

The Hungarian Crisis

Written by Andrew Arato

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ANDREW ARATO, JAN 31 2012

Twenty years after the transition from a Communist regime, 8 years after the joining the EU, Hungary is in a constitutional crisis. In itself a crisis need not be feared, and can even be the bases of democratic renewal. But, the Hungarian crisis should be of huge concern because it may lead to an authoritarian political outcome in the middle of Europe.

How did this crisis come about?

What is its nature?

What are the possible outcomes?

What are the forces that point toward democratic reconstruction?

A massive alteration of governmental incumbents, here the emergence of the "FIDESZ: Hungarian Civic Party" elite with its right wing ideology as Hungary's hugely dominant governmental majority, does not in itself represent a constitutional crisis of a country. I will thus here neglect the causes of the electoral defeat of the previously governing Hungarian Socialists, all linked to economic disasters and their mismanagement. I reluctantly concede that the defeat of the "Center Left" was in significant part self-caused, as well as deserved. The disappearance of the liberal SZDSZ (Alliance of Free Democrats) perhaps the main protagonist of the regime change of 1989 is very sad for me personally, but it too was self-caused. Thus it is again the turn of the right, as it was in 1990 and 1998, a normal phenomenon in a competitive democracy. And that is the regime we fought for.

The reason why the economic crisis, and the political alternation became a constitutional crisis, is to be sought on the constitutional level. We should not accept the ideological claims of the FIDESZ government about the constitution of 1989-1990 being still the Stalinist constitution of 1949. It was a materially new constitution even if produced by amendments, in reality the work not of the last Kadarist parliament but of the National Round Table of 1989, or: one negotiated by the last Communist government and 8 new parties, among them the then liberal FIDESZ. But, as was the case with the South African document of 1994, this was still an interim constitution, with the promise that a final one would be approved in due course. The Hungarian interim constitution was a fully liberal democratic document, establishing for example the strongest constitutional court in the region. But it had severe flaws. First, unfortunately it did not contain, as did the South African Interim Constitution, rules for the production of the final one. Second, the amendment rule of the 1949 Constitution, used to keep the changes legal, was maintained. This allowed 2/3 of parliament to alter the constitution as it desired, or to create a new one without limits. Third, though not in the constitution, the electoral law, that can be enacted or changed only with a 2/3 majority, turned out in practice to be highly disproportional, making the amending majority easy to attain. I hope it does not seem too pretentious here to note that I have warned about these three interlinked problems ever since the first elections in the early 1990s.

Thus the reasons for making a new constitution in Hungary existed ever since 1990, and they were of two types. First the flaws I have just mentioned needed to be corrected. Second, the legitimacy problems of the interim constitution needed to be democratically transcended. These legitimacy problems had to do ultimately with unelected parties having drawn up the interim constitution, and the need for freely elected representatives (wholly or in part elected for

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that purpose) to confirm or perfect that document. There was one such effort in 1994-1998, but it failed. At that time a center left coalition of the MSZP (the Socialists) and SZDSZ, having created consensual rules for the purpose, managed to get as far as to produce a new draft. But it could not be approved, amazingly enough, because the leaders of the same Socialist party – led by PM Gyula Horn – joined the then right (not including FIDESZ!), in a red brown coalition to defeat it. FIDESZ can and does claim now, in 2011, to have resumed the task, this time successfully, completing the process of constitutional change with the enactment of the New Basic Law.

The constitutional crisis has to do with what is false in that claim. The constitutional plans of the new government were not announced in the elections of 2010. Instead of following the consensual pattern of 1989 and even 1996, FIDESZ has used its 2/3 majority, gained with 52 % of the votes, to vote in its own constitution. Thus the project is more a monistic, single stage, imposed one than the completion of a pluralistic, multi stage, negotiated one whose last stage should have preserved the spirit and achievements of the first. On substance too, the Basic Law accomplishes a mini or partial regime change by simultaneously limiting the power of the Constitutional Court and packing it with party loyalists; by massively removing sitting judges through a retroactive retirement clause; by creating a large number of devices by which current incumbents would be kept in office, and their policy oriented legislation would be entrenched; and by developing an electoral law designed (perhaps too optimistically) to achieve even greater advantage in seats for FIDESZ according to the lessons of the last elections. With respect to the key area of public communications, FIDESZ has enacted measures allowing its incumbents to control national TV and radio, and also criminalizing organs and users of private, including print media. Finally, on the symbolic level, the Basic Law and its Preamble reveal a very different imagery of the polity than its forerunner: religious rather than secular, ethnically rather than civically nationalist, honoring the authoritarian rather than republican aspects of the country's past. This is expressed by the very name of the country, changed from Republic of Hungary to Hungary (Magyarország or the country of the Magyars).

Let me note that this distasteful project is not yet, or not in itself the end of competitive democracy. Whether it will be will depend on politics, and also on how the law would be administered. The electoral rule may work very differently if the voters, as in 1994, 1998, 2002 and 2010 again shift their allegiance, an outcome quite possible given the bad economic performance of the FIDESZ government. The constitution amending rule, inherited from 1949 remains in force, in spite of all the claims about the previous survival of the Stalinist constitution. This rule could be used by a new, bare majority in votes to undo what FIDESZ has done, in whole or in part. The key in defeating FIDESZ and its constitution may very well be first electoral and then coalition building strategy. Even if FIDESZ wins again, with a much lower electoral total it may not obtain the same type of majority as now in spite of its plans. Without 2/3, entrenching many policy oriented laws (like a flat tax) may lead to ungovernability. Thus a part of FIDESZ may then be ready to negotiate. Finally, even a packed Constitutional Court may resist interpreting the New Basic law according to its authoritarian character. That Court moreover will be under pressure from the ECHR and the ECJ, and may not wish to be repudiated on European levels.

Why call it a crisis, and not a semi-authoritarian transition? Why not just say that there was only a crisis of the 1989-1990 system of public law, one that was resolved by FIDESZ? The system FIDESZ has in mind, whether in an authoritarian or a more moderate version has not been consolidated in spite of the new paper document successfully enacted. It has led to intense though impotent opposition in Parliament, and more successful challenge on the European level. Civil society organizations have been able to mobilize a very large number of people in protest demonstrations, even if the government is still able to call on even larger crowds for the moment. If the opposition parties, now mainly the Socialists, the new ecological LMP, and a breakaway from the first can co-ordinate electoral strategy, they can do very well potentially. This leaves the country with an unconsolidated constitution and order of public law that may be radically changed within 2 or three years. The legitimacy of the current order is low not only normatively, but in the eyes of internal and external elites, and its structural problems are serious.

Much depends on how different actors choose to act. It will be extremely important for the European Parliament and Commission to keep up the pressure, on whichever issues belong to their respective jurisdictions. Soon the two European courts may come into play, necessitating further action by the executives and the key states. In the short term, this level is the most important, because internal actors do not yet feel their potential power. But in the long term, it will be either the acceptance or the rejection of the new order by broad internal segments of the population

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that will be most crucial. There is currently a silent majority, between the mobilized parts, that has little interest in constitutional questions. Where this majority will swing should depend on the effectiveness of the two, opposed mobilizations, the strategy of the parties, and indeed the continued European response.

It is too early to predict what a return to a more democratic path will take. A consensual, negotiated settlement including a new, open democratic constitution making process would be most desirable. Yet it cannot be excluded, given the possibility of a majority without the amending power, that extra-legal steps would be used, perhaps under the impact of a "color revolution". Such an outcome would be extremely dangerous, given the polarization of the politically active part of the country, and the unconsolidated nature of its public order. It may be that as in 1989, it will be the common danger that will bring left and right to a negotiating table. But this time, if that happens, they should not forget the requirement to make negotiated solutions fully legitimate in the sense of democratic norms.

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