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Devolution or Deconstruction Czecho-Slovak Style

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DEVOLUTION OR DECONSTRUCTION CZECHO-SLOVAK STYLE

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This essay is a part of a broader study entitled "Post-communist Constitution-making: Confessions of a Comparatist" which focuses on Czechoslovakia.

The present Czech and Slovak Federative Republic is a unique variant of federalism. It is composed of only two component units (shades of Lebanon, Cyprus, perhaps Belgium), and it is seriously asymmetric: demographically, *there are twice as many Czechs and Moravians in the Czech Republic as there are Slovaks in the Slovak Republic;* economically, *the Czech area has been highly industrialized while Slovak industrialization has come much later and is less diversified;* historically, *the Czech lands have had a long tradition of political and cultural identity even as part of the Austro-Hungarian Empire, while the Slovaks remained under an oppressive Hungarian dominance for a thousand years until the establishment of the Czechoslovak Republic in 1918.*

The Czechs and Slovaks are of the same Slavic origin and their languages are very similar, but the Slovaks have resented the dominant Czech role in the unitary state. In 1968, giving way to Slovak nationalist pressures, the Communist regime adopted a federal structure which, however, in reality did little to modify the centralized decision-making.

After the "negotiated," "velvet" revolution of November 1989, the process of drafting a new constitution turned quickly into an increasingly difficult dialogue between the Czech and Slovak political actors, centering on the reallocation of powers among the Federation and the two Republics.

The text that follows describes the principal actors, the phases of the negotiations, the resulting new constitutional law adopted by the Federal Assembly in December 1990 and the jurisdictional controversies that have arisen under that law.

Contrary to general expectation that the thorny allocation problem had been settled—and to the consternation of the Czech side—the Slovak side promptly reopened the issue by proposing a "treaty" to be concluded by the two Republics, which would redefine the legal basis of the common state as well as the power distribution. As of this writing (May 1992), the negotiations have proved inconclusive.

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I. Actors and Process

A. *Principal Institutions*

The power to amend the Constitution of the Czech and Slovak Federative Republic or to adopt a new constitution is vested in the Federal Assembly. That body consists of the Chamber of the People, composed of 150 deputies elected directly throughout the entire country, and of the Chamber of Nations of 150 members, half of whom are elected directly from the Czech Republic and half from the Slovak Republic.[1] A new constitution or constitutional amendment (in the form of a so-called "constitutional law") requires approval by a three-fifths majority of all deputies in the Chamber of the People as well as the consent by three-fifths of all deputies in both halves of the Chamber of Nations.[2]

As in other parliamentary systems, executive power is divided between the government and the president (the "dual executive" system). The federal government holds most of the executive power of the Federation.[3] The president's legal powers are limited, but, following the tradition of strong personalities in the First Republic, his political influence is considerable.[4] The republics have their own directly elected parliaments, "the National Councils," as well as governments.[5] The "Presidia" of the Federal Assembly and of the two National Councils are entrusted with significant functions.[6]

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

B. *The Process*

The original idea, closest to the Czech perception, was for the federal constitution to be drafted first, with the Republic constitutions to

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

2. *Id.* art. 41.

3. *Id.* arts. 66-85.

4. *Id.* art. 61.

5. *Id.* arts. 102-39a.

6. *Id.* arts. 32(3), 33(2), 45(3), 49(3), 51, 52, 54, 56-59 (on the Federal Presidium); *id.* arts. 104(2)-(3), 111(3), 116(3), 119-22 (on Presidia of the two National Councils).

follow. The Federal Assembly established a "Committee of Deputies for the Preparation of a Proposal for a New Constitution" (Committee of Deputies) composed of fourteen members of the Federal Assembly (seven Czechs, seven Slovaks) and ten deputies each from the two Republic National Councils, reflecting the entire political spectrum. The chairmen and other members of the Presidia of the three legislatures were included. The chairmen of the three legislatures alternated in presiding over the sessions.[7]

To assist the Committee of Deputies, the presidium of the Federal Assembly appointed a Committee of Experts—again on a parity basis—composed of eighteen members selected on the basis of their special knowledge or experience. A majority was drawn from university law faculties, but federal and Republic deputies and officials were also included.[8]

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

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

In November 1991, a part of the Committee of Deputies working with some experts produced a formal proposal for the revision of the federal executive and legislative institutions, which was subsequently

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

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

submitted by fourteen deputies to the Federal Assembly;[9] it met again twice in January 1992 to consider a modified text worked out by a group drawn from the Committee of Experts.[10] The explanatory report attached to the original proposal is replete with references to constitutions of Western European states, indicating that the experts, in drafting specific provisions, took into account not only the existing and prior Czechoslovak constitutional texts but also the most recent Constitutions of Greece, Spain, and Portugal, as well as the German, Italian, Dutch, Austrian, French, and—marginally—U.S. Constitutions.

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

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

Although the membership of the federal and Republic committees overlaps to a certain extent, there have been no meetings or formal contacts between these committees on a tripartite basis. Any consultations that have taken place have occurred only inside political parties, most of which are organized on both the Czech and Slovak side at the federal and Republic levels. President Havel deplored the inadequate cooperation and—with a view to assuring coherence among the three constitutional charters—asked the three legislatures to establish "a small group of the best Czech and Slovak brains" to prepare a draft federal text in close cooperation with the drafters of the Republic Constitutions.[11] In the changing political atmosphere the President's call was ignored. Even though the June 1990 elections confirmed the Civic Forum and its Slovak counterpart, Public Against Violence, as the

9. Fed. Ass. Print [FS] 1071.

10. *Id.* 1071/A.

11. *Znovu vybudovat stát*, LIDOVÉ NOVINY, June 30, 1990, at 1, 2.

strongest groups in their respective lands, the rising Slovak nationalism had a direct impact on the constitutional discourse.

II. THE NEGOTIATIONS

A. *The First Phase*

The "hyphen war" in the Federal Assembly over the new name of the country was the culmination of the initial round of the Slovak struggle for new powers.[12] A termination of the common state surfaced as an actual option in a strident exchange between Czech and Slovak intellectuals which appeared in two leading periodicals.[13] With several thousand Slovaks demonstrating in Bratislava for independence, Dr. Ján Čarnogurský, then a federal deputy prime minister and leader of the Christian Democratic Party, at the time the second largest political group in Slovakia, spoke for the first time of the gradual dissolution of the Czechoslovak federation with a view to a separate entry of the two states into the European Community.[14]

On the Czech side Czech Prime Minister Petr Pithart signalled a reversal in the constitution-making process: it will now be for the two Republican governments to produce a list of those powers the Republics are willing to cede to the federation.[15]

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

As early as summer 1990, it became clear that the Slovaks were not prepared to wait for the solution of the power distribution issue until consensus was reached on the entire new constitution. It was

12. The hyphen in question appeared in the name of the Czecho-Slovak Federal Republic, which was changed after a bitter debate to Czech and Slovak Federative Republic. Jan Obrman & Jiří Pehe, *Difficult Power-sharing Talks*, REP. ON E. EUR., Dec. 7, 1990, at 5, 6, 8; this section draws on this article and on Peter Martin, *Relations between the Czechs and the Slovaks*, REP. ON E. EUR., Sept. 7, 1990, at 1-6.

13. Martin, *supra* note 12, at 1-2.

14. Jiří Pehe, *Growing Slovak Demands Seen as Threat to Federation*, REP. ON E. EUR., May 23, 1991, at 1, 2, *passim*. The Slovak National Party, the only group with a parliamentary representation advocating independence polled about 12% of votes in the first federal election and 14% in the election to the Slovak parliament in June 1990. A number of small Slovak parties and groups organized before or in the wake of the elections took a similar stance. Other intellectual and social groups agitated for separation, assisted by Slovak emigrés. Vladimír V. Kusin, *Czechs and Slovaks: The Road to the Current Debate*, REP. ON E. EUR., Oct. 5, 1990, at 4, 5.

15. Obrman & Pehe, *supra* note 12, at 6.

therefore agreed to settle the issue promptly by preparing a separate constitutional law, to be effective, as the Slovaks demanded, on January 1, 1991. That law would amend the division of powers in the existing 1968 federal Constitution,[16] pending adoption of the new constitution. At the same time, at the urging of federal Deputy Prime Minister Dr. Rychetský, a deadline was set for adoption of the federal constitution and the Republic constitutions, one year and two years respectively from the date of the June 1990 elections. One might mention parenthetically that—after some internal sparring within the Civic Forum—a corresponding decision was taken to proceed similarly by a special constitutional law with the formulation of a Bill of Rights, an undertaking that proved surprisingly successful and relatively uncontroversial.[17]

B. *The Second Phase*

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

In the first round on August 9, the three governments' representatives, meeting in the Slovak spa Trenčianské Teplice, agreed on a list of federal powers in the form of a series of guidelines that were to be developed into a draft proposal by ten tripartite expert commissions. The multiple commissions hastily produced reports of variable length and quality, leaving a number of gaps, and an effort by a "free working group" to consolidate the conclusions did not prove successful.[18] Shortly after the August meeting, the Slovak government created its own Ministry of International Relations, although foreign policy was listed in the guidelines as falling within federal competence, and the President urged a single federal Foreign Affairs Ministry.[19] It is said that the President was not given advance notice.

16. Const. Law 143/1968 Sb., *translated in* Constitutions of the Countries of the World (Albert P. Blaustein & Gisbert H. Flanz eds.) [hereinafter Constitutions] (Czechoslovakia by Gisbert H. Flanz, out of print, 1974).

17. Const. Law 23/1991 Sb., Instituting the Charter of Fundamental Rights and Freedoms.

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

19. Obrman & Pehe, *supra* note 12, at 6-7. Not until almost two years later did the Czech Republic establish its own corresponding Ministry of International Relations.

Little has been made public about another round of talks in September and October of 1990, first in Prague and then in the Moravian town of Kroměříž, this time in the presence of the President himself. The participants, it is reported, reaffirmed the guiding principles accepted at Trenčianské Teplice and the deadline for the new reallocation of powers.

In a declaration adopted on the anniversary of the birth of the first Czechoslovak Republic the President and the three Prime Ministers "condemn[ed] all attempts to destabilize Czechoslovakia and pledged to continue the federation."[20] Finally, on November 5, the three Prime Ministers, meeting again in Prague, approved a draft of a constitutional amendment paralleling, with a few exceptions, the previous guidelines. The draft was ready for submission to the respective governments and legislatures.

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

Following its acceptance by the three governments the constitutional bill came before the legislatures of the two Republics and the Federal Assembly.[21] It received quick approval in the Slovak National Council, but this time it was the Czech National Council that decided to propose several substantial changes, as did the committee of the Federal Assembly on taking up the text.[22]

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20. *Id.* at 7 & n.7.

21. This part relies primarily on Jiří Pehe, *Power-sharing Law Approved by Federal Assembly*, REP. ON E. EUR., Dec. 21, 1990, at 6-9.

22. The Czech National Council proposed, *inter alia*, that the federation be responsible for issues of nationality and minority rights because these were covered by international treaties to which the common state (not the Republics) is a party; that the provision for annual alternation

The Slovak leaders, who apparently had assumed that the approval by the three executive branches precluded any further modification, were reported to have threatened in private conversations to declare supremacy of legislation passed by the Slovak National Council over federal laws (shades of John C. Calhoun who in the 1820s claimed the same right for his state of South Carolina against federal law under the doctrine of nullification[23]). In response, the Czech Prime Minister warned against such a "grave and irreversible step" against the federation and adumbrated that his government had several possible courses of action in case of a constitutional crisis. The Slovak Prime Minister Mečiar, while denying having made the threat, hinted at a secret Slovak plan that would be employed if the Federal Assembly should change the agreed text, but at the same time he affirmed Slovakia's continuing interest in the common state. Furthermore, by attacking prominent Czech politicians, as well as the federal Prime Minister, a Slovak, for not paying sufficient heed to Slovakia's economic needs, he injected a new issue into the controversy. In doing so he disclosed the growing rift between the two presumed allied groups, the Czech Civic Forum and the Slovak Public Against Violence, the latter having come out emphatically in support of the Slovak position against any change in the power allocation agreement.

On December 9 President Havel reentered the scene by pointing out first that Mečiar and others did not understand the separate roles of the legislative and executive branches: that the three governments had reached an agreement did not mean that the federal legislature must approve it without changes. He warned that pressure on the legislature may "break up the federation."[24] He followed up the next day with a dramatic speech before the Federal Assembly in which he pictured the grave economic and political consequences of the country's breakup and charged Mečiar and other Slovaks with fueling the crisis: while recent opinion polls showed a majority of Czechs and Slovaks supporting the federal state, most of the respondents viewed the power-sharing conflict as "a high stake gamble by some leading politicians." The President proposed prompt establishment of a constitutional court, a law on referendum and an unspecified temporary broadening of the President's power.

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

23. BERNARD BAILYN ET AL., THE GREAT REPUBLIC 588 (1977).

24. Pehe, *supra* note 21, at 8 & n.12.

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

More than seventy deputies participated in the Assembly debate, proposing some thirty changes, most of which were voted down. Of the several modifications proposed by the Czech National Council, the Assembly accepted the one designed to retain federal legislative jurisdiction over nationality and minority issues as well as over churches.[25]

Responding to the appeal of its leaders to have reason prevail "over prestige-seeking, unitarism, and separation,"[26] the Assembly on December 12 adopted the bill by 237 to 24 votes with 17 abstentions.[27] The public reaction to the Assembly's action was generally favorable as clearing the way for critical parliamentary business that had been slowed down, if not blocked, by the festering power allocation controversy.

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

III. The New Allocation-of-Powers Law of 1990

A. *"From the Top" or "From Below"?*

It makes at least a doctrinal and symbolic difference whether the power allocation is structured in the context of an extant common state by devolution from the central authority to component units (from the top—"shora" in the Czech parlance); or whether independ-

25. The Assembly also voted to keep control over distribution of energy in cases of emergencies. Pehe, *supra* note 21, at 9.

26. *Id.* at 9 & n.18.

27. Const. Law of 12 Dec. 1990, 556/1990 Sb., *in* Consolidated Text, *supra* note 1.

ent states create a new structure by accepting a common constitution (from below—"zdola").[28] The Czechs contend that the current process of constitution-making can be nothing else but a devolution, considering the inescapable fact of the existing federation and its history. The Slovaks, insisting on the "from below" method, point out that federations built "from the top" have historically fared much worse (Yugoslavia, Belgium, Canada) than those built "from below" (the United States, Germany, Switzerland). The late Soviet Union—the Slovaks might argue—although built on a treaty preceding the constitution was in reality formed "from the top." According to the terminology used in Czech and Slovak discourse, the choice is between a "federation" and a "confederation," assuming, of course, the continuation of the common state. The real issue is the nature and extent of the powers conferred on the central authority that determine the viability of the common state in given historic conditions.

This controversy became the central issue in the subsequent negotiating phase over the Slovak-proposed "treaty." Suffice it to say here that on its face at any rate the December 1990 law does not resolve the issue. That law has now been included in the new consolidated version of the 1968 Constitution containing all the amendments adopted thus far. It incorporates, with minimal omissions of the ritualistic invocations of socialism and proletarian internationalism, the preamble and the "basic provisions" of that constitution: a ringing affirmation of the virtues of the common state and of the single internal market is coupled with an equally eloquent assertion of the right of the two Republics to self-determination "up to separation" and no less than eight references to their sovereignty and right to self determination.[29] It is the two Republics "represented by their deputies" in the Czech and Slovak National Councils "that have agreed on the creation of a Czechoslovak federation."[30] Yet the new law was adopted by the Federal Assembly in accordance with the prevailing procedure for a con-

28. Jan Rychlík, *Federace budovaná 'zdola' či 'shora'?*, LIDOVÉ NOVINY, Jan. 14, 1992, at 9; Krecht, *Federativní stát a jeho právní systém (Studie zaměřená k ústavní problematice)*, 130 PRÁVNÍK 721 (Nos. 9-10, 1991). Krecht's interesting study, strongly influenced by normative positivism, postulates a "treaty" between sovereign states as preceding the constitution in a "from below" building of a common state. There was no such treaty preceding the Confederation in the United States, only a Declaration of Independence. And there is a question whether the 13 colonies were ever fully "independent states." See generally on the Czech-Slovak controversy, P. Kalenský and A. Wagner, *Sebeurčení národů a suverenita v diskusi o státoprávním uspořádání*, LIDOVÁ DEMOKRACIE, Oct. 2, 1990, at 5.

29. Const. Law 103/1991, *supra* note 1, pmbl. & art. 4(1). The sovereignty of the common state is also recognized. *Id.* art. 1(5).

30. *Id.* pmbl. (last para.).

stitutional amendment which does not require, as we have seen, ratification by the Republic National Councils.

B. *The Options*

1. A Model

Power allocation entails identifying the subject or field (e.g. foreign affairs, taxation, telecommunications), allocating it between the federation and the component state (horizontal dimension), and defining the "depth" of the allocated authority (vertical dimension).[31]

Horizontally, the power accorded in a discrete field may be exclusive, concurrent, or shared. Concurrent power may mean either that component states are free to act until the federation acts to preempt the field in part or in full, or that the states act except where action by the federation serves the common purpose more efficiently than would individual state actions—the old-new principle of subsidiarity.[32] Shared power may entail joint federal and state action ranging from notification, consultation, supervision by the federation to codecision.

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

Unallocated powers remain with the states. Finally, the constitution may empower the federation to "redelegate" certain of its powers to the states.[33]

2. Current Patterns

In practice, federal constitutions employ the "enumerated powers" pattern, with or without the exclusivity concept, but invariably leaving non-enumerated powers to the component states. Apart from this common thread, however, the allocative patterns vary greatly from one constitution to another, evidently shaped by local, idiosyncratic

31. For the reader more familiar with U.S. federalism, it may help to mention that the vertical dimension assumes a greater significance in the Czecho-Slovakian model.

32. For interesting definitions of subsidiarity, see GRUNDGESETZ [Basic Law] [hereinafter GG] art. 72(2) (F.R.G.); Treaty on European Union and Final Act [Maastricht Treaty], *done* Feb. 7, 1992, tit. II, art. G(b)(5), 31 I.L.M. 247, 257-58 (inserting a new art. 3b into the Treaty establishing the European Economic Community), *also in* 1 THE NEW TREATY ON EUROPEAN UNION (Belmont European Policy Center ed., 1992).

33. For a useful list illustrating the many potential combinations, see Krecht, *supra* note 28, at 729.

influences. The German Basic Law, which employs exclusive and concurrent categories, presents on its face the most logical scheme; however, it has been brought out of kilter by subsequent amendments and—above all—by a powerful drive toward centralization, comparable to the forces that have made the U.S. Congress practically all-powerful. The details of the allocation patterns in federal constitutions range from the sparse list in the U.S. Constitution to the wildly casuistic Swiss Constitution which went so far as to allocate the authority to issue gambling permits in *Kursälen* (salons in spas).[34]

C. *The Text*

The 1968 Constitution was the starting point of the negotiations for the redistribution of powers. The new scheme, however, reflects the pressure from the Slovak side toward broadening the Republic authority at the cost of the center. In contrast to the 1968 pattern,[35] the new text omits the listing of *exclusive* federal and *shared* competences.[36] Instead, it

(1) enumerates subjects falling generally in the competence of the federation with no indication of any limits on the horizontal dimension of the federal power (foreign affairs, war and peace, defense, currency, federal material resources, and protection of the federal Constitution),[37]
(2) singles out federal competences in enumerated subject areas, limited—at the vertical dimension—in principle to legislative action, except where the constitutional law provides otherwise,[38]
(3) leaves all unallocated competences to the Republics.[39]

In the second category of "singled out" competences, federal power is defined in often indeterminate terms, e.g. "formation of strategy" or "structural concepts with federal significance," or "common principles,"[40] signalling the intention to limit federal action either to the German-type framework legislation (*Rahmengesetz*),[41] or at most

34. CONSTITUTION FÉDÉRALE art. 35(2) (Switz.), *translated in* Constitutions, *supra* note 16 (Switz. by Gisbert H. Flanz & Gunter E. Klein).

35. Const. Law 143/1968, *supra* note 16, arts. 7-9; also in contrast to the Civic Forum's First Draft of the Constitution of Feb. 1, 1990, arts. 30-32.

36. The trichotomy of *exclusive* federal, *concurrent* federal-state, and *exclusive* state competences, with undelegated powers remaining in component states prevailed in the Soviet Constitutions and still applies in the German Basic Law and in Canada. GG, *supra* note 32, principally arts. 71-74; Jiří Grospič, *Zákonodárná pravomoc a působnost v Československé Federaci a otázky jejího uplatňování*, 15 STÁT A PRÁVO 5 (1973).

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

38. *Id.* art. 28b(2).

39. *Id.* art. 9.

40. *Id.* arts. 10, 17.

41. GG, *supra* note 32, art. 75.

to ordinary legislation.[42]

Thus, federal power includes basic legislation on general economic policy planning, transportation, environment, price and wage policy, labor relations, statistics, regulations of ownership and enterprises, and protection of consumers and of basic rights. The power to implement and execute federal legislation, however, is in principle in the hands of the Republic institutions, with the exception of customs, sea, air, and railroad transportation, and supervision of nuclear safety, in which the federation was expressly given the entire panoply of power.[43] Although the federation has the power to legislate on the protection of competition, it is specifically left to the Federal Assembly to determine the "division of execution" between the federation and the Republics.[44]

In other provisions federal power was defined in such terms as "legal disposition," "legislative disposition," "determination of uniform rules," "organization and direction," which, as we shall see, have already raised questions as to the reach of federal jurisdiction in the vertical dimension.[45]

Financial and budgetary policy is determined by agreement among the federal government and the governments of the two Republics; the Federal Assembly enacts principal tax legislation (value added and income taxes) but the Republics administer it. The Federal Assembly decides on the allocation of proceeds.[46] Thus far the three governments have succeeded in reaching an agreement on the budget based on a previous formula, said to favor the Slovaks, but there is no provision for the contingency that an agreement proves impossible.

Although the Slovak side first pressed for including in the Constitution a division between the Federation and the Republics of publicly owned resources and facilities, the idea was abandoned when it became clear that any effort for an all-inclusive enumeration would be incomplete—and the solution was left with the political process.[47] The Federal Assembly, however, is given explicit authority to deter-

42. *See infra* text accompanying note 60 (discussing the Constitutional Court's interpretation).

43. Const. Law 103/1991, *supra* note 1, arts. 13(2), 19d-e, 21b.

44. *Id.* art. 24e.

45. *See infra* text following note 60; *see also* Const. Law 103/1991, *supra* note 1, art. 12(4) (regarding administration of the tax laws); *id.* art. 37(1) (expressly confirming the Federal Assembly's legislative power).

46. *Id.* arts. 11(1), 12.

47. *Id.* art. 4(3)-(7). For an example of a constitution that does specify the resources owned by the federation see CONSTITUIÇÃO FEDERAL art. 20 (Braz.), *translated in* Constitutions, *supra* note 16 (Braz. by Albert P. Blaustein).

mine ownership of the vital oil and gas pipelines and certain electric networks.[48]

As a compromise, the original idea of establishing three separate central banks was dropped in favor of a single federal State Central Bank with "centers" of that Bank established for each of the Republics, although the role of the centers is not specified.[49]

Further federal legislative authority, limited, however, "*to the extent required by the uniformity of the legal order*," covers nationality, ethnic minorities, churches, health, lower education, copyright, and other matters.[50] This limitation on the federal legislative powers, carried over from the 1968 Constitution, is in a sense a variant of the subsidiarity concept, motivated, however, by a specific interest in the preservation of legal coherence.

History played a major role in shaping one important aspect of the power allocation. Typically, upon creation of a federation, a federal grid is superimposed on preexisting legal orders of states entering the federation: federal law is interstitial and supplementary. In 1918 Czechoslovakia, however, two different legal orders were embraced within a *unitary* state, one based on Austrian, the other on Hungarian law. After World War II, in the still unitary state, the two legal orders were replaced with a uniform system of law, and in 1968 the federal scheme was overlayed upon the uniform legal system. Preservation of uniformity was in potential conflict with the new law-making powers of the two Republics. The resulting compromise[51] keeps the bulk of the uniform legal order—including the civil, commercial, and criminal codes—within the orbit of federal legislative power, but where the federation does not preempt the entire field the Republics may legislate. In any event, the "execution" of these codes and laws pertains to the Republics, and the Federal Assembly may "redelegate" its authority to the Republics.[52]

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48. Const. Law 103/1991, *supra* note 1, art. 4(4). Earlier constitutional law lists certain resources (mineral wealth, basic sources of energy, "basic forest fund," waters, etc.) as within "state ownership" without indicating Federal or Republic ownership; "details" are left for determination by an ordinary law. Const. Law 100/1990 SB. art. 10.

49. The Law on the Czechoslovak State Bank, 22/1992 SB., was modeled after the German Bundesbank legislation. It was passed along with a general banking legislation. *See* Peter Martin, *Banking Reform in Czechoslovakia*, RFE/RL RESEARCH REPORT, Apr. 10, 1992, at 29.

50. *Compare* Const. Law 103/1991, *supra* note 1, art. 37(3) *with* Const. Law 143/1968, *supra* note 16, art. 37(3) (the latter providing a more extensive enumeration); *see also* Const. Law 103/1991, *supra* note 1, arts. 5, 6 (addressing in the "Basic Provisions" citizenship and equality of the Czech and Slovak languages).

51. Const. Law 103/1991, *supra* note 1, art. 37(2).

52. *Id.* arts. 37(2), 38(1)-(2). Here also, Constitutional Law 103/1991 essentially carries over limitations from Constitutional Law 143/1968, art. 38(1)-(3). *See also* Const. Law 103/1991, *supra* note 1, art. 28b.

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

It is in the area of foreign affairs, which touches directly upon the "external sovereignty" and international personality of the federation, that—on its face at any rate—the expansion of the Republic power is most evident. The federal authorities negotiate international treaties, legislate the basic lines and instrumentalities of foreign economic policy, and provide for representation of the common state abroad.[53] The Republics maintain their authority to participate in negotiations of international treaties and in the representation in international organizations on matters falling within the legislative competence of the Federation.[54] In addition, however, they acquire a measure of their own international personality. In the first place, the Republics may, "*in harmony*" with federal foreign policy, conclude agreements with component parts of other composite states for cooperation on a broad spectrum of subjects ranging from economy and commerce to culture, health, and television. More importantly, they may conclude, *when so authorized* by the Federation, international agreements on matters within their legislative competence, and they may maintain their own representation abroad and receive foreign representatives on the same matters.[55] The important question of the modalities of the federal authorization remains open and will be regulated presumably by a federal law.

D. *The Emerging Jurisdictional Conflicts: The Constitutional Court Speaks*

Even a cursory perusal of the text of the 1990 law reveals many ambiguities bound to result in conflicting claims of competence between the Federation and the Republics. This was already the situation under the 1968 text but—in the words of a Czechoslovak commentator—these differences were resolved at the time "during the elaboration of the legislation and other political decisions. It is for this reason that during the . . . years of the functioning of the Czechoslo-

53. Const. Law 103/1991, *supra* note 1, arts. 7(1)a, 16, 36(1)b, 36(3).

54. *Id.* art. 25.

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

vak federation [under the Communist regime] no conflict had arisen that would have had to be resolved by specific constitutional measures," that is, by the Constitutional Court which was provided for in the Constitution but never made operational.[56]

With the end of "the guiding role of the Communist party" and "socialist legality," the need for an authoritative dispute settlement of jurisdictional quarrels became imperative. Who, for instance, regulates forests when agriculture policy is federal but the Republics own the forests? In some cases, where federal legislative power was clear but the authority to adopt urgently needed uniform regulations for implementation was disputed (e.g., on pensions) the federal government, to avoid controversy, proposed new legislation instead of issuing a regulation, which would be the normal course. This technique, while feasible in a few exceptional instances, obviously could not be employed as a general procedure. Anticipating a plethora of challenges to its power, the federal government proposed to clarify the vertical-dimension ambiguity in a new proposal, which, however, has not been acted upon thus far.[57]

Happily, the Constitutional Court (six Czechs and six Slovaks) has been in place since 1991,[58] and its first case dealing with a jurisdictional conflict is a harbinger of things to come.[59] The Federal Ministry of Communications asked the Court to resolve a dispute over the interpretation of the 1990 law with respect to jurisdiction over the communications network. The principal provision at issue appears to distinguish between the three branches of the system: posts, radio communications, and telecommunications,[60] and the Court was faced with the unenviable task of defining, and applying the puzzling textual variations.

The article in question (art. 20) gives the federation competence for:

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

56. Jaroslav Zacharias, *Rapport Tchéchoslovaque*, 17 REVUE BELGE DE DROIT INT'L 138, 139-40 (1983).

57. Proposal for the Chapter of the Constitution Dealing With the Distribution of Competencies Between the Federation and its Republics Elaborated According to the Position of the Government of the Czech and Slovak Federative Republic, Dec. 31, 1991, Prague, Č.j. 2956/91-PV.

58. Const. Law 91/1991 SB., on the Constitutional Court of the ČSFR; Law 491/1991 SB., on the Organization of the Constitutional Court of the ČSFR and Proceedings Before It; *see also* Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741 (1992).

59. Judgment of Apr. 9, 1992, Const. Ct. of the ČSFR, Č.j. Pl.ÚS 2/92 (unofficial advance typed copy).

60. Const. Law 103/1991, *supra* note 1, art. 20.

providing "legislative disposition" on posts and telecommunications (para. a),
organizing a "uniform system of posts" (para. d), and
organizing and *directing* a uniform system of telecommunications (para. e).[61]

Seizing upon the single word "directing" which appears only in connection with telecommunications, the Court ruled that in that field the federation possesses the entire gamut of powers ranging from legislation, generally binding regulations, to administration and individual decisions. Regarding posts and radio communications, the Republics have the competence of administration, with the federation confined to the issuance of uniform traffic rules.[62]

The Court found support for this conclusion in two general provisions: in the principle of "enumerated powers"[63] and in the rule reserving "execution" of federal legislation to the Republics unless a constitutional law provides otherwise.[64] Perhaps more importantly, the Court relied on history of the constitutional development which it read as indicating the intent of the constitution-makers to change the regime of radio communications and posts in favor of the Republics while retaining federal administration of telecommunications as it had existed since 1971. The Court, however, pointedly referred to the possibility of a "redelegation" of the execution of federal competences to the Republics by a law of the Federal Assembly.[65]

In the reasoning part of the opinion the Court throws some light

61. *Id.* art. 20c authorizes the Federation to issue stamps and other postal values.

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

63. *Id.* art. 9.

64. *Id.* art. 28(2). Presumably the term "organizing and directing" is taken to provide the exception contemplated in this provision.

65. *Id.* art. 28b(1). The Court points out that the original text of Const. Law 143/1968 SB., art. 20 entrusted the federation with legislation, determination of uniform rules, and conception of development of the post and telecommunications systems; but it did not contain a provision analogous to the present text of art 20e. *See supra* note 61 and accompanying text. The current state of the law has prevailed since Const. Law 125/1970 SB. on Communications came into effect, and Const. Law 550/1990 SB. did not bring about any change in the federal competences to organize and direct the telecommunications system.

In an interesting passage the Court deals with those arguments of the Republics which were based on administrative agreements between the federal and Republic Ministries and minutes of sessions of the Prime Ministers. Although denying its own competence to pass upon the validity of such instruments, the Court considered them useful aids for interpretation to the extent that they were not in conflict with prevailing law. In the given situation, the Court disregarded them as contrary to its interpretation of the 1990 Constitutional Law.

on certain indeterminate concepts: "legislative disposition" means power to enact legislation only, while "legal disposition" includes the additional authority to issue "generally binding legal rules for implementation of legislation."[66] Beyond that, however, the opinion focuses scrupulously on the specific clauses at issue; and it follows the narrow path of a textual and contextual method of interpretation, with a glance at prior legislative practice.

Unlike some other constitutional courts (such as the U.S. Supreme Court, the Court of Justice of the European Communities, or the German Constitutional Court) the Czecho-Slovak counterpart shows no ambition at this early state to fashion fundamental constitutional principles or to offer a grand doctrinal design for the new federation. Nor does it meditate over the consequences of its ruling which affirms as constitutionally mandated a schism between the modes of operation of the communications system, whatever problems this may entail for the economy of the common state. Clearly, the Court is not willing to add to its burden—heavy as it is—of having to resolve ambiguities due more to a lack of political consensus than to drafting inadequacies. This reticence may reflect the prevailing concept of limited judicial function even at the highest level, as well as the tension in the relations between the Czechs and Slovaks.

It has been suggested that the Republics will be viewed as "the losers."[67] Although the decision preserves the unity of the telecommunications branch of the system under one body, "it heralds the eventual demonopolization of the network" since this is the policy of the current federal Minister. That policy, opponents claim, will jeopardize present projects for massive foreign investments designed to modernize the system.[68]

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

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

67. *Court Ruling May Threaten Telecommunications Monopoly*, PRAGUE POST, Apr. 21-27, 1992, at 4.

68. *Id.*

lished in 1992 only with a minimal staff.[69]

The practice developed by the Federal Ministry of Foreign Affairs ever since the 1968 Constitutional Law has been to include Slovak participation in federal treaty making proceedings, and it has now been extended to commercial treaties. The federal government is experimenting with the idea of federal framework treaties on matters of shared competence, pursuant to which the Republics would conclude their own treaties. Even before the 1990 Constitutional Law the Republics concluded several agreements with components of other states (Bavaria, the Russian Socialist Federal Republic, a Chinese province). The Republics maintain a variety of foreign contacts of their own in matters of their legislative competence such as education, health, and culture, so that the two Republic Ministries are sufficiently occupied without crossing wires with the Federal Ministry of Foreign Affairs. The situation could change, of course, if for instance the original incumbent is returned to the Slovak Ministry.

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

With the problem of jurisdictional conflicts in mind, some foreign advisors urged the adoption in the new constitution of a supremacy clause that would assure priority, within the allocated power, of federal over Republic legislation; modern constitutions have adopted the supremacy doctrine either in an express constitutional provision[70] or by implication and practice.[71]

No such clause was contained in the 1968 Constitutional Law on the theory that federal and Republic competences—as delimited in the Constitution—were of equal hierarchic standing. To an outsider, the need for the clause appeared even more pressing under the 1990 law for reasons adumbrated earlier. Yet it became clear at an early stage

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

70. CONSTITUCIÓN ARGENTINA art. 31, *translated in* Constitutions, *supra* note 16 (Arg. by Fortuna Calvo Roth); AUSTL. CONST. Ch. V, art. 109; GG, *supra* note 32, art. 31; CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 133, *translated in* Constitutions, *supra* note 16 (Mex. by Gisbert H. Flanz & Louise Moreno); U.S. CONST. art. VI, cl. 2; FED. CONST. MALAYSIA art. 75, *translated in* Constitutions, *supra* note 16 (Malay. by Harry E. Graves & Steven A. Holt); CONST. NIGERIA ch. I, pt. II, § 4(5), *in* Constitutions, *supra* note 16 (Nig. by Carol Tenney); CONST. PAKISTAN art. 143, *in* Constitutions, *supra* note 16 (Pak. by Leslie Wolf-Phillips, Ghous Mohammad & Albert P. Blaustein).

71. Austria, Belgium, Brazil, Canada, India, and Switzerland.

that such a clause would not be acceptable, because—apart from the doctrinal objection—it would be viewed by the Slovak side as a further strengthening of the central power.