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STUDENT NOTES

SELF-DETERMINATION, MINORITY RIGHTS, AND CONSTITUTIONAL ACCOMMODATION: THE EXAMPLE OF THE CZECH AND SLOVAK FEDERAL REPUBLIC

*Claudia Saladin**

Perhaps the greatest threat to establishment of stable democracies in Eastern Europe is ethnic tension.¹ Self-determination and the rights of minorities are especially important issues for these countries because of their ethnically diverse populations. As the following discussion will demonstrate, the issues of self-determination and minority rights are closely related to one another and to the issue of democratic legitimacy. Using the example of current constitutional reform and debate in the Czech and Slovak Federal Republic (CSFR), this Note will describe the interrelationship of these issues. It will argue for the necessity of recognizing the legitimate right of ethnically, linguistically, and culturally distinct communities to a certain measure of autonomy. At the same time, this right must be balanced against the needs of nation states for cohesion in domestic affairs and for the development of a sense of national unity.

Part I will explore the concepts of self-determination and minority rights in international law and their development over time. This is particularly relevant to the countries of Central and Eastern Europe, because these concepts saw their first full flowering in the period during and following the First World War, when those countries gained

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1. See, e.g., Celestine Bohlen, *East Europe's Past Imperils 3 Nations*, N.Y. TIMES, Dec. 16, 1990, § 1, pt. 1 at 16; Celestine Bohlen, *Ethnic Rivalries Revive in East Europe*, N.Y. TIMES, Nov. 12, 1990, at A1; Burton Bollag, *Havel Asserts Nation Faces Breakup*, N.Y. TIMES, Dec. 11, 1990, at A4; *Czechoslovakia, The Danger of Delinquency*, ECONOMIST, Mar. 16, 1991, at 44; Jan Urban, *Eastern Europe — Divided it Fails*, N.Y. TIMES, Nov. 21, 1990, at 23; see also AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 1 (1977) ("Social homogeneity and political consensus are regarded as prerequisites for, or factors strongly conducive to, stable democracy. Conversely, the deep social divisions and political differences within plural societies are held responsible for instability and breakdown in democracies."). Indeed, some would argue that such social diversity "necessarily entails the maintenance of political order by domination and force." *Id.* at 18.

their independence from the European powers.² Part II will discuss the evolution of the constitutional relationship between the Czechs and the Slovaks from the constitution of the first Czechoslovak Republic to the current constitutional reforms of the CSFR. This analysis will show the emerging recognition of a limited right to a measure of autonomy.

I. SELF-DETERMINATION

The concepts embodied in the principle of self-determination have been developing since at least the American and French revolutions. They are intimately connected with the concept of popular sovereignty proclaimed by the French Revolution: government based on the will of the people.³ But self-determination is not simply synonymous with representative democracy. It also entails the notion of freedom from alien rule,⁴ which focuses on the rights of States against other States. These different perspectives on self-determination are often referred to as internal self-determination and external self-determination.⁵

This distinction is crucial because internal self-determination cuts against traditional notions of State sovereignty. For this reason States have been reluctant to recognize it. Since the Second World War, self-determination in international law has been concerned primarily with the external aspect of self-determination, in the context of decolonization. Professor Antonio Cassese has argued that this focus was due to the bifurcated nature of the international community in the period following the Second World War and the different political agendas of East and West during that period.⁶ In general, the West has viewed the existence of a truly representative government as "the surest guarantee of genuine 'self-determination' " for all peoples.⁷ External self-determination, or freedom from outside domination, was seen as peripheral.⁸ The non-Western countries emphasized the concept of self-

2. See *infra* notes 47-56 and accompanying text.

3. See, e.g., DOV RONEN, *THE QUEST FOR SELF-DETERMINATION* 1-9 (1979); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 17 (1973); UMOZURIKE O. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 6-11 (1972); Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867, 869 (1989).

4. HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 30 (1990); UMOZURIKE, *supra* note 3, at 3; Thornberry, *supra* note 3, at 869.

5. See, e.g., MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 37-42 (1982); Thornberry, *supra* note 3, at 869.

6. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 134 (1986).

7. POMERANCE, *supra* note 5, at 38; see also *infra* notes 47-50 and accompanying text.

8. POMERANCE, *supra* note 5, at 38.

determination as the right of sovereign States to nonintervention.⁹ According to Cassese, a limited consensus resulted from this conflict. Internal self-determination was limited to the right to be free from a racist regime and external self-determination was granted only to peoples under colonial domination.¹⁰ With the end of the Cold War, representative democracy is reemerging as a crucial element of self-determination.¹¹ The following sections will discuss some of the aspects of the right to self-determination and their development over time.

A. *Who Has the Right to Self-Determination?*

The right to self-determination is generally held to belong to "peoples" and not to "minorities." Whether a group is considered a people or a minority is significant in determining what rights can be attributed to the group under international law. Modern international law recognizes three collective human rights of peoples:¹² the right to physical existence,¹³ the right to self-determination,¹⁴ and the right to natural resources.¹⁵ Minorities have two collective human rights under international law:¹⁶ the right to physical existence¹⁷ and the right to preserve a separate identity.¹⁸ A crucial difference, then, between peoples and minorities is the right to self-determination. As set forth in the International Covenant on Civil and Political Rights, self-determination refers to full rights in the cultural, economic, and polit-

9. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N.Doc. A/6014 (1966); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 466 (1971).

10. CASSESE, *supra* note 6, at 134; see HANNUM, *supra* note 4, at 49; see also *infra* notes 31, 93-94, and accompanying text.

11. See *Rights of Self-Determination of Peoples in Established States: Southern Africa and the Middle East* (panel discussions), 85 PROC. AM. SOC'Y INT'L L. (forthcoming Dec. 1991).

12. Yoram Dinstein, *Collective Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 105-11 (1976).

13. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

14. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Covenant on Civil and Political Rights]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Covenant on Economic, Social and Cultural Rights].

15. Covenant on Civil and Political Rights, *supra* note 14, art. 1(2); Covenant on Economic, Social and Cultural Rights, *supra* note 14, art. 1(2).

16. Dinstein, *supra* note 12, at 118.

17. Genocide Convention, *supra* note 13.

18. Covenant on Civil and Political Rights, *supra* note 14, art. 27; Covenant on Economic, Social and Cultural Rights, *supra* note 14, arts. 13 & 15.

ical spheres, with political control being the most essential aspect of the right.¹⁹ Minority rights as set forth in the Covenant do not include political control.²⁰

Despite the importance of the difference between the two groups there is no official definition of either minority or people. Francesco Capotorti, the special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defines minority as:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly a sense of solidarity, directed towards preserving their culture, traditions, religion or language.²¹

This definition includes both objective criteria (groups with distinct characteristics, numerical inferiority, nondominant position) and subjective criteria (a group perception of distinctiveness and a desire to preserve that distinctiveness). Definitions of “peoples” given by scholars have similar criteria. Yoram Dinstein, for example, argues that “peoplehood” is contingent on two separate elements: the objective element of the existence of an ethnic group linked by a common history and the subjective element of the state of mind of the group.²² Aureliu Critescu, also a special rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, lays out the following criteria as crucial in defining a people for the purpose of affording them the right of self-determination:

- (a) The term “people” denotes a social entity possessing a clear identity and its own characteristics,
- (b) It implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population.²³

Thus the crucial element distinguishing a people from a minority is the

19. Covenant on Civil and Political Rights, *supra* note 14, art. 1(1) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

20. Thornberry, *supra* note 3, at 880; *see* Covenant on Civil and Political Rights, *supra* note 14, art. 27.

21. FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS, AND LINGUISTIC MINORITIES at 96, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979).

22. Dinstein, *supra* note 12, at 104.

23. AURELIU CRITESCU, THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS at 41, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981). Critescu then cautions that “[a] people should not be confused with ethnic, religious or linguistic minorities,” without, however, defining or distinguishing “minority.” *Id.*

concept of territory, but scholars seem hard pressed to articulate further the difference between peoples and minorities.

Despite the different rights attributed to "minorities" and "peoples," international law provides neither a practical nor a legal means of distinguishing between the two. While the Hungarians are obviously a people, possessing their own territory and nation state, and sharing a common history, Hungarians living in Czechoslovakia are a minority. Such a group, which represents a portion of a people separated from the territorial nation state of their larger group, is clearly a minority in some sense of the word. But when one considers ethnic groups that do not possess a nation state of their own, defining the difference between a minority and a people becomes more problematic. Take the Kurds as an example: they are a distinct group possessing distinct ethnic and linguistic characteristics as well as a subjective group identity and a territorial base, yet within each nation state that they occupy (Iraq, Turkey, the USSR, and Iran) they are treated as a minority, although they appear to meet all the criteria of a people. Unlike the Hungarians living in Czechoslovakia, they have no nation state of their own to which they could emigrate or which is in a position to petition other States for their protection. The Slovaks are problematic in a similar way, although, as a group, they have the comparative advantage over the Kurds of being within one State. They possess a history and language separate from, although related to, that of the Czechs. They also possess a distinct territorial base. They have existed, briefly, as a nation state and have also been a distinct territorial and administrative unit within Czechoslovakia since 1968. In a large part the difficulty in arriving at, or deriving from practice, meaningful definitions of these two categories, demonstrates the confusion surrounding these concepts and the artificiality of the distinction between them. Instead, the concepts might be conceived of as points on a continuum, or different manifestations of a single problem, rather than as distinct categories.²⁴

Professor Ian Brownlie has asserted that "the issues of self-determination, the treatment of minorities and the status of indigenous populations, are the same, and the segregation of topics is an impediment to fruitful work."²⁵ He goes on to argue that the recognition of group rights, that is, minority rights, represents the practical and internal working of the concept of self-determination,²⁶ providing a link

24. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 5-6 (James Crawford ed., 1988).

25. *Id.* at 16.

26. *Id.* at 6.

between the concepts of self-determination and minority rights. Brownlie contends that the core of the principle of self-determination consists of the right of a community that has a distinct character to have this character reflected in the institutions under which it lives.²⁷ The eclectic terminology used in discussing self-determination—"nationalities," "peoples," and "minorities"—all involve the same concept.²⁸

The problem inherent in the realization of both self-determination and minority rights, and in developing accurate and consistent terminology with which to discuss the problem, is the impossibility of complete and universal application of the principle of self-determination, if self-determination is to mean political independence, or "full" external self-determination.²⁹ It is precisely the difficulty of giving full political independence to all who ask for it that led many to accuse the peace-makers at Versailles of applying a double standard, meaning that only some peoples gained full independence.³⁰ The problem of the double standard has again manifested itself as new countries have gained independence from colonial rule. Until recently the content of the norm of self-determination in international law was limited to the right to be free from colonial or racist rule. As one author has put it, "the arrival of independence entails 'the subjugation of new minorities to new majorities.'"³¹ Put another way, the majorities in newly independent countries often oppressed the minorities, especially since the concept of nonintervention protected these new majorities from international scrutiny of their treatment of minorities. Michla Pomerance argues that this outcome is no less a double standard than that reached at Versailles, and that while the much maligned League system had many faults it had certain virtues in terms of international guarantees for the rights of groups which were not afforded full "external" self-determination.³²

B. *Cultural Rights and Human Rights*

Cultural rights of peoples—that is, the rights of groups to preserve their own culture and identity—are implicit in the right of self-deter-

27. *Id.* at 5.

28. *Id.* at 5-6; see also Thornberry, *supra* note 3, at 868 ("Minorities appropriate the vocabulary of self-determination whether governments or scholars approve or not.")

29. POMERANCE, *supra* note 5, at 6.

30. *Id.*

31. *Id.* at 37 (citation omitted).

32. POMERANCE, *supra* note 5, at 40-41.

mination³³ as they are in minority rights. To a certain extent cultural rights have also been implicit in individual rights; so, for example, freedom to express one's views, practice one's religion, and associate with others are all rights necessary to the development and maintenance of a group culture.³⁴ Inherent in the concept of cultural rights is the idea that groups as such have rights, although human rights instruments have not really addressed group rights apart from self-determination.³⁵ A general assumption behind classical formulations of standard human rights is that if individual rights are protected, group rights will automatically be protected.³⁶ This assumption, however, does not address the claimed right of groups to take positive action to maintain their cultural and linguistic identity, nor does it address the claims of groups based on the right to self-determination; such claims involve a variety of political models, including independence, statehood, or some form of autonomy or associated statehood.³⁷

Patrick Thornberry has argued that minority rights are really a form of human right because any system of human rights must recognize that people exist not simply as individuals, but within their cultural settings.³⁸ Both individual rights and rights addressed to protecting minorities are necessary for the perpetuation of minority cultures and the protection of the human rights of the individual members of those cultures.³⁹ Others have expressed the relationship between individual and group rights as follows: group rights are necessary to ensure the effective implementation of fundamental individual rights, because if minorities are not given rights specifically designed to defend their culture they will be treated unequally and unjustly.⁴⁰ Thus, minorities need special rights to defend their cultures in order to give meaning to other fundamental human rights, such as equality. Without these "special rights" members of the mi-

33. Vernon Van Dyke, *The Cultural Rights of Peoples*, UNIVERSAL HUM. RTS., Apr.-June 1980, at 1.

34. HANNUM, *supra* note 4, at 109-10; Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in THE RIGHTS OF PEOPLES, *supra* note 24, at 93, 94; see also Covenant on Civil and Political Rights, *supra* note 14, arts. 18-19 & 21.

35. Brownlie, *supra* note 24, at 2-3 (discussing articles 1 and 27 of the Covenant on Civil and Political Rights).

36. *Id.*; see also *infra* notes 64-65 and accompanying text.

37. Brownlie, *supra* note 24, at 2-4.

38. Patrick Thornberry, *Is There a Phoenix in the Ashes? — International Law and Minority Rights*, 15 TEX. INT'L L.J. 421, 445-46 (1980).

39. *Id.*

40. Gillian Triggs, *The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?*, in THE RIGHTS OF PEOPLES, *supra* note 24, at 141, 145. For a discussion of the League minority protection system, see *infra* notes 51-58 and accompanying text.

nority possess only the right to assimilation into the dominant culture.⁴¹

Although it would appear that group rights are necessary to protect individual rights, nevertheless a conflict is perceived between individual and group rights.⁴² This clash has often been associated with the ideological divisions of the Cold War. It is described as one between the Western liberal tradition stressing the importance of the individual, and the non-Western view stressing the importance of the collectivity, economic rather than political rights, and equality over liberty.⁴³

Yet it is not merely Cold War rhetoric that has created tension between the two sets of rights. The conflicting principles relate to the problems posed in plural societies.⁴⁴ The focus on the individual manifests itself at the domestic level in the concepts of equality and nondiscriminatory treatment. The principle of "one person, one vote," however, makes it highly probable that some people will be relegated to the status of permanent minorities, and so may serve discriminatory ends.⁴⁵ The focus on group rights manifests itself at the international level by permitting particular groups to look after their own interests in relative independence from other groups. Neither principle can be carried to its logical extreme; the problem in plural societies is how to combine these competing principles of individual rights and group rights in a manner that protects both.⁴⁶

C. *The Development of Self-Determination*

Self-determination and minority rights became prominent in international relations in the aftermath of World War I. President Wilson believed that the concepts of self-determination and democracy were

41. Thornberry, *supra* note 38, at 440; CAPOTORTI, *supra* note 21, at 40-41.

42. See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* § 26 (1983); Eugene Kamenka, *Human Rights: Peoples Rights*, in *THE RIGHTS OF PEOPLES*, *supra* note 24, at 127, 139; John P. Humphrey, *The World Revolution and Human Rights*, in *HUMAN RIGHTS, FEDERALISM, AND MINORITIES* 147 (Allan Gotlieb ed., 1970).

43. See Humphrey, *supra* note 42, at 151-52; Triggs, *supra* note 40, at 142 (U.S. withdrawal from UNESCO in part because of emphasis on collective rights); .

44. The following discussion is from Van Dyke, *supra* note 33, at 1, 7-8. Arend Lijphart has defined plural societies as those divided by political divisions that closely follow social cleavages which are particularly salient to that society. Such cleavages "may be of a religious, ideological, linguistic, regional, cultural, racial or ethnic nature." LIJPHART, *supra* note 1, at 3-4.

45. See LIJPHART, *supra* note 1, at 145 ("The . . . meaning of democracy, that the will of the majority must prevail, violates the primary rule [that citizens must have the opportunity to participate in decision-making] . . . because it excludes the minority from the decision-making process. . .").

46. This is the question Van Dyke poses in his article. Van Dyke, *supra* note 33, at 8. The competing principles could also be defined as majority rule and some form of proportional representation. See LIJPHART, *supra* note 1, at 145.

intimately related.⁴⁷ He considered external freedom from alien sovereignty meaningless without a continuing process of self-government internally.⁴⁸ Conversely, if a regime were democratic, then external self-determination became peripheral.⁴⁹ To Wilson's mind the minority regime became necessary only in the absence of true self-government.⁵⁰ As he conceived it, the principle of self-determination had the protection of minorities as a corollary. He originally proposed that an article on minorities be inserted in the League of Nations Covenant but, instead, minority rights were dealt with in territorial treaties guaranteed by the League.⁵¹ In particular there were five special minority treaties, including one with Czechoslovakia.⁵²

The purpose of the minorities rights guarantee, which was laid out by the Permanent Court of International Justice (PCIJ) in *Minority Schools in Albania*, was to put nationals belonging to minorities on an equal footing with other nationals and to assure minorities the means to preserve their traditions and national characteristics.⁵³ The League guarantee had internal and external aspects. Internally the State was required to regard the treaty provisions as fundamental law that invalidated any laws that conflicted with them. Externally the guarantee applied only to the infringement of rights of persons belonging to racial, religious, or linguistic minorities.⁵⁴ The League guarantee meant that the Council of the League could take action in the event of an infraction of the treaty obligation. Members of the Council had a duty to call attention to actual or threatened infractions. Minorities themselves were allowed to petition the League, but in practice the right was exercised primarily by strong minorities, such as the Germans,

47. 54 CONG. REC. 1742 (Jan. 22, 1917) (Statement of President Wilson before the Senate) ("No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just power from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."); President Woodrow Wilson, Address before the League to Enforce Peace (May 27, 1916), reprinted in 53 CONG. REC. 8854 (May 29, 1916) ("We believe these fundamental things: First, that every people has a right to choose the sovereignty under which they shall live."); POMERANCE, *supra* note 5, at 3.

48. POMERANCE, *supra* note 5, at 3.

49. *Id.*

50. *Id.*; see also HANNUM, *supra* note 4, at 31 ("[T]he League of Nations scheme for minority protections was in part designed to provide what might be termed cultural self-determination to those groups whose demands for fuller political recognition were denied by the Great Powers.").

51. Thornberry, *supra* note 38, at 428-29; Mary Gardiner Jones, *National Minorities: A Case Study of International Protection*, 14 LAW & CONTEMP. PROBS. 599, 604-05 (1949).

52. For a more detailed discussion of the League of Nations minority protection system, see Thornberry, *supra* note 38, at 428-31; CAPOTORTI, *supra* note 21, at 17-18.

53. 1935 P.C.I.J. (ser. A/B) No. 64, at 17; see also HANNUM, *supra* note 4, at 31; Thornberry, *supra* note 38, at 431-33.

54. Thornberry, *supra* note 38, at 433.

rather than by weaker minorities, such as the Jews.⁵⁵ Minorities were strongest if there was a State in which they constituted the majority and which acted to guarantee their rights in a bilateral treaty.⁵⁶ Stateless minorities such as Jews and Gypsies were relatively weak because they lacked such a champion.

The League system was a step forward in human rights law because it developed the notion of rights against the State.⁵⁷ In the end, however, the system deteriorated because of State objections to the limitation placed on their sovereignty by the minorities treaties and the instability generated by fractious minorities within their territory; minorities themselves wanted liberalization of the petition procedure and greater autonomy and assurances against assimilation.⁵⁸

After the Second World War there was a general disenchantment with the League minorities program. This was partly due to the perceived double standard in the League system. Only the rights of minorities were raised to the level of internationally guaranteed rights, whereas the rights of nonminorities remained solely within the domestic sphere. Also, critics of the League system perceived minority rights as privileges.⁵⁹ But the PCIJ in the *Minority Schools in Albania* case addressed this issue by drawing a distinction between equality in law and equality in fact:

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact. . . . The equality between members of the majority and of the minority must be an effective, genuine equality. . . .⁶⁰

55. *Id.* at 433-36. One of the objections to the minority system was that it provided a powerful tool for purposes other than protection of minorities. Jones, *supra* note 51, at 619. The presence of a large, territorially compact, German minority in Czechoslovakia, for example, facilitated Hitler's efforts to dismember Czechoslovakia in 1938. P. DE AZCARATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 36-37 (1945); see Jan Mlynarik, *The Nationality Question in Czechoslovakia and the 1938 Munich Agreement*, in CZECHOSLOVAKIA: CROSSROADS AND CRISES, 1918-1988, at 89, 94-95 (Norman Stone & Edward Strouhal eds., 1989) (discussing the formulation of the Carlsbad program by Hitler and the leader of the Sudeten German Patriotic Front, which "provided a platform on which it was easy to advance from Sudeten self-determination to aggression against Czechoslovakia."); see also Jones, *supra* note 51, at 610-26, for a discussion of the functions of the minority system.

56. *Id.* at 607 (citing the example of the Czechoslovak-Polish treaty relating to Silesia).

57. Thornberry, *supra* note 38, at 438.

58. *Id.* at 436-38.

59. *Id.* at 439-40.

60. *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 19.

Rather than deal directly with the minorities issue again, there was a concern to eliminate minorities by redrawing boundaries and transferring populations,⁶¹ as demonstrated by the expulsion of the large German minorities from Poland and Czechoslovakia.⁶² The disenchantment was also due in part to the way the League system had been manipulated by the Nazis.⁶³

The United Nations replaced the idea of internationalizing the rights of certain minority groups with the concept of universal human rights on a nondiscriminatory basis.⁶⁴ The feeling was that if human rights and fundamental freedoms were respected without discrimination, then protection of minority rights would not be a problem. This was in part due to the influence of the United States, which emphasized its "melting pot" tradition, consistent with the dominant philosophy of the time favoring assimilation.⁶⁵

The only "group right" recognized in the U.N. Charter is the principle of self-determination;⁶⁶ however, it is questionable whether the U.N. Charter ever contemplated the question of minorities in its self-determination provision. The problem of minorities was seen more as an issue of universal human rights than one of self-determination.⁶⁷ Article 1 of the U.N. Charter merely states that self-determination is a

61. Thornberry, *supra* note 38, at 438.

62. The expulsion of the German population from Czechoslovakia began in May 1945. The Potsdam Agreement of August 1945 sanctioned the organized expulsion of Germans from Poland, Hungary, and the Sudetenland in an effort to curb the violence that had characterized the previous expulsions. Mlynarik, *supra* note 55, at 89, 99. A total of approximately 3 million Germans were expelled from Czechoslovakia by late summer 1947. *Id.*

63. Humphrey, *supra* note 42, at 164; *see also* DE AZCARATE, *supra* note 55, discussing responsibility for the dismemberment of Czechoslovakia at the Munich conference in September 1938:

The mistake, or weakness, of those responsible lay in the fact that they allowed the question to revolve around the situation of the German Minority. That was a grave error. Firstly because it based the whole problem on a false and artificial attitude, and secondly because it furnished Hitler with the easiest means of giving his plans a veneer of legitimacy.

Id. at 37. Hitler's interest in the German Minority in Czechoslovakia, which was one premise of the Munich conference, was purely pretextual. According to de Azcarate, Germany never showed any concern for the Sudeten Germans until September of 1938. This contrasted sharply with its position on the German minority in Poland, on which it was quite vocal. *Id.* at 37-38. It was, according to de Azcarate, "impossible to prevent the governments from continuing to use national minorities as an instrument with which to achieve certain political aims." *Id.* at 39.

64. CAPOTORTI, *supra* note 21, at 27.

65. *See* Humphrey, *supra* note 42, at 164; Thornberry, *supra* note 38, at 438-39; *see also* Albert Blaustein, *The New Nationalism*, 30 AM. J. COMP. L. 377, 378-79 (Supp. 1982) (asserting that views that hold ethnicity or group consciousness to be a primitive stage of political and social development were of short-lived popularity immediately following the establishment of the United Nations).

66. U.N. CHARTER Art. 1(2) ("The purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace.").

67. Thornberry, *supra* note 3, at 872; *see* INIS L. CLAUDE, JR., NATIONAL MINORITIES, AN INTERNATIONAL PROBLEM 69-78 (1955).

basis of "friendly relations among nations,"⁶⁸ but does not elaborate upon the content of the right. Some form of self-determination, however, is implicit in the U.N. Charter's provisions on non-self-governing territories⁶⁹ and the international trusteeship system.⁷⁰ These provisions, however, explicitly refer to the administration of *territory*;⁷¹ the language of the U.N. Charter does not address minorities without a specific territorial base.⁷² Since the U.N. Charter, then, the principle of self-determination has been applied predominantly to peoples living under colonial regimes.

The two U.N. covenants on human rights, the International Covenant on Civil and Political Rights⁷³ and the International Covenant on Economic, Social and Cultural Rights,⁷⁴ developed the notion of self-determination further by classifying, to a certain extent, the scope of the right and the relationship between the right of self-determination and individual human rights.⁷⁵ Thus article 1 of both Covenants states that by virtue of the right to self-determination all peoples may "freely determine their political status and freely pursue their economic, social and cultural development."⁷⁶ Some have argued, however, that it would be incorrect to take the article as meaning literally "all people" since there are simply too many instances of peoples denied the right to self-determination.⁷⁷ The article goes on to say that "States Parties . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."⁷⁸ The right of self-determination, however, was still one for whole peoples and not sections of them and therefore did not extend self-determination to mi-

68. U.N. CHARTER Art. 1(2).

69. *Id.* ch. XI.

70. *Id.* ch. XII.

71. *See id.* Art. 73 ("the administration of territories whose peoples have not yet attained a full measure of self-government. . ."); *see also id.* Art. 75 (providing for the establishment of "an international trusteeship system for the administration and supervision of such territories").

72. Thornberry, *supra* note 3, at 872.

73. Covenant on Civil and Political Rights, *supra* note 14.

74. Covenant on Economic, Social and Cultural Rights, *supra* note 14.

75. Antonio Cassese, *The Helsinki Declaration and Self-Determination*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 83, 87 (Thomas Buergenthal ed., 1977).

76. Covenant on Civil and Political Rights, *supra* note 14, art. 1; Covenant on Economic, Cultural and Social Rights, *supra* note 14, art. 1.

77. Emerson, *supra* note 9, at 462. The examples he mentions are: Germans, Koreans, Vietnamese, Biafrans, south Sudanese, the Baltic peoples, Formosans, Somalis, Kurds, and Armenians. Since Emerson's article, both Covenants have come into force and are binding on the parties, although many exceptions still exist.

78. Covenant on Civil and Political Rights, *supra* note 14, art. 1; Covenant on Economic, Cultural and Social Rights, *supra* note 14, art. 1.

norities.⁷⁹ The Covenants reflect the view that if the community does not freely determine its political status then individual human rights can have little content.⁸⁰ While the obligation is vague, by linking the right of self-determination to the free choice of the people, the Covenants sanction both internal and external self-determination. External self-determination is to apply to non-self-governing and trust territories, but States Parties are also to recognize the right to self-determination within their own territory.⁸¹ This was the first step away from the idea that the right of self-determination applied only in the context of decolonization.⁸²

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities was able to get article 27 on minorities inserted into the Covenant on Civil and Political Rights, which is historically significant because it is the first international norm dealing specifically with the rights of ethnic, religious, and linguistic groups that is capable of and intended for universal application.⁸³ Article 27 of the Covenant on Civil and Political Rights spells out the rights of minorities. These rights, however, are phrased negatively, rather than positively: the right to "not be denied the right . . . to enjoy their own culture" The rights granted by article 27 are more limited than the rights of the people itself, but are those essential to defend minority identity against assimilation.⁸⁴ They are vested in the "persons belonging to such minorities . . . in community with other members of their group"⁸⁵ and are thus rights vested in individual members of the group, rather than the group as such, although it does acknowledge the importance of membership in the group. Article 27 appears to require only that States tolerate minorities and refrain from interfering with their cultural or religious practices,⁸⁶ rather than impose positive

79. Thornberry, *supra* note 3, at 880.

80. Cassese, *supra* note 75, at 87.

81. Covenant on Civil and Political Rights, *supra* note 14, art. 1; Covenant on Economic, Cultural and Social Rights, *supra* note 14, art. 1; Cassese, *supra* note 75, at 87.

82. Cassese, *supra* note 75, at 87.

83. The full text of article 27 reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Covenant on Civil and Political Rights, *supra* note 14, art. 27, 999 U.N.T.S. at 179 (1976); see Thornberry, *supra* note 3, at 883. The Subcommission tried to have an article on minorities inserted into the Universal Declaration of Human Rights, G.A. Res. 217 (1948), but was unsuccessful. CAPOTORTI, *supra* note 21, at 27.

84. Thornberry, *supra* note 3, at 880.

85. Covenant on Civil and Political Rights, *supra* note 14, art. 27.

86. Thornberry, *supra* note 3, at 881.

duties, although it is arguable that in order to effectively implement article 27, States would have to move from equality in law, or nondiscrimination, to equality in fact.⁸⁷ The Covenant on Social, Economic and Cultural Rights contains a provision on the individual's right to take part in cultural life,⁸⁸ but not the right to use a language. Like article 27 of the Covenant on Civil and Political Rights, it is a right vested in the individual and not a group right to cultural life.

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations⁸⁹ reaffirms the right to self-determination of peoples, but echoes the more limited views of self-determination as a means of achieving peaceful international relations:

[e]very State has the duty to promote . . . and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle [of equal rights and self-determination of peoples], in order . . . [t]o promote friendly relations and co-operation among States . . . and . . . [t]o bring a speedy end to colonialism. . . ."⁹⁰

The principle remains vague; it grants that "all peoples have the right freely to determine, without external interference, their political status[.]"⁹¹ but arguably this only grants self-determination in the sense of the right to freedom from external interference and is thus the right of the State to nonintervention rather than a right vested in the people.⁹² The Declaration goes on to reaffirm the principle of territorial integrity, also limiting the notion of internal self-determination, provided the State complies "with the principle of equal rights and self-determination of peoples . . . and [is] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."⁹³ Given the wording of the provision, which places the requirement of a government representing the people within a racial context, Cassese has argued that the Declaration limits the applicability of the principle of internal self-determination to peoples living under a racist regime and grants to them the right to be free from systematic racial or religious discrimination and not the right of a people in a sovereign State to elect and keep a government of

87. *Id.*

88. Covenant on Economic, Social and Cultural Rights, *supra* note 14, art. 15(11)(a).

89. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28 at 121, U.N. Doc. A/8028 (1971) [hereinafter Friendly Relations Declaration].

90. *Id.* at 123-24.

91. *Id.* at 123.

92. Cassese, *supra* note 75, at 89.

93. Friendly Relations Declaration, *supra* note 89, at 124.

their own choosing.⁹⁴ The political conditions required to fulfill the principle of self-determination under the Declaration are quite minimal⁹⁵ and do not provide for any protection of "the people" as a distinct group or community. In addition, the affirmation of the principle of territorial integrity could be interpreted to deny that a segment of a population of a State can be a people, or, even if it is a people, to deny it the right to self-determination.⁹⁶ On the other hand, the Declaration states that in addition to the establishment of an independent State, "the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people[.]"⁹⁷ thus recognizing that there are ways other than full independence to implement the right of self-determination.⁹⁸ The resolution, therefore, does theoretically admit that the principle of self-determination is applicable to peoples within an existing State, although the threshold requirement of self-determination is low. Nonetheless it does make the guarantee of territorial integrity contingent upon the existence of a representative government.⁹⁹ As a General Assembly resolution the Friendly Relations Declaration itself has no binding legal force,¹⁰⁰ although the provisions regarding peoples living under colonial rule or a racist regime have become principles of customary international law.¹⁰¹

Self-determination has also been addressed in Europe through the Conference on Security and Cooperation in Europe (CSCE) process. The provisions of the 1975 Helsinki Final Act,¹⁰² which was adopted at a summit level meeting of CSCE countries, are meant to apply to

94. CASSESE, *supra* note 6, at 134; Cassese, *supra* note 75, at 90-91. Rosenstock, however, read the text to affirm the necessity of representative government to the principle of self-determination in general. Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 732 (1971).

95. Cassese, *supra* note 75, at 89-90.

96. Van Dyke, *supra* note 33, at 4.

97. Friendly Relations Declaration, *supra* note 89, at 124.

98. Rosenstock, *supra* note 94, at 731.

99. Thornberry, *supra* note 3, at 876. The United States and the United Kingdom both proposed drafts more directly linking the concept of self-determination to the existence of representative government. The more hesitant wording of the provision as it appeared in the Declaration was the result of a compromise with the Third World States. POMERANCE, *supra* note 5, at 38-39.

100. See CASSESE, *supra* note 6, at 192-95, for a discussion of the role of General Assembly resolutions in international law-making.

101. SUREDA, *supra* note 3, at 226; CASSESE, *supra* note 6, at 134; Cassese, *supra* note 75, at 92; see also POMERANCE, *supra* note 5, at 63.

102. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, reprinted in DEP'T STATE BULL. Sept. 1, 1975, at 323 [hereinafter Helsinki Final Act].

the participating States.¹⁰³ Self-determination in the CSCE context, therefore, does not refer to the case of decolonization. The CSCE process leading up to Helsinki was, for the Soviet Union, largely an attempt to get Western recognition of its postwar position in Europe,¹⁰⁴ while the West hoped it would be an opportunity to discuss humanitarian issues and confidence building measures.¹⁰⁵ These divergent goals demonstrate the different approaches of East and West to the notion of self-determination; they embody the different principles of freedom from external interference and of individual rights and representative government.¹⁰⁶ Arguably, a large portion of the conference was concerned with external self-determination, including the principle of nonintervention,¹⁰⁷ by the tacit recognition of Soviet hegemony over Eastern Europe. It did, however, raise the issue of self-determination outside the context of decolonization. This necessarily raised the question of internal self-determination,¹⁰⁸ which is particularly important for contemporary Eastern Europe.

The document is thus unique, as it stresses that the principle of self-determination applies to *all* peoples and is a continuing right,¹⁰⁹ and because it guarantees both internal and external self-determination of peoples.¹¹⁰ As with the other documents relating to the right

103. The CSCE participating States are: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America, and Yugoslavia. Albania is an observer country. Conference on the Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, reprinted in 29 I.L.M. 1305, 1306 (1990) [hereinafter Copenhagen Conference].

104. Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT'L L. 242, 244 (1976). This included U.S. recognition of the German Democratic Republic, which occurred during stage two of the conference. *Id.*

105. *Id.* at 245.

106. See *supra* notes 6-10 and accompanying text.

107. Principle III of the *Declaration of Principles Guiding Relations Between Participating States* reads:

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating state.

Helsinki Final Act, *supra* note 102, at 324-25. However, some commentators feel that the Soviet Union largely failed in its objective of obtaining general Western acceptance of existing frontiers and that the Final Act did not recognize those frontiers in Europe. Russell, *supra* note 104, at 249. Whether the principle of inviolability of frontiers would appear in the Final Act as an independent concept was a major issue of the negotiations. *Id.* at 251.

108. Cassese, *supra* note 75, at 93-94.

109. *Id.* at 100.

110. Thomas Buergenthal, *International Human Rights Law and the Helsinki Final Act: Conclusions*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD, *supra* note 75, at 3, 9.

to self-determination, principle VIII of the Helsinki Final Act reaffirms the principle of territorial integrity¹¹¹ and the significance of self-determination "for the development of friendly relations."¹¹² Principle VIII also states that "all peoples always have the right, in full freedom, to determine . . . their internal and external political status."¹¹³ The scope of "peoples" in principle VIII was not intended to include "national minorities;"¹¹⁴ it extends the right of self-determination only to groups living in and identifying with sovereign States.¹¹⁵ Principle VII of the Final Act addresses respect for human rights and fundamental freedoms and incorporates minority rights. The protection for minorities is thus weaker in the Final Act than in the Covenant on Civil and Political Rights; it provides only for their equality before the law and "actual enjoyment of human rights and fundamental freedoms"¹¹⁶ without any protection for their right to maintain a separate identity.¹¹⁷

The leaders of the CSCE States met in Paris in November 1990 at the first summit level meeting of CSCE since the adoption of the Helsinki Final Act. The Charter of Paris¹¹⁸ reaffirmed the principles of the Final Act,¹¹⁹ including "the equal rights of peoples and their right of self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law including those relating to territorial integrity of [S]tates."¹²⁰ However, the principles of territorial integrity and political independence were also reaffirmed, as in the Helsinki Final Act, within the context of the prohibition on the use of force.¹²¹ The Charter of Paris reflects a renewed concern with democracy as the basis of international security.¹²² In addition to reaffirming the principle of self-determination and nondiscrimination as a basis for peace and security, the Charter also refers to "the advancement of democracy, and respect for and effective exercise of

111. Helsinki Final Act, *supra* note 102, at 325.

112. *Id.* at 326.

113. *Id.*

114. Cassese, *supra* note 75, at 101.

115. *Id.* at 102.

116. Helsinki Final Act, *supra* note 102, at 325.

117. Thornberry, *supra* note 3, at 886.

118. Charter of Paris, *reprinted in* 30 I.L.M. 190 (1991).

119. *Id.* at 196.

120. *Id.* at 197.

121. *Id.* at 196 ("we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State . . ."); Helsinki Final Act, *supra* note 102, at 324 ("The participating States will refrain . . . from the threat or use of force against the territorial integrity or political independence of any State . . .").

122. Charter of Paris, *supra* note 118, at 196-97.

human rights.”¹²³

Like the Helsinki Final Act, the Charter of Paris was not deposited with the Secretary General of the United Nations and was not intended to be a legally binding document, but it is nonetheless significant. It adapts the principles contained in the U.N. Charter to conditions in Europe.¹²⁴ Although not legally binding, both were products of summit level meeting and, especially in the case of the Helsinki Final Act, long and arduous negotiations,¹²⁵ and States are held accountable.¹²⁶

E. *Self-Determination After the Age of Decolonization: A New Concern with “Minorities”?*

Although in the period since the Second World War the problems of peoples or groups under colonial domination have been at the forefront of international concern with group rights, the band of States that were the subject of the League of Nations minorities treaties have once again come to the fore of international attention¹²⁷ and there is a growing concern with minorities. The only significant group right to emerge since 1945 is the concept of self-determination and even that concept has only developed into an accepted legal norm with regard to decolonization. Although the international community hoped that a regime of universal individual human rights would solve the problems of minorities, the issue of group rights remains troublesome. Self-determination has arguably become relevant beyond the context of colonial or racist regimes and within Europe itself, even if not yet as a *legal* norm. In addition, the concept has acquired a democratic content; in other words, internal self-determination requires, at a minimum, a measure of representation of the population by the government. Representative democracy, like self-determination, is a complex concept; it is relatively simple to adopt as a goal, but more difficult to determine

123. *Id.* at 197.

124. Cassese, *supra* note 75, at 105.

125. See generally Russell, *supra* note 104.

126. Cassese, *supra* note 75, at 106-07; see, e.g., Craig R. Whitney, *Sign of World Transformed: A Rights Meeting in Moscow*, N.Y. TIMES, Sept. 10, 1991, at A5 (“We are arriving at the conclusion that national guarantees in this area are not sufficient,” the new Soviet Foreign Minister, Boris D. Pankin, said the other day [referring to CSCE]. “So we have to review the principle of noninterference in affairs of other governments.””).

127. The belt of minority States covered under the League of Nations minorities treaties were Latvia, Lithuania, Estonia, Poland, Czechoslovakia, Austria, Hungary, Yugoslavia, Rumania, Bulgaria, Albania, Greece, Turkey, and Iraq. See Jacob Robinson, *International Protection of Minorities: A Global View*, 1 ISRAEL Y.B. HUM. RTS. 61, 63-68 (1971). For contemporary developments in these States, see, e.g., *Yugoslavia's Ethnic Fighting Begins to Look Like War*, N.Y. TIMES, Sept. 1, 1991, § 4, at 3; Clyde Haberman, *The Kurds: In Flight, Once Again*, N.Y. TIMES, May 5, 1991, § 6, at 34.

the mechanisms of representation. This section will explore the new concern with minorities and various legal solutions to the problems of multiethnic and multilingual states, before going on in part II to explore the experience of Czechoslovakia in dealing with these problems.

The CSCE process has begun to recognize the problems of minorities. The Helsinki Final Act briefly addresses minority rights in principle VII.¹²⁸ The CSCE process, in the wake of the changes in Central and Eastern Europe over the past two years, has shown a renewed interest in minorities. The Charter of Paris affirms that the "ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law."¹²⁹ The Charter agrees to implement the provisions of the document of the Copenhagen meeting of the Conference on the Human Dimension, part IV of which is devoted exclusively to the problems of national minorities.¹³⁰ It further provides for the meeting of experts on national minorities, which was held July 1 to 19, 1991.¹³¹ Under "Guidelines for the Future" the Charter states that "friendly relations among our peoples, as well as peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created[.]"¹³² and that "the rights of persons belonging to national minorities must be fully respected as part of universal human rights."¹³³

The emerging rubric for a solution of the minorities problem emphasizes democracy. Human rights play a complementary, rather than a primary, role.¹³⁴ The emphasis remains, however, on individuals rather than minority groups. Part IV speaks of "persons belonging

128. Helsinki Final Act, *supra* note 102, Principle VII provides:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

Id. at 325.

129. Charter of Paris, *supra* note 118, at 195.

130. *Id.* at 199. For a citation to the Document of the Copenhagen Meeting, see 29 I.L.M. 1305 (1990) [hereinafter Copenhagen Conference].

131. Charter of Paris, *supra* note 118, at 199.

132. *Id.*

133. *Id.*

134. Copenhagen Conference, *supra* note 130, part IV, ¶ 30 ("The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework. . . . This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, [and] political pluralism . . .").

to national minorities"¹³⁵ and generally vests rights in those persons and not the group itself.¹³⁶ There is, however, some recognition of the group rights aspect of minority protection; participating States pledged to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity."¹³⁷ The document also recognized the importance of language rights,¹³⁸ while still allowing States to require that linguistic minorities learn the official language.¹³⁹ Especially interesting, considering that most definitions of minority do not have a territorial aspect,¹⁴⁰ is paragraph 35, in which

The participating States *note* the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.¹⁴¹

The participating States are, however, careful to reaffirm the principle of territorial integrity within the context of the discussion of national minorities.¹⁴²

As was at least alluded to in the Friendly Relations Declaration, the right to self-determination can be exercised in ways other than complete independence.¹⁴³ The challenge is to arrive at a legal and political status which will satisfy the demands of a group for cultural preservation and self-determination that is also compatible with the existing international system, the principle of territorial integrity, and the needs of existing states. Van Dyke suggests three possible statuses: the granting of a measure of autonomy (e.g., federation), the guarantee of a degree of political power to defend or promote group interests, or the giving of special assurances.¹⁴⁴ The third type of status is analogous to those guarantees given under the League minority treaty system. The other statuses are most appropriate for States composed of

135. *Id.* ¶¶ 30-32, 34, 35, & 38.

136. *Id.*

137. *Id.* ¶ 33; *see also id.* ¶ 32.6 ("Persons belonging to national minorities can exercise and enjoy their rights individually as well as in community with other members of their group.").

138. *Id.* ¶¶ 32.1 (private and public use of native language), 32.5 (dissemination, exchange, and access to information in their native language) & 34 (instruction of and in their native language and its use before public authorities).

139. *Id.* ¶ 34.

140. *See supra* notes 21-23 and accompanying text.

141. Copenhagen Conference, *supra* note 130, part IV, ¶ 36 (emphasis added).

142. *Id.* ¶ 37.

143. *See supra* notes 97-98 and accompanying text.

144. Van Dyke, *supra* note 33, at 5-6.

several "peoples," such as the CSFR. Such composite States are called plural societies and are often thought to be incapable of supporting stable democracies.¹⁴⁵ The challenge of both human rights and constitutional theory is to devise a way to accommodate the needs of these different groups for autonomy and the needs of the international system for cohesive States that exercise some degree of control over their populations. This is especially important for the CSFR (and other countries in Central and Eastern Europe) if they wish eventually to become part of the European Communities, which will not accept internal divisions as a reason for not implementing its directives.¹⁴⁶

Nationalism and increasing demands for autonomy, however, are unlikely to disappear. In fact, Hurst Hannum has argued that it is precisely the lack of responsiveness on the part of States to the needs of minorities and other distinct groups that has contributed to the growth of nationalism.¹⁴⁷ Finding a way to accommodate the needs of peoples and other groups for some measure of autonomy or self-government is also necessary for the promotion of human rights and democracy. Very few nations are ethnically or culturally homogeneous, and the attempts to create homogeneity are in fact likely to lead to repression and human rights violations.¹⁴⁸ Democratic theory has also addressed this problem through the theory of "consociational democracy." This is a form of democracy that aims at accommodating the needs of plural societies and providing for political stability.¹⁴⁹ Consociational democracies are composed of four elements: a "grand coalition" of political leaders representative of the different groups in the society; the presence of a mutual veto for the protection of minority interests; proportionality in political representation and appointment; and a high degree of autonomy for each group in running its internal affairs.¹⁵⁰

One constitutional arrangement that affords distinct groups a degree of internal autonomy to accommodate cultural diversity is federalism.¹⁵¹ It is probably better able than other systems, Brownlie has

145. See *supra* note 1 and accompanying text.

146. Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 530 (1991).

147. HANNUM, *supra* note 4, at 23.

148. *Id.* at 26.

149. LUPHART, *supra* note 1, at 1-2.

150. *Id.* at 25.

151. *Id.* at 41-42; Brownlie, *supra* note 24, at 6; see also DANIEL J. ELAZAR, *EXPLORING FEDERALISM* (1987); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990); Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081 (1956). Viktor Knapp has argued that the socialist States have used federalism as a way of dealing with the nationalities problem, mak-

argued, to provide a regime of stable autonomy which provides group freedom within a wider legal and political system and harmonizes the principle of nationality and the ideas of genuine coexistence of peoples.¹⁵²

In the Czechoslovak context an accommodation of the needs of the Slovaks has already been attempted in the form of a federation, and the Czechs and Slovaks are currently trying to work out a compromise that will balance the Slovak desire for a measure of autonomy with the need of the Czechs and Slovaks to coexist in a single nation state and ultimately as one country.

II. THE CZECH AND SLOVAK EXPERIENCE

Having explored the development of the concepts of self-determination and minority rights, this section will explore the development of the relations between Czechs and Slovaks and its reflection in the evolving constitutional structure that has shaped and continues to shape their relations.

The Czech and Slovak Federal Republic is located in central Europe. It borders on the Soviet Union in the east, Germany on the west, Poland to the north, Austria to the southwest, and Hungary to the southeast. The two primary ethnic groups are the Czechs, composing approximately two-thirds of the population, and the Slovaks, composing about one-third of the population. There are also significant minority populations of Hungarians and Gypsies and a small German-speaking minority. Slovakia lies in the eastern part of the country; its capital is Bratislava. The Czech Lands, composed of Bohemia and Moravia, occupy the western two-thirds of the territory of the CSFR. Bohemia occupies the westernmost portion of the Czech Lands. The capital of Bohemia is Prague, which is also the Federal capital. The capital of Moravia is Brno.

A. *Before the First World War*¹⁵³

Both the Czechs and the Slovaks were subjects of the Austro-Hun-

ing specific reference to the Soviet Union, Czechoslovakia, and Yugoslavia. Viktor Knapp, *Socialist Federation — A Legal Means to the Solution of the Nationality Problem: A Comparative Study*, 82 MICH. L. REV. 1213 (1984). While it is true that the socialist countries have used federalism in dealing with their minority problems, it is worth noting that what until 1989 comprised the East Bloc, was also the "fault zone" covered by the minority treaties under the League of Nations. See Robinson, *supra* note 127.

152. Brownlie, *supra* note 24, at 6.

153. This section is adapted from Victor S. Mamatey, *The Establishment of the Republic*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC 1918-1948, at 7 (Victor S. Mamatey & Radomir Luza eds., 1973) and Joseph F. Zacek, *Problems of Slovak Nationalism*, in 1 STUDIES IN CZECHOSLOVAK HISTORY 125 (Miloslav Rechcigl, Jr. ed., 1976).

garian Empire prior to World War I. The Austro-Hungarian Empire was split between Austria and Hungary in 1867 in what was called the *Ausgleich*. The Czech Lands fell within the Austrian half of the empire and Slovakia within the Hungarian half. Following the *Ausgleich* the Hungarian government adopted a policy of Magyarization which sought to create an ethnically and culturally homogeneous Magyar state.¹⁵⁴ This policy was carried out through a process of cultural and linguistic assimilation. In Slovakia under Hungarian rule there was no Slovak university, and in 1874 the three existing Slovak secondary schools were closed; by 1879 Hungarian was mandatory in all elementary schools.¹⁵⁵ In addition, Hungary's industrial revolution did not begin until the end of the nineteenth century and Slovakia, as part of Hungary, was primarily an agrarian State. Unlike the Czech Lands, Slovakia did not have an industrial working class or, more importantly, a middle class.¹⁵⁶ Hungary never adopted a policy of universal male suffrage and by 1910 only six percent of the population had the right to vote.¹⁵⁷ Slovak cultural and political life in the nineteenth and early twentieth centuries was severely curtailed by these Hungarian policies.

The Austrian half of the empire was, comparatively, far more progressive. Unlike the cultural awakening in Slovakia, the nineteenth century Czech national revival was not repressed and the Czechs aggressively revived their national and cultural heritage. In 1907 universal male suffrage was adopted in the Austrian part of the empire, ensuring the Czechs of representation in the *Reichsrat* in Vienna,¹⁵⁸ and giving Czechs experience in parliamentary politics. At this time Czech officials were also advancing within the Austrian civil service.¹⁵⁹ Thus the sense of national identity and self-assurance was far greater in the Czech Lands than in Slovakia when World War I provided the opportunity for independence, and there were a greater number of Czechs than Slovaks with experience in government administration.¹⁶⁰

154. Mamatey, *supra* note 153, at 7.

155. JOSEF E. KORBEL, TWENTIETH-CENTURY CZECHOSLOVAKIA 89 (1977).

156. Mamatey, *supra* note 153, at 5.

157. *Id.* at 8.

158. Gisbert H. Flanz, *Czechoslovakia, Constitutional Chronology* at 2 (1974), in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1974) [hereinafter *Constitutional Chronology*].

159. *Id.*

160. For the importance of this in later politics, see *infra* notes 211-12 and accompanying text.

B. *The Foundation of the Czechoslovak Republic*

Both Czechs and Slovaks had long aspired to independence, or at least some form of autonomy. World War I, the crumbling of the Austro-Hungarian Empire, and the culmination of nineteenth century nationalism came together to provide them with the opportunity for independence. On October 28, 1918, the provisional National Council in Prague proclaimed the existence of an independent Czechoslovak State. While various schemes for Czech and Slovak independence were contemplated during the war,¹⁶¹ the newly independent Czechoslovakia, as approved by the Allies in the Treaties of Versailles,¹⁶² Saint-Germain,¹⁶³ and Trianon,¹⁶⁴ was formed under the leadership of Thomas G. Masaryk. Masaryk had been elected by the National Council in Prague while he was in the United States. The creation of an independent Czechoslovakia had been supported by the Allies and others, including Czech and Slovak groups in the United States. On May 30, 1918, Masaryk had signed an agreement with representatives of Slovak and Czech organizations in the United States. This agreement, known as the Pittsburgh Agreement, envisioned a degree of autonomy for Slovakia. It stipulated that Slovakia should have its own legislature, courts, and administration and that Slovak would be the official language, although it left the detailed provisions for Slovak autonomy to be decided by representatives of the Czechs and Slovaks after the War.¹⁶⁵ The Czechoslovak Republic, however, was established as a unitary State.¹⁶⁶

On November 13, 1918 the provisional constitution was

161. See CZECHOSLOVAKIA: CROSSROADS AND CRISES, *supra* note 55, at 11-88.

162. Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, ch. 1, arts. 80-86, 2 Bevans 43, 87-89 [hereinafter Treaty of Versailles].

163. Treaty of Peace Between the Allied and Associated Powers and Austria, Sept. 10, 1919, part III, § III, art. 53, III Redmond 3149, 3174 [hereinafter Treaty of Saint-Germain].

164. Treaty of Peace between the Allied and Associated Powers and Hungary, June 4, 1920, part III, § IV, art. 48, III Redmond 3539, 3562 [hereinafter Treaty of Trianon].

165. The Pittsburgh Agreement is reprinted in JOZEF LETTRICH, HISTORY OF MODERN SLOVAKIA 289-90 (1955). The Slovak Populist Andrej Hlinka made the Pittsburgh Agreement the cornerstone of his policy until his death in 1938. Vaclav L. Benes, *Czechoslovak Democracy and its Problems 1918-20*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC 1918-1948, *supra* note 153, at 39, 84. President Thomas Masaryk said of the Pittsburgh Agreement:

I signed the [Pittsburgh Agreement] unhesitatingly as a local understanding between American Czechs and Slovaks upon the policy they were prepared to advocate. . . . [I]t was laid down that the details of the Slovak political problem would be settled by the legal representatives of the Slovak people themselves. . . . And so it was. The Constitution was adopted by the Slovaks as well as by the Czechs. The legal representatives of Slovakia thus expressed themselves in favor of complete union, and the oath sworn upon the constitution binds the Slovaks, the Czechs and me too.

THOMAS G. MASARYK, THE MAKING OF A STATE 221 (1927).

166. Constitution of the Czecho-Slovak Republic § 3(1), translated in 179 INTERNATIONAL CONCILIATION 409 (Oct. 1922).

adopted.¹⁶⁷ All power was vested in a unicameral National Assembly, which elected the Prime Minister and the Cabinet.¹⁶⁸ The provisional constitution was not adopted by an electoral body and it gave to the provisional National Assembly the right to draft and adopt a permanent constitution.¹⁶⁹ Vavro Srobar, the only Slovak who signed the proclamation of Czechoslovak statehood, selected the forty Slovak deputies who were to represent the Slovak people in the provisional National Assembly.¹⁷⁰ Half of these Slovak Deputies were Protestants, although Protestants constituted less than seventeen percent of the Slovak population.¹⁷¹ Srobar had no opportunity to consult with anyone in Slovakia in choosing the Slovak delegation as Slovakia was in a state of disarray and partially occupied by the Hungarians.¹⁷²

The Slovak populists were dismayed by the lack of Slovak autonomy in the Czechoslovak Republic. On August 27, 1919, Andrej Hlinka, one of the leaders of the Slovak Populists, and several others left Czechoslovakia to attend the Paris peace conference. At the conference they submitted a memorandum¹⁷³ to the allied delegations demanding an international guarantee of Slovak autonomy in Czechoslovakia similar to the one given to Ruthenia¹⁷⁴ in the Treaties of Saint-Germain, Versailles, and Trianon.¹⁷⁵ They decried the oblit-

167. *Constitutional Chronology*, *supra* note 158, at 2.

168. Benes, *supra* note 165, at 55-56.

169. *Id.* at 54-55.

170. *Id.* at 56-58. Some sources say there were 44 Slovak representatives in the provisional National Assembly. *Constitutional Chronology*, *supra* note 158, at 3.

171. Since the reformation there had been a split within the Slovak population between Protestants and Catholics. The Protestants tended to identify more with the Czechs. Slovak Protestants had, for example, used Czech as their liturgical language since the 16th century and had been in favor of adopting Czech as the Slovak literary language in the 19th century. They mistrusted what they saw as the conservative influence of Catholicism on the Slovak people. Mamatey, *supra* note 153, at 8. They also believed in Czechoslovak identity and insisted that the peoples were completely identical, despite having been separated for 1000 years of their history. *Id.* The other important trend within the Slovak National Party was the Catholic-populist trend, represented by the priest Andrej Hlinka. Prior to 1918, Father Hlinka endorsed the principle of Czechoslovak unity, but became increasingly suspicious of Czech anticlericalism, and continually sought greater autonomy for Slovakia. *Id.* at 9. The Czechs tended to be suspicious of Slovak Catholicism, in part because they identified their loss of national identity with the Catholic counterreformation. They tended to be secular in outlook and critical of the Catholic Church. *Id.*

172. Benes, *supra* note 165, at 56-58.

173. An English translation of this memorandum can be found in JOSEPH A. MIKUS, SLOVAKIA, A POLITICAL HISTORY: 1918-1950, at 331-40 (1963) [hereinafter Versailles Memorandum]. The memorandum included the text of the Pittsburgh Agreement.

174. Ruthenia, sometimes known as Russinia, is ethnically Ukrainian and was located in the easternmost part of interwar Czechoslovakia. It became part of the Soviet Union after World War II.

175. Versailles Memorandum, *supra* note 173, at 333, 338; see also Treaty of Versailles, *supra* note 162, art. 81, 2 Bevans at 87; Treaty of Saint-Germain, *supra* note 163, art. 53, III Redmond at 3174; Treaty of Trianon, *supra* note 164, art. 48, III Redmond at 3562. There was also a treaty executed between the Allies and Czechoslovakia, pursuant to article 57 of the Treaty of

eration of Slovak identity in the new Czechoslovak State,¹⁷⁶ but the Allied Powers had already drifted apart and they did not revise the treaties to include a guarantee of Slovak autonomy.¹⁷⁷

1. The 1920 Constitution

The Constitution of the newly created Czechoslovak State was unanimously approved by the National Assembly on February 29, 1920. It provided for a unitary State and, in accordance with the Peace Treaties, it contained guarantees for the autonomy of Ruthenia,¹⁷⁸ but not for Slovak autonomy. Even among the Slovaks, however, there had been some disagreement on the question of provincial autonomy for Slovakia. The Slovak agrarians wished to postpone the questions because they did not believe that the Slovak people were ready for autonomy.¹⁷⁹ The Slovak populists were willing to postpone the issue, recognizing that Slovakia was not yet ready for administrative and legislative autonomy, but wanted guarantees of future Slovak autonomy inserted in the constitution.¹⁸⁰ The Slovak socialists were opposed to autonomy.¹⁸¹ Many Slovak political leaders favored Czechoslovak unity and fought against Slovak populist attempts at autonomy.¹⁸² When the National Assembly learned of the Slovak trip to Paris demanding an international guarantee of Slovak autonomy,

Saint-Germain, regarding the protection of minorities. Articles 10 to 14 of this treaty elaborated on the provisions for Ruthenian autonomy guaranteed in the Treaty of Saint-Germain. Treaty between the Principal Allied and Associated Powers and Czechoslovakia, Sept. 10, 1919, arts. 10-14, III Redmond 3699, 3703-04 [hereinafter Appendix II]. The text of the Versailles Memorandum itself asked "for political autonomy, a national Slovak parliament, a Slovak government responsible to this parliament, [and] our own administration and [magistrate]." Versailles Memorandum, *supra* note 173, at 338.

176. Versailles Memorandum, *supra* note 173, at 338, stated that "[t]here is not a Czecho-Slovak nation, but there is a Czech nation and a Slovak nation. We are not Czechs nor Czecho-Slovaks, but Slovaks, and we wish to remain Slovaks forever." Referring to article 57 of the Treaty of Saint-Germain, which contained the obligation of the Czechoslovak State to protect racial, religious and linguistic minorities on its territory, the memorandum asked that "the Allied and Associated Powers envision [the Slovaks] as a minority different from the Czechs and to protect our interests by guaranteeing us the greatest possible political autonomy." *Id.* This illustrates the lack of conceptual utility in attempting to draw these distinctions between peoples and minorities as well as the difference in legal status these distinctions entail. See *supra* notes 24-28 and accompanying text.

177. Benes, *supra* note 170, at 85.

178. 1920 CONSTITUTION § 3.

179. Benes, *supra* note 165, at 93-94.

180. *Id.*

181. *Id.*

182. Victor S. Mamatey, *The Development of Czechoslovak Democracy, 1920-1938, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC*, *supra* note 153, at 99, 121-22; see also Busek, *The Czechoslovak Constitutions of 1920, 1948 and 1960, in THE CZECHOSLOVAK CONTRIBUTION TO WORLD CULTURE* at 396 (Miloslav Rechcigl, Jr. ed., 1964) (asserting that the unitary structure of the 1920 Constitution reflected a genuine sense of national unity).

Czech party leaders wondered whether the Slovaks could be trusted with autonomy.¹⁸³ The Prague government also feared that Slovak autonomy would provide Hungary with an opportunity to annex the territory of Slovakia, which contained a considerable Hungarian population, and would lead to the disintegration of the Czechoslovak state.¹⁸⁴

The 1920 Constitution provided that "the territories of the Czecho-Slovak Republic shall form a united and indivisible unit[.]"¹⁸⁵ and that "[c]itizenship in the Czecho-Slovak Republic is single and uniform."¹⁸⁶ On the same day the National Assembly also adopted an act "establishing the principle of language rights within the Czecho-Slovak Republic"¹⁸⁷ (the Language Law), which provided that the "Czecho-Slovak language shall be the state, official language of the Republic," although it is now recognized that Czech and Slovak are separate languages, albeit closely related.¹⁸⁸

The 1920 Constitution, in accordance with the Treaty of Saint-Germain,¹⁸⁹ provided for a measure of self-government in Ruthenia "compatible with the unity of the Czecho-Slovak Republic. . . ."¹⁹⁰ It also provided that Ruthenia would have its own legislature,¹⁹¹ which had jurisdiction in linguistic, educational, and religious matters and in domestic administration,¹⁹² and its own governor.¹⁹³

The 1920 Constitution was progressive in the rights that it granted other minorities. It provided for equality before the law¹⁹⁴ and free use of any language in private and business relations, in the press and publications, and public assemblies.¹⁹⁵ It also provided that in areas where there were "considerable fraction[s] of Czecho-Slovak citizens

183. Benes, *supra* note 165, at 94.

184. Mlynarik, *supra* note 55, at 92.

185. 1920 CONSTITUTION § 4(1).

186. *Id.* § 4(1).

187. Constitutional Act Establishing the Principle of Language Rights within the Czecho-Slovak Republic, translated in INTERNATIONAL CONCILIATION No. 179, at 448 (Oct. 1922) [hereinafter Language Law].

188. See AFTER THE REVOLUTION 52 (Tom D. Wipple ed., 1991); Benes, *supra* note 165, at 96; see also discussion, *supra* notes 171 and 201.

189. Treaty of Saint-Germain, *supra* note 163, art. 53; Appendix II, *supra* note 175, arts. 10-14, III Redmond at 3703-04.

190. 1920 CONSTITUTION § 3(2).

191. *Id.*

192. *Id.* § 3(3). Section 6 of the Language Law, *supra* note 187, provided that the Ruthenian parliament would have the right to "sett[le] the language question for this territory in a manner consonant with the unity of the Czecho-Slovak State."

193. 1920 CONSTITUTION § 3(5).

194. *Id.* § 128(1).

195. *Id.* § 128(3).

speaking a language other than Czecho-Slovak, . . . due opportunity to receive instruction in their own tongue” would be guaranteed, while providing that education in “the Czecho-Slovak language . . . may be prescribed as a compulsory subject of instruction.”¹⁹⁶ The Language Law, in accordance with the Treaty of Saint-Germain, provided that in districts where twenty percent of the citizens spoke the same language, courts and government organs and offices would be required to conduct business in that other language, in addition to the official language.¹⁹⁷ In these regions, public prosecutors would have to frame charges against the accused in this language, and the minority language would be used concurrently with the official language in proclamations and notices issued by State courts, offices, and organs.¹⁹⁸

Slovak populists were disappointed with the constitution because it provided for a unitary Czechoslovak State and ignored Slovakia’s identity. Because the Slovaks were not recognized as a nationality separate from the Czechs, it was unclear whether the provision regarding protection of minorities applied to them. Slovak populists agreed to vote for the constitution only after registering a reservation that their vote should “in no way prejudice their demand for Slovak autonomy with a legislative diet” in the future.¹⁹⁹ Hlinka and the Slovak Populists continued to demand Slovak autonomy. Slovak populists introduced their first bill for Slovak autonomy in the National Assembly in January 1922, but it was overwhelmingly defeated.²⁰⁰ Slovak centralists and autonomists continually fought one another over the issue of “one nation or two” and the “battle of the hyphen” over whether the name of the country should be spelled with the hyphen (Czecho-Slovakia) as in the wartime documents and peace treaties or without a hyphen (Czechoslovakia), as became popular after the war.²⁰¹ The Czech politicians backed the centralists, but avoided direct conflict

196. *Id.* § 131.

197. Language Law, *supra* note 187, § 2.

198. *Id.*

199. Benes, *supra* note 170, at 96-97 (citation omitted).

200. Mamatey, *supra* note 182, at 121.

201. *Id.* at 125-26. Another example of the tensions both between Czechs and Slovaks and between Slovak Populists and Slovak Centralists is the language issue. In 1932, the Minister of Education, Derer, a Slovak centralist, attempted to undertake a reform of the Slovak language. A new grammar was prepared by the Slovensko Matica (the Slovak Cultural Institute) with the assistance of the Czech academy in Prague, which reflected a conscious effort to render the Slovak language as close to Czech as possible. The Slovaks had long been deprived of the use of their language under the Hungarians and were very sensitive about their language and their right to use it. At the Matica’s annual meeting on May 12, 1932, the opponents of the new grammar won and the czechophiles were ousted from the Matica. In retaliation Derer ordered school authorities to use the grammar anyway. *Id.* at 150.

with the Slovaks.²⁰²

2. Administrative and Economic Developments under the First Republic

The separation of the economies of the Czech Lands and Slovakia from the Austro-Hungarian Empire caused economic dislocations throughout the Czechoslovak Republic.²⁰³ These economic hardships were felt more keenly in Slovakia than in the Czech Lands, causing tension between the two groups. As mentioned earlier, Hungary did not enter the industrial revolution until the end of the nineteenth century. Slovak industry was relatively well developed in comparison to Hungary,²⁰⁴ but not in comparison to Czech industry, since Bohemia had been the center of the Austrian industrial revolution. As a result of separation from the Austro-Hungarian Empire, both regions lost a substantial part of their markets,²⁰⁵ but the older, better capitalized, and more efficient Czech industries weathered the postwar crisis better than Slovak industry.²⁰⁶ In addition much of Slovak industry had been owned by Hungarians and most of Slovak commerce and industry passed into the control of Prague banks.²⁰⁷ These economic developments forced Slovakia back into the status of an agrarian province vis-à-vis the industrial Czech lands. When Czechoslovakia was forced by economic conditions to curtail industrial production, Czech banks shut down the less profitable and less efficient factories in Slovakia first. From 1918 to 1923 over 200 plants in Slovakia were shut down.²⁰⁸ The result of this was an intensification of rural overpopulation and unemployment or underemployment.²⁰⁹ Thus the economic consequence of independence hit Slovakia harder²¹⁰ and generated resentment on the part of the Slovaks toward the more fortunate Czechs.

202. *Id.* at 126.

203. *Id.* at 114.

204. *Id.*

205. *Id.*

206. *Id.* at 115.

207. *Id.*

208. *Id.* at 116.

209. *Id.* at 117.

210. *Id.* at 114-17. Under the Czechoslovak Socialist Republic the official Communist view perceived the nationality problem in primarily economic terms: "[i]n this official view socialism had eradicated nationalism in principle by opting for a policy of economic equalization and a commensurate ideological campaign instructing the new socialist man that his nationalist loyalties were artificial and were based on a defensive response to an earlier policy of economic discrimination and exploitation." ROBERT W. DEAN, NATIONALISM AND POLITICAL CHANGE IN EASTERN EUROPE: THE SLOVAK QUESTION AND THE CZECHOSLOVAK REFORM MOVEMENT at 2 (Monograph Series in World Affairs, vol. 10, no. 1, 1972-73); see also *id.* at 21-24. As this account shows it was not necessarily a matter of exploitation or underdevelopment, but rather a consequence of other developments over a long period of time. More important than the root

Another factor causing resentment was the fact that most government posts were held by Czechs, even in Slovakia. This stemmed from the fact that because of Slovakia's history there were simply not enough qualified Slovaks to fill government positions in proportion to their size in the population.²¹¹ Particularly during the depression when unemployment was especially high in Slovakia, resentment of Czech officials serving in Slovakia was acute.²¹²

C. *Munich and an "Independent" Slovakia*

The government tended to underestimate the influence of the populists. Malypetr, Prime Minister from October 1932 to February 1934, did not invite them into the cabinet and, left in opposition, they became more radical in the 1930s.²¹³ On May 8, 1930, the Slovak populists introduced the second bill for Slovak autonomy in the National Assembly, which failed as well.²¹⁴ While Slovak populists were unsuccessful in their demands for autonomy in the National Assembly, by the 1930s Slovak politics had acquired a broader base.²¹⁵

In 1938, Hitler was able to manipulate Czechoslovakia's other vocal minority, the Germans, in order to annex the Sudetenland. The growing support in Slovakia for autonomy aided German efforts to split Czechoslovakia.²¹⁶ In June of 1938, the Slovak People's Party again demanded autonomy and presented these demands to the National Assembly on August 17 of that year.²¹⁷ They asked for the recognition of the individuality of the Slovak people, exclusive use of the Slovak language in Slovakia, and the creation of an autonomous Slovak legislature. After the Munich conference of September 29 and 30, 1938, where Germany was given the Sudetenland, the weak position of Prague gave the Slovak autonomists the opportunity to renew their demands.²¹⁸ On November 11, 1938, Constitutional Law No. 299/1938, providing for Slovak autonomy, was promulgated.²¹⁹ On March 14, 1939, the Slovak legislature unanimously declared Slovak

cause of the disparity is the perception on the part of Slovaks of being underdeveloped and the effect this has had on their national consciousness.

211. DEAN, *supra* note 210, at 5.

212. Mamatey, *supra* note 182, at 143-44.

213. *Id.* at 148-49.

214. *Id.* at 149; *see also supra* note 200 and accompanying text.

215. Mamatey, *supra* note 182, at 143-44.

216. *Id.* at 159-60.

217. Theodor Prochazka, *The Second Republic, 1938-1939*, in *A HISTORY OF THE CZECHOSLOVAK REPUBLIC*, *supra* note 153, at 260.

218. *Id.*

219. *Constitutional Chronology*, *supra* note 158, at 6.

independence,²²⁰ and on March 15, German troops occupied the remaining territory of Czechoslovakia, establishing the protectorate of Bohemia and Moravia.²²¹ Slovakia, however, was now highly dependent on Nazi Germany. Initially Germany was content with tight control of the Slovak army and did not interfere significantly with purely internal affairs.²²² On July 19, 1939, however, the Slovak government had to promise to "continue directing domestic political development in Slovakia in a spirit unqualifiedly positive and friendly towards Germany."²²³ On August 18, 1939, Slovakia was placed under German military control.²²⁴

D. *The Czechoslovak Socialist Republic*

In September 1943 the Slovak National Council was established and in August 1944, the Slovak uprising occurred under its leadership.²²⁵ Though unsuccessful, the uprising was important to the prestige of Slovakia and gave credibility to Slovak claims for self-government after the war.²²⁶ It also led to the negotiation of the Kosice Program in April 1945.²²⁷ The Kosice Program provided that the "Slovak National Council . . . shall be . . . the representative of state power in the territory of Slovakia."²²⁸ The new government of the Republic promised to "incorporate into the Constitution . . . the Slovak legislature, governmental and executive organs, as they already exist in the Slovak National Council,"²²⁹ and promised that "[t]he Slovaks will be adequately represented, both in the central state offices, institutions and economic agencies, both as to number and the importance of their functions."²³⁰

After World War II, Czechoslovakia had a coalition government which included the Communist Party. In February 1948, the Communist Party staged a government crisis which led to the resignation of twelve non-Communist members of the government.²³¹ In May of

220. Prochazka, *supra* note 217, at 268.

221. *Constitutional Chronology*, *supra* note 158, at 7.

222. Jörg K. Hoensch, *The Slovak Republic, 1939-1949*, in A HISTORY OF THE CZECHOSLOVAK REPUBLIC, *supra* note 153, at 271, 278.

223. *Id.* (quoting Documents of German Foreign Policy 1918-1945, Series D vol. VI, at 205).

224. *Constitutional Chronology*, *supra* note 158, at 7.

225. DEAN, *supra* note 210, at 5-6.

226. *Id.*

227. *Id.* The Kosice Program is reprinted in LETTRICH, *supra* note 165, at 317-18.

228. Kosice Program, *supra* note 227, at 317-18.

229. *Id.* at 318.

230. *Id.*

231. COMMUNISM IN EASTERN EUROPE 117 (Teresa Rakowska-Harmstone ed., 2d ed. 1984).

that year the non-Communist president refused to sign the new Constitution and resigned shortly thereafter. Klement Gottwald, head of the Communist Party, then became president.²³² In July the new constitution was adopted.

1. The Constitution of 1948

Like the 1920 Constitution, the 1948 Constitution provided for a unitary State, but acknowledged that it was composed of two nations: Czech and Slovak.²³³ The supreme legislative body was the unicameral National Assembly.²³⁴ The new constitution provided for the existence of Slovakia as a legally separate entity, by creating the "Slovak National Organs."²³⁵ The stated purpose of the Slovak National Organs was to "ensure . . . the equality of Czechs and Slovaks . . . [and] that equally favorable conditions be created for the economic, cultural and social life of both nations."²³⁶ The Constitution recognized the Slovak National Council as the legislative organ in Slovakia²³⁷ and created a Board of Commissioners, which was to exercise executive power in Slovakia.²³⁸ The Board of Commissioners, however, could be appointed and recalled by the government of the Republic, i.e., the central government in Prague.²³⁹ The National Assembly had exclusive jurisdiction to decide on the constitutionality of acts of the Slovak National Council,²⁴⁰ and the Slovak National Council was summoned and could be dismissed by the Prime Minister.²⁴¹

While the Slovak National Organs ostensibly had "legislative, governmental and executive power" within the territory of Slovakia,²⁴² the powers of the Slovak National Council were not clearly defined and the Constitution left ample room for central control.²⁴³ It desig-

232. *Id.*

233. CONSTITUTION OF THE CZECHOSLOVAK REPUBLIC OF JUNE 9, 1948, art. II(1), *translated in* CONSTITUTIONS OF NATIONS 689 (Amos J. Peaslee ed., 2d ed. 1956).

234. 1948 CONSTITUTION art. V.

235. *Id.* art. VIII(1) ("The State power in Slovakia is vested in and carried into effect and the national individuality of the Slovak nation is represented by the Slovak National Organs.").

236. *Id.* art. VIII(2).

237. *Id.* art. IX(1).

238. *Id.* art. IX(2).

239. *Id.*

240. *Id.* § 65.

241. *Id.* § 102.

242. *Id.* § 93.

243. *Id.* § 94 ("The Slovak National Council shall discharge the legislative power (section 96) in matters of a national or regional character, provided that these matters require special regulation so as to ensure the full development of the material and spiritual forces of the Slovak nation, and provided that the said matters are not such as require uniform regulation by Act [of the National Assembly].").

nated a specific realm of competence to Slovak Organs with the State holding residual power,²⁴⁴ but the central government could act in any of these areas where the National Assembly established the need for uniform regulation, or where Slovak jurisdiction was inconsistent with the needs of the economic plan.²⁴⁵ There was no policy area where the Slovak National Organs had exclusive authority.²⁴⁶ In addition, the central government had the right to introduce legislation in the Slovak National Council and to participate in Slovak National Council meetings.²⁴⁷

The 1948 Constitution differed from the 1920 Constitution in that it actually provided for institutional penetration of the Slovaks into the State bureaucracy and policy making structure, but there was a crucial difference from the situation under the 1920 Constitution. While there was no actual institutional recognition of a separate Slovakia in the interwar Czechoslovak Republic, there were at least periodic elections which gave Slovak nationalists a check upon the centralists and allowed the legitimacy of state policy to be tested. Elections also provided public forums for the airing of nationalist grievances; this ceased to be the case after 1948.²⁴⁸

The postwar Slovak political structure did not afford a meaningful base of access for expression or achievement of nationalist claims.²⁴⁹ The Slovak political organs lacked both a clear area of jurisdiction²⁵⁰ and the power to assert themselves.²⁵¹ Like the other countries in the Soviet Bloc, Czechoslovakia followed a political course influenced by Stalinism. Even in the post-Stalin period, the Communist Party of Czechoslovakia, under the leadership of Antonin Novotny (1953-68) followed a conservative Communist approach.²⁵² During the 1950s even the semblance of formal meetings of Slovak political organs disappeared.²⁵³ National aspirations were not recognized as legitimate by the Communist government. Such aspirations were seen primarily as a throwback to the earlier era of imperialist and capitalist exploita-

244. *Id.* § 96.

245. *Id.* §§ 94, 110(2); CAROL SKALNIK LEFF, NATIONAL CONFLICT IN CZECHOSLOVAKIA 100-01 (1988).

246. LEFF, *supra* note 245, at 100-01; *see, e.g.*, 1948 CONSTITUTION, *supra* note 233, §§ 117, 121, 122.

247. 1948 CONSTITUTION §§ 108, 105; LEFF, *supra* note 245, at 101.

248. LEFF, *supra* note 245, at 102-03.

249. *Id.* at 108.

250. *Id.*

251. *Id.*

252. COMMUNISM IN EASTERN EUROPE, *supra* note 231, at 118.

253. LEFF, *supra* note 245, at 106. The Slovak National Council met fifteen times a year in both 1948 and 1949. In the 1950s, however, it met an average of zero to four times a year. *Id.*

tion.²⁵⁴ Party leaders who pushed for Slovak interests were called "bourgeois nationalists." From 1950 to 1954, the wartime leaders of the Slovak Communist Party, who had advocated some measure of autonomy for Slovakia, were arrested for "bourgeois nationalism."²⁵⁵

2. The 1960 Constitution

The 1960 Constitution was the first truly communist constitution in Czechoslovakia, in that it incorporated the leading role of the Communist Party.²⁵⁶ The reason for adopting the new constitution was to reflect the consolidation of Communist power in Czechoslovakia under the leadership of Novotny. Like its predecessors, the new constitution provided for a unitary State.²⁵⁷ It no longer provided for the Slovak Board of Commissioners, and narrowed the legislative power of the Slovak National Council.²⁵⁸ For example, the Slovak National Council now had the authority to "enact laws of the Slovak National Council where empowered to do so by law of the National Assembly[.]"²⁵⁹ and to "discuss and approve the budget of the Slovak National Council."²⁶⁰

In the early 1960s, nationalist sentiment resurfaced and the question of leadership recruitment became a leading issue. Nationalist activity focused on pushing out the Slovaks who had been loyal to Novotny and rehabilitating the "bourgeois nationalists" who had been imprisoned during the 1950s. At the December 1963 meeting of the Central Committee of the Communist Party, the Czechoslovak Communist Party officially repudiated "the fiction of so-called bourgeois nationalism."²⁶¹

3. The 1968 Federation

In 1968 debate on the creation of a federation began and the Slovak elite made it clear that the asymmetrical model was no longer acceptable. They argued that the absence of equivalent Czech organs inevitably put central institutions in the position of defending Czech

254. See discussion *supra* note 210.

255. DEAN, *supra* note 210, at 6. This included Gustav Husak who received a life sentence. Husak was later rehabilitated. *Id.* at 7. He would become the leader of the Communist Party of Czechoslovakia after the Prague Spring, where he led the harsh policy of "normalization" after the Soviet invasion. *Id.* at 4.

256. CONSTITUTION OF JULY 11, 1960, art. 6, translated in 3 CONSTITUTIONS OF NATIONS 222, 228 (Amos J. Peaslee ed., 3d ed. 1968).

257. 1960 CONST. art. 1(2).

258. *Id.* art. 74; DEAN, *supra* note 210, at 7.

259. 1960 CONST. art. 74(b).

260. *Id.* art. 74(d).

261. LEFF, *supra* note 245, at 19.

interests against the Slovaks.²⁶² The 1960 Constitution, having recentralized the government and subordinated Slovak governmental organs to the Prague center, frequently left the administration of Slovak regions to those with little knowledge of Slovakia and its problems, which only increased Slovak dissatisfaction with the central government.²⁶³

The Slovaks were not the only group dissatisfied with the highly centralized and rigid regime under Novotny. Even during the period of de-Stalinization ushered in by Nikita Khrushchev in 1956, Novotny had been reluctant to "de-Stalinize" the country.²⁶⁴ Novotny's conservative policies heightened social and political problems. This led to a push for liberalization, beginning within the Party, in what became known as the Prague Spring.²⁶⁵ The debate on federation was part of the Prague Spring reforms, and it was not a coincidence that this debate began at the same time as the debate on democratization; both were crucial elements of the Prague Spring. The push for federalization was part of the central premise for democratization during 1968, namely, that democratic ideals and intentions were meaningless without structural guarantees.²⁶⁶ Federation was seen, in part, as a structural guarantee of the free assertion of national rights and national autonomy.²⁶⁷ The Slovaks adopted the metaphor of "democratization" in conceptualizing the nationality problem as one of equality among nations; they saw the solution of the nationality problem as a prerequisite to achieving a more democratic social and political order.²⁶⁸ During the Prague Spring, Slovak authorities attributed a high priority "to achieving a symmetrical, binational federation through constitutional reform."²⁶⁹ Slovak intent was on strengthening Slovak authority in its own territory with the hope of insulating Slovakia from the central government in Prague.²⁷⁰ The Czechs were less concerned with national rights and more concerned with institutional pluralism

262. LEFF, *supra* note 245, at 122-23. As a result of the Slovak pressure, and as a prelude to the creation of the federation, the Czech National Council was formed in June 1968. DEAN, *supra* note 210, at 33.

263. DEAN, *supra* note 210, at 15.

264. COMMUNISM IN EASTERN EUROPE, *supra* note 231, at 118.

265. *Id.*

266. LEFF, *supra* note 245, at 126. Institutional guarantees were not the only common concern. Similarly, it was Slovak demands for a certain degree of economic self-management and the inability of the Novotny regime to respond to them constructively that helped bring down Novotny in 1967. He was replaced by Alexander Dubcek, a Slovak. DEAN, *supra* note 210, at 26-27.

267. LEFF, *supra* note 245, at 126.

268. DEAN, *supra* note 210, at 11.

269. *Id.* at 28.

270. *Id.*

and individual liberty.²⁷¹ There were, within the general push for democratization and structural guarantees, different agendas which split along national lines and often conflicted with one another.

One issue over which Czech and Slovak demands clashed was the concept of majority rule. The Slovaks insisted that mere proportional representation was insufficient because it would officially relegate the Slovaks to minority status. Instead they sought parity in all legislative and executive decision-making bodies.²⁷² Slovaks advocated a form of democracy in which each recognized grouping would have veto power.²⁷³ A minority veto of some type is not uncommon in societies composed of diverse communities.²⁷⁴ The idea of a minority veto, however, is fraught with certain difficulties. Democracy is most frequently associated with the concept of majority rule and this type of veto is perceived as "minority rule."²⁷⁵ If one accepts the Slovak principle of "one nation, one vote," then this weighted representation is consistent with democratic representation.²⁷⁶ The Czechs, however, did not accept the Slovak conception of democratic representation. The Czech conception was based on a definition of representation that designated the individual citizen and not the nation as the basis of democracy; proportional representation, not parity, was at the core of the Czech democratization effort.²⁷⁷ Thus, what to the Slovaks was a necessary and essential democratic safeguard, was to the Czechs a repudiation of basic democratic principles.²⁷⁸

271. *Id.* at 2, 28.

272. LEFF, *supra* note 245, at 126. Parity refers to the principle of having top government positions equally divided between Czechs and Slovaks. It is a form of proportional representation. Proportionality is often used as a method of allocating scarce resources, including government positions, in plural societies. LUPHART, *supra* note 1, at 38. The advantage of such a system is that it provides a neutral standard and thus hopefully reduces divisiveness and resentment. *Id.* at 39. "[P]arity is an especially useful alternative to proportionality when a plural society is divided into two segments of unequal size. In such a case, proportionality does not eliminate a majority-minority confrontation in decision-making bodies because it merely reflects segmental strengths." *Id.*

273. LEFF, *supra* note 245, at 126.

274. LUPHART, *supra* note 1, at 28.

275. *Id.* ("On the one hand, broad agreement among citizens seems more democratic than simple majority rule, but, on the other hand, the only real alternative to majority rule is minority rule — or at least minority veto.")

276. LEFF, *supra* note 245, at 126. This conflict is the conflict between group rights and individual rights. See *supra* notes 33-46 and accompanying text. Without some ability to function politically as a group, the Slovaks feared that they would be unable to protect their unique Slovak interests as they perceived them. Because the Czechs did not perceive their cultural identity as threatened, and because they constituted a majority, it was not as important to them to have the veto. Thus the different forms of democracy proposed represent the different needs of different groups.

277. LEFF, *supra* note 245, at 126-27.

278. *Id.* at 127.

The federation which emerged in October 1968—the only part of the program of the Prague Spring to survive the August invasion—represented an uneasy compromise between these rival conceptions of democracy.²⁷⁹ The compromise established is largely still in place today. The supreme legislative body is the Federal Assembly,²⁸⁰ which is divided into two houses: the Chamber of the People and the Chamber of Nations.²⁸¹ The Chamber of Nations is composed of 150 deputies, seventy-five elected from the Czech Republic and seventy-five from the Slovak Republic.²⁸² Deputies to the Chamber of the People are elected by direct vote throughout the country.²⁸³ Resolutions are adopted by the Federal Assembly by a simple majority of each Chamber, except for certain acts for which majority rule is prohibited.²⁸⁴ In such cases, the members of the Chamber of Nations elected from the Czech Republic and the Slovak Republic vote separately and a majority, or in some cases a supermajority, of each, voting separately, is required.²⁸⁵

The 1968 Federation Act also provided for parity in office holding. This was to ensure that top level posts in the federal government were equally distributed between Czechs and Slovaks. If, for example, the Chairman of the Federal Assembly is a Czech, the Vice-Chairman would have to be a Slovak and vice versa.²⁸⁶ Similarly the composition of the Constitutional Court was constitutionally mandated to be half Czech and half Slovak,²⁸⁷ and the Chairman and Vice-Chairman could not be citizens of the same republic.²⁸⁸ The Federation Act also addressed Slovak concerns regarding the asymmetry of the situation prior to 1969 by creating parallel Czech organs.

In addition to the structural decentralization, there were also dis-

279. *Id.* (arguing that this compromise is theoretically inconsistent).

280. Federation Act, art. 29(1), translated in CONSTITUTIONS OF THE WORLD, *supra* note 158.

281. *Id.* art. 29(2).

282. *Id.* art. 31(2).

283. *Id.* art. 30(1).

284. *Id.* art. 40(3). Articles 41 to 43 establish which acts require a super majority. These include, *inter alia*, constitutional acts and amendments.

285. *Id.* art. 41 (three-fifths majority of each required); art. 42(1) (simple majority of each required).

286. *Id.* art. 56.

287. *Id.* art. 94(4).

288. *Id.* art. 95(2); see also DEAN, *supra* note 210, at 23-24. According to Dean, there was a consensus among Slovak economists in the period leading up to the Prague Spring on the problem of slow economic growth in Slovakia: (1) The centralized planning process and the inability of Slovak authorities to implement planning policy impeded Slovak economic growth; and (2) The creation and implementation of long-range development policy for Slovakia should be carried out by Slovak authorities in order to make more effective use of Slovak resources. *Id.*

putes about the degree to which policymaking should be decentralized. The Slovaks wanted to limit the sphere of federal competence to general planning and international relations, while the Czechs sought federal coordination of policy and a broader sphere of common affairs.²⁸⁹ Of particular importance for future events was the problem that decentralized planning would pose for central economic organization²⁹⁰ and the implications of the federation for the reorganization of the government and Communist Party.²⁹¹

It was in part these concerns which led to the 1968 invasion, and in 1970 to a revision of the Federation Act and the recentralization of economic affairs.²⁹² The original federal arrangement was modified in the direction of greater federal and central control.²⁹³ In December of 1970, the Constitution was revised to provide for the reunification of the economy, some Slovak ministries were abolished or reorganized, and their jurisdictions partially transferred to the federal government.²⁹⁴

For several reasons, even the initial federal solution was unsatisfactory to the Slovaks. The parity principle was most consistently implemented in the Constitutional Court and the National Assembly, which have been the weakest political institutions in traditional communist systems.²⁹⁵ The federal ministries, where decisionmaking and policy implementation took place, were still governed by the majority principle.²⁹⁶ The authority of the legislative and judicial institutions in which the parity principle was realized could only be sustained through a democratized system. Thus the institutional concessions made to Slovaks were extremely vulnerable to the postinvasion process of "normalization,"²⁹⁷ which left the federation in place but reversed all of the democratic advances of the Prague Spring. The federal system, even after 1970, gave Slovaks greater regional autonomy than before, but still fell short of providing institutional guarantees of Slovak access to and influence on politics.²⁹⁸

289. LEFF, *supra* note 245, at 127-28.

290. *Id.*

291. DEAN, *supra* note 210, at 41.

292. *Id.* at 4.

293. LEFF, *supra* note 245, at 247.

294. *Id.*

295. *Id.* at 245.

296. *Id.*

297. *Id.*

298. *Id.* at 249. This concern may in large part be addressed in the current constitutional reform. Since Article 6 of the 1960 Constitution, providing for the leading role of the Communist Party, has been repealed, parity in legislative and judicial institutions is largely maintained (as has been the case in current reforms, see *infra* notes 355-359 and accompanying text), and

Prior to the invasion a federalization of the Communist Party had been contemplated as part of the rejection of the asymmetrical structural model, but these plans were abandoned after the invasion,²⁹⁹ and indeed the planned federation of the party was a significant factor in the Soviet decision to invade.³⁰⁰ Thus the central organs continued to double as Czech organs—there was a separate Slovak party—which perpetuated the asymmetry in political life, given the leading role of the Communist Party.³⁰¹

The Slovaks have, however, made progress within the federation. Since 1969, Slovakia has achieved a roughly proportional share of the country's production.³⁰² Slovakia also benefited more from postinvasion investment policies than Bohemia and Moravia.³⁰³ Slovakia's increased standard of living has contributed to a sense of resentment on the part of Czechs.³⁰⁴ Between 1969 and 1983 Slovaks received roughly one-third of the ministerial assignments, although Czechs maintained a monopoly in top government positions in security and control functions.³⁰⁵ Unfortunately for future relations between Czechs and Slovaks, the influx of Slovaks into the federal bureaucracy was often at the expense of Czech reformers who were purged from their positions as part of the postinvasion "normalization" process.³⁰⁶

Another legacy of the events of 1968 is resentment on the part of Czech reformists, who felt that the Slovaks abused the reformist alliance of 1968 by pushing forward federation over democracy, and what was perceived as Slovak complicity in the "normalization" of the Husak regime.³⁰⁷ And indeed, there was little cooperation between Czech and Slovak reformists after 1968.³⁰⁸ The level of Slovak activism in dissident activities was much smaller than that of Czechs. Only four to five percent of government retaliations against dissidents in the late 1970s took place in Slovakia and ninety percent of the political

these institutions will most likely become far more important in the political life of the country. Hopefully the legislature, not the bureaucracy, will become the primary policy-making body, thus assuring Slovak access to genuine legal and policy making organizations.

299. LEFF, *supra* note 245, at 245-46.

300. DEAN, *supra* note 210, at 4.

301. LEFF, *supra* note 245, at 245-46.

302. *Id.* (citation omitted).

303. COMMUNISM IN EASTERN EUROPE, *supra* note 231, at 131.

304. *Id.* ("this split has developed into the most serious nationality conflict in the history of the country").

305. LEFF, *supra* note 245, at 253.

306. *Id.* at 270; COMMUNISM IN EASTERN EUROPE, *supra* note 231, at 131.

307. LEFF, *supra* note 245, at 262, 270; DEAN, *supra* note 210, at 25.

308. LEFF, *supra* note 245, at 262, 267; *see also id.* at 268-72 for a discussion of the growth of Czech resentment of the Slovaks since the creation of the Federation.

trials following the invasion involved Czechs.³⁰⁹

E. *The "Velvet Revolution" and Beyond: The Czech and Slovak Federal Republic*

The CSFR was one of the last countries in the former Soviet Bloc to have its revolution in 1989, but its revolution was also one of the fastest.³¹⁰ It began on November 17, when a rally commemorating the death of a student killed by the Nazis in 1939 turned into a protest for democracy; the police responded with violence. In response to the police brutality a number of antigovernment protests took place in the days following November 17. On November 19, the opposition group Civic Forum was formed in Prague and the next day a similar group, the Public Against Violence, was established in Bratislava. On November 26, the Communist-led government met with members of Civic Forum. Both Civic Forum and Public Against Violence called for a general strike on November 27, if their demands for freedom of speech and political pluralism were not met. The strike took place as scheduled, and negotiations continued with the government. As agreed to in the negotiations, a number of deputies resigned from the Federal Assembly on December 28, and opposition members took their places. On December 29, the Federal Assembly elected Vaclav Havel President of the Republic. In June of 1990 new elections to the Federal Assembly were held and the Public Against Violence and Civic Forum won 46.6% of the vote.³¹¹ Once a new Federal Assembly had been elected, negotiations on the new constitution began in earnest.

Nationality problems, long if not always successfully repressed under the postwar communist regimes in Eastern Europe, resurfaced once the old regime fell.³¹² In the CSFR the problem was somewhat

309. *Id.* at 264.

310. Material in this paragraph is adapted from AFTER THE VELVET REVOLUTION, *supra* note 188, at 14-20 and *Chronology 1989*, 69 FOREIGN AFF. 213, 226-30 (1990).

311. *Czechoslovak Election: Now, Govern*, THE ECONOMIST, June 16, 1990, at 53, 54. The Slovak National Party won 11% of the vote in Slovakia, giving them six seats in the House of the People. *Id.* at 54. The Hungarian minority in Slovakia formed a coalition with the German speakers in Slovakia, gaining 8.6% of the vote in Slovakia (2.8% nationally) giving them four seats. The Moravians won 7.9% of the vote in the Czech Republic (5.4% nationally) giving them nine seats. *Id.*

312. In addition to the problems in the CSFR, one has only to think of events in Yugoslavia in the summer of 1991, or the quickly disintegrating Soviet Union. See, e.g., Edward L. Keenan, *Rethinking the U.S.S.R., Now That Its Over*, N.Y. TIMES, Sept. 8, 1991, § 4, at 3; Serge Schmemmann, *Soviet Congress Yields Rule to Republics to Avoid Political and Economic Collapse*, N.Y. TIMES, Sept. 6, 1991, at A1; Serge Schmemmann, *Soviets Recognize Baltic Independence, Ending 51-Year Occupation of 3 Nations*, N.Y. TIMES, Sept. 7, 1991, at A1; *Yugoslavia's Ethnic Fighting Begins to Look Like War*, N.Y. TIMES, Sept. 1, 1991, § 4, at 3.

unexpected and emerged in early 1990 when President Havel introduced a bill in the Federal Assembly to change the name of the country from the Czechoslovak Socialist Republic to the Czechoslovak Republic. It was then that the "battle of the hyphen" reemerged; the eventual compromise was the Czech and Slovak Federal Republic.³¹³ Since then, the political and constitutional debates have taken place largely in the context of the relations between Czechs and Slovaks.³¹⁴ Before a new constitution is adopted for the CSFR, the leaders of the country decided that certain provisions should be adopted as amendments to the current constitution.³¹⁵ Since the 1989 revolution, several constitutional acts have been adopted defining the jurisdiction between the federal government and the republics,³¹⁶ creating a Charter of Fundamental Rights and Freedoms,³¹⁷ and establishing a Constitutional Court.³¹⁸ The structure of the Federal Assembly, however, remains that which was established by the 1968 Federation Act.³¹⁹

As was discussed earlier, the 1968 Federation Act was enacted largely in response to Slovak demands for greater recognition and autonomy.³²⁰ The party, however, was not federalized, and since before the 1989 revolution real policymaking and decisionmaking remained within the party, the legislative framework of the federation was never really tested. Now that the Federal Assembly has become a genuine legislative body some of the difficulties of the system have become apparent. As the approval of both houses is required for enactment, in cases requiring a three-fifths majority, thirty-one deputies from either of the republics in the Chamber of Nations, voting as a block, can prevent enactment.³²¹ This procedure gives a great deal of power to

313. *Slovakia, The Spirit Revives*, ECONOMIST, June 9, 1990, at 53; Jan Carnogursky, *Physics, Psychology and the Gentle Revolution*, in AFTER THE VELVET REVOLUTION, *supra* note 188, at 111-12. The name was officially adopted by the Federal Assembly in Constitutional Act No. 101 of April 20, 1990 (on file with *The Michigan Journal of International Law*).

314. An excellent and detailed discussion of current constitutional reform in the Czech and Slovak Federal Republic is Cutler & Schwartz, *supra* note 146. Both authors were part of team of American and West Europeans who participated in conferences with the Czechs and Slovaks responsible for drafting the new constitution.

315. *Id.* at 521-22.

316. Federal Assembly Resolution No. 75, Dec. 12, 1990 [hereinafter Competencies Act] (on file with *Michigan Journal of International Law*).

317. Constitutional Act of Jan. 9, 1991, instituting the Charter of Fundamental Rights and Freedoms [hereinafter Charter] (on file with the *Michigan Journal of International Law*).

318. Constitutional Act of Feb. 27, 1991, concerning the Constitutional Court of the Czech and Slovak Federal Republic [hereinafter Constitutional Act of Feb. 27, 1991] (on file with the *Michigan Journal of International Law*).

319. See *supra* notes 280-88 and accompanying text.

320. See *supra* notes 262-65 and accompanying text.

321. For a more detailed discussion of the problems and ramifications of this scheme of voting, see Cutler & Schwartz, *supra* note 146, at 548-49.

deputies from either republic in the Chamber of Nations, if they vote together, to block legislation which is supported by a numerical majority of the deputies and creates a likelihood of deadlocks. As discussed above, the CSFR is not the only country to use a minority veto mechanism.³²² A frequent solution to the conflict between principles of majority rule and minority veto is to provide for majority rule in normal decisions and "extraordinary majorities" in more important decisions, such as constitutional amendments;³²³ this is the case in the CSFR.³²⁴ The balance, however, is a delicate one. While the constant presence of deadlocks and resentment of minority veto may heighten tension and lead to disunity, strict majority rule in a society with potentially hostile groups may also, in the words of Professor Lijphart, "strain the unity and peace of the system."³²⁵ In political theory the hope is that the presence of the minority veto will give the minority a sufficient sense of political security to allow for cooperation among groups and prevent overuse of the veto.³²⁶ This is problematic in the CSFR because the bifurcated nature of the federation gives most conflicts a confrontational quality, like that of government and opposition. This type of competitive confrontation can be "destructive of any prospect of building a nation in which different peoples might live together in harmony."³²⁷

President Havel has presented an alternative model³²⁸ for dealing with the problem of creating a workable federal legislature which is capable of acting quickly, but which also provides some balance to the principle of simple majority rule and addresses Slovak concerns about being a permanent minority. This draft proposes a Federal Assembly, which would be elected directly throughout the CSFR,³²⁹ and a Federal Council which would consist of the Chairperson and fourteen members each from the Presidium of the Czech National Council and the Slovak National Council.³³⁰ The Federal Council could veto measures of the Federal Assembly by a two-thirds vote, whereupon they would be returned to the Federal Assembly for another vote.³³¹

322. See *supra* note 274 and accompanying text.

323. LIJPHART, *supra* note 1, at 28.

324. See *supra* notes 280-85 and accompanying text.

325. LIJPHART, *supra* note 1, at 28.

326. *Id.* at 36-37.

327. *Id.* at 145.

328. The proposal of President Havel was presented in the form of a draft constitution in March 1991 [hereinafter Havel Draft] (on file with the *Michigan Journal of International Law*).

329. *Id.* art. 77.

330. *Id.* art. 99.

331. *Id.* art. 92(1).

If the Federal Assembly were to repass a bill by a three-fifths majority of the Czech and Slovak members of the Federal Assembly, voting separately, then the bill would be enacted.³³² The adoption of Constitutional Acts and a declaration of war would still necessitate a three-fifths majority of the deputies of each republic.³³³ Parity in officeholding would also be maintained between the Chairman and Vice-Chairman of the Presidium of the Federal Assembly.³³⁴ This arrangement has the advantage of creating a balance between the need for a flexible and responsive legislative process and the Slovak fear of being relegated to the position of permanent opposition. As Lloyd Cutler and Herman Schwartz have pointed out, it also more closely integrates the governments of the republics into the federal government, giving them a greater sense of responsibility in the acts of the federal government.³³⁵ It provides a forum for Czech and Slovak cooperation as well as a "veto mechanism," while also reducing the potential for overuse of the veto.

An example of the type of deadlock that can be created in the bipartite, power-sharing government structure in the CSFR is the controversy surrounding the constitutional amendment establishing the jurisdictional divisions between the federal government and the governments of the republics.³³⁶ A large part of the debate centered on the issue of whether the power to declare and protect the human rights of minorities (especially Hungarians and Gypsies) would be under the jurisdiction of the National Councils or the Federal Assembly.³³⁷ This controversy was sparked in part by the adoption of the Slovak Language Law. The bill adopted provided for Slovak to be the official language in Slovakia and that minorities making up ten, or possibly twenty percent of the population in a community would have the right to use their languages in official contacts; an alternative bill proposed by the Matica Slovenska, the Slovak cultural institute, had provided for "Slovak without exception."³³⁸ The eventual compromise on the federal bill was to expand the federal government's power over minority protection.³³⁹ This type of controversy demonstrates the need for

332. *Id.* art. 92(2); see also Cutler & Schwartz, *supra* note 146, at 549.

333. Havel Draft, *supra* note 328, art. 89(3).

334. *Id.* art. 98(3).

335. Cutler & Schwartz, *supra* note 146, at 550.

336. Competencies Act, *supra* note 316.

337. Cutler & Schwartz, *supra* note 146, at 524-25.

338. *Adoption of Slovak Language Bill Causes Protests and Threat of Strike*, British Broadcasting Corporation, Summary of World Broadcasts, Oct 27, 1990, available in LEXIS, Nexis Library, INTL File.

339. *Id.*; Competencies Act, *supra* note 280, ¶ 37 (amending art. 37(3) of the 1968 Federation

balance between local and federal control. If there was no federal check on Slovakia, it is possible that the "self-determination" of Slovakia might lead to a lack of "self-determination" for other ethnic and linguistic groups living in the territory of Slovakia.

The Charter of Fundamental Rights and Freedom (the Charter),³⁴⁰ adopted January 9, 1991, incorporates the principles of the European Convention on Human Rights.³⁴¹ It includes the principle of nondiscrimination, providing that "[f]undamental human rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethnic or social origin, membership in a national or ethnic minority, property, birth, or other Status."³⁴² Consistent with the Copenhagen Conference document,³⁴³ it also provides for self-selection in determining nationality.³⁴⁴ Chapter III of the Charter concerning the rights of national and ethnic minorities is brief, containing only two Articles. Article 24 provides for nondiscrimination, providing that "[t]he national or ethnic identity of any individual shall not be used to his or her detriment."³⁴⁵ The Charter also guarantees to citizens who constitute a minority the right to develop their own culture, to disseminate and receive information in their native language, and the right of association.³⁴⁶ Minorities are further guaranteed the right to education in their own language,³⁴⁷ "to use their language in official contact[,]"³⁴⁸ and "to participate in the settlement of matters concerning the national and ethnic minorities."³⁴⁹ The right to education is guaranteed and school attendance for a period to be specified by later law is made obligatory.³⁵⁰

Another major constitutional amendment which has been adopted is the act establishing the Constitutional Court of the CSFR.³⁵¹ One

Act) ("If required by the unity of the legal system, the Federal Assembly shall effect the codification in matters concerning nationalities and ethnic minorities . . .").

340. The Charter was adopted as a constitutional act by the Federal Assembly with the requisite supermajorities.

341. Cutler & Schwartz, *supra* note 146, at 531.

342. Charter, *supra* note 317, art. 3(1).

343. Copenhagen Conference, *supra* note 130, ¶ 32.

344. Charter, *supra* note 317, art. 3(2) ("Everybody has the right to a free choice of his or her nationality.").

345. *Id.* art. 24.

346. *Id.* art. 25(1).

347. *Id.* art. 24(2)(a).

348. *Id.* art. 25(2)(b).

349. *Id.* art. 25(2)(c).

350. *Id.* art. 33(1).

351. Constitutional Act of Feb. 27, 1991, *supra* note 318.

important function of the Constitutional Court is to resolve jurisdictional disputes between the republics and the federal government. It will rule on conflicts of jurisdiction between the organs of the federal government, between the organs of the federal government and the republics, and between the organs of the two republics.³⁵² The Court will also have the power to rule on the constitutionality of acts of the Federal Assembly, the constitutionality of government decrees, and to determine whether acts of the Federal Assembly, the Czech National Council and the Slovak National Council conform with the international human rights treaties to which the CSFR is a party.³⁵³ For the Slovaks, the importance of a constitutional court was to provide a legal and institutional guarantee that constitutional provisions for Slovak self-government would not be diluted, as had been the case under the 1968 Federation Act.³⁵⁴

Parity in office holding is also a principle that has continued to apply in the CSFR. The act establishing the Constitutional Court includes provisions on parity. Six of the twelve justices shall be citizens of the Slovak Republic and six shall be citizens of the Czech Republic.³⁵⁵ The Chief Justice and Assistant Chief Justice may not be citizens of the same Republic.³⁵⁶ The Court is to hear cases either in full session or panels of four justices.³⁵⁷ The application of the parity principle may lead to split decisions, if panel votes split along national lines.³⁵⁸ The Competencies Act creates the State Bank of Czechoslovakia and provides for parity in office holding between the two vice governors of the Bank and the Central Bureau of the Bank; the position of Governor of the Bank will rotate between citizens of the Czech and Slovak Republics.³⁵⁹

CONCLUSION

While the future structure of the CSFR is not clear, and current debate sometimes leads to doubts about its continued existence,³⁶⁰ it

352. *Id.* art. 4.

353. *Id.* art. 2.

354. *Slovak Parliament Premier Meciar on Czechoslovak Federation Law*, British Broadcasting Corporation, Summary of World Broadcasts, Nov. 23, 1990, available in LEXIS, NEXIS Library, INTL File.

355. Constitutional Act of Feb. 27, 1991, *supra* note 318, art. 10(4).

356. *Id.* art. 11(2).

357. *Id.* art. 14.

358. Cutler & Schwartz, *supra* note 146, at 538.

359. Competencies Act, *supra* note 316, art. 5(12) (amending art. 14(2) of the Federation Act, *supra* note 280).

360. Burton Bollag, *Havel Asserts Nation Faces Breakup*, N.Y. TIMES, Dec. 11, 1990, at A4.

appears at least for the time being that some form of federation will remain in place. But the questions currently being raised about Slovak autonomy are not new. They have persisted since an independent state of Czechs and Slovaks was first contemplated. Any future constitution of the CSFR must ultimately grapple with these issues.

In her book on national conflict in Czechoslovakia, Carol Skalnik Leff argues that the real purpose of federalism is to provide procedural legitimacy to political decisionmaking and political harmony.³⁶¹ She further argues that the main reason for Czech acquiescence to federalism was the hope that it would end Slovak complaints,³⁶² yet Slovak demands have persisted. Ultimately, if the CSFR is to remain a single nation, the federation will have to provide a greater sense of legitimacy. While democracy is important to a sense of government legitimacy, the form of that democracy is equally important. As this Note has shown, in a country composed of diverse populations, recognition of the right of distinct groups to a certain measure of self-government contributes to this sense of legitimacy. The solution, however, is more complicated than simply allowing "peoples" to choose their own form of self-government. How groups are defined is equally important. Self-determination for Slovakia must not be at the expense of the right to self-determination of other groups living in Slovakia. Some form of the right of self-determination must be recognized if the rights of all groups are to be respected and if the governments of plural societies are ultimately to be acknowledged as legitimate by all their citizens.

361. LEFF, *supra* note 245, at 250.

362. *Id.*