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Constitution Making and Transitional Politics in Hungary

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More than a dozen years and five general elections after the end of its old regime, Hungary has a liberal democratic constitution that established a foundation for its relatively well-functioning parliamentary political system. The process of constitution making was entirely peaceful, was within established legality, and never involved the danger of dual power, civil war, or state or popular violence. As one political regime, a Soviet-type dictatorship, was fully replaced by another, liberal democracy, the destructive logic of friend and enemy well known from the history of revolutions—purges, proscription, massive denial of rights, and terror—was avoided. Since 1989, the main political antagonists under the old regime have functioned on the political if not always the rhetorical level as opponents within a competitive multiparty democracy.

In the strict legal sense, the method of constitution making that achieved this result was one of parliamentary constitution making through legal continuity, utilizing the

amendment rule of the old regime, a rule that survives to this day.¹ More important, it was a product of a process, in common with five other countries—Poland, Czechoslovakia, the German Democratic Republic, Bulgaria, and the Republic of South Africa²—in which the terms of the political transition from forms of authoritarian rule were developed through roundtable negotiations. On a comparative and theoretical level, the Hungarian case represents an incomplete model of democratic constitution making; it could be characterized as postsovereign with respect to the ideals of the American and French revolutions. Characteristically, in this model, constitutions are drafted in a process of several stages, during which no institution or representative body can claim to represent fully, in an unlimited fashion, the sovereign people. What makes the model democratic is the drafting of the final constitutional product by an assembly, one that is elected, at least ideally, primarily for that purpose, even if it does not become a sovereign constituent

assembly of the past. Hungary did not complete this last stage. An ordinary parliament elected in 1996 assumed the task of second-stage constitution drafting but failed to accomplish it, making the interim constitution of 1989–90 ultimately a work of elite agreements, *de facto* permanent. The only democratic participation that Hungarian constitution making involved—the referendum of November 1989 that decided the question of the country becoming a parliamentary rather than a presidential republic—produced this result because of a rejection of communist attempts to preserve and convert old forms of power. Paradoxically, on the constitutional issue of that referendum, the majority would have always preferred, though not particularly passionately, direct elections of the head of state, probably with greater powers than the current system allows.

The merits of the constitution-making method that Hungarian political actors adopted concern both what it avoids and what it contributes positively to future democratic developments. The significance of round-table negotiations, aside from the great strategic advantage of avoiding violence and civil strife, is to help find an alternative to two forms of imposition that tend to lead to pseudo-democracy and pseudo-constitutionalism: by the forces of an old regime and by new, revolutionary actors. Historically, the former has generally taken the form of imposed constitutions or reformist, top-down constitution making. The preferred form of the latter has been revolutionary and sovereign constituent assemblies with the plenitude of power. In opposition to these models, from a theoretical point of view, the interim constitution tends to impose constitutionalism on the process of constitution making that in traditional European democratic models is under the dominance of potentially dictatorial provisional governments and all-powerful assemblies.³ Here, the advantage of the method is best seen in what it avoids,

namely renewed authoritarianism or a new form of dictatorship. But positive benefits can be claimed for the approach as well. The many-stage process allows the generation of different modes of legitimacy⁴ as well as the institutionalization of learning between the stages. The former advantage implies a solution to the hitherto intractable problem of beginning democratically where there is no democracy by substituting initial pluralist for democratic legitimacy through inclusion of as many relevant actors as possible and having them come to agreement through consensus or fair compromise. The latter advantage means that with or without appropriate sunset clauses, initial power-sharing arrangements or concessions to old regime forces can be adopted without incorporating them in the final constitutional product.

The comparatively important question in the case of Hungarian constitution making is whether the incomplete version of the model of postsovereign constitution making, which we fully present here, allowed Hungary to anticipate and take advantage of the paradigm more completely developed elsewhere, above all in South Africa. There is little question that it did in what it helped to avoid: the danger of authoritarian imposition or relapse to dictatorship during the critical period of constitution making. If we consider the relevant period to be 1989 to 1997, between the meeting of the National Round Table (NKA) and the definitive failure of the new constitution-making effort, it is clear that constitutionalism has been successfully applied in this period, to both constitutional and normal politics through an allegedly interim basic law. There was never constitutional imposition in Hungary during this time by merely one political force.

In positively contributing to democratic developments, the picture is more differentiated. It is clear to us that little democratic legitimacy was generated for the process, or for the interim constitution that became perma-

nent, one reason being that there was no attempt to promote public participation or education during the failed effort of 1996–97. At the same time, constitutional learning proceeded dramatically between 1989 and 1990, the dates of the two main elite agreements concerning the interim text, resulting in the removal of consociational devices in a fashion parallel to developments elsewhere. After 1990, and especially with the failure to produce a new and permanent constitution in 1994–96, constitutional learning became almost exclusively the domain of the very powerful Constitutional Court, immediately raising suspicions about whether such judicial activism or constitution making could be sustained in view of Hungary's "soft" constitutional background, that is, the weak democratic legitimacy of the constitution.⁵ For a while, the answer was that it could, as the Constitutional Court imposed important limits on parliamentary actions that endangered constitutionalism, such as attempts to change the constitution through simple statutes. Eventually, however, judicial activism could not be sustained. With the Constitutional Court much more quiescent under new leadership, from 1998 to 2002, a new right-wing coalition adopted a significant number of measures constraining parliamentary democracy that were arguably incompatible with the constitution. Public interest in resisting these measures was minimal. Was this because of the relatively low legitimacy of the constitution or because of the shift of interest to economic performance and joining the European Union? Probably both played a role. In all countries, issues like the latter occupy public interest and the understanding of constitutional and political questions is low. It is up to institutions such as constitutional courts, professional groups such as lawyers, and elites such as liberal parties to raise normative and constitutional issues and mobilize around them. They can do so only if there are latent significant meanings

and available historical narratives to which they can refer, such as the plausible claim that the constitution belongs to the people, or that it was partly the people's work in a great historical period, or that it was made in the people's name by persons in whom the people have or had confidence and who have been entrusted to that purpose. In Hungary, not all of these claims could be made, and even those that could, regarding the dramatic historical events of 1988–89, have not been made successfully. This is what we mean by the constitution's legitimacy problem, which does not mean that constitutional or democratic government is in crisis in Hungary. What they face is a long-term and already ongoing erosion of interest and support, which may or may not matter for stability and the quality of political life depending on historical circumstances.

Both the achievements and the failures of the new Hungarian constitution are best interpreted in terms of the procedural history of its making, which in turn is related to the character of the country's transition from communist rule. Before the transition, Hungary was a partially reformed postcommunist regime.⁶ The country's negotiated path of transition, hardly the only type possible, was favored by this particular regime type. On one hand, despite many an earlier dream, there was little chance of a revolutionary overthrow of the system. The memories of the failed revolution of 1956 and the partial successes of communist economic reform⁷ more or less guaranteed that there was no possibility in Hungary of a popular uprising, even in the late 1980s. The high level of civil privatism in this period, linked to the development of the second—that is, private—economy, made the emergence and development of even a Solidarity-type non-revolutionary mass movement unlikely. Unlike other governments in Eastern and Central Europe, Hungary's was ready throughout the age of Mikhail Gorbachev to experi-

ment with further economic reforms and even tightly managed political liberalization.

On the other hand, a top-down process of reiterated reforms slowing down the process of eventual system change, as in Mexico or Chile, also turned out to be impossible. The regime's weakness, the existence of a small but well-organized and articulate democratic opposition since the late 1970s, and the activism of a variety of small movements and initiatives in the 1980s, along with the increasing rapidity of change in the whole region, made the top-down option, not to speak of a conservative one, impossible.⁸

Thus, a fully negotiated transition with unbroken legal continuity occurred in Hungary, one resembling the slightly earlier process in Poland and, to an extent, the later processes in the German Democratic Republic and Bulgaria. As in all these cases, the central institution of change in Hungary was a round-table, the NKA. Unlike in the other transition countries, in Hungary, all democratic forces had been organized as proto-parties before unification in the so-called Round Table of the Opposition (EKA). Though both were weak, the respective strengths of government and opposition at the negotiations were relatively well matched. Undoubtedly, the unexpected pace of prior change in Poland reinforced the strength of the united Hungarian opposition.

Until the South African transition, Hungary's NKA was the only such body that produced a new, detailed, and fully enacted constitution,⁹ even if it was technically an amendment of the Stalinist constitution of 1949 and was stated to be an interim document.¹⁰ The constitution was supposed to serve a double purpose: to provide the framework for political institutions as well as political guarantees for all the actors, persons, and groups to be able to continue in the process. A suitable set of rules was to be provided for a unique and one-time event—the democratic transition itself—and for an undetermined

period, for the functioning of a liberal democratic regime. Many of the compromises that were required to make the task in the first period viable were, however, obvious liabilities from the point of view of the second.

Thus, immediately after the Round Table agreements, including the new interim constitution, were signed on September 18, 1989, a process of constitutional reform and adjustment began.¹¹ The referendum of November 26, 1989, which established the priority of parliamentary elections and provided for parliamentary selection of the president of the republic, set off this process. The parliament of the old regime, which technically had to enact the Round Table constitution and retained the right to amend it by a simple two-thirds majority, was a key institution; its role was not limited to the formal legal one, either before or after the interim constitution was enacted. The new constitutional court set up by the Round Table constitution was another important actor. However, the most important institution after the Round Table that was involved in molding the new parliamentary regime was the first freely elected parliament in 1990. Behind its significant revisions of the Round Table constitution stood a temporary pact between the two major parties during the change of regimes—the nationalist, right-of-center Magyar Demokrata Fórum (MDF), or Hungarian Democratic Forum, and the liberal, left-of-center Szabad Demokraták Szövetsége (SZDSZ), or Alliance of Free Democrats—that together easily formed the required two-thirds parliamentary majority (for a list and description of the parties, see the glossary appended to this chapter). Avoiding the writing of a new constitution, the new parliament's revisions rationalized and completed the development toward a pure parliamentary regime; a few later amendments and many relevant judicial decisions only modified some details.

The constitution-making project was taken up only one more time after the efforts of

the late 1980s, during the 1994–98 coalition government of the Magyar Szocialista Párt (MSZP), or Hungarian Socialist Party, and the SZDSZ.¹² This was the only time since 1990 that a governmental coalition had the required votes to change the constitution. Aside from addressing a few substantive deficiencies, the coalition hoped to generate greater political legitimacy by putting in place a democratic constitution no longer laboring under the interim label or its technical continuity with the 1949 constitution. The effort failed, however, and it remains an open question whether it could have succeeded given the piecemeal process of evolutionary development already in motion. To be sure, the workings of the political process sufficiently explain the failure of 1996–97, when adequate political support was not available for any new constitutional alternative, whether a relegitimated and rationalized parliamentary constitution, a more presidential one, or possibly an option with corporatist elements. More generally, in contrast to the much more successful two-stage Polish and South African efforts, the Hungarian failure draws attention to the importance of time, sequence, political opportunity, and procedural learning in processes of constitution making.

The Process

Prehistory: The Development of a Transition Strategy

When political change is widely anticipated in a country and especially in a region, generally only the most rigid authoritarian regimes, such as those in Czechoslovakia and Romania in 1988–89, decide or feel compelled to avoid all preemptive reforms from above. The majority of authoritarian regimes undertake some liberalizing reforms. As Adam Przeworski¹³ argued, liberalization tends to release a dynamic that eventually leads to societal polarization and a stark choice between repres-

sion and transition—stark because moderate agents of reform tend to lose power either way. According to Przeworski, if liberalizing elites understood what they were doing, they would not opt for liberalization. The argument, however, works only if we confine the target of liberalization to the sphere outside of politics. As Bolivar Lamounier¹⁴ first noticed in the case of Brazil, liberalization—when not rigidly counterposed to democratization—can involve carefully controlled reform of the political order itself. Such reforms, even when reiterated, may protect the power positions of ruling elites in the context of a gradual change in the very identity of a regime. In our view, there are in principle two fundamental but combinable ways of achieving the goals of transition preservation through reform. One is the purely electoral road Lamounier has in mind, which was most successfully practiced in Mexico. The other is the path of institutionalizing from above a partially authoritarian, partially democratic constitution, as was accomplished in Chile around 1980,¹⁵ which may or may not be coupled with an electoral strategy. The first of these options involves organizing from above *partially* competitive elections, which lead to either “soft” dictatorships or “hard” democracies that can nevertheless appeal to democratic legitimacy. Though we cannot demonstrate it here, we strongly believe that the precondition of this version of reformism is a viable claim of legitimacy, whether it draws on older revolutionary ideologies, newer nationalist ideologies, or their eclectic combination. The method can work because free elections are highly sensitive targets for political intervention even without electoral fraud; they can be influenced on the level of electoral rules, finances, and timetables, as well as through controlling access to the media.¹⁶

We encounter the model of authoritarian electoral reform in a wide variety of contexts, not only in Latin America, but in South Africa (reforms of 1983) and the old Soviet

Union (reforms of the late 1980s). In Hungary, the policy was tried in 1985 when, as a result of a reform allowing multiple candidacies on all levels, in many electoral districts (about 71 out of 352), competitive elections occurred that led to the loss of 35 parliamentary seats by the ruling party.¹⁷ The hitherto merely paper powers of parliament were not increased in this reform, no independent new parties were allowed to nominate candidates or even organize themselves, and in most districts, the authorities informally blocked truly independent candidates from running. Nevertheless, the turmoil associated with some of the nomination struggles in which dissidents tried to run, and the loss of face involved in the loss of seats, must have convinced the ruling party of the dangers of this road in isolation. In retrospect, the Hungarian communists did not have either the self-confidence or the legitimacy of the Partido Revolucionario Institucional (PRI) in Mexico, or even Gorbachev in the Soviet Union, to seriously try to impose or exploit a controlled electoral transition path.¹⁸

Nevertheless, in the epoch of Gorbachev, given the significant changes occurring in the Soviet Union and the reformist self-understanding of the Hungarian communist party, the Hungarian Socialist Workers Party (MSZMP, precursor to the MSZP), as well as the intensification of a variety of pressures from below, political reforms had to be tried. In late 1988, after organizing a series of public discussions under the heading of "social discussion," these efforts took the form of enacting a variety of liberalizing reforms targeting civil society, the rights of association and assembly and the right to strike being the most important.¹⁹ In these cases, however, the MSZMP had the unfortunate experience of being forced to enact much more radical measures than it initially envisaged because of the unexpectedly lively character of the social discussions and even parliamentary debates, in which a few unof-

ficial deputies could participate.²⁰ The idea of producing civil society from above turned out to be as contradictory in Hungary as it was in the Soviet Union.²¹

Thus, the alternative notion of enacting an entirely new, partially liberal, and even democratic constitution came to be advocated by a variety of forces within the ruling party. Initially—around the time that the relevant work group in the Ministry of Justice was formed in May 1988—these forces hoped to use a new constitution to relegitimize a reformed version of the one-party system. Though they were probably unaware of the example, the relative success and stability at that time of the Pinochet constitution of 1980 indicated that the effort was by no means unthinkable or impossible.²² Differing from the Chilean option, which envisaged elections only much later, the Hungarian variant in all its forms sought to link the project of authoritarian constitution making to a quick move to general elections that the MSZMP would win one way or another. More important for the drafters than the Chilean experience were the results of the Polish Round Table agreements. Concluded in April 1989, these agreements did not create even a provisional new constitution, but rather transitional arrangements defined by a strong executive and partially competitive elections, with the expectation at the time that both the presidency and the parliamentary majority would wind up in the hands of the communist party.²³

More or less in the Polish spirit, after examining a variety of options, the Hungarian Ministry of Justice came up with two draft conceptions and one proposal for extensive constitutional revisions in November 1988, January 1989, and May 1989. The last two were presented to parliament in March and May, respectively. The first of these latter documents envisaged neither open multi-party competition and fully free elections nor an executive responsible to or even checked by parliament. The proposal brought to par-

liament in March 1989 sought to imitate the Polish arrangements rather closely, providing for parliamentary elections in which the party shares were divided in advance; as an option, a bicameral legislature, but without a freely elected chamber; a strong presidency; and a relatively weak constitutional court.²⁴ The discussion of this proposal in the political bureau of the MSZMP foresaw a subsequent election in 1995 that would be free, though under rather unspecified conditions. The final proposal submitted to parliament in May seemed to reduce the power of the president somewhat, at a time when the ruling party was obviously gearing up for projected negotiations. But it still provided for full presidential control over foreign policy, the military forces, and, rather strikingly, states of emergency.²⁵ Clearly, the political bureau at this time was no longer thinking in terms of formally distributing parliamentary seats in advance, as in the Polish model, but it is less clear that they abandoned the idea of a two-stage process with some kind of electoral restriction in the first of these. In their own words, they sought to reduce the competitive character of the next elections, either by a prior coalition agreement with a part of the opposition or, at the very least, an early timing that would not allow the opposition to organize and campaign adequately.²⁶ None of the three proposals established parliamentary responsibility for the executive; to somewhat different degrees, each concentrated executive power in a strong or medium-strong directly elected presidency.²⁷

Even if many individual parts of the last constitutional draft that the Ministry of Justice produced found their way into the eventual compromise,²⁸ it is clear that the system-defining features of the two original draft presidential constitutions were quite different in spirit and structure from any fully democratic document. They were semidemocratic and semiauthoritarian constitutions, with important nondemocratic preserves for

the old ruling power, both in parliament and the executive.²⁹ The sponsors may not have believed in the permanence of such a constitution even if it were to be enacted. What they sought was to institutionalize an elaborate, electorally centered transition, in which political power would not be risked for a considerable period—an arrangement that a reformist, partially democratic system of the rule of law was to legitimize.³⁰ Crucial in this context was not as much the various constitutional contents, of which only a relatively strong presidency seems to have been a constant, but the political timetables involved. The opposition in Hungary—poorly organized, with relatively few members and resources, its leaders hardly known—could not have competed effectively if any of the top-down variants were enacted in early 1989 and elections soon followed, as was planned.

Thus, there was significant danger from the democratic point of view in another set of proposals calling for the early election of a constituent assembly, made variously early in 1989 by groupings within the Hungarian Democratic Forum, already the dominant and best-organized force in the moderate part of the opposition,³¹ and somewhat later by some of the most reformist elements of the ruling party, the only group well-enough organized to win such an election (i.e., by Mihály Bihari and the New March Front). The idea of a constituent assembly was strongly associated with revolutionary democratic ruptures in the European tradition. In principle, such an assembly could have enacted an entirely democratic constitution and organized free, competitive elections. In practice, however, the formula in Hungary also could have very possibly produced yet another variant of the Ministry of Justice proposal: Early elections for such a body, organized by the government in office, were likely to result in a communist majority, which then could enact a reformist, regime-conservative option with greater formal legitimacy than the sitting parliament

had. For this reason, the radical part of the opposition rejected this formula, which, after its adoption by the reform socialist New March Front, became unacceptable to the moderate opposition as well.

It was, however, not clear that rhetorically rejecting all of the options could block one of them from being imposed from above. As a series of constitutional amendments enacted in early 1989³² indicated, the danger of new legislation was constant,³³ and the opposition was divided into a variety of rather weak groupings, or proto-parties. The ruling party could easily exploit political party fragmentation, with the cooperation of some but not all oppositional groups, to stage less than fully competitive elections. Only if united could the opposition force the regime into an alternative procedural mode that favored the opposition—namely, full-scale negotiations. It was quite important, therefore, to block any significant part of the opposition from agreeing to participate in any formula imposed from above, no matter how superficially attractive. This was the main though not the only function of the Round Table of the Opposition that, in March 1989, brought together seven parties or proto-parties and two nonparty associations in a single organization with the purpose of pushing for and engaging in negotiations with the ruling power.

Rejecting the election of a constituent assembly—the classical European democratic formula—as understandable as it was in the circumstances, had unfortunate results. The formula came to be associated with top-down, authoritarian regime-dominated forms of constitution making and was not considered as a model to be combinable with creating an interim constitution by roundtable negotiations. However, this very combination later proved to be successful in Bulgaria and South Africa, in the latter powerfully enhancing the legitimacy of the final constitution, even as the constitutional principles agreed upon in roundtable negotiations were preserved

and adhered to. In Hungary, however, the option was not even raised. As a result, it became clear, if by default, that ordinary parliaments—in the end, two of them—would play significant roles in constitution making. This was a procedure inherited from the communist past and undesirable from the point of view of the heightened legitimacy needed for democratic constitution making, under which voters need to know that the assembly that they elect is about to undertake a constitution-making role. Monistic, parliamentary constitution making is also not conducive to creating the two-track structure needed for constitutionalism.³⁴

The Opposition Round Table and the Beginning of Negotiations

Apart from a brief period of increasing repression in the early 1980s after the introduction of martial law and the banning of Solidarity in Poland, the situation in Hungary was characterized by the old regime's growing awareness that it could best contain future pressure from the population by continuing some reform policies. Liberalization in Hungary was not restricted to measures targeting the political system; it also involved making concessions to, or at least tolerating the existence of, dissident or other extrainstitutional groups. Most relevant was the emergence in the 1980s of three distinctive groups of intellectuals who opposed the regime in one form or another. The first and second were a group of democratic dissidents and a circle of so-called populist writers. The third group, soon called the Fiatal Demokraták Szövetsége (FIDESZ), or Alliance of Young Democrats, emerged from various student associations to reach some level of permanence in early 1988. The democratic dissidents consisted of intellectuals who openly opposed the system by publishing declarations (e.g., condemning the arrest of Vaclav Havel in Czechoslovakia) and illegal

magazines, and who, as a consequence, were subject to frequent persecution and official abuse. The populist writers for the most part remained within the confines of the official public sphere; their primary concerns focused on social issues, such as declining birth rates or the situation of ethnic Hungarians in neighboring countries, rather than on explicitly political causes. The liberal SZDSZ grew from the first group; the nationalist, populist MDF grew from the second.³⁵ These groups had a clear view of their own identities and those of the others, and as the process leading to the opening of negotiations about the transition was evolutionary rather than dramatic, there was no point in that evolution at which they would have felt compelled to unite forces altogether and renounce their independence. This did not exclude rather extensive cooperation among these groups and those that emerged later, when the time for negotiations had finally come.

A crucial moment in all negotiated transitions occurs when representatives of the old regime unequivocally announce the need for a general overhaul of the system. The manner and pace of a transition depends on whether such a proclamation was forced by an open and general disintegration of existing power structures or irresistible popular pressure, as in the German Democratic Republic and Czechoslovakia, or was made when the old regime could still claim a vital role in the transformation, or even take charge of it altogether, as in Poland and Hungary. The latter case is much more likely to lead to a real bargaining situation, as the rules of the new regime are neither imposed on society by the old regime nor formulated exclusively by agents representing the would-be new regime, with old institutions and leaders being reduced to placing the official stamp on the new rules. In other words, a real bargaining situation is characterized by the fact that all main parties to the deal see themselves and the others as having a lot to gain as well as a

lot to lose. In Hungary, pronouncements by highest-level leaders of the old regime that the fundamentals of state socialism were to be abandoned came at such an early point that it arguably surprised even many of the dissidents. In May 1988, an impromptu conference of the MSZMP ended the thirty-two-year rule of General Secretary János Kádár. In November, Prime Minister Miklós Németh declared that the Hungarian reforms should eventually lead to a Western-style parliamentary regime.

The proclamations said next to nothing about the pace of transition, the precise character of the new regime to be built, or the prerogatives that the still-ruling party would preserve under the new rules, not to mention the role of opposition groups in devising the new system. The idea of a negotiated transition clearly came into view as a consequence of parallel events in Poland. After months of preparation, the Polish government conducted negotiations with Solidarity between February and April 1989, reaching a compromise solution whereby, in exchange for the relegalization of Solidarity, the opposition conceded partially free elections and a strong presidency to the ruling party. The beginning of Polish negotiations triggered a similar chain of events in Hungary, albeit with altogether different outcomes.

In mid-February 1989, the central committee of the MSZMP announced that it would conduct bilateral and multilateral discussions about the new ways of exercising power. In response, a joint declaration of the most important independent organizations—most notably, the MDF, the SZDSZ, and FIDESZ—urged roundtable talks with the participation of the government and the democratic political organizations. Yet there was no agreement as to the terms and objectives of the proposed negotiations. The government wanted discussions of new constitutional drafts under preparation by the Ministry of Justice. The independent groups

wanted merely to work out the legal framework needed to freely elect a democratic legislature that would, in turn, adopt a new constitution of its own making. At the same time, preparation of a new electoral law was well under way by the government; apparently, the bilateral and multilateral discussions that the government urged were meant, at least at this point, to do little more than give an air of popular consent to a new regime that the government could impose on the people. The danger was especially great that the government would gain as its partners one or more of the new so-called historical parties that were recently formed: the Független Kisgazda Párt (FKgP), or Independent Small Holders Party; the Keresztény Demokrata Nép Párt (KDNP), or Christian Democratic People's Party; the Magyar Szociáldemokrata Párt (MSZDP), or Hungarian Social Democratic Party; and the Néppárt, or People's Party.³⁶

The ambiguities of the government's proposal notwithstanding, the prospect of negotiations created a new situation on the opposition side. In Hungary, there was no single unified opposition movement comparable to Solidarity with demonstrable popular support, unquestioned authority, and nationally known leaders. The months preceding the beginning of negotiations in July 1989 were characterized by a rapid proliferation of independent groups, and in the multitude of voices, the general public could hardly perceive the difference between groups with a decade of prehistory and significant intellectual background and newly emerging formations with no discernible substance. With negotiations approaching, the question of political agency was bound to surface with unusual urgency for the opposition. Who would participate in the negotiations? The issue was settled in a more or less ad hoc manner: On March 22, 1989, eight organizations, comprising all of the important independent groups,³⁷ formed the EKA, which became a coordinating body between them and the single negotiating

partner of the government.³⁸ The EKA delegates, rather than their respective organizations, were to represent the entire opposition at the NKA, the scene of negotiations. As a logical consequence, the EKA had to adopt the consensus principle as its own way of proceeding. Each organization had the right to veto any EKA resolution. Nevertheless, the opposition groups emphatically retained their ideological as well as organizational independence.

The political agents belonging to the opposition EKA, whatever their previous views as parties, were driven to favor the model of constitution making by a new legislature, which some interpreted as a constituent assembly, for two distinct yet interrelated reasons. Both stemmed from the weakness of the opposition agents. First, agents rightly perceived that being unelected with small memberships, they lacked the popular support necessary for them to claim the authority to devise the rules of the new regime by themselves. Second, opposition groups were divided among themselves on crucial constitutional issues yet, at the same time, were forced by circumstances to act in a coordinated manner; therefore, on pain of losing influence over the transition process altogether, they were left with the single option of postponing decisions on all constitutional issues that separated them until an undefined later point—at the very least, until the election of a new legislature or constituent assembly. Thus, their initial position was that the agenda of the NKA talks should be confined to establishing the conditions for a disciplined transition, in the restricted sense of a transfer of power. The agenda, in their view, should have been limited to adopting a new electoral law and removing or at least neutralizing the MSZMP's strategic organizational and financial advantages, leaving open questions regarding the new regime's features.³⁹

The crucial question then turned out to be whether the government might be persuaded

to adopt the EKA's terms for the discussions. In this respect, the decisive move came in early June 1989, when—sensing the growing influence of the opposition as well as its own progressive disintegration—the MSZMP agreed to limit negotiations to the conditions of the transition and to abandon its own draft constitution, which it had completed in May.⁴⁰ This concession, together with the earlier formation of the EKA, finally created the conditions for a real bargaining situation. But it was sustainable only as long as the MSZMP could keep its promises to avoid entering into the substantive issues of the design of the new regime and to provide fair conditions for the transition, and only as long as the EKA could retain a sufficient level of unity. Given the substantial differences among the opposition groups, the second condition could be met only if the first condition was met. As it happened, the MSZMP kept neither of its two promises, but by that time, it only disturbed the transition process rather than spoiling it altogether.

The most important period of classical bargaining occurred between June and August 1989, when all the essential prerequisites of bargaining between two autonomous parties were present in a particularly clear form. First of all, by this time it was a more or less common understanding that the Soviet Union would not intervene should the outcome of the negotiations lead to adopting an entirely new type of regime. Thus, the single most important strategic advantage of the communist party was removed. Second, the reburial of Imre Nagy, the executed prime minister of the 1956 uprising, on June 16, 1989, altogether shattered the ideological as well as symbolic self-understanding and legitimacy of the old regime. After some initial hesitancy, the reform-minded leaders of the party decided to support preparations for the reburial and even attended the ceremony, which became from a psychological point of view the turning point of the sequence

of events. After June 16, there simply was to be no returning to attempts to impose a new regime by the government; the old regime's pretensions to representing the people were given a final blow. Third, the most important opposition groups stabilized their status as the negotiating partners of the government, and some of them—most notably the MDF—even demonstrated substantial popular support in by-elections. Therefore, the opposition realized that it had a direct stake in concluding the negotiations in a timely fashion. Fourth, the relative reversal of perceived strengths notwithstanding, the outcome of any popular elections, either presidential or legislative, was vastly unpredictable, especially for the legislature. In all, the major external constraints on the bargaining process were removed, there was to be no return to the old ways, and neither of the major political agents was strong enough to set the terms of the process all by itself.

The NKA talks had a rather sophisticated structure that facilitated the overcoming of major obstacles yet had little to recommend itself in the way of public accessibility, let alone popular participation.⁴¹ The negotiations were conducted at three levels: one plenary, one medium political level, and one expert level. The two lower levels were divided into various thematic committees. The government insisted, and the opposition reluctantly agreed, on making only the plenary level accessible to the media, the level that, for the most part, was confined to being the public stage for declarations and the forum for striking the final deals on various details.⁴² The main bargaining was carried out in the committees and subcommittees of the medium level, with the participation of the most prominent figures of both sides. Minor adjustments and differences were ironed out at the expert level. This structure, combined with informal background talks among various agents as well as the EKA sessions, provided sufficient flexibility and fallback op-

portunities to retain the unity and continuity of the negotiating process even in the face of serious disagreements. However, the structure also meant that devising the crucial details of the new regime was insulated from the general public, which was hardly aware of either the major issues of the negotiations or the alternative positions and choices. Admittedly, a more open bargaining process could have had undesirable consequences; it is easy to see how greater public involvement could have led to more plebiscitary alternatives, particularly a popularly elected strong presidency. As we argue, the sophisticated bargaining structures made for favorable institutional outcomes but little transparency. There was an important cost for this: Because the population was given little opportunity to see the emerging institutions as their own work, the new constitution was to have much less legitimacy than was generally thought desirable.⁴³

From Round Table to Referendum

At a rather late point in the negotiations, in late July 1989, when there was already remarkable progress in almost all areas, the MSZMP delegates changed their stance on both the issue of the agenda of the negotiations and the issue of providing for fair conditions of transition. First, they announced that the party would not abolish its organizations at workplaces or publish accounts of its property, nor would it dissolve the Workers' Guard, the party's own paramilitary organization. All of these were seen as providing unfair electoral organizational advantage to the communists, contrary to any acceptable notion of a fair transition. Second, the party urged that the president of the republic should be elected by the population at large before the new legislative assembly was elected; this was intended to secure this position for the party and its then-popular candidate Imre Pozsgay. The first set of positions could have obstructed the fair conditions of

transition, whereas the position on presidential elections forced the EKA to enter into many of the substantive issues of the new constitutional design. To be sure, the opposition groups had already agreed before this episode to discuss some of the key elements of the new regime, such as the constitutional court, the ombudsmen, and even the presidency itself. It was, however, the question of the timing and manner of presidential elections that was to lead to the (partial) breakdown of the negotiation process.

Arguably, the communist party's change of strategy was due to its perception that its chances of retaining at least some of its powers in popular elections were deteriorating further. The summer of 1989 witnessed the landslide victory of Solidarity for all contested seats (one-third of Sejm, 99 out of 100 of the Senate) in Poland's general legislative elections, as well as the victory of opposition candidates in three by-elections in Hungary. While perceiving its relative weakness had forced the government to accept the EKA's terms of debate early in the summer, the premonition of its possible defeat in popular elections pushed it to tighten its grip on power and seek to retain it by other means. At that moment, the party's only relative asset that could have been mobilized in popular elections was the popularity of one of its nationally known leaders, Imre Pozsgay, who had been up to that point in the forefront of reforms. The only way the party could have cashed in on this advantage was through a popular presidential election with Pozsgay as the party's candidate. After Pozsgay's election as president, the outlook for parliamentary elections could very well change.

The dramatic change of perceptions on the part of the MSZMP leadership transformed the entire bargaining process. Previously, as all parties of the NKA agreed to postpone discussing the substantive issues of the new regime, the opposition parties could also avoid a Polish-type outcome of a previ-

ously arranged parliamentary chamber and the division of the executive between a president and a prime minister. It was assumed both that the election of the new legislature would be entirely free and that there would be no division of the executive power. Both assumptions were plausible because the two sides not only felt themselves weak but also perceived their relative weaknesses as being in balance. Because both could hope to win fair but not overwhelming representation in a popular legislative election, they could agree on holding entirely free elections without Polish-type restrictions. According to János Kis, the SZDSZ's most important leader, the weakness of opposition agents paradoxically led to their radicalization; unlike Solidarity, the independent Hungarian organizations lacked the authority they would have needed to persuade society that concessions to the old regime were necessary. Thus, instead of dividing executive and legislative powers, they focused on imposing constitutional constraints on them, such as through establishing the constitutional court and the ombudsman's office.⁴⁴ Arguably, the negotiating process was smooth only as long as the self-perceived weaknesses of the bargaining parties were relatively balanced. The moment one of the sides perceived its chances as being considerably better or worse than those of the other party, the bargaining process was bound to face difficulties. Of course, there is an asymmetry here. Had it been the case that the communist party sensed its position to be dramatically improving rather than deteriorating, it could have left the bargaining table altogether instead of changing its strategy.

The change in dynamics between the two sides of the NKA entailed a change in the dynamics within the EKA. The moderate wing, led by MDF, was ready to sign the final agreement and thus for all practical purposes to concede the presidency, albeit with very limited powers, to the MSZMP. The more radical wing, represented by the SZDSZ

and FIDESZ, saw no reason to grant such a concession to the government in the changing circumstances. However, if they used the right of veto given to them by the rules of the EKA, they would risk all the results that were achieved at the round table, possibly spoiling the entire process of transition. Therefore, they decided to neither sign nor veto the final agreement but called for a referendum on the four contested issues of the presidency, the communist party's property, its organizations at workplaces, and the Workers' Guard.⁴⁵ On September 18, 1989, the majority of the EKA organizations signed the final agreement and the rest initiated a referendum. FIDESZ and the SZDSZ gathered far more than the necessary 100,000 signatures to support their referendum initiative. As a result, the last communist legislature still in office adopted the agreement reached at the round table and thus amended the constitution on October 17–20; a few days later, a referendum was officially called for November 26 on the four contested questions. The answers favored by the radical wing carried the day on all four questions, although on the presidency issue, the margin was only six thousand votes. Thus, the presidential elections were postponed until after the new legislature was elected and conditions of relative equality for the upcoming competition secured.⁴⁶

To sum up, through the agency of the generally obedient old one-party parliament, the NKA had been without a doubt the chief organ of making the new democratic constitution of Hungary. In institutional terms, its most important products included a new electoral system, a regulation of the relationship between the executive and the legislature—leaving the issue of the presidency unresolved until the referendum—and the introduction of significant constitutional constraints on the government, such as the Constitutional Court and the Ombudsman's office. More specifically, the NKA adopted

a mixed proportional-majority electoral system, in which 45 percent of the seats were filled through the majority-plurality system and 55 percent were elected through the proportional representation method, though with peculiarly disproportional consequences due to the relatively low average district size. Regarding executive-legislative relations, the arrangement reached at the NKA was for a mostly parliamentary system, with executive power exercised by a parliament-elected government dependent on legislative confidence. In subsequent steps of constitutional amendments and Constitutional Court rulings, this arrangement was further shifted in the direction of pure parliamentarianism. Regarding constitutional constraints on the executive and the legislature, the restrictions imposed on the government by the arrangements arrived at by the NKA gave the Hungarian democratic regime a truly constitutionalist character. Not only did the constitution emphatically recognize a list of fundamental human rights and other constitutional principles that the government was obliged to respect, but it also provided for effective institutions to enforce these rights and principles. In particular, the Constitutional Court introduced by the NKA was given such extensive powers that until the later creation of the South African Court, it was regarded as the most powerful institution of its kind around the world. In the early 1990s, the Constitutional Court played a crucial role in protecting fundamental rights from invasions by the government and in clarifying the relationship between various branches of government.

In hindsight, one can argue that both the moderate and the radical wings of the opposition were crucial to preparing the way for a peaceful and disciplined transition. By signing the agreement, the moderate organizations helped secure the vital achievements reached at the NKA; by initiating and subsequently winning a referendum, the more

radical organizations helped remove a possibly damaging compromise from the structure of the new constitution. Finally, the government and the MSZMP chose to accept these outcomes rather than block the process altogether.

With the referendum, the most important phase of constitution making was over. It had two long-run effects. First, the referendum turned what was until then a purely elite affair into one involving popular initiative and participation. Whatever legitimacy and popular acceptance the constitution was to have in the beginning certainly benefited from this element of politics from below. Second, the referendum was not strictly about constitutional issues but also about the timing of the elections. On the issue of the presidency, the population probably did not agree with its own decision to avoid direct election of the president; it voted the way it did by a very slim majority only because of the dubious circumstances of the NKA agreement on this issue, which the radical opposition exploited. Certainly linking the issue of the presidency with three additional questions on which there was vast popular agreement facilitated the outcome. Thus, what was gained for the legitimacy of the NKA arrangements was probably limited and certainly unmeasurable, although the party most associated with the referendum, the SZDSZ, definitely gained much new support in this process.

Ironically, the referendum—the single popular moment in any of the phases of the making of the Hungarian constitution—intensified the already existing cleavages among the opposition organizations. When the making of a definitive new constitution required their unity, the major parties of regime change, the MDF and SZDSZ, became bitterly divided, even though the interim constitution more or less satisfied their top negotiators' basic ideals concerning a parliamentary republic. The division of the opposition and of the EKA itself, always one

of the aims of the negotiators of the ruling party, finally occurred, even if only at the very end of the process of successfully drawing up the interim constitution. As a result, the new constitution itself was not looked upon even by the new political elite—not to speak of the population in general—as of its own common making. Given that the document itself was in most respects acceptable, it was first and foremost its relatively weak legitimacy that inspired a variety of actors to seek further constitution making.

A Plurality of Constitution-Making Agents

The Old Parliament

The Hungarian model of transition was based equally on comprehensive negotiations and the maintenance of legal continuity. A remarkable feature of this process was the legalism of all the actors, who scrupulously adhered to the letter of the law even when it was to their disadvantage. The ruling party, for example, accepted the validity of the petition campaign and subsequent referendum and was not tempted to manipulate the result concerning the presidency, even when its position lost by a mere six thousand votes. The opposition was equally defenseless when the sitting parliament, the last communist one, enacted the provisions agreed upon by the NKA. It was a technical requirement of the 1949 constitution, then in effect, that parliament had to enact all constitutional changes by a two-thirds majority as well any new electoral rule. The opposition at the NKA had assumed that parliamentary consent would be achieved on all issues in “the usual way,” that is, according to the unwritten material constitution of all communist regimes: by the political pressure of the Political Bureau—the party to the agreements—on the government and the parliament. But during the rapid developments of 1988 and 1989, this unwritten constitution, too, was changing. Government

achieved a measure of independence from the party; and parliament, in smaller measure, from both.⁴⁷ From a more skeptical point of view, the necessary public role of government and parliament gave a legal opportunity to the ruling party to modify agreements in a retroactive and one-sided way by appealing to the still-fictitious independence of other communist actors. Whatever the truth, the last communist parliament managed to play an independent role in the making of the new constitution twice: once in October during the enactment of the interim constitution and once under the rules of this new basic law.

The electoral rules agreed upon at the NKA were an obvious compromise, mixing directly elected seats (152), seats attained in provincial lists (152), and seats attained from a national compensational list (70), the function of which was to make the overall electoral result more proportional. In discussing this particular proposal, the parliament staged a veritable rebellion, demanding a dramatic expansion of individual seats. It is impossible to know whether this was done to fight for the original bargaining position of the ruling party that the MSZP itself had to modify or to protect the personal interests (however mistakenly interpreted) of deputies who were elected in individual districts in which they were well known.⁴⁸ In any case, the result was a compromise that increased the directly elected seats to 176, at the expense of the national compensational list, which was reduced to 58. This produced a much less proportional system than the one agreed upon by the NKA, which survives to this day.⁴⁹ That parliament was operating under something like a veil of ignorance about actual voter preferences is shown by the outcome of the first free elections, however. The ex-state party, the renamed MSZP, won only one seat in individual districts in March 1990. The action probably cost at least a few deputies their jobs and political careers.

Modifying the electoral law did not formally require constitutional revision. The same is not true of basic rights. In another example of its exercise of independence, before fully enacting the package agreed upon at the NKA, the old parliament rewrote the paragraph concerning the impossibility of limiting the rights identified in the package by providing a set of classical conservative limits rooted in the requirements of public order, public security, public health, and public morality. More significant and more lasting, parliament also added the right to social security in the table of basic rights.

The same parliament failed, but only temporarily, to establish the direct election of the president of the republic, rejecting the parliamentary solution of the NKA negotiations.⁵⁰ The NKA, confusingly, originally established a relatively weak presidency elected by parliament, and it was only for the first free elections that a direct popular election of the president was provided for—if it took place before parliamentary elections. This one-time feature was reversed by the November 1989 referendum, which, in the view of the Constitutional Court, did not deal with the constitutional issue of the mode of electing the president, but only the question of its timing.⁵¹ When the court ruled on the matter, it allowed the old parliament under the new constitution's purely parliamentary amendment rule (two-thirds of an absolute majority) to revise the constitution and provide for a popular election of the president after the first parliamentary elections.⁵² This the parliament actually did on the initiative of Deputy Zoltan Kiraly, the most famous independent member elected in 1985, who himself was a candidate for the presidency.⁵³ What mattered was not the institutional interest of parliament but the strong preference of the now renamed MSZP, still smarting from its defeat in the referendum, for a directly elected presidency. Nevertheless, they did not know what they were doing. As

the MSZP received only 10 percent of the votes in the first parliamentary elections in March 1990, the party was certainly going to lose the presidency in a popular election if it took place any time in 1990 (i.e., after the parliamentary elections).

The New Parliament: the MDF-SZDSZ Pact

That the last communist parliament did not fully adhere to the NKA agreements was an important reason for further constitutional change. However, it was most certainly not the only one. The agreements incorporated features that were important for both sides from the point of view of guarantees of a significant political role in case of severe electoral defeat. These guarantees can themselves be grouped under two headings: consensus democracy and constitutionalism. As in South Africa, coming to agreement by two relatively equal sides was very much facilitated by using both types of guarantees. In both countries, however, it was soon recognized that while constitutionalism enforced by a court could somewhat narrow the framework of possible policy making, strong consensus requirements could interfere with policy making, directly resulting in political deadlock that a new democracy did not need. Such requirements, moreover, could imply that there was only one effective form of government formation, a grand coalition of the largest parties irrespective of their ideological orientation. This approach minimizes the constructive government-opposition relationship of parliamentary democracy and interferes with the accountability of government that is so important for countries extricating themselves from authoritarian regimes. Admittedly, consensus requirements, including qualified majorities required for constitutional amendment, do have an important purpose, namely, stopping temporary majorities from modifying the rules of the game to benefit incumbents. Some consen-

sus democracy is thus required also for constitutionalism. But in Hungary as well South Africa, the initial drafters went much too far in requiring that ordinary legislative (Hungary) and executive (South Africa) acts be consensual. Making ordinary policy making dependent upon reaching consensus among parties with vastly divergent political views substantially increases the risk of failure in the political process, which is particularly dangerous in newly established democracies with mounting economic problems. In Hungary, the last undemocratic parliament added to the NKA agreements further consensual requirements for legislation, to the point that governability itself became a problem.

The most important form that consensus democracy took in Hungary was the very large number of laws that would be modifiable only by two-thirds relative majorities—the vote of two-thirds of those present and voting, almost as difficult to achieve as constitutional amendments that required two-thirds of all members, present and absent. Because the new government formed in 1990 chose not to create a grand coalition, it had an immediate interest in reducing the number of two-thirds laws. Given potential parliamentary volatility, the government also was very interested in measures guaranteeing stability, such as the constructive no-confidence vote and the elimination of the individual responsibility of ministers. The new center-right nationalist Christian coalition, dominated by the MDF, did not, however, have the two-thirds vote necessary to amend the constitution. Of its opponents at that time, the MSZP and FIDESZ strongly defended consensus democracy and opposed the strengthening of the executive at the expense of parliament. So the only plausible partner for change was the liberal, culturally left-of-center SZDSZ, at that time the MDF's toughest competitor and a strong runner-up in the general elections. Because the SZDSZ was thought to have the best chance of the Christian coal-

tion's opponents to take political power from the MDF, it was the most interested in the type of changes that the MDF government favored. The SZDSZ was not ideologically inclined to consensus democracy; the main sponsor of the 1989 referendum, it was deeply committed to reestablishing a purely parliamentary presidency. In return for elements of chancellor democracy providing for a strong parliamentary executive, and the drastic reduction of the number of two-thirds laws to an enumerated group of twenty,⁵⁴ the MDF could easily offer the concession concerning the election of the president—which the prime minister, József Antall, in any case favored—along with the nomination of Árpád Göncz as the first president. Göncz was an SZDSZ founding member and veteran of 1956, whom Antall thought (wrongly) he could control. With this concession came a slight strengthening of presidential powers, presumably to offer further guarantees to the SZDSZ that the government would not abuse the new powers of the executive.⁵⁵ Thus was born the MDF-SZDSZ pact, easily ratified by parliament as the law 1990: XL.⁵⁶ It was the second general agreement that, together with the first (the NKA compromise), established the new Hungarian constitution.

The occasion for enacting the pact seemed to motivate the other parties and individual members of parliament to offer a variety of amendments. Some of these proposals actually passed, and some even helped to improve the rule-of-law dimension of the new constitution. The term of the president was extended from four to five years, and in case of impeachment proceedings, the Constitutional Court had the responsibility to try him. A habeas corpus provision was established, and parliament reversed the limits on rights that the last undemocratic parliament inserted into the NKA package.⁵⁷

These additional amendments show that there was at the time strong latent parliamentary interest in constitution making. Why not

then move toward a comprehensive agreement on a new constitution, especially as the Round Table constitution defined itself as an interim one? We do not believe that this option was seriously raised at the time, though the relevant leaders must have considered it. To begin with, the SZDSZ and MDF were by then bitter ideological opponents with an extremely divisive election campaign behind them. It was not clear that they could agree on a wide range of questions for which worldview mattered first of all. Their militants and members were quite hostile to one another; cooperation was not popular among their rank-and-file members. Had there been an all-party constitution-making effort instead of a two-party one, consensus might have been achievable. But the preferences of the MDF's allies and the MSZP for direct election of the president, and even presidentialism, made them impossible partners for the SZDSZ, which cared about this issue most of all. Moreover, the attachment of FIDESZ and the MSZP to consensus democracy made them difficult partners for the MDF government. It is possible that a comprehensive bargaining framework could have ironed out the differences through compromise. But there was no guarantee that from the point of view of the SZDSZ or MDF or both, such a result would not have produced a substantively worse constitution than what they could arrive at through their pact.

What the parties neglected, however—aside from several serious remaining flaws of the constitutional setup, such as the highly disproportional electoral rule and the much-too-easy constitutional amendment rule—was the issue of legitimacy. They did not even try to explore what kind of constitution could be produced through extensive discussion and consultation. It is very likely that if attempted, MDF, SZDSZ, and FIDESZ cooperation could have produced a solid constitution expressing the new public-law ideas of 1989. We have reason to believe that such

a collective effort could also have moderated the destructive ideological and institutional struggles from 1990 to 1994 that helped to weaken decisively the two important parties to the pact. We have even better reason to think that despite the passing of some constitutional amendments between 1990 and 1998, probably the best chance was missed in 1990 to establish the definitive constitution of the new liberal democratic parliamentary republic. This is so because the 1990–94 period was the only and last time when the three parties that were the true motors of the regime change—the MDF, the SZDSZ, and FIDESZ—had overwhelming majority.⁵⁸

As for the procedural aspects of the second major round of constitutional amendments, it was, if anything, even less participatory than the Round Table process itself. The preparations were restricted to secret talks between top leaders of the MDF and SZDSZ, completely excluding all other parties, the media, and the general public. The secretive nature of the preparatory talks, and the fact that the outcome was presented as an accomplished fact, infuriated many of the leaders and ranks of the two participating parties themselves, leading to lasting ruptures within the MDF. The agreements made by the two parties were presented as a *fait accompli* to the other parliamentary parties and the public as well; hence, the slightly denunciatory term “pact” attached to the whole process. The proposals had been submitted to the legislature jointly by MDF and SZDSZ and were subsequently passed without any substantial alteration, despite the stark criticism of FIDESZ and MSZP, the two opposition parties. MDF secured the support, albeit not without certain misgivings, of the two junior partners of the governing coalition. There is no indication whatever that the chief agents behind this second round of amendments—the MDF and SZDSZ—ever seriously considered that popular participation or citizens’ groups should be

brought into the process. To be sure, because the agreement, in addition to constitutional amendments concerning governability and the number of two-thirds laws, involved several ad hoc deals to nominate particular persons for offices including the presidency, the governor of the central bank, and the chairmen of the national public television and radio stations, the exclusion of public participation was inevitable. Clearly, citizens could not have been brought into what was to a great extent a self-interested compromise between the two largest parties.

This is not to say that the MDF-SZDSZ pact as a whole was not beneficial for the nation's constitutional arrangement. As was often the case in Hungary's process of negotiated transition, substantively desirable outcomes were reached by less-than-desirable procedural routes. And while the pact left the nation with a much-improved constitutional situation, the act itself—a rare feat of imagination, foresight, and mutual self-restraint in Hungary's extremely divisive post-1989 constitutional politics—was and has been widely perceived as yet another instance in a long series of elite bargains conducted over the heads of ordinary citizens. Therefore, its welcome consequences notwithstanding, the second round of major constitutional amendments did little to refurbish the legitimacy of the new regime.

The Constitutional Court

Political conditions that favor negotiated transitions also increase the likelihood that the constitution-making process will be discontinuous, more extended over time, and the work of different primary agents in different phases of constitutional consolidation. It was argued above that the pure form of negotiated transitions is likely to take place when political agents on both sides perceive themselves as weak; furthermore, it was argued that the weakness of political agents is

likely to produce a constitution with a perceived legitimacy deficiency. It may be added at this point that the outcome of such a process of constitution making is likely to have a provisional, patchwork character. Weak agents may be tempted, by an awareness of a lack of democratic authorization, to resort to amending and revising the existing constitutional document rather than devising an entirely new constitution. Thus, it is also more likely that in subsequent periods, the actors of the new regime will be more prone to engage in amending and revising the resulting document than they might for a constitution with uncontested legitimacy. Also, the patchwork character of the document likely makes it more susceptible to having significantly diverging interpretations. As there is no single unified constitution-making process with uncontroversial democratic authorization, the original intention of the framers, too, is even more obscure than is the case generally, and the room for judicial interpretation greater. Thus, a role for the Constitutional Court would seem to be unusually important in consolidating the new constitutional arrangement—though this logical requirement, inherent in the negotiated transition method of constitution making, has been fully realized among the important cases only in Hungary and South Africa.

For Hungary's 1989–90 constitution, both the creation and the judicial practice of the Constitutional Court to a large extent reflect the circumstances characteristic of negotiated transitions. Although the agreements made at the NKA—modified by the referendum of November 1989—and by the two largest parties after the 1990 elections represented an entirely new constitutional arrangement in substantive terms, the document formally still retained an air of temporariness. The paradoxes of the negotiating process, originally intended merely to provide for the conditions of a disciplined transition but resulting in a new constitution, are well illus-

trated in the preamble of the document itself. The preamble claims that the document merely intends to “promote the transition to the rule of law”⁵⁹ until the adoption of a new constitution, which has yet to happen as of this writing. Thus, the Constitutional Court established by the new constitution was confronted with the task of exercising constitutional review on the basis of a patchwork document; in this situation, quite a lot depended on how the court understood its function as the constitution’s guardian.

The extensive powers granted to the court were certainly necessary conditions for the very active role that the court was to assume in consolidating the new constitutional order. But such powers would not have been sufficient to perform this role were it not for the specific circumstances characteristic of negotiated transitions. The usual dilemmas of popular sovereignty versus judicial review surfaced in a special context, in which the constitution not only lacked uncontested legitimacy but also was the outcome of a series of substantial revisions and amendments, containing unsettled issues and possible inconsistencies. Thus, an opportunity was presented for the court to act as the constitution’s maker as well as its guardian.⁶⁰

In addition, as the law on the Constitutional Court was the product of a last-minute compromise, it displays all the traces of a temporary character. Among other things, it leaves a number of questions unsettled, such as the procedural rules and the so-called rules of order of the court. It is natural that the judges interpreted these provisions broadly, giving themselves the largest possible freedom.

The specifically activist period of the court stretched from 1990 to around 1993. Although the court’s decisions in this period concerned chiefly the evolution of fundamental rights, they were also consequential for defining the function of the presidency within the structure of the republican consti-

tution, as well as for deciding contested issues related to retroactive justice that emerged as a consequence of regime change. In one of his early opinions, the chief justice of the court, László Sólyom (at the time of this writing the president of Hungary) argued that

the Constitutional Court must continue to ... articulate the theoretical bases of the Constitution and the rights incorporated in it, and to formulate a coherent system that will serve, as *an invisible constitution*, as a safe guideline of constitutionalism above the existing constitution that is currently still being amended out of fleeting daily purposes.⁶¹

Thus, initially, the court explicitly asserted the right to revise the constitution itself where it judged necessary. In some instances, the court revised existing constitutional provisions.⁶² Between 1990 and 1993, Constitutional Court rulings provided a very robust interpretation of the freedom of speech, abolished the death penalty, authoritatively settled conflicts of competence between the president of the republic and the prime minister (establishing that the role of the president within the executive branch was merely formal),⁶³ and prohibited punishment of crimes committed by the previous regime once the term of limitation had expired.⁶⁴ In this period, the court had a decisive but ambiguous role in defining the function of various institutional agents as well as in making different political agents realize the limits of their powers in the new constitutional arrangement. Unsurprisingly, in the same period, the charge of usurping the constituent sovereignty vested in the legislature was most frequently made against the court.

As the consolidation of the new regime progressed and major interpretive decisions were made (which are binding in future rulings of the court itself), the coherence of the new regime was stabilized and the room for judicial activism with respect to questions of state organization was reduced to a minimum. Since then, the main focus of judicial

activism has shifted to such areas as welfare rights.

As with the NKA talks and other phases of the Hungarian constitution-making process, it may be claimed that the court's activity exhibits a characteristic ambiguity vis-à-vis the symbolic and substantive aspects of its outcome. While the court has performed an essential and, in substantive terms, beneficial function in consolidating the republican constitution, judicial constitution making (or consolidation) as a general rule is not the most adequate means to enhance the legitimacy of a constitutional arrangement. As the major interpretive decisions and formulation of rules were carried out by a body insulated from the democratic political process rather than by popular representatives, the experience of constitution making was again lost for the general public. Nevertheless, as the major political agents in subsequent legislative terms were, for the most part and either formally or in terms of legitimacy, too weak to make fundamental constitutional resolutions, not to mention a new constitution, it was left for the court to make such decisions after 1990.

Failure of the Effort to Produce a New Constitution in 1996–97

All acts of constitutional review between 1989 and 1995 were based materially on the supposedly interim Round Table constitution of 1989, which was formally an amendment of the Communist constitution of 1949.⁶⁵ Thus the idea of producing a definitive constitution survived on the political back burner, waiting for a time when there was political power and will to accomplish the task. That it took six years to get to that point was not unusual in the history of constitutions. The United States waited six years between the ratification of the Articles of Confederation in 1781 and the drafting of the federal constitution in Philadelphia.

Closer to our context, it took the Poles eight years and the South Africans three to move from interim to definitive constitutions. In principle, the intervening time is quite useful, allowing the accumulation of learning experiences concerning an interim constitution, the weaknesses and difficulties of which become apparent only over a sufficiently long period.⁶⁶ It can also happen, however, that the window of opportunity for legitimate and consensual constitution making closes before there is sufficient interest and political support to attempt the task of full-scale re-drafting and enactment. That is what seems to have happened in Hungary.⁶⁷

In 1994, a left-of-center coalition of the ex-state party MSZP and the SZDSZ came to power after four years of a national Christian center-right coalition. The new government easily commanded a constitution-amending majority (over 70 percent of the seats when only two-thirds were required), and its intention to draft and enact a constitution was a powerful spur for the other three (eventually four) parliamentary parties to cooperate. On the advice of several experts (including one of the authors), the coalition offered parliament an elaborate constitution-making procedure that was to involve a high level of consensus before any draft could finally be approved. First, it would require the agreement of 80 percent of the deputies to approve a constitution-making procedure; that majority was successfully achieved. Second, the procedure included a formula that gave each of the six parliamentary parties four seats on the drafting committee. Third, it provided that committee decisions required five out of six parties and two-thirds of the members of the committee. To protect the project from the dangers of such high consensus requirements, the procedure also provided that whenever no agreement on a constitutional provision was possible, the corresponding provision of the 1989 constitution would be maintained and integrated

in the new draft. Finally, as the biggest party, with 54 percent of the seats, the MSZP had the additional guarantee that as always, the final draft would have to be approved by two-thirds of parliament, which would be impossible without the strong support of that party. This feature was important because the project was not easy to accept for the ex-state party, whose minister of justice, exactly like his predecessor in 1989, continued to play with the idea of producing a constitutional draft by his own experts in the ministry.⁶⁸

Because no constitution actually emerged from the process, it would take us too far afield to discuss the details. It is enough to note that despite exemplary cooperation on the level of the committee, the draft that emerged did not deal with some of the greatest structural problems of the 1989 constitution—the highly disproportionate electoral law and the deep tension between a simple parliamentary amendment procedure and an extremely powerful constitutional court. But a draft did emerge even with the forbidding consensus requirements. What then occurred, however, was extremely peculiar. Though the SZDSZ, the MDF, and FIDESZ voted for the draft, the right-wing Small Holders and Christian Democrats did not. More strikingly, enough members of the governing MSZP, including most government ministers, voted against the draft—for which their own party's committee chairman bore the main responsibility—thus depriving it of the necessary two-thirds majority. In effect, a red-black coalition, present in Hungary only for that moment, brought the effort down. After that fiasco, there were attempts to save the draft by satisfying some of the critics, by including some mildly social corporatist elements, but new defections and the final failure of the project were unavoidable.⁶⁹ The comparison with Poland, where, under the leadership of President Kwasniewski, the Poles got rid of most of the presidentialist features of their own interim constitution, is strik-

ing. The Poles, unlike the Hungarians, faced serious structural and legitimation problems with respect to their presidency, which was a forced concession to the Communists at the time of the Round Table and mixed poorly, as President Walesa's tenure showed so well, with parliamentary institutions. There were no problems of this magnitude in Hungary. Moreover, unlike in South Africa, the makers of the interim Hungarian constitution neither constructed a timetable to produce a definitive version nor put in place sufficient rewards and sanctions for the parties to stay loyal to the task.

Several factors militated against success in Hungary in 1996. Having come out from under the empirical veil of ignorance, parties sought not conversion of present into future power or guarantees against future persecution or marginalization but rather the realization of the needs of their new political identities. The ideological field in Hungary, much more than the field of real choices, had become extremely polarized.⁷⁰ Around issues of diverging identities, no full consensus was possible. The expert drafting committee only had to reconcile interests, and that turned out to be easy enough. There was no political majority, however, and certainly not a two-thirds one, behind any ideological vision of the constitution, including the 1989 constitution's liberal democratic parliamentary-constitutionalist model. Admittedly, that very constitution was the default for any new provisions that could not be agreed—that was the clever ploy of the liberal leaders of the committee. But a sufficient number of members of parliament, waiting for another day to establish their vague constitutional dreams, could and did choose not to relegitimize the system they were living and acting under.

How could a temporary red-black linkage get away with such sabotage in the face of the majority of the committee and even that of parliament? First, unlike in Poland, no

popular participation or discussion was organized, and the government did not have to fear any popular pressure. This state of affairs characterizes the entire constitution-making process in Hungary, where, with the exception of the referendum campaign of the fall of 1989, there was no popular participation at all. There were very few people (including one of the authors) who advised, in 1994, a popular, participatory, and educational process on the model of South Africa, but the legal experts of the coalition parties tended to consider such an approach irrelevant or even dangerous. The liberal party feared that popular participation would lead to a directly elected president, possibly to a strengthened executive. They may have been right about this, but on the other hand, the absence of public attention to the process made it much easier for members of the government, along with unlikely right-wing allies, to sabotage the project of their own coalition.

Second, even the liberal SZDSZ and its lawyers did not care about the issue sufficiently to make cooperation of the MSZP leaders with their own committee a condition of their own continued participation in the governmental coalition, which they should have left when the sabotage of the draft took place. Third, public opinion as well as the liberal party leaders had become accustomed to an evolutionary pattern of constitutional learning and change, of which the Constitutional Court was the main protagonist. They did not fully realize the paradoxical nature of court activism in the context of a soft constitutional background;⁷¹ the likely future reticence of a court eventually attacked from all sides could mean that other political branches could grab the power to mold the material constitution even without formal amendments. That last outcome has been realized under the government cycle of 1998–2002 by the right wing FIDESZ government, putting Hungary's constitutional future temporarily in doubt. However, the lack of popular

attachment to the constitution never allowed authoritarian deformations to emerge as an issue around which the opposition of that particular period could mobilize.

The Constitution as a Product of Models and Bargains

Innovation and Models

During the epoch of the reconstruction of civil society in Eastern Europe, many involved in that process recalled the famous saying *ex oriente lux*. Intellectual innovation was a striking feature of the crumbling Soviet empire in Eastern and Central Europe, and brilliant political projects were organized around the reconstruction of civil society by activist intellectuals such as Adam Michnik, Jacek Kuron, Vaclav Havel, and János Kis.⁷² This innovation did not extend to the constitution-making sphere, however. With respect to Western models, the Eastern European innovators felt they had nothing new to offer on the level of constitutional and institutional design. It was the common sense of Hungarian institutional designers that they must take their institutional option from the best that was available. But what was that best?

In Eastern and Central Europe, democratic constitution makers had low regard for the U.S. version of the separation of powers as well as British parliamentary sovereignty. To the extent that elements of either of these appeared, they were in the form of semi-authoritarian strategies of old ruling parties (the U.S. presidency, majoritarian elections) or new nationalist groupings with a parliamentary majority (either the U.S. presidency or British cabinet government). In countries with negotiated transitions (with the temporary exception of the first, Poland), these options were unsuccessful, and we see their lasting influence only where options were imposed from above. From the point of view

of professional opinion in the Round Table countries, which was generally echoed by liberal and democratic forces, the constitutions and electoral arrangements of the German Federal Republic and the French Fifth Republic were considered close to the best available. As it turned out, even federal states in the region chose one or another version of parliamentary government or semipresidentialism, with governments headed by prime ministers (supposedly) responsible to parliament. Among parliamentary republics, none chose to operate without a written constitution, insulated amendment rule, and some kind of constitutional review. No country chose a single-district, first-past-the-post, one-round plurality electoral rule, nor was the idea of electing the president through an electoral college ever seriously entertained anywhere. The model of constitutional jurisprudence chosen was invariably the European Kelsen type, fluctuating between weak French and strong German prototypes. But the choice among mostly French, German, and other options—the last including a given country's own earlier constitutional heritage—was filtered through the political party interests as well as legitimating needs faced by the major actors.

As against other countries, especially further east, outside experts and advisers were not significant in the Hungarian constitution-making process, even if the constitutional solutions of other countries were broadly influential.⁷³ The most direct influence on the Hungarian drafters was the European Convention on Human Rights, the first fourteen articles of which provided the structure and much of the content of the twelfth chapter of the Hungarian constitution on fundamental rights and duties. As far as we can tell, adopting these provisions at the Round Table on the proposal of the ministry of justice was entirely uncontroversial, even if just a few months before, agreement concerning statutory freedoms of association and assembly, as

well as the right to strike, was reached only after intense conflict and debate.

Bargaining for an Electoral Rule and the Conversion of Power

The electoral formula for the constituent assembly negotiated at the Round Table was acceptable to all sides. Claims for both proportional and direct individual mandates were satisfied in a combination the high level of disproportionality of which was not yet clear to anyone, least of all to the historical parties that significantly contributed to it by insisting on county lists. The 4 percent cutoff agreed upon seemed relatively unthreatening to the parties of the EKA, many of which had no idea how weak they actually were. This feature would ultimately be an important part of manufacturing a majority out of a minority. Even the parliament's unilateral raising of the number of seats to 176, which was a third source of the high disproportionality of the system, involved a 45 percent–55 percent ratio of direct to proportional representation mandates, which was closer to the EKA formula of 50–50 than the Round Table compromise itself.

What emerged, then, as a result of bargaining over the electoral system, was a set of rules that gave something to all the main forces, and therefore unavoidably a unique set of extremely complex, mixed rules that had some features (two ballots) of the German model that it superficially resembled and some important elements (two rounds) of French elections. Those who hoped that this would be the model only for the first elections were deeply mistaken. The very early freezing of the model confirms the expectation of most political scientists: Despite the embarrassing disproportionality of the system, its inhospitability to small and new parties, and the dangers of super-large majorities, it is unrealistic to ask parties that have just won an election to change the rules

Table 13.1 1990 Elections

Party	Percent of Votes for Party Lists	Number (Percent) of Seats (total: 386)
MDF	24.73	165 (42.7)
SZDSZ	21.39	92 (23.8)
FKgP	11.73	44 (11.3)
MSZP	10.89	34 (8.8)
FIDESZ	8.95	23 (5.9)
KDNP	6.46	21 (5.44)
Independent		7 (1.8)

that led to their success. Close to the next election, however, polls would indicate the beneficiaries of any change with clarity, thus making any tinkering with the rules appear self-serving (see Table 13.1).⁷⁴

Bargaining and the Nature of the Presidency

A similar compromise model was impossible in the case of the presidency, in part because the MSZMP proposal was already a mixed one, putting together, in the French style, a directly elected presidency with a prime minister with parliamentary responsibility. More important than this formal point was the determined opposition of the radical opposition and even many moderates to presidential government that, in the context of Hungarian tradition,⁷⁵ seemed like a foreign import. Whereas some of the minor groups in the EKA always favored a directly elected presidency, the radical opposition saw a conversion strategy for what it was and feared the authoritarian possibilities of a plebiscitary presidency more than the potential weaknesses of a model involving problems of divided government, as in the United States, or cohabitation, as in France. The compromise engineered by Antall, but never accepted by the radical SZDSZ and FIDESZ, involved a partial return to the two-stage schemes of the reform Communists. While the constitution would generally affirm a

fully parliamentary structure, with a rather weak president elected by parliament,⁷⁶ it mandated during the first electoral period the direct election of the president if it took place before parliamentary elections.⁷⁷ Ordinary legislation was then to order that the election of the president would occur before parliamentary elections.⁷⁸ Thus, it was possible to sell the model to some who opposed it with the idea that direct elections would involve only a one-time, exceptional compromise of their positions.⁷⁹

There is a question whether those who changed their position at the Round Table—in particular the MDF, which always thought in terms of the model of the 1946 weak, parliamentary presidency—were actually naïve concerning the potential meaning of the concession. There has been significant speculation about a private or secret agreement between Imre Pozsgay of the MSZMP and József Antall of the MDF concerning this compromise, which would supposedly lead to a Hungarian version of the Polish “your president, our prime minister” formula. Though there is some evidence of this,⁸⁰ it is possible and more charitable to take Antall’s remarks at the last plenary at face value, according to which he was still uncertain about the possibility of Soviet intervention and civil war when making the concession. With over ten years’ hindsight, it is also possible to say that there was a highly functional division of labor between moderate and radical oppositions, with the former making the then-possible deal with regime reformers, while the radicals who rightly chose not to veto the agreements as a whole chose instead to turn to the electorate in the petition-referendum campaign to get rid of its one objectionable feature.⁸¹ It is easy to see why the radicals won in the referendum, and only won slightly. Whether there was a deal or not, many Hungarians tended to believe that there was, an idea reinforced by the very low level of publicity for what was going

on at the Round Table negotiations. Making a deal, however, that shattered the unity of the main opposition parties seemed like sacrificing a great deal at that moment for private party advantage. It would have meant leaving the veil of ignorance and genuine public-regarding argumentation behind. The referendum was won by only 6,000 votes because the actual preference of the majority in a plebiscite was, logically enough, for the plebiscitary election of a president. The dangers of a plebiscitary president concerned only relatively few intellectuals.

Veil of Ignorance and Guarantees

Though they acted as if they knew the future, the parties were under what could be called an empirical veil of ignorance regarding the outcomes of rules for both projected presidential and parliamentary elections. The solid expectations of many were frustrated. The MSZMP did poorly in the single-member districts it originally fought for so hard; many of the small parties were not particularly concerned about the 4 percent threshold, which then led to their elimination; the MDF would have done much worse under the balanced mixed system it advocated than under the more disproportionate system that emerged; and the SZDSZ would have done worse under the system of more direct seats that it wanted. In the end, the acceptance of a mixed formula speaks for the parties hedging their bets in the context of uncertainty.⁸² The same is even more true for those parts of the bargain involving guarantees of a continuing political role for losers in the first free elections. While the MSZMP sought to convert part of its powers, it also sought, in case of failure, guarantees that belong to two categories: constitutionalism and consociationalism. Not having anything to convert, the opposition was also interested in guarantees of constitutionalism, but this interest had to be factored in with the concern that

the other side was using guarantees to preserve power.⁸³

The most important case in point was the agreement concerning the Constitutional Court. From the beginning of making reform proposals, such a court was on the MSZP/MSZMP's list of innovations. The idea was consistent with the project of controlled liberalization, in which partially free elections and an increased sway of the rule of law would relegitimize a partially authoritarian system. The importance of models in this case is clear: There was never a moment when the Hungarian discussion entertained a U.S.-type judicial review, and all the options were conceived in terms of a Kelsen-type independent tribunal outside the judicial system proper. This type, however, allowed strong (German) and weak (French) variants. In its original version, the plan included a relatively weak court, with no standing for anyone outside the political system, possibly with the option of parliamentary overrule of decisions that in any case would be easy given the existing constitutional amendment rule. Judges, of course, would have been selected through the Ministry of Justice or a combination of actors that the party would control. It was still a variant of this project—allowing only a suspension of unconstitutional laws and including the feature of parliamentary overrule—on which parliament voted in a preliminary version in March 1989, in a “putsch like fashion” in the eyes of the opposition,⁸⁴ and that the MSZMP brought to the Round Table. This version restricted standing, in the French pattern, to public law authorities such as the president of the republic, the president of parliament, and large parliamentary minorities. Whereas the existing oppositional political manifestos were for a strong constitutional court, interestingly the EKA did not support its immediate establishment.⁸⁵ The EKA sought originally only the enactment of a few organic laws necessary for free elections, and, due to the Round Table's

lack of democratic legitimacy, it was against producing a full constitutional synthesis.⁸⁶ A new constitutional court in their view presupposed a legitimate constitution, one that Hungary could not have until after the first free elections. Moreover, a court might tend to freeze transitional arrangements that are still based on an old constitution not thought worthy of preservation even if reformed.⁸⁷ Nevertheless, using public-regarding reasons, it was difficult to oppose the establishment of a body internationally considered to be the very organ of constitutionalism and the rule of law.

When it turned out that, piece by piece, the EKA had to reverse its position and agree to a massive effort of constitutional re-writing, there was suddenly the prospect of having a constitution worthy of preservation and protection. Thus, the opposition shifted its strategy by accepting the setting up of the Constitutional Court before free elections, but in return demanding, first, that the court be given greater powers, specifically allowing the annihilation and not just suspension of unconstitutional legislation, and that, outside of constitutional amendments, the decisions of the court be regarded as final, without any kind of parliamentary override; second, that the court should be also open to suits emerging outside the political system, and specifically the *actio popularis* that would allow anyone and not just interested persons to challenge the constitutionality of legislation; third, that the judges be elected in part by the new parliament, and even those elected immediately would be elected consensually; and fourth, that former officials of the Ministry of Justice be excluded from serving as constitutional court judges.⁸⁸ The resulting compromise wound up producing an even stronger version of the German court than in Germany itself. The opposition very much favored the model, as it had to drop only the last of its demands and concede in effect that the vice-minister negotiating

this very issue would become a Constitutional Court judge.⁸⁹ More certain of itself in the beginning of negotiations, the MSZP sought a court that was no more than what was needed for the purposes of legitimation. Less certain toward the end, it became more interested in—or less opposed to—constitutional guarantees.

Once guarantees were sought, it would have been sensible to entrench them, but this did not occur. A massive electoral victory by one of the sides could have led to the abolition or weakening of any guarantee whatsoever by constitutional amendment. The Constitutional Court, in other words, represented no protection against a force controlling two-thirds of the legislature; its powers themselves could be amended. Thus, to be consistent and secure, the MSZMP and some of the parties less certain of their future should have tried to change the easy amendment rule of the inherited constitution, but they did not do so. They were certainly not stopped from doing this by theoretical arguments, such as those of Carl Schmitt and Alf Ross, that amending an amendment rule by its own use was either impossible or invalid. It is unlikely—though possible—that no participant was aware of the logical link between a relatively difficult amendment rule and the possibility of constitutional review, and the theoretical inconsistency involved in establishing one but not the other.

In a potentially multiparty setting, it was rightly thought that no party could obtain a majority, certainly not the two-thirds of parliament needed for amendments. But it should have been noticed that the same multiparty system necessitated coalitions, and there was no obvious limit to how large they could be. Even this argument does not explain why smaller parties and even the SZDSZ—which feared an MDF-MSZMP coalition that certainly would have the power to amend—did not raise the issue of changing the amendment rule. The real explana-

tion is that the opposition especially took for granted the lack of legitimacy of the Round Table and the last communist parliament. They were conscious that the massive constitution making they were engaging in was an elite affair, without genuine publicity or any popular participation. Thus, in Hungary, the problem of generations appeared especially intractable. It made no sense to allow an illegitimate or nonlegitimate set of actors to bind the hands of future, more legitimate actors. By insisting on the interim character of the Round Table constitution, its authors deprived themselves of the right or the rationale to enshrine their work.

The peculiar feature of the interim constitutional settlement was that while the constitution was insulated only by a relatively easy parliamentary amendment rule, much ordinary lawmaking was to have consensus requirements almost as high (two-thirds of present members versus two-thirds of all members). While this feature can be interpreted as a guarantee against unilateral legislation or against the marginalization of a sufficiently large party such as the MSZP, it was one in terms of consociational or consensus rather than constitutional democracy.⁹⁰ It seems that the idea of proposing a set of organic laws that can be modified by parliament only by two-thirds majority originated in reform socialist constitutional proposals brought before parliament before Round Table negotiations began.⁹¹ Originally, the idea was part of a conception that limited parliamentary sovereignty, for the benefit of a strong presidency also in the same plan. It is unclear whether or not there was any Round Table discussion of this issue, and it may be that the original justification consisted of the need to protect the organic laws required for the transition toward free elections from easy modification by the communist-era parliament still in place. It may be that an argument subsequently referred to by the Constitutional Court also played a role, namely

that the text of the constitution should be relieved from being inundated with legislative elements.⁹² Clearly, with the weakening of the presidency model in the same negotiations, the restriction on legislative powers pointed less and less to an instrument of authoritarian conversion and more and more to a guarantee for all parties, though with the risk of ungovernability.

In any case, it seems that it was the MSZMP—which, because of its built-in advantages in expertise and staff resources, could dominate the formulation of all that was not deemed particularly important at the Round Table—that was primarily responsible for incorporating this feature. The other parties did not oppose the feature, as they were mainly concerned with the risks of the transition period posed by the old parliament, and they probably also wanted to hedge their bets in case of an electoral victory by the ruling party. What then happened was therefore curious. The same old parliament, dominated by the MSZMP, not only willingly established the category of constitutional laws that would tie its own hands and those of its successors but also added a formulation according to which all rules regulating fundamental rights and duties would have to take the form of constitutional laws.⁹³ Next, the Constitutional Court, when it was still dominated by an MSZP majority, proceeded to interpret this broad premise in a particularly expansive way that implied that any law touching on matters affecting basic rights would have to be passed by a two-thirds majority.⁹⁴ Undoubtedly, the more extreme interpretations followed a time sequence that corresponded to a more and more realistic and therefore pessimistic evaluation by the MSZP of its electoral chances.

The MSZP turned out to be right in their pessimism, but the two-thirds requirement could not protect a party that garnered only 10 percent of the vote and 8 percent of the mandates in 1990. The authors of the MDF-

SZDSZ pact of 1990 considered the vast extension of the scope of constitutional laws beyond the Round Table agreements one of the illegitimate acts of the old parliament. They therefore proceeded to abolish the plastic and expandable notion of constitutional law and restricted the number of two-thirds laws to an enumerated twenty.⁹⁵ It was a peculiarity of the time that the only party that really fought for preserving more consensual legislation was FIDESZ, which was too small to put the government past the two-thirds threshold and not needed if either of the two other parties were available.⁹⁶ Thus, we can presume that their motivation was a principled support for consensus democracy that did not last by the time FIDESZ itself came to power in 1998.

What FIDESZ did not understand, at least in 1990, was the change of function of consensual guarantees from the period of a democratic transition to a time afterward when the institutions of a working democracy should be operating. The kind of protections needed by erstwhile enemies are different from those required by political opponents in a democratic system. While consociational arrangements need not hamper a country getting ready for general elections, they potentially threaten later governability and accountability. Only in radically divided societies should they be resorted to, and there, too, hopefully only within time limits. As the South African constitution makers confirm, the best path is one that moves from a transitional consensus democracy to one whose protections and guarantees are recast in terms of constitutionalism.⁹⁷ But FIDESZ's brief for consensus democracy in 1990 could be strengthened by pointing to a difference between South African developments and the earlier Hungarian ones. The South African constitution makers moved beyond consensual features present in their interim constitution only in their definitive constitutional document. In Hungary,

the MDF-SZDSZ pact, eschewing full and open drafting and enactment of a new constitution, did the same without moving beyond the supposedly interim arrangements. The question, therefore, is whether it could be legitimate to move to majoritarianism by mere majority rule (together MDF-SZDSZ had 66 percent of the mandates, but only 45 percent of the popular vote), or whether constitution making presupposes higher conditions of legitimacy, including consensus, than ordinary legislation. To be sure, this argument would not justify the expansive institution of constitutional laws, but it raises questions concerning the method of their abolition in 1990. It also points to the fundamental problem of an otherwise successful process of Hungarian constitutional design: legitimacy.

Conclusions: Achievements and Failures

This chapter began with the achievements of the Hungarian process of constitution making. To that list we can now add the creation of a basic law that establishes a liberal democratic blueprint for a parliamentary republic drawing on the best available European (mainly German but also French) sources. The same blueprint also sets up a system of viable and active judicial protections of constitutionalism, understood as limitations on all branches of power by a system of the rule of law, which enshrines constitutional rules against easy change by temporary majorities, as long as these remain under the two-thirds threshold, which is unfortunately not out of the question for coalition governments.⁹⁸ This chapter also noted failures, linked to the problem of democratic legitimacy, that inhibited the emergence of constitutional patriotism—in other words, a political culture oriented to constitutionalism. To this list, too, we can add a variety of unsolved problems. The Hungarian constitution makers could not successfully address structural problems

in the constitution—most significantly, in our view, the potentially dangerous combination of an extremely powerful Constitutional Court, a purely and under some possible circumstances easy parliamentary amendment rule, and an electoral framework that tends to produce a high level of disproportionality between votes and seats, to the benefit of the largest parties. On the symbolic level, there is a deep contradiction between a substantively new basic law and the formal state of affairs in which this institutional design represents only a set of amendments of the 1949 Stalinist constitution. Even more important, while the constitution announces its merely temporary status in its very preamble, the chances of producing a definitive new document have by now disappeared. These symbolic failures move some to speak about a revolution stolen by the makers of the Round Table constitution.⁹⁹

In our view, both the achievements and failures can be traced back to the long, drawn-out set of procedures that produced the constitution. The question is whether they necessarily imply one another. If that were so, the Hungarian pattern of constitution making would provide only highly ambiguous lessons for future designers of institutions in democratic transitions and reconstructions. But we believe that the advantages could have been achieved at a much lower set of costs. A summary of what went right in the Hungarian process, what went wrong, and the paradoxical relationship between the two supports this conclusion.

What Went Right: Legal Continuity

The Hungarian model of transition or regime change has been defined by its best participant-interpreter, János Kis, as the unlikely combination of a break in legitimacy and legal continuity. By legal continuity or continuous legality, we mean a fairly unusual requirement in the context of a change of regimes,

namely, that the new constitution is adopted by a body that is formally authorized to amend the constitution, and the outcome establishes the rule of law. Given that this condition would formally empower in a country like Hungary in 1989 a nondemocratic body unaccustomed to the rule of law, namely, the inherited parliament of the old regime, it required the invention of the Round Table and comprehensive negotiations to make the rules of regime change under the condition of legal continuity. The Round Table, however, was not in a position to fully dictate rules to the sitting parliament, especially to force it to violate the existing amendment rule. Legal continuity involved relying on this parliament using the existing amendment rule to formally enact all (or most) changes agreed upon at the Round Table.

Though legal continuity rested on the fiction of the rule of law under a lawless old regime,¹⁰⁰ its value was considerable. An *ex lex* condition of legal rupture or legal state of nature so strongly criticized by Hannah Arendt¹⁰¹ was thereby avoided, and along with it, the legal insecurity and nihilism characterizing so many of the great modern revolutions. The Round Table, playing the role of a quasi-constitutional convention but without formal powers, could gain its influence only through consensual decision making, which in turn was possible only if all the parties received the required guarantees in case they turned out to be the political losers of the process. These guarantees were the foundation of consensual and constitutional features of the transition and had importance beyond the circle of the negotiating partners. It is certainly true that these features of transition helped to stabilize it and keep it on a peaceful and nonviolent path. Since the Round Table constitution was not imposed by or on any of the sides and was, in effect, their common work—whatever they later came to believe concerning this subject—even one-sided acts, such as the legislation of

the old parliament, the referendum of 1989, and the MDF-SZDSZ pact of 1990, did not lead to its violent abrogation, or the defection of any of the sides.

The consensus, to be sure, had an elite character. The parties of the EKA chose one another as partners. The ruling party, itself without democratic authorization, chose as partners those represented in the EKA, who also were not selected democratically. Not only popular participation but also the public sphere was more or less excluded from the Round Table negotiations. Only the plenary sessions, where nothing really happened, were open to the press and the electronic media. There was only one short weekly opinion program on television that dealt with the negotiations. Thus, not surprisingly, the population experienced almost nothing from the momentous changes. Coupled with the absence of a legal rupture was the absence of political rupture. There was no great political novelty, in fact, until the free voting on the referendum of 1989. But even that vote could not compensate for the common experience that old and new elites were managing the entire regime change over the heads of the inert population.¹⁰²

In retrospect, many liberals came to believe, even if they fought for greater openness initially, that the absence of popular pressures made the job of creating a liberal democratic constitution easier. Popular participation and public pressure implied the danger of the intrusion of plebiscitary democratic forms that would leave their institutional traces in the outcome. The result, in their view, could have been a directly elected, strong presidency and a weak constitutional court. In actual fact, the establishment of a strong constitutional court was opposed in the end by only very small segments of society. Even if a large majority would have always preferred a directly elected presidency in principle, the public was certainly educable regarding its dangers in the transition period. The narrow

SZDSZ-FIDESZ victory in the referendum of 1989 proves that even direct democratic instruments could serve the interest of parliamentary democracy, given a sufficiently informative and well-designed campaign. By avoiding such participation in general, along with its very real risks, the Round Table participants endangered the democratic legitimacy of their work. The democratic forces kept their own work hidden, with the consequence that most of these parties themselves did not construct their identity around their own achievements of 1989.

What Went Wrong: the Deficit of Democratic Legitimacy

A constitution-making process might purport to meet the requirements of legitimacy if the political agents who participate in the making of the new constitution are authorized to do so in a relevant sociological rather than in a merely formal legal sense. That is, the constitution makers should be able to demonstrate sufficient popular backing—or better, popular belief in the justification—for their claim that they are giving a constitution to the people in the name of the people.¹⁰³

Certainly, the very idea of popular sovereignty implies that some form of non-institutional action should at least be involved at some point in the process of making a constitution. On the other hand, the empirically available “people,” as a mere multitude of individuals, is incapable of being drawn into the making of a constitution otherwise than ratifying it through a referendum, which may not be a very good way to organize participation or articulate a majority opinion. It follows, therefore, that the non-institutional agents whose inclusion in constitution making is normatively required by the idea of popular sovereignty will typically be some spontaneously emerging political movements or organizations—voluntary but partial associations of citizens. This inevita-

bly raises the question of democratic authorization. Are these noninstitutional political agents justified in claiming to represent the people? This question cannot be decided by abstract argument.

The existence or lack of such a popular mandate is in a crucial sense an extralegal reality. There is no general rule that would furnish the criteria for deciding whether or not, in a particular case, a popular mandate is obtained.¹⁰⁴ In a similar vein, although the demands of legitimacy with respect to the process of constitution making—primarily, transparency and open access for a variety of agents—may be articulated generally, there are no exact criteria to decide whether these conditions obtain in any one particular instance. These are, to a large extent, questions of political judgment and are open to contestation. There are a variety of ways to achieve the legitimacy of a constitution-making process. In a revolution involving legal rupture, the accomplishment of liberation from a hated old regime and the project of building a better future society together add up to what has been called revolutionary legitimacy. Revolutionary legitimation was in principle excluded, however, in the Hungarian context of legal continuity and a fully negotiated transition. But so was full democratic legitimacy for the makers of the interim arrangements that were the framework for the first free elections—agents who, logically, were not elected to perform that task. Thus, the EKA unsuccessfully fought against the project of creating a detailed interim constitution. When this fight was lost, the opposition had no interest in enshrining through democratic legitimacy based on participation, publicity, or popular ratification an interim instrument that they wished to replace after the first free elections. The political constellation developed, however, in such a way that there was opportunity only for yet another elite bargain, in 1990, concerning a package of constitutional amendments.

Thus, the absence of genuine political legitimacy carried over from the Round Table to all its successors, of which there were many, as they did not have to meet an established hurdle of a high degree of political legitimacy to change the constitution. The fragmentation of the process made its completion in the formal sense less and less likely. In principle, however, a many-stage constitution-making process allows for learning from what does not work to perfect the constitutional product.¹⁰⁵ This is what happened in the case of consensus democracy not only in South Africa but in Hungary even earlier.

For obvious reasons, negotiated transitions are likely to impose certain constraints on majority rule. There are two fundamental types of such constraints, one being a sharing of power among different agents, independently of the outcome of elections. This was the case in Poland and may be interpreted as a form of consensus democracy, where the different agents are forced to reach agreements on matters of policy. The other type might be characterized as imposing limits on what can be made a matter of policy to begin with—that is, on the scope of the legislative and executive powers in general. This version of restricting the rule of the majority is usually referred to as constitutionalism. Much of the Hungarian constitution-making process in its later phases may be described as a movement away from power sharing (or consensus democracy) toward constitutionalism. The movement was already discernible during the months of the national Round Table talks when, perceiving the changes in strength of the different agents, the ruling party gradually came to focus not so much on converting its power in institutional forms as on securing the institutional guarantees of the integrity of the persons and property of its members—that is, on the rule of law. One lingering element of power sharing was nevertheless retained in the MDF and MSZMP's compromise about the presi-

dency, though this compromise was removed by the referendum of November 1989, which represented a further step toward a unified yet constitutionally limited executive power. The agreement between the MDF and SZDSZ, the two largest parties in April 1990, then eliminated the vast majority of two-thirds laws, the single largest element of consensus in the new regime. The last important element of power sharing was removed from the constitutional order in 1992, when the Constitutional Court, arbitrating the conflict of competence between the prime minister and the president, ruled that such rights of the president as granted by the MDF-SZDSZ pact were against the constitution. Mainly due to the activity of the Constitutional Court, the normative and procedural constraints on the executive and the legislature became political realities of the new regime, to be reckoned with by all political agents.

Even though direct democracy, parliament, and the Constitutional Court all played their roles in a many-step process of constitutional learning, it does not follow that leaving a process open-ended and relying on the normal political process to eventually produce the material constitution has much promise in the long run. Empirically, such an approach tends to require reliance on the Constitutional Court as almost the exclusive method of self-improvement. An unelected Constitutional Court acting as “a constituent assembly in permanent session” may work in a country like the United States, which has made its constitutional tradition part of a civil religion.¹⁰⁶ In Hungary, where that tradition has little normative force, such a court only embodies and continually reexpresses the initial legitimation problems. Bruce Ackerman was right to warn that the activist practice of the Hungarian Constitutional Court was untenable in light of its “soft constitutional background.”¹⁰⁷ After the retirement of its great first chief justice, László Sólyom, the Hungarian court decisively retreated from

its activist role.¹⁰⁸ In its absence, learning is in the unreliable hands of parliamentarians, who without strong review cannot be stopped from unconstitutional constitutional revision in the form of ordinary legislation.¹⁰⁹

Beyond the Paradoxes of Hungarian Constitution Making?

Did what went right inevitably imply what went wrong? Would generating greater democratic legitimacy imply substantive losses with respect to the constitutional outcome? Was legal continuity and negotiated transition incompatible with a process that would produce democratic legitimacy?

Most certainly, proponents of constitutionalism in the sense of imposing procedural and normative constraints on the executive and the legislative branches of power—that is, the SZDSZ, FIDESZ, and some leaders of the MDF—were not strong enough during the summer of 1989 to shape the outcome to such an extent as is reflected by the liberal-democratic character of the finished product. That the Hungarian constitution-making process, despite its lack of democratic legitimacy, produced a liberal-democratic outcome can best be explained by the dynamics of negotiated transitions. More accurately, it is not so much some necessary internal dynamics of negotiated transitions as the material conditions that give rise to such a form of transition—primarily, the perceived weakness of agents and a relative veil of ignorance—that lead to outcomes that are truly liberal-democratic. On the other hand, the same material conditions usually lead to a sense of lack of legitimacy regarding the new regime. Such a legitimacy deficit runs through the entire twelve years of Hungarian constitution making.¹¹⁰

But was it inevitable that conditions in Hungary in 1989 could not have tolerated a more democratically legitimate process? We believe not. The distinction between up-

stream and downstream publicity that Elster describes allows us to see that while the presence of public pressure could have led to undesirable consequences for constitution drafting, the same would not have been true for a ratification process afterward, one that never took place. Granted, even during ratification, a substantively desirable constitution could be lost as it almost was in the United States in 1787–89, and as did in fact happen in France in 1946, and in referendums on a new European Union constitution in 2005. Nevertheless, democracy must imply taking a chance with uncertainty, even in constitution making. When coupled with a massive education effort as in South Africa, the degree of uncertainty can be greatly reduced.

The problem becomes more difficult, however, when one is dealing with an interim constitution that the relevant agents do not want to enshrine. The reasons for not engaging in an extended ratification process for extensive amendments to an authoritarian constitution—an inevitable artifact of legal continuity—are cogent. But it should be realized after the Hungarian experience that a constitution, even an interim one, can be enshrined *de facto* by pursuing a process of piecemeal constitutional engineering, as well as by the closing of the window of political opportunity for constitution making. While it may in principle be desirable to leave room for an extended learning period, that window may close fully before that period is over. In this respect, it would be important for future constitution makers operating within a similar set of procedures and constraints to avoid the mistake of Hungarian constitution makers, who postulated the interim nature of their constitution but provided neither a democratically enhanced procedure for making the permanent constitution nor a timetable armed with relevant sanctions for the production of the definitive document. While we cannot speak today of a definitive formula of constitution making

in fully negotiated transitions involving legal continuity, we should readily admit that the South African constitution makers surpassed all their Central European predecessors in elaborating such a project.

One point should be added about the connection between the procedural history of the making of the Hungarian constitution and the regrettable fact that none of the major agents of today's Hungarian politics construct their ideological identities around their role in the constitution making, even though the roles of the MDF, the SZDSZ, FIDESZ, and the Communists were, though different, very significant. Because of the rather protracted and multistaged character of the constitutional process, there was no single point that could be identified as the moment of the coming-to-be of the new constitution, when all the major actors gave their clear backing to the constitutional state of affairs. The October 1989 amendment that amounted to a substantively new constitution is the most plausible candidate, but at least some of the important agents did not endorse the arrangement that led to it. Similarly, at every other significant juncture—the referendum, the MDF-SZDSZ pact—at least some of the main participants felt alienated from the process. The October 1989 constitution, ratifying the Round Table's final agreement, left the SZDSZ and FIDESZ feeling betrayed and excluded. In turn, the outcome of the referendum in November 1989 left the MDF and MSZP feeling humiliated and deceived; more specifically, they claimed that the Hungarian people had been deceived by the tendentious grouping of the questions on the ballot. Finally, the MDF-SZDSZ pact estranged all those left out from the outcome. Therefore, even though over the years that have elapsed since 1990, all of these parties have pledged allegiance to the emerging arrangement, at least at the general rhetorical level, at no point during the long process of its coming to existence

could the new constitution claim the simultaneous support of all the actors that had a share in its making. Quite independently of the almost total absence of popular participation in the constitution-making process, this must have contributed to the fact that the symbolic political self-understanding of the new democratic republic does not center around the constitution—which, it is widely agreed among experts at least, is worthy of protection and respect.

Glossary

EKA — Ellenzéki Kerekasztal; Round Table of the Opposition. Formed in March 1989, to bring together six parties, one circle, and one independent union for purposes of negotiation with the ruling party.

FIDESZ — Fiatal Demokraták Szövetsége; Alliance of Young Democrats. Formed in March 1988 as a social-political organization of young activists. A political party after the negotiations. In parliament since 1990. Leading party of coalition 1998–2002. Most important early leaders: Viktor Orbán, László Kövér, and Gábor Fodor.

FKgP — Független Kisgazda Párt; Independent Small Holders Party. “Historical” party of middle peasantry. Biggest party of 1945–1948 coalitions. Recreated around old members in November 1988. In government 1990–1994; 1998–2002. Failed to win seats in parliament in 2002. Best known leaders: Imre Boross and József Torgyán.

KDNP — Keresztény Demokrata Nép Párt; Christian Democratic Peoples Party. Formed by mostly older activists of a variety of Catholic organizations (and lively Catholic subculture) in late 1989. In governmental coalition of 1990–1994. Failed to win seats in parliament in 1998.

MDF — Magyar Demokrata Fórum; Hungarian Democratic Forum. Formed by populist writers, and intellectuals and their supporters in 1987. Largest opposition (center-right) party in 1989, at which time won three by-elections. Winner of first free elections in 1990, and leading force of government 1990–1994. Failed to win seats in parliament as an independent party in 1998 and 2002, though several members entered with support of FIDESZ. István Csurka’s MIEP (Hungarian Truth and Life Party) is a right-wing offshoot that entered parliament between 1998 and

2002. Most important leader was József Antall, at least during the period of the Round Table.

MSZDP — Magyar Szociáldemokrata Párt; “historical” social democratic party, absorbed into the MDP (renamed Communists) in 1948. Recreated in January 1989, and since troubled by splits and scandals. Failed to win seats in parliament in 1990.

MSZMP/MSZP — Magyar Szocialista Munkás Párt, renamed in October 1989 as Magyar Szocialista Párt; Hungarian Socialist Workers Party, renamed in October 1989 as Hungarian Socialist Party. Successor to KMP, MKP, and MDP (different names of the Hungarian Communist Party). Ruling state party from 1948 to 1989. In parliament since 1990; leading party of government 1994–1998; 2002–present. Best known leaders in 1989: Karoly Grosz, Imre Pozsgay, Miklós Németh, and Gyula Horn.

Néppárt — People’s Party. Successor to the “historical” party of the peasantry, the Nemzeti Parasztpárt (National Peasants Party). Recreated by officials active in the Patriotic People’s Front, the Communist electoral front organization. Has failed to win any seats in parliament.

NKA — Nemzeti Kerekasztal; National Round Table. Met June 1989 to September 1989, and produced Round Table constitution.

SZDSZ — Szabad Demokraták Szövetsége; Alliance of Free Democrats. Inheritor of the democratic opposition of the late 1970s and 1980s. First formed as the Network of Free Initiatives in 1988. A liberal political party since November 1988. Main early leaders were János Kis, Bálint Magyar, Péter Tölgyessy, and Iván Peto.

Notes

1. Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham, MD: Rowman and Littlefield, 2000), chaps. 5 and 7.

2. Jon Elster, ed., *The Roundtable Talks and the Breakdown of Communism* (Chicago: University of Chicago Press, 1996); A. Bozoki, ed., *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy* (Budapest: CEU Press, 2002); S. Friedman and D. Atkinson, eds., *The Small Miracle: South Africa’s Negotiated Settlement* (Johannesburg: Raven Press, 1994); and Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Capetown: Oxford University Press, 1998).

3. See Carl Schmitt, *Verfassungslehre*, 7th ed. (Berlin: Duncker and Humblot, 1989), chaps. 6 and 8.

4. We are ultimately concerned with the sociological sense of the term *legitimacy* as established by Max Weber, having to do with a significant part of a population—at the very least, the main political and social elites (his “administrative staff”)—considering a political order as a whole or the government based on it (two different matters) justified or valid. This sociological meaning of the term is related but not identical to legal and moral philosophical meanings. We assume, *ceteris paribus*, that political orders and governments that can be justified by valid normative (moral and legal) assumptions shared by a political community will be legitimate in the sociological sense as well. But there is no one-to-one relation, and all things are rarely equal. Legitimacy in the sociological sense is undoubtedly also affected by performance as well the presence and effectiveness of delegitimizing ideologies. In the present study, not concerned with broader social and political matters, we have to assume a rough identity of legitimacy in the sociological sense with legitimacy in the normative sense. It is primarily in the latter area, however, that we detect a legitimacy deficit, and it is well worth asking for comparative purposes how this deficit came about, even if the translation into empirical legitimation problems has either not occurred or if these phenomena have been neutralized by factors such as relatively successful economic performance and joining the European Union. Such sources of compensation are evidently not always and everywhere available.

5. Bruce Ackerman, *The Future of the Liberal Revolution* (New Haven, CT: Yale University Press, 1992), chap. 6; Andrew Arato, “Constitutional Learning,” in *Theoria* 52, no. 106 (April 2005), pp. 1–36.

6. Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore, MD: Johns Hopkins Press, 1996), chap. 17.

7. Janos Kornai, “The Hungarian Reform Process: Visions, Hopes and Reality,” in *Crisis and Reform in Eastern Europe*, eds. F. Feher and A. Arato (New Brunswick, NJ: Transaction Publishers, 1991).

8. Arato, *Civil Society*, chap. 2.

9. The GDR Round Table produced a draft, but the Volkskammer did not enact it, either before or after free elections. Thus the Hungarian interim constitution was the first of the new genre. It did not, like that of South Africa, contain a procedure for fi-

nal constitution making. Thus it did not posit itself consistently and insistently enough as interim.

10. The preamble to the constitution states: “In order to facilitate a peaceful transition to a rule of law state that actualizes a multi-party system, parliamentary democracy, and a social market economy, the National Assembly—until the ratification of our country’s new Constitution—establishes the text of Hungary’s Constitution as the following.” *A Magyar Köztársaság Alkotmánya* (Budapest: 1990). Available at net.jogtar.hu/jr/gen/getdoc.cgi?docid=94900020.tv (accessed July 14, 2009).

11. The parliament fully enacted the interim constitution on October 23, 1989, on the anniversary of the uprising of 1956.

12. MSZMP (Hungarian Socialist Workers Party), the Communist Party, changed its name and identity to MSZP (Hungarian Socialist Party) on October 7, 1989, a social democratic party in terms of its intentions. The old name was kept by a small communist party that plays no role in this story. We will refer to the party before October 6–9 as the MSZMP and after as the MSZP.

13. Adam Przeworski, *Democracy and Market* (Cambridge: Cambridge University Press, 1991), pp. 54–66.

14. Bolivar Lamounier, “Authoritarian Brazil Revisited: The Impact of Elections on the Abertura,” in *Democratizing Brazil*, ed. A. Stepan (New York: Oxford University Press, 1989).

15. Przeworski might point out that today all three countries—Brazil, Chile, and Mexico—are democracies. But, first, we do not maintain that the reformist road, when tried, must succeed, only that it need not necessarily fail. Second, the time gained in these relatively slow transitions (ten years in Brazil and Chile, twenty years or more in Mexico) may be the functional equivalent of success for the relevant elites. And third, in all such cases, important preserves are won for the relevant elites that survive democratization.

16. Arato, *Civil Society*, chap. 1.

17. Rudolf Tokés, *Hungary’s Negotiated Revolution* (Cambridge: Cambridge University Press, 1996), pp. 189–90; István Kukorelli, *Igy választottunk* (Budapest: ELTE Állam- és Jogtudományi Kar, 1988).

18. Further research is necessary on this point. When a new round of reformism was decided on in Hungary, it took the much broader form of a reform package presented in terms of preemptive constitution making from above.

19. Laws 1989 II, III, and VII. See Jutasi in *Magyarország Politikai Évkönyve 1990* (Budapest: Országgyűlési Napló, 1990), 372; G. Halmi in *Magyarország Politikai Évkönyve 1988* (Budapest: Országgyűlési Napló, 1989).

20. Laszlo Bruszt, "1989: The Negotiated Revolution in Hungary," in *Social Research*, vol. 57, no. 2 (1990), p. 366.

21. "Social Movements and Civil Society in the Soviet Union," in *From Neo-Marxism to Democratic Theory* (Armonk: M.E. Sharpe, 1993), chap. 14.

22. M.A. Garreton, *The Chilean Political Process* (Boston: Unwin Hyman, 1989), pp. 132–45.

23. High-level Political Bureau delegations, including Imre Pozsgay, the leader of the reform faction, traveled to Warsaw to discuss the consequences of the Polish Round Table and their possible applicability to Hungary. See M. Kalmár, "Modellváltástól a rendszerváltásig az MSZMP taktikájának a metamorfózisa a demokratikus átmenetben," in *A rendszerváltás forgatókönyve*, vol. 7, ed. A. Bozoki (Budapest: Magvető and Új Mandátum presses, 1999 and 2000); *Alkotmányos forradalom*, pp. 287–88.

24. Csaba Tordai, "A harmadik köztársaság alkotmánya születése," in *A rendszerváltás forgatókönyve*, vol. 7, p. 482; K. Kulcsár, *Két világ között: Rendszerváltás Magyarországon 1988–1990* (Budapest: Akademia, 1994). Kulcsár was the last minister of justice before the free elections and his memoirs make for highly interesting reading. It should remind those like ourselves who disagree with his evaluation of top-down reform that there is an important case to be made for the positive role of such efforts.

25. Tordai, "A harmadik köztársaság alkotmánya születése," pp. 483–84.

26. Kalmár, "Modellváltástól a rendszerváltásig az MSZMP taktikájának a metamorfózisa a demokratikus átmenetben," pp. 288–89, versus Kulcsár, *Két világ között*.

27. This is true even of the last of the three constitutional proposals, which, however, was probably more a first statement of a negotiating position than an actual attempt at imposition.

28. Rudolf Tokés speaks of an implausible three-fourths of contents, though he admits that it was probably the new one-fourth that defined the character of the Round Table constitution. Later, however, he resumes treating that constitution as primarily the work of the Ministry of Justice. See "Intézményalkotás Magyarországon elemzési szem-

pontok és alkotmányos modellek," *A rendszerváltás forgatókönyve*, vol. 7, p. 167.

29. See Samuel Valenzuela, "Democratic Consolidation in Post-Transitional Settings," in *Issues in Democratic Consolidation*, eds. Scott Mainwaring, Guillermo O'Donnell, and Samuel Valenzuela (South Bend, IN: University of Notre Dame Press, 1992), pp. 57–105.

30. Most clearly put by Kalmár, "Modellváltástól a rendszerváltásig az MSZMP taktikájának a metamorfózisa a demokratikus átmenetben," p. 287ff.

31. See remarks by József Antall in A. Richter, ed., *Ellenzéki kerekasztal* (Budapest: Ötlet Kiadó, 1990), pp. 160–61; L. Lengyel, "A kerekasztal hóse" in *A rendszerváltás forgatókönyve*.

32. 1989: Amendment I on rights and on a constitutional court; 1989: Amendments VIII and IX on the possibility of a modified parliamentary vote of confidence; 1989: Amendment XVII on popular petition and referendums. These amendments presented needed democratic change but generally were poorly or incompletely formulated. Only the referendum amendment came to have real importance during 1989. The problem with the series of amendments was, however, even more procedural than substantive; they involved the danger of establishing an uncontrollable and mutable, top-down, gradual model of change. Thus the ruling party was forced to agree to a moratorium on further one-sided constitutional legislation at the start of the Round Table negotiations. See I. Kukorelli, "Az országgyűlés a többpártrendszer első évében," in *Magyarország Politikai Évkönyve* (Budapest: Aula-Omikk Press, 1990), p. 195, lamenting that the move interfered with the decision-making process of government and the normal working order of parliament.

33. The threat of new legislation was used as a club also during the Round Table negotiations, after the MSZMP formally agreed to suspend such unilateral efforts. See Kilényi at the July 27 meeting of the Middle Level Political Coordinating Council of the National Round Table in *A Rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben. II* (Budapest: Magveto, 1999), pp. 645–47.

34. See Bruce Ackerman, *We the People, Vol. 1: Foundations* (Cambridge, MA: Harvard University Press, 1991).

35. On the origins of these parties, see Tokés, *Hungary's Negotiated Revolution*, as well as the various writings of Bozoki and Körösenyi.

36. These parties were called historical because their forerunners were important in pre–World War II Hungarian history, especially in the coalition governments between 1945 and 1948. While old members played a role in their reorganization, it is generally assumed that so did various factions of the ruling party, the MSZMP, which wished to compete with Imre Pozsgay, who was involved in the formation of the MDF. For this reason, they were obvious targets for overtures from the ruling party at least until the Round Table agreements were concluded. None of this is meant to suggest that significant members of these parties did not at all times seek to play an honorable and independent role.

37. These were the three new organizations (MDF, SZDSZ, and FIDESZ), the four historical parties (FKgP, KDNP, MSZDP, and Néppárt), and one association (Bajcsy Zsilinszky Endre Baráti Társaság). The League of Independent Trade Unions (Liga) received only observer status.

38. For the best study by far of the negotiations, see András Bozóki in *Lawful Revolution in Hungary*, eds. Bela Király and András Bozóki (Boulder, CO: Social Sciences Monographs, 1995). Also see Tokés, *Hungary's Negotiated Revolution*.

39. See *A Rendszerváltás Forгатókönyve*, vol. 1, especially Bozóki's own essay.

40. Ibid., pp. 599–607; compare to pp. 88–90.

41. We are neglecting here that the Hungarian Round Table was, on the insistence of the MSZMP, “triangular.” The ruling party did not wish to see negotiations as a confrontation of the power and society or even as regime and opposition. See *A Rendszerváltás Forгатókönyve*, vol. 1, pp. 91–92. Thus a third negotiating partner, representing established official and semiofficial organizations, was insisted on. The opposition, however, managed to insist upon consensual decision making; thus, the so-called third side could not team up with the MSZMP to put through proposals. Their only significance was in floating trial balloons that deviated from the MSZMP line that it did not wish to immediately modify. This happened, e.g., when county lists (demanded by the historical parties of the EKA) were accepted first by the third side when the MSZMP still insisted on unified national lists for parties in elections. See *A Rendszerváltás Forгатókönyve*, vol. 3.

42. The reluctance of particular actors depended on party and professional affiliation. It seems to us that the SZDSZ and nonlawyers were most amenable to publicity on any level, while the MSZMP and the lawyers on both sides most insisted on excluding it. See debates in *A Rendszervál-*

tás Forгатókönyve, vols. I, II, and III; M. Vásárhelyi. Eventually the discussion moved on to the type and frequency of television coverage that would be provided. The overall contrast with Poland was obvious, although in Poland some important agreements were made privately at the Magdalenka Castle by a small group around Jaruzelski and Walesa. In Hungary, the existence of primarily nonpublic negotiating sessions also did not prevent most likely important additional private contacts between ruling party officials and important members of opposition parties.

43. See Bruce Ackerman, *The Future of the Liberal Revolution* (New Haven, CT: Yale University Press, 1992), chap. 6, “Judges as Founders”; Arato, *Civil Society*, chaps. 3 and 4.

44. János Kis, “1989: A víg esztendő,” *Beszédo*, vol. 4, no. 10 (1999), pp. 22–46.

45. *A Rendszerváltás Forгатókönyve*, vol. 4; see Bozóki and Tokés for two different views.

46. On the referendum see Kis, “1989”; Tokés, *Hungary's Negotiated Revolution*; Tordai, “A harmadik köztársaság alkotmánya születése”; L. Bruszt and D. Stark, “Remaking the Political Field in Hungary,” in *Eastern Europe in Revolution*, ed. Ivo Banac (Ithaca, NY: Cornell University Press, 1992); as well as the interviews with Antall and Tölgyessy in Richter, *Ellenzéki kerekasztal*.

47. Many ex-ministers and their expert advisers maintain that the process would have developed more smoothly if the opposition agreed to negotiate with the leaders of the government and not the party. We remain skeptical about the difference this would have made, and the noninclusion of those who controlled sovereign powers for such a long time would not have been or seemed safe in an epoch still marked by uncertainties. See Kulcsár, *Két világ között*.

48. In the latter case confirming Elster's position on the question of the institutional interests of constituted powers that participate in constitution making, against Tokés (*Hungary's Negotiated Revolution*), who is certainly mistaken in his belief that it was the hidden institutional interests of the Ministry of Justice that dominated in the process.

49. J. Schiemann, “A választási törvény megalkotása,” in *A rendszerváltás forгатókönyve*, vol. 7; Halmai Az, “1949 Alkotmány jogállamosítása,” in *A rendszerváltás forгатókönyve*, vol. 7.; See Arato on the negative aspects of electoral system in *Civil Society*, chaps. 5 and 6.

50. Tordai, "A harmadik köztársaság alkotmányának születése," pp. 494–95.

51. 1/1990 Constitutional Court Ruling.

52. The court was arguably wrong to do this; the referendum covered the first selection of a president, and only careless phrasing that left out reference to the parliamentary election that was already in the constitution (Article 29/A[1]) allowed the interpretation that the issue was merely that of timing and not mode of election. Of course, mode was as important as timing, or even more so, from the point of view of the petitioners. Parliamentary modification of the results of referendums was possible, but only after two years. An interesting feature of this decision was that the court ruled on the constitutional validity, to be sure only in the procedural sense, of a constitutional amendment.

53. Tordai, "A harmadik köztársaság alkotmányának születése," p. 495.

54. The twenty laws that remained subject to the two-thirds requirement fall into two main groups. Some of them concern fundamental liberties, such as the freedom of assembly and the freedom of religion, or they regulate the functions and powers of basic constitutional institutions, such as the judiciary, the prosecutor's office, and the electoral system. In actual fact, many of them have been subject to change since 1990. Neither did the number of two-thirds laws remain constant, as a few have been added to the list.

55. One especially unfortunate aspect of these, which had no significance for the 1990–94 positions of the parties, allows the president to dissolve parliament in forty days if his candidate for prime minister is rejected. The 1989 formulation, requiring at least four attempts, was obviously better, as we found out in 2002, when there was speculation that the current president could offer the office of prime minister to the largest party, which in fact could not form government, thereby forcing new elections in extremely polarized circumstances.

56. For the text of the pact, see *Magyarország Politikai Évkönyve* 1991.

57. See Tordai, "A harmadik köztársaság alkotmányának születése," and Szalay in *Magyarország Politikai Évkönyve* 1991.

58. Seventy-two percent of the mandates. It is thus probably true that József Antall made the gravest error when, on the basis of old-fashioned cultural nostalgia, he chose the Independent Small Holders (FKgP) and the Christian Democrats (KDNP) and not the SZDSZ and FIDESZ as his coalition

partners, an option that János Kis, the leader of the SZDSZ was quite inclined to, as was the FIDESZ leadership.

59. Magyar Köztársaság Alkotmánya (1949/XX), preamble.

60. This was further accentuated by the fact that László Sólyom, the first chief justice of the court, who all but dominated the first years of the court and shaped its self-understanding, had also been a prominent figure of the Round Table discussions on the opposition side. Thus, he might have felt doubly justified in spelling out rulings that substantively shaped the unfinished constitution-making project.

61. 23/1990 Constitutional Court Ruling.

62. This occurred in the case of abolishing the death penalty (23/1990). For an analysis of this ruling, see János Kis, *Alkotmányos demokrácia* (Budapest: INDOK, 2000), pp. 204–11.

63. On the role of the court in defining the presidency, see Andrew Arato, "Az Alkotmánybíróság a médiaháborúban," in *Civil Társadalom, Forradalom és Alkotmány*, ed. Andrew Arato (Budapest: Uj Mandátum, 1999).

64. On these formative years of the court, see András Sajó, "A 'láthatatlan alkotmány apróbetűi,'" *Állam- és Jogtudomány*, vol. 1–2 (1993), pp. 37–96; and János Kis, "Alkotmánybíráskodás a mérlegen," in *Alkotmányos demokrácia*, esp. pp. 200–57.

65. For the important distinction between material and formal constitutions, see H. Kelsen, *The General Theory of State and Law* (Cambridge, MA: Harvard University Press, 1945), pp. 124 ff, 258–60. We do not, however, accept Kelsen's idea that using a constitution's own amendment rule even to completely replace it would leave in place the same constitution, an idea that disregards his own distinction between formal and material.

66. S. Holmes, "Back to the Drawing Board," in *East European Constitutional Review*, vol. 2 (1993/1), pp. 21–25.

67. Ackerman, *The Future of the Liberal Revolution*; Arato, "Constitutional Learning."

68. Arato, "Refurbishing the Legitimacy of the New Regime: Constitution-Making Endgame in Hungary and Poland," in *Civil Society*, pp. 199–228.

69. Halmai, *Magyarország Politikai Évkönyve*; Arato, *Civil Society*, chap. 7.

70. Hungarian politics is increasingly shaped by the hardening of two major blocks, which are themselves internally heterogeneous. The socialist-

liberal side is emphatically pro-Western, favors privatization and integration into the international economy, and draws support mostly from the urban, professional middle classes, the elderly, and the ranks of the former Communist party and bureaucracy. The right-of-center block is more open to economic protectionism, less enthusiastic about international integration, and draws support from the rural, agricultural population, small to mid-size entrepreneurs, religious voters, and the younger generation of voters.

71. Ackerman, *The Future of the Liberal Revolution*.

72. For the Hungarian case see Kis, Haraszi, and Solt, *The Social Contract*, samizdat 1987, that involved a creative constitutional package as well as the first open declaration that "Kadar Must Go!"

73. One of the authors of this case study, Andrew Arato, played a very occasional role as an expert of the SZDSZ, in constitutional matters, as well as a more formal role submitting drafts to the parliamentary drafting committee (in 1995–96) concerning the electoral law and the constitutional amendment rule. In both cases, however, Arato was asked to participate as a Hungarian rather than foreign expert.

74. Nevertheless, the latter was done once, in 1993, when the government, with the tacit consent of the largest opposition party, raised the electoral threshold from 4 to 5 percent.

75. Hungary was a monarchy until 1945, in theory with a responsible parliament, a parliamentary republic from 1945 to 1948, and formally even after. See, e.g., Antall's remarks at the last plenary session of the National Round Table, in *A Rendszerváltásforgatókönyve. Kerekasztal-tárgyalások 1989-ben*, vol. 4 (Budapest: Új Mandátum, 2000) pp. 499–500.

76. Constitution of the Republic of Hungary, art. 29(A).

77. Constitution of the Republic of Hungary, 1989 text, art. 40(1).

78. See also the text of the last plenary session of the National Round Table in *A Rendszerváltásforgatókönyve*, vol. 4, pp. 499–507 and note 18.

79. See Antall in Richter, *Ellenzéki kerekasztal*, p. 163.

80. See Kulcsár, *Két világ között*, who, however, mentions no quid pro quo, and most recently Lengyel, "A kerekasztal hosei," who denies a special deal by affirming in effect an even wider and

more pervasive collaboration between Pozsgay and Antall.

81. This eventually became Antall's position; see remark attributed to Tölgyessy by Lengyel, but see Antall's denial of explicit coordination with the radical opposition in *Ellenzéki kerekasztal*, pp. 164–65.

82. See Przeworski, *Democracy and Market*; Schiemann, "A választási törvény megalkotása," and Halmai, *Magyarország Politikai Évkönyve*.

83. See Halmai, *Magyarország Politikai Évkönyve*.

84. *A Rendszerváltás forgatókönyve*, vol. 3, p. 649; see *Magyarország politikai évkönyve 1990* for the legislation.

85. SZDSZ, *Rendszerváltás programja* (Budapest: SZDSZ, 1989).

86. For the formal position of the EKA, see Arato, "Az Alkotmánybíróság a médiaháborúban," p. 612. For a vigorous debate on this position see remarks by Tölgyessy and Kilenyi in *Ellenzéki kerekasztal*, pp. 649–50.

87. See the September 15, 1989, Middle Level Political Coordinating Council of the National Round Table in *A Rendszerváltás forgatókönyve*, vol. 4, pp. 410–13.

88. Undoubtedly many of the elements of the eventual design for the constitutional court came from reform communist drafts. But Kulcsár's argument that he and vice minister Kilenyi actually wished for the stronger model, did not introduce it for tactical reasons, and were happy when the opposition forced through its points is unconvincing and unverifiable. See *Két világ között*, pp. 252–53. Ultimately what matters is not what these politicians believed but what they proposed. Kulcsár omits from his list the expansion of standing in front of the court, successfully demanded by the opposition.

89. September 18, 1989, session of the EKA; September 18, 1989, Middle Level session of the National Round Table, *A Rendszerváltás forgatókönyve*, vol. 4, pp. 450–51, 472–79.

90. The distinction is papered over by Arend Lijphart in *Democracies*, in which he treats constitutionalism as a dimension of consensus democracy.

91. Kulcsár implies, but supplies no proof, that the conception originated with Tölgyessy, who claimed that it was the MSZMP. See *Két világ között*, p. 261. In any case, the idea of constitutional laws that can be changed only by qualified majorities seems to have been in the draft conception of a new constitution brought to parliament by the

Ministry of Justice in April–May 1989. See Tokés, *Hungary's Negotiated Revolution*, p. 163, who cites the text *Igazságügy Minisztérium—Magyarország Alkotmánya—Szabályozási Koncepció*. We do not see, however, why he claims that parliament received some kind of veto right thereby, in a conception that otherwise sought to limit parliamentary sovereignty in a variety of ways. See also Tordai, “A harmadik köztársaság alkotmánya születése.”

92. 4/1990 Constitutional Court Ruling.

93. Jutasi, *Magyarország Politikai Évkönyve 1990*.

94. 4/1990 Constitutional Court Ruling.

95. Jutasi, *Magyarország politikai évkönyve 1990*.

96. Tordai, “A harmadik köztársaság alkotmánya születése.”

97. See D. Atkinson, “Principle Born of Pragmatism? Central Government in the Transition,” in *A Small Miracle*, eds. S. Friedman and D. Atkinson (Pretoria: Raven Press, 1994); R. Schrire “The President and the Executive,” as well as the other essays in *South Africa: Designing New Political Institutions*, eds. M. Faure and J.-E. Lane (London: Sage, 1996).

98. Bruce Ackerman, *We the People*, vol. 1 (Cambridge, MA; Harvard University Press, 1991), chap. 1.

99. Istvan Csurka, “Meg nem történt forradalom” in *Csendes, Forradalom, Volt*, ed. András Bozóki (Budapest: Twins, 1992); “Az alkotmánybíróság döntéséhez,” in *Magyar Fórum*, March 12, 1992.

100. Arato, *Civil Society*, p. 3.

101. See Hannah Arendt, *On Revolution* (New York: Penguin Classics, 1990).

102. See Mária Vársárhelyi, “A tárgyalások nyilvánossága, a nyilvánosság tárgyalása,” in *A rendszerváltás forгатókönyve*, vol. 7, p. 575 ff.

103. Arato, *Civil Society*, pp. 69, 124–25; Kis, “Between Reform and Revolution,” *Constellations* (January 1995), p. 405.

104. Schmitt, *Verfassungslehre*.

105. Holmes, “Back to the Drawing Board.”

106. Woodrow Wilson in Arendt, *On Revolution*.

107. Ackerman, *The Future of the Liberal Revolution*.

108. Halmai, *Magyarország Politikai Évkönyve*.

109. Kelsen, *General Theory*, p. 155 ff.

110. The material structure of the Hungarian negotiations based on two weak sides was first stressed by Bruszt and Stark, “Remaking the Political Field.”