[12]

Jean Monnet Chair Papers

Post-communist Constitution-making: Confessions of a Comparatist

(Part I)

Eric Stein

The European Policy Unit at the
European University Institute

Jean Monnet Chair Papers [12]

Stein, *Post-communist Constitution-making: Confessions of a Comparatist (Part I)*

The Jean Monnet Chair

The Jean Monnet Chair was created in 1988 by decision of the Academic Council of the European University Institute, with the financial support of the European Community. The aim of this initiative was to promote studies and discussion on the problems, internal and external, of European Union following the Single European Act, by associating renowned academics and personalities from the political and economic world to the teaching and research activities of the Institute in Florence.

Jean Monnet Chair Papers

Post-communist Constitution-making: Confessions of a Comparatist

(Part I)

Eric Stein

1992
The European Policy Unit at the
European University Institute

Printed in Italy in August 1992
European University Institute
Badia Fiesolana
I-50016 San Domenico (FI)
Italy

Contents

Post-communist Constitution-making: Confessions of a Comparatist (Part I*)

ERIC STEIN**

I. Introduction

This essay is a record of an episode in the ageless learning process rather than a comprehensive account of post-communist constitution making.[1] It focuses on the cluster of people brought together under the name of Czechoslovakia because - apart from strong personal reasons which will become readily apparent - that country, one of the number of troubled 'ethno-territorial'[2] groupings in Western and Eastern Europe, possesses

* Part II of this essay will contain an analysis of the developments following the adoption of the 1990 law and concluding observations which will attempt to link the data to the general propositions in the introductory sections of Part I.

** Hessel E. Yntema Professor of Law Emeritus, University of Michigan Law School.

[1] See on this, Cutler and Schwartz, "Constitutional Reform in Czechoslovakia," 58 Chi. L.R. 511 (No. 2, Spring 1991). See generally Ludwikowski, "Searching for a New Constitutional Model for East-Central Europe," 17 Syracuse J.Int'l L.& Comp.L.91 (1991); Saladin, "Self-determination, Minority Rights and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic," 13 Mich. J. Int'l. L. 172 (1991); Schwartz, "Constitutional Developments in East Central Europe," 45 J'l Int'l Affairs 71 (Columbia U., no. 1, 1991); Slapnicka, "Das tschechoslovakische Verfassungsprovisorium," 37 Osteuropa Recht 257 (Dec. 1991); Lijphart, "Democratization and Constitutional Choices in Czechoslovakia, Hungary and Poland 1989-91," 4 J. Theoret. Stud. 207 (1992).

[2] Thompson and Rudolph, Jr., "The Ebb and Flow of Ethnoterritorial Politics in the Western World" in J.R. Rudolph, Jr. and R.J. Thompson, Ethnoterritorial Politics, Policy, and the Western World 1 at 2 (Lynne Rienner Publishers, Boulder and London, 1989), use "ethnoterritorial" "for various political movements and conflicts that are derived from a group of people,...having some identifiable geographic base within the boundaries of an existing political system."

certain discrete characteristics that merit an inquiry into its search for a new constitutional framework.

My hope is that this piece, idiosyncratic as it is, will provide some insights into the many-splendored idea of federalism, the ubiquitous problem of cross-frontier transferability of institutions, and, last but not least, into the uneasy interaction between constitution making and the transition from a totalitarian-formed to a civil society in an atmosphere of ethnic tension.

1. The return of the native

I was born and raised in Czechoslovakia, graduated from the Charles University Law Faculty and left the Nazi occupied country in 1939 for the United States. I returned to Prague forty-three years later, in 1982 - by one of those baffling chances which defy explanation - unknowingly a day before the fiftieth reunion of my high school (gymnasium) class with fifteen of the 21 graduates attending. Their compelling stories took me through the Nazi occupation, the wartime, the brief return of the democratic Republic in 1945-1948, the communist take-over, the Stalin directed trials of leading communists in the early fifties, the 'Prague Spring' of 1968 and the subsequent re-Stalinization after the Warsaw Pact invasion.

Of all the gymnasium graduates those who chose law fared worst. The most talented one, because he came from a long established bourgeois family of lawyers, ended up as a lowly clerk in a government corporation after a stint at a construction site. Another found refuge in the transportation department of the Prague general prosecutor's office after returning, in 1945, from a concentration camp. Still another made a meagre living as a 'black market' purveyor of legal advice. A promising classics scholar was dismissed from his posts at the University and Academy because of his kinship to the Finance Minister in the First Republic; his mother took him as a young boy to the funeral of the Minister - the only connection with this relative. He ruined his eyesight working in a sandpit.

I returned once more in 1985 and left firmly determined never to come back to a country so grievously torn from its Western roots by a regime at that time no longer relying on physical torture or faith in an ideology but rather on a demoralizing combination of assurance of economic security and tight surveillance. Although almost everyone criticised the government in private there were few outward signs of dissent beyond reports of the courageous few - some 700 in number - who signed the Charter 77.

In the closing years of the old regime a handful of American lawyers established contact with Czech and Slovak dissidents and provided them with a variety of support. Professor Herman Schwartz of the American University in Washington D.C. went to Prague under the auspices of the Helsinki Watch to monitor the criminal trial of Václav Havel and wrote a brief on his behalf.

In an unexpected turn of events the same dissidents emerged as leading players in the post-revolutionary government. It was only natural for these leaders to suggest, building on the previous contacts, that the Americans provide assistance in the drafting of a new federal constitution by making available Western constitutional experiences from which the country had been cut off for forty years. In response to this suggestion, Lloyd Cutler, the quintessential Washington attorney, along with Schwartz, proceeded to organize a small international group of lawyers, judges, academics, and politicians from the United States, most of the Western federal states, France and the United Kingdom. I was asked to deal with foreign affairs aspects of the constitution because of my work in international law and European law.[3]

2. The mode of operation

As the first step early in 1990, each member of the group was asked to write a paper on an aspect of the draft federal constitution prepared under the direction of the then Procurator General of the Czech Republic, Dr. Pavel Rychetský, an intelligent and attractive major figure in the Civic

[3] The financing was provided by Mr. and Mrs. Sid Bass and the Charter 77 Foundation of New York. The original group included among non-Americans, former Prime Minister Pierre Trudeau of Canada; Prof. Dr. Helmut Steinberger, Director of the Max Planck Institute for Foreign Public and International Law, Heidelberg, Germany; Prof. Vernon Bogdanor, Oxford; Prof. Francis Delpérée, Catholic University, Louvain-la-Neuve, Belgium; Prof. Roger Errera, member of the Conseil d'Etat, Paris, France; Prof. Dr. Herbert Hausmaninger, University of Vienna; Prof. Gilles Petitpierre, University of Geneva, member of the Swiss Federal Parliament.

Working papers prepared by the following members of the group were published in Czech translation in the review Právník: H. Schwartz, Laurence H. Tribe, F. Delpérée (issue no. 1 of 1991); Vicki C. Jackson (no. 2 of 1991); V. Pěchota, Martin Garbus, A.E. Dick Howard (no. 4 of 1991); Albert J. Rosenthal, Charles Fried, Nigel Wright (no. 5 of 1991).

Forum which spearheaded the 'velvet' revolution[4] in the Czech Republic. With its Slovak counterpart, Public Against Violence, that movement emerged from the first free elections of June 1990 as the strongest political force in the Federation.

At that time Dr. Rychetský became Deputy Prime Minister of the Federal Government in charge of federal legislation and relations with the legislative bodies. In 1970, Dr. Rychetský was dismissed by the Communist regime from his assistantship at the Charles University Law Faculty in the course of the 'normalization' following the suppression of 'the Prague Spring' of 1968. Thereafter he worked as a lawyer with various organizations. He was one of the original signatories of Charter 77, and published samizdat materials opposing the regime.

Another prominent member in the Czech and Slovak group organized to work with the international counterpart was Dr. Zdenek Jičínský, austere, somewhat melancholy, with a neatly trimmed goatee, Deputy Chairman of the Federal National Assembly - a former law professor, also a victim of the post-1968 're-Stalinization' After his expulsion from the Prague Law Faculty, Prof. Jičínský, having refused a laborer's job, was employed in an insurance organization, only to be dismissed again because of signing the Charter 77. He was expected to head the important committee of the Federal Assembly responsible for drafting the new constitution but was not reelected reputedly because of his prominent role in the drafting of the first federal constitution in 1968.

Finally, I should mention the Deputy Federal Prime Minister Dr. Jan Čarnogurský, a Slovak lawyer who was disbarred under the old regime for criticizing the government while defending dissidents in court and was jailed for his organizing activities. It was Dr. Čarnogurský who articulated the mission of our group in the first press conference: to provide a rational, impartial perspective as a necessary corrective in a tense and emotional atmosphere. I shall have a great deal more to say about Dr. Čarnogurský who later in 1990 returned to his native Slovakia and, as the head of the Christian Democratic Party, became Prime Minister of the Slovak Republic.

The principal spokesman on the Slovak side turned out to be another law professor, the jovial Dr. Karol Plank, Chief Justice of the Slovak Supreme Court and Chairman of the Commission for the Preparation of the Constitution of the Slovak National Council (parliament). Additional

[4] The first use of the term is attributed to Rita Klímová, at the time a translator for Václav Havel, later first Ambassador of the 'new' Czech and Slovak Republic to Washington.

political figures and academics from the Czech, Moravian and Slovak Universities and from the two Academies of Science participated in the group.

The two groups first met in April 1990 in Salzburg, Austria, at the baroque castle built in the eighteen-thirties by the ruling Archbishop Firmian; it now serves as the seat of the American Salzburg Seminar. After two days of meetings we all proceeded - under the benevolent command of the Czecho-Slovak Ambassador to the United States - by bus to Prague. At the frontier we saw the remnants of the barbed wire barriers. We were struck by the sharp contrast between the prosperous Austrian countryside and the run-down Czech villages.

The meetings continued in an estate outside Prague, originally built in the early fourteenth century by a Czech nobleman, Jan of Rokycany, held for a time by the Habsburg General Wallenstein, and presently owned and beautifully restored by the government. The haunting past that lurks pervasively near the surface emerged poignantly when Professor Jičínský recalled that in the cellars of this very building the police of the old regime held and interrogated its political prisoners. Yet post-revolutionary euphoria and hope for the future was in the air.

After the first conference more papers were written and small meetings of specialists on basic rights, emergency presidential powers and the judiciary were arranged in Prague.

The international group returned to Prague in January 1991, the night before the unleashing of 'Operation Desert Storm'. The government, press and, by all indications, the people were remarkably united in support of the Allied action: "A small country like ours can feel a bit less lonely on this planet" - a taxi driver told me. Alas, I thought, there is no oil in his land.

We met in the vast faculty room of the modernist building of the Law Faculty on the banks of the river Vltava, an inner sanctum I, as a student, had never dreamed to enter; at the Prime Minister's building, a student dormitory in my time; in the cosy Ministry of Justice of the Czech Republic with the Minister and members of the judiciary; and in the Hrzanský Palace, a delightful baroque structure in the romantic castle area, used for representative functions of the government. There, at the very entry visitors were faced with a large mural declaring "With the Soviet Union for eternal times."

In the Presidential wing of the Castle we were received by the Chancellor, "Prince Karl von Schwarzenberg, the chairman of the International Helsinki Federation, with tweed jacket and Sherlock Holmes

pipe,"[5] a picture of an Oxford don except for the elegant cowboy boots. A scion of an ancient Austro-Hungarian nobility which, however, was closely identified with the First Republic, he aided the Czech dissidents at some personal risk. When I mentioned that as a student at the Charles University I participated in a Roman Law seminar with a Schwarzenberg, he pointed to a photograph of his father.

The next encounter took place in June of 1991 at the request of Dr. Čarnogurský, by then Prime Minister of the Slovak Republic, in Bratislava, the capital of Slovakia, in an atmosphere of rising Slovak nationalist pressures. The town has a distinctly provincial, Eastern European atmosphere. The hotel, built as an exclusive abode of the party aristocracy with the Moscow idea of luxury, offered a breath-taking view across the Danube into Austrian countryside.

Before returning home I stopped in Prague. Ambling through the cavernous Černín Palace, the seat of the Federal Foreign Ministry, I thought of Jan Masaryk, the last chief diplomat of the democratic Republic, who fell to his death from a window in this Palace in the wake of the Communist takeover. During my days in the Department of State I interviewed Masaryk's personal physician, his novelist friend Marsha Davenport and others in an unsuccessful effort to clear up the mystery of his death.

By the time of this visit in early summer, 1991, the newly acquired freedom was taken for granted, the post-revolutionary good feeling had largely evaporated in the face of pervasive uncertainties. In the following months I have remained in contact with the constitution making authorities in Prague, principally on matters relating to foreign affairs and international law.

3. The lesson in self-knowledge

Henry James wrote: "There comes a time when one set of customs" - and I would add "one set of laws" - "wherever it may be found, grows to seem to you about as provincial as another; and then I suppose it may be said of you that you have become a cosmopolite."[6]

[5] T. Garton Ash, The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin, and Prague at 118 (New York, Random House, 1990).

[6] L. Edel, Henry James: A Life at 121 (Harper & Row, New York, 1985).

Having been trained in two different legal systems, and after a lifetime of international activities, I thought of myself - more or less consciously - as a cosmopolite in Henry James' sense. To my astonishment I found myself faced with not one, but with two strong biases that stood in the way of my understanding of Czecho-Slovak reality.

First, having been raised and trained under the first Czechoslovak Republic of 1918 I was subliminally unable to envisage an alternative to that unitary democratic system, the only one existing in my memory. In the June, 1991 meeting in Bratislava, the Slovak Prime Minister Čarnogurský urged the constitution makers to 'draw on the best' from the experience in the East as well as in the West, and he made it quite clear that our group was expected to offer technical expert advice rather than political solutions. Quite inappropriately, in the presence of a Slovak TV crew, I found myself making an impassioned defense of the 1920 Constitution.

The second bias, of equally surprising intensity, was due to my identification with American life and law, and - more importantly - my deep conviction of the unique rationality of the Constitution of the United States. This stimulated misleading analogies. I was by no means alone in this quandary.[7]

It took several months of conscious effort and face-to-face exposure to the local environment to bring the double bias under a measure of control.

A closely related but separate factor was my indoctrination in American thinking about democratic federalism in general. The traditional discourse among constitutional lawyers, not only in the United States but in other mature federations, centers on an analysis of constitutional texts and problems arising from the 'living law' as it evolves from these texts. Political scientists dealing with federalism also often follow the formal, legal pattern. They assume the existence of given conditions that make a federalist system possible, desirable or indispensable and do not inquire into the nature of these conditions. They do not distinguish between conditions that make it possible for an existing federal system to continue functioning in the light of a changing environment, from conditions that make it possible for a new federal system to come into being in the first place. "The temptation is to make functional theories to do double duty as genetic theories."[8]

[7] Reske, "U.S. Constitution Unpopular," ABA J'l. Dec. 1991 at 28-29.

[8] Rustow, "Transitions to Democracy - Toward a Dynamic Model," 1970 Comparative Politics 337 at 341 (Apr. 1970), referring to distinction between how a democratic

It occurred to me after some time that the traditional approach to federalism must be reconsidered when it comes to a situation such as prevails in the Czech and Slovak state. In the next section I outline a conceptual framework that has helped me - after some trials and tribulations - to comprehend better the problems faced by the constitution-makers in that country, including the chances for transferability of foreign institutions into indigenous structures.

4. On asymmetric federation - and beyond[9]

In his 'theoretical speculation' on elements of federalism Tarlton distinguishes an ideal symmetric federal system in which the interests of the component units in relation to the center as well as to each other are identical, from an 'ideal' asymmetric system in which "each component unit would have about it a unique feature or set of features which would separate in important ways its interests from those of any other [component unit] or the system considered as a whole"[10] (situation of "latent secession" or "secession potential"[11]).

The interests in question are predicated upon equality or disparity in the aggregate conditions of the respective units which may be grouped into environmental factors (size and location of the territory, climate, population), social factors (ethnic origin, language, religion, history, tradition, law, social groupings), and political factors (the political system).

system comes into existence and how an existing democracy can best be preserved.

[9] See the innovative discussion in R. Dehousse, Fédéralisme et relations internationales 96-100 (Bruxelles 1991). The Czechs and Slovaks mean by 'asymmetric' the fact that certain institutions set up in the process of federalization in Slovakia do not have a counterpart in the Czech Republic, e.g. the first autonomous organ under the 1948 Constitution, the Slovak Academy of Sciences (there exist only the Czechoslovak Academy of Sciences in Prague), and - most important under the old regime, the 'asymmetric organization' of the Communist party.

[10] Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," 1965 J'l of Politics 861, 868. In such a system "it would be difficult (if not impossible) to discern interests that could be clearly considered mutual or national in scope (short of those pertaining to national existence *per se*)". *Ibid* at 869. Citing Livingston, A Note on the Nature of Federalism - Federalism as a Juridical Concept, LXVII Political Science Quarterly 80 (No. 1, 1952).

[11] Tarlton, *ibid.* 870; Rustow *supra* note 8 at 350.

One may conjure up a continuum between the two opposite ideal models in which the position of a given federal state would depend on the degree to which the interests of the units coincide or diverge. "[H]armony or conflict within a federal system can be thought of as a function of the symmetrical or asymmetrical pattern prevailing within the system." In general, 'real' federal states would be located on the continuum "somewhere between the complete harmony of the symmetrical model and complete conflict potential of the asymmetric model."[12] The United States, the Federal Republic of Germany (particularly before unification), Austria and Australia may be viewed as relatively symmetrical systems as contrasted with the strongly asymmetrical former Soviet Union and Yugoslavia in the process of dissolution by secession. After secession a new unitary state, if it comprises strong disparate groups, may itself be a victim of its high level asymmetry (Croatia, Bosnia Herzegovina).

An affinity with, or outright intervention by, a foreign state, or activities of emigré groups, may contribute to the corrosive effects of the asymmetry (Canada, Belgium, Yugoslavia, in some measure emigrés from Czechoslovakia).

Although the United States, Austria, and Australia are multi-ethnic, their component states are not organized on an ethnic basis as are Canada and Belgium.[13] The position on the continuum of the two last mentioned States, marked by strong asymmetric elements, is presently in question.

Two-unit states organized on the basis of ethnicity or religion (such as Lebanon[14]), the Czech and Slovak state and, in reality, Belgium[15] pose

[12] Tarlton, *ibid.* 871.

[13] Kuzin, "The Confederal Search," Report on Eastern Europe 36, July 5, 1991. Kuzin considers Switzerland as essentially territorially rather than ethnically or nationality based. Spain constitutes "a blend of ethnic and administrative devolution." *Ibid.* 37.

[14] Under the Constitution and the National Pact of 1943, as amended by the Taif Agreement of 1989, the President is a Maronite Christian, the Prime Minister a Sunin Muslim, and the Speaker of the Chamber of Deputies a Shi'a Muslim. See generally T. Collelo (ed.), Lebanon: A Country Study 144 (Federal Research Division, Library of Congress, Washington D.C., 1989); U.S. Dept. of State, Country Reports on Human Rights Practices for 1991, Rep. Submitted to the Committee on Foreign Affairs, House of Rep. and the Comm. on For. Rels., U.S. Senate, 102d Cong., 2d Sess. p. 1485, Feb. 1992.

[15] The Belgium Constitution establishes in addition to the central and provincial institutions, three linguistic communities (four linguistic regions) and three territorial

a special problem with pressures for absolute parity in representation, voting power and the consequent danger of blockage. Moreover, secession from a two-unit state has unique consequences: it means the end of the composite state.

Asymmetry implies diversity. In an atmosphere of tolerance diversity enriches and energizes the society. Intolerance and bigotry brings conflict within and among the component units. To endure, the constitution of a federal state must take account of the underlying conditions in an appropriate way.

Over time, a rising degree of asymmetry leads to increased devolution of powers from the center to the component units. One option is for the component units to share in central decision making, the other is to increase the scope of their independent action within their own sphere. The latter option has special consequences in the foreign affairs field, raising the problem of 'external sovereignty' and international personality.

Avoiding the concepts of 'consociation' or 'international regime,' political science artifacts of variable utility, the symmetric-asymmetric continuum may be described in traditional terminology: if devolution fails to satisfy the claims arising from asymmetry, the process may turn into a restructuring of the system into a 'confederation,' a loose composite in which the central authority derives from, and continues to be dependent upon, a consensus of the component 'sovereign' units which retain the right of secession. At a certain point, the status of the common structure as an international person may come into question. 'Confederations' have proved inherently unstable: they have either disintegrated or turned into more or less centralized federations as was the case with the United States, Switzerland and Germany. No 'confederations' in the above sense exist

regions, all with their own organs - a costly system of overlapping competences and Kafka-esque complexity. Belgium Constitution of Feb. 7, 1831 as amended, arts. 3bis, 3ter., 107 quarter. Despite the radical decentralization, the normally marginal Vlaams Blok party moved from two to no less than twelve seats in the Parliament as a result of legislative elections of Nov. 24, 1991 after a racist campaign, advocating an independent Flemish state. Europe, Brief Notes, Belgium, No. 1156, End of Dec. (sic!) 1991, Luxemburg. "Belgium has been fairly successful at taming Flemish nationalism by successive rounds of devolution" but this "method of containing communal conflict may reach its limits when the remaining central powers cannot be devolved without hurting one side or the other." The Economist, October 12-18, 1991, at 50-51. Cyprus may fall in this category if it should become a common state.

today, although one or more may emerge from the ruins of the Soviet empire.[16]

Beyond the confederation format is a variety of more or less loose functional, regional and global associations such as the European Community,[17] Benelux, the British Commonwealth, the new Commonwealth of Independent Republics of the former Soviet Union, and the numerous intergovernmental international organizations.

II. The Asymmetry of the Czech and Slovak State

On April 20, 1990, after two full days of debate, the Federal Assembly (the federal parliament) adopted the country's new name, the Czech and Slovak Federal Republic, discarding, under Slovak pressure, the name (Czechoslovak Federal Republic or in the Slovak version, Czecho-Slovak Federal Republic) adopted just one month earlier. The 'hyphen debate' almost led to a constitutional crisis[18] and the ultimate decision was supported by a majority of four.

The 1960 Constitution[19] amended in 1968 remains still in force although heavily amended by a series of post-communist constitutional laws.[20] It called for a federal scheme embracing two component units, the Czech Republic and the Slovak Republic. The federal aspect proved at best an administrative division, at worst a hollow sham, but it led to a dramatic increase of Slovaks in the bureaucracy. The task faced by the current

[16] See generally P. King, Federalism and Federation at 133-145 (Croom Helm, London & Canberra, 1982).

[17] The European Community today is a *sui generis* body marked by high-level economic, monetary, social and legal integration and a low-level, incipient political integration, a hybrid between a confederate and federal structure.

[18] Obrman and Pehe, "Difficult Power-sharing Talks," Report on Eastern Europe, 5 at 6, Dec. 7, 1990. The hyphenated name Czecho-Slovakia evokes a bitter memory for the Czechs; it was used briefly during the German occupation and before the establishment of the secessionist Slovak state in 1940.

[19] Constitution of July 11, 1960, 100/1960 Sb., translated in Constitutions of the Countries of the World (A.P. Blaustein and G.H. Flanz eds.) (Czechoslovakia by G.H. Flanz; out of print; 1974.)

[20] Const. Law 143/1968 Sb., translated *ibid.*

constitution makers has been in effect to build a new structure responding to the new aspirations.

That task, however, must proceed in the context of conditions which, I shall assume, in the aggregate, define the interests of the two component Republics with respect to each other and to the common system as a whole. They determine the position of the common state on the continuum of asymmetry described earlier.

1. Environmental conditions: geography, demography, ethnicity, economy

The country, the size of the state of New York, is located in the center of the Continent, a bridge - according to conventional wisdom - between East and West. Jan Masaryk, the son of Czechoslovakia's first President, complained that, as with any bridge, everyone feels free to trample over it; and it can also be easily blown up.[21] The precarious geographic position at the crossroad of major powers has obvious security implications that must be taken into account in policies if not in the institutional structures of the country.

Approximately ten and a half million people live in the Czech Republic; in addition to the Czech speaking majority, Moravians and Silesians who speak a slightly different dialect live in the East and North East of the Republic.[22] Five and a half million live in the Slovak Republic. The total population of sixteen million is substantially less than that of New York State.

The Czechs and Slovaks are of the same ethnic, Slavic origin. However, in Slovakia there are 600,000 Hungarians (some estimates are as high as 750,000) settled predominantly along the border with Hungary, 70,000 Poles, and some 60,000 Ukrainians and Ruthinians. Throughout the country there are 60,000 to 100,000 Germans, a remnant of the three million expelled by the Czechs at the end of the Second World War, some 800,000 Roma or gypsies, mostly in urban areas and in eastern Slovakia, some remaining Vietnamese (originally 40,000 in number), gently pushed out to

[21] V. Fischl, Hovory s Janem Masarykem 40 (Mladá Fronta, Praha, 1991); H. Brandon, Special Relationships 23 (New York, Atheneum 1988; Obrman, Minorities Not a Major Issue Yet, Report on Eastern Europe 9 at 50, Dec. 13, 1991.

[22] Obrman, "Minorities Not a Major Issue Yet," Report on Eastern Europe 9-10, Dec. 13, 1991.

Austria, and more recently some hundreds of refugees from Romania.[23] The gypsies, many well assimilated with representatives in the legislatures, nevertheless account for a disproportionate part of certain crimes in the context of a dramatic rise of criminality after the November 1989 revolution.[24]

In summary, one third of the people in Slovakia and one tenth of the entire country are minorities, a "birth defect"[25] due to the post-World War I settlement which was greatly alleviated but not remedied by the mass expulsion of the Germans. Thus the two-to-one demographic asymmetry is greatly complicated by the still extant minority problem.

In 1918, the Czech lands (Bohemia, Moravia, Silesia) contained two-thirds of the entire industrial plant of the Austro-Hungarian empire, while Slovakia was much less developed. A great deal has been done particularly in the last 20 years to put the Slovak and Czech economies on an equal footing with the result that the living standards between the two Republics today are similar. Nevertheless, Slovakia remains the more rural, still federally subsidized area. The major part of important industries is located in the Czech Republic,[26] while the Slovaks are left with obsolete armament and heavy industrial establishments, substantially more vulnerable in the process of transition to the free market. The asymmetry in economic development, although greatly reduced, persists - and at any rate is perceived to persist, a consideration which - from a rational viewpoint - should influence the negotiations on the future shape of the common state.

[23] The above data are based substantially on Brian Hunter (ed.), Statesman's Yearbook 408-409, 127th ed. 1990-91 (St. Martin's Press, New York 1990); World Almanac and Book of Facts 1990, 703 (Pharos Books, New York, 1990). It is widely believed in the West that official census data have underestimated significantly minority numbers. On a possible reason, see Tribe, Draft Paper on Federalism issues for Consideration by the Framers of the Czechoslovakian Constitution 40 (unpublished).

[24] In 1990 crimes rose by 78% in the Czech Republic and by 48% in the Slovak Republic as compared with 1989. Pehe, "Crime Rises in Czechoslovakia," RFE/RL Research Report 55, Apr. 3, 1992.

[25] "The hardest struggles in a democracy are those against the birth defects of the political community." Rustow, *supra* n. 8 at 360.

[26] Obrman and Pehe, "Difficult Power-Sharing Talks," Report on Eastern Europe 5, Dec. 7, 1990.

2. Social conditions: history, culture, religion

The history of the two peoples differs greatly. Until the end of World War I, the Czechs, Moravians and Silesians lived in the Austrian-German sphere of the dual empire with a measure of political autonomy which allowed for the development of an authentic national culture and political consciousness; the Slovaks were under the oppressive rule of the Magyars (Hungarians) for a thousand years with the result that in 1918 the peasant society lacked any upper or middle class, intelligentsia or culture of its own.[27] In 1939, after two decades of coexistence with the Czechs, the Slovaks broke away from the Czechoslovak Republic and established their own fascist puppet state in a deal with Nazi Germany. The head, a Catholic priest, was hanged after the war as a war criminal. In 1991 the Czechs were incensed when some Slovak nationalist groups memorialized him as a hero.[28]

History plays perhaps even a more vital role in Central Europe than in the western part of the Continent. Despite seven decades of a common political system (interrupted only in 1939-1945 by the defection of the Slovak State) the asymmetry in historical memory continues to stalk private and public life. "[A] shared forgetfulness is at least as important as common memories of a shared past for the emergence of a nation."[29]

Considerable divergence exists in religious orientation as well, although a substantial majority of both Czechs and Slovaks are Catholic. While the Slovak (and Moravian) church wields considerable influence in the Polish-conservative mode, the Czech catholicism is of a more liberal hue, suspected by the Slovaks of secularity and humanism. Protestant minorities exist in both Republics.

[27] Kusin, "Czechs and Slovaks: The Road to the Current Debate," Rep. on Eastern Europe 4 at 7, Oct. 5, 1990. On history, see A.H. Hermann, A History of the Czechs (Allen & Lane, London, 1975); A. Lettrich, History of Modern Slovakia (Praeger, New York, 1955); E. Táborský, Czechoslovak Democracy at Work (G. Allen & Unwin 1945); R.W. Seton-Watson, A History of the Czechs and Slovaks (Hutchinson & Co., London, New York, Melbourne, 1943).

[28] Kusin, *Ibid.*

[29] Renan, Qu'c'est-qu'une Nation (1882) cited by Majone in M. Tushnet (ed.), Comparative Constitutional Federalism - Europe and America 67 at 69 (Greenwood Press, 1990).

A distinct language is generally viewed as a dominant characteristic of a nation. Yet there is very little difference between the Czech and Slovak language: broadcasts alternate in Czech and Slovak, and with my Czech background, I have no difficulty reading or understanding Slovak.

"What is the Slovak nation?" asked a distinguished scholar of Charles University with a twinkle in his eyes. "They have no distinct language, no hero, no myth, no literature, not even a saint."[30] Intended as a *bon mot*, the statement is an evident hyperbole. There is in Slovakia today a layer of intelligentsia and talented artists, although much thinner than in the Czech lands. Czech cultural life was revived and has flourished since the third quarter of the last century, although it was profoundly impaired by the German occupation and the communist regime. Nevertheless, the private remark illustrates the attitude prevailing among the Czechs of all classes. It is a heritage of the early, almost colonial relationship and actual or perceived discrimination as it evolved after 1918 when Czech teachers, officials and entrepreneurs moved to Slovakia to help establish an indigenous system of education, economy and administration. Masaryk's idea of a single *political* (not cultural) nation in the image of modern West European states, essential as it was in 1918, became - it is said - erroneously interpreted to apply in a cultural and ethnic sense as well.[31] The benign view of the relationship between the two peoples taken by the respected scholar Milan Simečka is that the Slovaks have no hate for the Czechs but a permanent sense of being number two,[32] Which, I may add, the Czechs feel, in the depth of their hearts, is true.[33] This psychological

[30] Private conversation, January 1990.

[31] Várossová and Pitha, "Vědomí národní, vědomí státu," Literární Noviny, Sept. 6, 1990, at 3, Prague.

[32] At the end of the First World War leading Slovak personalities opposed Slovak autonomy because the people had "neither a national nor human consciousness" and they called for strong centralism: the autonomous movement evolved from the conflict between the governing Slovak protestants supporting unity and the opposition Slovak catholics whom the 'progressionist-socialists' kept from jobs, also from economic discontent as well as from the 'nationalist' friction between the Czechs and Slovaks. F. Peroutka, Začátky Česko--Slovenského Soužití 33-34, 88-89 (Edition Sokolova, Paris, 1953?).

[33] Opinion polls in spring 1991 showed that only 9% of all Slovaks favored independence. 21% were for a 'confederation' and 43% for a federation but the polls did not indicate how much devolution to the Republics they would insist on. Pehe, "Growing

factor has fed the Slovak aspiration for recognition of their national identity, the most visible symptom of the asymmetry of the system and the dominant Slovak goal in the negotiations for a constitutional compact, overshadowing all other considerations.

3. Political conditions

For this generation of Czechs and Slovaks, except for the very old ones, the democratic experience in the First Republic of the nineteen twenties and thirties is a distant, if not subliminal, memory. The long term impact of Nazi occupation and the Stalinist modernization is still not fully revealed.

The democratic institutions of the 1920 Constitution based on a tripartite division of powers, respect for individual rights, rule of law, pluralism and market economy were destroyed. They were replaced by 'democratic centralism,' a hierarchy of public power organs with the people's assembly at the summit, and all subject to the 'leading role' of the Communist Party. The federal framework introduced in 1968 under Slovak nationalist pressure as a dialectic reconciliation of the opposites of unity and diversity[34] did little to alleviate centralized policy making and party control on all levels of government.[35] A formidable security establishment guarded the regime against any opposition; it is estimated that one out of ten people cooperated in one role or another. To maximize the monopoly of the party, the regime did all it could to atomize the society - "to destroy the institutions and bonds of solidarity and loyalty that hold society together as a society" and "to prevent the types of social, political and economic interactions that could promote individual and group autonomy."[36]

Slovak Demands Seen as Threat to Federation," Report on Eastern Europe 1 at 2, Mar. 22, 1991.

[34] For a socialist perspective, see Knapp, "Socialist Federation - A Legal Means to the Solution of the Nationality Problem: A Comparative Study," 82 Mich.L.Rev. 1213, 1215-16 (1984).

[35] Kuzin speaks of "concealed unitarism, a unitary federalism of the one-party state entailing administrative regionalism with all policy making functions centralized and upheld by the ubiquity of the party." "The Confederal Search," *supra* n. 13 at 38.

[36] Schöpflin, "Post-communism: constructing new democracies in Central Europe," 67 Int'l Affairs 235 at 237, 241 (no. 2, 1991).

Socialization of property - or - in Havel's terms, its anonymization ("everything is owned by all, in reality by no one"[37]) was pressed in Czechoslovakia further than elsewhere in Eastern Europe, particularly as part of the post-1968 'normalization'. The end effect was the drowning of individual responsibility and initiative in a labyrinth of bureaucracy, indifference or hostility to the state and its property, with, on the other hand, the expectation that the state would guarantee jobs, housing, what the Chinese call the 'iron rice bowl'. Pervasive negative egalitarianism frowned on individual success and there was no tradition in risk-taking.

The political system of the First Republic (1918-1939) was in the image of the Western European democracies. It was dominated by the interaction of five principal parties ranging from the moderately nationalist right to the social democratic left with a well entrenched communist party in opposition. The President, although limited in terms of legal authority, exerted considerable influence. This party system, already distorted in 1945, was destroyed after 1948 by the communist take-over: the parties were reduced to discredited shells in a sham 'National Front'.

The political forces emerging from the 1989 revolution in both the Czech and Slovak Republics were quite different and did not divide along the political spectrum[38] of the First Republic parties. The Civic Forum in the Czech Republic and its Slovak counterpart, Public against Violence, which I mentioned earlier, were conglomerate political movements embracing a variety of different, even contradictory currents, held together predominantly by non-material considerations. By their very nature they were destined to fragmentation, symptoms of which became manifest shortly after the first election.[39]

[37] "Znovu vybudovat stát," Lidové Noviny, June 30, 1991, at 1.

[38] See generally on Central and Eastern Europe, Schöpflin, *supra* n. 36 at 237. On the outcome of the first election of June 1990, see "Now Govern," The Economist, 16-22 June 1990, p. 53-54. The Civic Forum and Public Against Violence received nationally 46.6%, Communists 13.6%, Christian Democrats 12%, Moravian and Silesian Autonomists 5.4%, Slovak National Party 3.5% (11% in Slovakia), coalitions of other minorities 2.8% (8.6% in Slovakia), and others 16.1%.

[39] Pehe, "Czecho-Slovak Conflict Threatens State Unity," RFE/RL Research Rep. 83, Jan. 3, 1992.

This was the political setting in which the Federal Assembly and the National Councils (parliaments) of the two Republics appointed their committees charged with the revision of their respective constitutions.[40]

III. On Transferability of Institutions

Implicit in the mission of our group to provide information on Western constitutional experience was the question of the transferability of such experience. This brought to mind Montesquieu, 'the first of all comparative lawyers'. I realized that the categories of conditions listed in the preceding section in connection with the symmetric-asymmetric models coincide essentially with those distilled by Kahn-Freund from Montesquieu's categories applicable to the transferability of legal rules and institutions from one legal order to another.

Kahn-Freund envisages a continuum of transferability: the degree of transferability of a given institution - and its place on the continuum - is in inverse relationship to its closeness to the local habitat, which in turn is determined by the aggregate categories of conditions enumerated above. The closer an institution is linked to the local conditions the less transferable it is and more prone to 'rejection' in case of an attempted transfer. Successful legal transplantation, Montesquieu warned, is "*un grand-hazard*", a great coincidence which cannot by any means be taken for granted.[41]

Still, according to Kahn-Freund, the environmental and social factors have lost in importance in the 200 years since Montesquieu's time because of the assimilation of the social structures set in motion by industrialization, urbanization and communications; the political factors on the other hand have greatly gained as obstacles to transplantation because of political differentiation: communist as against non-communist governments, dictatorship as against democracy, presidential as against parliamentary systems.[42] Since the constitutional choices with which we are concerned in this essay are closest to the political conditions (the political system), the

[40] *Infra* text after note 100.

[41] Esprit des Lois, Book I, Chap. 3, cited in Kahn-Freund, "On Uses and Misuses of Comparative Law," Chorley Lecture, London School of Economics, 37 Modern L. Rev. 1 at 6 (1974).

[42] *Ibid.*

assumption is, if we follow Kahn-Freund, that the transferability of rules and institutions would be particularly difficult in that field. Yet can it be that, with the waning of the communist regimes and increasing assimilation toward more democratic systems not only in Eastern Europe but in the Third World as well,[43] the impact of political conditions may be decreasing?

This raises the question of the continuing role of environmental and socio-cultural factors as perhaps the predominant obstacles to transferability of foreign rules or institutions when it comes to drawing up constitutional documents. On one hand there is the danger that a foreign transplant will be 'rejected' as dysfunctional because incompatible with local conditions; but on the other hand ignorance of foreign patterns and a romantic, parochial conception of the specificity of local conditions may prevent functional transfers and produce naïve 'novelties'.[44]

IV. Four Threshold Issues

1. The scope and flexibility of the Constitution

A constitution being the highest in the hierarchy of norms, a crucial question facing a constitution maker is how much of the country's law should be given constitutional status and - as a corollary - what should be the modality of modifying it. Dahrendorf illustrates the dilemma:

> Whatever is raised to [the constitutional] plane is thereby removed from day-to-day struggle of normal politics...a line is drawn between rules and principles which must

[43] "As of late 1991, there are more than 110 governments, almost all represented in the United Nations, that are legally committed to permitting open, multiparty, secret ballot elections with a universal franchise. Most joined the trend in the past five years." Franck, "The Emerging Right to Democratic Governance," 86 A.J.I.L. 46 at 47 (1992), citing i.a. U.S. Dept. of State, Country Reports on Human Rights Practices for 1990. However, in a number of states, old and new, elections have brought to power old leadership or aspiring dictators.

[44] See generally, Stein, "Uses, Misuses - and Non-Uses of Comparative Law," 72 Northwestern L.R. 198 (1977).

be binding on all, and differences of view which can be fought out within these rules.[45]

President Havel told the Federal Assembly that, in his opinion,

> Our future constitutions should be utterly clear, simple and basic to the extent that our successors would not have to modify them each year by ever new constitutional laws and additions.[46]

In our first series of meetings in Salzburg and Prague, American participants recounted the experience with the sparse federal constitution and its difficult amending procedure[47] which accords the States an important voice along with Congress: a possibility of frequent amendments, James Madison argued, would promote factionalism and provide no firm basis for republican self-government.[48] In support of the proposition that more than approval by the federal legislature is necessary, the Americans quoted Madison:

> [T]he Constitution is to be founded on the assent and ratification of the people of America...this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, - the authority of the people

[45] R. Dahrendorf, Reflections on the Revolution in Europe 36-37 (Random House, New York, 1990).

[46] "Znovu vybudovat stát," Lidové Noviny, June 30, 1990, 1 at 3.

[47] The U.S. Constitution has 7 articles (the most detailed, art. I, has ten sections, art. II has eight sections). art. 5, amending procedures, requires two-thirds of both Houses of Congress or two-thirds of state legislatures calling a convention whose decisions require ratification in three-fourths of the states. There have been XXVII amendments to the Constitution.

[48] James Madison, "Letter to Thomas Jefferson (Feb. 14, 1790)," reprinted in Marvin Meyers, ed., The Mind of the Founder: Sources of the Political Thought of James Madison 230-31 (Bobbs-Merril, 1973) cited by Sunstein, "Constitutionalism and Secession," 58 Chi.L.R. 633 at 636, n. 12 (No. 2, spring 1991). Jefferson on the other hand thought that the constitution should be amended by each generation in order to ensure that the dead past would not constrain the living present. Sunstein, *ibid.* at 636.

themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.[49]

Although the Belgian and The Netherlands' constitutions may be amended by no more than a special procedure in the legislature, in most unitary European democracies a constitutional amendment, after approval by the legislature or constitutional convention, is submitted either automatically, or on request of a minority in the legislature, to ratification by a vote of all the people. This practice prevails, for instance, in France, Italy, Spain and Sweden.[50]

As for federal states, only in Germany may an amendment be adopted by a two-thirds majority of both houses of the federal legislature. In other divided-power states a referendum is either optional (Austria) or obligatory (Switzerland), or the approval of a specified majority of legislatures of the component units is necessary, following action by the federal legislature (Austria, Brazil, Canada and India in most matters, Mexico, United States).[51]

A Canadian member of the group advocated a simple, short document with special, demanding requirements for any amendment. He cited the 15 regimes or constitutions in the past 200 years of French history as a deterrent. Some of the European members of the group were reticent on this subject. Yet it soon became clear that the answers lay elsewhere.

The first Czechoslovak Constitution of 1920, fashioned after the Charter of the French Third Republic, had 124 articles,[52] the 1960-68 Constitution[53] had 151, the Civic Forum draft 160, President Havel's

[49] Federalist Papers, No. 39, (Mentor Books, The New American Library of World Literature) 243 (1961).

[50] France: art. 89 of the Constitution of 1958. Italy: arts. 138, 139 of the 1947 Constitution. Spain: arts. 166-169 of the 1978 Constitution. Sweden: art. 15 of the 1975 Constitution.

[51] Germany: Grundgesetz (Basic Law) art. 79, 146 (on new constitutions); Austria: art. 44 of the 1929 Constitution; Switzerland: art. 118-123 of the Constitution; Canada: art. 38-49 Const. Act. of 1867; United States, see *supra* n. 47. India: Part XXI art. 368. Mexico: art. 135. Brazil: art. 60; Australia: art. 128.

[52] The Constitution of the Czechoslovak Republic of June 9, 1948, 150/1948 Sb., translated in Constitutions of Nations 689 (A.J. Peaslee ed., 2d ed., 1956), also published by Czechoslovak Ministry of Information, transl. by F.O. Stein (Orbis, Prague, 1948).

[53] Const. Law 143/1968 Sb.

original draft 180, the Czech Republic working draft 195. For a constitutional amendment, the 1968 Constitution requires - in addition to an absolute three fifths' majority in the lower chamber - a three fifths' majority of the Czech and Slovak National groups in the upper chamber of the Federal Assembly.[54]

It became quite clear to us that as regards the scope of the Constitution, the Czechs and Slovaks will follow their own tradition which they share with most other states and which mirrors the turbulent history of the European Continent marked by frequent violent changes. For one thing, although basic decisions are made by politicians, constitution making is "the hour of lawyers"[55] and the lawyers' way is paved with precedents. More importantly, the lack of trust on the part of the Slovaks fuels the tendency to spell out in detail the laboriously achieved consensus, far in excess of the minimum scaffolding of basic rights and institutions deemed necessary for a system based on constitutionalism and democracy. Finally, in the present circumstances individual constitution makers are in no better position than anyone else to foresee the future role they and the groups they represent will be able to play in the still unformed political system. This uncertainty is an added motive for including matters that would normally be left to the political process. Moreover, unlike the United States, the Czechoslovak tradition follows the Continental pattern in that it does not rely on the construction of constitutional documents as the principal method of adapting them to changed requirements of the society. As one Czech expressed it, the United States Constitution can not serve as a model because the general conditions at the time of its drafting "were much simpler"; in view of the need to accommodate the power claims of the two Republics the new Constitution must be more detailed and flexible. As for the call for Havel's "utter clarity", it is endemic to contentious negotiations such as those between the Czechs and Slovaks that a consensus is often reached only at the price of ambiguity.[56]

Evidently, with respect to both the content of the constitution and its flexibility, environmental factors (demographic asymmetry, legal tradition,

[54] See art. 41 of the 1968 Constitution retained in the full amended text 103/1991 Sb. To similar effect, Aug. 1991 fed. Draft, Chap. 4, art. 12(3), variant I.

[55] Dahrendorf, *supra* n. 45 at 86.

[56] See e.g. art. 6 of the Constitutional Law of Jan. 9, 1991, instituting the Charter of Fundamental Rights and Freedoms, 23/1991 Sb.: "Human life deserves to be protected already before birth."

history), as well as political conditions (individual and group attitudes and interests and the political system) prevail over both President Havel's voice and foreign advice.

It appeared equally probable at the time of our early meetings that the precedent of an amendment procedure not requiring separate ratification by the two Republic Parliaments would likewise be continued, regardless of what appears to be the trend in modern European constitutions. In short order, however, this expectation has proved unwarranted, due to unforeseen developments which I shall elucidate later on.

* * *

A variety of thoughts came to me as we were driving from the meeting through the gray streets of Prague in a steady, slow, early spring drizzle - a 'female rain' in Navajo parlance. The United States Constitution - the historian Gordon S. Wood told me once - broke down after seventy years, as did the Soviet Union's; is there magic in the number 70? The ominous constitutional crisis in the 1930ies depression time was due in large part to the glaringly obsolete allocation of powers between the federation and the States in the federal Constitution. Applying the outdated Constitution, the Supreme Court struck down vital social and economic federal legislation. Why did the President choose the controversial - and ultimately disastrous - attempt at 'packing the court' rather than the natural course of invoking the amending procedure? Although assured of the necessary support for an amendment in Congress, was he concerned that the effort to obtain approval in three-fourths of the State legislatures was too aleatory or, perhaps more likely, too time-consuming to meet the demands of the day? In the end, the Court, with its membership changed through normal attrition, upheld the broadest federal power by an interpretation of the commerce clause which - in the minds of Continental jurists - amounted to "*une expansion demesurée*," "susceptible of englobing any aspect whatever of state activity."[57] In fact, eventually even federal civil rights legislation was ruled constitutional on the basis of the commerce clause.[58]

[57] R. Dehousse, Fédéralisme et Relations internationales, *supra* n. 9 at 23.

[58] Katzenbach v. McClung, 379 U.S. 294 (1964).

2. Constitution as a symbol

The differences in the perception of the constitution go to its function in the society as well. In the United States, the Americans pointed out, people freely criticize the President, Congress, the Supreme Court, they even burn the flag but not (at any rate since the end of the Civil War) the Constitution, a unifying symbol of the country. The economic interpretation of the Constitution, advanced by some historians who view it as an artifact designed to maximize national interests of the property-holding class, may have affected 'the public philosophy', but it has not diminished the broad attachment to that document; most Americans remain convinced with Prime Minister Gladstone that the Constitution is "the most wonderful work ever struck off at a given time by the brain and purpose of man."[59] One may say that the country is held together "not by common ancestry or ethnic ties and memories, but by the Constitution and a related system of beliefs."

The German federal Basic Law of 1948 has been the foundation of 'constitutional patriotism' which, over the last four decades, has superseded - one would hope - the mischievous features of a nationalist ideology.

The Czechoslovak liberal, pluralist tradition had its origin in the Constitution of 1920.[60] That charter, however, was turned into a scrap of paper after only nineteen years when the President, acting under duress but nevertheless in flagrant disregard of the Constitution, surrendered the country to Germany.

The brief effort to restore the constitutional tradition after the Second World War ended in a communist takeover and the President's resignation due to his refusal to sign the communist-influenced 1948 Constitution.[61] That Constitution in fact was not applied. The 1960-68 Constitution, a communist creation in the Soviet image, became again in most respects a scrap of paper. History has not allowed the Czechs and Slovaks to develop a lasting sense of loyalty to, and identification with, the fundamental document. The problem is, a Slovak judge sighed, how to make the new constitution a document people will view "as their own".

[59] P. Smith, The Shaping of America: A People's History of the Young Republic, vol. 3, 94 (McGraw-Hill, New York, 1980).

[60] English translation, the Constitution of the Czecho-Slovak republic, 179 Int'l. Conciliation (Oct. 1922).

[61] The Constitution of the Czechoslovak Republic of 1948, *supra* n. 52.

Since hope springs eternal one must trust that, in this instance, past is not prologue and a new Constitution will endure where its predecessors have failed. Of all the environmental factors, the geography of the country located between the German and Russian empires has been the determinant condition of its constitutional history. That condition, alas, persists, even though the spots of the leopard may have changed.

3. On secession and referendum

The third threshold issue of existential weight - it so appeared at any rate in the early stage of constitution writing - was whether the new constitution should specifically recognize the right of the two component Republics to secede from the common state.

To the amazement of the entire international group, the Civic Forum draft, and for that matter all the subsequent drafts that have come to our attention, contained a text affirming that right in one form or another.[62] This despite the fact that President Havel told the Parliament that he saw no purpose in grounding the right to secede in the new Constitution.[63] For Americans, a secession clause signified the very opposite of the 'perpetual union' contemplated by Madison and affirmed by Lincoln who declared that "[N]o government proper ever had a provision in its organic law for its own termination."[64]

In his study on Constitutionalism and Secession, Professor Sunstein concludes:

> To place such a right [to secede] in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create

[62] Civic Forum Draft, 1 Feb. 1990, Sec. 5(2); the 1990 federal draft art. 3(3); the Slovak Rep. working draft Chap. 5, art. 2(2); on the Aug. 1991 federal draft, see *infra* text at n. 72.

[63] Quoted in Z. Jičínský, "Problémy dvoučlenné federace," Lidové Noviny, Oct. 25, 1990, no. 198.

[64] First Inaugural Address (Mar. 4, 1861), reprinted in T. Harry Williams (ed.), Selected Writings and Speeches of Abraham Lincoln 117 (Packard and Company 1943) ("Lincoln Writings"). The Supreme Court has made it clear that a state of the Union has no right to secede since its acceptance of the federal Constitution constituted a waiver of that right. Texas v. White, 74 US 700, 724-26 (1869).

> dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance. Constitutionalism, embodying as it does a set of precommitment strategies, is frequently directed against risks of precisely this sort. Political or moral claims for secession are frequently powerful, but they do not justify constitutional recognition of a secession right...In Eastern Europe, where strong nationalist passions persist and threaten to infect daily politics if given an explicit constitutional home, a right to secede would be especially damaging to the prospects for democratic government. All this suggests a strong presumption against a constitutional right to secede.[65]

In the light of subsequent developments this eloquent exhortation evokes sentiments of nostalgia. Yet, in what seems a contradiction, Sunstein adds that "under certain conditions" (he mentions Yugoslavia, the Soviet Union and - prophetically - Czechoslovakia) the inclusion of a secession clause may serve as an incentive to join in the first place with "few deleterious effects" and "may prevent serious harms."[66]

In our first series of meetings, the international group argued emphatically against a secession clause: there is no such clause in the 1968 Constitution[67] and no existing federal constitution contains any such provision, the U.S.S.R. Constitution (for particular historical reasons), being the only exception.[68] Even subfederal, functional entities such as the United Nations or the European Community do not sanction withdrawal.

The reaction to our arguments on the Slovak side was one of surprise: to them this was a non-issue, a closed matter beyond debate. The Czech members responded with an air of resignation: that course was the only way - "a calvary," "a route through Balkanization" - toward a new - and, one would hope, lasting - relationship. The Czechs, it was said, wanted

[65] Sunstein, Constitutionalism and Secession, 58 Chicago L.R. 633, 634-35, 654 (No. 2, Spring 1991).

[66] *Ibid.* at 654.

[67] But the preamble speaks of the "inalienable right of self-determination even to the point of separation."

[68] The Soviet constitutions referred to the 1922 treaty in which the right to secede was recognized; it was intended by Lenin as an inducement particularly for the Asian Republics to join the Union. See generally, Ludwikowski, "Searching for a New Constitutional Model for East-Central Europe," 17 Syracuse Int'l & Comp. L. 91 at 104ff (1991). On the efforts to read a right of secession into the Yugoslav Federal Constituiton, see Bagwell, "Yugoslavian Constitutional Questions: Self-determination and Secession of Member Republics," 21 Ga. J. Int'l & Comp. L. 489, 508-514 (1991).

marriage, the Slovaks a contract. Some of us felt that the idea of providing for dissolution in order to avoid it was a paradox worthy of Hašek,[69] Kafka - and the playwright of the absurd, Václav Havel. Yet - as the reality unfolded - it became apparent that the issue was indeed foreclosed.

Instead, the debate turned on the conditions under which the constitutional right of secession could be invoked and the complex problem of 'fair compensation' in case of a secession. Federal states have state assets and liabilities including transportation and communication systems, cash and bank deposits, foreign exchange reserves, armed forces, physical facilities of all kinds, domestic and foreign debts, rights and obligations under domestic contracts and international agreements and memberships in regional and international organizations that would have to be apportioned.[70] With one exception, to which I shall return, the various drafts relegated this particular thicket to later constitutional legislation or popular vote.[71]

The complexity of the secession problem is accentuated by the unique situation in a two-member federation such as the Czech and Slovak state: unlike in a multi-member entity, a secession in this situation means the end of the federal state with direct consequences in international law and relations. Curiously, none of the authors writing on the subject of secession took notice of this factor.

In the end, urged on by President Havel, the Federal Assembly, in July 1991, adopted a constitutional law[72] which makes possible a referendum on basic constitutional issues and, specifically, on any proposal for a secession advanced by one or the other Republic. The subsequent federal draft would expand the scope of the referendum and move a step further in regulating the consequences of a separation. In that contingency, it would require a division of federally-owned realty according to its location, and it would allocate reserves and other movables to the Republics according

[69] Hašek is the creator of the immortal good soldier Svejk, the bane of the Astro-Hungarian imperial bureaucracy and army.

[70] Lloyd N. Cutler, "The Dilemma of Secession," The Washington Post, July 21, 1991, p. C7.

[71] C.F. draft Sec. 5(2); Slovak Rep. working draft Chap. 1, art. 7(2); the limited exception is the 1991 federal draft.

[72] Const. Law of 18 July 1991, 327/1991 Sb.

to their respective populations.[73] In the event of an all-state vote to terminate the federation, both Republics would become fully sovereign states, but nothing is said about the succession into treaties and other international obligations assumed by the Federation. If only one of the Republics voted to secede, the international personality of the federal state and its membership in international organizations would pass to the other Republic 'which did not decide' to secede.

If it is next to unprecedented to provide for a secession in a national constitution it is even more extraordinary to clothe its consequences with a constitutional mantle. Yet once an opportunity for a division is offered, it may prove unavoidable to agree in advance on the modalities as well - and in view of the absence of trust - to entrench the agreement in the Constitution.

I shall return to the controversy surrounding President Havel's proposals for a referendum on the continuation of the common state in the broader context of the subsequent negotiations between the Czechs and the Slovaks. Suffice it to say that under the present state of the law a secession would be constitutional if accomplished in conformity with the July 1991 law. The question whether or not to invoke a constitutional right of secession evidently becomes one of policy and morality. Since vocal groups in Slovakia advocate independence, one might speculate whether a secession in the present situation could be justified by some general standard.

In contrast to the abundance of writings on revolution, civil disobedience - and self-determination - there appears to be very little on a normative theory of secession.[74] Buchanan postulates two categories of justification: first, injustice based on a historical grievance or discriminatory distribution and second, the distinctive conception of a community or a particular conception of the religious life.[75]

If by historical grievance is meant a wrong at the creation of the common state, then this justification would clearly not apply since, in 1918, the handful of Slovak leaders who participated in the revolution against the Austro-Hungarian empire worked closely with the Czechs and, in view of

[73] Fed. draft of Aug. 1991, Third Part, Second variant, art. 8.

[74] A. Buchanan, "Toward a Theory of Secession," 101 Ethics 322 at 323 (Jan. 1991). He cites Lea Brilmayer, Harry Beran, Richard Arheson, William A. Galston and Bruce Ackerman. See also Sunstein, *supra* note 48 at 643ff. See Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," 16 Yale J'l Int'l L. 177 (1991).

[75] Buchanan, *ibid.*

the conditions in Slovakia at the time, had little, if any, option other than joining in the common state.[76] It has been said, however, with some justification, that after the founding of the unitary Republic, Presidents Masaryk and Beneš construed the idea of a Czechoslovak nation not as a way toward gradual integration of two distinct nationalities in a common structure but as a denial of their national differences.[77]

In answer to a Slovak claim of discriminatory distribution, the Czechs point to major and sustained subsidies of the Slovak economy from Czech resources. The Slovaks on the other hand, question the budgetary data on the ground that the Czechs draw an unfair advantage from the impact of the taxation system since most of the Slovak products - raw material and semi-finished goods - are taxed for the added value in the Czech Republic.[78] Until late 1991 the debate was singularly devoid of any relevant data, on the Czech side perhaps because of the desire to avoid adding to the tension, on the Slovak side because of the predominance of emotion.

The assertion of 'a distinctive conception of a community' has been the principal Slovak motivation in the constitutional negotiations. It could, I assume, be supported by the evolving, albeit still ambiguous, principle or right of self-determination since the Slovaks and Czechs may be considered as separate 'peoples' living in distinct territories. The unresolved question is how to reconcile the right of self-determination with the well established rights of a state to territorial integrity in case of a unilaterally asserted claim to secession in disregard of the constitution.[79] I wonder, in any case,

[76] See F. Peroutka, *supra* n. 32.

[77] K. Adamová, "K dalšímu výzkumu české státnosti," 130 Právník 160 at 161 (no. 2, 1991).

[78] In the 1991 Federal Budget the Czech Republic carried 93%, the Slovak Republic 7% of federal expenditures. By the population key the Slovak contribution should be 33%. Public Lecture by the Ambassador of the Czech and Slovak Republic, R. Klímová, Ann Arbor, Michigan, Apr. 6, 1992.

[79] Buchanan, *supra* n. 74 at 328-29; Brillmayer, "Consent, Contract, and Territory," 74 Minn.L.Rev. 1 (1989-1990). How does one reconcile the right of "selfdetermination of peoples" (U.N. Charter art. 1, art. 55, Int'l Covenant on Civil and Political Rights art. 1 (1)) with the right of a sovereign state to its territorial integrity (U.N. Charter art. 2(4), Helsinki Final Act and other documents)? When it comes to a definition of "people," the scholarly discussion inevitably runs in the sand. See e.g. Cutler, "The Internationalization of Human Rights," 1990 U. Ill. L. Rev. 575 at 589-591; Cassese in T. Buergenthal (ed.), Human Rights, International Law and the Helsinki Accord 83 at 101 (1977). At any rate this question becomes acute in the case of a unilaterally asserted

whether - despite the demographic and historic asymmetries mentioned earlier, and leaving aside the very relevant considerations of the viability and risks of a separate Slovak state[80] - such an assertion can serve as a *justified* ground for termination of the common state.

4. Constitution and society

The underlying theme of the discussion in our meetings was the fundamental issue of the nature of the new society and state. The question was posed to the Czechs and Slovaks: now that you have eliminated one ideology what will you put in its place?

The answer was articulated again by President Havel in his address to the Federal Parliament:

> "No official ideology or political doctrine even if it were a thousand times superior to the ideology of the system we have overthrown. The foundations of the state and its entire policy should be inspired by a single basic idea. That is the idea of respect of the unique human being, recognition of human rights in the broadest sense, including social and economic rights, and respect for environmental, material and cultural legacy of our forebears"... modern democratic state of democratic pluralism balancing "mutual relationships of legislative, executive and judicial power" and a new balance "between local self-administration and state administration...on all levels and in all societal areas...changing totalitarian centralized anti-economy to normally functioning market economy..."[81]

Yet, I asked myself, can the new state of Havel's image be sustained by a society left in the wake of the old regime? Earlier in this essay I speculated on the continuing impact of the totalitarian regime "which

claim and threat of secession *in disregard of the constitution*. For an analysis showing that self-determination has not been interpreted to include the right of secession, see Morphet, "Article 1 of the Human Rights Covenants: Its Development and Current Significance" in D. M. Hill (ed.), Human Rights and Foreign Policy 67 at 83-86 (1989). See also Emerson, "Self-Determination," 65 Am. J. Int'l L. 459 at 464 (1971); Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments," 38 Int'l & Comp. L. Q. 867 (1989); on self-Determination generally, see Thürer, "Self-determination" in R. Bernhardt (ed.), Encyclopedia of Public International Law, Instal. 8, 470 (North-Holland Publ. Co., Amsterdam-New York, 1985).

[80] Martin, "Slovakia, Calculating the Cost of Independence," RFE/RL Research Rep., Mar. 20, 1992.

[81] Havel, *supra* n. 37 at 1, 3.

succeeded in a mere forty years to disrupt the fragile gossamer of...relationships that had been formed by experiences of entire generations."[82]

Only gradually, and with mounting dismay, have I apprehended the "giant discrepancy between the institutions of the wished-for political democracy and the state of the civil society" which was forced into "an oriental mode."[83]

Democracy, still according to Havel, is:

> more than a mere compound of systemic arrangements, formal rules of the game or mere organizational tricks...[It is] an outward expression of something very internal that no generation of computers or political science discoveries is able to fashion. Democracy is an artifact of a human being who has internalized his or her inalienable human rights and human responsibility and who respects human rights and believes in human responsibility of others.[84]

Democracy, Schöpflin would add, demands self-limitation, bargaining and compromise which the post-communist societies cannot be expected to acquire overnight, for they can only result from years of practice.[85]

Havel felt that the germs of basic freedoms and pluralism have latently persisted in the society and in fact they quickly surfaced during the first free election campaign. Returning to Prague in 1991, I had the feeling that such freedoms had already become a matter of course to be taken for granted, even though the brief post-revolutionary identification of the people with the new government has again reverted to the 'we and they' attitude toward the politicians.[86]

However, the transformation of the economy's basic structure with the consequent serious hardships of a transition has posed an unprecedented challenge to the political process generally and, of course, to the constitution-makers. They have been faced with the task of writing a basic document for a society greatly different from Havel's vision and to do so

[82] Havel, *supra* n. 37.

[83] Tóth cited in Kulcár, "Právní kultura, Právní Stát a Rule of Law," etc., 130 Právník 193 at 203 (1991).

[84] Havel, *supra* n. 37 at 1.

[85] Schöpflin, *supra* n. 36 at 236.

[86] See generally Nelson, "Europe's Unstable East," 1991 Foreign Policy 137 at 141.

at a time when the new society is at best only dimly discernible. At an early stage, the negotiations for a new constitution, difficult as they turned out to be owing to the asymmetries discussed earlier became complicated by disagreements over the economic reform process. The work of the Czechs and Slovaks has been perhaps more demanding than that undertaken by the founding fathers of the United States or even by the founders of the new democracies built on the ruins of the dictatorships at the end of the Second World War.

V. A Federation?

1. Federalism as an improvisation: an interlude

On democracy and republicanism the Founding Fathers of the American Republic could mine rich European thought. As regards federalism, however, unlike their Czech and Slovak counterparts who have had laid before them extensive Western theory and practice, the eighteenth century Americans had no working models to turn to, and, in drafting the Articles of Confederation, they showed little concern for the theoretical dimension of the task.[87] Federalism "was an improvisation which was later promoted into a political theory."[88]

Until 1937, the enumerated federal powers were construed as limited to specific subject matters as is presently contemplated for a Czech and Slovak constitution. Thereafter, however, the division between federal and state power was held to depend not on subject matter but - except for a short-lived doctrine of protection of states' rights based on structural requirements of state autonomy[89] - on the working of the federal political process only. As a result, Congress's power over the national economy has been for all practical purposes viewed as plenary, subject to political constraints only; with the changes in membership of the Supreme Court,

[87] Rakove, "The First Phases of American Federalism," in M. Tushnet (ed.), *supra* n. 29 at 4.

[88] Roche, "The Founding Fathers: A Reform Caucus in Action," 55 Am.Pol.Sci.Rev. 799 at 804 (1961).

[89] National League of Cities v. Usery, 426 U.S. 833 (1976) expressly overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). See L. Tribe, American Constitutional Law 386-97 (2nd ed.) (Mineola, N.Y., 1988).

however, the new majority may restore the earlier limited exception - and thus 'the improvisation' continues.

Historically, Americans have thought of federalism primarily as a form of separation of power along the vertical axis, that is in the *negative* sense, as a form of government designed to inhibit concentration of power at the center. This appears to be also the goal of the Czech and Slovak constitution makers who favor a common state. For them, however, federalism has the additional *positive* function of enabling the two peoples to live together despite the conditions of asymmetry.

2. On theory of constitution-making

To test the ongoing process of making a Czech and Slovak constitution against a general theory, I would need sufficient empirical data that at this time are not available to me, or for that matter to anyone else. Nevertheless, as I shall illustrate, my response would be that a theory based on an analysis of the bargaining process in a contractual setting would be most germane in the given situation.[90]

The dominant issue - the contraposition of interests between the Czech and Slovak sides appears simpler than was, for instance, the division in 1787 Philadelphia between the Northern and Southern states and between the large and small states. The parties, the 'Federation' and the two Republics, speaking through the agents of their respective governments and parliaments, as is the case in any contractual negotiations, bring to the discussions a mixture of complementary and opposed interests on the entire spectrum of issues in question. There are, of course, not only institutional but also personal and group interests of the individual elite actors. For this, if not for other reasons one may think here of bilateral negotiations for a contract, not in the sense of classic, primordial social contract theorists such as Hobbes, Locke, and Rousseau, but as strategic bargaining over the allocation of expected benefits and costs focussed "on the actual conditions on which real contracts are negotiated,"[91] and leading to an agreement

[90] I rely here primarily on Heckathorn and Maser, "Bargaining and Constitutional Contracts," 31 Am.J'l Polit.Science 142 (no. 1, 1987); Jillson and Eubanks, "The Political Structure of Constitution Making: The Federal Convention of 1787," 28 Am.J'l. Polit. Science 435 (1984); J. Buchanan, the Limits of Liberty (Chicago Univ. Press, Chicago, 1975).

[91] Heckathorn and Maser, *ibid.* at 144 and *passim.*

ultimately embodied in the constitution. The bargaining techniques range from appeals to common good, ethical and rationalist principles, to efforts to squeeze concessions out of the other side while offering only minimal concessions and finally warnings and threats.[92]

The appealing contractual analogy, however, must not be allowed to conceal the specificity of the situation where a dispute goes to the very existence of a political community and may ultimately not be susceptible to settlement by "split[ting] the difference."[93] A minimum sense of commonality is a prerequisite background condition for the success of any negotiating process.

3. The setting

At one of our early meetings in the spring of 1990, a Canadian member addressed the Czechs and Slovaks with a threshold proposition, which on its face was quite obvious, and with a question, which was shortly to turn out to be of fundamental importance. The proposition was that the international group sees itself in a position of advisor and expects the client to pose the issues; and the question was: "Do you want a common state composed of one nation or of two nations?" The Swiss member recalled his country's concept of one nation with four 'nationalities'.

Yet both the proposition and the existential question received short shrift at that juncture because the entire international group, with the Americans at the forefront, unanimously pleaded for a strong federation - a posture taken previously in the papers prepared for the meeting: only a federation with sufficient power at the center would be able to accomplish the unprecedented restructuring of the economy internally and, externally, the integration of the country into the European and international political and economic systems. Internally, a federation, to be viable, must have a mechanism for avoiding and dissolving blockages in the political process. In the international arena, it must speak with a single voice. If the two Republics are to play a role in foreign affairs, they must do so in full conformity with the federally set foreign policy as is the case in Austria, Germany and Switzerland, and the scope of their authority, the federal

[92] *Ibid* at 159. See also Elster, "Constitutionalism in Eastern Europe: An Introduction," 58 Chi.L.Rev. 447 at 449 (No. 2, 1991).

[93] Rustow, *supra* n. 8 at 359.

control and international responsibility must be clearly defined for the benefit of the foreign partners.[94]

A leading staff member of the Commission of the European Community joined us in Bratislava to reinforce our view. He explained that any composite state which aspires to membership in the Community must show that the central authority is strong enough to ensure full and prompt compliance with Community legislation and judgements of the Community judiciary throughout the territory of the common state.[95]

We were taken aback by the intensity of the negative response to this plea not only on the part of the Slovaks (we should have expected that), but by some - though by no means all - on the Czech side as well. The prime target of a Czech academic was the communist-controlled federal bureaucracy, 'seventeen ministries with some 2000 staff each', the embodiment and the bane of mischievous centralization. For the Slovaks Prague was dominant not only because it was 'Czech' - and thus by definition in conflict with Slovak national aspirations - but also because it was the center of communist power.[96] (The fact that some of the most powerful actors at the center were Slovak communists was mentioned in private conversation only.)

The drafters of the Articles of Confederation of the United States reacted similarly against the overbearing monarch and his minions in America when they reached the fatal decision to dispense altogether with any central executive power, an error remedied in the Federal Constitution. Constitutions, it seems, are written with an eye on - and against - the past that is known rather than on the future that is a mystery.

After our meetings in Bratislava in June 1991, the chairman of the Slovak National Council (Parliament) Jozef Prokeš expressed his "immense disappointment" over the activity of our group: "We view it" - he declared in Bratislava - "as an effort to support a certain wing in the Czech and Slovak Federal Republic which seeks a strong central power and the idea of a single Czecho-Slovak nation...the foreign participants proceed from erroneous assumptions when they compare Czecho-Slovakia as a federation with Germany, Austria and the United States. They forget that these

[94] Stein, "Zahraniční věci v moderní ústavě," 130 Právník 33 and 576 (1991). This paper was prepared for the meetings with the Czech and Slovak authorities.

[95] Director General Claus-Dieter Ehlermann quoted in Národná Obroda, Bratislava, 24 June 1991, p. 1.

[96] Kusin, *supra* n. 27 at 11.

countries are one-nation federations and their central organs act abroad in the name of that nation. In Czecho-Slovakia, however, live two different nations and one of them is being denied the right to speak in its own name. The Czecho-Slovak Federal Republic should be compared to Canada with all the consequences flowing from it."[97]

4. Actors and process

a. Principal institutions

The power to amend the Constitution of the Czech and Slovak Federative Republic or to adopt a new Constitution is vested in the Federal Assembly. That body consists of the Chamber of the People, composed of 150 deputies elected directly throughout the entire country; and of the Chamber of Nations of 150 members, half of whom are elected directly from the Czech Republic and half from the Slovak Republic.[98] A new constitution or a constitutional amendment (in the form of a so-called 'constitutional law') requires approval by a three fifth's majority of all deputies in the Chamber of the People as well as the consent by three fifths of all deputies in both halves of the Chamber of Nations.[99]

As in other parliamentary systems, executive power is divided between the federal government and the President (the 'dual executive' system). The federal government holds most of the executive power of the Federation. The President's legal powers are limited, but, following the tradition of strong personalities in the First Republic, his political influence is considerable.[100] The Republics have their own directly elected parliaments, 'the National Councils', as well as Governments.[101]

[97] Národná Obroda, *supra* n. 95. Another deputy of the Slovak National Council was critical of the current federation; he saw the federation as a process through which Czecho-Slovakia as two nation-republics enters into a community and at the same time this community differentiates itself. *Ibid.*

[98] Const. Law 103/1991, Sbírka zákonů České a Slovenské Federativní Republiky (Sb.), arts. 29-31, consolidated text and containing a complete version of Const. Law 143/1968 as amended through Jan. 9, 1991.

[99] *Ibid.* art. 41.

[100] On the President's powers *ibid.* art. 61. On the Federal Government, *ibid.* arts. 66-85.

[101] *Ibid.* arts. 102-139a.

The 'Presidia' of the Federal Assembly and of the two National Councils are entrusted with significant functions.[102]

The responsibility for carrying forward the constitution making process has been in the hands of the leading political personalities: the President, the chairmen and vice-chairmen of the three parliamentary and executive organs and - last but not least - the leaders of the political parties represented in the three governments. The roles of the individuals and of the institutions, however, have varied greatly in the successive phases of the negotiations.

b. The process

The original idea, closest to the Czech perception, was for the federal Constitution to be drafted first, with the Republic constitutions to follow. The Federal Assembly established a 'Committee of Deputies for the Preparation of a Proposal for a New Constitution' (Committee of Deputies) composed of 14 members of the Federal Assembly (seven Czechs, seven Slovaks) and ten deputies each from the two Republic National Councils, reflecting the entire political spectrum. The chairmen and other members of the Presidia of the three legislatures were included. The chairmen of the three legislatures alternate in presiding over the sessions.[103]

To assist the Committee of Deputies, the presidium of the Federal Assembly appointed a Committee of Experts - again on a parity basis - composed of eighteen members selected on the basis of their special knowledge or experience. A majority was drawn from university law faculties, but federal and Republic deputies and officials were also included.[104]

[102] *Ibid.* arts. 32(3), 33(2), 45(3), 49(3), 51, 52, 54, 56-59 (on the Federal Presidium); Art. 104(2)-(3), 111(3), 116(3), 119-122 (on Presidia of the two National Councils).

[103] At the time of the creation of the Committee of Deputies, the Chairman of the Federal Assembly was A. Dubček (Slovak), the Chairman of the Czech National Council was D. Burešová, and the Chairman of the Slovak National Council was F. Mikloško.

[104] The original chairman, Prof. Dr. Marián Posluch, formerly a member of the Federal Assembly from Slovakia, head chair of constitutional law at the Komenského University in Bratislava, and Slovak Minister of Justice, was appointed to the Federal Constitutional Court on Jan. 31, 1992. The deputy chairman is Prof. Dr. Jiří Boguszak, advisor at the Office of the Federal Government and presently again member of the Charles University Law Faculty in Prague.

In the course of 1991, for example, the plenary Committee of Experts met not less than eleven times in one day sessions, but twice for an entire week. As a rule, working drafts, texts of foreign constitutions, literature and specialized studies are circulated in advance of the meetings. The proceeding centers usually on a chapter of the constitution, and the discussion results in a draft containing several variants and sub-variants. This text is submitted with an explanatory report to the Committee of Deputies, which returns it with its comments and suggestions for modification and additions. Special questions are dealt with by groups of more limited membership drawn from the Committee of Experts, some delegated to elaborate a concrete variant.

During the same year, the plenary Committee of Deputies met only five times, always with the participation of the chairman or deputy chairman of the Committee of Experts; as a rule a representative of the President's Chancery is also in attendance. The deputies discuss the materials submitted by the experts.

In November 1991, a part of the Committee of Deputies working with some experts produced a formal proposal for the revision of the federal executive and legislative institutions, which was subsequently submitted by fourteen deputies to the Federal Assembly;[105] it met again twice in January 1992 to consider a modified text worked out by a group drawn from the Committee of Experts.[106] The explanatory report attached to the original proposal is replete with references to constitutions of Western European states, indicating that the experts, in drafting specific provisions, took into account not only the existing and prior Czechoslovak constitutional texts but also the most recent constitutions of Greece, Spain and Portugal, as well as the German, Italian, Dutch, Austrian, French and - marginally - United States constitutions.

Surprisingly, in the extensive federal apparatus in Prague there is no Ministry of Justice that would prepare or coordinate the preparation of legal texts. To fill the gap, the Deputy Prime Minister in charge of legislation organized a Legislative Council and a number of working groups drawn from personnel of various ministries and outside experts to assist not only in constitution-writing but also in drafting extensive revisions of the codes and new federal legislation. Only in 1991 was a special institution for legislation established within the office of the Prime Minister.

[105] Fed. Ass. Print FS 1071.

[106] *Ibid.* 1071/A.

Like the Federal Assembly, each of the Republic National Councils established its own constitutional committees. A draft of a Slovak Republic Constitution was prepared under the leadership of Professor Karol Plank, President of the Slovak Supreme Court with some forty collaborators in - it is said - a month's time. A Czech text, allegedly kept secret, also surfaced, albeit in an incomplete form.

Although the membership of the federal and Republic committees overlaps to a certain extent, there have been no meetings or formal contacts between these committees on a tripartite basis. Any consultations that have taken place have occurred only inside political parties most of which are organized on both the Czech and Slovak side at the federal and Republic levels. President Havel deplored the inadequate cooperation and - with a view to assuring coherence among the three constitutional charters - asked the three legislatures to establish 'a small group of the best Czech and Slovak brains' to prepare a draft federal text in close cooperation with the drafters of the Republic Constitutions.[107] In the changing political atmosphere the President's call was ignored. Even though the June 1990 elections confirmed the Civic Forum and its Slovak counterpart Public Against Violence as the strongest groups in their respective lands, the rising Slovak nationalism had a direct impact on the constitutional discourse.

VI. The Negotiations

1. The first phase

The 'hyphen war' in the Federal Assembly over the new name of the country was the culmination of the initial round of the Slovak struggle for new powers.[108] A termination of the common state surfaced as an actual option in a strident exchange between Czech and Slovak intellectuals which appeared in two leading periodicals.[109] With several thousand Slovaks

[107] "Znovu vybudovat stát," Lidové Noviny, June 30, 1991, 1 at 2.

[108] The hyphen in question appeared in the name of the Czecho-Slovak Federal Republic, which was changed after a bitter debate to Czech and Slovak Federative Republic. Obrman and Pehe, "Difficult Power-sharing Talks," Report on Eastern Europe, Dec. 7, 1990, at 5, 6, 8; throughout this section I draw on this article and also on Martin, Relations between the Czechs and the Slovaks, *ibid.* Sept. 7, 1990, at 1-6.

[109] Martin, *ibid.* at 1-2.

demonstrating in Bratislava for independence, Dr. Ján Čarnogurský, then a federal Deputy Prime Minister and leader of the Christian Democratic Party, at the time the second largest political group in Slovakia, spoke for the first time of the gradual dissolution of the Czechoslovak federation with a view to a separate entry of the two states into the European Community.[110]

On the Czech side it was the Czech Prime Minister Petr Pithart who signalled a reversal in the constitution making process: it will now be for the two Republican governments to produce a list of those powers the Republics are willing to cede to the federation.[111]

Although allocation of powers emerged as the central issue, the Committee of Deputies in principle avoided it, expecting the National Councils of the Republics to produce a common stand. It was said that the Committee served mainly as a sounding board "for the monologues of the different political factions." The President, having lost patience, submitted his own draft of the complete new constitution but no one seemed to take note of it.

As early as in summer 1990, it became clear that the Slovaks were not prepared to wait for the solution of the power distribution issue until consensus was reached on the entire new constitution. It was therefore agreed to settle the issue promptly by preparing a separate constitutional law, to be effective, as the Slovaks demanded, on January 1, 1991. That law would amend the division of powers in the existing 1968 federal Constitution,[112] pending adoption of the new constitution. At the same time, at the urging of the federal Deputy Prime Minister Dr. Rychetský, a deadline was set for the adoption of the federal constitution and the Republic constitutions, one year and two years respectively from the date of the June 1990 elections. I might mention parenthetically that - after some

[110] Pehe, "Growing Slovak Demands Seen as Threat to Federation," 2 Report on Eastern Europe, no. 12, May 23, 1991, 1 at 2 and *passim*. The Slovak National Party, the only group with a parliamentary representation advocating independence polled about 12% of votes in the first federal election and 14% in the election to the Slovak parliament in June 1990. A number of small Slovak parties and groups organized before or in the wake of the elections took a similar stance. Other intellectual and social groups agitated for separation, assisted by Slovak emigrés. Kusin, "Czechs and Slovaks: The Road to the Current Debate," Report on Eastern Europe, Oct. 5, 1990, 4 at 5.

[111] Obrman and Pehe, Dec. 7, 1990, *supra* n. 108 at 6.

[112] Const. Law 143/1968 Sb., translated in Constitutions of the Countries of the World (A.P. Blaustein and G.H. Flanz eds.) (Czechoslovakia by G.H. Flanz; out of print, 1974).

internal sparring within the Civic Forum - a corresponding decision was taken to proceed similarly by a special constitutional law with the formulation of a Bill of Rights, an undertaking that proved surprisingly successful and relatively uncontroversial.[113]

2. The second phase

The negotiations for a constitutional law on the new division of powers was undertaken in the first instance by members of the federal and Republics' governments in a series of talks held behind closed doors - partly with the participation of the President - between August and mid-November of 1990.

In the first round on August 9, the three governments' representatives, meeting in the Slovak spa Trenčianské Teplice, agreed on a list of federal powers in the form of a series of guidelines that were to be developed into a draft proposal by ten tripartite expert commissions. The multiple commissions hastily produced reports of variable length and quality, leaving a number of gaps; and an effort by a 'free working group' to consolidate the conclusions did not prove successful.[114] Shortly after the August meeting, the Slovak government created its own Ministry of International Relations although foreign policy was listed in the guidelines as falling within federal competence, and the President urged a single federal Foreign Affairs Ministry.[115] It is said that the President was not given advance notice.

Little has been made public about another round of talks in September and October of 1990, first in Prague and then in the Moravian town of Kroměříž, this time in the presence of the President himself. The

[113] Const. Law 23/1991 Sb., instituting the Charter of Fundamental Rights and Freedoms.

[114] Zpráva svobodné pracovní skupiny o výsledcích práce komisí, ustanovených na základě jednání představitelů vlád ČR, SR a ČSFR v Trenčianských Teplicích ve dne 8. a 9. srpna 1990, příloha II, Rozhodnutí hospodářské rady vlády ČSFR (undated). The attempt to classify all the imaginable competences in much greater detail than either the 1968 Constitution or the early Civic Forum draft into the categories of exclusive federal, exclusive Republican and shared federal-Republic competences appeared particularly illusory.

[115] Obrman and Pehe, Dec. 7, 1990, *supra* n. 108 at 6-7. Not until almost two years later did the Czech Republic establish its own corresponding Ministry of International Relations.

participants, it is reported, reaffirmed the guiding principles accepted at Trenčianské Teplice and the deadline for the new reallocation of powers.

In a declaration adopted on the anniversary of the birth of the first Czechoslovak Republic the President and the three Prime Ministers condemned all attempts to destabilize Czechoslovakia and pledged to continue the federation.[116] Finally, on November 5, the three Prime Ministers, meeting again in Prague, approved a draft of a constitutional amendment paralleling, with a few exceptions, the previous guidelines. The draft was ready for submission to the respective governments and legislatures.

The governments of the two Republics gave their approval of the draft in the following two days; but the federal government, although agreeing 'in principle', insisted on certain modifications, since in its view some of the provisions adversely affected the working of the federal authorities. In response, the Slovak Prime Minister Mečiar warned of an impending 'deep crisis'. The ensuing 'emergency negotiations' among the three governments in Modra near Bratislava, included this time the leaders of the two major groups, the Civic Forum and the Public Against Violence, but the talks proved inconclusive. Finally, another meeting held in Prague on November 13 produced an agreement, which was completed on November 28 in another encounter among the three Prime Ministers, on the subject of federal and Republic budgets. The approved text, however, failed to deal with a number of important points, such as the authority over the national transportation system, which had proved beyond the reach of a consensus and were left to be regulated in the new constitution or in special legislation.

Following its acceptance by the three governments the constitutional bill came before the legislatures of the two Republics and the Federal Assembly.[117] It received quick approval in the Slovak National Council, but this time it was the Czech National Council that decided to propose several substantial changes, as did the committee of the Federal Assembly on taking up the text.[118]

[116] Rudé Právo, Oct. 29, 1990 cited in Obrman and Pehe, *ibid.* at 7.

[117] In this part I rely primarily on Pehe, "Power-sharing Law Approved by Federal Assembly," Report on Eastern Europe 6, Dec. 21, 1990, at 6-9.

[118] The Czech National Council proposed i.a. that the federation be responsible for issues of nationality and minority rights because these were covered by international treaties to which the common state (not the Republics) is a party; that the provision for

The Slovak leaders, who apparently had assumed that the approval by the three executive branches precluded any further modification, were reported to have threatened in private conversations to declare supremacy of legislation passed by the Slovak National Council over federal laws. (Shades of John C. Calhoun who in the eighteen-twenties claimed the same right for his state of South Carolina against federal law under the doctrine of nullification.[119]) In response, the Czech Prime Minister warned against such a 'grave and irreversible step' against the federation and adumbrated that his government had several possible courses of action in case of a constitutional crisis. The Slovak Prime Minister Mečiar, while denying having made the threat, hinted at a secret Slovak plan that would be employed if the Federal Assembly should change the agreed text, but at the same time he affirmed Slovakia's continuing interest in the common state. Furthermore, by attacking prominent Czech politicians, as well as the federal Prime Minister, a Slovak, for not paying sufficient heed to Slovakia's economic needs, he injected a new issue into the controversy, and in doing so he disclosed the growing rift between the two presumed allied groups, the Czech Civic Forum and the Slovak Public Against Violence, the latter having come out emphatically in support of the Slovak position against any change in the power-allocation agreement.

On December 9, President Havel re-entered the scene by pointing out first that Mečiar and others did not understand the separate roles of the legislative and executive branches: that the three governments had reached an agreement did not mean that the federal legislature must approve it without changes. He warned that pressure on the legislature may 'break up the federation'.[120] He followed up next day with a dramatic speech before the Federal Assembly in which he pictured the grave economic and political consequences of the country's break-up and charged Mečiar and other Slovaks with fueling the crisis: while recent opinion polls showed a majority of Czechs and Slovaks supporting the federal state, most of the

annual alternation of governorship of the Central Bank between a Czech and a Slovak be dropped and the subject be regulated by internal rules of the central bank; and finally that a different method be adopted for generating income of the federation and the Republics. *Ibid.* at 7. Eventually, the Federal Assembly accepted the first proposed modification. *Ibid.* at 8.

[119] B. Bailyn et al., The Great Republic 588 (Little Brown & Co., Boston-Toronto, 1977).

[120] AP. Dec. 9, 1990, Pehe, *supra* n. 117 at 8.

respondents viewed the power-sharing conflict as 'a high stake gamble by some leading politicians'. The President proposed prompt establishment of a constitutional court, a law on referendum and an unspecified temporary broadening of the President's power.

Most of the Czech political forces supported the President's proposals; Slovak leaders, although favoring the first two, opposed the last one and the Assembly decided to table them all until the power-allocation bill had been dealt with. Both Mečiar and the Chairman of the Slovak National Council, Mikloško, thought Havel's statement one-sided and unfair to Slovakia, but they sought to de-dramatize the situation. In response to mixed reactions to his speech, the President said he believed his intervention defused the crisis and he left on an official visit abroad.

More than 70 deputies participated in the Assembly debate, proposing some 30 changes most of which were voted down. Of the several modifications proposed by the Czech National Council, the Assembly accepted the one designed to retain federal legislative jurisdiction over nationality and minority issues as well as over churches.[121]

Responding to the appeal of its leaders to have reason prevail "over prestige-seeking, unitarism, and separation,"[122] the Assembly on December 12 adopted the bill by 237 to 24 votes with 17 abstentions.[123] The public reaction to the Assembly's action was generally favorable as clearing the way for critical parliamentary business that had been slowed down, if not blocked, by the festering power-allocation controversy.

The optimistic expectations, however, proved short lived. The Czechs assumed that the adoption of the 'new concept' of the common state as deriving its powers and its continuing existence from the 'sovereign republics' would satisfy the Slovak national aspiration. Yet even before the Assembly debate, Slovak Prime Minister Mečiar hinted that the new concept should be embodied in a 'state treaty' between the two Republics, thus opening a new phase in the conflict. By definition, the law was provisional in the sense that it was to form a part of the future new constitution.

[121] The Assembly also voted to keep control over distribution of energy in cases of emergencies. Pehe, *supra* n. 117 at 9.

[122] Chairman of the Assembly Alexandr Dubček, ČTK Dec. 11, 1990, *ibid.* at 9.

[123] Const. Law of 12 Dec. 1990, 556/1990 Sb., in Consolidated Text, *supra* n. 98.

3. The new allocation-of-powers law of 1990

a. 'From the top' or 'from below'?

It makes at least a doctrinal and symbolic difference whether the power allocation is structured in the context of an extant common state by devolution from the central authority to component units (from the top - *shora* in the Czech parlance); or whether independent states create a new structure by accepting a common constitution (from below - *zdola*).[124] The Czechs contend that the current process of constitution making can be nothing else but a devolution, considering the inescapable fact of the existing federation and its history. The Slovaks, insisting on the 'from below' method, point out that federations built 'from the top' have historically fared much worse (Yugoslavia, Belgium, Canada) than those built 'from below' (the United States, Germany, Switzerland). The late Soviet Union - the Slovaks might argue - although built on a treaty preceding the constitution was in reality formed 'from the top'. According to the terminology used in the Czech and Slovak discourse, the choice is between a 'federation' and a 'confederation', assuming, of course, the continuation of the common state. The real issue is the nature and extent of the powers conferred on the central authority that determine the viability of the common state in given historic conditions.

This controversy became the central issue in the subsequent negotiating phase over the Slovak-proposed 'treaty'. Suffice it to say here that on its face at any rate the December 1990 law does not resolve the issue. That law has now been included in the new consolidated version of the 1968 Constitution containing all the amendments adopted thus far. It incorporates (with minimal omissions of the ritualistic invocations of socialism and proletarian internationalism) the preamble and the 'basic provisions' of that

[124] Rychlík, "Federace budovaná'zdola' či 'shora'"?, Lidové Noviny, Jan. 14, 1992, at 9; Krecht, "Federativní stát a jeho právní systém (Studie zaměřená k ústavní problematice)" 130 Právník 721 (No. 9-10, 1991). Krecht's interesting study, strongly influenced by normative positivism, postulates a 'treaty' between sovereign states as preceding the constitution in a 'from below' building of a common state. There was no such treaty preceding the Confederation in the United States, only a Declaration of Independence. And there is a question whether the thirteen colonies were ever fully 'independent states'. See generally on the Czech-Slovak controversy, Kalenský and Wagner, "Sebeurčení národů a suverenita v diskusi o státoprávním uspořádání," Lidová Demokracie, Oct. 2, 1990, at 5.

Constitution: a ringing affirmation of the virtues of the common state and of the single internal market is coupled with an equally eloquent assertion of the right of the two Republics to self-determination "up to separation" and no less than eight references to their sovereignty and right to self determination.[125] It is the two Republics "represented by their deputies" in the Czech and Slovak National Councils "that have agreed on the creation of a Czechoslovak federation".[126] Yet the new law was adopted by the Federal Assembly in accordance with the prevailing procedure for a constitutional amendment which does not require, as we have seen, a ratification by the Republic National Councils.

b. The options: a model and current patterns

Power allocation entails identifying the subject or the field to be allocated (horizontal dimension) and defining the 'depth' of the allocated authority (vertical dimension).

Horizontally, the power accorded in a discrete field may be exclusive, concurrent or shared. Concurrent power may mean either that component states are free to act until the federation acts to preempt the field in part or in full; or that the states act except where action by the federation serves the common purpose more efficiently than would individual state actions - the old-new principle of subsidiarity.[127] Shared power may entail joint federal and state action ranging from notification, consultation, supervision by the federation to codecision.

Vertically, the federation may be accorded full powers to legislate, to enact implementing regulations and to execute them; or it may be given only legislative power (embracing any legislation or limited to basic principles and organizational structures) with the rest of the powers in the field left with the component states. Even where the federation is accorded

[125] Const. Law 103/1991 Sb., *supra* n. 98, Preamble and art. 4(1). The sovereignty of the common state is also recognized, art. 1(5).

[126] *Ibid.* Preamble last para.

[127] For interesting definitions of subsidiarity, see Grundgesetz [Basic Law] art. 72(2)(F.R.G.); Treaty of European Union and Final Act [Maastricht Treaty], done Feb. 7, 1992, tit. II, art. 3(b)(5), 31 I.L.M. 247, 257-58 (1992) (inserting a new art. 3b into the Treaty establishing the European Economic Community), also in The New Treaty on European Union (Belmont European Policy Center ed.).

powers to legislate *and* implement, the execution may be reserved to the states.

Unallocated powers remain with the states. Finally, the constitution may empower the federation to 're-delegate' certain of its powers to the states.[128]

In practice, federal constitutions employ the 'enumerated powers' pattern, with or without the exclusivity concept, but invariably leaving non-enumerated powers to the component states. Apart from this common thread, however, the allocative patterns vary greatly from one constitution to another, evidently shaped by local, idiosyncratic influences. The German Basic Law, which employs exclusive and concurrent categories, presents on its face, the most logical scheme; however, it has been brought out of kilter by subsequent amendments and - above all - by a powerful drive toward centralization, comparable to the forces that have made the United States Congress practically all-powerful. The details of the allocation patterns in federal constitutions range from the sparse list in the United States Constitution to the wildly casuistic Swiss Constitution which went so far as to allocate the authority to issue gambling permits in "*Kursälen*".[129]

c. The text

The 1968 Constitution was the starting point of the negotiations for the re-distribution of powers. The new scheme however, reflects the pressure from the Slovak side toward broadening the Republic authority at the cost of the center. In contrast to the 1968 pattern,[130] the new text omits the listing of *exclusive* federal and *shared* competences.[131] Instead, it

[128] For a useful list illustrating the many potential combinations, see Krecht, *supra* n. 124 at 729.

[129] Salons in a spa. Constitution Fédérale, art. 35(2) (Switz.), translated in Constitutions, *supra* n. 112 (Switz. by G.H. Flanz and G.E. Klein).

[130] Const. Law 143/1968, *supra* n. 112, arts. 7-9; also in contrast to the draft of the Civic Forum's First Draft of the Constitution of Feb. 1, 1990, arts. 30-32.

[131] The trichotomy of *exclusive* federal, *concurrent* federal-state, *exclusive* state competences, with undelegated powers remaining in component states prevailed in the Soviet Constitutions and still applies in the German Basic Law and in Canada. German Basic Law, *supra* n. 127, principally arts. 71-74. Grospič, "Zákonodárná pravomoc a působnost v Československé Federaci a otázky jejího uplatňování," 15 Stát a Právo 5 (1973).

(1) enumerates subjects falling generally in the competence of the federation with no indication of any limits on the horizontal dimension of the federal power (foreign affairs, war and peace, defense, currency, federal material resources and protection of the federal Constitution),[132]

(2) singles out federal competences in enumerated subject areas, limited - at the vertical dimension - in principle to legislative action, except where the constitutional law provides otherwise,[133]

(3) leaves all unallocated competences to the Republics.[134]

In the second category of 'singled out' competences, federal power is defined in often indeterminate terms, e.g. "formation of strategy" or "structural concepts with federal significance," or "common principles" (Arts. 10, 17), signalling the intention to limit federal action either to the German-type framework legislation (*Rahmengesetz*),[135] or at most to ordinary legislation.[136]

Thus, federal power includes basic legislation on general economic policy planning, transportation, environment, price and wage policy, labor relations, statistics, regulations of ownership and enterprises, protection of consumers and of basic rights. The power to implement and execute federal legislation, however, is in principle in the hands of the Republic institutions, with the exception of customs, sea, air and railroad transportation, and supervision of nuclear safety in which the federation was given expressly the entire panoply of power.[137] Although the federation has the power to legislate on the protection of competition it is specifically left to the Federal

[132] Const. Law 103/1991, *supra* n. 98, art. 7(1). The list corresponds essentially to the enumeration of *exclusive* federal subjects in art. 7(1) of the 1968 Constitutional Law.

[133] *Ibid.* art. 28b(2).

[134] *Ibid.* art. 9.

[135] German Basic Law, *supra* n. 127, art. 75.

[136] See *infra* text accompanying n. 152 (discussing the Constitutional Court's interpretation).

[137] Const. Law 103/1991, *supra* n. 98, arts. 13(2), 19d and e, 21b.

Assembly to determine the "division of execution" between the federation and the Republics.[138]

In other provisions federal power was defined in such terms as "legal disposition," "legislative disposition," "determination of uniform rules," "organization and direction," which, as we shall see, have already raised questions as to the reach of federal jurisdiction in the vertical dimension.[139]

Financial and budgetary policy is determined by agreement among the federal government and the governments of the two Republics; the Federal Assembly enacts principal tax legislation (value added and income taxes) but the Republics administer it. The Federal Assembly decides on the allocation of proceeds.[140] Thus far the three governments have succeeded in reaching an agreement on the budget based on a previous formula, said to favor the Slovaks, but there is no provision for the contingency that an agreement proves impossible.

Although the Slovak side first pressed for including in the Constitution a division between the Federation and the Republics of publicly owned resources and facilities, the idea was abandoned when it became clear that any effort for an all-inclusive enumeration would be incomplete - and the solution was left with the political process.[141] The Federal Assembly, however, is given explicit authority to determine ownership of the vital oil and gas pipelines and certain electric networks.[142]

As a compromise, the original idea of establishing three separate central banks was dropped in favor of a single federal State Central Bank with

[138] *Ibid.* art. 24e.

[139] *Infra* section 4. See also Const. Law 103/1991, *supra* n. 98, art. 12(4) regarding administration of the tax laws. The legislative power of the Federal Assembly is expressly confirmed in art. 37(1).

[140] Arts. 11(1), 12.

[141] Art. 4(3)-(7). For an example of a constitution that does specify the resources owned by the federation see Constituição Federal art. 20 (Braz.), translated in Constitutions, *supra* n. 112, (Braz. by Albert P. Blaustein).

[142] Const. Law 103/1991, *supra* n. 98, art. 4(4). Earlier constitutional law lists certain resources (mineral wealth, basic sources of energy, "basic forest fund", waters, etc.) as within "state ownership" without indicating Federal or Republic ownership. "Details" are left for determination by an ordinary law. Const. Law 100/1990 Sb., art. 10.

'centers' of that Bank established for each of the Republics, although the role of the centers is not specified.[143]

Further federal legislative authority, limited, however, "*to the extent required by the uniformity of the legal order*," covers nationality, ethnic minorities, churches, health, lower education, copyright and other matters.[144] This limitation on the federal legislative powers, carried over from the 1968 Constitution, is, in a sense, a variant of the subsidiarity concept, motivated, however, by legal coherence rather than by preservation of component state power.

History played a major role in shaping one important aspect of the power allocation. Typically, upon creation of a federation, a federal grid is superimposed on preexisting legal orders of states entering the federation: federal law is interstitial and supplementary. In 1918 Czechoslovakia, however, two different legal orders were embraced within a *unitary* state, one based on Austrian, the other on Hungarian law. After World War II, in the still unitary state, the two legal orders were replaced with a uniform system of law; and it was in 1968 that the federal scheme was overlayed upon the uniform legal system. Preservation of uniformity was in potential conflict with the new law-making powers of the two Republics. The resulting compromise[145] keeps the bulk of the uniform legal order - including the civil, commercial and criminal codes - within the orbit of federal legislative power, but where the federation does not preempt the entire field the Republics may legislate. In any event, the "execution" of these codes and laws pertains to the Republics, and the Federal Assembly may "redelegate" its authority to the Republics.[146]

[143] The Law on the Czechoslovak State Bank 22/1992 Sb., was modeled after the German Bundesbank legislation. It was passed along with a general banking legislation. See Martin, "Banking Reform in Czechoslovakia," RFE/RL Research Rep., Apr. 10, 1992, at 29.

[144] Compare Const. Law 103/1991, art. 37(3), *supra* n. 98, with Const. Law 143/1968, supra n. 112, art. 37(3) (the latter providing a more extensive enumeration); see also Const. Law 103/1991, supra n. 98, arts. 5,6 (addressing in the "Basic Provisions" citizenship and equality of the Czech and Slovak languages).

[145] *Ibid.* art. 37(2).

[146] *Ibid.* arts. 37(2), 38(1)-(2). Here also, Const. Law 103/1991 essentially carries over limitations from Const. Law 143/1968, art. 38 (1)-(3). See also Const. Law 103/1991, art. 28b.

The opaque lines between the federal and Republic competences of the 1968 text were blurred further in the 1990 law. A number of important issues that proved beyond the reach of a consensus were either omitted or left to the Federal Assembly. The actual scope of the intended devolution in domestic matters will be determined by practical application.

It is in the area of foreign affairs which touches directly upon the "external sovereignty" and international personality of the federation, that - on its face at any rate - the expansion of the Republic power is most evident. The Federal authorities negotiate international treaties, legislate the basic lines and instrumentalities of foreign economic policy and provide for representation of the common state abroad.[147] The Republics maintain their authority to participate in negotiations of international treaties and in the representation in international organizations on matters falling within the legislative competence of the Federation.[148] In addition, however, they acquire a measure of their own international personality. In the first place, the Republics may, "*in harmony*" with federal foreign policy, conclude agreements with component parts of other composite states for cooperation on a broad spectrum of subjects ranging from economy and commerce to culture, health and television. More importantly, they may conclude, *when so authorized* by the Federation, international agreements on matters within their legislative competence, and they may maintain their own representation abroad and receive foreign representatives on the same matters.[149] The important question of the modalities of the federal authorization remains open and will be regulated presumably by a federal law.

d. The emerging jurisdictional conflicts: The Constitutional Court speaks

Even a cursory perusal of the text of the 1990 law reveals many ambiguities bound to result in conflicting claims of competence between the Federation and the Republics. This was already the situation under the 1968 text but - in the words of a Czechoslovak commentator - these differences were resolved at the time "during the elaboration of the legislation and

[147] Const. Law 103/1991, *supra* n. 98, arts. 7(1)a, 16, 36(1)b, 36(3).

[148] *Ibid.* art. 25.

[149] *Ibid.* art. 7(2)c. The status of the representatives is to be determined by the receiving state. I shall deal with the foreign affairs powers problem and international law implications in a separate paper.

other political decisions." "It is for this reason that during the... years of the functioning of the Czechoslovak federation [under the old regime] no conflict had arisen that would have had to be resolved by specific constitutional measures," that is by the Constitutional Court which was provided for in the Constitution but never made operational.[150]

With the end of 'the guiding role of the Communist party' and 'socialist legality', the need for an authoritative dispute settlement of jurisdictional quarrels became imperative. Who, for instance, regulates forests when agriculture policy is federal but the Republics own the forests? In some cases, where federal legislative power was clear but the authority to adopt urgently needed implementing uniform regulations was disputed (e.g. on pensions), the federal government, to avoid controversy proposed new legislation, instead of issuing a regulation that would be the normal course. This technique, while feasible in a few exceptional instances, obviously could not be employed as a general procedure. Anticipating a plethora of challenges to its power, the federal government proposed to clarify the vertical-dimension ambiguity in a new proposal, which, however, has not been acted upon thus far.[151]

Happily, the Constitutional Court (six Czechs and six Slovaks) was established since 1991,[152] and its first case dealing with a jurisdictional conflict is a harbinger of things to come.[153] The federal Ministry of Communications asked the Court to resolve a dispute over the interpretation of the 1990 law with respect to jurisdiction over the communications network. The principal provision at issue appears to distinguish between the three branches of the system: posts, radio communications and

[150] Zacharias, Rapport Tchéchoslovaque, 17 Revue belge de droit international 138 at 139-40 (1983).

[151] Proposal for the chapter of the Constitution dealing with the distribution of competences between the Federation and its Republics elaborated according to the position of the Government of the Czech and Slovak Federative Republic, Dec. 31, 1991, Prague, Č.j. 2956/91-PV.

[152] Const. Law 91/1991 Sb. on the Constitutional Court of the ČSFR; Law 491/1991 Sb. on the Organization of the Constitutional Court of the ČSFR and Proceedings Before It. See also Schwartz, The New Constitutional Courts in Eastern Europe, 13 Mich.J.Int'l L. (1992).

[153] Decision of the Constitutional Court of the Czech and Slovak Federative Republic, 9 April 1992, Č.j. Pl.ÚS 2/92 (typed text).

telecommunications,[154] and the Court was faced with the unenviable task to define, and apply the puzzling textual variations.

In the article in question (Art. 20), the federation was given the competence for

issuing uniform traffic rules and tariffs for all three branches (para. b),

providing "legislative disposition" on posts and telecommunications (para.a),

organizing a "uniform system of posts" (para. d),

organizing and *directing* a uniform system of telecommunications (para. e).[155]

Seizing upon the single word "directing" which appears only in connection with telecommunications, the Court ruled that in that field the federation possesses the entire gamut of powers ranging from legislation, generally binding implementing regulations, to administration and individual decisions. Regarding posts and radio communications, the Republics have the competence of administration, with the federation confined to the issuance of uniform traffic rules.[156]

The Court found support for this conclusion in two general provisions: in the principle of "enumerated powers"[157] and in the rule reserving "execution" of federal legislation to the Republics unless a constitutional

[154] Const. Law 103/1991, *supra* n. 98, art. 20.

[155] *Ibid.* art. 20c authorizes the Federation to issue stamps or other postal values.

[156] The competence to administer includes, according to the ruling, the authority to organize state agencies or enterprises in the respective fields of communications. The Court does not seem to be impressed by the fact that in other instances where the Constitutional Law allocates the power of administration to the federation it says so using the specific terms "state administration" or "execution"; but neither of these terms is employed with regard to telecommunications. See, e.g. *ibid.* arts. 19d-e, 21b. "Execution" according to the Court, encompasses administration, organization and direction.

[157] *Ibid.* art. 9.

law provides otherwise.[158] Perhaps more importantly, the Court relied on history of the constitutional development which it read as indicating the intent of the constitution makers to change the regime of radio communications and posts in favor of the Republics while retaining federal administration of telecommunications as it has
existed since 1971. The Court, however, pointedly referred to the possibility of a "redelegation" of the execution of federal competences to the Republics by a law of the Federal Assembly.[159]

In the reasoning part of the opinion the Court throws some light on certain indeterminate concepts: "legislative disposition" means power to enact legislation only, while "legal disposition" includes the additional authority to issue "generally binding legal rules for implementation of legislation."[160] Beyond that, however, the opinion focuses scrupulously on the specific clauses at issue; and it follows the narrow path of a textual and contextual method of interpretation, with a glance at prior legislative practice.

Unlike some other constitutional courts (such as the United States Supreme Court, the Court of Justice of the European Communities or the German Constitutional Court) the Czecho-Slovak counterpart shows no ambition at this early state to fashion fundamental constitutional principles or to offer a grand doctrinal design for the new federation. Nor does it

[158] *Ibid.* art. 28(2). Presumably the term "directing" is taken to provide the exception contemplated in this provision.

[159] *Ibid.*, art. 28b(1). The Court points out that the original text of Const. Law 143/1968 Sb. art. 20 entrusted the federation with legislation, determination of uniform rules and conception of development of the post and telecommunications systems; but it did not contain a provision analogous to the present text of art. 20e. See *supra* text accompanying note 155. The current state of the law has prevailed since Const. Law 125/1970 Sb. on Communications had come into effect, and Const. Law 550/1990 Sb. did not bring about any change in the federal competences to organize and direct the telecommunications system. In an interesting passage the Court deals with the arguments of the Republics based on administrative agreements between the federal and Republic Ministries and minutes of sessions of the Prime Ministers. Although denying its own competence to pass upon the validity of such instruments it considers them useful aids for interpretation to the extent that they are not in conflict with prevailing law. In the given situation the Court disregarded them as contrary to its interpretation of the 1990 Constitutional Law.

[160] The Court also offers an interpretation of the concept "*soustava*" (system) as used in art. 20d-e.

meditate over the consequences of its ruling which affirms as constitutionally mandated a schism between the modes of operation of the communications system, whatever problems this may entail for the economy of the common state. Clearly, the Court is not willing to add to its burden - heavy as it is - of having to resolve ambiguities due more to a lack of political consensus than to drafting inadequacies. This reticence may reflect the prevailing concept of limited judicial function even at the highest level, as well as the tension in the relations between the Czechs and Slovaks.

It has been suggested that the Republics will be viewed as "the losers".[161] Although the decision preserves the unity of the telecommunications branch of the system under one body, "it heralds the eventual demonopolization of the network" since this is the policy of the current federal Minister. That policy, opponents claim, will jeopardize present projects for massive foreign investments designed to modernize the system.[162]

In contrast with domestic matters, surprisingly, there has been little controversy in practice over the application of the foreign affairs powers in the new law. Rumor has it that an ambassador of Slovak nationality insisted on reporting to Bratislava rather than to Prague and one hears complaints of insufficient Slovak representation in the federal diplomatic service. However, the somewhat controversial first chief of the Slovak Ministry of International Relations was replaced by a young scientist reputedly with a realistic conception of his role within a limited budget. The Czech counterpart Ministry was established in 1992 only with a minimal staff.[163]

The practice developed by the Federal Ministry of Foreign Affairs ever since the 1968 Constitutional Law has been to include Slovak participation in federal treaty making proceedings and it has now been extended to commercial treaties. The Federal government is experimenting with the idea of federal framework treaties on matters of shared competence, pursuant to which the Republics would conclude their own treaties. Even before the 1990 Constitutional Law the Republics concluded several agreements with components of other states (Bavaria, the Russian Socialist Federal Republic, a Chinese province). The Republics maintain a variety of foreign contacts

[161] "Court Ruling May Threaten Telecommunications Monopoly," Prague Post, Apr. 21-27, 1992, at 4.

[162] *Ibid.*

[163] In early 1992 the Slovak Ministry had some 100 officials, the Czech less than a dozen.

of their own in matters of their legislative competence such as education, health, and culture, so that the two Republic Ministries are sufficiently occupied without crossing wires with the Federal Ministry of Foreign Affairs. The situation could change, of course, if for instance the original incumbent is returned to the Slovak Ministry.

At times foreign missions are at a loss about their interlocutors on the Czech and Slovak sides. On treaties of general import, such as investment treaties, they negotiate with the federal government, but when it comes to economic or technical assistance they deal with Republic authorities as well. In some instances foreign diplomats prefer not to seek guidance from federal authorities in order not to be precluded from dealing with the Republics.

In the first series of our meetings - with the problem of jurisdictional conflicts in mind - we urged the adoption in the new constitution of a supremacy clause that would assure priority, within the allocated power, of federal over Republic legislation: modern constitutions have adopted the supremacy doctrine either in an express constitutional provision[164] or by implication and practice.[165]

[164] Constitucíón Argentina art. 31, translated in Constitutions, *supra* n. 112 (Arg. by F. C. Roth); Austl. Const. Ch. V, art. 109; German Basic Law, supra n. 127, art. 31; Constitucíón Politica de los Estados Unidos Mexicanos art. 133, translated in Constitutions, supra n. 112 (Mex. by G.H. Flanz and L. Moreno); U.S. Const. art. VI, cl. 2; Fed Const. Malaysia art. 75, translated in Constitutions, supra n. 112 (Malay. by H.E. Graves and S.A. Holt); Const. Nigeria ch. I, pt. II, §4(5) in Constitutions, supra n. 112 (Nig. by C. Tenney); Const. Pakistan art. 143 in Constitutions, supra n. 112 (Pak. by L. Wolf-Phillips, G. Mohammed and Abert P. Blaustein).

[165] Austria: R. Walter and H. Mayer, Grundriss des österreichischen Verfassungsrechts, 6. ed., Part II, 4IV8, Part V. 1IIB (Wien, 1988); R. Walter, "Der Stufenbau nach der derogatorischen Kraft im österreichischen Recht," 1965 ÖJZ 168 at 171; Belgium: so-called "*primauté*", Rusen Ergec, Introduction au Droit Public at 21 (1990); Brazil: conclusion from art. 24 (4); Sabid Maluf, Direito Constitucional, 3. ed. at 117 (Sao Paulo, 1974); Canada: so-called "paramountcy", decisions of the Privy Council, Hodge v. The Queen, 9 A.C. 117 (1883), Attorney-General of Ontario v. Attorney-General for Canada, (1894) A.C. 189; Peter Hogg, Constitutional Law of Canada, 2. ed, Chapter 16 (Toronto, 1985); India: Tika Ramji v. State of U.P., A.I.R. (1956) S.C. 698-699; Switzerland: conclusion from art. 3 of the Constitution and art. 2 of the transitory provisions of the Constitution, M. Imboden, Bundesrecht bricht kantonales Recht, Diss. (Zürich, 1940), U. Häfelin, W. Haller, Schweizerisches Bundesstaatsrecht, 2. ed., Rz. 369 (Zürich, 1988).

No such clause was contained in the 1968 Constitutional Law on the theory that federal and Republic competences - as delimited in the Constitution - were of equal hierarchic standing. To an outsider, the need for the clause appeared even more pressing under the 1990 law for reasons adrumbrated earlier. Yet it became clear at an early stage that such a clause would not be acceptable, because - apart from the doctrinal objection - it would be viewed by the Slovak side as a further strengthening of the central power.

EUI Jean Monnet Chair Papers

EUI Jean Monnet Chair Papers are published and distributed by the European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

From Name . . . . . .

Address . . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .

❒ Please send me a complete list of EUI Jean Monnet Chair Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1992/93
❒ Please send me a complete list of EUI Working Papers

Please send me the following EUI Jean Monnet Chair Papers:

No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .
No, Author . . . . . .
Title: . . . . . .

Date . . . . . .

Signature . . . . . .

Jean Monnet Chair Papers

CHRISTOPH BERTRAM/Sir JULIAN BULLARD/ LORD COCKFIELD/ Sir DAVID HANNAY/MICHAEL PALMER
Power and Plenty? From the Internal Market to Political and Security Cooperation in Europe,
April 1991, pp. 73

ROBERT GILPIN
The Transformation of the International Political Economy,
April 1991, pp.27

EDMOND MALINVAUD
Macroeconomic Research and European Policy Formation
April 1991, pp. 58

SERGIO ROMANO
Soviet Policy and Europe Since Gorbachev,
April 1991, pp. 25

BERNT VON STADEN, The Politics of European Integration,
April 1991, pp. 33

HELGA HAFTENDORN
European Security Cooperation and the Atlantic Alliance,
July 1991, pp. 42

THOMAS ANDERSON/STAFFAN BURENSTAM LINDER
Europe and the East Asian Agenda,
October 1991, pp. 87

ROGER G. NOLL
The Economics and Politics of Deregulation,
October 1991, pp. 89

ROBERT TRIFFIN
IMS International Monetary System - or Scandal?,
March 1992, pp. 49

EGON BAHR
From Western Europe to Europe,
June 1992, pp. 42

HELGE HVEEM
The European Economic Area and the Nordic Countries - End Station or Transition to EC Membership?
June 1992, pp. 21

ERIC STEIN
Post-communist Constitution-making: Confessions of a Comparatist (Part I)
August 1992, pp. 63