

Unconstitutional Constituent Power¹

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Can there be an unconstitutional constituent power? This may sound rather like that famous question about angels and heads of pins. But the question about constituent power matters rather more than one might think because not all powers that may claim to be constituent are. Extreme cases may help us see why.

Suppose I give myself the task of creating a new constitution for Idealaria. Since I have a lot of expertise in these matters of constitutional design (though no particular experience with Idealaria), I conjure up what the people of Idealaria should want, what kind of government they should have, and what sort of constitution they should adopt. I consult best practices and comparative constitutional history, design the most thoughtful of all possible constitutions and then present the results to the population of Idealaria. Constituent power is pure reason, I tell the people of Idealaria. Here is your perfect constitution!

Well, the population of Idealaria might object, it might have been nice if you had consulted *us*!

They have a point – and that point bears on what is a legitimate constituent power. A constituent power can't just constitute itself as an exercise of reason; it has to be engaged with population for which the constitution would be written as well as with the specifics of the place.² Abstract constitutions won't do. Constitutions have to grow from the soil in which they are supposed to root.³

Take another country. Pandemonia,⁴ let's call it. In Pandemonia, politics is highly polarized. Everyone of voting age has staked themselves out as a Green or a Red. Greens refuse to compromise

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² Jeremy Bentham's huge Constitutional Code was written as just such an abstract and ideal plan. He peddled it around various Latin American countries hoping for its acceptance somewhere, but alas for him, no country adopted it.

³ The image is Karl Llewellyn's: "Law, as against other disciplines, is like a tree. In its own soil it roots, and shades one spot alone." KARL N. LLEWELLYN, *THE BRAMBLE BUSH: CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 44 ([1930] 1960).

⁴ The word pandemonium was coined by John Milton to describe a place where demons live. <http://en.wiktionary.org/wiki/pandemonium>. The plural might have more demons.

with Reds and Greens refuse to even talk to Greens. Nothing can get done in the government, which has a complex system of checks and balances, because the Greens veto everything that the Reds want to do and vice versa. The Greens, however, are constitutionally entrepreneurial – making the case to all who will listen that Pandemonia’s key problem is the existing constitution because it routinely blocks the expression of true majoritarian preferences.⁵ The Greens establish a constitutional convention that the Reds protest and boycott. The Greens meet, draft a new constitution for Pandemonia, and adopt it unanimously among themselves as the new constitution of the country. They then present the Reds with a *fait d’accompli*. As the constituent power of Pandemonia (because we were the only ones who showed up), they say, we now present the new constitution of Pandemonia under which we will all live. It just so happens of course that the rules are written to give the Greens an advantage and that the Reds will never again be able to veto their plans. Constituent power in action?

Well, no, you might rightly think. A group that controls a constitutional process to rig the rules to favor themselves cannot call itself a constituent power. A constitutional drafting process has to be more representative. If parts of the population are systematically excluded or exclude themselves in protest, the resulting constitution cannot be considered legitimate.

If you agree that both of these constitutional drafting processes are problematic and give rise to an illegitimate constitution, then you probably also believe that a constitution must result from some process that systematically attempts to include all of the major players in its construction. A plan shouldn’t be drafted for a theoretical people and a theoretical place. The process can’t be rigged to exclude people who are then disadvantaged in the polity that results. In short, constituent power needs to embody meaningful consent of the actual population that is to be governed.

But how responsive does the process have to be – and how far must consent extend? And what counts as consent? Surely not every individual – or even every political fraction – can exercise a veto!

A hypothetical country may help to show what is at stake here. So let us consider Freedonia.⁶ In Freedonia, politics is very tempestuous. It is hard to keep a government standing for long because there are so many parties and the political spectrum is so wide that it is hard to form stable and enduring coalitions. Moreover, the parties of the right almost always have to bring the tiny group of Fascists into the government in order to get a working majority and the parties of the left almost always have to bring in the tiny group of Communists to do the same, so politics is often torqued from extreme left to extreme right as governments change and the extremist parties hold their coalitions hostage to

⁵ Any similarity between this argument and those of Sandy Levinson in his twin books, *OUR UNDEMOCRATIC CONSTITUTION* and *FRAMED*, is purely coincidental.

⁶ Carrying on a long line of exemplary Freedonias, see <http://en.wikipedia.org/wiki/Freedonia>.

views that do not have widespread support. A coalition of civil society organizations organizes the parties of the middle, representing about 90% of the population, to draft a new constitution, in which parties that get less than 10% of the popular vote – the Fascists and Communists – have no representation in the constituent assembly. The Fascists and the Communists strenuously object, but the constitution is enacted over their objections and the two parties are banned under the new constitution. Is the 90% group a legitimate constituent power?

And if you think that it is permissible for the 90% of the population to exclude the 10%, especially when that 10% consists of anti-liberal groups, would it matter if the far right and the far left had formed 90% against the liberal 10% middle instead?

By now, you can see the problem. Our constitutional theory tells us that a constitution should be framed by a constituent power, but it turns out not to be terribly helpful at telling us how to find that constituent power or how to know, when some assemblage calls itself a constituent power, whether it has the right to do so. But as these three examples show, we may have strong intuitions that some sorts of constituent powers may be more legitimate than others – more *constitutional*, in a way. In this paper, I want to try to try to explain why there *can* be an unconstitutional constituent power – first in theory, and then with reference to the recent trouble case of Hungary.

I. Constitutional Theory and Constituent Power

Constitutional theory generally presupposes that the life of constitution can be divided between the moment of its birth when the constituent power is summoned up to create a new constitution and the lifetime it has thereafter when a political community will live under this constitutional order. This distinction between the *pouvoir constituant* and the *pouvoir constitué* dates to the famous French revolutionary pamphlet of Emmanuel Sièyes, “What is the Third Estate?” Sièyes, of course, was attempting to justify the break in French politics caused by the refusal of the revolutionaries to honor the constitutional system they had inherited. No longer was the king to be the sole determinant of the constitutional system; instead, the “totality of citizens belonging to the common order”⁷ – the Third Estate – could claim the power, the *pouvoir constituant*, to make a constitution for the nation as a whole.

⁷ Emmanuel Sièyes, “What is the Third Estate?” in SIÈYES, POLITICAL WRITINGS (ED. AND TRANS. MICHAEL SONENSCHER) (Hackett Publishers, 2003) at 99.

According to Sièyes, political revolutionaries could realize this power by convening a body of extraordinary representatives, tasked with speaking for the nation. What would bind these extraordinary representatives in the work of constitution-making? Sièyes explained that the existing constitution could *not* be one of those constraints:

[T]hey are not to be subject to the constitutional forms on which they have to decide. In the first, place, this would be contradictory because these forms are in dispute, and it is up to them to settle them. Secondly, they have nothing to say about matters for which positive forms have been fixed. Thirdly, they have been put in the place of the Nation itself as if it was it that was settling the constitution. Like it [the nation], they are independent. . . . [T]heir common will has the same worth as that of the nation itself.⁸

For Sièyes, the freedom from prior constitutional understandings that liberated the constituent assembly did not mean that the *pouvoir constituant* was without constraint at all. He believed that an extraordinary representative assembly, convened for one purpose and one purpose only, could change the constitutional order only through the discovery and deployment of a common will, under which this new order must be constrained. The contours of this common will were defined by Sièyes as the sum of individual wills of the nation, determined by a majority in the case of disagreement. And this general will could – in fact, must – limit the creation of the constitution itself.

Sièyes' majoritarianism must be understood in the context in which he was arguing. Under the existing system of Estates General, the Third Estate could be outvoted by the other estates, even though the Third Estate constituted the numerical majority of the political community. In this context, majoritarianism was a revolutionary claim because the new political community was refusing to be governed by a minority allegedly acting on behalf of all. But in the context, where the Third Estate was being functionally excluded from having any part in determining the fate of the country because it would always be outnumbered by the First and Second Estates voting together, Sièyes might be interpreted as making a slightly different point: A constituent part of the political community cannot be spoken for by others.⁹

⁸ Sièyes at 139.

⁹ Sièyes did not address the question of whether majoritarianism would need to go “all the way down,” so to speak. He assumed that the Third Estate itself would speak with one voice. But he never addressed what would happen if members of the Third Estate were divided so that no one position of the “Third Estate” as a collectivity would represent a majority of those within it.

Elaborating a distinction that still animates most theories of constitution-writing today, Sièyes argued that extraordinary representatives in the constituent moment are free of existing positive political forms, while still being deeply constrained by the common will of the nation in the exercise of the *pouvoir constituant*. By contrast, the ordinary representatives and daily government are bound in the exercise of the *pouvoir constitué* under the constitution that determines the positive political forms.

If the common will can constrain a constitution-making process, then it is important to understand what this common will is. The common – or general – will is a concept familiar to French constitutional theory not just from Sièyes' writing, but perhaps even more famously from the writings of Jean-Jacques Rousseau. Unlike Sièyes, Rousseau did not portray the general will as resulting from the summing up of the wills of individuals subject to the principle of majoritarianism. Instead, the general will for Rousseau is a collective property of a group and is not reducible to some one-step mathematical relationship of individual wills (like their mere addition or averaging). The general will's chief manifestation comes through the imagination of a common good in which all could share. The general will, in accomplishing this task, omits the partiality of individual and private wills and extracts from them only those elements that all share in common. Says Rousseau:

There is often a great deal of difference between the will of all and the general will. The latter looks only to the common interest; the former considers private interest and is only a sum of private wills. But take away from these same wills the pluses and minuses that cancel each other out, and the remaining sum of the differences is the general will.¹⁰

Of course, as many have noted, this is far from an unambiguous and clear idea. It is an imagined unity that cannot be reduced to the sum of the parts. But the crucial element for our purposes is that some generally derived desire of the political self-governing group is a constraint on what the *pouvoir constituant* can do. The *pouvoir constituant* is not an unlimited power; it is simply not limited by prior political forms. It is subject to the constraint of the common good of the political community, and is therefore not a roving idea that can be captured by anyone who pretends to speak in the community's name.

The idea that legitimate constitution making is subject to no constraint other than a general will – but that it is in fact *limited* by that general will – can be found also in a theorist who, in many particulars, could not be more different from Rousseau. Writing in the turbulent years of the Weimar

¹⁰ JEAN-JACQUES ROUSSEAU, SOCIAL CONTRACT, Vol. IV, p. 146.

Republic, Carl Schmitt elaborated on these ideas of constituent power and its constraint in *Constitutional Theory*. According to Schmitt,

The constitution in the positive sense originates from an *act of the constitution-making power*. . . . The act *constitutes* the form and type of political unity, the existence of which is presupposed. It is not the case that political unity first arises during “the establishment of a constitution.” The constitution in the positive sense entails only the conscious determination of the particular complete form, for which the political unity decides.¹¹

For Schmitt, the political unity is a power that precedes any particular act of constitution-making and represents the decision by a political community that it will be self-governing, much as the general will served this purpose for Rousseau. For Schmitt, a constitution is dependent on the existence of this political unity, which expresses itself in the foundational decision to make a constitution for itself. Through this political unity, the people bring a practical form of governance into existence in ways that cannot be changed by anything short of another overriding expression by this same political unity, or through a supplanting decision by another political unity occupying the same political space. Constitutional laws, the positive laws that elaborate what the legal constitution entails, may be changed in accordance with the rules for constitutional change given in a constitution itself. But the ability to change a constitutional law through an amendment to the constitution does not imply the ability to change the foundational principles of the constitution as a whole:

That “the constitution” can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and replaced through some other decision. The German Reich cannot be transformed into an absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag.¹²

Instead, according to Schmitt:

¹¹ CARL SCHMITT, *CONSTITUTIONAL THEORY* (ED. AND TRANS. JEFFREY SELZER) (Duke University Press, 2008) at 75.

¹² Schmitt at 79. Of course, the Weimar Constitution did in fact become something else, as the state of exception authorized under Art. 48 was used to undermine the system of constitutional checks on power, particularly after 1933. Once undermined through the invocation of its own exceptional provisions, the constitution collapsed in practice even as it remained formally in effect.

[C]onstitution “making” and constitutional “change” [by constitutional amendment] are *qualitatively* different because in the first instance the word “constitution” denotes the constitution as complete, total decision, while in the other instance, it denotes only the individual, constitutional *law*.¹³

For Schmitt, a constituent assembly must be different from an ordinary parliament because only the constituent assembly can make a constitution. But also, for Schmitt, a constitution in the existential sense must not be confused with the specific written form that a particular constitution takes as it emerges from a constituent assembly. In any actual constitutional-drafting process, compromises among the different factions represented in the process are inevitable. Schmitt believed that one could and should see through these expedient political compromises to the more basic principles that grounded any existing constitution, principles so basic that they went without saying for all concerned when the constitutional text was written.

For example, Schmitt found that the basic constitutional principles of the Weimar Constitution included a) the establishment of a bourgeois *Rechtsstaat* that put rights at the core of its existence, in which the principle of liberty was the “defining directive,”¹⁴ b) the commitment to non-concentration of political control, which found expression in the division of powers, and c) the entrenchment of a basic political organization that could not be fundamentally altered by any particular set of temporary rulers, distilled in the idea of limited government. While specific features of the positive constitution could be changed or even suspended, this central creation – a rule of law state that put rights, division of powers and the constitutional entrenchment of a political order at the core – could not be modified by any subsequent actual government in power, but only by the political unity itself.

Schmitt’s idea of the political unity is in many ways as compelling and also as mysterious as Rousseau’s idea of the general will. But Schmitt gives this idea somewhat more concrete content when he describes this political unity as a historically changing force. In his account, this historically changing force is not abstract; it is different for each different political community and it may be differently constituted at different moments for the same political community. As a result, the English constitution is different from the French which is different in turn from the German – and each constitution has continually changing contours as the political community remakes itself over time. In each national

¹³ Schmitt at 80.

¹⁴ Schmitt at 90.

tradition, the sequence of governmental forms – from absolute monarchy, to constitutional monarchy, to democratic republic, for example – is imagined by Schmitt to be the result of decisions of differently constituted political communities organizing themselves in successive ways across history. Each political community, considering its own history and its own aspirations, has the power to determine its own constitution by making a decision as to its own political form.

How does one know what the political unity is in order to understand the decision it has made? Schmitt, like Rousseau, locates this power in the idea of a political will:

The constitution-making power is the political will, whose power or authority is capable of making the concrete comprehensive decision over the type and form of its political existence. The decision, therefore, defines the existence of the political unity *in toto*. . . . In contrast to any dependence on a normative or abstract justice, the world “will” denotes the essentially existential character of this ground of validity.¹⁵

For Schmitt, the constitution must therefore be understood as the decision by a political community to bring a certain form of political life into being. The constitution-making power that brings a constitution into existence “is unified and indivisible. It is not a coordinate additional authority (legislative, executive, judicial . . .) alongside other ‘powers’ and ‘divisions of power.’”¹⁶ Instead, it is a foundational power that exists before and over all others (to borrow spatial metaphors). Building on Sièyes’ formulation of the *pouvoir constituant*, Schmitt concluded:

The people, the nation, remain the origin of all political action, the source of all power, which expresses itself in continually new forms, producing for itself these ever renewing forms and organizations. It does so, however, without ever subordinating itself, its political existence, to a conclusive formulation.¹⁷

According to Schmitt, while one constitution may succeed another in the same political space, such a succession may only be legitimately accomplished by a new decision made by the political unity, by the common will of the political community.

¹⁵ Schmitt at 125.

¹⁶ Schmitt at 126.

¹⁷ Schmitt at 128.

From this understanding of the constituent power, one can discern the difference between a constitution-making power and a constitutional amendment in Schmitt's theory. Schmitt argued that a constitutional amendment, determined by the ordinary representatives of a political community and not by the extraordinary representatives of the political unity, operates within a much more constrained political space than does the constitution-making process itself:

The authority to "amend the constitution" granted by constitutional legislation means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved. This means that the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc. in constitutional provisions that preserve the constitution itself. . . . *Constitutional amendment, therefore, is not constitutional annihilation. . . . A constitution resting on the constitution-making power of the people cannot be transformed into a constitution of the monarchical principle by way of a constitutional "amendment". . .*¹⁸

This trajectory of political thought – from Sièyes inspired by Rousseau to Schmitt – emphasizes that constitutional change has limits. One sees these limits play themselves out differently in the three different phases of constitutional construction: constitution making, constitutional amendment, and ordinary political life under a constitution. From this trajectory of ideas, one learns that there are limits to constitutional change, first and most clearly in the sense that a constitution can itself be created only as an expression of the general will of the political community. While constitution-making cannot be constrained by prior constitutions, it can be constrained by the requirement that a general will and not simply the will of a subset or a fraction of the political community underwrite the foundational elements of this new constitution.

Within any specific constitution-drafting process, however, some provisions of the positive constitution will emerge out of the inevitable political compromises that are made among those who are concretely sitting in the constituent assembly. Their different interests may lead to contingent but not foundational aspects of the new constitution.¹⁹ These contingent provisions, traceable to some specific

¹⁸ Schmitt at 150-1.

¹⁹ In this formulation, Schmitt almost seems to anticipate the later contributions of John Rawls, who argued that the basic constitution-writing process of any political order had to take place among people who were unaware of their specific interests and therefore who had to act on the basis of hypothetical interests they might have. Rawls

set of interests that are not general, can be changed by later amendment. But no later amendment can change the foundational elements of a constitution without transgressing the limits of a constituted power. Only the constituent power may make such fundamental changes; constituted power must stay within those limits. In daily constitutional life, of course, there may be contestation over the shape and meaning of the constitution as it applies to concrete political controversies. But as one moves from constitution-making to constitutional amendment to ordinary constitutional interpretation and contestation, the ability of ordinary participants to change the basic political order is ever more sharply constrained.

It follows from this analysis that a particular government that transgresses these limits on the constitution-making and constitutional amendment procedures will produce a breakdown in the existing constitutional order by creating a profound unconstitutionality of action. Such a breakdown can occur either if a government amends the constitution in a way that violates the basic principles of the constitution or if a government brings into being a new constitution without establishing that the will of the political community is unified on the need for and shape of this new constitution. Making amendments to constitutional fundamental principles and/or drafting a wholly new constitution without a political mandate to do so are both violations of the constitutional order that should call into question whether the new order is constitutional at all. There is, in other words, a possibility that a constituent power can itself be unconstitutional.

But abstractions only get us so far. Let's examine a hard case where the identity and existence of a constituent power is a serious political question – repeatedly over a space of decades. Let us, then, turn to Hungary.

II. The “Rule of Law Revolution” of 1989-1990 and the Post-Communist Hungarian Constitution

After decades of living under a Soviet-imposed regime, Hungary went through dramatic political changes in 1989-1990 that resulted in a new constitution. The self-appointed democratic opposition in Hungary sought to negotiate a peaceful transition from communism to democracy in 1989, and called upon the party in power to develop a new framework that would allow a multiparty election to occur and a new constitution to be written. The Hungarian National Roundtable of 1989 produced a new

then argued that the hypothetical interests such constitution-makers should assume were the interests of those who had the most to lose in the actual political community that resulted. Merely contingent interests were not to have a place in determining the basic elements of a constitution.

constitutional text that was adopted as a set of amendments to the existing Stalinist constitution, Law XX of 1949. At the National Roundtable, the democratic opposition groups negotiated directly with the Hungarian Socialist Workers Party (MSzMP) with the participation of a “third side” consisting of officially sanctioned organizations. The pacted transition of 1989-90 that resulted from the National Roundtable allowed the country to move toward a system of multiparty elections, democratic transformation, rule of law and general constitutional entrenchment.

Was the constitution produced through the Hungarian National Roundtable process the expression of a general will, as a constitution-making process requires? At one level, the situation was not promising. The communist government was still operating in the shadow of the Soviet Union with the presence of Soviet troops in the country. It could not operate independently without considering whether its actions would be seen as having crossed invisible red lines drawn by Moscow. Even with what eventually turned out to be substantial political room to maneuver, the MSzMP government in 1989 did not have any democratic legitimacy of its own because it had been installed and maintained in power by a foreign force. The democratic opposition was self-appointed and hardly representative of the whole Hungarian population whose political views could not be fully probed at that time. The vast majority of the Hungarian population became mere spectators to the public part of the National Roundtable which was a highly staged demonstration of the fact that negotiations were going on without revealing much about their substance. In fact, bargaining over the fundamental aspects of the constitution happened in subcommittees that were not visible to the public eye.²⁰ At first glance, the 1989 National Roundtable did not look like a will-forming or will-expressing constituent assembly.

That said, the situation was more ideal for constitution writing than one might imagine. It was clear that the winds of change were blowing through the region, but it was not at all clear what their effects would be. Prior to the National Roundtable, János Kádár had already been pushed out of office after 32 years as General Secretary of the Communist Party (the MSzMP) and he died as the Roundtable process got underway. It was not just Kádár who left office; a whole generation of hardliners who has been associated with the worst of the communist abuses was displaced with him. Though there were still a few communists left in power who could still be associated with the horrors of the 1950s, the MSzMP was already changing because reformers were in the ascendancy. While the communist party went through these changes, opposition groups were forming (and were allowed to form) under a variety of rubrics ranging from trade unions to NGOs.

²⁰ The proceedings of the National Roundtable, and in particular of the Opposition Roundtable that coordinated the views of the democratic opposition, were eventually published as *A RENDSZERVÁLTÁS FORGATÓKÖNYVE: KERESZTAL-TÁRGYALÁSOK 1989-BEN I–VIII.* (ANDRÁS BOZOKI, EDITOR, 1999-2000), but not until 10 years after the fact.

Perestroika provided an opening for political change throughout the Soviet bloc, and both the communists and the opposition groups agreed that Hungary would move toward a different form of government. They agreed the Hungarian people should be able to express their political views through an election with real choices, though neither the communists nor the opposition could know who would be the winners and who would be the losers in an election of a sort not held in nearly half a century.²¹ Because of this uncertainty, no one could design new political institutions in such a way as to ensure that they would be able to gain and maintain power over the long run. As a result, everyone had the incentive going into the constitution-writing process to design a new system of government in which no one would be too badly off if the new politics went against their interests.

In this evolving situation, the new constitution guaranteed that power could not be captured indefinitely by whichever party emerged victorious in one particular election. The National Roundtable produced a constitution in which all would have the protection of rights under the watchful eye of a new and powerful Constitutional Court, and in which there were many safeguards to guarantee that there were limits to what any new government could do to those who lost out. The negotiations at the National Roundtable, then, were rather like deliberations behind a veil of ignorance, to use John Rawls' term for a situation in which people decide on the shape of a basic political ordering not knowing what interests they would have in the political system that they designed.²² Because the moment was fluid and all parties were aware of the potential dangers, the new Hungarian constitution was written in a way that aspired to constitute a general will much more than one might have imagined. The situation led all those at the Roundtable – and those watching them eagerly as history changed from one day to the next – to design the new constitution from a general point of view that was not dictated primarily by short-term self-interest. How could one benefit one's own interests if it was not clear how to do so – or even what one's interests were?

Technically developed as a set of amendments to the existing communist constitution, the new Hungarian constitution was voted on piecemeal by the existing communist parliament over two weeks

²¹ In retrospect, it appears that everyone must have known that the anti-communists would win. But at the time, this was really not so clear. Among other things, the communist leaders were the only ones who were widely known; the challengers were new and untested. In addition, the communist leaders who were put forward in the election were the reformers who might have gotten the benefit of the doubt by being the ones to have opened up the process to constitutional change in the first place. Finally, Hungary in the 1980s was much less repressive than many of its neighbors and the communists were not as widely hated as they were in other countries in the region.

²² JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press, 1971) at 118-123. Andrew Arato and Zoltán Miklósi, writing about this period, independently came to the conclusion that the Roundtable process approximated bargaining behind an "empirical veil of ignorance." Andrew Arato and Zoltán Miklósi, "Constitution Making and Transitional Politics in Hungary," in LAUREL MILLER (ED.), *FRAMING THE STATE IN TIMES OF TRANSITION* (US Institute for Peace, 2010).

in mid-October 1989.²³ The Hungarian Republic was officially declared on 23 October 1989, two weeks before the fall of the Berlin Wall, with the adoption of this fundamentally new constitution. While the Hungarian parliament that passed this new constitution was itself neither representative nor legitimate, it largely deferred to the National Roundtable process and approved the constitution that the National Roundtable produced. It added a few amendments, for example, inserting a limitations clause on the rights provisions, permitting their restriction to defend public order, public security, public health and public morality as well as supplementing the list of agreed-upon rights with a provision about the right to social security.²⁴ The constitutional amendments were supplemented by a series of cardinal laws requiring a two-thirds vote of the parliament.²⁵ These laws were also agreed upon at the Roundtable and they shaped crucial institutions in the new government like the Constitutional Court, the political parties, and the framework for elections (in particular expanding the number of individual constituencies). But otherwise, the parliament in 1989 agreed to exactly what had been negotiated at the National Roundtable.²⁶

The 1989 constitution made a radical break with the 1949 constitution in substance, even as it was enacted using the amendment rules of that very constitution. Was the new 1989 constitution legitimate as a new constitution – and were these 1989 constitutional amendments legitimate amendments to the prior 1949 constitution? In so far as the comprehensive amendments of 1989 completely changed the structure of Hungarian government from a party-state to a multi-party republic and from a state without guaranteed rights to a state that ensured rights for all, the changes of 1989 could not reasonably be thought of as mere constitutional amendments though they took that form. The basic principles of the supremacy of the party-state and the guiding role of socialism could not be converted to principles of separation of powers and respect for liberal, bourgeois rights without fundamentally changing the 1949 constitution. Following from the theory of constitutional change elaborated in the first section of this essay, such radical change could only be accomplished by a constitutional founding rather than by an amendment of the old order. Making the changes formally as constitutional amendments does not settle their status from the standpoint of a theory of constituent

²³ The 1989 constitution involved nearly a hundred separate amendments to the 1949 constitution.

²⁴ Arato and Miklósi.

²⁵ The difference between a constitutional amendment, which requires a two-thirds vote, and a cardinal law, which also requires a two-thirds vote can be found in the denominator of the fraction. A constitutional amendment requires a two-thirds vote of all of the members of parliament, while a cardinal law requires a two-thirds vote of any number of MPs above a quorum.

²⁶ Throughout the National Roundtable process, the opposition groups met in the Opposition Roundtable, which itself had a complex inner dynamic. See Andrew Arato and Miklósi for details.

power. For the changes to be legitimate under the conception of a constitutional order discussed above, a new constituent power had to be formed to make these amendments legitimate. But was such a constituent power present during this transition?

János Kis, in a brilliant formulation of pacted transitions like the Hungarian one, explained that the old order in 1989 was already in the midst a legitimation crisis. Such a crisis created the precondition for a new constitution that could be negotiated between those who held power and those who aspired to share that power. Unlike the revolutionary times through which Sièyes lived where power was seized from one group by another, the “coordinated transition” of 1989 did not involve a public seizure of power or, for that matter, even a public repudiation of the old order. Instead, old and new orders cooperated so as not to leave a legal vacuum as the country moved from one political system into another. But the transition was no less radical for its cooperative nature. In a pacted transition,

. . . coordination cannot be maintained unless the holders of institutional power are ready and able to cooperate with the groups that belong to the extra-institutional opposition. Those in power do not have sufficient authority to secure compliance with the rule of the system during the transition period. They need additional authority and the opposition leaders are ready to lend it, provided there is an acceptable agreement on the changes that are to be implemented. . . [This kind of political change] is marked by a conscious strategy to preserve coordination.²⁷

The result, according to Kis, is “a transition scenario toward a new regime with a basis of legitimacy, which is incompatible with the belief that the old regime is legitimate as well.”²⁸ In short, this structure of transition could constitute a constitution-founding moment because those who were designing the new constitutional order for themselves (and this included those who would be losing power as well as those who stood to gain) made a decision in this moment on the basic principles that would structure their new political life together. Those new principles represented a fundamental break with the old order even as elements of the old order helped the new order into existence. The agreement on the new order therefore extended to those members of the *ancien régime* who were themselves going to live in this new political order.

²⁷ János Kis, “Between Reform and Revolution,” 12 *EAST EUROPEAN POLITICS AND SOCIETY* 300-383 (1998), at 319. János Kis is not only a distinguished philosopher, but in the years of the transition, he was the leader of the SzDSz (Free Democrats), a liberal political party that was the second-highest vote-getter in the 1990 elections.

²⁸ Kis at 320.

There is nothing in the idea of the *pouvoir constituant* that requires a radical break of political form in order to achieve a radical break in the underlying legitimacy of the system. True, a constituent power would not be *bound* by the prior political system; as a result, it was not strictly necessary for the 1989-90 Hungarian constitution to have been achieved by constitutional amendment of the old system. But neither was it necessary to have a radical break in the underlying legitimating principle of the new constitution, creating formal legal discontinuity.

A constituent power may create a wholly new constitution, even if the new constitution has some structural elements in common with the previous one (and for that matter, even shares some of the same people in power). For example, the constitution that resulted from the French constituent assembly in 1789-91 maintained the monarchy but put the king under constitutional constraint. There was a complete break in the legitimation of the two regimes, however, even though both shared not just the institution of the king, but also the same actual king. The new regime did not have to keep the king (either office or person), of course. The constituent power formed in that historical moment of the early French Revolution could have chosen a republic. But the fact that the revolutionaries at first created a constitutional monarchy did not mean that a constituent power had not been mobilized or that the new system failed to have a fundamentally different basis for legitimacy than had the *ancien régime*.²⁹

The Hungarian transition in 1989-90 was made possible by the fact that the Kádár government retained the support of virtually no one, not even those within the MSzMP who had, after all, deposed him and his circle before the transition began in earnest. Those from the MSzMP who took control of the government in 1988-1989 were largely (though not entirely) a group of reformers, already bent on changing the system. Even before convening the Roundtable, the new communist government had passed a series of new laws that brought elements of liberalism to the state. Laws on the right of association, the right of assembly and the right to strike passed the parliament in spring 1989, and a new draft constitution that would substantially liberalize the government was already being proposed by the new MSzMP justice minister and his staff months before that. The reformers within the MSzMP had already wanted to change the constitutional framework dramatically in 1988-89. Not only had the appearances and reality of government in Hungary always been separated in the communist regime, but also they were increasingly and publicly *seen to have come apart* as opposition to the regime grew. And the reformers within the communist party wanted to fix this.

²⁹ The king, of course, eventually refused to hold up his end of the new constitutional deal, and was executed as a new republic was declared.

The communist constitution, Law XX of 1949, still had many pretty rights whose realization depended upon arbitrary decisions of state and party officials. A consistent enforcement of law was important to the legitimacy of the state, and yet those who lived under state socialism could never be certain that the law would be enforced as written. The legal system looked good in many respects on paper, but in it was not real in daily life. The reformers from within the MSzMP were trying to bring the reality and promise of law together. A new constitution could hasten a transition to a more liberal government, or so the reformers thought.³⁰

In the meantime, the political opposition had developed a highly legalistic view about how to lodge their protests to the arbitrariness of the communist system. Opposition members refused a strategy of violating the law to express their judgment that the regime was illegitimate. Instead, the political opposition urged everyone to *follow* the law in every particular:

During periods of a legitimation crisis, disobedient behavior generally consists in breaking the law. In those countries of Eastern Europe where the democratic opposition was successful in laying down some kind of political tradition, the main form of disobedience was not violating the law, however, but sticking to it, practicing it publicly, challenging the power-holders to come to terms with the rules of a legal state in which citizens have rights. . . . Legalism was a highly relevant feature of the transition from communism to democracy in countries like Hungary.³¹

This strategy of compulsive adherence to legality on the part of the democratic opposition meant that their fundamental critique of the socialist system did not require a complete repudiation of prior law. Instead, the critique took the form that the regime should live up to the commitments that the law already promised. As a result, much of the law could remain the same in a political transition even as the basis for the political legitimacy of that law shifted underneath its unchanging surface. What did need to change, however, was the structure and – most importantly – the accountability of the government itself.

³⁰ These observations about the ideas of the reformers within the MSzMP are based on multiple interviews with those who had been the officials at the MSzMP justice ministry during this period, including 14 hours of interviews I conducted in 1995 with former Justice Minister Kálmán Kulcsár himself. I also interviewed some the delegates from the MSzMP justice ministry to the Roundtable talks. The book edited by Géza Kilényi (later a Constitutional Court judge) and Vanda Lamm, called *DEMOCRATIC CHANGES IN HUNGARY: BASIC LEGISLATION ON A PEACEFUL TRANSITION FROM BOLSHEVISM TO DEMOCRACY* (Hungarian Academy of Sciences, 1990) gives voice to some of those who were involved in those negotiations on the Justice Ministry side as does Kálmán Kulcsár's book *KÉT VILÁG KÖZÖTT 1988-1990* (1994).

³¹ Kis at 335-336.

Both the reform communists and the democratic opposition came to the Roundtable agreed that the law should be made real and that a new government would be constituted after a multiparty election. This put a new constitution into focus, though at first differently for each side. While the reform communists wanted to enact a new constitution quickly, the democratic opposition thought that only an elected constituent assembly with public legitimacy could make such a fundamental change – and that would have to wait until after free elections occurred. In short, the reform communists and the democratic oppositionists disagreed on how to constitute the constituent power.

The Roundtable negotiations arrived at the conclusion that the new political system would make as radical a break with the old system as the government in Moscow would permit. Convening a constituent assembly would have been provocative. But as 1989 went on and it became more and more clear that Moscow would not in fact intervene, the constitutional talks got bolder and bolder about the change that all thought was possible.

Both the MSzMP and the democratic opposition changed their positions as the Roundtable talks went on. The MSzMP agreed to put its fate before the Hungarian electorate without guarantees that it would control any of the key branches of power under a new constitution and the democratic opposition agreed to more constitutional change than they had originally thought was wise before an election could legitimate (and perhaps amplify) their bargaining power. In fact, as the MSzMP justice ministry officials rolled out their constitutional proposals through the summer of 1989, the democratic opposition realized that the constitution that they could negotiate in the Roundtable subcommittees provide enough guarantees of political fairness for all sides that it became “worth defending.”³² In the end, both the MSzMP and the Opposition Roundtable agreed on a sweeping package of constitutional changes that not only guided the transition to a multiparty republic, but that also set up the key institutions of the new government, added a strong bill of rights and created a Constitutional Court to defend the new constitution.³³

The constitution that emerged from the Roundtable process in fall 1989 made many major alterations of the 1949 constitution. The governing party and the democratic opposition disagreed most

³² This phrase came up often in interviews I did in 1994-1995 with those who were deeply involved with the constitution-negotiating process at the time. In particular, Péter Tölgyessy used this phrase repeatedly. Tölgyessy had been the key Opposition Roundtable delegate to the three-person subcommittee that drafted the legal language of the new constitution. Interview with Péter Tölgyessy, White House (parliamentary office building), spring 1995.

³³ This paragraph is based on a set of interviews I did in 1994-1995 with a number of the people who were involved in the constitutional drafting process at the Roundtable, including but not limited to those mentioned by name above.

intensely, however, over how the new president of the new republic would be selected. Since this issue could not be resolved within the Roundtable due to repeated deadlock, both the MSzMP and the democratic opposition agreed to put the question to the Hungarian public as a whole in a referendum, which was held in November 1989. The referendum determined that the new president was to be elected by the parliament rather than by general election, taking the democratic opposition's position in the debate, albeit with a very narrow majority.³⁴

A list of some of the changes in the new constitution of 1989 will reveal how comprehensive the revision of the 1949 text was.³⁵ The new constitution provided that 'parties shall not directly exercise public power and accordingly, no party shall direct any state organ' (Hungarian Constitution 1989, Art. 3(3)). Parliament's power was strengthened so that it was the 'supreme organ of state power and popular representation' with the power to 'guarantee the constitutional order of society' and 'determine the organization, direction and conditions of governmental activity' (Hungarian Constitution 1989, Art. 19). As a rejection of the strong executive-ministerial powers during the Soviet period, the constitution mandated that the parliament was to meet during nine months of each year (Hungarian Constitution 1989, Art. 22).³⁶ But the 1989 constitution left the soviet-style Council of Ministers largely unchanged, still possessing the power to issue decrees (Hungarian Constitution 1989, Art. 33-40). In a significant addition to the constitutional framework, however, any minister or even the whole Council of Ministers could be subject to a vote of no confidence by the parliament (Hungarian Constitution 1989, Art. 39A), after which a new minister had to be named or a new council had to be formed. Through the revisions of 1989, the formerly supreme Council of Ministers became accountable to the parliament, which was itself about to change its party composition substantially.

The first multiparty elections in the late spring of 1990 put a center-right government composed of parties from the democratic opposition into power. The MDF (Hungarian Democratic Forum) formed

³⁴ The communists wanted the new president to be elected by popular vote, as their candidates were nationally known already. By contrast, the democratic opposition, consisting largely of self-appointed figures without broad recognition, wanted the new president to be elected by the parliament because they believed that they could win a majority there. Kis at 350-355. The solution – to put the choice to the people themselves – fits Schmitt's general view that only a decision of the political unity can settle foundational questions. Though the referendum settled the issue by a very small margin, the narrow majority voted to limit its own power by deciding to not preserve its own power to elect the president and to permit the parliament to elect the president instead.

³⁵ Because the 1989 constitution passed as a series of formal amendments to the 1949 constitution, the constitution retained its formal designation as Law XX of 1949, as amended. It was this absence of a name change that caused the Fidesz government elected in 2010 to claim that the communist constitution survived, despite the fundamental change described here.

³⁶ In the Soviet period, the parliament was limited to two ceremonial meetings per year, during which time it rubber-stamped proposed legislation without debate. A parliament that met nine months per year would finally have the chance to engage in actual legislative work.

a government with the conservative Smallholders and Christian Democrat parties. Shortly after the election, in which the Socialists (successor party to the MSzMP) won only 11% of the vote, a new set of major constitutional amendments was passed by the new parliament, rounding out the transition that had begun the year before.³⁷ In these constitutional changes, the Council of Ministers was finally abolished and replaced by a Prime Minister and ministerial government on a parliamentarist model (Hungarian Constitution 1989, as amended May 1990, Ch. VII). In addition, the general limitation clause on rights – that they could be legally infringed in the name of public order, public security, public health and public morals – was removed.

The new center-right government could have decided to govern on its own. But instead, the largest party in the government entered into a power-limiting agreement³⁸ with the largest party in opposition. The Hungarian Democratic Forum (MDF) agreed with the opposition Free Democrats (SzDSz) that major governmental institutions and foundational areas of state policy would be decided upon not by a simple majority, but instead by supermajority of two-thirds that would require the governing parties to consult and agree with the political opposition. This inclusive move,³⁹ which revealed both self-limitation of those in power and an agreement that crucial aspects of this new state would always be decided upon by a coalition of multiple political forces,⁴⁰ represented a commitment to govern as a political unity, as Schmitt might call it. As such, one may be warranted in concluding that the Hungarian transition, with its multiple multiparty pacts and its frequent consultation with the population as a whole (first through referendum and then through election), did in fact summon a *pouvoir constituant* to create a new constitution.

³⁷ To make these amendments, which required a two-thirds vote of the parliament, the governing parties needed parties in the political opposition to join them.

³⁸ The agreement is simply called the “Paktum” in discussion of this period.

³⁹ There is some controversy here that ought to be explained. The MDF entered into this agreement without the Smallholders and Christian Democrats with whom they were in coalition. The SzDSz entered into this agreement without any of the other parties in opposition. While the MDF won about 25% of the popular vote and the SzDSz won about 21%, the pact between them excluded parties that had garnered between them the majority of voters: the Smallholders (12%), the Christian Democrats (6%), Fidesz (9%) and the Socialist (11%). The remaining 15% of the vote went to smaller parties that did not meet the 5% threshold for party representation. As a result, even though this MDF-SzDSz Pact brought together the leading government and opposition parties, it had to some of those left out the air of a secret agreement that was not transparent. It remains the most controversial element of the transition, particularly for Fidesz, which was left out of the bargain. For the election results of 1990, see http://www.ipu.org/parline-e/reports/arc/2141_90.htm.

⁴⁰ This did not mean that all parties agreed on the particulars, which of course one would not expect in a normal democratic system. Instead, most of the parties agreed on the basic structure of governance, putting the most crucial institutional changes beyond the reach of a simple majority. Arato and Miklósi highlight the differences of opinion in the various political groups in the parliament at the time.

What were the foundational principles underlying this new constitution? While those involved in the constitutional drafting process never produced a list of these principles,⁴¹ we can derive such principles from the most important elements of the various agreements from which no major faction dissented. While there was disagreement on specifics within the constitutional order, several principles were so taken for granted at the time that there were no serious proposals to the contrary under consideration.

First, the 1989-90 constitution is centrally committed to human dignity bolstered by a long list of constitutionally guaranteed rights. Rights had been hollow in the Soviet time; the transition enabled the rights that existed previously only on paper to become real. Moreover, the Roundtable process had brought Hungary into line with its international legal commitments by adding to the constitution virtually all of the rights the state had committed to defend through its ratification of international human rights treaties. The commitment to the legal enforceability of rights was realized through the creation of a powerful and independent Constitutional Court which could review all laws for their consistency with the new constitution, particularly the rights provisions. The realization of rights, centrally organized through the concept of human dignity, was a core element of the new constitution with which no political faction disagreed.

Second, the 1989-90 constitution established the principle that Hungary would be a democratic, multiparty republic. The move from a communist state to a democratic republic was a key feature of the transition, signaled by the importance in the constitution of electoral mechanisms of political change. Moreover, given the history of the one-party state that preceded the new Hungarian republic, it was essential that this new democratic government retain its multiparty character. No single party could capture the government, as was evidenced in a crucial principle added in the 1989 constitutional changes: "No single social organization, state organ, or citizen shall . . . capture or exercise power by force or exclusive possession thereof. It shall be a right and a duty of everyone to take action under the

⁴¹ Andrew Arato has identified a constitution-producing process that operates in multiple-stages, where one of the early stages involves outlining a set of principles that the constitution must adhere to as it becomes gradually more detailed. He calls this multi-stage model post-sovereign constitution-making. In his model, the parties first agree on governing principles, then they elect a body charged with writing a constitution according to those principles. The constitution that results is checked back against the initial principles for conformity therewith. In his view, the Hungarian constitution failed because it never actually produced this final constitutional text. But, as I will argue below, the Constitutional Court both attempted to derive these principles and to check the results of the 1989-90 constitution against them, thus completing the process. If one takes the Court as more central to the process of constitution-making than Arato does, then it is easier to arrive at the conclusion that in fact all of his steps were followed.

law against such designs.”⁴² But the new constitution never created a plebiscitary democracy, despite the use of a referendum in the process of constitutional creation. Instead, Hungary was firmly a republic, governing through representatives who were themselves democratically elected. These three elements – creating a democratic, multiparty and republican state – marked the core agreement over the form of government Hungary would have under the new constitution. Again, there was no public challenge to this view at the time

Finally, the 1989-90 constitution distinguished itself from its predecessor in entrenching the principle of self-limiting power. The party-state had refused any limits on its own jurisdiction; the new Republic of Hungary would be characterized by a government that did not claim control over all of daily life. First, this was evidenced in the independence of individuals from the state, contained in the idea of fundamental rights. Second, this was evidenced in the withdrawal of the state from the economy and society, reflected in the constitutional protection of both free association and a free market. Finally, self-limitation of power was a founding principle because all major decisions in those crucial two years during which the constitution was created rejected simple majoritarianism as sufficient for the most crucial decisions that the state had to make.⁴³ These self-limitations were also enforced by the Constitutional Court, which had the power to scrutinize all laws in the light of the new constitution for their compatibility with these principles. Handing such power to the Court was another act of the self-limitation even of democratically elected majorities.

If we take the basic principles of the 1989-1990 constitution to be a) the protection of human dignity through the protection of rights, b) the creation of a democratic, multiparty republic and c) the self-limitation of state power, then the Constitutional Court’s task was to elaborate and defend these principles as the guarantor of the constitution’s integrity.

III. The Constitutional Court and the Invisible Constitution: Building out the Constitutional Consensus

The new constitution created the new Hungarian Constitutional Court. The Constitutional Court was the first part of the new structure to operate when it opened on January 1, 1990, fully five months before the first election. The Court immediately started to issue path-breaking decisions, indicating that

⁴² Constitution of the Republic of Hungary, as Amended by Act No. XXXI of 1989, Article 3.

⁴³ The principle of self-limitation was further manifested in a constitutional amendment made in 1995 that required the procedure for enacting a new constitution to be subject to a four-fifths majority in the parliament instead of the constitution-amending two-thirds. About this, more later.

it was going to take the new constitution seriously and create what the first Court President László Sólyom would later call the “revolution under the rule of law.”⁴⁴ If the previous communist government had failed to take law seriously, the Constitutional Court would indicate its revolutionary break from the past by making the rule of law one of its key normative pillars. All laws consistent with the new constitution would begin to be enforced as written, starting immediately.

The Constitutional Court quickly stepped into the role of the guardian of this new constitution⁴⁵ as it elaborated on what the new constitution meant. Nowhere was the role and operating theory of the new Court more evident than in Court President László Sólyom’s concurring opinion in the Death Penalty Case in late October 1990. In this opinion, President Sólyom first proposed the idea of the “invisible constitution.” The new invisible constitution had to stand above constant parliamentary attempts at revision, because a foundational principle of this new constitution was that it should be entrenched as a limit to state power. President Sólyom’s particular worry was that the new democratically elected parliament would keep amending the constitution to the point where its foundational elements would become blurry and its entrenchment would be under threat. Implicitly relying on the arc of constitutional theory we examined in the first part of this essay, President Sólyom created a distinction between the text of the constitution (what Schmitt would call the positive constitutional law) and the principles followed by the constituent power that had created the constitutional order (what Schmitt would call the foundational constitution). The invisible constitution was the set of crucial principles that made up the foundational constitution’s commitments, which President Sólyom called “the standard of constitutionality above the constitution.” Being the result of an act of constituent power, the foundational principles of the constitutional order could not be changed by mere constitutional amendment. In forwarding this principle, President Sólyom joined the set of distinguished set of constitutional theorists who believed it was crucial to distinguish between the *pouvoir constituant* and the *pouvoir constitué*.

The emergence of the idea of the invisible constitution in the Death Penalty Case was highly symbolic. Less than one year into its work, the Constitutional Court heard this signature case, crucial because of the central role of the death penalty in the transformation of the Hungarian state. Under the communist government, the death penalty marked the absolute power of the state over the individual, and it was used for political crimes above all. After the 1956 uprising, about 230 people had been

⁴⁴ László Sólyom, “Introduction to the Decisions of the Constitutional Court of the Republic of Hungary,” in *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY* (2000), at 1, 38.

⁴⁵ Kim Lane Scheppele, “Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe,” 154 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1757-1851 (2006).

executed, most after trials before judges of questionable independence. Among those executed was Imre Nagy, prime minister during the temporary government established during the uprising. Nagy's symbolic reburial in June 1989 was the most visible sign that the communist monopoly on symbolic power had ended. In the new democratic and multiparty republic that followed, where human dignity was fundamental and the state was to come under constitutional control, the new constitution now marked the end of the communist claim to absolute power. But the death penalty remained on the books as one of its last remnants.

Ending the death penalty in 1990 was not politically controversial among political elites. The outgoing communist government, which had the option to defend the law before the Court, refused to do so and even suggested that European legal development pushed Hungary in the direction of abolition. The chief state prosecutor, Kálmán Györgyi, who was also asked for his opinion by the Constitutional Court, also urged the death penalty's demise. Academic experts appointed by the Court additionally found the death penalty to be indefensible under the country's new constitution. In its judgment, surprising no one, the Court joined them all by finding the death penalty to be unconstitutional.⁴⁶ Only one dissent to the decision was filed; Justice Schmidt argued that the parliament and not the Court should abolish the death penalty. But he certainly did not argue that the death penalty should stay.

Taking the opportunity in such a historic decision to mark what the case stood for in symbolic terms, President Sólyom's lengthy and theoretically ambitious concurring opinion went beyond the specific case to outline a particular theory of the new constitution and a particular role for the Constitutional Court in this new constitutional system. Pointing out that Hungary had gotten not just a new constitutional text, but a new constitutional order, President Sólyom argued that Hungary now also had a new invisible constitution. In determining what the constitution was and what it meant, the Constitutional Court had a special role, according to President Sólyom:

The Constitutional Court must continue in its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an "invisible Constitution" provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interests; and therefore this coherent system will probably not conflict with the new Constitution to be

⁴⁶ On Capital Punishment, Decision 23/1990 (X 31) A.B. hat.

established or with future Constitutions. The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality.⁴⁷

With this analysis, Sólyom put the Constitutional Court in the position of a constituted power operating *under* the constitution's mandate. That said, the Court was a privileged interpreter of the meaning of the constitution because it had the mandate to exclude "current political interests" in the course of making its decisions. Instead the task of the Court was to be the expositor of a coherent system of legal values that would underwrite both this constitution and future constitutions⁴⁸ by referring back to what was decided by the constituent power mobilized at the time of constitutional drafting.

By the invisible constitution, President Sólyom identified a "principled coherence" to the constitution that could not be destroyed by amendments. The idea was both more and less powerful than its advocates wanted. It was less powerful than its advocates wished because the Constitutional Court never actually used the idea of an invisible constitution to ground any decisions or to limit amendments that could be made to the constitutional text. But it was more powerful than its detractors may have wanted because it began the process through which the Constitutional Court would elaborate the fundamental principles of the new constitutional order, beginning in the death penalty case with the centrality of human dignity.

President Sólyom's death penalty concurrence also implicitly acknowledged another fundamental principle of the new constitution: its self-limiting quality. No longer could the state assert primacy over all others in its territory; in the Death Penalty Case, the dignity of the individual emerged as the untouchable core of the individual's relationship not only to the state but to others. With human dignity as a clear and unquestionable limit to state power, the new constitution had fundamentally transformed the state from one where the goals of the state dominated all other features of the society to one where the state had limits. Abolishing the death penalty was one clear sign that things had changed – and had changed fundamentally.

President Sólyom's invocation of "constitutionality beyond the Constitution" was nonetheless disturbing to those not familiar with the arc of constitutional theory running from Emmanuel Sièyes through Carl Schmitt. Against that background, President Sólyom was simply asserting that neither the

⁴⁷ Id. (Sólyom, P., concurring).

⁴⁸ Sólyom's reference here to future constitutions was no doubt a reference to the fact that the 1989-1990 constitution had a preamble which indicated that it was temporary, and that it should be replaced by a permanent constitution when the transitional period was over. The constitutional text envisioned a future constitution that would be based on the process started in the 1989-1990 constitutional-drafting period.

Constitutional Court nor any other configuration of state officials had the power to change the fundamental constitution created by the *pouvoir constituant*. Following this theoretical framework in which the constituent power and the constituted power were subject to different limits, President Sólyom was merely stating the obvious to constitutional theorists, however shocking his pronouncement may have seemed at the time. Principles of the fundamental constitution could not be changed by Court or by the parliament, not even through the procedure of a constitutional amendment. Therefore, when the Constitutional Court explained that the unconstitutionality of the death penalty implicated the fundamental principle of human dignity, there was nothing the parliament could do to restore the death penalty again. The Court was not writing a new constitution; it was explaining what the constituent power mobilized in the 1989-90 constitutional drafting process had already decided.

As we can see from this account, the creation of a constituent power around the 1989 transition was not captured in a single constitutional assembly. Instead, it comprised a multi-stage process that started with the National Roundtable, followed by the amendment of the 1949 constitution by the last communist parliament, followed by the public referendum on the presidency, followed by the multi-party election, followed by the Paktum – and after 1 January 1990, the elaboration of the 1989-1990 multiparty agreements was coordinated by Constitutional Court (which was itself further certified by its high public approval). By the time all of those agreements and public certifications has occurred, Hungary had a constitutional system that was really taken for granted by all players in the system. In the 1989-1990 constitution, then, constituent power had expressed itself and created the framework for a new Hungarian constitutional system.

V. The 1989-1990 Constitution as Transitional

The 1989-90 constitution had an Achilles' heel that made it vulnerable. Despite having successfully instantiated a constituent power, the new constitution always claimed that it was merely temporary. Given that it was written in a period of rapid political change, the various parties to the political transformation of 1989-1990 believed that they might, with reflection, do better once it was clear just what new state would emerge. As a result, the constitution was explicitly written as a transitional constitution, one to guide the new state until such time as the transition was complete. The preamble of the 1989-90 constitution reflected this view:

In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted.⁴⁹

That preamble raised a question that the text itself did not answer: When, then, was the transition over, so that a new constitution should replace the 1989-1990 one?

Hungary had so quickly developed normal politics organized around a relatively stable six-party parliament that the transition seemed to be over before the first decade was out. Already in 1995, then, the government that was elected in the second free, multiparty election initiated a process to write a new constitution.

But the government of 1995 was no ordinary government. The election of 1994 brought the Socialists and the SzDSz together to form a *two-thirds* government.⁵⁰ The Socialists won an absolute majority of seats in the parliament and so could have governed alone; welcoming the SzDSz on board both broadened the coalition and relieved the anxieties of those who were nervous about the post-communist party running the government again so soon after its predecessor party had claimed a monopoly on power. But the coalition generated new worries: with two-thirds of the parliamentary mandates, the new government could theoretically do anything. One aspect of the 1949 constitution that had *not* been changed was the amendment rule that allowed a single two-thirds vote of the parliament to amend any provision of the text.

The constituent power that brought the 1989-1990 constitution into being agreed on three principles: that the new constitution required a commitment to the defense of individual rights, a multiparty democratic republic and a self-limiting government. To change any one of these would require the mobilization of a new constituent power; amendments short of that could still be considered as amendments. Rather than challenge these constituent principles, however, Socialist-SzDSz government organized the new constitutional drafting process to realize those basic principles more

⁴⁹ 1949 Constitution of the Republic of Hungary, as amended in 1989-1990, available in English translation at http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf. Note that the constitution retained the formal legal name of the document that had been fundamentally changed by constitutional amendment in 1989-90.

⁵⁰ The second multiparty election brought the Socialists to power with a majority of seats in the parliament (33% of the party list votes and 209 total seats of the 396 available). Though they didn't need a coalition partner to govern, the SzDSz – which had received 20% of the party list votes and 29 of the total seats – agreed to form a coalition with the Socialists. For the election results in 1994, see http://www.ipu.org/parline-e/reports/arc/2141_94.htm.

fully. While the government could have changed the constitution by itself, the government used its two-thirds vote in the parliament to amend the constitution to require a *four-fifths* vote of the parliament to agree to a process through which a new constitution would be written. In short, as the first government possessed of the absolute constitution-changing power, the Socialist/SzDSz government of 1995 chose to put that power out of its reach. In doing this, the government acknowledged both the centrality of a multiparty republic (requiring parties outside the government to participate in the constitutional drafting process) and also a self-limiting government (because the first supermajority put itself under even more onerous constraints).

Upon acquiring the four-fifths vote necessary to begin a new constitutional drafting process, the parliament charged a constitutional drafting committee composed of parliamentarians to come up with a new constitutional draft. Under the ground rules agreed by this super-supermajority of the parliament, the committee proceeded by starting with the 1989-1990 constitution, only changing any of its provisions if five of the six parliamentary parties agreed to the change. As a result of these ground rules, any two parties acting together – regardless of the size of their fraction in the parliament – could block a change to the constitutional text.

In the end, as often happens with near-unanimity rules in complex political processes, the whole process foundered. The Smallholders Party, which had variously advocated a restoration of the monarchy and a return of the Holy Crown of St. Stephen to the center of the constitution, decided to boycott the process. The five remaining parties therefore had to agree all changes unanimously. While a number of changes were debated and received the approval of majorities of parliamentarians, no single change was able to clear the five-party threshold. As a result, the 1989-1990 constitution was left intact.

What did the failure of the 1995-1996 constitutional process signify? It is always hard to interpret a negative, but at a minimum, it meant that there was no agreement on any other constitution besides the 1989-1990 constitution. While there were many proposals coming from different parts of the political spectrum to make changes big and small, none attracted the super-supermajorities required to actually re-found the constitutional order. So Hungary's 1989-1990 constitution remained intact.

Perhaps more importantly for our purposes, however, the constituent power mobilized in 1989-1990 remained intact also. The values that the constituent power agreed in the immediate post-communist transition guided the 1995-1996 constitutional drafting process so that those constitutional super-values were reinforced rather than rewritten. And then normal politics proceeded from there. No new constituent power was summoned or even attempted with the 1995-1996 constitutional

drafting process. And so that constituent power – and that constitution – continued as the backbone of Hungarian constitutionalism. For the next decade and a half, no more talk was heard about a new constitution.

VI. The “Revolution of the Ballot Box” and Constitutional Change: What are the Limits to Constitutional Amendment?

The election of 2010 produced a “revolution of the ballot box”⁵¹ that soon resulted in the rapid adoption of a wholly new constitution. In the 2010 election, the center-right party Fidesz – in a joint party list with the Christian Democrats (KDNP)⁵² – received 53% of the popular vote. In Hungary’s complicated electoral system, that simple majority translated into 68% of the seats in the parliament.⁵³ With its two-thirds majority, the power to change everything in the constitutional order was in the hands of one political bloc. First through constitutional amendment and then through replacing the 1989-1990 constitution altogether, Fidesz claimed to exercise constituent power.

The 2010 election was run as a normal election, by contrast with the 1990 election, which had been run as a system-changing plebiscite. The campaign in 2010 did not feature pledges to change the constitutional order and voting did not carry the symbolic weight of choosing between an old and a new system of government. True, Hungarian politics in 2010 was spectacularly polarized. The Socialists were in disarray; the SzDSz had collapsed entirely; the far right was represented by a neo-fascist party called Jobbik and a new youth party of vaguely liberal and vaguely Green (but mostly vague) ideology called Politics Can Be Different (LMP) entered the scene. Only Fidesz remained a familiar and relatively untarnished alternative. But while Fidesz was eager to smear the Socialists and the Socialists returned the favor, nothing in the 2010 electoral campaign promised a radical system change. The election was a nasty version of politics as usual – but it was politics as usual.

⁵¹ This is what Prime Minister Viktor Orbán has called his mandate from the 2010 election. For the slogan, and some resistance, see <http://www.guardian.co.uk/commentisfree/2011/dec/17/young-hungarians-viktor-orban>.

⁵² The joint party list should not create the impression that there are really two distinct parties there. The Christian Democrats did not offer a separate parliamentary list in the national election nor did it put up candidates in most of the individual member districts. The KDNP’s leadership is practically merged with the leadership of Fidesz and the two grouping rarely disagree in public. Virtually all of Fidesz’s radical legislation and constitution-making proposals since 2010 have been voted unanimously by the Christian Democrats in parliament. As one Socialist politician said to me in a recent interview, the Christian Democrats are the “Christian wing” of Fidesz. From here on, I will refer to the government simply as a Fidesz government, which is also how the government refers to itself. It has not disputed its one-party formation.

⁵³ Fidesz got 68% of the seats in the parliament despite the fact that Fidesz had about 40% popular approval on the eve of the election. Reduced voter turnout produced a 53% majority for the Fidesz/KDNP party list. The disproportionate Hungarian electoral law then boosted that 53% majority to 68% of the parliamentary mandates. But Fidesz did not, as the party often implies in its public statements, get 68% of the vote.

That said, once the government headed by Fidesz leader Viktor Orbán took office, it claimed it had a mandate to change the constitutional order. Interpreting its 2/3rds majority as the manifestation of a *pouvoir constituant*, Orbán announced his intention to create a new constitution, one that would finally and radically break from the communist order of 1949-1989. Orbán denied that the 1989-1990 constitution had brought about a fundamental constitutional change and further denied that a legitimate constituent power had been summoned in those years. Instead, he and his party pledged to rewrite what they still called the “communist constitution.”

At the time of the 2010 election, the constitution could still be amended by a single two-thirds vote of the parliament. But the constitution also said that a new constitutional drafting process could only be initiated by a *four-fifths vote* of the parliament.⁵⁴ As one of its first acts in power, the Fidesz parliament used its reliable two-thirds supermajority to amend the four-fifths rule, which paved the way for Fidesz to start a constitutional drafting process with only the votes of its own party. And so it did.

Before completing its own new constitution, the new Fidesz government amended the old constitution so frequently that the constitutional revolution occurred even before a new constitution was unveiled. Over the course of 12 constitutional amendments in its first year in office, the Fidesz government changed more than 50 different provisions in the 1989-1990 constitution.⁵⁵

While the Fidesz government eventually adopted a wholly new constitution in April 2011, one year after it took office, there is still an important question of how much a constitution can be changed by amendment within the limits of the prior authorizing constituent power. Were the constitutional changes of 2010-2011, including the new constitution itself, consistent with the principles that the constituent power had created and endorsed during the preceding 20 years? Or was this a new constitutional moment, in which a new constituent power was summoned up to change the basic principles of the new constitutional order?

Many of the constitutional amendments of 2010-2011 violated the core constitutional principles that the constituent power had established during and after the transition. The elimination of the four-fifths rule for agreement on the shape of a constitutional drafting process removed a crucial self-

⁵⁴ The continued legal validity of this provision was subject to some contestation in 2010. When the parliament amended the constitution in 1995 to set the bar at four-fifths before a constitutional drafting process could begin, the bill that passed the parliament containing the amendment specified that the four-fifths requirement was to end in 1998 when the government in power would be up for election again. (The law as it passed the parliament was 1995. évi XLIV. törvény.) But the actual amendment inserted into the constitution never mentioned that sunset provision. As a result, the four-fifths clause was still in the constitution at the time that Fidesz came to power, though some argued that it had formally lapsed in 1998.

⁵⁵ Miklós Bánkúti, Gábor Halmai and Kim Lane Scheppelle, “Disabling the Constitution.” 23 JOURNAL OF DEMOCRACY 138-146 (2012).

limitation on the power of two-thirds governments.⁵⁶ A constitutional amendment of 5 June 2010 changed the procedure for electing judges to the Constitutional Court, eliminating the first step of the process that had required a majority of parliamentary parties to agree to a nomination before a two-thirds vote could then elect that nominee to office.⁵⁷ Under the newly amended constitution, the votes of the governing party were alone enough to name constitutional judges, which removed another crucial self-limiting constraint on power. The government then amended the constitution again to remove crucial jurisdiction of the Constitutional Court in fiscal and tax matters, as retaliation against a Constitutional Court decision declaring a 98% retroactive tax unconstitutional.⁵⁸ Not only did this violate the principle of self-limiting power, but it also violated a basic human right present in all democratic constitutional systems worth the name, which is the right to be free of punitive *ex post facto* laws. The Constitution was then amended again to increase the number of judges which, together with retirements and other openings coming up in the normal scheme of things, gave the governing party the ability to name seven of the 15 judges on the Court in its first year in office. In a unicameral parliamentary system which Hungary inherited from the soviet period and did not revise in 1989-1990, the Constitutional Court was the primary check on power. With the amendments of 2010-2011, the independence of the Constitutional Court was sharply reduced.

The Fidesz government then passed a frenzy of sub-constitutional laws to revamp the structure of many independent bodies. Virtually all of these laws had the effect of bringing formerly independent bodies, crucial to the enforcement of a self-limiting power, under the control of the government. The Election Commission's composition was changed. All of the members elected for fixed terms of office before the 2010 election were unceremoniously booted off the commission and new members (all loyal to Fidesz) were elected in their place. This mattered not only for election supervision but also because any public referendum that might challenge the government first had to clear the hurdle of the Electoral Commission before it could be put to a popular vote. So the capture of the Electoral Commission functionally limited the ability of the public to challenge what was happening as the government

⁵⁶ This statement, of course, presupposes that the four-fifths rule was still legally valid, something that was challenged at the time.

⁵⁷ Amendment to Law XX of 1949 on the Constitution of the Republic of Hungary, 5 July 2010, *MAGYAR KÖZLÖNY*, Issue 113 (2010).

⁵⁸ For the decision of the Constitutional Court on retroactive taxes, see Hungarian Constitutional Court, Decision 184/2010 (X. 28), *MAGYAR KÖZLÖNY*, Issue 165 (2010). For the constitutional amendment restricting the jurisdiction of the Court, see Law CXIX of 2010 on the amendment to Law XX of 1949 on the Constitution of the Republic of Hungary, *MAGYAR KÖZLÖNY*, Issue 177 (2010).

prepared to rewrite the constitution.⁵⁹ This was yet another violation of the principle of self-limiting government.

Two new laws restructured the system of media regulation, so that a new Media Authority and a new Media Council appeared on the scene with the power to regulate public and private media in any medium (broadcast, internet and print).⁶⁰ Among other things, the Media Council had the power to inflict bankrupting fines on any media organizations whose news operation failed to achieve political “balance” and the new Media Authority was responsible for awarding or renewing all broadcast frequencies. All of the seats on these crucial governing boards went to Fidesz supporters for terms that would run through three parliamentary election cycles, nine years. Not surprisingly, critics claimed that this chilled the robust debate that might have occurred over the constitutional revolution.

There was more, but we have already established enough to ask the key question: Was the constitutional-amendment process in the run-up to the drafting of the new constitution a *constitutional* constitutional-amendment process? If *constitutional* constitutional amendments are limited to matters that do not infringe the basic constitutional principles that a constituent power has established, as Schmitt would argue, then any amendment that transgresses the constituent power’s red lines should be considered unconstitutional.

The Constitutional Court had a chance to rule on this question, but it failed to take the Schmittian route.⁶¹ The reduction in the Constitutional Court’s own jurisdiction was challenged before the Constitutional Court, but the Court declined to find the constitutional amendment that did so unconstitutional. In fact, the majority of the Court’s justices argued that the Court lacked jurisdiction either to review the substance of the constitutional amendment or even the constitutionality of the procedure through which it was adopted. And the Court said this even while pointing out that the constitutional amendment created a conflict with other provisions still in the constitution that ensured the rule of law and legal security. But, said the Court, this was a matter for the constituent power and not for the Court to resolve.

⁵⁹ The process is slightly more complicated than this. Decisions by the Electoral Commission at that time could be appealed to the Constitutional Court for review, so the Constitutional Court was really the final body to approve a referendum. But, as we have seen, by the time any public referendum might have emerged to challenge Fidesz, the Court was already packed with government supporters.

⁶⁰ Law CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content and Law CLXXXV of 2010 on Media Services and Mass Media. The laws are translated at the website of the Center for the Study of the Media at Central European University at <https://cmcs.ceu.hu/node/2624>.

⁶¹ This paragraph discusses Constitutional Court Decision 61/2011. (VII. 13.). A thorough analysis of this decision that I have relied on heavily here can be found in Gábor Halmai, „Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?”

A dissenting opinion penned by Justice András Bragyova argued for reviewing both the procedure and substance of the amendment. He would have found the amendment limiting the Court's jurisdiction unconstitutional for precisely the reasons that are by now familiar to readers of this paper: Justice Bragyova found that the constitution embedded human rights, as well as a multiparty system, rule of law, parliamentary democracy and social market economy, as principles that could not be modified by amendment. Those principles were unamendable, which is to say that they were created by a constituent power that could not be contradicted by anything less than a new constituent power, so the Court had the power to declare the constitutional amendment unconstitutional. In a separate dissent, Justice László Kiss argued that the restriction on the jurisdiction of the Court in matters affecting rights also violated unamendable principles, though his list was slightly different, including "the rule of law, the protection of the attained level of human rights, as well as the most important principles of voting rights, [and] the prohibition on obtaining or exercising power by violent means and on holding absolute power, and the norms regulating the right of resistance."⁶²

Even with the Constitutional Court's majority meekly accepting its constitutional fate, however, enough questions were raised about the amendments in the first year of the Fidesz government to cast doubt on whether these amendments continued the original constituent power. As I have argued here, these Fidesz amendments removed too many limitations on the power of the party to do anything it wanted, and the amendments also violated a basic principle established by the constituent power summoned in 1989-1990, the principle of self-limiting government. Moreover, since Fidesz repeatedly amended the constitution with the votes of only its own party, it also violated the constitutive principle that required that the post-1989 government remain a multiparty republic.

VII. The Realization of the Existing Constituent Power? The New Hungarian Constitution of 2011-2012

While the Fidesz government was amending the constitution in 2010-2011 with the primary effect of bringing important independent institutions under its control, it also started the process of replacing the constitution altogether. At first, it appeared that the government would follow the track of "post-sovereign constitution making" that Andrew Arato has described.⁶³ The constitutional drafting

⁶² Halmai, *id.* at 32.

⁶³ Andrew Arato, "Post-Sovereign Constitution-Making and Its Pathology in Iraq," 51 *NEW YORK LAW SCHOOL LAW REVIEW* 535-555 (2006-2007), available at http://a.nyls.edu/user_files/1/3/4/17/49/NLR51-311.pdf. What is post-sovereign constitution-making? As Arato writes: "What gradually emerged . . . was the new reliance on two drafting stages that foresaw from the outset the production of two constitutions, an interim and a final one, where

process, as it was announced, would proceed in two interdependent steps: outlining principles first and then writing a full text afterwards.

The constitutional committee of the parliament convened as a body that would develop constitutional principles for use in drafting a final text. The committee finished its work on 7 March 2011, when the committee published a 17-page document containing principles that, in the view of the committee, the new constitution should include. But by then, most of the democratic opposition⁶⁴ had walked out of the committee, complaining that none of their suggestions had been incorporated and arguing that they would no longer create the appearance that the draft principles had multiparty support.

On the day that the principles were reported out of committee to the floor of the parliament, the Fidesz supermajority then voted with its reliable two-thirds to call on any MP to submit a proposed constitution to the parliament “*with or without*” following the principles that the committee had agreed. The parliament gave all MPs *one week* – until 14 March 2011 – to come up with a complete constitutional draft.

Notice what happened here. The government first announced that it would follow this two-stage process, with the newly elected parliament itself taking the lead on the first step. So far, so good. But the constitutional committee, with a majority of government members, simply vetoed any of the changes suggested by the opposition parties. So while that committee was formally representative of the parliament and generally mirrored the results of the recent election,⁶⁵ the proposals that emerged reflected only one party. And then even those proposed principles were ignored.

The democratic opposition might have thought it could make up for the disadvantage it had already suffered by engaging again in round two, in whatever process would draft the constitution. But that process and its ground rules were not specified until the day that the parliamentary committee’s

the rules of the first constrain the making of the second. The existence of a fully developed, explicitly interim constitution is the most important component and documentary evidence of the new paradigm of constitution-making.” A more detailed analysis can be found in his later book, ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IRAQ (Columbia University Press, 2009)

⁶⁴ The term “democratic opposition” is what the parties to the left of Fidesz call themselves to distinguish themselves from the entire parliamentary opposition, a designation that would include the neo-fascist party Jobbik. As a result, Jobbik is specifically excluded from the “democratic opposition” designation.

⁶⁵ Recall, however, that under the Hungarian electoral law valid at the time of the 2010 election, majorities became supermajorities and strong contenders were reduced in influence in the parliament that resulted. Fidesz got 53% of the party list votes and 262 of the seats while the Socialists got 21% of the vote and 59 of the seats. See <http://www.electionresources.org/hu/assembly.php?election=2010>. While much of the disparity comes from the fact that Fidesz swept the single-member districts, the lopsided effect comes from a combination of the disproportionate election law in place at the time and the way that district boundaries were drawn.

report was issued. Only then did the democratic opposition learn that it had one week to prepare a draft constitution – all without knowing before that day what the principles were that had to be followed. In the end, the principles turned out to be irrelevant, given that the parliament released any constitutional drafter from following them. (That was the last that was heard of the principles, which never made an appearance anywhere else in the process.) The crucial point was that the government gave everyone without inside knowledge about how the constitutional drafting process would proceed only one week to develop a constitutional draft.

In the end, two constitutional proposals were submitted to the parliament by the deadline: one offered by a collection of MPs and MEPs from Fidesz and the other written by independent (former Socialist) MP Katalin Szilli. The Szilli draft was never discussed on the floor of the parliament. Only the Fidesz draft was considered and it was introduced into the parliament as a “private member’s bill” that could bypass the more rigorous parliamentary procedures required of a government bill.

In Hungarian parliamentary procedure, government bills must be introduced with a period of public consultation during which time both opposition parties and civil society groups, as well as affected parties more generally, must be consulted. In addition, the ministries affected by a bill must have a chance to comment. An impact statement must be prepared that estimates the effects of the law on society before the parliament can take up the matter. With a private member’s bill, however, none of these prior steps have to be carried out and a proposed law can go straight to the floor of the parliament for discussion. The proposed constitution, which had been drafted in secret in a close circle of party insiders, was introduced through a private member’s bill, which eliminated the consultation round and allowed it to proceed on a fast track.

The Fidesz government set only one month for debate of the constitutional draft, which had been sprung out of the blue on an unprepared opposition and general public. While a few public debates were held, the by-now-Fidesz-controlled broadcast media said very little about the new constitution.⁶⁶ The general public, the NGO community and the political opposition were caught off-

⁶⁶ By this time, only one independent radio station, KlubRádió, and one independent TV station, ATV, were operating in Hungary. While the print media were more diverse, they, as well as the broadcast and internet-based media, were governed by the new media law that allowed the Fidesz-only Media Council to impose bankrupting fines on any news broadcast that was not “balanced.” Later, after the constitution was adopted, the Constitutional Court struck down the content restrictions on the print media, but at the time when it would have been most crucial to have a robust debate – during the month when the constitution was open for discussion – even the print media were under the Media Council’s Sword of Damocles.

balance. Foreign observers, including the Council of Europe⁶⁷ and the European Union,⁶⁸ had virtually no time to react.

Instead the government launched a “public consultation” which, the government said, was designed to take the public pulse on the new constitution. The public consultation was a questionnaire sent out to every voter in the country, and it consisted of twelve questions.⁶⁹ While many of the most crucial questions about the organization of government were never addressed in the questionnaire and a number of questions asked were puzzling (for example, should parliament sanction people who failed

⁶⁷ The government had asked the Venice Commission (the Commission for Democracy through Law) of the Council of Europe for its advice on three small issues in the new constitution before the new draft was made public. The Venice Commission saw no serious objections to the three proposals, though it also noted with some testiness that much depended on how these three proposals fit into the new constitution, which they did not have a chance to review. For the Venice Commission’s initial report on the three questions, see <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29001-e>. There was no time for the Venice Commission to review the draft constitution in its entirety, which was only done some months later upon a request from the European Parliamentary Assembly. For the final report on the entire new constitution, see <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29016-e>.

⁶⁸ The government was required to submit the draft constitution to the European Commission for its review as well. But the English translation of the constitution that was submitted to the Commission omitted the controversial preamble, though which only ethnic Hungarians were established as the constituent power. In addition, the preamble laid symbolic claim to Hungary’s historic lands and peoples, repudiated the constitution and all laws that were in effect between 1949 and 1990, and established Christianity, family and nation as the key principles of the new state. The draft also contained a number of misleading translations that disguised some of the more objectionable features of the new constitution. For a list of the misleading translation mistakes in the version of the constitution originally provided to the EU, see http://www.ekint.org/ekint_files/File/tanulmanyok/alkotmanyozas/list_of_all_the_omissions_and_mistranslation_s.pdf. For the current official translation, see http://www.kormany.hu/download/2/ab/30000/Alap_angol.pdf. For an alternative translation, see http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

⁶⁹ The questions were:

- (1) Should the new constitution declare only rights or should it also declare obligations of citizens (work, study, national defense, environment)?
- (2) Should the new constitution restrict the extent of sovereign debt and thus accept responsibility for future generations?
- (3) Should the new constitution bring under its protection common values such as family, labor, home, order and health?
- (4) Should the new constitution grant voting rights to the parent of a minor on behalf of his/her child?
- (5) Should the new constitution permit taxing the cost of raising children?
- (6) Should the new constitution undertake responsibility for future generations?
- (7) Should the constitution declare that only companies with a transparent ownership should have access to state funds?
- (8) Should the new constitution express the value of national togetherness with Hungarians living beyond our borders?
- (9) Should the new constitution provide protection for the biodiversity of the Carpathian Basin?
- (10) Should the new constitution provide special protection of national assets, especially arable land and water supplies?
- (11) Should the courts have powers to give life prison sentences that cannot be changed?
- (12) Should the new constitution define sanctions for no-shows before a parliamentary committee for a hearing?

to show up before the parliament to testify at hearings?), the timing of the questionnaire meant that it could have no effect. The questionnaire was sent to households starting in February 2011, before the Fidesz draft became public, but the results were not due back until after the constitution was adopted in the parliament. The government claimed that 900,000 questionnaires were returned (out of roughly 8 million voters). But the questionnaire could influence neither the draft nor the final constitution, and the government never published the results.⁷⁰

The parliament itself scheduled only nine sessions to discuss the constitution, during which time about 180 amendments were proposed. But the only alterations that had any chance were those offered by Fidesz. Democratic opposition parties, whose proposals were virtually all rejected, eventually walked out of the chamber and did not vote on the final constitution. Only the far-right Jobbik stayed and voted no. By the time that the final constitution came up for a vote in the parliament after these marathon sessions, neither observers nor the members of parliament knew which amendments had been added and which had not. There was no final draft text publicly available when the final vote was taken.

In a party-line vote, with all Fidesz members in favor and everyone else either boycotting or voting no, the new constitution passed parliament by the requisite two-thirds vote and was signed by the president on 25 April 2011. There was no public referendum to ratify the result. The new constitution went into effect on 1 January 2012, along with many of the “cardinal laws” that the constitution required to fill in the specifics.

If the new constitution honors the same constituent principles as the 1989-1990 constitution, then there was no need for the government to have summoned a new constituent power to underwrite it. A new constitution could then piggyback off the legitimation coming from the constitutional process of 1989-1990. So let us look at this new constitution to see whether it honors: a) the protection of human dignity through the protection of rights, b) the creation of a democratic, multiparty republic and c) the self-limitation of state power.

Let's begin with the self-limitation of state power. Already we saw that the constitutional amendments brought in by Fidesz in 2010-2011 violated this basic principle by removing many of the

⁷⁰ The government had promised anonymity to those who responded. But later, the ombudsman for data protection, shortly before his office was abolished, discovered that the questionnaires contained a QR barcode that could be read by any QR scanning device. This QR barcode contained the name and address of the person who received the questionnaire so that the responses were *not* anonymous. But now the government knows precisely who is in the government's camp and who was not in favor of its various constitutional proposals.

checks on its own power, making its power theoretically limitless. Unfortunately, the new constitution made that problem worse. Not only did the new constitution keep the institutional changes added by the amendments to the old constitution – the new system for electing judges to the Constitutional Court, the restriction in the Court’s jurisdiction and the increased number of judges so that the votes of Fidesz alone were enough to name them all without multiparty input – but the new constitution went even further. Under its aegis, either in the constitution itself or in the cardinal laws that were required by the constitution as supplements, virtually all of the independent checking institutions were now occupied by Fidesz loyalists whose terms of office extended far beyond the current election cycle of four years. With terms of six, nine and 12 years, Fidesz loyalists in key positions could hold power during the next two or sometimes three new parliaments down the road.

In addition, the new constitutional order severely limits the independence of the ordinary judiciary.⁷¹ Under the old system, lower court judges were selected by panels of their fellow judges. Under the new system, the president of the newly created National Judicial Office has the power to select new judges, to promote and demote any judge, to begin disciplinary proceedings, and to select the leaders of each of the courts. The person actually chosen by parliament with its two-thirds majority as head of the National Judicial Office is both a close friend of Prime Minister Orbán and the wife of József Szájer, the principal drafter of the new constitution. Moreover, under a new constitutional amendment to the new constitution, she will have the power to assign any case to any court, overriding the usual procedural rules that specify jurisdiction in each case in a formal and rule-based fashion.⁷² With one person possessed of so much power to shape the judiciary, especially one person so close to the governing party, it is hard to say that the judiciary is independent.

This structural dependence of the judiciary on a single person was compounded by the one-off trick that Fidesz pulled to get control of the judiciary even faster than the normal attrition rate would

⁷¹ The term “ordinary judiciary” is customarily used in systems that have constitutional courts to distinguish the courts that do not have constitutional jurisdiction – the “ordinary courts” – from the one court that does, the Constitutional Court.

⁷² There is a back story here. After the constitution was enacted, and just before it went into effect, the parliament adopted an act called “Transitional Provisions of the Constitution.” The Transitional Provisions were supposed to be added to the constitution to provide information about how the new constitutional system would be phased in; instead the Transitional Provisions also included a number of permanent amendments to the constitution. In its decision of 45/2012, the Constitutional Court declared that the permanent amendments included in the Transitional Provisions failed for formal reasons to properly amend the constitution and so were unconstitutional. So the government has now (as of 8 February 2012) announced that it will seek to introduce a new constitutional amendment, done in the proper manner, *again* giving constitutional power to the head of the National Judicial Office to assign any case to any judge. In the meantime, between the nullification of the Transitional Provisions and the new constitutional amendment, the head of the National Judicial Office must rely on her statutory power in the cardinal act on the judiciary to accomplish the same goal.

allow. Suddenly lowering the judicial retirement age from 70 to 62 meant that, overnight, Fidesz had 10% of the judicial seats in the country to fill. By firing people from the oldest age cohort, Fidesz ensured that the 10% of seats were not randomly distributed. Instead, they came disproportionately from the leadership stratum of the courts. The new retirement age eliminated 25% of the Supreme Court judges, nearly half of the appeals court presidents and two-fifths of the local court presidents.⁷³ The new head of the National Judicial Office, then, got to remake the judiciary in the first year of the new constitution's existence with an appointment power that could not be second-guessed.⁷⁴

In addition to the compromised independence of the judiciary, other independent institutions have taken a hit in the new constitutional order as well. The head of the state audit office was given additional powers to conduct investigations into the expenditures of state funds and the public prosecutor, like the head of the National Judicial Office, was given the power to pick the court in which he could bring any criminal case. Both of these offices have extraordinary long terms – 12 years for the state audit office head and nine years for the public prosecutor. And both offices are now filled by people who are close to the governing party.

The ombudsmen's offices have also been affected. Where the old constitution had three subject-matter-specific ombudsmen (for minorities, data protection and the environment) *plus* an ombudsman with general jurisdiction, the new constitution has only one "parliamentary commissioner for human rights" with two deputies to do the same work. The office of the ombudsman for data protection was closed and his responsibilities were transferred to an office that is part of the government with a political appointee at its helm. The office, as a result, has lost its independence.

The dead-hand control of the current governing party can extend now over any other parliamentary majority that might be elected over the next several election cycles. There are a number of ways this can happen, so I will detail only one here. The new constitution establishes a Budget

⁷³ Kim Lane Scheppele, "First, Let's Pick all the Judges." Blog post at <http://krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/>.

⁷⁴ The lowering of the judicial retirement age was declared unconstitutional by the Constitutional Court, citing the "historic constitution" that the constitutional judges are supposed to honor. According to the Court, the retirement age of judges had been set at 70 in the mid-19th century and it was a violation of the principle of legal security to change it without any time for the judges to adjust. The decision of the Constitutional Court – to which Prime Minister Orbán responded with defiance by announcing "the system remains" – was further supported by a decision of the European Court of Justice that found the sudden lowering of the retirement age to be a violation of EU law as well. Faced with this overwhelming judicial pressure, the government finally backed down and agreed to reinstate the judges – but not to their former leadership positions which had already been filled. For an analysis of the Constitutional Court decision [Decision 33/2012. \(VII. 17.\) AB határozat](#), see Kim Lane Scheppele, "How to Evade the Constitution," blog post at <http://www.comparativeconstitutions.org/2012/08/how-to-evade-constitution-case-of.html>.

Council with the power to veto any budget produced by parliament that adds even a single forint to the national debt. The Budget Council consists of three officials, two elected by a two-thirds vote of parliament and one appointed by the president (who will be, at least until 2016, a Fidesz loyalist). All three members of the Budget Council have terms of office that exceed a normal parliamentary cycle—six years for two of the members and twelve for the other.

According to the new constitution, if parliament fails to agree on a budget by March 31 of each year, then the president may dissolve parliament and call new elections. Obviously, if the Budget Council, dominated by Fidesz loyalists, vetoes the budget on the eve of the deadline, the constitutional trigger may be pulled for new elections. As a result, if another party manages to gain power in a future election, this provision will enable the remaining Fidesz party loyalists to spring a trap that generate new elections almost immediately after any new government takes office.

Under the new constitutional order, the governing party has managed to fill all of the major checking institutions with party loyalists who will be quite disinclined to limit the government's power. As a result, there are no constitutional guarantees any longer that this will be a self-limiting government. Of course, a government does not have to use all of the power that it has; it could in fact limit itself. But the point of a *constitutionally self-limiting government* is that one should not have to rely simply on the good will of a governing party. The new constitutional order therefore violates the first of the constituent principles established in the 1989-1990 summoning of constituent power.

What about the second principle: the guarantee of a multiparty democratic republic? This principle features three separate elements represented by each of the three words. Let's start with multiparty. As our discussion has already pointed out, the constitution was brought in with the votes of only Fidesz, against opposition from all of the other parties. The new constitutional institutions have been filled with the loyalists of only one party as well because the government has removed all constraints on the power of their own two-thirds to name particular people to offices. Fidesz has refused the proposals, suggested amendments and candidates of all of the other parties. This is a Fidesz constitution whose offices are filled by Fidesz loyalists and with devices permit Fidesz to block multiparty appointments to key positions.

And democratic? In a democracy, power must be able to move back and forth between organized political fractions, depending on the results of free and fair elections. But the election machinery set up by this new system raises doubts about its fairness. Not only is the new electoral

commission filled entirely with Fidesz supporters,⁷⁵ but the new electoral laws have been shown to clearly favor Fidesz. In the new constitution, Fidesz cut the size of the parliament in half, which required redistricting. (This move may have been the only one that actually had support across the political spectrum.) But the boundaries of the new electoral districts are now entrenched in a cardinal law that will require a two-thirds majority to change it. And these new districts have been shown by one opposition think tank to have been drawn in Fidesz's favor. Had all of the elections since 1998 been carried out under these new districts, Fidesz would have come to power in 1998 and would never have been voted out since, despite the fact that under the old system, Fidesz lost both the 2002 and 2006 elections, the latter by a large margin.⁷⁶

Since the electoral districts were drawn, Fidesz introduced a constitutional amendment that required voter registration – and this in a country that has a complete and accurate civil list that registers everyone for the purposes of a national identification document. By some estimates, the voter registration requirement would have lowered the effective voting population by half. The voter registration scheme was struck down by the Constitutional Court twice: first on procedural grounds because it was one of those permanent constitutional amendments made by the Transitional Provisions and then on substantive grounds because it interfered with the right of citizens to vote.⁷⁷ Right now, it appears that the government will not amend the constitution again to include voter registration, but with its two-thirds majority, it could do so at any time.

So is the new constitution committed to democracy? We have not yet seen all of the rules that will regulate the next election in 2014, but the rules that have been so far introduced as part of the new constitutional order are not encouraging. It seems that the government is trying to rig the rules in its favor and to guarantee that it alone can win the next election.⁷⁸ Add to this tricks like the potential Budget Council veto that might trigger new elections, and one can see that the ability of any other party to come to power and to stay in power is quite limited by the new rules.

⁷⁵ During an election campaign, each party is allowed to send one delegate to the electoral commission, but the number of members of the electoral commission has been set so that Fidesz is guaranteed to still win every vote.

⁷⁶ Viktor Szigetvári, Csaba Tordai, and Balazs Vetô, "Beyond Democracy," available at <http://lapa.princeton.edu/hosteddocs/hungary/Beyond%20democracy%20-%2027%20Nov%202011.pdf>.

⁷⁷ For an explanation of the two Constitutional Court decisions, see Renata Uitz, "The Return of the Hungarian Constitutional Court," blog post at <http://www.verfassungsblog.de/en/author/renata-uitz/#.URg-6GdOSSo>.

⁷⁸ Among the rules that I have not mentioned in the main text are the elimination of the second round voting in single-member districts making them into first-past-the-post elections (which will throw those seats to Fidesz unless the fractious opposition can unite behind a single candidate) and the restrictions on media coverage of the campaign (which channels all funding for election ads to the private media dominated by Fidesz and all free media spots to the Fidesz-dominated public media).

What, then, about a republic? Hungary's official name used to be the Republic of Hungary. The new constitution changes the name merely to Hungary. But the constitution does formally guarantee (in Article B[2]) that the form of government is a republic. Can we take this constitutional provision at its word? We have already noted the lack of multiparty participation in the drafting of the constitution and lack of guarantees of multiparty participation in governance from here on out. Democratic government will be difficult to maintain under the rules, also, so the key elements of a republican form of government are under challenge. So is Hungary under the new constitution a multiparty democratic republic? The answer is not clearly yes. And it might even be no.

Finally, what about protection for basic rights? The new constitution impressively lists a variety of rights in its second major section. But words on paper alone do not guarantee rights. Institutions must be established that respect rights; courts and other bodies must defend rights. As we have already seen, however, the independence of the ordinary judiciary has been severely compromised both by the politicization of judicial appointments and by the continued ability of elected officials to move any case to any court outside the usual legal rules about jurisdiction. In addition, the government of Hungary has created a new secret police, the anti-terrorism police, with the ability to bypass judicial warrants for many types of searches and the ability to engage in surveillance without having limits on how long and for what purposes the information so acquired can be used.⁷⁹ In a context like this, it is hard to have faith that rights will be protected.

The longer this government stays in power, however, the more clearly we can see that rights respected in most constitutional democracies are not respected in Hungary. One right whose realization has deteriorated quickly has been freedom of religion. Under a new "cardinal law" on churches, the government of Hungary removed the legal status from more than 300 religious organizations while establishing only 33 churches as official state-recognized religions. The rest have been cast into a legal no-man's-land, officially encouraged to register as secular organizations but denied this organizational status each time they have tried.⁸⁰

While Hungary has not yet become a country where human rights are subject to mass abuse, vulnerable populations are starting to leave. The emigration of Roma to Canada has been so pronounced that the government of Canada just closed its borders by pronouncing Hungary "safe"

⁷⁹ For the legal details, see Kim Lane Scheppelle, "The New Hungarian Secret Police," blog post at <http://krugman.blogs.nytimes.com/2012/04/19/the-new-hungarian-secret-police/>.

⁸⁰ For the details, see David Baer, "The Fate of Hungary's Deregistered Churches," at <http://hungarianspectrum.wordpress.com/2012/08/13/david-baer-the-fate-of-hungarys-deregistered-churches/>.

against all of the evidence.⁸¹ And recently, Hungarian Jews have been leaving the country as well, citing anti-Semitism as a key reason.⁸² Vulnerable groups feel the lack of a rights-culture first. The warning signs are clearly there. Hungarian institutions cannot be depended upon to defend the rights that are in the constitution.

From this evaluation, we can see that the three principles that the constituent power of 1989-1990 insisted upon are no longer guaranteed by the new constitution. Can this mean that Fidesz has summoned a *new* constituent power to underwrite this new constitution?

VIII. The Creation of a New Constituent Power?

If the new constitution of 2012 is no longer authorized by the constituent power summoned in 1989-1990 because its constituent principles have been violated, has Fidesz been able to mobilize a new constituent power? Given what we have seen of the process used to usher in the new constitution as well as the content of and public backing for this new constitutional order, the answer is no.

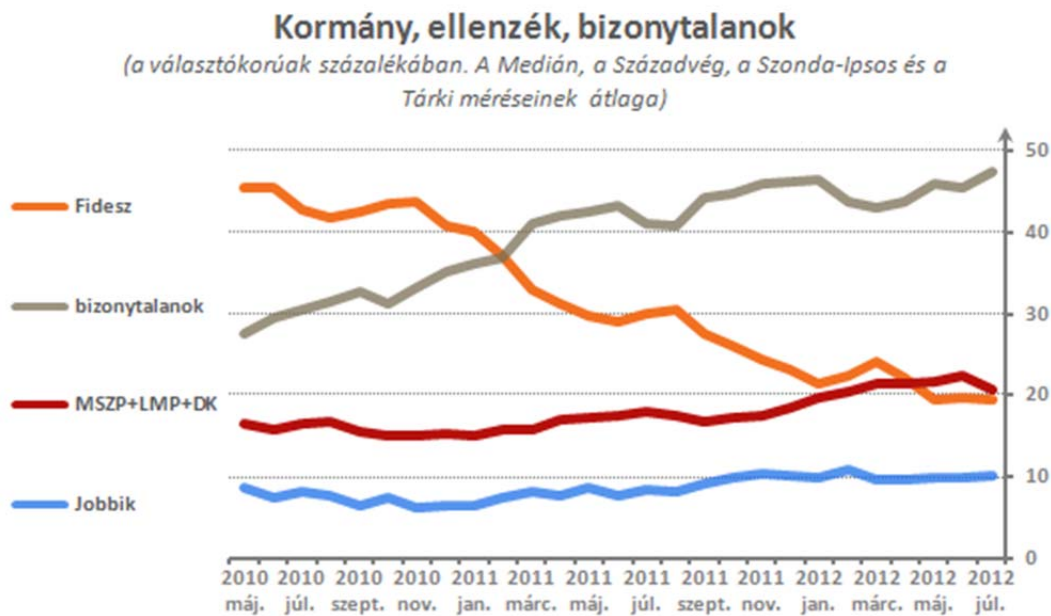
First, on process. By contrast with the constitutional drafting process of 1989-1990, which consisted of a Roundtable agreement, support by two successive parliaments (one before and one after a multiparty free election), a plebiscite, an election and a multiparty Pact that was reaffirmed despite an orderly process for changing it, the rushed constitutional drafting process of 2011 was attributable to one party and one party only. There was no attempt to get true consensus among the parliamentary parties. There was no meaningful public consultation to get input into the process. There was no referendum on the final constitution to certify public approval. There was just a hurried and secret constitutional process in which all those not in the governing party were left out.

Fidesz has always distrusted its co-parliamentarians, and it has insisted that it had a mandate resulting from the election to change everything. If Fidesz were acting on the basis of a public demand for a new constitution, one would expect popular support for its bold and aggressive moves. But

⁸¹ For more on the Canadian actions and the reactions of those familiar with the Roma issues in Hungary, see Judy Young Drache, "The Roma of Hungary: A Canadian View," on the Hungarian Spectrum blog at <http://hungarianspectrum.wordpress.com/2013/02/09/the-roma-of-hungary-a-canadian-view-by-judy-young-drach/>.

⁸² "Anti-Semitism Pushing out Hungarian Jews, Vienna Community Says," JTA, 3 February 2013, available at <http://www.jta.org/news/article/2013/02/03/3118601/anti-semitism-pushing-out-hungarian-jews-vienna-community-says>.

opinion polls do not bear out the “mandate” theory. Instead, Fidesz has lost more than half of its voters since it came to power in May 2010:



Results of opinion polls from the first month Fidesz took office in May 2010 through summer 2012, showing that Fidesz (in orange) lost more than half of the public support it had at the time of the election (which was never itself majority support). The red line represents support for the combined parties of the “democratic opposition.” The blue line represents support for Jobbik, the neo-fascist party. Perhaps most intriguingly, the grey line shows the part of the population that would vote for none of the existing parties or doesn’t know for whom to vote.

Far from revealing that the public demanded constitutional change that Fidesz supplied, the polling data show that people are running away from Fidesz both in public opinion and in literally voting with their feet.⁸³

Where is this constituent power that Fidesz has invoked? The “revolution of the ballot box,” if indeed such a revolution existed, dissipated as the content of the Fidesz constitutional plan was developed and publicized. While the new constitution is still too new to tell, there doesn’t appear to be substantial public support for it. As a result, there would seem, in addition, to be no new constituent power lurking in the wings.

The new Fidesz constitution combines objectionable elements that we identified at the start of the paper. From the Idealaria scenario, Fidesz borrowed the feature that the constitution was written behind closed doors by the brain trust of the party and presented without further debate or multiparty input as the ideal constitution for Hungary. From the Pandemonia scenario, Fidesz excluded the other parties from its constitutional-drafting process and presented its one-party constitution as if it were a constitution for the whole of the country. And from the Freedonia scenario, Fidesz declared itself the party of the middle and excluded the fractions to either side of it. In the course of doing so (and contrary to the Freedonia example), Fidesz eliminated not 10% of the political spectrum, but the majority.

Hungary is now faced with a situation in which a new constitution was rammed through a stacked political process, in violation of the constituent power that accompanied the 1989-1990 process and without constituting a new constituent power to underwrite this new constitution. Fidesz, however, claims to be a constitution-making power supported by the “revolution of the ballot box” but a closer analysis of what they have done demonstrates otherwise.

⁸³ On 30 January 2013, the current Minister of the National Economy, György Matolcsy, noted that about half a million Hungarians are working outside Hungary in the EU. He said that about 300,000 were in the UK, another 100,000 were in Germany, about 50,000 were in Austria and another 50,000 were in other EU countries. He did not mention how recent this exodus is. According to German sources, 41,000 Hungarians moved to Germany between May 2011 and May 2012 alone. “Immigration in Germany Shoots up to Highest Level in 16 Years,” GMA Network, 11 May 2012, available at <http://www.gmanetwork.com/news/story/258525/pinoyabroad/news/immigration-in-germany-shoots-up-to-highest-level-in-16-years> In addition to these figures, the number of Roma seeking refugee status in Canada has sharply increased: “In 2011, 4,427 of 24,416 new Canadian refugee cases were from Hungary, up from 2,300 a year earlier, according to the Immigration and Refugee Board.” Rick Westhead, “Why the Roma are Fleeing Hungary and Why Canada is Shunning Them.” The Star, 13 October 2012, available at http://www.thestar.com/news/world/2012/10/13/why_the_roma_are_fleeing_hungary_and_why_canada_is_shunning_them.html. Given that the population of Hungary is only about 10 million people, these are large numbers, relatively speaking. And the surges are new.

The idea of an unconstitutional constituent power may sound abstract, ideal and irrelevant to any real-world constitutionalism, but we can see with the case of Hungary that it is important for constitutional theorists to elaborate when the claim to have established a constituent power is legitimate. The Hungarian case gives us many moments to analyze – from the 1989-1990 founding to the Constitutional Court's elaboration of the text, to the 1995-1996 constitutional drafting process, to the frenzy of amendments in 2010-2011, to the new constitution itself. Tracing this complex constitutional history, I have argued that there was a constituent power established in 1989-1990 which has not been legitimately displaced by events since 2010. As a result, Hungary is currently operating under a government which has claimed an unconstitutional constituent power.