Restoring Constitutionalism in Hungary

How Should Constitution Making Be Different from What Happened in 1989?

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The question this contribution attempts to answer is how a future democratic government can recreate constitutional democracy after more than a decade of authoritarian constitutional politics in case the united opposition beats Fidesz during the 2022 parliamentary election. Even if this will happen, it is very unlikely that the new governing parties will reach the two-third majority which according to the current rules is necessary to enact a brand new constitution or even to amend Fidesz's 'illiberal' constitution. So the question may arise whether there is an alternative to either breaking the legality by repealing the Fundamental Law with a single majority, an approach represented by Péter Márky-Zay, the Prime Minister candidate of the oppositional alliance, as well as by some constitutional scholars, or to doing nothing about the 'authoritarian enclave' (copyright Andrew Arato) of the 2011 Fundamental Law.

The Necessity to Replace the Fundamental Law

My starting point is that the Fundamental Law is an illegitimate, authoritarian constitution which needs to be replaced in order to restore constitutionalism in Hungary. It was enacted by the votes of the governing party alone, without a referendum of ratification being held at all. It rested on nothing more than the will of parliament, the famous 2/3 majority achieved through a highly disproportional electoral rule. Thus, the Fundamental Law cannot be regarded as the expression of the democratic constituent power of Hungarian society. Beyond the doubtful legitimacy of its enactment the Fundamental Law was proudly declared by Viktor Orbán as an 'illiberal' constitution[1] that has since, as a result of nine amendments, become increasingly autocratic, based on the false concept of ethnic and religious homogeneity of the Christian Hungarian nation as its constitutional identity. The lack of separation of powers and guarantees of fundamental rights are obviously entrenched in this illiberal document. But also political preferences, such as the pension system, family support, and taxation, ordinarily belonging to statutory law, are placed in the constitutional text and thus made unchangeable for a future government with only simple majority.

It is clear that even if Fidesz loses a national election and a new government will be formed, the latter will not be able to function whether in the legal, economic or cultural domains. On the foundation of the Fundamental Law, a great deal of power will remain in the hands of its present holders or those near to them. The new government would not be able to really govern; all or most of its measures can be sabotaged by state officials, among them constitutional judges who cannot be removed or replaced under the Fundamental Law, during the next parliamentary term.

If therefore a democratically elected government would wish to replace the autocratic system institutionalized by the Fidesz government with a constitutional system, it must free itself from the Fundamental Law. But how? The new document should be one created by a democratic constituent power according to newly enacted rules on constitution making to do everything to avoid civil war and its usually accompanying violence. In its process of drafting the rules of the constitution making process the 1989 round table can be a model, even if one cannot count on the acceptance of a new constitutional draft by 2/3 of the parlia-

[1] In an interview Orbán admitted that his party did not aim to produce a liberal constitution. See 'A Tavares jelentés egy baloldali akció' (The Tavares report is a leftist action), Interview with PM Viktor Orbán, *Hungarian Public Radio*, Kossuth Rádió (5 July 2013).

ment elected in 2022. In my view, the procedure has to avoid two things proposed by others. First, the amendment of the Fundamental Law by a simple majority, and even more the enactment of a new constitution by the same, would be an unacceptable but also unnecessary break of legality. But it should also be avoided that a new democratic government would have to govern in the long run within the framework of the present 'illiberal' Fundamental Law. Such a possible scenario with important roles of a Round-table designing the composition and the electoral rules of a Constituent Assembly has been proposed in an earlier blogpost by Andrew Arato and myself.

From Legal Towards Civic Constitutionalism

The most important element of any proposal for a new constitution-making process must be the involvement of the widest range of the politically extremely divided society. This is a different approach as compared to the 'constitutional moment' of the 1989 democratic transitions which did not mobilize the constituent power of the people and established a substantively full-fledged liberal democratic constitution without participatory constitutionalism. According to some authors, the prospects for democracy in the newly independent states of Central and Eastern Europe, including Hungary following the 1989–90 transition, were diminished by a judicial, technocratic control of politics, including also transfer of power to other independent bodies, such as independent regulatory agencies, central banks, fiscal councils, etc – all of which played a key role in the early stage of the transition.[2] This blunted the development of civic constitutionalism, civil society, and participatory democratic government as necessary counterpoints to the technocratic machinery of legal constitutionalism.[3] Adherents to this viewpoint argue that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardized the development of participatory democracy.[4] In other words, according to these views, legal constitutionalism fell short of developing a constitution of the people, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.[5]

In discussing the relationship between legal and civic constitutionalism, or constitutional law and constitutional culture,[6] one has to investigate the question of how far (constitutional) courts and other non-elected technocratic bodies and government agencies stand apart from the society in different legal systems. This question is highly relevant regarding Hungary after 1989. The very notion of what has been termed 'countermajoritarian difficulty' by Alexander Bickel presupposes that courts stand apart from society, which is called the canonization of courts.[7] This means that judges usually decide cases according to their beliefs and values, using the legalistic form of constitutionalism, and thereby producing constitutional law. Many of these decisions do not match with the constitutional culture of the non-judicial actors, most importantly with the beliefs of the people. Some cases were decided on a legally correct basis even though the general public opposed the decisions. This happened in 1990 in Hungary when the Constitutional Court abolished capital punishment based on the joint reading of the Constitution's right to life and human dignity clauses, despite the fact that the majority of Hungarians were in favour of the death penalty.[8] However, in this case, if the judges would have left it to the Parliament to decide, the outcome would have been the same, as the abolishment of the death penalty was a precondition to join the European Convention of Human Rights of the Council of Europe. But in the case of the punishment of crimes committed

[2] See Ph. Ther, Europe Since 1989. A History, Princeton University Press, 2017.

[3] See this argument regarding the more narrow 'legalistic' aspect *in* P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also, Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. *See* W. Sadurski,'Transitional Constitutionalism: Simplistic and Fancy Theories', *in* A. Czarnota, M. Krygier & W. Sadurski (Eds.), *Rethinking the Rule of Law After Communism*, CEU Press, Budapest, 2005, 9-24.

[4] *See* R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal,* Vol. 31, No. 1, 2008, p. 4.

by Communist leaders, in which the Court opted for prohibiting retroactive justice measures, neither the Parliament nor the general public supported this decision.

One can even ask the hypothetical question whether an earlier and more inclusive or participatory constitution-making process in the early 1990s would have ensured the durability of democratic institutions and avoided backsliding in Hungary. There is nothing to suggest that this would have prevented the illiberal turn. The question is whether those proponents of participatory constitutionalism who argue that with participation backsliding would not necessarily have happened do sufficiently take into account the lack of civic interest in constitutional matters due to poor constitutional culture, not to mention other, non-constitutional factors that contributed to backsliding.[9] But the situation is hopefully different now, and we cannot so easily dismiss the need for participatory constitutionalism.

Conclusion

All in all, I am convinced that to restore constitutionalism in Hungary after more than a decade of authoritarian constitutional politics there is an alternative to either breaking the legality by repealing the Fundamental Law with a single majority, or to doing nothing about the Fundamental Law of 2011 in the absence of the constitution making majority required by the 'illiberal' constitution. I think that despite the many determinacies of the more elitist, imported approach of 'legal constitutionalism' a new constitution making process after 2022 should not follow the pattern of the 1989 approach by sidelining participatory constitutionalism. To reestablish constitutional democracy expected by a large majority of the population, besides the revolutionary change in the substance, the massive use of civic involvement will be needed. And exactly this is the lesson the current Hungarian opposition and hopefully will-be governing parties have to learn from the experiences of the recent constitution-making process in Chile. If the civic participation cannot establish a constitutional culture supporting the values of liberal democratic constitutionalism, the new constitution will again be in vain, and authoritarianism will prevail as it happened in 2010.

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[5] *Cf.* Sadurski, 2005, p. 23.

[6] Robert Post uses the term referring to the beliefs and values of non-judicial actors, most of all the people. On the other hand, the term 'constitutional law' according to Post refers to constitutional law as it is made from the perspective of the judiciary in the American-type of a decentralized judicial review system, or in countries with a German-type centralized judicial review and constitutional courts. There is a dialectic relation between the two, as constitutional law is based on constitutional culture and is also its influencer. See R. C. Post, The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, *Harvard Law Review*, Vol. 117, 2003, pp. 4-112, at p. 7.

[7] See K. Whittington, Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History, Princeton University Press, 2007.

[8] I have to admit that as chief advisor to László Sólyom, the that time President of the Hungarian Constitutional Court, I fully supported the decision, and still do.

[9] See similarly the critical reviews on Blokker's book (Fn. 54) by Jiri Priban and Bogusia Puchalska in ICONnect. *Book Review/Response: Paul Blokker, Jiri Priban and Bogusia Puchalska on Civic Constitutionalism*, Int'l J. Const. L. Blog (10 September 2013).