

Constitutional Reform in Czechoslovakia: *E Duobus Unum?*

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Czechoslovakia was created in 1918, when the Versailles Peace Conference carved the lands of the neighboring Czech and Slovak peoples out of the Austro-Hungarian Empire and created a new democratic state. This arranged marriage was a voluntary act of self-determination by those two long-repressed peoples, but they did not marry for love and they have not been very happy together.

Ever since, the process of constitution-making in Czechoslovakia has been critically influenced by the historic division between the Czechs and Slovaks. Now that the nation has cast away its communist shackles, so smoothly and nonviolently that the process has been dubbed the "Velvet Revolution," it has taken up the task of drafting a new and democratic constitution. Predictably, the differences between Czechs and Slovaks are proving to be the major obstacle to an equally smooth resolution of the principal constitutional issues.

In this Article,¹ we discuss the approach of the newly renamed Czech and Slovak Federative Republic (CSFR) to four major constitutional issues: federalism, the bill of rights, an independent judiciary, and the separation of powers among the president, the cabinet, and the federal legislature.

Before one can understand what is transpiring in the CSFR, a brief review of the political and social history of the nation is necessary. As with other Eastern European countries, many of Czechoslovakia's current difficulties originate not only in the effects of

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four decades of communism, but also in long-ago events ingrained in the country's history. We therefore begin by considering the roots of the current constitutional dilemma.

I. THE HISTORICAL BACKGROUND

A constitution is a legal document, but it is more than that. When it is created at a seminal moment in a nation's life, the constitution reflects the triumphs and disappointments of a nation's past and embodies its hopes for the future. To understand and interpret such a document, one must be familiar with those triumphs, disappointments, and hopes.²

A. Before 1918

The Czech and Slovak nations, as they call themselves, share a common ethnic heritage, religion, and almost identical languages. They have also experienced a substantial amount of cultural interaction throughout their histories. Yet their practical union is a comparatively recent creation, dating only from 1918.

For almost a thousand years, Slovakia was part of Hungary, dominated by and subordinate to the Hungarian nobility. Most of Slovakia's people consisted of peasants, with almost no indigenous business or professional middle class, intelligentsia, or aristocracy. Slovaks were essentially a source of cheap labor for the Hungarians.

During this period the Czechs established an empire in Bohemia and Moravia that reached its peak in the fourteenth century, when it became the seat of the Holy Roman Empire. In contrast to the Slovaks, the Czechs and Moravians developed a town culture, with Prague becoming one of the great cities of Europe.

Early in the fifteenth century, the Protestant Reformation swept the Czech Lands (Bohemia and Moravia) and made them the cradle of Protestantism. Austria's Catholic armies invaded and totally defeated the Protestant Czechs in 1620, ending Czech independence for 300 years. The Czech aristocracy was destroyed and Catholicism enforced. Despite the Austrian repression, the Czechs ultimately became a very middle class, egalitarian, highly edu-

² This section is based on Vladimir V. Kusin, *Czechs and Slovaks: The Road to the Current Debate*, Report on Eastern Europe 4 (Oct 5, 1990); A. H. Hermann, *A History of the Czechs* (Allen Lane, 1975); Jozef Lettrich, *History of Modern Slovakia* (Praeger, 1955); Norman Stone and Eduard Strouhal, eds, *Czechoslovakia: Crossroads and Crises 1918-88* (St. Martin's, 1989).

cated, and cultured cosmopolitan people. Both then and later, the Czechs were part of western—primarily German—culture and society, while Slovakia, under Hungarian dominance, remained largely rural and underdeveloped. Both nations continue to be overwhelmingly Catholic, but Slovak Catholicism was and is much more traditional.

In the nineteenth century, the Slovaks participated in the national revival movement, but their efforts were harshly rebuffed by the Hungarians, who tried to “Magyarize” the Slovaks and other national groups under Hungarian rule within the Austro-Hungarian empire. Some of the Slovak revival efforts were carried on in conjunction with their Czech cousins, who were trying to assert their own national identity within the Austrian part of the Empire. Although efforts to establish a more independent political structure within the Austro-Hungarian Empire failed, the Czech Lands rapidly industrialized and modernized.

When World War I broke out, the Czech and Slovak nationalists saw their chance. Putting aside their social and cultural differences, Czech and Slovak leaders, with the help of American Czechs and Slovaks, persuaded the United States, Britain, and France to recognize the new nation of Czechoslovakia, whose independence was declared on October 28, 1918. The boundaries of the new state were defined and recognized by the Treaty of Versailles. The leader of the Czechs, Tomas Masaryk, said at the time that it would take 50 years for the Czechs and Slovaks to become one nation. They had only 20 before Adolf Hitler came along.

B. 1918-1938

The First Czechoslovak Republic was a comparatively modern, well-functioning democracy. It achieved the dual purposes of a democratic government: preserving order and maintaining individual freedom. Because of this success, the First Republic has served as a model for modern-day reformers. In particular, the Czechs and Slovaks have turned to the 1920 Constitution for guidance in their current constitution-writing process.

In designing their first constitution, the Czechs and Slovaks looked to the West for inspiration and example, particularly to the French parliamentary system with its tradition of multiple political parties and coalition governments—a trend they reinforced by constitutionally mandating a proportional representation method

of election.³ Although Czechoslovakia was formed as a union of two neighboring peoples with quite separate political histories, the framers adopted a unitary state rather than a federal system. Because there were twice as many Czechs as Slovaks, the rights of Slovaks and other minorities were expressly guaranteed by a Bill of Rights. But the founding fathers firmly resisted the idea of a federation of two separate sovereign republics, the idea that dominates the drafting of the new constitution today.

The 1920 Constitution organized the executive, legislative, and judicial powers in traditional continental European fashion. The following sections will examine the constitutional structure of the First Republic as well as the extra-constitutional factors that affected the structure in practice.

1. The executive.

Pre-World War II Czechoslovakia, like Austria and Weimar Germany, had a dual executive, consisting of a president and a government, both elected by the legislature. Executive dualism was designed to keep the president, as the head of state, weak.⁴ It responded to a widespread fear of anything even remotely resembling monarchy.

The Constitution of 1920 expressly conferred on the president certain limited executive powers and reserved all other executive powers to the government. Apart from being commander-in-chief, the most significant powers granted the president were the right to appoint and dismiss the prime minister and all other government ministers; the right to dissolve parliament (called the National Assembly), except during the last six months of a presidential term; and the right to exercise a suspensive veto.⁵ The president, however, did not enjoy the right of legislative initiative. That belonged solely to the government and the Assembly. Also, every act of the

³ "Pre-Munich Czechoslovakia was a state of political parties The whole of public life was penetrated . . . by the atmosphere of partisan politics." Edward Taborsky, *Czechoslovak Democracy at Work* 94 (George Allen & Unwin, 1945). Taborsky was a secretary to the second President of the First Republic, Edward Benes.

⁴ "[D]ualism in executive power is decidedly one of the shortcomings of the [1920] Czechoslovak Constitution . . . [and] the authors of the Constitution . . . [in instituting dualism] went further than was perhaps wise." *Id.* at 18.

⁵ The president also had limited emergency powers in exceptional cases where parliament had delegated the legislative power to the government. In such cases, the president's countersignature was a prerequisite to the statutory validity of government decrees. See the Constitutional Charter of the Czecho-Slovak Republic § 64 ("1920 Constitution"), reprinted as *The Constitution of the Czecho-Slovak Republic*, 179 *Intl Conciliation* 35, 55 (Oct 1922).

president required the countersignature of a responsible government minister in order to be valid.

In practice, the government exercised the most important executive powers. The general competence clause assigned the government all the executive powers not expressly granted to the president. It was entrusted, among other things, with the legislative initiative and the right to have bills enacted by public referendum if they failed to garner a National Assembly majority.

As in other parliamentary democracies, the president was not politically responsible to the Assembly. Rather, the government bore political responsibility for its own as well as the president's acts, for only the government stood under the threat of a parliamentary vote of no confidence. This threat, however, was never successfully invoked in Czechoslovakia between 1920 and 1938.

2. The legislature (National Assembly).

Until 1947, the Czechoslovak parliament consisted of two chambers—a 300-member Chamber of Deputies and a 150-member Senate. Both deputies and senators were elected on the basis of universal, secret, direct, and equal ballot, with mandatory proportional representation. Approval of both chambers was required to enact legislation, but if the Senate disagreed with the Chamber of Deputies, the Chamber could insist on enacting the bill by an affirmative majority vote.

The Assembly, besides being the supreme legislative body, elected the president and participated in appointing the Constitutional Court, treaty-making, and declaring war. As in the British and French parliamentary models, the legal primacy over legislation belonged to Czechoslovakia's Assembly, but the real power to draft and initiate legislation rested with the cabinet.

3. The judiciary.

Under the 1920 Constitution, a Constitutional Court, consisting of seven members, was exclusively responsible for determining whether statutes were in conflict with the Constitution. In practice, however, the Court was never asked to determine whether a statute violated the Constitution.

In the First Republic, the protection of individual rights and freedoms was secured through applications to the Supreme Administrative Court, which reviewed the validity of governmental decrees. It served as a court of appeals from all administrative bodies and as the tribunal for litigating alleged violations of political

rights. The Administrative Court was established in 1867 when Czechoslovakia was still part of the Austro-Hungarian monarchy. As Edward Taborsky, a secretary to the second president of the interwar republic, later described it: "[It is] the child of the struggle of the Central European peoples against a despotic government and [it] represents the triumph of law over despotism."⁶ Building on this glorious inspiration, the Court evolved into a powerful tribunal during the interwar period.⁷

4. Extra-constitutional factors.

This constitutional overview, however, explains only part of Czechoslovakia's political democracy during the interwar period. The real balance of power in the First Republic was quite different from the scheme provided for by the Constitution. The two main reasons why politics in practice varied so much from the constitutional design were Czechoslovakia's party structure and the personalities and leadership of the two interwar presidents, Tomas Masaryk and Edward Benes.

a) *The parties.* In reaction to the sudden liberation in 1918 from centuries of foreign domination, and in response to Czechoslovakia's ethnic heterogeneity, a large number of parties, representing every shade of political opinion, were founded. Some of them encompassed all of the main nationalities—Czech, Slovak, German, and Carpathian Ruthenian—while others included only one national or ethnic group. Constitutionally mandated proportional representation sheltered the small parties and precluded the bigger ones from achieving the dominance necessary to control the Assembly and form their own government. Coalition governments were therefore the order of the day.

An Assembly member owed his seat entirely to the party, because the electorate had to choose among lists of candidates presented by each party and could not vote for different individuals presented by different parties. The parties had an additional means to guarantee deputies' obedience: before elections, the party made each candidate sign an undertaking that he would yield his

⁶ Taborsky, *Czechoslovak Democracy At Work* at 132 (cited in note 3).

⁷ It is interesting to note that the Czechoslovak legal system has never and does not currently recognize *stare decisis*. No rulings have *de jure* precedential value. It has been suggested that, in order to achieve uniform compliance with the Charter of Fundamental Rights and Freedoms, *stare decisis* might be introduced to rulings of the Constitutional Court. No decision on this has been adopted, however. See Part II.C.2.

seat in the Assembly if asked to do so by the party. With this constant threat of losing their seats, the deputies blindly followed the party's will and rarely opposed its instructions.⁸

The most important channel for carrying out the party will was the special political council (the "Petka," or the "Five"). This body, consisting of the leaders of the political parties forming the majority coalition, convened in private chambers, without public scrutiny, and decided every major issue facing the republic.⁹

b) *The presidents.* Although the constitutional powers of the president were weak on paper, the first two presidents enjoyed immense personal prestige and became the real leaders of the new country. Masaryk was called the President-Liberator or "*Taticek*" ("Daddy"). His collaborator and successor, Benes, enjoyed a similar reputation, although Munich tarnished it in the eyes of many. Both leaders significantly influenced Czechoslovak politics by their ability to counterbalance the power of the coalition parties.¹⁰ The modern-day drafters are struggling to overcome the weakness of the executive, fearing that the country might not always be blessed with such charismatic and powerful leaders who are able to guide and control the legislature.¹¹

C. 1938-1948

Czechoslovakia was one of the happier creations of the Treaty of Versailles, but the Treaty spawned other disasters that led to the rise of Nazi Germany and in turn to the destruction of Czechoslovak democracy. One factor in that demise was the restiveness of the Slovaks as the minority partners in a unitary state dominated by the Czech majority.¹²

The Czechs have always outnumbered the Slovaks by more than two to one. The Czechs staffed most of the administration in

* As Taborsky put it: "Parliament . . . became a *collegium* of several party groups, acting and voting *en bloc*, according to principles agreed upon or laid down in advance." Taborsky, *Czechoslovak Democracy at Work* at 104 (cited in note 3).

* Taborsky described the immense power of the "Five" as follows: "Having behind them a compact mass of five big political parties with a majority of deputies clad in the straitjackets of rigorous party discipline, [these 'Five'] could defeat the 'official' government at any time, and thereby compel its resignation." *Id.*

¹⁰ *Id.* at 113.

¹¹ For a discussion of the current proposals for strengthening the power of the executive over that of the legislature, see Part II.D.

¹² Another factor was the pro-Nazi party among Czechoslovakia's 3½ million German minority in the Sudetenland, whose alleged oppression by the Czechoslovaks gave Hitler an excuse to strike at Czechoslovakia.

both regions, and in general dominated the country. Slovaks developed a feeling that they were being disdained and exploited. This stimulated the formation of Slovak nationalist parties, some of which were drawn to Fascism and anti-Semitism.

When Hitler went after Czechoslovakia in 1938, some Slovak nationalists saw their chance. They declared Slovakia's autonomy within the Czechoslovak state less than a week after Munich. They declared complete independence on March 14, 1939, the day before the Nazis took over what remained of the Czech region. From 1939 through 1945, Slovakia was a Fascist puppet state, led by Father Jozef Tiso. It was viciously anti-Semitic—in 1942 it delivered some 60,000 Jews to Hitler for the death camps, nearly all of whom were murdered—and sent its army to fight the Russians.¹³ In time, however, many Slovaks turned against the Nazis. In 1944, they launched a revolt led by an underground Slovak National Council, the Slovak National Uprising, which had as one of its aims a restoration of the Czechoslovak state but with a truly federal structure.

Upon liberation in May 1945, the Czechoslovak government returned from exile in London and adopted a program granting the Slovaks a somewhat ill-defined degree of self-determination within the Czechoslovak nation. That development was soon crushed by the communist takeover in 1948, which struck directly at nationalism and the Church. The communists installed a tightly controlled unitary state that was to govern the country for the next twenty years.

D. 1948-1968

The communists junked the 1920 Constitution and replaced it with a typical communist version, full of socialist principles, worker autonomy, a paper bill of rights, and, of course, the enshrinement of the Communist Party as the "guiding force in society and in the State."¹⁴ But it also bowed to Slovak nationalism by creating separate Czech and Slovak National Committees with considerable power, at least on paper, over their respective areas.

Built up over the twenty years of the prewar republic, Slovak resentment simmered during this communist period. The commu-

¹³ Lettrich, *History of Modern Slovakia* at 174-91 (cited in note 2); Karel Skalicky, *The Vicissitudes of the Catholic Church in Czechoslovakia, 1918 to 1988*, in Stone and Strouhal, eds, *Czechoslovakia* 297, 309 (cited in note 2).

¹⁴ Constitution of 1960, Art 4, reprinted in Gisbert H. Flanz, *Czechoslovakia* 6, in Albert P. Blaustein and Gisbert H. Flanz, eds, *4 Constitutions of the Countries of the World* (Oceana, 1990).

nists simply swept the problem under the rug, however, by instituting a policy of forced homogenization—communists have always claimed that the national question is secondary to and can be resolved by the development of communism, which will first assert the primacy of the working class and ultimately eliminate both class and national differences.¹⁵ For two decades, the Slovaks were relatively quiet, but they erupted again in the short-lived Prague Spring of 1968.

E. 1968-1989

One of the central planks of the Prague Spring manifesto, the Action Program, was a truly federal state in which the two republics would be the primary repositories of governmental power and the central government would have largely derivative and carefully enumerated limited powers. Even after Soviet and Warsaw Pact tanks invaded Czechoslovakia on August 21, 1968, the impetus for such a federal state continued, partly because the leader of the reaction, Gustav Husak, was a Slovak and had been imprisoned in 1955 for his nationalism. In October 1968, the Constitution was amended to create a federal state, and a constitutional court, to go into effect on January 1, 1969. Power was divided between the federal government and the two republics, and local parliamentary systems were established in the republics, with unicameral legislatures (National Councils) and governments led by prime ministers.

As a further protection for the Slovaks, the 1968 constitutional amendments created a bicameral legislature, with membership in one house, the Chamber of the People, based strictly on population, and the other house, the Chamber of Nations, divided between 75 Czechs and 75 Slovaks. Legislation concerning certain especially important matters such as citizenship, budget, taxes, votes of confidence, and domestic and foreign economic matters required an absolute majority¹⁶ of each national delegation in the upper Chamber. The Constitution also required that constitutional amendments be passed by a three-fifths absolute majority in the lower chamber plus three-fifths of each national group in the Chamber of Nations, giving a veto over important acts to 31 Czech or Slovak members of the Chamber of Nations.

¹⁵ See Jozef Kalvoda, *National Minorities Under Communism: The Case of Czechoslovakia*, 16 *Nationalities Papers* 1, 9-11 (Spring 1988).

¹⁶ That is, a majority of those elected, not just of those present.

But the Slovaks were to be disappointed again. The Husak-led "normalization" became simply the imposition, in a particularly harsh and repressive form, of centralized communist totalitarianism. The federalist institutions created by the 1968 constitutional amendments, one of the few remaining vestiges of the Prague Spring, turned out to be nothing more than a Potemkin village. The restored communist bosses clamped down on any sign of independence—political, intellectual, or cultural. The central government, which in practice meant Party Secretary and later President Gustav Husak, asserted the right to set aside laws passed by the national legislatures. The new constitutional court specified in the 1968 amendments was never even set up.

Husak did provide certain special privileges to Slovakia, including disproportionate investment, and jobs in the state and Party administration. The government sought to equalize the educational levels between the two parts of the country, but the most important parts of the economy were still in the Czech Lands. Even today, the Slovak economy, which is concentrated in basic materials production and heavy inefficient industry, remains weaker than the Czech.¹⁷ The result of all this was, as one historian put it, that "the Czechs now felt that they were being governed by the Slovaks, while the Slovaks thought that it was once again 'Prague' that was depriving them of genuine home rule."¹⁸

F. Contemporary Czechoslovakia

The downfall of the communist regime in November 1989 was both unexpected and prepared-for.¹⁹ As late as October 1989, there was despair in Czechoslovakia that, as one person put it in a note to the authors, "Everywhere else the world is turning upside down, but here things stay the same." After 1968, the Czechoslovak people had made a deal with the communists—the people would stay out of politics and the regime would not bother them—and the deal seemed to hold.

Below the surface, however, discontent had grown. In 1977, a small group of intellectuals and artists, including playwright Vaclav Havel, formed Charter 77 to try to enforce the Helsinki Accords. Despite severe persecution, Charter 77 survived and grew,

¹⁷ Kusin, *The Road to the Current Debate* at 12 (cited in note 2).

¹⁸ *Id.*

¹⁹ For a brief description of events prior to May 1989, see Herman Schwartz, *Fueling Demands for Czechoslovakian Reform*, *The Nation* 660 (May 15, 1989). The best description of the velvet revolution remains Timothy Garton Ash, *The Magic Lantern* (Random House, 1990).

though it never went above 1200-1300 signatories. In March 1988, there was a demonstration for religious freedom in Bratislava that was put down brutally. On August 21, 1988, the twentieth anniversary of the Soviet invasion, thousands demonstrated against the regime, including many young people. Peace and civil liberties groups began to proliferate. The regime wavered in its response, now using repression, now showing a more liberal face.

On Friday, November 17, 1989, soon after the communist regime began to topple in East Germany, thousands of young Czechs turned a student march in commemoration of a student killed by the Nazis in 1939 into a peaceful rally against the regime. The communists responded brutally. From the following Monday, the demonstrators started pouring into the streets of Prague and other cities. A general strike a few weeks later drew an unexpected two million supporters. A coalition formed around Havel in a movement calling itself Civic Forum, with a parallel organization in Slovakia, the People Against Violence. Within weeks, the communists gave up, and Havel became President on December 29, 1989. The lack of violence, and the smoothness of the transition, led to its name—the “velvet revolution.” After adopting new election laws in the spring of 1990, Czechoslovakia elected a new Federal Assembly in June, which in turn reelected Vaclav Havel as President. Instead of the normal four-year terms, the Assembly and the President have been elected for just two years, during which the Assembly is expected to adopt a new constitution.

In the following sections of this Article, we discuss how the new democratic government has tackled the four major constitutional issues of federalism, the bill of rights, the independent judiciary, and the separation of federal government powers among the president, the cabinet,²⁰ and the two chambers of the Federal Assembly.

II. THE CURRENT CONSTITUTIONAL PROCESS

In September 1990, a constitutional commission of National Assembly members assisted by a committee of experts was appointed by the Assembly to draft a completely new document. The leaders of the country decided, however, that certain sections of the document—those dealing with federalism, the bill of rights, and the constitutional court—would be adopted by the Federal As-

²⁰ In the CSFR and other European countries, the cabinet is usually referred to as the government. In this Article, the terms are used interchangeably.

sembly first as amendments to the current Constitution, and then incorporated later in the final text of the new constitution. Since the 1960 Constitution, as amended in 1968, is still in effect, the country has followed the existing amendment procedure, which requires a three-fifths vote of each national delegation in the Chamber of Nations as well as three-fifths of the members of the Chamber of the People. But the formal amendment process is only part of the story. Various groups in the country have spent and will continue to spend months negotiating over the content of the constitutional provisions that will eventually come before the Federal Assembly for a vote. The players in the constitution-drafting process include President Havel and Deputy Prime Minister Pavel Rychetsky, Slovak political figures like Christian Democratic Union leader and new Slovak Prime Minister Jan Carnogursky, the two National Councils, and various political parties.

A. Federalism

This Section first examines the road to structural reform in the federalism arena. It then considers two structural reforms in particular: secession, and the division of power between the federal government and the two national governments. Finally, we evaluate these reforms.

1. Road to structural reform.

The achievement of substantial autonomy within a federal system of government has been the Slovak goal since the republic was founded over seventy years ago. That goal was also an unfulfilled promise of the Prague Spring. Devising and adopting a system that creates a central government with enough authority to deal with the many daunting economic, ecological, social, political, and international problems that Czechoslovakia faces, while allowing the Slovaks the degree of autonomy they demand, will be very difficult.²¹

One major stumbling block is the reemergence of fierce ethnic hostility between the Czechs and Slovaks. Czechoslovakia is not

²¹ There is another nationalist element in this mix: the Moravians and Silesians. Czechoslovakia is roughly divided into three parts, with Bohemia in the west, Moravia and Silesia in the center, and Slovakia in the east. Bohemia and Moravia-Silesia comprise the Czech Lands and currently fall under the Czech republic. Some Moravians and Silesians have been agitating for autonomy, and even a three-republic state, but the Slovaks will have none of it, for it would weaken their power. Jiri Pehe, *The First Weeks of 1991: Problems Solved, Difficulties Ahead*, Report on Eastern Europe 9 (Mar 8, 1991).

unique in this regard, for such quarrels, many of ancient origin, have occurred throughout Eastern Europe since 1989. Communist hegemony had largely suppressed these quarrels, but when the lid was lifted, the animosities erupted again. Along with these ethnic disputes, communism, with its tyranny, corruption, and inefficiency, has increased public skepticism of all forms of central government, even democratic ones.

The result is a trend toward centrifugalism that has manifested itself in a widespread demand throughout Eastern Europe for devolution of central authority into a loose form of federalism, with power shifting from the center to the regions. At this writing, it is very difficult to imagine that Yugoslavia, for example, can survive even as a loose federation, let alone with the more centralized structure it has enjoyed since World War I. The future shape of the Soviet Union at this writing is equally obscure, for the giant Russian Republic seems willing to enter into a loose "confederation" with many of the other republics, but the Baltic states, Armenia, Moldavia, and Georgia want to be independent of the Soviet Union and will be kept in it only by force.

Centrifugal ethnicity and regionalism are, of course, not peculiar to Eastern Europe. There are intermittent separatist movements in Italy, Spain, and even in Great Britain. There are also numerous examples of successful federal systems with a reasonably strong central government, such as the United States, Germany, Belgium, Canada, Switzerland, Spain, India, Brazil, and Argentina. Of these, however, only Switzerland, Belgium, and Canada consist of a few geographically separate, self-conscious ethnic groups, and the only fully successful federation among the three is Switzerland. Neither Belgium nor Canada has entirely succeeded in resolving the difficulties of making one country out of two ethnically different peoples, though Belgium seems to have achieved a *modus vivendi* between its French and Flemish communities. Whether the Czechs and Slovaks will be able to do as well as Belgium and Switzerland remains to be seen.

The Czechs and Slovaks resumed their squabbling soon after the velvet revolution took place in November and December 1989. From the outset, the Slovaks made it clear that this time they were determined to fulfill their yearning for a significant measure of self-determination. Slovak political figures demanded various forms of autonomy, ranging from full independence to near-independence within a weak federal structure. The first eruption, in April 1990, was over what to name the state, and nearly produced a constitutional crisis. The solution was the cumbersome "Czech

and Slovak Federative Republic", a slight variation on "Czechoslovak Federative Republic," the name adopted just one month earlier. In March 1991, the Christian Democratic Union, Slovakia's leading party, proposed a "treaty" between the two nations to form a state with very limited power in the central government, from which either nation could secede at any time.²² Tempers flared on both sides. Some Czechs reacted by saying: "Let them go; we're better off without them."²³

The actual strength and extent of the separatist impulse in Slovakia as a whole is difficult to gauge. Recent polls show only a small, though not insignificant, percentage of Slovak secessionists, as well as a few Czech secessionists.²⁴ But for now at least, most Slovaks seem to want what *The New York Times* called "an open marriage, not divorce": a quite loose confederation of the two national republics, in which, with the exception of protection for basic rights and freedoms, the central government does not act directly on the people as a whole but only on the two governments.²⁵

The Slovaks thus considered the first major issue to be the division of power between the central (or federal) government and the two national republics. To resolve this issue, the leaders of the Czech and Slovak National Councils and of the federal government met in a series of difficult, often acrimonious meetings between August 9 and November 13, 1990.²⁶ These meetings produced an agreement among the prime ministers of the federal government and the two republics on a constitutional amendment that was adopted in November by the Slovak National Council.

²² This, of course, presupposes that the two nations are already separate and seems inconsistent with the assumption, until now unquestioned, that the 1960 Constitution, as amended in 1968, is still in effect. It may be based on a theory, propounded by one Slovak scholar at a conference in Washington, D.C., on April 19, 1991 that the original 1920 Constitution and all its successors were unconstitutionally adopted and therefore the two nations are in the state of nature in which their declaration of independence and the collapse of the Austro-Hungarian Empire left them in 1918.

²³ Peter Martin, *Relations Between the Czechs and the Slovaks*, Report on Eastern Europe 2-3 (Sept 7, 1990).

²⁴ An opinion poll in June 1990 found that 8 percent of the Slovaks and 5 percent of the Czechs wanted two completely independent states. Kusin, *The Road to the Current Debate* at 5-6 (cited in note 2).

²⁵ John Tagliabue, *Slovaks Want an Open Marriage, Not Divorce*, NY Times A12 (Dec 28, 1990). "Federations are communities of both politics and individuals and emphasize the liberties of both . . . Confederations, on the other hand, are primarily communities of politics, which place greater emphasis on the liberties of the constituent politics." Daniel J. Elazar, *Exploring Federalism* 93 (Alabama, 1987).

²⁶ For a chronology of events, see Jan Obrman and Jiri Pehe, *Difficult Power-Sharing Talks*, Report on Eastern Europe 5, 6-8 (Dec 7, 1990). For a Slovak view of these negotiations, see *Address by Slovak Republic Premier Vladimir Meciar*, Foreign Broadcast Information Service—Eastern Europe 10 (Aug 30, 1990) ("*Meciar Address*").

The Czech National Council, however, balked at the limited powers the agreement gave to the federal government. First, it objected to the amendment's provision giving the power to declare and protect the human rights of other minorities (for example, Hungarians and Gypsies) to the two National Councils instead of to the federal government. It also objected to the agreement's division of authority to raise revenue for the three governments.²⁷ This eleventh-hour crisis impelled President Havel to make a stern and ominous speech attacking Slovak separatism as suicidal for the country and its new democracy.²⁸ After the speech, the groups reached a compromise that expanded the federal government's power over minority protection, the post office, and oil pipelines, and clarified federal power to raise taxes to carry out federal responsibilities. The agreement was then adopted by the Federal Assembly as a constitutional amendment on December 12.

With this amendment in place, the Slovak members of the Federal Assembly joined in approving critical federal legislation containing some of the economic measures necessary to create a free market, most of which are now in force.²⁹ On January 27, 1991, a bill of rights was adopted as a constitutional amendment, and another amendment creating a Constitutional Court was adopted on February 27, 1991.³⁰ The rest of the Constitution, together with possible revision of these amendments, will be treated in the final overall document.

2. The constitutional amendment's provisions on federalism.

There are several fundamental elements of federalism now built into the CSFR constitutional structure as amended by these

²⁷ Jiri Pehe, *Power Sharing Law Approved by Federal Assembly*, Report on Eastern Europe 6, 7 (Dec 21, 1990).

²⁸ Burton Bollag, *Havel Asserts Nation Faces Breakup*, NY Times A12 (Dec 11, 1990).

²⁹ Under the communists, Czechoslovakia was among the most hostile of all the East Bloc countries to private capital. Shortly after the revolution, the Assembly moved quickly to amend the Constitution to allow the establishment of private businesses, including joint stock companies. Later in 1990, it enacted laws for the privatization of small firms and, in early 1991, the restitution of property and the privatization of large-scale enterprise. Small-firm privatization had begun in late 1990. The law on restitution of property, designed to restore nationalized property to its original owners, was very controversial, and difficult to enact. The law on large-scale enterprise will probably not be implemented until the end of the year. Jan Obrman, *Two Landmark Bills on Privatization Approved*, Report on Eastern Europe 12 (Mar 15, 1991). In addition, the government removed price controls, made the currency convertible, and is in the process of establishing capital markets. Jiri Pehe, *The Agenda for 1991*, Report on Eastern Europe 11, 12 (Jan 18, 1991).

³⁰ The texts of both amendments are on file with U Chi L Rev.

constitutional amendments. First, the CSFR is stated to be a union of two independent republics. While there is no explicit right of unilateral secession, such a right is frequently asserted and rarely challenged. Second, the federal government has only those relatively few powers given it by the Constitution. The republics retain all residual power. Indeed, the powers given the federal government and the republics are intended to be mutually exclusive, with as few concurrent powers as possible.³¹ The federal government's powers include the authority to legislate the basic standards for most governmental policies, but at least in theory the administration of many such policies is vested in the republics. Also, all high political, judicial, and administrative offices are to be divided equally between Czechs and Slovaks.³² Finally, the Constitutional Court is to resolve jurisdictional disputes growing out of the above arrangements.³³ A relatively loose federation with a weak central government is thus being created.

a) *Independence and secession.* The first clauses of the 1960 Constitution, as amended in 1968, define the sovereignty of the two republics. Unlike the American Constitution, which begins with a Preamble in the name of "WE, THE PEOPLE of the United States," the Preamble to the Czechoslovak Constitution opens with:

(1) The Czech and Slovak Federative Republic is a federative State of two equal, fraternal nations, the Czechs and the Slovaks.

³¹ In contrast, the 1968 amendments contained a long list of concurrent powers. See Art 8, reprinted in Flanz, *Czechoslovakia*, in Blaustein and Flanz, 4 *Constitutions of the Countries of the World* (cited in note 14).

³² Unbreakable tradition mandates that if the president is from one nation, the federal prime minister must be from the other, and the same for the chairman and vice-chairman of the Federal Assembly. Specific constitutional provisions mandate the same arrangement for high administrative officials. See, for example, Article 105 of the 1960 Constitution covering the procuracy; similar arrangements provide for different national backgrounds for the president and the vice-president of the Constitutional Court, as well as an even division of the twelve members of the Court (Articles 10, 11 of the Constitutional Act of February 27, 1991) (on file with U Chi L Rev), and an alternating presidency for the Central Bank (Article 12 of the Constitutional Act of December 12, 1990) (on file with U Chi L Rev).

³³ Associated with this dismantling of federal power are plans for strengthened local governments which, under the communists, were merely vehicles for Party control. Now local governments are to be governed by the republics. See Obrman and Pehe, *Difficult Power-Sharing Talks* at 6 (cited in note 26); 1990 Constitutional Amendment, Art 4(7) (republic decides what property communities may have). Local government elections were held on November 25, 1990.

(2) The Czech and Slovak Federative Republic is founded on the voluntary bond of the equal, national states of the Czech and the Slovak nations, based on the right of each of these nations to self-determination.³⁴

Paragraph 4 of the Preamble then declares that the two republics are to have "an equal position" in the federation, and the composition of the Federal Assembly, discussed earlier, reflects this, particularly the equal representation of Czechs and Slovaks in the Chamber of Nations and the super-majority voting requirements.

Although the current Constitution has no explicit provision about unilateral secession, there are indications that the new one will allow each republic to secede virtually at will; whatever right to secede presently exists seems to stem from a reading of the references in the Preamble to a "voluntary bond" and "self-determination." A 1989 draft (now superseded) of a new constitution prepared for Civic Forum by now-Deputy Prime Minister Pavel Rychetsky, the government official in charge of the constitution and other legislation, specifically declared such a right, as does the CDU "treaty" mentioned above, and a draft constitution proposed by President Havel in March 1991.³⁵ No one, however, has attempted to draft the provisions to deal with such controversial issues as the division of assets, liabilities, and ongoing responsibilities between the separating parties—issues that plague all divorces and other separations.

b) The division of power between the federal state and the two republics. The 1968 constitutional amendment established concurrent jurisdiction for both the federal and republic governments over most matters, with exclusive federal or republic jurisdiction in just a few areas. The current arrangement, in contrast, purports to establish spheres of exclusive jurisdiction for the federal government in a very few areas such as foreign policy, defense, customs, and banking; some form of concurrent jurisdiction also in a handful of areas yet to be determined; and exclusive jurisdiction in the republics as to everything else.³⁶

The final version also gives the federal government power to "codify" the laws in many of the fields nominally reserved to the

³⁴ All quotations are from an official translation (on file with U Chi L Rev) unless otherwise noted.

³⁵ Copies of the CDU and Havel proposals are on file with U Chi L Rev.

³⁶ The Havel proposal would give much more authority to the federal government but as of this writing (April 1991) is not given much of a chance.

republics.³⁷ The power to "codify" apparently means the authority to pass laws setting legislative standards and guidelines in a field, leaving the administration of those laws to the republics. The commentary to an earlier draft of the 1990 amendment described this codification power in the context of economic matters as follows: "The role of the [federal government] . . . is to create . . . the conditions for a uniform market. Therefore, the draft shifts the . . . fields of concept formulation and fundamental legislation" to the federal government."³⁸

For example, in the 1990 constitutional amendment, "concept formulation and fundamental legislation" in the field of price policy is now a federal responsibility.³⁹ The same federal authority to "codify" now exists in such matters as foreign economic relations, transport, communications, utility regulation, and the environment. In some of these fields, such as telecommunications and "nuclear [power] security," the federal government has the additional authority to "exercise State supervision," "organiz[e] and control," and otherwise to exercise direct supervisory or operational control.⁴⁰

A current illustration of how things may work is the Federal Assembly's recent enactment of the concept formulation and fundamental legislation on privatization.⁴¹ Although much of the administration of these laws will be at the republic level, the federal policies have now been approved by the Czech and Slovak representatives at the federal level, and in the administration of these laws by the two republics, the agreed federal policies are expected to prevail. But should the present political accord fall apart, there is no assurance that the courts would uphold the federal policies; there is not yet any supremacy clause establishing the primacy of

³⁷ Arts 10-28(b).

³⁸ Commentary of the Slovak National Council on draft of the Constitutional Law amending Constitutional Law No 143/1968 on Czechoslovak Federation C/2 (Nov 5, 1990) (unofficial translation) (on file with U Chi L Rev).

³⁹ See Constitutional Act of 1990, Art 15:

In the field of price policy the jurisdiction of the Czech and Slovak Federal Republic shall include:

(a) the determination of the concept of the price policy and the declaration of principal measures of price regulation,

(b) the codification of the price area.

⁴⁰ In still other areas, such as oil and gas pipeline regulation and television, the lines are either blurred or left for the future. See Constitutional Act of 1990, Arts 17, 20.

⁴¹ On February 26, 1991, the Assembly approved a law on privatizing major state-owned industrial enterprises. *Another Law Crucial for Economic Reform Approved*, CTK National News Wire (Feb 27, 1991).

federal law over state law, and the strong political opposition to such a clause makes its adoption unlikely.⁴²

Other provisions of the 1990 constitutional amendment may help to create the necessary unity to address the country's pressing economic and other problems. Article 4 declares that there is to be a uniform Czechoslovak market integrating the economies of the two republics, and Article 37 declares that the federal government is authorized to create the legal codes for commercial law and securities law, among other areas.⁴³

In addition, the Czechs and Slovaks seem to have avoided one major problem the United States faced under our Articles of Confederation—raising revenue. Under the 1990 constitutional amendment, the federal government has the authority to impose turnover and income taxes directly on the people; it need not depend on the republics for funding its operations. However, we were told by one official that the federal government is entitled to only 35 percent of the take, much of which is eaten up by mandatory obligations. Moreover, tax legislation is among the categories requiring an absolute majority of each national delegation in the Chamber of Nations, and obtaining such a majority from one delegation may be difficult if the revenues from the taxes or other special purpose funds to be raised are to be spent primarily in the other republic.⁴⁴

3. Will the federalism experiment succeed?

Whether this experiment in loose federalism can succeed is very uncertain. The institutional structure, with its divisions of authority, its super-majority legislative requirements, and its insistence on dividing all high federal offices equally between Czechs and Slovaks, creates many obstacles to action and many opportunities for impasse and immobility.⁴⁵

⁴² See Part II.C. (on independent judiciary). Professor Jiri Boguszak, the head of the Federal Assembly's committee of experts on the constitutional revision told the authors that in his opinion, the "codification" power is of little significance, for a republic may ignore it with impunity because of the absence of a supremacy clause, unless the matter is held to be exclusively within the federal competence.

⁴³ The Article also allows the federal government to create legal codes for courts, and, if necessary for the "unity of the legal system," for minorities, churches, religious societies, health care, and education below the college level. The German legislature has apparently used a similar power extensively and effectively. However, the German example—in which there are no ethnic divisions—may not be wholly applicable to the Czechs and Slovaks.

⁴⁴ The tax power does, however, offer a possible federal lever. The Slovak Republic is likely to require more financing than Slovak revenues alone can provide, which gives the federal government political leverage to obtain Slovak agreement to expanding federal powers.

⁴⁵ The success with which the Slovaks have succeeded in their centrifugalism is somewhat surprising, for they are in a distinctly weaker position in the country. They are much

On the other hand, there are few more difficult problems than dividing and allocating power by mutual agreement. The four months that the Czechs and Slovaks took is not very long, especially given the many historical, emotional, and other antagonisms involved. The fact that they resolved the last-minute crisis and finally reached agreement is certainly a hopeful sign, although a less happy omen is that both sides already want to modify the division.⁴⁶

The common Czech and Slovak desire to enter the European Community may also force a tighter union. The EC recognizes only member states capable of discharging their responsibilities as Community members, and it does not accept internal divisions as an excuse for failing to implement Community directives. This may mean that the CSFR will have to correct the inherent centrifugalism of its constitutional structure before it can hope to join the Community as a full or even associate member. Although some Slovaks have expressed a desire to enter the EC as two virtually separate states—"to have a separate seat," as one Slovak leader put it in a private conversation⁴⁷—it is not likely that the Community will accept this notion.⁴⁸

The differences between the two nations are real, however, and the federation mechanism the Czechoslovaks have adopted will almost certainly be very difficult to operate. Just as Americans

poorer and will have to rely on Czech cooperation and support in the Federal Assembly to obtain resources to ease the hardships that will result from the transition to a private enterprise economy, and from the conversion of their industry from armaments to civilian production. Super-majority requirements and Czech resentment could easily produce deadlock and no resources. There is also a fear in Slovakia that if the republic were to become fully independent—which would happen if the Czechs were to secede, an easy matter under the Slovak proposals—the Hungarian minority in southern Slovakia (and perhaps the Ukrainians as well) would try to split off and unite with their ethnic relatives. Under the circumstances, the Slovak success in forcing the Czechs to accede to taking away so much power from Prague and vesting it in the republics is both remarkable and possibly self-defeating.

⁴⁶ Other disputes resolved after a near-crisis include disagreements over the bill of rights and a restitution law, the latter of which was originally rejected by Slovak deputies.

⁴⁷ See also Tagliabue, *Open Marriage, Not Divorce* (cited in note 25).

⁴⁸ Peter Malanczuk, *European Affairs and the 'Lander' (states) of the Federal Republic of Germany*, 22 Common Mkt L Rev 237, 238 ("[t]he Community Treaties . . . refuse to take notice of any internal subdivision within a Member State."). See also European Commission Vice President Martin Bangemann: "[A] confederation cannot be a member of a European union." Address, Mar 7, 1991, reprinted in *Europe* (Mar 8, 1991).

Belgian and French colleagues who work closely with the EC Commission told the authors that when the Belgian and German governments have tried to justify a failure to comply with Community directives on the ground of local autonomy over the subject matter, Commission officials have rejected such explanations.

found it necessary in 1787 to change our structure radically in order to survive as a nation, so too the Czechs and Slovaks may have to drastically change theirs. Whether they have the time to experiment, given their immediate economic problems, and whether future difficulties will bring them together rather than drive them even farther apart, are questions that time alone can answer.

B. The Bill of Rights

The second critical issue that the Czechs and Slovaks agreed to consider immediately was in the area of individual and minority rights. On January 9, 1991, the Federal Assembly adopted a bill of rights, the "Charter of Fundamental Rights and Freedoms" (the "Charter"), by the necessary super-majorities for a constitutional amendment. The drafting of the Charter was a direct response to the public demand that basic human rights and freedoms—so callously abridged by the previous regime—be protected immediately.

The Charter was the culmination of a long process of legislative deliberation, controversy, and compromise that reflected the differing cultural, socio-political, and ideological persuasions and aspirations of the deputies to Czechoslovakia's three parliaments. The January 9 document had been preceded by several working drafts, one of which passed both the Czech and Slovak National Councils. The National Councils then presented a harmonized version to the Federal Assembly, which adopted it with a few more modifications.

The people of Czechoslovakia, proud of the brief democratic period they experienced between the two world wars, turned to the ideals of the interwar republic and used their 1920 legislative and institutional forms as a model for the new Charter. This bill of rights also incorporates principles of the European Convention on Human Rights. Indeed, the proponents of the Charter urged that the document be adopted as soon as possible, because early adoption would assist Czechoslovakia in becoming a member of the Council of Europe, the institutional incarnation of the Enlightenment values endorsed by all European democracies.⁴⁹ By adopting the Charter, Czechoslovakia has signified to the world its firm commitment to all the human rights proclaimed on the banners carried

⁴⁹ On February 21, 1991, Czechoslovakia became a full member of the Council of Europe. *Czechoslovakia Becomes 25th Member of the Council of Europe*, CTK National News Wire (Feb 21, 1991).

by the crowds assembled in Prague and other cities during the ecstatic days of November 1989.⁵⁰

In contrast to the eighteenth-century terseness of the American Bill of Rights and the French Rights of Man, the CSFR's Charter is a detailed document divided into a preamble, a general provisions section, and separate articles addressing human rights and fundamental freedoms (including the rights of minorities), economic, social and cultural rights, and judicial review, as well as some features common to all the provisions.

1. The Preamble.

The Preamble mandates that all other constitutional acts, ordinary legislation, and secondary legislation must conform to the Charter.⁵¹ It affirms the republics' power to enlarge the fundamental rights and freedoms beyond the scope of the Charter, but not to narrow those rights.⁵² The Preamble also specifies that international treaties concerning human rights and fundamental freedoms that have been ratified by the CSFR are self-executing and prevail over ordinary domestic legislation, but not over the Constitution itself.⁵³

2. General Provisions.

The Charter's section on General Provisions codifies the separation of church and state. It contains a comprehensive non-discrimination clause that prohibits discrimination on the basis of sex, race, skin color, language, faith, religion, political persuasion, ethnic or social origin, property, birth, or other status.⁵⁴ The General Provisions further stipulate that individual duties may be imposed only within the "limits of the law,"⁵⁵ and that if rights and freedoms are limited in certain exigencies, "the substance and

⁵⁰ Addressing a session of the Council of Europe in Strasbourg, Czechoslovakia's Foreign Minister, Jiri Dienstbier, expressed the country's commitment to the values representing a common European heritage. He stated that his country's membership in the Council was important to its "return to Europe" and its renewal as a democratic state. *Membership Approved*, FBIS-EEU Daily Report East Europe 12 (Jan 31, 1991).

⁵¹ Charter of Fundamental Rights and Freedoms § 1 (Jan 9, 1991) (on file with U Chi L Rev).

⁵² *Id.* at § 2.

⁵³ *Id.* Some states, such as The Netherlands, have recently amended their constitutions to provide that such treaties and decisions of the tribunals they create do prevail over the national constitution.

⁵⁴ *Id.* at Art 3.

⁵⁵ *Id.* at Art 4.

meaning of these [fundamental] rights and freedoms shall be respected."⁵⁶

3. Enumerated rights.

a) *Human rights and freedoms.* In the first section, "Fundamental Human Rights and Freedoms,"⁵⁷ the Charter protects the right to life, including an ambiguous clause (added as an ingenious compromise with anti-abortion groups) that "human life deserves protection already before birth."⁵⁸ It also prohibits torture, inhumane treatment, capital punishment, forced labor, slavery, and wrongful imprisonment. It guarantees the inviolability of a person's privacy and personal freedom. It protects the sanctity of the home and human dignity, personal integrity, name, and good reputation. It provides for the right to own property and protection against expropriation. It guarantees the privacy of letters, freedom of movement, and freedom of thought, conscience, and religious conviction.

b) *Political rights.* The second section protects freedom of expression and information; prohibits censorship; and guarantees rights to petition and peacefully assemble, to freely associate, and to participate in the administration of public affairs, either directly or through elections. It also establishes a right to information on government activity. Following a similar provision in the German Constitution, it seems to protect the right of civil disobedience to protest unlawful government conduct in extreme situations.⁵⁹

⁵⁶ Id at Art 4(4).

⁵⁷ The official translation of the Charter refers in various places to "fundamental rights and freedoms," "human rights and fundamental freedoms," and "fundamental human rights and freedoms." It is too early to tell whether this linguistic inconsistency will someday be interpreted to reflect intentional and substantive distinctions.

This inconsistency is particularly difficult to interpret in the case of Article 36(2). According to this provision, anyone claiming a violation of rights by an administrative decision can turn to a court to have the decision judicially reviewed, unless the law provides differently. The article further states, however, that decisions affecting "fundamental rights and freedoms listed in the Charter, may not be excluded from the jurisdiction of the courts." Presumably this provision applies to the whole document—the official title of which is the "Charter of Fundamental Rights and Freedoms"—and not just to the rights listed in Chapter Two, Division One—entitled "Fundamental Human Rights and Freedoms"—which does not include, for example, freedom of expression. (Freedom of expression falls under Division Two, "Political Rights.")

⁵⁸ How long before birth is not specified in the text.

⁵⁹ "Citizens have the right to resist anybody who would remove the democratic order of human rights and fundamental freedoms established by the Charter, if the work of the constitutional organs and an effective use of legal means are frustrated." Art 23.

c) *Rights of national and ethnic minorities.* The influence of the 1920 Constitution on the Charter is probably most evident in the provisions pertaining to ethnic and national minorities. The 1920 Constitution established equality between national, ethnic, and religious minorities and the rest of the citizenry. National minorities had the constitutional right, for example, to use their own language in personal and business discourse, in the press, and in religious institutions. The 1920 Constitution also gave minorities the right to address authorities in their own language in districts where they constituted more than 20 percent of the local population. In addition, the 1920 Constitution explicitly prohibited forcible denationalization, and the state gave material support to schools for minorities in districts with large minority populations.

The new Charter similarly guarantees minorities rights necessary to safeguard their culture, language, and customs. Minorities also have rights "under conditions set by law" to education in their own language, to use their language when addressing authorities, and to participate in the settlement of matters concerning them. These rights are perhaps too broad and vague to be relied upon, but they comply in form and substance with the minority rights guaranteed by other European human rights documents.⁶⁰

The vague language in the Charter also reflects compromise, without which the various parties involved could not have agreed on a final version of the Charter. The subject of minority rights was a matter of bitter controversy between the Czech and the Slovak deputies. The largest minorities in Czechoslovakia are Hungarians and Gypsies, both of whom live mainly in Slovakia.⁶¹ Ironically, some Slovaks, themselves a minority in Czechoslovakia and before that victims of centuries of Hungarian cultural oppression and forcible denationalization of the Slovak people, tried to limit the language and cultural rights their own resident minorities would enjoy.⁶² This seems to be partly in retaliation for the past

⁶⁰ The latest document recognizing the group rights of national and ethnic minorities is the Document of the Copenhagen Meeting on the Human Dimensions of the Conference on Security and Cooperation in Europe (June 29, 1990). Czechoslovakia participated in the meeting.

⁶¹ Hungarians, with whom Slovaks have a long and unhappy history, account for some 11 percent of the population in Slovakia. Jozef Kalvoda, *National Minorities Under Communism* at 17 (cited in note 15). It is very difficult to find estimates of the Gypsy population, which is larger and growing. Id. Other important minority groups in Czechoslovakia include Germans, Poles, and Ukrainians.

⁶² The Slovak National Council passed a very controversial language act in the fall of 1990. It proclaimed Slovak the official language in Slovakia, and gave minorities the right to address authorities in their own language only in districts where they constitute more than

oppression, partly from the fear of irredentism, and partly from resentment at the past and continuing refusal to recognize Slovak minority rights in Hungary.

d) *Due process of law.* The Charter also includes a chapter on judicial and other legal protection. This chapter provides for the judicial review of administrative acts, the right against self-incrimination, the right to counsel, and the right to public trial.

e) *Economic and social rights.* A significant but more problematic section of the Charter concerns economic, social, and cultural rights. The Charter provides substantially more protection for social and economic rights than do most western constitutions and human rights documents and it goes far beyond the marginal treatment of these rights in the 1920 Constitution.⁶³

The Charter recognizes the right to free choice of profession and appropriate training, to make a living through gainful employment, to material security provided by the state for those unable to work through no fault of their own, to fair compensation for work, and to satisfactory working conditions. This section of the Charter also guarantees free education through the secondary level; various protections for women, adolescents, and the handicapped; free medical care under a system of public health insurance; and life in a favorable living environment.

Many of these guarantees impose obligations on the government that it may not have the financial ability to fulfill. But the drafters of the Charter did not include these rights naively. Historically, the Czechs in particular have been known as an egalitarian, socially conscious, even leftist nation. Furthermore, the post-1968 Communist Constitution, like the other East Bloc constitutions, broadly guaranteed social and economic rights, including rights to work, free education, and free medical care. At this point in Czechoslovakia's development, with the future so uncertain and economically grim, backtracking from the social guarantees of the previous regime would not have been politically viable.

A final factor influencing the broad framing of economic rights in the Charter was the common perception, shared even by various

20 percent of the local population, as in the 1920 Constitution. See *Text of Controversial Law on Slovak as Official Language*, CTK National News Wire (Nov 9, 1990).

⁶³ In his comments on the 1920 Constitution, Taborsky argues that "economic and social rights are an increasingly important factor in modern democracy. Any Constitution that overlooks them, as do almost all existing Constitutions, is bound to be defective." Taborsky, *Czechoslovak Democracy at Work* at 130-31 (cited in note 3).

drafters, that a constitution is a political declaration as well as an instrument creating and guaranteeing real, substantive, and enforceable rights. Czechoslovakia is not alone in this perception. Indeed, the German Constitution contains not only enforceable rights, but also "political aspirations" that guide interpretation. Thus, after long deliberation, and in appreciation of the differences in practical enforceability between fundamental rights and freedoms and the economic and social rights, the Czechoslovak drafters included a provision, Article 41, which states that some of the Charter's economic and social rights are only enforceable to the extent provided by legislation implementing those rights. For all practical purposes, they have been downgraded from rights to aspirations and exhortations to the legislature.

4. The qualification of rights.

That the legislature can be trusted to implement and to protect fundamental rights is a theme that runs throughout the Charter. Many of the Charter's ringing guarantees conclude with the phrase "unless the law provides otherwise" or "unless limited by law." Such caveats always seem dangerous to Americans, who fear placing so much discretion in the legislature's hands, and prefer to trust the courts to define the scope of any necessary exceptions. But the European parliamentary tradition places great faith and confidence in elected representative bodies. To Europeans, such caveats are comforting guarantees of the supremacy of parliament over the king and the king's judges. In the same vein, several articles of the Charter, following the European Convention, limit specified rights "if it is essential in a democratic society for protecting the life or health of individuals, for protecting the rights and freedoms of others, or for averting a serious threat to public security and order."⁶⁴ But Article 4(4) counterbalances those *ordre publique* limitations and sets general restrictions on the limitations of the fundamental rights and freedoms. Article 4(4) sets forth the government's duty to respect "the substance and meaning of those rights and freedoms." It further provides that "[s]uch limits may not be misused for purposes other than those for which they were intended."

⁶⁴ See, for example, Charter, Art 12(3) (dealing with interference with sanctity of the home). Other provisions include variations and expansions of these preconditions. See, for example, Art 14 (freedom of movement and residence); Art 16 (freedom of religion); Art 17 (freedom of expression); Art 19 (freedom of peaceful assembly); Art 20 (freedom of association); and Art 27 (freedom to create trade unions).

Moreover, despite much discussion, the final version of the Charter does not specifically provide, as many European constitutions do, for suspending rights in emergency situations.⁶⁵ The drafters had contemplated following the European Convention, which sets a high threshold the state must meet before interfering with its citizens' human rights and freedoms in an emergency, but they could not agree on the text. The legislators are currently preparing a separate specific act in a form suitable for later incorporation that will regulate emergency situations and specify measures to be taken in the event of war or constitutional impasse.

5. Enforcement of rights.

However eloquently any particular right or freedom is inscribed in the Charter, it requires effective enforcement procedures if it is to have real meaning. In Czechoslovakia's case, enforcement procedures are particularly important. If the fundamental rights and freedoms come to be perceived as merely aspirational, the new Charter will be just as ineffective as the former Communist Constitution in protecting fundamental rights.

In addition to domestic enforcement mechanisms, which are discussed in the next section, Czechoslovak citizens can now petition the European Commission of Human Rights directly. Having become a member of the Council of Europe in February 1991, Czechoslovakia, after ratification, will be bound by Article 25 of the European Convention on Human Rights, which guarantees access to the Commission for "any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this convention." Of course, petitioning the Commission does not provide speedy relief, for domestic remedies must first be exhausted. Also, the Commission has limited power over member states, and often cannot provide effective redress. More effective relief would exist if Czechoslovakia also carries out its intention to accede to the jurisdiction of the European Court of Human Rights,

⁶⁵ See Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention *to the extent strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law." (emphasis added).

For other examples, see Hungarian Constitution, §§ 8(4), 19(3)(i), reprinted in Blau-stein and Flanz, eds, *7 Constitutions of the Countries of the World* (cited in note 14); German Basic Law, Art 90A, in *id*; French Constitution, Arts 16, 36, in *id*.

whose decisions are binding on member states of the Council of Europe.

C. The Independence of the Judiciary

Everyone involved in the current constitution-writing process recognizes the need for an independent judiciary to enforce the guarantees of the Charter. In addition, an independent judiciary is necessary to resolve disputes about the division of powers between the federal government and the republics, and to review the actions of all public officials for compliance with the Constitution and the laws. The institution that will be responsible for fulfilling these tasks is the Constitutional Court.

The 1920 Constitution provided for a constitutional court, but this court was never asked to pass on the constitutionality of any statute, although it did review the acts of some public officials.⁶⁶ The 1968 Act, which was written by the current Vice Chairman of the Federal Assembly as a reformist measure during the Prague Spring, also provided for such a court, but, like so many other provisions of that act,⁶⁷ it never went into effect. Nevertheless, the 1968 Act has served as the model for the provisions establishing the new Court. The questions to be resolved regarding the Court relate primarily to how best to assure the real independence of the judges, and the power the Constitutional Court will have over the republics.

1. The independence of the Constitutional Court.

Like the Federal Assembly, the structure of the Court has been designed to assure an equal representation of Czechs and Slovaks. The Court will consist of twelve judges: six Czechs and six Slovaks.⁶⁸ Equal representation forces an even rather than an odd number of judges, thus heightening the likelihood of deadlock, especially because the Court is directed to hear and decide all cases in panels of four. However, the current draft provides that if a panel divides evenly, the case can be reviewed by all twelve judges.

In further contrast to the American system, the proposed act exactly reverses our constitutional appointment process. Whereas

⁶⁶ Taborsky, *Czechoslovak Democracy at Work* at 76-77 (cited in note 3).

⁶⁷ See the discussion above of the federalism provisions in the 1968 constitutional amendments.

⁶⁸ In keeping with the usual pattern, the president and vice president of the Court must be from different republics.

in the United States the president appoints Supreme Court justices by and with the advice and consent of the Senate,⁶⁹ Constitutional Court judges are to be nominated by the Presidium of the Federal Assembly and appointed by the president. Whether the president can refuse to appoint someone so nominated is not specified.

The present draft of the provision establishing the Constitutional Court follows the general European model of appointing the judges for a term of years—in this case, seven—apparently with eligibility for reappointment. In contrast to the American method of appointment “during good Behaviour”⁷⁰ (i.e., for life), a short seven-year term and the possibility of reappointment could well lead to the judges’ excessive dependence on the political bodies that appoint and reappoint them, or at least the appearance of such dependence.⁷¹ This could seriously hamper the Court’s functioning; public support, as in all constitutional democracies, will depend on whether its members are perceived to be objective and independent, or politically motivated because of their dependence on the other branches for their appointment and reappointment. Aware of this, some of the experts have indicated that the final version of the constitution may specify a longer term without reappointment, as in Germany.

Judicial independence is especially vital in Czechoslovakia, where the jurisdictional problems reflect the underlying rivalry between Czechs and Slovaks and there is no tradition of strong and self-confident judicial review. An acute shortage of experienced judges who are not compromised by their judicial records under the communist regime only exacerbates this concern.⁷² The explicit division between Czechs and Slovaks also raises appearance problems, if nothing else, especially in the inevitably large number of cases dealing with Czech-Slovak-federal jurisdictional problems.⁷³

⁶⁹ US Const, Art II, § 2.

⁷⁰ US Const, Art III, § 1.

⁷¹ Compare *Bowsher v Synar*, 478 US 714 (1986). German Constitutional Court judges are ineligible for reappointment. Constitutional Court Act § 4(1) (1971); see generally Donald P. Kommers, *Judicial Politics in West Germany* 88 (Sage, 1976).

⁷² The Czech republic alone is said to be short at least 330 judges. One hundred were dismissed after November 1989, and another 120 left voluntarily, with only 115 new judges appointed to replace them. Unfortunately, the salary and social status of judges are both very low. Jan Obrman, *Rehabilitating Political Victims*, Report on Eastern Europe 5, 7 (Dec 14, 1990).

⁷³ Because of the obviously political nature of the jurisdiction given many European constitutional courts, which often includes electoral disputes, in some countries the judges

Although the proposed Act is silent on the subject, the Constitutional Court could follow the prevailing continental European practice of voting secretly and publishing only one opinion of the Court, regardless of the actual split among the judges. No dissenting opinions would be published. Of course, this limitation would deprive the legal profession and the public of the benefit of learning how and why the judges split over the issues. It also would reduce the possibility that, as often happens when judges expose their differences in dissenting opinions, the views of the dissenters find public or scholarly support and become the majority view of a later generation.

The reason for secret voting and the suppression of judicial dissent is of course to protect individual judges from public criticism and the threat of nonreappointment. These risks are thought to be especially high in multinationality courts where publicity might deter a judge from voting against the interests of the country or region she represents. But the costs of secrecy are also high, and secrecy may do more to weaken public respect for a court and the integrity of its processes than to strengthen it.⁷⁴

2. The Court's jurisdiction and its power over the republics.

The Court will not be one of general jurisdiction. Instead, its jurisdiction will be limited to adjudicating jurisdictional disputes between federal and republic agencies, and cases in which there is a question as to whether federal and republic statutes and other actions conform to federal constitutional law and human rights treaties.⁷⁵ The capacity of the Court to resolve such jurisdictional disputes in favor of the federal government will be much weaker

are appointed on an explicitly political basis. See Carl Baar, *The Courts in the Federal Republic of Germany*, in Jerold L. Waltman and Kenneth M. Holland, eds, *The Political Role of Law Courts In Modern Democracies* 92-93 (St. Martin's, 1988); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 138 (Clarendon, 1989) (Germany, France); see also Belgium, where half the twelve judges are French and half are Flemish, Belgian Const Arts 21, 22; Allan R. Brewer-Carias, *Judicial Review in Comparative Law* 252-53 (Cambridge, 1989) (France).

To reinforce the Czechoslovak Court's independence, it has been located in Brno, which is in Moravia, not in Prague nor Bratislava. It seems that some judges living in Prague or Bratislava may not want to move to Brno. Given the small pool of eligible judges, this could create difficulty in finding enough qualified jurists for the Court.

⁷⁴ Interestingly, the European Court of Human Rights in Strasbourg announces its votes and publishes dissenting opinions, as does the International Court of Justice in The Hague, yet public respect for these tribunals is certainly high. An interesting compromise is contained in a German statute that required secrecy in the initial years of the German Constitutional Court's existence, but not thereafter.

⁷⁵ Art 2, quoted in text at note 76.

than the comparable capacity of the Supreme Court of the United States. Our Constitution recognizes the possibility of overlap or conflict between federal laws and treaties adopted in exercise of the federal government's enumerated powers, and state laws adopted pursuant to the Constitution's general reservation of all other powers to the states. Our Supreme Court can invoke Article VI of our Constitution, which makes "the supreme Law of the Land" not only the Constitution itself but also the laws "made in pursuance thereof."

Because of Slovak opposition, the constitutional amendments adopted so far mandate the supremacy only of federal *constitutional* law and human rights treaties over republic law, but not of federal *statutory* law over republic constitutional or statutory law. Thus, Article 2 establishing the Court's jurisdiction provides only that:

The Constitutional Court shall rule on whether

(a) Acts of the Federal Assembly and Legal Measures of the Presidium of the Federal Assembly conform to the Constitutional Acts of the Federal Assembly;

(b) Acts of the Federal Assembly, Constitutional Acts and other laws enacted by the Czech National Council, and Constitutional Acts and other laws enacted by the Slovak National Council conform to international treaties on human rights and fundamental freedoms, ratified and promulgated by the Czech and Slovak Federal Republic;

(c) Constitutional Acts and other laws enacted by the Czech National Council and by the Slovak National Council, and Legal Measures of the presidium of the Czech National Council and the presidium of the Slovak National Council conform to the Constitutional Acts of the Federal Assembly;

(d) decrees of the Government of the Czech and Slovak Federal Republic and legal regulations issued by Federal ministries and other Federal organs of state administration conform to Constitutional Acts and other laws enacted by the Federal Assembly;

(e) decrees of the governments of the Czech Republic and of the Slovak Republic and legal regulations issued by ministries and other organs of state administration of the Czech Republic and of the Slovak Republic conform to Constitutional Acts and other laws enacted by the Federal Assembly.⁷⁶

⁷⁶ Art 2, as amended by the Constitutional Act of February 27, 1991 (on file with U Chi L Rev).

A supremacy clause, of course, recognizes that powers cannot be divided precisely between a federal government and its constituent states, and that situations will arise in which the actions of one overlap or are inconsistent with those of the other. The Slovak argument appears to be that a surgically precise division of jurisdiction between the federal government's authority and that of the republics can be and has been made, and that a supremacy clause is therefore unnecessary—conflicts between federal and republic statutes can be resolved by determining which has jurisdiction under the constitution. This is, however, highly implausible.⁷⁷ The unspoken argument, of course, is that preferring federal statutes to those of the republics is unacceptable to Slovakia.⁷⁸

The supremacy problem is aggravated by a novel ambiguity in Article 3(1), which provides for the nullification of legal measures inconsistent with the Constitution, treaties, or federal law (where federal law prevails, for example, over conflicting administrative decrees), but also provides that "this shall not apply to Constitutional Acts of the [republic] National Councils."⁷⁹ What this means is not at all clear. If it is intended to leave it up to the republics themselves to annul those of their constitutional acts inconsistent with the federal Constitution or treaties, there will be even more confusion, conflict, and deadlocks, because the republics may well insist on keeping their own constitutional acts in effect. So far, there seems to be no provision for resolving such a conflict.

Without a supremacy clause, there will be continuous clashes of authority between federal officials operating under federal law and republic officials, with no ready means to resolve them. Such clashes are especially likely given Slovak hostility to Prague centralism, and could wreak havoc on the economic and environmental reforms that are clearly within the jurisdiction of both federal and republic governments. As Holmes said of our country:

I do not think the United States would come to an end if we [the federal courts] lost our power to declare an Act of Con-

⁷⁷ See Cappelletti, *The Judicial Process in Comparative Perspective* at 169, 313 (cited in note 73) ("Federalism . . . demands the affirmation of some degree of preeminence of a federal law over local, regional, or state laws, as well as respect for boundaries of federal jurisdiction.").

⁷⁸ The issue might be resolved in the highest court of general jurisdiction in Czechoslovakia, the federal Supreme Court, given that the judiciary article for courts of general jurisdiction is still to be written. The drafters are setting up the Constitutional Court to handle such controversies, however, and it is unlikely other courts will be allowed jurisdiction over them.

⁷⁹ Article 3(1), Constitutional Act of February 27, 1991 (on file with U Chi L Rev).

gress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the Several States.⁸⁰

These problems may be resolved in the final comprehensive federal constitution, but many seem inherent in the Slovak insistence on substantial independence and may be intractable.

With respect to human rights, the Court has specific jurisdiction to resolve disputes in which individuals challenge official actions that are allegedly inconsistent with the federal Constitution and international human rights treaties. This jurisdiction may apparently be invoked by private citizens seeking recourse directly from the Court, subject however to the Rules of the Court, which may require prior recourse to some other court. If the German experience is a valid precedent, human rights cases will account for a large part of the Court's docket.

Article 3(1) of the Charter of Fundamental Rights provides that everyone in the federation has the same basic human rights. This should provide ample basis for the Court's human rights decisions to be the ultimate authority throughout the federation, and for the Court to strike down violations of these rights by laws or official acts of the two republics as well as by the federal government. Thus, the provision on the universality of rights will probably act as a *de facto* supremacy clause, at least in regard to these issues.

However, a prominent judge in Slovakia declared in a private conversation with one of the authors that he did not believe that the federal Constitutional Court should have the last word on human rights issues arising out of laws or official actions of the republics. In his view, the Constitutional Court of the Slovak republic should review the actions of Slovak organs, and the Czech Court should review the actions of Czech organs. This could of course produce inconsistent rulings from the two regional constitutional courts, raising the possibility of different safeguards in the two republics for the same or similar rights. Because there is no specific provision for review by the federal Constitutional Court of the constitutional rulings of the republic constitutional courts, the federal Constitutional Court may someday have to decide whether such a power is implicit under Article 3(1). The standing rules in

⁸⁰ Oliver Wendell Holmes, *Collected Legal Papers* 295-96 (Peter Smith, 1952); see generally Cappelletti, *The Judicial Process in Comparative Perspective* (cited in note 73).

Article 8 also allow both federal officials and private natural or legal persons to bring proceedings before the federal Constitutional Court.⁸¹ Individuals may thus have a choice of forum and may be able to circumvent the risk of an unfavorable republic Court decision by going directly to the federal Constitutional Court.

The very broad standing rules in Article 8 summarized above are a reaction to the very limited standing in the 1920 Constitution, which is said by some to be an important reason that the first Constitutional Court did so little.⁸² There is a danger, however, that such broad access could overwhelm this new and inexperienced tribunal with an avalanche of difficult cases.

D. Separation of Federal Legislative and Executive Powers

The provisions governing the separation of legislative and executive powers at the federal level have yet to be determined. As noted in the introductory section, prewar Czechoslovakia had a parliamentary form of government dominated by the Czech majority, with the principal executive powers vested in a cabinet of legislative leaders and with a figurehead president elected by the legislature. The 1968 change from a unitary system of representative government to a federation of two republics was constructed to give the Slovak minority in the legislature an absolute veto power over the Czech majority. This was never a problem in the days when the Central Committee of the Communist Party made all the important decisions. But in the true democracy that now prevails, nothing can be accomplished without the agreement of both legislative groups. Agreement has been reached on some subjects, such as the bill of rights and a few of the laws essential for the transition to a free market. On many other critical issues, however, there is a growing sense of frustration over the deadlocks that have occurred, and a growing conviction that the federal government may be unable to act decisively at a time of economic or political crisis. As a result, President Havel, members of the federal cabinet, and

⁸¹ Under Article 8, the Constitutional Court can initiate proceedings on jurisdictional matters upon the request of the president, the Assembly, any federal or republic state organ, the National Councils, a court of justice, the prosecutor general, and, in jurisdiction cases, by one fifth of the members of any of the federal or two republic parliaments; on human rights questions, by any natural or legal person; and on political questions, by any person authorized to act for the political group involved.

⁸² Taborsky, *Czechoslovak Democracy at Work* at 77-78 (cited in note 3). Access was limited to the Supreme Justice, Administrative and Electoral Courts, and the two legislative chambers and the Diet of Russia, an autonomous area. See V. Joachim, *Rules of Franchise; The Constitutional Court*, 179 *Intl Conciliation* 17, 28 (Oct 1922).

their advisors have been studying a number of possible changes in the existing structure and powers of the legislature and the presidency.

A number of these proposals are included in a draft of a new constitution prepared at the direction of President Havel and circulated by him in March 1991 to leaders of the main political parties, the Federal Assembly, and the governments of the two republics. This is one of a number of initiatives Havel has recently launched to spur the process of constitution-making, which according to Czechoslovak parliamentary tradition has been considered as the exclusive province of the legislature. He has initiated regular meetings of federal, republic, and party leaders on the subject at Lany, his official country residence; he has urged the Slovaks to conduct a referendum on whether they want to remain within the federation or not; and he has made several speeches urging the nation to rise above its ethnic rivalries and get on with the constitution-making task.

The principal changes under consideration are summarized below. They include:

- (1) strengthening the executive powers of the president,
- (2) changing the process for electing the president,
- (3) changing the structure of the two legislative chambers and modifying the supermajority requirements for the approval of major legislation and constitutional amendments,
- (4) resolving legislative deadlocks on constitutional amendments and government organization by a referendum of the people.

1. Increasing the powers of the president.

Under the 1968 Constitution, the president's powers are limited to conducting foreign affairs, serving as commander-in-chief of the Armed Forces, appointing and recalling the prime minister and other members of the government, dissolving the Federal Assembly if it cannot agree on a budget, and calling for new legislative elections. He does not have the American president's power of vetoing legislation or the French president's power to dissolve the legislature at any time for any reason, or to go over the legislature's head to enact certain types of legislation by referendum of the people, or to legislate by decree in an emergency.

President Havel's draft constitution does not grant veto power to the president, but it would make the president's power to dismiss the Federal Assembly almost as broad as the French presi-

dent's. He could do so if the Assembly has voted no confidence in the government, or if it fails to pass a government draft of a law within five months after submission. The Havel draft would also give the president the power to initiate a referendum (discussed below) for the enactment by popular vote of a constitutional amendment or other change in the political structure.

Finally, the Havel draft would include the French president's power to legislate by decree in national emergencies. The president could declare a state of emergency in time of war, violent disruption of the constitutional organization, or threats to health or paralysis of the economy. Except in wartime, a state of emergency could not last more than ninety days and would require the consent of the federal government as well as the government of the republic in which the emergency exists. If the Federal Assembly does not approve the state of emergency within forty-eight hours of its declaration, the declaration would no longer be effective. During the state of emergency, the president and the cabinet could govern by decree, and could restrict various rights and freedoms other than the right to life and the abolishment of the death penalty, freedom from torture, the right to own property, freedom of thought and religion, freedom of scientific research and artistic creativity, and freedom from prosecution under *ex post facto* laws.

2. Direct election of the president.

A number of Czech and Slovak participants in the drafting process have discussed the direct election of the Czechoslovak president, along the lines of the French model. The French system provides an interesting compromise between the presidential and parliamentary systems. It combines a traditional parliamentary system with a president who is elected by the people of the entire nation and who possesses significant executive powers.

Those favoring direct election argue that real political benefits might follow if the new Czechoslovak constitution provided for a president elected directly by all the people. If a future Czechoslovak parliament should deadlock because of Czech-Slovak disagreement and the breakup of multi-party coalitions, a president elected by all the people could have the mandate and the stature needed to persuade members to change their votes and resolve the deadlock.

Importantly, direct popular elections of the president would also encourage the formation of truly national political parties. At present, the only truly national political party is the Communist Party. In addition, direct presidential elections could reduce the

number of viable political parties to a more workable level. It would provide a useful offset to the divisive ethnic, cultural, religious, and occupational interests that have dominated party organizations and programs throughout Czechoslovakia's history.

Yet, the direct election of the president would pose special problems in an ethnically divided country like the CSFR. The Slovak community might fear that in a direct national presidential election the candidate favored by the Czech majority would always win, and that a more powerful president would not be sufficiently responsive to Slovak concerns. The proponents of direct election believe this fear could be alleviated in several ways. First, the constitution might provide for both a president and a vice president, and require that the president and vice president could not be citizens of the same republic.⁸³ This would oblige each party to nominate a Czech and a Slovak to run in tandem for these offices and would enhance the ability of each party's presidential and vice presidential nominees to win votes throughout the nation. Voters would be required to cast their votes for a single pair of presidential and vice presidential candidates, as in the United States, and would not be allowed to "split" their ballots.

Another way to protect the Slovaks' voting interest would be to require that a candidate win a majority of the voters in each republic in order to be elected, with a tie-breaking mechanism in case different candidates win a majority in each republic. For example, if one candidate wins a majority of the votes in the Czech republic and the other candidate wins a majority of the votes in the Slovak republic, the election could be determined by majority vote of the Chamber of Nations, where the two republics have equal representation. If the vote in the Chamber of Nations resulted in a tie, the Chamber would continue to ballot until one candidate wins a majority.

Finally, the constitution could make it compulsory for a president who is a Czech citizen to continue the existing practice of appointing a Slovak citizen as prime minister, and vice versa. It could also require that at least one-third of the federal cabinet consist of Slovak citizens, and that at least one-third consist of Czech citizens.

In addition to the Slovak fear that Czechs will dominate presidential elections, the former communist states have developed a healthy antipathy toward dictatorship. In the CSFR, where memo-

⁸³ Compare US Const, Amend XII.

ries of the communist dictatorship are fresh, there may be some concern about the risk that a popularly elected president with significant powers might abuse those powers to reassert tyrannical control over his fellow citizens. Similar concerns were recently raised in opposition to President Gorbachev's successful amendment of the Soviet Constitution to provide for a direct presidential election in 1994.⁸⁴ Francois Mitterand made similar arguments when he opposed the Gaullist proposals that became the constitution of the Fifth Republic. But subsequent experience in France, including Mitterand's own two terms in the Elysée Palace, as well as the political history of the United States, have shown that so long as the constitutional structure maintains a sufficient tension of checks and balances between the branches, there is little basis for such concern. Poland has recently conducted a direct presidential election and, as a result, President Lech Walesa's moral and legal authority has been greatly enhanced.

The Havel draft of the new constitution does not go all the way toward direct election of the president, but it does take a major step in that direction. It continues the present process of election by the Federal Assembly, but it provides that if no candidate wins a two-thirds majority of the Czech and Slovak members, counted separately, on the first ballot, or an absolute majority, counted separately, in a second ballot run-off between the two top contenders, a public referendum would be held in which the winner would need an absolute majority of the Czech votes and of the Slovak votes, counted separately. If no one achieves both these majorities on the first public referendum ballot, there would be a second ballot in which the winner would need only an absolute majority of all Czech and Slovak votes combined.

3. Changing the legislative structure and modifying the super-majority procedures.

As noted above, the Federal Assembly now consists of two chambers—a Chamber of the People consisting of 200 members elected by direct vote throughout the CSFR and a Chamber of Nations consisting of 150 members, half elected from the Czech republic and half from the Slovak republic. Minor legislation can be passed by a simple majority vote of both chambers. Important legislation, however, requires a simple majority vote in the Chamber

⁸⁴ See Michael Dobbs, *Moscow Creates Strong Presidency*, Wash Post A1 (Mar 14, 1990); Victor Danilenko, *Gorbachev: No Dictator*, Wash Post A11 (Mar 19, 1990).

of the People and a "qualified" majority vote in the Chamber of Nations, "qualified" meaning a majority of the Czech members and a majority of the Slovak members, counted separately. Constitutional amendments, election of the president, and decisions declaring war require a three-fifths majority in the Chamber of the People and a "qualified" three-fifths majority of the Chamber of Nations.

This structure gives absolute veto power over important legislation and constitutional amendments to the members elected from Slovakia. While they are a minority of only one-third in the Chamber of the People, they have equal representation in the Chamber of Nations, which consists of 75 elected Czechs and 75 elected Slovaks. If the 75 Slovaks in the Chamber of Nations vote as a block, they can defeat any legislation. If a minority of 31 vote in the negative, they can defeat constitutional amendments and other major acts requiring a three-fifths majority; a bare majority of 38 voting in favor of a motion of no confidence will bring down the federal government. The authors know of no democratic government anywhere in which comparable minorities of legislative bodies have as much blocking power.

The Havel draft constitution proposes to deal with this overarching problem in several ways. The Chamber of the People would be renamed the Federal Assembly, and the Chamber of Nations would be replaced by a new Federal Council consisting of thirty members: the Chairman and 14 members of the Presidium of the Czech National Council and the same officials of the Slovak National Council, just as the German Upper House, the Bundesrat, consists of the legislative leaders of each of the German states (the *länder*).

Under the Havel draft, the passage of all laws, minor and major, would require a qualified majority in the Federal Assembly. Constitutional amendments and declarations of war would require a three-fifths supermajority of Czech members and of Slovak members, again counted separately. All measures passed by the Federal Assembly must be submitted to the Federal Council, which can disapprove them by a two-thirds vote and return them to the Assembly. But if the Federal Assembly then repasses the bill by a three-fifths vote of the Czech and Slovak members, counted separately, the bill becomes law.

The Havel draft also retains the power of the Federal Assembly to dismiss the federal government by a vote of no confidence, but provides that it must be passed by an absolute majority of all Czech and Slovak members, counted together rather than sepa-

rately. This is a major improvement on the post-1968 Constitution, under which a majority of the Slovak members in the Chamber of Nations alone is sufficient to pass a resolution of no confidence.

Under these proposals, the power of the Slovak members to block major legislation is essentially preserved, but in a somewhat diluted form. Approximately one-third of the members of the Federal Assembly will be elected from Slovakia. A majority of this Slovak minority will no longer be able to block minor legislation but will retain its present power to block major legislation. Forty-one percent of the Slovak minority will retain its present power to block constitutional amendments and a declaration of war. But not even the entire Slovak minority will be able to pass a motion of no confidence, if the majority Czech members vote to support the government.

More significantly, the abolition of the Chamber of Nations will bring the elected leaders of the Czech Republic and the Slovak Republic directly into the federal legislature as members of the Federal Council. They will no longer be able to distance themselves from the federal government or avoid responsibility for its failure to act responsibly. This change could help to improve the chances of responsible compromise between national and regional interests, as has proved to be the case in Germany.

4. Legislation by referendum.

Under Article 46 of the 1920 Constitution, the cabinet was authorized to call for a referendum of the people if Parliament rejected a bill presented by the government. This power was left out of the 1960 Constitution and the 1968 amendments, but President Havel has recently proposed to revive it in a limited form similar to the referendum power of the French president. Under Article 11 of the French Constitution, the president, on the proposal of the cabinet, may call a referendum on any bill dealing with the organization of the government, the approval of an EEC agreement, or the ratification of a treaty affecting the formation of French institutions.⁸⁵

Under President Havel's draft constitution, the president would be authorized to call for a referendum on any constitutional act "concerning the principal problems of the political system or

⁸⁵ For the text of the French Constitution and Article 11, see Vlad G. Spitzer, *France* 25, in Blaustein and Flanz, eds, 5 *Constitutions of the Countries of the World* (cited in note 14).

the organization of the State," a change in the boundaries of the nation, the deployment of foreign armies in CSFR territory or of the CSFR army abroad, or a proposal for the secession of the Czech republic or the Slovak republic from the federation. In the last case, the president would have discretion to call for the referendum only in the republic wishing to secede.

The president would be required to promulgate a referendum if the Federal Assembly requests him to do so. He would also have discretion to promulgate a referendum if requested to do so by the federal government or the government of the Czech republic or the Slovak republic. The proposals submitted to referendum would be enacted if approved by a majority of all the voters in both the Czech republic and the Slovak republic combined.⁸⁸

If all four of the above proposals were adopted, the ability of the federal government to act decisively would be enhanced. But several parts of this package are likely to encounter serious opposition precisely because they tend to reduce the present power of the Slovak community to block any legislation it opposes. Moreover, direct election of the president and the expansion of presidential powers run counter to the parliamentary tradition of Czechoslovakia's earlier democratic experience, and to the widespread concern about a return of dictatorship. The referendum power, if invoked to force a showdown on breaking up the existing federation, could increase the risk that a break up would actually occur, and that after the two republics went their separate ways, each would be less able to resolve its economic problems or play a significant role in the future economic and political development of Europe. Finally, if the power to declare an emergency were to be abused, the threat to human rights and the risk of dictatorship would be enhanced.

For all of these reasons the adoption of President Havel's entire package of proposals is problematic. But if none of his recommendations are approved, the ability of a democratic CSFR to govern itself effectively will be seriously diminished.

If most or all of President Havel's proposals are rejected, another alternative worthy of consideration is the Constitution of Belgium, a nation with a comparable ethnic division among a Flemish (Dutch) speaking community in the eastern part of the country (about 55 percent), a French speaking community in the western portion (about 40 percent), and a German speaking com-

⁸⁸ In the case of a referendum on secession conducted only in the republic proposing to secede, a majority of the voters in that republic would be sufficient.

munity in the south (about 5 percent). Belgium is a constitutional monarchy with a unitary bicameral legislature and three separate "communities"—French, Flemish (Dutch), and German. Each community has legislative power over ethnic issues such as education, the right to speak and address the authorities in one's own language, personal identity, and cooperation between and among the communities.⁸⁷ General laws come under the authority of the legislature, which acts by majority vote, except for constitutional amendments, which require a two-thirds vote. Each chamber of the legislature is divided into linguistic sections, but only for the purpose of enabling each section, by a 75 percent majority, to object to a proposed bill on the ground that it would have "a serious effect on relations between the communities." In such cases the Council of Ministers (the government) must make a reasoned report within thirty days defending the bill or accepting various modifications. After this procedure is followed, the bill may be enacted by majority vote of all members.

This system has worked reasonably well in Belgium, primarily because the French speaking and Flemish speaking communities have been willing to compromise and defer to one another on ethnically critical issues. If the Czechs and Slovaks cannot resolve their ethnic differences in any other manner, they would be well advised to take another look at the Belgian system.

CONCLUSION

The first elected post-communist government of Czechoslovakia is just completing the first year of its two-year term. Sitting as a legislature, it has already enacted much of the statutory framework for turning a centrally planned state economy into a market economy. Sitting as a constituent assembly, it has adopted amendments to the 1960 Communist-era Constitution with its 1968 Amendment that reallocate legislative powers between the federal government and the governments of the Czech and Slovak republics, create a modern bill of rights, and establish a Constitutional Court to resolve constitutional disputes relating to the allocation of powers and the enforcement of citizen rights. None of these amendments fully meets the standards of western constitutional scholars or indeed of the Czechs and Slovaks themselves; all are

⁸⁷ In addition to the three communities, the constitution provides for three regional institutions (the Walloon region, the Flemish region, and the Brussels region where French and Dutch are both spoken) to which many regional government powers are assigned.

subject to revision in the final document. Nevertheless, they are a remarkable achievement for a nation that has not governed itself or experienced democracy for more than forty years.

In the remaining year of its mandate, this first post-communist elected regime faces many formidable challenges, both economic and political. Some of those challenges—particularly the separation of executive and legislative powers and the extraordinary blocking power of the Slovak members of the legislature—may indeed prove too difficult to overcome. But based on their track record to date, and assuming that the separatist forces in their society do not split the federation into two independent republics, the Czechs and Slovaks have a good chance of completing and adopting a constitution that is democratic, workable, and wholly consistent with the rule of law.

