcry. In the legally prescribed procedure, by the legally prescribed body, with the legally prescribed voting ratios, the act must be removed from the legal system. If we publicly announce that a legal act is unfair or disgraceful, that does not make it "null and void", at least not in a legal sense.

vi. "The Fundamental Law declares its own legal basis to be invalid, therefore it is also invalid"

Revolutionary argument: *"Since the Fundamental Law itself declares the invalidity of the (previous) Constitution, but its validity derives from it, the Fundamental Law actually declares is own invalidity. Therefore, the two-thirds voting ratios required by the Fundamental Law can also be disregarded."*

Rebuttal: The relevant provision of the Fundamental Law is mistaken (it actually makes no sense).[96] However, this does not affect the validity of the Fundamental Law.

The Fundamental Law does contain a logical self-contradiction, when in the preamble it speaks of the invalidity of the former 1989 Constitution (formally, Act XX of 1949), and according to point 2 of the Final Provisions, the validity of the Fundamental Law is derived from the former Constitution.[97] However, the part of the text stating the invalidity is included in the preamble (and preambles only have a weak normative value), while the legally meaningful version is in the binding part of the text (among the Final Provisions). We must therefore assume that the Fundamental Law just

95 The Fundamental Law was published in no. 2011/43 of the Hungarian Gazette (Magyar Közlöny).

96 Jakab (n. 63), 183.

97 Doctrinally, instead of "invalid" the correct term would have been "not in force". For a detailed demarcation of the two concepts see András Jakab, *A jogszabálytan főbb kérdéseiről* (Budapest: Unió 2003), 27–79.

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"repeals" the previous Constitution (this is explicitly contained in point 3 of the Final Provisions), and it does not actually declare the "invalidity" of the former Constitution. The wording in the preamble is probably the result of the drafters being carried away by rhetorical fervour and therefore worded it doctrinally imprecisely. This inaccuracy has, however, no legal consequences.

But even if we were to accept that the preamble has full normative value (as in fact it has not, since it is only an aid of interpretation),[98] this would not result in the invalidity of the Fundamental Law, since the Fundamental Law can only "invalidate" the former Constitution only after itself is already valid and effective. So the derivation of validity cannot be affected by the question.[99]

vii. "In order to restore the rule of law in a substantive sense, certain requirements of the rule of law in a formal sense must be disregarded"

Revolutionary argument: "*Since the rule of law in a substantive sense (including fundamental rights protection, separation of powers) is violated by the current Fundamental Law, its formal (procedural) rules do not have to be followed, since the purpose of the formal rule of law is actually to ensure the substantive rule of law. Therefore, the two-thirds procedural rules can be disregarded if this is necessary to restore the substantive rule of law.*"

Rebuttal: This type of argument (as long as it is not understood as a natural law argument →III.1.b)) shows doctrinal confusion regarding the concept of the rule of law. The purpose (*telos*) of the rule of law is to prevent the arbitrary exercise of state power.[100] In order to achieve this, a list of requirements has historically been developed,[101] which now includes both the formal rule of law requirements (clarity, stability, enforceability of the

98 Liav Orgad, 'The preamble in constitutional interpretation', International Journal of Constitutional Law 8 (2010), 714–738; Lóránt Csink, 'A preambulum szerepe egyes alkotmányokban', Collega 2 (2005), 6.

99 I am grateful to Dániel Karsai for this argument.

100 András Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 117–122, with further references.

101 See the analyses by the Venice Commission: *CDL-AD(2011)003rev-e Report on the rule of law. Adopted by the Venice Commission at its 86th Plenary Session* (Venice, 25–26 March 2011), para 41; *CDL-AD (2016)007revRule of Law Checklist. Adopted by the Venice Commission at its 106th Plenary Session* (Venice, 11–12 March 2016). The World Justice Project Rule of Law Index also works with a similar list-like concept (aggregating the individual list elements without weighting). The dominant position of the relevant literature is that the concept can best be defined as a list of

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rules, actual compliance, etc.) and the substantive rule of law requirements (fundamental rights protection, division of powers). However, there is no hierarchy between the individual elements of the list, and in the event of a potential conflict, there is no conflict resolution rule which would follow from the concept of the rule of law itself. Violations of the requirements of the formal rule of law will therefore not become acceptable if they are done in order to restore the substantive rule of law. (And, of course, the reverse is also true: just because something is adopted in rules that meet the requirements of the formal rule of law, it will not automatically meet the requirements of the substantive rule of law.)

viii. "Referendums are only prohibited on amendments to the Fundamental Law, not on a completely new Constitution"

Revolutionary argument: *"Article 8(3)(a) of the Fundamental Law only names the amendment of the Fundamental Law as a prohibited referendum subject, so a referendum could actually be held on a completely new Constitution."*

Rebuttal: Logically, the aforementioned prohibited subject area also includes the referendum on a completely new Constitution, since it is "more" than the amendment. In legal reasoning, this is called *argumentum minori ad maius*, i.e. if the smaller thing is already explicitly forbidden, then the prohibition of the bigger thing is implied in the rule.[102] That is, if it is forbidden to give one slap, then it will be even more forbidden to give two slaps. It can be demonstrated even without elegant Latin expressions: if a referendum on the amendment is prohibited but a referendum on a completely new Constitution is still allowed, then the rule would be completely meaningless since it could be circumvented very simply by allowing a referendum on a "new" Constitution that would only differ from the "previous" Constitution in a single provision (i.e. the provision that we wanted to amend).

requirements, see e.g., Katarina Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte* (Tübingen: JCB Mohr 1997); Lord Bingham, *The Rule of Law* (London: Penguin 2010).

102 For details on the topic of the *argumentum a fortiori* (of which the *argumentum a minori ad maius* is a subcategory), see Thomas Kyrill Grabenhorst, *Das argumentum a fortiori* (Frankfurt am Main: Peter Lang 1990).

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ix. "In order to fulfil the obligations under EU and international law, we are disregarding and/or suspending certain two-thirds majority rules of the Hungarian legal system"

An argument for disregarding certain two-thirds majority rules: *"Several rules of the Hungarian legal system currently contradict EU law and the country's international legal (especially international human rights) obligations. This can provide a legal basis for overcoming the two-thirds hurdle in certain cases, even in the absence of a two-thirds parliamentary majority."*

Rebuttal: Among the arguments that have been discussed so far that disable two-thirds majority rules, this is the only argument that is actually working from a legal doctrinal point of view. Moreover, it is not actually revolutionary in the sense that it would result in a break in legal continuity. In some cases, therefore, in principle, it can really indeed help to resolve the blockade stemming from two-thirds majority rules (i.e. it could be combined with my above three-stage plan →II.1). However, its scope of application is very narrow, much narrower (and in part it also works much slower procedurally) than some authors expect, i.e. it will not solve the majority of the problems indicated at the beginning of this chapter (or only partially and much slower than desired). This method is not suitable for the removal of Orbán's deep state officials, but rather for remedying certain human rights violations.

In order to clarify exactly when, how and for what these legal arguments can be used, it is worth dividing the question into two parts: (1) Hungarian legal provisions that contradict EU law and (2) Hungarian legal provisions that contradict international law (for example, the European Convention on Human Rights). The legal nature of the two cases is very different.

Ad (1). EU law has supremacy (i.e. primacy) over national law. This means that in the event of a conflict, the national organs (judges, administrative agencies) must apply EU law without formally repealing Hungarian law, national law shall simply be set aside.[103] The national legislation that

103 The ability of private parties to invoke an EU law norm in front of the courts (and, as a result, direct applicability by the courts) is also called direct effect, which, however, also requires that the EU law rule is clear, unconditional and does not require further national detailed rules. See ECJ, *Van Gend en Loos*, judgment of the 5 February 1963, case no. 26/62, ECLI:EU:C:1963:1; ECJ, *Lütticke*, judgment of the 16 June 1966, case no. 57/65, ECLI:EU:C:1966:34. The clarity of the EU norm (e.g., Art 2 TEU) necessary for direct applicability can ultimately also be created by the case law of the ECJ. However, the ECJ case law on Art 2 EUV has not (yet)

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has not been applied remains valid and effective according to national law, but it must not be applied. The supremacy exists not only with respect to national laws (even cardinal laws), but also with the national constitution (i.e. Fundamental Law)[104] and even with the decisions of the Constitutional Court.[105]

However, supremacy does not mean authorisation to create the necessary national legislation. The national legal order and the EU legal order are two separate autonomous legal orders. In other words, the majority requirements required in the national legislative procedure or the authorised legislative body do not change based on EU law. So if there is no parliamentary majority to implement an EU directive (on a topic that would require constitutionally an implementation by an Act of Parliament), the failure to implement is a clear violation of EU law but this does not mean that the implementation could be done now just by government regulation (unconstitutionally, with reference to EU law).

Nor does it follow from supremacy that a body that (even regularly) violates EU law could be dissolved on the basis of EU law (its members could be replaced, notwithstanding the domestic legal procedures, etc.). For example, the German Federal Constitutional Court has already made a decision that expressly and obviously violates EU law,[106] yet it has not yet

reached the stage where it can offer the hoped-for solution. For the current state of the ECJ case law, see Luke Dimitrios Spieker, *EU Values before the Court of Justice* (Oxford: Oxford University Press 2023). The case law of the ECJ has developed rapidly in recent years, so future changes in this regard cannot be ruled out. On future perspectives (including some doubt about these perspectives) see e.g., Matteo Bonelli and Monica Claes, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTIQ+ rights in Hungary', Maastricht Journal of European and Comparative Law 30 (2023), 3–14.

104 ECJ, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstellt für Getreide und Futtermittel*, judgment of the 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114.

105 On 21 December 2021, the CJEU established this against the Romanian Constitutional Court in the following cases: ECJ, *Euro Box Promotion and others*, judgment on the 15 March 2022, case no. 357/19, ECLI:EU:C:2022:200; joint cases with ECJ, DNA-Serviciul Teritorial Oradea, case no. 379/19, ECLI:EU:C:2021:174; ECJ, *Asociația "Forumul Judecătorilor din România"*, judgement on the 18 May 2021, case no. 547/19, ECLI:EU:C:2021:393; ECJ, *DNA-Serviciul Teritorial Oradea*, C-379/19; ECJ, *FQ and others*, C-811/19 and ECJ, *NC*, C-840/19.

106 András Jakab and Pál Sonnevend, 'The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht', Verfassungsblog, 25 May 2020, <https://verfassungsblog.de/the-bundesbank-is-under-a-legal-obligation-to-ignore-the-pspp-judgment-of-the-bundesverfassungsgericht/>.

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occurred to anyone (not even EU lawyers) that the German Government would have the right to disrupt the German Constitutional Court with a bunch of policemen because of this, or that they could just retire the Constitutional Court Judges with immediate effect (with reference to EU law). In the case of the Romanian Constitutional Court, the Court of Justice of the European Union recently concluded that the case-law of the Romanian Constitutional Court that violates EU law should be disregarded, but it did not establish legal consequences for the organisation of the Romanian Constitutional Court either.[107]

This means that in the Hungarian case, the amendment of the two-thirds rules with a simple majority or the replacement of bodies belonging to Orbán's deep state cannot be based on EU law either. It is indeed possible not to apply Hungarian legal (cardinal or even constitutional) provisions that contradict EU law, or even Constitutional Court decisions (e.g., to disregard the annulment of a statute). However, supremacy works in a decentralised manner:[108] *in individual cases*, it provides an opportunity for organs applying the law, but law-making authorisation cannot be directly derived from it.

It is debatable whether national constitutional law can impose limitations on the supremacy of EU law. On the one hand, according to EU law, this kind of limitation is not possible (I agree with this perspective),[109] on the other hand, however, national Constitutional Courts, referring to national constitutional identity or to the lack of national authorisation given to the EU (*ultra vires* EU acts), sometimes reserve such powers for themselves or at least that is what they are trying to do.[110]

107 ECJ (n. 105).

108 ECJ, *Amministrazione delle finanze dello Stato v Simmenthal*, case no. 106/77, judgment of 9 March 1978, ECLI:EU:C:1978:49.

109 'Luxemburg locuta, causa finita', see Jakab (n. 84), 249.

110 See e.g., the Decision of the Hungarian Constitutional Court 22/2016. (XII. 5.) AB. From the academic literature see Federico Fabbrini and András Sajó, 'The dangers of constitutional identity', *European Law Review* 25 (2019), 457–473; Beáta Bakó, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires and Fundamental Rights Review in Hungary', Heidelberg Journal of International Law (HJIL) 78 (2018), 863–902; R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', Cambridge Yearbook of European Legal Studies 21 (2019), 59–74; Attila Vincze, 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Euro-

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Since, according to some opinions, constitutionally it is possible to refer to limits of the supremacy of EU law, the situation should be unquestionable at least in terms of EU law. And this is only the case if a CJEU decision can be presented for the given question (i.e. a report by the European Parliament[111] or the European Commission[112] is not enough for this, since the CJEU is the only authentic interpreter of EU law),[113] which practically can arise in two types of procedures: national court (even the Constitutional Court) initiates a preliminary ruling procedure (i.e. referring to the content of the Hungarian legal act, but not to the specific Hungarian act, formally interpreting EU law based on Article 267 of the TFEU) or an infringement proceeding (i.e. specifically judging the conformity of a Hungarian legal act or practice with EU law based on Articles 258 and 260 of the TFEU). The former procedures take an average of 15–16 months (to this must be added the time necessary for the national judge to initiate the CJEU procedure in the first place), the latter takes an average of 40 months,[114]i.e. none of these represent a quick solution (in the second case, the incumbent Hungarian Government can have a more significant influence on the speed and outcome if it intentionally fails to defend itself or does not use the full deadline for certain procedural steps). In the absence of a CJEU judgment, not applying politically disputed (two-thirds majority) rules is pretty risky. On the one hand, if even the EU legal situation is not completely clear,[115]

parechts in der Rechtsprechung des ungarischen Verfassungsgerichts', Europäische Grundrechte-Zeitschrift 2022, 13–21.

111 The Sargentini report (2018) was prepared in the frame of an Article 7 TEU procedure against Hungary in the European Parliament, see European Parliament, 'REPORT on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded', <https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_HU.html?redirect>.

112 See European Commission, '2022 Rule of law report. Country chapter on the rule of law situation in Hungary', 13 July 2022, <https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf>.

113 The reports of the EP and the Commission concerning the rule of law in Hungary typically do not make much effort to name the *specific* sources of EU law, which could have supremacy over the contested Hungarian norms.

114 Petra Bárd and Anna Śledzińska-Simon, 'Rule of law infringement procedures', CEPS Paper in Liberty and Security, 2019-09, 12, <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf>.

115 For the sake of *legal certainty*, Article 267 TFEU provides for the preliminary decision procedure in case of interpretation doubts.

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domestic enforceability problems can be guaranteed, and on the other hand, if in the end, the CJEU is not in favour of a radical solution (i.e. it does not provide EU legal authority for it), then the revolutionary step either has to be undone, or the illegal behaviour belies the rhetoric of restoring the rule of law.[116]

It should also be noted that although in the 2010s the Commission was particularly (even cynically) lenient towards the Hungarian Government, this trend has changed in the last two or three years: in other words, where it was possible to launch an infringement procedure, there is a good chance that the Commission has already done so, the judgment of the CJEU has been issued, or at least the case is ongoing. Therefore, it cannot be expected that after the change of government, EU law will suddenly be able to find an effective grip on the legal order of the Hungarian hybrid regime in many new cases. The incumbent national government has no *direct* influence on the initiation of the infringement procedures, but informally it might encourage procedures against itself – this would, however, most likely not result in a solution to the deep state problems because of the above (i.e. timing and scope).

In some of the cases, there is a CJEU judgment condemning Hungary, but the issue is related to a simple majority law, which means that there is no need for the supremacy of EU law to disregard two-thirds majority rules (refugee rights, anti-NGO legislation, chasing away the Central European University).[117] In other cases, the removal of an official (judge, data protection commissioner) was in violation of EU law,[118] but this does not automatically result in the authority to reinstate the former official: in some cases, the violator Member State has other options (e.g., paying reparations

116 The astonishingly honest words by the former (2002–2004) socialist Minister of Justice Peter Bárándy, see 'Alkotmányos jogállam és büntető igazságtétel 2.', Népszava, 20 November 2021: 'Three or four years later, the European Court of Justice might condemn us. That should be our biggest problem.', <https://nepszava.hu/3138449_alkotmanyos-jogallam-es-bunteto-igazsagtetel-2>.

117 ECJ, *Commission v Hungary*, judgment of 18 June 2020, case no.78/18, ECLI:EU:C:2020:476; ECJ, *Commission v Hungary*, judgment of 6 October 2020, case no.66/18, ECLI:EU:C:2020:172; ECJ, *Commission v Hungary*, judgment of 16 November 2021, case no.821/19, ECLI:EU:C:2021:930; ECJ, *Commission v Hungary*, judgment of 17 December 2020, case no.808/18, ECLI:EU:C:2020:1029.

118 ECJ, *Commission v Hungary*, judgment of 6 November 2012, case no.286/12, ECLI:EU:C:2012:687; ECJ, *Commission v Hungary*, judgment of 8 April 2014, case no. 288/12, ECLI:EU:C:2014:237, paras 63–65 could have served as a legal base for questioning the mandate of the president of the new data protection authority NAIH (at least during his first mandate).

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to those affected, like in the case of the early retirement of Hungarian Judges), and in other cases there could be an obligation of the Member State to reinstate the official following from Article 4(3) TEU (e.g., in the case of the removal of the Hungarian data protection commissioner, even though the case eventually never reached procedurally this phase), but only according to the Member State's own domestic procedural provisions.

The removal of the President of the Supreme Court at the end of 2011 was indeed illegal, but not according to EU law, but according to a decision of the European Court of Human Rights (and ECHR law does not enjoy the supremacy of EU law over national law),[119] and since then there has been another change at the head of the Supreme Court (now called *Kúria*). Neither the CJEU nor the ECtHR ruled on the personnel capture of the Hungarian Constitutional Court (as opposed to Poland →VI.). There is no specific EU rule regarding the necessary competences of the Constitutional Court (i.e. restoring the *actiopopularis*, restoring the competence to review of financial laws), and if, for example, we were to try to restore this competence under the general principle of non-regression,[120] it would actually strengthen Orbán's deep state (i.e. personally captured institutions would re-acquire competences). There is no CJEU judgment (or even ECtHR judgment)[121] that obliges Member States that the legal form of registered homosexual partnerships must be "marriage"; the issue of non-discrimination (i.e. specific statutory rights contained in a registered partnership) lies in the legislative competence of the simple parliamentary majority. A constitutional preamble with nationalist rhetoric does not violate EU law either (I note that if it did, several EU Member States would be in trouble).

There is no CJEU ruling on the Hungarian electoral system either. Hungarian gerrymandering, for example, is an obvious phenomenon, but the extent to which it is an issue of EU law is highly debatable (rather not, or

119 On the basis of infringement of freedom of speech, i.e. not judicial independence, see ECtHR, *Baka v Hungary*, judgment of 23 June 2016, no. 20261/12. A specific violation established by the ECtHR does not automatically (e.g., based Article 6(3) TEU) become a violation of EU law, but requires EU competence on that matter. In case of doubt, a CJEU decision is required here as well.

120 ECJ, *Repubblika v Il-Prim Ministru*, judgment of 20 April 2021, case no.896/19, ECLI:EU:C:2021:311. Mathieu Leloup, Dimitry V. Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru', European Law Review 46 (2021), 687.

121 ECtHR, *Schalk and Kopf v. Austria*, judgment of 24 June 2010, no. 30141/04; ECtHR, *Chapin and Charpentier v. France*, judgment of 9 June 2016, no. 40183/07.

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only at a very-very abstract level), and even if it were, there is still no alternative map of electoral districts that could be applied by the force of EU law. The much criticised issue of extreme disproportionality in the electoral system (rewarding winners, which in a slightly different form is also known in the Italian and Greek electoral systems, and if the current Hungarian opposition wins, may even help them) is also a national competence.

And where it is not the (two-thirds majority or simple majority) law itself, but only its application violates EU law, there is no need to amend the law to comply with EU law.[122] In general, as I noted at the beginning of this chapter: the basic values of constitutionalism (which are also the values of the EU according to Article 2 TEU) are not primarily violated by the formal rules of the Hungarian hybrid regime (although this also happens rarely), but mostly by informal practices. And to further clarify: my argument is *not* that only the legal content of those CJEU judgments is applicable to Hungary, where you have "Hungary" in the title. My argument is that (1) considering the *current* political situation in the EU, it is unlikely that there would not be at least a pending case against Hungary wherever there is a fair chance of winning, and (2) considering the *hypothetical* political situation in Hungary (as the main hypothesis of the present paper), it is practically not advisable to disregard domestic two-thirds majority laws without an undisputable legal opinion (i.e. CJEU judgment).

Referring to the supremacy of EU law is, in theory, indeed an option to turn off certain two-thirds majority rules, but so far I have not yet found a single specific case where there is *currently* a case in which this would practically help (although I admit, I have not systematically examined all possible issues of the entire Hungarian legal system).[123]

122 ECJ, *Illégalité de l'ordonnance de renvoi*, judgment of 23 November 2021, case no.564/19, ECLI:EU:C:2021:949.

123 It would help a lot in solving national rule of law problems if the CJEU finally recognised the direct applicability of the EU Charter of Fundamental Rights to purely national cases. Unfortunately, this has not happened until now (with reference to Article 51 of the EU Charter of Fundamental Rights), see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights', Cambridge Yearbook of European Legal Studies (2022), 239–261; András Jakab and Lando Kirchmair, 'Zwei Wege zur Vollendung der Europäischen Grundrechteunion: Änderung oder Neuinterpretation von Artikel 51 der EU-Grundrechtecharta', Europäische Grundrechte-Zeitschrift (2023), 188–199; András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases', in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values:*

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Ad (2). Promulgated international treaties have an intermediate rank in the Hungarian legal system between the Constitution (Fundamental Law) and statutes (including cardinal laws). According to Article 24(2)(f) of the Fundamental Law, the Constitutional Court reviews the compatibility of Hungarian laws with international treaties, and according to Article 24(3)(c) of the Fundamental Law it *may* annul laws or provisions that conflict with international treaties. Compared to EU law, there are several differences:

(a) a supra-constitutional rank is out of the question here (the situation of international treaties is weaker in this respect, because in the case of EU law, at least according to some opinions, this exists),

(b) in the case of sub-constitutional legal acts, a formal annulment may take place (i.e. the Hungarian legal act or legal provision that violates an international treaty may totally disappear from the Hungarian legal system, in this respect its position is stronger than that of EU law),

(c) the occurrence of the former is, however, not necessary, but depends on its *discretion* of the Constitutional Court (so the Constitutional Court does not have a legal obligation to annul the domestic norm, in contrast to the supremacy of EU law, which is the obliges domestic state organs to disregard the domestic norm that contradicts EU law), and

(d) as opposed to ensuring the supremacy of EU law vis-à-vis the national legal system, the procedure here is centralised, i.e. only the Hungarian Constitutional Court is authorised to trigger this possibility in the Hungarian legal system (and not ordinary courts or executive organs).

In particular, the latter two characteristics weaken this type of method for turning off the two-thirds majority rules, although it does not make it completely impossible. Concerning point (d), it should be emphasised once again that the method of resolving the conflict of norms is basically determined by the Constitutional Court. This may be the annulment of the internal legal norm (cardinal law), but it may also be just obliging the Parliament to resolve the conflict of norms by setting a deadline (e.g., by amending the cardinal law). However, this latter obligation does not mean that this would change the possible two-thirds majority requirement to a simple majority in the Parliament. The government itself can initiate the procedure before the Constitutional Court, but the Constitutional Court

Ensuring Member States' Compliance (Oxford: Oxford University Press 2017), 252–262.

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has no time limit in such procedures, and may even sit on cases for several years.

Compliance with EU treaties cannot be reviewed in such a procedure – since this group of norms is not "international law" in the sense of Article Q) of the Fundamental Law, but rather "European Union law" in the sense of Article E) of the Fundamental Law.[124] For ensuring compliance with the European Convention on Human Rights (promulgated by Law XXXI of 1993), however, this could be a meaningful route.[125]

Based on Section 13(1) of Law L of 2005, "[w]hen interpreting an international treaty, the decisions of the body with jurisdiction to decide legal disputes related to the given international treaty must also be taken into account". This means that the decisions of the ECtHR[126] must also be taken into account when interpreting the ECHR by Hungarian state organs (including the Constitutional Court),[127] but e.g., the domestic legal relevance of the opinions of the Venice Commission does not become stronger this way. In the light of the above, there are, e.g., some cardinal laws about secret surveillance[128] and religious freedom,[129] in which cases the annulment by the Constitutional Court with reference to ECHR would be ideal and legally absolutely doable (but these steps cannot be legally enforced by the government or a simple parliamentary majority either).

124 This case-law pre-dates the Fundamental Law, see the decisions of the Constitutional Court 1053/E/2005. AB and 72/2006. (XII. 15.) AB.

125 On methods for ensuring compliance see Tamás Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (Budapest–Pécs: Dialóg Campus – Dóm 2013), chapter VII.

126 Scheppele (n. 55).

127 For itself, the Constitutional Court has determined even more strict obligations about considering ECtHR decisions and their weight in the constitutional interpretation of fundamental rights. See the Constitutional Court decision 61/2011. (VII. 13.) AB – according to which, following the principle of *pacta sunt servanda*, the Constitutional Court must follow the ECtHR case-law even if this does not necessarily follow from the Hungarian Constitutional Court's own former decisions.

128 ECtHR, *Szabó and Vissy v. Hungary*, judgment of 12 January 2016, no. 37138/14.

129 ECtHR, *Magyar Keresztény Mennonita Egyház v. Hungary*, judgement of 8 April 2014, no. 70945/11, 23611/12, 26998/12.

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b) "The two-thirds majority rules can be disregarded on the grounds of morality/natural law/legitimacy"

In order to disregard the two-thirds rule, some authors are not looking for positive legal but moral arguments. Arguments questioning the validity (and/or legal binding force) of positive law on moral grounds are called natural law theories in legal philosophy. Political philosophers and political scientists conceptualise these problems in terms of "legitimacy" (i.e. being worthy to be followed).

i. "The adoption procedure of the Fundamental Law was not fair, therefore the two-thirds majority rules contained in the Fundamental Law can be disregarded on the grounds of morality/natural law/legitimacy"

Revolutionary argument 1: *"They did not indicate their intention to adopt a new Constitution before the 2010 elections, so the Fundamental Law 2011 and the two-thirds majority decisions entrenched in the Fundamental Law can be disregarded."*

Revolutionary argument 2: *"Even though the legally required two-thirds parliamentary majority was behind the adoption of the Fundamental Law, the purpose of the rule about the necessary majority is to reach a consensus with the opposition, but it was not there. In other words, this is only the constitution of Fidesz, it was adopted unilaterally. Therefore, the two-thirds majority was actually not enough for the adoption of the Fundamental Law, and as a result, the Fundamental Law and the two-thirds majority decisions based on it can be disregarded."*

Revolutionary argument 3: *"The Fundamental Law is not even a real constitution, because it was not approved by the people (in a referendum)."*

Rebuttal: It is indeed true that the 2010/11 constitution-making process was not entirely fair. Before the elections, it was not made clear that a new Constitution would be adopted if a two-thirds majority was obtained. The opposition was indeed only apparently involved (which, after realising this, withdrew from the process, because it understandably did not want to play along without having any meaningful say). And it would indeed have been better if a referendum had been held on the Fundamental Law (although there are many successful and highly respected Constitutions in the world that were not subject to a referendum when they were adopted, and the constitutional regime already before 2010 expressly forbade a referendum

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on a new Constitution →III.2.d)). All of these provide a basis for why it would be worthwhile to (legally) create a new Constitution one day again, but the authorisation to create a Constitution illegally does not follow from this.

First of all, it is worth establishing once more: the above-mentioned arguments do not affect the legality of the adoption of the Fundamental Law according to Hungarian law. The argument here is that despite being legal according to positive law, the Fundamental Law could be disregarded because it was adopted via morally unfair procedural steps (or omissions). To put it differently: we admit that the Fundamental Law was created legally according to Hungarian law (since the necessary two-thirds majority of MPs supported it in the legally prescribed procedure),[130] but we still say that it can be disregarded. This only makes sense if we also say that "there is a natural law requirement, higher than Hungarian law, to hold a referendum, to announce our intention before the election or to involve the current opposition".[131]

This argument cannot be falsified or proven in this form. The characteristic of natural law arguments is precisely that they are not valid because they are written somewhere in law, but rather stem from the nature of the world, society or human beings (for the sake of simplicity: from nature –

130 The Constitution (in the formal sense) always provides the legal framework for the simple parliamentary majority, which is why we require a larger majority. In Hungary, since 1949, this required majority has been two-thirds of all MPs, and this was also maintained after the 1989/90 regime change. In international comparison, this is a fairly standard ratio requirement for unicameral parliaments (i.e. where there is no upper house). Legally, in 2011, not Fidesz, but two-thirds majority of MPs voted for the Fundamental Law. Politically, these two happened to coincide, as the voters gave the representatives of Fidesz such a strong authority (according to the old electoral system, which has not been questioned by the current opposition) that Fidesz achieved a constitution-making majority (with which they could legally adopt a new Constitution and even override decisions of the Constitutional Court).

131 The argument that "the meaning/purpose of two-thirds majority requirement is consensus, therefore if a single party already has two-thirds majority, then in fact an even larger majority is needed" is *not* a purposive interpretation (where we would choose the one closer to the *telos* among various interpretation versions), but replacing a clear procedural rule (defined as a number) with another (higher-ranked and unwritten) rule, i.e. applying a new natural law rule ("consensus is required for constitution making") and denying the validity of the original procedural rule ("two-thirds majority is required for constitution making"). By the way, in my opinion, consensus is indeed required for constitution-making →II.1.c), but this is a *political-moral* requirement in the interest of the public good, and not a legal provision.

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hence the name: *natural* law). This type of argument has been relegated to the background in modern constitutional law because the historical experience in politically controversial issues is that political actors typically discover very different natural law rules, especially in conflict situations. If we, however, hope that constitutional law will provide a peaceful framework for political differences of opinion, i.e. it will settle conflicts in peaceful procedures instead of violence, then we must rely on what is valid as a positive legal rule, because it is not as easily disputed as a starting point for arguments.[132]

If, for example, the current democratic opposition says: "without a referendum, there is no Constitution (according to natural law)", but the supporters of the Orbán regime, on the other hand, say: "there is no need for a referendum when adopting a new Constitution (not even according to natural law)", then a mere statement stands against another mere statement. Basically one-to-one. What peaceful method can be used to decide the dispute between the two points of views?[133] If the conflict should be decided on the basis of constitutional law, then the supporters of the Orbán regime are clearly right: according to Hungarian law, a referendum was not required (and is still not required) for a new Constitution. And if we say that the real decision between the two competing claims of natural law will be what the voters say in the next parliamentary elections, then in fact this is no longer the original "procedural natural law" argument, but the question of any legal limitation of the will of the people and thus the denial of the possibility of formal constitutional law. This is also a natural law argument ("the will of the people is stronger than the written law"), but this is no longer about the procedural issues of 2011, i.e. it is actually a new and different kind of argument, which I will return to separately below →III.1.b)iv.

ii. "The content of the Fundamental Law is unacceptable to the extent that it makes it possible to disregard the two-thirds majority rules on moral/natural law/legitimacygrounds"

132 On constitutional law 'taming' political conflicts see András Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 5–7, 45–46, 53, 238 with further references.

133 The list of natural law theories is very long, in which everyone can always find the right one to their liking (and according to their current political needs): secular or religious, supporting an absolute monarchy or supporting democratic revolution, conservative or liberal, right-wing or left-wing, old or new, understandable or confusing. And, of course, they usually see themselves as the only true and right one.

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Revolutionary argument 1: *"The Fundamental Law is not even a real constitution, because its content does not comply with the principles of democracy and the rule of law."*

Revolutionary argument 2: *"Radbruch has already established that such an unjust legal system does not have to be followed."*

Revolutionary argument 3: As a hypothesis: *"And if it were written into the Fundamental Law that Viktor Orbán would remain Prime Minister for the rest of his life, would the opposition have to accept that as well?"*

Rebuttal: In the intellectual history of legal philosophy, there are indeed thinkers who believe that the names 'law' or 'constitution' cannot be used for norms that do not meet certain minimum content (correctness, moral) criteria.[134] However, these types of arguments do not apply to the current Hungarian legal system. There are minor problems with the text of the Fundamental Law, but overall a constitutional democracy could be operated even based on this text. As András Sajó put it in 2021: "There are no particular problems with the Fundamental Law (apart from some of its ideological provisions and the lack of certain constitutional guarantees), one could actually live with this text in a democracy."[135]

134 In constitutional history, the best-known example of this is Article 16 of the Declaration of the Rights of Man and of the Citizen (1789): 'A society in which rights are not guaranteed, nor the separation of powers defined, has no constitution at all.' The vast majority of modern constitutional theories, however, have worked with a positivist concept of the constitution, which is independent of the correctness of the content of the norm. See e.g., Georg Jellinek, *Verfassungsänderung und Verfassungswandlung* (Berlin: Häring 1906), 8: 'a higher degree of formal legal force' *(erhöhte formelle Gesetzeskraft)* differentiates it from ordinary laws. The *written* Constitution is an innovation that has been used by both democratic and non-democratic regimes since the 18th century, see Linda Colley, *The Gun, the Ship and the Pen. Warfare, Constitutions, and the Making of the Modern World* (New York – London: Liveright 2021).

135 András Sajó, 'Hogyan lehet új alkotmány a kormányváltás után?', Magyar Narancs, 7 November 2021, <https://magyarnarancs.hu/publicisztika/hogyan-lehet-uj-alkotmany-a-kormanyvaltas-utan-243259>. In April 2011, László Sólyom had a similar opinion (although the text has deteriorated somewhat since then) in an interview: 'This Constitution is like the new building of the National Theatre. It has nothing to do with modern theatre architecture, it is eclectic, tidal, which was forced through the word of power despite the unanimous protest of the architectural profession. But that still makes it possible to play good theatre if there are good actors, a good

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Natural law (as an argument to refuse positive laws) is usually referred to after major cataclysms, wars or genocides. The Hungarian hybrid regime is, however, not a genocidal totalitarian regime, but rather a tricky, corrupt hybrid regime that is gradually eroding the rule of law. In this regime, with exceptions, the formal legal rules meet the standards of Western constitutionalism →I.1. In other words, the hypothesis of revolutionary argument 3 not only does not happen to hold, but it *cannot* hold due to the operational logic of the regime known so far ("plausible deniability").

In order to understand Radbruch's irrelevance for the current Hungarian situation, it is worthwhile to consider not just one or two of his short writings,[136] but the context of his oeuvre. He created his own theory to deal with the past of the Nazi totalitarian genocidal dictatorship (immediately after the Second World War), not for a hybrid regime like Hungary now. The reference to Radbruch in the context of the Hungarian hybrid regime also indicates similar jurisprudential misunderstandings as the arguments about the right to resist discussed and refuted above →III.1.a)i. Indeed, the Radbruch formula does not provide legislative authority, but defines an exception for citizens and the judge from the application of an "unbearably" unjust norm.[137] Radbruch himself warned against the arbitrary nature of references to natural law that can endanger legal certainty, and therefore limits their scope only to the most extreme cases (giving as an example the complete denial of human rights).[138] If he were still alive, he would certainly be astonished that in the Hungarian context some people are trying to justify breaking legal continuity with him.[139] (But even if his teachings would fit the Hungarian situation, it is still not clear why the work of a deceased German legal philosopher would be decisive for us. Several other,

script and a good director.' See András Stumpf, 'A kétharmad nem törtszám – Interjú Sólyom Lászlóval', Heti Válasz 16 (21 April 2011).

136 See e.g., Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', Oxford Journal of Legal Studies 26 (2006), 1–11; Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)', Oxford Journal of Legal Studies 26 (2006) 13–15.

137 For details, with further references (considering Radbruch's arguments as a theory of adjudication) see Brian H Bix, 'Radbruch's Formula and Conceptual Analysis', American Journal of Jurisprudence (2011), 45–57.

138 On the issue of *Maßfrage* in Radbruch's work see e.g., Carsten Bäcker, *Gerechtigkeit im Rechtsstaat* (Tübingen: Mohr 2015), 69–83, with further references.

139 The currently best analyses on Radbruch's formula are the following: Martin Borowski (ed), *Modern German Non-Positivism. From Radbruch to Alexy* (Tübingen: Mohr Siebeck 2019). I would also recommend this classic piece in German to those interested: Horst Dreier, 'Gustav Radbruch und die Mauerschützen', Juristenzeitung (1997), 421–434.

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intellectually more exciting and more significant, legal philosophers (legal positivists or natural lawyers) could be named, who in different ways would say something different about such situations. But I would emphasise once again: in fact, Radbruch himself would most likely be doubtful about the applicability of his own natural law theory to Hungary.)

But applying natural law arguments to the Hungarian hybrid regime is not only disproportionate, it is in fact even a double-edged sword. I wonder what opposition politicians (some of whom are proposing to disregard the two-thirds majority rules by referring to natural law arguments) would say if Viktor Orbán, with a simple majority after the elections, did the same by referring to "justice" (which of course he himself would recognise alone)? Due to the nature of natural law arguments, he would obviously also be able to find such arguments (I would refrain from giving him specific ideas).[140]

iii. "Political practice based on the Fundamental Law is unacceptable to the extent that it allows disregarding two-thirds majority rules on moral/natural law/legitimacygrounds"

Revolutionary argument: *"A legal system in which this or that state organ (Constitutional Court, government, police, etc.) behaves in such a way does not conform to the principles of democracy and the rule of law. Therefore, we do not have to respect its rules."*

Rebuttal: Unfortunately, there are indeed serious problems with political practice in Hungary. However, the question of the rule of law and democracy is not binary, but gradual, and the Hungarian regime is in the intermediate grey zone (i.e. it is a hybrid regime →I.1). There are indeed outrageous cases, but we need an overall assessment, which is why various indices are used in political science and nowadays in legal scholarship as well to measure this.[141] The argument not only wrongly implies that the question is binary, but also implies that there is already a dictatorship in Hungary. However, this is factually not true at the moment.

Furthermore, Hungarian problems do not primarily stem from the rules of the legal system, but largely from the disregard of legal rules and from certain informal practices. In other words, the simplest way to improve the rule-of-law and democracy situation is to improve the observance (and enforcement) of the current rules, at least in the first round (and in some

140 The situation would be different if, after a lost election, Fidesz tried to retain power by force. In my opinion, the probability of this is very small, see below n. 149.

141 Jakab and Kirchmair (n. 3).

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cases lower rank rules in ordinary laws or government regulations could also be changed, instead of two-thirds majority rules).

iv. "Popular sovereignty is stronger than written law"

Revolutionary argument 1: *"If we tell the voters in advance that we will do this, then obtaining a simple majority is enough, because we will specifically receive our authorisation from our voters to disregard the two-thirds majority rules."*

Revolutionary argument 2: *"Referring to the constituent power of the people (via referendum) is always stronger than any written laws."*

Revolutionary argument 3: *"The incumbent Parliament is always sovereign, and cannot be bound by previous Parliaments."*

Revolutionary argument 4: *"If there is overwhelming social support, a revolution cannot be stopped by written legal rules."*

Rebuttal: The fact that we announce a violation of the law in advance ("we tell the voters in advance that we will do this") does not make the act in question legal. If, for example, our neighbour repeatedly makes a noise at an unlawfully high volume at night, it does not mean that we can smash his door (or his head) with an axe as punishment the next morning, even if we announce this to him in advance.

According to the current Hungarian constitutional rules, a political force receives the authorisation from the people to make a Constitution if it obtains enough votes to achieve a two-thirds majority in the Parliament.[142] From this point of view, it does not matter at all whether the new government is supported by 52 % or 62 % of the seats in the Parliament: what matters is whether they have 67 % of the seats (i.e. two-thirds majority in the Parliament). If there was truly "overwhelming social support" behind the revolutionary plans, then the opposition would achieve a two-thirds majority in the Parliament, and then there would be no need for a revolution in the legal sense (i.e. the revolutionary argument Nr. 4 implies false facts, or to put it differently, it does not satisfy its very own triggering condition).[143]

142 See above n. 130.

143 Tóka Gábor, 'Milyen parlamenti patkót ígérnek a közvélemény-kutatások? 3. rész: Nyerhet-e parlamenti többséget az ellenzék?', vox populi, 29 December 2019: 'Fidesz-KDNP can gain two-thirds majority of the seats in the parliament with a

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And if we say that the incumbent simple parliamentary majority can do anything, in case it is moral according to the majority's own interpretation (restoring democracy, etc.) and has requested authorisation in advance, then we actually deny the idea of a Constitution in the legal sense. In constitutional theory, this is a possible position (it is known as "democratic centralism" and was a central element in the constitutional doctrine of socialism),[144] and in the case of Western democracies, the idea of British parliamentary sovereignty is close to it (but this would also mean that, for the future, all new Parliaments, even a simple Fidesz majority would be legally just as unrestricted).[145] However, the moment of model change would undoubtedly be illegal under the current legal system. An additional referendum would not remedy the illegality of the constitution-making. Legally speaking, a referendum is not "more" but "different" than the two-thirds majority vote in the Parliament.

In the last couple of decades, it happened a few times in South America that the will of the people (as a natural law trump) was referred to as a reason for the open violation of positive constitutional rules. This is nothing more than overthrowing the entire constitutional system from the inside with openly illegal means in possession of government power. It is no coincidence that the Spanish term *autogolpe* is used for this also in the English-language literature.[146] Sometimes it is successful, as in Peru in 1992, and sometimes not, as in Guatemala in 1993.

With such a step, Hungary would, unfortunately, dig itself even deeper out of an already bad situation. The polarisation process that began in 1990 (which can be described as a negative self-reinforcing spiral) would

slightly smaller vote margin of 13 %, but the opposition would also only need a vote margin of over 14 % (say an opposition 55 %, Fidesz-KDNP 40 % vote distribution) to achieve a similar parliamentary superiority.' The text and the mathematical details can be downloaded here: <https://kozvelemeny.wordpress.com/2019/12/29/milyen-parlamenti-patkot-igernek-a-kozvelemeny-kutatasok-3-resz-nyerhet-e-parlamenti-tobbseget-az-ellenzek/>.

144 András Jakab and Miklós Hollán, 'Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary', Journal of East European Law (Columbia University) 2–3 (2004), 95–122 (104–108), with further references.

145 Following Dicey and Austin, see Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Oxford: Oxford University Press 1999); Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press 2004), 33–37.

146 See e.g., David Landau, 'Constituent Power and Constitution-Making in Latin America' in: Hanna Lerner and David Landau (eds), *Comparative Constitution-Making* (Edward Elgar Press 2019), 567–585.

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continue, during which those on the opposite side of the barricade cross new and new borders, previously thought to be impassable, citing violations of norms committed or believed to be committed by opponents.[147] We would create a precedent that could be called upon by the new winner at every parliamentary election in the future – possibly even citing exactly the revolution in question as something justifying a new future revolution again.

c) "From a practical political point of view, there is no other choice but to disregard certain two-thirds majority provisions"

i. "The Fiscal Council will overthrow the new government within a few months"

Revolutionary argument: *"The Fiscal Council will overthrow the new government within a few months. They themselves can cunningly/creatively calculate the increase in public debt necessary to veto the new budget. If we want to avoid this, we have to disregard certain two-thirds majority rules."*

Rebuttal: There is a good chance that Orbán's deep state will be unfriendly to the new government, and they might even take illegal steps in some cases (and thus make life difficult for the new government), but in the current constitutional system there is only one body that can formally overthrow the government: the Fiscal Council. However, fears about this are exaggerated, and the above revolutionary argument is mistaken in several ways. (1) Vetoing the yearly Budget Act is only possible according to Articles 36–37 of the Fundamental Law for one single reason: because of its public debt-increasing nature. Regarding the national debt calculation method, the relevant cardinal (Law CXCIV of 2011) refers to the relevant EU rules, i.e. the Fiscal Council cannot "cunningly/creatively" calculate the national debt. (2) If, in spite of everything, the Fiscal Council were to veto the budget (even though it would not actually increase the state debt -- and the Hungarian economy is not in recession, when the budget could even increase the debt), it would be illegal. Procedurally, after such an

147 In the end, the main question is not what kind of wrongdoing the other side has committed, but what kind of country we want to live in. A democrat, therefore, does not behave towards the opposition as they behaved towards him/her during his/her opposition days – but as s/he would like the current government to behave towards him/her as an opposition in the future.

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illegal Fiscal Council veto, the Parliament would presumably (referring to the illegality of the veto) still adopt the bill. The President of the Republic then has two options: (a) Either s/he can send it back to the Parliament for re-consideration [Article 6(5) of the Fundamental Law], but if the Parliament adopts the same, then s/he must sign it. (b) Or if s/he considers it unconstitutional, s/he sends it to the Constitutional Court, and in this case the Constitutional Court has 30 days to make a decision (Article 6(4) and (6) of the Fundamental Law). However, according to Article 37(4) of the Fundamental Law, the Constitutional Court does not currently have the authority to examine the yearly Budget Act (with the exception of one or two exceptional violations of fundamental rights, which are conceptually out of the question here). If the Constitutional Court were to examine the budget despite the obvious lack of competence (and would also judge the illegal Fiscal Council veto as legal), then Orbán's deep state would be breaking the legal continuity, i.e. the revolution in the legal sense would actually be triggered by Orbán's deep state →II.2. And a final remark: it is not possible to organise new elections with a government that considers the calling of elections illegal. But even if the new government were to organise this, it could be politically very risky for Orbán's forces and their illegal move could easily backfire at the polls.

ii. "The new government will not be able to do anything: the country will be ungovernable"

Revolutionary argument: *"So many things are entrenched in two-thirds majority rules, or in the hands of deep state officials who are protected by two-thirds majority rules (who will obviously sabotage everything), that it will simply be impossible to govern (the country becomes ungovernable). In essence, the new government will be unable to act: it will be a lame duck. If we want to avoid this, we have to disregard certain two-thirds majority rules."*

Rebuttal: The situation of the new government will be difficult indeed. There are indeed some (specifically public policy) subject areas that should be in a simple majority legislative competence because their being subject to two-thirds majority rules weakens democratic political accountability structures.[148] And the deep state officials will probably really not sympathise

148 András Stumpf, 'Ilyet az MSZMP művelt – Jakab András a fideszes vagyonátmentés indokolhatatlanságáról', valasz online, 28 April 2021, <https://www.valaszonline.hu

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with the new government (by publicly threatening them that they will be replaced illegally only makes this worse). The Hungarian hybrid regime has also made a conscious effort to lower the stakes of the elections.[149]

However, it is factually not true that the new government and the simple parliamentary majority cannot do anything. The majority of public administration positions (such as the police, the military, secret services, ministerial bureaucracy, county-level government offices, etc.) will be under their control (with the right to replace high officials, and give them orders and instructions). Simple majority laws (including the yearly Budget Act, tax laws etc.) and government decrees can regulate the vast majority of subject areas. It is theoretically conceivable that one day we will get to the point where the competences of the simple parliamentary majority and the government will really be emptied.[150] But at the time of writing this study, we are certainly not there yet. The stakes of the parliamentary election are still very high (even with the maintenance of legal continuity).

Supporters of breaking legal continuity do not define the concept of "governability", yet they place this amorphous goal above all else, which would sanctify even breaking legal continuity. What would be the point at which "ungovernability" is realised? If the Constitutional Court annuls a law (which would really be its task in the given case), then can we establish "ungovernability"?

Furthermore, we currently do not and cannot know exactly how the deep state will actually function if Orbán were to be forced into opposition. This will also depend on compliance with certain informal norms and expectations. There is indeed an effort on the part of the current government to

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149 From the point of view of electoral fraud (including holding on to power despite losing the election), entrenching more and more issues in two-thirds majority rules is actually a good sign. This indicates that Orbán is counting on the possibility of losing the parliamentary majority as a realistic chance, i.e. a massive Belarusian-style election fraud is not expected. This also follows from the nature of the regime →I.1: it pays attention to appearances ("plausible deniability"), but many unfair (and partially illegal) tricks can be expected, i.e. we can expect in Hungary "free but not fair" elections in the future.

150 However, overdoing this could also be risky for Orbán, as this could make it difficult to operate the power machinery (perhaps not immediately, but in the medium term) if Fidesz only obtained a simple majority. This would only be rational on their part if they were sure of losing the elections – however, at the moment of closing the manuscript, this is by no means the case.

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build a deep state, but I dare say it will work less effectively than they hope. The unconditional loyalty of the deep state officials is far from certain if the political gravitational field changes (strategic defection).[151] In any case, the opposition at least needs to give it a try to play along the rules.

iii. "The remnants of the hybrid regime must be wiped out as long as we have the impetus (i.e. we have to act quickly)"

Revolutionary argument: "*The remnants of the hybrid regime must be wiped out as long as we have the impetus (i.e. we have to act quickly), because if we wait, the new democratic coalition might fall apart due to internal struggles and Orbán's hybrid regime will continue.*"

Rebuttal: By itself, "impetus" is of no use. Rushing into chaos and street violence out of impetus is not a good idea, even if the alternative is cumbersome governance. And the fact that the governing coalition is breaking up due to internal struggles is absolutely no reason to break legal continuity. One cannot ignore the absurdity of this argument: it is no longer Orbán's conspiracy to build a deep state, but the clumsiness and internal struggles of the new democratic coalition that would justify the breaking of legal continuity (i.e. the democratic coalition's own potential mistakes would be used as a justification for the revolution).

iv. "If Fidesz refuses to participate in the process of making a new constitution after the elections, then it proves its bad faith"

Revolutionary argument: "*If Fidesz refuses to participate in the process of making a new Constitution after the elections, it proves its bad faith. Consequently, after Fidesz rejects a good faith invitation to participate in the process, Fidesz's Fundamental Law can be replaced, even illegally.*"

Rebuttal: First, the main problem is not the rules of the Fundamental Law. Second, an *ultimatum* to Orbán's supporters ("if you do not cooperate in the legal replacement of the Fundamental Law, then we will do it illegally anyway, also without you") would be such an aggressive and unnecessary threat that would certainly increase the already pathologically high level of polarisation. It is not clear why Fidesz would cooperate with such an ag-

151 For details about similar situations with examples from Argentina see Gretchen Helmke, 'The Logic of Strategic Defection: Court–Executive Relations in Argentina under Dictatorship and Democracy', American Political Science Review (2002), 291–303.

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gressive new government that threatens illegally dismantling the two-thirds majority rules and replacing the deep state officials who sympathise with Fidesz. If someone shouts in front of the door, "open the door on request, otherwise I'll break in by force", then the rational behaviour is "I'm definitely not opening it, I'll lock it and even barricade it". Such a brutal threat would push the chance of a new Constitution into the even more distant future, and even make it impossible for the foreseeable future. And if the new Constitution were to succeed in the end, it would be just another "anti-Fundamental Law" and not a common Constitution for the nation as a whole.

At the end of the day, this would only be an insincere ritual pretending to involve Fidesz, which would show that "we tried", but in fact the argument is actually the same as the one discussed above in point III.1.c)ii.

d) "Several excellent constitutions (which conform to high standards of the rule of law and democracy) have been adopted procedurally illegally in foreign constitutional history"

Revolutionary argument: *"New Constitutions in world history have usually been adopted illegally. This is completely normal, nothing to see here. We will just do the same."*

Rebuttal: Indeed, constitution-making processes have often taken place around the world in an illegal manner.[152] In fact, some of the constitutions born in this way have been particularly successful (and conform to requirements of democracy and the rule of law). But I specifically dispute that in the current Hungarian situation this would be a sensible way to go.

In Hungary, there was no cataclysm, collapse, loss of a war or street revolution that overthrew a dictatorship, after which you would draft a new Constitution. The hypothetical context of the debate (and this paper) is exactly the opposite: some would try to break legal continuity in order to overthrow an existing legal order – in a situation in which a significant part of the electorate would explicitly and possibly even violently oppose this. In addition, the maintenance of (old) legality would be supported by a well-organised political force. In such a situation, the unilateral and illegal imposition of a new Constitution would lead to increased polarisation and

152 See e.g., Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford: Oxford University Press 2016).

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likely to chaos and street violence. I will detail these specific procedural issues and dangers below →III.2.

2. What the supporters of a revolution can not or do not want to answer: questions about concrete procedural steps and the social costs of a revolution

Revolutionary plans (adopting two-thirds majority rules with a simple majority) are mistaken not only because they are unconvincingly justified →III.1, but also because of what they do not contain. It is not clear what specific procedural steps (when, how, by whom etc) could be taken to implement these ideas, what could be done in response to the expected reactions of other constitutional organs, and how chaos and street violence could be avoided.[153] Only some fragments of the plan have emerged and these fragments were not realistic, such as the idea of a revolution to be announced solemnly on the very first day of the new Parliament's session. Verbal radicalism, moral posturing and philosophical expositions cover up the lack of both practical feasibility and thoroughly considered small print.

Hungarian politics is sick, and the Orbán regime plays a very important (negative) role in this. But the problem is not only with the Orbán regime: if it were to end suddenly tomorrow, Hungary's problems would not be solved either, since they are based on a culture that is unfavourable for democracy and the rule of law (the regime can also be explained to a large extent by this culture →I.3). The revolutionary brainstorming is very similar to the situation when a patient turns to "quack doctors" promoting unorthodox methods in the hope of a sudden, miraculous recovery. However, as with severe sicknesses often, there is no quick cure here, and this kind of "cure" can actually cause even more damage than the original underlying disease.

153 On the question of which provisions of the Fundamental Law and cardinal laws are incompatible with constitutional democracy, a consensus can probably be reached within the opposition between supporters and opponents of breaking legal continuity. There are enough constitutional experts in Hungary who could draft relatively quickly a new Constitution, for such a draft see e.g., Jakab (note 63), 70–163. The bigger challenge is rather what procedural steps can be taken to *peacefully* create a functioning and effective new Constitution. This is one of the key issues where (within the democratic opposition) opponents of the revolution disagree with proponents of the revolution.

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a) The legal form of the parliamentary decision, the signature of the President, and publication in the Hungarian Gazette

First of all, it is not clear what exactly would be the legal form of a (simple majority) parliamentary decision that would formally disregard the two-thirds majority rules. All parliamentary laws and constitutional amendments must be signed by the President of the Republic [Article S(3) and Article 6(3) of the Fundamental Law]. The President will obviously not sign the constitutional amendment or the parliamentary law repealing two-thirds majority rules by simple majority, and will send the bill to the Constitutional Court – and rightly so. This means that the law or the constitutional amendment cannot even be published in the Hungarian Gazette, i.e. it would not become a valid legal rule. If, for some reason, the publication hurdle could be overcome (e.g. the new government would publish the norm in the Hungarian Gazette without the signature of the President, i.e. illegally), then the rule would certainly be challenged before the Constitutional Court within the shortest possible time (fifty MPs, the president of the Kúria, the chief prosecutor or the ombudsman would all have the standing to challenge it), and the Constitutional Court would certainly establish the unconstitutionality with extreme speed. Rightly so, again.

In the event that the form of the decision was a so-called parliamentary normative decision not requiring the signature of the President of the Republic (this is an internal legal act, it cannot have external legal effects, see section 23 Act of Legislation), the Constitutional Court would say so with similar speed, that it has no legal effect outside the organisation of the Parliament. And finally, if it is a solemn political declaration (according to section 82 Standing Order of the Parliament), then it cannot have any legal effect whatsoever.[154]

From the point of view of the mentioned procedural problems, it does not matter whether we talk about disregarding a provision of the Funda-

154 There has already been such a revolutionary political declaration: *1/2010. (VI. 16.) OGY parliamentary political declaration on National Cooperation*. Orbán's hybrid regime began in this way in 2010 with a solemn parliamentary political declaration (in addition, of course, the declaration ended the corrupt past and promised a bright future): 'In the spring of 2010, the Hungarian nation gathered its strength again and carried out a successful revolution in the voting booths. The Parliament declares hereby that it recognizes and respects this revolution fought within the constitutional framework. ...'. Legally, there are of course no obstacles to such symbolic solemn declarations, but they also have no legal effect whatsoever.

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mental Law or a provision of a cardinal law by a simple majority. Just as it does not matter whether the rules in question are formally repealed, annulled, declared null or their application suspended (whether for a short or long time). Although some of the categories are doctrinally mistaken (declaring certain two-thirds majority rules or the entire Fundamental Law "null and void" →III.1.a)v.) or linguistically unusual (e.g., in the case of legislation, "annulment" is usually reserved for acts by the Constitutional Court), but the meaning of the parliamentary decision would still be clear, and (if the new democratic parliamentary majority really wanted to achieve an external legal effect, then) the unconstitutionality of the parliamentary decision would also be obvious.

b) The Constitutional Court

It is also not clear how the supporters of breaking legal continuity plan to handle the expected reaction of the Constitutional Court. If they simply refuse to publish the court's decisions in the Hungarian Gazette (this was, for example, PiS's method for deactivating the Polish Constitutional Court), the Hungarian Constitutional Court would certainly publish the decisions on its own website in the same way (if the government shut down the court's website, then the court could quickly create a new website, or you could even send the decisions to ordinary courts, government offices, etc. in a round-email – in an endless cat-and-mouse game).

In case the government decides to close down Constitutional Court building, then this would be of course illegal, and even the issuance and execution of such an order raises the possibility of a 'crime against the state' (since a necessary element of the order is the "threat of violence", cf. section 254 of the Criminal Code), and on the part of government members and police leaders, who participate in the decision, also an 'abuse of office' (section 305 of the Criminal Code). By the way, it doesn't really help if the government closes the building of the Constitutional Court with the police, since then the body can even make decisions while sitting in a private apartment.[155] Of course, further similar scenarios can be invented up to the point of arresting constitutional judges, although there would really be no legal basis for this, and the issuance and execution of the relevant order

155 It would be possible even by video conference, see section 48/A of the Act on the Constitutional Court: 'The full session of the Constitutional Court, as well as the session of a chamber, can also be held using an electronic communication device

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would constitute the above-mentioned crimes. In the case of these crimes, the prosecution services (which are in Hungary an agency organisationally independent from the government) would obviously take action against the new government (and this action would be entirely legal). Moreover, due to the risk of committing further crimes while not arrested, the arrest would be justified against those issuing revolutionary orders [Section 276(2)(cb) Criminal Procedural Code].

I have not yet come across any proposal solving these problems by supporters of breaking legal continuity. Complete legal uncertainty would erupt among law enforcement agencies, the majority of ordinary courts and prosecutors would probably side with the Constitutional Court, and the majority of those working in the central state administration (because of the chain of command in the police etc) would side with the new government – but islands (enclaves) would probably occur on both sides.[156] I will return to the question of the police below →III.2.c) Practicing lawyers and private persons/companies would consider different rules as authoritative depending on which law enforcement agency follows which legal order. The result of such an action would ultimately be that two parallel legal systems would emerge in Hungary. There would be overlaps in many places (e.g., company law, civil procedure law, inheritance law, consumer protection law), but in constitutional law very significant differences between the two legal systems would emerge within weeks.[157]

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if the President [of the Constitutional Court] decides so.' This was actually the practice during the Covid epidemic.

156 The Orbán regime also anticipates a possible violent mass demonstration scenario (either in connection with the elections or in a situation that is the subject of this study): Law CXXXIV of 2021 amended the Section 256(1) of the Criminal Code. Since 1 March 2022, the definition of "rebellion" has been expanded to protect also the Constitutional Court: 'Whoever participates in a mass disturbance, the direct purpose of which is [...] e) to obstruct the Constitutional Court in the exercise of its powers defined in the Fundamental Law by force or by threat of force, or to force it to take action, shall be punishable by imprisonment from two to eight years for a felony.' According to the official explanatory notes to the bill, the Constitutional Court itself initiated the amendment. In the case of rebellion, the Criminal Code also order the 'preparation of rebellion' to be punished [section 256(3) Criminal Code].

157 Due to the existence of a Constitutional Court and its judicial review, there is no such thing as 'breaking the legal continuity just a little bit' (i.e. we cannot limit the illegality of the transition just to a few provisions of some cardinal laws or of the Fundamental Law). If legal continuity breaks even just a little bit, then for this to be successful, the Constitutional Court protecting the hierarchy of norms must also

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c) The duplication of the legal system: conflict between law enforcement agencies and chaos

The greatest danger in revolutionary ideas is the doubling of the legal system and the fact that it will not be clear to law enforcement agencies which one to follow (or one part of them will follow this, and another part will follow that).

The idea (mentioned by some supporters of breaking legal continuity) that a "parallel" chief prosecutor should be appointed is also a clear sign of confusion concerning practicalities. It remains unclear why subordinate prosecutors would accept this. Such an appointment could only happen in an unconstitutional law with a simple majority (and we have already arrived at the question of what to do with the Constitutional Court →III.2.b)). If we were to set up a complete second organisation of prosecuting services in parallel, then it remains unclear which prosecutors will be able to bring charges in criminal cases. If the courts do not accept the indictments of the "revolutionary prosecuting services", then a "revolutionary court" system may also become necessary. And, of course, the most dangerous aspect: if different police units are facing each other (one following the revolutionary legal system, the other following the old legal order), it is not clear what kind of *peaceful* conflict resolution method could be applied to the situation.

The main danger is not that the population would take up arms in such a conflict situation. The danger is that some of the armed state agencies (police, military and secret service) stand on the opposite side of the conflict, following two separate and partially opposing legal systems. According to the old legal order, the new government and the new police leadership[158] are punishable under section 254 of the Criminal Code (because they give orders for physical coercion, thus the "threat of violence" element of the

be switched off, which, however, is only possible by switching off the prosecuting services, etc. In political practice, it is, therefore, possible to try to contain the escalation (but due to the unpredictability, this can only be contained to a limited extent, which is why it is dangerous and irresponsible to trigger it →III.2.c)), but doctrinally, the interruption of legal continuity is conceptually binary.

158 Some supporters of the interruption of legal continuity argue that the legal revolution must be launched on the very first day of the newly elected Parliament. Others would, however, wait for a later, "appropriate" moment. Legally there is no difference between the two. In practice, however, the difference is whether the acting police chiefs were appointed by the Orbán regime or by the new government.

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crime is realised), on the other hand, according to the new legal order, officials of Orbán's deep state commit the same crime.

If the new (actually illegal, i.e. according to the old legal order: fake) prosecuting services ordered an arrest, it would be a crime (depending on the specific organisational position of the prosecutor according to section 194, 304 or 305 of the Criminal Code). And very soon, the motion to arrest the new "alternative" chief prosecutor would arrive at the court from the "real" (original) prosecuting services. Legally speaking, rightly so.

d) Organising a referendum

The above problems cannot be solved by the referendum either. First of all, according to the legal rules currently in force, it is not possible to organise a referendum on amendments to the Fundamental Law or on a new Constitution →III.1.a)viii., and this rule itself can only be changed by a two-thirds vote (the ban is old, not from the Orbán regime).[159] Therefore, it would be possible to organise a referendum only after the legal continuity has already been broken (i.e. to "remedy" the illegality), but practical problems and, in all likelihood, violent situations would arise even before it could be held. Moreover, in polarised societies (like the Hungarian one), referendums with their binary choices are likely to increase polarisation and escalate the conflict.[160]

e) Weighing costs and benefits: potential number of victims, setting a precedent, increasing polarisation

The public figures who support the revolutionary proposals have either not played through the individual steps in their heads, or they do not honestly reveal to the public that this plan will predictably lead to violence. The

159 Constitutional Court decisions 2/1993. (I. 22.) AB, 52/1997. (X. 14.) AB.

160 The polarizing effect can best be avoided if there is a consensus among the relevant political actors, and the referendum can be experienced as a nationwide ritual (rather than a sharp decision), as happened in the case of Hungary's EU and NATO accession. On the basis of the Swiss experience, on the potential polarising effect of referendums (and the responsibility of political elites in this regard), see Wolf Linder and Sean Mueller, *Swiss Democracy. Possible Solutions to Conflict in Multicultural Societies* (4th edn, Cham: Palgrave 2021), 156–158.

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revolutionary road is actually a scenario for heating up the polarised politics into physical violence, for venting the accumulated emotions. Scenes that seem unimaginable at the moment would await Hungary, such as we have seen in Kiev and Tbilisi in recent years. In the heightened mood after elections, in highly polarised public life, with well-organised and significant mass support, to act against legally independent institutions with an *illegal* constitutional reform or constitution-making (in the current state of the Hungarian legal system and according to our current knowledge) would be a dangerous, unnecessary and irresponsible mistake.[161]

Moreover, we cannot even be sure that the revolutionary government would win the violent street conflict. But even if they did win, it wouldn't be worth it considering the overall social costs and benefits. I wonder how much of a sacrifice it is worth, according to the supporters of breaking the legal continuity, to replace the chief prosecutor? Or does it cost what it costs?

It is also worth considering that such a step could easily have a precedent-setting effect. In the future, the possibility would arise essentially after every change of government. (The content of the justification for the revolution is still lacking →III.1, and such low-quality arguments can be fabricated at any time for anything. Let's say that against the now planned "illegal revolution", the idea of a pro-Orbán counter-revolutionary "restoration of the rule of law" could also emerge.) Do we want to pay the social costs for this also?

And finally, it is also worth considering that a unilateral revolutionary constitution-making attempt, whether it succeeds or not, would significantly increase the already abnormally high level of polarisation in Hungary. Moreover, the public discourse about it, the threat of it, in itself (without actually happening) has already the effect of increasing polarization →IIi.1.c)iv.

161 Therefore, it would be a rather weak answer to our concern that a civil war did not break out when Fidesz eroded Hungarian democracy. It was basically *legal* →I.1, it took place in small steps, and there was no unified and well-organised opponent on the other side.

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3. Typical logical problems in revolutionary arguments

a) Stepping out of the legal system, stepping into the legal system

There is a serious internal contradiction in the proposals supporting the interruption of legal continuity. On the one hand, they want to come to power (to win an election, to take office) according to the legal rules currently in force, but on the other hand, they want to abandon the legal system (or selectively certain parts of it) from the position of power. In terms of its structure, this instrumental understanding of the legal order sadly reminds us of what Turkish President Erdogan said about democracy when he was mayor of Istanbul: "Democracy is like a tram. You ride it until you arrive at your destination, then you step off"[162] In other words, we use the institutional system of modern constitutionalism as long as it helps our goals, after which we move on.

It would be a possible principled position if someone considered the current legal order to be so reprehensible (unjust, anti-democratic, illegitimate, etc.) that he does not accept it as a valid legal system (see natural law approaches →III.1.b) above). But some opposition politicians still consider the current legal order to be valid, since they are running for offices in elections, exercising their mandate as MPs or mayors, collecting their salaries, or even submitting motions to the Constitutional Court.[163] In light of this, it is very problematic to say they actually consider some of the basic rules of the legal system to be invalid. Of course, the practical considerations are clear: starting a revolution from the opposition is much more risky, and gaining full (or in other words: exclusive) power from a government position is easier. However, this approach is not principled, it rather reminds us of the hyper-pragmatism of the Orbán regime, in which logical problems do not matter, and depending on our position of power,

162 Ozan O. Varol, 'Stealth Authoritarianism in Turkey' in: Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press 2018), 339.

163 According to the website of the Constitutional Court: <https://www.alkotmanybirosag.hu/ugykereso>, e.g., in 2021 there were five Constitutional Court decisions that were initiated by a quarter of all MPs. Submitting a motion implicitly acknowledges the validity of the relevant rules on the part of the signatories. For an empirical analysis of the MPs' motions to the Constitutional Court between 2012–2020 see Kazai Viktor Zoltán and Karsai Dániel, 'Ellenzéki petíciók az Alkotmánybíróság gyakorlatában', *Fundamentum* (2020), 60–75.

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any time the exact opposite can be said of what we said yesterday. In other words, if we accept this, then the basic logic is primarily the Schmittian "us vs. them".[164] Certain logics should, however, not be learned from the Orbán regime if the ambition is to build a better country.

b) Orbán's deep state is both strong and weak

According to the revolutionary plans, Orbán's deep state is a very curious entity that is both strong and weak at the same time. It is strong, as even from an opposition position it can overthrow the new government, while it is also pretty weak, as it cannot prevent the *illegal* adoption of new two-thirds majority rules. I don't rule out that there is an explanation for this, but I haven't seen one yet.

c) We will not tell you the procedural details of how we plan to disregard the two-thirds majority rules, so that Fidesz does not build up new two-thirds majority defences against our plan

Sometimes it is also said that the supporters of breaking legal continuity do not say more about the procedural details of how they are planning to deactivate the two-thirds majority rules, because this would allow the Orbán regime to pre-emptively build up new two-thirds majority defences to protect the deep state. This makes no sense: if we want to disregard the two-thirds majority rules, then by definition it is not possible to protect them with more two-thirds majority rules. Keeping the list of exact legislative changes a secret is only worthwhile if you want to stay within the legal framework (as this chapter is based on), since the entrenchment into two-thirds majority rules is only an obstacle if you want to stay legal.

Of course, it can be said that we are not giving out details of our plan so that Fidesz cannot prepare, but this preparation cannot, by definition, mean entrenchment by two-thirds majority rules. However, since certain procedural fragments have already leaked out (and they are not convincing at all →III.2), it can be assumed that the concrete, practical steps of the revolution are not known because they are not feasible. In other words, the

164 Beáta Bakó, 'Újraírni, vagy csak betarta(t)ni kellene az Alaptörvényt a NER után?', Közjogi Szemle (2021), 59–66, (60).

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claim of the supporters of the interruption of legal continuity that "we are being secretive about the plan so that Fidesz cannot prepare with further two-thirds majority rules" actually serves to cover up their bewilderment. There is no hidden plan (only incoherent fragments), because no peaceful plan is possible in the Hungarian context if you want to break legal continuity. Of course, I wouldn't even dare to think that anyone would plan violence.

d) We advise the public and the politicians on how to organise the transition – but we only talk about philosophical foundations, without the question of practical feasibility

Sometimes the proponents of breaking legal continuity deflect questions about practical implementation by saying that it is not their task, because they are only interested in the theoretical foundations (philosophical questions, etc.). There is no problem with such an approach in itself, but then why are they trying to advise the public and politicians on what to do? This is an eminently practical question.[165]

e) Problems related to the timing of the revolution: having it early is not smart, having it late is not useful

At first, the supporters of breaking the legal continuity said that they would announce a "revolution in the legal sense" on the very first day of the new Parliament →III.2. However, the practical impossibility of this plan quickly became clear even to the most bewildered supporters: the new government

165 This attitude is similar to what Georg Lukács described a hundred years ago: 'It is not our intention here to deal with the possibilities of the practical feasibility of [...], nor the beneficial or harmful consequences of its possible coming to power. Apart from the fact that the writer of these lines does not feel at all competent to decide such questions, it seems appropriate for once, for the sake of the clarity of the question, to completely disregard the consideration of the practical consequences: the decision is anyway – as in all important questions – of a moral nature, the immanent clarification of which, precisely from the point of view of pure action, it is a top priority task.' For example, "revolution" or something else can be substituted in the underlined part. For the original text, see Lukács György, 'A bolsevizmus mint erkölcsi probléma', Szabadgondolat (1918), <https://www.marxists.org/magyar/archive/lukacs/bmep.htm>.

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must take office (the full handover process takes several months), obviously there would be a change of leadership at the police, secret services, etc. If they also wanted to organise a referendum (which, by the way, cannot legally be done on constitutional amendments or on a new Constitution →III.1.a)viii., but possibly on some relevant issue, for example anti-corruption measures), the procedural and logistical preparation for that could be measured in several months. However, if the new democratic government was not overthrown by Orbán's deep state during these several months, there is probably no need for a revolution to protect against it anyway. We have not yet received a convincing explanation for this time paradox either.

f) The deep state officials are all fanatical blind followers of Orbán, but we will quickly convince the Fidesz voters with rational arguments that they should participate in our constitution-making process (against the Fidesz that they voted for)

Supporters of breaking the legal continuity usually paint various deep state officials as if they blindly follow Viktor Orbán to the bitter end. At the same time, they plan to involve Fidesz voters in the drafting of the new Constitution – Fidesz voters are supposed to be convinced by rational arguments that it will be good for them to get involved in innovative forms of popular participation for the sake of the country.

However, I believe it is exactly the other way around.

(1) A very significant part of the deep state officials actually do not believe in the Orbán regime[166] and are only temporarily loyal to it out of self-interest (the role of former communist secret agents in the current regime, as well as maintaining the secrecy of communist secret services lists, is not a coincidence).[167] In any given case, most of them ("strategic defectors" →III.1.c)ii.) would be willing to move on from the old networks of the Orbán regime without any problems (not suddenly, but gradually). Some of them would not even experience this as a swap via cognitive dissonance reduction mechanisms – and this should be welcomed for the sake of a peaceful transition (we do not and cannot know the exact proportions in advance).

166 This is an important difference between Poland and Hungary that many Western observers fail to recognise →6.

167 Krisztián Ungváry, *A szembenézés hiánya* (Budapest: Jaffa 2017).

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(2) However, a very significant part of Orbán's voters really believe almost anything that the regime propaganda tells them, sometimes even despite their own everyday experiences. The closer one sees the reality of the cynical and kleptocratic operation of the Orbán regime, the less one can believe in its moral character. In any case, it does not seem realistic that the already extremely distrustful Fidesz voters would be willing to participate in an illegitimate constitution-making (and this distrust would actually be rational on their part →III.1.c)iv.).

IV. General Questions

1. Can the rule of law only be built in a process conforming with the rule of law?

Although this question has already been raised in this paper, it is worth summarising here my opinion concerning the famous 1992 dictum of the Constitutional Court, according to which "[t]he rule of law cannot be implemented through violation of the rule of law (especially of legal certainty)".[168]

In order to answer this question, we should break it down into three sub-questions: (1) Is it theoretically possible to build a rule of law with steps that are (partially) illegal? (2) Is it necessary to break the legal continuity (i.e. to organise a revolution in the legal sense) in order to dismantle the Orbán regime? (3) Is breaking legal continuity a possible scenario during the dismantling of the Orbán regime?

Ad (1). The answer to the first sub-question: yes, it is *theoretically* possible to build a rule of law with steps that are (partially) illegal. In other words, the Hungarian Constitutional Court's classic statement that the rule of law can only be built with rule of law instruments is not entirely correct. Historically, there are many examples of this, in fact, a significant part of the successful Western Constitutions were created illegally →III.1.d) And of

168 For a detailed critical analysis of the decision see András Jakab, 'Decision 11/1992. (III. 5.) AB – Retroactive Transitional Justice' in: Gárdos-Orosz and Zakariás (n. 75), 85–102.

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course counter-examples can be collected in a good number where illegality eventually resulted in a non-democratic regime.[169]

Ad (2). The answer to the second sub-question: it is not (more precisely: probably and hopefully not) necessary to break legal continuity (i.e. organising a revolution in the legal sense) to dismantle the Orbán regime. The Orbán regime is basically not built by laws but by informal practices →I.1, and I think the deep state will be much less effective than many people believe (they fear or hope →III.1.c)ii.). And if, later on, if the public mood changes, and a strong majority of the country believes that the Orbán regime will not return (e.g., following additional elections, parliamentary, municipal or European Parliament), then the deep state will wither away. Dismantling the Orbán regime is a multi-stage process →II.1., the real challenge is to prevent another hybrid regime from being built (with different rhetoric, with different people).

Ad (3). And finally, the answer to the third sub-question: yes, it is possible to imagine a break in legal continuity during the dismantling of the Orbán regime, but this should be avoided if possible. If it cannot be avoided, then the representatives of Orbán's deep state must clearly bear the responsibility for this (e.g., by trying to unlawfully overthrow the new government). In other words, breaking legal continuity requires more than the democratic legitimacy obtained in the elections, as the opposition parties cannot conceptually request/receive authorisation for this in elections →III.1.b)iv.

2. Legal academia and politics: tasks and responsibilities of legal scholars

According to my personal experience (I admit: this is not representative in a sociological sense), Hungarian constitutional lawyers are much less divided on the issue of the possible interruption of legal continuity than it might seem to the Hungarian public. I myself perceive that even among colleagues who are very critical of the Orbán regime, there is a significant

169 See e.g., Dmitry Kurnosov, 'Beware of the Bulldozer: What We Can Learn from Russia's 1993 Extra-Constitutional Constitution-Making', Verfassungsblog, 7 January 2022, <https://verfassungsblog.de/beware-of-the-bulldozer/>: 'Today we are used to seeing Russia as an example of an authoritarian constitutional structure, especially since last year's amendments that removed most of the liberal pretense. It is easy to forget that initially the country's basic law has been the outcome of extra-constitutional constitution-making (in 1993) that emphasized popular sovereignty, democracy, and human rights.'

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majority of those who hold views close to what is being said in this chapter (i.e., who are fundamentally sceptical of revolutionary arguments).

Constitutional lawyers' opinion has recently become interesting for the (remainders of free) press, and it feels like having a national brainstorming, in which not only lawyers without specific expertise in constitutional law, but also completely everyday people participate. This is partly gratifying, but partly the wildest (often factually false) thoughts reach the public unfiltered, disguised as professional opinion. In such a situation, professionals have a patriotic duty to speak up, and this motivated also the writing of this study. Nevertheless, the institutional environment of a hybrid regime unfortunately makes it understandable if several experts actually stay silent.[170]

3. Polarisation as part of the cultural problem

One of the most serious problems in Hungarian public life is extreme polarisation. This not only creates a bad mood, makes citizens less rational and bewilders them (although these would be big enough problems in themselves), but also damages democratic accountability structures. If the other side is the devil himself, then the vices of one's own side must be swallowed. But in a democracy, political accountability is about if the politicians are dishonest (or just plain clumsy), then we replace them during the elections. However, if there is a tribalistic war, if Schmittian "us vs. them" fight is going on, then the embezzling a few million (hundred million or even billion) forints does not seem such a terrible act anymore. After all, this is still better than "them" being/staying in power.

The Orbán regime itself largely feeds on this polarisation:[171] it demonises the current opposition (or György Soros, the EU, etc., whose "agent" the opposition is). Pushing the agenda of identity politics issues instead of public policy issues is a conscious effort to strengthen polarisation and to divert attention from real government performance and corruption (i.e. to immunise against performance measurement, thereby destroying democratic accountability). Ideological polarisation is a *tool* in the hands of the

170 András Jakab, 'Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country', Verfassungsblog, 15 July 2020,<https://verfassungsblog.de/moral-dilemmas-of-teaching-constitutional-law-in-an-autocratizing-country/>.

171 This is generally characteristic for populist regimes, see the Turkish example: F. Michael Wuthrich and Melvyn Ingleby, 'Pushback against Populism: Running on 'Radical Love' in Turkey', Journal of Democracy 31 (2020), 24–40.

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Orbán regime, even though the Orbán regime itself is not ideological in nature →I.3.

However, this polarization logic characterises also the opposition and even the Hungarian debates on the restoration of constitutional democracy. This includes, e.g., the description of the regime as a dictatorship (a symptom of this could be the ambiguous terminology of "authoritarian" or "autocrat" instead of the clearer "hybrid regime" →I.1), so that the exaggerated negatives of the Orbán regime can justify the planned illegal revolutionary steps. In the name of the fight against the dictatorship, legally unlimited power can be claimed in the elections for the "definitive and complete defeat" of the other side. This is why the deep state now becomes a fanatical army →III.3.f), even though these are obviously fallible people who unfortunately made bad moral choices at critical moments (but their loyalty to the Orbán regime is far from unlimited and unconditional).

Following James Madison, we usually say that Constitutions are based on the idea that men are neither angels nor devils.[172] The promise of "give me unlimited power, I won't abuse it in the slightest" usually doesn't end well (although many of the supporters of discontinuing legal continuity actually imply exactly this), because we are all fallible. We should not assume that everyone in the group opposite us is a quarrelsome villain or perhaps a marionette figure. If public life is dominated by Manichean thinking, according to which "we" are morally angels, while "they" are morally hellish, then it doesn't matter what kind of clever constitutional text we draft, whether adopted legally or illegally, it won't work. It is therefore important to emphasise that the logic of hatred is not "the nature of politics", but merely a specific (harmful) political practice of current Hungarian politics.[173]

172 Madison originally spoke of the government, see Federalist Nr 51: 'If Men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.'

173 Politics is *not* primarily about gaining power ("us vs. them" fight →III.1.c)iii.), but about the common good. Unfortunately, the various revolutionary proposals in their current form ultimately do not serve the public good: they lead to further polarisation (referendums, for example, are tools for further polarisation →III.2.d)), and their expected social costs exceed their social gains →III.2.e). And horribly boring, frustrating, slow and complicated legal procedures are still the relatively best way to find the common good. As an alternative, you can of course imagine

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A direct consequence of this Schmittian approach is the logic that a simple majority is apparently enough for "us" to amend the Constitution, but not even two-thirds majority is enough for "them". However, if the described procedural rules do not matter anyway, then ad absurdum actually a simple majority would not even be necessary: it would be enough to "announce" the new constitutional rules that we consider ideal. Moreover, one should not even win an election, since it is not possible to obtain legitimate power from the illegitimate procedures of an illegitimate regime anyway→III.3.a).

Unfortunately, the political situation and the public mood in Hungary are so polarised and feverish to such an extent that no matter what happens in the next elections (whether the incumbent party wins or not), further escalation is in the air. That is (also) why we should not inflame the tempers with half-baked revolutionary proposals.

4. Optimism and pessimism in public speaking/writing

A public speech, an interview, an op-ed, or, as in the case of this article, the publication of a study intended for public opinion are actually all political actions that not only describe but also shape their subject. If someone writes about – and especially if this remains on the agenda – what the worst case scenario is, that person inflames the tempers of his/her own camp. And if s/he writes about how brutally (and illegally) s/he would act against the other side, then s/he inflames the tempers of the other side. In other words, publicly voiced pessimism and negative expectations regarding the escalation of the conflict also strengthen polarisation and are partially self-fulfilling. One of the country's most important problems is precisely the increasing degree of polarisation →IV.3. Instead of complaining about the worst case scenario and scaring yourself with it (the probability of which, in my opinion, is overestimated anyway), the discourse should be focused on the possibilities (and not complaining about what cannot be done). These considerations also played a role in how I wrote the original Hungarian version of this paper.

philosophical exchanges or the law of fists: unfortunately, historical experience shows that in the absence of legal procedures, the last option is usually what you get in practice.

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5. Is planning a revolution an offence under Hungarian criminal law?

In the course of public debates, the question arose as to whether planning the revolution (i.e. breaking legal continuity) is a crime under the current Criminal Code. In my opinion, it is *not*. In the case of the most relevant crime (Section 254 of the Criminal Code, violent change of the constitutional order), "violence" or "threat of violence" should be intended. I have found so far no proof of such intentions in the materials available to me. Although the preparation of this crime is also punishable according to Section 254(2) of the Criminal Code, but this would require specific and directly committed actions according to the dominant doctrinal opinion,[174] so mere revolutionary speculation is not 'preparation' in itself. In other words, in my view, revolutionary brainstorming in Hungary is political irresponsibility, but it is not a crime.[175]

V. Conclusions for a Future Hungarian Transition to Restore Constitutional Democracy

At the beginning of the article, I presented the nature of the Hungarian hybrid regime, and I suggested that in its current state it is neither a dictatorship nor a constitutional democracy, but is located in the grey zone between the two. It is a hybrid regime that operates illiberal political practices behind the veil of formal legal rules that mostly correspond to Western liberal constitutional standards (its formal rules violate these standards only in a few cases). From an ideological point of view, it is agnostic, its official rhetoric and real actions are incoherent, it actually only uses ideology as a tool (in some cases with a particularly provocative, agenda-setting, distracting and polarising purpose). There are various reasons for its emergence, in this text I have mostly emphasised cultural factors.

One of the possible scenarios after the next parliamentary elections is that the current opposition will win with a simple majority, but will not have a two-thirds majority necessary to amend the Fundamental Law and cardinal laws. This means that the new democratic government might face cohabitation with Orbán's deep state. In order to solve this problem, vari-

174 Szomora Zsolt, 'Btk. 11. §' in: Karsai Krisztina (ed.), *Nagykommentár a Büntető Törvénykönyvhöz* (2nd edn, Budapest: Wolters Kluwer 2019), 68.

175 To the crime of 'rebellion' according to the Criminal Code see above n. 156.

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ous suggestions for breaking legal continuity (i.e. organising a revolution in the legal sense) have emerged. I refute almost all of these,[176] because revolutionary ideas in the polarised Hungarian political reality threaten the remainder of social peace and can easily lead to violence. These plans are themselves symptoms of polarisation. Moreover, the various revolutionary justifications are unconvincing as to their content. The procedural details of such a move concept have not been worked out either, and what has been revealed so far is legally and/or practically unfeasible in that form. The long-term consequences of the possible implementation of such plans would also be very unfavourable: they would further increase polarisation, and with each future change of government, the possibility of breaking legal continuity would increase significantly.

On the one hand, revolutionary suggestions are *too pessimistic* regarding the transition of power, because they start from the assumption that informal relationships will function in the new political gravitational field just as they do now. I am convinced that the deep state will operate significantly less efficiently than its illiberal planners and the current opposition actors believe. Of course, the exact extent of this cannot be foreseen, but efforts should be made to maintain legality as far as possible, and in my opinion, the associated difficulties of cohabitation should not be exaggerated.

On the other hand, revolutionary ideas are *too optimistic* with regard to the legal-political culture, because they want to quickly solve a problem that is not primarily of a formal-legal type with the tool of formal law. The key issue is the legal-political culture, changing which will be a much longer, slower and more difficult process. If we want real change (i.e. if we want not only the faces/characters to change), then certain methods must be abandoned. Courage is needed not to use certain methods, but on the contrary: to refrain from them, to get out of vicious circles.

If it took with two-thirds parliamentary majority more than a decade to build the Hungarian hybrid regime, then it cannot be dismantled with-

176 The only non-revolutionary way of disregarding two-thirds majority rules is based on EU law (in the present volume the chapters of Armin von Bogdandy and Luke Dimitrios Spieker, Kim Lane Scheppele, Werner Schroeder, Pál Sonnevend) that could also be combined with my three-stage plan →II.1. The practical applicability of these EU law solutions in the Hungarian context (where mostly informality runs the regime and the majority of the remaining legal obstacles is in simple majority laws) is, however, in fact very narrow →III.1.a)ix. The scope, e.g., concerning replacing national office holders, might change in the future if EU law itself changes (via new case-law, treaty amendments or secondary law).

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in two months with a simple majority. For dismantling it, I presented a three-stage plan that could be implemented over several years. In this I am not talking about a Gordian knot, which we could cut to solve suddenly the problems, because in my opinion such a Gordian knot does not exist. Instead of expecting a miracle, it requires slow and tiring – partly political – nitty-gritty work, with a lot of well-designed technical details, carried out according to a strategy that has been thought and planned with a cool head. If one day Viktor Orbán is gone, the way out will still be long and difficult for the country.[177]

VI. Postscript on the Differences between Poland and Hungary – and a Few Potential Lessons for a Polish Transition

From the outside, the regimes in Hungary and Poland may seem similar: in both places, the situation of the rule of law and democracy has deteriorated significantly in recent years (which in both cases led to conflicts with the EU), and the Christian-conservative (anti-migrant, anti-LGBTQ, traditional Christian, illiberal) rhetoric may also seem similar (although anti-Russian rhetoric is absent from the Hungarian regime). The Polish governing parties have learned some measures that undermine the rule of law specifically from their Hungarian friends (e.g., gaining influence in the court system by lowering the retirement age of judges). In addition, in European politics (especially EU affairs), the two countries behave as close and permanent allies (again, except for the relationship to Russia and recently especially the Russian aggression against Ukraine). In reality, however, there are also significant differences, mostly in the internal operating logic of the two regimes. I would like to draw the attention to three differences:

(1) The Hungarian regime is deeply permeated by centrally organised corruption (which, according to one of the ideologues of the Orbán regime, is the "central policy of Fidesz").[178] In this form, this is not true for the Polish regime, although there are also corruption phenomena.[179]

177 On the political and social future of Hungary as an uphill difficult road see Jakab and Urbán (n. 52).

178 See above n. 40.

179 For a comparison of corruption in Poland (which distributes positions in state-owned companies and in the public administration on the basis of political loyalty)

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(2) For the most part, the operators of the Polish regime really believe what they say (this is clearly demonstrated by their insistence on otherwise unpopular strict abortion regulations). In other words, they are not characterised by the kind of cynicism that characterises the Orbán regime →I.3.

(3) In the Polish case, the erosion of the rule of law took place to a significant extent (also by a domestic constitutional standards) using illegal means.[180] However, since the prosecuting services there are not legally independent (but subordinate to the Ministry of Justice, since 2016 the Minister of Justice is basically the chief prosecutor at the same time), therefore, there have been no criminal charges for these illegal moves, and in the Hungarian revolutionary scenarios, a dangerous duplication of the legal system could not occur in a future transition →III.2.c). However, enclaves of the "old" liberal legal order were formed, and legal uncertainty has existed to this day regarding the ordinary court system. Since PiS did not have the constitution-amending majority, but still imported the legal technique from Hungary, the erosion happened in a more brutal and primitive manner (in addition, being a much larger EU Member State that did not court German car-making investors either), this earned the anger of EU institutions.

The Orbán regime, ironically, seems to have been endangered by its own "success": Orbán's model was imported by his Polish colleagues,[181] who provoked the ire of the EU, and this ire then was widened onto the Hungarian Government as well (although for years, the EU institutions assisted with cynical inaction in the erosion of the rule of law and democracy in Hungary). The behaviour of the Hungarian regime towards the EU could best be described with the metaphor of a corner lawyer playing dirty tricks, while the Poles, on the other hand, behaved like beaters with baseball bats.[182] If you like, all those who are concerned about the Hungarian rule

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and Hungarian (which also conquers complete private economic sectors with legislative instruments and converts state or EU money into private money through public procurement), see Edit Zgut, 'Tilting the Playing Field in Hungary and Poland through Informal Power', German Marshall Fund Policy Paper 2021, <https://www.jstor.org/stable/resrep31802>.

180 For details see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

181 On this topic in general see Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press 2021).

182 See also the contrast between the Polish Constitutional Tribunal's (K 3/21, October 7, 2021) and the Hungarian Constitutional Court's [32/2021. (XII. 20.) AB] judgments on the relationship to the EU legal system. Nóra Chronowski and Attila

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of law can be grateful to PiS for provoking external pressure from the EU against the Orbán regime as well.

The three differences above also have consequences for what should be done when the current Polish illiberal regime comes to an end.

Ad (1). Since corruption is less central there, after the restoration of constitutional democracy, dealing with such cases will be less important than in Hungary.

Ad (2). Since the operators of the Polish regime for the most part really believe in the moral character of the regime, it is less likely that the officials installed by PiS will find a modus vivendi with the new democratic government (although there might be cases of strategic defection there too, but probably less often than in Hungary, as their degree of loyalty is expected to be stronger to the Polish illiberal regime there).

Ad (3). To this day, a significant number of Polish officials continue to exercise their office illegally according to domestic constitutional law, and this is also evidenced by ECtHR and CJEU judgments,[183] which allows for tougher action against them in case of a transition (and since there are no cardinal, i.e. two-thirds majority, laws there, and the PiS never had a constitution-amending majority either, the dilemmas related to two-thirds majority rules similar to the Hungarian situation will not arise in Poland).[184]

Vincze, 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', Verfassungsblog, 15 December 2021,<https://verfassungsblog.de/full-steam-back/>.

183 The Polish Constitutional Tribunal does not meet the requirements of a 'tribunal established by law', see ECtHR, *Xero Flor v Poland*, judgment of 7 May 2021, no. 4907/18. About the Polish ordinary court system: ECJ, *Commission v Poland*, judgment of 6 October 2021, case no.204/21, ECLI:EU:2021:834; ECJ, *Commission v Poland*, judgment of 15 July 2021, case no.791/19, ECLI:EU:C:2021:596; ECtHR, *Broda and Bojara v. Poland*, judgment of 29 September 2021, nos. 26691/18 and 27367/18; ECtHR, *Reczkowicz v. Poland*, judgment of 11 July 2021, no. 43447/19.

184 In this form, this is missing in the Hungarian situation, since (a) the illegal removal of András Baka (illegal according to the ECtHR, but not according to domestic law) was a freedom of speech issue before the ECtHR, and since then the current Curia President is already the second successor (Baka's original mandate would have expired long ago). There is no ECtHR judgment stating that the Curia in its current form is not a "tribunal established by law" either. (b) The early retirement of judges was conceptualised as age discrimination before the CJEU, and the Hungarian Government subsequently formally complied with this CJEU decision (although this did not change much in substance, as it largely paid compensation to the judges involved). In the Hungarian situation, there is therefore no CJEU (or ECtHR) judgment which, like in the Polish situation, would prove the domestic illegality

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Very similar are, however, the pre-democratic cultural heritage and the dynamics of spiralling polarisation, both of which are risk factors of backsliding and should therefore also be warning signs that erosion might happen also in Poland again and again in the future. Erosion is not a one-off accident, but a sign of weak cultural immune system that is going to keep us on edge for a long time even after the current illiberal regimes in Poland and Hungary end.

of the changes in the court system based on judicial independence (therefore in Hungary, Article 6 ECHR and Article 47 EU Charter of Fundamental Rights do protect the illiberal judicial appointments, as opposed to Poland). Concerning the Constitutional Court, there has been no ECtHR or ECJ rulings that would question its independence or classify the institution's political capture as illegal. Moreover, the ECtHR has even considered the Hungarian constitutional complaint as an effective remedy on several occasions (this is an even narrower category than being a "court", i.e. its absence would not in itself mean the denial of being a court either). See ECtHR, *Mendrei v. Hungary*, judgment of 15 October 2018, no. 54927/15; ECtHR, *Szalontai v. Hungary,* judgment of 4 April 2019, no. 71327/13. Under certain circumstance, the ECtHR denied that complaints to the Hungarian Court are an effective remedy, but never with reference to the Hungarian Constitutional Court's independence or illegal personnel composition, see e.g., ECtHR, *Sándor Varga and others v. Hungary,* judgment of 17 June 2021, nos. 39734/15, 35530/16 and 26804/18. For the sake of completeness, I also note that the independence of the Hungarian prosecuting services is not protected by EU or ECHR rules, but both the Hungarian and the Polish data protection authorities and central banks are protected by EU law. For exact references to the judgments implied or mentioned in this fn. see also above III.1.a)ix.

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