Post Sovereign Constitution-making in Hungary:  
After Success, Partial Failure, and Now What?  
Andrew Arato

PART ONE

The study reconstructs what the author calls the model of post sovereign constitution making, namely the multi stage, democratic model with a round table or multi party negotiations as its center piece, involving two constitutions, with a free election in between, with important role for legality and its enforcement through a constitutional court. This is the model that was more or less perfected in South Africa in the 1990s. In comparison, Hungary, the empirical object of the study is seen as an imperfect realization, because here the final stage, not provided for in the interim constitution was not completed in a democratic process. The author thus sees the role of the Hungarian Constitutional Court as compensatory, and inevitably weakening given the weak legitimating background provided for by the incomplete process. A case in point focused on by the study is the jurisprudence of constitutional amendments. In light of the inherited amendment rule, the constitution of the regime change could only be reliably protected if the Hungarian Constitutional Court adopted one or another version of amendment review, in the path of the Indian Basic structure doctrine. The study tries to show that a 4/5 rule concerning constitutional replacement adopted during an unsuccessful effort at constitution making could be a textual support for such a review. Subsequently to the writing of the study, the new right wing Hungarian parliament abolished the 4/5 rule, by using the 2/3 amending rule. This in the view of the author of the study is prima facie unconstitutional. ¹

Introduction

Without being fully aware, Hungarians have been pioneering participants in a dramatic new method of democratic constitution-making, one that I call post-sovereign in the sense that the constituent power is not embodied in a single organ or instance with the plenitude of power, and all organs participating in constitutional politics are brought under legal rules.² Lack of adequate understanding of this method, and what it has accomplished, as well as its deliberate devaluation by some, has contributed not only to the realization of only an incomplete version. It also involves the significant danger of returning to sovereign constitution-making, via parliamentary sovereignty, that is strangely enough inherited from the Communist past’s paper constitution.

The elements of the method of constitution-making I have in mind go back to the American Revolution, and some experiments in more recent French history (1945-46), as well as the making of the Grundgesetz. More significantly, it was revived in a new and much more generalisable way in Spain in the 1970s, was practiced under severe constraints in Poland in

¹ Even when the useful example of the South African constitution makers is not followed in making entrenching clauses reflexive (art. 74 (1) higher forms of entrenchment -as those in the U.S. art. V. or the Grundgesetz 79 (3) - must be assumed to be self-referential. Otherwise they would not to lose their meaning if the amending power followed two step procedures, the first of which removing the surplus-entrenchment, and the second the limitation (concerning e.g. equal representation in the U.S. in the senate or human dignity in Germany).
² The principle of sovereignty at issue in international law is not at issue here.
1989, and then more widely in Central Europe in the years of regime change 1989-1990, before it was finally perfected in the Republic of South Africa in the 1990s. It was still practiced in Nepal in the present decade, before the rise of ethnic-identity politics came to deform an otherwise promising process whose outcome is now highly uncertain. Its key characteristics are a two (or more) stage process of constitution-making, with free elections in between, and an interim constitution (or constitutions). The underlying idea, unfortunately all too poorly understood, is to apply constitutionalism not only to the result but also to the process of constitution-making. This method, when fully realized, is the democratic alternative to revolutionary constitutional politics that all too easily steps over the threshold to dictatorship. But it is ultimately also different than reformist constitution-making, because the type of legitimacy it seeks to generate does not depend alone on the legality of ordinary legislative powers. It is the constitution-making method appropriate to an independent modality of fundamental political transition, beyond the reform and revolution dichotomy.3

The South African case demonstrates both the underlying idea, and the specific elements of the new method. The fundamental idea, within an overall democratic method, is to apply constitutionalism not only to result but also to the democratic process of constitution-making. The method turns on the following essential elements:

1. A two stage process and the making of two constitutions, where the making of the first constitution regulates and binds the making of the second. (Substantive limits like the famous 34 principles of the South African Interim Constitution are unique and not universal features of the new process).

2. Round-table negotiations that lead to the making of the first constitution. Here the important thing is not the name (for instance in South Africa, the Multi Party Negotiating Forum and CODESA), but the relative inclusiveness of these bodies that replace. They cannot and do not claim electoral legitimacy. Their legitimacy turns on multi-vocal or pluralistic civil society representativeness.

3. An emphasis on legal continuity throughout the transition. Central to this continuity is the formal role (indeed strictly formal role) of parliamentary institutions of an old regime in ratifying the initial changes, including the interim constitution, according to an old amendment rule.

4. The significant role of constitutional courts, generally created by interim constitutions, in policing the procedural (in South Africa also substantive) limitations stipulated by first or interim

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3 For further articulations, cf J Kis ‘Between Reform and Revolution: Three Hypotheses about the Nature of Regime Change’ (1995) 1 Constellations 3 and ‘Between Reform and Revolution’ 1998 VOLUME East European Politics and Society PAGE; A Arato Civil Society, Constitution and Legitimacy (2000); A Arato ‘Constitutional Learning’ (2005) 44 Theoria 1; A Arato Constitution-making under Occupation. The Politics of Imposed Revolution in Iraq 2003-2005 (2009), especially chapters 1 and 2. This was also the method that was reluctantly adopted in Iraq by the country’s American rulers in a very pathological and unsuccessful form. The method may well have been compromised by this miss-application. Already, in Latin America, in the Andean republics, the alternative of revolutionary-populist sovereign constitution-making has re-appeared, and after Iraq it will offer itself, in spite of the already authoritarian processes and predictably authoritarian outcomes as the better, more radical and indeed the more democratic alternative. People may very well forget South Africa, and may remember Iraq when interim constitutions and binding constitutional assemblies will be raised as political and legal options.
constitutions. The initial refusal of the South African Constitutional Court to certify (thus invalidating in effect) the final constitution was extraordinary in this regard, but in line with the basic logic of the method.

5. The central role of a democratically elected assembly in drafting the second and final constitution. This assembly is different from the classical European type of constituent assembly, given the limitations of the interim constitution to which it is bound, but also different from the merely ratifying role of the American convention of 1787-1788 (the latter could agree or reject, but could not contribute to the drafting process). The choice of the name “constitutional assembly” instead of “constituent assembly” in South Africa was especially fortunate.

The Hungarian case of post Communist constitution-making represents an early version of this paradigm, one that has made a significant contribution to its development. This was the first case where the characteristic institution, the Round Table could operate without fear of outside interference. It was also the first case where a developed interim constitution was first produced, intentionally so, something that even the democratic opposition did not initially want. And it is also here that the logically (if not empirically) important role of the constitutional court in constitution-making during the process first made its appearance. 4 Yet because of its obvious incompleteness, and less obvious structural as well as legitimacy problems, the Hungarian case is not likely to provide much justification to those few at present who consider both this form of constitution-making and the type of transition associated with it to be an exemplary object of constitutional learning. Those who wish to make a general case for post sovereign constitution-making, as against reformist and revolutionary models, will have to rely more on the South African experience.

In Part One of this essay, I present the developed new paradigm of constitution-making, as it has been fully realized in South Africa, making the relevant comparisons with the two classical models of democratic constituent power originating in America and France. With respect to each element, I would like to indicate whether or not the Hungarian model anticipated and fulfilled the requirements of the developed version. Speaking of partial failure involves no unfair projection from a model to a specific historical case because many Hungarians were themselves conscious of adopting crucial devices from Spanish and Polish forerunners. Yet it is not a question of blaming the actors, especially in the beginning. I believe that to an important extent this partial failure, the epitome or essence of which is the amendment rule that has remained unchanged to this day, was very likely due to the pioneering role itself.5

Omissions of one or more of the elements of the method are theoretically interesting (and historically understandable) but politically troublesome. All components of the model are significant and mutually reinforcing and none should be neglected. This is especially true for the role of the constitutional court. This is an essential element of the new method and its omission

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4 In the literature, A Bozóki’s, G Halmai’s and Cs Tordai’s essays on this process are the best and most reliable. Cf A Bozóki et al A rendszerváltás forgatókönyve: kerekasztal-tárgyalások 1989-ben Vol 2 (1999/2000). J Kis’ essay ‘Reform és forradalom közt’ remains the theoretical centrepiece of this volume.

5 Cf M Brzezinski The Struggle for Constitutionalism in Poland (1998) 89 for a discussion of a similar development in Poland.
has always met with negative consequences.\(^6\) Part Two highlights the seriousness of omissions, but also shows how one might compensate for them. It emphasizes the role of the Court in Hungary, even larger than the role of the Constitutional Court in South Africa, in actually constituting (instead or merely enforcing) the new order.\(^7\) However, I also show that the judicial compensation for the lack of the second stage of the constitution-making program that would have completed the process was far from perfect and perhaps could not have been otherwise, as some decisions of the Hungarian Constitutional Court demonstrate. The shortcomings of this judicial compensation for the completion of the process surely show how this incompletion still hangs like a sword of Damocles over the constitution and indeed Hungarian constitutional democracy, even though this threat has appeared to be less grave lately.

Given the evident failures by both the Hungarian parliament and Court, the essay cannot end, as I would have preferred, in a very optimistic manner. Yet, understanding what has and has not been done, provides helpful clues for remedial action that may become necessary should a serious challenge to the Constitution arise.

I. The Two Stage Process and Interim Constitution

All constitution-making involves many events and several stages. What gradually emerges from the Spanish (1975 to 1977) and South African (1991-1996) examples is the new reliance on two drafting stages that foresee from the outset the interlinked production of two constitutions, an interim and a final one, where the rules of the first constrain the making of the second. The existence of a fully developed, explicitly interim constitution is the most important documentary evidence of the new paradigm of constitution-making. It successfully combines the need for a provisional government with the requirement of subjecting this government to constitutional limitations. It further combines the need for flexible constitutional learning in the early stages of constitution-making with the requirement that the new constitution be insulated against easy alteration.

Many successful constitutions like the U.S. Federal Constitution, the Grundgesetz, and the Constitution of the Vth Republic were parts of learning processes involving two constitutions with long or short crisis periods in between. However, in none of these cases were the initial

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\(^6\) For instance in Iraq. Cf Arato *Constitution-making under Occupation* (note 2 above).

\(^7\) My stance on Hungary has not changed since my first writings on the subject. Cf Arato ‘Dilemmas Arising out of the Power to Create Constitutions in Eastern Europe’ 1992 *Cardozo LR* (later taken up again in M Rosenfeld (ed) *Constitutionalism, Identity and Difference* (1994)) as well as the two part article A Arato ‘Constitution and Continuity in the East European Transitions I: Continuity and its Crisis’ 1994 (1) *Constellations* 92; and A Arato ‘Constitution and Continuity in the East European Transitions II: The Hungarian Case’ 1994 (1) *Constellations* 306, as chapters 1, 2 and 5 of *Civil Society, Constitution and Legitimacy* (note 2 above). For the record, I have always advocated the “the revision of the revision” (revision of the amendment article in the Constitution), endorsed the case for differentiating between rules for constitution-making and mere amendment rules and stressed the multi-tier Bulgarian constitutionalism as the best example of democratic constitutionalism. What is new in this article is a clearer recognition of constitutional review in enforcing the multi-tier structure and the difference between constitution-making and amending. I refer in this regard to the compensatory role of the Hungarian Court (and its Indian antecedent) in finishing the unfinished constitutional process in Hungary. Against this background, the chapter title ‘Judges as Founders’ in B Ackerman’s *The Future of Liberal Revolution* (1992) is not all that exaggerated.
constitutions, the Articles of Confederation, the Weimar Constitution or the Constitution of the 4th Republic, said or meant to be interim or provisional. The successor constitutions were also not made according to the rules of amendment of their predecessors. It is also possible to regard the making of a single constitution like that of the U.S. in 1787 as involving multiple actors or instances: the Convention, Congress, and the ratifying Conventions. But as the anti-federalists specifically charged, only one of these instances could play a role in the actual drafting the document, and the state Conventions were denied the power to do anything but to ratify or reject the document as a whole. In the new, emerging paradigm there are at least two instances that play a fundamental role in the drafting process: the instance that drafts the interim constitution, typically a round table of major political forces, and an instance that drafts the final document, always a freely elected body that should not be called a constituent assembly (une constituante) in the French terminology at least. In addition, parliaments inherited from a previous system, ministries of justice, and constitutional courts too may play a role.

In my view, it is above all this two stage character that is the key to the idea of post-sovereign constitution-making. With respect to the procedures in France in 1791 and 1848 (hereafter invoked as French Model I) the post-sovereign model envisages no instance that can claim to represent in the absolute sense the sovereign will of the people. But also with respect to the procedures in France in 1793-1795 and 1945-1946 (hereafter invoked as French Model II) and the procedures in Massachusetts in 1780 and Philadelphia in 1787 (hereafter invoked as the American Model), there is no supposed incorporation of the people in a “two body” version where the natural body of the people in a referendum or the organized body of the people in a convention checks through its yes or no the compliance of the will of the assembly with the people’s will. If the people can be said to be present in the new type of constituent process this is so in a plural, complex and always limited way that has neither the possibility of the absolute no of the referendum, nor the unlimited constituent power incorporated in an assembly.  

The issue of stages and the related issue of the interim constitution unmistakably show that the Hungarian process of constitution-making both anticipates the new model, and yet does so in an incomplete manner. Thus there are admittedly different ways of understanding this constitutional history. Evidently it could be regarded either as fundamentally a two stage process, with a failed final stage of making a new constitution in 1996, or because of the failure of that final stage, as a single stage major constitutional revision followed by amendment packages, as well as transformational court decisions, or even as a fundamentally fragmented

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8 Jefferson supported this argument in some letters. See ‘To A. Donald’ February 7, 1788 and ‘To Francis Hopkinson’ March 13, 1789 in A Koch & W Peden (eds) Thomas Jefferson (1944).

9 It is true that there was one important anticipation of the interim constitution within a classical democratic model, namely in the French Model II in 1945-1946 when a referendum was asked to approve a very short set of regulations (La loi constitutionnelle du 2 Novembre 1945) as a “préconstitution” (or: “la petite constitution”) that would minimally bind the constituent assembly to be elected during the same voting procedures as well as the provisional government. But neither the limited contents nor the extent of the limits on the constituent assembly make this important forerunner an actual example of the new model. The importance of a referendum authorizing the préconstitution, which in turn established another referendum to control the work of the assembly, requires that one treat this as a deviant or transitional case of sovereign constitution-making. In contrast, the new model does not involve referenda. When referenda do play a role in actual cases of the post-sovereign model, these cases can also be regarded as deviant or pathological, for example in Iraq.
process. Given international comparisons, I prefer to do the first. The interim constitution turned out to be a permanent one. It is still in effect 20 years later.

In summary then, the Hungarian process, in its intentions, anticipated the structural two-stage model with the interim constitution as its center-piece. But the result turned out to be different from what was intended. We should, however, not over-emphasize this divergence. Some of the goals of the new method were already actualized in this imperfect form and the process, however, incomplete, still meets the demands of constitutionalism. That was dramatically confirmed when all parties rigorously adhered to all referendum and election results following the promulgation of the interim constitution. And the fragmented multi-stage process, though not equal to the successful two stage one, allowed similar processes of constitutional learning. An example in this regard was the removal of the extreme consensual requirements in the first big amendment package of the Summer of 1990. This move echoed the South African catch-phrase “from consociationalism to constitutionalism”.

II. Round Table Agreements, Free Elections and Non-Sovereign Constitutional Assemblies

The interim constitution helps with subjecting the process of constitution-making to constitutionalism, but not with the vexing problem of how to begin democratically or at least legitimately in the absence of an already existing democracy. However, the disadvantage is really an advantage. The legitimating principles relied on in revolutionary and reformist constitution-making only disguise the fact that unitary imposition by an actor that has the power cannot be easily legitimated by either the credits earned in a liberation struggle (revolution) or by adherence to (reform) procedures under a constitution that were not designed to replace one basic law by another. Thus, unlike its rivals, the fully developed post-sovereign model becomes a veritable workshop that produces much of the legitimacy it lacks in the beginning.

The famous round tables from Poland to South Africa (under whatever name) substituted principles like adherence to the rule of law, publicity and pluralistic inclusion of the main political forces for the missing principle of democratic legitimacy. This act of replacement is almost always accompanied by consciousness, in varying degrees, of the lack of full representative status that only electoral legitimacy could provide. This consciousness affects the degree to which the round tables can fashion constitution-making rules for the freely elected constitutional assembly for which it only prepares the way. These qualms have misled many interpreters and especially hostile critics. In most of the cases these very qualms informed a crucial element of the model, namely the recognition that the final constitution had to be the work of a freely elected parliamentary assembly, and not some commission chosen by the executive, or even an assembly put together on the bases of a bargain as in Poland in 1989.

Evidently, the round tables are new institutions when compared to the drafting assemblies of the two French Models and even the American one; they are not the makers of the final constitution. But they have been compared plausibly to the drafting convention of the

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10 Note that this last problem can never be solved rigorously: The French constitution makers of 1945 (mainly René Capitant, it seems) who tried desperately and creatively by putting elections and a referendum at the very beginning of the process, inevitably remained exposed to the charge that they determined the electoral rule undemocratically (that is, before the elections and referendum).
American model, given their co-existence with the ordinary legislative body, the normal operations of which continue without interference, and the formal supremacy of which is recognised by the requirement that it consents to the drafting process. They are juridically slightly weaker but politically much stronger than the American convention in its last and final form of appearance, as pioneered in Massachusetts and Philadelphia. Legally, the round tables are only private gatherings with no public law status. But given the role of the old ruling party in the negotiations their agreements generally amount to much more than mere recommendations that can be turned down by ratifying bodies. The official parliaments that must approve the interim constitutions for the sake of formal legality can only initiate marginal changes and sometimes not even that. Hungarian exceptions to this rule, and they too were only exceptions, are unusual.

The constitutional assemblies of the model are new as well. They are different from the French and American models because of the limitations to which they are subjected, even if they are given special names like the Grand National Assembly in Bulgaria, or where the distinction between constitutional and constituent assembly is fudged. The limitations can admittedly be as thin as having to work under the amendment rule of the interim constitution or under ratification rules provided by that constitution for the final process, but they can also be extensive. They can include voting rules, the composition of the constitution-making committee, their voting rules, the role of outside inputs, the length of time allowed for the process, mechanisms for new elections in case of failure, etcetera. Some of these restrictions (especially time frameworks) could be applied to traditional constituent assemblies like the two 1946 assemblies in France, but the number of possible procedural limitations and especially the restrictions on majority rule here are very new. Of course we should not mistake these external and prior restrictions with restrictions that a sovereign assembly establishes entirely for itself after its first meeting.11

Again, the Hungarian case anticipated much of the above, but only incompletely so. The Hungarian National Round Table was in fact the first genuine example of the type. Unlike the great Polish predecessor, it was distinguished by two advantages, namely, much greater inclusivity and the ability to work without external constraints. The first advantage (an element of legitimation) is a function of initial disadvantage. In the absence of one great societal movement, the small parties and multiple movements first had to be brought together to constitute a viable force capable of negotiating with the leaders of the existing regime. This was the task of the unique and creative institution, the Roundtable of the Opposition. It embodied a method of pluralistic inclusion. Interestingly, but unfortunately, given its pluralistic inclusivity, the Hungarian opposition imagined that it could agree to a greater exclusion of public scrutiny over the whole round table process than its Polish predecessor, where the level of public scrutiny, a crucial factor in the creation of legitimacy, was exemplary. As regards the second advantage, it was precisely from the results of the Polish elections that the actors of the

11 Other historical parallels must not mislead one. It is true that the South African interim constitution’s provision for electing a two chambered legislature that would meet under one roof as the constitutional assembly was anticipated by the French 3rd Republic. But under the South African system it was the amendment rule that involved this provision, while the national assembly that made the original constitutional laws of 1875 was unicameral, entirely unbound and could have made no senate if it so desired. The South African constitutional assembly thus represented the new model with respect to all our older historical predecessors.
Hungarian Round Table realized that they did not have to make undemocratic concessions to the incumbent regime, as Solidarity did.

It would be fundamentally incorrect to deny the “legitimacy production” of the first stage of the process and of the Round Table as does A. Kőrösenyi, the most sophisticated spokesman for this politically motivated position. Kőrösenyi’s views can be criticised on many grounds, but it is important to note here his contention regarding the lack of consensus that burdened the process. His understanding of consensus clearly excludes the possibility of fair compromises in the face of actual cases of dissensus. His views in this regard is mistaken. Consensus cannot mean that there is agreement of competing parties about the best constitutional package. Were that the case, no constitution would ever be made, except ones imposed by single actors. Constitution-making only requires agreement about some fundamental principles like constitutional democracy, competitive elections, fundamental rights, and eventually the acceptance of a particular solution that all parties can consider as a second best, preferably the result of some kind of fair compromise based on the aggregation of views. There was certainly such an agreement at the Hungarian Round Table, if not at the beginning then at the end. Moreover, the parties that did not sign, did not disagree concerning the public law package agreed upon as Kőrösenyi suggests. They disagreed only about a political choice to have a once-off popular presidential election brought up early.

I agree that the Hungarian process created serious legitimacy problems, but these problems concerned two other aspects of legitimacy production that pertain to the missing or unsuccessful second stage of the process, the election of a constitution-making assembly. Hungary certainly had free and fully competitive elections, the first of which (1990) led to an important round of constitutional amendments. The second (1994) was supposed to lead to the making of a new constitution. The electoral campaigns, however, were conceived in terms of regular parliamentary elections. Constitution-making, and even less its principles, was never announced by any of the parties as their major project. There were no rules enacted for constitution-making and ratification apart from mere amendment rules, neither at the Round Table (as in South Africa), nor before the election of any of the relevant assemblies (as in Poland).

The drafting assemblies of the developed model are not sovereign constituent assemblies, but they are meant to be elected or constituted for the purpose of constitution drafting. They are meant to be more than ordinary parliaments, hence the use of terms such as “Grand National Assembly” in Bulgaria, “National Assembly” in Poland, the fortunate invocation of “constituent assembly” in South Africa, and the less accurate invocation of “constituent assembly” in Nepal. In Hungary too there were early calls in 1989 for a national constituent assembly. The democratic opposition then rightly understood this tactic as a way of calling for elections before rules of the game could be agreed upon, and the first free elections along with the constitution-making process could be controlled by forces of the old regime – most likely reformist ones. This fear was valid, but an unfortunate consequence has been a flat rejection of

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13 Brzezinski (note 4 above) 89-90.
the formula of a special assembly dedicated to constitution-making - including a type under pre-existing rules.14

More significantly than mere nomenclature, the rules of constitution-making for all these assemblies from Poland to South Africa and even Nepal were different than the amendment rules under which the interim documents were made, and for that matter also those of the new constitutions. The Hungarian constitution was changed in 1995 so as to usher in a new amendment rule and the Parliamentary House Rules were modified to create a new rule of the making of a new constitution. However, these amendment rules differed significantly from constitution-making rules in Poland, Bulgaria, and South Africa. In the latter cases, the new rules that bound the constitution-making parliaments were introduced through previous amendment rules (Poland) and by the Round Tables that enjoyed special legitimacy. In Hungary the new amendment rules appeared only as a form of self-binding. Incredibly enough, not only the modification of the House Rules, but also the validity of the amendment rules were linked to sunset clauses based on the tenure of the parliament that enacted them.15 Moreover, with the failure of that effort in 1996, the operational constitution changing rule, the amendment rule, art 24(3), remained identical to the amendment rule of the Communist Constitution of 1949. This rule was based on parliamentary sovereignty. As such, it remains a threat to everything else that was accomplished.

III. Legal Continuity and the Use of Amendment Rules

The post-sovereign model of constitution-making generally avoids the notion of a state of nature in which one line of thought from Sieyès to Schmitt situates the pouvoir constituant. The illegalities that attached to Philadelphia Convention’s break with the amendment rules of the Articles of Confederation also brought the notion of a break in the chain of law and thus of an interim state of nature to the fore. All the characteristic cases of the new model, from Spain to South Africa, involve no legal break between the old and the new. Generally the new regimes in these cases relied on the old regime’s amendment rule to accomplish revolutionary change through legal means.

However, two reservations need to be made regarding this issue. First, it is the amendment rule of the formal constitution that is used, which may not have been ever seriously treated as the old regime’s actual rule of change. Indeed the legality that is being preserved in many of the cases is fictional, or is rather created for the occasion, since the old regime’s were dictatorships with paper constitutions that may have routinely disregarded and not only violated their own ritualized legality. Second, when an amendment rule is used for real for the first time there is always a risk that it will be unusable in practice, irrespective of whether the amendment rule derives from a previous rule of law regimes or from dictatorships, as many historical examples

15 Between 1994 and 1997 the question whether the moratorium on ordinary amendments, provided for in the rules, should be revoked was discussed repeatedly. I would argue on the bases of considerations below, that regarding amendments that amounted to a new constitution such a move would have been unconstitutional also in the legal sense, whether in a one step or two step form (the latter first amending art 23(5) as it then stood).
tend to show. Allowing for some illegality as the American framers did, may well be better then than sticking blindly to legality.

The Hungarian process has been exemplary in terms of its strict adherence to the principle of legality. There was also no danger in Hungary that the amendment rule would turn out to be unusable, at it did in Czechoslovakia. At issue was a typically Soviet type amendment rule, namely article 15(3) of the Constitution of 1949.\textsuperscript{16} It was a simple 2/3 majority rule that allowed a relatively low threshold for unrestrained changes to any feature of the constitution. This rule was in fact extremely useful for the creation of an interim constitution that allowed for the replacement of all major institutions and the establishment of several new ones such as a constitutional court and an extensive table of rights, without severing the chain of legal continuity.

There was of course no logical problem with using article 15(3) to replace, for instance, the presidential council with a president of the republic, but the question whether an amendment rule can be used to change itself, does remain politically contentious, even when one agrees that Alf Ross’ arguments concerning the logical impossibility of an amendment rule changing itself can now be taken as refuted.\textsuperscript{17} Those who seek to revise the revision rule ostensibly seek to either make future amendments unduly easy for themselves or unduly difficult for their adversaries. Still, there were good reasons for changing the 2/3 amendment rule contained in article 15(3) so as to render changes to the interim constitution more difficult and the ratification of the final constitution more inclusive. This was not done, mostly likely because of a preference for the easy parliamentary constitution-making and -amendment embodied in existing practices. Those who claim that the constitution of October 1989 eradicated all significance elements of the Stalinist Constitution of 1948 are wrong. The old amendment rule was still intact and even strengthened. Moreover, the framers exacerbated its potentially invidious effects by what turned out to be a highly disproportionate electoral rule.\textsuperscript{18}

IV. The Role of Constitutional Courts and Constitutional Principles

Legal continuity has little significance when it is not accompanied by the proper enforcement of the new interim or final constitutions, hence the significance of a constitutional court that can overlook this enforcement for the post-sovereign model of constitutional change. The democratic opposition in Hungary resisted the premature institution of a Constitutional Court, but consented to one as soon as it had a constitution “worthy of defense.” Constitutional Courts played no role in the classical democratic models of constitution-making. Constitutional Courts should and does of course not contribute to constitution-making. It is the role of the latter to set up the former, even if some primitive forerunner tribunal already existed. Once instituted, however, the Constitutional Court exercises control over the constitutional assembly

\textsuperscript{16} Art 146 of the last Soviet Constitution required 2/3 of each chamber; but Hungary was then as well as now mono-cameral.

\textsuperscript{17} For the most extensive and reliable treatment, cf P Suber \textit{The Paradox of Self Amendment: A Study of Logic, Law, Omnipotence and Change} (1990).

\textsuperscript{18} The sitting parliament knowingly made the system less proportional by decreasing the size of the compensational list and increasing the size of the directly elected seats. The 1994 elections showed the most extreme possible result so far: The two parties that formed government coalition received less than 50% of the initial vote but gained over 71% of the seats.
and constitution-making process. The South African transition was the first to incorporate this extraordinary innovation in fully-fledged form, but it was also anticipated to some extent by the unchangeable elements of the German Grundgesetz. The inauguration of the final South African Constitution was conditional upon certification by the Constitutional Court to ensure the Constitution complied with a set of 34 constitutional principles. This introduced into the tradition of constitutionalism the truly remarkable phenomenon of an unconstitutional constitution in view of which interested parties can actually take legal action to have the draft constitution declared unconstitutional. The Court can also issue guidelines to the Assembly concerning the forms of redrafting that will be required and acceptable. Nowhere has anything like this been possible during earlier examples of constitution-making.\(^{19}\)

South Africa’s 34 constitutional principles allowed for the substantive review of the final constitution. This is unique. Be it as it may, the post-sovereign model always at least provides for the procedural review of the constitution-making process to ensure the constitutional assembly sticks to the procedures stipulated by the interim constitution. The counter-majoritarian question remains a concern here, but no one can invoke the will of the majority of the people here to support, in the manner of Hamilton, Marshall, Hayek or Ackerman, the argument that the court frustrates the will of the majority of the people, given the absence of any link between the framers of the interim constitution with the electorate. The democratic deficit can therefore also not be remedied in this case by appeals to popular sovereignty.

Next to South Africa there is no country where the constitutional court has played as dominant a role during a democratic transition as in Hungary. Indeed, second only to its Spanish predecessor, the Hungarian Constitutional Court is the second major example of the central role of the constitutional court under the new model. While it is wrong (and counter-productive\(^{20}\)) to pronounce the Court rather than the Round Table the main or “only” protagonist of the Hungarian transition, as did L. Sólyom, the first president of that Court, the very possibility of making such a statement indicates the extent of the influence of the judges during the transition.\(^{21}\) The role of the court was nevertheless mostly compensatory. It had to make up for the failure of the Round Table and first parliament to complete the drafting process and its contribution to the process was limited to this completion.\(^{22}\)

\(^{19}\) In Germany too only amendments can be declared unconstitutional, but who knows what might have happened if the promise of a constitution upon unification had been taken up. Multi-tier constitutionalism based on a differentiated amendment rule and the active role of the court in constitution-making have thus far only materialized in Bulgaria and South Africa.

\(^{20}\) It is counter-productive because the legitimacy of the activist jurisprudence is itself based on the legitimacy of the Round Table constitution. This is implicitly recognized by Sólyom when he speaks of the revolutionary legitimacy (a misleading term here) of the Court that allowed for a kind of early activism unknown to the U.S. Supreme Court and the Bundesverfassungsgericht. To speak of the Court as the real maker of the constitution while denigrating the work of the politicians thus removes the foundations from the Court’s own work. It is also not accurate to consider the amending activity of parliament to be mainly technical and to reserve the significant developmental role for the Court. This is a prejudice of American and German law schools and its importation to Hungary is unfortunate. Cf Arato Civil Society, Constitution and Legitimacy (note 6 above) chapter 6.


\(^{22}\) Cf Arato & Miklósi (note 13 above) for a list of reasons why the role of the Court was so significant in the Hungarian transition. Today I would stress above all the combination of the nature of the transition...
The Hungarian Constitutional Court is indeed the enforcer of an interim constitution. Claims that the constitution was never meant to be provisional are contradicted by the preamble, as well as the almost identical wording of the Polish Little Constitution. But serious enforcement of what turned out to be a patch-work constitution constantly reshaped by amendments over and extended period of time, inevitably leads to the increase of independent judicial constituent activity. The significant human rights jurisprudence of the Court has rendered this independent constituent activity less offensive to defenders of the liberal Round Table constitution. The democratic deficit of that constitution nevertheless rendered it unsustainable, as some critics predicted it would. Even the most democratically made constitutions remain subject to the counter-majoritarian difficulty that attach to activist constitutional review. This difficulty only gets worse when it is accompanied by serious democratic legitimation deficits. Under these circumstances, even liberal improvements of the constitution cannot avoid aggravating this deficit. Ultimately it was not democratic support for the constitution and the court, but the failure of right wing critics of the Court and of the Round Table constitution to obtain the required majorities for changing the constitution and the law regarding the constitutional court that saved the court’s human rights jurisprudence in the period of the Sólyom presidency.

PART TWO

The Sword of Damocles and the Guardian of the Constitution

The elements of the new model imply one another. The two stage structure requires an interim constitution and vice versa. The effectiveness of the interim constitution requires its enforcement by a Constitutional Court. These elements are therefore intrinsic to the model. Full legal continuity and substantive and enforceable constitutional principles (unique to South Africa) are nevertheless not indispensable. There may not be enough legality in the old regime to allow the former, and the round tables may not generate enough legitimacy to allow for the latter.

that leads to a need to enforce an interim arrangement, and the fact that the Hungarian version left open the manner of completion until the failed attempt to do so between 1994 and 1996. This left constitution-making roles for both the amending power and the Court.

23 From a legal point of view of course the constitution is the supreme law. Its provisional nature is therefore irrelevant. But this insight should not lead to the denial of what was politically always obvious, and what is still reflected in the construction and style of text, and indeed in the amendment rule that the Court always hated. Sólyom himself noted the preparations for the new Constitution in his famous separate opinion in the death penalty case, AB határozat 23/1990 23 X.31.

24 The Preamble of the Hungarian Constitution of 1989 states that the constitution is adopted “to facilitate the peaceful political transition ... till the ratification of our country’s new Constitution”. The last part of this sentence is echoed in the Preamble of the Polish Constitution of 1992 (“till the ratification of the new constitution of the Republic of Poland”).


26 Cf Ackerman (note 6 above); Arato & Miklosi (note 13 above).

27 That full legal continuity is not an absolute condition was shown in Nepal. But full legal continuity with an unworkable amendment rule destroyed the Czechoslovak federal state.
Compensation is required when an intrinsic element in the model is missing. This was the case in Hungary where the enlarged role of the court, especially its human rights jurisprudence, had to compensate for the democratic deficit of the constitution. But as shown above, this very jurisprudence may well have aggravated the constitution’s democracy deficit. Hope still prevails that rational legitimacy and liberal values might substitute for democratic legitimacy in the long run, but this liberal project can also be upset by a structural problem that hangs over the constitution like the sword of Damocles, namely the too lenient amendment rule contained in art 24 (3) coupled with a disproportional electoral system. The disproportional electoral system has the all over effect that the 2/3 majority for constitutional changes can be attained by as little as 56 to 60% of the vote. The disproportionality between the percentage of votes obtained and the percentage of seats won in parliament has been decreasing steadily between 1990 and 2006 from 21% in 1990 to 6.5 % in 2006, but it can easily return to around 10% if the 2006 figure turns out to have been anomalous. We thus do not need the unlikely repetition of the result of the recent European elections with its 71 % vote for the right (Fidesz and Jobbik) to fear a coalition quite hostile to the current public law order from coming to power.

Carl Schmitt’s critique of the supposedly unlimited nature of the Weimar amendment rule (art. 76) in terms of which he argued that ad hoc majorities should not be able to change an institutional framework in ways that favor their interests not to remain exposed to further competition or even to checks and balances remains fundamentally sound. Works such as his Verfassungslehre and Legalität und Legitimität contain powerful arguments why it cannot be legitimate, even where narrowly legal, to use an amendment rule to transform the fundamental nature, essence or identity of a constitution. And it is worthwhile remembering that he articulated these arguments against the background of a highly proportional electoral system. These arguments remain valid even if he himself ended up justifying such amendments when the NSDAP abolished the Weimar Constitution in terms of the very same art. 76. One clearly has a choice between two Schmitt’s, however inauthentic the earlier may seem in light of the later. But even the earlier Schmitt’s theoretical arguments were based on a mythological notion of origins and very unclear with regard to what exactly has to be entrenched.28 Constitutionalists who take his political arguments seriously therefore need to develop a different theory to support it.29 More relevant for this essay are practical innovations in three countries that have made an original purely academic doctrine an important constitutional option today, namely the codification of what is to remain entrenched in the German Grundgesetz, the development of a “Basic Structure” jurisprudence for reviewing constitutional amendments in India, and the combination of these two elements in Turkey in the 1970s and in 2008. To these three we can safely again add the example of the South African Constitutional Court’s capacity to examine the constitutionality of a whole constitution in terms of substantive principles before certifying its definitive promulgation. This fourth option would have been unintelligible to Schmitt, for whom the original constituent process could not be limited.30 Be it as it may, the power of the Constitutional Court in Hungary is fully comparable to those of any of these countries and the role this Court carved out for itself as a substitute for acts democratic completion can be argued to imply and even require that it continues to ensure that constitutional evolution remain on a democratic and constitutionalist path, given the absence of anything else for doing so.

28 A Arato ‘Multi Track Constitutionalism Beyond Carl Schmitt’ forthcoming in Constellations
29 Ibid.
The effort to create a new constitution from 1994 to 1996 may well have been the last chance for securing closed form of constitutional evolution and failure to make use of it discouraged later attempts to do so. Fine jurists close to the Constitutional Court, including its first president Sólyom, have argued repeatedly for a “revision of the revision” by using article 24 (3), the old article 15(3) in fact, to introduce a more stringent amendment rule. Such revision would indeed effect closure and fend off the threat Schmitt once feared. But politically that would require something highly unlikely if not impossible. Why would a parliament limit its own freedom without seeking to entrench new substantive provisions?

Developing a jurisprudence for the review of amendments by a constitutional court, as in India, may nevertheless be as affective as establishing a more demanding rule for parliamentary amendments. Such a jurisprudence could block amendments that would threaten the integrity of the constitution as effectively as an express constitutional amendment rule. Evidently, the closure or channeling of the amendment process through amendment review is not the classical or standard way of doing so, but it is feasible when a Court is powerful enough. Having occupied such an important place in the public law scheme of the Round Table constitution thus far, the Hungarian Constitutional Court certainly has both the responsibility and the motivation for not abdicating its role as ultimate guardian of the constitutional order. What it needed in this regard was a sound jurisprudential justification for doing so.

Models of Justification for Reviewing Amendments

Prof. Sólyom, president of the first Constitutional Court, now of the Republic, once raised the question of constitutional review of amendments that are neither permitted nor forbidden by the current text as follows:

[We, the Court] recognize the constitution above us as an absolute standard, whose creation is in the hands of parliament. This is one kind of self-limitation and consciousness of the fact that we do not stand above parliament, but are a part of the constitutional system. The majority of the Constitutional Court does not aspire to review the constitutionality of constitutional amendments, although theoretically it could be justified. Of course not by a positivistic method: in our constitution there are not elevated, so-called eternal rules as in Germany, by which we could evaluate the amendment. In the case of unacceptable constitutional amendment moral critique remains: one resigns. [My trans.; my italics]

The ambivalence of this statement (theoretical belief in possibility of review of amending power vs. subordination of Court to parliament) reflects the unresolved tension in Hungary between constitutionalism and parliamentary sovereignty. But it also reflected the

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31 Cf Schmitt ibid., 25ff.; 102ff.
32 There is one such a moment. Either a parliamentary majority not interested in making any amendments, or an outgoing parliament that have the 2/3 votes, reads the polls and fear that new forces will have the same power soon. Under today’s conditions of polling and possible mass mobilization, such an act would be politically very difficult.
33 Sólyom “A nehéz eseteknél á biró erkölcsi felfogása jut szerephez. Sólyom Lászlóval, az Alkotmánybiróság elnökével Tóth Gábor Attila beszélet” in Halmai (note 24 above) 389.
actual trend of the Court’s relevant jurisprudence at the time. A series of binding decisions between 1994 and 2004 excluded amendment review more and more vociferously. However, none of these decisions was based on serious theoretical considerations. And there are sound theoretical arguments in support of Sólyom’s predilections to the contrary, five of which are well-known. The first concerns the literal meaning of the word “amendment”. The second is a natural law argument. The third invokes the basic structure of constitutional identity. The fourth turns on notions of constituent power and an original decision and the fifth relies on historical theories of constitutional principles or conventions. These arguments do not exclude one another and have occasionally been combined. Each of them of course benefits from formal codifications of amendment rules that automatically render them applicable to all amendments. These codifications can take three forms: 1) restrictions built into the amendment rule; 2) restrictions built into provisions that are super-entrenched; or 3) amendments that explicitly or implicitly (by the lex posterior principle) amend the original amendment rule or other provisions. However, all five justificatory arguments remain valid without the benefit of such formal codification.

The literal or textual argument contrasts the meaning of “amendment” with “constitution-making”. The former means “to modify” or “to add to” whereas the latter involves a “total revision”. This difference is also reflected in article 19(3) and 24(3) by the respective terms megalkotja and megváltoztatásához), but this difference is now vitiated by the fact that the great changes of 1989 and 1990 were introduced under the heading of módositások, that is, amendments, while they were clearly much more than mere amendments. In any case, this argument remains insufficient in itself, despite frequent reliance on it. It requires a criterion that affords a distinction between marginal changes and fundamental changes that affect the identity or essence of the constitution. The articulation of such a criterion is exactly what the other four arguments set out to do.

The natural law argument envisages constitutions that have institutionalized their fundamental values and principles, mostly but not exclusively in the form of basic rights. The Hungarian Constitution, for example, holds human rights to be “inviolable and inalienable”. It is the state’s primary duty to respect and defend them. The natural law argument would accordingly deny the right of any amending power to abrogate these rights. This however is less significant than it seems. Many semi-authoritarian governments are quite comfortable with leaving all their rights obligations intact on paper while unscrupulously loading the rest of their constitutions with amendments that are hardly compatible with constitutional democracy. These amendments ultimately also affect rights very negatively and little can be done about them in the absence of codified amendment rules. Examples of what such authoritarian constitutional amendments might look like abound in Europe.

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35 Cf art. 8(1). This article was inserted in the text on the demand of the democratic opposition at the Round Table. See Halmay “Az 1949-es alkotmány jogállamosítása” in A Bozóki et al (note 3 above) 183.
36 Cf Murphy (note 33 above). Cf also the Golak Nath case discussed in Austin (note 33 above).
37 For example: French semi-presidentialism with its weak legislative power, Scandinavian church-state relations and Slovenian interest representation for starters.
The Basic Structure doctrine, the second argument pointed out above, addresses this problem of unconstitutional changes in material parts of constitutions that sidestep the natural law principles embodied in their bills of rights. But here the problem of over-inclusivity comes to the fore. The basic structure argument potentially includes too much under what is unamendable. This approach was developed in India after the collapse of attempts at natural law jurisprudence in this area. Its core idea is to distinguish between incremental modifications or alterations, on the one hand, and changes to the basic and defining features of the constitution like constitutional democracy, federalism, parliamentary government, separation of powers, judicial independence including constitutional review (review of amendments included), and fundamental rights, on the other. The latter elements positivise the natural law elements of the constitution. According to the doctrine developed by the Indian judiciary, these elements constitute the basic structure of the original constitution that is exempted from any possible amendment other than amendments by a totally new constituent power. But who is to decide what belongs and does not belong to the basic structure of the constitution when the constitution does not stipulate this? The question naturally raises concerns about gouvernements des juges or juristocracies. This, however, was not a real concern in India where this jurisprudence clearly helped to save democracy.

The fourth justification for the constitutional review of constitutional amendments, going back to A. Hamilton and John Marshall, is based on democratic legitimacy. Though no defender of review by judges, Carl Schmitt’s argument that amendments cannot change the fundamental decision of the original, revolutionary constituent power, must be included here. Schmitt allowed only for the amendment of constitutional laws, not of the constitution. However, without a codified expression of the original decision of the constituent power, the distinction between constitutional laws and the constitution is as difficult to draw as it is to define the basic structure of the constitution in the absence of such codified expression. In fact, Schmitt’s argument anticipated and influenced the identification of a Basic Constitutional Structure in India with reference to the making of the Constitution of 1950, an empirical set of events that are justifiably revered in India and allow for the invocation of pure democratic beginnings and of the people as a unified, homogenous constituent power. Critics of this approach can of course always show that these beginning are rarely as perfect as they are made out to be and hardly justify the right of the initial constituent power to limit the democratic amendment powers stipulated in the constitution. But what if the original process did satisfy high standards of legitimacy? But why, on the other hand, should legitimacy be linked to origins

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39 The first question was rigorously unanswerable, but the Indian judges answered it by their answer to the second: the Court itself. Their decision could be trumped – possibly - only by a new constituent process. Only in South Africa, where the 34 principles represent a codification of a kind of Basic Structure, could the question –again possibly – be raised that a new constitution again would have to adhere to these principles, as enforced by the constitutional court that may remain in existence during a new process. But the idea, that judges have the final word over all change (apart from whole new constitutions) moves us in the direction of a republic of judges and cannot be made compatible with democratic legitimacy.

40 Many followers of course proceeded to bring together his views on amendments with post war doctrines of constitutional review. The most influential was apparently Dietrich Conrad. See especially AG Noorani Constitutional Questions and Citizen Rights (2006).
Maurice Hauriou’s doctrine of *supraconstitutionalité*, influenced by Schmittian and natural law arguments, but secularising them in terms of re-interpretations of the historically established principles and norms that informed but also transcended the (many) individual French constitutions, is an example of the fifth justification of the constitutional review of constitutional amendments invoked above. The doctrine turns on the notion of constitutional principles that are more important than ordinary constitutional provisions and therefore need greater entrenchment. These principles can be fundamentally entrenched like the famous republican clause of the 3rd Republic or recorded in some but not all constitutions like the *Declaration of Rights*, or implicit in the constitutional text. There is a good case for assuming the presence of such principles in constitutions that are entrenched by conventions if not by formal limits to amend, such as the constitutional conventions of the United Kingdom. The amending powers by simple majority of the British parliament are unlimited. Dicey referred in this regard to the legislative as well as constituent powers of parliament. Dicey nevertheless held these powers to be subject to conventions that entrench *popular* sovereignty – such as the convention that parliament cannot enact any significant constitutional change if it has not been part of the winning party’s election campaign; hence also the further convention that any significant constitutional change requires the dissolution and new election of parliament. Such conventions are neither absolutely entrenched nor necessarily linked to a founding event. They hold advantages but also contain weaknesses. Violation of conventions are for instance only politically sanctionable, not judicially. It remains a good question whether courts can enforce constitutional laws better than conventions, but recent international jurisprudence suggests conventions are also judicially enforceable.

The case for the reviewability of amendments in Hungary could have drawn (and can perhaps still) on a combination of all five arguments above. Sólyom’s views regarding theoretical justifiability of review indicate familiarity with at least some of them. Although not altogether clear, he may have contemplated the idea of the an “invisible constitution” that is hardly as unusual as his Hungarian critics have assumed. The connection between this idea and the

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41 M Hauriou *Précis de droit constitutionnel* (1923) 296 et seq.
42 Cf A V Dicey *The Law of the Constitution* (1982) 28 note 51 for Dicey’s argument that two parliaments with an election in between would be needed for any fundamental constitutional change, by the convention of the constitution as against the law that would allow one parliament to do it. The change would be legal but unconstitutional in exactly the British sense. Dicey 371. All this is based on his theory of conventions as expressing popular vs. legal sovereignty see 27-29, 285-291. Sir Ivor Jennings doubts the generality of this interpretation of the conventions of the British constitution, but seems to support it in the case of constitutional change. Cf his observations regarding the so-called “mandates” in Jennings *The Law and the Constitution* (1959) 176 et seq.
43 Dicey ibid note 292 ff.
44 Jennings (note 41 above), for one, contests the sharp difference between law and convention in this respect at 131 ff. Admittedly the argument is made in a country without constitutional jurisprudence in the strict sense. But there are relevant cases from the U.S. as well, from the presidencies of Jackson and Lincoln for starters.
45 Cf in particular the Canadian development reflected in the Patriation Reference 1981 and Quebec Veto Reference 1982.
arguments above – especially the natural law and supraconstitutionalité arguments - is obvious. While not patently cast in natural law language, he may well be contemplating something like a positive enactment of natural law principles in the Hungarian Constitution and at the European level. Cast in this form, natural law remains relevant to the idea of an invisible constitution, especially as regards the European human rights jurisprudence to which Hungary is now linked through a variety of treaty obligations. The idea nevertheless turns more on the notion of an internal and immanent, than on an external and transcendent set of norms. Central to the invisible constitution idea is an immanent coherence hypothesis, resembling, but not identical to the Basic Structure doctrine. According to Sólyom, „the constitution as a whole” is a coherent system of principles that is not immediately apparent from the actual paragraphs and sentences (tőmondatok). The Court must make the invisible structure visible in its opinions and precedents. Sólyom focused this „structural interpretation” primarily in the area of basic rights, but logically it surely also applies, as Indian jurisprudence shows, to the framework of government stipulated by the rest of the constitution.

The notion of uncovering the invisible constitution when engaging in active and often counter-majoritarian review is relevant for Sólyom’s assessment of the respective roles of Court and parliament in what he calls „constitutional development”. The first 15 years of this development, he maintains, was mainly the achievement of the Court. Apart from three exceptions, he describes the 30 odd amendments since 2003/2004 as „minor” and „technical” changes. I take this to be a characteristic exaggeration. Be it as it may, the Court’s work is seen here as making the basic structure visible, whereas the amendments are regarded as mere tinkering that neither uncovered nor endangered the basic structure.

Sólyom’s description nevertheless rightly implies that the amending power (as indeed the Court) has so far for whatever reasons remained loyal to the Round Table constitution. This loyalty was tested in 1990 and 1994-1996, but not only did it survive, it also secured the Round Table constitution’s fundamental principle of consensus. The third and fourth arguments above become relevant here, namely the legitimacy that attaches to original decisions and the historical development of conventions through subsequent practice. Again, Sólyom comes moderately close to the approach of Schmitt when he stresses the revolutionary legitimacy of the Court and the principle of the original regime change that informs the coherence of the constitution. But he moves closer to Hauriou when he speaks of the „invisible constitution” in

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46 Cf Kis (note 24 above).
48 Kis (note 24 above).
49 Indeed Sólyom also claims that “the decisions regarding state institutions are no less significant than those concerning fundamental rights”. This seems to be an overstatement. Cf Sólyom „To the Tenth Anniversary of Constitutional Review” in Halmai (ed) The Constitution Found? (note 24 above) 23. This expanded reading is repeated in A Holló’s opinion in AB 1260/B/1997 which was joined by three other judges.
50 Two from 1990 (constructive vote of no confidence, and abolition of the category of laws of constitutional force) and one from 2002 (LXI. Törvény) concerning the entry of Hungary into the EU.
51 I hardly see why amendments reducing the number of 2/3 laws, changing the form of the election of the president of the republic, establishing the forms of local government and representation and regulating national defense, and especially the mode of making the new constitution, are not very important, even if they do not imply regime alteration. But then neither do the decisions of the Court.
52 Sólyom “A nehéz eseteknél a bíró erkölcsi felfogása jut szerephez” (note 32 above) 384-387.
terms of the principles or „standards of constitutionalism” articulated by the Court. These standards, he maintains, „will not enter into conflict with the new constitution, or the constitutions of the future”.

But what are these principles? The only one that Sólyom seems to mention is that of “jogállami forradalom”, that is, the rule of lawful revolution. He has in mind here the adherence to legal continuity even in the midst of revolutionary system change. The idea combines the two principles of legality and legitimacy in one phrase. As I have also repeatedly argued, legality or legal continuity is indeed a central principle of the new model of constitutional change, but not the only one. And resting as it currently still does in Hungary on an unlimited amendment rule, it is powerless against this rule. Indeed, it is powerless against the very rule it relied on and reproduced. The principle of legal continuity alone could not have stopped and could not stop now a „legal revolution” in the opposite direction.

However, Sólyom’s phrase fortunately misses the specific nature of the Hungarian regime change. At issue in this change is not a revolutionary legitimacy, however much Sólyom wishes to highlight the fact that the radical powers of his Court were originally established, and not derived through evolutionary practice and precedent as it was in American constitutional history. The South African Constitutional Court (obviously more familiar with revolutionaries and the meaning of revolution than Hungarian judges!) was on much firmer ground in this regard when it justified its initial declaration of the unconstitutionality of the Constitutional Assembly’s first draft on the basis of „the solemn promise” the parties in the negotiations have made to each other, expressed in the 34 principles. Whereas revolution is the principle of one-sided imposition, the solemn promise is that of two or many sided mutuality and coming to an agreement about the second best.

Instead of stressing revolutionary legitimacy à la Schmitt, Sólyom would have done better to focus on the second major principle of the Hungarian transition, namely, the principle of consensual decision making in constitutional matters that governed the Round Tables. It is this principle that kept the amending power on an amendment track that Sólyom derides as mostly technical, serving daily political interests only. More importantly, it was this idea, beginning to harden into a convention, that led the MSZP-SZDSZ coalition in 1994 to produce a highly consensual method of making a new constitution. Equally important, as the Court

54 See especially Arato Civil Society, Constitution, and Legitimacy (note 6 above) chapter 5.
55 C Rickard ‘The Certification of the Constitution of South Africa’ in P Andrews & S Ellmann (eds) Post Apartheid Constitutions (2001) 228, 263, 270. Rickard points out the link to the basic structure doctrine, and illustrates the role of the judges in producing a multi-track constitutional structure with the ordinary amending powers undergoing some limitation.
56 Even the MDF-SZDSZ pact in 1990 involved the important consensual element of the agreement of the main governing and main opposition party. This was certainly a missed chance for much wider, more inclusive and more democratic constitution-making. In the end, MSZP and Fidesz did not vote for the amendments (law XL) of 1990 that received 280 (beyond the 258 necessary) votes. But precisely its errors contributed to the much better formula of 1994 that the Court upheld in a significant, though hardly surprising decision a year later. That decision, while denying the existence of unchangeable provisions of any kind in the Hungarian Constitution, affirmed the purpose of the effort to perfect the guarantees of the realization of human rights and the goal of preserving the foundations of the existing public law order. AB határozat 39/1996. (IX. 25.) I personally sympathize with the litigants who were certainly right and
noted, is the fact that parliament linked the creation of the new constitution, through a constitutional delegation, to an especially high consensus, namely four fifths of all its votes. The Court considered this procedure to be an adequate expression of popular sovereignty, with or without referendum. The question is whether it could do so if parliament returned to the method of new constitution-making through the amendment rule, that requires only two thirds of the votes. The court’s own precedents suggest that it could and would.

Can the Existing Public Law Order be Protected Against Radical Change?

It is difficult from a narrow legal point of view to simply dismiss the Court’s jurisprudence on amendments, however little theoretical grounding has been provided for it, and however pernicious the potential consequences may be. The justifying arguments explored above, many of them evident in Sólyom’s reflections, do not yield a strong basis for reviewing 2/3 majority amendments made under art 24(3). Natural rights arguments, even with the aid of European codification and European constitutional jurisprudence, help only with a certain range of amendments. “Basic structure” and “invisible constitution” arguments require a principle of legitimacy that defends the word of the interpreter against the “constitutional amending power”. They are therefore seriously vitiating by the legitimacy problems that haunt the Round Table Constitution. The principle of legal continuity, we saw, actually favors the amending power. Only the convention of significant consensus between opposing parties that emerged from the practices of the Round Tables presents a clear limitation on ordinary 2/3 majority amendments. This convention has not hardened yet. Add to this the conflation of parliamentarianism with parliamentary sovereignty characteristic of civil law countries and it becomes clear that some textual foothold in the Constitution is needed for this convention to become a significant jurisprudential foundation. That seemed to have been the position of a Court minority in 1998. Three judges joined a concurrent opinion that identified such a textual foothold in the Constitution.

57 The Court also noted, with no comment, the high consensus requirements for the Constitution Preparatory Committee: 5 out of 6 parties and 2/3 of all the members had to agree for a proposal to be adopted.

58 Kis is right: The Court in the very beginning was willing to critically challenge amendments and even parts of the constitution through its review. But this phrasing already points to the problem: given the constitution-making approach used in 1989 and 1990, and the possible illusion of its entirely parliamentary nature, there was no distinction between constitution and amendments. Most of the valid text could be regarded as two major series of amendments supplemented by other amendments. Nevertheless, both the point of Kis, and the relevant problems can be illustrated in terms of the very first case before the Court (AB 1/1990 II.12) which dealt with a challenge to the „Lex Kiraly” amendment. The „Lex Kiraly” amended the constitution to allow direct election of the president of the republic in spite of the referendum of November 1989. The case took the form of a prior interpretation of the Constitution (under the Law of the Constitutional Court 1989 XXXII 1g) and thus could be claimed, very superficially, to involve no ruling on an amendment. Cf Kis “Az első magyar Alkotmánybíróság értelmezési gyakorlata” (note 24 above).

59 A Holló, Parallel Argumentation AB 1260/B/1997 joined by A Ádám, GKilényi, and A. Szabó
foothold in “the defense of legal security and fundamental rights, as well as other constitutional institutions”. These textual footholds could and had to be invoked, they argued, not directly against the amendments, but at least against the enabling legislation that forms part of the amendment. However, the Court’s refusal to review the constitution-making projects of 1994 and 1998 underlines the weakness of this project as a whole, involving as it did a moratorium on amendments.  

Ironically, at the time that these separate and concurrent opinions were written, a textual foothold still existed in the now defunct article 24(5). Article 24(5) required a 4/5 majority for constitutional changes that effectively created a new constitution. It read as follows: “Az új alkotmány előkészítésének részletes szabályairól szóló országgyűlési határozat elfogadásához az országgyűlési képviselők négyötödének szavazata szükséges”. This rule is still included in most texts of the Constitution. Together with article 24(3), the amendment rule, article 24(5) provides for a three track constitution in terms of which the amendment and the making of the new constitution belong to different procedural tracks. The Constitution had already distinguished between the creation (megalkotás) of the new constitution and amending or changing (megváltoztatás) the existing one, but up to 1995 when 24 (5) was written, there was no procedural distinction between them. The substantive constitutional innovations of 1989, for all practical purposes a matter of real constitution-making, was formally enacted by the amendment rule contained in article 15(3), the predecessor of the current article 24(3).

I would like to show what the constitutional situation would have been like had the 4/5 rule remained fully in effect. If article 24 (5) survived not only in some of the current texts of the Constitution, but with full legal force, it would have provided the Constitutional Court with a very strong foothold to review and reject amendments made under 24(3) that in its view contradicted the basic structure of the Constitution. This is so for the following reasons:

1. By the principle of lex posterior art 24(5) implicitly amended art 24(3). If the 2/3 amendment rule previously covered all constitutional changes, art 24(5) now removed certain changes from its range and subjected them to a 4/5 majority requirement, irrespective of the fact that the constitution as a whole was introduced under the 2/3 majority rule.

2. Amendments of article 24(5) itself is not expressly subject to the 4/5 majority requirement contained in it, but implicitly it is. It would simply make no sense if the higher entrenchment contained in it could simply be undone by first amending that higher entrenchment clause with recourse to a lower entrenchment clause. Examples of such implicitly self-entrenching rules are evident in article 5 of the United States Constitution and art. 79 (3) of the German Grundgesetz. Art 5, for example, would mean nothing if equal membership in the Senate could be reduced in the case of a particular

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60 On the renunciation of that moratorium see Halmai (note 24 above).
61 Including the ones on the websites of the Constitutional Court and the Parliament, but not on the few available texts indicating the “legal valid” text.
62 For the notion of implicit amendments, cf Suber (note 16 above) on whose excellent theoretical work I rely much in this section.
63 Ibid.
state by first altering Article V. In a complex set of amendment rules, the more stringent one should generally be understood as implicitly self-entrenching.

The operation of article 24(5) would have demanded the judicial review all significant amendments. It would have meant no sense to interpret “new constitution” in the narrow sense of a whole new document, detailed, formal and named as such. A single sentence amendment could represent a new constitution. E.g. The sentence “His royal majesty’s Otto v. Habsburg’s word (and after his death, his lineal descendant’s, following the traditional succession) is law, and all Hungarian public law authorities are required to follow it” added anywhere in the current Hungarian Constitution would replace the whole thing by an entirely different one. Of course many changes would not be as obviously categorizable as either fundamental or merely technical. While replacing Otto in the sentence with a president elected for life would certainly qualify, the mere election of the head of state (as in Austria) without new powers would not. But what about a popularly elected president with significant new, including decree powers? Or the creation of a corporate second chamber or one or two established churches? Ultimately, as in the case of any version of the Basic Structure doctrine, it would depend on the Court’s evaluation what counts as merely technical and what counts as fundamental. But in contrast to India where the Basic Structure doctrine must suffice, the Hungarian Court would not just have had to rely on constitutional interpretation to pronounce some or other constitutional clause unchangeable.64 In the case of any change the Constitutional Court deemed fundamental, it would have demanded that that the path for making a new constitution stipulated under article 24(5) be followed, and not merely that for amendments under article 24(3). This is also indicated by the difference between the language of article 19(3) and that of article 24(3).65

In my mind there is little question that between 1995 and 1998, when article 24(5) had full legal effect, the Constitutional Court could and should have invalidated any structurally important amendment made under article 24(3). The point was not entirely academic. The moratorium on amendments voluntarily assumed by the governmental parties at that time was all the more important, because the consensual rules agreed upon provided for the transference of those paragraphs of the then valid constitution into the new one that could not be altered consensually. If and when the moratorium was renounced, as occasionally threatened and eventually carried out, amendments could again provide a non-consensual track of constitution-making for the governing coalition by-passing the new rules. But exactly that move should have been seen as potentially unconstitutional as I myself did not originally realize.66

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64 Under the constitution, in line with AB határozat 39/1996. (IX. 25.)
65 I assume that 19 (3) “megalkotás” and 24 (5) “élőkészítés” are the same, though the former may refer to the total process of constitution creation, including ratification, while the latter to the first, highly consensual part.
66 This means that though AB 1260/B/1997 was decided rightly in terms of substance, because the amendment in question was neither unconstitutional, nor did it plausibly mean a new constitution that would require at that time procedures as under 23(5), it was the job of the Court to examine that given the existence of two rules, and the open question under which the given act should be subsumed. Under the circumstances neither should jurisdiction been refused, nor the statements of the exclusive and unlimited powers of parliament as long as the 2/3 majority is attained should have been asserted with such vehemence. At that time, an unconstitutional amendment made according to a constitutional rule was hardly a self-contradiction, but had a clear meaning, namely that of following the wrong rule. Cf. Arato Civil Society, Constitution, Legitimacy (note 6 above) Chapter 6.
That was then. The sun has now presumably set on article 24(5). But has it set entirely?\footnote{I am not entirely sure why 24 (5) is still there in the available documents, and why it is not an empty paragraph indicator only, as in the case of provisions actually removed. Would there have to be a vote to remove it? By what majority?} Are only fully legal provisions of constitutions, supposedly enforceable by courts, relevant to constitutions and constitutional adjudication as positivists sometimes argue, and not preambles, constitutional goals, etcetera? Are emerging conventions of the constitution relevant, and if so how? In my view article 24(5), still included in many of the texts of the Hungarian Constitution, expresses just such an emerging constitutional convention, despite the fact that it was law in the strict sense only between 1995 and 1998. It could be re-legalized by either the Constitutional Court or a parliamentary act similar to the one that brought it into being. Today, however, there is little chance of either, but the latter would undoubtedly be preferable. The former would nevertheless also be acceptable, given the now established tradition in Hungary of the Court serving as the important compensatory power for missing constituent activity.

Further constitutional entrenchment will only be likely in the face of danger, and that danger, should it materialize, would presumably come from parliament itself. Today’s parliament poses no such danger and has enough incentive to preempt it. But it does not have the 2/3 majority to do so. A clear line of precedents suggest the Court has the power to intervene, but there is little ground for hope in this regard. The incomplete state of the post-sovereign constitution-making process that Hungary embarked on and the at best partially adequate compensatory potential of the Court create a legitimacy problem under circumstances where an institution that gains its authority from the Constitution alone has a difficult time competing with elected powers. Yet, under new leadership and with new judges on the bench, it could still do so.

In such a setting the only recourse left may be Locke’s idea of popular resistance, or more exactly Dicey’s notion of conventions that embody popular sovereignty as against parliamentary sovereignty. These conventions can only be enforced through elections and public pressure, that is, by the by the actor(s) whose sovereignty is at stake. However, if popular sovereignty were to be confined to elections in which parties need not even reveal their constitutional plans, the chances for success would be slim. This is of course not what Dicey envisaged,\footnote{That seems to be badly misunderstood by those who argue for a “reform” of the Hungarian public law order, eliminating its “consensual” elements, like parts of the jurisdiction of the Constitutional Court, some of the very few independent powers of the president of the republic, the remaining 2/3 laws and so on. The use of art. 24 (3) on which I concentrated, to push through majoritarian reform, has an elective affinity with such direction of change advocated by B Pokol. Cf Halmai (note 11 above). But it is compatible with other regime altering changes as well. Interestingly, a change in the direction a badly understood “Westminster” would expose its makers to quick reversal by a future parliament. Would they leave art. 24 (3) as is?} and it is very unfortunate when the judiciary seems to have abandoned the effort to help define the difference between “people” and parliament in constitutional matters.\footnote{Unfortunately, I saw this weakness in it jurisprudence as early as 1994 when I argued that the Sólyom Court was a defender of “liberal”, but not of “democratic constitutionalism. Cf Arato ‘Constitution and Continuity in the East European Transitions I’ (note 6 above) 308ff; also in Civil Society, Constitution and Legitimacy (note 6 above) 185 ff.} Some great Constitutional Courts, as the Indian example shows, refused to go down this way. It invalidated numerous amendments, sometimes even without explicit textual support. And thus
did it help save democracy under very difficult circumstances.70 One can only hope that there will be enough popular and intellectual resources around should similar challenges arise in Hungary. The public law order created by the Round Table and its progeny is well worth the greatest of such efforts.

70 See Austin’s magnificent Working a Democratic Constitution (note 33 above).