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RESEARCH ARTICLE

The Day After a Broken Democratic Polity

M. Victoria Kristan

University of Ljubljana, Faculty of Law, Slovenia
Email: victoria.kristan@pf.uni-lj.si

Abstract

Lon Fuller's fictional Purple Shirt regime, Victor Orbán's illiberal democracy in today's Hungary and the Kaczynski brothers' recently ended unconstitutional republic of Poland are three examples of a 'broken democratic polity' in which many aspects of the rule of law and constitutional democracy have been compromised and cannot be fixed without a qualified majority, even if democratic forces come to power. In this article, I address the question of whether illegal state action of a democratic government is an appropriate means of restoring legitimacy to what I call a 'broken' polity. Put differently: Is it morally defensible for a new democratically elected government to override and replace the rules of illiberal constitutional reform in violation of formal legality? If so, under what conditions? I argue that a positive answer to this question is justified if we adopt a neo-republican approach to politics and legitimacy.

Keywords: abusive constitutionalism; destituent power; illiberal democracy; rule departures

Introduction

In his book *The Morality of Law*, Lon Fuller described a hypothetical scenario in which a new Minister of Justice asks his five deputies how to deal with 'grudge informers' and their testimony *after the fall* of the Purple Shirt regime and the restoration of a democratic constitutional government.[1] Fuller used the term 'grudge informer' to describe a type of informant who reports to authorities out of malice, personal spite, or other non-legal motives, rather than a genuine desire to uphold the law. This situation is often associated with authoritarian regimes or contexts in which the government or ruling party relies on informants to maintain control. The Purple Shirts regime is a case in point. Here is an almost literal transcription of how Fuller[2] describes it:

When the Purple Shirts came to power, they took no steps to repeal the old Constitution or any of its provisions. They also left the Civil and Penal Codes and the Code of Procedure untouched. No formal action was taken to dismiss any government official or remove any judge from the bench. Elections continued to be held at regular intervals and ballots were counted with apparent honesty. Nevertheless, a reign of terror prevailed in

[1]LL Fuller, *The Morality of Law* (Yale University, New Haven, CT, 1964) 245–53.
[2]See (n 1) 245.

the country. While judges who rendered decisions contrary to the wishes of the party were beaten up or murdered, the accepted meaning of the Penal Code was perverted to imprison political opponents, as many people worked on their grudges by denouncing their enemies to the party or government authorities.

After the fall of the Purple Shirts regime, recourse to informants and their testimony raised questions about the validity and reliability of the information provided. In some cases, the information was false or exaggerated, leading to new unjustified convictions and punishments. Indeed, reliance on grudge informers undermined the principle of procedural fairness, which requires that judicial proceedings be fair and impartial. And the new government faces the question of practical reason: What should be done about the grudge informers? Shall they be punished? According to Fuller, the five deputies to the Minister of Justice provide the following answers:

(1) There is nothing we can do. The acts the informers reported were unlawful according to the rules of the government then in actual control.
(2) We can do nothing against the grudge informers for the opposite reason. The acts they reported were not unlawful, for the law ceased to exist when the Purple Shirts came to power. During their regime, there was an interregnum in the rule of law, and therefore the acts of the informers were also not prohibited.
(3) We must be prepared to distinguish between the normal and lawful actions and the blatant lawlessness of the Purple Shirts Regime. Where the philosophy of the Purple Shirts intrudes and the administration of justice is diverted from its normal aims and purposes, we must interfere. Those behind the lawless actions must be held accountable in a just manner and according to our legal standards.
(4) There is only one way of dealing with this problem. In the name of restoring elementary justice, a special statute should be passed that provides a legal basis for holding the Purple Shirts accountable for their crimes, even if it is retroactive.
(5) We should stand idle and leave the matter to the people, who will solve the problem in their own way and give the Purple Shirts the justice they deserve. There are times when we should allow this instinct to express itself directly, without the intervention of the forms of law.

While Fuller used this hypothetical scenario to illustrate the complexity of the problem of the grudge informer and the difficulty of developing a coherent and just response to it (Fuller concluded his text with the question, 'As a Minister of Justice, which of these recommendations would you adopt?'), the same scenario serves us to discuss a more general problem, namely, the question of the legitimate means of repairing a 'broken' democratic polity – such as the Purple Shirts regime or, more importantly, the non-fictional illiberal democracy of Viktor Orbán in contemporary Hungary and the unconstitutional Republic of Poland of the Kaczynski brothers.[3]

Unlike the Purple Shirts, who, as I have already mentioned, retained the letter of the old constitution and all the important laws when they came to power, the ruling majorities

[3]Unfortunately, there are many more real examples of a broken democratic polity. Nino wondered, for example, what to do with the Argentine legal system after the return to democracy in 1983 and how to deal with the few laws enacted by the military dictatorship, the 'juntas'. See CS Nino, 'Comment: The Human Rights Policy of the Argentine Constitutional Government: A Reply (Detailing the Legal Obstacles to Overturning the Amnesty Law)' (1985) 11 *Yale Journal of International Law*, 21. See also CS Nino, *The Validity of Law* (1985).

in Hungary and Poland have changed the nature of these states in ways that can hardly be undone according to the requirements of formal legality. On the one hand, Viktor Orbán's Fidesz party introduced a *new constitution* and a series of 'cardinal laws' that explicitly transformed a liberal democracy into an illiberal democracy. They did this with the qualified majority required by the old Hungarian constitution. Future changes to the state system, however, became very unlikely precisely because of the threshold of formal legality, as I will explain in more detail later. In Poland, on the other hand, the ruling majority of the PiS party left the text of the old constitution untouched just like the Purple Shirts did. However, systemic changes were achieved in Poland mainly through a change in constitutional interpretation resulting from a combination of two forms of *abuse of executive powers*. The first was to postpone the publication of certain (unfavorable) decisions of the highest court in the Official Gazette, thereby preventing them from becoming law and getting legal effect when it was less favorable to the government. The second consisted of *court packing* – that is, manipulating the Constitutional Court's membership for partisan ends.

Note that in our non-fictional examples of Poland and Hungary, it seems much more difficult to achieve the restoration of the liberal democratic character of the state than in Fuller's fictional scenario. Indeed, it is plausible to think that with the fall of the Purple Shirts, the terror was over, and the nonperverted meaning of the Penal Code was reestablished, so that nothing more was needed to restore the legitimacy of the state. The same does not hold for Poland and Hungary. Even if a democratic opposition gains an absolute majority in Hungary or Poland, this is not strong enough to change the power-preserving rules of the current constitutional regime.[4] The question can therefore be raised of whether it is morally justifiable for the next democratically elected government to override and replace the rules of a broken democratic polity in violation of formal legality? Although this very question was recently posed in a slightly different form in Poland led by the newly elected government,[5] the examples of Poland, Hungary, or the Purple Shirt regime (but also Turkey, Israel or Venezuela, etc.) are not of my interest per se. I will rather use them in what follows as a backdrop for an examination of the links between constitutional theory on the one hand and legal and political philosophy on the other. More specifically, the aim of this article is to show what conditions must be met to justify a positive answer to the above question if we adopt a neo-republican approach to politics and legitimacy.[6]

Neo-republicanism is a doctrine of political philosophy characterized by its conception of freedom as non-domination. In other words: Neo-republicans define 'freedom' as the absence of arbitrary interference.[7] Moreover, neo-republicans assume that freedom is

[4]See Arato and Sajó, 'Restoring Constitutionalism: An Open Letter', *VerfBlog*, 2021/11/17, available at <https://verfassungsblog.de/restoring-constitutionalism/>, https://doi.org/10.17176/20211117-202408-0.

[5]"The speed and methods used by Tusk have raised concerns about whether he should be breaking the law in order to fix it'. R Minder, 'Inside Donald Tusk's Divisive Campaign to Restore Polish Democracy'. *Financial Times*, Warsaw, 18 Feb. 2024, available at <https://www.ft.com/content/e3b10baf-c508-4af1-ad25-8188cf60b174>.

[6]Although I am adopting here the neo-republican doctrine espoused by Philip Pettit, the core arguments of this article are not exclusive to it. They are situated in a broader liberal tradition that is consistent with various liberal democratic frameworks. Therefore, the insights set out in this paper may also be relevant to, and adopted by, those who agree with the broader tenets of liberal democracy.

[7]P Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, Cambridge, 2012) 10–11.

not a predicate for actions, but rather a matter of the status of persons. More precisely, a person is free in terms of status if she can live as she wishes because she is not arbitrarily subjected to the will of another. The legal rules that govern social interaction and thus a person's actions do not arbitrarily subject the person to the will of others unless they are established in violation of two neo-republican conditions for non-dominating governance: ultimate popular control and the respect of the perceived interest of citizens. However, broken democratic polities fall short of meeting these conditions. This warrants the incumbent governments' illegal state action as a means of repairing an illegitimate regime. Or so I will argue.

The article is structured as follows. First, in section 'Illiberal breaks in constitutional democracy and the rule of law', I introduce the concept of the 'broken' democratic polity highlight both on the context (e.g., democratic backsliding) in which such breaks occur and the concepts close to ours, which are sometimes not well distinguished. Sections 'When formal legality is arbitrary' and 'In which cases is justified that states officials engage in actions of civil disobedience?' introduce the neo-republican requirements for state legitimacy and explain the circumstances in which illegal state action meets these requirements, implying that the action in question is morally justifiable. Finally, in section 'Realizing rule departures to remove abusive constitutionalism', I explore constitutional implications and suggest preliminary guidelines to help overcome the constitutional pitfalls that broken democratic polities introduce into constitutional legal orders.

Illiberal breaks in constitutional democracy and the rule of law

In the last decades, constitutional democracy has been under persistent attacks. As Scheppele[8] states 'New autocrats […] are attacking the basic principles of liberal and democratic constitutionalism because they want to consolidate power and entrench themselves in office for the long haul.' It has become commonplace that charismatic leaders start a constitutional revolution by not playing by the rules, and instead, hijack constitutional democracies by using constitutional malice,[9] with a commitment to a program of wholesale destruction of constitutional checks.[10] The phenomenon is sometimes characterized as democratic backsliding[11] or decay.[12]

The outcome of this process has been treated in the literature from various perspectives. Three are of particular interest for my purposes: the perspectives of comparative constitutionalism (section 'The perspective of comparative constitutionalism'), general theory of law (section 'The perspective of the general theory of law') and democratic theory (section 'The perspective of democratic theory'). As we shall see in this section,

[8]KL Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 547.

[9]See KL Scheppele, 'On Being the Subject of the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 465–71, See (n 8) 85 and KL Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559. Constitutional malice can be described as the intentional, legally bad interplay of constitutional provisions with the goal of hijacking constitutions by limiting challenges to their rule and undermining the crucial accountability institutions of a democratic state.

[10]See GJ Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press, Oxford, 2023) 153 and GJ Postema, 'Constitutional Norms – Erosion, Sabotage and Response' (2022) 35 *Ratio Juris* 99–122.

[11]See F Wolkenstein, 'What is Democratic Backsliding?' (2022) 30 *Constellations* 269.

[12]TG Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9–36.

these fields of study raise important questions about broken polities, but neither addresses the precise question posed in this article. While I try to show the morally justifiable course of action after the fall of regimes that break our democratic polities, the scholarship of comparative constitutionalism and the general theory of law describe the genesis of these breaks and democratic theory describes the obligations one has before and during these regimes.

The perspective of comparative constitutionalism

Addressing the genesis of broken democratic polities, Landau[13] and Dixon and Landau[14] focus on phenomena such as 'democratic erosion', 'democratic regression', or 'backsliding', and analyze them in the light of abusive constitutional borrowing or abusive constitutionalism.[15] However, this focus is somewhat narrower than ours, which becomes clear when we compare the Purple Shirts example, where no attempt was made to repeal the old constitution or any of its provision, with what Dixon and Landau call abusive constitutionalism.

Under this term, the authors describe the use of formal mechanisms of constitutional change to undermine the democratic order and make a state significantly less democratic than it was before, whereby the use of constitutional amendment and replacement can be used by would-be autocrats to subvert democracy with relative ease.[16] In other words, abusive constitutionalism explains how the limits of constitutional power are exceeded and violate the rule of law by means of formal changes of the law. Paradigmatic cases of abusive constitutionalism occur when powerful incumbent presidents and parties – and sometime also Constitutional Courts–[17] can engineer constitutional amendments to make it difficult to unseat themselves and by defunding institutions such as courts that are supposed to check their exercise of power.

The effects of abusive constitutionalism on constitutional democracy are obviously negative and explain why certain developments represent a degeneration of constitutional democracy or a deterioration of democratic life. Moreover, it also has implications over the deterioration of the rule of law, constituting sometimes direct violations to it,[18] where it is not uncommon for those in power to claim the halo of the rule of law for their own policies, using the rhetoric of democracy or the rule of law and insisting that they offer a new model of constitutional democracy and a competing conception of the rule of law.[19]

[13]DE Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.

[14]R Dixon and DE Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, Oxford, 2021).

[15]See T Ginsburg and A Huq, *How to Save a Constitutional Democracy* (The University of Chicago Press, Chicago, 2018); M Graber, S Levinson and M Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018); S Levitsky and D Ziblatt, *How Democracies Die* (Crown, New York, 2018); A Przeworski, *Crises of Democracy* (Cambridge University Press, Cambridge, 2019); see (n 13) 189; see (n 8) 545.

[16]See (n 13) 189–94.

[17]See, for example, Sentencia Constitucional Plurinacional 0084/2017 of the Tribunal Constitucional Plurinacional of Bolivia, available at <https://edwinfigueroag.files.wordpress.com/2017/12/sentencia-0084-2017-tcp-bolivia-reeleccion-evo-morales.pdf>.

[18]MA Graber, S Levinson and M Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018).

[19]See (n 10) 153.

As a result of these effects, illiberal breaks corrode constitutional democracies and transform representative states into illiberal democracies. The transformation may be partial or complete depending on the degree of accomplishment of the illiberal agenda. Representative states turn into illiberal democracies by regressing, either by suspending or obstructing, those basic liberties that assure the free civic status[20] of the individuals.[21] However, the most disturbing characteristic of illiberal democracies is that this happens in a context of legality. A straightforward explanation of this aspect comes from the general theory of law. For instance, in Hungary, the Orbán government's 'revolution at the ballot box' in 2011 introduced a constitutional reform that was in line with his intention to eliminate any kind of checks and balances and even the parliamentary rotation of the ruling parties. The Fidesz party amended and replaced the constitution, using a number of different constitutional and legal techniques to undermine the power of checks and balances and consolidate the power of the party.[22] This was possible because the party won the election with 53% of the vote but received 68% of the seats, based on electoral rules designed to encourage majority voting by rewarding winning parties with additional seats.[23]

The perspective of the general theory of law

Legal theorists have recently analyzed the abuse of power in the context of legality primarily in terms of an 'atypical infringement' of the law.[24] According to Atienza and Ruiz Manero,[25] one can speak of an atypical infringement when behavior that complies with the rules violates some legal principles that justify the rules of the system in question and guide their application. In other words, the concept of abuse of power denotes a situation where actions that are technically still within the bounds of law violate its spirit or underlying principles. Thus, for the exercise of legal authority to constitute an abuse of power, there must be a conflict between a rule that authorizes or requires the exercise of authority under the given circumstances to the effect E and a legal principle that prohibits the production of that effect.

Here is an example: Acts of parliament and judicial opinions are often required by law to be published to take effect. This requirement serves the legal principles of transparency, immediacy, and accountability, ensuring that the public is informed and that the

[20]J Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press, Cambridge, MA, 1999).

[21]P Pettit, 'The Basic Liberties,' in M Kramer, C Grant, B Colburn and A Hatzistavrou (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford University Press, Oxford, 2000) 201–24; M Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment' (2017) 24 *Constellations* 51–62; J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766–81.

[22]R Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *International Journal of Constitutional Law* 279, 292.

[23]G Halmai, 'A Coup Against Constitutional Democracy: The Case of Hungary' in M Graber, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, New York, NY, 2018) 246.

[24]See, at least, M Atienza and J Ruiz Manero, *Ilícitos atípicos.* Sobre el abuso del derecho, el fraude de ley y la desviación del poder (Trotta, Madrid, 2000); B Celano, 'Principios, reglas, autoridad. Consideraciones sobre M. Atienza y J. Ruiz Manero, Ilícitos atípicos', in B Celano (ed), *Derecho, justicia, razones. Ensayos 2000–2007* (Centro de Estudios Políticos y Constitucionales, Madrid, 2009) 171–91; P Comanducci, 'Abuse of Right and Legal Interpretation' (2011) 21 *Revista de Derecho Privado* 107–18.

[25]See (n 24).

government's actions are open to scrutiny. Now, imagine that the executive branch of government is tasked with publishing these documents to make them legally binding. If the executive selectively delays the publication of a constitutional court's unfavorable opinion, it technically does not break the rule of publication since the document might be published eventually. However, the delay abuses the power vested in the government because it infringes upon the principles of transparency and immediacy that justify the publication rule. By doing so, the government effectively undermines the check on its authority that the publication is meant to ensure, allowing it to continue actions that the constitutional court has found to be unlawful. This represents a conflict between the rule (to publish rulings) and the legal principles (ensuring government actions are immediately held accountable), characterizing an abuse of power. The facts from this example actually occurred in Poland a few years ago.[26]

As mentioned in the previous section, however, the focus on abusive constitutionalism is narrower than ours. The concept of broken polity should not be confused with the result of abusive constitutionalism. Indeed, a system of government can be undermined by the abuse of legal norms (including constitutional and statutory norms), the abuse of informal rules, or both. Furthermore, a 'broken polity' can be the result of a rapid process (such as a coup d'état) or a slower erosion of institutions, consistent with the typical definition of democratic backsliding. We thus arrive (at least) at six different scenarios that lead to illiberal breaks in constitutional democracy and the rule of law:

i) instant abuse of legal norms
ii) instant abuse of informal rules
iii) instant abuse of legal norms and informal rules
iv) prolonged abuse of legal norms
v) prolonged abuse of informal rules
vi) prolonged abuse of legal norms and informal rules

With no intention of being exhaustive, it is nevertheless useful to point out that the Purple Shirt regime is an example of prolonged abuse of informal rules (case v), while Hungary with its 2011 constitutional reform is arguably an example of instant abuse of legal norms (case i) and Poland with atypical infringements of the law is an example of prolongued abuse of legal norms (case iv).

The perspective of democratic theory

Democratic theory shifts our focus from the *genesis* of illiberal breaks in constitutional democracy and the rule of law to the *obligations* one has in a broken polity. The relevant literature offers two frameworks for discussion: the concept of political obligation (a) and that of militant democracy (b). While the former refers to the obligations one has toward the laws of a broken polity, the latter concerns the obligations one has to prevent or fight against such laws.

[26]See W Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, Oxford, 2019) 75–76; See CDL-AD(2016)001 Opinion No. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland adopted by The Venice Commission Session (Venice, 11 March 2016), p. 43, 136, 137, 143; and available at <https://konstytucyjny.pl/ex-iniuria-ius-non-oritur-trzy-narracje-i-paradoks-andrzej-grabowski-bogumil-nalezinski/>.

(a) The scholarship on political obligation links this to a moral duty to obey the laws of one's country or state.[27] Two distinct accounts of political obligation are salient for the purpose of determining the obligations one has toward the authorities in a broken polity: the natural duty account and the associative account.[28]

According to the associative account of political obligation, agents have obligations arising from their roles within certain social relationships, such as being a parent, friend, doctor or citizen. The specifics of these obligations can vary based on the nature of the relationship and the societal context. However, the view implies that even members of the unjust groups, and therefore of broken polities, would be obligated to obey oppressive rules.[29] This stance has been challenged on various fronts. Some question the very existence of such obligations, even among family members, arguing that they rely on a level of intimacy and emotional connection not present in the broader citizen-state relationship (Wellman 1997). Others argue that proponents of this view must explain what makes political associations valuable enough to warrant these obligations.[30]

The natural duty account of political obligation, in contrast, assumes that people possess certain obligations simply by being moral agents. These obligations therefore exist independently of any social role they may have. They are universal, owed to anyone possessing certain characteristics like rationality or sentience. This account of political obligation was introduced by John Rawls in his book *A Theory of Justice*.[31] According to Rawls, everyone is subject to a natural duty of justice that 'requires us to support and to comply with just institutions that exist and apply to us'.[32]. The natural duty account has been further developed by Jeremy Waldron,[33] Thomas Christiano[34] and Anne Stilz (2009),[35] among others. Stilz, for example, argues that law omnilaterally imposes obligations on all only if it expresses a general will. This condition is fulfilled if and only if law, first, 'defines rights (protected interests) that apply equally to all'; second, does it 'via a procedure that considers everyone's interests equally'; and third, 'everyone who is coerced to obey the law has a voice in the procedure'.[36] Given that, as Stilz maintains, the latter two conditions can only be met by a democratic procedure, there is no general duty to obey the laws of a broken polity, although some still argue for a duty of non-interference on the

[27]See R Dagger and D Lefkowitz, 'Political Obligation', in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), available at <https://plato.stanford.edu/archives/sum2021/entries/political-obligation/>.

[28]Both approaches, associative theories and natural duty accounts, have also been combined. See D Mokrosinska, *Rethinking Political Obligation: Moral Principles, Communal Ties, Citizenship* (Springer, London, 2012).

[29]See R Dagger, 'Membership, Fair Play, and Political Obligation' (2000) 48 *Political Studies* 104–17, also from the same author *Playing Fair: Political Obligation and the Problems of Punishment* (Oxford University Press, Oxford, 2018) 89.

[30]See (n 27).

[31]See (n 20).

[32]See (n 20) 99.

[33]J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999).

[34]T Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press, Oxford, 2018).

[35]A Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press, Princeton, NJ, 2009).

[36]See (n 35) 78.

part of the citizenry.[37] I will turn back to this point in section 'In which cases is justified that states officials engage in actions of civil disobedience?'.[38]

(b) Moving away from the question of obligations one has toward the authorities in a broken polity, scholarship on militant democracy argues for an obligation to prevent and resist illiberal breaks in constitutional democracy and the rule of law. The concept of militant democracy, introduced by Loewenstein,[39] refers to the practice of democratic regimes to act undemocratically in order to ward off internal threats. According to this view, democracies may even have to violate their own principles in order to preserve themselves. As Müller[40] (2012: 1253) puts it, we sometimes need to take pre-emptive, ostensibly illiberal measures to stop those who intend to use democratic means to undermine the democratic order.[41] An example of this is banning political parties that want to destroy parliamentarism. The central question, however, is not whether banns of this kind are necessary, but which conditions make them morally justifiable and morally required. To clarify this question, Kirshner[42] introduces the dilemma of whether or not a democracy should wait until actual rights violations occur before taking action, which could give anti-democratic forces the chance to consolidate their power in the state. In response to this dilemma, the author offers a normative framework to analyze the compatibility of militant democracy measures with democratic principles. In other words, the framework tells us when one is justified to act against democratic values in order to protect democracy.[43]

Both political obligation and militant democracy provide essential conceptual foundations for understanding the dynamics of legitimacy, authority, and the boundaries of state and individual actions within a democratic polity. In fact, both frameworks help frame the broader debate about the legitimacy and morality of certain actions taken to protect or restore democracy. Although both discussions – political obligation and militant democracy – revolve around the overarching question of this article, namely, whether illegal state actions can legitimately restore order to a compromised democratic system, they diverge in their specific concerns. These discussions do not delve into the aftermath of an illiberal regime's collapse or question whether it is morally justifiable for a newly elected

[37]K Greenawalt, 'Legitimate Authority and the Duty to Obey' in WA Edmundson (ed), *The Duty to Obey the Law* (Rowman and Littlefield, Lanham, 1999). See also ZG Szűcs, 'Political Obligations in Illiberal Regimes' (2020) 26 *Res Publica* 541–58. https://doi.org/10.1007/s11158-020-09477-x.

[38]As we shall see, if by interference we mean interference with the state's regulation of the society, it is not clear that this can be coherently distinguished from disobedience. See T Christiano, 'Authority', in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), available at <https://plato.stanford.edu/archives/sum2020/entries/authority/>.

[39]K Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *American Political Science Review* 417–32.

[40]JW Müller, 'Militant Democracy', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford Academic, Oxford, 2012; online edn, 21 Nov. 2012) 1253.

[41]For a normative framework analyzing the compatibility of militant democracy with democratic principles see AS Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press, New Haven, CT, 2014).

[42]See (n 41) 118–22.

[43]T. Theuns, 'Is the European Union a Militant Democracy? Democratic Backsliding and EU Disintegration' (2023) *Global Constitutionalism* 1–22.

democratic government to annul and replace the regulations of illiberal constitutional reforms, contravening formal legalities. Instead, my focus, through the lens of neo-republicanism, centers on a distinct question: In such preceding conditions, can state officials participate in acts of civil disobedience? Specifically, the focus of this article is on the justification of rules departures by using the tools of constitutional theory, this is destituent power.

When Formal Legality is Arbitrary

When Fuller introduces the problem of the Grudger Informer, the third deputy of the new Ministry of Justice states that we must be prepared to distinguish between normal and lawful actions and blatant lawlessness.[44] Applying his arguments to illiberal democracies, it becomes clear why, even when they operate within the bounds of legality, they are unable to provide their people with the means and protection to exercise basic liberties. This means that illiberal democracies operating through acts on the margins of legality cannot be considered democratic if they enshrine basic liberties but do not provide for an adequate form of citizen control of public power in which citizens have the opportunity to shape and reshape the imposed order. At this point, two conditions of the neo-republican theoretical framework ensure that the government is not a dominating government (i.e., that there is no vertical domination).

The first condition, that is, ultimate popular control of legal rules, requires that individuals have equal access to a system of popular influence on government to provide direction, and that direction is equally acceptable to all individuals.[45] This means that the people must be able to exercise effective, equally shared control over the government's decisions, which in turn guarantees political equality. Of course, there are also conditions under which constitutional provisions make a particular rule change impossible, and there may be good reasons to protect certain basic liberties in this way.[46]

The second condition, consist in the respect of the perceived interests of citizens, means that the interests that government should satisfy are those that make government desirable in the first place.[47] Pettit defines the perceived interests as those 'that are consistent with the desire to live under a shared scheme that treats no one as special. They are interests that those who are expected to give a system of government their allegiance may reasonably expect a government to track'.[48] When state action tracks these kinds of interests, Pettit argues, it accords with reasons related to the public good and is non-dominating.[49] These perceived interests of citizens are to be equated with those that benefit all when they seek to cooperate collectively in shaping their relations. To achieve this, decision-making power must be dispersed. This condition implies that no one should

[44]See (n 1) 250–1.

[45]See (n 10) 172.

[46]S Ingham and F Lovett, 'Domination and Democratic Legislation' (2022) 21 *Politics, Philosophy & Economics* 97–121.

[47]P Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105–44. For a distinction between preferences and interest and its importance for the Rule of Law see also D Bello Hutt, 'Rule of Law and Political Representation' (2022) 14 *Hague Journal on the Rule of Law* 1–25. https://doi.org/10.1007/s40803-021-00163-5.

[48]P Pettit, 'Republican Freedom and Contestatory Democratization,' in *Democracy's Value* (Cambridge University Press, Cambridge, 1999) 176.

[49]P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, Oxford, 1998).

be able to decide unilaterally whether to accept or reject a particular proposal. In fact, the decisions that violate this condition are identified with dictatorial rules that empower a single person to decide all issues. Remember that non-domination is achieved not through threats or coercion, but 'by introducing constitutional authority' that is so organized that it cannot itself be a dominator. These institutional conditions 'will not just inhibit domination, but bring it to an end'.[50] Such constitutional authority does not dominate its citizens to the extent that 'the interference that it practices has to track their interests according to their ideas' and be responsive to the common good.[51] But as already mentioned, there are also – non-dictatorial – rules established under democratic conditions that require unanimity to adopt changes to group rules, such as the cases involving the protection of basic liberties where it is justified to adopt the maximum protection for the rights that make us free.[52] However, there are other cases where imposing unanimity[53] or a qualified majority are not justified, as for example the case of enlarging basic liberties, limiting government powers or when the norms intend to amend a frame of legality by imposing a frame of formal legality, as when majorities or unanimity are used as to limit the possibility to amend power-perpetuating-rules within the frame of formal legality.[54] The adoption of these arrangements violates the rule of law and constitutes a source of domination, since the possibility of enacting new rules, that is, of shaping and reshaping the imposed order, is restricted.[55]

The neo-republican conception of freedom with the two conditions for non-dominating governance is constitutionally discriminating in the sense that it gives clear directions as to when a constitution is satisfactory or unsatisfactory. '[A]ny constitution or dispensation that allows those in government to have a degree of arbitrary power over its people […] will be to that extent objectionable'.[56] Given that illiberal democracies do not meet these conditions, the rules in question leave room for arbitrary interference in the lives of their subjects. In other words, the constitutional rules of an illiberal democracy affect individual freedom as a status by arbitrarily restricting it. Indeed, they are vehicles of domination of their subjects by the originators of those rules and must therefore be replaced. However, some would say that the substitution of such constitutional rules

[50]See (n 49).

[51]J Bohman, '*Cosmopolitan Republicanism and the Rule of Law*', in S Besson and JL Martí (eds), Legal Republicanism: National and International Perspectives (Oxford University Press, Oxford, 2009; online edn, Oxford Academic, 2009) 62.

[52]See Moreso regarding the forbidden preserve (*coto vedado)* of constitutions. JJ Moreso, *La Constitución: Modelo para Armar* (Marcial Pons, Madrid, 2009) 127–9. See also R Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, Cambridge, 2022) 162.

[53]Pettit rejects unanimity requirement 'amounting as it does to a regime that gives each a veto' (2012, 168) but all other systems of shared control will remain on the table. See (n 7) 168.

[54]See R Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 663; R Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, Oxford, 2019).

[55]As Ingham and Lovett exemplified with Jim Crow segregation laws, they explain that 'when the existing rules already permit or sustain patterns of social behavior that frustrate individuals' choices, such as Jim Crow segregation laws, each individual would have an uncontrolled ability to perpetuate such patterns by unilaterally vetoing any proposal to eliminate them, and that ability would constitute domination'. S Ingham and F Lovett, 'Domination and Democratic Legislation' (2022) 21 *Politics, Philosophy & Economics* 103. And accordingly, Pettit rejects unanimity requirements. See (n 7) 168.

[56]P Pettit, 'Republican Liberty and Its Constitutional Significance [Paper Delivered at the Inaugural Conference of the Julius Stone Institute of Jurisprudence 'Philosophical Foundations of Constitutional Reform' (1999: University of Sydney)]' (2000) 25 *Australasian Journal of Legal Philosophy* 2, 241.

without the majority required by the current illiberal constitution could be characterized as an infringement of the rule of law, an act of arbitrary interference in the lives of (dissenting) individuals that is morally reprehensible.[57] This brings us back to the question that Fuller posed in *The Problem of the Grudge Informer* after the fall of the regime of the Purple Shirts. In what follows, I'll show that neo-republican arguments lead one to embrace Fuller's third option and explain why it is morally justifiable to override and replace the rules of illiberal constitutional reform in violation of formal legality.[58]

It seems that a fundamental consequence of a broken democratic polity is its decline, as shown by the question with which this article begins. Autocrats tend to be legally shrewd, using laws to shut down constitutional democracy and leaving it to the next government to deal with unlawful rules. As I explained before, changes in the constitution are sometimes explicit, but there are more often subtle by weakening the norms and practices on which the constitution rests, thereby hollowing out constitutional constraints on their power.[59]

In Which Cases is Justified that States Officials Engage in Actions of Civil Disobedience?

As in the case of the Purple Shirts regime, the question is what to do after an illiberal democracy that has hijacked[60] constitutional democracy comes to an end? Just a clarification before we turn to this question: Of course, most constitutions require special majorities to be amended. We cannot say, for example, that the U.S. Constitution makes it impossible to amend, only that it imposes demanding conditions in order to implement it. So why should it be any different in the case of Hungary or other illiberal democracies? The difference has less to do with the idea of an entrenched constitution[61] than with the authoritarian nature of that constitution,[62] which makes it no longer legitimately entrenched and impossible for the citizenry to change.

If a new government's attempt to replace the rules of illiberal constitutions in order to dismantle autocratic legalism by returning it to its legitimate path is compatible with the above demand for ultimate popular control, such an attempt is morally justifiable.[63]

[57]For a similar concern regarding the moral justification of violations of the rule of law, but in the fight against terrorism see A Jakab, 'Breaching Constitutional Law on Moral Grounds in the Fight Against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on "The Rule of Law vs. Terrorism"' (2011) 9 *International Journal of Constitutional Law* 1, 64.

[58]Jerzy Zajadło and Tomasz Tadeusz Koncewicz have applied a similar argument to the Polish Constitutional Court, although they do not use a neo-Republican framework. They explain why the Court's judges, who stood behind hostile interpretations and willingly enshrined the manifest unconstitutionality, never earned their right to retire as constitutional judges through performance. See 'Hostile Constitutional Interpretation: Sending a Warning in Rebuilding the Polish Constitutional Court', *VerfBlog*, 2023/1/06, available at https://verfassungsblog.de/hostile-constitutional-interpretation/, https://doi.org/10.17176/20230107-001611-0.

[59]See (n 10) 152–4. See (n 26) 255.

[60]See A Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge University Press, Cambridge, 2021).

[61]See NW Barber, 'Why Entrench?' (2016) 14 *International Journal of Constitutional Law* 2, 325–50.

[62]See G De Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20 *International Journal of Constitutional Law* 1, 16–17.

[63]Morally permissible actions are not equivalent to a morally praiseworthy action or a moral obligation. As Elizabeth Harman (2016) argues, there are unjustified actions that are morally permissible. Theron Pummer (2021) explains that there are actions that are impermissible and at the same time praiseworthy. Also a moral

Constitutional reform[64] can be consistent with ultimate popular control even if – as in a potential case in Hungary – it does not meet the approval of the qualified majority required for constitutional reform under the current constitution.[65] This is because one has control over laws even if one does not approve of or agree with their content.[66] Crucial to control over some laws is that one has equal access to a system of popular influence over their enactment and reform, and contestation – the capacity to shape and reshape the norms we live under – is a safeguard of the whole system of freedom as non-domination. Without this kind of control, the state may prove undemocratic when it comes to laws or other measures it wants to enforce.

To be clear, a substantial part of the coercive order imposed in illiberal democratic regimes does not adequately relate to the people on whom it is imposed in the sense that the legal rules do not correspond to the perceived interests of the people, where people cannot breathe life into law and institutions. An important point about the regimes I mentioned is that they tried to discredit or eliminate rival political parties altogether. This seems to be a way of suppressing citizens' capacity for collective action – and thus the possibility of an attentive and vigilant citizenry. Of course, if people perceive certain laws to be unjust, that means it is morally justifiable for them to try to change those laws. And here we are talking about an urgent situation because basic liberties are neglected, but the ability to shape and reshape the imposed order is hindered.[67] An active and resistive community, a vigilant citizenry, is required to achieve freedom as non-domination.[68] When those in government are the powerful party in the relationship between the people and the government, and the imbalance of power means that the people can only hope for the appearance of controlling influence, not the real thing, how can we expect the people to be able to exercise the necessary unconditioned form of influence? The people's control of the state can rest on the willingness of the people to rise up against government abuses, and on the willingness of the government to withdraw in response to the fact or prospect of such resistance. This is the trump card that the people can always play, resorting to the various violent and nonviolent, direct and indirect, individual and collective measures that they can use to resist a regime. The same can be expected when autocratic legalism leaves behind a hijacked system that cannot be rebooted. So, most regimes offer some ways of resisting their laws that are clearly within the system, by appealing to the legislature, taking the government to court, speaking out in the media, demonstrating

obligatory and a supererogatory one had been distinguished by JO Urmson (1958) seminal article 'Saints and Heroes.' E Harman, 'Morally Permissible Moral Mistakes' (2016) 126 *Ethics* 2, 366–93; T Pummer, 'Impermissible Yet Praiseworthy' (2021) 131 *Ethics* 4, 697–726; JO Urmson, 'Saints and Heroes,' in AI Melden (ed), *Essays in Moral Philosophy* (University of Washington Press, Seattle, WA, 1958).

[64]Certainly, challenging the established order can be achieved through various means. One such method is desuetude, which renders laws unenforceable due to a prolonged lack of enforcement. Another, more foundational method, is through the courts' interpretation of the Constitution. Here, it is possible to significantly alter the Constitution's meaning without modifying its text. Such alterations can be profound, equating to the impacts of formal constitutional reform procedures themselves. The recent Dobbs case in the United States serves as an illustration of this approach, exemplifying how foundational changes can stem from judicial interpretation.

[65]See GJ Jacobsohn and Y Roznai, *Constitutional Revolution* (Yale University Press, New Haven, CT, 2020).

[66]See (n 7) 232.

[67]See (n 7) 136–7.

[68]See (n 7) 219.

in the streets and, of course, challenging the ruling party in elections.[69] However, this is not the case with illiberal democracies. When all avenues of contestation within the system are obstructed, the act of breaking the law emerges as a form of contestation, also as a way of defying the laws within the system,[70] because to be classified as disobedience, action must be taken within 'the boundary of fidelity to law'.[71]

This act of breaking the law within an illiberal democracy, or stepping against the illiberal legacy that has used constitutional or legal methods[72] to eliminate checks on the executive, limit challenges to its rule, and undermine the crucial accountability of the institutions of a democratic state, is equated with a moral right to disobedience that arises when it is not possible to shape and reshape the rules,[73] as in the cases described earlier, where people have only the appearance of controlling influence but no actual influence.[74] Here the advantage of the concept of freedom as non-domination gains importance: the legitimacy of disobedience can be measured by whether it promotes the protection of those basic liberties that are a precondition for the realization of non-domination. While civil disobedience[75] provides us with the moral ground to justify individual illegal as a means of repairing an illegitimate regime, it also has, when constitutional change is necessary, constitutional implications under the form of destituent power. In short, civil disobedience and destituent power are two forms of political action that can be used to challenge illiberal constitutional rules.

There is no dispute that a democratically elected government has a mandate from the people to govern in their best interest. But if the illiberal rules of the Constitution prevent the government from fulfilling that mandate and protecting the basic liberties of the people, then it is morally justifiable to take action to change those rules.[76] The circumstances of illiberal democracies and attempts to eliminate them place the emphasis on state institutions rather than the traditional version of civil disobedience.[77] This raises the

[69]See (n 7) 173, 232.

[70]'The observation that popular control of government is grounded in the actual or perceived potential for widespread resistance is not new. Locke embraced the importance of the possibility in arguing for the right of people to rise up against de government'. See J Locke, *Two Treatises of Government* (Cambridge University Press, Cambridge, 1960) 11.149.

[71]Those protestors who cross this boundary are engaged in 'resistance' which, like 'conscientious refusal', is distinguished from civil disobedience. See (n 20) 322.

[72]See (n 60) 300–23.

[73]Of course that the idea that it is impossible to legally change illiberal norms is not an absolute impossibility, but a relative one. This impossibility amounts to saying that it is unlikely in the short or medium term that we will be able to legally change illiberal norms. But if it is understood as a probability and not an impossibility, the problem arises of determining the 'sufficient' degree of difficulty 'of the change and the criteria for its determination'.

[74]See (n 7) 137–8. Arendt conceives the acts of civil disobedience can be a manifestation of this collectively generated power, provided that the desired reforms are justified by constitutional principles which must be, in general, shared by 'a significant number of citizens'. H Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, on Violence, Thoughts on Politics, and Revolution* (Houghton Mifflin Harcourt, Boston, MA, 1972) 74.

[75]See D Lefkowitz, 'On a Moral Right to Civil Disobedience' (2007) 117 *Ethics* 2, 202–33.

[76]To explore the hypothesis that every attribution of responsibility rests on the fact that an expectation has been breached See S Figueroa Rubio, 'Expectativas y Atribución de Responsabilidad' (2015) 26 *Revus: Journal for Constitutional Theory and Philosophy of Law* 93–110.

[77]Lefkowitz (2020) explains that although traditional depictions of civil disobedience portray grassroots activists and social movements as its principal proponents, engaging in illegal actions aimed at changing government policies, there are emerging calls for state civil disobedience. He proposed that it is more

following question: in which cases can states officials engage in actions of civil disobedience?

Traditionally, scholars who provide an answer to this question move from civil disobedience[78] to other types of protest, in this case, rule departures. However, rule departures are considered another type of protest similar to civil disobedience. This is because both civil disobedience and rule departures express the actor's dissociation from and condemnation of certain policies and practices. Civil disobedience and rule departure differ primarily in the identity of their performers and their legality. First, while departure from the rules is typically committed by a state official (including citizens serving injuries), civil disobedience is typically committed by citizens (including officials acting as ordinary citizens rather than in their official capacity). Second, while the civil disobedient person violates the law, the public official who departs from the rules associated with his or her role typically does not violate the law unless the rule he or she breaks is also codified in law.[79] For example, jurors may refuse to convict a person for violating an unjust law. If they do, they are overruling the law.

Conceptually, rule departures are the deliberate failures of a state official to fulfill the duties of his or her office as a matter of conscience.[80] As Kadish and Kadish detail, when state authorities departed from mandatory rules, they depart from rules that are specifically addressed to them, from where derive their mandatory import from the inherently restricted role of those officials as recipients of a limited governmental authority, Kadish and Kadish[81] calls these rules 'rules of competence', as they are the terms under which she is given governmental power (1971: 906).[82] Kadish and Kadish cite several examples of departures from rules of competence: the jury not deciding according to the law given by

appropriate to consider a readiness to face punishment as significant in determining the ethical justification of specific instances of civil disobedience carried out within political communities where officials and citizens generally abide by the principle of the rule of law. State civil disobedience, while still potentially acceptable, represents a new form that is centered on the state rather than civil society, compared to its more conventional variants. D Lefkowitz, *Philosophy and International Law* (Cambridge University Press, Cambridge, 2020).

[78]According to the most influential definition by John Rawls (1971), civil disobedience is 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government' See (n 20) 320. See also H Arendt, *Crises of the Republic: Lying in Politics, Civil Disobedience, on Violence, Thoughts on Politics, and Revolution* (Houghton Mifflin Harcourt, Boston, MA, 1972, and J Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 *Berkeley Journal of Sociology* 95–116.

[79]It can also be said that, according to this view, a deviation from the law is not necessarily tantamount to a violation of the law, which includes the Constitution and, above all, that immutable part of the Constitution which protects fundamental rights and which, it is argued, is beyond the disposal of the legislature, even if it is constitutional. Therefore, civil disobedience, even by civil servants, would consist of violating the law by invoking immutable constitutional law.

[80]J Feinberg. *Freedom and Fulfillment: Philosophical Essays* (Princeton University Press, Princeton, NJ, 1994) 152.

[81]MR Kadish and SH Kadish, 'On Justified Rule Departures by Officials' (1971) 59 *California Law Review* 905.

[82]Alchourrón and Bulygin, from a non-reductionist theory, define rules of competence as constitutive rules – that is, as definitions – exclusively, since they do not regulate any behavior as obligatory, prohibited or permitted. See C Alchourrón and E Bulygin, 'Definiciones y Normas', in C Alchourrón and E Bulygin (eds), *Análisis lógico y derecho* (Centro De Estudios Políticos Y Constitucionales, Madrid, 1991 [1983]) 439–63; C Alchourrón and E Bulygin, *Normative Systems* (Springer, Wien, New York, 1971). See also G Villa Rosas, 'Prescribir y Definir: Cuatro Tesis para una Teoría de la Competencia Jurídica' (2018) 36 *Revus: Journal for Constitutional Theory and Philosophy of Law* 111–41.

the judge; the administrative authority not giving decisive weight to a single factor in its decision; the judge not setting bail solely on the basis of the need to ensure the defendant's presence at trial, or that the judge, in light of the particular situation, grants probation to persons who are not entitled to it.[83]

Two questions arise from the use of this figure of rule departures: 1) Is it justified?; 2) even if the notion of rule departure is used to describe the deviation of state officials from mandatory rules, is it applicable to the specific situation considered by this article? Regarding the first question, scholars tend to agree that rule departures are not necessarily condemned by the legal system and do not deprive these actions of all legitimacy.[84] Kadish and Kadish explain that they used the term 'departure' rather than 'violation' because of its neutrality.[85] This neutrality allows the characterization of departures from rules of competence as something different, and less serious, than a violation. They argue that 'if there are offices in the legal system that indeed permit departures from rules of competence in our sense, it would be inappropriate to characterize the departure as a violation. For violation implies, flat-out, that has been done that ought not to have been done; but if there are rule departures of the sort here at issue, then while that which was done is of the sort that is not supposed to be done, the undertaking of the action was justified' (1971: 906). Greenawalt, also explains that 'situations can arise in which the moral inequity of doing so makes declining enforcement the morally proper choice. Some may believe that the only moral alternatives for an official are to perform or resign; but this view neglects, or gives inadequate attention to, two sorts of situations. One concerns practices that are so evil the official should not forfeit his power to prevent terrible things from happening by resigning. One thinks, for example, of judges in Nazi Germany who were distressed by rules depriving Jews of property and liberty and who knew that their resignation would result in appointments of Nazi sympathizers. The second situation concerns a single isolated evil. An official may not think a matter grave enough to warrant resignation when the performance of his other duties is acceptable and desirable; but he may believe that carrying out his official duty on this occasion will have serious adverse effects that could be avoided by nonperformance. One thinks, for example, of the plight of the junior officers trying Billy Budd in Herman Melville's story. Straightforward application of the Rules of War required them to find Budd guilty of a crime with a mandatory death sentence, but they understood that Budd was morally innocent in striking his own false accuser, Claggert'.[86]

Greenawalt continued explaining that 'whatever may be true of trivial breaches of duty, the argument that the promise of performance is comprehensive for matters of importance is much stronger for officials than for private citizens'.[87] This is the case only when the breach of duty, the rule departure, as the previous examples illustrate, is motivated to serve the overall goals of the office. In this case, the rule departure is justified. However, I think that the reasoning should distinguish between different departures to justify or not. In other words: Not every departure is justified, even if it serves the overall goals of the office. What I want to argue is that it is sufficient to suspend a single point or several precise conditions of the rule of law to be able to restore it. This

[83]See (n 81).

[84]See K Greenawalt, *Conflicts of Law and Morality* (Oxford University Press, Oxford, 1989); See (n 81); See (n 80).

[85]See (n 81) 906.

[86]See (n 84) 279.

[87]See (n 84) 280.

distinction marks a contrast between the exercise of power according to an agent's best judgment within defined limits and the usurpation of power by the official.[88] For instance, in 2016, the Polish Constitutional Court had difficulty publishing its judgments[89] because 'the government illegally refused to publish the CT judgments that it deemed improperly handed down'.[90] The government even introduced a distinction between judgments and adjudications – rozstrzygnięcia Trybunalu Konstytucyjneg –[91] to be published in the Official Gazette. Let us assume that the hypothetic publication of the judgments of the Polish Constitutional Court on social networks violates the publicity requirement of the rule of law. Nevertheless, the hypothetical publication on social network serves the general objectives of the office.

It is time for the second question: is the notion of rule departures applicable to the specific situation considered in this article? While the purpose of rule departures is to describe those acts of officer's conduct, in democratic as well as autocratic regimes, that do not fit within legality but are nevertheless justified because they serve the goals of the office as a whole, it seems that it is applicable. As shown in the previous paragraphs, rule departures are pursued by an officer's individual or collective decision –as the criminal jury does–, for reasons of conscience, not to discharge the duties of her office, or to serve the overall goals of the office.[92] As Greenawalt explained '[i]f an official's breach of a specific duty is more in keeping with the spirit and overall aims of the office than a painstaking respect for its particular duties is, then the former might be said to adhere better than the latter does to the demands of the office' (1987: 281).

Regarding the structure of rule departures, it concerns mainly individual and collective actions, as it was exemplified above. However, this figure could also be extended to cover systemic rule departures[93] that captures the severity of the measures that state authorities must implement to overcome a broken democratic polity. These kinds of departures are different in form but not in spirit. In this vein, we should extend rule departures in order to cover the departures of a number of state officers of different rules but acting coordinated from a variety of positions in government to accomplish political work: to restore the rule of law. To restore the rule of law by bringing a constitutional change, various officials from different spaces in the government must be coordinated to disobey a specific set of rules[94] that prevent a democratically elected government from fulfilling its mandate.[95] It is worth remembering that when public officials serve the general purposes

[88]See (n 81) 930.

[89]The judgments of the Polish Constitutional Court of 9 March, 11 August and 7 November 2016 (ref. no. K 47/15, K 39/16 and K 44/16).

[90]See (n 26) 75–6. See also CDL-AD(2016)001 Opinion No. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland adopted by The Venice Commission Session (Venice, 11 March 2016), p. 43, 136, 137, 143.

[91]See <https://konstytucyjny.pl/ex-iniuria-ius-non-oritur-trzy-narracje-i-paradoks-andrzej-grabowski-bogumil-nalezinski/>.

[92]See (n 84); See (n 80).

[93]See C Valentini, 'Deliberative Constitutionalism and Judicial Review: A Systemic Approach' (2022) 47 *Revus: Journal for Constitutional Theory and Philosophy of Law*.

[94]In doing so, it would be desirable for them to interact with citizens in a manner similar to what they would do in a society without domination. I will elaborate on this point in section 'Realizing rule departures to remove abusive constitutionalism'.

[95]With an ex ante perspective, consider the debate among government lawyers about whether to serve the Trump administration. See WB Wendel, 'Government Lawyers in the Trump Administration' (2017) 69 *Hastings Law Journal* 275.

of their office, they can provide a moral justification that mitigates the corrosive effect of their departures on others' respect for the rule of law. By departing from the rule of law, they reinforce it, especially in the context of illiberal democracies where fidelity to the rule of law is largely unrealized, by substituting illiberal norms for norms that secure basic liberties. Rule departures, acting in systemic form will be key to dismantling abusive constitutionalism.[96]

However, admitting the moral justification of rule departures opens Pandora's box. However, rule departures are not justified in all cases, and how are we to know what those cases are? From the point of view of any official, there will be various cases in which the domination resulting from illiberal government seems impermissible.[97] This raises two problems: 1) the law is minimally objective: morality, even if objective in some sense, involves the existence of deep moral disagreements, which makes a common justification criterion a very difficult task, if not an impossibility, and furthermore 2) a slippery-slope problem could arise: in case *x*, we consider it justified because the government's abuses are very gross. In case *y*, they are not so gross, but it is close enough to *x* to justify disobedience. Where should we put the brakes? The following section intends to answer this question.

Realizing rule departures to remove abusive constitutionalism

While rules departures provide us with a moral justification for breach of a specific duty to challenge autocratic legalism, constitutional theory in recent years has elaborated the normative grounds on which constitutional disobedience might be permissible and realizable. Constitutional disobedience puts the focus on the trigger of constitutional change by destituent power, where the permissibility of constitutional disobedience is conditioned to the fact that the lawbreaker seeks a 'moral improvement of society'.[98] As Patberg[99] explains, the concept of destituent power was first developed as the form of implementation of state civil disobedience in the field of international norms,[100] as it has also had development in global constitutionalism.[101] In this context, what the literature on destituent power suggests is that a politics of disruption can function as a legitimate trigger for constitutional change.[102] While destituent power comes in two conceptions,

[96]For an expanded notion of civil disobedience see C Delmas, *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, Oxford, 2018).

[97]Moreover, it is difficult to determine in real-time when changes will lead to result in genuine reform of hijacked norms. See (n 10) 158.

[98]R Hjorth, 'State Civil Disobedience and International Society' (2017) 43 *Review of International Studies* 2, 332.

[99]M Patberg, *Constituent Power in the European Union* (Oxford University Press, Oxford, 2020).

[100]As Franceschet explains: 'This approach was developed primarily with the international sphere in mind. For example, it has been suggested that certain forms of illegal state action can be justified as a legitimate response to injustices for which no other remedy exists'. A Franceschet, 'Theorizing State Civil Disobedience in International Politics' (2015) 11 *Journal of International Political Theory* 239, 241. See also J White, 'Principled Disobedience in the EU' (2017) 24 *Constellations* 637, 643–6; K Möller, 'From Constituent to Destituent Power Beyond the State' (2018) 9 *Transnational Legal Theory* 1, 32–55; N Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14 *International Journal of Constitutional Law* 3, 657–79.

[101]See W William, 'Civil Disobedience as Transnational Disruption' (2017) 6 *Global Constitutionalism* 3, 477–504.

[102]See (n 99) 124.

anti-juridical and juridical, the juridical is the one that aims at changes in the legal-institutional structure of politics[103] and which I will follow in the rest of this work.

Although destituting power is a legal concept mostly confined to explaining international or European domestic political strategies, it allows us to explain political strategies that may seem arbitrary or destructive at first glance as potentially legitimate forms of disruption aimed at reversing democratic decline. If we associate it with rule departures from the norm in the context of dismantling autocratic legalism to provide the normative basis for restoring a legitimate order, it can act as a corrective, a remedy for certain ills in a general legitimate political system. In a nutshell, its normative basis is the freedom and equality of citizens within the political system in question. Only when this status is violated in some way can state civil disobedience be exercised – and only with the goal of ending the violation.

Destituent power is in line with the purpose of rule departures since both concepts' grounds the idea that under certain circumstances it can be permissible for institutional actors to break the law in order to remedy legitimacy problems that cannot be addressed through traditional channels. In other words, the link between destituent power and rule departures is established under the justification of restoring basic liberties to 'a constitutional order that (presumably) goes back to a democratic founding act –and which it seeks to improve or restore'.[104] Under this understanding, rule departures can be legitimate when they: i) seek to restore a liberal constitutional order, after the fall of an illiberal regime, and ii) are constrained by certain procedural and substantive standards (interests-tracking, avenues for contestation, etc.).[105]

Certainly, departing of the rule of law using instruments of destituent power could be consider as playing 'reactive hardball'.[106] Tushnet explains what playing hardball consists of: 'political claims and practices-legislative and executive initiatives-that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings. It is hardball because its practitioners see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold. In effect, one plays "hardball" by arguing that their opponents did it first or worse and that they mean only to restore a level playing field.'[107] However, destituent power does not fit into this game because it does not play the game of autocratic legalism – or the saboteur's game – by hastening the saboteur's objective. Instead, destituent power acts as a democratic notion by performing actions consistent with the intention of escaping the regulatory grasp of public authority, rendering political institutions inoperative, and dismantling constitutional orders. It is expected to provide-or at least be consistent with normative standards that explain what acts of disruption are legitimate. Importantly, destituent power does not respond reactively but seeks to clarify why the norms matter and how they can be repaired or reformed.

[103]See (n 99) 125–7.

[104]See (n 99) 133.

[105]This distinction parallels the distinction made by just war theorists between the reasons that justify legitimate military intervention and the standards that must be met during the intervention for it to remain legitimate.

[106]See M Tushnet, 'Constitutional Hardball' (2003) 37 *John Marshall Law Review* 523. See also (n 10) 159–60.

[107]See (n 106).

At this point in the argument, there is no doubt that representatives of a political community have the right to disobey and challenge different kinds of dominating norms, even its own, when they violate the freedom of the people within the political system. Constitutional disobedience, through destituent power, follows a logic of restoration. This act of restoration implies that action outside formal legality, an action that initially departs the rule of law, is legitimate if it is in response to deficiencies in the constitutional order.[108] According to this logic, destituent power can only act as a corrective, not as a self-authorizing source of new constitutional norms.[109] When freedom as a status is violated, destituent power is in place to put an end to constitutional dominating norms. This logic implies that it is permissible, or at least not immediately questionable, to declare institutional actors to be bearers of destituent power.

But the destituent power to contest illegitimate norms of an overall legitimate political system also comes with limitations. There are limitations to prevent destituent power from becoming a form of domination, for how can it ever be justified to postulate that a state can be morally justifiable to breach the rule of law when state power itself is a potential source of domination? Destituent power can only act as a corrective, not as a self-authorizing source of new constitutional norms and the democrats who hold the destituent power, should assume that there are good reasons for maintaining the order in question and should not be able to establish new constitutional norms. They should confine themselves to restoring a democratic order in decline by correcting or removing the norms that challenge citizens' freedom.

This way of changing the rules of an illiberal constitution is, of course, not ideal. It would be much better to change them both under a deliberative process which assures people's participation and ultimate popular control, together with the approval of the qualified majority required by the current constitution. However, replacing a dominating rule with a non-dominating rule is clearly more important than meeting all the procedural requirements of formal legality. Indeed, even replacing a dominating rule with a less dominating rule is, in my view, more important than the requirements of formal legality. In contrast, it is morally impermissible to ignore the requirements of formal legality in order to replace one dominating rule with another dominating rule. Applied to our context, here are three scenarios to illustrate these points:

(S1) A group of public intellectuals authors a draft proposal for constitutional reform. This draft is discussed in an extensive public debate and edited to ensure that the final version tracks the perceived interests of the citizens. Among other things, it is proposed to abolish official censorship of the press. The proposal is then passed in a parliament elected in accordance with the requirement for ultimate popular control (i.e., citizens have equal access to influence its composition and determine its direction, etc.). However, the reform does not meet the formal constitutional requirement of qualified majority support, as it is only approved by an absolute majority of members of parliament. In other words, this is a scenario in which the constitutional reform meets both neo-republican conditions for a non-dominating governance, although it does not meet all the requirements of formal legality. Such a reform is morally permissible in the neo-republican view, as it guarantees the individual freedom of all citizens, including those who feel represented by the minority.

[108]Of course, there is another important terrain that needs to be addressed in order to restore the rule of law, namely social norms, but this will be analyzed in another work. On the importance of social norms, see C Bicchieri, *Norms in the Wild: How to Diagnose, Measure, and Change Social Norms* (Oxford University Press, Oxford, 2016).

[109]See (n 99) 133.

(S2) A group of public intellectuals authors a draft proposal for constitutional reform. Again, the draft is discussed in an extensive public debate and edited to ensure that the final version tracks the perceived interests of the citizens. Among other things, it is proposed to abolish official censorship of the press, just as in (S1). However, in this case, the proposal is passed by a parliament whose composition does not meet the demand for ultimate popular control (i.e., citizens do not have equal access to influence its composition and determine its direction, etc.). Moreover, this reform also does not meet the formal requirements of a qualified majority, as it is only adopted by an absolute majority of the entire membership. In other words: In the second scenario, the reformed constitution reflects the interests of the citizens, but it does not fulfill the second neo-republican requirement for non-dominating rule (i.e., ultimate popular control), nor does it fulfill all the requirements of formal legality. Nonetheless, such a reform is also morally permissible in the neo-republican view because it replaces a dominating rule with a less dominating rule. Indeed, even if the new constitution does not eliminate domination because it does not guarantee ultimate popular control of the laws, it abolishes official censorship of the press as a paradigmatically illiberal institution.

(S3) A group of public intellectuals drafts a proposal for constitutional reform. This draft is not exposed to public deliberation and does not track the perceived interests of the citizens. For example, it does not propose to abolish official censorship of the press, unlike in the first two scenarios. As for the rest, the constitutional reform follows a similar path as in the second scenario: The proposal is passed in a parliament which is not composed in accordance with the requirement of ultimate popular control (i.e., citizens do not have equal access to influence its composition and set its direction) and it does not meet the formal requirements of a qualified majority, as it is only adopted by a simple majority. In other words, this is a scenario in which constitutional reform does not meet the neo-republican conditions for a non-dominating governance, nor all the requirements of formal legality. Such a reform is morally impermissible according to the neo-republican-view.

As seen, there are three criteria to consider: *a*) qualified majority, *b*) ultimate popular control, and *c*) respect of the perceived interests of the citizens. While the third scenario, where all three criteria (*a*–*b*–*c*) are ignored, is morally impermissible, the second scenario, where two criteria (*a*–*b*) are not met, and the first scenario, where one of the criteria (*a*) is not met, are morally permissible. The constitutional reform of the first scenario is morally permissible because it fully liberates its subjects by guaranteeing them individual freedom in terms of status. The constitutional reform of the second scenario, on the other hand, is morally permissible only because it somewhat expands individual freedom in terms of status rather than restricting it or perpetuating the status quo.

This is not to say that passing a constitutional reform that violates the qualified majority requirement is not an arbitrary act of interference in the lives of dissenting individuals. It is, but it is not necessarily morally reprehensible. Its moral reprehensibility depends on the outcome. An act of arbitrary interference that subjects a person to the will of others while securing him (more) freedom (S1 and S2) is quite different from an act of arbitrary interference that subjects a person to the will of others in order to dominate him (S3).[110]

[110]See also in this direction P Pettit, 'The Inescapability of Consequentialism,' in U Heuer and G Land (eds), Luck, *Value and Commitment: Themes from the Ethics of Bernard Williams* (Oxford University Press, Oxford, 2012) 60.

In other words, an act of arbitrary interference that subjects a person to the will of others while securing (more) freedom for him is not a case of domination, because you are not arbitrarily restricting their freedom, but protecting yours and creating the conditions for everyone to be equally free under the same law. My aim was to show that neo-republican arguments justify the former but reject the latter.

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