
Petra Gümplová

Abstract

This paper discusses the process of the making of the Czech constitution in 1992. I analyze the new, historically unprecedented model of constitution making and I try to explain it within a broader context of a specific type of regime change called “coordinated transition” which was particular to Eastern European transitions to democracy. The main focus of my paper is the question in what way exactly there has been the failure to establish sovereign constitutional politics. To answer this question and to suggest my own model of constitution making and its possible democratic legitimacy, I look at the framework of legality and legitimacy within which the revolutionary models of constitution making are explained. I challenge the view that the fact of legal continuity necessarily implies the lack of democratic legitimacy. I argue that the explanation of legal continuity has to distinguish between “the ethics of legalism” and the normative idea of the rule of law and that this distinction enables to assess constitution making beyond the framework of legality and legitimacy. I propose to address the issue of legitimacy from a discursive perspective and suggest that the constitution making entails democratic legitimacy deficit when it fails to engage an extensive public deliberation and the reconfiguration of the discursive practice in the public sphere. The article concludes by addressing the consequences of the method of constitution making on Czech democratic politics—which include the failure to give the foundation of sovereign democratic politics and the misconceiving the challenge of the European constitution.

Reflecting the sweeping changes in Eastern and Central Europe since 1989 and the worldwide trend toward the embrace of constitutionalism, the research on constitutional democracy has soared in the last decades. Yet there is still a remarkable lack of scholarship pertaining to what it takes for constitutionalism to have a democratic origin. The history of modern revolutions, all too often swept by dictatorships and permanent revolutionary movements, has certainly contributed to the suspicious attitude to this topic. Indeed, the concept of democratic constitution making itself points out to the most puzzling paradox in democratic theory. Should constitutions have democratic legitimacy, the constituent process itself must be democratic. Since modern democracy is conceivable only according to rules and procedures, there must be rules available for constitution making. Yet if there are such rules, the constitution cannot be in a true sense of the meaning the ultimate source of authority, but the act of an already
established authority, hence not genuinely legitimate. An element of non-democracy in the moment of constitution making seems thus unavoidable.¹

Isn’t the beginning irrelevant? I believe that constitution making matters and should be democratic, yet it matters a great deal how we understand democracy in the foundation process. Constitution is not a piece of paper or just some legal document, but a profound expression of political self-definition. Constitution making is a most precious moment in the life of a polity that offers its members a unique opportunity to define a common political identity. It is a truly political moment of fundamental decision through which people, in the collective deliberative process of political reconstitution, break symbolically with the past and construct a new normative order for itself.

Nobody has reminded us of the idea of genuine new start involved in the constitution making more clearly than Hannah Arendt. She believed that a written document which becomes the source of law is the only way how to institutionalize and secure public freedom. In her political writings Arendt referred to constitution making as to a “new beginning” containing its own principles which alone create novus ordo saeclorum, the new order.² Following Thomas Paine, Arendt insisted on the difference between a constitution as the act of government imposed upon people and the constitution by which the people constitute a government. Only the latter can become a genuine foundation of a new order.

Arendt derives her normative model from the making of the American and French constitutions, even though the latter failed, according to her, to establish free institutions. Only these two great revolutions embodied the conviction that source and origin of legitimate political power resides in the people and involved an extensive public participation and deliberation. History offers different paths of constitution making as well. Constitutions can be products of revolutionary assemblies or constituent conventions, but also an outcome of organic evolutionary process, or made by already established government. The wake of constitution making in East Central European countries in late 1980’s and early 1990’s brings to the forefront the model of constitution making based on the absence of a reference to the sovereign people as the subject of constitution making and lacking a genuine form of revolutionary legitimacy.

This paper discusses the process of constitution making in Czechoslovakia in 1992 as an empirical case that provides an opportunity to rethink issues of democratic constitutionalism in light of new historical experience. It is important to state my aims clearly. My analysis is not historical and process-oriented and does not discuss at length mechanisms by which the Czech constitution came into being. I am concerned with reconstructing a framework for the analysis of the constitution-making process and discussing the conceptual issues involved. The main question I seek to answer is How to conceive of a new beginning in the specific historical context of transition in Eastern Europe, and How to assess the process of constitution making in this light?

I shall proceed as follows: first, I will discuss the framework of legality and legitimacy within which the Czech case is explained. I want to reconsider the legal continuity account, especially as it has led some theorists to claim that legal continuity with the previous regime implied the lack of legitimacy and a failure to establish sovereign constitutional politics. I will try to show that the explanation of legal continuity has to distinguish between legalism and the normative idea of the rule of law which enables to assess constitution making beyond issues of legal continuity or discontinuity. Second, I want to address the issue of legitimacy from a discursive perspective and suggest that the constitution making entails democratic legitimacy deficit when it fails to engage an extensive public deliberation. My aim is to interpret the extraordinariness involved in the constitutional politics not in radical revolutionary, extralegal sense, but in the sense of reconfiguration of the discursive practice in the public sphere.

**Transition and Constitution Making**

The constitutional history of Czechoslovakia is marked by the years 1920, 1948, 1969, and 1992. The constitution of the democratic First Republic of 1920 which followed the creation of Czechoslovakia after World War I instituted a state with no federal elements, although the two countries had different histories and cultural and economic constellations. The constitution of 1948, adopted three months after the communist coup, introduced the system of asymmetric federalism: in addition to the federal parliament and government, Slovakia had its own parliament and government, but no such arrangement existed in the Czech country. In 1968, during the Prague Spring, the Slovaks called for the regular federal structure of the republic. In
the new constitution of 1969 the asymmetry was eliminated by the creation of the Czech parliament and the bi-cameral federal assembly with an upper house divided into two-equal size Czech and Slovak sections that voted separately. The new constitution was passed after the military invasion and with Soviet approval. In the years until the breakdown of communism in 1989 the constitution did not matter as the Communist Party had the prerogative over the legislature, but it mattered significantly in the process of transformation after the collapse of communism and shaped writing of the new constitution.

The conditions and the modality of the transition to democratic regime and the nature of communist regime shaped profoundly the process of constitution making, proving Arendt’s observation that revolution is predetermined by the type of government it overthrows. First of all, the transformation, although revolutionary in its political, economic, and social outcomes, cannot be understood as a revolution. Like Poland or Hungary and other countries in the region, the Czechoslovak democratization process has to be explained in the coordinated transition framework suggested and outlined by János Kis. Two most important features of this type of regime change that distinguish it from both revolution and a mere reform are, first, that the transition was effectuated by roundtable negotiations between the opposition and communists, and second, that the old regime was transformed into a new one according to its own procedural rules. Coordinated transitions, according to Kis, are characterized by the interruption of legitimacy, but continuity of legality.4

The transition framework is based on the distinction between legality and legitimacy. It is a regime change induced and characterized by a legitimation crisis, but implemented within the preexisting legal order, preserving legal continuity. In terms of agency, the process of coordinated transition operates through the vehicle of roundtable talks between communists and extra-institutional opposition. As Andrew Arato pointed out, roundtables were an original, but also problematic vehicle of transition. Actors themselves questioned their own legitimacy to negotiate constitutional changes therefore they subordinated themselves to already constituted legality and acted as though its laws were valid.5 The fact that the transition operated under inherited communist legal framework has been usually interpreted as entailing a serious lack of

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democratic legitimacy and as a failure to mark an era of revolutionary democratic liberalism.\textsuperscript{6} The significant degree of legal and institutional continuity with previous regime did not involve a clear break with the past and thus led to compromising on the status of emerging constitutional norms, so the objection goes. The Czechoslovak case seems to be the exemplary case of such compromise. Unlike in Poland and Hungary, the Czechoslovak transition was not negotiated before the breakdown of communism. Roundtable negotiations articulated the opposition’s demands as it was clear that the Soviet bloc broke down.\textsuperscript{7} Of all Central and Eastern European processes of transition the Czech was perhaps most extreme in its non-extraordinariness, pragmatism, institutional continuity and lack of public concern.

The Czech constitution making has to be understood within this framework of “coordinated transition.” Reforms were implemented by the existing parliament and within a constitutional continuity. The political process in the first years 1990 – 1991 was determined by the federal constitutional framework created in 1969 after Prague Spring. It was the inherited, rigid federal framework that shaped the political process during the first parliamentary period and ultimately rendered the dissolution of Czechoslovakia inevitable.\textsuperscript{8} Apart from efforts to create the legal and institutional framework for market economy and the privatization, the political agenda in the first two years was dominated by the struggle to define the division of powers between the federation and the two constituent republics. Although the original idea had been to resolve this issue as part of the general process of establishing a new constitution, in July 1992 Klaus and Mečiár, the prime ministers of Czech and Slovak governments agreed on ending the federation.\textsuperscript{9}


\textsuperscript{7} Both parties in roundtables were concerned primarily with the fear of social conflict, the threat of retribution, and military crackdown. As Elster points out, the obstacles to radical reform came, paradoxically, from the opposition itself (Civic Forum): 1) the insistence on the legal continuity 2) the respect for Slovak sovereignty and 3) the decision to adopt a system of proportional representation in the first elections and to elect the first parliament for two years which left a strong Communist presence. The roundtables didn’t produce a significant constitutional package, yet the subordination of the actors to inherited legality did have serious constitutional results. Jon Elster, “Transition, Constitution-making and Separation in Czechoslovakia,” European Journal of Sociology/Archives Europennes de Sociologie 36:1 (1995): 113.

\textsuperscript{8} The most important feature of this constitutional setup was that the upper house of the federal assembly was divided into two-equal size Czech and Slovak sections that voted separately. Constitutional changes needed three fifths majorities in these instances. 31 deputies of the one section of the upper house could thus block all constitutional changes.

\textsuperscript{9} The reason why the federation broke up was the failure to reach an agreement on the relations between government, parliament and the president in a new federal constitution. Slovakia initialized the separation politically and legally with its declaration of the Slovak sovereignty in July 1992 and the adoption of the Slovak constitution on 1
The imminent constitutional crisis and the failure to adopt a new federal constitution that resulted in the dissolution of the state immediately rendered Czech constitution making an administrative, state-rebuilding necessity rather than the foundation of a new political order. Although there were earlier attempts to draft a constitution, the process of making a constitution started after the declaration of the Slovak independence when it was clear that the federation is falling apart. It took three months only to draft a new constitution. It is above all the work of the executive led by Václav Klaus. As to provisions adopted, the new constitution is based on the constitution the First Republic from 1920 with minimal adjustments. The constitution of the First Republic was used to justify specific provisions, most fundamental of which are: 1) bicameral Parliament, 2) lower house elected by the proportional method, 3) president elected by the parliament and endowed with limited formal powers, and 4) three fifths majority required for constitutional amendments. The biggest concern was not the concentration of powers, but rather the efficiency of legislative process. The constitution of the Czech Republic was adopted on 6 December 1992, few weeks before the Czechoslovakia officially came to an end on 1 January 1993.

The Czech constitution making had normal parliamentary character. The constitution was made by the executive and approved by normal legislature. The idea of sovereign constituent assembly was never raised. Due to the conditions of the state dismantling and the urgency of economic reform this option would not have seemed realistic anyway. There was no popular ratification of the constitution. President Václav Havel unsuccessfully called for the one-time popular vote of the first president as a make-up for the popular ratification of the constitution. The public ignored the constitution making. Due to the lack of understanding that constitution making should operate on different democratic channel than normal legislative politics, there was no questions of the proper foundation of new legal authority or validity of a new constitution. There was no extensive public discussion of the constitutional design and the specific provisions, neither in the initial stages of the drafting process, nor during the actual constitution making.

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September 1992 before the new federal constitution with the clear tendency towards the separation, not respecting the federal institutions.

10 Klaus originally proposed a simple majority for amending the constitution! Other issues discussed in the committee were: territorial division, the creation of a Senate, the electoral rule (there was a fear of majority system), and the issue of referendum meant to foster democratic legitimacy. Calls for semi-presidential system were refused.

11 Elster claims that the making and implementation of the Czech constitution stands out as an example of blatantly self-serving constitutional design, referring to the discussion of presidency and Havel’s calls for a strong presidential
political elite did not realize the significance of this exceptional political decision and therefore did not attempt to mobilize large public engagement and support in this momentous political reconstruction.

Democratic Constitutionalism I: Legal Continuity and the Rule of Law

Bruce Ackerman laments that Eastern Europeans have run away from the originality of their revolutions and missed the constitutional moment, as they gave up a radical democratic constitutional politics, outside of regular electoral politics and chose normal, parliamentary constitution making. A new constitution that does not emerge from the original, revolutionary setting fails to become a deeply rooted, significant political construction that can shape the terms of political development for a long time to come, and, moreover, closes a window of opportunity for future legitimate constitution making. In Eastern Europe, as Ackerman puts it, “window of opportunity has slammed shut.” Ackerman insists that a clean break with the past is the only way how to make a legitimate new beginning, how to succeed in the act of collective, self-conscious political reconstruction.

The claim of legitimacy deficit, raised by other theorists as well, addresses two issues that, in my view, need to be distinguished from one another and treated separately. According to the first claim, the legitimacy has been compromised because of the insufficient institutional and legal discontinuity with the previous regime. This claim has to do with the fact that the constitution was made and adopted by normal legislature whose origin followed a series of transformations made with the strict application of legal continuity. According to the second claim, the legitimacy deficit follows from the insufficient, or rather no public participation, both in the form of the ratification through a plebiscite and involving no proper deliberative consideration and public support. These two claims are often linked to one another. In the following I would like to show that while legal continuity does not need to involve legitimacy deficit, the second claim to public deliberation is crucial for understanding the extraordinariness of veto, the bargaining over bicameralism (the creation of the Senate) and the unusually strong immunity that Czech framers granted themselves. Elster, “Constitution making in Czechoslovakia,” 123.

12 Ackerman, The Future of Liberal Revolution, 55.

13 According to Elster’s criteria there was questionable upstream legitimacy as the constitution was not produced by a constituent assembly and is perceived to be a mere bargain among interest groups (in the Czech case), and no
of constitutional politics and assessing the legitimacy of the constitution making process. Let me discuss each claim in turn.

The first argument suggests the conception of legitimacy derived from legal discontinuity, rupture, or extralegality. The break with the past is understood not only in normative sense of discursive justification, but in the sense of legal and institutional break with the previous regime. This approach emphasizes the link between constitution making and the revolution seen as a total collapse of the old regime and disintegration of old legalities. It represents the classical European model of the sovereign constitutional assembly, based on the doctrine of extralegal constituent power of the people. This view operates on the assumption that in the moment of foundation legality and legitimacy are two distinct, mutually exclusive models of justification, one based on legality and the present constitution, the other based on democratic legitimacy of the constituent power of the people outside of all forms of preexisting legal authority.\footnote{14}

The most important conceptual justification for the idea of extralegal sovereign constitution making is provided by Carl Schmitt in his substantive theory of democratic constitutionalism. The claim of Schmitt’s theory is that the people is the only legitimate sovereign authority, because they are the unique holders of the \textit{constituent power}. The doctrine of constituent power, introduced first by Emmanuel Sieyès as a distinction between \textit{pouvoir constituant} and \textit{pouvoir constitué} (already constituted powers as opposed to the capacity of constituent power), refers to the ability of the people to determine its own political existence through giving itself a constitution. Constituent power is envisioned as a direct popular will that \textit{ex nihilo} creates a new legal and constitutional order out of a juridical and normative vacuum. Schmitt, pursuing a radical, substantive, decisionistic critique of liberal jurisprudence, located the exercise of the constituent power in the state of nature, which is to suggest that the exercise of the constituent power cannot be bound by any preexisting law, procedure, institution or organization.\footnote{15}

Schmitt’s theory of foundation represents an intriguing, yet very dangerous attempt to conceptualize the capacity to radical, autonomous reconstruction of society and to give a purely

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\item Arato calls this model of democratic constitution making “Revolutionary Democracy and Sovereign Dictatorship.” Arato, “Forms of Constitution making,” 202.
\end{itemize}
democratic answer to the question of the beginning. The theory was subjected to numerous critiques, most of them pointing out the logical link between groundless, extralegal, and nonprocedural state of nature as the milieu of the exercise of the constituent power, and the unlimited sovereign dictatorship as the only instance that is ultimately capable of the exercise of the constituent power. Schmitt links foundation and democratic will formation with dictatorship, and since there is no procedure that delegates constituent power and limits sovereign dictator, the dictatorship can easily become a permanent one. The point is that legitimacy and legality are conceived of as normatively antithetical. While legality, understood by Schmitt exclusively in terms of proceduralism and positivism, kills popular self-determination, legitimacy, on the other hand, refers to the direct will of the sovereign people expressed outside of any procedures or institutions which alone is the source of legitimate political order. Legitimacy refers to revolutionary legitimacy that involves a claim of complete identity with the sovereign people in whose name and interest a total rupture with the past is justified. Such conception of legitimacy cannot become a viable basis of democratic order.

Central-Eastern European mode of constitution making cannot be assessed against this revolutionary democratic model. The theory that explains this pattern must account of legal continuity and legitimacy separately and explain their relationship, rather than maintain their strict separation. János Kis in his insightful analysis argues that legal continuity claim would render the Eastern European transitions legal reforms, which is obviously a counterintuitive claim that obscures the fact of radical discontinuity of the new order with the communist regime. Discontinuity can be explained through legitimation crisis that hit communist regimes in the region at the end of 1980’s even though they were in fact always already perceived illegitimate. An account of legal continuity must, furthermore, take into account an important distinction between legalism and the normative concept of the rule of law. It is this distinction that accounts

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16 Arato points out that there is no difference between democracy and dictatorship in Schmitt’s theory, at least not in the constituent process. Schmitt’s substantive claims (popular sovereignty, substantive unity, constituent power) can lead to revolutionary dictatorship that may use substantive democratic claims to legitimacy to justify the creation of entirely nondemocratic political regimes. Andrew Arato, “Good Bye to Dictatorships?” Social Research 67:4 (2000): 925 – 955. See also Carl Schmitt, Die Diktatur (München und Leipzig: Duncker & Humblot, 1921)

17 The Czechoslovak regime did not enjoy legitimacy after 1969 and yet it was hit by legitimation crisis at the end of 1980’s. Kis explains this by making a distinction between explicit and implicit ideology. While explicit ideology expressed the official rhetorics of communist nomenclature, implicit ideology derived from a shared conviction that any resistance would provoke military intervention of the Soviet Union. Kis rightly reminds that it was this implicit ideology that produced the efficient, but not genuine “surrogate legitimacy” in the 1970’s and the 80’s. As a result of Perestroika and the economic decline, this surrogate legitimacy began to erode. Kis, “Between Reform and Revolution,” 336 – 337.
for the working of communist regimes and the nature of transition and is important for the account of the process of constitution making.

Kis argues that communist states have to be understood as dual states, exactly in the sense of duality Ernst Fraenkel used for the description of Nazi state. Duality refers to the coexistence of the prerogative state (Massnahmenstaat) not limited by any legal constraints, and the “normative” state of statutes, rules, and procedures (Normenstaat) that was subordinated to the prerogative state of the power-holders. While the arbitrary political interference unconstrained by law was the matter of 1950’s in Eastern Europe, since 1960’s there was an irreversible trend toward separating the legal system from political power and restricting the arbitrary interference of the power-holders. The autonomy of law increased as there was a tendency toward routinization and rationalization of the regime.\footnote{Kis, “Between Reform and Revolution,” 333. See Ernst Fraenkel, The Dual State: A Contribution to the Theory of Dictatorship (New York: Oxford University Press, 1941)}

This trend also explains the peculiar and often misunderstood “always-under-law” strategy of most Eastern European dissidents and their demands for the “legal state” that gained much wider currency than the idea of democracy, at least in the Czech context.\footnote{Václav Havel in his influential essay Power of the Powerless suggests that totalitarianism and democracy are just two sides of one coin of what he calls “global automatism” of technological civilization and consumer culture. Václav Havel, The Power of the Powerless (Armonk, N.Y.: M.E. Sharpe, 1985), 92.} Therefore, the main form of disobedience under communist regime was not violating the law, but sticking to it and challenging the power-holders to come to terms with the rules of a legal state in which citizens have rights.\footnote{This strategy was partially due to legal and political culture of legal positivism based on Rechtstaat-like positivistic conception of law as a medium of governance and a means of constraint on the exercise of governmental power. This legal consciousness blurred the distinction between modern democratic constitutionalism and traditional parliamentary Rechtstaat. The demand for the legality and its preference over democracy can be further explained by the fear of legal chaos, lawless state, corruption, economic criminality and wild capitalism on one hand, and totally discredited notions of the people, popular sovereignty and “popular democracy” by the communist ideology on the other hand.} As Kis puts it, Eastern European dissidents acted \textit{as if} the law already had supreme authority, \textit{as if} the citizens had legal rights, and as if the power-holders could be expected to take these rights seriously. This trend was particularly helpful for the success of the transition and a highly relevant feature of the “legally continuous” transition from communism. It helped to avoid the unstability and the danger of dual power when the old forces no longer have support and new forces not yet have it, and to protect individuals in the midst of such large scale social and economic transformations. The point, however, is that legalism made it possible to anticipate and transform itself into the rule of law. Legalism made it possible to complete the
transition toward the rule of law under the rule of law, which explains the remarkable fact that the pre-existing legal framework was not considered as illegitimate, because it included the preconfiguration of the rule of law.\textsuperscript{21}

Kis calls this “the politics of as if”: the opposition acts \textit{as if} the other side were an appropriate partner in a common search for principled consensus, \textit{as if} the Parliament of the old regime had legitimate authority to enact the agreement as law. Even though the Parliament and the constitution of the old regime do not command legitimate authority, the rule of law does. According to Kis, the “as if” rules of the transition period are identical with the basic rules of the constitutional democracy in anticipation. The new regime draws its legitimacy from the establishment of the rule of law, and of institutions protecting the rights of the individual. Rule of law is the normative principle that legitimizes the present order, and at the same time allows us to characterize the previous order as morally unacceptable.\textsuperscript{22}

**Democratic Constitutionalism II: Popular Sovereignty and Discursive Legitimacy**

Does this account of legal continuity say that there was no possibility of genuine democratic constitutional politics? It only suggests that the normative assessment of the constitution making process has to bypass the fact of legal continuity. We have to get beyond the idea of using a historical model to assess efforts at constitution making. Yet we should not give up the relevance of the process of political reinstitutionalization and the idea that constitutions are acts of people and only such are legitimate, even under circumstances described above. The plausibility of this ideal as a normative principle of constitution making depends on how exactly we understand the referent of constitution making and hence the problem of popular sovereignty.

Popular sovereignty is one of democracy’s basic normative ideas according to which “the people” is the ultimate source of political authority. It implies that people’s authority does not originate in some further authority, which on this account also suggests that the sovereign authority to be legitimate must be rather of a substantive kind. Constitution making is an original and primary act of political authorization by the people. The understanding of popular sovereignty linked to constitution making is thus especially important to avoid what Arendt called “the problem of an absolute,” inherent in every modern revolution, namely the problem

\textsuperscript{21} Kis, “Between Reform and Revolution,” 334 – 336.
how to constitute and find the source of a new authority without resorting to any “transmundane” source, such as religious sanction.

Revolutionary democratic constitutional politics represented by Schmitt links legitimacy to a substantive notion of popular sovereignty formulated in terms of constituent power of the people. The people is understood in strictly substantive sense of social homogeneity, unity, and existential identification in common political substance. As the legal definition makes it impossible to see the people as the ultimate origin of power, legitimacy is then understood as the will of the sovereign people expressed outside of any legal procedures or institutions. But such fictional idea of popular sovereignty cannot become the normative criteria of constitution making. A constitution cannot originate in the people conceived of in substantive sense because it necessarily renders the will of the sovereign people indeterminate, unlimited, and unlimitable.

How should we solve the issue of popular sovereignty with regards to constitution making? Kis argues that popular sovereignty is a feature of political regime rather than something actually exercised prior to its establishment. The “people” in the sense of an authorizing collective agent is not made to be the ultimate source of political authority, but is only recognized by the constitution makers as such. The people is a regulative idea, an egalitarian principle that furnishes us with a criterion to judge whether the totality of citizens and voters is a legitimate source of public authority. Popular sovereignty can thus be understood as an ultimate moral attribute of the totality of subjects of a state in the same manner as the human rights are the ultimate moral attributes of individuals.

Unlike Kis, I believe that we can solve the problem of the legitimacy of the sovereign ultimate authority of the people by replacing the concept of the people with the idea of the public sphere. The concept of the public sphere enables to think “the people” in the relational, reflexive, dialogically self-reflective way and to conceptualize the act of authorization in the process of constitution making in terms of self-limiting deliberative procedure, thus avoiding the dangers of

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22 Kis, “Between Reform and Revolution,” 370.
23 The problem of the absolute refers to the question how to find the source of law which would bestow legality upon positive laws, and the origin of power which would bestow legitimacy upon the powers that be. The need for absolute within the political sphere, Arendt argues, follows from two vicious circles, the one inherent in human law making, the second in the very task of foundation, which has to do with the problem how to transcend the legislative act itself. Sièyes, by distinguishing the constituent power and the constituted power, and by putting the former into the state of nature, only seemingly solved both problems. Arendt claims that Siéyès’ solution could not result in the establishment of a republic and the rule of law, but had only replaced one-man rule (monarchy) with rule by the majority (democracy). Arendt, On Revolution, 158 – 162.
24 János Kis, Constitutional Democracy (New York: CEU Press, 2003), 133 – 140.
sovereign dictatorship inherent in substantive conception of popular sovereignty. A model of such conceptualization of popular sovereignty can be found in Habermas’s discursive paradigm of law and democracy. Habermas radically desubstantializes the notion of popular sovereignty by conceiving of the people not as a substantive entity, as a “body,” but as the proceduralized communicative practice of public autonomy. In Habermas’s theory the notion popular is replaced by public; and the principle of popular sovereignty refers to a mode of exercising public autonomy which Habermas conceptualized in terms of discursive procedure of vindication of validity claims.\textsuperscript{25}

Understanding people as the public sphere points to a discursive notion of legitimacy understood as justifiability within a given public space. In any case, the claim included in popular sovereignty principle, namely that the people is the ultimate authority and the source of all power has to be detached from the substantive, extralegal idea of the constituent power of the people. Legitimacy linked with substantive notion of constituent power and juxtaposed against legality cannot be a norm that is constitutive for democratic project. The task of constitution making can be carried out by the people only if there is a free public space and publicity mediates the self-understanding of the constitution making demos whose constituent power is limited by procedures of discursive redemption of validity claims and by deliberative processes of self-reflection.

The idea of the justification of constitution making through a deliberative principle approximates Arendt’s normative model of foundation. Arendt praised the American path of constitution making because it was successful in institutionalizing of the public freedom based on the republican institutions and the rule of law, both actually the source as well as the outcome of the revolution. As Arato remarks, Arendt actually seems to be defending legal continuity when asserting that the American constituents derived their authority from the subordinate, duly authorized bodies and authorities, seeking to preserve the source of their own authority intact.\textsuperscript{26} Arendt rejects the view that the constituent power can rest only on atomized individuals, or that it cannot be bound by any legal restrictions. Using the American case, she seeks to show that it is possible to derive the constituent power from already established republican institutions, and the legal authority of the constitution from a different source.

\textsuperscript{25} Jürgen Habermas, \textit{Between Facts and Norms} (Cambridge: MIT Press, 1998), 476.
Arendt derives the decisive act of foundation from the principle of public deliberation. It is the deliberative principle that is the ultimate source of constitution in her view. She finds the foundation of the American republic in the deliberative way in which the representatives of the people organized the process of making of the constitution. The deliberative act of foundation itself can avoid violence and the problem of the absolute and lays down the laws of action for the future new order. What she means by the “beginning containing its own principles” is thus the process of public deliberation that itself makes the source of authority of the new political order and later the authority of a constitution.\(^{27}\)

**The Public Sphere of the Czech Constitutional Politics**

Arendt was unable to give up her concept of the public derived from classical understanding of the political. She bases her normative conception of public freedom (popular sovereignty) on a historical ideal type of small-scale, self-governing deliberative political bodies based on the strict separation of the public from the private. Since Arendt insists on this thoroughgoing separation, which corresponds with her essentialist distinction between action (public) and labor (private), she is forced to assess all revolutionary attempts for permanent institutionalization of public freedom in the twentieth century as a failure, because of the clash with social question and modern liberal principles of privacy and civil society.\(^{28}\)

I suggest we disregard Arendt’s antimodernist critique which compels her to see a genuine public life impossible in modern society, and link her deliberative theory of foundation with her phenomenological method of political analysis. Arendt attempted to apply this approach in many contexts, most notably in her analysis of totalitarianism. Phenomenological dealing with topics within the political field implies the view that the public sphere is a spatio-temporal locus in which phenomena occur and which is created by the phenomena themselves, in other words the public space is constituted simultaneously with political events. The public space is thus the interplay of events, historical facts that are actualized with events, narratives, symbols, meanings, argumentative practices, and human action. The public space has a discursive texture; it is an


original and incidental constellation of facts, narratives, and events that condition and configure each other.\textsuperscript{29}

In every political discourse there are paramount arrays of narratives, symbols, and interpretations that we can perhaps call \textit{symbolic centers}. A symbolic centre is a cluster of historically embedded narratives and argumentative practices that configures the logic of employing symbols, notions, and discursive justification, and that creates the substantive discursive setting of the political practice. There have been several symbolic centers in the Czech political discourse that were significant for the Czech constitutional politics, such as the \textit{First republic, democratic Europe, economic welfare, the rule of law, or non-political civil society}. These discursive symbolic centers with their particular logic of validity claims redemption based on specific historical narratives made up symbolic background of constitutional politics and can help to understand the practices of normative political justification.

I believe that this discursively-phenomenological approach can explain the course of political events as they occurred in particular geopolitical constellation of the disintegration of the Soviet bloc, as well as coexisting with interlinked processes such as transition to a market economy, the process of privatization of state property, state dismantling and state rebuilding, demands for justice, and the process of lustration and restitution. It suggests why the only project that could be taken seriously was that of multiparty constitutional democracy and capitalist market economy, and that the specific provisions in the new constitution were based on the constitution of 1920 in an attempt to establish the continuity with the original, democratic regime of the First Republic.

In what sense, then, did Czechs run away from the originality of their foundation? As I argued at the very beginning, constitution making is an extraordinary act of public, collective, political self-definition. It plays a central and affirmative role in the normative project of a new political regime and thus becomes the crucial element in the political identity. Constitutional narrative has a profound impact upon political memory and hence the political future. The most significant failure of the Czech constitution making is that it did not occur as an extraordinary

\textsuperscript{29} Arendt never described her own phenomenological method. In the account of totalitarianism she tries to trace back the incidental crystallization of events, institutions, and other elements that preconfigured totalitarianism as a phenomenon, not as a logical consequence or a historical necessity. For an outstanding account of Arendt’s method see Ernst Vollrath, “Hannah Arendt and the Method of Political Thinking,” \textit{Social Research} 44:1 (1977): 160 - 182. See also Hannah Arendt, “Understanding and Politics,” in \textit{Essays in Understanding} (New York: Harcourt Brace & Company, 1994)
public event. It failed to accord constitutional politics the central place in the political discourse, as the process of the drafting and ratifying of the constitution did not involve serious and lengthy consideration, extended public deliberation, and popular approval. Consequently, the constitution making failed in setting a precedent for future extraordinary occasions of a collective deliberative process that will make it necessary to transcend normal politics. Only time will show if these rather weak foundations for liberal politics will not prove fateful.

Constitution making is a model of discursive politics of the extraordinary. Constitutional politics has a privileged discursive access to the political identity of a community; to the reconsideration of the community’s self-perception and to the formulation of a normative project for the future. The arguments and their validity claims employed at times of constitution making hold privileged positions in the memory and narratives that the society retells itself on various occasions. Public discourse, both as the principle of democratic constitution making and the dimension to be institutionalized in constitutions, represent major criteria by which revolutions and constitutions should be judged. In this respect, the lost treasure of the Czech constitution making is the failure to establish a new symbolic center in the discursive sense. Constitution making is a special occasion to give new dimensions to moral reasoning, and to retell the history in such a way that it provides normative principles for the future. In the course of the Czech constitution making the political questions of history, memory, national and European identity or normative principles of future democratic society were never raised, and if, they were not linked to this extraordinary discursive moment. It was a unique opportunity to find new meaning in the language, practices, and symbols of a national history and political culture and reconfigure the argumentative practice in the public discourse. The Czechs failed to exploit its extraordinary opportunities to the fullest.

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30 Arato considers publicity one of the key principles that help to achieve democratic legitimacy during constitution making. Other principles include consensus, legal continuity, plurality of democracies, the veil of ignorance, and reflexivity. See Arato, “Forms of constitution making,” 224 – 231.
Bibliography


