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The Concept and Measurement of Legislative Backsliding

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The article examines the concept of legislative backsliding and offers a measurement strategy for its empirical analysis. Legislative backsliding is defined as a move away from liberal democracy in four critical dimensions of legislative quality, its public policy; legal-constitutional-formal; procedural; and stability aspects. We operationalise each of these dimensions with their separate indices relying on components such as stakeholder consultations, time passed between bill introduction and passing the law as well as results of constitutional reviews. We use qualitative mini case studies from Hungary, widely considered from 2010 on to be a poster child for democratic backsliding, to illustrate the viability of the proposed measurement strategy. We find that laws which show deficiencies in terms of legislative quality exhibit them in not just but several dimensions. Based on the case studies we offer insights into scaling up the law-level analysis to the level of legislative cycles and show how the legislative quality index can be used to measure macro-level legislative backsliding.

Keywords: Legislative studies, Democratic backsliding, Legislative backsliding, Legislative quality, Hungary

1. Introduction

The question of legislative quality is a staple of news coverage in many countries, even if it is not often discussed in such abstract terms. A remarkable case in point is related to the 'Bridge to Nowhere' in Alaska. In 1996, the City of Ketchikan passed Resolution 1311 supporting the construction of a bridge between Gravina Island and Ketchikan. Afterwards, the construction and financing of the bridge

provoked intense debate.[1] The proponents of Gravina Bridge claimed the project was a transportation necessity,[2] even though only 50 people lived on the island and the ferry transfer took 7 min and cost $6 a ticket.[3] Finally, the project was launched with federal financial support (with 'The Transportation Equity Act of 1998' as Public Law 105–178)[4].

In 2005, Sarah Palin, then a prospective candidate for governor in the state, campaigned in Ketchikan holding a pro-bridge T-shirt,[5] and a month later she also confirmed, in reference to the bridge, that 'I would like to see Alaska's infrastructure projects built sooner rather than later'. Yet in a curious turn of events, after winning the election for governor, Palin stated 'I told Congress, "thanks, but no thanks" on that bridge to nowhere'.[6] Eventually, in September 2007, Governor Palin announced 'Ketchikan desires a better way to reach the airport, but the $398 million bridge is not the answer'.[7]

The 'Bridge to Nowhere' is a famous example of what is widely considered to be a 'bad' law. It also goes to show that 'good' and 'bad' laws are not regime-dependent categories (as the case is from one of the oldest liberal democracies). Nevertheless, in extant research, autocracies and hybrid regimes (such as electoral/formal or self-proclaimed 'illiberal' democracies) are often associated with a deteriorated quality of law-making (Drinóczi and Cormacain, 2021). To be able to draw conclusions on the overall quality of legislation in different regime types (which is often associated with *democratic backsliding*), however, the first step is to operationalise 'bad' laws properly. Such methodological work can start with analysing the most widely used cases of such laws of deficient quality as the 'Bridge to Nowhere'. If bad quality legislation becomes the norm rather than the exception between legislative cycles, we observe a case of *legislative backsliding* between these cycles.

This novel concept refers to the deterioration of the quality of legislation over time from a democratic perspective–a move away from liberal democracy in four critical dimensions of legislative quality. These dimensions cover the following

[1] *Politico* (2008, 24 September) '"Bridge to nowhere" chronology".

[2] *Taxpayers for Common Sense* (2005, 9 February) 'The Gravina Access Project: A Bridge to Nowhere'.

[3] Airport Ferry 'Ketchikan Gateway Borough', accessed at www.kgbak.us on 14 March 2023.

[4] See '1492. Construct Gravina Island Bridge in Ketchikan'. Source: https://www.fhwa.dot.gov/tea21/tea21.pdf

[5] *Politico* (2008, 24 September) '"Bridge to nowhere" chronology'.

[6] *The New York Times* (2008, 31 August) 'Account of a Bridge's Death Slightly Exaggerated'.

[7] *Politico* (2008, 24 September) '"Bridge to nowhere" chronology'.

areas of the quality of individual pieces of legislation: (i) public policy (such as policy effectiveness, efficiency, the availability and sensibility of cost-benefit analyses); (ii) legal-constitutional-formal (see laws struck down by constitutional courts); (iii) procedural (having the necessary stakeholder consultations and parliamentary procedures) and (iv) stability (the text of adopted laws is durable and not changed extensively over the short course).

While these aspects have all been analysed separately or in some combination in legislative studies literature (see e.g. Galligan, 2003; Rubin, 2005), we conceptualise them in a unified framework. We treat them as constituent parts of legislative quality, a concept which we propose to measure at scale across various jurisdictions (thus allowing for comparative analysis–also not something that is at the forefront of extant literature). As such, our research is explorative in nature, as it develops a new concept (legislative backsliding) and offers a face validity test with three illustrative mini case studies from the illiberal regime of Viktor Orbán in Hungary (Bozóki and Hegedűs, 2018; Körösényi *et al.*, 2020; Sebők and Boda, 2021).

We test the viability of the proposed measurement strategy by investigating the legislative quality of sample laws in the four dimensions introduced above. We find that laws which show deficiencies in terms of legislative quality exhibit them in not just but several dimensions. Based on the case studies we also offer insights into scaling up the law-level analysis to the level of legislative cycles and show how the legislative quality index can be used to measure macro-level legislative backsliding.

In what follows, we first introduce the concept of legislative backsliding in the context of the well-established literature on democratic backsliding and posit that the former is a critical part of understanding (and measuring) the latter. Second, based on a literature review, we provide a general theoretical framework of legislative quality. Third, we operationalise legislative quality for empirical research. Fourth, we conduct mini case studies to examine the legislative quality of individual pieces of legislation in four dimensions. Fifth, we generalise our measurement strategy for legislative backsliding which we do by analysing changes in legislative quality between legislative terms. Here, we also discuss the scalability of the proposed research design and mention additional country cases which may serve as fertile ground for further testing the framework. In the Conclusion we summarise the logic of the article, our results and consider avenues for future research, notably the impact of the European Union on legislative quality.

2. Legislative backsliding in the context of democratic backsliding

After decades of optimism regarding the sustainability of democratic transitions, during the 2010s new developments caused many scholars to reconsider their previous confidence in democratic norms and institutions. While liberal

representative democracy, as noted by its authoritative historians (see e.g. Manin, 1997), has been facing various crises since its inception, the rise of hybrid regimes (Diamond, 2002) has posed a particular challenge in the 21st century. Hybrid or illiberal regimes both feature key procedural characteristics of democracy (such as regular elections), and attributes associated with authoritarian regimes (from the repression of the free press to infringements of civil rights). These regimes and their trajectories have been variously labelled as democratic backsliding (Haggard and Kaufman, 2021), competitive authoritarianism (Levitsky and Way, 2002), electoral authoritarianism (Schedler, 2015) and illiberal democracy (Zakaria, 1997). Overall, these tendencies were summarised as 'a state-led debilitation or elimination of the political institutions sustaining an existing democracy' (Bermeo, 2016). In a notable twist to previous cases of de-democratisation, democratic backsliding proved to be less abrupt and more gradual, posing a danger of erosion through small, seemingly insignificant steps (Ginsburg, 2018, p. 355; Huq and Ginsburg, 2018, p. 81).

As for the conceptualisation of democratic backsliding, it is notable that contemporary autocrats aim to maintain the appearance of democratic institutions, such as elections, constitutions and courts, while controlling their outcomes (Ginsburg, 2018). Huq and Ginsburg (2018) identify five different ways of democratic backsliding: constitutional amendments to consolidate power; bypassing the checks and balances of other political branches (such as reshaping the judiciary, filling it with loyalists or undermining the legislature); undermining the rule of law and the institutions that protect it by consolidating power in the executive (because the rule of law by definition constrains leaders, it poses a threat to those seeking to consolidate power); manipulating the information environment, attacking or controlling the media and academia in an attempt to degrade the public sphere; and electoral meddling.

Just as this study, the developing democratic backsliding literature at large puts more weight the rule of law and the media than on other potential aspects of democratic backsliding (policy effectiveness, procedural matters or the stability of legislation). Furthermore, the mostly qualitative, case-based analyses have given a great deal of attention to *why democracy backslides* (see e.g. Cooley, 2015; Jakli *et al.*, 2018; Andersen, 2019; Gandhi, 2019; Lührmann and Lindberg, 2019), but less to *how de-democratization takes place* and how to measure its emergence in a consistent framework. The resulting literature, therefore, 'have given a great deal of attention to measuring regime type but have paid little explicit attention to measuring regime change' (Waldner and Lust, 2018, p. 96). Waldner and Lust (2018) mostly cite macro-level theoretical propositions related to political culture, institutions, social structures or the political economy when accounting for the development of hybrid regimes. What is missing from this list is any reference to micro-level, day-to-day public policy decisions or law-making processes.

While most recently, a few studies (Bartha *et al.*, 2020; Ilonszki and Vajda, 2021) did tackle the problem of illiberal governance, the bulk of the analysis of individual policy decisions and legislative procedures is still taken up by international organisations and NGOs (such as the Millennium Challenge Corporation, the Bertelsmann Sustainable Governance Indicators or the OSCE Office for Democratic Institutions and Human Rights (ODIHR)). Lately, the legislative aspects of democratic backsliding have also taken on significant importance under the new rules of Article 7 of the Treaty on European Union. The integration of the detail- and policy-oriented analysis of such think tank reports with the deeper theoretical insights of the academic literature, therefore, offers a potentially fruitful way to reinvigorate the subfield of comparative politics as it relates to hybrid regimes and democratic backsliding.

We undertake this challenge by introducing the concept of legislative backsliding. One key aspect of concept formation according to Gerring (1999) is the identification of attributes that provide necessary and sufficient conditions for locating examples of the term or phenomenon itself. Drawing on this best practice approach, we first define legislative backsliding and place it among the related families of concepts. It is important to note, that this article is not the first to use this term. For instance, Epstein (1999) discusses the issue of legislative backsliding and its privacy implications. His research argues that legislative backsliding occurs when the government enacts laws that undermine previously established privacy protections. This approach is typical in the literature in the sense that it associates backsliding with a move away from a concrete (and normatively desired) policy *substance* (see also Howard and Krishna, 2022). Furthermore, these studies do not aim to generalise the concept for multiple policy domains let alone for the full body of legislative decisions.

Legislative backsliding is also seldom used within the context of the bourgeoning literature on democratic backsliding (a Google Scholar search at the time of writing does not yield a single journal article or chapter which mentions both). In this article, we posit legislative backsliding to be a constituent part and sub-trend of a wider democratic backsliding process. It may or may not have a significant effect in illiberal regimes but given the fact that by definition these states are not fully-fledged autocracies, legislative bodies will generally retain some importance in government decision-making and governance in general (this is especially true of European Union member countries which are bound by rules, such as the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the case law of the Court of Justice of the European Union (CJEU), to keep up a functioning separation of powers).

As shown in Figure 1, judicial-, electoral-, executive- and legislative backsliding can be conceptualised as features of democratic backsliding. These occur when the practice of the given domain shifts away from key elements of liberal

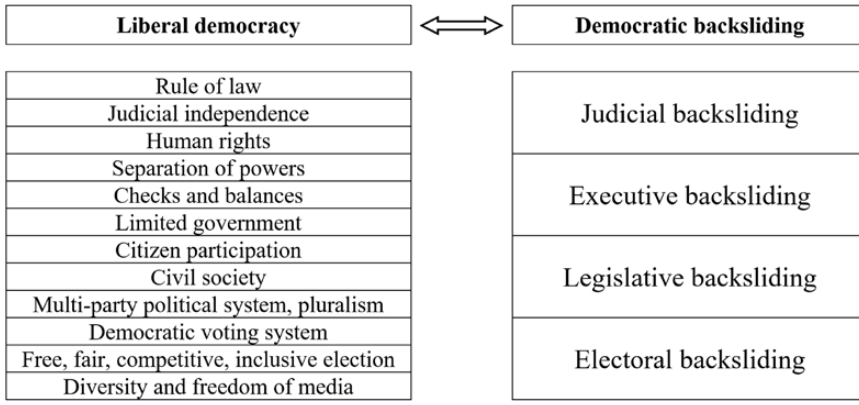

Figure 1 Key elements of liberal democracy and features of democratic beckssliding.

democracy. These encompass, inter alia the rule of law (human rights, checks and balances—see Coppedge *et al.*, 2020, p. 33), separation of powers (Salzberger and Voigt, 2009, p. 197), limited government (Coppedge *et al.*, 2020, p. 33) containing mechanisms of delegation and accountability (Manin *et al.*, 1999, p. 29), the electoral component (Lindberg *et al.*, 2014, pp. 160–161), citizen participation, multi-party political system, competition (Coppedge *et al.*, 2020, p. 33) judicial independence (Russell and O'Brien, 2001, p. 1), civil society (Osborne, 2021) or the diversity and freedom of media (Lavarch, 2012).

While our focus here is on the legislative aspects of democratic backsliding, it is important to note that these domains of democratic backsliding naturally overlap. Hungary is often mentioned as the poster child of illiberal transformation which allows us to use this case to illustrate our point regarding this overlap and the centrality of legislative backsliding to the study of democratic backsliding.

The new Fundamental Law in 2012 enabled the government to elect members of the Constitutional Court to be appointed based on personal loyalty (Ilonszki and Vajda, 2021, p. 774). Furthermore, influencing elections is often also done through legislative acts for which the electoral reform law of 2011 is a prime example: it favoured Orbán's political party and limited the possibilities of the parliamentary opposition (Várnagy and Ilonszki, 2018). As (Drinóczi and Cormacain, 2021) note the transparency of legislative processes has suffered in this period, and Hungarian governments in this period relied heavily on the majoritarian principle in its purest form by, for example, using accelerated legislative processes and omnibus legislation (see e.g. Szabó, 2020; Erdős and Szabó, 2021).

While it is commonplace in the democratic backsliding literature to assert, as Haggard and Kaufman (2021, p. 3) did, that 'backsliding results from the political strategies and tactics of autocratic leaders and their allies in the executive,

legislative and judicial branches of government', the legislative aspects of backsliding are seldom singled out as the focus of research. Furthermore, despite the fact that legislative aspects of democratic backsliding are prevalent in the literature on democratic backsliding without converging on an elaborate conceptualisation and operationalisation of the term for empirical research.

We fill this gap in the literature by providing an explicit conceptualisation of legislative backsliding within the context of democratic backsliding (see Figure 2). In our quest to conceptualise and operationalise legislative backsliding, we use the literature on legislative quality to provide a framework that can serve as the basis for a viable comparative empirical research design building on a sound measurement strategy. We define legislative backsliding as a substantive move away from liberal democracy in four critical dimensions of legislative quality, its public policy; legal-constitutional-formal; procedural; and stability aspects. We suggest evaluating laws according to the four dimensions. We argue that if the proportion of laws that are 'bad' in any aspect is higher in a legislative term than in the previous term, this sign can be treated as an indicator of legislative backsliding. We return to the 'substantial' aspect of our definition below.

3. The conceptualisation of legislative quality

While the quality of legislation is an important topic in political and legal thought, the various interpretations of the concept of quality have failed to result in a coherent–and even more so: empirically scalable–research agenda (as, for instance,

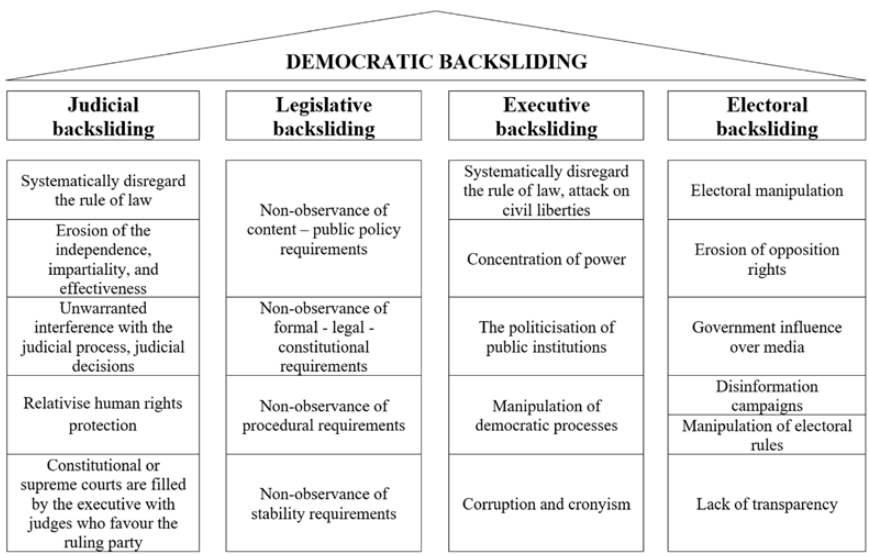

Figure 2 Legislative backsliding as a feature of democratic backsliding.

in relation to legislative organisation (Krehbiel, 2004), or the quality of deliberations in representative assemblies (Steenbergen *et al.*, 2003)). The burgeoning literature on the 'quality of government' (Rothstein and Teorell, 2008), 'good governance' (Rotberg, 2014) and 'better regulation' may be regarded as close relatives. While more general in scope than legislative quality, this literature informs our discussion insofar as it highlights features of quality that (i) refer more explicitly to the legislative process and its outputs and (ii) emphasises the overarching importance of procedural features in assessing policy quality.

Nevertheless, all things considered it is the literature converging around the concept of legisprudence (Wintgens, 2002) and legislative design (Mousmouti, 2019) which provide the most natural starting point for conceptualising the quality of legislation for empirical research. In some cases, these studies are more practical and focus on legislative drafting with no theoretical agenda. In other cases, they are characterised by a level of theoretical abstraction that is somewhat removed from the mundane problems of quantitative social research, and rarely venture beyond qualitative analysis of a limited number of cases. Overall this literature still offers the best springboard for our investigation, as it provides a solid theoretical basis for empirical work and a number of ideas related to the quality of legislation which can be re-purposed in a more general framework.

A key term in this line of research is *legislative failure*, which is alluded to in several forms—failed legislation, unanticipated consequences, miscarriages of the legal system, counterproductive regulation, disasters, fiascos or catastrophes (Mousmouti, 2019, p. 129). Legislative *design* failures include 'conceptual' flaws (analysis of the problem, definition of the objective, choice of technique to address the issue, intervention mechanisms, selection of compliance and implementation strategies) in the regulatory process, the justification and the legislation's mechanics. *Drafting and communication* failures refer to ambiguous, overlapping or poorly aligned provisions (accessibility, structure, language, ambiguity, complexity, gaps in requirements, inconsistencies between laws or within a rule, poorly linked definitions, unclear legislation). *Implementation* failures (including unintended consequences) capture cases where promises are not delivered, not because of a faulty plan but due to resources not properly mobilised, human and institutional lapses or a changing reality not adequately anticipated (Mousmouti, 2019, pp. 131–137).

While the legislative failure framework is critical a building block of a comprehensive conceptualisation of legislative quality it does not meet all the requirements necessary for a theoretically sound and empirically testable theory. First, in legislative studies legislative failure is used in a different sense. Breunig (2014, pp. 135–137) builds on the rational choice literature to suggest that legislative failure can be attributed to the strong executive branch, multiple veto points in the legislative process and partisan competition among a small set of parties. Gelman (2017) explicitly speaks of 'dead-on-arrival bills' when

discussing legislative failure, as do Figureiredo and Limongi (2000) when they discuss the role of presidential power and legislative organisation in 'failure to pass' specific bills (as in passing an annual budget). In our quest for a general theory of legislative quality we are not interested in bills which are not passed—legislative quality is only related to the quality of *adopted* legislation. Building on a terminology that down the line and we decided to focus on legislative quality proper (which can be good, bad or someplace in between) instead of legislative failures.

Second, many additional aspects of legislative quality which should be legitimately taken into consideration are not covered by this framework. The wider legisprudence literature features three more or less distinctly delineated conceptual models: a substantive, an impact-based and a formal one. This terminology is more in line with the needs of a comprehensive and empirically scalable approach and we will build on this in formulating such a new scheme.

To start with substantive analyses, these rely on a narrow focus on the texts of statutes. The type of examination can extend to the internal coherency of legal texts and their external context (typically their constitutionality). Vanterpool (2007) focuses on whether the objectives of the law are clearly stated in the text of the statute and whether the writing is clear, while Voermans (2009, p. 61) and Gomes *et al.* (2011) use constitutionality as the standard to inform their analysis.

The second group, which consists of impact-based examinations (cf. regulatory impact assessment/evaluation), looks at legislation's anticipated or actual consequences (Dunlop and Radaelli, 2016). This approach is especially widely used in both policy and governance studies. Topics frequently analysed include the efficiency and effectiveness of and stakeholders' satisfaction with the adopted regulations. Mousmouti (2012, pp. 201–202, 2019) looks at the efficiency of adopted laws as the objective standard of their quality. She posits that a law is efficient if it tackles the most critical challenges, follows a clear structure and allocates the proper instruments to implement its goals (although this terminology is somewhat at odds with the usage of the term in the closely related cost-benefit analysis literature where efficiency is related to the optimal utilisation of inputs to produce outputs). For Radaelli and De Francesco (2013, p. 36), the quality standard is based on the mode of adoption and the economic impact of the law in question.

The third cluster of research in this area analyses the formal features of the quality of legislation. In a technical sense, the legal sciences have tended to identify a due process of law with, for example, the clarity and unequivocally of legal norms, the infrequency of their amendment, the prohibition of retroactive legislation and the proper time to adjust to new legislation (Vogler, 2012, pp. 934–935). Standard features may also include the procedures used for adopting laws (Arter, 2006) on legislative performance, as well as the adequacy of the law's internal structure (Marshall, 2002, p. 63) and its formal accessories (e.g., avoiding the adoption of

so-called omnibus bills, which pertain to a variety of unconnected policy areas, bills—see Norton, 2001).

Formal quality indicators, regarded as necessary by several international institutions, such as the European Union and the OECD, are typically applied jointly with numerous substantive and impact-based criteria (Mousmouti, 2012, pp. 195–196; Aitken, 2013, p. 8). Stability is one of the key aspects which has received a quantitative treatment in the literature: Sebők *et al.* (2017) develop a measurement framework for formal legislative quality (FLQ) and construct a quality index. Their concept is based on the theory that good laws do not need to be amended at many points and within a short time (within the legislative term of the adoption) after their adoption. A low FQL index indicates stable laws, while a high FQL index indicates unstable laws. For the sake of terminological clarity, we utilise this score as part of our overall design under the 'stability index' phrase.

Based on this cursory review of the legislative quality literature, it is hardly surprising that most authors approach the subject as a combination of the factors discussed above. This perspective is followed by Mousmouti (2014, p. 314) and Xanthaki (2014), as well as Timmermans (1997, pp. 1236–1237) and Florijn (2008, p. 78). Karpen (cited by Aitken, 2013, p. 5) proposes a mix of formal and substantive criteria for identifying quality laws: by the former, he means the quality of language and structure, and by the latter, efficacy, effectiveness, efficiency and stability. At the same time, he also stresses that excessive stability will come at the expense of quality: 'good' laws must also be flexible. While we accept these inherent limitations when it comes to formulating a fully coherent yet empirically measurable concept of legislative quality, the four dimensions of public policy, legal-constitutional-formal, procedural and stability stand out as critical elements of a comprehensive theoretical-empirical assessment of the concept.

4. The measurement of legislative quality

Our criteria for the operationalisation of such a concept of legislative quality include a reasonably wide range of applicability (at least to developed countries, regardless of, inter alia, the form of government); comprehensiveness (legal aspects, policy aspects, democratic aspect etc.); and neutrality in the sense that the it must pass a 'blind' test of by whom, when and where it was introduced. This latter is important in the more general context of legislative backsliding: 'bad' laws are not an exclusive hallmark of illiberal regimes, just as 'good' laws can, in fact, be adopted in such hybrid regimes. It is precisely such a framework that allows for the empirical investigation of legislative quality in different regime types.

With these considerations in mind, we define legislative quality in four dimensions: in its (i) public policy, (ii) legal-constitutional-formal, (iii) procedural and (iv) stability aspects. In this theoretical framework, the 'good' ideal of the

legislative process and the law which results from it is one that meets the four criteria and the respective expectations we have summarised in the following tables.[8]

The first dimension concerns the public policy content of legislation (see Table 1). These encompass various aspects mentioned in the literature in relation to the purpose of legislation, its appropriateness in the given context, its effectiveness and efficiency in the cost-benefit analysis sense as well as the political aspects of policy-making including meaningful debates with a policy focus and joint policy-making of the political class (consensus) which (provided the opposition is autonomous) may signal the importance of underlying policy issues and enhance the durability and virtues of the proposed policy solution.

As is customary in social science research design, any one of these concepts can be operationalised in multiple different ways. Some of these have a well-established methodology, such as cost-benefit analysis, and some are directly observable (the availability of impact assessments and voting records). While weighting between the various factors can be a controversial issue with no objectively superior solution, the systematic analysis of any given metrics would already yield useful information on the public policy quality of the given piece of legislation.

Table 1 Measuring legislative quality: content–public policy dimension

	Quality criterion	**Operationalisation (example)**	**Measurement options**
Content–public policy	Purpose of legislation	Accuracy of the policy goal Political risk—the sponsor of the bill eventually opposes the proposal	Identifying measurable goals in Legislation
	Appropriateness	Law-making is the best tool to solve the problem?	Impact assessments
	Effectiveness	Measurability policy outcomes	Monitoring and review
	Efficiency	Budgetary efficiency	Cost-benefit analysis
	Parliamentary debate	The generality of standard law-making procedures	Analysis of Standing Order regarding the schedule of the law-making process.
	Consensus	Joint proposals of government and opposition MPs	Number of joint proposals, Number of accepted opposition proposals

[8]In these tables the measurement column offers a perspective on the potential empirical strategies for operationalising high-level concepts related to legislative quality.

As for the second dimension, the various formal, legal and constitutional aspects of legislative acts are difficult to disentangle and, therefore, it makes sense to treat them within the same general category (see Table 2). Here, the main principles mentioned in the (mostly legal) literature include comprehensibility, coherence, subsidiarity and transparency–stables of law-making best practices since the dawn of the modern administrative state. Some of these are more closely associated with legal formalities, some with constitutional doctrine. Overall, measurement is also straightforward for at least some aspects. Ruling on constitutionality in principle is the primary purpose of national/federal and supranational constitutional and/or supreme courts, and requisites of the legality of laws are also routinely observable (such as promulgation in official gazettes).

The third dimension is related to process understood in more substantive terms than sheer legality (see Table 3). The involvement of stakeholder, experts, the public in general, parliamentary actors are both legal requisites and normative prescriptions for good quality law-making as consultations may point out issues with the original draft that are less costly (in both a material and immaterial sense) to rectify in the proposal phase. For instance, surprise legislation introduced by individual legislators is often used to circumvent lengthy consultation procedures stipulated by the by-laws of legislative rule-making. The length, and the number of substantive changes adopted during, such consultation periods is a clear indication of the procedural quality of individual pieces of legislation.

Finally, the stability of legislation is a crucial criterium in many authors' work associated with the principle of predictability (notwithstanding Karpen's comments related to flexibility which may be the exception related to emergencies than the general rule of law-making). Here we have the possibility to rely on a concrete operationalisation by Sebők, Molnár and Kubik (2017), which allows

Table 2 Measuring legislative quality: formal–legal–constitutional dimension

	Quality criterion	**Operationalisation (example)**	**Measurement options**
Formal–legal–constitutional	Comprehensibility	Less usable in German-like legal systems	Readability scores
	Consistency and coherence	Contribution of professionals	Number of amendments concerning inconsistency
	Subsidiarity, appropriate level	Proper selection of the level of legislation (Law vs Decree)	Length of laws
	Transparency	Transparency of promulgation	Promulgation in the official gazette
	Constitutionality	Constitutional court decisions	Ratio of laws with constitutional review

for the quantitative assessment of the frequency and extensiveness of legislative amendments to promulgated laws (see Table 4).

While a 'good' law is one that meets the criteria indicated in the above tables, a 'bad' law is (i) not effective/efficient in terms of reaching its public policy goals, (ii) raises constitutional concerns and/or does not adhere to formal requirements, (iii) was adopted in an unwarranted (short, exclusive etc.) procedure and (iv) was amended within a short period after passage/extensively due to its inherent flaws (rather than an apparent disaster or economic distress). The general analysis of individual pieces of legislation can take a more or less refined form in line with research purposes and capacity. In some cases, a binary or three-way classification may suffice (was the law beyond repair or not; does it have more negative than positive scores etc.).

Table 3 Measuring legislative quality: procedural dimension

	Quality criterion	**Operationalisation (example)**	**Measurement options**
Procedural	Stakeholder consultations and transparency of proposals	Is there enough time for each subprocess of law-making?	Number of laws—no time to properly read a proposal The time between introduction and promulgation
	Involving experts from ministries	Who introduced the legislation? Individual government MPs vs. government ministries	Analysis of introducers and associated procedural safeguards
	Public deliberation	Are there active and passive communications? Are the proposals publicly available?	Disclosure (e.g., in websites), the time of publication Quantitative analysis of public deliberations
	Parliamentary debate	Debate length	Divergence from average number of days spent on debate for legislation of similar length

Table 4 Measuring legislative quality: stability dimension

	Quality criterion	**Operationalisation (example)**	**Measurement options**
Stability	Predictability	Amendments after ratification—Stability score—number/ extensiveness of amendments	Number of amendments after ratification during the same electoral cycle

Composite indices may be useful to assess a slew of aspects such as those related to impact assessments. These can be graded according to multiple features, including whether they contain quantitative or just qualitative analysis, whether they are directly related to the legislative purpose, the overall detail of work or even the formal availability of such a document. Finally, across the board scores can be calculated across multiple aspects of all four dimensions for more ambitious projects. The above operationalisation framework allows for any of these approaches and thus meets critical criteria (such as wide applicability, comprehensiveness and neutrality) for creating an empirically testable theory.

5. Empirical case studies

5.1 Case selection

To illustrate our conceptualisation and measurement strategy related to legislative backsliding the selection of a case where such backsliding is expected is beneficial. The regimes most often cited in the context of (various degrees of) illiberal transformations and democratic backsliding, in general, include Erdoğan-era Turkey, or the consecutive governments of Viktor Orbán in Hungary following the 2010 elections. The common denominator of these regimes is a strong leader who strives to consolidate his power by means that diverge from the practices of liberal democracies (Bozóki and Hegedűs, 2018).

As mentioned above, Hungary under the consecutive governments of Viktor Orbán from 2010 on is often treated as the poster child of illiberal transformation, one of the key cases of digression from a fully-fledged liberal democracy (which is not the case for example for Turkey and Russia). Parliamentary legislation took on a fundamentally different character in this era than in the two decades after the regime change (Ilonszki and Vajda, 2021). This allows us to use the Hungarian case to illustrate our point regarding this overlap and the centrality of legislative backsliding to the study of democratic backsliding and to move beyond customary structural explanations (such as packing the courts).

With the period and country case thus defined, we looked for laws with some notable, but varied, deficiencies to test out our measurement strategy. We used the databases of laws and media developed under the Hungarian Comparative Agendas Project for our case studies (Sebők and Boda, 2021). One of our selection criteria was the stability index of Hungarian laws developed by Sebők *et al.* (2017). Another aspect considered in our analysis was the type of procedure (such as emergency rules, individual MP proposals, see (Kiss, 2020)) used for adoption as they often serve as red flags for rushed or otherwise flawed legislation. We also looked at media reaction, to single out 'important' cases and thus align quantitative and qualitative aspects of 'bad' laws. Based on these factors–as well as to allow for the diversity of policy issues for extended validity–three laws have been

selected for further evaluation in mini case studies (see Table 5). The dimensions in which the law was assessed to be deficient were marked as red. Those that met the considered criteria were marked in green. For those that allowed for no such clear-cut judgement we assigned orange.

5.2 Anti-smoking Act

The Act of 2012 on reducing youth smoking and the retail sale of tobacco products prescribed that tobacco products are sold in a separate 'national tobacco shop' (as opposed to retail shops at large as had been the case before). From a policy content perspective, it was a very suspicious construct from the get-go: while the title combines two policy goals (reducing youth smoking; retail sale of tobacco), the policy-making process and the afterlife of the law indicated the supremacy of the latter over the former. The legislative text is unrelated to smoking or health care, its complete focus is on regulation retail commerce. The explanatory note mentions 'statistical' evidence that teenagers face no practical hurdles in getting a hold of tobacco products (although it makes no actual reference to any such analysis). It also mentions the repercussions that future concession holder family businesses would face (and avoid) as a rationale for legislative action vis-á-vis the general sale of these products, as well as the creation of new jobs. On the latter claim an independent analysis projected that the proposal it would lead to the loss of 15,000 jobs.

The notion that limiting availability can reduce social harm related to substance abuse has its merits and policy legacy (see liqueur stores in the U.S. and Scandinavia). Yet we could find no evidence of a prior regulatory impact analysis was attached to the proposal that would have supported the statistical claims of a causality between limiting access and youth smoking (nor could we find ex post analyses since the decade since its passage). The nationalisation/concession approach was also just one of several options to limit supply and alternatives were not actively explored. Eventually, the real authorship (and rationale) for the bill was accidentally revealed in an accidental Word document note in the process of consultation with the European Commission: the proposal was supposedly directly drafted by the leader of the biggest tobacco lobby (and of the biggest suppliers in Hungary: Continental Zrt.), János Sánta, a close associate of the political proposer, János Lázár.[9] Lázár later claimed that talking to Sánta was part of the social consultation process.[10] Leaked audio recordings of the allocation decision

[9]See the parliamentary speech of opposition MP, Katalin Ertsey: *Országgyűlési Napló* (2012) 'A dohánylobbi diktálja a trafiktörvényt?' [Is the tobacco lobby pushing the bill on tobacco?] accessed at www.parlament.hu on 14 March 2023.

[10]*Origo* (2013, 24 April) 'Lázár segítője jól járt a dohányboltokkal' [Lazar's sidekick benefited from tobacco shops].

Table 5 Selected cases

Act number	Topic	Proposal number	Term	Content, public policy	Formal, legal, constitutional	Procedural	Stability
Act CXXXIV of 2012	Anti-smoking	T/5281.	2010–2014	Evidence points to a purpose for the legislation other than the curtailment of smoking.	The European Court of Human Rights ruled that the law violated property rights.	Private MP bill; Key case of insufficient transparency	The instability of the legislative text was extremely high.
Act CII of 2014	Sunday retail	T/1914.	2014–2018	The policy goal was clear. No detailed justification of the expected effects. It was forced through in the face of (and eventually abolished due to) negative public opinion.	No constitutional concerns were raised. The text of the law was coherent and transparent.	An opinion poll was ordered years prior to introducing the proposal. Preparation time was only 10 weeks. Formal consultations were held.	The law was in force for only one year.
Act LXIII of 2018	Home savings and loans	T/2600.	2018–2022	Policy goal clear (and easily implementable) but the surprise effect could only be achieved with minimum prior consultations.	The Constitutional Court partly rejected the case on its merits, partly on procedural issues.	The law violated all principles of good procedure.	Stability issues were not identified.

meetings of the concessions also disproved that the secondary aim was to help regular family business: many concessions landed in the hands of a few politically connected businessmen (or actual family members of politicians).[11]

From a legal perspective, the bill was recommended by the Foreign Ministry to be submitted to the European Commission for review in relation to the rules governing the single market.[12] After a process of almost half a year (which delayed initial adoption) the Commission found no reason to object to the submitted text.[13] In a separate legal process, however, the law was also challenged before the Hungarian Constitutional Court by 16 different plaintiffs. They claimed that the law violated their property rights without compensation due to their long-standing licenses to sell tobacco products. The Constitutional Court struck down these claims in a split decision–minority opinions emphasised that the law limits the constitutional right to choose a profession and to start an enterprise.[14] Nevertheless, the European Court of Human Rights (in Vékony v Hungary) agreed with the plaintiffs that the law violated property rights and sanctioned indemnification related to it.[15]

From a procedural quality perspective, the case also shows a number of deficiencies. While the policy aim was apparently national in scope and should have been prepared within standard cabinet procedures, the bill was introduced as a private member's proposal (which carries significantly less requirements in terms of public debate and impact assessments). In a clear procedural mishap, proposed modifications had already featured in the EU commission draft (before even they were voted on–see footnote on Ertsey speech). The implementation was also ripe with transparency issues as for example the names of the bidders for the operation of the newly created tobacco concessions were not made public (undergirding opposition suspicions that the allocation of concessions was politically motivated). It even led to a new law limiting information freedom rights.[16]

As for stability, the law was a direct follow-up to a similarly themed–but in a sense more regular–public health regulation related to smoking (T/2489). It is relevant insofar as the close timing of the two bills: the first had its focus on

[11]*Népszava* (2020, 8 August) 'Kaszálnak a fideszes trafikosfamíliák' [The Fidesz tobacconist families make a hefty profit].

[12]*Index* (2012, 16 February) 'Mi lesz a trafiktörvénnyel?' [What will happen to the Tobacco Law?].

[13]*Origo* (2012, 18 August) 'Átment Brüsszelen a trafiktörvény' [The tobacco law passed in Brussels].

[14]Decision 3194/2014. (VII. 15.)

[15]Case of Vékony v. Hungary (Application no. 65681/13).

[16]*A TASZ jelenti – 444* (2014, 5 August) 'Trafik-pályázatok: nyilvánosak is, meg nem is' ['Trafik tenders: both public and non-public].

smoke free zones and was promulgated in May 2011 whereas the bill in our focus was introduced in December of the same year. This is additional evidence for the different provenance of the two substantially similar bills. Act CXXXIV of 2012 (T/5281) was additionally amended twice within the same electoral cycle. Less than 3 months after its original adoption (which lasted almost 9 months) it was amended with T/9165 (practically at the first such date possible in regular legislative process). The reasoning emphasised that 'due to processes, and social demands articulated (since the original passage) an amendment of the law became necessary'. T/9863 further modified it to allow for the sale of lottery and other gambling products (interesting choice for a harm reduction bill).

In the next legislative cycle, an additional amendment (T/2080) became necessary to 'fine tune' the regulatory text (approximately two years after the first adoption). According to its explanatory note, the original law had stipulated more tobacco concessions than what 'market demand' had necessitated. It also expanded the products sold in these shops to bubble gums and public transport tickets. Overall, the anti-smoking act was not particularly aimed at its stated claim, was prepared and implemented in a legally dubious process, missed out on critical procedural aspects of legislative quality and was extensively amended in a short period of time after its adoption. All in all, it is the embodiment of bad legislative quality in all four dimensions.

5.3 Sunday Retail Act

The Act CII of 2014 on prohibition of work on Sundays in the retail sector (known in the media as the 'Sunday Retail Act') prescribed shops to be open between 4.30 am and 10 pm on retail trading days and stipulated that they should be closed on Sundays and public holidays. The law also made a distinction based on the type and size of shops, as well as the products sold. A key section limited Sunday work to those of the owners and their family members.

In a recurring pattern, the motion was introduced in the autumn of 2014 by MPs of the governing coalition, this time by the smaller, Christian Democratic governing party. The proposal (T/1914) ran for less than 10 pages, with only 3 pages of explanation—an unusual length and level of detail for a bill that aimed to comprehensively regulate a full day of retail commerce per week. The justifications referenced no impact assessments, only a passing allusion to similar German and Austrian bans. Critics of the original bill pointed out that such restrictive retail regulation is unprecedented in the European Union, especially in neighbouring countries with similar economic characteristics. As for the German and Austrian cases mentioned in the debate, it is important to note in Germany for instance the Sunday ban was not absolute, and bylaws were different from province to the other.[17]

[17] *Adó Online* (2015, 6 October) 'A vasárnapi foglalkoztatás szabályai a régióban' [Sunday employment rules in the region].

It only became clear later that at least some basic research had been done in relation to the (eventual) proposal. The Ministry for National Economy (and not the MPs who formally submitted the proposal) published the results of a study prepared by the relatively unknown M.S. Concord Consulting and Service Company back from 2011 (and these 'impact assessment' results were not published during the legislative process). According to its results, 54% of the population surveyed did not support closing shops on Sundays (M. S. Concord, 2011). Similar results were found in a March 2015 survey conducted by Ipsos, which found that 64% of respondents were against Sunday closing.[18] Likewise, 62% wanted shops to be open on Sundays, according to a survey by Medián.[19] In regard to consensus, besides the full spectrum of the opposition even the minister responsible for economic affairs was against the proposal referencing survey results that 20% of families conducted their shopping on Sunday (eventually he toed the party line in the parliament).[20]

The economic impact of the law proved to be a mixed bag. Total turnover in the retail industry increased instead of decreasing as consumers shifted their shopping habits.[21] However, the number of people employed in the sector fell by thousands, and there was a growing retail labour shortage. One of the explicit objectives was to protect workers' physical and mental health by providing adequate rest time and striking the right balance between the freedom of practising commercial activity and the interests of workers working on Sundays. But in practice this effect was limited as the law only prohibited stores from opening—it still allowed employers to call their workers in on Sundays, for instance, to fill up shelves.

Regarding the formal–legal–constitutional dimension, the Sunday Retail Act can generally be considered to be a 'good' quality law. No constitutional challenges were made, and the text of the law is focused on a single policy topic and provides a clear rationale for regulation (even if it does not provide proper impact assessments, but this only affects other quality dimensions). As for procedural aspects, an actual policy impact assessment (beyond opinion surveys) was not apparently carried out. The final provisions of the law allowed only 10 weeks to prepare for

[18] *Index* (2015, 4 December) 'Még mindig utáljuk a vasárnapi boltzárat' [We still hate Sunday shop closings].

[19] *Világgazdaság* (2015, 7 May) 'Nem akarjuk a vasárnapi zárva tartást, de a kormányt ez nem érdekli' [We don't want Sunday closing, but the government doesn't care].

[20] *HVG.hu* (2014, 3 November) 'Varga Mihály nem támogatja a vasárnapi zárva tartást' [Mihály Varga does not support Sunday closing].

[21] *Portfolio* (2015, 11 August) 'Mit okozott a vasárnapi boltzár? - Megtudtuk a friss adatokat!' [What are the implications of Sunday shop closing - We have the up-to-date statistics!].

the new regulation. The government conducted formal consultations with a wide variety of stakeholders.[22] Many companies set to gain business from the new regulation supported it, those set to lose were against it, while trade unions were not in unison on the subject.[23]

Finally, for the stability dimension, ever since its adoption the Sunday Retail Act prompted widespread criticism and various challenges to lift the retail ban. Opposition parties tried to initiate a referendum against the regulation, but the government erected procedural hurdles in multiple cases. Eventually, in early April 2016, the Curia (order no. Knk.IV.37.257/2016/7.), the highest judicial authority, overruled Decision 17/2017. of the National Election Committee and agreed that the question could be placed before the electorate. At this point, however, the government immediately did a U-turn, and parliament adopted the government's proposal to repeal the Act (T/10171). The official reasoning attached to the repealing law acknowledged that the policy 'divided' the nation and became a politicised issue. In this debate the government was 'unsuccessful' in 'convincing the people' of its merit. (Political considerations were also revealed in the text which stated that instead of Sunday retail the government wanted to focus on a 'unified action against forced resettlement as advocated by Brussels'.) Eventually, the decision to scrap the law killed two birds with one stone: it avoided a referendum likely to result in a humiliating defeat for the government, and most Hungarians (as evidenced by polls) were pleased with the outcome.

Overall, the law on Sunday retail showed mixed characteristics in terms of legislative quality. Politics clearly trumped policy considerations throughout the process leading to an almost unprecedented U-turn resulting in a classic basket case of legislative stability. Yet it showed no formal, legal or constitutional deficiencies and its procedural analysis showed both positive (widespread consultations, secret but eventually publicly shared opinion polls) and negative characteristics (see an extremely short preparation time).

5.4 Home Savings and Loan Associations Act

Home savings and loan associations were a staple of the Hungarian real estate market for decades and have enjoyed government financial support in the form of tax credits. The institution was kept mostly intact over consecutive Orbán governments until 15 October 2018 when a surprise submission by individual MPs

[22] *HVG.hu* (2014, 12 November) 'Szinte mindenki nekiment a vasárnapi zárva tartásnak' [Almost everyone was against Sunday closing].

[23] *HVG.hu* (2014, 18 November) 'Támogatja a vasárnapi zárva tartást a CBA, a Coop és a Reál' [CBA, Coop and Reál support Sunday closing]; *HVG.hu* (2014, 7 November) 'Vasárnapi boltbezárás helyett több bért akar a LIGA' [LIGA wants more salaries instead of Sunday shop closing].

proposed to essentially abolish these financial organisations. Erik Bánki, the sponsor of the bill (who headed the economy committee at the time—a tell-tale sign of a government backed bill) justified the intervention in terms of the grand scheme of government policy: the tax breaks needed to be redirected towards a new family support policy (along with the trademark anti-finance language of Orbán governments referencing 'extra profits'). The explanatory note minces no words in terms of the need for a policy realignment and, therefore, provides a clear rationale for re-regulating the sector.

The criticism of Bánki related to the savings banks relying on state subsidies to turn a profit was denied by Bernadett Tátrai, the chairman of Fundamenta-Lakáskassza Zrt. (the largest home savings bank in Hungary) at a conference held the day after the proposal was submitted.[24] Press coverage in non-government aligned media was also critical of the overnight de facto discontinuation of a financial institution type which had served millions of clients in achieving their housing objectives (and a lack of explanation how the bill fit into a comprehensive housing policy strategy).[25] As a poster child for an intentional policy shock going for the surprise effect (so that there is minimum time for signing new contracts under the old system), it clearly violated multiple principles of good governance, including stakeholder consultations, impact assessments and wider societal–political consensus (subsequent referendum proposals to overturn the law were held off by government majority bodies).

The proposal immediately generated legal challenges. The opposition submitted a petition to the Constitutional Court (CC) on 21 November 2018 for an ex post review. They requested the CC to declare certain law provisions unconstitutional and to annul them retroactively to their entry into force. Opposition MPs argued that there had been neither a public debate nor a broad social consultation before the bill was introduced. Furthermore, they took issue with the breaching of procedural guarantees (the law was adopted in a combination of 'discussion with urgency' and 'exceptional' procedures, the most expedited available, which was not properly explicated according to the petition). They also argued that the law did not allow sufficient time for preparation and that it violated the requirement of the prohibition of discrimination, the right to property, the right to decent housing conditions and the protection of one's home. The Constitutional Court ruled (in Decision 24/2019. (VII. 23.)) that applying the procedure was formally lawful

[24] *Portfolio* (2018, 16 October) 'Exkluzív! Megszólalt a Fundamenta vezérigazgatója (vágatlan)' [Exclusive! Comment from the CEO of Fundamenta (uncut)'] accessed at www.youtube.com on 14 March 2023.

[25] *Portfolio* (2018, 15 October) 'Viszlát, lakás-takarékpénztár, szerettünk!' [Goodbye, home savings bank, we loved you!]; *Habitat for Hummanity Magyarország* (2018, 19 October) 'A lakástakarékok beszántása is a legszegényebbeket sújtja' [Home savings bank collapse hits the poorest].

and constitutional. It also found the petition to be partly unsuitable for examination on its merits and partly to be unfounded.

As this court case showed, the introduction of the bill was ripe with procedural (if not constitutional) issues. The bill's sponsor requested an extraordinary procedure with a minimal time limit on submitting amendments; in this way, other MPs had close to no opportunity to formulate and introduce substantive amendments. Finally, just over a day after the bill had been introduced, it was adopted on a party line vote. The law was promulgated on 16 October and entered into force the very next day. The process omitted prior impact assessment, evaluation and social consultation in order (according to Bánki) to circumvent the social 'hysteria' that was developing around the case and clients laying siege to savings bank to gain access to tax credits as long as they could.[26]

In a stark contrast to a similarly controversial law as the Sunday Retail Act, the Home Savings Act did not generate a subsequent turnaround. Referendum challenges from political opponents were contained by government appointed members of National Electoral Commission and, given that the law pertained to tax policy, it was also exempted from the more straightforward constitutional challenges. As a consequence, the law was not subsequently amended (which is par for course for sunset type regulations) and therefore has proved to be a long-term resolution to the issue. Overall, the law had apparent (and intentional) flaws in terms of the preparation process (to apply the shock effect to the market) but had clearly stated policy aims which were successfully implemented yielding a mixed evaluation in this dimension. It had no such apparent deficiencies in terms of legality and stability. Finally, in terms of procedural quality it was a veritable basket case from start to finish (which took in fact one business day).

6. The measurement of legislative backsliding

The aim of the conceptualisation and operationalisation of legislative quality was to provide a proper framework for measuring legislative backsliding. With measurement strategies for the four dimensions of legislative quality spelled out, we now return to this question and offer an empirical research design to account for legislative backsliding. The three mini case studies offered a micro- or unit-level look at legislative quality which we now extrapolate to the macro, or legislative cycle level. We defined legislative backsliding as part and parcel of democratic backsliding and posited that it implies a downward general trend in the average legislative quality for any given jurisdiction between two legislative cycles. Such a trend can be observed by first measuring a general quality score which is composed of individual metrics for each dimension (see Table 6 which demonstrates this logic for the three cases of Table 5).

[26]*HVG.hu* (2018, 22 October) 'Mondott pár érdekeset Bánki Erik a lakáskasszák folytatásáról' [Erik Bánki said some interesting facts about the future of home savings banks].

Table 6 Measurement of legislative quality

Act number	Title	Proposal number	Legislative term	Content, public policy	Formal, legal, constitutional	Procedural	Stability	Legislative quality score (%)
Act CXXXIV of 2012	Anti-smoking	T/5281.	2010–2014	0	0	0	0	**0**
Act CII of 2014	Sunday retail	T/1914.	2014–2018	0	25	12.5	0	**37.5**
Act LXIII of 2018	Home Savings	T/2600.	2018–2022	12.5	25	0	25	**62.5**

While there can be many possible formalisations for the overarching reasoning, here we now propose a simple system where each dimension covers 25% of the total score, and each dimension can get the value of zero (for an uncontested 'bad' assessment), 12.5% for a mixed analysis, and 25% in the case of no clear-cut deficiency in the given dimension. A law can get a perfect 100% score if all four dimensions conform to the ideal of legislative quality, a zero if all four show major defects, or a score in-between for equivocal analysis outputs.

This table can be scaled up to cover (i) all laws passed in a given jurisdiction in a given legislative terms and then legislative backsliding (or overall quality gain) can be calculated by (ii) comparing the average quality of laws between legislative terms. The result (the sum of the quality scores of the individual laws divided by the total number of laws adopted) is an average quality score for the quality of legislation in a given legislative term and can serve as the basis of intertemporal comparative analysis. Supplementary Appendix A provides a mock extrapolation of the logic of Table 6 to two consecutive legislative cycles.

The first column in Supplementary Table A1 shows two consecutive legislative terms, the second an imaginary number of bills adopted in the given cycle. Next come the four dimensions in which, in the following columns, each law is evaluated. In some cases, as for Law Nr. 1 it is bad quality across the board, for others, such as Nr. 7, quality is good in all for dimensions. The legislative quality score row shows the composite index for each law. The ultimate column aggregates unit-level scores and calculates a legislative term-level average. If the average legislative quality of one legislative term is lower than the average legislative quality of the previous term (as is the case in the example in Supplementary Appendix), it indicates legislative backsliding (regardless of starting point).

Two issues merit further discussion in relation to this proposed measurement strategy for legislative backsliding: internal and external validity. As for the first, the proposed system is tailored towards simplicity: each of the four dimension has equal weights. Yet, depending on context, one factor may be more important than others, or certain dimensions may be disregarded altogether. Constitutional courts, for instance, may be captured in the more general process of democratic backsliding, which may render positive scores (as in the case of Sunday retail and or Home savings laws above) pointless. Dimension-level scores for individual laws also rely on a combination of factors (formal, constitutional and other legal issues in the case of one) and the analysis of the relative importance of any of these factors contributing to the dimension-level score is inherently subjective.

Here, we reiterate our position that weighting between various factors may not have an objectively superior solution. What can aim for, though, is to provide a first iteration of a system that is still more transparent and replicable than entirely qualitative case studies which dominate the extant literature on legislative quality. Such a scalable system is more adept at picking up on systematic deterioration on

the big data level than case studies and, therefore, has a competitive advantage in establishing legislative backsliding on the macro level.

The second issue worth additional discussion concerns the external validity of the proposed framework. While Hungary is a key case in the literature on the study of democratic backsliding, we consider the measurement strategy of this article to be universally applicable to at least developed Western democracies (and possibly even beyond). In the post-2010 government cycles in Hungary it is clear that the legislature has suffered a decrease in power, the reasons for which can be found in the general democratic condition, the weakening of the formal limits of the legislature, the constitutional and political position of the parliament and finally the autocratic features of Fidesz (see Ilonszki and Vajda, 2021). As legislative control withered, legislative quality also deteriorated—the three mini case studies illustrate some aspects of this trend.

Nevertheless, for the framework to be scalable, it is still necessary to present how they would travel to other cut cases where legislative backsliding is often implied in qualitative studies. We offer three such examples which buttress the claim of external validity of our measurement system (see Supplementary Appendix B for a summary table of these cases).

The judiciary reform in Poland in 2017 is often singled out as an example of democratic backsliding in general, and legislative backsliding (without naming it as such) in particular. The leading party in government, Law and Justice (PiS), which had won a majority in the lower house of parliament in 2015, introduced reforms that would have given the government greater control over the judiciary.

The reform of the Polish judiciary started with adopting the amendments to the Act of 25 June 2015 on the Constitutional Tribunal. This already raised issues related to stability. The process continued in 2017 with the comprehensive justice reforms voted in 2017. They immediately drew criticism from the European Commission for violating the independence of the judiciary and the rule of law (constitutional quality problems). Despite an infringement procedure (INFR(2021)2261), the PiS government continued to push forward with its reforms and the prime minister argued that the EU has no right to interfere in national judicial systems. The government thus asserted that EU law does not take primacy over national law (Bárd and Bodnar, 2021). In Case C-791/19, the Court of Justice of the European Union found the new disciplinary regime for Polish judges to be incompatible with EU law. In sum, the Polish judiciary reform act raised multiple issues related to the four dimensions of legislative backsliding, including constitutional–legal, policy effectiveness, procedural and stability.

In Turkey, a similar judicial reform bill (1/726 Esas Numaralı Tasarının) on Amendments to the Law of the Council of State and Other Laws introduced in 2016 focused on restructuring the administrative and civil supreme courts

in Turkey. It took the form of an omnibus bill which already points procedural issues. One of the most controversial parts of the law (No. 6723) was to strip almost all the existing members of the Council of State and the Court of Cassation of their duties while reducing the size of these courts (prompting denouncements from many domestic and international stakeholders—see procedural quality; for more on the case: Olcay, 2016). The president directly appointed a quarter of the seats, while the rest of the seats in both courts were filled by the Supreme Council of Judges and Prosecutors within five days of the bill's enactment. The regulations sparked controversy as the law reinforced severe concerns about the independence of the judiciary and the rule of law in Turkey in general. Although the Turkish Constitutional Court, in its decision (2020/75 Anayasa Mahkemesi Karari), rejected the motion to repeal the law in its entirety and found that the law No. 6723 was not formally unconstitutional, several parallel reasoning and dissenting opinions were attached (see our point on constitutional independence).

An additional case from Brazil sheds light on not just the geographical scalability and external validity of the proposed research design, but also signals that it may very well be applicable to other levels of rule-making in the administrative state (in this case executive decrease). Despite promising to increase transparency in government both as a presidential candidate and after being elected, Jair Bolsonaro's actions have actually worked to reduce transparency. This was particularly evident in early 2019, shortly after Bolsonaro took office, when his administration issued a decree (Decreto No. 9.690/2019, issued on 23 January 2019) that significantly expanded the number of officials authorised to classify information as confidential. The decree amended decree No. 7.724/2012 which regulated the law on access to information (LAI), which had been in force since 2012.

The law specifies that information can be classified in extreme situations, such as when national sovereignty, public health or the state's financial stability is at risk. The LAI legislation was amended without transparency and dialogue with civil society and met resistance from the public and media, ultimately resulting in the decree's defeat in Congress.[27] Under pressure from society and MPs, the decree was repealed (with Decreto No. 9.716/2019), and the confidentiality classification was restored. This event was just one in a series of actions taken by the Bolsonaro administration to undermine transparency, with other notable examples being the Supreme Court's rejection of a presidential decree (Decreto No. 9.759/2019) aimed at eliminating citizen councils in the federal government (Gonçalves and Vieira, 2020). As in the Hungarian case, when it comes to selected Polish, Turkish

[27] *O Globo* (2019, 19 February) 'Camara Aprova Urgencia de Projeto Para Revogar Decreto do Governo Sobre Sigilo de Documentos' [Chamber Approves Urgency Project to Revoke Government Decree on Document Secrets].

and Brazilian examples legislative backsliding in all its four dimensions was clearly at play within larger trends related to a shift away from liberal democracy.

7. Conclusion

In this article, we presented a novel theoretical framework explaining and measuring legislative backsliding. We explicated why existing concepts related to the more general phenomenon of democratic backsliding are not sufficiently suited to be used in legislative research. Therefore, we drew on the literature on legislative design to conceptualise the four dimensions of legislative quality which could serve as the cornerstones of a new measurement system of legislative backsliding. These four dimensions were the (i) public policy; (ii) legal–constitutional–formal; (iii) procedural and (iv) stability aspects of legislative quality.

Next, we offered an operationalisation of the theory of legislative backsliding for empirical research with three mini case studies from Hungary's illiberal turn under Prime Minister Viktor Orbán from 2010 on. Finally, we offered insights into how our analysis can be scaled up for comparative research. Here, we posited that the substantive deterioration of average legislative quality from one legislative cycle to the next can be considered to be a case of legislative backsliding. In sum, we proposed a blueprint for the systematic comparative analysis of legislative quality and backsliding.

This is not to claim that there are no open questions associated with the theoretical framework or measurement strategy proposed by this article. We address two such avenues for further development: the role of the EU in the case of its member states; and the threshold related to substantive legislative backsliding vis-á-vis milder cases of sliding statistical indicators of legislative quality. For the first thorny issue which would warrant further investigations we can offer only some rudimentary remarks along the four dimensions of legislative quality. EU accession has not overridden domestic jurisdiction in many policy areas due to the principle of conferral, which limits the EU's competences (TEU Article 5). The impact of the EU on democratic backsliding primarily affects exclusive EU competences. Member state governments have considerable room for manoeuvre in implementing their policy decisions, even if they violate EU law. Lengthy infringement and court procedures are typically required to uphold the supremacy of EU law. However, illiberal governments often exploit these procedural delays and are unlikely to change their position during the process (Strupczewski, 2022).

Nonetheless, exclusive EU competences present a challenge for the theory of legislative backsliding compared to domestic legislation. EU policy-making adheres to higher practical standards of effectiveness, efficiency and procedural quality. While domestic laws governing legislative quality include requisites such as stakeholder consultations, transparency, cost-benefit analyses and formal-legal

quality, these standards are often not consistently met. In contrast, EU legislation follows a more complex and leisurely timed process, which contributes to its stability. Nevertheless, limited access for local stakeholders and potential barriers, such as language, networking and lobbying budget constraints, can arise in EU-level legislation. Consequently, questions about the EU's democratic deficit cannot be dismissed in the analysis of legislative quality and backsliding.

Our final point is related to the notion of 'substantive' deterioration in our definition of legislative backsliding. Our framework does not tie the measurement of legislative backsliding to a concrete threshold so as to make it as widely applicable as possible. Having said that, we would already consider a deterioration of 10–20% across the board of the four dimensions as legislative backsliding. This level of degradation of legislative quality would supposedly be an outcome of concrete political, institutional or other developments and not just a measurement error. Needless to say, further empirical work should be conducted to substantiate such intuitions. As for the role of starting points, in our view, it is beneficial not to limit the universe of cases by setting concrete standards in this respect. With additional work, future research can engage in a more detailed typology and delineate the differences between legislative backsliding within liberal democracies, illiberal regimes and beyond.

Supplementary data

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Conflict of interest

The authors have no conflicts of interest to report.

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