

The abortion of a 'conservative' constitution-making

A discourse analysis of the 1994-1998 failed Hungarian constitution-making enterprise

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Abstract

What are the similarities and the differences between the failed constitution-making enterprise of the left-wing coalition (1994-1998) and the enactment of the Basic Law of Hungary by the right-wing parties (2011-2012)? In my paper, I argue that there is a fundamental difference of political visions underlying the failure of the first enterprise and the controversial nature of the other: the socialists and the liberals represented a consensualist vision of politics that was the heritage of the political culture of the Kádár-regime and the democratic transition; the right-wing coalition, on the contrary, stressed a conflictualist vision. The failure of the first enterprise was a result of the weakening of the political culture of political consensus: though no one dared to explicitly refute a consensual way of constitution-making yet, but the rightist parties only half-heartedly participated in the procedure. By contrast to this, the success of the second was a by-product of the qualified (two-thirds) majority of the right-wing parties representing a conflictualist political style in the parliament rather than a result of a capacity (let alone a design) to create a non-partisan agreement on the issue. In my paper, I will describe these two visions, their origins, and their influence on the outcomes of the constitution-making debates.

Introduction

The aim of this paper is to give an interpretation of the aborted constitution-making enterprise that was initiated and worked on under the socialist-liberal government between 1994 and 1998. I assert that this failed constitution-making process was based on a consensualist vision of politics¹ that prevailed in Hungary during and immediately after the democratic transition, and its fate was determined by the decline and fall of this vision. The origins of this consensualism can be traced back to the last decades of the communist rule, and played a role in the consolidation of the Kádár-regime as well as in its peaceful dissolution. The early grand-scale societal, economic and political reforms of the democratic transition were also due to the consensus of the political and professional elites. We have enough documentary evidence to think that the promoters of the 1994-1998 constitution-making process understood their motion as a mere continuation (what is more a symbolic consummation) of the transition process.²

¹ The term 'vision of politics' I borrowed from the title of Quentin Skinner's book (Quentin Skinner: *Visions of Politics*. Vols. 1-3. Cambridge: Cambridge University Press. 2006.) but without any claim to apply his conceptual apparatus in this analysis. I may just as well use 'political outlook' or 'understanding of politics' etc.. What is important in this respect is that consensualism was a principle underlying the political reasoning in a great deal of very different cases.

² For example, the socialist MP, Zoltán Gál who was the chair of the Constitution-drafting Committee, said: „As it is known, the preparatory work on the codification of a new constitution which would construct a modern, democratic state based on the rule of law had begun already in the 1980s. The laws that made the political regime change possible

As is well known, Hungary was one of the two East-Central European countries that did not draft an entirely new constitution during the democratic transition.³ The rewriting of the old constitution was a deliberate strategy followed by the opposition parties when they made an agreement with the communist party at the roundtable talks. What they intended to do was to lay down the politico-legal foundations of the democratic transition, not to build a new democratic regime.⁴ They had at least two reasons to do so. First, it was the best way to avoid giving too much concession to the communists. (The Polish example seemed to teach them that lesson.) Second, they felt that they did not have legitimacy enough to make the final arrangements of the democratic polity.⁵ A series of modifications in the old constitution (although, in the course of the roundtable talks, the number of changes grew so high that in reality only some sentences were preserved of the original text) seemed the best way to guarantee the democratic transition without constraining the freedom of action of the future democratic legislation.⁶

The preamble of the rewritten constitution declared its transitional character, saying that 'For the sake of promoting the peaceful political transition into state of the rule of law that would realize political pluralism, parliamentary democracy, and social market economy, the Parliament established the text of the Constitution of the Hungarian Republic as follows'. Based on this intention and the prevalence of a consensualist political vision during the early 1990s it was

and received their content in the course of the roundtable talks were born. The political preconditions for the new constitution were still lacking. The agreement about the modification of the old constitution laid down the legal foundations for the peaceful transition into parliamentary democracy, social market economy, and the rule of law, and it provided a chance for the newly elected parliament after 1990 to draft a new constitution. However, the energies of the government were spent on the task of adjusting the whole legal system to the renewed constitution. Therefore, the making of the new constitution waits for the present Parliament. This task was considered important by all significant political parties as can be seen from the fact that all of them put the promise of a new constitution on their platforms." (Somogyvári, István – Kisfaludy, Zoltán eds.: *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol.1. Budapest: Center for Parliamentary Management. 1998. 70)

³ Elster, Jon – Offe, Claus – Preuss, Ulrich K.: *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press. 1998. 63-108. It was Andrew Arato who developed a theory of 'post sovereign constitution-making' after the model of the Hungarian and Polish examples (Redeeming the Still Redeemable and Post Sovereign Constitution Making. *Journal of Politics, Culture, and Society*. Vol. 22. No.4. 427-443.).

⁴ The metaphor of 'alap' (foundation) was often coined at the Roundtable Talks as the interpretation of the agreement between the communists and the opposition parties. See Szűcs, Zoltán Gábor: *Az antalli pillanat: A nemzeti történelem szerepe a magyar politikai diskurzusban, 1989-1993*. Budapest: L'Harmattan. 88.

⁵ This problem resurfaced when extreme right subcultures invented the conspiracy theory of a 'Rózsadomb pact' as an alternative narrative of the democratic transition in which the USA, the Soviet Union, the Israeli and European powers outlined the script of the transition. For a good journalistic summary of this theory see http://www.komment.hu/tartalom/20090225-velemenya-rozsadombi-paktum-mint-osszeeskuves-elmelet-hattere.html?SYsref=NONE&ret=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%253A%252F%252Fwww.komment.hu%252Ftartalom%252F20090225-velemenya-rozsadombi-paktum-mint-osszeeskuves-elmelet-hattere.html&ei=V9dOUIsMM_Esway4oDoCw&usq=AFOjCNGNY6L5ub0zU8rkqAAD9TWeePCRJg&cmnt_page=1

⁶ About the roundtable talks see Ripp, Zoltán: *Rendszerváltás Magyarországon, 1987-1990*. Budapest: Napvilág. 2006; Bozóki, András: *Politikai pluralizmus Magyarországon, 1987-2002*. Budapest: Századvég. 2003; Bozóki András et al. eds.: *A rendszerváltás forгатókönyve*. Vols. 1-5. Budapest: Új Mandátum.

plausible to think that a new constitution should be written as soon as possible after the democratic transition, and that this new constitution should be accepted in a consensual manner. As we will see, the whole procedure of the 1994-98 constitution-making process was built on these principles, thus what its failure foreshadowed was the decline of the consensualist vision of politics.

After the failure of the 1994-98 constitution-making enterprise, the issue of constitution-making became increasingly the expression of conflicting political identities. After the victory of a right-wing coalition, as the finished constitution-draft was off the agenda, the whole question became a cleavage-point between the governing coalition and the socialist-liberal opposition. The motion of the minor coalition party's Minister of Justice to rename the old constitution from 'Act XX of 1949' to 'Act I of 2000' in order to do away with its uneasy origins was more than a mere technical issue. Rather it was a product of the 'millenniarist' rhetoric of the new government in which a moral-political renewal of Hungary was intertwined with the end of the 20th century and the millennium of Hungarian statehood.⁷ As this moralizing rhetoric of renewal became a kind of benchmark of the Hungarian right, the socialists and the liberals started to call into question the necessity for making a new constitution.⁸ Interestingly, the socialist-liberal coalition, even after their gaining power in 2002, did not entail a return to the 1994-98 constitution-making process either. Instead, there occurred some faint attempts to begin the work afresh, but these soon died away as they became public.⁹

What can explain the failure of these recent undertakings is the emergence of a new public discourse that asserted that the 1989 constitution was an entirely new one which, together with the constitutional interpretations of the Constitutional Courts, has grown into one of the most significant achievements of the new democratic polity. It was also a part of this discourse that there is no reason to make a new constitution; and if politicians insisted on constitution-making it would have been best to change the text of the current one as little as possible. Although this discourse infiltrated the socialist-liberal parties as well, it was defended most fiercely by lawyers, among whom a number of *par excellence* conservative intellectuals played a prominent role, thus the name of a 'conservative view of the constitution-making' fits this discourse even better than the one

⁷ The minister, Ibolya Dávid said in a debate in 1999: 'the reference to the Act XX of 1949 should be erased from the title of the constitution; we would like to replace the preamble that emphasized the transitionality with one that would be good enough for a thousand-year-old country; and the chapter about the fundamental rights should take its proper place in the structural system of the constitution' (http://parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=36&p_uls=107&p_felsz=2&p_szoveg=%28%20alkotm%E1ny%20or%20szent%20istv%E1n%20%29&p_felszig=2)

⁸ But before that they made a last effort in 1999 to renew the 1994-98 constitution-making process. The motion was introduced by three socialist MP's: György Wiener, a socialist MP and constitutional lawyer, Balázs Csákaonyi and Dezső Avarkeszi. (http://parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=36&p_izon=1838)

⁹ For example, Minister of Justice, József Petrényi outlined a draft in 2006, but it was never discussed in public. Even the document was only published by the *Hírszerző* blog in 2011. (<https://docs.google.com/file/d/0BzvAZNwR8mVjNzc3OGQxNmMtYTMlYS00NTE5LTJhYTMtZmZkYTJvYzFkMjU5/edit?hl=en&authkey=COTAusAI&pli=1>)

between 1994 and 1998.¹⁰

What created a radically new situation in this story was the landslide victory of the conservative-national parties in 2010¹¹ because the two-thirds majority of the new governing parties in the parliament set the choice before them either to keep themselves to the consensualist way of making a new constitution at their own discretion or to open a new chapter in the history of Hungarian constitutionalism and draft a partisan constitution. After a short period of uncertainty, the coalition chose the second way the result of which was a heatedly debated Basic Law with a strongly ideological National Confession as an introduction of the text that came under especially harsh criticism.¹² As a consequence, the constitution-making process was surrounded by unusually radical ideas on the part of the leftist intellectuals who openly discussed in public journals whether, after the fall of the national-conservative coalition if the new government had not the parliamentary majority needed to revoke the constitution, it would be possible to nullify the new Basic Law on the basis of its unconstitutionality or it should be done in a plebiscitary way.¹³ It goes without saying that these debates were clear expressions of the end of the age of consensualism, and were reactions to the renaissance of partisanship in the first decade of the new millennium.

After this short overview of a great transformation of Hungarian political thought that underlay the change in opinions in the issue of constitution-making from the 1990s to the 2010s, it is time to restate the aim of the paper in a more detailed form. The aim is to trace the clues of the transformation focusing on the moment when the predominance of the consensualist vision began to decline. To show this process, the argument of my paper will be as follows:

- 1) the first section will give a short summary of the 1994-98 constitution-making enterprise;
- 2) the second section will analyze the arguments of the constitution-making debates from the perspective of consensualism;
- 3) the third section will contrast the history of the birth of the Basic Law with the case of the 1994-98 constitution-making enterprise.

¹⁰ A monument of this veneration for the 1989-constitution was erected by a grandiose project initiated by László Sólyom (a former chair of the Constitutional Court and later the President of the Hungarian Republic) and coordinated by András Jakab that was published in a two-volume form of *‘Az alkotmány kommentárja’* (Budapest: Századvég, 2009) by the Századvég publishing house, a right-wing think-tank, in 2009. The project involved the collaboration of about 50 constitutional lawyers and attempted to plant German legal genres into the Hungarian juristic discourse. Ironically, the work lost its momentum the moment it was published.

¹¹ The best political science analysis of the elections is provided by Enyedi, Zsolt – Szabó, Andrea – Tardos, Róbert (eds.): *Új képlet: A 2010-es választások Magyarországon*. Budapest: Demokrácia Kutatások Magyar Központja Alapítvány. 2011.

¹² The National Confession was analyzed by the conservative political philosopher, Ferenc Horvay Hörcher in a somewhat apologetic manner in Horvay Hörcher, Ferenc: A Nemzeti hitvallásról. In: Jakab, András – Körösi, András (eds.): *Alkotmányozás Magyarországon és máshol*. Budapest: MTA TK PTI – Új Mandátum. 2012. 287-309.

¹³ In 2011, mostly the popular weekly of the liberal intelligentsia, *Élet és irodalom*, provided space for these discussions of which the most prominent contributors were the Eötvös Károly Közpolitikai Intézet led by the former ombudsman, László Majtényi, Máttyás Eörsi, a former liberal MP, Viktor Szigetvári, a former spin doctor of the socialist prime ministers, Csaba Tordai, a constitutional lawyer and a former state secretary at the Office of the Prime Minister etc..

1. The events of the 1994-98 constitution-making

The consensualist intention of the 1994-98 constitution-making enterprise was evident even from the government's program. This document declared that 'in order to finish the political transition, *create national consensus*, and lay the foundations for the stability of constitutionalism, the government is committed to making a new constitution. The drafting will be brought about through extensive *professional and public debates*, by drawing lessons from domestic and international *legal studies* and the developments of modern states. The procedures will be built on the *broadest possible national consensus* to enforce the social acceptance of the constitution'.¹⁴

According to the original schedule, the government planned to end the procedure with a referendum in the second half of 1995. At that time, it was also presumed that the Minister of Justice will coordinate the work, and he set out to arrange the procedure by establishing a Secretariat for the Preparation of the Constitution within the Ministry of Justice and officially asked for the professional contribution of the Legal Institute of the Hungarian Academy of Sciences to the work. The result of this work was almost a hundred studies discussing various parts of the constitutional agenda as well as two comprehensive conceptions for the future constitution: the conception of the Legal Institute was elaborated by András Bragyova (later a judge of the Constitutional Court), while the conception of the Ministry was authored by a committee of eight experts. After the cabinet had accepted the report of the minister in March 1995, a period of domestic and international consultations started ranging from the MP's of the coalition parties to civic society, professional organizations, and the Venice Commission of the Council of Europe.¹⁵

Despite this seemingly unproblematic progress, the parliamentary process seldom proceeded. The parliament decided only in May 1995 to establish a committee for the preparation of the new constitution that gave equal representation from each parliamentary party, and regulated the process of constitution-making. The regulation included strong restrictions on the legislative influence of the governing parties that had a two-thirds – constitutional – majority when requiring a four-fifths majority in the Parliament to accept the principles of the new constitution, and required a five-sixths majority within the committee for the preparation of the new constitution.

The committee began work on 5 October 1995, and it soon set aside the materials of the Ministry, starting the whole job afresh. This was a decision that, as it turned out later, proved fatal to the cause of constitution-making. When the parliamentary committee, after a long and complicated debate, introduced its proposal about the principles of the new constitution to the Parliament in

¹⁴ Somogyvári István: *Alkotmányozás Magyarországon, 1994-1998*. in: Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 20. (the emphases were added by me)

¹⁵ A difference that stands out when compared to the process of the preparation of the Basic Law.

March 1996, the schedule included the date of final voting on the proposal as 3 July 1996. However, the final voting was prolonged for a considerably long time, since the voting on the modifications of the proposal on 27 June 1996 had ended with an astonishing result: some members of the cabinet voted against the proposal (supposedly, it happened because they were reported by the Minister of Justice¹⁶ that the proposal of the committee contained unacceptable terms) and this fact was interpreted by the opposition parties as an open violation of the preliminary agreements.

It came as no surprise that, after this incident, the opposition parties did not want to continue the constitution-making process or return to the table. It took until September 1996 for the discussions to reopen. Although, on 17 December, the Parliament accepted the proposal of the committee, and authorized it to elaborate the text of the constitution until March 1997, the constitution-making gradually became a lost cause: in March 1997, the committee still did not set about its new work; and it took one more year to complete the task and draft a text that contained 43 textual alternatives at various points. By then, because the Parliament finished its work on 16 March 1998, all the parties agreed that the draft should not even be introduced to the house, let alone be discussed.

Some might argue that the failure of the acceptance of the principles of the new constitution in June 1996 entailed only a short pause in the process, thus we should not accept without further consideration the opposition's interpretation of the events and say that it was the cabinet's fault that the constitution was never enacted. For example, it was said that on 27 June 1996, if the opposition MPs were present in larger numbers, the failure of the voting would have been avoided. Still, it remains a fact beyond doubt that the result of the voting opened a great opportunity for the opposition to slow the whole process down and successfully accuse the government of violating their own promises.

2. The 'conservatism' of the 1994-98 constitution-making

This is the history of the 'abortion of the conservative constitution-making' in a nutshell. We saw already that the socialist-liberal coalition was really stuck to a consensualist vision of politics: in vain did they have a constitutional majority and they started a constitution-making on the basis of 'national consensus', 'professional and public consultations', and constitutional restrictions on their own power. We can even catch the moment of hybris on the part of the socialists: it occurred when their Minister of Justice counseled the cabinet to derail the consensual procedure.

The 'conservatism' of the enterprise came from its consensualism. One can imagine a situation where a national consensus is needed for a radical reform, but the 1994-98 constitution-

¹⁶ The minister was obviously frustrated by the loss of control over the constitution-making process, as it was later confirmed informally to me by Mihály Bihari, the former socialist member of the parliamentary committee.

making procedure was not of that kind. That was intended to finish the political transition and ‘put the icing on the cake’, and since the Hungarian political transition was supposed to be a gradual and not a revolutionary one, the new constitution had to be continuous with the rewritten old text. This commitment to the continuity was expressed in the regulation of the parliamentary committee saying that the old text should be retained where there was no consensus about a new version.

The ‘conservatism’ of the constitution-making was recurrently highlighted by the participants of the public debates. For example, a liberal MP, Péter Hack said that it was time to complete the new constitution because the ‘process of the conservative constitution-making reached a point during recent years from which there is no reason to continue further discussions of certain questions’.¹⁷ Similarly, the socialist MP, Mihály Bihari mentioned the ‘need for legal continuity’ in the course of constitution-making.¹⁸ The MP of the opposition party Fidesz, József Szájer (the author of the 2010 Basis Law) also said that ‘there is no need to change the foundations of the democratic institutions as they were established in 1989 and 1990. In this sense, the Fidesz wants a conservative constitution.’¹⁹ The independent MP, László Salamon, who was formerly a member of the conservative MDF and later became a leading politician of the Fidesz, emphasized that the most important advantage of the current constitution-making is its conservative nature. As he said: ‘It’s good that the authors of the principles of the new constitution resisted the temptation of l’art pour l’art innovating’²⁰ Finally, we should mention that the term became so common that it was coined even when someone wanted to criticize the whole undertaking. For example, the Christian Democrat MP Miklós Gáspár stated that the ‘model of a liberal state’ underlying the conception of the new constitution cannot be accepted because it is designed to ‘preserve an unjust and unhealthy societal structure for the future’.²¹

Put differently, the constitution-making was to be built on the grounds of ‘national consensus’ and a ‘conservative’ attitude towards the already existing democratic polity. This kind of consensualism was not without precedent in Hungarian politics. On the contrary, the idea of consensual legislation and cautious changes was strongly supported by the system of the so-called

¹⁷ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 81.

¹⁸ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 94.

¹⁹ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 103. His speech is especially interesting from our perspective because it mostly articulated the Fidesz’s commitment to certain constitutional values and used a martial rhetoric as if it were his (as well as his party’s) urgent task to stand up for values endangered by the socialist-liberal cabinet, but otherwise the speech discussed the same themes as the other speeches. The combative and lofty rhetoric and the content of the speech were in obvious contradiction and demonstrated the beginning of the decline of the politics of consensus.

²⁰ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 118.

²¹ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 174.

‘two-thirds majority’ laws that in a normal case would need the cooperation of the governing parties and the opposition. For this reason, governments were regularly forced to reach a consensus even in cases where they originally held the initiative: in 1990, the government had to rewrite its proposal concerning the local governments when it was faced with a strong opposition²²; in 1996, the Parliament passed a law on media on a consensual basis that was designed to close a series of heated debates about governmental influence over the mass-media (a period of which was even termed ‘Kulturkampf’). What was peculiar in the case of the 1994-98 constitution-making was that it proved a failure of consensualism so complete and persistent that cannot be compared to any other issues in Hungarian politics.²³

Why did it happen? A possible answer could begin by stating the fact that the socialist-liberal coalition lost the 1998 elections and a coalition of the former right-wing opposition parties led by Viktor Orbán succeeded them, and it seems plausible to say that the right-wing forces opposed the whole constitution-making process as it had been conducted by the socialist-liberal parties, and that the right-wing parties also opposed the text which had been outlined in this process. Although this explanation has its merits²⁴, it cannot explain the striking contradiction between the early descriptions of the constitution-making process as a ‘conservative’ or a *consensual* one on the part of the governing parties and the refutation of the 1994-1998 constitution by the former opposition as a socialist – liberal *partisan* project.

There should be something more here than merely the succession of power from one political coalition to another. During the constitution-making process, rightist politicians (especially the Fidesz and MDF) cooperated with the majority and their objections against the process were limited to such questions as: why is it so important to draft a new constitution just now?²⁵ Or: do they have enough time to finish the process before the 1998 elections etc.? Even if we can recognize the signs

²² Szűcs, Zoltán Gábor: *Az antallai pillanat: A nemzeti történelem szerepe a magyar politikai diskurzusban, 1989-1993*. Budapest: L’Harmattan. 147-162.

²³ Interestingly, the 1996 media law also did not put an end to the political conflicts around the mass-media. After 1998, it was the socialist and liberal parties who became the proponents of the need for a better regulation because of the apparent political abuses of the law on the part of the national-conservative parties. Those who originally initiated the 1996 law became the most committed critics because of the large number of its errors and loopholes, and it was the national-conservative coalition that unilaterally made a new regulation in 2010. In a sense, we can say that the fate of these motions needing government-opposition cooperation and initiated between 1994 and 1998 is the best indicator of the decline and fall of consensualism. However, the success of passing the media law and the failure of the constitution-making are stories that cannot be equated without risking to overlook the exceptional significance of the constitution-making process.

²⁴ It is a known fact that the term ‘alkotmányozás’ (constitution-making) emerges only twelve times in the official records of the Parliament between 1998 and 2002. Moreover, it was usually the opposition that coined it.

²⁵ For example, the Christian Democrat MP, Tamás Isépy claimed that ‘we must not speak of any ‘state of emergency’ in the point of constitution-making’ (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 99). Similarly, József Szájer, quoted László Trócsányi’s words: ‘the Hungarian public legal traditions oblige the constitution-makers to proceed with necessary self-restraint and consideration in the course of drafting the new constitution that would embody the national consensus’ (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 105).

of a kind of resentment against the possibility of successfully making a new constitution under the rule of a socialist – liberal coalition, we cannot find expressed refusals of the whole enterprise in the documents. The only moment when they used a radical rhetoric against the constitution making was the above-mentioned defeat of the proposal about the principles and structure of the future constitution. The reaction to this surprising failure was almost hysterical: rightist politicians spoke about the 'betrayal of consensual politics' and also about the 'appearance of the true nature' of socialists.²⁶ And, as we saw already, it took months until they returned to the constitution making discussions.

This lack of explicit refusals of the legitimacy of the constitution-making before 1998 means that any later shift in the evaluation of the enterprise from a consensual to a partisan one needed either to ignore the procedural guarantees of the constitution-making or to debunk the hidden political maneuvers of the socialist-liberal coalition behind the curtains of a seemingly consensual procedure. What right-wing politicians really presented when they were confronted with the fate of the 1994-1998 constitution-making process was a mixture of suggestions and intimations, but there was no elaborate discussion of the issue. But what is also striking is that they never initiated a new constitution-making procedure between 1998 and 2002 that could have proved more 'consensual' or 'conservative' (in the above-mentioned sense of the word) than the 1994-1998 process. Rather, as we also saw, they said something like 'now is not the time to make a new constitution' and later merely proposed to change the name of the old constitution from Act XX of 1949 to Act I of 2000.

This strategy of reticence on the part of the right-wing coalition that can be well contrasted with their otherwise radical rhetoric of overall societal and political changes²⁷ suggests that the criteria of 'consensus' and 'conservatism' (in the above-mentioned sense of the word) lost their legitimizing power after the fall of the socialist - liberal coalition. Had it not happened, the governing parties presumably could not have chosen other than to continue the constitution-making.

This suggestion can also be underpinned by the events of the last months when a qualified majority of the right-wing coalition that returned to power after 8 years of opposition and was led again by Viktor Orbán drafted a new constitution without any substantive contribution from the

²⁶ For example, the Fidesz's MP, János Áder said in an obviously irritated manner shortly after the voting: "[the socialists] broke the consensus, the attempt to make a consensual constitution as we had agreed eight months ago." (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 758.) The Christian Democrat MP, Tamás Isépy asked: 'I am asking now: who did break the agreement?' (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 759.) Imre Kónya, an MP of the Hungarian Democratic People's Party: 'It is without precedent that it was the government that is responsible for the stability that broke the agreement' (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 760.) Ervin Demeter, an MP of the Hungarian Democrats: 'In our opinion, this situation has no precedent, and it questions the sincerity of the intentions [of the government] and of the governing majority.' (Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 761.)

²⁷ One of their most popular slogans was 'More than a change of government, less than a change of system' in 1998.

leftist parties, and they legitimized their actions by reference to their two-thirds majority in the Parliament as a direct mandate. They also described their constitution-making enterprise as a part of the so-called 'revolution of the poll booths'. And it goes without saying that a 'consensus' of political elites or any sort of 'conservatism' are not of much use in the course of a 'revolution'.

But how can we account for the apparent discursive differences between the two constitution-making processes, that is, for the differences between the 'conservative' and the 'revolutionary' one? I think that in this – both conceptual and political – change in Hungarian political thought there was much more at stake than rhetoric. What came about here was the fall of one kind of 'vision of politics' in which 'consensus' played a significant role and also the emergence of another vision in which political 'consensus' is downplayed and the struggle of conflicting values is emphasized instead.

It is important to emphasize that 'consensus' was clearly a normative ideal of the political debates, not a really existing political practice. Indeed it was a key concept that assumed a number of different meanings ranging from the classical notion of 'shared common values' to mere 'agreement' or 'compromise' between different standpoints, but what was always its asymmetric counter-concept was 'conflict'. In the early 1990s, no politicians dared to speak about substantial differences of perspectives in politics and to recognize their equivalence or at least the inerasability of the differences. Even the liberals supposed the unity of the foundations of the polity or, if not, they condemned the other perspectives as anti-democratic ones. Similarly, the right-wing politicians used the notion of political conflicts as a means of exclusion from the political community.

By contrast to this, a growing sense of fundamental differences between the two poles of the political culture began to spread in Hungarian political discourse from the late 1990s. This process became manifest in the pillarization of the printed and electronic media, the decline and fall of technocratic ideals of policy-making, the emptying of the political center in the citizens' political attitudes²⁸, the stability of a bipolar party-system for more than a decade²⁹. As a specific answer to this development the political parties recurrently initiated campaigns to reposition themselves from a non-ideologically defined political 'center' that had been so popular hitherto among them to ideologically distinct positions. For example, the socialists deployed the 'let's be leftists' slogan ('*Merjünk baloldalinak lenni!*') in 2006, the liberals amended the name of Alliance of Free Democrats with 'Hungarian Liberal Party' in 2005, the leader of the MDF compiled a 'conservative manifesto' in 2004 etc.. It was a kind of 'renaissance of politics' in that all political actors turned

²⁸ Angelusz, Róbert – Tardos, Róbert: Régi és új törésvonalak, polarizáció, divergenciaspirál. Tardos, Róbert – Enyedi, Zsolt – Szabó, Andrea (eds.): *Részvétel, képviselet, politikai változás*. Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2011, 347-382.

²⁹ Enyedi, Zsolt – Benoit, Kenneth: Kritikus választás 2010. A magyar pártrendszer átrendeződése a bal–jobb dimenzióban. Enyedi, Zsolt – Szabó, Andrea – Tardos, Róbert (eds.): *Új képlet. Választások Magyarországon, 2010*. Budapest: Demokrácia Kutatások Magyar Központja Alapítvány, 2011, 17-42. p.

their attention to the role of disagreement in politics.

From the middle of the 1990s the emergence of the new predominantly right-wing political party (Fidesz) played a prominent, though somewhat ambiguous role in this political renaissance. On the one hand, no other party pushed the consequences of the bipolar characteristic of Hungarian politics further than they did. There is a very strong continuity in the ‘us and them’ rhetoric of the Fidesz from the early 1990s up to now. This rhetoric always emphasized the unsurmountable differences between the Hungarian left and right, it also presented parliamentary elections as an ultimate choice between two worlds, past and future, (post-)communists and patriots etc.. In this sense, Fidesz was a major promoter of the political renaissance. However, we should keep in mind that partisanship was certainly not described in the Fidesz’s rhetoric as a peaceful contest between equal adversaries, but as an asymmetric struggle between Good and Bad.³⁰ Thus, on the other hand, this asymmetry (that can be compared to the asymmetric conceptualization of political struggles between Democrats and Anti-democrats in the leftist and liberal discourses of the day) meant that partisanship was not understood as an ideal state of political contest by them, but as a step towards the moral renewal of the political community on the basis of commonly shared values. As we will see later, the rhetoric of Fidesz can be understood as much a rhetoric of new national consensus as an apology of partisanship and conflict.

The consensualist vision of the early 1990s was a complex interplay between various discursive traditions.³¹ First, it was a direct consequence of the rhetoric of ‘*national consensus*’ of the late Kádár-regime that was transmitted to the new democratic regime by the peaceful process of political transition. After the 1956 revolution and the reprisals, the communist regime increasingly endeavored to base its rule on the expressed consent of the people. The incessant growth of social expenditure from the late 1960s, cautious reform policies around 1968 and later in the late 1970s, the lack of open political repressions, the propagation of a ‘welfare nationalism’ against the national-communism of some of the neighboring communist regimes, the increasing dissociation of private individualism and public ideology, the popular cult of János Kádár as a puritan leader who hates any Stalinist-kind ‘cult of personality’ etc. were all means of creating this ‘national consensus’. Second, although the Marxist grounds of the public discourse could never be

³⁰ E.g. Viktor Orbán said in the campaign in 2002: „Still our life is something more than merely a struggle for survival. And it is this something more that makes our life really beautiful; it is this that really matters.”

<http://www.erdonline.hu/portal.aspx/document/show/81474237-2801-45b0-abca-4b683137f072>

³¹ Although, in the following, I will emphasize the emancipatory and dissident features of the consensual vision of politics within the Hungarian context, we should not overlook the increasingly consensualist and conservative undertones of the late Kádár-regime because this latter fact also contributed to the persistent popularity of the ideas of consensus and cautious reforms. The term ‘nemzeti konszenzus’ (national consensus) was coined in official documents at least from the 1970s and the symbolic politics of the communist regime began to return to the conservative traditions of the Hungarian political thought (especially to the person of count István Széchenyi, a hero of the 19th century liberal nationalist reform movement as well as an idol of the ultra-conservative Horthy-regime in the 20th century) as it was uncovered by the dissident historian, Miklós Szabó in a series of excellent essays (Szabó, Miklós: *Politikai kultúra Magyarországon, 1896-1986*. Budapest: Medvetánc. 1986.).

questioned without risking oppressive responses, and Marxism remained the only legitimate ideological language in the publicity (apart from some nationalistic undertones), at least from the 1970s there began a kind of re-institutionalization of originally non-Marxist or 'bourgeois' social, legal and economic sciences.³² And, as a side-effect of this development, alternative – *technocratic* – descriptions of the political reality appeared in the public sphere, and the monopoly of the Marxist regime in the interpretation of the society, economy and polity turned into a silent struggle between the ideological and 'professional' discourses. In the professional discourses of the 1970s and 1980s, a number of politically sensitive issues came under discussion from demographic problems to class differences and poverty in a socialist country and on to a superiority of market over economic planning. In a certain sense, the result of this phenomenon was a pluralisation of the public discourse, but the relationship between 'ideology' and 'expertism' step-by-step developed into a total refusal of ideology and an anti-political rhetoric of expertism. It is more than a mere coincidence that the last communist cabinet declared itself independent from the communist party as a 'government of experts' in 1989. Partly, it could have happened because it was a logical way of interpreting the decline and fall of the communist regime in the form of a narrative of the emancipation of Reality (as it is described and explained by the experts) under the oppression of the Ideology. At this point, the discourse of technocracy became necessarily mingled with the Western, liberal narrative of the 'end of history', the discourse of liberal democracy and neo-liberal economic policies. In this sense, technocracy conceptualized 'consensus' as based on historical necessities, universal truths, and professional knowledge. Ironically, the Reality of the experts was a typical counter-product of Marxism: it was a Reality in which economy still determined the societal superstructure, but the Market proved better than Soviet-type economic Planning. Still, paradoxically, any political voluntarism was judged as a mere ideological illusion if compared to the expertism-based policy-making, because voluntarism and economic planning were different sides of the same coin. The same applies to expertism and the refusal of statism. In this vision, politicians had to be deprived of agency in political processes and they had to be orientated by experts. Third, the various opposition groups of the Kádár-regime had a very strong *anti-political incentive* that included an asymmetrical conceptualization of open-minded discussion and consensus against partisanship and conflicts. This anti-political incentive was manifest in the uncertainties both by the national-populist and the democratic opposition groups as to whether they should found parties as well as their choice of names for their movements. The national party was named 'forum' and the liberal was named 'alliance' in the end. It comes as no surprise that anti-

³² This development was analyzed in-depth by a handful of books as, among others, Becskeházi, Attila – Kuczi, Tibor: *Valóság'70*. Budapest: Scientia Humana. 1992; Csizmadia, Ervin: *Diskurzus és diktatúra*. Budapest: Századvég. 2001.; Körösnéyi, András: *Értelmiség, politikai gondolkodás és kormányzat*. Budapest: Osiris. 2000. For a broader Eastern European contextualization of this question see: Aligica, Paul Dragos – Evans, Anthony J.: *The Neoliberal Revolution in Eastern Europe: Economic Ideas in the Transition from Communism*. Cheltenham – Northampton: Edward Elgar.

politics with its consensualist ideal remained present in the democratic political discourse as well. Fourth, there is an underlying *tradition of 'compromise'* of the Hungarian political culture³³ from the early modern age. The most famous examples of this cult of compromise are the compromises that ended the Rákóczi rebellion (in 1711), and the 1848-49 War of Independence (as late as 1867). Moreover, the early modern Hungarian parliamentarianism was a mechanism of discussion between the nation (the Estates) and the king, and the acts of the early modern parliament were conceptualized as compromises between the two parties. This mechanism was termed 'tractatus dieatalis'. Thus it can be argued that making compromises played a prominent role in the Hungarian political culture, and this traditionally positive evaluation of compromises was symbolically exploited in the Roundtable talks as well where the example of Ferenc Deák, the main author of the 1867 compromise was often recalled. Similarly, compromise was a central piece of József Antall's political thought and was expressed usually in historical terms. Since he was the leader of the Forum of Hungarian Democrats and the first prime minister after the democratic elections, his specific understanding of compromise-centered political practice played its part in the Hungarian politics of the early 1990s.

Of these traditions, the technocratic discourse was of utmost importance in constitutional issues. To mention just one example, an opposition politician said during the 1994-98 constitution-making discussions: 'fortunately, constitutional lawyers already determined exactly what role a constitution has, so we do not have to think about it.'³⁴ Put differently, the standard argument in the 1994-98 debate was a technocratic one. It supposed that constitution-making is the business of constitutional lawyers. As a consequence political consensus is always possible in these issues - at least in theory - because every political problem is supposed to have a certain rational and professionally grounded solution. While consensus is always possible, the reasons for political disagreement are of a merely ideological or tactical nature. However, constitution-making is undoubtedly one of the most important political issues, thus every egoistic, ideological party interest had to be subjected to the interests of making a proper constitution. In short, political consensus implied to be a symbolic expression of the lack of any serious political alternatives to liberal democracy.³⁵

Those who stayed outside the consensus risked their legitimacy in the world of democratic

³³ Cf. Péter, László: *Elbától keletre*. Budapest: Osiris. 1998.

³⁴ Somogyvári, István – Kisfaludy, Zoltán (eds.): *Az Országgyűlés Alkotmány-előkészítő munkájának dokumentumai, 1994-1998*. Vol. 1. Budapest: Center for Parliamentary Management. 1998. 96

³⁵ A similar situation can be observed in the rhetoric of the East-Central European constitutional courts. These courts used a 'moral realist' rhetoric when speaking about human rights, and put strong constraints on the freedom of action of the legislation and the executive branch. Some even argued that this 'democracy by judiciary' (to coin Kim Lane Scheppele's term) was not only by definition anti-democratic, but also had serious negative effects on the democratic education of the political actors of new democracies because both the politicians and the citizens began to see constitutional courts as arbiters of all the 'sensitive' political issues. See Wojciech Sadurski: *Rights before courts*. Dordrecht: Springer 2005.

politics as 'demagogues' or 'anti-democratic' politicians, so those who did not want a new constitution were forced to accept the consensus as the rule of the democratic game and to present themselves as seeking consensus. Some parts of the right-wing opposition chose the first way, but the Fidesz picked the second one, and I argue that this choice can account for their strangely ambivalent attitudes toward the constitution making process. Until 1998, the right-wing opposition did not have the discursive means to challenge the consensual vision of democratic politics, thus they had to take their part in the constitution making, even if they did not wish to.

On the other hand, the consensualist vision provided some arguments against making a new constitution between 1994 and 1998 as well. Hungary had a constitution after 1989, and it was based on the consensus of the parties that were present at the Roundtable Talks. Moreover, the re-writing of the text of the communist constitution established a liberal democratic polity, and none of the political actors doubted its liberal democratic features. Since the rhetoric of expertism usually suggested that every political problem has only one right solution, any changes in the institutional settings of the liberal democratic polity would need detailed argumentation and very careful consideration. It was the main reason for the self-description of the constitution making process as a 'conservative' one. They had to emphasize that making a new constitution would not threaten the democratic values of the post-1989 polity. Ironically, the right-wing opposition, that perhaps did not like the whole process, could only exploit this need for careful consideration in its rhetoric before 1998 when trying to slow the discussions down.

I think, the failed constitution making between 1994 and 1998 was the last great enterprise that was to be legitimized in the language of this commonly shared set of political principles, concepts and rhetoric. After 1998, the new government tried to systematically undermine the validity of this vision of politics and replace it with a conflictual vision of politics.

2011 Basic Law as a conflictual vision of politics

The shift of political visions was a slow process that came about almost unnoticed. Although the novelties of the politics represented by the Fidesz were detected and criticized by the liberal and leftist intellectuals from the late 1990s as symptoms of political cynicism, the emergence of a broader intellectual perspective received much less attention. It was only some marginal figures like the famous, but lonely neo-Marxist philosopher, Gáspár Miklós Tamás who supposed the existence of a system of ideas and attitudes behind the politics of the Fidesz³⁶, but the others were stuck to the problems of how sincere or cynical the behavior of the Fidesz was. Meanwhile, a number of isolated, but parallel developments signaled the decline of consensualism.³⁷ To mention just a few

³⁶ Tamás, Gáspár Miklós: Új osztálypolitika. *Mozgó Világ*. 1999. 1. 15-33.

³⁷ Szűcs, Zoltán Gábor: A magyar politikai diskurzus változásai 2000 óta. In: Körösnéyi, András – Boda, Zsolt: *Trendek a magyar politikában*. (in prep)

examples: the evaluation of the stabilizing economic policies of the socialist Minister of Finance, Lajos Bokros (1995-96), became a cleavage-point between leftist and rightist economists: what was adored as an unorthodox, still neo-liberal masterpiece of policy-making by the left, was criticized as a mistake that had devastating effects on the Hungarian economy; in political science, the functionalist paradigm of the 1980s was replaced by various schools most of which were interested in the effects of endogenous factors on politics; both in conservative and post-modern intellectual circles, Carl Schmitt's political theory had a momentum; there emerged a populous extreme right sub-culture with an alternative canon of Hungarian history and literature, and a racist discourse of political incorrectness. Put bluntly, the conflictual rhetoric of the Fidesz was as much a mere symptom of a broader intellectual change as a reason for the restructuring of Hungarian political discourse.

From this perspective, the making of the 2011 Basic Law was a logical consequence of the change of political visions, but even my interpretation might offer a somewhat misleading reconstruction of the story, because the 'revolutionary' self-description of the right-wing government in 2010 and 2011 was actually a coincidence of two different strands of the political discourse. First, the political behavior of the right-wing parties was based on their bias towards specific political values which they interpreted as a reason to exclude the possibility of any consensual way of making a new constitution, but it did not suggest a 'revolutionary' constitutional change in itself. In fact, some people were rather surprised when the Fidesz declared that they wanted to make a new constitution in 2010 because it was not explicitly part of their campaign and other issues might have seemed more important from an outsider's viewpoint. Second, when Fidesz won a qualified majority in the Parliament in 2010, it made it legally possible for them to radically change the constitution without the consent of any other political actors and implement their specific political values into the constitution, and it was immediately interpreted by them as a mandate to really bring about radical changes. As the future prime minister stated, 'more votes would allow more radical changes'.

Although opposition publicists emphasize the radical expansion of the power of the executive through the re-ordering of the constitutional relationship of the various institutions and through the extending of the right of appointment of the PM, these essentially sound criticisms are built on the present situation in which the government has an extraordinarily strong parliamentary support, and therefore these criticisms miss an important aspect of the making of the new constitution. As the right-wing rhetoric suggests, the 'revolution' is intended to be an extraordinary moment in politics, a moment of re-founding of the polity, not a normal way of making politics, and the Basic Law is in reality full of institutional and procedural checks and balances to prevent a future government from exceeding the limits of the new constitution. It was explicitly stated by László Kövér, a prominent

leader of the Fidesz in the debate on the new constitution when he said that ‘[the new constitution] will be made not because of the two-thirds majority of the Fidesz and the Christian Democrats in the Parliament, but because it is the first time that a minimal consensus of values –which is indispensable for a successful future – has the opportunity to gain a two-thirds support from the elected representatives’³⁸. He also said that the main flaw in the construction of the democratic transition and the first two decades of the democratic politics was the assumption that there can be made a stable and meaningful democratic consensus between the former communists and all the other people. From this perspective, the new constitution has a twofold character. On the one hand, it is based on a conflictual vision of politics (a conflict between us and them). On the other hand, it is designed to become a firm legal foundation for a new political and moral consensus.³⁹

As a conclusion we can say that the 'revolution' tries to return to a kind of 'consensus' (if not in the present, but in the future), but this 'consensus' is not to be the same as the consensus of the extra-political developments, expertist knowledge and the 'end of history' of the 1994-1998 constitution making enterprise. Rather, it would be a consensus of a political community of exclusive values.

³⁸ http://parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=76&p_felsz=13&p_szoveg=&p_felszig=13

³⁹ Certainly, we have reasons to have but little trust in this self-interpretation: the legislative practice of the national-conservative cabinet was criticized fiercely by international organizations, the European Union as well as a number of various legal experts from Kim Lane Scheppele to László Sólyom and Gábor Halmai.