Round Tables in Czechoslovakia and the Future of Post-Sovereign Politics of Constitutional Change

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As in Poland and Hungary, in Czechoslovakia the round table talks between the ruling Communist Party and the broad coalition of dissident and opposition forces (the Civic Forum) took place in 1989, thus facilitating a peaceful and coordinated regime change. In a rapid sequence of events, the Civic Forum was established on 19 November 1989 in one of Prague's theatres in response to a brutal police crackdown on a student demonstration which took place on 17 November as a commemoration of the 50th anniversary of the Nazi closure of Czech universities. The top leadership of the Communist Party, including the General Secretary Miloš Jakeš, resigned on 24 November. On 27 November, a nation-wide general strike occurred, demanding the end of the one-party rule and the free election.

Round table negotiations between the Civic Forum and the leaders of the Communist Party of Czechoslovakia which followed the unexpected nation-wide mobilization of students, workers, and citizens paved the way for a swift democratic transition. Within days, the parliament eliminated the articles about the leading role of the communist party and the dominance of Marxist-Leninist ideology. The government was reconstructed to include other political parties and independents. On 29 December, Václav Havel was elected president. In January 1990, new members were coopted into the Federal Assembly and national legislative bodies. The agreement on a new electoral system was reached and in June 1990, Czechoslovakia held its first free and democratic elections since 1920.

Polish and Hungarian round tables set the baseline for negotiations in Czechoslovakia. Unlike in Poland and Hungary where roundtables were initiated as elite negotiations, the Czechoslovakian one was set up after mass demonstrations spread. The call for a round table was made by the Communist Party. The initially preferred strategy of the Civic Forum was the strategy they called a "dialogue with the powers that be" and that of external control on the self-transformation and liberalization of the Communist Party. Strongly influenced by Václav Havel's preference for "non-political politics" (against parliamentarism and party system, preference for charismatic leadership, self-organization, horizontal non-hierarchic structure), Civic Forum was unwilling and unprepared to overtake power. When it was compelled to assume a more active role in the transition, as a result of the retreat of the Communist Party, it displayed unnecessary restraint and failed to channel the dynamic of the wide popular support into demands for more sweeping changes (e.g. propose a candidate for prime minister, seize control of the Ministry of Inferior and the secret police archives).

Concerns for the continuity of the state and the constitution were the dominant mantra of the Czechoslovak transition. While communists sought to stay in the new political game, the Civic Forum feared the disintegration of the state, the collapse of the administration, and empty legislative chambers unable to enact the key transitional steps. The lack of personnel to take over and the self-perception of the Civic Forum's role as a transition facilitator, integrating a plurality of interests, and not as a political party, are key to understanding the strong commitment to legal and institutional continuity. This commitment blocked any efforts to change the communist constitution and its Constitutional Act on the Czechoslovak Federation from 1968 which introduced the system of bicameral legislature and required that constitutional amendments are approved with three-fifths supermajority both in the Chamber of the People and in each

national half in the upper Chamber of the Nations. The refusal to produce an interim constitution or change the existing one to accommodate to the new political reality of democracy and political pluralism in the two-nation state caused a deadlock which contributed to the breakup of Czechoslovakia.

Round Tables and the Commitment to the Rule of Law

National specifics and ambiguities notwithstanding, round tables have been established as one of the most important innovations of modern politics of constitution making and regime change. Eastern European coordinated transitions from communist dictatorship were crucial for making them a preferred device for the revolutionaries trying to avoid chaos, violence, and instability inherent in the radical politics of the *pouvoir constituant* – the constituent power of the people. As Ulrich Preuß remarked, round tables worked as "midwives" so to speak for the generation of legitimate actors and the creation of new rules of the new game and for negotiating the conditions for the creation of a new constitution. Based on the 1989 experience, round tables became an indispensable instrument in what Andrew Arato called a new paradigm of post-sovereign constitution making – a two-stage process of making an interim and the final constitution where the rules of the first constitution constrain the second.

What are round tables' distinct features? As János Kis pointed out, the moral advantages of a negotiated transition are enormous and they amount to much more than preserving peace, avoiding breakdown, and coordinating changes within available institutions. The innovation of round tables consists in that they (re)institutionalize and embed the political values of constitutionalism and democracy in the process of the regime change itself. Based on the modern practice of round tables, from 1989 predecessors to round tables in Chile, Colombia, or South Africa, their two fundamental principles can be identified: *representation* (plurality, inclusion, and participation of decisive political forces, and symmetrical consensus building) and *legality* (regularity, procedural legitimacy, publicity, transparency, accountability, and appeals to broad notion of justice and human rights).

Legality is the most striking and unique innovation of round tables during 1989 transitions in Eastern Europe and their most relevant feature. Strict adherence to constitutionalism and the rule of law is to be explained by an enormous authority of the rule of law, constitutionalism, and human rights and their being seen as ways to achieve the projects of multiparty constitutional democracy and free market economy. As Kis put it, the politics of legal continuity was based on the "as if" assumption that the legitimate rule of law is already in place. This made it possible to act as if the other side had been a legitimate partner in a common search for a principled consensus as if the old parliament had the authority to enact new rules, as if the round table represented the people's will and could make decisions with binding force. Acting in the "as if" mode made it possible to complete the transition toward the legitimate rule of law under the old rule of law.

Given the ultimate value the Eastern European round tables placed on constitutionalism and the rule of law, a question arises: What explains the current decline of constitutionalism in this region? Could a round table serve as a tool for the reconstruction of democratic constitutionalism?

Round Tables and Constitutional Politics Today

Round tables have become a crucial device in extraordinary political moments of a breakdown in which it is necessary to establish a representative plurality of actors and interests who have some degree of legitimacy to produce the rules of the game for the transitional period and for the production of a new constitution. Their key role is to redistribute power and agency anew, to reestablish the representation of political forces and interests out of no longer legitimate, asymmetrical, or non-existent power distribution, and to include actors in the game who were unjustly excluded or underrepresented. The goal of round tables is then to provide constitutive rules for the process of making norms with a constitutional nature. The use of round tables to frame and to proceduralize the process which

leads to a new constitution makes them uniquely applicable in the context of regime change and constitution making following a fundamental political transformation.

Several issues can be identified in the post-transition history of the Czech Republic. Constitutional issues concern the asymmetry between the legislative and weak constitutional authority of the executive, a strong directly elected presidency, and the proportional electoral system which does not facilitate the formation of parliamentary majorities. Unstable cabinets, shaky coalitions, and frequent use of technocratic cabinets can also be related to the institutional weakness of political parties (small membership base, poor organization, corruption), the ideological polarization and the blocked left (communists continuously present but with no coalition potential), and a relatively weak civil society.

Since 2013, there has been some degree of democratic backsliding in the Czech Republic, i.e. a gradual process of regression of democracy resulting from executive aggrandizement, weakening of constitutional checks and balances (courts, judiciary, the media), and asserting control over state-owned companies. The source of backsliding is twofold. On one hand, there is the current Czech president Miloš Zeman and his geopolitical orientation toward China and Russia and his repeated ignorance of the constitutional rules of the political process. On the other hand – and more significantly – there is a significant level of concentration and the fusion of the private economic and media power with the political power and the authoritarian managerial political style of its current Prime Minister Andrej Babiš and his technocratic-populist movement ANO. Both Zeman's and Babiš's repeated subversions of constitutionalism have been undermining the pluralistic democratic governance. Still, according to accepted assessment standards of democratic governance, the Czech Republic is a consolidated democracy and the Zeman-Babiš tandem has not eroded Czech democracy to such an extent that we can speak about an illiberal regime.

Given the features and the role of round tables and the specific context of constitutional politics in which they serve as an important strategic instrument, I do not see any meaningful role for roundtables to address democratic backsliding, at least not in the Czech Republic. The applicability of roundtables beyond the context of regime change and constitution making depends on how broad the notion of constitutionalism and constitution-making we are willing to accept. If we agree that round tables are institutionalized fora which enable to involve all legitimate actors in a negotiation about rules with a constitutional nature, not just constitutions in the narrow sense of the term, then we can, for example, envision their role in international law making or in processes of making rules of transnational governance. In fact, round tables have been used and successfully replicated in the making of a range of norms of international environmental law (e.g. UN Convention on the Law of the Sea or the Vienna Convention for the Protection of the Ozone Layer) or transnational private governance (e.g. the pioneering Roundtable on Sustainable Palm Oil). Given the urgency and global or transnational nature of some risks (e.g. climate change) and hence the necessity to create representative bodies which cut across existing borders and transcend available systems of political representation, it is plausible to ask what role can round tables play in the reinvention of the global rules of the game.

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