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Dr. Kálmán Pócza

## The political culture of constitutionalism

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## 1. The political culture of constitutionalism<sup>\*</sup>

### Summary

The main argument of this short paper is that constitution-making processes determine the future interpretations and acceptance of a new or radically changed constitution. Concerning constitution-making processes, I claim that the political culture of a given country has priority over institutional constraints. In lack of any institutional constraints, the only factors that regulate the political actors' behavior during constitution-making are the habits and unwritten norms (i.e. the political culture) of a community. Therefore, in this short essay I am going to scrutinize the political culture of the actors involved in the recent constitution-making process in Hungary. Herein I will discern five fundamental aspects of a comparison (subject, timing and duration of a constitution-making process, external and internal constraints) and conclude that the lack of self-limitation on both the government and the opposition side is the main reason for Hungary's deficiencies of the political culture.

The key question of this short paper – as that of a larger research project as well – is whether the Hungarian constitution-making process of 2010/2011 was an abnormal and peculiar phenomenon or more of a usual customary procedure. To answer this question, a comparative analysis should be made which might contribute to the moderation and professionalization of the intensive discussion on the recent constitution-making in the Hungarian public sphere and scientific community. Although it is necessary to make some references to the Fundamental Law adopted, I am not going to scrutinize either the institutional design or the text of the new Fundamental Law, except for the preamble of the new constitution. In my research, I will focus on the genesis of the new constitution and on the political culture of the actors involved in the recent constitution-making process. To concentrate on the political culture of the political actors is an absolute necessity in case of constitution-making processes because these are not determined by any rules given prior to the process itself. In this regard, the only determinative factors are the unwritten laws of the political culture together with the political actors' interests, motivations and presumptions.

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Constitution-making processes are special in comparison to other legislative and political procedures: since they are the fundament of all other political processes; there are no rules to guarantee the framework of the foundation of a political system. All of the proceedings of the constitution-making processes are restricted only by the self-limitation of the *pouvoir constituant*. Therefore, to scrutinize constitution-making is an absolute necessity if we want to understand a particular country's political culture. Having no written rules and restrictions for a constitution-making process, the *pouvoir constituant* is finally constrained only by the unwritten habits and norms together with her own moral norms. In other words: beyond the otherwise very important *external* constraints, the *pouvoir constituant* is constrained only by the community's political culture. This is the point: having no institutional or written constraints, the only factors that regulate the political actor's behavior are the habits and unwritten norms of the political culture. To put it briefly: in case of constitution-making processes, the political actors' behavior has priority over institutional constraints.<sup>1</sup> On the other hand, to study the founding process and the political culture of a community is an essential objective because constitution-making processes might affect the quality, endurance, legitimacy and recognition of the new constitution.<sup>2</sup>

At first glance, examining constitution-making processes seems to be a typical research field in comparative constitutional law. It should be emphasized, however, that regarding our research project, the comparative perspective does not refer to the text itself but to the circumstances of the constitution's birth. This means that I will consider the pre-legal, pre-textual phases of the process, of which the actual constitution is the outcome. Although the juridical or legal perspective cannot be totally ruled out since some related questions are extensively discussed by scholars of the comparative constitutional law as well (e.g.. defining the boundaries between a totally new constitution and an extensively amended one). Nevertheless, the present analysis is going to utilize the instruments of political science rather than those of constitutional law. It should also be stressed that until most recently in the international literature there had been an explicit scarcity of academic works studying the questions of constitution-making procedures.<sup>3</sup> In spite of a prevailing consensus in the literature about the importance of constitution-making processes, there are few contributions of academic quality on the issue. Consequently, there is a huge discrepancy between the alleged

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<sup>1</sup> On the debate "behaviorialism-institutionalism," see: Falter, Jürgen (2011): Behavioralism, in: Badie, B., Berg-Schlosser, D., & Morlino, L. (Eds.) (2011): International encyclopedia of political science. Thousand Oaks: SAGE Publications, pp.136. and Immergut, Ellen (2011): Institutions and Institutionalism, in: Badie, B., Berg-Schlosser, D., & Morlino, L. (Eds.) (2011): International encyclopedia of political science. Thousand Oaks: SAGE Publications, p.1202.

<sup>2</sup> Bonime-Blanc 1987:161.

<sup>3</sup> Tribe-Landry 1992:632; Elster 1995:364; Elkins et al. 2009a:202.

gravity of the subject and the untapped research field of “constitution-making processes”.<sup>4</sup> This explicit scarcity of academic works is even more surprising if we compare this with the huge amount of scientific papers treating the institutional and cultural mechanism of simple legislative processes in general.<sup>5</sup>

The relevance of a comparative research on constitution-making processes is reinforced not only by this scarcity in the international scientific literature but also by the recent constitution-making process in Hungary, which generated heated international debate. Regarding Hungarian affairs, a comparative analysis could also reveal which elements of the criticism are tenable and which ones are irrelevant. Furthermore, a comparative research will show the similarities and differences with other similar processes. It will also unfold the positive and negative peculiarities of the Hungarian case, and thereby facilitate its more factual evaluation.

As for the methodology, it is to be underlined that the evaluation should not be normative, not reckoning with the facts of real life (like political actors’ interests, motivations and constraints). If we consider a very particular procedure, we should compare its quality to other concrete procedures rather than to an ideal. That is why a comparison is a better instrument for evaluating the recent process in Hungary than deploying a normative standard. In this regard, the present research is intentionally a modest one, because I doubt the merits of a normative research project and even more the capabilities of a predictive one.

However, comparing constitution-making processes presupposes a definition of the elements and aspects to be compared. Herein it is useful to distinguish between two kinds of elements of procedures: on the one hand, we have to examine the essential factors of the process, which determine the circumstances of the constitution-making. These are the following: 1. The subject of the constitution-making procedure; 2. the timing of the constitution-making process; 3. the length of the process; 4. The parties’ awareness of their actual and prospective power on the political battlefield; 5. external and internal constraints (occupation, consultation, obligatory or facultative referendum). On the other hand, we should distinguish seven phases of the constitution-

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<sup>4</sup> A new scientific project tries to cover this huge gap but it is still at the early stages of the investigation. Its key goal seems to be to create a very useful database containing a huge amount of quantitative data rather than to make a qualitative analysis: <http://www.comparativeconstitutionsproject.org>

<sup>5</sup> Bos 2004:19ff.

making procedures and their special characteristics. Nevertheless, a detailed analysis of all these phases cannot be done in the present paper; it should stay a challenge for a next paper.<sup>6</sup>

## 2. Three hypotheses of the research project

Prior to outlining the main character of the Hungarian constitution-making process, the three main assumptions of this paper are briefly explained. Let me begin with an excerpt of a recent article by Francis Fukuyama, which concerns the actual internal affairs of Hungary, published in a recent issue of the *The American Interest* magazine:

In terms of the formal powers the new constitution grants the Hungarian executive, they are not greater than those traditionally possessed by a British prime minister. The Bank of England became independent only in 1998; there is no British constitutional court and therefore no judicial checks on legislative power; not just 2/3s but a fifty percent plus one majority in the House of Commons is sufficient to overturn any law in the land, including any protecting England's fabled press freedoms. So the real difference between Hungary under Orbán and classic British governments does not lie in the formal allocation of powers in the political system. The problem lies entirely in how those powers are used. (...) The new Hungarian constitution is bad not so much for what it is, but what it reveals about the long-term proclivities of its authors. If the political will exists to do something even in a system with a lot of veto players, it will happen; conversely, bad actors can undo even the best-designed institutions. Maybe institutions don't matter, after all.<sup>7</sup>

This short passage corresponds to the first claim of this paper: I am not going to scrutinize either the institutional design or the text of the new Hungarian Fundamental Law but concentrate on the political culture of the actors involved in the recent constitution-making process.<sup>8</sup> At the same time, this ruling out of the textual analysis makes the research more complicated since for a comparative study a purely textual analysis is a less arduous undertaking. The text of a constitution is an a priori given corpus, while an investigation of a constitution-making process requires an in-depth analysis of complex procedures with many actors led by particular interests, motivations and assumptions but constrained by some institutional factors. Therefore, my first thesis is that the most important job of a pre-textual analysis is to scrutinize the political culture of the political community that undertook to change the basic rules of the political process.

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<sup>6</sup> On the seven phases of the process, see the chart 1 below

<sup>7</sup> Fukuyama, Francis (2012): Do Institutions Really Matter?, in: *The American Interest*, January 23, 2012 <http://blogs.the-american-interest.com/fukuyama/2012/01/23/do-institutions-really-matter/>

<sup>8</sup> Pócza, Kálmán (2010): Hogyan (ne) készítsünk alkotmányt? A konzervatív eljárások védelmében, in: *Kommentár*, 2010/6, pp.58.

What I claim is scrutiny of the constitution-making process is not only a possibility but an absolute necessity if the cardinal purpose is to understand a particular country's political culture. This is because constitution-making processes are special at least in one aspect in comparison to other (legislative/political) procedures: since they are the preconditions of all other political processes, there are no predetermined written rules for framing the process of the foundation. All moments of this foundation are restricted only by the affinity of the *pouvoir constituant* to compromises and self-limitation. This self-limitation can be engendered by the pure fact that the *pouvoir constituant* is not homogeneous. Having no overdominant party to decisively determine the constitution-making process, by neglecting the necessity of seeking at least a partial agreement with other parties, the chances and effectiveness of a possible constitution-making process depend on the parties' inclination for making compromises (*propensity to compromises*). On the other hand, having an overdominant party, which is not constrained by compromises, the quality and character of the process is determined solely by this party's inclination to self-limitation (*propensity to self-limitation*). In both cases, the unwritten habits and norms of public life (i.e. the political culture) determine the character of the constitution-making process. In other words: during a constitution-making process the *pouvoir constituant* is constrained only by the community's political culture. And that is the point: without any institutional/written constraints the only factors that regulate the behavior of the political actors are the habits and unwritten norms which are the products of the political culture of the community concerned. This is the reason for prioritizing the political culture over the institutional constraints in case of a study on constitution-making processes.

Now how could we characterize the present-day political culture of Hungary? There are a number of deficiencies in it, of which I would highlight two. On the one hand, it is definitely and extremely polarized without any chance for compromise between the parties. On the other hand, there is a lack of self-limitation, a vitally important factor of the realms of unwritten political norms. Despite these claims, I do not fully agree with Fukuyama on the condemnation of Orbán's government. My disagreement is not only due to the reason that I do not see the situation in Hungary as being as tragic as depicted in Fukuyama's article. Although some of Fukuyama's claims could be queried, he is probably not wrong in what he claims, but he seems mistaken in what he withholds: he does not consider the whole landscape of the Hungarian political culture but only the government's activity and the parliamentary supermajority. Accordingly, the second fundamental message of this paper is that it is not only the government that might be held responsible for the antagonistic character and lack of self-limitation in the Hungarian political culture but all political actors including the opposition parties. There is no culture of "his majesty's loyal opposition": over



the last 20 years, the opposition has opposed not only the politics of the government but the whole system. This is an absolutely pervasive characteristic of Hungarian politics.

In order to get closer to the original goal of this paper (i.e. to some preliminary remarks on the comparison of constitution-making processes), the next question is whether this intransigent and conflict-oriented character of the constitution-making process was an inevitable consequence of the special characteristics of the Hungarian politics or there would have been other possibilities for finding a consensus or at least some compromises.

### 3. Subject of the process

As noted above, a comparative study should scrutinize the subject, the timing and the duration of the constitution-making process together with the awareness of the parties of their actual and prospective power on the political battlefield and the external and internal constraints. Now let us turn to the subject of the constitution-making process as an important aspect of the founding process.

Who is the subject of the process? This is the most fundamental question of all analyses concerning constitution-making processes. There are at least three categories corresponding to the three potential political actors participating in the process: the executive branch, the legislative branch and (by means of a referendum) the people (See Table 1). The *people* are contingent players in all three cases: a constitution-making process is conceivable with and without any referendum in all three cases. *Legislative assemblies* have many types depending on the type of mandate they are provided with. The most desired case is a constitutional convention combined with a referendum where the assembly is mandated only for the constitution-making process and is dissolved when this task has been completed. But this is close to being a utopian case, and you can find few constitutional conventions in practice.<sup>9</sup>

Table 1: Possible subjects of constitution-making processes

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<sup>9</sup> Elster 2006:187.

legislative assemblies (+referendum)	constitutional conventions
	constituent legislatures mandated to constitution-making
	constituent legislatures mandated to amend the constitution
	constituent legislatures not mandated to constitution-making or amending the constitution
	constitutional conventions which legislate without any mandate to legislating
legislative assembly and executive branch (+referendum)	constituent legislatures mandated to amend the constitution + executive
	constituent legislatures not mandated to constitution-making or amending the constitution + executive branch
executive branch (+ referendum)	

As for the recent constitution-making process in Hungary, from a completely formal point of view it was parliament that adopted the new constitution. The executive branch did not formally participate in any phase of the process. No government proposal was submitted and no involvement of any ministries could be detected in the drafting phase. It was clear, however, that the most important decisions were not made in parliament or at a formal cabinet meeting: in spite of poor (written) evidence, it was obviously the headquarters of the Fidesz party that hosted the most important meetings of party leaders and invited special guests<sup>10</sup>. In this sense, the process was not genuinely transparent.

Furthermore, the process suffered a lot of abrupt reversals: after a short period of operation of a parliamentary ad-hoc committee (from June to October 2010), in which the parliamentary factions were represented proportionally, two of the three opposition parties boycotted the constitution-making process because the parliamentary two-thirds majority of Fidesz radically curtailed the competence of the constitutional court. Thus the regulative conception of the new constitution was adopted only by the two-thirds majority of Fidesz. The radical right-wing party (Jobbik) voted against the regulative conception; the left-wing parties did not participate either in the debate of the ad-hoc committee or in the plenary debate of and voting on the regulative conception. Nevertheless, in February 2011, Fidesz invited all parties (including the two left wing

<sup>10</sup> <http://www.origo.hu/itthon/20110307-a-fidesz-elnoksege-jovahagyta-az-uj-alkotmany-tervezetet.html>;  
[http://index.hu/belfold/2011/03/02/igy\\_keszul\\_a\\_fulkeforradalmi\\_alkotmany/](http://index.hu/belfold/2011/03/02/igy_keszul_a_fulkeforradalmi_alkotmany/);  
[http://hvg.hu/hvgfriss/2011.16/201116\\_szinfalak\\_mogott](http://hvg.hu/hvgfriss/2011.16/201116_szinfalak_mogott); <http://www.origo.hu/itthon/20110308-nemzeti-hitvallas-lehet-az-uj-alkotmany-preambulum-neve.html>

parties who had boycotted the process) to present their own draft constitution<sup>11</sup>. Parallel to the debate on and the adoption of the regulative principles of the new constitution, Fidesz began to elaborate its own draft constitution, of which three well-known Fidesz politicians were in charge. In the meantime, the recently adopted regulative principles were degraded to an almost useless document. The draft constitution of Fidesz was published on 15 March, the parliamentary debate took place between 22 March and 18 April, leaving a very short period for such an important document. The left wing parties did not even attend the sessions of the ad-hoc committee, the standing committee of constitutional issues or the plenary debate. Therefore, the new Fundamental Law was adopted in the absence of the left-wing opposition, by a narrow two-thirds majority. Moreover, there has been no referendum on the new Fundamental Law. To put it briefly: from an institutional perspective it was parliament that made the new constitution, but from an actor-centered viewpoint it was only the party leader and the Fidesz parliamentary faction that adopted the new Fundamental Law of Hungary. There has been no compromise and no real participation of either the opposition or the electorate. Consequently, the subject of the constitution-making process has been formally confined to the parliamentary Fidesz faction, but in effect to the party leaders of Fidesz.

Nevertheless, it is another question who is to blame for this situation. Who was responsible for this situation? Unlike Fukuyama and most international critics of the Fidesz government, I would argue that *both* political sides have their own responsibility. If we consider how many actors were included in the constitution-making process (that means the inclusivity of the process, which is a very important factor at the evaluation of constitution-making processes), we should keep in mind the reasons of the restricted numbers of actors: it was not only the lack of generous behavior of the two-thirds majority that prevented a more inclusive process but also the system-opposing mentality of the actual opposition.

In this sense, the left-wing opposition parties have adjusted themselves to a long-term tradition of Hungarian political culture: they were opposing not only the government and its politics but the whole process of constitution-making, as well as the recently adopted new constitution. This political behaviour and reaction to unwelcome and disapproved political developments fits into a deep-rooted and long-standing tradition of Hungarian political culture: the mentality of opposing the whole political system established by the adversary pertains not only to the last 20 years of Hungarian politics but it was a fundamental characteristic of the inter-war period and already of the

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<sup>11</sup> <http://www.origo.hu/itthon/20110211-az-ellenzek-visszahivasaval-erositene-az-uj-alkotmany-t-a-fidesz.html>

period of the Austro-Hungarian Empire. In fact, it seems to be one of the most elemental features of party politics in Hungary.<sup>12</sup>

#### 4. Timing of the process

Nevertheless, the main characteristics of the Hungarian constitution-making process last year (i.e. extreme polarization and lack of self-limitation) are undoubtedly related to the timing of the processes. And this is the *second* aspect to be considered in an in-depth comparative analysis. In the international literature, there has been a debate on the right timing of the constitution-making process.<sup>13</sup> There are reasonable arguments for and against a constitution-making process during or immediately after a political transformation. Consensus-building is typically easier during the transformation process. A constitution adopted by a wide spectrum of the political elite in a transformation process could be more enduring than a constitution adopted after an advanced democratization process.<sup>14</sup> By contrast, advanced democratization implicates a moderate (or extreme) polarization of the political field, since democracy presupposes party competition. And to find a consensus or even a compromise after the emergence and consolidation of a competitive party system is much more difficult than during the transformation process.

On the other hand, some political scientists claim that a premature and rushed constitution-making could lead to a scamped constitution full of inconsistencies, missing the required coherence and not aggregating and integrating a considerable amount of interests and arguments because of the restricted time framing. Moreover, the excited moments of transformation processes do not necessarily encourage moderate debates and rational argumentations.<sup>15</sup>

So what about the Hungarian process regarding timing and its effect? The Hungarian case reinforces the argument that a constitution-making process is hardly conceivable as being consensus-oriented after the democratization process has reached an advanced phase.

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<sup>12</sup> Csizmadia, Ervin (2009): A magyar pártfejlődés történelmi perspektívában: új hipotézisek, *Politikatudományi Szemle*, 2009/4, pp.16; Bibó Istvan (1984): Eltorzult magyar alkat, zsákutcás magyar tortenelem, in: *Válogatott tanulmányok, II. Magvető Kiado*, 569–620; Boros Zsuzsanna (2011): *Rendszerváltások Franciaországban*, h. n., L'Harmattan Könyvkiadó.

<sup>13</sup> Bos, Ellen (2004): *Verfassunggebung und Systemwechsel. Die Institutionalisierung von Demokratie im postsozialistischen Osteuropa*, Opladen: VS Verlag für Sozialwissenschaften, 54.

<sup>14</sup> McWhinney, Edward (1981): *Constitution-making. Principles, Process, Practice*, Toronto: University of Toronto Press, p.15.

<sup>15</sup> Holmes, Stephen (1995): *Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries*, in: Crawford, Beverly (ed.): *Markets, States and Democracy. The Political Economy of Post-Communist Transformations*, Boulder: Westview 71.

Constitution-making in peace time and after the consolidation of democracy through the emergence of a *highly* competitive party system, not necessarily but presumably, tends to lead to a conflict-dominated process. In addition to extreme polarization and the lack of self-limitation, timing may be the third factor of the special character of the recent constitution-making process in Hungary.

## 5. Duration of the process

According to many political scientists, the *length* of the constitution-making process correlates with the higher or lower level of legitimacy of the constitution adopted. During a prolonged process the electorate has enough time to get to know the parties' arguments, they might be familiarized with the fundamental questions, and the discussion might contribute to improving voters' political awareness.<sup>16</sup> Extending the debates on constitutional issues might be essential for higher legitimacy. By contrast, constitutional debates rapidly closed down before discussing all the arguments might facilitate the delegitimization of the constitution. Defining the exact date of the launch of the process is, however, not always as clear-cut as one might think. Consequently, the most important question regarding the Hungarian process is whether we are able to determine the exact starting point or not.

We have at least three different answers to the question when the process of the constitution-making actually began: 1. At the setting up of the authorized parliamentary ad-hoc committee in June 2010. 2. At the call for a draft constitution of the parliamentary parties in January 2011. 3. At the presentation of the draft constitution of the Fidesz-party in March 2011. Regarding pure formalities, it is quite clear that the process started with the setting up of the ad-hoc parliamentary committee in June 2010. By accepting this first answer, one should argue that the process lasted for almost one year. After 20 years of constitutional discussions, which have produced many draft constitutions and accumulated a lot of knowledge on constitutional issues, a period of one year should have been sufficient for producing a relatively finely elaborated draft constitution integrating many interests, arguments and a lot of constitutional experiences. On the other hand, it is quite unclear to what extent this knowledge and constitutional experience was incorporated in the drafting process.

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<sup>16</sup> Holmes, Stephen/ Sunstein, Cass R. (1995): *The Politics of Constitutional Revision in Eastern Europe*, in: Levinson, Sanford (ed.): *Responding to Imperfection. The Theory and Practice of Constitutional Amendment*, Princeton: Princeton University Press, p. 285.

By accepting the call for a draft constitution in January 2011 as a starting point of the process, the time frame of the constitution-making process is confined to barely three months, a truly short period for such an important issue. According to Elkins et al., who collected data of almost all processes since 1789, the average duration of constitution-making took 16 to 22 months. Consequently, by referring to the call for a draft constitution as the starting point one is compelled to adjudicate the process as highly precipitated. Extreme examples might be cited as the drafting process of the new constitution of Myanmar or the extremely short drafting process in Japan after the Second World War, but the relative short, three month term (devoid of any devastating cataclysm) cannot be regarded as the average rate in peacetime. This diagnosis is even more accurate if we consider the date of the publication of the draft constitution by the ad-hoc committee of the Fidesz party. Between the publication of the draft constitution of the Fidesz party (March 2011) and the adoption of the new constitution (April 2011) there was a mere one month. By selecting this last answer to the question concerning the starting point of the process, it might be noticed that this was a very rapid process indeed without any intensive and substantive discussions on the draft.

On the other hand, some additional arguments should also be taken into account: the first constitution-making in Hungary took place during the transformation process and this caused a rapid constitutional change in 1989/90. It took no more than two months in 1989 before Hungary had an almost entirely revised constitution. Moreover, we should remember that the left wing parties did not participate in the parliamentary discussion from mid-November 2010, consequently there could not be a long and extensive discussion on constitutional issues. Having no opposition parties in parliament, the debate became a unilateral and distorted discussion without real substance. Here we come back to our second thesis: the opposition parties are partially responsible for the lack of a genuine debate on constitutional issues. Without real opposition, ultimately it makes no sense to discuss constitutional issues.

Thirdly, it is important to remark that a prolonged dispute, in combination with a deeply polarized public opinion and party politics, might have had an even more devastating effect by intensifying the polarization of Hungarian politics. Cass Sunstein makes it clear that a drawn-out political process within an ideologically polarized society/group might easily have a totally counterproductive outcome.<sup>17</sup> Instead of moderating the conflict and mediating between the

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<sup>17</sup> Sunstein, Cass R. (1999): *The Law of Group Polarization*, in: *The Law School of the University of Chicago: John M. Olin Law & Economics Working Paper 1999/91*, p. 4. but see also: Stasavage, David (2007):

polarized groups, an enduring and heavy debate could intensify the conflict even more. And this could have been a highly conceivable scenario had the constitution-making process in Hungary lasted for some more months.

## 6. Information available about power relations

Let us move on to the fourth aspect of a comparison of constitution-making procedures, namely to *the parties' awareness of their actual and prospective power* in the political system. This information is important because the expectations and presumed interests of the parties influence their motivations, strategies and behavior (i.e. their political culture). In this regard, the best scenario is the well-known condition of the veil of ignorance when the political actors do not have any information about their actual and prospective political power. Under the veil of ignorance, the political parties are constrained by their fear of an unforeseen overwhelming majority that could disregard all interests of the minority groups. Due to the fear of not being a member of this possible majority but one of the overruled minority, every political actor wants to set up guarantees for the minority groups and limit the power of the majority.<sup>18</sup> According to constitutional theorists, a constitution-making process under the veil of ignorance will have by far the fairest outcome. Once again, by answering the question concerning the information available on the prospective power, it is indispensable to warn of the danger of false idealism: situations resembling the veil of ignorance are quite rare. In due consideration of the fact that parties in a constitution-making process are mainly aware of their actual and potential power, the most important question is whether the power allocation is even or uneven.<sup>19</sup>

Taking into account that constitution-making processes are not predetermined by any given rules a priori but only by unwritten laws of the political behavior and by the interests, motivations and presumptions of the political actors (political culture), it is inevitable to concentrate on the respective actors' particular motivations and behavior. In this regard, a general principle could be formulated as follows: if the political actors have information about their actual and prospective political power, and the actual political power is unevenly allocated in a way that one homogeneous

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Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy, in: *The Journal of Politics* 2007/1. 59; Sunstein, Cass R. (2001): *Designing Democracy: What Constitutions Do*, Oxford: Oxford University Press, p. 8.

<sup>18</sup> Przeworski, Adam (1991): *Democracy and the Market. Political and Economic Reforms in Eastern Europe and in Latin America*, Cambridge: Cambridge University Press, p. 87.

<sup>19</sup> Przeworski, Adam (1991): *Democracy and the Market. Political and Economic Reforms in Eastern Europe and in Latin America*, Cambridge: Cambridge University Press, p. 81.

political actor is able to give a constitution to the political community, the new constitution will reflect the perception and ideology of this political power, unless this homogeneous political actor is generous enough to respect ideas originating from the opposition parties. This is a consequence of political logic and the rational choice theory: the interests and motivations of the parties determine their strategic behavior. The political parties always want to maximize their win and minimize their loss. Having the possibility to maximize their win (for example, by changing the constitution) it is not surprising that they use this opportunity. From the perspective of the rational choice theory, the requirement of the self-limitation is a vain appeal to an idealized world. The question whether this appeal is justified and reasonable should remain an open question in this short essay.

awareness of the parties of their prospective power	high	power equally allocated
		power unequally allocated
	low	

After these short theoretical considerations, let us return to the Hungarian case. By comparing the last three constitution-making processes in Hungary, it is obvious that the first process in 1989/90 was an almost typical case of a constitution-making under the veil of ignorance. The second process between 1994 and 1997 was a fruitless procedure resembling the third condition listed above: the political actors were aware of their actual power and this power was rather unevenly allocated (the two-party-coalition had a comfortable two-thirds majority between 1994 and 1998). It should be remarked, however, that a certain kind of self-limitation and the colliding interests of the two governing parties led to the failure of the constitution-making process. The last effort of giving Hungary a new constitution was a successful project but it was dominated by the two-thirds parliamentary majority of the Fidesz-party and characterized by the boycott and total absence of the left-wing opposition. This last case was a typical example of the commonplace detailed in the last section: due to the circumstances of a homogeneous two-thirds majority in parliament, the radical polarization and the lack of self-limitation of both political sides, the new Fundamental Law reflects the ideological and strategic conceptions of this super-majority. It is necessary, however, to make it clear once again: the successful but in some regard rather odd process has been a consequence of four factors: first of all the radical polarization of politics, secondly the normal party competition as a consequence of the timing of the constitution-making



process, thirdly the unique supermajority of a very homogeneous parliamentary fraction behind the government, and last but not least the lack of self-limitation on both political sides.

## 7. Impact of the process: the National Avowal and its interpretation

Before the closing remarks, let me show an example of the effects the peculiar political culture and the main characteristics of constitution-making process (i.e. polarization and lack of self-limitation on both sides) might have on the interpretation and acceptance of the recently adopted constitution. The subject of this brief examination is the preamble of the new constitution, officially called "National Avowal." It is one of the most heavily criticised parts of the new constitution, full of value-oriented declarations. In my view it is, however, quite a permissive text at least concerning the question of faith. Although a number of critics claim that the first line of the new constitution infringes the principle of secularity, I contend that it is a very tricky and permissive solution for integrating religious and atheist voters by one and the same phrase. Due to the special process, however, the very permissive and integrative text was unable to accomplish this aim. And here is why.

The first line of the new Fundamental Law literally corresponds to the first line of the national anthem of Hungary: "God bless the Hungarians." This short reference is a certain type of intertextuality, a very famous method of modern literature, including fiction and poetry. This reference could be interpreted in two ways, neither of which excludes the other: it might be interpreted literally, or as a reference to the Hungarian national anthem. Thus, this appears to be a short, brilliant and ingenious way of making the text acceptable to both believers and atheists. As for believers, they can read it as a literal invocation to God with the intention to ask him to protect Hungarians. On the other hand, an atheist has the alternative to read these few words as a reference to the national anthem without being compelled to accept the religious content of the message. Since the phrase "God bless the Hungarians" is the first line of the national anthem, nobody is coerced to accept religious content, and it is quite rare for people to deny their commitment to their own country's national anthem.

Here we have arrived at the central problem of Hungarian political culture: many of the secular critics of the new Fundamental Law pretend to be forced to read the phrase "God bless the Hungarians" as a religious message. But the phrase has a double significance allowing both ways of interpretation for the reader without prescribing any exclusive binding interpretation. In this sense,

this solution seems to be inclusive and permissive. In spite of this tricky resolution of the conflict between religious and secular principles, the first line of the new Fundamental Law was regarded as an exclusive and totally religious reference to God.

What is the reason of this phenomenon? It might be explained only by a pre-textual analysis of the political process and Hungarian political culture, which has two main characteristics: a long-standing tradition of "anti-system opposition" which is, however, a consequence of the lack of the self-limitation on both the government and the opposition sides. These two characteristics in general and of the recent constitution-making process in particular are or will be the most important factors for a possible failure of the new Fundamental Law. Even if the phrase "God bless the Hungarians" could integrate atheists and believers, the desired effect may not be reached because the text did not originate in a dialog and compromise but was adopted only by one political power. This is the reason why the opponents of the text pretend to be forced to accept religious content. In this sense, the constitution-making process determines the interpretation and the acceptance of the new Fundamental Law. To put it differently: the political culture as reflected in the constitution-making process prevents the opposition from adhering to a constitution adopted only by the political adversary. Although the first line seems to integrate atheists and believers, the opponents of the Fundamental Law do not only oppose the government but the new system established by the government party. They deny the commitment to this particular phrase even if it offers an acceptable compromise. It is rejected because of the process it was adopted rather than content. Overall, it is the constitution-making process which predetermines the interpretation of the adopted text of the constitution.

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1. sSubject	legislative assemblies (+referendum)	constitutional conventions	
		constituent legislatures mandated to constitution making	
		constituent legislatures mandated to amend the constitution	
		constituent legislatures not mandated to constitution making or amending the constitution	
		constitutional conventions which legislate without any mandate to legislating	
	legislative assembly and executive branch (+referendum)	constituent legislatures mandated to amend the constitution + executive	
constituent legislatures not mandated to constitution making or amending the constitution + executive branch			
executive branch (+ referendum)			
2. mMoment	cataclysm		
	normal peacetime		
3. dDuration/length			
4. aAwareness of the parties of their prospective power	high	power equally allocated	
		power unequally allocated	
	low		
5. eExternal constraints	overall		
	partial		
6. iInternal constraints	upstream		
	downstream		
7. pPhases of the constitution making processes	a. idea-generating phase /preliminary consultation	duration	
		inclusiveness	inclusive
			exclusive
		importance	considerable
			inconsiderable
		b. election of the constituent assembly	illegitimate/negotiated
	proportional		
	majority		
	mixed		
	c. regulation for the	compromising	

	constitution making procedures	majority	
	d. consultation	duration	
		inclusiveness	inclusive
			exclusive
		importance	considerable
			inconsiderable
		strategy	compromising
	conflict-oriented		
	publicity	open to the public	
		secret	
	e. drafting phase	duration	
		strategy	compromising
			conflict-oriented
		publicity	open to the public
	secret		
f. discussion	duration		
	strategy	compromising	
		conflict-oriented	
g. adoption	referendum	turnout and rate/ration of the adoption on the referendum	
		rate/ration of the adoption in the assembly	
	without referendum (rate/ration of the adoption in the assembly )		
8. Illegitimacy	formal	dubious	
		unambiguous	
	Empirical		

Chart 1. Main aspects of a comparative analysis of constitution-making processes

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