Orbán's (Counter-)Revolution of the Voting Booth and How it was Made Possible

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During the age of great revolutions, Joseph de Maistre distinguished between counter revolutions and the contraries of revolutions. Fearing, rightly, that counter revolutions may have the same horrible consequences as the Jacobinism that he witnessed, he expressed his preference for the contrary of revolutions, but never really explained how it would work. If we take the Bolshevik type revolutions of 1917 and after as the baseline, the self limiting, velvet, peaceful, negotiated revolutions, "refolutions" or "reforradalmak" of 1989, 1990 and in South Africa a bit later supplied the answer. Where there were previously dictatorships linked to party or parliamentary sovereignty, or their combination, they established constitutional democracies through round table led negotiations, and legal continuity. The legal continuity itself rested in part on the fiction that the previous regimes had real law, and in part on the possibility that part of that fiction, and in particular the amendment rule of constitutions (Art 15 (3) in Hungary originally) could be turned into workable mechanisms.

The problem De Maistre articulated returns if we take the negotiated revolutions or changes of regime as our revolutionary baseline. Those who wish to reverse the outcome, namely constitutional democracy, always had a choice: break with all white gloved legality and establish a new regime of their choice through revolutionary rupture, or use the mechanisms of constitutional democracy to abolish the very system according to what Goebbels already considered the best joke about democracy. Again the choice: contre-revolution or le contraire de la revolution. In Hungary only a fascinating figure like István Csurka, whose spirit was hardened under the name Rasputin in the service of the old ministry of the interior was inclined to the old counter revolutionary scenario; I doubt that his children in Jobbik are involved in more than elaborate political theater. But be that as it may, Viktor Orbán, far more clever than any of them chose to do both things at once, in watered down versions. Verbally he is a full fledged revolutionary, if only on well chosen occasions when for example he decides to rename an otherwise identical sitting parliament as the national constituent assembly (alkotmányozó nemzetgyűlés). Legally, he follows the plan of a contrary revolution, based on the open ended normal parliamentary amending process of the constitution he seeks to replace. In reality, much more than the constitution of the regime change of 1989-1990, his proposal is simply full of continuities with the regime that he dishonestly claims has never had validity in his eyes: the same branches of power, the same parliamentary system with an only slightly altered constructive vote of no confidence, a reduced, dramatically packed (11 to 15) but still potentially strong constitutional court (even if not for the current session when the new form of prior review will be useless), a system of 2/3 laws that was a unique aspect of just that regime, and a presidency elected more or less the same way. Admittedly these are kept next to new elements that will make his particular governmental incumbency, Pinochet style, extend its life into the future through special appointments, and a somewhat deformed existing table of rights. More dramatic ideas like a second corporate chamber, vdouble voting for mothers with children, and the creation of a new amendment rule are however abandoned. All in all I hold my view that masquerading as a new constitution Orban's basic law is only a bizarrely put together amendment package

that, despite vocal claims and exclusionary symbolic elements noisily advertising total transformation of the regime's identity, earn him only the title, to use an American expression: "chicken shit revolutionary".

But people should have the right to name themselves and their revolution. Orbán and Szájer, both of whom I have the misfortune of personally knowing, are according to their own designation "revolutionaries of the voting booth", a curious addition to the vocabulary of the many handsome Central European qualifiers of the substantive, revolution. This absurd construction once again recalls the words of the master: "the first time tragedy, the second time farce". Alas, a farce can last politically and institutionally for 20 years as it did in the case of Louis Napoleon (longer in fact than the tragedy of the uncle). The farcical combination of the rhetoric of revolution, and the utilization of not only constitutional contents but the very method of continuity from 1989, denuded of its normatively attractive elements, can succeed even if people realize the possible contradiction (they have not yet) of denouncing the current legal validity of the 1989-1990 constitution, and using its amendment rule to enact a new one that contains the very same amendment rule.

This contradiction can only be removed if we admit also that the 1989-1990 constitution was itself a full break with its predecessor, a new and fully democratic rule of law constitution. That is logically quite possible within the method of continuity, a point of H.L.A. Hart versus Kelsen that I will not try to formally revisit here. It is more true for the constitution of 1989-1990, than of the new construction that is about to be passed, irrespective of the formal absence of the 1949 label. And indeed, if the regime of 1989-1990 was a new one, why should there be a new revolution organized against it? No one in Europe wants to say that he or she is a counter or contrary revolutionary against the constitutional state, accept maybe Jobbik and its ilk elsewhere. It is on this point however that the historical omissions of the liberal side have helped Orban make his case, if not first and foremost in terms of revolutionary or even soft revolutionary rhetorics. At issue is the unfinished nature of the Hungarian regime change, or negotiated revolution. The commentary FIDESZ appends at the end of its constitutional proposal is right to point this out, even if the concept of finishing a constitutionally incomplete regime change, within legal continuity, is not the same as reversing it through any kind of revolution, contrary or counter, legal or illegal. What I am interested in is not only how the enterprise of current constitution making is justified, indeed how three contradictory arguments or rhetorics are inorganically combined . Rather, I would like to maintain, that the one valid argument among the three that FIDESZ martials in its own defense indicates how the door was left open to its current constitution making effort by the defenders of the constitution of 1989-1990. They are therefore i*n significant part* responsible for what is happening now.

What I am saying, horribile dictu, is that on one point FIDESZ is right, as against its liberal critics. The latter still claim, with an expression known only to the Hungarian semi-professional literature, that there is no constitution making compulsion or "alkotmányozási kényszer" in Hungary. I find and always found the very term incredibly irritating (along with another one indicating that middle strong amendment rules "cast the constitution in concrete") , and particularly misleading in Hungary. In Hungary there has been constitution making compulsion of some special kind since 1989, not primarily because of the contents of the Constitution agreed upon at the Round Table, and especially as corrected in 1990 by amendments, but because its very preamble refers to its own interim status by indicating its validity till "the enactment of our country's new Constitution". It is useless to interpret Hungary in terms of the debates of Jefferson and Madison, and side with Madison's much more conservative position, because not one of the at least 13 or more constitutions made in America at the time of that extended debate (at least 11 in the states, 2 for the Federal Union) were made in the way that resembles the Hungarian process. The latter belongs to another innovative pattern, beyond the dicothomy of revolution and reform, pioneered in Spain, practiced in different ways by several Central European countries and perfected in South Africa, and its very structure

involves a constitution making compulsion between two stages of constitution making for the sake of learning and legitimacy both. Hence the similarity of the openly stated provisional status and the very language of the 1989-1990 Hungarian constitution to the Polish Little Constitution 1992, the Bulgarian amendment package 1990, or the South African interim constitution of 1994 was not accidental. It was generally and entirely correctly recognized that coopted bodies like Round Tables, whatever their subsidiary legitimacy from other sources (inclusion, consensus, deliberation, publicity, veil of ignorance regarding specific outcomes) did not have the full *democratic* legitimacy based on free elections any more than the parliaments of the old regimes on which they technically relied on to enact substantively new final constitutions of the changed regimes. Yet the transitions to democracy had to already take place under the sign of constitutionalism if the danger of civil war or revolutionary dictatorship was to be fully averted. The solution was the interim constitution under various names, and more generally a two stage model of transformation where after free elections in a second or later stage a freely elected assembly (constitutional assembly or Grand National Assembly or parliament under special conditions) would produce the final constitution. The South Africans rightly recognized that the best way to do this was for the interim constitution to include the detailed rules for the making of the final one. This was unfortunately omitted in Hungary with the very unfortunate consequence that after free elections in 1990 a pact of just two parties could replace a consensual new constitution making effort at what would have been the most logical time.

FIDESZ was rightly an early critic of this last procedure, but that did not make it an opponent of the subsequent 1994-1996 effort. At that time it was widely felt that there was at least a need (if not a compulsion or kenyszer) to re-legitimate the constitution of the regime change through finally enacting the new promised constitution. I emphatically do not share the view that the effort was motivated by the reluctance of the MSZP to accept the constitution of the regime change that was already fine as it was. The SZDSZ was even more committed at that time to making finally a new constitution, and for me at least this was the main point in entering into the coalition of 1994 – in the end a mistake I participated in. Mea culpa, especially since the constitution effort failed. It is true, that while some people spoke of conservative constitution making at the time , others hoped for more substantive changes. That is as it should be; this was a legitimate point for negotiations, unless one side was to impose one or the other. While those in the minority (including FIDESz) feared a constitutional dictatorship of the MSZP-SZDSZ supermajority, many of us urged that majority through SZDSZ to adopt highly generous consensual methods of constitution making. The 4/5 rule modifying the constitution, requiring that the rules for constitution making be made by 80% of parliament, the representation of all parties on the relevant committee by parity and the highly consensual voting rule were the result. FIDESZ was very satisfied and became one of the most active participants. I admit I did not much like the rather wooden result that was emerging, and not only because my role in helping to create an amendment rule was leading to nothing. Nevertheless the product was consensual and should have been passed. It was not passed because of what Imre Konya rightly called the little putsch of Gyula Horn against his own party, indeed expressing impotent resentment against the regime change, that he shared not with the majority of the MSZP! but with the KDNP and the Small holders Party.

That is when SZDSZ should have left the coalition that it perhaps never should have entered. It should have tried to build a new one around defending the democratic regime change, symbolized by the need of its completion. Instead, by 2002 the issue was considered dead among most experts. I was alone at a conference in 2004 trying to remind everyone: the promise is still unkept, and the Damocles sword hanging over the country should remind them all if my arguments were insufficient. What is that sword? Everyone in Hungary was actually aware of it. It is the combination of the 2/3 amendment rule and the highly disproportional electoral system. But that is mixing law and political

science, and why should we do that? The electoral law is not even in the constitution. With the partial exception of G. Halmai and J. Kis noone gave a damn about my warnings, repeated since the early 90s, because there was no alkotmányozási kényszer as it was already well known.

The role of people close to Prof. Sólyom is most remarkable in this because they at least knew and hated the existing amendment rule. A court's word whatever the law and its own selfimage say about its finality is not final; it can be trumped by constitutional amendment. Indeed as Hungarians just discovered, but Americans and Indians always knew, it is also possible to remove jurisdiction and repass the same law in the same procedure. One could even raise the majorities needed to invalidate laws of parliament as the Turks just found out. The amendment rule is higher in the judicial hierarchy, and the Hungarian power to amend depended on contingent and disproportionate electoral outcomes. Everyone knows this now. I have been saying it for 20 years. People around the CC (AB) too have always understood the very simple point, of course. There were two answers to the dilemma: toughen the amendment rule or begin to review amendments, and reshift the constitutional hierarchy to the benefit of the CC. (AB) Sólyom was always for the first option, but amazingly enough thought that it could be done by a simple revision of the revision, that in some countries counts as an abuse and some great thinkers even thought it impossible logically. While these extreme views are wrong, as a matter of logic, politically for an assembly to tie the hands of a body just like itself requires a high amount of surplus legitimacy. This is why it is normally constituent assemblies or conventions or special elected parliaments with joint sessions or referenda confirmation that wind up doing this job. You revise the revision in other words in a new constitution making process. But Sólyom and most of his friends felt there was no need to make a new constitution, because there was no alkotmányozási kényszer. As Agnes Heller once literally said to me, don't bother them, let the Court make the constitution, it is their job. While people near the Court never said it so crudely, this was their position in essence. Moreover, they neglected to do this job seriously enough given the threat they well understood. In spite of Sólyom's theoretical considerations occasionally articulated in interviews, and even a very early precedent from 1989, they gradually came to the conclusion that reviewing amendments under 24 3 is impossible, with the very absurd pseudo-Kelsenian argument that an amendment is already part of the constitution so there is nothing to review it against. Would this also be true in the case of a procedural flaw in making the amendment? Obviously not. But then, a substantively unconstitutional amendment that changes what is unchangeable by definition suffers from a procedural flaw. One cannot change by 2/3 what even 100% cannot change. A better Kelsenian could have also said that an amendment text was part only of the document, but of the material constitution only after it has become legally operative, and that is what a challenge was allowing it to become or not to become. Or whatever. I doubt that the Indian justices who invented the great Basic Structure doctrine also without eternity clauses to rely on and used amendment review in posterior, case oriented matters were technically deficient, or inferior to the Hungarian judges. Learning from them might have stopped not only the removal of jurisdiction this spring, but also the prima facie unconstitutional act of removing the art 24 5 requiring 4/5 majority by using 2/3 only. FIDESZ could do these things already knowing that the Court would do nothing even if it was appealed to (it was not, also inexplicably, since the second matter was procedural unlike previous considerations of amendments). To sum up: the Court played down the need to make a new constitution, while implicitly realizing that there was the need to do so, and gave up the only possible substitute, the one weapon that actually could have protected the 1989 -1990 constitution including many of its own prerogatives against subversion by government, namely amendment review.

Given the Court's failure, FIDESZ nevertheless was in the position of the victors of 1994, against whom it once warned of a possible constitutional dictatorship. That it came into the position that it did was the consequence not only of failed policies of the recent

past that gave it the now proverbial 2/3 out of the far less often mentioned 52.7 but

1. Failures and Omissions of MDF led and MSZP-SZDSZ governments to fulfill their constitution making responsibilities for 20 years,
2. Failure of the Constitutional Court to help with the constitution making process, or, if not, then to defend the basic structure of the new regime through amendment review
3. A general failure of appreciating the heritage of the Round Table that needed to be completed as elsewhere in the world, not abandoned.

Even with these givens a resumption of consensual constitution making practice that was relatively well established in Hungary would have possible and desirable. Had that happened, FIDESZ could have claimed real credits with respect to the omissions of the past. Given its weight in parliament, most of its legitimate constitutional ideas would have had a chance to enter into compromise formulas, and no idea that it hated could have been approved. The 4/5 rule did not require that the same 1995 rules be adopted in any case with many fewer parties including Jobbik in Parliament, but it required some other set of relatively fair rules. Abolition of that rule by 2/3 was not only illegal on the face of it (because a rule like that would be entirely meaningless if it only said "parliament must do xyz by 4/5 unless it chooses to do it by 2/3"); it was also symbolic of the fact that here a force with 52.7% of the nation's votes is going to impose a constitution, whether the other half likes it or not.

It is the glory of the NKA, the National Round Table, and even of the failed parliamentary effort of 1994-1996 to have inaugurated a convention for constitution making, that such an effort can be legitimate only if involving very broad party agreement concerning a document that is worthy of enactment. It is this important tradition that FIDESZ is now violating with devastating consequences for the cognitive, normative and aesthetic contents of the document.. What was done is also prima facie illegal, even if noone is in position to go to the Court over the violation of higher entrenchment, and the Court would most likely turn its face from such a case. But the violation has its own consequence. Fidesz cannot produce the constitutional legitimacy to actually close the constitution making process. Earlier they have proposed a version of the Spanish- Dutch (Holland) two parliamentary session 2/3 rule for future constitutional amendments. As against Hungarian critical opinion, I argued previously in Népszabadság that this rule taken in isolation is the only progressive feature of their construct. Surprisingly, even Cohn Bendit just claimed that such a rule is absurd and exists nowhere. He should look to Spain whose two stage differentiated version without an eternity clause , for the record, I prefer (art 168 dealing with total revision and revision of certain sections that is apparently on the same level , where moreover referenda are added in addition); and if not then next door from Brussels to the Netherlands (chapter 8: articles 137-138). Moreover it is also a convention of the British constitution, if not always entirely obeyed, that a constitutional proposal suddenly introduced by a parliament must receive a mandate in the next election and be also passed by the next parliament. Yes: the rule is in itself a good one. But it depends on what it seeks to entrench of course. The critics confuse these two questions. Not entrenching a good constitution and entrenching a bad one are both bad ideas. The MSZP was however right to propose to FIDESZ: if you like your new amendment rule proposal so much, why don't you already pass your constitution by two successive parliaments, by 2/3 of the vote of this and also of the next one, before it is fully enacted. This was much preferable to the call for a referendum as Sándor Révész has well argued. Without answering MSZP or other critics including my humble self, FIDESZ then quietly dropped the new amendment rule.

So the old 1949 one remains in place, with a different numbering once again, as both the living symbol of what will the unfinished nature of the whole job even after April 2011, or January 2012, and a viable instrument for its immediate continuation yet again within legal continuity if possible. The job must be indeed be resumed, by much more serious discussion and public participation than ever before, not by

defending the past, itself marred by elitism often enough, and not by seeking to restore anything, but by trying to figure out how to allow Hungarians to have finally a new democratic process and a new democratic constitution that this nation and its citizens fully deserve. Then and the only then can and must the revision rule be itself revised, finally completing the process.

So what should we say on April 18, 2011? Forward to a new, legitimate Hungarian constitution produced by a democratically elected constitutional assembly, under new, politically consensual, public and participatory rules! (And we will know of course that such an assembly if successful will be the final completion of the regime change that began even before 1989.)

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