

Constitution-Making Process in Post-Communist State: The Case of Czech Republic

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Abstract

Constitution-Making process is a very crucial and challenging procedure, which requires maintenance and preservation of some principles prescribed by the doctrine of liberal and democratic constitutionalism. In this essence, equally important is familiarity with and understanding of the chief principles as well as their inviolability by all agents engaged in the process of issuing, designing and adopting constitutional provisions and constitution itself. The aim of my thesis is to explore implementation of constitutional politics within Czech case and to figure out peculiarities and complexities pertinent to the process itself. Reference to various theories will help me to identify legitimacy of both procedure and outcome. The latter concept is very important, provided that all democratic regimes should guarantee legitimate and stable settings within the polity. On the other hand, constitution entails “cherished principles” and hence it is prudent to get people involved in the process of deliberation, but not the other way round. Otherwise, serious legitimacy problems arise that further complicate the relations between political elite and people. In addition, the role of constitution –making bodies should be equally examined once we are about to deal with due and legitimate procedure. Process-tracing and content-analysis will be used as my methodological tools in order to undertake my research.

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Devoted to the Czech Republic and its People

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Introduction

Constitution-Making process is a very crucial and challenging procedure, which requires maintenance and preservation of some principles prescribed by the doctrine of liberal and democratic constitutionalism. In this essence, equally important is familiarity with and understanding of the chief principles as well as their inviolability by all agents engaged in the process of issuing, designing and adopting constitutional provisions and constitution itself. One of such inviolable principles requires, as noted by Howard Schweber, “the consent of the governed”, which indicates respect for fundamental democratic commitment to self-rule by the people.”¹ On the contrary, excessive power concentration in the hands of certain groups does elucidate how, in practice, some democratic principles could be disregarded, which is more or less apparent in the case of authoritarian and totalitarian regimes.

In this paper, I will attempt to illustrate the main features and elements of constitution-making process in case of Czech Republic and relate the underlined procedure with various theories of constitutionalism and figure out the level of functioning of “popular involvement” or “deliberative undertakings”. Hypothesis 1 is the following:

*“Popular participation is a crucial component of democratic and legitimate constitution-making or in other words, an engagement in extraordinary constitutional politics on the part of the people is a prerequisite if aim is to guarantee due representation of all interests of social stratum”.*²

¹ Howard Schweber, *The Language of Liberal Constitutionalism* (United States of America: University of Wisconsin, Madison, 2007), 2

² Various scholars do associate participation with legitimacy. For an overview please visit Anne van Aaken, *Deliberation and decision: economics, constitutional theory and deliberative democracy* (Christian List and Christoph Luetge, 2004), 221

Hypothesis 2 reads:

In times of crisis it is better to leave the task of amending some constitutional provisions and even the entire text of constitution to special elected bodies for the fixed time and defined task of constitutional.

My research question is whether constitution-making process implemented through the roundtable negotiations and parliamentary assemblies yields legitimacy or incorporates patterns of illegitimate procedure and outcome.

To undertake the latter mentioned task, in the first chapter I will refer to theoretical conceptions and approaches to constitutionalism and in subsequent chapters state the problems associated with transition to democratic regimes in case of post-communism as well as apply the concepts of legitimacy and legality in order to comprehend the nature and substance of constitution-making procedure.

The main methodology is process-tracing analysis, which helps to figure out the “the causal mechanisms and effects of independent variable on dependent.”³ I use this analytical tool, as it highlights the behavior of all participants, whether it is politicians, parliamentarians or people. In other words outcomes and effects are envisaged by means of thorough analysis of “all triggering events and implications as well as consequences of decision-making and undertaken policies.”

In addition to it, I used content analysis, which helped me to interpret some statistical data on issue of Czechoslovak dissolution, general political mood, trust in institutions and politicians. Moreover, this methodological tool is useful so far as it allows “to conceptualize content of

However my aim is to further test this hypothesis and check its validity on the basis of Czech constitutional politics

³ Tulia G. Falleti, *Theory-Guided Process Tracing in Comparative Politics: Something Old, Something New* (University of Pennsylvania), 1

phenomena and to make valid inferences from meaningful sources.” Therefore, numerical record has been analyzed by means of replicating data and proceeding with its revision.⁴

In my case, independent variable is parliamentary constitution-making (the lack of popular participation) and dependent is legitimacy problems associated with the nature of constitutional process.

The structure of my thesis runs as following: Chapter 1 consists of theoretical analysis of constitution-making procedure on the basis of existing literature, Chapter 2 explores various forms of constitution-making and incorporates some empirical evidence by virtue of citing the American Model, East European and various cases from post-colonial African countries. In other words, I provided some theoretical implications and applied various empirical cases to stated theories. Chapter 3 elaborates on the Czech case, particularly, the functioning of roundtable negotiations and the way transition to democracy has been made. Moreover, peculiarities of Czech constitutional politics had been envisaged. The following two chapters are about post-transformation period, primarily the workings of “democratic politics”, some complexities and controversies palpable in the aftermath of new regime consolidation.

In conclusion, I will acknowledge my findings, interpreting the results and figuring out whether to reject or prove my hypothesis.

⁴ Klaus Klippendorff, *Content Analysis and An Introduction to Its Methodology* (California: Sage Publications, 2004), 19

Chapter 1- Legitimacy of Constitution-Making Process

1.1 The concept of Dual Politics

*“How the constitution is made, as well as what it says, matters. Process has become equally as important as the content of the final document for the legitimacy of the new constitution”*⁵

To appreciate the structure of constitution-making procedure and assess its legitimacy, politics should be divided into two types: ordinary (normal) and “higher lawmaking” (constitutional) politics. According to Ackerman, the former implies subsequent engagement on part of politicians and their enormous influence on political, economic and social spheres of life, whereas the latter unites all people and indicates their stakes during periods of severe frustration and dissatisfaction with operating government.⁶ To put it other way round, constitutional politics refers to the process of designing and implementing the highest act, whereas normal politics denotes the political processes within an established constitutional framework.

My claim is that in times of crisis, when an old regime no longer vindicates its ability to serve peoples’ interests and hold cherished ideals such as “freedom, liberty and equality”, the task of amending some constitutional provisions and even the entire text of constitution should be undertaken by people’s representatives elected for the fixed time and a defined task. Consequently, under such circumstances it would be more prudent to leave constitution-making option to special constituent assemblies, which in turn engage in constitution drafting and propose their piece of work to the audience.⁷

⁵ Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23), 1

⁶ Bruce Ackerman, “Dualist Democracy”, In *The We The People* (Cambridge: Harvard University Press, 1991),6

⁷ The speculation would be further analyzed and discussed in other sections

However, doubts could arise in terms of asking whether it is practical to estrange power holders from being involved in constitutional politics and reserve their powers for ordinary politics, which is realized during normal times. I think Ackerman and Duverger would react to such challenges with the positive answer. According to Ackerman, it is vital to recognize necessity of dualist politics, which induces reconciliation of democracy and rights in such a manner as to push forward their consistent existence without overlooking significance of each conception.⁸

On the other hand, Duverger argues that “it is the constitution that derives its authority from the constituent power and not the constituent power that derives its authority from the constitution.”⁹ Both of them seem to assign the task of extraordinary constitutional politics to the general public that in turn could realize their stakes on the grounds of either direct or indirect participation.

As Ackerman puts it, a clear-cut distinction between constitutional and normal politics is important once we deal with issues of legitimacy and constitutional authorship. The concept of ordinary politics mostly concedes the primacy of representatives’ decisions and peoples’ silence in respect to substantive matters of politics by means of preferring “exit” option rather than “voice”.¹⁰ On the contrary, launching constitutional politics by the same political actors in the end would result in advancing their interests and desires, thus keeping apart strong reasoning and rational behavior while issuing new norms and rules.¹¹

To corroborate the stated, Elster’s explanation of Czech constitutional politics makes sense. He argues that constitutional foundation of Czech Republic somehow reflects interests of one

⁸ For more information please see Bruce Ackerman, *We The People* (United States of America: Harvard College, 1991)

⁹ Maurice Duverger’s idea mentioned in the article “Popular Sovereignty, Democracy and The Constituent Power” ed. by Andreas Kalyvas (Constellations, vol. 12, no. 2, 2005), 1

¹⁰ Terms of exit and voice have been borrowed from Albert O.Hirschmann, *Exit, Voice and Loyalty* (United States of America: Harvard College, 1970)

¹¹ Jon Elster, “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal* 45 (1995): 380

particular class that pursued one chief principle - to further strengthen their own powers or grant themselves more flexibility over issues of political arrangement.¹²

Aforementioned illustrates the logic “Kompetenz-Kompetenz”, which at least means that framers allocated “power to determine their own powers.”¹³ Hence, we already witnessed how blurred the picture is if constitutional and ordinary politics are mixed.

On the other hand, some doubts might arise in respect to granting absolute power to majority or people that could equally be absorbed in meeting their own demands, whereas disregarding interests of minorities and leaving them unprotected. To evade the speculated assumption, it is more sensible to keep the balance while framing a new constitution, provided that representatives of all groups find their stakes in the process of deliberation and negotiation. Moreover, adherence to some fundamental principles would bring us closer to legitimate procedure. To it put other way round, crucial premises such as “respect for human rights, liberties, freedom of speech and assembly, access to information, institutionalization and protection of minority rights ” better be seriously taken by drafters in order to evade the majority dictatorship and establishment of totalitarian rule.¹⁴

By underlined logic, I want to stress that I am not straightforwardly advocating for the majority rule, which in turn could overturn to tyranny, at least I am referring to the implementation of Western Liberal Doctrine that contains above-stated principles and that

¹² Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology* (1995): 123

¹³ Hereby by term “Kompetenz-Kompetenz” Elster wants to show the strength of the argument – that is better to involve people by means of their own selection of drafters. Only in such case framers will not have a chance to determine their own powers by themselves once constitutional politics was embarked, or in other words, they would be subject to ongoing constraints - Jon Elster, “Deliberation and Constitution-Making”, *In The Deliberative Democracy*, ed. Jon Elster (Cambridge University Press, 1998), 99

¹⁴ Gerd Meyer, “Democratic Legitimacy in Post-Communist Societies: Concepts and Problems”, *In The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest: T-Twins Publishers, 1994), 21-23

could limit the scope of actions taken by peoples' representatives in the process of deliberation. Otherwise, minorities could be underrepresented and suppressed.

Consequently, my concluding observations from this section are like: 1. Differentiating between constitutional on the one hand, and normal politics on the other. 2. Pursuance of liberal and democratic principles by the main stakeholders in the course of constitution-making, which could help to integrate all interests, be it majorities or minorities into the constitutional text.

1.2 The Movement Action Plan Model and Constitution-Making

To examine constitutional politics and its implications, it is crucial to identify preconditions, which trigger lawmaking process and induce popular deliberation in the light of far-reaching public debates. I think the latter is best exemplified by Bill Moyer, who issues the MAP strategy (Movement Action Plan) and demonstrates proliferation of social and political movements, equally specifying different stages for collective behavior. According to Moyer, there are eight phases, which in turn determine the degree and effectiveness of movements: Normal Times, Proving Failure of Institutions, Ripening Conditions, Take off, Identity Crisis of Powerlessness or a Sense of Failure, Gaining Majority Public Support, Success and Continuing Struggle.¹⁵

Given such a framework and distinction, it is worthwhile stressing that during normal times people do not exhibit strong concern for reorganization of political life since they rely on representatives elected by their own efforts.¹⁶ In contrast, the scene dramatically changes once people realize the abuse of power is taking place in a sense that delegates become

¹⁵ Bill Moyer, JoAnn McAllister, Mary Lou Finley and Steven Soifer, "Eight Stages of Social Movements", In *The Doing Democracy, The MAP Model for Organizing Social Movements* (Canada: New Society Publishers, 2001), 42

¹⁶ Bruce Ackerman, *We The People: Transformations* (Cambridge: Harvard University Press, 1998), 6

corrupted by their own passions and self-serving motives. Hence, it is the latter speculation that brings us to the second and third stages of movements simultaneously asserting us of political and social mobilization, which is associated with failure of institutions to sustain fundamental principles of liberal and democratic constitutionalism.

Consequently, constitutional politics, I would say is launched in the fourth stage – take off that is due to the fact of peoples’ raised consciousness of ambiguous policies implemented by their trustees as well as recognition of “constitutional moments” and necessity of political revolution so that to transform the very meaning of relations between society and state, to maintain “the rule of law”, on the one hand, and set some restraints on governmental power to guarantee protection of rights and freedoms of people on the other. For instance, an American case does demonstrate traits of elitist deliberation, but at least, some attempts had been made to bring the issue of legitimacy to the forefront by virtue of “electing special ratifying conventions in each state that act on behalf of people.”¹⁷

Hence, it is permissible to speculate that deliberation by constitutional committees is deemed legitimate so far as people voluntarily undertook the transfer of their own powers to delegates by means of voting. Therefore, in this respect it is a separate constituent assembly not an already constituted committee that engages in constitutional politics. Furthermore, it is prudent to state that temporarily elected assemblies, in most cases, are not inclined to deliberate in terms of gaining more benefits for themselves on the grounds being dissolved after the task is completed or in other words members are impartial as they do recognize interim responsibilities.¹⁸ Accordingly, James Madison’s thoughts are important to make sense of the classical doctrine of separation of constituent and constituted powers: “Whenever

¹⁷ <http://www.proconservative.net/CUNAPolSci201PartFiveB.shtml>

¹⁸ Tom Ginsburg, Zachary Elkins and Justin Blount. 2009. Does the Constitution-Making Process Matter? *The Annual Review of Law and Social Science*, available also online at www.annualreviews.org (Last accessed July 21, 2010)

legislatures retain the power of constitutional revision, they are in position to establish themselves as oligarchical replacements of the power they claim only to represent, that is the constituent power.”¹⁹

Once we grant due attention to the threat of peoples’ fundamental interests and basic needs, we do perceive negative consequences of putting constituent power in the hands of politicians during times of crisis. So, if an old regime is too weak and about to collapse, then would it be rational to assign the role of constitution-making to already constituted power or formerly elected politicians? or Should power holders of former regime go on with deliberation and claim that they act on behalf of people? My answer would be the negative one, provided that the same political agents are inclined to reform rather than abolish an already rotten system, regardless of taking responsibility to totally transform institutions and replace them with the new – functional ones (characteristic of post-communist transition). Yet, some traces of an old regime do lurk in the foundations of the transformed political order. I will try to address the last made point in the following chapters, particularly in the case of Czech constitution-making.

Consequently, I would have opted for the balance of constitutional and ordinary politics in revolutionary times so far as their mixture leaves us with some sense of ambiguity explicable in terms of arbitrary power definition and sometimes its usurpation by the main deliberative body. Then the question is inevitable such as what is the source of power of the main actors participating in the process? To put it simply, in the period of crisis, the challenge of who is entitled to change or reframe the institutions is of a huge importance once we think over the issue of positive achievements – developments.²⁰

¹⁹ Andrew Arato, “Dilemmas of the Power to Make Constitutions in East Europe”, In *The Civil Society, Constitution and Legitimacy* (New York, Oxford: Rowman and Littlefield Publishers, 2000), 135

²⁰ The question is similar in logic to that of Preuss, what comes first the constituent or constituted power?

Otherwise, it is much harder to attain democratic legitimacy, given the wide range of values, orientations and attitudes of people in respect to the emerged outcome. Here, I want to go back to Ackerman and reinforce again his line of “higher” vs. “lower law-making” if we are about to concern for the legitimation issue for the reasons of regime stability and endurance. In a more plain logic, “democracies find their normative legitimacy, granted that a particular set of basic values such as order, freedom and prosperity” have been secured and deeply ingrained in the very nature of political institutions.²¹ Only then government is entitled to ongoing support and trust on the part of general public and, hence, comes legitimacy.

In contrast, the mixture of both types of politics and their blurred character seems to entail underrepresentation on the one hand (low probability that drafters will be concerned with general welfare, it is said usually their first-rank preferences are own motives and interests), and the lack of total break with the past institutions, which is more or less associated with the problem of continuity.²² Another argument for keeping constitutional politics aside from ordinary law-making is “politicization of constitution apparent in public’s alienation from, and even the lack of desire for being engaged in all intricacies of constitutional politics.”²³

Ulrich K. Preuss. 1994. Constitutional Power Making for the New Polity: Some Deliberations on the Relations Between Constituent Power and Constitution. In *The Constitutionalism, Identity, Difference and Legitimacy*, ed. M. Rosenfeld. Durham and London: Duke University Press. 4

²¹ Gerd Meyer, “Democratic Legitimacy in Post-Communist Societies: Concepts and Problems”, In *The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest: T-Twin Publishers, 1994), 50

²² The term continuity means compliance with the rules of existing regime, and in case there is an attempt to reconstruct the new political society, it should be done within the framework of legal order. However, take a communist rule at the end of 80s that was considered already rotten– Could we change all practices of the previous system, let alone to stick to the same old succumbing rules? I think this question is more complex one and it needs further analysis and investigation. I will discuss it later within the Czech case.

²³ Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies* (Washington D.C: the Catholic University of America, School of Law), 69

The latter was the case after the collapse of communist ideology in East Central Europe explicable by the notion of roundtable negotiations, which I will further discuss in the second chapter of my thesis.

1.3 Institutional and Radical-Democratic Approaches to Constitution-Making

Two approaches to constitution-making procedure are worth examining: radical-democratic and institutionalist so that to figure out essential characteristics of normal and constitutional politics. The first approach insists on inviolability of the sovereign willpower of people and indicates that exercise of such an absolute power cannot be constrained by any legal norms and rules. On the other hand, the essence of this approach is concentration of both constitutional and normal politics in the hands of people by virtue of which they do maintain the eternal character of revolutions. To put it other way round, according to radical-democrats “people as the true bearer of revolution cannot possibly be limited by constitutional norms and thus the defeat of the old regime does not mean the end of revolution.”²⁴

In contrast, institutionalist approach deems the separation of ordinary and constitutional politics an important task once the people achieve their aims at times of higher law-making. In this respect, as far as they participate and enjoy right to popular deliberation and complete the revolution – that is the establishment of the new regime, they should comply with endorsed rules of the highest legal act, granted that it is they who are the authors of political and legal order. Furthermore, they do not have distrust in politics as long as they choose the institutions and elect their own representatives that are supposed to act on behalf of their electorate. In case, if there is the power abuse on the side of delegates, then the people can replace them in the course of the next elections. Hence, under such conditions people do not

²⁴ See Ulrich K. Preuss. 1994. Constitutional Power Making for the New Polity: Some Deliberations on the Relations Between Constituent Power and Constitution. In *The Constitutionalism, Identity, Difference and Legitimacy*, ed. M. Rosenfeld. Durham and London: Duke University Press. 145-146

lose their right to vote as the latter has been institutionalized. From that perspective, once total transformation of an old regime has been achieved and “the results of the revolution translated into the text of constitution”, then the people “could enforce their own will in post-revolutionary times of normal politics without being forced to permanently revitalize the lasting spirit of revolution.”²⁵

1.4 Monist and Foundationalist Approaches to Constitution-Making

I want to consider the next two approaches to constitution framing in order to find out the most legitimate way among all existing models. However, before proceeding with this issue, I need to go thorough the main assumptions of both monists and foundationalists. They diverge on issues of constitutional and ordinary politics and below I will attempt to illustrate the underlined.

According to monists, popular sovereignty could be substituted by parliamentary sovereignty that is acknowledged in privileging elected politicians over issues of constitutional lawmaking. It means that during “ripening conditions” or “critical juncture” popularly elected delegates could act with the full authority of people and launch constitutional politics.²⁶ This idea is unfolded in the claim of monists: “Democracy necessitates the grant of law-making authority to the winners of general election so far as the latter is conducted under free and fair electoral rules.”²⁷

²⁵ Ulrich K. Preuss. 1994. Constitutional Power Making for the New Polity: Some Deliberations on the Relations Between Constituent Power and Constitution. In *The Constitutionalism, Identity, Difference and Legitimacy*, ed. M. Rosenfeld. Durham and London: Duke University Press. 147

²⁶ For the term “ripening conditions” see Bill Moyer, JoAnn McAllister, Mary Lou Finley and Steven Soifer, *Doing Democracy, The MAP Model for Organizing Social Movements* (Canada: New Society Publishers, 2001) For the term “critical juncture” see Peter A. Hall and Rosemary C. R. Taylor. 2001. Political Science and the Three New Institutionalisms. *Political Studies*. 942

²⁷ Bruce Ackerman, “Dualist Democracy”, In *The We The People* (Cambridge: Harvard University Press, 1991), 11

Furthermore, monists insist on commitment to the democratic principles, which they deem to be the core of their ideology. However, I do have some conflicting ideas with regards to such a monist identification, considering its rejection of any judicial review by Supreme Court, which is apparent from the following claim: “when a Supreme Court, or anybody else, invalidates a statute, it suffers from countermajoritarian difficulty.”²⁸ In fact, these thoughts indicate that they grant more power to elected representatives and demand their sovereignty while reducing the independence of other branches on the one hand, and blending ordinary law-making with higher or constitutional legislating on the other.

In contrast, foundationalists, endorse the following hierarchy pertinent to the constitution-making process: firstly, rights and freedoms of individuals should be specified not by people themselves but delivered by constitution (the latter fulfills the rights-protective function), secondly, constitution authorizes the people to work out their own will or, in other words, to exercise “voice option” only after particular rights are incorporated in the text of “supreme law’ (constitution perform democratic function).²⁹

On the other hand, couple of questions is worth asking: What is the core of constitution-making procedure? How constitutional moment is perceived and who is entitled to determine the future of society and dynamics of polity?³⁰ It seems to me that monists would prefer constitution-making by ordinary legislatures acting in the name of people, whereas foundationalists, I would say, do not have clear-cut answer to such a challenge.

Given this framework, an assumption is that none of these approaches effectively deals with legitimacy problem the way dual politics does in the face of giving everyone its own fair

²⁸ Bruce Ackerman, “Dualist Democracy”, *In The We The People*, (Cambridge: Harvard University Press, 1991), 8

²⁹ See Bruce Ackerman, “Dualist Politics”, *In The We The People*, (Cambridge: Harvard University Press, 1991), 13

³⁰ Anne van Aaken, *Deliberation and decision: economics, constitutional theory and deliberative democracy* (List Christian and Christoph Luetge, 2004), 223

share to participate and contribute to the changes. The latter would be further elaborated in the next chapters.

Chapter 2 – Modes of Constitution-Making

2.1 Constitution- Making by Parliamentary Assemblies

“A democratic constitution cannot be written for a nation, nor can one be written in haste” ³¹

In this subsection my aim is to demonstrate some consequences accrued to parliamentary deliberation with regard to constitution-making.

First of all, one of the stimuli towards constitutional endeavors could be social-economic changes within a particular state, which in turn lead to inefficient functioning of old institutions.³² Under such settings, different voices rise in order to bring some changes into the structure and operation of institutions, both major and minor ones, and to reach stability necessary during times of normal politics. On the other hand, it is more prudent to replace constitutions of an old regime in the course of liberation from colonist and authoritarian rule or so far as independence of particular country is at stake.

Taking into consideration the experiences of post-communist states in Eastern Central Europe as well as those of post-soviet republics, we have to grant the importance of constitution-making to special constitutional committees, which stand apart from ordinary legislatures so far as we want to guarantee legitimacy of procedure as well as established institutions. In addition, Elster implied that elected institutions are not prone to partisanship and advancement of their own passions and inclined more to meet demands of their electorate.³³ Otherwise, it is difficult to maintain stability or even if the latter is sustained – in the short

³¹ Vivien Hart. 2003. *Democratic Constitution-Making*. Washington D.C: *United States Institute of Peace*, Special Report no. 107, (July 23), 12

³² Jon Elster, “Forces and Mechanisms in the Constitution-Making”, *Duke Law Journal*, 1995

³³ Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology* (1995)

run, and public trust in newly formed institutions and political elite would be considerably low.

In order to illustrate the validity of stated arguments, I want to refer to Simone Chambers, who touches upon the problem of constitutional negotiation as well as the substance of both legitimate procedure and outcome. She endeavors to address legitimacy of decision-making, once constitutional politics has been launched, subjugating it to the verdict-driven on the one hand, and evidence-driven procedures on the other. Thus, to digest the logic of such interrelation, the following quotation of Chambers' thoughts is given: "Verdict-driven process stimulates hasty conclusions, whereas an evidence-driven process is more focused on hearing all voices before arriving at ultimate decision - constitution."³⁴

To paraphrase Chambers, an evidence-driven procedure is legitimate in the way that people are given the better opportunity to engage in constitutional politics in the light of expressing their own attitudes and beliefs with regard to the type of governance, form of liberties and rights they would like to possess. Furthermore, the formed system is a result of evidence apparent in public having argued and discussed all concerned constitutional issues. On the contrary, verdict-driven process is a product of bargaining among major stakeholders or decisions are matter of compromise as opposed to the "force of better argument".³⁵ In addition, it is threats that play decisive role in constitutional politics rather than warnings.³⁶

Thus, the results of such a procedure are deemed hasty conclusions.

³⁴ Simone Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy* (Blackwell Publishing Ltd, *Constellations*, vol. 11, no. 2), 156, 200

³⁵ This term belongs to Habermas

³⁶ The distinction between threats and warnings has been made by Jon Elster that insists on dominance of warnings over threats. He states in the "Deliberative democracy" that the main actors reach decisions by making constant threats. Their own interests are disguised as threats and if there were impartial reasoning whilst debating the most important issues of constitutional, then warning would be the best option once the aim is deliberation for the general welfare, not for advancement of particular interests.

Consequently, I think, given the Chambers' picture of constitution-making, it would be more feasible to leave the task of constitutional to the special deliberative bodies rather than parliamentary assemblies.

However, one could question the plausibility of such insistence on elected constitutional committees that mandates to state empirical evidence so that to strengthen the nature of such reflection. I think the Fiji's constitution making of 1970 clearly indicates the grievances of appointing constitutional commission rather than electing by people and ordaining both structure and adoption of constitution to the parliamentary assemblies. The nature of the process itself (appointed commission) and the agents that influenced the outcome (legislators and the members of parties) clearly indicate the negotiated character of a constitutional text and dominance of bargaining. Moreover, the lack of concern for the legitimacy resulted in more racial electorate and the absence of plurality and suppression of emerging political parties. Institute of Democracy and Electoral Assistance reports that ordinary politics, in general, was embraced in more race-based electoral politics as opposed to more liberal procedure of running for candidacy and voting. In addition, the position of governmental body - Chief of Councils was more privileged in the aftermath of constitutional politics and thus all means of control were concentrated in its hands. Correspondingly, as long as the task of drafting finished, the troublesome consequences ensued characterizing the political system such as "ethnicization, power monopolization and disaffection of various groups."³⁷

In other words, Fiji's evidence does show that deliberation behind "closed doors" proves inadequate as long as it disregards interests of all segments of society, including those of

³⁷ The ideas of this paragraph were borrowed from Jill Cottrell and Yash Ghai, "The Role of Constitution Building Processes in Democratization, Case Study Fiji" (IDEA-Institute for Democracy and Electoral Assistance, 2004), 6, available also online at <http://www.idea.int/cbp/upload/CBP-Fiji.pdf>

minorities simultaneously triggering the lack of identification with constitution and provoking the sense of distrust on the part of large public.³⁸

Another example is drafting and adoption of constitution in Belarus by Supreme Soviet in 1994.³⁹ Given the nature of constitution making, it is possible to assume that not all parties were duly represented and their voices were slowed down so far as they attempted to integrate into the process.

Even though constitution drafting could be undertaken by parliamentary assemblies, but for its effectiveness, longevity as well as legitimacy we should look beyond the scope of ordinary legislature and invite broad public to participate, at least, by means of voting.⁴⁰ The latter condition may somehow compensate for the alienation of people from constitutional politics during the first stages of provision framing. Therefore, the following arguments are useful in order to recognize the essence of challenges posed by “elitist constitution-making”:

Constitution is no longer “social contract” but “an elite enterprise”, given the fact of bargaining and safeguarding interests of certain dominant groups or, in other words, it bears dissensual feature as opposed to consensual element. Hence, constitution is used as an effective instrument as long as elite participants grant themselves extensive rights and incorporate them in the text of constitution to enjoy future autonomy in decision-making once normal politics is launched. As a result, choices made in the framework of constitution

³⁸ Laurel E. Miller, “Designing Constitution-Making Processes, Lessons from Past, Questions for the Future”, In *The Framing the State in Times of Transition, Case Studies in Constitution-Making*, ed. Laurel E. Miller and Louis Aucoin, (Washington D.C: United States Institute of Peace Press, 2010), 635

³⁹ http://www.servat.unibe.ch/icl/bo__indx.html

⁴⁰ For more details, please visit Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23)

making seem to be immature, yet related to “the lack of popular discussion on the one hand, and deliberation characterized only by efforts of politicians and party leaders on the other.”⁴¹

In addition, further points should be added to perceive power distribution among politicians and public and its disproportionate character caused by parliamentary deliberation during constitutional times. Rational choice theory could be helpful so far as it addresses motives of rational actors given costs and benefits framework. So, it is permissible to reflect upon parliamentary deliberation as of “instrumental or strategic behavior” when it comes to the specification of future prerogatives of parliamentarians and other branches of government. Hence, it would be ideological, at least, as most East European countries illustrate, to insist on strong persistence of ongoing “checks and balances” that necessitate the division of state bodies and their independence from each other, given unconstrained power to the already constituted power to embark on constitution designing. In other words, while parliamentarians claim to be legislating on behalf of people during critical moments, they are more prone to be working on their own interests and engaged in maximizing their own preferences to the detriment of the people. So, rational choice institutionalism could explain such behavior in terms of winning more benefits for themselves rather than acting as “peoples’ agents”.⁴²

The latter term refers to the principal-agent theory, the very essence of which is “to hire an agent to represent principal’s goals and intentions.”⁴³

⁴¹ Levent Gorenc, “Constitutional Change and Consolidation of Democracy” and “Constitution-Making”, In *The Prospects for Constitutionalism in Post-Communist Countries* (Netherlands: Kluwer Law International, 2002), 117, 367, 368

⁴² For the developments in Eastern Europe please see Levent Gorenc, “Constitutional Change and Consolidation of Democracy” and “Constitution-Making”, In *The Prospects for Constitutionalism in Post-Communist Countries* (Netherlands: Kluwer Law International, 2002) and for Rational Choice theory Peter A. Hall and Rosemary C.R. Taylor, “Political Science and Three New Institutionalisms”, 1996, 12

⁴³ http://tutor2u.net/economics/content/topics/buseconomics/principal_agent.htm Although the term is widely used in economics field, but we could apply it to constitution making process as well in terms of people being principals and constitution makers –agents

To vindicate what already has been stated, I am referring to the constitution-making process in Hungary that accelerated since the collapse of communism was evident. As a deliberative function was performed by parliamentary assembly and without much public debates, we see vagueness of some provisions.⁴⁴ In other sense, the emphasis on clear-cut division of state bodies' (legislature, executive and judiciary) functions is missing once we pay due attention to the following points: "Constitution defines the role of National Assembly as guarantor of constitutional order of society and determines organization, orientations and conditions of the government."⁴⁵ However, existence of such a provision is somehow contrary to the common role of legislature defined in doctrine of constitutionalism so far as its prerogatives extend beyond expectations, provided that it undertakes, more or less, the task of constitutional court. In addition, in a democratic society it is judicial review that checks and control constitutionality of laws.⁴⁶

Another aspect of blurred power division among branches is the presence of particular constitutional provision empowering President "to safeguard democratic functioning of the State Organization."⁴⁷ Further, it is crucial to note that due to the character of constitution-making (endorsement of changes by parliament and ratification of constitutional changes by the same body) made legislature strong enough within the political system. For instance, members of parliament have quite reasonable power to elect both Prime-Minister and President as well.⁴⁸

⁴⁴Jon Elster, Claus Offe, and Ulrich K. Preuss, *Institutional Design in Post-communist Societies – Rebuilding the Ship at Sea* (Cambridge University Press, 1998), 104

⁴⁵ Constitution of The Republic of Hungary, Article 19, Paragraph 2

⁴⁶ <http://legal-dictionary.thefreedictionary.com/judicial+review>

⁴⁷ Constitution of the Republic of Hungary, Article 29, Paragraph 1

⁴⁸ Constitution of the Republic of Hungary, Article 19, Paragraph 3

All cited does illustrate the point of rationalization of politics on one hand, and politicization of constitution on the other. The former means “strategic behavior” within the structure of costs/benefits which I made reference to earlier, whereas the latter elucidates constitution as a tool to implement the realization of political goals and ambitions. To put in a more plain logic, my aim is to illustrate that element of “checks and balances” even though present in the framework of constitution, but at least, is not fully implemented and practiced due to “ambiguity of some provisions left by the legacies of communism.” Taking for granted all these peculiarities and uncertainties, I would advocate for more public inclusiveness and engaging them in constitutional politics even at the later stages of deliberation.

2.2 Constitution-making by Special Constitutional Committees and Conventions

“The idea of constitution-making as an open-ended conversation between all members of political community, rather than legal and expert drafting of a contract by technically qualified elite on behalf of the nation, no longer lurks on the fringe of democratic theory”⁴⁹

In this section, I want to elucidate the nature and proper workings of constitutional assemblies directly or indirectly elected by people so as to test whether legitimacy of power is preserved and all interests are represented instead of being violated or severely overlooked.

First of all, deliberation by special constitutional committees could be justified in a sense that they are directly elected by people only for engaging in constitutional politics. In other words, established committees do not engage in ordinary legislature and act as they are elected for

⁴⁹ See Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23), 12

the particular period in order to avoid turmoil and violence during collapse of an old regime. It has been broadly stated that these constitutional assemblies usually act on behalf of people, which is due to peoples' voting by means of which they transfer their sole power and authority to such operative bodies.⁵⁰

However, due consideration should be granted to the inclusiveness of all interests and parties as well as guaranteeing their stakes in constitution-making process. The latter is employed if electoral procedures are fair and equal, based on proportional system, which in turn compensates for the weaknesses of majoritarian model. Consequently, everyone has equal chances and opportunities of being elected and the whole procedure of power and authority transfer from people to the elected delegates, given such settings, is deemed legitimate.⁵¹

The second alternative is indirect election of special constitutional conventions aimed at drafting constitutional text, while delivering the task of ratification to popular vote or referendum.⁵² In this case, although such deliberative body is elected by national assemblies or parliaments it is still accountable to the people and should act in accordance with their needs and desires so far they pursue one particular aim – to integrate their thoughts into the text of constitution.⁵³ Moreover, to regain legitimacy in procedure better to involve equally civil-society based groups, NGO's and other advocates of democracy. In fact, this helps to

⁵⁰ Andrew Arato, "Forms of Constitution-Making and Theories of Democracy", In *The Civil Society, Constitution and Legitimacy* (USA: Rowman and Littlefield Publishers, 2000), 238

⁵¹ For more detailed information please revisit See Vivien Hart. 2003. *Democratic Constitution-Making. Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23)

⁵² See Andrew Arato, "Forms of Constitution-Making and Theories of Democracy", In *The Civil Society, Constitution and Legitimacy* (USA: Rowman and Littlefield Publishers, 2000), 252

⁵³ As Elster suggests "downstream constraints" do play an important role in shaping political decisions of constitution makers

achieve more transparency in the light of availability of delegates' beliefs, their thorough analysis and peoples' confidence in impartiality, guarantee of inclusiveness and representativeness.

To reformulate the underlined logic, it is worthwhile noting again that “constitution making is essentially about distribution of power”⁵⁴ and once constitutional politics is launched by ordinary legislature or parliament temporarily acting as constitutional committee, the process would end up in advancing political status of parliamentarians and leaving more prerogatives to them as opposed to other interests. The latter is pertinent to constitutional culture of East and Central European countries that excluded public from popular deliberation and decided the main fundamental principles at round tables.⁵⁵

Furthermore, it was particular interests that were assimilated into constitutional texts equally pointing at underrepresentation of other groups and thus questioning legitimacy of process, even though produced outcome was more or less legitimate. For instance, Bulgarian, Czech and Polish constitutional practice does indicate mixture of ordinary with constitutional politics in a sense of deliberation on the part of parliamentarians, not specially elected constitutional committees, thus “producing weak executive and causing few checks on parliament.”⁵⁶

On the other hand, constitution-making process in Zimbabwe started from 1999 illustrates the patterns of inconsistency and almost absence of popular identification with constitutional

⁵⁴ See Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23), 9

⁵⁵ Particularly underlined problems are relevant to Czech constitutional politics as implied by Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology*, 1995, 123

⁵⁶ Jon Elster, “Conference on Democratic Transition and Consolidation”, *Working Group 1: Constitutional Design*, 5

draft, which is due to voting against its provisions by people.⁵⁷ In other words, Zimbabwean practice clearly demonstrates the negative consequences of appointing committees rather than directly electing special constitutional assemblies. The former is usually meant to be captured by certain prejudices, passions and therefore act out of motivated interests on the one hand, equally being subject to “upstream instructions such as pressures from parties and national elite.”⁵⁸

On the contrary, it is more prudent to stick to the second alternative - constitutional convention elected for the sole task of constitution framing in terms of “members randomly being assigned” to the so-called deliberative body, which in turn reduces the likelihood of their being corrupted in the light of “serving committees that attract their own interests.”⁵⁹ From that standpoint, the American model of constitutional politics does offer reasonable option once we trace availability of electing ratifying assemblies from each state.⁶⁰ Hence, we could concede that in this particular case “constitution won mandate from the people”, given the framework of their own votes.⁶¹

To put it another way, if an expert deliberation is undertaken behind “the closed doors” and people are far from expressing their will, disequilibrium will be apparent in the light of procedural secrecy, which in turn puts at risk public interest and makes dominant those of leaders. Given such a flow of events, the problem of legitimacy becomes a commonplace phenomenon that is resolved once people are invited to participate or voice their demands and desires. Consequently, indirect election of constitutional conventions is permissible so far as peoples’ power to further debate and engage in constitutional politics is not terminated by the

⁵⁷ Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C.: United States of America*, Special Report no. 107 (July), 9

⁵⁸ See Jon Elster, “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal* (1995): 376

⁵⁹ Institutions and Procedures in Constitution Building, Draft Proceedings”, Co-Hosted by *Bobst Center for Peace and Justice, Interpeace*, the Princeton Law and Public Affairs Program, and International IDEA

⁶⁰ http://www.usconstitution.net/consttop_ccon.html

⁶¹ Bruce Ackerman, *The Future of Liberal Revolution* (New Haven and London: Yale University Press, 1992), 54

mere fact of exercise of “sovereign will” by self-motivated framers. Otherwise, “constitution is nothing but the embodiment of the negotiated and compromised interests of elites” assimilated into texts of fundamental law.⁶²

Moreover, International Conventions and Declarations do recognize and emphasize the right of people to either direct or indirect participation.⁶³

⁶² See Levent Gonenc “Constitution-Making”, *In The Prospects for Constitutionalism in Post-Communist Countries*, (London: Kluwer Law International, Martinus Nijhoff Publishers, Hague, 2002), 115

⁶³ International conventions and declarations set some normative criteria in terms of enumerating universal rights of men that should not be violated by whatever type of governance exercised by states. I want to refer to some of these conventions in order to briefly elucidate their implications to the constitution-making process. First of all, Article 21 of Universal Declaration of Human Rights is worth considering in that it stresses 1. Every individual is entitled to take part in the government of his country by virtue of direct participation or through freely chosen representatives, 2. Everyone has the right to equal access to public service in his country, 3. The authority of government emanates from the will of people, expressed in times of genuine elections, conducted on the basis of universal and equal suffrage as well as by secret ballot. Although declaration does not straightforwardly specify conditions under which individuals enjoy their rights to participate in the organization of government, except the electoral period, United Nations Committee on Human Rights does recognize in some cases peoples’ right to participate in framing constitution. In this respect, its General Comment on article 25 of ICCPR (International Covenant on Civil and Political Rights) contending that “the right to participate in public affairs” is fulfilled so far as “citizens choose and alter the constitution as well as decide public affairs by means of referendum” and Committee’s ruling on *Marshall v. Canada* case illustrate the shift toward granting, if not directly, the people rights to self-organization and deliberation over issues of constitutional. (Arguments were borrowed from Thomas M. Franck and Arun K. Thiruvengadam “Norms of International Law Relation to the Constitution-Making Process”, *In The Framing the State in Times of Transition, Case Studies in Constitution-Making*, ed. Laurel E. Miller and Louis Aucoin, (Washington D.C: United States Institute of Peace Press, 2010), 7 On the other hand, special attention should be granted to Article 24 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which indicates that “any state has the right to appeal to the Commission once it realizes that another signatory state violated norms of the Convention” and Article 25 stating “any person, group of individuals as well as nongovernmental organization has the right to issue a claim of violation by any other member-state of the Convention.” (Taken from Ludger Kuhnhardt, Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley. 1993. *European Courts and Human Rights, Constitutionalism and Democracy In Transitions in Contemporary World. New York: Oxford University Press.* 128-129

In order to reformulate aforementioned assumption, it is worthwhile noting again that the main actors – states and power holders do apprehend the significant contribution of international conventions and agreements to the process of legitimization and democratization of operating regimes. Hence, under such circumstances, I would say no characteristics of unrest and revolts are feasible, which is due to the “participatory feature of politics” enhancing both stability and security within various polities.

General evaluation

In this subsection I want to summarize all previously stated arguments before proceeding with the analysis of Czech case. Hypothesis 1 says “Popular participation is a crucial component of democratic and legitimate constitution-making or in other words, an engagement in extraordinary constitutional politics on the part of the people is a prerequisite if aim is to guarantee due representation of all interests of social stratum.” Hypothesis 2 reads as following: In times of crisis it is better to leave the task of amending some constitutional provisions and even the entire text of constitution to special elected bodies for the fixed time and defined task of constitutional.

In theoretical part of my thesis I presented the concept of dual politics, examined some negative consequences of mixing constitutional politics with ordinary legislature by applying various case studies (examples of Fiji and Hungary). In addition, reference to some scholars and their doctrines was made in searching for the true path of constitution-making.

Furthermore, I attempted to figure disadvantages of parliamentary deliberation (based on various scholarly literature) as it casts shadow on legitimate process in terms of the following assumptions:

1. If mandate of drafters does not emanate from direct election, at least, better some endeavors be taken in order to accommodate for legitimacy issue. The latter proves useful as in this case “constitution matters” and reflects an outcome of a more creative process rather than a result of bargaining over assets,
2. To eradicate prevalence of certain political ideologies in the text of constitution, even minimum public engagement could be a solution.

Otherwise, “constitutional charter is a non-neutral character and becomes closely associated with fortunes of transient fortunes of dominant political party or pressure group.”⁶⁴

To put it other way round, as long as constitutional politics is launched by ordinary law-making bodies, little evidence exists for their impartial deliberation and concern for the general provisions. Therefore, I think it is more prudent to constrain the scope of actions in the course of constitution crafting by virtue of simply sticking to procedural constraints. Here, by the very last term I am not referring to the adherence of legal rules of the previous regime, (this is another problem – that of continuity), but more or less to pursuance of legacies of democratic and liberal constitutionalism.

In the next chapters I am going to explore Czech case and to test the validity of already implemented analysis within the context of this country.

⁶⁴ Taken from Andras Bragyrova, “Some rules of constitutional - prudence for contemporary Constitution-Makers.” In *The Constitutionalism: Theory and Law*, (1998): 134-135

Chapter 3 - Constitution-Making Process: Empirical Approaches.

The case of Czech Republic

3.1 Turmoil or Stability in the Federation? The Political Background and Constitutional Issues

To test the legitimacy of constitution-making procedure we must cast a glance at political, sociological, psychological (peoples' attitudes, orientations and mood) and economic factors surrounding the issue of dissolution of Czechoslovak state. Late 80s accelerated the process of disintegration of federation, which is due to several reasons. First of all, communist rule established and enforced by imposition of communist constitution by Soviet Union on Czechoslovakia, no longer seemed bearable and legitimate in the eyes of all people. Measures taken against citizens such as limitation of press freedom, restriction of association and assembly, suppression of intellectuals and activists propagating human rights and principles of democratic governance, set a stage for "Velvet Revolution" and hence the fall of communism followed. The brutal treatment of students by police and interference with peacefully held demonstrations devoted to the "Student International Day and the Fifteenth Anniversary of the Closure of Czechoslovak Institutions by Nazis" led to the open confrontation between opposition in the face of youth on the one hand, and the regime representatives on the other. Under such circumstances, dissidents – all members of Civic Forum and PAV (Public against Violence) embarked once again on their fight against political elites in order to establish pre-World War II legitimate and democratic governance. The reason why they treated Federal Assembly and government illegitimate had something to do with the lack of representativeness and persistence of communist party's leading role

almost in all areas of life.⁶⁵ To prove this suggestion, the results of public opinion polls in both Czech and Slovak Republics should be put into the limelight.

According to Ivan Gabal, 61% of the surveyed in the Czech Republic and correspondingly 78% in Slovakia expressed their discontent with the regime and functioning of political institutions as well as the level of economic development.⁶⁶

All these signs facilitated the organization of various commissions to prepare draft texts of new Federal Constitution as the previous one did not prove functional and constituted only socialist and communist legacy of that period. Consequently, the “Velvet Revolution” opened the way into the direct challenge of existed practices that in turn was due to the external triggering events apparent in the face of collapse of gigantic power - Soviet Union.⁶⁷

The first results of constitutional changes were elections conducted in June 1990, where representatives of the opposition gained the majority seats from both sides, either Czech or Slovak, simultaneously leaving communists behind, that is among the minority ranks.⁶⁸

First of all, elected deputies were about to deliberate and negotiate the terms of a new constitution for the Federation and change the whole constitutional and legal order, which meant the transformation from “autocratic single-party to democratic multi-party rule”.⁶⁹

However, various tensions palpable in relations of Czechs and Slovaks over the distribution

⁶⁵ Ideas stated in this paragraph were taken from John F.N. Bradley, *Czechoslovakia's Velvet Revolution, A Political Analysis* (New York: Columbia University Press, 1992) and Bernard Wbeaton and Zdenek Kavan, *The Velvet Revolution, Czechoslovakia, 1988-1991* (San Francisco: Westview Press, 1992)

⁶⁶ Provided information was taken from Sharon L. Wolchik, “The Politics of Transition and the Break-Up of Czechoslovakia”, In *The End of Czechoslovakia*, ed. Jiri Musil, (Budapest: Central European University, 1995), 228

Ivan Gabal, director of the Presidential Office for Political Analysis, reported in “Poll Views Czech, Slovak Attitudes on Issues”, *Foreign Broadcast Information Service – East European Report*, (1991): 91-185

⁶⁷ For term “triggering event” please see Jon Elster, Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal*(1995):10

⁶⁸ Klara Vlachova, “The crystallization of political attitudes and orientations”, In *The Ten Years of rebuilding capitalism: Czech Society after 1989*, ed. Jiri Vecernik and Petr Mateju (Jacques Rupnik, 1999), 276

⁶⁹ Sharon L. Wolchik, “The Politics of Transition and the Break-Up of Czechoslovakia”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 226

of power and economic privileges as well as imminence of ethnic cleavages did make compromise unattainable and thus led to drafting of individual state constitutions. The work on future constitutions of both states was permissible, given that Federal Assembly passed an amendment law on Federation Act the very core of which stated that “Czechoslovak Socialist Federative Republic (CSFR) is transformed into Czech and Slovak Federative Republics”.⁷⁰

There are various controversial points that pushed forward the constitution-making procedure of both states leading in the future to the appearance of two new independent states in the international and political arena. As Vaclav Zak contends among all challenging issues the more prevalent question was of Slovak “visibility” or in other words the right to self-determination. Moreover, Slovaks insisted on the dual character of Federation, whereas Czechs were firmly for the tripartite model and thus objected to any such reasoning.⁷¹

The next reason causing the failure to adopt new federal constitution was inability of popularly elected deputies as well as remaining communist representatives to negotiate the issue of drafting over which constitution should come first – state constitutions or Federal one. There was a split of preferences among Czechs and Slovaks, due to which Czechs ultimately gave up and decided to follow the example of their fellows, that is “to go on their own”, in other words, to proceed with drafting the Czech Constitution.⁷² Due to the lack of space, I will not go into much deeper, but discuss primarily the Czech case in the following subsections.

⁷⁰ Vaclav Zak, “The Velvet Divorce – Institutional Foundations”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 257

⁷¹ The concept of dual model refers to granting sovereignty to both Republics whilst being united under the same Federation, however the latter should obtain much looser character, similar to that of Confederation. In contrast, tripartite model privileges at the first place the Federation, i.e it is the most sovereign entity, whereas sovereignty of states emanates from that of Federation. This information is taken from:

Vaclav Zak, “The Velvet Divorce – Institutional Foundations”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 248

⁷² Vaclav Zak, “The Velvet Divorce – Institutional Foundations”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 251, 258

3.2 Paradoxes of Roundtable Negotiations within the Czech context

The transition to new liberal and democratic system in the framework of CEE countries has been characterized by the introduction of new mechanism such as negotiations between representatives of totalitarian regime on the one hand, and democratic opposition on the other. Worth considering is peculiarities and complexities of such a bargaining, given the nature of concessions reached among the main political forces and actors. To explain the point where Czech constitution-making failed, we should, further trace back the circumstances impeding the failure of the very same process in Czechoslovakia.

Negotiations accelerated as regime was no longer able to maintain stability or in other words inability to encourage “negative consensus “, which was due to the system’s rigidity and oppressiveness. However, the paradox is how we could make successful transition so that in times of ordinary politics to prevent unrest and disaffection on the part of citizens? I think the dynamics of roundtable negotiations prove that it managed to make progress in particular spheres, whereas leaving aside some ambiguity and uncertainties in others. So, it is necessary to map both negative and positive aspects of these talks and assess where legitimacy problems arise within the context of transition.

Political and economic prerequisites made it inevitable for Czechs and Slovaks to appeal to means other than entering into bargaining position with political elite of already rotten regime. Hence, dissidents truly assessed the situation and tried to push their own demands to change the system to democracy and guarantee universally accepted human rights. From that angle, CF’s insistence for making constitutional amendments and introducing clauses such as “freedom of association and assembly” and “freedom of press and information” , “the elimination of any control of church by the state”, “abandonment of Marxist-Leninist ideology”, “dismissal of the so-called People’s Militia” as well as “deleting the leading role of CPC (Communist Party of Czechoslovakia)” once again vindicated the great potential and

desire of opposition to rid its people from living under such a totalitarian system.⁷³ In addition, the latter's efforts with regards to the urging regime to abolish "the baston law" explicitly shows their being acted on behalf of people.⁷⁴

Further, opposition's claim for initiating laws on "human rights, education and environmental rights" makes us think of such a political behavior as of a matter of "reason or ultimate truth" as opposed to "partiality and unavoidable passions".⁷⁵ Such premises deem to be justified as well as supported by the large specters of population, granted that people would have opted for more open politics. However, the dilemma is that "representatives of democratic opposition were not elected by people", which in turn leaves the door open for some deviation from undertaken responsibilities. I will try to be as precise as I can in order to explain the logic of such an argumentation.

Firstly, all above stated seems to undergird the flow of legitimate process. But the paradox is "Were dissidents completely pursuing the "common good" or were there nuances of self-interestedness that is so common in the process of struggling for political power? I think, it is possible to assume that democratic opposition, even not fully, but partially acted out of passions and own motivations, equating the chances of drafting new federal constitution to nothing. For instance, bargaining over issue of how to rationally divide power between "communists and non-communists, Czechs and Slovaks" already presupposes inclination of democratic opposition to being tightly involved in the benefits/means trade off. Moreover,

⁷³ Milos Calda, "The Roundtable Talks in Czechoslovakia", In *The Roundtable Talks and the Breakdown of Communism* ed. Jon Elster (USA: The University of Chicago Press, 1996), 138, 142

⁷⁴ "Baston law" has been characterized as a tool that gave police extensive rights to suppress any demonstrations against state (see Jon Elster)

⁷⁵ Jon Elster, *The Roundtable Talks and the Breakdown of Communism* (USA: University of Chicago Press, 1996), 145

federal prime-minister's desire for "keeping communists" simultaneously allocating some places for CF and VPN (Civic Forum and Movement Against Violence) in parliament indeed demonstrate, to borrow from Arato, the problem of continuity of political bodies.⁷⁶

On the other hand, political elite of an old regime acted as if it tried to implement substantives changes, but in reality "it was playing for time", provided that the tool of changes was a revision rule for amendments of communist constitution.⁷⁷

However, scholars such as Elster and Arato equally challenge the appropriateness of sticking to the very same legal nature that in turn invokes rupture and regime transformation. For instance, Arato asserts impossibility of entering onto the new path, that is establishing new political system whilst the break is done in terms of drafting constitution by efforts of parliamentarians. In other words, if legal continuity is further maintained, then some aspects of toppling regime would be preserved and cast shadow on legitimacy of the process and outcome in theoretical and normative sense.⁷⁸

Moreover, the debate over distribution of ministries for interior and defense also clearly shows that the very idea of dividing power deems illegitimate, provided that tools and mechanisms applied for the selection are not most promising in terms of bringing changes to the forefront.⁷⁹ On the other hand, I want to emphasize the special character of meeting between representative of opposition – Havel and then Federal Prime-Minister Adamec. First of all, too many concessions given to regime left space open for communists to push their

⁷⁶ Milos Calda, "The Roundtable Talks in Czechoslovakia", In *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (USA: The University of Chicago Press, 1996), 146, 150

⁷⁷ Jon Elster, *The Roundtable Talks and the Breakdown of Communism* (USA: University of Chicago Press, 1996), 146-148

⁷⁸ Andrew Arato, *Civil Society, Constitution and Legitimacy* (Rowman and Littlefield, 2000), 180-182

⁷⁹ For more detailed information see Jon Elster, *The Roundtable Talks and the Breakdown of Communism* (USA: University of Chicago Press, 1996), 159, 160

own candidates forward for the main positions. This is evident in intention of government to reconstruct rather than to reform the government.⁸⁰ The legal continuity made it possible for communists to preserve their own share in the new government of National Understanding.

According to Elster's report, we do know that the interim government formed for the sole purpose of introducing changes and ridding itself from communists' dominance in politics. Instead, it consisted of "10 communist ministers out of 21." In addition, Adamec's insistence on allocating 50% of parliamentary seats to communists could be understood as further extending powers of crumbling elite regardless of its challenged status in both state and society. In other words, as Janos Kiss once stated, legality and legitimacy are mutually exclusive phenomena, and maintenance of one of them means giving up another. As a result of legal continuity "mere personal changes were implemented in the Federal Assembly, as well as Czech and Slovak National Councils, which by and large, hindered the more rapid transformation of the whole legal system and promoted to prevalence and continuity of local and regional communist mafias." Moreover, proposal of their own candidates by regime on the one hand and dissidents on the other for the position of federal prime-minister, chairman of parliament and president of republic elucidates the logic of tough bargaining and rational division of power.⁸¹

To put it in a more plain language, Havel's acceptance of Adamec being elected President was possible so far as the post of prime-minster and speaker of parliament were occupied by a

⁸⁰ John F.N. Bradley, *Czechoslovakia's Velvet Revolution, A Political Analysis* (New York: Columbia University Press, 1992), 107, 120

⁸¹ Arguments in this paragraph were borrowed from Milos Calda, "The Roundtable Talks in Czechoslovakia", In *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (USA: The University of Chicago Press, 1996)

non-communist delegate. On the contrary, such demands were not tolerated by the former minister and thus the confrontation was unavoidable.⁸²

I think these circumstances underpin the fact of self-interestedness of the main political forces and the lack of concern for general welfare, due to prevalence of strategic behavior to win more power. Of course, it would be unfair to say that self-elected opposition acted only out of their own motivations, but at least, some features of desire for being represented in the course of future ordinary politics cannot slip from our consideration.

Worth conceding is opposition's desire to protect minorities and its attempts to institutionalize and guarantee them rights. From that perspective, representatives of a democratic opposition argued for establishment of ministry for minorities and ethnic affairs.

⁸³ Such a move, if it had been implemented, would have indicated that changes are not a fiction, but real truth, provided that all principal actors stick to the same premises.

In contrast, the selected mechanism for transition, in our case roundtable negotiations, and inviolability of the continuity principle placed many constraints on benevolent intentions of opposition, which in turn tried to replace the already dead regime. Hence, political elite by playing on continuity pursued one aim – to rectify the defects of communism and restructure the political system rather than to break with it forever.⁸⁴

⁸² Milos Calda, "The Roundtable Talks in Czechoslovakia", *In The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (USA: The University of Chicago Press, 1996), 146-147

⁸³ Milos Calda, "The Roundtable Talks in Czechoslovakia", *In The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (USA: The University of Chicago Press, 1996), 158

⁸⁴ According to records of negotiations, communists insisted on unacceptability of proposed deadlines for reforming the system and made various excuses to evade such a flow of events (J.Elster)

Once communist regime collapsed, the new constitution of Czechoslovak state could have been adopted and passed reflecting and integrating substantive changes. However, taken all previously stated facts into close inspection, it is prudent to infer that Czechoslovak constitutional politics failed, first of all, due to the prevalence of various interests and impossibility of accommodating all of them into the text of new constitution.⁸⁵ For instance, it has been widely postulated that “efforts to pass a new constitution were first hampered by the remaining members of parliament who had been “elected” under the old regime, and managed to survive as members due to roundtable compromises discussed earlier on the one hand, and later completely abandoned as a result of igniting Czech-Slovak ethnic tensions.”⁸⁶ Consequently, all this accelerated the constitution-making process both for Czech and Slovak states independently.

3.3 Drafting Czech Constitution

The main concern of this section is to go through the Czech constitution-making process, find out the chief agents, their motivations, beliefs and value-orientations simultaneously applying theoretical conceptions to the case study.

Czech constitution drafting had been started right after the June parliamentary elections of 1990. The main deliberative bodies that launched constitutional politics are provided below:

Deputy Committee in collaboration with Government Committee - Government Committee - Constitutional Committee of Czech National Council.⁸⁷

⁸⁵ The reasons behind the failure to produce new Czechoslovak constitution will be further discussed in subsequent chapters in more details

⁸⁶ See Milos Calda, *Roundtable Talks in Czechoslovakia*, 165

⁸⁷ Report on Czech Republic 1992, available online at <http://www.princeton.edu/~pcwcr/reports/czechrepublic.html>

Before proceeding with analysis of Czech constitutional politics, I want to specifically address whether elected deputies or government officials did have an authority to implement both structural changes and deliberate on behalf of people. The answer seems to be positive, given the direct involvement of population in the elections and their choice of deputies from the ranks of competing political parties. To put it in another way, once deputies had been given their mandates, they could have claimed to represent their constituents' interests and thus realization of constitutional politics might have been justified.

However, various scholarly works insist on separating constitutional politics from ordinary legislature, which is due to the presumption that emanating provisions are sometimes unclear in order to be properly interpreted. For instance, Tom Ginsburg, Zachary Elkins and Justin Blount imply to engage as much public participation as possible by means of either arranging various public hearings before negotiations on constitutional deliberation takes place, or during as well as after exhaustion of all bureaucratic steps. Otherwise, constitution bears "elitist character" as it is compiled, discussed and ratified only by numerous attempts on the side of political leaders.

On the contrary, in case of Czech implementation, drafting and negotiation procedures no efforts had been made in order to keep the balance of due and legitimate constitution-making, provided that the text of constitution was passed by 30 deputies without much discussion of it.⁸⁸

In other words, by term due and legitimate procedure I mean absence of people's participation in negotiations over substantive constitutional issues in the light of, for instance, signing petitions or sending various requests to members of deputy and government committees, nor they ratified it by virtue of individual voting. According to polls conducted

⁸⁸ <http://www.princeton.edu/~pcwcr/reports/czechrepublic.html>

during envisaged time, majority of people were against the split of Federation and people favored life under the common state rather than living under two independent states. Such existing mood among public did point at the arising legitimacy problem of the whole Czech constitution-making. Below, I will attempt to explore the correlation of the following two variables:

Independent variable – Public Mood, Dependent – Legitimacy of the Process

The Institute for Public Opinion Research collected the results of polls conducted in October 1991 and reported that the majority of Czech (70%) and Slovak respondents (50%) would vote for preservation of a common state if referendum on such a delicate issue were held and only 9% of Czechs as well as 18% of Slovaks admitted that their preference is a state division. The Institute repeated the survey again after two months and concluded that 68% of Czechoslovaks, 73% of Czechs and 58% of Slovaks were against the dissolution of Federation, whilst 13% of Czechoslovaks, 12% of Czechs and 16% of Slovaks agreed that they would vote for the option to divide the state.⁸⁹

On the other hand, people's trust in political institutions had been shifted even after parliamentary elections of 1992, which was inherent in separatist intentions on the side of both Premiers – Klaus and Meciar accordingly. Thus, the large specters of population (82% of Czechs and 84% of Slovaks) alleged that “the further fate of state should be determined not by politicians but by citizens themselves in a referendum”.⁹⁰

⁸⁹ The results of polls are taken from Sharon L. Wolchik, “The Politics of Transition and the Break-Up of Czechoslovakia”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 233

⁹⁰ The results were obtained by the survey conducted by the Institute for Public Opinion Polls in July 1992, taken from Sharon L. Wolchik, “The Politics of Transition and the Break-Up of Czechoslovakia”, In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 234

Taking into account such flow of events, my suggestion is “it would have been better, had Czechs held National Conference”, which could have integrated more interests, given the dynamics of such a deliberative body, which will be further explained.

In transitional period, it is more crucial to secure people’s stake in deciding over the question of future arrangements, to somehow limit the role of government and guarantee some rights for people by means of maintaining them in the text of future constitution. On the contrary, we observe patterns of almost total exclusion of Czech people from choosing over the mode of government and structure of its institutions as “initial idea-generating stage”, drafting, adoption and ratification processes were undertaken only by legislature and various appointed committees.⁹¹

In such case, bargaining option prevailed over arguing once we trace back the nature of negotiations and some given compromises. Jon Elster and Jire Pehe asserted that “Czech Parliament voted primarily for bicameral legislature as a matter of compensation for the dissolution of Federal Assembly, otherwise former delegates would not have voted for that option.”⁹²

It seems to me that the situation could not have been the other way round as the main stakeholders were deputies and political parties. It has been stated that after several times of failure to produce comprehensive draft either by “deputy” or “government committee”, crafting of main principles had been started and completed by deputies of National Council, which at that time constituted the sitting legislature.⁹³ Therefore, the result was parliamentary democracy, rather than presidential.

⁹¹ <http://www.princeton.edu/~pcwcr/reports/czechrepublic.html>

⁹² Jire Pehe. 1993. The Waning Popularity of Czech Parliament. *RFE* (Nov.12), 9
See also Jon Elster, “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal* (1995):377

⁹³ <http://www.princeton.edu/~pcwcr/reports/czechrepublic.html>

All cited evidence plays against deliberation by legislature for the sole argument of fulfillment of deputies' impulsive passions. However, in times of low trust in political leaders as well as institutions holding of a referendum seems more rational so that public had a chance to ratify or reject the document if it did not identify with it or setting elections to the main deliberative bodies by such means enabling citizens to employ their own concerns and anxieties. Therefore, I would have opted for the National Conference model to secure participation and thus the legitimacy of procedure as well as endurance of future "supreme law". The model has the following benefits: 1. Representative character, provided that it grants certain numbers of seats to various organizations, among which NGOs and other civic groups participate, 2. Direct election by people of candidates, who will then be members of a National Conference, 3. Elected only for the specific time and distinct task of constitutional negotiation.⁹⁴

On the contrary, elected constitutional committee rather than appointed or already constituted assembly in the light of legislature would have reduced the risks of underrepresentation equally fostering legitimacy of both process and outcome. To put it other way round, drafters would have considered, to borrow from Elster, "downstream constraints" – ability to predict ambitions and act out of reason as opposed to institutional or personal interest. Hence, a statement from Elster is worth quoting:

"Motivations of constituents are more important than those of framers, but unfortunately, in Eastern European Constitution-Making we observe, nevertheless, domination of institutional interests... and therefore, to minimize risks of institutional interests, constitutions ought to be written by specially convened assemblies and not by bodies serving simultaneously the

⁹⁴ <http://www.princeton.edu/~pcwcr/drafting/models.html>

function of ordinary legislatures. Nor should legislatures be given the central place in ratification.”⁹⁵

From that standpoint, I think the negotiated character of dissolution and decision privileging independence was illegitimate, at least considering the trade off over the benefits at the cost of public whilst leaving it behind the “doors of ignorance”. By that term, I primarily refer to the lack of educational campaigns that might be arranged by the will of opposition-parties and power holders of the former regime.

Moreover, Czech constitution-making process reflects features of bargaining both over presidential as well as parliamentary powers.⁹⁶ But, then President Vaclav Havel could not manage to strengthen presidential prerogatives and, as a result, present Czech constitution elucidates traits of rather empowered parliament contrary to Poland’s strong presidency.⁹⁷

Due to the fact that constitution was drafted by legislature in the face of National Council contrasted to specially elected committee, an explanation to the question why constitutional position of deputies are so advantageous, for instance, stems from provisions concerning “impermissibility of launching criminal proceedings against deputies or in other words, deputies made those provisions for their own benefit, as they granted themselves strong immunity and indemnity clauses.”⁹⁸ According to article 27, paragraph 4 of Constitution:

⁹⁵ Tom Ginsburg, Zachary Elkins and Justin Blount. 2009. Does the Constitution-Making Process Matter? *The Annual Review of Law and Social Science*, available also online at www.annualreviews.org (Last accessed July 21, 2010)

⁹⁶ Please visit Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology*, 1995

⁹⁷ For more details information see Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology*, 1995 and Jon Elster, “Forces and Mechanisms in the Constitution-Making Process”, *Duke Law Journal*, 1995

⁹⁸ Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology* (1995):123

A Deputy or a Senator may not be criminally prosecuted without consent of the Chamber of which he or she is a member. If the respective Chamber declines its consent, criminal proceedings are rendered impossible forever.⁹⁹

I think, all this could have been justified, if the provisions were discussed and adopted by the members of an elected committee for the task of constitution-building. On the other hand, we have interests of presidential branch at stake and they are counterexample to those of legislature. It seems to me that if the main deliberative body were “government committee” or the one that is appointed by the executive, then the powers of this particular institution would be more reinforced. For instance, the clauses proposed by Vaclav Havel “the exclusive presidential veto right, the right to dissolve the parliament, direct presidential election as well as call for referendum” deemed to empower presidency at the cost of other branches.¹⁰⁰

Another aspect pointing at illegitimate character of transition to democracy is the principle of legal continuity that meant all constitutional changes should be made within the framework of Constitution on Czechoslovak Federative Act of 1968.¹⁰¹

However, to transform the political culture, the nature of economy, promote public interest and trust in mechanisms such as referendum, voting and elections, transitional country needs to implement some provisional changes so that the endorsement of the new liberal and democratic legal order seemed credible. Otherwise, the consolidation of democracy would be costly and the pace of transition slowed down. Herein, it seems to me Hannah Arendt is

⁹⁹ Constitution of Czech Republic, available online at <http://www.legislationonline.org/download/action/download/id/1586/file/b525fba0a0ffc188d5453679804.htm/preview>

¹⁰⁰ Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology*, (1995): 8-9

¹⁰¹ Jon Elster, *The Roundtable Talks and the Breakdown of Communism* (USA: University of Chicago Press, 1996), 165

completely right in stressing the necessity of new beginning, which is “novus ordo saeculorum” in the course of constitutional politics. But the dilemma is how to open the new page whilst sticking to the rules of old regime?

Moreover, some scholars emphasize the lack of break with the past as a consequence of legality, which is done, more or less at the cost of legitimate procedure.¹⁰² So, therefore if the rationale is for “novus ordo saeculorum” then, it is much better to have as a first-rank preference pursuance of legitimate procedure during times of extraordinary constitutional in order to maintain and encourage stability, effectiveness and support for constituted political regime in the future. In other words, to borrow from Arato, new rules with regards to the arrangement of due constitution making process need introducing, and only afterwards we could speak of rupture with the crumbling regime.

On the contrary, Czech constitution framers used, I would say, some “dual element” in the process of drafting the text of constitution. By the phrase “dual element” I refer to the motivations of authors who, in one case, preferred to change authoritarian regime on the basis of the crumbling constitutional act of 1968, but in other situations rejected the same line – the communist constitution while initiating deep-rooted changes in the organization of all spheres of life. For instance, according to then valid communist constitution the issue of secession should be straightforwardly put on referendum and the latter has to be arranged in that country, which raised the concern of division.”¹⁰³ As various sources inform us, no attempts to discuss the division of state by virtue of holding referendum and listening to people’s

¹⁰² Janos Kiss concedes mutual exclusiveness of legality and legitimacy, provided that these two concepts did manage to coexist in the case of Czechs.

¹⁰³ Jon Elster, “Transition, Constitution-Making and Separation in Czechoslovakia”, *The European Journal of Sociology* (1995):10

voices had been made. On the contrary, leaders of political parties Klaus and Meciar seem to be battling for “who will obtain more profits and fruits provided by federation.”¹⁰⁴

Nonetheless, it is crucial to state that the more or less successful character of made transition to democracy was not because of efficiency of the principle of legal continuity and non-revolutionary character of transformation, but due to the “defective nature of regime itself”, which means the authoritarian regime toppled as a consequence of its own ineffectiveness.¹⁰⁵

Had it be the other way round, leap from commanded economy and social democracy to liberal and competitive economy as well as pluralist democracy could not have been realized.

In other words, I want to challenge Czech constitutional politics by posing dilemma as such: “What had happened if pre-communist constitution also contained ambiguous provisions and paragraphs the application of which could not have been justified in a democratic regime?” It seems to me such questions are of a relevant importance, given that current Czech Constitution is built upon the constitutions of 1920 and 1960 correspondingly. It has been stated that actors engaged in constitutional drafting decided to slightly alter some provisions, but mostly incorporate all elements mentioned in previous texts.¹⁰⁶ Of course, it might have been permissible so far the circumstances surrounding constitutional politics were not promising. But public estrangement opens the door for political maneuvering by virtue of trying to think of future articles as of an instrument to further excise their own powers.

¹⁰⁴ See Jiri Musil, *The End of Czechoslovakia*, 238-240

¹⁰⁵ For comprehensive overview please see Andrew Arato, *Civil Society, Constitution and Legitimacy* (Rowman and Littlefield, 2000)

¹⁰⁶ Milos Calda, *Constitution-Making in Post-Communist Countries, A Case of Czech Republic* (1999):12

3.4 Bargaining or Arguing? Which option depicts Czech constitutional politics?

Once tensions arouse over issue of federation vs. confederation options among Czechs and Slovaks, the former no longer wanted to remain under the same statehood and understood that the common life had come to an end. Under such circumstances, Klaus started thinking of how to split the country as soon as possible, which was due to “his desire to keep foreign investment and capital going into the Czech Republic.” In contrast to him, another player wanted “to minimize transition risks that are much higher compared to more industrialized Czechs as well as benefit from using amount of apportioned finances from the federal budget.”¹⁰⁷

I think cited examples clearly illustrate how two politicians were performing the role of self-serving actors by means of disregarding public opinion and even deviating from any reference to launch referendum on the division of state and some other constitutional issues. The speculated illegitimate character of Czech constitution-building procedure derives from the “illegitimacy of the break-up of Czechoslovakia.”¹⁰⁸

Moreover, my own assumptions in respect to illegitimacy issue, which I associate with the lack of public participation, are further underpinned by scholar Vaclav Zak, who together with other scientists, questions the whole process of Czechoslovak state dismantling as well as reshaping new constitutional order for independent states by members of legislature. Hereby I refer to the quotation that stresses the central idea of then prevalent mood: “The question of gravity of which would still be felt, was whether the deputies, who had received the mandate of by promising fidelity to this very state, could divide it now.”¹⁰⁹

¹⁰⁷ Vaclav Zak, “The Velvet Divorce – Institutional Foundations” In *The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University, 1995), 248-249

¹⁰⁸ Vaclav Zak, “The Velvet Divorce – Institutional Foundations”, *In The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 265

¹⁰⁹ Vaclav Zak, “The Velvet Divorce – Institutional Foundations”, *In The End of Czechoslovakia*, ed. Jiri Musil (Budapest: Central European University Press, 1995), 265

Furthermore, the constitution should not be designed in order to provide for the interests of self-serving drafters, quite the opposite, it is deemed to be “a contract between the citizenry and the state.”¹¹⁰ This fact is also recognized by Voigt that relates participation and inclusiveness to the legitimacy and endurance of produced documents – constitutions. In addition, he contends that “inclusive processes will result in more independent institutions, thus simultaneously derogating powers from legislature.”¹¹¹ The reverse scene happened while implementing constitutional politics in case of Czechs.¹¹²

My doubts in terms of legitimacy of Czech constitutional process are further confirmed, given the structure of crafting procedure and motivations of the chief actors. European Journal of Sociology on Constitution-Making in Czech Republic reports the following idea: “Vaclav Klaus told the drafters that constitution of future Czech Republic could be written over weekend.” I think such stipulation does point at trivial character of the procedure as framers and all actors involved did not recognize the very fact of deliberating for the general public. To further strengthen the last mentioned argument, I want to cite an example of reached compromise between the principal stakeholders and elucidate how the constitution of Czech Republic from January 1993 was passed and ratified. “In sum, for constitution to be passed 121 votes should be gathered, but the Klaus coalition which hold draft approving as the main

¹¹⁰ The idea of perceiving of constitutions in the sense of contracts belongs to Tom Ginsburg, Zachary Elkins and Justin Blount. Another suggestion in respect to leaving aside partiality and identification of constitution as a device for protection of self-serving interests is borrowed by me from Jon Elster

¹¹¹ See Tom Ginsburg, Zachary Elkins and Justin Blount. 2009. Does the Constitution-Making Process Matter? *The Annual Review of Law and Social Science*, available also online at www.annualreviews.org (Last accessed July 25, 2010), 17

¹¹² Jon Elster in his article on “Transition, Separation and Constitution-Making in Czechoslovakia” assumes that crafters-deputies favored themselves and empowered themselves in times of ordinary politics which could be apparent from some ensued constitutional provisions: The more decisive position of deputies in that they, according to the Article 50, clause 2 of Czech Constitution, could pass the returned laws by President if the majority of deputy votes have been collected. However, hesitation is inevitable, given such provisions bear general character and could be integrated in the text of other constitutions as well, but at least, it seems to me that Elster wanted to point at intentions of crafters and decisions that were driven behind self-interestedness. Moreover, my own challenge is: Why presidential democracy was not established? In addition, the rather weak presidential power is reflected by virtue of the absence of reference to the veto powers of President in the text of constitution

goal, had only 105 members. To be sure that the text will be ratified some additional votes were necessary. It is this reason that led to the vague promises and bargaining among the various political parties such as Civic Democratic on the one side and Moravian, Communist as well as Social Democrats on the other, which gave up their votes for some concessions on the side of governing coalition. To put it other way round, “12 votes were obtained from Moravian Party and the rest from Social Democrats and Communists that reached compromise in terms of constitutional reference to the Bill of Rights and Freedoms.”¹¹³

Consequently, it is not possible to ignore the specificity of constitutional politics within Eastern European countries emanating from different economic, political and cultural cleavages on the one hand, and the absence of prior expertise in liberal and democratic constitutional culture on the other. As a result, it would be unfair to insist on the same level of constitution implementation as in most liberal western countries, given the challenging nature of developments in Eastern Europe. Nonetheless, some attempts could have been taken so that to reduce the problematic nature of roundtable negotiations, parliamentary higher law-making and to compensate for the lack of legitimacy within the initial stage.

It seems to me that the secret nature of talks in terms of negotiating behind the closed doors would have been somehow reduced, provided that different educational campaigns were launched. The rationale of such choice is that people would know the reasons of downfall, perceive the necessity of split and inadequacy of coerced regime within existing political and economic tensions. If politicians acted on behalf of people and did not pursue their own political ambitions, then why did not they consider referendum to be appropriate way of constitution ratification? Why public involvement was totally disregarded?

¹¹³ Jon Elster, “Transition, Separation and Constitution-Making in Czechoslovakia”, *The European Journal of Sociology* (1995):12

The Bill of Rights and Freedoms from 1991 embodies the bulk of economic and social rights. Therefore, communists and social democrats as well as other political parties did favor its inclusion or at least reference to it in the constitution. As a result of such trade off Constitution of Czech Republic entails the clause 1 of Article 112 on Constitutional Order, the very core of which illustrates that the Charter bears constitutional meaning, nevertheless it is not directly incorporated into the text of constitution

In most of democratic procedures general public is more or less engaged in order to ensure, what Abraham Lincoln calls “the government from people, government for people and government by people.”¹¹⁴ The logic of legitimate process implies consent of all strata, be it workers, professors or deputies. No discrimination is permissible and thus the secrecy accompanied by the first stage of drafting and negotiating the terms of constitutional text, ultimately must be balanced by open public discussions and voting on several issues. My aim is not to advocate for the absolute power of people that also would lead “to tyranny by majority”. Instead, I claim to keep balance where no actors are given advantageous position, either drafters or people, on the contrary, each of stakeholders are constrained by the necessity to make results of discussions public once deliberation behind closed doors had been completed and compromise reached. Such picture would elucidate that no absolute power or usurpation on the side of parties is traceable. To reformulate once again the stated logic, the quotation from Diamond is worth mentioning: “power kills, absolute power kills absolutely.”

In contrast, the Czech case follows the dilemma: “constitution is the embodiment of the will of already constituted government imposed on people rather than acts of the latter constituting the government.”¹¹⁵ The result as such was attained as long as features of bargaining prevailed over an option of arguing.

¹¹⁴ http://thinkexist.com/quotation/democracy_is_the_government_of_the_people-by_the/6959.html

¹¹⁵ The above made quotation is paraphrased, the real version reads as follows: “The constitution is a thing antecedent to the government and government is its creature in this sense.” Thomas Paine, “The Rights of Man” available also online at <http://www.ushistory.org/PAINE/rights/singlehtml.htm>

Chapter 4- The concept of democracy, the dilemma of elections and party politics in post-transformation state – Czech Republic

In this section I want to check the functioning of democracy as well as trust in political institutions. Furthermore, the principal task for me is to explore the constitutional heritage that was left for us by virtue of multiple efforts on the side of drafters to produce the text of the current Republic constitution. As for the previous parts of my thesis, I tried to explain the notion of legitimacy whilst undertaking constitutional politics, and I did find results compelling enough to prove my hypothesis “legitimate constitution-making entails people’s participation.”

But here, I want to concentrate more on the final product and its impact on the political life of the country. Moreover, the legitimacy of constitution - the outcome, not mentioning constitutional process, simultaneously evokes importance and requires equal scrutiny.¹¹⁶ Below I will try to refer to some controversies that arouse within the context of ordinary politics after gaining independence.

In the aftermath of constitution adoption and ratification, the Czech state stepped onto the new path of democracy and started practicing its most important features. Among them the concept of elections (direct voting for parliamentary delegates by people), and referendum played crucial role as these tools were the first-signs of already transformed state.¹¹⁷

¹¹⁶ See Vivien Hart. 2003. Democratic Constitution-Making. *Washington D.C: United States Institute of Peace*, Special Report no. 107, (July 23), 13

¹¹⁷ Jiri Vecernik and Petr Mateju, *Ten Years of rebuilding capitalism: Czech Society after 1989* (Jacques Rupnik, 1999)

However, as it was alleged in the previous chapter, after parliamentary elections of 1992, public trust in most popular figures such as Vaclav Klaus and even Vaclav Havel considerably shifted and ranked low.¹¹⁸ These conditions did necessitate the formation of a new coalition government and repeated parliamentary elections.

In the meantime, this suggestion was almost impossible to convert into reality, which is palpable so far as we pay due attention to the Article 112 of Constitution that says: 1. On the day this Constitution comes into effect, the Czech National Council becomes the Chamber of Deputies whose election term expires on 6 June 1996, 2. Until the Senate is elected according to the Constitution, the functions of the Senate shall be discharged by the Provisional Senate. The Provisional Senate shall be constituted in the manner determined by constitutional law. The Chamber of Deputies shall execute the functions of the Senate until this law becomes effective.¹¹⁹

In addition an Article 108 asserts:

The Government of the Czech Republic appointed after the 1992 elections and executing its function on the day when the Constitution comes into effect is considered a Government appointed according to this Constitution.¹²⁰

But, as various scholars put it, there is ambiguity left in that no specification of how the Provisional Senate would be represented was made directly in the constitution. Instead, it spells out that function of Senate will be temporarily undertaken by the lower chamber representatives. Such a vague definition is a result of negotiated compromise between the main stakeholders as they left unspecified this provision so that “the Czech deputies from the

¹¹⁸ Public Opinion Polls conducted in former Czechoslovak State after June 1992 elections

¹¹⁹ Constitution of the Czech Republic from January 1993

¹²⁰ Constitution of Czech Republic from January 1993

Federal Assembly could gain some seats in the Senate.” However, later it was argued that they had, as Elster stresses, “the second thoughts.”¹²¹

4.1 Parliamentary elections and Public Opinion Polls

Institute for Democracy and Electoral Assistance (IDEA) reports the results of parliamentary elections and percentage of voter turnout per years 1990, 1992, 1996, 1998, 2002 and 2006. According to the 1990 estimates, 96.33% participated in the voting, this figure was 84.68% in 1992, 76.29% in 1996, 74.00% in 1998, 57.95% in 2002 and 64.47% correspondingly in 2006 elections.¹²² From this analysis, we witness how interest in voting as well as participation had been shrunken after the higher turnout of 1992 elections. One explanation for the lower turnout since 1996 elections could be the issue of dissolution of Czechoslovak state, by and large, reflecting the strong faith and memory of citizens on the one hand, and people’s disbelief in their own ability to influence the course of events and incapability of changing the composition of government on the other.

Hereby, I think some points in respect to the results of the first parliamentary elections since independence need elaborating and analyzing. There were some problems associated with forming coalition government. First of all, two large political parties were competing – Civic Democratic Party of Vaclav Klaus and Social Democrats of Milos Zeman. According to the

¹²¹ Jon Elster contends that the shift in the mood occurred and therefore, elections to the Senate were not held. For additional information see Jon Elster “Transition, Constitution-Making and Separation in Czechoslovakia”, *European Journal of Sociology* (1995):12

¹²² IDEA’s country report on parliamentary elections held in Czech Republic in respective years, available online at http://www.idea.int/vt/country_view.cfm?CountryCode=CZ#pres (Last accessed July 28, 2010)

one source, in order to form the government, Klaus was about to join with other satellite parties so that to resist its counterpart.¹²³

From that very fact, it is clear how patterns of bargaining again are present even in a democratic state. The behavior of Vaclav Klaus informs us of his being a rational actor as long as he acts out of “costs vs. benefits framework.”¹²⁴ To constitute a government, his coalition did not have enough members, thus the alternative option for either ODS or KDU-CSL as well as ODA was unity and conformity of policies with each other, if they wanted to remain in the political arena.¹²⁵ Such state of affairs points at reaching “Nash Equilibrium”, which is defined as follows:

“No actor has an incentive to deviate from his or her chosen strategy once the rules of cooperation have been specified that create expectations of opponent’s choice. Otherwise, an individual actor can no longer benefit from altering behavior, provided that other players remain constant in their strategies.”¹²⁶

Moreover, other characteristics of bargaining are apparent once we trace back some concessions made to Social Democrats. For instance, the report concedes that “in return for support for the minority government, the Social Democrats won leadership positions in parliament, and CSSD leader Zeman became Speaker of parliament.”¹²⁷

¹²³ Civic Democratic Party formed a coalition with Civic Democratic Alliance and Christian Democratic Union as reported in the literature on Czech Republic, available online at <http://www.fas.org/man/crs/92-051.htm> (Last accessed July 28, 2010)

¹²⁴ According to Rational Choice Theory rationally oriented actors behave strategically so far the distribution of assets are concerned. Their instrumental behavior is visible by means of engaging in ongoing calculation process. The latter refers to the assumption that costs should not override benefits, otherwise actors are losers. The information was taken from Peter A. Hall and Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms* (Political Studies, 2001)

¹²⁵ For more detailed information please visit <http://www.fas.org/man/crs/92-051.htm>

¹²⁶ See Investopedia Dictionary, available online at <http://www.investopedia.com/terms/n/nash-equilibrium.asp> (Last Accessed May 20, 2010)

¹²⁷ <http://www.fas.org/man/crs/92-051.htm> (Last accessed July 29, 2010)

Taken for granted all stated, we could assume that although the transition to democracy has been made, it would take time to really change the legacy left by communist rule and get rid politics from benefiting at the expense of general public. Irrespective of democratic provisions enshrined in the text of constitution, the level of democracy is still low in Czech Republic and institutions need reforming. The latter logic is underpinned once we appeal to the records such as World Survey Report on Direct Democracy, which contains information on 214 countries, including Czechs.¹²⁸

¹²⁸ Information concerning the source of data will be provided below

Data on Czech Republic

Table 1

Legal provisions for mandatory referendums (national level)	Legal provisions for optional referendums (national level)	Legal provisions for Citizens' initiative (national level)
Yes	No	No

Table 2

Legal provisions for agenda initiatives (national level)	Legal provisions for recall initiatives (national level)	Are referendum results binding?
No	No	Yes

Table 3

Legal provisions at the regional level	Legal provisions at the local level	Has there been a national referendum since 1980?
No	Yes	Yes

According to Tables, 9 important questions were revised in terms of which democracy is measured. The absence of legal provisions with regard to citizens' initiative, holding of optional referendums at national level whenever stalemate occurs, and the lack of enough legal means to recall power holders once they deviate from implementing all promised, do

reflect somehow weakened position of democracy in Czech Republic as compared to another post-communist state – Poland, which ranks much higher on the scale.¹²⁹

¹²⁹ This information and results incorporated into Tables are taken from World Survey Report Databases, available online at http://www.idea.int/elections/dd/world_survey.cfm (Last accessed July 31, 2010)

Chapter 5 - Deadlock or Stability? How to depict Post-Constitutional Developments?

The Constitution of Independent Czech state contains all the characteristics of democratic political system. According to the article 1, “It is a sovereign, unified, democratic law-observing state based on the respect for the rights and freedoms.” In addition, article 2, paragraph 1 says “all state power derives from people” and article 4 reads “the fundamental rights and freedoms enjoy protection of the Judiciary.” Equally worth mentioning is article 5, which is about guarantying “free foundation and competitiveness of political parties.”¹³⁰

On the contrary, ordinary politics following the transitional period does entail instability within the political system and the lack of rather empowered civil society on the one hand, and still lasting elements of bargaining over political power. My main concern is to touch upon post-constitutional developments since 1996 and explore the elements of left communist legacies.

First of all, as mentioned in previous chapter, public trust in institutions shrunk, which was evident once we trace back the voter turnout in parliamentary elections. The latter might have been provoked by internal inconsistencies and ongoing frictions between two major parties ODC (Civic Democratic Party) and SSSD (Social Democratic Party). However, the scene reversed and controversies seemed to vanish when in 1998 previously opposing parties signed the so-called “Opposition Agreement”, the chief principle of which was to initiate constitutional changes.¹³¹

It is these circumstances that confuse me a lot and force to confirm the following hypothesis: “if the constitution-making process is itself inclusive and more representative, or public has

¹³⁰ Constitution of Czech Republic from January 1993

¹³¹ Information has been extracted from Milos Calda’s article on *Constitution-Making in Post-Communist Country: A Case of Czech Republic* (1999): 11-12

its own way into the process of establishing new order, then the ordinary politics would further guarantee such participation in normal times.”¹³² The baseline of this reflection is that the character of Czech constitution-building such as keeping public aside from making its own contribution to the underlined process further estranged it from their equal share in politics.

From that perspective, I would assume that leaders of political parties such as Klaus and Zeman repeated the same picture as it was in 1992. According to Calda, both agents appointed committee for the task of producing constitutional draft, which was done to change some provisions in order to stabilize effectiveness and secure position of “coalition government and limit president’s prerogatives.” The ensuing reconsideration of existing articles and revision of some paragraphs do inform us of aggregating preferences and motivations of the main stakeholders in this process. For instance, CSSD demand to change constitutional provision so that to extend immunity of legislators to the area of “drink and drive offences” on the one hand, and to weaken President’s constitutional position by means of introducing the clause like “President should ask the leader of the strongest party in Parliament to form a government, in case the latter fails, he has to request the same from the second largest party” on the other.¹³³

In addition, some misunderstanding and raised conflicts over issue of reforming electoral system did end in appointing new commissions that in turn could push the negotiations to the progress.¹³⁴ Under such circumstances people once gain were deprived of their opportunity to somehow reduce the scope of bargaining for constitutional assets and institutionalized power.

¹³²For more details please visit Tom Ginsburg, Zachary Elkins and Justin Blount. 2009. Does the Constitution-Making Process Matter? *The Annual Review of Law and Social Science*, available also online at www.annualreviews.org (Last accessed July 21, 2010)

¹³³ Milos Calda, “Constitution-Making in Post-Communist Countries: A Case of the Czech Republic”, 1999, 14-15

¹³⁴ Milos Calda, “Constitution-Making in Post-Communist Countries: A Case of Czech Republic,” 1999, 15

At his stage, I am advocating for public access to all made negotiations that could have helped to hold government accountable to people.

On the contrary, the very fact of absence of proper mechanisms for public involvement (which is due to the nature of Czech constitutional politics) led to another type of bargaining apparent in one of ODS representative's proposal "for granting legislative initiative to the single senators but not to the Senate as a whole, and enhancing the role of Senate in issues of budget."¹³⁵

Consequently, as long as we observe patterns of such political behavior, we could more or less assume that it has been left by communist legacy and political elite is not used to the prescribed practices of new democratic political regime. Of course, such announcement sounds too strict, but inclination to amend constitution with the sole aim of advancing institutional interest of one particular group points at the same train of thoughts. In more simple words, the desire to change constitution and integrate all above-stated clauses entails "deadly blow to democracy and curtailment of political choice."¹³⁶

Further, we see that adherence to "Opposition Agreement" by the main actors elucidates prevalence of "interests and passions" rather than "impartial disinterest." One instance of how interests dominate, as Milos Calda contends, is "a grudge against President Havel."

Taking into consideration all arguments, it seems that the scene was dominated only by representatives of ODS and SSSD simultaneously leaving other small parties behind the stage. The challenge then is how we could speak of democratic traits as long as everything is

¹³⁵ Milos Calda, "Constitution-Making in Post-Communist Countries: A Case of the Czech Republic", 1999, 14

¹³⁶ Milos Calda, "Constitution-Making in Post-Communist Countries: A Case of the Czech Republic", 1999, 12

settled by multiple endeavors on the part of two political parties whilst others do not have either representation or own influence on the flow of events. I think the question bears considerable attention, provided that in a democratic society the terms of competition and participation of political parties with various platforms are strictly maintained as well as safeguarded and the constitution is not regarded as “fiction, but as a reality or an ultimate truth, from which validity claims are derivative.”¹³⁷

In addition, instead of straightforwardly arguing for the advancement of legislators’ position, I presume, it would have been more rational to revise the issue of judiciary and to somehow strengthen its position so far as “it checks constitutionality of laws and preserves constitutional order.”¹³⁸ The parliament is the last constitutional body that needs reforming at this stage. On the contrary, in my opinion, judiciary appeals to more scrutiny stemming from the following constitutional provision: “Judges of all courts of the Czech Republic, exercising the function of judge on the day on which this Constitution comes into effect, are considered judges appointed according to the Constitution of the Czech Republic.”¹³⁹ To consolidate democracy, it is more crucial to rid itself of all elements, which reminds traits of communist era. Certainly, the judges under authoritarian rule cannot be compared to those of democratic regime as their political culture as well as perceptions of what is permissible and forbidden makes them different.

Aforementioned facts undergird the existing close correlation between legitimacy and popular participation. The noteworthy point is to explore political mood at envisaged time and peoples’ assessment of regime and political events.

¹³⁷ According to Levent Gonenc, “validity claims” mean legitimate political decisions

¹³⁸ <http://www.businessdictionary.com/definition/judicial-review.html>

¹³⁹ Article 111 of the Constitution of Czech Republic

But before going on that, I want to refer once more to theory and state Andras Bozoki's evaluation of political systems: 1. open confrontation, 2. latent confrontation, 3. forced stabilization, 4. negative consensus

Consequently, given the development of political events in Czech Republic within the post-constitutional context, we do see patterns of both "forced stabilization" (identified by scholar as condition of general public disagreement, but people are slowed down, which in other words, might be explained by the notion of "cold peace") and "negative consensus" (defined as citizens' loyalty in exchange for gained benefits). To put it other way round, there is a clear-cut division between "political society of power holders and apolitical society of citizens."¹⁴⁰ Therefore, two concepts such as "political power and society" are irreconcilable in a way that existence of one of them overshadows another.

According to the estimates driven from polls conducted in East Central Europe, trust in institutions is associated with "overall evaluation of the whole political developments and efficiency of economic system."¹⁴¹

In addition, worth stating is the correlation between material position of Czechs (related to labor market position and personal income) and trust in institutions. Data taken from Markowski analysis contains dependent variable – unemployed position and independent – trust in institutions. Beta value is (-.075), T-value – (-5.0) and correlation (-.060).¹⁴² Our Null Hypothesis says there is no correlation between two variables, whilst Hypothesis 1 states

¹⁴⁰ Andras Bozoki, "Confrontation and Consensus: On the Forms of Political Integration", In *The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest: T-Twins, 1994), 72

¹⁴¹ Radoslaw Markowski, "Trust in Institutions in East Central Europe in the Beginning of Transformation", In *The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest, T-Twins, 1994), 211

¹⁴² Radoslaw Markowski, "Trust in Institutions in East Central Europe in the Beginning of Transformation", In *The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest, T-Twins, 1994), 202

some correlation exists. Given our correlation value of (-.060) we could conclude negative correlation between unemployment and trust in institutions, which means increase in unemployment level results in decrease in trust. Therefore, correlation deems negative, but it is strong enough to reject Null Hypothesis.

In the meantime, given challenges caused by transition to market economy, the speculation is that people could not be completely satisfied with economic developments as they are no longer under “paternalistic eye of socialist state.”¹⁴³ Further, political developments seem no longer promising, given the estimated percentage of voter turnout and trust in institutions. Hence, all this causes legitimacy problems once we rely on explanations of theoretical heritage. Therefore legitimacy is not a mass loyalty or tacit consent, but is aggregate of regime effectiveness, stability, public trust and support.¹⁴⁴ In other words, legitimacy could be achieved only when there is a strong civil society and rather restricted government, which in the end leads to the balance or shift of power explicable by virtue of separating constitutional politics from ordinary law-making and more sensible power division between society and political elite.

¹⁴³ The term was borrowed from Andras Bozoki

¹⁴⁴ Andras Bozoki, “Confrontation and Consensus: On the Forms of Political Integration”, In *The Democratic Legitimacy in Post-Communist Societies*, ed. Andras Bozoki (Budapest: T-Twins, 1994), 73

Conclusion

This section bears evaluative character of constitutional politics in the framework of Czech Republic. My aim is to briefly restate all peculiarities of deliberative process and some complexities related to it. To display all mentioned, I will firstly revisit again understanding of legitimacy and only then attempt to assess my hypotheses with regards to the legitimacy of both process and outcome.

We have to distinguish between two types of legitimacy – normative and sociological. The former implies necessity of separating constitutional politics from ordinary law-making, that is leaving space for revolution and thus, the total split with legacies of a dead regime is completely feasible, whereas the latter means acceptance of constitution and the new political order as a result of psychological factors – knowledge that regime replacement had been made and “constitution is no longer an act of communist imposition.” To put it other way round, the fact that constitution is imposed by efforts of certain democratic forces (self-elected opposition), even if not by extensive public participation, already presupposes that people would accept such a document so far as it asserts “nation’s self-determination and identity” as well as reference to democratic principles.¹⁴⁵

Hence, in sociological sense, Czechs agreed to accept endorsed legal system irrespective of being alienated from constitutional politics and opting for the preservation of common Czechoslovak state. Consequently, incorporation of democratic provisions in the constitution of independent Czech Republic such as “guaranteeing individual rights and freedoms, their protection by judiciary”, “competition among political parties” , “ the absence of force whilst

¹⁴⁵ Andrew Arato, “Constitution and Continuity in the East European Transitions”, In *The Civil Society, Constitution and Legitimacy* (USA: Rowman and Littlefield Publishers, 2000), 182

making political decisions” as well as “protection of minorities” do tell more with regards to the results of made transitions.¹⁴⁶

It is this rationale that makes legitimacy in sociological sense plausible, but its ground is still volatile and weak, which is due to precepts of legitimacy in the normative sense. As I already discussed the issue in previous chapters, I will briefly return to the case in order to make my concluding observations.

Given the nature of Czech constitution-making, the tools and mechanisms used, bodies involved in deliberating, drafting and negotiating, it is plausible to conceive of the whole procedure as of entailing illegitimacy of settings. First of all, even if there were not alternative to dissolution of common state and launching of constitutional politics for Czechs and Slovaks separately, there should have been efforts taken to reduce the scope of illegitimate character of constitutional crafting by representatives of already constituted powers, which in turn refers to the continuity of political bodies.¹⁴⁷ So, here the problem of “identity of constitution-making body derivative from its relation to the remnants of communist regime and expansion of powers to the extent of being constituted in future ordinary politics” poses constraints on legitimate process in terms of evading the logic of constituent power and its revolutionary character.¹⁴⁸ The worth stressing is the idea of constitutional authority as long as we are concerned for the legitimate and due procedure.

Another crucial point to recognize is “the power and will of lawgiver”, which matters both during politics of constitutional as well as in ordinary times. In other words, “the law is a function of lawgiver’s power and will, and in order to motivate the obedience of the ruled, it

¹⁴⁶ Constitution of Czech Republic from January 1993

¹⁴⁷ The term continuity of political bodies belongs to Arato

¹⁴⁸ Andrew Arato, “Dilemmas to the Power to Make Constitutions in East Europe”, In *The Civil Society, Constitution and Legitimacy* (USA: Rowman and Littlefield Publishers, 2000), 141-142

needs not to refer to its teleology, but should rest upon formal-procedural quality as a result of more or less arbitrary enactment.”¹⁴⁹

Given such a clarification, we could question the legitimacy of lawgiver within the Czech context as the political power of deliberating body-deputies of National Council elucidates features of legal continuity and the lack of absorption of constituent power in times of normal lawmaking. Hence, continuity made it permissible for main political forces to survive, (deputies of parliament) and their prior power of constitutional negotiation was transformed into that of sitting legislature.¹⁵⁰

However, the puzzle is “how to limit the power of governors, if they themselves establish rules for future politics?” I think it is this latter dilemma that left some ambiguities in the text of Czech constitution and posed some hurdles on the way of resolving constitutional crises.

On the other hand, some insist on positive features of Czech transition and constitutional politics. The most importance carries “the lack of violence and speedy nature of democracy consolidation as well as total transformation of economic system.” Persistence of such a political atmosphere is depicted as “self-limited revolution” or “revolutions against revolution.”¹⁵¹ The latter term is associated with legal continuity as political decisions were taken mostly by representatives of polity on the one hand, and small group of dissidents who in turn represented civil society. Nevertheless, the problems arising out of such extra-constitutional politics, I think outweigh and cast shadow on the nature of easily reached compromises in the course of drafting the text.

¹⁴⁹ Ulrich K.Preuss , *The political meaning of constitutionalism.*, 13

¹⁵⁰ According to the Constitution of Czech Republic the composition of government and deputies remained almost the same. The only changes and break with continuity of political bodies seems plausible with implementation of future elections

¹⁵¹ “Constitution and Continuity in the East European Transitions”, In *The Civil Society, Constitution and Legitimacy*, ed. Andrew Arato (USA: Rowman and Littlefield Publishers, 2000), 173

Legal continuity seems to embody the following paradox: 1. absence of a new beginning, as emphasized by Hannah Arendt, 2. blurred picture of constitutional and ordinary law-making, 3. weak constitutional legitimacy and popular identification with “the supreme law” only in sociological sense, the lack of such attribute in procedural-normative sense.

Further, some aspects and content of roundtable negotiations do point to the failure of the main actors to engage in deliberating for the general welfare, which is apparent in bargaining over distribution of parliamentary seats and individual minister portfolios. Moreover, the survival of even transformed communist ideology, does demonstrate that adherence to continuity made it difficult to break away with its legacies. Therefore, even today communist party in both Czech and Slovak Republics enjoys participation in elections and its representatives continue to struggle for political power whenever regime crisis is inevitable.

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Hence, given all these facts I want to approve both of my hypotheses and to state once more that legitimacy of process and outcome requires popular involvement and participation. Once the latter has been maintained legitimacy in normative as well as sociological sense is firmly established and further sustained. Otherwise, constitution, political regime and its implied legitimacy is only ideological, which induces deadlock and inevitable crises.

¹⁵² Attila Agh, “The Regions in Comparative Transition, Re-democratization in East Central Europe”, In *The Politics of Central Europe* (London: Sage Publications, 1998), 155

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