

# The Undignified Part of Constitutional Analysis

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Gábor Attila Tóth (ed.): *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Budapest, CEU Press 2012) ISBN 978-615-5225-18-5

When I lived in Budapest about a decade ago, sympathizers of the political far right regularly gathered in the square below my window. Sometimes the rallies were large, very large, and late in the evening, as they broke up, men on their literal and metaphorical fringes, dressed like *betyárok* – folk bandits – would stand in the street, cracking bullwhips. It was ridiculous but also impressive and intimidating, in that way the crack of a whip or the stomp of jackboots usually is.

Not my cup of tea, but evidently it was for a great many people, and this is a social fact about Hungary one does well not to forget. The authors of the book under review here<sup>1</sup> were surely not at those rallies, just as they were not likely to have voted for Fidesz, the center-right party whose crushing electoral victory in 2010 led, on New Year's Day 2012, to Hungary's controversial new constitution – the Fundamental Law – that this book is so angrily about.

Much like the qualities of a jackboot, that anger is as troubling as it is understandable, because this book is, in miniature, an experiment much of the kind a constitution is: an effort to forge a common foundation out of diverse elements. It is an edited volume, so each of its 14 chapters<sup>2</sup> has its author, and sometimes two or three – including the late Ronald Dworkin, János Kis, Andrew Arato, Gábor Halmai, Sándor Radnóti, Kim Lane Scheppele, a list as redoubtable as one

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<sup>1</sup> Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

<sup>2</sup> Plus a preface and amicus brief written by some of the authors, the Venice Commission's opinion on the Fundamental Law, and, quite valuably, the whole text of the Fundamental Law.

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could want for a book on constitutionalism and Hungary – but collectively they have chosen to write *this book*. They have constituted themselves as an integral intellectual (and political) community. So we should read them as a whole – ‘*par[te]s pro toto*’<sup>3</sup> – the more so because, despite many fine individual contributions, there is something singularly wrong with the whole.

The thing wrong is not the attack on the constitution, which well deserves attacking. *Disunited Nation* lays out several entirely accurate and fair charges against the Fundamental Law and its authors in Fidesz: their refusal to incorporate the views of opposition parties; the entrenchment of Fidesz’ own political preferences; the evisceration of structural checks on executive and parliamentary power that had operated in the so-called 1989 constitution drafted at the transition from the Communist era, which the Fundamental Law replaces<sup>4</sup> – especially the restriction of the much-praised Hungarian constitutional court’s jurisdiction over budgetary matters; and the refusal to draft a value-neutral constitution integrating all Hungary’s citizens. Readers wishing to know more about these features – defects – of the new constitution, and of its authors in Fidesz, will find them thoroughly explicated; together these critiques constitute an undeniable indictment of this document’s many, serious, occasionally dangerous divergences from broader European and global patterns of constitutional design and practice. (The book went to press before the most recent constitutional amendments and cardinal laws that further altered Hungary’s constitutional structure, but these would only have increased the intensity of the criticism.)

So there is much – very much – in this book that will instruct, inform, perhaps enrage in a productive sense. Still, we are concerned here, not with the constitution’s flaws, but the commentary’s – with the charges against the book itself. There are three: its dismissive attitude to constitutionalism’s democratic impulses; its unprincipled overreach; and its fundamental immoderation.

For while the constitution is profoundly flawed, so is this book. It can be awkward to criticize something if, by so doing, one might be thought to be defending something worse: What if, in declaring the latest study of Hitler poorly done, one

<sup>3</sup> Sándor Radnóti, ‘A Sacred Symbol in a Secular Country: The Holy Crown’, in Tóth, *supra* n. 1, at p. 85 at p. 108.

<sup>4</sup> In 1989, as part of the negotiations for the transition to a multi-party democracy, the communist Parliament radically amended the existing Basic Law, rather than replacing it with a new document. This produced an effectively but not formally new constitution – a unique situation in the former Soviet bloc states, and one which, as János Kis ably shows, contributed over time to a poisonous constitutional discourse in Hungary. There was one earlier, abortive attempt to introduce a new constitution in the 1990s, which foundered, and the issue then lay dormant – festered – until Fidesz, which incidentally had not supported the 1989 formula, produced and passed its new constitutional draft after the 2010 elections. János Kis, ‘Introduction: From the 1989 Constitution to the 2011 Fundamental Law’, in Tóth, *supra* n. 1, at p. 1-21.

were misunderstood? But that is the risk: To review a text about another text is, inevitably, to say something about both.

### IMBALANCED ANTI-MAJORITARIANISM

The Fundamental Law the authors of this book criticize arises out of Fidesz's overwhelming electoral victory in 2010, which gave that one party the parliamentary supermajority needed to amend the constitution the following year. For the authors of *Disunited Nation*, this apparent popular legitimacy is potentially problematic, of course, since it suggests that the Fundamental Law might be both flawed and, somehow, the people's desire; the book's response is a relentless assault on majoritarianism's relationship to constitution-making.

Tactically, this means diminishing the significance of this particular electoral victory and its consequences, and this the authors do almost systematically: Fidesz' share of the vote was 'barely more than 50 percent'<sup>5</sup> – as if, in a multi-party system, that were anything short of extraordinary. Its parliamentary supermajority is variously ascribed to the effects of districting,<sup>6</sup> disproportional electoral rules,<sup>7</sup> 'quirks',<sup>8</sup> and 'a trick of the existing election law'.<sup>9</sup> Even chapters acknowledging the obvious adopt a strangely dismissive language, referring to the election as 'a lopsided vote',<sup>10</sup> or Fidesz' parliamentary fraction as 'a transient majority'.<sup>11</sup> Denying the consequences of an electoral majority is the mark of a minority position – the logic of boycott. It is always frustrating to lose: It always feels – any child knows this with burning pre-moral intensity – just so *unfair*.

This is crude stuff, which by trying to deny merely reminds us just how important numbers, and democracy, are in the constitutional process. Constitutions have *something* to do with the people's will, and although the book asserts an

<sup>5</sup> Andrew Arato, 'Regime Change, Revolution, and Legitimacy', in Tóth, *supra* n. 1, at p. 34 at p. 49.

<sup>6</sup> Ronald Dworkin, 'What is Democracy', in Tóth, *supra* n. 1, at p. 25 at p. 25.

<sup>7</sup> Arato, *supra* n. 5, at p. 34 at p. 49; Miklós Bánkuti et al., 'From Separation of Powers to Government without Checks: Hungary's Old and New Constitutions', in Tóth, *supra* n. 1, at p. 237 at p. 237, in n. 5.

<sup>8</sup> Zoltán Miklósi, 'Constitution-Making, Competition, and Cooperation', in Tóth, *supra* n. 1, at p. 59 at p. 59.

<sup>9</sup> Bánkuti et al., *supra* n. 7, at p. 237 at p. 253.

<sup>10</sup> Bánkuti et al., *supra* n. 7, at p. 237 at p. 268.

<sup>11</sup> Jeremy McBride, 'Trees in the Wood: The Fundamental Law and the European Court of Human Rights', in Tóth, *supra* n. 1, at p. 359 at p. 371 (criticizing the Fundamental Law's cardinal law provision, which requires a two-third majority of those present and voting in Parliament to change certain norms, for 'allowing a transient majority – which may either be the result of an exceptional electoral landslide or just the votes of those present on the day – to give enhanced protection to [those matters]').

electoral equivalence – calling the Fundamental Law ‘a constitution of one half of the nation imposed on the other half against their will’<sup>12</sup> – the problem with dismissing ‘the present majority’ is that the present majority was *really* large.

And large enough to meet all the requirements of amendment. Early on we find the claim that the previous, 1989 Constitution gave the *opposition* a say in constitutional reform,<sup>13</sup> but this is clearly not true: It only required a two-third majority of Parliament. Normally this would give the opposition some purchase – no one imagined a single party was likely to achieve this on its own (and in fact in 2010 Fidesz won on a common list with KDNP, the small Christian Democratic People’s Party), but nothing precluded this result. This is a design with consequences, an object lesson about the advisability of making the amendment process slow or multi-stage and of separating the *pouvoir constituant* and the *pouvoirs constitués*<sup>14</sup> – but also a reminder: Constitutional design should assume people will not follow their better angels, but instead be self-serving and take advantage where they dare. At least, it should recognize that other people’s better angels are not necessarily one’s own.

So the fault for the new document lies in the previous one, whose rule allowed precisely this outcome – the ‘Achilles’ heel in the Hungarian constitutional system’.<sup>15</sup> That feature was there for any to take advantage of, if they could muster the votes for ‘a revolution (...) in the polling booth’.<sup>16</sup> It is against that flaw that a *constitutional* critique properly lies, and not against the new constitution, which may be contested as politics, but must be acknowledged as valid.

Unless there is a *principled* reason not to – and of course, there is: The more strategic critiques in *Disunited Nation* meet the awkward challenge of electoral consequentialism, not by pretending Fidesz didn’t win, but by invoking anti-majoritarian principles. Dworkin, in one of his last published texts, reminds us that ‘majority preference in and of itself has no value whatsoever’<sup>17</sup> – as true as it is convenient for his view of the proper relationship of law to democracy. This Dworkinian view permeates the whole book, especially its strong opposition to reductions in the jurisdiction of a ‘zealous’<sup>18</sup> constitutional court that had ‘elevat[ed]

<sup>12</sup> Kis, *supra* n. 4, at p. 1 at p. 20-21.

<sup>13</sup> Kis, *supra* n. 4, at p. 1 at p. 5.

<sup>14</sup> Oliver W. Lembcke and Christian Boulanger, ‘Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court’, in Tóth, *supra* n. 1, at p. 269 at p. 294. Arato also ably describes the problem with this design. Arato, *supra* n. 5, at p. 34-56.

<sup>15</sup> Bánkuti et al., *supra* n. 7, at p. 237 at p. 252.

<sup>16</sup> Renata Uitz, ‘Freedom of Religion and Churches: Archeology in a Constitution-making Assembly’, in Tóth, *supra* n. 1, at p. 197 at p. 220. The phrase appears elsewhere in the. See Bánkuti et al., *supra* n. 7, p. 237 at p. 253 (noting also that Fidesz itself has presented its electoral victory as a revolution).

<sup>17</sup> Dworkin, *supra* n. 6, at p. 25 at p. 31.

<sup>18</sup> Dworkin, *supra* n. 6, at p. 25 at p. 25.

itself above the will of the democratic legislature'.<sup>19</sup> This means there is no need to minimize elections or parliamentary super-majorities, because a 'delusive constitutional majoritarianism'<sup>20</sup> is never empowered to violate foundational principles, or do anything except produce a value-neutral document that integrates all segments of societies. The Fundamental Law fails because it 'does not fulfill the integrative function of modern constitutions. It is biased in favor of the winners of the 2010 elections and against everybody else'.<sup>21</sup>

Of course, to avoid being just a loser's veto, this claim of principle must be grounded somewhere, and thus a final layer of anti-majoritarian defense: Europe. The overriding priority of higher European norms offers a constitution for constitutions, which is why resort to the Venice Commission (the Council of Europe's advisory committee on matters constitutional, which is also quite critical of the Fundamental Law), the European Court of Human Rights and the European Union are so important to the book's argument – as fixed references outside and above the merely domestic constitutional order.<sup>22</sup>

All of this simply recapitulates the obvious point that this book shares in a more general liberal perspective on constitutionalism, which as an intellectual project has quite successfully conflated democracy, constitutionalism, human rights and the rule of law, and which is rightly suspicious of populist, national sensibilities: Limiting majority power through procedural restraints and fundamental rights is one of a constitution's core protective functions. Still, it can be awkward to harp on about it after one has been eviscerated in an election. Because constitution-making is *also* a majoritarian act, with the implicit purpose of making – constituting – a political community. Principles and populations both matter, and a defensible constitutional practice must balance the demands of each.

I do not have a fully developed theory of the relationship between immutable principles and respect for human agency expressed in democratic choice – which after all is also one of those principles. I only know that it should be a balance, meaning that while we need not accept just whatever dangerous violence the democratic process churns out – if the Fundamental Law provided for the can-

<sup>19</sup> Lembcke and Boulanger, *supra* n. 14, at p. 269 at p. 276.

<sup>20</sup> Gábor Atila Tóth, 'Preface', in Tóth, *supra* n. 1, at p. ix at p. x.

<sup>21</sup> Tóth, *supra* n. 20, at p. ix at p. ix.

<sup>22</sup> European perspectives clearly matter to Hungarians across the political spectrum, so this is a sensible framework. At the same time, Fidesz's rhetoric about the EU is very confrontational, expressing a skepticism about existing European institutions as a source of dispositive value that we must assume is at least accepted, perhaps even approved, by many Hungarian voters, who after all in the most recent European Parliamentary election handed Fidesz an absolute majority of both votes and seats. (Fidesz took 51% and 12 of 21 seats; Jobbik came in second with almost 15% and 3 seats; 3 liberal parties took 21% between them and 5 seats, while the Socialists took just under 11% for 2 seats.)

nibalistic enslavement of Gypsies, we would be right to object, even if every single Hungarian had voted for it – but we properly intrude upon each society's autonomy only to the extent that truly universally shared values truly require, and we must skeptically interrogate our decision to intrude, not make it cavalierly or preferentially. Somewhere between the ovens and the traffic code there is a line; I don't know exactly where it should be – I only know it when I don't see it: Instead, prioritizing the abstract claims of structure, rights, and Europe, the authors of *Disunited Nation* leave no space in constitutional deliberation for the popular will so recently, forcefully and (to them) disagreeably expressed an election; immutable principles determine everything, and the challenges of taking democracy seriously are neutered in a republic of virtue.

#### THE LURE OF PREFERENCE

All of which might be all right if those immutable principles really determined everything. Here the book's second problem: an inability to stick to a *principled* position on what a constitution should contain. Formally, the authors' liberalism is insistently value-free and radically plural: 'to achieve the broadest possible agreement which is still meaningful; in modern secularized societies with a plurality of moral convictions, world-views, and interests this cannot be more than a minimum'.<sup>23</sup> But not all liberalisms are thin, and neither is this one: It is pregnant with mandatory desiderata of precisely the kind the authors rightly criticize the constitution for entrenching.

An example: The book repeatedly criticizes the Fundamental Law's protection of the heteronormative family and of fetuses, correctly noting the challenge this poses to abortion and privacy rights.<sup>24</sup> On principle, we are told, these matters should not be in the constitution: Important but non-structural matters should be left to regular politics, not frozen in constitutions or cardinal laws enacted by a contingent super-majority. Protective institutions and rules for political competition should be entrenched, but walling off non-fundamental norms is 'incompatible with parliamentarism and the principle of the temporal division of powers',<sup>25</sup> because this 'rule[s] out the future ability of the Hungarian legislature, following

<sup>23</sup> Radnóti, *supra* n. 3, at p. 85 at p. 87.

<sup>24</sup> Catherine Dupré, 'Human Dignity: Rhetoric, Protection, and Instrumentalization', in Tóth, *supra* n. 1, at p. 143 at p. 152-156; Kriszta Kovács, 'Equality: The Missing Link', in Tóth, *supra* n. 1, at p. 171 at p. 194; McBride, *supra* n. 11, at p. 359 at p. 370; Andrew Arato et al., 'Opinion on the Fundamental Law of Hungary (Amicus Brief)', in Tóth, *supra* n. 1, at p. 454 at p. 467-469 and 470-471.

<sup>25</sup> Arato et al., *supra* n. 24, at p. 454 at p. 483.

the world-wide tendency, to make the institution of marriage available to same-sex couples'.<sup>26</sup>

But note that tendency: The authors aren't simply leaving doors open, but insisting we go through them – anticipating a particular value-oriented change that *they want* to entrench. For it turns out that sexual orientation 'requires the highest level of legal protection, namely constitutional protection'.<sup>27</sup> The constitution is wrong, not for entrenching a rule, but the wrong rule. Nor is this the only such instance: Similar internal contradictions – similarly revealing dichotomies – appear for rules on social and economic rights, market regulation, the relationship of rights to duties, and references to religion; usually *Disunited Nation* keeps its criticism of the constitution's particular entrenchments from appearing on literally the next page after it has called for entrenching the opposite rule, as happens here, but one rarely has to read far.

Though one has to read lively, because the twists can be hard to follow: Sometimes it is the antithesis of the good society to lock up an issue, other times the good society's very foundation that something be locked away; some rules are criticized for being cardinalized, others for *not* being. Although notionally motivated by a desire to preserve the policymaking choices of future parliaments, the only grounds that consistently explain when this book prefers a given rule to be entrenched or left open is a particular liberal vision: not principles but preferences – and theirs, not those of the party representing an actual but irrelevant majority.

## IMMODERATION

These imbalances – principles trumping democracy, and the partisan tilt of those principles – suggest a certain immoderation. The authors want a very particular constitution – with a certain structure, certain rights, even certain options. It is a particular vision – and a very rigid one, which explains why it utterly dispenses with democratic legitimacy: They want this model, even if others do not; this normative structure is valid and necessary, whatever the humans actually subject to it think. Their justifications arise out of a European vision – another abstraction of democracy: a Union filled with democracies but not, itself, a famously democratic institution – and so do their touchstones, even on issues for which there is no consistent European practice.

Instead of democratic, their procedure is consultative. And while this is actually a good idea as a practice of constitutional design, it has its limits. The repeated notion that some element should not be in the constitution because it is

<sup>26</sup> Kovács, *supra* n. 24, at p. 171 at p. 194.

<sup>27</sup> Kovács, *supra* n. 24, at p. 171 at p. 193.



unacceptable to some part of the people or ‘the nation’<sup>28</sup> is hard to square with the actual constitutional practice of almost every country: Many constitutions indeed have come about through or provide for wide deliberation, but few provide an absolute veto for a dissatisfied but undifferentiated minority.<sup>29</sup> Any constitutional process ultimately reaches a set of decisions, and it is simply not true that everyone has to agree. The authors’ relentless deflation of any majoritarian consequentialism is a political fantasia of social unanimity – and therefore oddly corporatist. But realism is there too, though subterranean: the expectation, *sotto voce*, that the majority must consult with *them*.

And not the reverse: The constitutionalism advanced in *Disunited Nation* is formally, insistently integrative, but the authors’ constricted, precise vision of a modern constitution’s acceptable contours comprehensively excludes the substantive views of so many of their countrymen, whose normative vision is not empty and minimal, but thick and nationally informed. There is little – really, no – evidence that the authors, given the constitutional chance, would craft a text that integrates, or even tolerates, their countrymen’s values.

Considering the authors so greatly prize integration, it is striking how exclusive their text is: Not one author actually defends the constitution – each chapter, even those notionally addressing very esoteric points of law, pointedly opposes it – and precious few engage in cool observation. (The best – Kis, Radnóti, Lembcke & Boulanger – sustain an objective analysis, keenly tracing, respectively, the poisoned politics of the 1989 constitution, the historical context of the Holy Crown doctrine,<sup>30</sup> and the clashing philosophical approaches to judicial and legislative authority animating the two sides, even as each makes patently clear his intense dismay at the new constitution.) Could the authors – the editor – not find sensible voices, if not to defend this text, then at least to discuss it without partisan purpose?

On balance I do not like this constitution, and I consider many elements of it dangerously defective, but even I could easily defend other parts of it, or describe its admixture of very troubling and entirely anodyne elements, or its (thoroughly

<sup>28</sup>Tóth, *supra* n. 20, at p. ix at p. xii; Kis, *supra* n. 4, at p. 1 at pp. 1 and 20-21. Similar arguments appear in Radnóti, *supra* n. 3, p. 85 at p. 109 (noting, accurately, that the Fundamental Law’s ‘ideology does not apply to the entire nation while at the same time it stretches beyond it’, meaning to ethnic Hungarians outside the borders of the state); Zsolt Körvélyesi, ‘From “We the People” to “We the Nation”’, in Tóth, *supra* n. 1, at p. 111-140 (discussing the Fundamental Law’s changes to national and civic understandings of who is a Hungarian).

<sup>29</sup>Federal systems, of course, can provide such a veto for identified – differentiated – communities. Hungary is not a federal state.

<sup>30</sup>The Holy Crown of King-Saint Stephen, the founder of the Christian Hungarian kingdom, is a central legitimating motif of contemporary Hungarian rightist constitutionalism, and its literal and metaphorical move from the National Museum to Parliament is the subject of one of the book’s best and liveliest chapters. Radnóti, *supra* n. 3, at p. 85-109.



modern) admixture of traditional nationalism and contemporary constitutionalism; or I could describe the processes that brought things to this troubled state without taking sides, and many scholars of and in Hungary could do all this much better than I. Such people exist – after all, such people must exist, unless the authors really believe that the entire right in Hungary is mad, senselessly, witlessly mad, and with them the 69% of the electorate who voted for these madmen or those worse – those farther right – than them.<sup>31</sup>

Too much in *Disunited Nation* suggests its authors believe exactly that. Thus the urgency about jackboots: The all-too-ready charge, surfacing occasionally in this book, that the new constitution returns to the darkest currents of 20th century Fascism (including references, in language now elliptical, now direct, to southern US states of unspecified date and Francisco Franco), suggests that the authors view the Hungarian constitution through the lens of a politically engaged, Manichean intellectual struggle, as if drawing sustaining outrage from a contest with the notional moral clarity of some endless Spanish Civil War.

Politics is a rough game, and one of its weapons is to claim that one's preferences are purest principle. If one understands this book as political, then its inconsistencies are just ways to win the argument. But if one imagines it to be a work of scholarship, and takes its principled claims for what they ought to be, one might be disappointed. Its critique, taken as a whole, lacks that cool, detached faculty that both makes an argument scholarly – that makes it scholarship instead of a knife fight – and, in this case, would have allowed its authors to apprehend the irony in their own critique.

For if *Disunited Nation* constitutes a kind of experiment, the results are troubling: Its authors convince us that the Fundamental Law is a flawed, even dangerous document, but we should wonder – unlikely event – what constitution they might write. Better on many counts, I am sure, but also, I suspect, strident and

<sup>31</sup> 69%, because that is the share of the popular vote won by Fidesz or parties the authors can tolerate even less. The far-right, anti-Gypsy and anti-Semitic Jobbik party polled 16% in the 2010 elections, becoming the third largest party in the Parliament. Much external discussion of Hungary's constitutional transformation conflates Jobbik and Fidesz, but in fact these are competitor parties, and Jobbik's parliamentary fraction voted against the new constitution. But from the point of view of the authors of *Disunited Nation*, this is no solace, and nothing in their constitutional prescriptions contemplates how to integrate this sizable part of Hungary's population into the polity. In the most recent election, in April 2014, Fidesz again won, with 44% of the vote – less than last time, but still far and away the most dominant party; Jobbik improved its share to around 20%. The electoral rules again give Fidesz a disproportionately large share of the parliamentary seats, but give Jobbik a disproportionately small share. So, reading backwards from this election – a perilous exercise – one might now say that a majority of Hungarian voters have chosen parties that opposed the constitution; but this requires one to assimilate the socialists, liberals and Jobbik to a common position. In the European elections in May, as noted above, Fidesz and Jobbik together took 66% of the vote.

self-righteous in a way we should beware, left, right or center. It is telling that the book includes a brief several of the authors submitted to the Venice Commission when it was evaluating the Fundamental Law.<sup>32</sup> The incapacity of that partisan text, as so many of the chapters, to separate legal analysis from political preference is comprehensive and irredeemable. And here we see, as so often happens, a curious convergence: the unyielding determination with which each – constitution and commentary – advances its own desire, to the exclusion of any other vision of the good life. The authors of *Disunited Nation* are no more capable of, indeed no more interested in uniting the nation on terms other than their preference, than is the constitution they criticize. They presumably recognize the very real immoderation in the Fundamental Law because, with a different coloring, it is their own.



<sup>32</sup>Arato et al., *supra* n. 24, at p. 454 at p. 467-469 and 470-471. The book also includes the Venice Commission's own opinion, Tóth, *supra* n. 1, at p. 491-535.