

Is There a Dictatorship in the E.U.?

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The Orban government has enacted sweeping changes that have raised the specter of autocracy in Hungary: is the European Union about to have a dictatorship among its member states? For Andrew Arato, even enemies of the new regime should recognize that it is still only a *demokraduras*, a hard democracy: only then will they be able to go back on the current reforms.

It may seem like a scholastic question: is the current Hungarian regime a dictatorship (or an autocracy) in light of the changes made by the Constitution of 2012, the so-called Basic Law? Does answering this question make a difference for those seeking to reverse or replace the regime? My answers are no to the first, and yes to the second.

The Rise of FIDESZ

First a little history. FIDESZ, the right-wing, leadership-oriented, in part anti-European, current governing party led by Viktor Orban, has received over two thirds of the parliamentary seats with 52.7% of the vote in the elections of 2010. Since 1990, no party has received as high a percentage in the first electoral round, but the gap between votes and seats was still a function of the mixed electoral system's disproportionality that, in each election so far (except one), has rewarded a much larger number of seats to the winning party than their portion of the vote. Most obviously the electoral result happened because the previous governing party, the Hungarian

Socialist Party (or MSZP, the successor of the earlier monopolistic state party) and its former leader Ferenc Gyurcsany were totally discredited during the previous cycle. The outcome is connected with several, deeper factors, but especially, in my view, with the failure of the new parties which came out of the regime change of 1989-1990 to stabilize: most notably, the Hungarian Democratic Forum (MDF) that won the first free elections, and Alliance of Free Democrats (SZDSZ) which was the inheritor of the great democratic opposition of the 1980s— FIDESZ (Alliance of Young Democrats) being here the exception.

On the center left, I attribute the failure to consolidate a new party to the attachment of the liberal SZDSZ to a largely European conception of liberalism: it remained, for too long, too closely identified with a primarily economic form, de-emphasizing if not entirely excluding social liberal and civil society-oriented options. In its overall ideological posture the emphasis on human rights, though important, had little effect on the economic policy options supported. The earlier stress on worker's self management, the multiplicity of viable forms of property and civil society inputs fell by the way-side. A coalition with the post communist MSZP between 1994 and 1998 (which I then supported) was probably, in retrospect, a poor decision, especially because the liberals turned out to be unable to renounce this alliance even when that would have been the right course strategically and on the level of principles. The party's political posture became self-destructive, especially after 2002, when the SZDSZ took an even more determined economic liberal turn. Its brand of liberalism, while valuable to hasten the transition from state socialism, never stood chance in a period of severe economic strains and impoverishment of the poorer sectors of the population, both in the industrial and agricultural sectors, especially in rural areas. It was FIDESZ (along with originally liberal parties in Poland and the Czech Republic) that recognized the unviability of originally rather Thatcherite forms of liberalism and abandoned its own ultra liberal posture by the mid-1990s.

So-called nostalgia parties, inspired by pre-Communist era politics, developed on the right, most notably the Independent Small Holders (FKGP) and the group of the Hungarian Democratic Forum (MDF) identified with Istvan Csurka, which sought to define themselves in terms of ideologies inherited from the interwar period—ideologies by then obsolete and even

comical. FIDESZ in time recognized that while some of the grievances these groups put forward found a response in Hungarian society, only a new, dynamic, and forward-looking party led by young or fairly “new” people could successfully channel them. FIDESZ did this with great success in the parliamentary elections of 1998 when it first formed a government. Since most Hungarians do not and never have voted mainly on the basis of ideology, FIDESZ could not rely on the most extreme irredentist, xenophobic, anti-European and anti-Semitic slogans of this nostalgic, right-wing authoritarian and exclusionary milieu. That is why its success in reconstructing the right had an unintended side effect: the formation and strengthening of Jobbik, a party of even younger people who have no problem adopting the most reprehensible slogans and ideologies. Together with Jobbik, the right in 2010 received 69% of the votes and 80% of the seats. This is what Orban refers to as “the revolution of the voting booth.”

Parts of the Hungarian right always considered the round table negotiated transformation of 1989 a form of conversion of Communist power. As in Poland, Bulgaria, the German Democratic Republic, even Czechoslovakia, and later South Africa, the round table in Hungary was the body that negotiated the peaceful regime change, within continuous legality. In 1989, through a process of comprehensive amendment, this body produced the first new, supposedly interim constitution of the country. While, at the time, members of the right attempted but failed to realize secret deals with the outgoing Communist power (one of which concerned the presidency of the country), they very soon denounced the round table process as a way to preserve older powers. It was a deal between reds and pinks, they claimed, suppressing their own actual role in the process, and denying the obvious, namely that there was indeed a full change of regime in 1989. Thus, many of the spokesmen of the right called for a revolution, or a “second revolution—” at least after this became safe in 1990.

In Hungary, party alternation is however neither new, nor revolutionary: it has happened in the elections of 1990, 1994, 1998, 2002 as well; 2006 was the exception. Moreover, in 2010 the voters were not told that a replacement or dramatic alteration of the regime of 1989-1990 was at stake in the election. If there was a revolution, it was engineered by the two-thirds of the Parliament, manufactured in part by the electoral rule, rather than by the voters themselves.

Under Hungary's old amendment rule, a qualified majority was legally able to alter all features of the political system. No feature of the Constitution was formally unamendable, as is the case for the famous French republican clause (Fifth republic: last sentence of Art.89), or the several elements of the German *Grundgesetz* that are themselves not open to amendment (Art 79-3). Such limits when they formally exist are always capable of expansion by courts, as this has been confirmed by German and Turkish Constitutional Court decisions. Even when there is no formal limit on the amending power, a tribunal like the Indian Supreme Court with its basic structure doctrine can declare and enforce an informal limit. Unfortunately, the Hungarian Constitutional Court has repeatedly denied that it could review amendments for anything other than purely procedural reasons (i.e. that the sufficient majority was not attained) and this possibility was affirmed too recently to interfere with FIDESZ' project.

Under the amendment rule, then, as in 1989, the whole constitution could in principle be replaced thanks to a single amendment or a document called a new "constitution" or basic law. While a complete replacement was by no means accomplished by the Basic Law of 2012 and the accompanying legislation, enough features of the 1989-1990 regime were altered or replaced to raise the question whether a second regime change has occurred in Hungary—legally but with revolutionary results.

Incumbent-protecting Measures

This is where the question of dictatorship becomes relevant, first because of the nature of the process of change.¹ Unlike the changes that took place in 1989 and 1990, and the failed attempt to draft a new constitution in 1994-1996, the effort of 2010 was entirely unilateral: the new constitution was imposed by the governing party without input from any opposition or minority. If we define (as we should) modern dictatorship by the rule of arbitrary will that is unable, like kingship, to rely on sacred, dynastic or any other form of inherited authority,

¹ I leave out of consideration of the term "autocracy" recently used by the famous economist Janos Kornai to describe Orban's system. This term, first used by Hans Kelsen in a twentieth-century context, expands the modern concept of dictatorship by including absolute monarchies, classical tyrannies and despotisms as well. For Hungary, the two terms, dictatorship and autocracy, have the same meaning. Thus, what I say about the concept of dictatorship's inapplicability applies to autocracy as well.

implying also the absence of any separation of powers, the 2010 process was dictatorial, even if it stopped short of the sovereign dictatorship of Carl Schmitt (see *Die Diktatur*²) and a clear legal break. Not only was it unilateral and arbitrary, but all other institutions like the Constitutional Court were excluded, and even confirmation in a referendum was studiously avoided. While not de facto illegal under the existing amendment rule and Court precedents, a different and stronger Constitutional Court could and should have declared the method of change illegal.³ Short of that, we are left with the unusual British solution: the concept of legal but unconstitutional, or legal but illegitimate change.

But is the result a dictatorship? Did it step over the threshold, wherever that is, from the previous system into an entirely new one? The main changes so far are, first: the packing of the constitutional court in a process controlled by FIDESZ, with the addition of five new justices to the original ten. The jurisdiction of this Court was significantly reduced, by excluding financial, tax and pension matters from review (unless human dignity is involved!) The extraordinarily wide rules of standing the Court had in the past were slightly reduced, or rather altered—in practice, the exact nature of the change is still unclear. Through manipulation of retirement rules in the new constitution itself, a large number of ordinary judges are being replaced. This process will be controlled by a new board under a political appointee. Second: there has been an attempt to cement the incumbent power by giving several important policy areas a new status, including taxation, financial management, pensions. It will require two thirds of the parliamentary votes to regulate these issues and make appointments not only in these areas but for all the boards and bodies in charge of media regulation. FIDESZ has a two-thirds majority now, but new governments after 2014 are less likely to do so. A series of appointments to bodies supervising the judiciary and economy should go into effect for periods well beyond the current

² Carl Schmitt-Dorotić, *Die Diktatur, von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, München und Leipzig, Duncker & Humblot, 1921.

³ There were technical grounds for this. One constitutional amendment opened the door to majoritarian constitution-making by replacing a 4/5 clause of the constitution, pertaining to parliamentary agreement concerning the making of a new constitution, by a vote of 2/3. It is strongly arguable, in my view entirely correctly, that rules of qualified majorities in constitutional change are implicitly self-entrenching. To remove a 4/5 rule by 2/3 implies that the original rule left open a two step-change by-passing it, and this would make the rule non-sensical (i.e. you must do this by 4/5... unless you choose to do it by 2/3!) If a court chose to follow my interpretation, this would be consistent with the idea of merely procedural or formal review.

parliamentary period (mostly 9 year terms). By naming these “bionic” officials now, Pinochet-style, under the new constitution, FIDESZ will be able to preserve some important powers beyond its current tenure. Third: the electronic media have been recentralized under a new board, and possibilities of sanctioning organs and journalists in the print media for “unfair” practices and reporting have been put on the books. Fourth: a new electoral rule has been enacted, more disproportional even than its predecessor, which on the basis of computerized surveys would give FIDESZ an even greater majority under the voting pattern of 2010, and could give this party a majority even with a vote far less than before.

All in all this is a series of strong incumbent-protecting measures. There is some plausibility in understanding dictatorship as a modern system in which incumbents cannot lose power, at least without a new change of regime. Is that the case under the new system? Note first that in terms of my previous definition, focusing on constitutionalism and separation of powers, even if the process of establishing it was dictatorial, the system FIDESZ established is not a dictatorship. There is still a Constitutional Court with important powers, that were used in several cases even after its packing. There are still elections, whose outcome will still depend on popular support. Striking democratic alliances before the one and only round of the next election would be a possible way to frustrate the intentions of the new electoral rule. For these reasons, the idea, propagated by some of the most fearful commentators, that FIDESZ cannot be replaced because of this rule is absurd. The independence of the Central Bank is likely to be preserved under European pressure. The likelihood that the media laws will or can be used to completely suppress free press and internet communications is small, especially because of, again, likely European pressure and possible recourse to the European courts. Civil society groups and parties can still demonstrate and mobilize, and show it almost every week. With all these channels open, the incumbent-protecting rules of the new arrangements cannot guarantee that FIDESZ will remain the governing party. It is true that two-thirds rules protect many of FIDESZ bionic appointments, but these do not last forever, and two thirds is not 100%. Indeed, with the self same amendment rule in place, a new re-alignment can result in a change or replacement of the Basic Law even if a new government does not have the necessary two thirds of the seats in Parliament.

Why Hungary Should Not Be Called a Dictatorship

The new FIDESZ regime, then, is a hard democracy, a *demokratúra* in the words of Guillermo O'Donnell and Phillippe Schmitter⁴, not a *dictablanda*, a soft dictatorship. It is still based on parliamentary sovereignty like its predecessor (and unlike the regime before 1989, which was based on the sovereignty of the Political Bureau of the Hungarian Communist Party). More accurately, it has shifted the balance between parliamentary sovereignty (the power of the two thirds) and constitutionalism to the benefit of the former. Thus, rather than a constitutional revolution, it is more accurate to call the changes FIDESZ made a sweeping reform, legal even if politically illegitimate, that hardened the existing democracy by weakening checks and balances and constitutionalism.

Calling Hungary a dictatorship serves the purpose of at the very least inviting outsiders to help reverse the changes. Neither the EU nor the Council of Europe have a republican guarantee clause like the U.S. constitution's Article IV.4, which allows the federal government to intervene in states that have abolished this form (however Congress chose to define it). Other federal states like India have such provision, and have used it perhaps all too frequently. Yet, as the difficulties of Turkey's entry into the EU indicate, it is important that all of its members have at least minimum political homogeneity in terms of constitutionalism, fundamental rights protection and free elections. One would think that it would be at the very least politically if not legally impermissible to allow a dictatorship to remain a member of the federation. There is little question that details of important European and international agreements and conventions are at stake as well. The legal and political pressure to enforcing these would however only require FIDESZ, as it has already, to make very partial changes. It would be different if Hungary were a dictatorship, which, fortunately or unfortunately, is a very tough case to make today. If it is tough to convince me, it will be even tougher to convince the right-wing European sister parties of FIDESZ who have at the moment the majority in the European Parliament, and have admittedly shielded the Orban government in undesirable ways.

⁴ Guillermo O'Donnell and Phillippe Schmitter, *Transitions from Authoritarian Rule: Comparative Perspectives*, Johns Hopkins University Press, 1986.

Moreover, those who try to make the case for dictatorship or autocracy within Hungary itself can easily be accused of trying to destroy the country's reputation and bring in foreign allies to "colonize" a sovereign country. In this context, it is best to apply the pressure of European institutions only where there are clear legal grounds to do so, both in terms of the substantive issue involved and the existence of a relevant jurisdiction. To its credit, the European Commission has insisted on Hungary having a system of financial and monetary regulation compatible with the Union, and media laws that do not interfere with the freedom of communications not only of Hungarian institutions and persons, but also of transnational organizations. It has already taken some important steps in areas clearly in its jurisdiction and forced the FIDESZ government to make changes, hopefully not merely cosmetic. Another step has been the defense of the judicial system and the tenure of judges, as related to the legal security that European institutions and economic actors have a right to require. The role of the European Parliament has been even more spectacular: it has explored in great detail the violations, actual or potential, of fundamental democratic and liberal principles in Hungary. Of course, the protests of the EP do not have any immediate effect. The role of the courts, both the European Court of Justice and the European European Court of Human Rights is likely to be much more effective, when individuals and organizations begin legal suits against the Hungarian government on the basis of their violation of European treaties and court precedents.

There is another political reason, besides the risk of being called enemies of the Hungarian "sovereignty," not to call the Orban regime a dictatorship. Except for the unlikely case that under FIDESZ' new electoral rule, left-of-center parties will gain a two-thirds majority, there is little chance that the new constitutional arrangements will be reversed by these parties alone. A color revolution is not likely either, nor is it unambiguously desirable. It could lead to the new winners imitating FIDESZ' imposed process of change, creating yet another poorly legitimated constitution. To do it better, consensually and legitimately, legal continuity is preferable. In that case, a most likely right-wing ally will be needed to enact a new, consensual constitutionalist constitution (one that cannot be suspended) beyond parliamentary sovereignty. Such ally or allies will have to come from among the members and supporters of FIDESZ.

Denouncing their system in terms they cannot condone can only lead to continued polarization and questionable legitimacy. And part of the right is indeed detachable from Orbán and FIDESZ: right-wing press and individuals were part of the movement that led to the resignation of the state president Pál Schmitt at the beginning of April 2012 after it was discovered that he had plagiarized most of his doctoral dissertation.

Yet other conditions are needed to make the required changes after the next elections in 2014. Center-left forces are always tempted to treat the FIDESZ regime as either a conspiracy, or a populist deformation of democracy. What they are not so willing to recognize is their own role in the current outcome. There is indeed a new and very disturbing populism in Hungary, represented by Jobbik and a part of FIDESZ' support. But why did this happen? And why do many voters, not open to xenophobic, anti-European, and traditional right-wing ideologies, also vote for FIDESZ? The fact that the place of the Left is occupied by the former state party cannot be left out of consideration, nor the demobilizing effects of the market oriented-version of liberalism offered by the SZDSZ when they were still relevant. Neither of these forces has done much to alleviate the growing poverty and inequality in the country. I note also that it was the MSZP leadership that shipwrecked the constitution-making effort of 1994-1996; the liberals allowed this to happen without leaving the coalition of that time. Thus the important legitimacy deficit of the 1989-1990 system was not reduced, and the destructive combination of a disproportional electoral rule and a purely parliamentary rule of constitutional change was left in place. These provided the open door through which FIDESZ marched in 2010. There are indeed many grounds for self-criticism on the part of most of the forces currently arrayed against FIDESZ in Hungary.

More than self-criticism is required, however. The Left and liberalism must be entirely renewed if elections are to be won. For the former, this would require the daunting task of making sense of social democratic protections in an era of economic globalization. For the latter, the task will be to generate a form of social liberalism that focuses not only on macro-performance, and the conditions of the least well off, but also on the conditions of declining middle strata. The orientation to civil society, so important in the beginning of the transition

process, should be renewed. For all these projects, the new ecological party LMP should be an important ally. The Left and liberals must also address the terrible problems of impoverishment in the country, made only worse by FIDESZ's actions. They must be ready to ally not only with each other for electoral purposes, but also to make genuine agreements with at least some forces on the right. This is what European partners and sympathizers should push for, even more than direct intervention, when necessary.

Finally, a new slogan is required. Attacks on "dictatorship" are implausible in the present circumstances. The call to create a new, consensual constitution that includes the whole country and embodies its genuinely common aspirations is a much better candidate.

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