
REVIEW ESSAY

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Constitutional restoration in hybrid regimes: the case of Hungary and beyond

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Abstract

The essay provides an overview of a debate that has been taking place primarily on the columns of a blog symposium on the prestigious constitutional law blog *Verfassungsblog* on constitutional restoration in Hungary. Given that Hungary is the poster child for hybrid, illiberal regimes, the discussion transcends Hungary and gives insightful additions to the illiberalism literature, targeting an audience beyond legal scholars. The starting point of the debate pertains to the classic dilemma of legal positivism vs. natural law, and in particular whether constitutional rules of dubious democratic nature can be replaced in violation of legality, for example in an extra-parliamentary democratic process. ‘Hybrid regimes’, or ‘elective autocracies’ and the phenomenon of ‘abusive constitutionalism’ provide the framework and specific context of the constitutional restoration debate, as it is placed in regimes that institutionalize ‘hegemonic preservation’, ‘authoritarian enclaves’ and ‘bionic appointments’ hijacking the vocabulary and imagination of constitutional democracy and entrenching legal provisions which remain beyond the reach of constitutional politics. The first part provides an assessment of the Hungarian institutional and political scene. The second part first distinguishes between three dimensions of the constitutional restoration-debate: theoretical, political and procedural, and subsequently discusses two focal points of the symposium: the role of constitutions in illiberal regimes and in constitutional resurrection, and the role of international and EU law as a tool for a legal revolution.

Keywords: constitutional restoration, Hungary, Radbruch, rule of law

This somewhat unconventional review focuses on a vehement debate among constitutional lawyers and political stakeholders on constitutional restoration in Hungary, about three months before parliamentary elections to be held in the spring of 2022. A recent electoral reform, intended to make it more difficult for small parties to put forward a national list (Makszimov, 2020), appears to have backfired, having united most opposition parties to form a single list, and polls indicate a chance for the coalition to overcome Viktor Orbán’s governance. Also, for the first time in Hungary a national primary was held to elect the prime min-

isterial candidate of the united opposition (Bayer, 2021), invigorating also discussions on constitutional restoration, and the potential overwriting of the 2011 constitution, the Fundamental Law (FL), adopted shortly after Orbán's victory in 2010.

The FL was adopted without seeking political consensus or a transparent popular asseveration (for a detailed assessment, see e.g. Páp, 2018), legitimized retroactively by the alleged constitutional moment created by a 'voting booth revolution', the election which created the parliamentary supermajority of Orbán's governing coalition. There is now a passionate debate on the legitimacy and even the validity of the FL in the Hungarian media and professional fora, involving a broad pool of politicians, academics, also including constitutional scholars and public intellectuals. Given that Hungary is the poster child for hybrid, illiberal democracies, the discussion transcends Hungarian for a and apparently draws international attention. This review essay provides an overview of the blog symposium on the prestigious constitutional law blog, Verfassungsblog (see <https://verfassungsblog.de/category/debates/restoring-constitutionalism/>), where the number of contributions from leading constitutional scholars is ever growing, standing over twenty at the submission of the manuscript. As a participant in both exchanges, besides a synthesis of the 'international' discussion, I also provide reflections on the Hungarian debate among academics and legal professionals. The debate on constitutional restoration provides insightful additions to the illiberalism literature and arguably targets an audience beyond legal scholars. In order to contextualize the positions, the affiliations of the debate contributors are added. This will also show the notable fact that out of the nine Hungarian authors, only two of us work in institutions within Hungary.

The starting point of the debate pertains to the classic dilemma of legal positivism vs. natural law, in particular whether constitutional rules of dubious democratic nature can be replaced in violation of legality, for example in an extra-parliamentary democratic process. The most well-known example for the jurisprudential question is post-WWII legislation and practice under the Radbruch formula (Radbruch et al., 2006), which advocates that where the conflict between statute and justice reaches such an intolerable degree that the law is "flawed", law must yield to justice.

The initiators of the blog-symposium (Arato & Sajó, 2021), Andrew Arato from New School and András Sajó from Central European University and former Vice-President of the European Court of Human Rights set the stage by emphasizing that '*constitutional restoration poses a challenging question where the constitutional system has entrenched "authoritarian enclaves," i.e. binding institutional solutions that make it practically impossible to restore a rule of law based democracy.*' They cite the case of Chile, where it has taken almost '25 years to eliminate the bionic appointments to offices as well as the binomial electoral system that made it nearly impossible to change the constitutional structure unless its beneficiaries were to agree.' Likewise, they point to the Turkish Constitution protecting the generals responsible for the 1980 coup and its bloody aftermath. The questions the call identifies are numerous. For example, what should the methodology and benchmarking be to determine the constitution's incompatibility with the rule of law? Also, when is disrespect of formal constitution-making appropriate in the absence of a collapse of the state or a revolution, if the previous regime is corrupt and based its existence on a violation of the rule of law? What should be the procedural and substantive minimum be in case such process is considered legitimate even if illegal? What kind of popular participation, i.e. referenda can legitimize extra-constitutional constitution-making?

The discussion covers an even broader array, including for example the question of what kind of political or state practice can provide moral and constitutional legitimacy for constitutions and constitutional regimes that are (as often happens) established under politically extraordinary circumstances and questionable procedures. Does for example the repeated electoral victory of those orchestrating the changes suffice? How about a continuous democratic and constitutional good practice affirmed and documented by international democracy-watchdog institutions?

The debate also has implications beyond illiberal regimes where the amendment of the constitution may be warranted but cannot be achieved under formal, regular procedures. Sanford Levinson (2021) from the University of Texas Law School brings the example of the US, where by 2040 70 per cent of the population will live in only fifteen states (today it is 50 per cent in ten), thus, 30 per cent of the population will control 70 per cent of the votes in the Senate, and these states are also more rural, with the voters being older, more religious, and more white than the larger states.

‘Hybrid regimes’, or ‘elective autocracies,’ these relatively new forms of authoritarianism provide the framework and specific context of the constitutional restoration debate. Arato and Gábor Halmai from the European University Institute (Arato & Halmai, 2021) emphasize that these regimes rely on both more or less competitive elections and ‘abusive constitutionalism’, the use of traditional constitutional instruments against constitutionalism. ‘Hegemonic preservation’, ‘authoritarian enclaves’ and ‘bionic appointments’ are the terms used to describe the strategy. Renáta Uitz from Central European University (Uitz, 2021a) explains how hybrid regimes rely on a trifecta of plebiscitary mobilization, ruling by cheating, and abusive constitutional borrowing from the global constitutional canon for the purposes of illiberal constitutional normalization. Illiberal constitutional learning strategically draws on the ideas, language and design of ‘constitutions, but actually hijacks the vocabulary and imagination of constitutional democracy (see e.g. Sajó, 2021a; Landau & Dixon, 2020; Braver, 2018). Ironically, Sajó adds, sometimes it is the logic of the rule of law that supports such enclaves – through entrenched provisions which remain beyond the reach of constitutional politics and maintain the effective influence of undemocratic forces – as a politically corrupt judiciary is protected by the principle of judicial irremovability (Sajó, 2021).

The first part of the review essay will provide an assessment of the Hungarian institutional and political scene. The second part will first distinguish between three dimensions of the constitutional restoration-debate: theoretical, political and procedural; and subsequently discuss two focal points of the symposium: the role of constitutions in illiberal regimes and in constitutional resurrection, and the role of international and EU law as a tool for a legal revolution.

1 Hungary: a laboratory for constitutional restoration?

The Hungarian case has implications for all electoral autocracies, yet, in order to understand and properly contextualize the discussion, we need to first elaborate on the institutional and procedural, as well as political specifics of Hungary at the first days of 2022.

1.1 The Hungarian political, institutional and constitutional landscape: The tradition (and consequences) of parliamentary supermajority

The requirement of a two-third parliamentary supermajority for the adoption for certain laws and the amendment of the constitution has been present for almost two-thirds of a century in Hungary. Introduced by the Stalinist 1949 constitution, it was been preserved by the 1989 roundtable-negotiated, constitutional 'refolution' pact (see e.g. American University International Law Review, 1997); a vast amendment (involving over 100 provisions), promulgated on the thirty-third anniversary of the 1956 revolution and just two weeks before the fall of the Berlin Wall, practically creating a new constitution with essentially only one provision remaining from the original Stalinist document: declaring Budapest as the state capital. The requirement of a parliamentary supermajority for a broad array of legislation was a mutually beneficial safety measure to prevent political and constitutional backsliding in the unpredictable times of 1989 reassuring both to the Communist government and the unelected representatives of dissident groups. The regionally unique feature of the Hungarian velvet revolution lies in the fact that the amended constitution, designed as the first of a two-step process, was never followed by the adoption of a new constitution after the first democratic elections in 1990, as it turned out to be suitable for liberal democracy and a capitalist market economy.

As János Kis (2012) points out, however, the lack of a democratic confirmation constituted a lethal weakness of the substantially workable constitution, and the unfulfilled reference in the preamble of the 1989 amendment, which stated that a new constitution will be adopted after the first free elections, created the impression that the new Hungarian post-communist society was still unfit for constituting a political community. The constitution, although built to foster a constitutional partnership, could not withstand a polarizing and obstructive powerful political party. The widespread supermajority-requirement has also enabled pre-2010 oppositions to obstruct structural reforms for decades. The German chancellor-type model, in which the prime minister can only be removed by a constructive vote of no confidence, created a strong government with a limited responsibility to the strong opposition and only one incumbent government was ever removed by this procedure (and even then the prime minister was replaced by a nominee of the same parliamentary coalition).

For the first time in democratic Hungary, 2010 brought a two-third victory for one political group (formally Viktor Orbán's FIDESZ is in a coalition with the Christian Democratic party, but practically it is a single political formation). Due to the specificity of the electoral system, this was achieved with a 52.7 per cent of the votes, and following a vast electoral restructuring, and gerrymandering (see e.g. von Notz, 2018), Orbán repeated this success with a mere 45 per cent in 2014 (see e.g. Scheppele, 2014) and 48.53 per cent in 2018 (Deloy, 2018). While hopes for an opposition electoral victory are moderate, should the tide turn, given the disproportionality of the electoral regime, a slim 'normal' electoral success can even translate to a parliamentary supermajority.

Currently a supermajority of two thirds of members of parliament (MPs) present (these are the so-called cardinal laws) is required for the regulation of over thirty legislative areas, and a dozen or so decisions, including the election of constitutional court judges, the presi-

dent of the high court, the Curia, the prosecutor general, the head of the State Audit Office and the Central Bank etc. The amendment of the FL requires an even higher bar, two-thirds of *all* MPs.¹

The FL also provides a long list of subject matters, including the amendment of the FL on which referenda cannot be held, and procedures for a referendum require an approval of the National Electoral Committee (the members of which are elected by a simple majority of Parliament), in case of intricate appeal procedures involving the Curia, the Constitutional Court, the President – all appointees or collective bodies staffed with a majority of proven government loyalists, most cemented into office for 9 or 12 years, some even automatically prolonged if no predecessor is elected.

As Sajó explains (Sajó, 2021b), winning the election in Hungary may not result in actual governmental power. *'If the budget is not approved by the Budget Council, the President can (will?) dissolve Parliament. ...The future President (who will be elected a few weeks before the national election by the FIDESZ majority) has the power to send all bills to the Constitutional Court where these may be declared unconstitutional in the hands of judges elected by FIDESZ.'*²

As Csaba Györy (Eötvös University, Hungary) adds, *'the governing majority has been moving billions of euros of public property (mostly in the form of shares of Hungarian multinational corporations) as endowments into nominally public, but effectively private foundations governing, among others, universities, but also FIDESZ-aligned think tanks. Through these, it will not only be able to keep a network of its international apologists and right-wing intellectuals on the payroll almost indefinitely, but also a huge pool of politicians and former public administrators, ensuring their long-term loyalty and effectively running a shadow government. These institutions are also enshrined in the Constitution (Art 36, Section 6) and cardinal laws.'*

As Michael Meyer-Resende from Democracy Reporting International (Meyer-Resende, 2021) points out *'FIDESZ pretends to represent the majority of Hungarians as long as it wins (flawed) elections. Once it loses, the party will withdraw behind the cemented barricades of legal norms to escape majority will. ... we will find ourselves, from one day to the next, on the flipside of the argument: We will argue that democratic majority should matter and FIDESZ will insist on the rule of law.'*

In the Hungarian case the scholarly, philosophical debate on the limits of legal formalism and the departure from formal rule-making (constitution-making) is situated in a con-

¹ The requirement of a parliamentary supermajority in itself raises concerns. Meyer-Resende points to the criticism raised by the Venice Commission: *'The functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order.'* ... *'When not only the fundamental principles but also very specific and detailed rules on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.'* Meyer-Resende (2021), CDL-AD(2011)016 Or. Engl. European Commission For Democracy Through Law (Venice Commission) Opinion on the New Constitution of Hungary, Strasbourg, 20 June 2011 Opinion no. 621/2011)

² The Constitution also requires the consent of the Fiscal Council to submit the budget to the Parliament (Art 44, Section 3). This organ consists of the President of the National Bank (a former minister of finance in the FIDESZ government), the head of the State Audit Office (a former FIDESZ MP), and the president of the Fiscal Council, a former chief of the State Audit Office, himself a fixture of FIDESZ-aligned economic think tanks. There is fear that the Council can veto the first budget of the incoming government. (see Györy, 2021).

text where the previous regime is held to be intrinsically corrupt and have pursued a continuous, well documented abuse of constitutionalism, yet a military or economic collapse of the state or of an international alliance is absent, and nor is there a revolution, or even a sweeping unified political support from ‘the people’ on the streets.

Even widespread endorsement of a constitutional referendum is questionable after months of agonizing governance in a potentially volatile rainbow-coalition (unified against Orbán, but not for a complex government program) working against Orbán’s deep-state, in an economy crippled by the Covid-pandemic.

Also, a broad, consensus-seeking negotiated round table-like discussion on a new constitution involving Orbán’s party is not a realistic scenario, but rather an internal cold war with massive perpetuated political mobilization. Furthermore, while a general discontent against Orbán’s illiberal regime is apparently on the rise (in urban settlements), this is not channelled into or ignited by a (coherent) political identity or ideology, and no overwhelming concern or enthusiasm for democratic principles or procedures is apparent to evolve into a ‘Hungarian Spring’.

It needs to be added that in the ‘value statement’ establishing the joint list and rules the primary elections, a commitment was made to adopt a new constitution which is to be affirmed by referendum (see, Link 2). Thus, the opposition is in a political and moral obligation to pursue this commitment in some way.

In sum, the constitutional entrenchment triggered a widespread discussion on the philosophical, political and legal justification and techniques for amending or replacing the FL in order to restore constitutionalism and a functioning system of check and balances. The options considered included formally illegal and extra-legal means. The debate in Hungary transcended the academic and political terrain, the President of the Constitutional Court, and the President of the Supreme Court, issued a declaration that ‘a constitutional coup is being planned’ and that ‘breaking’ the basic law would mean breaking the sovereign Hungarian state (see https://hunconcourt.hu/uploads/sites/3/2021/12/nyilt_level_en.pdf; Makszimov, 2021; Uitz, 2021b). The ombudsman (Commissioner for Fundamental Rights, n.d.) as well as the Prosecutor General (Magyarország Ügyészsége, 2021; Cseresnyés, 2021) joined the statements which hinted at potential criminal sanctions. Adjacent to this, a member of the Constitutional Court raised the possibility of dissolving opposition parties on these grounds (Pokol, 2021).

In order to properly understand the quandary, we need to dwell on the procedural details.

1.2 The procedural toolbox

Ironically, the most formally ‘rule of law-compatible’ methodology to terminate the mandate of Orbán-clientele in pivotal constitutional offices, say the constitutional court or the prosecutor general would be to reorganize and rename the entire institution: a strategy Orbán used to dismiss the National Radio and Television Body, the Data Protection Commissioner (ombudsman) and even the President of the Supreme Court. This practice was univocally condemned by the ECJ (ECLI:EU:C:2014:237) and the ECHR (Case of Baka v. Hungary, Appli-

cation no. 20261/12), and, of course, the current opposition. Of course, here the argument could be made that the re-enactment of institutional restructuring would now be used to restore and to implement higher standards for constitutionalism.

Commentators have expressed deep-running fears of a political and legal chaos that a potential dual constitutional institutional structure may cause (Sepsi & M. Tóth, 2021), e.g. if the Constitutional Court is replaced by a constitutional amendment it does not recognize and continues to operate, say in a rental office, striking down laws, first of all the allegedly unconstitutional constitutional amendment. This may not only lead to street violence, but also an inability for judges and the administration to navigate in the maze of legal validity.

András Jakab from the University of Salzburg (Jakab, 2021) warns that there is no Gordian knot that one can simply cut, constitutional restoration 'is lengthy, tiring, and full of small-print' even if revenge-hungry politicians and angry voters would prefer theatrical solutions. He warns of the dangers of parallel legal systems as well as *'unimaginable violent scenes (not just violent street protests, but with armed forces and casualties on both sides) that we have only seen so far outside of the European Union – with no perspective for a peaceful solution.'* In line with this, Győry (2021) argues that *'such a crisis could very well lead to new elections and the return of the previous government, which would then have a legal excuse to use the criminal justice system aggressively against the opposition.'* Nevertheless, in agreement with Jakab, he adds that a new government would not necessarily be powerless. For example, *'in its fight against corruption. It can, for example, beef up the investigative arm of the tax authority and increase its resources to conduct wealth gain investigations. Or through changes of the Criminal Procedural Code, it can weaken the prosecutor's influence on criminal investigations conducted by the police without touching the prosecutor's indictment monopoly. It can use tax policy creatively to recoup at least parts of the public wealth "privatized" through grand corruption.'*

2 The constitutional restoration debate

Overall, three dimensions of the debate can be distinguished: theoretical, political and procedural. Let us address these in turn.

2.1 Theory, rhetoric and politic

Participants of the debate on constitutional reconstruction are not divided along political or even ideological lines: liberal commentators and conservative critics of the Orbán regime are equally divided on how to solve the contradiction that a constitution adopted in a formally adequate manner by a two-thirds majority could be overwritten by a simple majority, relying on the very 'voting booth revolution' that had been severely criticized from both the political and theoretical point.

There are no easy choices: one can blame themselves (and others) for being collaborators for observing legal formalism, or atone for not only jeopardizing the foundations and integrity of the legal system by allowing moral judgments to override normativity (and opening a Pandora's box of potential permanent constitutional revolution) but also making martyrs of autocrats who can then cynically claim to be defenders of the very rule of law.

Let us never forget: the very nature of a hybrid regime is in the legal finesse of avoiding blatant violations of international standards, and the sustenance of a political and legal rhetoric for constitutionalism.

Emphasizing that constitution-making is rarely a matter of pure legality, and a number of constitutions were created illegally, Sajó (2021b) sets the stage for the debate by arguing against the ‘constitutional despair’ according to which the rule of law cannot be restored by its antithesis, as it would only start an endless cycle of illegality. *‘The standard justification among the irregular constitution-makers ... is that the constitution served injustice or became illegal because the government did not respect it. Grievance is legitimation.’* He claims that the above-mentioned Radbruch formula is wrongfully conceptualized as applicable only in cases where injustice reached a degree of intolerableness as in the Nazi-like regimes. *‘If this is the standard, there is no ground to depart from the legal prescriptions and constitutions of illiberal democracies like Hungary. Illiberal democracies do not reach that threshold. ... the Nazi legal system was flawed law not only because of a fundamental violation of equality etc., but because ... it was a system of lies.’* He argues, however, that Orbán’s legal regime pertains to the same family: like the Nazis, the Orbán regime institutionalized a legal system based on cheating by the law (for a monography-deep assessment see e.g. Sajó, 2021a).

2.2 Procedures

Arato and Halmai (2021) argue that the replacement of the Fundamental Law is necessary with a rule of law constitution that restores freedom, adding that the new document should be created by a democratic constituent power according to newly enacted rules (including roundtable-like mechanisms), making every effort to avoid civil war and the violence it is usually accompanied by.

In agreement with János Kis (2012), Halmai (2021) points out that the 1989 democratic transitions did not mobilize the constituent power of the people and established a substantively full-fledged liberal democratic constitution without participatory constitutionalism. Legal constitutionalism, a judicial, technocratic control of politics, blunted the development of civic constitutionalism, and participatory democracy, reducing the Constitution to an elite instrument. Now, given the lack of civic interest in constitutional matters due to poor constitutional culture, if the civic participation cannot establish a constitutional culture supporting the values of liberal democratic constitutionalism, the new constitution will again be in vain, and authoritarianism will prevail as it happened in 2010.

While few would doubt the value of developing and widely advertising innovative and inclusive procedures (involving the civil society, NGOs, unions, informal citizen groups, individuals etc.) (see e.g. Tushnet, 2021), the debate and even political programs are mostly silent on actual procedures.

The one notable exception is put forward by legal scholar and former Constitutional Court judge Imre Vörös (Vörös, 2021), who, accompanied by two former ministers of justice, declared that *‘in the case of change of government the restoration of the rule of law must begin with a new republican constitution, that would be ratified after the parliamentary vote by a popular referendum’*; in other words, there is no need for 2/3 for the enactment of a new constitution (For more on this see Arato & Halmai, 2021). Under this script, Parliament would pass a

law of nullification by a simple majority withdrawing the appointment of all state office-holders chosen by 2/3 but without consensus, and could also replace the Constitutional Court (see Arato & Halmai, 2021). This is the only course of action that actually elaborates on the procedural aspects, including the feasibility of publishing the resolution in the official gazette, as it does not need the countersignature of the President (who will be elected by the current parliamentary majority shortly before the elections).

Moving away from Hungary, we can see that constitutions often arise under questionable circumstances. The American founding fathers transgressed their accreditation (see e.g. Levinson, 2021; Klarman, 2016), the Japanese was commissioned by American generals (see e.g. Maki, 1990), and we could continue with examples from France (see e.g. Uitz, 2021a) to Germany (see e.g. Bakó, 2021). Apparently, a continuous constitutional good practice (recognized as such by international organizations or the scholarly community) or a long-term electoral confirmation and reaffirmation can create retroactive legitimacy and make the world forget the original sin. See the glorification of the 1989 Hungarian constitution and the round table talks which also lacked actual democratic authorization.

Sajó (2021b) argues that *'just for being extra-legal, constitution-making does not have to be lawless. Extra-constitutional constitution-making requires its own rules that satisfy the rule of law (procedural fairness), civility (inclusive rational discourse) and democracy (participation of the citizenry), and concern (toleration) for minorities including the opposition. ...Constituent assembly (disciplined by constitutional principles and supported by referendum) is the textbook solution to this kind of a problem, though not the only possible technique.'*

On the other hand, citing examples from the 1977 amendments to the Indian Constitution, the 2015 amendment in Sri Lanka, and the Correa-Moreno deal in Ecuador, Rosalind Dixon (University of New South Wales) and David Landau (Florida State University) point to the dangers and complexities of an 'abusive' constitutional change, the constitutional 'tit for tat' or 'ping pong' between abusive and pro-democratic amendment, when the same tools are used to achieve abusive change can be used to reverse it (Dixon & Landau, 2021).

Roberto Gargarella (2022) from the University of Buenos Aires adds lessons to be learned from Chile's 1980 Constitution (just about to be changed), the self-amnesty law passed by the *military junta* in Argentina in 1983, and describes the Janus-faced 'electoral extortion' of the 2004 Bolivian Constitution orchestrated by Evo Morales. In these cases, although widespread consultations were held involving millions of voters, the widely supported clauses related to social and economic rights for indigenous communities were combined with a repulsed power-grab, granting the president further terms for re-election.

Renáta Uitz (2021a) points to how the reputation of constituent assemblies has been damaged by President Maduro in Venezuela in 2017 when he used it to circumvent the opposition-controlled legislature and to remove public officials who stood in his way. She also reminds of cautionary tales stalling the work of the constituent assembly under the guise of procedural complications in Tunisia, or the implementation of a new constitution in Kenya in 2010. Sometimes even evaluation is difficult, for example the 2008 constitutional reforms of Myanmar (Burma) has also been narrated as ingenious constitutional innovation that circumvented formal constitutional constraints and as compromised democratization.

Building on Turkish experiences, Ece Göztepe (Bilkent University), Silvia von Steinsdorff and Ertuğ Tomuş (Humboldt-Universität zu Berlin) warn (Göztepe et al., 2021) that radical and undifferentiated political purges may endanger the long-term stability and resil-

ience of the restored democratic order. For example, the new state president could copy from the French example of cohabitation, where the head of state renounces the use of some of his competences in respect of a changed political majority in the National Assembly. This political self-effacement should also be applied to the field of judicial appointments.

Discussing the history and contemporary implications of Yeltsin's 1993 constitutional coup, Dmitry Kurnosov (2022) from the University of Helsinki points to how *'Russia teaches us how dangerous extra-constitutional constitution making can be – and that it should always be just a last resort ... (and) that mere political inconvenience cannot be a reason for extra-constitutional constitution-making (and) ... It could only be applied in a 'negative' sense, i.e. by annulling individual provisions aimed at perpetuating the previous regime ... 'positive' extra-constitutional rule-making must be limited to the establishment of an interim framework with clear deadlines and outcomes. ... Otherwise, there will always be the danger that breaking the rule of law will continue even after constitutional change has taken place. This is precisely what Russian intellectuals and jurists, who supported Yeltsin in 1993, learned under the rule of Vladimir Putin. We should try to avoid repeating their mistakes.'*

3 Two prominent questions in the debate

The following section will overview two pre-eminent questions that many contributors addressed in the symposium: the positioning of the constitution in illiberal regimes and in the subsequent constitutional resurrection; and the role of international, but even more so of EU law as a tool for a legal revolution and instrument for validating constitutional restoration.

3.1 The role and importance of the constitution in a *Frankenstate*

On a basic level, constitutions set forth three things: the institutional design of the state and the morphology of power structures (including rules of recruitment for crucial offices); the list of fundamental rights; and, optionally, the fundamentals of constitutional identity. Arguably, while Hungarian opposition politicians and citizens find certain, or even many ideological commitments in the FL controversial and annoying, in part because of the initial lack of public debates and consensus, and there are certain, but not too many unacceptable shortcomings in the philosophy and policy for fundamental rights for some (such as the criminalization of homelessness), the unified opposition (which would need to take political and legal action) is not a coalition built on commonly held principles of identity politics.

Furthermore, the overwhelming majority of the FL's provisions on constitutional institutions triggers no objections. Sajó (2021b) underlines that *'the Hungarian Fundamental Law (except some divisive, ideologically driven articles) does not deviate from the constitutional textbook, although it is far from ideal in terms of separation of powers. It is not by accident that in 2011 the Venice Commission (CDL-AD(2011)016 Or. Engl. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) OPINION ON THE NEW CONSTITUTION OF HUNGARY, Strasbourg, 20 June 2011 Opinion no. 621/2011) called the Fundamental Law a "commendable step" and could not find major shortcomings in it except regarding the non-inclusive process of its making and sensing the potential for abuse in the institutional setting.'*

Rather, as this is how hybrid illiberal regimes work, it is the meta-constitutional fabric of practices building up, what Scheppele identifies as the *Frankenstate*,³ stitching together perfectly normal rules from the laws of various EU members into a monstrous new whole, abusing constitutionalism and the rule of law (Sajó, 2021a). This is epitomized and operated by irremovable public officers.

Most contributors seem to agree on that the problem is not so much with the text of the constitution, but with practice (Bakó, 2021). Johanna Fröhlich (2021) from the Pontifical Catholic University of Chile draws attention to the fact that complex social-political-legal problems are viewed as exclusively legal problems to be resolved by a constitution, but at the same time the legal enforceability of the constitutions is denied by overemphasizing their aspirational, political aspects of social justice. In other words, social-political hurdles are reduced to and turned into constitutional design problems, while constitutions claim to be less and less the 'rule of the land', and more and more symbolic political acts of social justice.

Jakab (2021) also argues that the central feature of the Hungarian 'electoral autocracy', or 'defective democracy' is 'plausible deniability'. The regime is not using open and brutal methods of oppression, and legal rules in most cases remain within the limits of Western constitutionalism. He argues that the nature of the regime cannot be understood based on its legal rules, as the typical modus operandi is exactly the biased application of laws. In agreement, Gyóry (2021) expands the regime's description by invoking Ernst Fraenkel's elaborate description of a 'dual state' (Fraenkel & Meierhenrich, 2017) where in '*cases that are politically irrelevant, the public administration and the justice system operates normally. In politically sensitive cases, however, the logic of action changes: the decisions are not guided by the law but what is in the interest of those holding political power.*'

Bogdan Iancu (2021) from the University of Bucharest points to a related difficulty: operationalizing the (resurrected) rule of law. He uses the cautionary tale of Romania (and other peripheral jurisdictions) where the rule of law was equated and reduced to anticorruption measures. Here along prosecutors being lionized and immortalized in the high-brow press, all political problems are translated in anticorruption terms, '*driving pre-existing cleavages to extremes and leaving no legitimate space for classical ideologies, negotiation, and compromise (in short, for recognizable party politics).*'

In sum, it appears that in Hungary problems with the constitution are twofold: cementing political appointments and preferences – such as the pension system, family support, and taxation, ordinarily belonging to statutory law, in the entrenched constitutional text – and legitimacy (Halmai, 2021).

Be it as it may, it is unclear, and remains insufficiently decompartmentalized what the current opposition aims to achieve by the prospected constitutional amendment/reconstruc-

³ '*The component pieces of the Hungarian Frankenstate might have operated perfectly well in their original contexts, but combined in a new constitutional system, these once-normal rules produce abnormal results. As government spokespeople have said every time there is criticism of a particular aspect of the new constitutional order: that rule exists in Greece. Or Germany. Or the United Kingdom. It's normal. End of story. But nowhere do all those rules exist together, except in the Hungarian Frankenstate.*' Such example is combining Germany's much-criticized rules for drawing electoral districts with Britain's highly disproportionate first-past-the-post rules for constituency elections, and topping it off with the widely used d'Hondt system for deriving proportional representation from party-list votes, a system that marginalizes small parties. Scheppele, 2013.

tion project: to prevent an obstruction from a deep state instructed and held in captivity by Orbán, or to produce a symbolic (political speech) act and procedure to mobilize and expand pro-democratic electorate. Positions also diverge, and as far as political statements go, remain unclear whether the entire FL should be replaced by a new constitution based on a more inclusive consensus-seeking process, or only surgical strikes are needed to dismantle the robust illiberal monolith (or the latter should at some point be followed by the first). Strategically speaking it is unclear whether it should be a one-time Blitzkrieg, initiated instantly after the elections, or a long process, (or both), or even only as a last resort if democratic reconstruction is turns out to be possible without extra-constitutional measures, for example by setting up anti-corruption special task forces without formally overriding the prosecutor general.

3.2 The role of international, and EU law

As Renáta Uitz (2021a) points out, *‘in constitution-making, supranational institutions are routinely presented as sources of minimum standards, facilitators of dialogue, fora of accountability, sources of expert advice (for constitution building) and transnational embedding,’* as well as fora for validation and archiving: *‘supranational litigation, monitoring and inquiry serve a key function in establishing a transparent and trustworthy public record of domestic events, a record that can be relied upon for setting a starting point for constitutional transition out of hybrid regimes.’*

Kim Lane Scheppele (2021) from Princeton University offers a daring recipe for a way out of Orbán’s legal lockdown. She claims that as the European Convention on Human Rights and the EU Treaties were brought into Hungarian law requiring a two-thirds vote of Parliament, thus when it comes to the Orbán regime’s law, two two-thirds laws are in conflict, and the FL is clear in giving treaties priority over statutes regardless of whether the statutes are ordinary or supermajority cardinal laws. Hence, the new Parliament could simply highlight the obvious, that international agreements take precedence over statutes, including cardinal laws. Thus, the process could begin by ‘disapplying’ these, admitting that disapplication does not amount to invalidation. Yet, her argument continues, *‘if the Hungarian Parliament were to say that it cannot change a two-thirds law with its mere majority, the ECJ would no doubt respond ... that the national rules blocking compliance with EU law must also be changed. In such a situation, the Hungarian Parliament could justify changing two-thirds laws by a simple majority because it must to do so to comply with EU law. ... EU law might even be interpreted to permit particular personnel changes that would otherwise pose challenges for the rule of law.’*

The new Parliament, Scheppele argues, could, for example, revisit judicial appointments which the ECJ or the ECHR found illegal to properly enforce these judgements. Also *‘a new Hungarian Parliament could rely on the April 2021 ECJ judgment in the Repubblica case, which announced the principle of non-retrogression from EU values, to revisit the changes that the Orbán government made to the judiciary with the goal of restoring judicial independence.’* Scheppele also has an idea to dismantle the Constitutional Court: *‘first, the Parliament, as a body entitled to ask for abstract review from the Constitutional Court, could send EU-law-violating Hungarian statutes to the Constitutional Court for review, with requests that the Constitutional Court send references to the ECJ for confirmation of whether the spotlighted laws are in violation of EU law.’* Should the Constitutional Court fail to do so, or follow the ECJ’s answer, it can face the fate

of Poland's Constitutional Tribunal, which under the ECtHR *Xero Flor* judgment (Case of *Xero Flor w Polsce sp. z o.o. v. POLAND* (Application no. 4907/18) that found was not to be a 'tribunal established by law'. If the Constitutional Court is thereby certified to be captured and packed '*a new Parliament would be justified in simply ignoring decisions of this Court. Or in dismantling it.*'

Armin von Bogdandy and Luke Dimitrios Spieker (2021) from the Max Planck Institute set forth a similarly valiant proposition by pleading for the criminal responsibility of those judges who severely and intentionally disrespect EU values.

4 Closing remarks

In regard to the Hungarian case, as much as I sympathize with the concept of a constitutional assembly and subsequent referendum, lacking an overwhelming evidence of democratic popular support (i.e. the articulate and unambiguous, specific, eruptive manifestation of popular sovereignty), I find arguments relying solely on (an admittedly large stock of) infringement procedures by the European Commission, reports adopted by the European Parliament, the Venice Commission or Council of Europe and UN bodies, alongside case-specific ECJ or ECHR judgments too thin to override constitutional normativity, even if a systematic disregard for the rule of law is adequately demonstrated (for a more detailed elaboration, see Pap, 2021).

I would also need to see how exactly such configurations would fit in or override the current constitutional and administrative procedural framework. Because just as the devil, the saviour archangel is also in the details. There are only two technical options: the unveiled overriding of the constitution with a simple majority transitional justice constitutional amendment (paving the way for a constitutional drafting body, a referendum and other surgical cleansing) lacking formal legal validity; or a formally valid constitutional amendment with Orbán on board. I do not see how middle-way solutions, such as a resolution of parliament or constitutionally non-recognizable initiatives can avoid having to interact somehow at some point with the formal constitutional architecture in one of the two aforementioned ways.

If we must choose, I am optimistic that there can be political means and viable strategies to achieve the constitutional goal of forcing the then-opposition (Orbán) to agree to introduce constitutional amendments. A political campaign and rhetoric advocating new institutions for anti-corruption, or a circumscribed invitation to hear the voice of the people can be very difficult to reject or obstruct for a populist like Orbán. The current opposition can turn Orbán's rhetorical weapon against him. If certain specific instruments for constitutional restoration are clearly and centrally positioned in the electoral campaign (such as for example the elimination of the constitutional ban on referenda on constitutional amendments, or the establishment of a constitutional convention, along the detailed description of its composition, along a roadmap for a two-step constitutional process), the 'voting booth revolution' argument regarding the 'will of the people', will be hard to disregard by Orbán. But this requires targeted and specific campaigning beyond grand narratives and theatrical argumentation.

Furthermore, I find moralizing generalizations unhelpful. While it is important to support arguments with solid constitutional theory, the debate needs to be focused and the ob-

jectives specified. The chosen model for constitutional restoration needs to be clear: is it an entirely new constitution with novel institutional design and constitutional identity, or a surgical intervention to secure certain goals for (or beyond) governmentality? Is this the time to, say, eradicate the double-edged institution of cardinal laws? Also, what is the point of reference for restoration: a specific pre-authoritarian constitutional historical moment, or the standard minimal (or optimal) design? For example, should the 1989-model for constitutional adjudication be reinstated with unrestrained *actio popularis*, or other institutional solutions can also be considered?

Innovative models for proactive consultation (i.e. preliminary advisory opinions) and monitoring by various instruments of multilevel constitutionalism is essential to provide political (and doctrinal) legitimacy. This could be extended to invite advisory panels from professional organizations or individual esteemed colleagues – it is unlikely to for these initiatives to be rejected – especially since the EU is already heavily engaged in operationalizing the concept of rule of law via the new rule of law conditionality mechanism against Hungary,⁴ which may result in the suspension of payments of EU funds.

Also: Orbán's trick for getting rid of uncooperative public officers and offices can only be applied in cases where the newly introduced institutional design meets, or arguably goes beyond international (and certainly current) standards. For example, reinstating an independent data commissioner, a new model for the National Electoral Committee, the Media Authority or even the administrative body overseeing and managing the judiciary with higher standards of political neutrality can easily be defended. One may even argue that the incorporation (and practical subordination) of the prosecutor general's office to the Ministry of Justice is a well-established and non-controversial practice. A red line will always be there though: certain constitutional institutions better not be messed with, in order to achieve a politically more diverse composition. Such are constitutional and high court appointments. To monitor partisan bias in these institutions (and pertaining to numerous other issues unaddressed here), extra-constitutional and even extra-legal avenues need to be sought. Transparent and democratic societies with open political discussions can provide the necessary tools. This takes time. As Sajó (2021b) writes, *'In a country where democratic and rule of law culture is weak, the restoration of the rule of law may last for many years. Perhaps the forty years (two generations) of wandering in the desert are still a requirement of liberty. Countries where different forms of populism were successful continue to oscillate between the rule of law and its abuse. Or perhaps only different forms of abuse will alternate.'* It may be the case that the silver lining only shines as bright as Renáta Uitz (2021a) contends: *'in the context of hybrid regimes, where constitutional change is gradual, the search for a magical (if not revolutionary) "moment" of constitutional reset is futile. Instead, constitutional scholarship is better off with envisioning a process of constitutional (re-)settlement through legally imperfect processes of trial and error.'*

⁴ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

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