

How to Deal With Evil Law in Hungary and Elsewhere

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2022-09-19T23:38:18

The Hungarian authoritarian regime that arose in the populist wave of societal processes accompanying the 2008-2009 economic and financial crisis has created a legal system in Hungary which is flawed and compromised in numerous ways. But is it valid? Can the law this regime put into force be accepted as law at all? It appears that, with a [few exceptions](#), the debates on [restoring constitutionalism](#) have not addressed this issue in depth. This article intends to demonstrate that the Hungarian legal system does indeed lack validity. To argue my point, I am using a simple formula that is easy to articulate and has symbolic meaning for practice in dark times.

According to the German legal philosopher Gustav Radbruch, Nazi Germany's legal system lost its validity and legal character because it was in such blatant violation of the principles of equality and justice. Nazi law was evil in both ways: not wanting to follow moral rules (amoral), and following racist ideas (immoral). I assume a historical situation has now arisen when the invalidity of evil laws is proving to be similar to the situation in 1946 when Gustav Radbruch coined his famous formula. The Hungarian regime, in its continuous search for enemies, often finds itself on a common platform with racists; the aims of amoral and immoral politics often come close together in practice. My point is, however, that the amorality of a legal system can in itself define its invalidity without using the immorality test.

I consider the applicability of the following formula: the validity of the basic rules of an amoral legal order, i.e., that these rules exist and can influence practice, can be rejected by anyone who follows moral principles, including organizations and communities that wish to live by moral principles. Therefore, I argue that a wide range of actions (from civil disobedience, and from judges reluctant to apply the law, to suspension of voting rights and withholding funds by the EU) are justifiable if the government clearly does not wish to live by moral rules and its legal order reflects this.

Amoral law

By amoral law, I mean law that does not systematically follow moral rules. Thus, I am not concerned with the possibility of separating law and morality but try to evaluate legal systems that fail to follow even their own constitutional values. For me, amoral legal systems are ones where the moral principles that are supposed to frame realistic politics are absent or not backed by deeds. In such regimes, the leader's inner circle may resemble that of a princely court. However, they cannot be called Machiavellian since the end-justifies-means principle does not work in them,

as these regimes have no moral purpose. Their actions are driven solely by the wish to maintain and strengthen their power.

Let us take as our starting point that the legal rules of human communities are based on moral values. In this, they certainly differ from the rules of board games. Thus, it is justifiable to reject a legal system that does not consistently reflect moral principles, just as the weathervane cannot serve as a moral compass. It is on this basis that the system guided by the interests of the passing moment, e.g., changing its refugee or foreign policies on a whim, can be rejected. This is precisely why we cannot act as unprincipled chess pieces in the games of amoral regimes. Moreover, unlike the rules of board games, in such regimes, the rules are constantly changing, and legal certainty hardly exists.

Although an amoral system may well be governed by law, it is defined by an amoral law ('statutory lawlessness') that is considered invalid in the absence of moral principles that restrict it. I argue that this formula is crucial and can be used when mass support for constitutional democracy is not visible. It can also be used to justify the measures taken after the fall of amoral regimes. Naturally, the practical applicability of the formula cannot be described in all cases, just as it is difficult to recognize a wolf in sheep's clothing, or Carl Schmitt dressed as a human rights defender in a human rights costume party.

The formula proposed by this article, i.e., that amoral law is invalid, is assisting primarily those who oppose evil law. They may be people who fight using civil disobedience, for whom the legalistic answer that their actions are illegal is unacceptably simplistic. Their struggle may be supported by the knowledge that they are fighting statutory lawlessness. Alternatively, the formula may also assist communities based on moral values, such as the European Union. For them, its primary message could be that debates with amoral systems must be guided by moral values. After all, the EU can only act against a realist policy by referring to its values accepted by the Member States. In other words, reference to moral principles should not be a mere decorative element in their debate with the Hungarian system. Thus, the formula is also a warning, drawing the attention of international organizations and states to the dangers of realist politics.

The rejection of immoral regimes serving exclusionary ideas is in many respects more difficult to justify than the rejection of amoral law and order since, in the former case, the masses may indeed consider the rules of the system and the leader's commands morally acceptable. In such cases, in addition to setting aside the influential arguments of moral relativism, the Radbruch Formula should be applied to assess whether the regime violates equality and justice to the extent that its rules can be denied. Since the moral standard set is unclear, strong arguments can be made both for and [against](#) applying the Radbruch Formula to an authoritarian system that does not reach the brutality of the Nazi regime. As already mentioned, the formula's main shortcoming is that it cannot describe what constitutes statutory lawlessness for the practitioner. Therefore, it cannot be decided whether in Hungary equality and justice are violated to such an extent that the formula could be applied. Nevertheless, I argue that there is a strong need for a formula that goes beyond the

legalistic arguments that can only provide simplistic answers to such issues as, for example, the Hungarian regime's arguments in defence of sovereignty.

Applying the formula I am proposing may be more straightforward than Radbruch's since in concrete cases it is much easier to capture the amorality of a law than to determine statutory lawlessness. In addition, when applying it, we need not say what moral standard we are applying. If we talk about the absence of morality, we need not arrive at a common understanding about what morality requires (e.g., the moral foundations of the international protection of human rights). I think that, in the case of amoral law, a crystal-clear line of conscience can be drawn. To apply the formula, it is sufficient to accept that law and political morality cannot be separated, and there is no law without political morality.

The Hungarian Case

This formula can be applied to various legal systems: for example, to former state socialist states. It can be shown that, at various points in time, the former state socialist states departed in an institutionalized way from the communist ideology and its moral principles. In the following, however, I will examine the applicability of the formula to the current Hungarian regime. I argue that this system does have rules, but in the absence of any serious moral principles they do not have to be obeyed. My starting point is the precondition that law must remain within the concept of justice. However, there is no underlying political morality in the Orbán system to control it.

The Orbán regime is based on a realist Schmittian politics where anyone can become an enemy (refugees, human rights defenders, civilians, Soros, the EU, universities, academia, LGBTIQ people, etc.). The system operates rationally in the sense that it consistently serves the regime's interests of power, sees politics as a continuous struggle, and its actions are thus determined by the need to maintain control over society and by a relentless lust for power, as well as by the knowledge that all power is fragile and in constant need of reinforcement. The regime applies a nepotistic distribution of wealth and positions to retain power, creating an uneven playing field by limiting political opponents' access to information. I am not arguing that amoral regimes defined by statutory lawlessness do not use moral arguments but that their operation is not constrained by a particular moral conception of the political community.

The Orbán regime appears to be working and enjoying social support even though its functioning cannot be described in terms of moral principles. The basic values in the Fundamental Law are freely shaped by the leaders' will, which is supposed to be „the will of the nation“. The values listed in the Fundamental Law, such as fidelity, faith, and love, can be shaped at the whim of power-hungry politicians and can serve as building blocks for Christian ethical arguments as well as for the leader's personal cult.

Although I regard the system amoral and think that its rules may be denied, this does not mean that the system is failing. As I will explain, I see my proposed formula as a kind of instrument of militant democracy that may be a shield against evil law.

For example, international institutions could apply it in their disputes with Hungary, and once the regime falls, it could also, with sufficient social support, be used to eradicate the remnants of the regime. Also, the acceptance of positivist arguments (a law is a law) or moral relativism made the Hungarian legal profession defenceless against evil law in much the same way as it happened in Nazi Germany. This formula may have convincing force for legal scholars reluctant to engage in moral reasoning about the legitimacy of the legal system.

Applying the formula

Obviously, the denial of the validity of the legal order does not mean that all its legal institutions are invalid, as long as private autonomy is tolerated within certain limits. In addition, the argument of legal certainty also justifies the maintenance of institutions. Private autonomous contracts are little affected by the lack of political morality, and institutional practices can be maintained by invoking the principle of legal certainty in order to avoid abrupt changes. Thus, there are numerous institutional practices in Hungary the maintenance of which is justified despite the invalidity of the foundations of the legal system. For example, the system has hardly harmed private law relationships because the persons involved take autonomous decisions. In other words, applying the formula does not mean that after the regime's fall, sales contracts or marriages concluded under the Orbán regime will be invalid. However, its Fundamental Law and its basic rules can be rejected.

I contend that for rejecting the Fundamental Law and the political system in Hungary, it is sufficient to accept that the current constitutional system is wronged by a total indifference to what is right and what is wrong, which, in conjunction with the masses of disinformation the authorities continually spread, corrupts the political community. Nevertheless, it is still an open question whether amorality stems from the Fundamental Law itself, or the Fundamental Law does not have any real influence on everyday politics that amend it. It is possible that the politics of tampering with the law stems from the leader himself, who has run the gamut of political careers from the left to the far right. However, to reject the Fundamental Law and the system's major rules, we can leave this question unanswered for now.

One manifestation of this indifference is the fact that, in its communication, the regime regularly associates Christian values with hate campaigns against various societal groups. Another [characteristic feature](#) of the Fundamental Law is that there are provisions contrary to international and European law, though it declares compliance with them. It should also be noted that the lost cases before the Strasbourg and Luxembourg courts have not prompted the Hungarian government to bring its anti-refugee and anti-NGO policies into line with the European Convention on Human Rights or EU law. In addition, the indifference to moral issues manifests itself in the hunger for power, the theft organized from above, the pandering to various dictators for political advantages in foreign policy, and in the intensive destruction of institutions in the name of conservative values. In contrast, Polish politicians at least give the impression of rock-solid faith in destroying their constitutional institutions and in being consistently anti-Putin, sometimes even anti-Russian in their politics.

Take an example of apparent hypocrisy: Hungary claims to be cooperating with international human rights mechanisms and uses the persuasive language of human rights. In fact, however, when demanding transparency, it is not about making state operations more transparent, rather about putting extra administrative burdens on independent NGOs. In doing so, it follows the logic, devoid of moral principles, that human rights violation occurs only where conduct conflicts with the regime's interests. Internationally, however, the Hungarian regime acts mainly in defence of its sovereignty, linking it to the protection of national identity. In this respect, it seems to be succeeding because, for example, changes in Hungarian refugee policy after 2015 were practically unaffected by international refugee protection, the international protection of human rights, or EU law. However, the Hungarian state openly violated, among others, the principle of open borders, the prohibition of discrimination, and the prohibition of inhuman treatment – by first starving and illegally detaining refugees in the transit zones, and later by closing its southern borders to asylum seekers (including the transit zones). The state later distinguished between refugees from Afghanistan, Syria and similar countries, on the one hand, and those arriving from Ukraine, on the other, when it opened the Ukrainian border to asylum seekers while keeping the southern border closed.

The European Union, for example, in its disputes with the Hungarian system, could take the view that the Hungarian government's arguments are not about protecting the country's values and national identity but about the government's momentary interests. International organizations could argue that the international protection of human rights and the foundations of global justice cannot be overridden by state politics that does not consistently follow moral values. This would require international organizations to return to purely moral arguments in these debates, and the entire spectrum of their own policies should be determined by the principles of global constitutionalism.

Rejecting the current Hungarian legal order can also be separated from the human rights issue. Opponents of the system may be able to find a moral basis other than human rights for their struggle, such as adopting the principles of „don't starve your fellow human being“, „don't steal“, or „don't lie“. Nor do the regime's opponents have to agree on the possibility of adapting the Radbruch Formula to the Hungarian case. Suffice it to say that an amoral legal system, insensitive to good and evil, does not exist.

