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CZECHO ? SLOVAKIA: CONSTITUTIONAL DISAPPOINTMENTS

Katarina Mathernova¹

INTRODUCTION

People often view the Czech and Slovak Federative Republic (CSFR), Hungary, and Poland jointly as being countries of the former Eastern bloc most likely to achieve democratic political and market economic reform. The recent constitutional developments of these three countries do possess some similar traits — all three have striven to reinstate the rule of law, create new democratic structures, protect fundamental rights and freedoms, create a system of reliable checks and balances, and introduce a genuine judicial review. It is important to realize, however, that despite these similarities, the current constitutional debate in Czechoslovakia is fundamentally different from the debate in the other countries.

The most fundamental difference is that Czechoslovakia is *not* ethnically homogeneous, while both Hungary and Poland are more or less ethnically homogeneous societies.² In Poland, the Poles constitute approximately ninety-five percent; in Hungary, the Hungarians are ap-

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This Article is adapted from a speech the author gave at the Woodrow Wilson International Center for Scholars in Washington, D.C. on January 6, 1992. At the time the author gave the speech and wrote this article, many of the events that recently took place were merely the author's predictions. Therefore, some of the items discussed are given greater prominence than the current status quo merits.

2. One commentator defines a "homogeneous" entity as one (1) containing only one people and (2) negligibly few members of that people live outside the entity. Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 450 (1991) (discussing the commonalities and differences of the constitutional processes in the countries of Eastern Europe). With regard to "heterogeneous" entities, the commentator distinguishes between an "internally heterogeneous" entity that has large number of members of several peoples, and an "externally heterogeneous" entity that consists of one dominant people, a large number of which live outside the entity's borders. *Id.*

This Article uses the term "heterogeneous" in the sense of internal heterogeneity.

proximately ninety-three percent of the population.³ Consequently, debate concerning the future of Czechoslovakia and its constitutional framework centers on "national"⁴ friction between the Czechs and the Slovaks, at the expense of other issues that vitally need to be addressed. The myopic focus of this debate casts into doubt the ability of the current Czechoslovakian state to surmount the obstacles it must confront.

In Part I, this Article briefly outlines the history of the relationship between the Czechs and the Slovaks, and points out some of the origins of the current conflict. Part II focuses on post-1989 constitutional developments. It outlines the institutional framework of the present governmental power and explains its crucial impact on the ongoing attempts to draft a new constitution. Finally, the Article attempts to explain the factors contributing to the failure to adopt a new constitution by the original deadline of June 1992, and outlines possible scenarios for the future.

I. HISTORICAL BACKGROUND

Understanding the historical development of Czechoslovakia is a prerequisite for understanding the current constitutional debate. Peoples of Central Europe characteristically pay much attention to historical events; they carry a "backpack full of history" on their shoulders. In Czechoslovakia, one still hears references not only to the Second World

3. *Id.*

4. The word "nation," as used in Czechoslovakia and other parts of Central and Eastern Europe, exemplifies the semantic and conceptual problems of cross-cultural exchanges. The term "nation" has a different meaning in Czech, Slovak, and German languages than in English and French. The Anglosaxon and French traditions define "nation" politically. The term "nation" means citizens of a state, members of a state entity. See BOMBÍK, *Národ v európskych súradniciach [Nation in European Axis]*, 51/52 *Kultúrny Život* 9 (1991) (analyzing the different conception of the terms "nation" and self-determination in the Anglosaxon and French tradition vis-a-vis the Central European understanding). In Central Europe, on the other hand, the understanding of the term "nation" is based on the linguistic and culturo-historic characteristics. This definition was conceived by the German Romantic philosopher J.G. Herder. *Id.* According to it, a community defined as a "nation" contains several attributes: common history, customs, culture, territory, and language. Consequently, the Czechs and Slovaks consider themselves distinct "nations."

English does not have a one word expression that would adequately convey the same meaning as the term "nation" in the Central European linguistic and culturo-historic environment. *Id.* The closest translation is probably the word "people." This term is used, for example, by John Elster who defines *people* "as a community with common traditions, common language, common religion, and — perhaps most important — common enemies." Elster, *supra* note 2, at 450.

This Article will refer to the Czechs and Slovaks as two *nations*, and for purposes of clarity will use quotation marks whenever the term "nation" contextually differs from its normal English connotation.

War, the pre-war years, and the revolution of 1848, but also to the Empire of Samo, allegedly founded on the territory of the modern CSFR in the year 623 A.D.

Compared to Samo's Empire, the coexistence of the Czech and Slovak peoples is a fairly new circumstance, dating back to the year 1918. The Czechs and Slovaks, despite their similar ethnic and cultural heritage,⁵ experienced rather different histories.⁶ Before 1918, the Slovaks belonged to the Hungarian Kingdom for almost a thousand years. The Czechs, by contrast, governed an independent kingdom for the first half of this millennium, before being annexed by the Austrian Empire in 1627 for the next 300 years. In 1918, after the fall of the Austro-Hungarian Empire, the first Czechoslovak Republic ("the First

5. Both Czechs and Slovaks descend from old Slavic tribes that settled roughly the territory of modern Czechoslovakia in the sixth century A.D. In the ninth century, they allegedly created an early feudal state, the Great Moravian Empire, which lasted only a short time. Thereafter, eastern tribes, later conquered by the strongest among them, the Magyars, penetrated the Danube lowland and separated the Slovak tribes from the Czech tribes for a thousand years. The historical paths of Czechs and Slovaks crossed several times during the subsequent thousand years. Since the 16th century they both lived under the Habsburg monarchs. Each "nation," however, remained so separate and distinct that the creation and development of national consciousness and self-awareness during the eighteenth and nineteenth centuries differed considerably among each "nation." See Podiven, *Národ Československý [Czechoslovak Nation]*, 17 *Revue pro Střední Evropu* 82 (1990) (explaining the history of the Czechs and the Slovaks and the history of their relationship); Kováč, *Slováci a Češi: Pohľad v spätnom zrkadle [Slovaks and Czechs: Look into a Rearview Mirror]*, 5 *Kultúrny Život* 1 (1992) (explaining the differences in understanding the concept of a common state between the Slovaks and the Czechs). See also, Cutler & Schwartz, *Constitutional Reform in Czechoslovakia: E duobus Unum?*, 58 *U. CHI. L. REV.* 511 (1991) (discussing the approach of the newly renamed Czech and Slovak Federative Republic to each of four major constitutional issues: federalism; the bill of rights; an independent judiciary; and the separation of powers among the President, the cabinet, and the federal legislature).

6. Rather few "commonalities" exist in the cultural profiles of Czechs and Slovaks. Consistent with tradition, Slovakia's cultural heritage revolved around Roman Catholic religion and rural living conditions prior to the communist post-war industrialization. The Czech Republic has a mixture of Roman Catholic and Protestant religions. On the whole, however, a lot of Czechs are secular and "religiously luke-warm" with a long tradition of town culture, and a comparatively strong industrial base. See Petr, *Česko(-)Slovensko není samozřejmostí [Czech(-)Slovakia is not given]*, 42 *Respekt* 4 (1991) (describing some of the differences between the Czechs and the Slovaks at the time the First Republic came into being); Sunstein, *Constitutionalism and Secession*, 58 *U. CHI. L. REV.* 633, 664 (1991) (discussing how cultural integrity and self-determination frequently fuel secession movements in Eastern Europe and elsewhere); Příhoda, *České Dilema: Slováci [Czech Dilemma: Slovaks]*, *C10/91 Přítomnost* 1 (1991) (discussing the various differences between the two "nations" and suggesting that a gradual and negotiated disintegration of the country may be the only way to settle the Czech-Slovak conflict).

Republic"),⁷ the home for both Czechs and Slovaks, came into being. The Treaty of Versailles confirmed its creation in 1919.

The First Republic was a relatively well-functioning democracy.⁸ Its basic document, the Declaration of Independence, promulgated by the Czechoslovak National Council in Paris in 1918,⁹ spelled out the principles of Czechoslovakian constitutionalism: parliamentarianism; governmental legitimacy based on a broad national consensus; proportional representation; and protection of fundamental rights and freedoms, including the rights of national minorities.¹⁰ The first Czechoslovakian constitution of February 29, 1920, incorporated these principles.

Despite the largely positive democratic characteristics of the First Republic, the Slovaks felt that they had merely traded Hungarian domination for Czech domination. They lacked an administrative and political expression of self-governance. During World War I, future Czechoslovakian President Tomáš Masaryk first agreed with Slovak representatives in the United States,¹¹ in the "Cleveland Agreement" of 1916,¹² that the future Czechoslovakia would be a federation. Later, the Slovaks obtained a further confirmation of their goal of autonomy in the "Pittsburg Agreement."¹³ This May 1918 agreement between Masaryk and the American Slovaks, without explicitly referring to a federation, formulated institutional safeguards of Slovak self-governance: a Slovak administration, assembly, and courts.¹⁴ The interpretation of the "Pittsburg Agreement" and its validity has not been consistent.¹⁵ By the end of the war, the founding fathers opposed having a federation comprised of two separate sovereign republics, and as a re-

7. The Czechoslovak Republic was one of a number of small, culturally, religiously, and ethnically diverse states that came into being after the fall of the Habsburg, Ottoman, and Czarist empires in 1917-1921.

8. See Cutler and Schwartz, *supra* note 5, at 513 (discussing how, in their first constitution, the Czechs and Slovaks looked to the West for inspiration and example, in particular to the French parliamentary, and the American systems).

9. Tomáš Garrigue Masaryk, the founder of Czechoslovakia and its first president, headed this body.

10. See generally, Grospič & Matula, *K Demokratické Tradici Československého Konstitucionalismu [On the Democratic Tradition of Czechoslovak Constitutionalism]*, 130 PRÁVNÍK, TEORETICKÝ CASOPIS PRO OTÁZKY STÁTU A PRÁVA [THE LAWYER SCIENTIFIC REVIEW FOR PROBLEMS OF STATE AND LAW] 608, 611 (1991)(detailing Czechoslovakia's constitutional history and democratic tradition).

11. At the beginning of the century, a fairly well organized Slovak community, formed by Slovaks that emigrated for economic reasons, existed in the United States.

12. See generally Doležel, *Cesko ? Slovensko, Prostor slovenské politiky [Czechoslovakia, The Space of Slovak Politics]*, Příloha Lidových Novin, Oct. 15, 1991, at I-IV.

13. *Id.*

14. *Id.* See also Respekt, *supra* note 4, at 4.

15. Doležel, *supra* note 12, at I-IV.

sult, the First Republic became a unitary state. The idea of a federation currently dominates the drafting of the new constitution.¹⁶ The official ideology of the First Republic was the existence of a single "Czechoslovak nation" bound by one government and cemented by one language.¹⁷ The Slovaks never accepted this concept, and it remains the aspect of President Masaryk's political views most criticized by Slovaks.¹⁸

The Slovak feelings of oppression and resentment caused by the lack of self-governance and self-determination continued throughout the existence of the First Republic. The unfulfilled promise of a federal structure or autonomy just aggravated these feelings. These ultimately led to the creation of a putatively "independent" Slovak Republic in 1939.¹⁹ In reality, this republic was merely a puppet of Hitler's Germany, a stigma against which Slovak nationalism today still struggles.²⁰ The republic, however, gained enough momentum to cause the post-war transitional democratic government to adopt a plan in 1945, the so-called Košice governmental program, which granted Slovaks some degree of self-determination within Czechoslovakia. It created a unitary state with a special position for Slovak bodies and their exclusive jurisdiction in certain areas.²¹ Unfortunately, when the communists seized power in February 1948, Czechoslovakia's democratic existence was terminated for over forty years, but not Slovakia's hopes for greater autonomy.

16. Cutler & Schwartz, *supra* note 5, at 514.

17. See Podiven, *supra* note 5, at 82 (noting that some declare the Slovak language a dialect of the Czech language, while others consider them "two branches of the same tree"); Doležel, *supra* note 12, at I-IV.

18. Podiven, *supra* note 3, at 82; Kováč, *supra* note 3, at 1. Rather than trying to identify every reason why the Slovaks appeal for greater autonomy and sovereignty, this article focusses on the effect of these appeals on the constitutional processes in Czechoslovakia today.

19. The Slovak Republic came into existence by a declaration of the Slovak Snem (assembly) on March 14, 1939, several months after the Munich dictate and the Viennese "arbitrage," pursuant to which Czechoslovakia lost its western territory, the Sudetenland, and southern Slovakia to Germany and Hungary, respectively. In November, 1938, the Slovak Snem passed the law No. 299 declaring the autonomy of Slovakia. The Slovak declaration of autonomy, and later the proclamation of an independent Slovak state, were unconstitutional acts under the Constitution of 1920, which did not allow territorial division of Czechoslovakia. Ján Mlynárik, *Pro Presnosť, Vyhlásení Slovenského Štátu byl Protiústavní Čin [For Accuracy, Proclamation of the Slovak State was an Unconstitutional Act]*, Respekt, Sept. 9 - Oct. 6, 1991, at 6. See also Doležel, *supra* note 12, at I-IV.

20. See Španár, *Slovensko: ide o dušu [Slovakia: the Soul is at Stake]*, 7 Kultúrny Život 1 (1992) (discussing the necessity of the Slovak nation coming to terms with its fascist period during World War Two).

21. See Doležel, *supra* note 12, at I-IV. The plan was named after a city in Eastern Slovakia, Košice, where it was executed.

The Constitution of May 9, 1948, retreated from the idea of a single Czechoslovak nation. In its preamble, the constitution defined Czechoslovakia as a state comprised of "two equal Slavic nations, Czechs and Slovaks."²² It also provided for a Slovak National Council and a Committee of Delegates (Zbor Povereníkov) in Slovakia.²³ These bodies did not have equivalents in the Czech lands, and presumably were partial compensation for having the center of power and the capital located in Czech Prague. This unusual asymmetry even survived the new constitution of July 11, 1960,²⁴ which broadened the power of the Slovak National Council.

Slovak yearnings for substantiation of their "national" identity came to the forefront of constitutional policies again in the aftermath of the 1968 Prague Spring. The Law on Czechoslovak Federation, adopted after the Soviet occupation in 1968 as an amendment to the 1960 Constitution,²⁵ established a federal structure with a bicameral parliament in a country with twice as many people living in the Czech lands than in Slovakia. However, it failed to resolve the real issue — Slovak self-governance. Also importantly, the absolute rule of the Communist Party's central committee effectively thwarted the implementation of the 1968 Federation amendment.²⁶ In other words, the federal structure set up by the 1968 amendment was never tested in practice, because the bicameral Federal Assembly was reduced to a rubber-stamping organ. As Václav Havel, before 1989 a prominent dissident and now the President of Czechoslovakia, said referring to 1968, history stopped and the country was put to sleep for twenty years.

22. Vratislav Pechota, *Československé ústavní Dejiny*, 130 PRÁVNÍK, TEORETICKÝ CASOPIS PRO OTÁZKY STÁTU A PRÁVA [THE LAWYER SCIENTIFIC REVIEW FOR PROBLEMS OF STATE AND LAW] 273 (1991).

23. Doležel, *supra* note 12, at I-IV.

24. ÚST.ZÁK. č.100/1960 Zb., Czech. Const. of 1960 *reprinted in* GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CZECHOSLOVAKIA (Blaustein & Flanz, eds. 1974).

25. ÚST.ZÁK. č.143/1968 Zb. o československej federácii, (CZECH. CONST. ACT No. 143/1968 Collection of Laws [hereinafter "Coll. of Laws"], Concerning the Czechoslovak Federation) [hereinafter "1968 Federation amendment"], *reprinted in* GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CZECHOSLOVAKIA, (Blaustein & Flanz, eds, 1974).

26. "The administrative directive implementation of the leading role of the Communist Party of Czechoslovakia distorted the entire political system, including the federal structure. . . ." Aleš Gerloch, *Nad Variantami Nového Státoprávního Uspořádání Československého Státu* [On the Alternatives of Constitutional Set-Up of the Czechoslovak State], 130 PRÁVNÍK, TEORETICKÝ CASOPIS PRO OTÁZKY STÁTU A PRÁVA [THE LAWYER'S SCIENTIFIC REVIEW FOR PROBLEMS OF STATE AND LAW] 503-04 (1991).

II. POST-1989 CONSTITUTIONAL DEVELOPMENTS

A. DISINTEGRATION OF THE ANTICOMMUNIST COALITION AFTER THE REVOLUTION OF 1989

In late 1989, Czechoslovakia woke up again. Following the successful attempts of people in other Eastern bloc countries to rid themselves of the communist rule, Czechoslovakian citizens forced the resignation of the communist leaders. This overthrow, or "revolution," started on November 17, 1989, when the police in Prague clamped down on a peaceful student demonstration commemorating the Nazi execution of a student in 1938. It culminated on December 29, 1989 when Václav Havel who led the coalition against the former regime, became President.

The revolution, which acquired the adjective "velvet" for its bloodless character, however, did not offer any solution to the Czech-Slovak, seemingly ethnic, dispute. During the revolution itself, the Slovaks fought their common enemy, the communist establishment, hand in hand with the Czechs. The broad anti-communist coalition in Czechoslovakia, had not required elaboration of any other concrete political goals or development of a unified vision of the future democratic institutions.²⁷ Following the overthrow of their common enemy, however, the Czechs and the Slovaks, like the members of most practical coalitions, started to fight among themselves.²⁸

27. Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595 (1991) (discussing the institutional aspects of the Polish constitutional process).

The process of disintegration is also typical of conflicts other than the Czech-Slovak conflict. The political differentiation that occurred in the CSFR after the revolution was a natural result of the diversity of the anti-communist coalition formed in the first days of the 1989 revolution. For example, Civic Forum, the leading political force in the Czech lands, initially led by President Havel, won a sweeping victory in the June 1990 parliamentary elections. Within 6 months, however, Civic Forum broke into two large groups and one small grouping. Several months later a similar disintegration took place in the Slovak equivalent of Civic Forum, Public Against Violence. Since then, most of the large movements or parties, including the Communist Party and the Christian Democratic Movement, have gone through similar processes.

This process is also not unique to Czechoslovakia. Poland, for example, serves as a text-book illustration of the fragmentation of a political coalition following a successful overthrow of a totalitarian regime. The October 1991 elections brought over 25 parties to the Polish parliament.

28. The first significant open conflict between the two "nations" was over the official name of the country. In March 1990, the federal parliament adopted a new name - Czechoslovak Federative Republic, dropping the word "socialist." A month later, in April 1990, following a controversial debate that became known as the "hyphen war," the federal parliament adopted the name "Czech and Slovak Federative Republic." Slovak deputies in the federal parliament demanded the use of a hyphen between the words "Czech" and "Slovakia" in the shortened name of the country, Czechoslovakia, hence the term "hyphen war."

Like many coalitions against a common enemy, the members of the anti-communist coalition in Czechoslovakia disregarded obvious ideological discrepancies and conflicting political agendas to achieve their paramount goal of overthrowing the prior regime. Once the totalitarian regime was defeated, and the broad national consensus that transcended the revolution and the immediate "post-revolutionary" period in Czechoslovakia eroded, it became evident that the two "nations" living in the country were at very different and, arguably, incompatible stages of development.²⁹ It transpired that the different histories of the two "nations" dictated that they possess divergent aspirations for the future. The Czechs, after conquering the communist totality, aspire to become part of transnational institutions, which would necessarily require them to give up some of the prerogatives of a sovereign nation. Some Slovaks, on the other hand, are still striving for their own sovereign state — either openly through achieving outright independence, or more subtly through limiting their ties to the Czechs to those of a confederation.³⁰

Another aspect that tends to be underestimated in characterizing the current political dynamics in Czechoslovakia is the disparate religious background of the Czech and Slovak societies. The Czechs, originally Protestant and now largely secular with a small Catholic population, cherish the democratic ideals of a civil society, liberalism, and individual rights. In contrast, one of the dominant factors in the Slovak society is a traditional, socially conservative form of Catholicism.³¹ Also, the political spectrum in each republic seems to be developing in a different direction on economic issues. People in the Czech lands have enthusiastically embraced the ambitious and aggressive plan for profound transformation of the centrally planned economy into a market economy. In Slovakia, most of the politicians, apart from some members of the current fragile government coalition, advocate a slow transformation with a goal of establishing a "social-market econ-

29. Příklad, *supra* note 6, at 1.

30. At the time of this writing, however, the Slovak governmental coalition still supports coexistence with the Czechs in a federation.

31. This distinction between the republics is apparent in the efforts of the politicians of the Christian Democratic Movement, members of the government coalition to abolish the principle of separation of the church and state. Also, at the time of this writing, a bill pending in the Slovak parliament would severely restrict the currently valid liberal law on abortions. These efforts are not paralleled, at least not to such an extent, in the Czech lands.

omy.”³² This approach, due to the grim economic situation in Slovakia,³³ has broad support among the population.³⁴

It is beyond the scope and aspiration of this Article to identify and analyze the entire spectrum of disparities and frictions between the Czechs and the Slovaks. These few examples indicate that the gap between the two “nations” exists on several levels, including religious, political, economic, and ethnic. This gap, disguised behind the mask of unity mandated and controlled by the Central Committee of the Communist Party throughout the last decades, seems to be further widening. It is foreseeable that the existence of a common state may not bridge the growing gap between the Czechs and Slovaks.³⁵

Slovak concerns and yearnings, with their historical basis in the period of domination by Hungary and the complex relationship with the Czechs, and the unfulfilled expectations of autonomy and self-governance, periodically surfaced when the country was undergoing transitions and crises.³⁶ History repeats itself now, and the Slovaks are again calling for more sovereignty. The call of the Slovaks for self-governance is not surprising under the circumstances. In today’s world, with pleas

32. For example, the Slovak Christian Democratic Movement which demands a declaration of sovereignty and an adoption of a constitution of the Slovak Republic, also “favours a social market economy.” *Klepac Party Favors Confederation, Social Economy*, FBIS-EEU-92-052, March 17, 1992, at 7 (citing Prague CSTK, March 16, 1992).

33. According to the Slovak Premier, “Slovakia’s economy is in worse shape than expected, with last year’s gross domestic product having dropped by about 15 percent and industrial production by 25 percent.” *Carnogursky Reviews Slovakia’s 1991 Economy*, FBIS-EEU-92-020, Jan. 30, 1992, at 7 (citing Prague CSTK, Jan. 28, 1992). Also, unemployment rapidly increased to approximately 300,000 by the end of 1991. This represents 11.8 percent of the total labor force. *Id. See also Preliminary Slovak Statistical Data for 1991*, FBIS-EEU-92-025, Feb. 6, 1992, at 4 (citing Pravda, Feb. 1, 1992) (giving statistics demonstrating Slovakia’s 1991 economic decline).

34. According to a survey conducted by the Group for Independent Social Analysis (AISA) in November and December 1991, “[a]dditional data reveal an interesting attitude toward the market economy, which is supported by 52 percent of respondents in the Czech Republic and 33 percent in the Slovak Republic, while 39 percent in the Czech Republic and 53 percent in the Slovak Republic favor a mixed economy.” *Poll Shows Several Groups Have Key Influence*, FBIS-EEU-92-020, Jan. 30, 1992, at 8 (citing Rude Pravo, Jan. 25, 1992).

35. The relationship between the Czechs and the Slovaks is different from, for example, the conflict between the Serbs and Croats at least in one significant aspect. In the relatively recent past, during the Second World War, the Croatian fascists committed genocide on the Serbs, killing over half a million people. While many Slovaks claim that the Czechs took advantage of them and benefited from the Slovaks, nowhere in the history of the coexistence of these two nations can one find a chapter similar to the Serb-Croatian scenario.

36. In 1918, the Slovaks felt unsatisfied with the unitary form of the First Republic. In 1938, they declared independence. Thirty years later, in 1968, while the Czechs strived for more political freedoms, the Slovaks pressed for more “national” sovereignty.

arising for self-determination on almost all continents, it can hardly be considered anachronistic. Such a call represents in essence, a political struggle of a "nation" that is trying to define itself, including its own political structures, vis-a-vis the rest of the world, rather than an ethnically driven hatred directed against the Czechs.

The right to self-determination, however, need not necessarily lead to secession. Indeed, only a small portion of Slovaks favors secession.³⁷ For others, the desired amount of self-governance is possible in a country shared with the Czechs. Their desire is more for a future institutional structure to reflect the *equality* of the two "nations." Consequently, it is important to distinguish in Slovakia the still rather limited nationalistic groups and parties demanding secession,³⁸ and a much broader-based appeal for a greater degree of self-governance.

Regardless of whether it is justified or not, this call is a real one. It draws people by the thousands for meetings in the streets. The call needs to be dealt with in a proper institutional manner. Unless the government adequately addresses it, the CSFR cannot emerge from its present situation with the requisite constitutional stability necessary for economic transformation and growth, protection of human rights and the rights of minorities, and the nurturance of democratic values and institutions.

B. ECONOMIC VERSUS CONSTITUTIONAL PROCESSES

In the first post-revolution elections on June 8 and 9, 1990, three parliaments, the Federal Assembly and the Czech and Slovak National Councils, were elected for two years, half the normal term, with a mandate to adopt a new constitution. Apart from its practical legal implications, the new democratic constitution would fulfill a paramount symbolic role: the old constitution, the pinnacle of the communist legal system, would be replaced by a document embodying the visions and aspirations of the people together with their concepts of a democratic state, thus formally breaking away from their totalitarian past. Because such a document cannot be drafted overnight, the federal parliament

37. See *infra* note 50, and accompanying text. See also Sunstein, *supra* note 6, at 644.

38. See *infra* note 120, and accompanying text (discussing the various Slovak nationalistic groups and parties).

This call is, in effect, self-destructive when one considers the bad economic conditions and forecasts for Slovakia, the relatively small population and territory, and a possibility of international isolation resulting from secession. Also, an important factor is the internal heterogeneity of Slovakia where the national minorities, notably Hungarians, may in turn also claim the right of self-determination, or even secession.

decided to leave the 1960 Constitution operational until a new one is adopted, and amend only the necessary parts.³⁹

An important characteristic of Czechoslovakia in this transitional period is the existence of two parallel but distinct attempts to restructure the country. First, to solidify the newly created democratic institutions and build the trust of the people in them. This undertaking, while difficult in its own right, is complicated by the second task: the necessity to carry out simultaneous fundamental structural economic changes designed to break away from the decade's long communist legacy of centrally planned shortages and inefficiency.

The first concept that entails the constitutional process is plagued by bitter disputes over the future framework of the country. The second, the economic concept, unlike the constitutional one, has been comparatively successful given the state of the economy after the overthrow of the communists. Since June 1990, the Federal Assembly managed to pass many significant pieces of economic legislation,⁴⁰ as well as other important acts such as the civil and penal substantive and procedural codes.

The reasons for the different results in the constitutional and economic legislation can likely be found in the initial continuance of the national consensus after the June 1990 elections, and the first good will efforts of the main political parties to find solutions to common problems and the ability and willingness to compromise, before the deep fragmentation of the political spectrum of the country took place. This was, however, only possible due to the absence of the institutional barriers to compromise.

Of course, any economic achievements realized to date may be short lived; the success of any economic regime necessarily depends on a solid constitutional underpinning and stability. Also, the economic transformation that is taking place, requires for its success, a stable and strong government that is able to make unpopular and difficult decisions necessary for the reform.

39. See *infra* notes 55 - 64 and accompanying text (discussing the 1990 - 1991 Constitutional Amendments).

40. The Federal Assembly passed regulatory laws dealing with privatization, restitution, foreign exchange, banking, joint ventures, foreign investment, and the commercial and concession-based trades codes. The area that urgently needs and currently lacks regulation, especially during the ongoing privatization process, is securities regulation.

C. FAILURE OF THE CONSTITUTIONAL PROCESS

One of the main reasons for the failure of the constitutional process in Czechoslovakia today lies in the institutional structure created by the 1968 Federation amendment.⁴¹ This document introduced a federal structure with exceptional protections and safeguards for the Slovaks who constitute, together with all the minorities living in Slovakia, one-third of the population. These protections include the principle of parity in one chamber of the federal parliament and in high executive positions, and super-majority voting requirements in certain instances. Most importantly, however, the 1968 Federation amendment established a concept referred to as the "prohibition of majoritarian rule" (*zákaz majorizácie*), which now, after the 1990 first post-communist free elections, has turned into the single most important institutional roadblock preventing the lawmakers in Czechoslovakia from proceeding with the constitutional reform.

1. *Prohibition of Majoritarian Rule*

Both the Czech and the Slovak republics have their own separate legislative bodies, the National Councils, and both republics are represented on the federal level by the Federal Assembly. The Federal Assembly consists of two chambers: the Chamber of People, which consists of deputies elected directly by the entire population on a proportional basis; and the Chamber of Nations, which consists of seventy-five deputies elected in the Czech republic and seventy-five deputies elected in Slovakia. For each piece of important legislation,⁴² the Czech and Slovak components in the Chamber of Nations vote separately. A bill is approved only if adopted by a majority of not the present, but the elected deputies representing each republic.⁴³ Consequently, thirty-eight votes in the Czech part, or thirty-eight votes in the Slovak part of the Chamber of Nations can block any ordinary legislation. In addition, only thirty-one votes in either part are sufficient to

41. 1968 Federation amendment, *supra* note 25.

42. *Id.* at art. 42. The majoritarian rule (a majority outvoting a minority) is prohibited, *i.e.* deputies in the two parts of the Chambers of Nations have to vote separately, when voting on bills regulating taxes, price policy, customs, technological investment, labor, wages and social policy, press, media, economic administration, establishment of federal organs of state administration, foreign economic relations, any budgetary questions and issues of citizenship. *Id.* Interestingly, the prohibition of majoritarian rule does not apply to votes of no confidence to the government (the executive). *Id.*

43. *Id.*

block constitutional acts or amendments which need a three-fifths majority of the elected deputies for approval.

While the composition of the Chamber of Nations favoring the smaller republic is not dissimilar to other federal states,⁴⁴ the consequences of the voting procedure in the Chamber of Nations are quite unique. These voting procedures result in a *de facto* creation of a three chamber Federal Assembly consisting of the Chamber of People, and the Czech and the Slovak parts of the Chamber of Nations. Because both chambers must approve each legislative act, the structure grants an effective veto power to a small minority of Czech or Slovak deputies. Obviously, this type of voting mechanism in a country with only two constituent parts is bound to create impasses.

The situation in the Federal Assembly in the past year demonstrates this proposition. The nationalistic Slovak opposition parties in the Assembly⁴⁵ have regularly exercised the broad veto power in the Chamber of Nations. While originally, after the elections, the Slovak parties arguably functioned as a "constructive opposition," they shifted gears and now paralyze the Parliament on any constitutional issue. This destructive role serves at least two important functions: (1) it magnifies the inability of the government coalition parties to bring about a new constitution; and (2) it maintains the institutional status quo until after the elections.

2. Super-Majority Voting Requirements

Pursuant to the 1968 Federation amendment, all constitutional acts and amendments, the declaration of war, and the election of the president need to be approved by a three-fifths majority of all elected deputies in all three parts of the Federal Assembly.⁴⁶ Considering the fragmented political spectrum in Czechoslovakia today,⁴⁷ this requirement

44. The United States Senate, for example, has two senators from each state regardless of its population. U.S. CONST. art. I, § 3.

45. See *infra* note 120 and accompanying text (discussing the various Slovak nationalistic groups).

46. 1968 Federation amendment, *supra* note 25, at art. 41.

47. Currently, the Federal Assembly consists of sixteen parties. Czechoslovakia's political system traditionally consists of multiple political parties and coalition governments due to an election system based on proportional representation. Pre-Munich Czechoslovakia demonstrated the variety and domination of political parties over Czechoslovakian public life. EDWARD TÁBORSKÝ, *CZECHOSLOVAK DEMOCRACY AT WORK* 94 (George, Allen & Unwin eds., 1945). See also Cutler & Schwartz, *supra* note 5, at 513-14.

As in the First Republic, the recently passed amendment to election law No. 47/1990 Zb. (on file with the American University Journal of International Law and Policy), is based on proportional representation. A natural result of the proportional elec-

makes it extremely difficult to reach political consensus on any of the major issues.

3. *Two-Member Federation*

The "dual" nature of the Czechoslovakian federation intensifies the complexity of the institutional structure set up by the 1968 Federation amendment. Czechoslovakia consists of only two constituent republics; the Czechs live in one, the Slovaks in the other. In this respect, Czechoslovakia differs from other "federal" systems, for example, India, Spain, Switzerland, the United States, and Canada.⁴⁸ Belgium provides the closest analogy to Czechoslovakia's ethnic division, with its dominant Walloon and Flemish parts. Belgium, however, maintains a unitary form of government, granting the ethnic groups a greater say only in matters of language and culture. Belgium also has a bicameral parliament, but neither of the chambers *de jure* represents the regions or ethnic groups; the deputies in both chambers are elected on a representative basis by the entire Belgian population.⁴⁹

In contrast to Belgium, Czechoslovakia has a tension already built into its institutional structure. As a result, two constituent units with divergent aspirations and political cultures are unable to find a compromise on fundamental issues of the future form of a common country. The existence of only two partners in the federation causes each constitutional issue to become over-politicized. Consequently, all issues are typically solved only at a negotiating table rather than by a rational search of optimal constitutional solutions. When discussion between the republics reaches a deadlock, there is no swing vote, no third force to break it.

It is in this respect that one needs to look at the history of the country in order to understand the current Czech-Slovak conflict. The bad memories the Slovaks retained from the periods of Magyar (Hun-

toral system is a proliferation of smaller parties. This is even more true in post-communist Czechoslovakia where, like in Poland and Hungary, political life remains unstabilized and parties struggle to define their identity, and their role and place in the political spectrum of the country.

48. Canada, while consisting of ten provinces, resembles Czechoslovakia by the clear polarization and resulting controversies between the English-speaking population and the French-speaking population concentrated almost exclusively in the Quebec province. India provides a similar situation where the division lies between the Hindu and Muslim populations.

49. G. H. FLANZ, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: BELGIUM* (Blaustein & Flanz, eds. 1974). It is true, however, that, despite the lack of any explicit constitutional provisions, Belgian parliamentary procedures are *de facto* based on a consensus and compromise among the various ethnic groups and communities.

garian) domination, the lack of sovereignty they perceive, their unfulfilled hopes for a federation in 1918, and the non-functional institutional framework discussed above all combine to make difficult any constructive constitutional discourse. It is important to keep in mind that the unworkable 1968 amendment was drafted during the communist period when the constitution was only a meaningless piece of paper, and when typically all parliamentary decisions were unanimous, regardless of any voting structure or mechanism. At its inception, the amendment was not contemplated to function without the authoritarian communist rule, in a democratic pluralistic parliament. This ill-conceived structure gives inordinate power to a small number of deputies of the Assembly who, as a result, possess the ability to block any important legislation proposed by a majority.⁵⁰

The constitutional process in the CSFR is further complicated by a socio-cultural phenomenon where raised emotions characterize all discussions and negotiations between the Czechs and Slovaks. Both sides juggle undefined and imprecise terms.⁵¹ Descriptions of the future framework of the country range from a federation, true federation, authentic federation, confederation, union, to a loose union. Recently, commentators started using a peculiar term, a "unitary form of federation."⁵² Efforts to define the terms to facilitate the discourse are lack-

50. Currently, Slovak nationalists benefit from this mixed blessing despite public opinion polls conducted in the CSFR in the last eighteen months that show that most people in both republics wish to continue living in a common state. *Nationwide Poll Shows Support for Federation Vote*, FBIS-EEU-91-222, Nov. 18, 1991, at 13 (citing Prague CSTK, Nov. 15, 1991).

Indicative of the strong bargaining position of the Slovak opposition deputies in the Chamber of Nations is, among other things, their resistance to increasing the federation members to include Moravia and Silesia. These two parts of the Czech republic historically enjoyed a certain degree of self-governance thanks to a state structure, similar to Germany's. Transferring the "dual" federation into one involving three, four, or more members would shift the balance of power to Slovakia's disadvantage. Despite a Moravian self-governance movement's recent proposals to offer Slovakia a special statute of autonomy in exchange for its support of the idea of a tripartite federation, the Slovak political representation remains opposed to this concept. *Moravian Deputy on Tripartite Federation Proposal*, FBIS-EEU-91-220, Nov. 14, 1991, at 12 (citing Národná Obrada, Nov. 12, 1991, at 3).

51. See Brodský, *V Tatrách bez občanských práv [In Tatras without Human Rights]*, Respekt, Nov. 11-17, 1991, at 8 (quoting the Hungarian Ambassador as saying "[i]n the area of constitutional terminology, post-communist Czechoslovakia represents a 'semantic black hole'").

52. See generally, Grexa, *O jednote po jednote [On Unity After Unity]*, 3 Kultúrny Život 1 (1992) (criticizing the populist call for a unity of the entire Slovak nation). The semantic confusion, however, is not only a specific problem of Czechoslovakia. One commentator cites research that revealed no less than 255 different understandings of the term "federalism." See Gerloch, *supra* note 26, at 499, (citing M. Frenkel, *Federalismus und Bundesstaat, Bd. I: Foederalismus*, at 113) (Bern Frankfurt a.m., 1984).

ing; the politicians even seem to thrive from the confusion and lack of precision.⁵³ Most of the terms used to qualify "federation," however, merely disguise the omnipresent political striving for greater autonomy and sovereignty.⁵⁴ This seemingly innocuous semantic battle is, unfortunately, a reflection of deeper, more fundamental dissimilarities between the two "nations."

D. 1990-1991 CONSTITUTIONAL AMENDMENTS

Despite the inability of the Czechs and Slovaks to resolve their relationship, the two "nations" have already dealt with some issues in an institutional manner. Soon after the parliamentary elections in January 1991, popular feelings induced the lawmakers to adopt a bill of rights.⁵⁵ This was an understandable move, considering the communist regime's numerous violations of civil and political rights, despite the fact that the communist regime's 1948 and 1960 constitutions were supposed to make the United States Bill of Rights "pale by comparison."⁵⁶

In December 1990, the Federal Assembly adopted a controversial constitutional act on power-sharing between the federation and the republics.⁵⁷ In March 1991, it adopted a constitutional act on the consti-

53. A survey conducted by a Slovak Institute for Public Opinion Research in February 1992 illustrates this problem. In the survey, 48% of the Slovak population expressed its wish to live in a federation "based upon the constitutions of two republics with equal rights." *Federation Most Favored State Form in Slovakia*, FBIS-EEU-92-044, March 5, 1992, at 12 (citing Prague CSTK, Feb. 27, 1992). Only eight percent, however, accept the current model of federation, despite the strong safeguards that the current model provides for the Slovak republic. *Id.*

54. There is only one party in Slovakia, the Slovak National Party, that openly expresses hopes for Slovakia's independence. Other parties, like the Movement for Democratic Slovakia, a splinter from the movement Public Against Violence, and the Slovak Christian Democratic Movement, a splinter of the Christian Democratic Movement, and some other smaller parties, hide behind "better sounding" and undefined terms like "confederation."

55. ÚST.ZÁK č.23/1991 Zb., uvádzajúci Listinu základných práv a slobôd (CZECH. CONST. ACT No. 23/1991 Coll. of Laws, instituting the Charter of Fundamental Rights and Freedoms) [hereinafter the "Charter"].

56. See Sunstein, *supra* note 6, at 647 n. 82 (noting that guaranteed rights mean little where there are no institutions through which individuals can claim their rights). In general, most of the communist constitutions in former Czechoslovakia and other former communist countries provided for a full range of civil and political rights and liberties on paper. In practice, however, the government violated each of these rights. See *id.* (listing rights guaranteed by the former Soviet Constitution).

57. ÚST.ZÁK č.556/1990 Zb., ktorým sa mení a dopĺňa ústavný zákon č.143/1968 Zb., o československej federácii (CZECH. CONST. ACT No. 556/1990 Coll. of Laws, altering CZECH. CONST. ACT No. 143/1968 Coll. of Laws, on the Czechoslovak Federation) [hereinafter "1990 constitutional act on power-sharing"].

tutional court⁵⁸ and in July 1991, it adopted a constitutional act on the judiciary.⁵⁹ In addition, the Parliament enacted a constitutional act on the holding of popular referenda in August 1991.⁶⁰

Despite these significant successes, the lawmakers concentrate too heavily on the issues of federalism and the future institutional structure. By doing so, constitutional drafters risk losing sight of the long-term interests and problems which a constitution should address.⁶¹

One example of an issue not sufficiently addressed due to the attention paid to the federalism debate arises in the Charter of January 1991. The Charter contains a provision establishing the supremacy of international treaties on human rights and fundamental freedoms, such as the International Covenant on Civil and Political Rights, ratified and promulgated by Czechoslovakia over domestic legislation. Such treaties directly apply to Czechoslovakian territory.⁶² A provision to this effect is new and unique within Czechoslovakia's legal order. Neither Czechoslovakian legal theory nor practice agree on the issue of the hierarchy of norms of international law within the Czechoslovakian domestic legal order. The existence of this unusual provision in section 2 of the Charter should signal lawmakers to pay sufficient attention to an issue as significant as the applicability and status of international law in the domestic legal order when they draft a new constitution.

Another example of an issue not sufficiently addressed is the treatment of the many national minorities living in Czechoslovakia. The Preambles to the 1948 and 1960 Constitutions, and the 1968 Federa-

58. ÚST.ZÁK. č.91/1991 Zb., o ústavnóm súde Českej a Slovenskej Federatívnej Republiky (CZECH. CONST. ACT No. 91/1991 Coll. of Laws, on the Constitutional Court of the Czech and Slovak Federative Republic).

59. ÚST.ZÁK. č.326/1991 Zb., ktorým sa mení a dopĺňa ústava Českej a Slovenskej Federatívnej Republiky v znení neskorších predpisov (CZECH. CONST. ACT No. 326/1991 Coll. of Laws, altering the Constitution of the Czech and Slovak Federative Republic as amended).

60. ÚST.ZÁK. č.327/1991 Zb. o celoštátnom referende (CZECH. CONST. ACT No. 327/1991 Coll. of Laws, on Referendum) [hereinafter "Referendum Law"].

61. The parliament's preoccupation with the intricacies of the federalism debate is the most obvious factor contributing to the lack of interest in important issues. There is, however, another related factor. Any problem that fails to directly connect with the main issue, federalism, still becomes a battle ground for the Czech-Slovak dispute. In essence, the two rival nations compete on all fronts.

62. See ÚST.ZÁK. č.23/1991 Zb., uvádzajúci Listinu základných práv a slobôd [CZECH. CONST. ACT NO. 23/1991 Coll. of Laws, instituting the Charter of Fundamental Rights and Freedoms] at sec. 2 (stating that "[i]nternational treaties on human rights and fundamental freedoms, ratified and promulgated by the Czech and Slovak Federative Republic, are universally binding on its territory and supersede its own laws"). The issue of whether international treaties supersede only ordinary legislation or also constitutional acts, which require a super-majority for adoption, remains unclear.

tion amendment spoke of the "equal" or "fraternal nations" of the Czechs and Slovaks.⁶³ The constitution, however, does not mention other nationalities such as Hungarians, Poles, Romanians, Ukrainians, and Ruthenians who represent about twenty percent of the population of Slovakia. In 1968, the Parliament enacted a separate constitutional act dealing with minorities.⁶⁴ It remains to be seen how this issue will be dealt with in a future constitution.⁶⁵

E. PLAYERS IN THE CONSTITUTIONAL ARENA

1. Federal Assembly

From a constitutional point of view, an unusual situation developed in the CSFR. The federation still exists, but its supreme legislative body, the Federal Assembly, lost most of its ability to influence the constitution's development to the republics' bodies, the Czech and Slovak National Councils and Czech and Slovak governments.⁶⁶ The main reason for this development is the above described paralyzes of the federal parliament in the constitutional arena. Many, including President Havel himself, criticized the absence of federal bodies from the constitution-making process. At the beginning of 1992, the Federal Assembly made an attempt to enact three chapters of a federal constitution newly arranging the relations between the president, the federal parliament, and the federal government.⁶⁷ This move was doomed from

63. Preamble of the 1960 Constitution, as amended in 1968 and 1991, states that: "(1) The Czech and Slovak Federative Republic is a federal state of two equal, fraternal nations, the Czechs and the Slovaks" and that "(2) The Czech and Slovak Federative Republic is founded on the voluntary bond of the equal, national states of the Czech and the Slovak nations, based on the right of each of these nations to self-determination." ÚST.ZÁK. č.100/1960 Zb., Czech. Const. of 1960 reprinted in GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CZECHOSLOVAKIA (Blaustein & Flanz, eds. 1974).

64. ÚST.ZÁK.CSFR č.144/1968 Zb., o postavení národností v Československé socialistické republice (CZECH. CONST. ACT No. 144/1968 Coll. of Laws, Concerning the Status of Ethnic Groups in the Czechoslovak Socialist republic).

65. One danger that the wording of the former constitutional preambles poses is that pursuant to the Central European definition of a "nation," where "nation," means "people," there is not much room for national minorities. See *supra* note 4 (explaining the different definitions of the word "nation").

66. This article uses the term "government" to refer to the Prime Minister and the Council or Cabinet of Ministers. This use, which does not connote the entire governmental structure, is common in parliamentary systems.

67. One of the most important changes in the amendment was a different structure of the federal parliament. The new parliament would consist of a Chamber of Representatives, and a Senate located in Bratislava, the capital of Slovakia. DRAFT ÚST.ZÁK.CSFR No. 1212/1992 altering CZECH. CONST. ACT No. 143/1968 Coll. of Laws, as amended (on file with The American University Journal of International Law and Policy).

its inception due to the institutional structure of the Federal Assembly. It follows that the amendment, while securing approval of the Chamber of People, failed to get the approval of the Slovak opposition parties in the Slovak part of the Chamber of Nations.⁶⁸

2. *Czech and Slovak National Councils*

The Federal Assembly, ineffective on constitutional matters, has been effectively replaced by the republics' bodies. In the past twenty months, the representatives of the National Councils and the republics' governments met approximately twenty times to discuss the future of the Czech and Slovak Federative Republic. Interestingly, these discussions were initiated by President Havel as consultations in search of an optimal solution for the future set-up of the country that would be based on a broad national consensus. The discussions, initially involving representatives of federal institutions as well as political parties, gradually transformed into negotiations between the National Councils. The main topics on their agendas included the creation of republic constitutions and a new redistribution of the respective powers ("competencies") between the federation and the republics.

Since the 1990 constitutional act on power-sharing,⁶⁹ both the Czechs and the Slovaks expressed dissatisfaction with the status quo in the division of powers, although for contradictory reasons. While many in the Czech Republic consider the power of the federal government and parliament inadequate, many Slovak politicians believe that too many powers remain at the federal level. In November 1991, the Slovak government adopted a conciliatory declaration⁷⁰ on the power-

68. *Federal Assembly Rejects Constitution Amendments*, FBIS-EEU-92-033, Feb. 19, 1992, at 3 (citing Prague CSTK, Feb. 18, 1992). Following a mandatory conciliation procedure, which is triggered anytime a bill passes one chamber and not the other, the amendment failed to pass the Slovak part of the Chamber of Nations again on March 3, 1992. *Federal Assembly Fails To Amend Constitution*, FBIS-EEU-92-044, March 5, 1992, at 7 (citing Czechoslovak Radio, Mar. 3, 1992). See also *Assembly Body Rejects Constitutional Amendment*, FBIS-EEU-92-041, March 2, 1992, at 15 (citing Prague CSTK, Feb. 27, 1992).

69. ÚST.ZÁK. č.556/1990 Zb., ktorým sa mení a dopĺňa ústavný zákon č. 143/1968 Zb., o československej federácii [Constitutional Act No. 556/1990 Coll. of Laws, altering Constitutional Act No. 143/1968 Coll. of Laws, on the Czechoslovak Federation].

70. *Slovak Government Adopts Stand on 'Power-Sharing'*, FBIS-EEU-91-226, Nov. 22, 1991, at 8 (citing Czechoslovak Radio, Nov. 19, 1991). This declaration became known as the "12:8 Declaration," because eight ministers, including the Slovak Prime Minister, refused to approve it. *Cernogursky Reacts to Declaration*, FBIS-EEU-91-226, Nov. 22, 1991, at 9 (citing Narodna Obroda, Nov. 20, 1991, at 1, 6). The Slovak Prime Minister stated that presenting the declaration at a government meeting

sharing dispute and its economic and social consequences.⁷¹ The declaration signified a more rational attitude by the Slovak executive to the complex relationship with the Czechs. Many deputies of the Slovak parliament, however, do not share the executive's viewpoint.

a. State Treaty

The discussion of the National Councils on the division of powers became intertwined with negotiations over the so-called "state treaty."⁷² This controversial concept best reflects the different aspirations and visions of the two republics.⁷³ The history of the negotiations over the treaty presents us with an interesting list of issues and concepts over which the two "nations" differ. Although the treaty is not going to be adopted, at least not before the elections, it is useful to outline the events that led to this result as an illustration of the Czech-Slovak conflict.

Theoretically, the state treaty was supposed to define the relationship between the two republics in a future common state and work in concert with a new constitution.⁷⁴ Initially, the Czech National Council firmly opposed the state treaty concept. Later, the Council agreed to it in principle, but controversies over the treaty remained. At first, there was contention based on the division of powers.⁷⁵ Afterwards, no agreement could be found on a more conceptual level. The Czech and Slovak

was politically dangerous. *Id.* Further, he asserted that the declaration is not legally binding for the political parties of the Slovak National Council. *Id.*

71. The declaration stated that, in addition to the existing powers, a common state should exercise legislative powers in the areas of labor, wages, and social policy. The declaration also recommended that a common state should exercise executive power in the areas of economic competition law, postal services, long-distance communication, the rail networks, and a single currency. *Id.*

72. Ján Čarnogurský, the present Slovak Prime Minister and the chairman of the Christian Democratic Movement, introduced this concept in the spring of 1991. The negotiations recently terminated after the Presidium of the Slovak National Council failed to adopt an agreed text of the treaty. *See infra* notes 79 - 89 and accompanying text (discussing the recently terminated negotiations on the state treaty).

73. *See supra* notes 5 - 22 and accompanying text (detailing Czech and Slovak attempts to shape the country's constitutional framework).

74. The expression "state treaty," apart from the problems of definition, is hard to translate into English. In Slovak, it is called "štátna zmluva." "Zmluva" can be translated as treaty, contract or agreement. The treaty was supposed to form a basis for a reformed federal institutional structure, including a new power-sharing arrangement between the federation and the republics.

75. As of November 1991, "of the 88 provisions contained in the draft treaty, no accord could be reached [between the National Councils] on 22 of them." *Czech, Slovak Differences on Treaty Viewed*, FBIS-EEU-91-222, Nov. 18, 1991, at 9 (citing Lidove Noviny, Nov. 14, 1991, at 1, 3).

politicians differed on the way in which the treaty should be adopted and its legal status and significance.⁷⁶

In principle, the parties struggled with the question of whether to build a federation from "below," in which the republics delegate power to the federation, or from "above," in which the federation grants power to the republics. The Slovak politicians advocated building from "below." They argued this position by asserting that the treaty should contractually oblige two *independent* republics to live in a common state to which each of the republics would delegate certain powers. The Czechs, on the other hand, supported the concept of building the federation from above and asserted that the legitimacy of the federation should derive directly from the people rather than from the republics.

Further, nationalistic Slovak politicians claimed that each republic should be a subject of international law, like all sovereign states. This was unacceptable to the federal and Czech politicians who asserted that as long as the federation existed it was the only body capable of being a subject of international law. Otherwise, they argued, one could not speak of a common state.⁷⁷

In addition, the Slovak version of the treaty called for a permanently binding state treaty officially entitled, "Treaty between the Czech and Slovak Republics." The treaty would include the Czech and Slovak republics as the only parties, thus implicitly recognizing Slovakia as an independent republic.⁷⁸ The Czech version called for a less formal internal agreement between the two National Councils.

After months of negotiations over the power-sharing aspect of the treaty, the division of powers between the republics was more or less settled.⁷⁹ At the beginning of February, the joint commission appointed

76. *In Czechoslovakia, the Political Pendulum Swings From Compromise to Confrontation*, WALL ST. J. EUR., Jan. 27, 1992, at 7 (arguing that the privatization process may expand the already existing economic gap between the republics, because Slovakia is less-developed, poorer, and subsidized by the federal budget).

77. *Id.*

78. *Havel, Carnogursky View Elections, State Treaty*, FBIS-EEU-92-014, Jan. 22, 1992 at 11 (citing Bratislava Radio Network, Jan. 17, 1992). In a recent radio interview, the Slovak Prime Minister elaborated on the differing approaches to the state treaty stating:

We insist on the treaty being between the Slovak Republic and the Czech Republic. Although the republics would be represented by their respective [N]ational [C]ouncils, it would be a treaty between the republics. In this sense it would be a state treaty, because it would be a treaty between two states.

Id. at 12.

79. The chairman of the Slovak National Council, in an interview after a negotiating session in Milovy in February 1992, stated: "Indeed, Wednesday night we noted something incredible - that on the question of division of powers we actually are not very far apart." *Reaction to Czech-Slovak Draft Constitution Treaty; Miklosko: 'Ac-*

by both Councils agreed on the text of the treaty.⁸⁰ The Czech National Council reacted to the agreement by a resolution approving the text.⁸¹ In the words of the chairwoman of the Czech National Council: “[W]e have succeeded in really drawing up a draft treaty which truly corresponds to the requirements of both participating parties.”⁸² Ten deputies of the Slovak National Council’s Presidium, however, did not share the chairwoman’s perception. The Presidium failed to approve the treaty.⁸³

The Slovak deputies had two principal objections to the text: (1) it did not define who was a party to the treaty⁸⁴ — it was not an official treaty between two republics considered subjects of international law;⁸⁵ and (2) it was not contemplated as a permanent source of law, rather just a “legal initiative” to the Federal Assembly which could either accept or disapprove the treaty.⁸⁶ Having failed to adopt the treaty, the two National Councils realized the futility of further negotiations, and agreed to suspend talks until after the June elections.⁸⁷

There are two important aspects of the state treaty negotiations to note. The political debate over the issues of whether to build an institution from “below” or “above” has approximately the same degree of precision and relevance as a debate over the difference between an “authentic” and “true” federation. The negotiations were, in fact, only another forum that highlighted the same differences between the two “nations” that paralyze the Federal Assembly.

The real significance of the state treaty did not rest in its content or form. Its value was largely symbolic. A successfully concluded treaty

ceptable Mechanism’ Found, FBIS-EEU-92-031, Feb. 14, 1992, at 12 (citing *Naroda Obroda*, Feb. 10, 1992).

80. *Czech, Slovak National Councils Agree on Treaty*, FBIS-EEU-92-027, Feb. 10, 1992, at 8 (citing *Czechoslovak Radio*, Feb. 8, 1992); *see also Text of Draft Czech-Slovak Constitution Treaty*, FBIS-EEU-92-031, Feb. 14, 1992, at 6 (citing *Hospodarske Noviny*, Feb. 11, 1992) (reprinting the entire text of the document).

81. *Czech Deputies ‘Welcome’ Next Meeting*, FBIS-EEU-92-032, Feb. 18, 1992, at 12 (citing *Czechoslovak Radio*, Feb. 13, 1992) (reprinting the entire text of the Czech National Council resolution of February 13, 1992).

82. *Czech, Slovak National Councils Agree on Treaty*, *supra* note 80, at 8.

83. *Slovak Council Fails To Pass Draft Treaty*, FBIS-EEU-92-030, Feb. 13, 1992, at 5 (citing *Prague Radio*, Feb. 12, 1992). 10 members of the Presidium voted to approve the treaty, and 10 voted against it. *Id.*

84. *Klepac Spells Out Objections to Draft Treaty*, FBIS-EEU-92-038, Feb. 26, 1992, at 10 (citing *Slovensky Dennik*, Feb. 15, 1992).

85. *Id.* The chairman of a nationalist oriented Slovak Christian Democratic Movement said: “The Czech side tenaciously tries to prevent Slovakia from becoming more visible as a separate entity.” *Id.*

86. *Id.*

87. *Czech, Slovak Leaders Suggest Talk Suspension*, FBIS-EEU-92-049, March 12, 1992, at 10 (citing *Prague CSTK*, Mar. 11, 1992).

would have been a preeminent symbol of national consensus, of the ability of the two peoples to compromise and reach agreement on overarching principles. The Czech disappointment with the failure to adopt a treaty, the concept they had originally opposed, best documents its symbolic importance.⁸⁸ The Slovak Prime Minister commented: "if a treaty on the principles of a constitutional arrangement is not adopted, the breakup of the common Czechoslovak state is possible."⁸⁹

b. Declaration of Sovereignty

The nationalistic parties have periodically brought another political tool into the negotiations between the National Councils — a threat to issue a "declaration of national sovereignty."⁹⁰ The threat of the Slovak National Council unilaterally presenting a declaration of sovereignty persists.⁹¹ Such a declaration would, among other things, pronounce the supremacy of the Slovak National Council's laws over those of the Federal Assembly. This would, arguably, constitute a violation of the current federal constitution. No declaration has been issued yet, and some say there is no danger of the declaration being issued before the elections.⁹² What will happen afterwards, however, remains to be seen. One reason for the hesitation over the declaration is that the Slovak National Council has been waiting for a Slovak constitution to be adopted. A draft of a constitution was presented in alternative forms in early January for a public debate.⁹³ No action on it has yet taken place. The current options in the draft document cover a wide range of choices, from a functional federation to an independent state.⁹⁴ Depending upon which alternative is adopted, the Slovak constitution itself, or certain provisions therein, may violate the federal constitution.

88. *Id.* The chairwoman of the Czech National Council called the treaty "a good document that could be a basis for transforming our state into an authentic federation." *Id.*

89. *Carnogursky: State Breakup 'Possible'*, FBIS-EEU-92-031, Feb. 14, 1992, at 13 (citing Prague Radio, Feb. 13, 1992).

90. *See Slovak Republic's Draft of Sovereignty Declaration*, FBIS-EEU-91-049, March 13, 1991, at 17 (citing *Smena*, Mar. 2, 1991) (reprinting the full text of the declaration). The parties even organized rallies in support of the declaration. *See 'Thousands' of Slovaks Demand State Sovereignty*, FBIS-EEU-91-048, March 12, 1991, at 10 (citing *CTK*, Mar. 12, 1991).

91. *Miklosko on Consequences of Treaty's Rejection*, FBIS-EEU-92-036, Feb. 24, 1992, at 13 (citing *Naroda Obroda*, Feb. 18, 1992) (interviewing the chairman of the Slovak National Council on the effects of the rejection of the state treaty).

92. *Id.* The chairman of the Slovak National Council is of the opinion that "no party will dare to take such a risky step before the elections." *Id.*

93. *See Návrh Ústavy Slovenskej republiky [Draft of the Slovak Republic's Constitution]*, *Práca*, Jan. 8, 1992, at 4.

94. *Id.*

F. CONSTITUTIONAL DEADLOCKS

The impasse, or some may say the constitutional crisis, that resulted from the failure of the Federal Assembly to adopt three chapters of a new constitution,⁹⁵ and from the inconclusive treaty negotiations between the two National Councils, highlight another crucial deficiency of the 1968 Federation amendment.⁹⁶ It does not provide for any effective safety valves or deadlock-breaking mechanisms.

During the past twenty years, following the Soviet occupation in 1968, deadlock-breaking mechanisms were unnecessary. Consequently, the magnitude of the Czech-Slovak conflict remained concealed due to the omnipotent Communist Party which, with its blessings from Moscow, effectively prevented people from getting involved in any highly emotional controversies.⁹⁷ Czechoslovakia's Communist Party no longer has a dominant role in the society. Also, because the country does not belong to any defense alliance, it is left in a security vacuum. Thus, the struggle between the two "nations" remains an internal matter.

With only two partners in this "dual" federation, and the built-in institutional tension, stalemates inevitably result. Therefore, the country would need a third force, either internal or external, to provide balance to the volatile political situation. President Havel recently tried to supplement the missing role of a "third force" and, in an emotional television address to the people,⁹⁸ he proposed several draft bills designed to combat the current impasses.⁹⁹

The politicians conducting the constitutional debate in Czechoslovakia have procrastinated for a relatively long time. One of the reasons is the fall-back position that the parliaments created for themselves. While the 1960 Constitution remains valid, amendments implemented by Parliament may allow the political negotiations and "submitting" to continue indefinitely. The amount of time the country has, however, is impossible to estimate. In today's fast moving world, the economic pressures may force Czechoslovakia to choose between speedily resolving the constitutional debate while simultaneously creating functioning

95. See *supra* notes 67 - 68 and accompanying text (detailing the reasons behind the Federal Assembly's failure to adopt three chapters of the new constitution).

96. 1968 Federation amendment, *supra* note 25.

97. As one commentator put it: "[W]ith its hypocritical internationalism, the communist regime covered up the existing conflicts, and made taboos of them. Problems were not being solved, they were covered up." Kováč, *supra* note 5, at 1.

98. *Havel Appeals for Support to Resolve Crisis*, FBIS-EEU-92-222, Nov. 18, 1991, at 7 (citing the Prague Federal 1 Television Network, Nov. 17, 1991) (translating and reprinting the text of Havel's "Address to the Nation").

99. *Id.* at 7-8. See also *infra* notes 103 - 118 and accompanying text (discussing the proposed bills).

democratic institutional structures in order to join European integrations, or continuing to squabble and leaving Czechoslovakia out of the integration processes.

G. PRESIDENT HAVEL'S LEGISLATIVE INITIATIVES

Czechoslovakia is a parliamentary democracy, so the President is *not* elected by the people and is *not* the head of the executive branch. Czechoslovakian constitutions traditionally gave little power to the presidents. President Havel's substantial influence in the country derives from his personal appeal and charisma — as was the case with President Masaryk — rather than from any particular constitutional provisions. The current constitution and laws of Czechoslovakia give the President some limited powers¹⁰⁰ which implicitly include the rarely exercised right of legislative initiative. The constitution, however, does not provide the President with any effective legal means to break deadlocks. The President cannot dissolve the Parliament (apart from the one instance when the Federal Assembly cannot agree on a budget), call for a referendum, or rule by decree.¹⁰¹ In an attempt to abate the constitutional crisis and improve the ill-conceived institutional structure of the 1968 Federation amendment,¹⁰² the President proposed several new laws to the federal Parliament.¹⁰³

The President's first proposal called for a ratification of the new federal constitution by the Czech and Slovak National Councils, after its

100. 1968 Federation Amendment art. 61, *supra* note 25. The presidential powers pursuant to the amendment are limited. The President may appoint and recall the Prime Minister and other ministers, grant amnesty, dissolve the Federal Assembly if it cannot agree on a budget, conduct foreign affairs, serve as Commander-in-Chief of the army, and call for new elections. *Id.*

101. Concerned with the situation in the country, President Havel opened his November 17 speech with the following words:

Everything seems to indicate that, at present, our representative bodies are unable to reach a timely and reasonable agreement about future coexistence in our state. . . . [T]he talks have begun to go in circles and have gradually become the object of opposition and even mockery by our citizens and the mass media.

Havel Appeals for Support To Resolve Crisis, supra note 98, at 7.

102. *Havel's New Year Speech Views Progress, Goals*. FBIS-EEU-92-001, Jan. 2, 1992, at 14 (citing Czechoslovak Radio, Jan. 1, 1992) (explaining the reasons for his proposals). In his New Year's speech Havel stated:

[N]ot long ago, I submitted to the Federal Assembly several draft laws that could open the road to further negotiations, create a system of safeguards against a possible crisis, and at least make sure that there would be an election in June.

Id.

103. *Havel Addresses Federal Assembly 3 Dec* [hereinafter "Havel's Proposals"], FBIS-EEU-91-233, Dec. 4, 1991, at 10 (citing Czechoslovak Radio, Dec. 3, 1991) (presenting his proposals in a speech to the Federal Assembly).

adoption by the Federal Assembly.¹⁰⁴ On January 21, 1992, even though President Havel's proposal met the demands of the radical Slovak politicians, the Slovak opposition parties in the Federal Assembly exercised their veto power and blocked its adoption for ratification.¹⁰⁵

Next, the President proposed an amendment to the Referendum Law which would allow him to initiate a referendum in the entire country or in only one of the republics with the consent of the federal government. The President would not have to secure the consent of the Federal Assembly.¹⁰⁶ This proposal also obligated the President to call for a referendum if 500,000 people in the Czech republic, or 250,000 people in the Slovak republic sought one.¹⁰⁷ Presently, 2.5 million signatures calling for a referendum have been collected in Czechoslovakia,¹⁰⁸ but to no avail. Current law¹⁰⁹ requires the initiation of a referendum no later than five months before the end of the election terms of the Federal Assembly and the National Councils. With the next election scheduled for June, hopes for a referendum are futile.¹¹⁰ The Federal Assembly voted down the proposed bill on January 21, 1992.¹¹¹

104. *Id.* In justifying the proposal, Havel noted that it corresponded to the CSFR's unusual situation. *Id.* The requirement of ratification originated with the Slovak representation and was opposed by the Czech and federal politicians. Ratification of the federal constitution by the National Councils was accepted as a political trade-off in order to reach a consensus with the Slovak representatives on the constitutional framework. *Id.*

105. *Legislators Reject Two Havel Draft Bills*, FBIS-EEU-92-014, Jan. 22, 1992, at 11 (citing Prague CSTK, Jan. 21, 1992) [hereinafter "*Legislators Reject Two Havel Draft Bills*"].

106. *Havel's Proposals*, *supra* note 103, at 13.

107. *Id.*

108. *Id.* According to the latest polls, 74% of the people in Czechoslovakia (78% in the Czech Republic, and 66% in Slovakia) believe that the question of a future existence of a common state should be decided by a referendum. *See Nationwide Poll Shows Support for Federation Vote*, *supra* note 50, at 13. *See also Legislators Reject Two Havel Draft Bills*, *supra* note 105, at 11 (noting requirements giving the president the right to call a referendum).

109. Úst.zák. o referende č. 327/1991 Zb., (Constitutional Act No. 327/1991 Coll. of Laws, on Referendum).

110. Even if a referendum was possible, however, it is not certain it would help the situation. The effectiveness of a referendum would depend on the question that would be presented to the people. The reason is that most of the population of Czechoslovakia wants to preserve a common state. The issue that no consensus has been reached on so far is a form that this common state should have. As one commentator put it: "[T]his [issue] really cannot be solved by referendum. Such an attempt would shed light on the matter only if [a referendum] resulted in a decision to break-up the common state." *Přihoda*, *supra* note 6, at 1-2. If the result of a referendum was a positive one, the protagonists of Slovak sovereignty might be silenced for a while, but the issue of the Czech-Slovak relationship would not be resolved. *Id.*

111. *Legislators Reject Two Havel Draft Bills*, *supra* note 105, at 11. Typically, it is the ethnic minorities and administrative entities that exploit referenda in their efforts

Another of the President's proposals would give him the ability to dissolve the parliament when the two chambers are unable to agree on a draft bill. It would further enable him to rule by presidential decree after dissolving the Parliament and before a new one would be elected.¹¹² This bill was rejected by both chambers of the Federal Assembly on January 28, 1992.¹¹³

Yet another of the President's proposals concerned a new Federal Assembly structure.¹¹⁴ First, the proposal would transform the Assembly into a unicameral body consisting of 200 deputies. Second, the proposal would create a new entity, consisting of thirty members, called the Federal Council.¹¹⁵ After the Federal Assembly failed to pass the President's drafts on the ratification procedure and the amendment to the Referendum Law, he withdrew his Federal Council proposal.¹¹⁶

The President's final proposal concerned a new election law based on a mixture of the majoritarian and proportional election systems.¹¹⁷ A group of eleven deputies of the Federal Assembly (from eight different political parties) proposed an alternative to Havel's proposal — an amendment to the current election law based on proportional representation.¹¹⁸ The Federal Assembly declined the President's proposal and adopted the one presented by the deputies.¹¹⁹ One reason for the refusal was that the Slovak opposition parties simply seem to resist any proposals from the President. But there was also a much more prag-

to gain independence, declare sovereignty, or achieve autonomy within larger units. Interestingly, in the CSFR, the pro-federation parties in both the Czech and Slovak republics pushed for a referendum while the nationalistic parties in Slovakia fiercely opposed such a measure.

112. *Havel's Proposals*, supra note 103, at 12.

113. *Parliament rejects Havel Presidential Powers Bill*, FBIS-EEU-92-019, Jan. 29, 1992, at 7 (citing Czechoslovak Radio Prague, Jan. 28, 1992).

114. *Havel's Proposals*, supra note 103, at 13.

115. The delegated representatives of the republics' National Councils would comprise the thirty members. The proposal would also give the Federal Council a suspensive veto over legislation. *Id.* It is doubtful whether such a structure would, if adopted, solve any potential deadlocks, because the proposal would still require the unicameral Federal Assembly to cast separate votes on many issues in the Czech and Slovak sections.

116. *Havel Withdraws Proposal for Federal Assembly and Council New Proposal Tabled*, BBC-EE-1287-B-1, Jan. 25, 1992, at 1 (citing Czechoslovak Radio, Jan. 22, 1992).

117. *Havel's Proposals*, supra note 103, at 14; *Havel Briefs Journalists on Draft Election Law*, FBIS-EEU-91-247, Dec. 24, 1991, at 6 (citing Czechoslovak Radio, Dec. 23, 1991).

118. *Prezident Kontra Parlament, Dva Návrhy Volebního Zákona [President Contra Parliament, Two Proposals of Election Law]*, Respekt, Dec. 16-22, 1991, at 4 (discussing optional proposals).

119. *Parliament Passes Amended Electoral Law*, FBIS-EEU-92-020, Jan. 30, 1992, at 7 (citing Prague CSTK, Jan. 29, 1992).

matic reason for the preservation of the proportional election system—self-interest. The deputies in the fragmented Parliament resisted a change in the election system that would endanger their prospects for reelection in June. The mixed election system would prevent a great number of small parties from getting seats in the Parliament.

The fate of the President's proposals in the Federal Assembly came as no surprise. The surprising part was the President's submission of the draft bills. While all the proposals, if adopted, would mean a valuable improvement to the constitutional framework of Czechoslovakia, they were destined to fail from the very outset. The veto power of thirty-one deputies in the Chamber of Nations, and the track record of the "Slovak bloc"¹²⁰ in this chamber of successfully blocking any attempts to change the institutional order of the federal Parliament is well known. Therefore, it is not only surprising, but indeed troubling, to see the President launch a constitutional initiative that, albeit well meant, cannot succeed under the circumstances. President Havel is one of the very few integrating factors left in Czechoslovakia today. This unfortunate move only diminishes his prestige. If President Havel, a man of great vision and personal appeal, fails to make the politicians agree, it is doubtful whether anything will.

H. POSSIBLE SCENARIOS FOR THE FUTURE

Czechoslovakia's future remains uncertain. At the time of this writing, one can only guess the results of the upcoming June elections and the developments they will bring. Indeed, the elections themselves may be problematic.

After the negotiations between the National Councils ended in failure, the political representatives decided not to make any further attempts to negotiate, and instead have concentrated their hopes on the elections.¹²¹ The elections might further destabilize the already volatile political scene, if their results create as fragmented a political spectrum

120. See Marián Timoracký, *Otázka otázky [Question of a Question]*, Respekt, Nov. 25 - Dec. 1, 1991, at 4 (discussing referendum and political parties in the CSFR). The most nationalistic parties in the Federal Assembly are the Slovak National Party, the Movement for Democratic Slovakia, the Party of the Democratic Left (formerly the Communist Party), and the Slovak Christian Democratic Movement (a recent splinter of the Christian Democratic Movement). These parties vote together as the "Slovak bloc."

121. The chairman of the Slovak National Council summarized the situation as follows: "We have agreed with the representatives of the Czech political scene and with the head of state that the situation should remain unchanged until the elections and that no risky experiments should be undertaken." *Miklosko on Consequences of Treaty's Rejection*, *supra* note 91, at 13.

as exists today. Because the institutional structure of the newly elected federal Parliament will be identical to the current one,¹²² it might even prove impossible to elect any president by the necessary three-fifths majority, and to form a federal cabinet.

Neither the 1968 Federation amendment, nor any other applicable law, dictates what happens if the Federal Assembly fails to elect a President.¹²³ The only applicable provision of the 1968 Federation amendment is article 64, which gives presidential powers to the federal Prime Minister if the President, for various reasons, is not capable of executing his duties. There is no provision, however, on how to ultimately bring about a successful election, nor is there any provision on who executes presidential functions if the Federal Assembly is unable to form a federal cabinet.

Some politicians, including President Havel himself, have recognized this danger. Voicing his concern, the President stated: "I am afraid that Jesus Christ combined with Winston Churchill would not be elected president in such an election. . . . It is possible to envisage that we will have neither a president nor a new government and, moreover, a non-functioning parliament."¹²⁴ Aware of the small probability of electing a president with the currently valid provisions of the 1968 Federation amendment, the three parts of the Federal Assembly were, surprisingly, able to agree on a constitutional amendment that made the prospects of electing a president after the June parliamentary elections a little more plausible. The new amendment provides for a presidential election in two rounds. If a candidate is unable to obtain a three-fifths majority in all three parts of the Federal Assembly in the first round, an absolute (fifty percent) majority will suffice in the second round.¹²⁵

Despite the many 'unknowns,' several likely scenarios for the future are summarized below. If the President is not elected and the federal

122. The Federal Assembly failed to adopt the three chapters of the constitution which would have changed the current set up. See *supra* notes 67 - 68 and accompanying text. See also Havel 'Afraid' of Presidential Election Problems, FBIS-EEU-92-000, March 13, 1992, at 6 (citing *Mlada Fronta Dnes*, March 10, 1992).

123. The 1968 Federation amendment, *supra* note 25, in art. 62 states: "The election of the President . . . shall be held within the last fourteen days of the Presidential term of office." *Id.* It may be inferred, that the incumbent President ceases to hold the office within fourteen days, regardless of whether a new President is elected.

124. See Havel 'Afraid' of Presidential Election Problems, *supra* note 122, at 6. The article cites the First Deputy of the Federal Assembly who, contrary to Havel, believes that "according to the currently valid constitution, the non-election of a head of state would not have to provoke a constitutional crisis." *Id.*

125. *Amendment to Presidential Election Law Passed*, FBIS-EEU-92-075, April 15, 1992 (citing Prague CSTK, April 15, 1992). If the second round fails, the incumbent president remains in office, but only up to a maximum of three months. *Id.* Consequently, parliament may not be able to agree on a president.

government is not formed, the country may continue disintegrating to the point of a complete breakup.¹²⁶ Alternatively, Czechoslovakia may be trapped in a continual constitutional crisis and long-term instability reminiscent of post-war Italy.¹²⁷ This may occur even if the Federal Assembly ultimately does agree on the remainder of a new constitution, and creates a highly decentralized federal structure with minimal powers on the federal level, or a confederation. Furthermore, such a framework would cause the economic processes in the two republics to develop in different directions.

While the post-1989 constitutional developments do not allow for excessive optimism, there are some grounds for a more optimistic outlook to defy this cynicism.

Public opinion polls have consistently shown that a majority of the population in both republics wishes to remain in a common state.¹²⁸ For these people, the strive for self-governance and self-determination does not necessarily result in separatist tendencies or secession. If their wish is unequivocally demonstrated, for example, in a referendum, that expression of unity may contribute a great deal towards constitutional stability. A considerable portion of the Czech-Slovak conflict is, in essence, a power struggle. There is some hope that if the most nationalistic politicians assume posts in the federal structures, they might graduate into "good citizens" of the common state.

Despite all of the above, one hopes that the economic realities, together with the international developments, including the European integration processes, will induce the Czechoslovakian lawmakers to move beyond the frictions and collisions, and to design a functioning common *modus operandi*.¹²⁹ If not, one must at least trust that the country will "muddle through" these difficult times in the hope that the two rival "nations" might come to terms with each other sometime in the near future.

126. This constitutes a "worst case scenario." No reasonable person wishes such a result. Even if the country splits, however, it is doubtful a Yugoslavian-like civil war would result. The internal as well as international consequences of such a split are hard to imagine. An issue, not yet sufficiently addressed, is the question of succession. That would, however, merit a separate article.

127. If such development was to follow, it could be terminated by the Czechs who might determine that it was not worth it remaining in the union.

128. See *supra* note 50 (discussing public opinion polls conducted in the CSFR).

129. One commentator suggested that the European Community, the Council of Europe, and the Conference on Security and Cooperation in Europe may, in fact, "exercise a salutary constraining influence" on the number of choices that the Eastern European countries have to face in their constitution-making processes. Elster, *supra* note 2, at 481.

CONCLUSION

Czechoslovakia is an example of how institutions are able to frustrate people's hopes. Two years ago, amidst the post-revolution and post-free election euphoria, few contemplated that the mandate to replace the old constitution with a new one before the June 1992 parliamentary elections would prove insurmountable. Now, without a new constitution, the country is waiting for the elections with mixed emotions: hope as well as fear of the fate of the common state and the speed and shape of the economic reform.

Two years ago, neither the population at large, nor the politicians on either side appreciated the significance of the factors that divide the society. Two of the important factors dealt with in this Article, the divergent aspirations of the two "nations" and the ill-conceived institutional structure, have combined to cause an unhappy result. If only the aspirations differed, a positive institutional framework could have contributed towards eliminating them. Conversely, if only the structure was a problem, and a broad national consensus would have continued, it could have caused the structure to change. To combat both of these factors simultaneously has proved impossible so far.

The Slovak call for self-determination and self-governance cannot be underestimated. Some argue it is a justified call, but regardless of any attempt to justify it by objective criteria, the significance of the call is its imminence and reality. The call has to be dealt within an appropriate institutional fashion, otherwise it will remain as a constant threat, a sword of Damocles hanging over the Czech-Slovak relationship and co-existence. When addressing it, one must, however, distinguish between a broad-based self-determination call, and populist secession demands reflecting the power struggle and ambitions of individual politicians. Perhaps the best distinguishing criterion between these two is how democratic are the means utilized by the politicians to achieve their goals.