

LEGITIMATING CONDITIONS OF DEMOCRATIC CONSTITUTION MAKING

**EVALUATING THE HUNGARIAN CONSTITUTION MAKING PROCEDURES
OF 1989 AND 2011**

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ABSTRACT

This thesis is a theoretical inquiry as to how different views of democracy can address the question of the legitimate conditions of constitution-making. This theoretical analysis focuses on the democratic legitimacy claims about constitutional politics made by Bruce Ackerman. The three fundamental pillars in Ackerman's typology of conceptions will serve as an evaluative framework for the constitution-making procedures that took place in Hungary in 1989 and 2011. The examination aims to show that accounts of the legitimate exercise of political authority in a democratic system are not all equally capable of addressing the justificatory principles and legitimate conditions of collective decisions in pre-constitutional and extra-constitutional circumstances. This critical enterprise highlights the conceptual shortcomings of purely substantive and purely procedural views of democracy, and may help to evaluate the accuracy of Ackerman's dualist model of constitutional politics. Based on the results of this theoretical inquiry, the thesis goes on to argue that the Hungarian constitution-making procedure of 2011 may best be described as democratic monism, while the transitional constitution-making process of 1989 may best be conceived through a reversed dualist lens. The thesis finds that both the constitutions of 1989 and 2011 encountered problems of legitimacy, and that while the Fundamental Law of 2011 was both procedurally and substantively flawed, the constitution of 1989 complied with the substantive conditions of legitimacy.

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INTRODUCTION

Over the last twenty-five years that have passed since the democratic transition in Hungary, the Hungarian society has had two constitutions, both with questionable legitimacy. Its first constitution, the amended Fundamental Law of 1949 was born out of a compromise among participants at the National Roundtable in 1989, and its legitimacy immediately became subject to passionate controversy. Certainly, apart from a rather small group of constitutional lawyers, none of the political actors could wholeheartedly identify with the constitution owing to its democratic deficit, that is, its insufficient legitimacy that the constitution inherited from the undemocratic constitution making process that was administered by the last, already illegitimate Communist parliament. Even though the revised constitution never achieved to become the symbol of a national proud over the newly acquired democracy, the democratic parliaments following the transition did not succeed in coming to an agreement over the question of terminating the transition, either by a symbolic adoption of a new constitution free from the burdens of the Communist legal number of Article XX of 1949, or by finalizing the existing one by collectively and publicly ascribing it full-fledged legitimacy. Yet on January 2nd 2012 when finally the presently governing Christian-Conservative coalition adopted the new Fundamental Law of Hungary, tens of thousands of protesters marched on the streets of Budapest to demonstrate their anger with regards to the nation's new constitution that had been adopted along party-lines.

The source of legitimacy has long been subject to scholarly debates among political philosophers, and various theoretical traditions have developed different accounts about the way political authority is to be exercised legitimately. The problem of how a community can amend a constitution or create a new one for itself that it can regard as legitimate consists of various questions that are strongly tied to one another. We can make an inquiry as to the sufficient properties of a social, political or institutional problem that qualify the problem itself as a minimally acceptable reason to amend the constitution, fully or partially. Also, we can ask whose view on the manner of an amendment should be regarded as appropriate and legitimate. Györfi argues¹ that the two implicit questions, the who-question (who should interpret or determine the content of the amendment, that is, a theory of authority) and the how-question (what is the appropriate interpretive or creative framework) are intimately intertwined.

In the present paper I am going to look at how different views about democracy can address the question of the legitimate conditions of constitution making. I am going to look at the three fundamental pillars of the typology of competing conceptions about democratic legitimacy claims concerning constitutional politics outlined by Bruce Ackerman in *We the People: Foundations*, so that I can provide an evaluative framework for the two constitution-making procedures that took place in Hungary in 1989 and 2011. My aim is to show that the

¹ Györfi, T., “In Search of a First-person Plural, Second-best Theory of Constitutional Interpretation”.

different accounts about the legitimate exercise of political authority in a democratic system are not equally capable of addressing the justificatory principles and legitimate conditions of collective decisions in pre-constitutional or extra-constitutional circumstances. This critical enterprise will highlight the conceptual shortcomings of purely substantive and purely procedural views of democracy, and may also help us evaluate the accuracy of Ackerman's dualist model of constitutional politics. Based on the results of this theoretical inquiry, I will evaluate the legitimacy claims of the two post-transitional constitutions of Hungary, and see if we can find legitimacy in their neighborhood.

In Section 1 of Chapter 1 (1.1), I am going to look at a rights-based, substantive view of democracy that Ackerman calls 'rights-foundationalism', and show what conditions the rights-foundationalist position sets out for justifying the legitimacy of a law; what a proponent of rights-foundationalism thinks about the appropriate distribution of institutional responsibility that is necessary to preserve the consistent moral character of the legal system in general; and finally, I am going to deconstruct the position in order to see its background principles that qualify the rights-foundationalist position to extend its domain to pre-constitutional circumstances and thus justify the act of constitution-making itself.

In Section 2 (1.2) I will look at a procedural account that Ackerman labels 'monistic democracy' which is best illustrated by the case of constitution making of the Hungarian Fundamental Law of 2011. Following a strategy outlined in Section 1, I will be looking at the

background justificatory principle of democratic monism, illuminate the connection democratic monism draws between the principle of moral equality and majority rule applied in legislative decision-making in order to settle conflicts of moral disagreement. Next, I will look at the legitimacy claim of democratic monism concerning constitutional politics that deems the last elected parliament the legitimate constituent agent, and will show that a procedural account of democracy cannot provide a plausible conception about proceduralist, majoritarian constitutional making.

In section 3 (1.3) I will present Ackerman's own reading of the American constitutional tradition which he names 'dualism' that, similarly to democratic monism, is grounded on a popular conception of ultimate political authority. I will point out that the basis on which Ackerman draws a distinction between higher lawmaking and lower lawmaking, that is, constitutional politics and normal politics, fails to provide a solid basis to evaluate the legitimacy of constitution making due to its focus on historically contingent political and social circumstances whose subjective perception cannot substitute the normative force of objective constituent pressures.

The proposed analysis will not only help us see the difference between the disparate conceptions of the appropriate conditions of constitution making, but the deconstruction of each position presented by Ackerman will help us discover their shortcomings when contrasting their normative premises with practical political difficulties. Showing that each of

the models presented by Ackerman fails to properly account for the legitimizing conditions of democratic constitution making procedures, in Section 4 (1.4) I will turn to the post-sovereign constitution making model of Andrew Arato that provides a practical case to overcome the difficulties the above positions must encounter in constitutional moments. Finally in Section 5 (1.5) I am going to provide a theoretical background for Arato`s democratic normative model. Contrary to Antal² and Györfi³ who identify the transitional constitution making process in Hungary to be in line with Ackerman`s rights-foundationalist model, I am going to point out that instead of a mere substantive reading, the drafting process and the subsequent constitutional legislation and jurisprudence should not be read through rights-foundationalist lens but it is more appropriate to interpret the constitutional events of 1989 as a case of a constituent agency-aware reversed dualist model that is rights-preserving on the first place, and democratic on the second.

In order to contextualize the results of the theoretical analysis in Chapter 1, the second part of the thesis will provide an overview of the constitutional politics in Hungary since the formation of the Roundtables. In Section 1 (2.1.) I will briefly present the historical background of the conflicts about the status of the constitutions. In 2.2 I will look at the most dominant political opinions about the legitimacy of the 1989 constitution. This section will

² Antal, "Politikai és Jogi Alkotmányosság Magyarországon." [Political and Legal Constitutionalism in Hungary].

³ Györfi, "A többségi döntés tartalmi korlátai és az alkotmánybírászkodás [Content-specific limits of majoritarian decision and constitutional jurisprudence]."

shed light on the roots of the reversed dualist – democratic monist shift that the Hungarian constitutional politics has gone through since the democratic transitions.

Finally, in Section 3 (2.3) I will connect the results of the two chapters and evaluate the legitimacy of the two constitution in light of the theoretical conclusions.

1. THREE TAKES ON CONSTITUTIONAL LEGITIMACY

1.1. RIGHTS-FOUNDATIONALISM - SUBSTANTIVE ACCOUNTS OF DEMOCRACY

In the rights-foundationalist position about democracy and the legitimating conditions of constitution making, rights are conceived as counter-majoritarian devices. The first-order obligation, therefore, the rights-foundationalist argues, that states owe to their citizens is the provision of the widest possible scheme of fundamental human rights and civil liberties. As opposed to democratic monism and dualism to which Ackerman contrasts rights foundationalism, rights trump democracy - insofar as democracy is understood as the procedurally realized will of the people, the ultimate source of authority within the political community⁴.

The status of rights, and accordingly, the role of moral principles in determining legal validity foreshadow the central normative premise of substantive accounts of political authority and legitimacy: the content of the law that the authority enacts and enforces needs to conform to pre-institutional, pre-legal moral principles. Be it customary or statutory, a law's conformity with particular fundamental moral principles is indispensable for the successful justification of its normative force. Laws must be, in fact, formalized moral norms, instruments that guide citizens to conduct their life according to a shared moral minimum. As a consequence, a supporter of substantive positions needs to argue that its moral merits, or its

⁴ Ackerman, *We the People: Foundations*, 12-16.

coordinative potential to advance the overall ability of the legal system to realize pre-institutional moral obligations cannot be disregarded when it comes to evaluating the legitimacy of a law.

Substantive views of law and democracy have long been contested from a moral point of view: priority of rights and their founding principles that disqualify any procedural political theory from the array of plausible accounts of democracy “ties democracy to the substantive constraints of legitimacy”⁵. Both democratic monists and dualists, who ascribe a normative superiority to a majoritarian conception of democracy read rights-foundationalism, rule of law or liberal constitutionalism as a genuinely disabling conception of democracy. Rights foundationalism is deemed to be undemocratic for subduing popular sovereignty to principles that once become entrenched and taken out of the legitimate scope of decision of the electorate cannot be decided from a conceptually neutral standpoint. Dworkin would argue, however, that the contrast between democracy and constitutionalism is illusory: democracy is not equivalent to majority rule - democracy means the legitimate use of majoritarian decisions. In other words, the majority rule is morally acceptable only if it meets further conditions⁶. The substantive conditions that a majoritarian decision must satisfy in order to be legitimate reflect the instrumental conception of law that rights-foundationalists endorse.

⁵ Dworkin, *Justice for Hedgehogs*, 384.

⁶ Dworkin, “Constitutionalism and Democracy,” 3 – 13.

Substantive views about the right way of exercising political authority to make new laws or amend existing ones are meant to treat decision-making mechanisms *within* existing political systems on the first place. The Ackermanian taxonomy of the three accounts that set different baselines for the legitimating conditions for engaging in constitutional politics requires us to make an inquiry with regards to the background principles that lie at the foundation of each position, see how these positions address the problem of constitution making itself, and whether the background principles that may justify rights-foundationalism, democratic monism or dualism when applied to already established systems, are also present at the moment of constitutional beginning.

As mentioned before, substantive accounts of democracy regard law from an instrumental point of view. Legal validity depends on the reasons behind the adoption of a law, and is contingent on its content, that is, to advance the realization of rights-protecting moral principles whose legal formalization, thus institutionalization is, as Dworkin argues, “essential to creating a democratic community”⁷. Amending or creating a new law – or even repealing a wrong one - must logically follow from the moral character of the legal system: the law either needs to be modified so that it conforms to its system’s overarching norms, or needs to be added to the community’s legal body once the community’s interpretation of a particular moral value has quasi unanimously changed (think about e.g. the changing

⁷ Dworkin “Constitutionalism and Democracy,” 11.

understanding of personal autonomy or human dignity that fosters the development of an egalitarian social ethos concerning the political and social status of minorities). In *Justice for Hedgehogs*, Dworkin argues against a dualist conception of law in which legal norms and moral norms constitute separate branches⁸. Dismissing the dualist conception for its inability to provide a general theory about the relationship between the morally normative constraints on law and the legal limitations of moral obligations, Dworkin outlines a unified legal theory in which law and moral value are united. What he calls for is an interpretive concept of law, that is, interpreting codified laws in line with their background principles and rules that are not even codified but can guide judges and lawmakers to interpret laws in the morally right way⁹, and thus advance the moral reading of both ordinary law and the constitution¹⁰. In a rights-foundationalist, substantive view of democracy, pre-institutional moral considerations justify ordinary lawmaking, amendment and adjudication within an existing constitutional political framework - however, substantive accounts cannot establish any different criterion for justifying constitution making itself that happens outside of the scope of normal lawmaking. I leave the question open whether such a unified concept of law and moral value is plausible within an existing framework of democracy. Being the focus of the present paper on constitution making, I argue that such substantive considerations must lie at the foundation

⁸ Dworkin, *Justice for Hedgehogs*, Chapter 19.

⁹ Dworkin, *Justice for Hedgehogs*, Chapter 19.

¹⁰ Dworkin, *Freedom's Law*, 10.

of the legitimate making of a supreme law. A substantive, rights-based component is essential to legitimacy, however, as I will show in the Section 5 of this chapter, it needs to be complemented with procedural considerations as well. The reason for the necessity of supplementing the rights-foundationalist account of legitimate constitution making is to be found in the way it treats the question of agency.

In terms of both ordinary and constitutional legislation, rights-foundationalism provides a monistic concept of democracy and constitutional legislation in the sense that the baseline for legitimacy is the institutionalization or codification of a particular set of fundamental rights. The legislative process necessary to realize this kind of preservation cannot depend, conceptually, on prior procedural considerations. As opposed to democratic monism that brings distinctively procedural aspect to democratic legitimacy, rights-foundationalism bases legitimacy on morally normative premises. Similarly to the role of law, the legislative body that enacts, interprets or modifies an ordinary statute - or in the case of constitution making: the constituent agent, the subject of constituent power - seems to be of instrumental value. Agency is subordinated to the moral imperative to realize what the moral coherence of the legal system requires. As we will see in the following section, rights-foundationalism and monism offer symmetrically opposite positions: a proponent of the former position must argue that the question of constitutional agency, the subject of

constitutional adjudication and legislation does not matter - or it is only of secondary importance after rights.

The rights-based account of legitimacy does not seem to contain any particular procedural component to settle the question as to how and by whom should fundamental rights be generated at the time of constitutional beginning, or be entrenched when the institutional framework is given. Its focus is restricted to the morally appropriate content of the legislative or juridical output, that is, the compliance of individual statutes as well as the legal system as a whole to *a priori* moral values. In this respect, foundationalism does not provide direct procedural guideline so as to overcome the coordination-problems of (a) how to opt one particular legislative proposal from a morally permissible multitude under uncertain institutional circumstances, and (b) how to distribute the institutional responsibilities. The democratic monist, in contrast, will appeal to the legitimate agency of the elected representatives when it comes to the determinants of legitimate constitutional amendment or interpretation. She will be concerned of the legitimacy-claims of non-elected institutions, the “Platonic guardians”¹¹ who insist to the priority of particular values over the democratic decision of the community, and who thus argue for constraining the range of morally permissible decisions of the present majority. It seems, then, that one can rightly argue that the contrast between rights-foundationalism and competing political theories that offer

¹¹ Györfi, “In Search of a First-person Plural, Second-best Theory of Constitutional Interpretation,” 1093.

procedural accounts for political legitimacy and legal validity can be translated into a conflict between rights-protecting rule of law and parliamentary sovereignty.

1.2 DEMOCRATIC MONISM - PROCEDURAL ACCOUNTS OF DEMOCRACY

A competing school of constitutional theory is what Ackerman calls *democratic monism*, and it is grounded on the same moral foundation as rights-foundationalism: on the idea of moral equality. In contrast to rights-foundationalists, however, democratic monists – and as we shall see in the following section, dualists too – deny that the legitimate exercise of political authority must reflect substantive moral values. On the contrary, the proponent of the monistic concept of democracy holds that what is the most characteristic about societies is the rampant disagreement about morality: members of a political community disagree about which principles are morally valuable and which are not; how moral principles are to be prioritized when they stand in conflict with each other; and what the specific content is of underdetermined abstract moral principles, that is, what do individual principles dictate when those are to be applied. Democratic monists are thus skeptical about the possibility that objective meaning of moral principles can be attained by rational or moral inquiry from a morally unbiased point of view. Instead of being concerned about the moral quality of the collective decisions, they call for a morally neutral scheme for decision-making that endorses the principle of moral equality and institutionalizes the popular concept of democratic political authority through representative self-government.

In contrast to rights-foundationalism that ascribes to the institutions of judicial review, eternity clauses and the like a special role in protecting fundamental rights, thereby realizing the principle of moral equality, democratic monists believe that equal voting rights provide the appropriate institution for decision-making under circumstances of moral disagreement¹². The majoritarian principle of decision-making is a technical solution to the problem of collective disagreement over substantive principles. No substantive principle - apart from the one of moral equality that conceptually buttresses the procedural principle of participation - can ground the argument in favor or against any other substantive principle precisely because substantive principles themselves stand in the focus of the disagreement¹³. Majoritarianism, democratic monists claim, ensures that every member of the political community has an equal say in the collective decisions, and thus precludes that one particular moral conviction or ethical choice enjoys a normative priority over others.

Democratic monists argue that rights do not need special protection, and “[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election”¹⁴. According to the monistic view of democracy and the legitimate conditions constitutional revision, therefore, constitutionalism constrains the legitimate will of the people. As Györfi points out, the justificatory principle behind the majoritarian principle of

¹² I refer to equal voting rights as they are normally treated in democratic societies: universal suffrage with minimal limitation with respect to age, mental abilities etc.

¹³ Waldron, “The Core of the Case Against Judicial Review,” 1346-1406

¹⁴ Ackerman, *We the People: Foundations*, 8.

collective decision-making preferred by democratic monism is procedural fairness¹⁵. The principle of procedural fairness allows and requires individuals to regard the outcome of a collective decision legitimate even if the decision does not yield the same degree of advantage that their preferred alternative could have, or if the outcome of the collective decision has a negative effect on them¹⁶. Therefore, the appropriate democratic scheme for making legitimate collective decisions must be one that reflects the popular will in a normatively undistorted way.

The strong emphasis on the priority that democratic monists ascribe to popular will, and the fundamental connection in the monistic position between democracy and parliamentary sovereignty has serious corollaries. A democratic monist would argue against a substantive view of democracy on the basis of its “countermajoritarian difficulty”¹⁷, according to which “all checks upon the electoral victors are presumptively antidemocratic”¹⁸. The monistic view therefore, does not only differ from a rights-foundationalist account of democracy that it provides a different institutional solution for realizing the background principles that the two share. As opposed to substantive accounts, democratic monists attach a pivotal role to agency in determining legitimacy. Instead of treating morally normative

¹⁵ Györfi, “In Search of a First-person Plural, Second-best Theory of Constitutional Interpretation,” 1094.

¹⁶ Waldron, “The Core of the Case Against Judicial Review,” 1346-1406.

¹⁷ Bickel, *The Least Dangerous Branch*, 16.

¹⁸ Ackerman, *We the People: Foundations*, 8.

considerations as necessary preconditions for legal validity, a consent-based account of legitimacy is located at the center of the countermajoritarian argument. Alexander Bickel argues that “[t]he heart of the democratic fiat is government by the consent of the governed...[T]he good society will not only want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values”¹⁹ - despite that a “high value attributed to stability is also a countermajoritarian factor”²⁰. Such a consent-based claim of legitimacy might be defended both from a practical perspective inasmuch as a supporter of this position might warn about the tyranny of the minority or about the dangers of institutional sclerosis, and from a moral point of view by showing the normative superiority of consent-based accounts to advance the realization of popular will. However, as I will point out in the next chapter, such conceptualization of the legitimating conditions of decision-making does not provide a plausible argument for applying identical procedural principles for the case of constitution making.

No plausible majoritarian, procedural account of democracy could be construed without certain background assumptions about what characterizes members of the same political community who have a basic interest in conducting their life peacefully despite their disagreement about questions of morality. As Waldron argues, in order for ordinary laws that are enacted on a majoritarian basis to be regarded legitimate, citizens must regard the basic

¹⁹ Bickel, *The Least Dangerous Branch*,. 27

²⁰ Bickel, *The Least Dangerous Branch*, 17.

structure of the political community as legitimate²¹. A sole procedural component, the right to participate, is not sufficient for grounding legitimacy: citizens need to respect each other's rights and dignity in order to trust the decision-making mechanism itself. A monistic argument against rights-foundationalism's countermajoritarian difficulty is precisely based on the above assumption: anti-majoritarian substantive constraints are a form of distrust in the democratically elected legislature, and therefore distrust in the electorate thus in others as well. A monistic attack on substantive positions hence holds that "mistrust of one's fellow citizens does not sit well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of rights which are being entrenched in this way"²².

Notwithstanding the deep conviction held by democratic monists that there is some rightness in the majoritarian decision, considering the substantial emphasis on the procedure to effectuate communal goals, the monistic concept of democracy - similarly to the dualist position - is a popular conception of democracy – in the brute sense. Contrasted to dualism, the will of the majority is not bound to any normative consideration apart from procedural ones, such as the provision of fair conditions for the opposition. Democratic monism and rights-foundationalism offer different criteria for legitimate constitution making. Contrary to substantive accounts on the legitimate use of political power that ties the legitimacy of a decision to the decision's moral character and its ability to conform to preexisting moral

²¹ Waldron, *Law and Disagreement*, 250-282.

²² Waldron, *Law and Disagreement*, 90.

principles – no matter whether the decision is pre-constitutional or extra-constitutional, or whether it is made within an existing constitutional system -, the procedural tradition holds that it is the procedural pedigree of the decision that provides a full-fledged democratic justification. Similarly to legal positivism, a procedural account thinks about laws as social facts, i.e., decision of the majority, and therefore the validity of a law is justified on the basis of its sociological context rather than moral considerations. Given that a monist will not tolerate any insubordination from unelected branches to the representatives, it will reject constraints that appeal to *a priori* principles. It does not come as a surprise, therefore, that monism is mostly objected by proponents of rights-foundationalism, who warn against every sort of institutional design that does not carry effective guarantees against a tyranny of any kind.

Not being able to substantively assess the output of democratic decisions, the procedural concept of legitimacy keeps monistic democracy vulnerable to antidemocratic political transformation. Waldron's argument about the legitimizing force of the principle of participation convincingly illustrates the core defect of the position: "[e]ven if a bill of rights is incorporated into a constitution, it doesn't make things more democratic. Incorporation is required by the principle of participation"²³, while on identical grounds he continues that

²³ Waldron, *Law and Disagreement*, 255.

“people should have whatever constitution, whatever form of government they want”²⁴. The absolute priority of popular will substantiated through majority rule is defenseless from the danger of violating the very foundational principles that justify majority rule itself. It is not only the case that fair conditions of participation can be suspended through the original procedural path: democratic monism and the procedural conception of democracy cannot account for the problem of permanent minorities whose concerns systematically do not succeed in being recognized in the political arena, and who therefore face their interests not being given sufficient weight. Democratic monism does not and cannot offer constitutional guarantees for rights or for the preservation of particular moral principles within the nation’s institutional design. As required by procedural fairness, a dictatorship, though logically undemocratic, is to be accepted, is to be permitted because democracy requires that.

As a consequence of such legal theoretical conclusions, a political theory that draws such an intimate link between democracy and parliamentary sovereignty must refuse Dworkin’s theory about law’s unity with moral value. The moral assessment of a particular statute will actually focus on the generation or the application of a particular law instead of its content. Democratic monism reaches back to the dual conception of law where legal norms and moral norms are separated. The results of judicial interpretation of the constitution can always be overridden by the majority of the representatives in the legislature that is always

²⁴ Waldron, *Law and Disagreement*, 255.

entitled to act as a constituent assembly without being subject to prior procedural or substantive conditions.

Apparently, democratic monism seems to be unable to protect the political community regarded as a moral companionship amidst certain historical shocks if the majority's will is not tied to substantive considerations. A theory that establishes the legitimacy of the law purely on the legitimacy of its maker might jeopardize the peaceful coexistence of members of a political community that is institutionally not prepared to overcome severe conflicts without overriding specific moral principles. I have pointed out that there are potential risks against which monism remains defenseless when the political respect for liberal democracy, and the respect for individual rights are in threat. These risks are inherent to this position, although, their intensity or relevance in one country can change over time, and might apply more to one country in one particular moment than to another. Although the shortcomings of democratic monism might be successfully utilized by its opponents who are skeptic about the self-regulating faculties of a country's political elite and its citizenry, the monistic concept of democracy and constitutional change nevertheless carries a significant merit. This merit consists of what the rights-foundationalist position fails to sufficiently account for. This is the intrinsic value of the right constitutional agency when it comes to constitution making in times of political transitions.

As noted earlier, democratic monism, just as all substantive and procedural views about democracy debate the proper institutional design and conditions for the morally permissible exercise of political authority in established democracies. Just as we had to make an inquiry in the previous section as to the background justificatory principles of rights-foundationalism to see whether the principles that justify substantive constraints on ordinary decisions of political authority are applicable for constitution making as well, we have to embark on the same path to see whether the domain of procedural accounts of democracy, and thus Ackerman's description of democratic monism can be extended to pre-constitutional circumstances. It seems, though, that the proponent of monistic democracy, who appeals to having won the last election, even with an overwhelming majority, encounters a conceptual difficulty in providing a plausible theory as to how a majoritarian decision about the identity of the constitutional order that affects the very character of a nation, can be applicable under conditions of constitutional beginning.

I argue that the creation of a fundamental law, or the alteration of the identity of the constitution of a political society cannot be justified purely on procedural terms. As discussed before, the basic principle behind democratic monism – as behind many other positions about the legitimating conditions of democracy – is moral equality. The equal right to vote that is given to nearly each member across the society connects the society's political and legal character that is normatively structured by the principle of moral equality with the legitimacy

of ordinary laws made through ordinary legislation. We have to see that the establishment of the morally neutral procedures that then yields morally good or morally wrong majoritarian decisions within an existing social framework, is also tied to pre-procedural substantive considerations. Justifying the legitimacy of constitution making that monism offers will need to point to more fundamental reasons than the will of the majority if its defender wants to provide a conception of legitimacy that safeguards the values of a well-working liberal democracy. However, this might seem paradoxical to a procedural view of democracy. The defender of democratic monism, Waldron or a follower of his, would reply that preferring a well-working liberal democracy over enlightened absolutism already reflects particular moral convictions, and the standpoint from where I, the proponent of liberal rule of law, argue for the normative superiority of this particular institutional design is already biased. It may be so, but it seems to me that my bias is still outweighed by two fundamental conceptual weaknesses that are inherent to proceduralism once it is attempted to justify constitution making that rests on a majoritarian principle of decision.

First, drawing on Dworkin's attack against moral skepticism, it seems that procedural arguments dissolve precisely in a kind of moral reasoning that it tries to eliminate from the set of justificatory conditions of legitimate lawmaking. The problem is that the proponent of a procedural conception of democracy who points at me and declares my argument for liberal rule or law biased, engages in the exact same exercise: she does not recognize that denying the

moral normativity of a rights-protecting rule of law is itself a first-order moral claim²⁵. The second weakness poses another difficulty of similar magnitude: at the time of constitutional beginning, the background conditions of democratic monism that ground procedural fairness are simply not in place: it is precisely the first, formative or constitutional decision of the community that yields the basis of procedural fairness. As a result, the first decision of the political community through which it defines its identity cannot rest on majoritarian premises, nor on consent-based conception of authority as consenting is contingent on individual will. The first decision cannot but be based on substantive premises.

Unless the monistic concept of democracy is construed as a decisionist position in which the decision of the sovereign justifies the law regardless of its content or its procedural pedigree, we have seen that the proceduralist account consists of two steps. The first step is a substantive one that establishes the legitimacy of decisions made in the second step that is characterized by majority rule in settling disagreement. A proceduralist who takes its tenet seriously must acknowledge that the first act of the constituent power must be pre-procedural and genuinely substantive in nature. Therefore she must also notice that democratic constitution making must follow the internal structure of proceduralism itself. In section 4 of the current chapter I am going to present the post-sovereign model of constitution making offered by Andrew Arato, which provides a principled solution for the creation of supreme

²⁵ Dworkin, *Justice for Hedgehogs*, Chapter 5.

law in which both substantive, content-specific as well as agent-regarding conditions of legitimate constitution making prevail.

1.3. ACKERMAN'S DUALISM

The third position about the appropriate conditions of legitimate constitution-making is what Ackerman calls *democratic dualism*, and which he believes to best describe the constitutional culture developed in the United States since the Philadelphia Convention. Its distinctive feature, that Ackerman takes as a constitutive component of American exceptionalism, is the strict distinction in constitutional affairs between the People and the representatives of the People, which distinction yields a further one between 'higher lawmaking', that is, "[d]ecisions by the People [that] occur rarely and under special constitutional conditions"²⁶ in times of 'constitutional politics'; and 'ordinary lawmaking' that is conducted by the People's representatives through the practice of 'normal politics' where the output of political decisions does not affect the fundamental structure of the society. The core idea in the above distinction is the hierarchical order between the two tracks of law-making: 'ordinary laws' must comply with 'higher laws', and conversely, the People as the ultimate source of political authority²⁷ enjoys priority over the decisions of its representatives. In order to identify the very acts of the constituent power, i.e. moments when the People speak, special conditions must hold – conditions that set out a proper and genuinely controlled

²⁶ Ackerman, *We the People. Foundations*, 6.

²⁷ Ackerman, *We the People. Foundations*, 8.

path for political actors on how to present a proposal for constitutional amendment. Based on Ackerman`s interpretation of the United State`s constitutional history, his proposed model of higher lawmaking consists of four phases, starting with a signaling phase during which “the movement earns the constitutional authority to claim that...its reform agenda should be placed at the center of sustained public scrutiny”²⁸, followed by the second phase of a ‘proposal’ whose maturing leads up to a the third phase of mobilized popular deliberation, at the end of which a movement either fails or its proposal becomes legally enacted²⁹. The question whether the specific scheme of constitutional amendment – or constitution making – offered by Ackerman as guidance to recognize such special events are precise enough or not, definitely exceeds the scope of this paper. Nevertheless, it reflects the underlying idea behind the dualist position: to protect the People`s identity-regarding formative decisions from momentary political sentiments. The separation of law-making tracks in dualism serves as a structural framework for self-government, however, we have to make sense of why constitutional politics must remain isolated from normal politics. There are multiple readings of this separation.

First, this distinction would allow citizens not to be permanently engaged in politics but go back to their private life and be *private* citizens, and only in heightened historical

²⁸ Ackerman, *We the People. Foundations*, 266.

²⁹ Ackerman, *We the People. Foundations*, 266-267

moments go „public” and be private *citizens* (Ackerman’s emphasis)³⁰. Interpreting the separation this way appears to be based on a mere anthropological insight, therefore this reading is rather human interest-regarding where dualism is introduced as model of political-(re)founding that better fits general human interests. The separation of higher law-making from lower law-making, therefore, does not seem to focus on the institutionalization of certain procedural principles (i.e. help us recognize constitutional moments by sustained majoritarian support). In fact, this reading is rather sociological than political.

Second, Ackerman suggests that the a clear advantage of dualist politics is the set of special conditions necessary for higher law-making that enables the People to interpret the true meaning of sociological-historical conditions under which a constitutional identity-changing proposal is put into the forefront of the community’s political agenda. The separation of the two tracks of lawmaking serves to help the lawmaker to *recognize* the peculiar and rare moments when the People speak, and thus detach the present majority from the possibility to overrule the achievements of its political community just by appealing to having won the last elections. The dualist model, Ackerman argues, enables the society and the lawmakers to realize whether the people signal that it wills to alter its identity through different institutional set up grounded on different principles. The second reading is, therefore, a constituent power-based reading inasmuch as Ackerman seems to suggest a framework

³⁰ Ackerman, “Storrs Lectures: Discovering the Constitution.”

designated to select whether a sustained popular support for a particular proposal for (even extra-legal) constitutional change qualifies as the will of the constituent power.

Though the two readings seem to promote the same ideal: a mobilized citizenry deliberating about the basic structure of their society, it seems that second reading is more applicable to support the argument in favor of the assumed superiority of dualism over democratic monism in articulating the authentic will of the People. Therefore, at first sight it might seem that Ackerman is attempting to formulate a model of constitution making that is protected from a purely majoritarian decision-making mechanism. Democratic dualism does not deny, however, that the political community, the People is the ultimate and unconstrained authority that defines the terms and conditions of the community's self-government. In fact, the ideal member of a political community is depicted by dualism as the citizen whose active participation is indispensable for making a legitimate decision about the community's future – without any appeal to principled constraints of any kind, presumably apart from the principle of procedural fairness.

Evidently, the common denominator between the two readings is the emphasis of popular sovereignty that lurks in the background of dualism. However, if dualism is primarily based on the idea of a normatively unconstrained will of the constituent power, Ackerman's view about constitutional moments that open the window of opportunity for legitimate

constitution making should rather be regarded as a mere analytical framework that allows us to distinguish between proposals of different degrees of public support.

In order to see whether only historical and sociological conditions must hold, as Ackerman argues, to obtain an imperative force with regards to constitution-making, we should look at more closely Ackerman's view about constitutional moments and see whether it can be complemented with further considerations.

1.3.1. Constitutional moments – An Alternate Take

When thinking about the reasons that can legitimately induce the constituent power to enact a new basic law, one needs to identify more severe historical events (e.g. a democratic transition) or structural problems (e.g. substantial incoherence within the constitutional text) than those illuminated along the contestation and dialogue that characterizes normal politics in a well-established political community. One needs to single out such problems, or as I shall call it, constituent pressures that call for a new constitution, even at the price of overriding the existing constitutional amendment rules. A prevalent theory of the appropriate conditions of constitution making holds that special historical facts qualify as the proper reason and condition to successfully justify the creation of a new constitution for the to-be-reestablished political community. Many authors agree on the importance of this empirical insight, and as a fundamental analytical tool of dualism, Ackerman offers an intriguing concept about the

constitution-making potential of what he calls *founding* or *constitutional moments*³¹. The term speaks for itself: in Ackerman's view, certain historical moments, when "citizens place the problem of political reconstruction at the forefront of their consciousness"³², are the most effective to found an institutionally ordered political community. Ackerman's statement is straightforward: he seems to regard historical shocks - or as Sujit Choudry points out in his marvelously lucid paper³³: constitutional crises - in a community's life to be the appropriate condition for producing a new consensus among members of the socially diverse political community about the basic principles that structure their possibly emerging moral conflicts. A shock does not necessarily mean bloodshed invading the streets. Though Ackerman's reading of the United States' own constitutional history - material to his normative concept of dualist constitution making - has been subject to criticism both for its historical accuracy and for the results of his interpretive enterprise³⁴, similarly to how 1787 served the proper moment for drafting the constitution for the United States, Ackerman identified the political turmoil of 1989 as a "window of opportunity for constitution-making"³⁵, a "revolutionary moment when

³¹ Though the term *founding moment* appeared in Ackerman's majestic work *We The People*, discussing the constitutional development of the United States, in his later work *The Future of Liberal Revolutions* the term is changed to *constitutional moment* to fit to the political challenges that post-socialist, transitioning countries faced after 1989.

³² Ackerman, *The Future of Liberal Revolutions*, 46.

³³ Choudhry, S., "Ackerman's Higher Lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?," 193-230.

³⁴ See supranote 33; also Fisher, "The Defects of Dualism."

³⁵ Ackerman, *The Future of Liberal Revolutions*, 26.

citizens are most alive to their problem in political construction”³⁶, and when the “the dynamics of revolutionary activity and the process of constitutional promulgation [yields] a situation in which a constitutional text can become a potent political symbol of national identity”³⁷.

This intuition of Ackerman is grounded on a great deal of empirical evidence that is marked by the historical pattern of typical occasions of constitution-making. Even though their respective constitutional theories differ, Ackerman`s theory about the potential of special historical events corresponds to the well-identifiable waves of constitution-making that Jon Elster describes in one of his studies³⁸. Elster identifies eight waves of political development that extended to a multitude of countries within one period. Each series of constitution-making reflect a quasi heterogeneous set of historical need to draft a new basic law about which, similarly to Ackerman, Elster notes that “new constitutions almost are always written in the wake of a crisis or exceptional circumstance of some sort”³⁹. The waves that Elster distinguishes are as follows: first, the time of social and economic crisis that characterized the United States and France at the end of the eighteenth century; second, revolutions that characterized countries in Central and Western Europe at the middle of the nineteenth century; third, regime collapses; fourth, the fear from regime collapses; fifth, constitution-making after

³⁶ Ackerman, *The Future of Liberal Revolutions*, 26.

³⁷ Ackerman, *The Future of Liberal Revolutions*, 47.

³⁸ Elster, “Forces and Mechanisms in the Constitution-Making Process,” 368-373.

³⁹ Elster, “Forces and Mechanisms in the Constitution-Making Process,” 370.

a defeat in war; sixth, during the reconstruction after war; seventh, the creation of a new state, either if it is a result of a reunion of multiple former smaller states or the collapse of a previous super-state; and eight, liberation of colonial rule⁴⁰.

Though history shows us that a community that finds itself in any of the above situation is provided with a significantly higher chances to produce a constitution that can successfully provide a stable framework for creating and amending ordinary laws, there are definitely exceptions – take the case of Israel, for instance, where the Constituent Assembly has not drafted a final basic law since the country's establishment in 1948⁴¹ -, which illuminates a significant question with respect to the exclusive constitution-making potential of historical events: if there are countries that do not adopt a constitution despite the favorable opportunity opened up by the massive public attention towards and participation in the (re-)formation of the community's political and moral identity, can we safely claim that the political crisis-oriented taxonomy of favorable constitution-making events that Elster or

⁴⁰ See detailed description with examples in Elster, "Forces and Mechanisms in the Constitution-Making Process," 371. Pócza arrives to similar conclusion: see Károly Pócza, "Alkotmányozási eljárások összehasonlító elemzése." [Comparative Analysis of Constitution-Making Procedures] In *Alkotmányozás Magyarországon és máshol* [Constitution-Making in Hungary and elsewhere] ed. Jakab and Körösné. (Budapest: Hungarian Academy of Science, 2012) 118-147. Contrary to Ackerman, however, Pócza also recalls the view of some theorists who contend that a crisis might not be an appropriate moment for constitution making inasmuch as the political upheaval might not provide ideal circumstances for the proper, interest-free political deliberation.

⁴¹ Shinar, "Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel."

Ackerman provides is conceptually comprehensive enough in terms of defining the precise set of legitimating circumstances? I believe that the answer is no.

For Ackerman, constitution making is legitimate provided that it forges national unity by reflecting the popular will that -according to his account of dualist constitution making - once nurtured under specific political and social circumstances, could yield qualitatively different results than the will of a momentary majority. Critiques, however, point out a severe weakness of Ackerman's account, namely that path of higher lawmaking that Ackerman prescribes is not in line with the way how history works⁴²: actors of constitutional politics are rarely aware of the fact that they are engaging in constitutional politics, and only an *ex post* analysis can assess whether higher lawmaking has followed the path Ackerman prescribes as the procedural component of the legitimacy of constitution making. The fundamental difficulty with Ackerman's dualist position about justifiable higher lawmaking is that he takes specific political and social circumstances to exclusively legitimate the constitution making process owing to the assumed ability of increased popular mobilization to provide ideal circumstances for the constituent power, understood as the aggregate of a community's members, to redefine its identity. However, either legally or extra-legally, responding to institutional necessities with legislative measures has an essential theoretic corollary: legitimacy that is claimed to be based on mere popular will - no matter what the degree is of a

⁴² See supranote 34.

proposal's popular support – is illusory; the legitimacy of a constitution making process also seems to have a substantively normative component that is exterior to the constituent power itself.

Illustrating the above point, take the fictive example mapped out in a seminal essay of János Kis *Between Reform and Revolution*⁴³, where he identifies various normative features of constitution making when making an inquiry about the circumstances that render the procedure and the outcome of the basic-lawmaking process legitimate. Kis also recognizes various events that call for the creation or a character-changing modification of a basic law. In his inquiry he illuminates a special sort of situation that is distinctive from such historical events that previous authors present as normative condition for formalizing a new foundational norm through constitutional legislation. Ackerman's historical interpretation of constitution making is based on such empirical observations where the public recognition about the need to establish the identity of the legal system is at the top of the political agenda. While maintaining the relevancy of such historical facts, Kis invites us to observe a fictive example that exposes an alternative but similarly valid demand to adopt a new constitution, that is, a constituent pressure, to review the content of the fundamental law. Kis takes the example of a political community where the entirety of the political spectrum agrees that a new scheme of social security needs to be implemented. Though the proposition is supported

⁴³ Kis, "Reform és Forradalom közt," [Between Reform and Revolution] 17-64.

by the majority of the citizenry and by each parliamentary party, a simple amendment, even with qualified majority, is not feasible due to the law-maker being bound by an eternity clause, that is, regardless of the political warrant of the law-maker – which is hundred percent for the sake of the argument -.The legislature, despite not being authorized to do so, disregards the amendment rule when it arbitrarily annuls the eternity clause. The legislative assembly seizes absolute creative power and transforms itself into a normatively unbound constituent power by having extra-legally redefined the constitution.

The lesson of Kis's example is of fundamental importance: despite the adoption of a substantively new constitution, neither the public, nor the institutional daily routine itself might regards the circumstances under which technically new constitution has been adopted as an identity-shaping, historical event – in fact, the constitutional legislation remains perceived as having been conducted along the lower law-making track: the legislative assembly's higher law-making is not qualified by increased public scrutiny to alter the constitution. Even though in Kis's fictive case we can identify a legal break given that the constitutional legislation is discontinuous due to the legislature's having deleted an eternity clause, the sociological legitimacy of the ruling political actors is not weakened or questioned: the legitimacy of Kis's fictive constitution making does not derive from the procedure's conformity with the amendment rules (because the legislature repealed the eternity clause that set out the limits of later amendments), nor from the fact that the new constitution would a

result of increased popular attention and deliberation (because it is not). What grants the constitution and its makers both sociological and normative legitimacy is their appropriate institutional response to an institutional impasse – though the core of my argument must definitely not remain at the surface of mere functionalism.

Before turning to the final argument against dualism, let me emphasize once again that I am not arguing against: I do not question the empirical premise of Ackerman's concept of constitutional or founding moments which draws on the historical fact that a vast majority of constitutions have been adopted as responses to crises. As I am going to point out later in this chapter, certain historical circumstances that yield more attentive civic participation might prove to be necessary but certainly not a sufficient condition for legitimating a constitution making process that affects the fundamental norms of the community.

Under objective institutional problems we ought not to understand technical difficulties that prevent institutions from appropriately perform their assigned tasks. Rather, we should regard these difficulties as obstacles for institutions to effectively realize particular moral norms that proper institutional performance is dedicated to effectuate. Once interpreting the function of institutions through such instrumentalist lens we can also see that agency, just as institutions themselves and the rules based to which the same institutions operate, are subordinated to pre-constitutional or extra-constitutional morally normative premises. Therefore it seems that neither agency nor political or social conditions, regardless of how

applicable those might be for constitutional innovation, matter in the first place: it is only the better realization of fundamental moral rights that can successfully legitimate constitution making.

Notwithstanding Ackerman's effort to construe an account of constitution making that is seemingly less vulnerable to wrong majoritarian decisions, when it comes to constitutional decisions, the dualist would invoke identical arguments in favor of majoritarian decision-making schemes that a democratic monist would, and therefore her preferred model *per se* will not provide guarantees against the danger of the tyranny of the majority. Dualism is defenseless against any proposal that would go against basic principles that are imperfectly institutionalized in the constitution, therefore it cannot withstand the creative force of massive popular support. As a result, as Tushnet points out, the dualist model cannot give constitutional answers to anti-constitutionalist attacks⁴⁴.

1.4. THE POST-SOVEREIGN MODEL OF CONSTITUTION-MAKING

Before introducing and defending a normative theory of democratic constitution-making that is outcome- and procedure-regarding at the same time, we need to identify certain background principles that a consensus about constitution-making is designated to realize. As we have already seen, constituent pressures must hold in order to justify legitimate constitution making. The objectivity of such needs is characterized by wide consensus

⁴⁴ Tushnet, "Constituting We the People."

generated within the political community. Since I argue for a liberal, rights-preserving model of constitution-making processes, I cannot but assume that the matter of consensus needs to be the institutionalization of newly recognized or reinterpreted relational principles that on the one hand define how institutions ought to treat their subjects who are presupposed to be individuals of equal moral position, and on the other hand, and a set of norms that structure the institutions themselves.

The constitution, therefore, must provide such an institutional system that has the greatest potential to provide a scheme as broad as possible of equal civil liberties and equal respect for and protection of individual rights. Certain theorists, such as Ronald Dworkin, whose main concern is the existence of such institutions, are not very much concerned of the way these institutions come to exist. However, as the eruption of the Hungarian constitutional crisis of 2011 illustrates, democratic legitimacy does not only have an intrinsic value but also instrumental one, inasmuch as the objective, recognizable fulfillment of procedural requisites are no less a guarantee of political stability than substantive considerations of legitimacy.

The proponent of the fundamental rights-protecting constitution making, and the proceduralist who ascribe a normative priority to procedural fairness by contending that legal authority is exclusively based on procedural conformity with a particular scheme of lawmaking, both face difficulties when confronted with the problem of constitutional beginning.

The rights-foundationalist presuppose that there is a general consensus within the community about those foundational principles that a constitution is designated to institutionalize and effectuate through a set of positive laws that gain legitimacy from the constitution itself. When we take a look, nevertheless, to daily politics, we see that political debates themselves reflect a competition among different interpretations of the very foundational principles laid down in the community's basic law. As constitutional contractarianism would dictate, people under the circumstances of interpretive pluralism can agree on nothing else than basic background principles, and as long as the members of the political community accept these principles to respect, individual outcomes will inherit the legitimacy of the background agreement, while conflicts within the constituted polity will be based on rational moral disagreement about interpretation and practical corollaries.⁴⁵

Michelman, however, raises an intriguing objection⁴⁶ by asking: why should we suppose that a community can agree on abstract background principles if there is a wide variety of views within the same community about the relating practical considerations? That is, why would rational individuals agree on principles about which they do not know how will be applied once implemented through positive laws? As Hendrick realizes it, such an agreement would either be illusory or would not be meaningful⁴⁷. Nonetheless, Hendrick also

⁴⁵ Hedrick, "Coping with Constitutional Indeterminacy," 188.

⁴⁶ Hedrick, "Coping with Constitutional Indeterminacy," 188-189.

⁴⁷ Hedrick, "Coping with Constitutional Indeterminacy," 189.

provides a convincing response to Michelman's radicalized objection of interpretive pluralism, and argues that "[p]articipants in practical discourse are capable of recognizing that agreements on abstract norms do not settle concrete practical questions by themselves" but "abstract norms have a cognitive function in argumentation" in as much as "[t]hey normatively structure practical discourse"⁴⁸.

As for supporters of procedural accounts of constitutional legitimacy, if insisting on a procedural approach to determine who is the rightful subject of the constitution-making process, the democratic monists and the dualists will face the following practical difficulty: how to start a democratic regime legitimately on procedural grounds, how to justify a democratic beginning on a procedural and *non-instrumental* basis? Although, as I mentioned before, my aim in this paper is not to provide an account of constitution making *ex nihilo*, conducted in a political vacuum, in a quasi state of nature where atomistic individuals live by each other without any guiding norms. My concern here is constitution-making carried out by an existing political community that is committed to redefine its identity through a regime change. Nevertheless, the existence of amendment rules that prescribe how existing institutions can be altered or completely changed does not mean that the same background conditions that justify and legitimize legislative outcomes once those are enacted by following the formally appropriate procedure, are present for constitution making too.

⁴⁸ Hedrick, "Coping with Constitutional Indeterminacy," 189.

As for the procedural component of constitutional legitimacy, in contrast to the question of constitutional beginning in the context of state of nature, the political reality of the existing yet illegitimate old regime forces us to reformulate the problem of beginning: how can we establish democracy under an undemocratic yet existing institutional system? The democratic nature of the institutional change can be secured by the adherence to rule or law, that is, by the compliance with the amendment rule of the illegitimate old regime when it comes to the creation of the democratic institutions themselves. It is legal continuity that provides the critical guarantee of the democratic beginning. This is one of the core procedural principles of the `post sovereign` model of constitution making formalized by Andrew Arato⁴⁹ that – as I shall argue - seems to be the most applicable to satisfy both substantive and appropriate procedural considerations of constitutional legitimacy in times of democratic transition.

Arato`s intention is outline a legally creative scheme in which the “constituent power is not embodied in a single organ or instance with the plenitude of power”⁵⁰, and the constitution making process is mediated through an *already* existing legal order under the auspices of legal continuity. The post-sovereign model is the democratic alternative to

⁴⁹ See Arato, “Redeeming the Still Redeemable: Post Sovereign Constitution Making,” 427-443; Arato, “Post-Sovereign Constitution-Making In Hungary: After Success, Partial Failure, and Now What?”; Arato, “Post-Sovereign Constitution Making and Its Pathology In Iraq.”

⁵⁰ Arato, “Redeeming the Still Redeemable: Post Sovereign Constitution Making,” 427.

revolutionary constitution-making where the ‘constitutional beginning’ problem is posed by a legal break – immanent to revolution -. In contrast to revolutions and the intrinsic uncertainty is coded into legal breaks, legal continuity guarantees the transparent and accountable shift of legitimate power from the undemocratic old to the democratic new regime. The South African transition is generally considered to be the purest form of this model, but the Polish as well as Bulgarian and the Hungarian transitions and constitutional transformations are also best described by Arato`s model⁵¹.

The key characteristics of his model are the two-stage process of constitution making with a free election in between, and an interim constitution. In the first part of the two-staged model is negotiated through round-table talks where all relevant political groups are represented, and the resulting interim constitution that will regulated the drafting and ratification process of the final constitution is enacted by the parliament of the old regime whose that only formally holds legitimate power. In the second stage, in contrast, a freely elected democratic assembly ratifies the final document that has been developed in line with the prescription of the interim constitution. Legal conformity would not be secured without rules being enforceable, as such, the constitutional court has a emphatically important role in the constitution making process.

⁵¹ Arato, “Redeeming the Still Redeemable: Post Sovereign Constitution Making,” 427.

One might ask, however, how can an interim constitution drafted and enacted by a body lacking democratic legitimacy, under the supervision of a constitutional court, make binding rules for the democratic constitution making body? We need to face again the above question of democratic beginning. The problem is partially solved by the institutionalization of such principles as publicity, wide inclusion, legal continuity, that is, the conformity with the old constitution's amendment rule. Although the post-sovereign model is ultimately aimed at providing a democratic model to institutionalization under undemocratic circumstances, Arato acknowledges that the "application of constitutionalism to the process as well as the result of the constitution making does not represent a sufficient solution to the problem of legitimacy"⁵². However, I argue that unless a complete, theoretically consistent solution for the constitutional beginning problem can be drawn, so long as the appropriate substantive and procedural principles are effectively implemented in the constitution-making process, the post-sovereign model might be the most effective one in minimizing the lack of democratic legitimacy.

1.5 REVERSED DUALISM

By this point we might agree that the post-sovereign model described by Arato appears to be a successful candidate in mapping the appropriate conditions of legitimate constitution making. We have pointed out before that in the American model of dualism the special

⁵² Arato "Redeeming the Still Redeemable: Post Sovereign Constitution Making," 427.

conditions for higher lawmaking do not constrain popular sovereignty. and therefore

dualism, just as democratic monism, seems to remain conceptually vulnerable to the moral blindness or irrationality of the majority.

In *The Future of Liberal Revolution*⁵³, Ackerman urged the revolutions in the Post-Communist region to adopt a dualist constitutional model, where the “higher lawmaking system imposes a rigorous set of institutional tests before allowing a revolutionary movement to transform fundamental political principles [so that] before a revolutionary change is adopted, it should have sustained a support of substantial majority, not just a support at a single moment”⁵⁴, thereby proposing a political guarantee against haphazard political entrepreneurs. However, Ackerman’s major reason for proposing a majoritarian support-based dualist model instead of one that endorses rights-foundationalism was his concern with the melting force of the constitutional moment on the one hand, while on the other, the questionable public legitimacy and capacity of the newly established Constitutional Courts to engage in an independent constitutional jurisprudence⁵⁵. Stephen Holmes, contrary to Ackerman, advised democratizing countries to be satisfied with stopgap constitutions while they settle major political conflicts that touch upon such crucial identity-relating questions as

⁵³ Ackerman, *The Future of Liberal Revolutions*.

⁵⁴ Ackerman, *The Future of Liberal Revolutions*, 15.

⁵⁵ Ackerman, *The Future of Liberal Revolutions*, 99-113.

citizenship, territory or the question of property-rights⁵⁶, instead of agreeing on a final constitution right at the outset of the new regime. Though their views definitely reflect their worry about the constitution's capacity to help the institutions adapt to the institutional pressure dictated by the political, economic and social transformations of a recently democratized country, it is remarkably interesting how much they underestimated the importance of the protection of political and human rights that might be in peril under circumstances of a marked historical turmoil.

In the previous chapter we saw that a major failure of rights-foundationalism is that it systematically leaves the question of agency underdetermined. In the Ackermanian description of the position, rights-foundationalism is depicted as a monist position. Contrary to *democratic* monism though, for a rights-foundationalist agency does not and cannot matter: somewhat similarly to Hart's account of legal positivism according to which validity and facticity are not separated, that is, there mere existence, its factuality and recognizability of the law grants it validity⁵⁷, Dworkin argues for unity-centered legal theory in which the validity of the law and the law's moral pedigree are united. Agency does not have a constitutive role in such a substantive account of law and democracy, thus a rights-foundationalists must argue that that no further practical premises are necessary to ground legitimacy.

⁵⁶ Holmes, "Back to the Drawing Board," 21-25.

⁵⁷ Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," 160-162.

Political reality, nonetheless, especially in new democracies, requires compliance with specific formal requirement, especially on the short run. I argue that a constitutional assembly, a drafting committee or any legislative body that is in charge of making a new constitution for the to-be-institutionalized political community cannot hope that the basic law it proposes will be regarded as legitimate unless the content of the constitution satisfies particular substantive, normative claims attached to the respect for fundamental rights, and the constitution is accepted under adequate procedures. An appropriate account of agency, or rather, the appropriate formal demonstration of the rightful discharge of authorship provides the citizenry with an experience able historical fact that helps them identify with the structural change of the polity. As such, a viable account of constitutional legitimacy might be a form of reversed dualism that is rights-preserving in the first place, and agent- and procedure-regarding on the second that eventually solves the coordination-problems unaddressed by pure foundationalism. However, reversed dualism does more than that.

It is its concerns about agency and the rightness of the constitution making procedure that distinguishes reversed dualism from rights-foundationalism. A proponent of the latter position regards process-related considerations as practical responses to a coordination problem that is intimately connected to the problem of supreme law making in times of social and political transitions. As we have seen above, the rights-foundationalist is only concerned about the adequacy or legitimacy of the way the supreme law comes into force to the extent

that the right laws are enacted and appropriate and sufficiently empowered institutions are established that can develop the legal character of the legal system itself from a consistent moral point of view. As we shall see in the following chapter, major proponent of this view, such as Sólyom or Bragyova, judged the legitimacy of the 1989 constitution merely based on its content, irrespective of the deficiencies of its enactment process and lack of active popular, democratic reinforcement that was supposed to legitimate the post-transitional political order.

Reversed dualism, however, does not only supplement the rights-based account of constitution making with practical recommendations. It regards the morally constrained popular sovereignty as a constitutive component of the legitimacy of the constitution, its drafting process and enactment as well. Arato's post-sovereign model realizes best the normative premises of reversed dualism: the substantive and procedural components of the constitution's legitimacy are fulfilled in two consecutive steps of a same procedure of higher lawmaking.

The Hungarian case is different from the post-sovereign model given that the second step of the constitution making process did not evolve as negotiations regarding the finalization of the constitution became conflated with ordinary politics⁵⁸. Despite the failure to create political consensus among political parties who gained parliamentary seats at the country's first free elections to ratify a final constitution, some believed that the satisfactory

⁵⁸ See the following chapter.

and socially acceptable practice of government conducted within the constitutional framework, the proper functioning of democratic institutions under the guidance of an activist constitutional jurisprudence would render the country's democratic constitution legitimate.

In order to see whether the interim constitution of Hungary drafted by the tripartite National Roundtable in 1989 and adopted by the last Communist legislature could have been regarded as legitimate, we need to historically reconstruct the most relevant views about legitimacy held by major political groups. The results of this reconstructive enterprise - to which I devote the following section -, will also help us to contextualize the constitution making process carried out in 2011 by the currently governing Christian-Conservative coalition, contrast its legitimacy claims with that of the 1989 constitution and see if the latter one is defensible.

2. MAKING SENSE OF THE HUNGARIAN CONSTITUTION MAKING

PROCESSES:

1989 vs. 2011

2.1. HISTORICAL BACKGROUND

By the spring of 1989, it had become apparent that the Communist regime was no longer capable of sustaining its monopoly of political power. Thanks to Acts 2 and 3 of 1989 that provided the right of association and the right to assemble respectively, nine political organizations, already operating legally, organized the Opposition Roundtable. The task of the Opposition Roundtable was to provide a collaborative forum for the participants in order to work out a unified set of claims against the state party instead of approaching it individually with different demands and strategy. Having the parties come to an agreement over the their claims, a three-party National Roundtable was formed in June 1989 between the representatives of the Opposition Roundtable, the Communist regime and the Third Party that consisted of representatives of various semi-civil organizations.

The National Roundtable was not meant to be a Constitutional Assembly, nor did it claim a right to draft a new constitution⁵⁹; its task had initially been planned to be constrained to foster an agreement among the parties about a specific set of organic laws required for the promotion of the first democratic elections. These amendments were targeting the electoral

⁵⁹ Tölgyessy, “Folytonos Alkotmányozás,” [Continuous Constitution Making] 15.

law, laws regulating the foundation of political parties, party financing, freedom of expression and freedom of press etc.⁶⁰. Though certain conditions of the elections made the roundtable undertake a more significant constitutional amendment than it had previously assumed, recognizing their democratic deficit, the parties at the Roundtable acknowledged their not being authorized to enact a final constitution⁶¹. As a result, the constitution of 1989, though substantially modified, formally remained an amendment of the fundamental law of 1949. Its preamble declared the constitution be only interim, with a task limited to “facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy (...) until the country’s new Constitution is adopted⁶²”, thus signaling that the condition of legitimate constitution making would be a democratic parliamentary election. As such, the first, democratically elected parliament was to carry the burden of finalizing the constitution making process.

Two factors jeopardized the first parliament’s ability to adopt a final document. First, the relationship of the competing parties, even the relationship of those parties that had been allies during the Roundtable negotiations, severely deteriorated over the course of the election campaign in 1990. Second, the disturbingly broad range of statutes that required two-thirds

⁶⁰ Anon. (b), “Minutes: Agreement between the participants at the National Roundtable about the topics and schedule of the negotiations, 21st June 1989,” 138.

⁶¹ Arato, “Kerekasztalok, demokratikus intézmények és az igazságosság problémája [Roundtables, democratic institutions and the problem of justice], 784.

⁶² *The Constitution of the Republic of Hungary*, Preamble, Act XX of 1949, (1989)

support for modification virtually disabled the government to govern effectively and thus risked its stability of the entire political system. In order to enable to government to act, and eliminate that institutional risk, the Hungarian Democratic Forum (MDF), the major party of the governing conservative coalition, and the liberal Free Democrats (SZDSZ), the major party of the opposition came to an agreement - known as the “pact” - to solidify the democratic institutions and to stabilize governance. The liberals pledged to enable the government`s work by cooperating in drastically decreasing the number of those constitutional acts that required supermajority for amendment, while in turn the conservatives supported the liberals` preferred candidate for presidency. The pact seemed to have created the last chance for the parliamentary parties to come to an agreement over the final constitution of the republic by ensuring the parliamentary system be operable⁶³. Although the result of the agreement, that is, the stabilized democratic system, was widely cherished across political parties, the pact itself made in secret and excluding other parties further demolished the trust among political actors and amplified political controversies. The roughened political competition thus granted priority to party-political interest over professional and philosophical

⁶³ See e.g. Kis, “A megállapodás.” [The Agreement]; Kis, “Gondolatok a közeljövőről.” [Thoughts about the near future]; Anon. (a), “Az MDF-SZDSZ paktum.” [The MDF-SZDSZ Pact]

considerations that finally rendered the consensual adoption of a new constitution impossible⁶⁴.

The first democratic parliament, therefore, did not see the enactment of a final constitution. After the elections of 1994, though, the winning socialist-liberal coalition committed itself to “finalize the transition” and consolidate the legitimacy of the country’s constitutional system by resuscitating the inter-party talks about constitution making. Having won almost seventy-two percent of the parliamentary seats, and realizing that the final constitution was to be a consensual document, the coalition modified the constitutional amendment rule that prescribed identical criteria for partial as well as total constitutional revision. But the amendment of the amendment rule, the coalition bound itself to pursue agreement with other parties and greater consensus in general, inasmuch as enacting a new constitution required four-fifths of the parliamentary votes contrary to the original two-thirds decision-rule applied for simple amendment. The same amendment also drew the line for differentiating legislative power from the constitution-making power. In 1995 a parliamentary committee, representing equally each parties, was established to deliver a new draft, however, the Socialists withdrew their support before the last parliamentary vote about the final text. Due to the general suspicion about the Socialists’ particularistic interest behind blocking the enactment, the chances to adopt the final document dissolved again.

⁶⁴ Paczolay, P., “Az alkotmányozás csapdái.” [Traps of constitution-making]

After the 1998 defeat of the socialist-liberal coalitions, the question of constitution making seemed to disappear from the political agenda as, on the one hand, the necessary level of political trust for a consensual legislation was missing, and the satisfying institutional system did not generate a constituent pressure that would require the parties to set aside their own political interest and break the constitutional status quo. Constitution making as a real political manifesto did not appear before the elections in 2010 by when political discourse had become tremendously polluted and the remainder of inter-party political trust disappeared. As a side-effect of large-scale political upheaval following the Socialist prime-minister's leaked speech in 2006, the major oppositional party not only criticized the government but questioned the legitimacy of the entire political system, and this questioning reached the legitimacy constitution as well. By 2009, former prime minister and president of FIDESZ, the largest party of the opposition, denied that one should owe much praise to the constitution that he called nothing but a "technocratic set of rules"⁶⁵.

Unlike its predecessors, following its electoral victory in the spring of 2010, the new Christian-Conservative coalition pursued a highly intensive constitutional politics. Right after the elections, already in the second month of its being in power, the coalition, obtaining two-thirds of the seats in the legislature, made the first constitutional amendment out of the total twelve that would be carried out before the 1st January 2012 when the new Fundamental Law

⁶⁵ Mizsei, "Orbán az alkotmányról." [Orban on Constitution]

came to force. Some of the amendments served minor institutional changes, others reflected a different approach to constitutionalism that will be discussed later in this chapter. By the time the legislature enacted the Fundamental Law, with votes in favor of the new document arriving exclusively from representatives of the coalition, the consensus, self-restriction and the institutional checks that set out the legitimate radius of action for the participants of the National Roundtable become replaced with the principle of majoritarian decision-making. In order to understand how this shift from a reverse-dualist transition to a genuinely monist understanding of legitimate constitution making evolved, first we have to look at those major opinions about the 1989 constitution`s legitimacy that dominated the post-transitional political discourse.

2.2. DOMINANT VIEWS ABOUT THE CONSTITUTIONAL LEGITIMACY

Both the National Roundtable and the amended Constitution of 1949 fulfilled their assigned tasks: the negotiations yielded a peaceful transition, and the new constitution established the appropriate institutional conditions for democratic party competition, a liberalized market economy, and the entrenchment of human rights and civil liberties carefully guarded by the recently created and exceptionally powerful Constitutional Court. Notwithstanding the merits of the transitional process, soon after the regime change, the legitimacy of the novel constitutional system became subject to large-scale controversies. The evolving disagreement reflected both content-specific discontentment as well as procedure-

regarding concerns. Most of the content-based critiques targeted the institutional design outlined in the constitution - i.e. the distribution of power and responsibilities between the prime-minister and president, or the question of establishing a second chamber for the legislature instead of single-chamber system -, and the newly developed legal system's ability to effectuate various measures of transitional justice that many regarded as the new regime's moral duty to adopt in coming to terms with the nation's past. Procedural concerns, however, were grounded on a single idea: that the National Roundtable lacked of authority for constitution making.

Along these two dimensions at least three dominant positions evolved about the legitimacy of the emerging system, in which one finds procedure- as well as content-regarding concerns being intimately intertwined.

The first position centered around the idea that the recently established political and legal system met the standards of liberal rule of law, therefore the successful institutionalization of the liberal constitutionalism rendered a further procedure of constitution making unnecessary if not redundant. The important professional consideration behind this position was granting normative priority to constitutional learning over constitution making⁶⁶. Constitutional learning was argued to allow a latter constituent assembly to apply the knowledge gathered in the course of the constitutional interpretation and judicial development

⁶⁶ Sólyom, "A jogállami forradalmtól az EU-csatlakozásig. Az alkotmányfejlődés keretei." [From Rule of Law Revolution to Joining the EU. Limits of constitutional development]

of the Constitutional Court, and thus enact a final document that would be free from the risk of losing its prestige and legitimacy by frequent amendments necessary to fit the needs of the quickly changing economic and social environment. Proponents of constitutional learning thus argued that the ultimate criterion of the constitution's legitimacy was content-based: as long as subsequent judicial corrections enhance the coherence of constitutional text, and the interpretive practice of the Constitutional Court results a solid constitutional culture allowing grounding norms to be consistently realized, the constitution itself is legitimate. As former president of the Court and former president of the republic argued, the fundamental task of the Constitutional Court is to "articulate its interpretation of the Constitution along with the principled basis of the rights it contains, wherein its constitutional adjudication constitutes a coherent system that, as an invisible constitution, serves as a benchmark of constitutionalism for the Constitution that is prone to be amended along daily political interests"⁶⁷. Based on this expansive understanding of the Constitutional Court's scope, some argue that it is neither the textual result of the constitution, nor the question of agency that ultimately matters: it is the Constitutional Court that defines what the constitution is⁶⁸.

⁶⁷ See the concurring opinion of László Sólyom for the Constitutional Court's decision. 23/1990. (X. 31). Constitutional Court of the Republic of Hungary, <http://public.mkab.hu/dev/dontesek.nsf/0/007BA9C2553A215BC1257ADA00525F0D?OpenDocument> (accessed: May 20, 2014)

⁶⁸ Paczolay, *foreword*.

Others supplemented the above idea of the legitimacy of the recently amended constitution by legal-technical or political considerations. Even though had been widely acknowledged that the accelerated work at the Roundtable, and the limited scope of the drafters rendered the constitution`s text technically flawed, some refused to accept the necessity of a new fundamental law by arguing that the only reason to successfully justify a new constitution would be the replacement of the present legal and political system with a completely new one⁶⁹. Others, however, despite having recognized that especially the above mentioned technical considerations would call for a new fundamental law, argued that the risk of the constitution becoming a subject to political rent-seeking provided a strong case against launching a new drafting process⁷⁰.

In contrast with the first position whose proponents saw the legitimacy of the recently established constitutional order sufficiently justifiable, the second and the third positions emphasized the urgency of finalizing the transition with a new fundamental law for different reasons. What distinguished the latter two positions was their relation to the outcome of the amendment-process initiated and carried out at the National Roundtable. What they had in common was ascribing a democratic deficit to the amended constitution it had inherited from the circumstances of its adoption. As mentioned before, the National Roundtable did not assume the task of ratifying a final constitution but intended to make the necessary

⁶⁹ Bragyova, "Jogállam," [Rule of Law] 15.

⁷⁰ Majtényi, "Jogállam," [Rule of Law] 40.

amendment that guaranteed the institutional conditions of the peaceful and democratic regime change. As a result of the negotiations, the constitution declared itself to be interim, albeit its main text did not establish any institution of interim effect, nor did it set out a binding deadline for the upcoming democratic parliaments to enact a final document. The preamble itself, therefore, provided the fundamental yet formalist argument in favor of the convocation of a constitutional assembly: a supreme law cannot render itself interim⁷¹. However, the legitimacy of a constitution and the stability of a democratic republic is evidently not contingent on a declaration of temporality set out in a constitution's preamble – nevertheless this had been the most frequently used argument against the constitution's legitimacy. The reasons for those being questionable were to be found in the historical circumstances of the transition and the political conditions of the drafting process and the act of enactment. The constitution of the Third Republic had been drafted by unelected participants of the Roundtables, and was promulgated by the already illegitimate Communist parliament. The drafters were aware of not having the necessary authority, thus the constitution-making, as described by the earlier discussed post-sovereign model of Arato, was hoped to consist of two steps: in the first step, the content of the fundamental law is determined at the negotiations, based on substantive considerations of legitimacy; in the second step, the democratically elected legislature provides the procedural component of the constitution's legitimacy.

⁷¹ See for example Kukorelli, "Jogállam," [Rule of Law] 30. and Paczolay, Id. 46.

However, as discussed before, the second step of democratic reinforcement had not been made by the post-transitional Parliaments, that in the first years after the transition many across the political spectrum felt to be highly problematic: Kardos argued that the cause of the constitution`s legitimacy deficit consisted in its indirect, passive acceptance by the citizenry⁷²; Arato held that citizens in general did not feel that the constitution was theirs, therefore it was of utmost importance to properly finalize the transition⁷³. Kis hoped that a new fundamental law that would bear the support of the political parties and the overwhelming majority of the citizenry would be key to consolidate the nation`s democratic institutions, and would enable them to better handle political conflicts⁷⁴. Thus proponents of the second position were mainly satisfied with the institutional design and the rights-protecting character of the constitution, yet argued for the symbolic value of a democratic reinforcement.

Unlike those who advocated the enactment of a formally new constitution but were majorly satisfied with the institutional design and the character of the legal system the transitional constitutional established, some, primarily from the far-Right in the early 1990s, heavily criticized the entirety of the new political order, and the criticisms were not only connected tightly to the amendment process that they saw *ab ovo* illegitimate, but also to the results of the transition. They were reluctant to accept the amended fundamental law as the

⁷² Kardos, “Ki alkotmányozzon?” [Who should make the Constitution?]

⁷³ Arato, “Jogállam,” [Rule of Law] 14.

⁷⁴ See for example Kis, “Gondolatok a közeljövőről [Thoughts about near future]; Halmai, “Alkotmánya várva,” [Waiting for Constitution]”.

basic legal document of the democratic system, and the fact that the old Communist parliament supervised the last pre-transitional amendments also increased suspicion against the constitution's legitimacy⁷⁵. As for its content, having the drafters decided to preserve the peaceful character of the transition, and giving absolute priority to the institutionalization of liberal rule of law over matters of justice, many wishing to see various measures of compensatory or retributive justice to be taken into effect so as to restore personal damages suffered during the years of Communist rule, perceived the Roundtable negotiations and the following human rights-protecting jurisprudence of the Constitutional Court as a betrayal of the nation, and regarded the transition as a corrupted compromise between unelected and corrupted participants helping former Communist political leaders to transform their political capital into economic advantage. For these critiques the constitution of 1989 never symbolized the country's democratic transition but was referred to as the Communist or Stalinian constitution.

In the mid-2000s, at the time of Hungary joining the European Union, discussions about the necessity of a new constitution surfaced again, yet the arguments in favor and against the formal finalization of the constitution became less varied. By 2004, those who had earlier shared some form of the second position realized that the constitutional moment had passed; and what János Kis called the "basic structure of the constitution", that is, the

⁷⁵ Arato, "Kerekasztalok, demokratikus intézmények és az igazságosság problémája" [Roundtables, democratic institutions and the problem of justice]

distribution of power, and the provision of human rights and civil liberties, had been well-established and properly taken care of. Thus similarly to those who relied solely on the Constitutional Court's jurisprudence in consolidating the legal system, thereby earning its legitimacy from the quality of the constitution's application⁷⁶, former "second-positioners" argued that, even though the constitution had proved to live up to its fundamental task, and therefore the fundamental law could be regarded as final, it needed a symbolic and democratic reinforcement. Such democratic reinforcement could either be realized through a conservative constitution making where a democratically elected legislature, functioning as a constitutional assembly, promulgates a new constitution without changing the basic structure of the legal and social system. A similar, formal solution could have been the "renumbering" of the constitution, that is, simply changing its number from Act 20 of 1949 to i.e. Act 1 of 2004, and removing the preamble that had declared the temporality of the amended constitution⁷⁷. These remained, however, merely technical considerations: as Kis⁷⁸ and Györfi⁷⁹ argued, the appropriate procedural component of the constitution's legitimacy must have stood not in the

⁷⁶ Sólyom, Sólyom, László. "A jogállami forradalmtól az EU-csatlakozásig. Az alkotmányfejlődés keretei." [From Rule of Law Revolution to Joining the EU. Limits of constitutional development]

⁷⁷ See i.e. Körösenyi, András., "Mozgékony Patthelyzet. Reform és változatlanóság között: a politikai és alkotmányos alapszerkezet változásai, 1990-2005," [Flexible Deadlock. Between Reform and Unchangingness: The Changes of Political and Constitutional Structure of Hungary Between 1990 and 2005] 29-68.

⁷⁸ Kis, J., "Az alkotmány véglegesítése," [Finalizing the Constitution] 43-57.

⁷⁹ Györfi, "A többségi döntés tartalmi korlátai és az alkotmánybíráskodás," [Content-specific limits of majoritarian decision and constitutional jurisprudence] 33-58.

Constitution`s number *per se*, but rather in a comprehensive support both from the overwhelming majority of the citizens and the political parties; in other words, the parties` unanimous declaration that they regard the constitution as the legitimate final document of Hungary could probably have consolidated the fundamental law.

In the meantime, while in the early nineties only far-Right parties tended to deny the constitution`s and the political system`s legitimacy, due to large-scale disenchantment with the transition itself, brought about by the widespread dissatisfaction with the post-transitional economic and social conditions, extremist anti-Communist and nationalist rhetoric seeped into the mainstream center-right political discourse. By the end of the first decade of the new millennium, despite the character-changing, substantial amendments that the document had earlier undergone⁸⁰, Right-wing politicians had begun referring to the constitution of 1989 as the Communist constitution of 1949, and condemned its drafting process to which many of them had personally assisted during the Roundtable talks. The ever-strengthening claims for a real transition topped with a new constitution articulated exactly the opposite to the grounding principles of the transition of 1989: priority of justice over rule of law, an institutional design that yields pre-defined outcomes instead of a calculable system of rules, but most importantly, a constitution created by a sociologically defined constituent power instead of consensual document that is primarily committed to agent-independent individual right-protection. The

⁸⁰ Halmai, “Mennyire sztálini a magyar alkotmány?” [How Stalinian is the Hungarian Constitution?]

Fundamental Law of 2011 was enacted on the above premises. It has been a result of what many had earlier worried about: the constitution became a matter of particularistic political interest instead of a product of consensual recognition. Although there are abundant evidences to support this claim, I am rather aimed at showing that unlike the transitional constitution-making process of 1989 that can be best described by the reverse-dualist model, the drafting-process of the 2011 Fundamental Law, along with its enactment and content provides a case for the purest form of what Ackerman would call democratic monism.

2.3. MAKING SENSE OF LEGITIMACY CLAIMS

As we saw in the previous chapter, the fundamental cleavages between dualism, democratic monism, and rights foundationalism is their different position on the question of constitutional agency, the problem of whose opinion should prevail when partially or totally amending, or interpreting the constitution. In case of an existing democratic regime with an entrenched constitution, three different answers can be given in line with the three competing major theories. As Györfi demonstrates⁸¹, these can be the framers, the present majority, and the judges for dualism, democratic monism and rights-foundationalism, respectively. However, given that Györfi is discussing the problem of how to reconcile judicial development with democracy, and who is entitled to interpret the constitution and therefore decide which understanding of the constitution should prevail when at least two fundamental principles

⁸¹ Györfi, "In Search of a First-person Plural, Second-best Theory of Constitutional Interpretation," 1091-1092.

conflict with each other, the focus of his analysis is limited to the problem emerging in existing constitutional democracies and therefore it does not seem to be directly applicable to the problem of constitution making. Although, as I have indicated before, my aim is not to provide a full-fledged account of legitimacy of constitution-making that include constitution-making *ex nihilo*. Yet we have a good reason to assume that total constitutional amendment, that is, making a new constitution must comply with a more complex set of conditions than a simple revision.

As we saw earlier, the rights-foundationalist will argue that agency does not matter so long as the right principles are built into the constitution. The democratic monists, by contrast, will reject this idea and will call the entire process antidemocratic thus illegitimate on the basis of procedural fairness as the preference of the majority, she argues, would be constrained by the priority of underdetermined principles that are designated to fix the basic structure of the society along a liberal conception of human and civil rights. The dualist will also be indifferent about the content but will emphasize the importance of an increased civic mobilization necessary to identify the rare occasion of “‘higher lawmaking’, in which a fully aroused citizenry, after an appropriate period of serious debate, issues new instruction to their elected representatives *and the members of the Supreme Court*”⁸². As such, the dualist will also favor popular sovereignty as opposed to morally normative considerations of

⁸² Emphasis added. Fisher, “The Defects of Dualism,” 961.

constitutional legitimacy. Reversed dualism that is in fact a theoretical formulation of Arato's post-sovereign model of constitution making, in contrast, serves as a conceptual bridge between these three positions. Contrary to the previous models that seem conceptually incapable to synthesize process-regarding and substantive conditions for the legitimacy of constitution-making, the reversed-dualist concept simultaneously draws a content-specific benchmark that satisfies rights-foundationalist standards, and recognizes the political sensitivity of the question of process and constituent power.

These being said, I believe, we can rightly argue that the Hungarian constitution-making process in 1989 can be classified as a reversed-dualist procedure substantiating the country's successful transition from a Communist single-party system to a capitalist democracy. It also seems, that unlike Ackerman's dualist proposal for post-Communist countries, it is precisely the rights-preserving character of the constitution, and the drafter's self-constraint driven by the acknowledgment of their lack of authority to make the final constitution that helped the Hungarian transition to retain its peaceful, non-revengeful tenor, and – as Arato put it⁸³ - grant a normative superiority to the post-sovereign model against alternative conceptions of legitimate constitution-making. The reversed-dualist nature of the constitution-making process is reflected in the originally planned institutional design of the transitional process according to which the open and public negotiations at Roundtables

⁸³ Arato, "Regime Change, Revolution and Legitimacy," 43.

should have been followed by a democratic reinforcement that eventually never happened. Following Arato's argument, the two roundtables, the National Roundtable and the Oppositional Roundtable ensured that the Schmittian sovereign constituent power would be replaced by *principles*⁸⁴ that are characteristic to the post-sovereign model, allowing each member of the participants of the constitution-making process to regard the process as second best strategy. However, the strong emphasis on the paramount importance of procedural considerations is what distinguishes the Aratoean reversed-dualist model from the rights-foundationalist position that had been shared by Sólyom or Bragyova. Though it was a matter of fundamental priority for the drafters to institutionalize the protection of rights, reversed-dualist equally emphasized the constitutive role of popular sovereignty in constitutional legitimacy. Within the theory of rights-foundationalism, agency does not enjoy even a secondary importance: it is a moral obligation to have moral laws, not matter how and by whom. Reversed-dualist recognized, by contrast, that under certain historical circumstances rights-foundationalism simply cannot save the constitution from political dangers – and I believe they were right.

As we have also seen in the previous chapter, the monist, and thus purely procedural view of democracy rests on the idea of moral equality that is realized through the institution of equal vote. A majoritarian scheme of decision-making, proceduralists argue, must yield

⁸⁴ Arato, "Kelet-Európa: Az alkotmányozás harmadik modellje," [*Eastern-Europe: The third model of constitution-making*] 25-31.

legitimate decisions provided that the decision has been the outcome of a fair process where participants respect others' rights and recognize each other as equals⁸⁵. Since evidently not every decisions would satisfy everyone's preferences, the only way for one to abstain from declaring every non-preferred outcome illegitimate is to regard the decision-making procedure itself legitimate. Thus when one faces a legal obligation that is not as advantageous as an alternative decision she would support, she would need to be confident the legal system at large and the basic structure of the constitution is still beneficial for her. Although I have pointed out might concerns about this assumption, for the sake of the argument let us suppose that the proceduralist argument *within the framework of an existing constitutional democracy* is acceptable. When it comes to constitution-making, however, the majoritarian scheme is severely problematic. One might point to practical concerns first, such as the problem of infinite regress, but my main concern here is a theoretical one about the monistic account of constitution making. If we are required to abide by the decision of the majority, and it is our moral duty to abide by the majoritarian decision, then the basis of the decision-making procedure must be in line with particular morally normative premises. Such premises must consist of principles that are designated to govern individual conduct that respects the ultimate priority of the protection of and respect for human rights and civil liberties. It is the rights-protecting character of the background conditions that promotes partially that members of the

⁸⁵ Waldron, "The Core of the Case Against Judicial Review," 1346-1406.

community can identify with the community's fundamental law. At time of constitution making, however, the decision-making process is not necessarily supplemented by such background conditions. The *first*, formative decision of the community, therefore, needs to be consensual. Therefore, at the time of constitution-making when members of the same community are both historically and sociologically well circumscribable, the legitimacy of a constitution that has been made without near unanimous consensus remains questionable.

While the constitution-making process in 1989 might have been informed by the framers' fear from the return of the dictatorship⁸⁶, or the informal power of the former *nomenklatura*, which fear pushed the constitution-making process as well as its output towards tripartite negotiations grounded on rights-protecting stances, the constitution-making of 2011 is definitely best described through democratic monist lens. The 2011 Fundamental Law of Hungary was adopted along party-lines⁸⁷, with the exclusive support of the present Christian-Conservative coalition, having a qualified majority with the two-thirds of the seats in the Parliament. The adoption of the Fundamental Law had been criticized along various lines. First, its framers dispensed with any consultation or effort to realize a consensus over the amendment of the Constitution of 1989 with other political parties. Second, its adoption

⁸⁶ This assumption might be justified by the opposition's fierce disapproval of the institution of a directly elected and powerful president that was eventually turned down by a referendum in November 1989.

⁸⁷ The Socialist MSZP and the Green-Liberal LMP boycotted the vote, the far-right Jobbik voted against the new Fundamental Law.

violated the amendment rule of the then existing constitution: the coalition began the amendment process by amending with its two-thirds majority the amendment rule of the 1989 Constitution which stipulated that the preparation of a new constitution required four fifth of the representatives⁸⁸. Third, the preamble of the Fundamental Law transformed the demotic character of the country's constitution into an ethnic one as it redefined the subject of the constituent power by restricting agency to ethnic Hungarians as opposed to the modern idea of neutral citizenship⁸⁹. Fourth, constituent pressures that could have justified the full revision of the 1989 Constitution were absent at the time of the governing coalition initiated the constitution making process. Finally, before its electoral victory, the governing coalition had not informed the citizenry about its intention to enact a new constitution but systematically appealed to its recently won supermajority after the 2010 elections.

The Hungarian constitution making procedure of 2011 that followed the Christian-Conservative coalition's constitutional politics that had yielded twelve (*sic!*) constitutional amendments between April 2010 and December 2011 which reflected a persistent legislative effort to disable the Constitutional Court to annul unconstitutional legislations, provides an exemplary case of the democratic monist account of constitution making as well as the threats procedural accounts of democracy might bring about. A constitution that is made along partial interests on a purely majoritarian basis faces a dual difficulty when claiming legitimacy: as we

⁸⁸ *The Constitution of the Republic of Hungary*, Section 24(5), Act XX of 1949, (1989)

⁸⁹ Kis, "From the 1989 Constitution to the 2011 Fundamental Law."

have already seen, the procedural justification of legitimate constitution making is conceptually flawed. Furthermore, when contrasting its central premise with political reality, we have to see that a majoritarian constitution, on the short run, cannot consolidate the political community.

CONCLUSION

We have seen that the three models for constitutional politics that Ackerman presents in *We the People* face conceptual difficulties of various sorts when contrasted to social realities of constitution making. We have seen that a substantive theory of law that Ackerman labels 'rights-foundationalist' regards the problem of constituent agency as of secondary importance. The case of the Hungarian constitution of 1989 has shown that the theoretical failure to take agency and thus some popular component of democratic legitimacy seriously has fatal effect as to the question of sociological legitimacy. We have also seen that Ackerman's dualism cannot provide a solid account about the legitimate conditions of constitution making being its focus on historically contingent circumstances as opposed to the objectively evaluable constituent pressure. About democratic monism we have shown that it fails to provide constitutional answers to anti-constitutional political challenges.

Since all of the above models have been dedicated to justify decision-making mechanisms within existing political systems, we embarked on a deconstructive enterprise to see whether these positions can be extended to the domain of pre-constitutional or extra-constitutional circumstances. We have seen that substantive and procedural views about democracy are not equally capable of addressing the legitimate conditions of constitution-making. Substantive accounts of democracy seem to establish identical criteria for the justifiable conditions of constitution-making and ordinary legislation, given these procedures'

not being concerned neither of the question of agency, nor procedures. Contrary to substantive accounts, we have shown that procedural views of democracy cannot provide plausible justification for majoritarian decision-making in times of constitution making. In other words, a majoritarian account of constitution making is implausible inasmuch as when it comes to the first, formative decision of the community about the identity of the constitutional order, the background principles of proceduralism, that is, the principle of moral equality is not established.

Though only substantive models provide acceptable conditions for constitution-making, substantive constraints on the constitution itself are not sufficient to undertake a democratic transition in one step. Arato's post-sovereign model of constitution making outlines a scheme of two steps with one interim constitution, where in the first step of the constitution-making process, the parliament of the already illegitimate regime enacts an interim constitution, while in the second step, the first democratically elected parliament finalizes the transition by enacting a new constitution or symbolically finalizes the exiting one.

Neither of the post-1989 constitutions could be regarded as legitimate, but their illegitimacy are of different kind and degree. I argued above that the constitution making process of 1989 is best described as an incomplete case of Arato's model. Due to the lack of democratic reinforcement of the 1989 constitution, none of the major political actors regarded

the constitution wholeheartedly legitimate, notwithstanding its substantive democratic qualities. We cannot show that the post-transitional constitution would have been fully legitimate given that the political elite has never declared its support and respect for the 1989 fundamental law.

In contrast to the one of 1989, I argue that the Fundamental Law of 2011 did not satisfy either procedural or substantive criteria of legitimacy. The preamble of the new Fundamental Law resulted a break in the character of Hungary`s constitutional culture by completely redefining the subject of the constituent power, and its historical interpretation and declared system of values precluded every citizen to regard the constitution as one that provides equal respect for each. Furthermore, along the constitution making process, the coalition broke with the amendment rule: with its two thirds of the seats in the parliament, it repealed the amendment rule that would require eighty percent of the representatives to enact a new constitution.

What the German and the Japanese examples show is that democratic reinforcement is not necessarily a legislative act. The democratic condition of the legitimacy of a constitution, once already enacted, is its potential to consolidate the political arena: that no party should feel that it is the opposition of the system instead of the government. A declarative support could have consolidated the post-transitional constitution of Hungary: a public declaration by

all major political actors to enable the constitution to become the symbol of constitutional patriotism.

The Fundamental Law of Hungary is a flawed constitution. Flawed, because it cannot unite the citizens of Hungary. Political consolidation definitely requires the Fundamental Law to undergo some textual modification - but not necessarily a completely new constitution.

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