

## The Czechoslovakian Divorce: “Velvet” Settlement, or Muted Coexistence?

*Martin Palouš*

The disintegration of the bipolar “Yalta system” with the sudden and unexpected collapse of communism at the end of the 1980s was greeted by Europeans with great joy and enthusiasm. Today, as we register more and more signals from postcommunist Eastern and Central Europe that the historical change goes deeper than we had originally thought—not only is the Cold War over now, but we can no longer even take for granted the Versailles system created after World War I—there are hardly any reasons to be enthusiastic about it.

In the autumn of 1990, when the Charter for the New Europe was solemnly signed in Paris by all member states of Conference on Security and Cooperation in Europe (CSCE), the sky was blue over the “old continent.” The magnificent vision of pan-European integration—of a confederated Europe that is “no longer the conglomeration of different nations influencing one another only through commerce and power struggle” (Husserl 1970, 289) but an organic unity of peoples connected above all by a shared political culture, respecting in all their differences the same principles of political behavior—seemed to be more realizable than ever before.

Now, two years later, in the autumn of 1992, the situation in Europe has changed. Optimism has faded, and more skeptical voices are being heard. What at first seemed a victory for the “free world” may turn, in the long run, into its downfall: “The collapse of the Soviet system threatens to become a defeat for the free world because we are failing to integrate this region into the free world and, instead of being integrated, it is disintegrating. Indeed, what used to be the Soviet

Union may become a black hole which may eventually swallow up civilization" (Soros 1992).

One of the very significant omens of our time is the end of the Czechoslovak state, which disappeared from the political map of Europe on 1 January 1993, after nearly seventy-five years of existence—paradoxically enough, also due to the collapse of communism. Will the Czechoslovak divorce be, in its final balance, as "velvet" as the Czechoslovak revolution in November 1989? The experience thus far has definitely not been as bad as some opponents of the split had predicted. So far, things have been going surprisingly smoothly, and the prudence and moderation demonstrated by Czechs and Slovaks alike have been positively appreciated by all observers. Nevertheless, considering the character and nature of the process that brought the end of the federation and the origin of the two independent states, scenarios for future developments in the former Czechoslovakia should be viewed not over optimistically but with caution and deliberation.

Those who have kept abreast of the rapid metamorphoses in Czechoslovak relations after the "Velvet Revolution" have observed a remarkable elemental aspect of the process. It was as if not only various political wills and ambitions were active, but also a strange automatism, what Václav Havel termed the force of historical necessity. Events seemed no longer dependent on the decisions of the human actors who were creating the story, but rather seemed to be taking place somewhere over their heads. It was not only that "the voice of the people" was not heard and a referendum on such an important issue as the dissolution of the state was not organized, but even the politicians involved in the decision making apparently did not control what they were doing and failed to adhere to their previously stated objectives. Both Václav Klaus and Vladimír Mečiar—the chairmen of the two victorious political parties in the June elections and, in that capacity, the main architects of the Czechoslovak divorce—recently have declared that the split is not exactly as they wished, that each side was forced by the other to accept this rather unhappy and, in many respects, problematic solution. There are many cogent reasons to presuppose that this argument will resurface again and again as the two new countries sort out their domestic agendas.

Discussion below begins with the broader historical framework of current Czechoslovak relations, proceeds to the present stage of events, and concludes with observations toward the future.

### **The Past**

The Czechoslovak Republic came into existence at the end of World War I, on the ruins of the Austro-Hungarian Empire. On 28 October 1918 in Prague, and on 30 October in Martin, Czech and Slovak political leaders declared the independence of Czech lands and of Slovakia from the governments in Vienna and Budapest, and the joint political will of both nations to found a single new democratic state: Czechoslovakia. The Paris Peace Conference, which opened early in 1919 with the objective of creating a new international order in Europe, confirmed these actions, recognized Czechoslovakia as a sovereign and independent state, and formally demarcated its borders in the treaties of Saint-Germain (1919) and Trianon (1920).

The foundation of their common state represented for both Czechs and Slovaks the fulfillment of long-standing political aspirations. This shared desire, however, was motivated and understood rather differently on either side. The joint political will masked two potentially conflicting national interests.

### *The Czech Perspective*

The Czechs have succeeded in transforming themselves into a modern European civil society during the course of the nineteenth century. As a vital, culturally developed, and economically strong national community, they became less and less able to tolerate inferior, second-rate status in the Austro-Hungarian Empire. Nevertheless, and even though the hallmark of the Czech national program was political emancipation, Czech policy during the nineteenth century was characterized by principal loyalty to the Habsburg monarchy. No matter how tense and, often, conflicting relations between Prague and Vienna became, and no matter how much Czechs desired a profound reform of the existing Austrian (after 1867, Austro-Hungarian) state, its existence as such was generally taken for granted. Generations of Czech politicians, headed by František Palacký, believed that the best way to protect Czech national interests was to strive toward the transformation—not the destruction—of the current political order. The stabilizing effect of a powerful empire in Central Europe was recognized as the necessary precondition for the development of autonomous Czech national existence in a cultural, political, and economic sense.

The Czech national community did not radically change its attitude toward Austria-Hungary until the outbreak of World War I. After 1914 Czech political opinion increasingly held that the only acceptable solution of the Czech question was to disengage from the

old monarchy and establish a sovereign stage. The most energetic proponent of independence was the university professor Tomáš Garrigue Masaryk, who left his homeland in 1914 to begin "foreign action" on his ideals; he later became the first president of the Czechoslovak Republic.

Masaryk did not believe the war should be seen entirely in terms of power and "Realpolitik." To him, World War I was a "world revolution," a conflict between two great, epoch-making forces, two opposing principles of social organization: theocracy and democracy. Different powers and national interests might confront each other on the battlefield, but far more was at stake: the whole spirit of relations between nations, the political culture that would dominate human affairs in the future. A revolution, similar to the one that had given birth to the United States and established on the territory of the British colonies a "New World Order," *Novo Ordo Seclorum*, had now burst out on the old continent. In the war a New Europe, a Europe of free, democratically governed nations, was striving to defend its cause against the traditional European order that had been created by power policies of "theocratic," absolutist monarchies. Full state sovereignty became the main objective of Czech national policy. The solution of the "Czech question" consisted in the formation of an independent government, in the creation of a republic based on an open, cultivated civil society, committed to humanistic ideals. Subordination under the federalized empire of Austria-Hungary, a strategic concept founded in a narrow, Central European point of view, had to be replaced by a policy of cooperation with the West. The proper place of the two small Slavonic nations in Central Europe was on the side of the "democratic" Allies.

The key element in Masaryk's thinking was Czechoslovakism, the concept of a unified nation comprised of two ethnic branches, Czech and Slovak. To be sure, this notion had pragmatic underpinnings. It would strengthen the position of Czechs and Slovaks in their negotiations with the Allies concerning future, postwar arrangements. It would solve the key problem of their independent political existence: how to create in Central Europe a strong national community large enough to counterbalance the hitherto dominant German element.

But Czechoslovakism in Masaryk's conception was also much more than an artificial, ad hoc construct geared to current events and justified only by its practicality. It was also the way to resolve the problem of the Slavonic nations of the collapsing Habsburg monarchy in the spirit of the emergent order, of the "New Europe," to build a higher purpose into the foundations of the new state. The idea of a

Czechoslovak state required the birth of a political nation, the creation of a new political entity through the free decision of Czechs and Slovaks to live together. It presupposed the shared will to commit to the same ideas and values, to enter and inhabit the common space of a national political culture.

In short, the solution of the "Czech question" (and the "Slovak question" as well, we may add) in the twentieth century has been conditioned by Czechs' (and Slovaks') willingness and ability to see their destiny in terms of the "world question"—to transcend the limited, idiosyncratic requirements of their immediate world and adopt a broader, more general point of view; to introduce courageous, generous, alert, and diligent policy; to fulfill their particular Central European task in the ongoing creation of the New World Order.

*The Slovak Perspective*

Whereas the Czechs had shared historical space with the Germans over the centuries, and permanent intercourse with the German element represented a principal theme in their history, the Slovaks had been living in the territories of the Hungarian Empire, and their principal partners (and eventual adversaries) in the political process were historically the Hungarians. And whereas Bohemia (the lands under the Czech crown) belonged to the most developed, industrial regions of Austria-Hungary, Slovakia was rural and very little industrialized. In its spirit and character Czech culture reflected the mentality of the nineteenth-century urban middle class. Slovak cultural identity stemmed from the peasantry—the majority of the population. (The ruling class and aristocracy in Slovakia were Hungarian; the urban population was predominantly German.)

In contrast to Czech secularism, Slovak national culture was religious and deeply devoted to traditional, conservative values. Yet the Slovak nation was very young and had no long history of Czech proportions. Nothing in the memory of the emergent Slovak political mind compared to the "glorious past" of the mighty Czech Kingdom or to the great "Hussite Revolution." Territorial patriotism, which in Bohemia had preceded a Czech-language-oriented national revival in the nineteenth century, was practically unknown in Slovakia. Until the modern, romantic "Herderian" concept of *nation* took root there in reaction to centralizing efforts of enlightened absolutist rulers who attempted to "Hungarize" the Slavonic population, no recognizable Slovak program existed to oppose the idea of the Hungarian state or formulate specifically Slovak demands.

When the "Austro-Hungarian Settlement" of 1867 left the political

needs of the Slavonic nations of the empire unsatisfied, the standing of Czech lands, strong both economically and culturally, did not change very much. But owing to the political invigoration of Hungary conditions in Slovakia deteriorated dramatically. Fearing "panslavism," the government in Budapest so intensified "Hungarization" that by the opening of the twentieth century the fundamental political question in Slovakia was not, as in Bohemia, the decentralization of government and political emancipation, but rather the cultural survival of the Slovak nation.

Thus when Slovak leaders during and after World War I supported and actively promoted the creation of the Czechoslovak state, they were motivated entirely differently than their Czech counterparts. In contradistinction to the "idealistic" self-understanding of the Czech political cause, which espoused the overarching concept of "world revolution," Slovak interests were defined in more "realistic" terms of the bare existence of the nation, of sheer national self-preservation.

Though Czechs and Slovaks had much in common from a long tradition of geographical closeness and intercommunication, some basic features of their political behavior differed. Their different mentalities, different cultures, different religious feelings, different historical experiences, and—last but not least—different socioeconomic situations, introduced certain tensions into the new Czechoslovak state from the outset. Czechs became the dominant element in the new Czechoslovak society; played in it the role of an older, more experienced, more knowledgeable, and stronger brother; and always emphasized, in the spirit of their "idealistic" understanding of politics, the importance of unity and state formation in the political nation of Czechoslovakia. Slovaks—in the role of younger and, in all respects, weaker brother—continued to stand for the preservation of their specific national (in the ethnic sense) identity.

### **Being Together**

Despite these differences everything went pretty well in the beginning. The state based on Masaryk's ideals flourished, and progress in the first years of his presidency was remarkable. Changes in all areas went rapidly forward. The postwar crisis was relatively brief and successfully overcome. The hitherto underdeveloped economic and cultural potential of the country, long suppressed by the "theocratic" government of the Austro-Hungarian Empire, began to exert a positive influence on the social environment. Solid foundations were laid for future prosperity, even wealth. Readily accepted by the

European community, Czechoslovakia enjoyed a strong and stable international status.

To Slovaks the immediate advantages of union with the Czechs were obvious. The new state paid very serious attention to the Slovak question, exerted enormous efforts to abolish lingering consequences of Hungarian policy there, and promoted cultural and economic growth in the region, initially under very difficult conditions. If the Slovak nation had found itself in dire straits before the war, its prospects had dramatically improved by the 1920s.

A good start, however, does not necessarily mean a good end. The collapse of the Czechoslovak Republic at the end of the 1930s, and particularly the way in which that happened, demonstrated all too clearly that neither the Czechs nor the Slovaks, nor both together, had been able to bring their task in Central Europe to fruition. They had fallen short of their own ambitions.

Czechs had failed to overcome the shadow side of their unitarian concept of coexistence with the Slovaks: they succumbed to the fallacy of their "eschatological" interpretation of the recent history of Europe and their "idealistic" or "progressivist" vision of a better European future. Czech politicians had not heeded some very basic questions that deserved serious attention. If raised in public at all, they seem to have fallen on deaf ears: Was not Slovakia aligned with the Czech lands, and the Slovak cause melded with the common Czechoslovak cause, for very different reasons than the Czechs had led themselves to believe? Was it not rather the Czechs' old fear of the Germans, and not ideals of "world revolution," that had fed the origins of Czechoslovakism? Was not Czech belittlement of Slovak identity symptomatic of a much deeper and more dangerous flaw in Czechs' idealistic, morally grounded politics—namely, of a carefully and cleverly masked inability to perceive matters from the other fellow's point of view? Was the atmosphere that had graced the Versailles Peace Conference a lasting one, and widely shared? Might not the biggest threats to the new Czechoslovak society be its superficial and frequent (especially in the Czech environment) progressivism, its materialism (no matter how embellished by sublime ideas), its cheap self-satisfaction in having chosen the right side in the recent historical struggle, and, above all, its foolish behavior as if this state of affairs would last forever?

No matter how strong the argument that the Czechoslovak state was much more a Czech than a Slovak business, and that Slovaks in fact never fully accepted the idea, the Slovak failure was no less than the Czech. Slovak national ambitions, Slovak efforts to maintain a national identity and political culture, the claims for Czecho-Slovak

settlement under the "Pittsburgh Agreement" of May 1918 between Czechs and Slovaks in exile—all these were fully understandable and legitimate concerns. Nevertheless, if Czechs, amid their "world-oriented" politics, had been unable to perceive events through the eyes of their Slovak brothers, the Slovaks' nationalistic myopia was far worse. Their grumbling about Czech "paternalism" while at the same time in willing receipt of Czech assistance, their strong affinity for myths favorable to the Slovak cause and hostile to external contexts, their tendency to unrealistic decision making—these and other "specificities" of Slovak politics were apt to be taken as symptoms of immaturity and (with some condescension) excused. Their fatal incomprehension of European developments at the end of the 1930s, and their active hand in the destruction of Czechoslovakia—though pressures from Nazi Germany gave Slovak politicians scarcely any room to maneuver otherwise—burdened the Slovaks with new historical baggage that was dubious indeed.

The fall of Masaryk's idea of the Czechoslovak state meant that both nations once more faced their ultimate task: to regain and defend freedom and independence in the shaky space of Central Europe. They would again have to formulate and implement policies that would enforce these basic objectives, their "national interests," whether peculiar to specific needs or aimed at world-oriented objectives. Historical conditions, however, forced Czechs and Slovaks to wait fifty long years before a new opportunity to do so finally came. After the six dark years of Nazi rule during World War II, Edvard Beneš, the second president of Czechoslovakia, was unable to restore the country's independence or the legal and political order of the prewar "first republic." His three-year regime failed, and the even darker era of communism arrived in February 1948. For more than forty years (discounting a few months of sudden liberalization in 1968) Czechs and Slovaks had to live under an oppressive totalitarian regime that was very inventive and efficient in manipulating Czech-Slovak tensions to strengthen its own rule. The constitutional law enacted in October 1968, according to which the unitarian state was transformed into a federation, changed practically nothing of the situation. Federalized totalitarianism remained totalitarianism. The next moment for change, a real chance to start anew in solving Czech and Slovak questions, did not come until the collapse of communism in the autumn of 1989.

#### On the Road to Divorce

The fall of communism brought long-desired freedom to Central and Eastern Europe. But at the same time, it meant the reemergence of very



complicated cultural, ethnic, and political tensions that had been fermenting over many centuries. After decades under the timeless spell of a very well stabilized late totalitarian regime, Czechs and Slovaks found that the moment arrived quickly and that things moved very rapidly. It was as if history, sleeping in the "heart of Europe" for quite a long time, had finally woken up again.

Czechs quickly recalled their Masarykian traditions and perceived this sudden reversal of their political fortunes in a universal context. In the new political processes they recognized new opportunities for global, world-oriented, solutions to the "Czech question." The Cold War, finally brought to a happy close, represented to them—like World War I in Masaryk's conception—not merely a conflict between giant power interests but also an epochal event, a clash between two great principles of civilization, two world ideologies. In that regard it seemed absolutely clear, from the Czech point of view, that Czechs and Slovaks had made or participated in one common revolution and should consequently strive together for the fulfillment of its objectives and ideals. The "return to Europe" has been a symbolic cipher for demolishing the consequences of the long totalitarian regime, for returning to the Masarykian foundations of the common state, for the radical transformation of the political and economic systems of the country, and for the reorientation of the country's international relations—and so forth.

Slovaks shared with the Czechs in greeting the collapse of communism with spontaneous enthusiasm. But from the very beginning of the "Velvet Revolution" they observed, with a certain anxiety and displeasure, that the Czechs were once again inclined, on liberation from oppression, to adopt their well-known biases and bad habits. Once again Slovaks felt wary of being deprived of their own causes, to be enlisted instead into Czech agendas to fight Czech struggles. Certainly most causes would be the same for all. But, also certainly, what occurred in Czechoslovakia after 17 November 1989 was not one velvet revolution but at least two—one in Prague and one in Bratislava.

Rather typically, at first Czechs did not even realize what would prove to be a major problem of these new developments. Much as they had after 1918, they underestimated the political weight and power of the awakened national consciousness of their Slovak brethren. Absorbed in other, more "rational" and thus, from their more "world-oriented" point of view, more important tasks of rejoining the European community, they did not see the need to pay attention to (in their view) petty, not very European, Czech-Slovak questions.

On the contrary, Slovaks continually stressed the importance of

new, more balanced Czecho-Slovak relations and increasingly emphatically demanded radical changes in constitutional arrangements. The more they felt unlistened-to and misunderstood, the more they began to succumb to their traditional nationalism.

The relapse into Czechoslovakism on the one side and the reawakening of Slovak nationalism on the other became the most salient and dynamic element in the ensuing political process. Despite all the importance attached to shared tasks and problems, repeatedly emphasized and reflected above all on the Czech side, the historical initiative in postcommunist Czechoslovakia lay with the Slovaks. The most crucial aspect of the country's return to Europe became the question of the yet to be realized Czecho-Slovak Settlement, the new foundation of statehood, the new constitutional and legal framework for Czecho-Slovak relations. Here, not elsewhere, was the central problem of posttotalitarian politics, the elemental theme on which the new political culture would be refined and further developed.

In the first phase of developments after November 1989 the political scene in Czechoslovakia was dominated by large political groupings that had emerged in the course of revolutionary events and then prevailed, due to revolutionary credit, in the first free elections in June 1990: the Czech Civic Forum (OF), the Slovak Public against Violence (VPN), and the Christian Democratic Movement (KDH). The major role in the political life of the country was played by Václav Havel, a president of Masaryk's stature, for his brave resistance to the totalitarian regime and for his deep insight into the nature of the crisis of modern humanity. He is a highly respected moral and political authority, both at home and abroad.

In an atmosphere still heady from memories of the Velvet Revolution, which ended the nightmare of communism, consensus-oriented policy appeared to be strong enough to keep conflicts and disputes under control, if not resolve them. Unifying principles, not differentiating interests, were still the main theme of postcommunist discourse. Thus when the Czecho-Slovak question resurfaced in Parliament for the first time, in the context of a debate over the official name for the liberated republic in February 1990, hardly anybody suspected that a dispute on whether or not to hyphenate the word Czechoslovakia would trigger the process that would end three years later in a complete split of the common state.

President Havel was among the few who recognized the relevance of that early signal and directed the Czech side toward tolerance and understanding of Slovak demands. As head of the common state, he tried to persuade both sides to rebuild from what he called "federated totalitarianism" a genuine—that is, strictly symmetrical—

federation. According to this proposal the system of government would be radically decentralized. The two national republics, whose share in the sovereignty of the state had already been formalized in 1968, would play the main role in this decentralization. They would be made more "visible" (as distinct entities in the state); they would be given much greater powers than before; each would assume responsibility for its own affairs; they would even become the fundamental source of law in the transformed federation.

Over the next two years discussion on the distribution of competences between the federation and the two national republics, and on the basic philosophy of the constitutional system in preparation, continued to reflect core Czechoslovak differences. The Czech side always stressed the need for functionality of any solution adopted, the need to delegate to the central organs enough power to perform their duties efficiently. As to basic constitutional architecture, they unequivocally favored giving primacy to the federal constitution and assigning the constitutions of the two national republics a subordinate role. They were prepared to accept the subsidiary role of the Czech constitution accordingly. They further argued that if the foundations of a reborn democratic state were to be properly laid, reconstruction must begin at the federal level. Only from there would it be possible to delegate power, whether executive, legislative, or judicial, to next-order segments of society that would create the whole constitutional system. They adduced the additional argument that the key to successful constitutional reform was the uninterrupted continuity of the Czechoslovak state. If proposed reforms presupposed even a very short-term suspension of the state (in the moment when state sovereignty would be passed from the federation to the two national republics), many unhappy and intractable legal consequences might ensue, especially in the realm of international law.

Slovaks, on the contrary, unequivocally insisted on their right to self-determination. In their view the only way to create a "genuine federation" was to build its components from scratch on two independent pillars, with full state sovereignty for each, subsequently delegating negotiated aspects of power to the federation.

Irreconcilable as these two positions may seem, concerted efforts to negotiate a viable compromise by representatives of the two national councils, and particularly by Petr Pithart and Jan Carnogursky, the prime ministers of the two national governments, were not entirely unsuccessful in the months between spring 1990 and spring 1992. A series of negotiations, held in different Czech, Moravian, and Slovak castles and other historic venues, aired many practical issues from the

standpoint of both sides and brought some consensus. The very fact that top-level dialogue between the two nations occurred without incident was very helpful in overcoming mutual prejudices and disinclinations to communicate. At the end of that two-year interval a solution to the constitutional puzzle seemed very close: in Miloš Zeman an agreement was almost reached between the Czech and Slovak national councils. The proposed solution required several steps. First, a State Treaty would be signed between the two national councils, which would delegate the sovereign power of two national republics to the Federal Assembly. Second, the Federal Assembly, on the basis of this initiative (which was fully legitimate according to the existing federal constitution), would draft and pass the new Federal Constitution. Third, the new Constitution would be ratified and accepted by the two national councils. Unfortunately the presidium of the Slovak National Council—at the last moment and by a one-vote majority—rejected the prepared agreement. The imminence of upcoming elections put an end to the whole process.

In the meantime, however, posttotalitarian political adjustments continued. The big movements that had at first united the entire population to overcome the totalitarian government were now collapsing under internal differences. The first generation of postcommunist politicians, many of whom had been active dissidents in the past, were gradually unseated by a second generation who, with less of a dissident past, were less inhibited by moral scruples and more apt to proceed pragmatically. In Czech lands the Civic Democratic Party (ODS) of Václav Klaus took over the reins from the Civic Forum. The Movement for a Democratic Slovakia (HZDS), headed by Vladimír Mečiar, seceded from the Slovak Public Against Violence (VPN) and rose to dominate the Slovak political scene. These were undoubtedly positive developments. Yet it was soon recognized that the new political style suffered from many serious shortcomings of its own.

Czech political discourse was again heavily ideologized. A New Right that emerged in Bohemia, intolerant, dogmatic, and aggressive against all opponents, polarized the political scene and fed already existing tensions. In Slovakia a nationalistic, populist policy increasingly attracted public support and discouraged real democratic dialogue. Though politicians from both nations had succeeded in establishing at least reasonably good working relations, the new tensions that emerged everywhere reopened, or deepened, the gap between Czech and Slovak. In the eyes of the Czech right Slovakia had taken a very dangerous “leftish” turn. To Slovaks, in a climate of exacerbated nationalism, any Czech decision or action was perceived

as untrustworthy or, at best, a new manifestation of old-fashioned Czech paternalism.

The new political strategies based on negative campaigning proved much more successful than the consensus-oriented policies of the first generation. They were a much more truthful reflection of the situation and mentalities of the posttotalitarian society, offering its troubled and uncertain populations at least some guidelines and certainties, however illusory. In the second free elections, in June 1992, ODS and HZDS gained decisive victories, and Klaus and Měčiar became prime ministers in their respective nations.

The change in government brought a radical reversal in negotiations over the new Constitution. Former representatives had been willing to keep negotiations open, even without visible results (the persistence of Petr Pithart, former prime minister of the Czechs, was almost proverbial); the new generation preferred unambiguous, explicit, and fast solutions. The idea was now to get rid of all uncertainties around the constitutional arrangements as soon as possible. The sooner a solution was reached, whatever it might be, the better. Under this impetus, especially at Klaus's urging, negotiations began to move very rapidly after June 1992. Instead of constantly making concessions to the Slovak side, instead of always managing to leave a window open for maneuvering and new Slovak demands, Klaus said very firmly, on behalf of the Czechs, no more, that's enough—if we cannot agree upon a rational common solution (functional federation), the only alternative is a quick separation. Quite unexpectedly the Czech side took the offensive in negotiations with the Slovaks and got its own way. On 1 January 1993 the country was dissolved and two new states, the Czech Republic and the Slovak Republic, came into existence.

#### Lessons of the Past, Prospects for the Future

The central theme of this volume is the phenomenon and concept of "public policy debate" in emerging democracies, that is, the place and role of public political debate in the political process, and its impact on decision making. Summing up the Czechoslovak (and Czechoslovak) experience with respect to the most important decision made after the Velvet Revolution, we may say that hardly any significant and influential public political debate occurred that could be discussed and analyzed in the present context. The Czechoslovak divorce demonstrated, albeit negatively, the crucial importance of public debate to political decision making—and what can happen in its absence. There are no independent institutions that could furnish a meeting place for informal political discussion, that could provide a

forum for alternative solutions and broaden the range of choices, or that could influence decision making not through political power but indirectly, by clarifying and addressing issues of public interest from a wider perspective than that of those in power. This is one of the most important and most disturbing features of the current state of posttotalitarian politics in the former Czechoslovakia and represents the greatest challenge for all involved, whether directly or indirectly.

Having said all that, I do not mean that Czechoslovakian affairs of recent years have proceeded in a climate of utter silence. Just the opposite was true. Politicians, journalists, academics—everyone—spent a good deal of time disputing all possible aspects of Czechoslovak relations. But the outcome of these endless polemics was poor and their impact more negative than positive. What was adopted as the only possible solution to the constitutional crisis was not at all a well thought out and well argued reform of an obsolete legal order, a reform that was not only balanced in terms of the basic needs and interests of both national communities but based on the consent of their populations. The end result reflects, more than anything else (which might include the strength of ethnic factors and the historical choices of the two communities) the helplessness of both Czech and Slovak political elites, a striking inability to find and implement some better, mutually more advantageous and inventive solution. When ODS and HZDS announced their agreement to split the country, people felt no joy or pride that the puzzle had been resolved, but only “relief from the decision,” as Ludvík Vaculík, one of the most respected Czech writers, put it—relief that what had preoccupied both nations for two years was finally over.

Looking back, one has to admit how powerful the totalitarian past remains in posttotalitarian decision making. In blaming the Czechoslovak divorce on historical necessity, President Havel did not seek to justify himself or to abdicate personal responsibility. He was merely describing what seemed to him a dominant element in the strange play that he (a playwright as well as a president) was performing in as one of the main characters: an automatism inherent in the course of posttotalitarian human affairs, which is much stronger than any concrete political will that is engaged with it. This places in a “tragic” trajectory all participants who might feel, for whatever reason, obliged to work against the current or to stop it, or change its direction.

The split of Czechoslovakia is now a fait accompli, and irreversible. Though public policy debate has not seemed to play a significant, positive role in the process, the more relevant question

today is its potential for developments ahead, in the "post-Czechoslovak" future. To bring the process of separation, with all its technical details, to a successful end, to guarantee that things will continue as smoothly as they have gone thus far, is unquestionably the greatest task confronting both the Czech and the Slovak governments. But even more than that is at stake in the political agenda. The destiny that led to the divorce of January 1993 may play further tricks: it may not allow the two nations to go their ways separately after all. That radical turn in Czechoslovak relations will set the tone and create the agenda in ways that were not intended. Old tensions will recur again and again, even where politicians on both sides would prefer to forget the Czechoslovak problem.

Certainly there are many good reasons why Czechoslovak relations should be kept as close and cordial as possible. One reason is more important than any: the two nations are linked through a practically insoluble web of varied interrelationships. Tens of thousands of Czechs and Slovaks (not to mention the Romanic, or Gypsy, community that lives in both republics) are tied through family connections. Because of these and many other common experiences over centuries of continuity and nearly seventy-five years of union in a single state, Czechoslovak friendship is no empty term. It is still a living reality. These loyalties require a truly deep transformation in Czechoslovak relations, as a moral obligation. All ideas of a common state are safely dead now, and unrevivable in the foreseeable future. In this milieu the idea of Czechoslovakism, correctly understood, is more genuine now than ever before. Not, of course, in the traditional sense of Czech domination of the weaker, Slovak brother, but as an appeal to mutual solidarity between the two, in hopes of insuring that policy makers in both independent states will not misuse the separation to build artificial barriers, escalate tensions, or deepen misunderstandings.

In this respect one of the most urgent tasks ahead would seem to be the opening of new channels of communication between opinion makers, to promote more thoughtful dialogue between and among them, to introduce the standards and practices of public policy debate into the posttotalitarian political arena, and to create and strengthen institutional structures necessary for the cultivation of better decision making. The split of the common state has generated a whole series of questions that may—indeed, will—have political implications that will require public debate in a joint Czechoslovak forum:

- In what sense can historical arguments be relevant and helpful after the political realities of the split? What is their place in formulating a political agenda today?

- Do the Czech and Slovak Republics have shared economic interests beyond the satisfactory conclusion of the division? If so, what are they? What policies can help promote such ends and, in turn, which might cause direct or indirect harm? What institutions can best foster Czecho-Slovak dialogue on socioeconomic matters? What are the critical issues in dividing the common economy? What would be the most painful operation from the economic point of view? What will the long-term trends be in the differentiation process?
- What role can and should the law play in deciding on and implementing the radical changes of state division, which will have far-reaching and hardly foreseeable consequences not only for the Czech and Slovak populations but also for geopolitical developments in Europe? Inasmuch as one of the main goals of the posttotalitarian societies is to create and strengthen the rule of law, how will that, and the authority of law (both national and international) relate to the transition process? What are, in legal terms, the "rules of the game"?
- The changes that have occurred in Czechoslovakia involve a transformation of the existing constitutional order and, as well, a transformation in terms of international law. What connects the two? How is the domestic process related to its projection in international relations? As for Czecho-Slovak relations, what should be considered from the legal point of view, if after January 1993 domestic affairs between two formerly constituent nations in a union can no longer be treated as such but must become part of foreign affairs?

There is much at stake. Jan Patočka, perhaps (next to Masaryk) the most important Czech philosopher of the twentieth century, once wrote that Czechs need Slovaks, for at least this reason: to learn the truth about themselves. Past and present experiences have demonstrated not only the lasting wisdom of that statement, but also its obverse: that there is not only a Slovak truth about Czechs, but a Czech truth about Slovaks. The current transition from the closed state of totalitarianism to an open society is vitally dependent on mutual coexistence and cooperation.

No doubt this symmetrical model of Czecho-Slovak relationships will be a key element of any new and stable arrangement in the "heart of Europe." And how can Czechs and Slovaks otherwise fulfill that goal, how can they protect their national interests and satisfy their natural human needs without a common search for linked truths,



however divergent? Through dialogue they can remain connected despite their present separation.

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# QUESTIONS OF CZECH CITIZENSHIP

*Martin Palous*

## *Introduction*

When we think about the concept of citizenship, which is certainly a fundamental political category, we immediately discover the following ambiguity. According to the standard definition, citizenship is a legally codified relationship between individual and state, a relationship that determines the rights and duties of individuals with respect to the state. However, it is obvious at the same time that such a definition is far from sufficient, for it omits what is perhaps the most important aspect of the problem of citizenship, which can be reduced neither to a legal formula nor to the factual description of its implementation under given historical and political circumstances.

Citizenship, as Daniel Warner points out in his paper, has besides its external or 'objective' aspect, also its inner, 'subjective' dimension. It presupposes that there are individuals in human society who are open to the idea that there are persons who comprehend and understand what it means to be a citizen. Citizenship is not a value-free (*wertfrei*) social fact, but a dynamic element of political reality. It is what literally *makes* the difference between the free life of a citizen and other life possibilities of human beings (between *euzen*, to live well, and *zen*, to live in the Aristotelian sense.<sup>1</sup>) As the constitutive element of civic identity, as an awareness of the difference between the various ways in which human life can be lived, citizenship depends above all on certain states of the human mind and presupposes the willingness of people to become citizens. It is not only that

<sup>1</sup>Aristotle, *Politics*, 1252b30: 'the state . . . originating in the bare needs of life, and continuing in existence for the sake of a good life'.

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which formally guarantees citizens their status, nor is it part and parcel of 'objective' political reality. In addition, citizenship is what motivates free human beings, what makes their lives 'good', and what inspires them to act in the way in which the founding fathers of the American Republic acted, giving the constitution to the people of the United States in order to promote not only 'the general welfare', but also to 'secure the blessings of liberty to ourselves and our posterity'.

### *The Legal Implications of the Split of Czechoslovakia*

There were two major political events which had a decisive impact on the present state of Czech citizenship: the Velvet Revolution (November 1989), which swept away the communist regime, and the split of the common Czechoslovak state at the end of 1992. The relation between these two events – the (at least at first sight) strange and paradoxical fact that, due to the collapse of communism, Czechoslovakia disappeared from the political map of Europe on 1 January 1993, after more than seventy-four years of existence – will be dealt with in the second part of this paper. This part will concentrate on the legal dimensions of this unexpected development and some of its legal implications.

On 25 November 1992, the Czechoslovak legislators who were elected in free and fair elections in June 1992 passed the Act on the Dissolution of the Czech and Slovak Federal Republic. The Federal Assembly of Czechoslovakia resolved:

- that on 1 January 1993, the Czech and Slovak Federal Republic would cease to exist and two successor states, the Czech Republic and the Slovak Republic, would replace it;
- that federal legislation would be invalid as of this date and the institutions of the Czech and Slovak Republics would become the sovereign sources of law on their territories;
- that on 1 January 1993 all federal organs, authorities and other institutions financed from the federal budget (such as army, police, etc.) would be dissolved, and all federal powers explicitly stated by the law or implied in the framework of the existing constitutional order would be transferred to the newly founded republics;

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– that in order to have all the necessary legal instruments for cooperation between the Czech Republic and the Slovak Republic ready immediately after the split, the Czech and the Slovak governments would be immediately authorized to prepare and ratify mutual international treaties, which would come into force after 1 January 1993.<sup>2</sup>

When the Federal Assembly finally took the decision to terminate the existence of the state they represented there appeared to be no other solution to the Czecho-Slovak problem. Things simply had gone too far and the process of the country's disintegration seemed irreversible.

The referendum, which was originally seen as the only legal mechanism for deciding between the continuation or dissolution of the common state, could not take place because of the absence of the necessary legislation and because of the lack of political will of the parties controlling parliament to enact a constitutional amendment to make the referendum possible.

An independent Slovak constitution which declared its superiority over the federal legal order had already been passed by the Slovak National Council on 1 September 1992. The Czech National Council was working intensively on a similar document for the Czech Republic.<sup>3</sup>

The two major political parties in the Czech and Slovak Republics, the Civic Democratic Party (ODS) and the Movement for a Democratic Slovakia (HZDS), which won the June elections, immediately concluded a mutual agreement to cooperate decisively in dismembering the 'dysfunctional' federation, and implemented their plan step by step. When Václav Klaus and Vladimír Mečiar, the new prime ministers, signed the 'Bratislava Declaration' on 23 July 1992<sup>4</sup> in their capacities as party leaders, one could have doubted whether the Czecho-Slovak Federation

<sup>2</sup>The Constitutional Act of the Federal Assembly of CSFR 542/92 of 25 November 1992.

<sup>3</sup>The Czech Constitution was passed on 16 December 1992 after tough and difficult discussions.

<sup>4</sup>According to the agreement signed by Václav Klaus and Vladimír Mečiar, ODS (the Civic Democratic Party) and HZDS (the Movement for a Democratic Slovakia) – the winners in the parliamentary elections in June 1992 – would propose that the Federal Assembly should enact 'A law on the possible ways of CSFR's termination and on the settlement of questions of property and other relationships.'

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was really in such a bad 'dysfunctional' condition; by the end of November 1992 there could be no doubt.

Strangely, the legal solution to the problem of Czecho-Slovak relations appeared to be the most dynamic issue on the political agenda of post-communist Czecho-Slovakia. This had two aspects which could not be separated, but which must be very clearly and precisely distinguished from one another. The split of Czecho-Slovakia and the creation of two independent states means a transformation of the existing constitutional order and, at the same time, a transformation in the relationship of the parties under international law.

From the point of view of international law, Czecho-Slovakia was divided when both partners agreed to dissolve the federation. Both the Czech Republic and the Slovak Republic were created as new states. Succession, however, meaning discontinuity of a state as a subject of international law, implies at the same time continuity in its international obligations. Both the Czech and Slovak Republics declared on the first day of their existence (1 January 1993) that they assumed all the obligations of the Czecho-Slovak Republic. This declaration is seen by the international community as an important condition for the international recognition of successor states and their integration into the system of international relations. The fact that both the Czech and the Slovak Republics were quickly and easily recognized internationally, and that they entered into practically all the important relationships which had been created and cultivated by the Czechoslovak state, is one of the key arguments in favour of those who organized the split of the common state. The positive importance of this fact is inestimable.

Nevertheless, for the heirs of Czecho-Slovakia the question of the continuity or discontinuity of the state and the international implications of the dismembering of the Czecho-Slovak Federation represent very sensitive issues. In the present political context, any attempt to problematize the already accepted legal interpretation of the history of Czecho-Slovakia could have far-reaching consequences for the successor states, seriously damaging their specific national interests and complicating their mutual relations. This problem can be illustrated by the polemics around the ratification of the Czecho-Slovak-German Treaty in spring 1992. The tendency of the Slovak leaders at that time to cast doubt on the fundamental dogma of Czecho-Slovak state-

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hood – that is, the uninterrupted continuity of Czechoslovakia during World War II and the alleged nullity *ab initio* of the Munich Agreement – by raising the question of whether the Slovak state came into existence in 1939 as a subject of international law was rejected vigorously by the Czech side because it touched upon the highly sensitive issue of Czech-German relations.

The question of the continuity or discontinuity of the state also played a very important role in the transformation of the constitutional order.<sup>5</sup> Here it might be useful to recapitulate the legal interpretation of the origin of the independent Czechoslovak state in 1918, keeping in mind the fact that uninterrupted existence was seen as the cornerstone of modern Czechoslovak statehood. The proclamation of the independence of Czechoslovakia on 28 October 1918 was interpreted by leading Czechoslovak legal experts as a 'legal revolution' against the Austro-Hungarian monarchy. Legal revolution meant legal discontinuity, the end of the existing legal order and the emergence of a new one. It had a very important consequence: the principle *lex posterior derogat priori*, the new law abrogates the old one, does not apply in this situation and there are no old laws in force after a new legal order has been born. The preservation of legal continuity (which is a necessary condition for stability during an interim period) requires the enactment of the reception norm explicitly enumerating the laws, legal provisions and regulations of the former regime which are valid henceforth. In the case of Czechoslovakia, the reception norm was Act 11/1918 (the constitution was enacted only in 1920); and this act was, from the legal point of view, the proper centre and origin of the new legal order.

The reception norm also created Czechoslovak citizenship: the existing legislation (par. 2 of the Austrian Law of December 1863 and par. 5 of Hungarian Law number XXII of 1886) was declared as remaining valid. All individuals 'who had by the 28th of October, 1918, the right of residence in a municipality in the territory where the Czechoslovak state exerts its sovereign power' were considered Czechoslovak citizens. The emergence of this new legal order was confirmed and internationally legalised.

<sup>5</sup> A detailed analysis of the problem can be found in a paper by Václav Pavlíček, 'O kontinuitě a diskontinuitě' ('On Continuity and Discontinuity'), *Právní praxe* (1993).

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zed at the Paris Peace Conference (1919-1920) as part of a whole package of treaties that said that 'state citizens of Germany, Austria and Hungary should be incorporated within the seceding states'. Taking into consideration that international treaties can only bind contracting parties, i.e., sovereign states in mutual relations, and cannot be regarded as a legal source of individual rights of their citizens, the agreed principles and regulations of these international treaties were later incorporated into the Czechoslovak legal order by a special Constitutional Act (236 of 9 April 1920) which then served as the basis for the general regulations of Czechoslovak citizenship, defining who was a Czechoslovak citizen and how someone could gain or lose citizenship.

The central dogma of Czechoslovak domestic and international policy became the assumption of legal continuity, the demand that all subsequent legal acts which together would create the whole corpus of Czechoslovak law must be tied to the basic source of law and that they would have to be connected with what is considered to be the real beginning of modern Czechoslovak statehood, and that any discontinuity was to be prevented at any price. And it was this dogma, rather than chauvinism of any kind, or Czech imperialism, or Pragocentrism, that caused the idea of the Czechoslovak state to fail in the end.

Nothing can better demonstrate how powerful was the conviction that state continuity had to be kept at any price than the peculiar fact that even the communists interpreted their seizure of power after World War II (in which they really succeeded in turning the order of human affairs upside down, and for which they had their revolutionary ideological explanation) as if it complied with the existing legal order. When the government crisis was being resolved in February 1948, it proceeded, according to the official communist interpretation, 'in compliance with valid constitutional provisions... combined with distinctively revolutionary means'.<sup>6</sup> Even the proclamations of 'Action Committees', the typical revolutionary organs, were later legalized: what they did was declared to be 'in compliance with the law, and that also in the cases in which they otherwise

<sup>6</sup>Quoted from the Commentary on the Constitution of CSFR [Výklad Ústavy CSFR], Praha 1987.

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were at variance with appropriate provisions and regulations'.<sup>7</sup> Constitutional changes during the communist regime – the Constitution of 9 May 1948, the so-called 'Socialist Constitution' of July 1960, and finally the Constitutional Act of October 1968, which transformed the unitarian Czechoslovak state into a Federation – never indicated that the otherwise revolutionary communist regime could ever conduct a 'legal revolution' in the sense of the discontinuity of law. The opposite was true: the May Constitution of 1948 explicitly declared its continuity with the first Czechoslovak constitution of 1920. In spite of the fact that the communists destroyed the concept of the state which Masaryk and his successor Benes had developed, a state built on the ideals of humanism and on the principles of the rule of law and political democracy, and in spite of the fact that they transformed the whole Czechoslovak political system 'in the likeness' of their Marxist-Leninist ideology, the communists stuck to the concept of legal continuity and passed off their revolutionary *opus magnum* as identical to the 'bourgeois', 'pre-Munich' republic.

The unconditional protection of the continuity of the state as it was founded and the rejection of any step which could problematize this foundation was also at the heart of so-called Czechoslovakism. This concept of one Czechoslovak nation composed of two ethnic branches, Czech and Slovak, from the very beginning problematized and burdened Czechoslovak relations. Because, in many respects, the Czech side was much stronger than the Slovak side (we will examine this problem in the next section), the relation between them was asymmetrical. From this it followed that the Czechs were always much more committed to the reason of the common state (they considered themselves as both Czechs and Czechoslovaks) than Slovaks (who regarded themselves exclusively as Slovaks and whose political identity had only very loose ties with Czechoslovak statehood). This asymmetry continued to characterize the Czechoslovak political system until the end of its existence, despite the fact that the Constitutional Act of 1968 transformed the unitarian state into a federation of national republics and gave Czechoslovak citizens a new legal identity: having either

<sup>7</sup>*Ibidem*.



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Czech or Slovak citizenship according to their birthplace, in addition to original Czecho-Slovak citizenship.<sup>8</sup>

No political event was powerful enough to eliminate this asymmetry, except, perhaps, the end of communism. On 1 January 1993, three years after the Velvet Revolution, Czechs and Slovaks finally got rid of the hated totalitarian regime, and seventy-four years after they spontaneously rejoiced over the first 'legal revolution' in this century, which brought them together, the second 'legal revolution' came and this time split them apart. The return from the Babylonian captivity of totalitarianism initiated a political process which discontinued the long-lasting legal continuity. Czechs and Slovaks, whose marriage in 1918 turned out to be rather difficult and not particularly happy, are legally divorced now and both are facing an entirely new, unknown and unpredictable situation.

Czecho-Slovak citizenship ceased to exist, and both republics have had to enact their own necessary legislation. Czech citizenship is automatically given to 'those physical persons, which by December 31, 1992, were state citizens of the Czech Republic',<sup>9</sup> and at the same time of the Czech and Slovak Federal Republic.<sup>9</sup> The Czech residents who are Slovaks by birthplace (i.e. who were state citizens of the Slovak Republic and the Czech and Slovak Federal Republic) must now apply for Czech citizenship if they wish to acquire it. Applicants have to fulfill certain conditions: they have to prove two years registered residency and five years with no criminal record. The implications of this decision for the future of Czech-Slovak relations, and its special impact on certain social groups which could become stateless after 31 December 1993, will be examined at the end of this study.

#### *Problems of Czecho-Slovak Citizenship in a Historical Perspective*

The communist regime which seized power in February 1948 succeeded in one important respect: it destroyed the public space in this country in such a way that the sheer concept of 'citizen' seemed to lose meaning for the average member of Czecho-Slovak society. This success, however, was not immedi-

<sup>8</sup>The Constitutional Act on the Czecho-Slovak Federation, n. 143/1968.

<sup>9</sup>The Citizenship Law (Law 40/1992 of the Czech National Council), par. 1.

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ate. In the first period, Czechoslovak civil society was still relatively resistant and only slowly adapted itself to the enforced principles of socialist life and socialist morality. The real crisis of citizenship emerged only in the second period. It was normalization, i.e., the restoration of order after the unsuccessful 1968 'Prague Spring' attempt to open a closed society, which had a devastating effect on the state of the Czech and Slovak political mind. The 'origins of totalitarianism' in Czechoslovakia, the revolutionary Stalinist 1950s, were certainly more cruel and more tragic from the point of view of the victims of that criminal regime, but the 1970s and 1980s seemed to be a period in which the social experiment of Marxism-Leninism, Central European style, reached its height. To quote Václav Havel:

The past twenty years in Czechoslovakia can almost serve as a textbook illustration of how an advanced or late totalitarian system works. Revolutionary ethos and terror have been replaced by dull inertia, pretext-ridden caution, bureaucratic anonymity, and mindless, stereotypical behaviour, all of which aim exclusively at becoming more and more what they already are. The songs of zealots and the cries of the tortured are no longer heard; lawlessness had put on kid gloves and moved from the torture chambers into the upholstered offices of faceless bureaucrats.<sup>10</sup>

The war and the killing assume a different form: they have been shifted from the daylight of observable public events, to the twilight of unobservable inner destruction. It would seem that the absolute, 'classical' death of which one reads in stories (and which for all the terrors it holds is still mysteriously able to impart meaning to human life) has been replaced here by another kind of death: the slow, secretive, bloodless, never-quite-absolute, yet horrifying ever-present death of non-action, non-story, non-life, and non-time; the collective deadening, or more precisely, anaesthetizing, process of social and historical nihilization. This nihilization annuls death as such, and thus annuls life as such: the life of an individual becomes the dull and uniform functioning of a component in a large machine, and

<sup>10</sup>Havel, V., *Open Letters, Selected Prose*, Wilson, P. (ed), London-New York 1991, p. 331.

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his death is merely something that puts him out of commission.<sup>11</sup>

Havel points to what is the most characteristic feature of a totalitarian regime, that which makes it different from all other kinds of tyranny. The Marxist-Leninist ideological perception of political reality materialized at the end, in the Central European environment, in a more absurd than openly demoniacal world of 'real socialism', a world not so much described by George Orwell as by Jaroslav Hasek and Franz Kafka. The society got used to reality, learned how to live with the 'false consciousness' of ideology, how to use its distorted language, and how to get along without trouble and complications. The paradigmatic hero of 'stories of totalitarianism' became the not very heroic 'good soldier Svejk' or the alienated and lonely individual, Josef K.

The Velvet Revolution in November 1989 meant a great awakening. Whatever the real cause of the collapse of communism was, and whoever organized the course of events from behind the scenes, the situation as ordinary people experienced it was simple: they went to the streets and took part in a festival of freedom which unexpectedly burst out during an unforgettable week of public rallies, demonstrations, street discussions and strikes; they rediscovered and restored their civic dignity. The good soldier Svejk, Josef K., numerous strange heroes who populated the landscape of late totalitarianism, became citizens again. A society which was kept closed for more than forty years finally opened up again.

The fall of communism has brought long-desired freedom into Eastern and Central Europe. It has enabled all the nations which were forced to live behind the 'Iron Curtain' to start designing and immediately implementing their fundamental goal of 'rejoining Europe'. They want to do away with all the consequences of decades-long totalitarian government, to profoundly transform their political and economic systems, to reintegrate themselves into all the Western structures, and to make themselves part of its freedom and prosperity.

However, liberation from Babylonian captivity has turned out to be more complicated than it seemed at the beginning: the end of the Cold War era has initiated a very dynamic, barely controllable and, in many ways, very risky and dangerous pro-

<sup>11</sup>*Ibidem*, pp. 329-30.

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cess. It has meant not only the revitalization of the ideals of open civic society in East Central Europe, but also the re-emergence of very complicated ethnic and political relationships which have been developing for centuries. With their program of 'rejoining Europe', the post-communist nations returned to their history. After a long period when they were living enclosed in the strange, ahistoric timelessness of a well-stabilized late totalitarian regime, they have found themselves suddenly in the midst of a fast stream carrying the boats of their political communities into an unknown and hardly predictable future.

The 'return to history' has also characterized the post-communist development of Czechoslovakia and has decisively influenced the genesis of Czech and Slovak post-totalitarian civic identity. Despite the importance of future-oriented goals and objectives connected with the 'rejoining of Europe', the most important part of the post-totalitarian political problem in Czechoslovakia has become the question of the still-to-be-realized Czech-Slovak settlement, the question of Czechoslovak statehood and the question of the constitutional and legal framework of Czechoslovak relations.

Let us look briefly at recent Czech and Slovak political history. The Czechoslovak Republic came into existence at the end of World War I amidst the ruins of the Austro-Hungarian monarchy. On 28 October 1918 in Prague, and on 30 October 1918 in Martin, Czech and Slovak political leaders declared the independence of the Czech lands and Slovakia from the governments in Vienna and Budapest, and proclaimed the political will of both nations to jointly found a new democratic state: Czechoslovakia. The Paris Peace Conference, which started at the beginning of 1919 with the objective of creating a new international order in Europe, confirmed what had happened, recognized that a sovereign, independent Czechoslovak state had been created, and demarcated its borders.

The foundation of a common state represented the fulfillment of long-standing political aspirations both for Czechs and Slovaks. This shared desire, however, was motivated and understood in one way on the Czech side and in another way on the Slovak side. The joint political will masked two different, even potentially conflicting, national interests.

While Czechs have for centuries shared a historical space with Germans, and this mutual history has been a dominant theme

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of Czech history, Slovaks lived in the territory of the Hungarian Empire, and their principal partners and eventual adversaries in the political process throughout history were Hungarians.

While 'The Lands of the Czech Crown' belonged to the most developed industrial regions of Austria-Hungary, Slovakia was rural and industrially much less developed. In its spirit and character, Czech culture reflected the mentality of the 19th-century urban middle class. Slovak cultural identity was formed by the fact that the decisive majority of the Slovak population was peasantry. (The ruling class and the aristocracy in Slovakia were Hungarian and the urban population predominantly German.)

In contrast to Czech secularism, Slovak national culture was religious and deeply devoted to traditional, conservative values. At the same time, the Slovak nation was relatively young in comparison with Czech history. There was nothing in the memory of the emerging Slovak political mind comparable to the 'glorious past' of the Czech kingdom or the Hussite Revolution'. The similar phenomenon of Czech national patriotism which preceded, in Bohemia, the language-oriented national revival in the 19th century, was a practically unknown phenomenon in Slovakia. Before the modern, romantic 'Herderian' concept of nation gained ground here as a reaction to the centralizing efforts of enlightened absolutist rulers who had started to 'Hungarize' the Slavonic population, there was no recognizable Slovak political programme opposing the idea of the Hungarian state and formulating specific Slovak demands.

With the 1867 Austro-Hungarian Settlement, which left the political demands of the Slavonic nations of the Empire unsatisfied, the standing of the Czech lands (which were strong in both economic and cultural terms) did not change greatly. In contrast, the situation in Slovakia dramatically deteriorated as a consequence of the political invigoration of Hungary. The Budapest government, acting out of a fear of 'Pan-Slavism', intensified 'Hungarization' to such an extent that, at the beginning of the 20th century, the fundamental political question in Slovakia did not concern the decentralization of the government and political emancipation, as in Bohemia, but the cultural survival and preservation of the Slovak nation.

From the beginning, the national interests of Czechs and Slovaks, rooted in their historical experience and their basic cultural

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patterns, differed substantively. From these differences it followed that their attitudes towards the Czecho-Slovak Republic were very different. Czechs felt that they finally had their own state, a state which embodied their long-lasting aspirations and gave them a dignified standing among other nations of the 'New Europe'. 'Czechoslovakism', the concept of the one 'Czechoslovak' nation composed of ethnic branches, Czech and Slovak, was seen by Czechs as 'part and parcel' of their modern political foundation. This had, of course, a pragmatic dimension (it strengthened the position of the Czech and Slovak leaders who negotiated post-war international arrangements in Central Europe with victorious Allies at the end of World War I), but in the conception of the founding father of Czecho-Slovak statehood, T. G. Masaryk,<sup>12</sup> it was much more than an artificial *ad hoc* creation justified only by its practicality.

For the Czechs, 'Czechoslovakism' was the way in which to resolve the political problem of the Slavonic nations of the dismembered Habsburg Empire in the spirit of the emerging 'New World Order'. It was also a way in which to build a high purpose on the foundations of the new state. In Masaryk's vision, the idea of the Czecho-Slovak state meant the birth of a political nation and the creation of a new political identity through a free decision of Czechs and Slovaks to live together. It presupposed a shared will to commit themselves to the same ideals and values and to enter and inhabit the common space of national political culture.

While from the Czech perspective, Czecho-Slovak statehood was perceived as a definitive solution of the 'Czech question', for Slovaks the existing state of affairs had only a transitory character and was aimed at offering shelter to the still very weak and vulnerable shoot of their modern political identity and independent existence in the family of European nations. From the very beginning of the common state, the key elements of the Slovak political programme were the preservation of Slovak cultural identity and autonomy. Permanent appeals to the May 1918 'Pittsburgh Agreement' between Czechs and Slovaks in exile and accusations that Czechs did not want to keep to the negotiated agreement were standard arguments of the Slovaks in ongoing Czecho-Slovak disputes and negotiations.

<sup>12</sup>Masaryk, T. G., *The Making of a State: Memories and Observations, 1914-1918*, trans. by Henry Wickham Stead, London 1927.

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The Czechs built their positions on the central dogma of legal continuity, and the Slovaks called repeatedly for constitutional change. Their basic goal and ambition was to 'repair' the original foundation of the state and introduce an element of discontinuity into its constitution. No matter how legitimate and justified their endeavour to see through the process of political maturation, it is a bitter irony of history that their 'Parish Republic', the long-desired 'independent' Slovak state, found its place in Europe at the end of the 1930s as an ally of a political power which neglected all the principles of European civilization, exterminated whole nations and waged a horrible war against the whole of civilized humanity.

The political catastrophe of the Czecho-Slovak state in 1938-39 meant that both nations again confronted a fundamental task: to regain and defend their freedom and independence in the shaky space of Central Europe; and to formulate and carry out policies which would enable them to enforce their fundamental objectives and their 'national interests', whether particular and oriented to specific needs or more general and universal. Historical conditions caused Czechs and Slovaks to wait fifty long years before this new opportunity finally came. Eduard Benes (who was, after Masaryk, the second president of Czecho-Slovakia) failed in his three-year attempt after World War II to restore the independence of the country and renew its links to the political order and traditions of the 'First Republic'. The six dark years of Nazi occupation were replaced in February 1948 by the dark age of communism. For more than forty years (excluding only the few months of sudden liberalization in 1968) Czechs and Slovaks had to live under an oppressive totalitarian regime. A real change - which was also the real chance to start anew in solving the Czech and Slovak questions - came with the collapse of communism in the autumn of 1989.

As I have already remarked, the main question which had to be solved in post-communist Czecho-Slovakia concerned Czech-Slovak relations. There was no other way to rebuild the existing legal order and move towards 'rejoining' Europe than to abandon the asymmetry which characterized all the constitutions of the past (the 1968 federalization did not solve the problem at all: in spite of being federalized, totalitarianism remained what it was by nature - totalitarianism), and to design and approve a new, strictly symmetrical model. In general, two alternatives

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came into consideration and were discussed between 1990 and 1992. On 31 December 1992, the federation finally fell apart.

On the basic constitutional issue of dividing competence and power between the federation and the two national republics, the original positions of Czechs and Slovaks differed considerably. Czechs subscribed to their traditional conception of Czecho-Slovak statehood based on the legacy of the 'First Republic', and they were unequivocally for the primacy of the federal constitution and the derivative character of the constitutions of the two national republics. They were ready to fully respect the principle of subsidiarity within the new constitutional order, the principle today so fashionable in Europe, stressing chiefly the need for the functionality of any adopted solution. But for reasons of principle, they argued, the new foundations would have to be laid at the federal level. This was because it is only possible to delegate power, be it executive, legislative or judiciary, from the federal level down to the next, by definition derivative or secondary, segments which create the whole of the constitutional system. What was unacceptable was the violation of the fundamental rule of uninterrupted legal continuity, a reform scenario whose implementation would presuppose suspension of the existence of the state, however brief such a suspension might be (in the moment when state sovereignty would pass from the federation to the two national republics).

Slovaks, on the contrary, insisted unequivocally on their right to self-determination and on their view that the only possibility for creating a 'genuine federation' (or a 'more perfect union' between Czechs and Slovaks, to paraphrase the American founding fathers) was to build it anew on two independent pillars, with full state sovereignty for the Czech and Slovak Republics who would then delegate some power, to be negotiated between them, to the federation.

No matter how irreconcilable these two positions appeared, the first proposed solution tried to overcome the gap and to negotiate a compromise. This alternative, which was in the end rejected by the presidium of the Slovak National Council by one vote,<sup>13</sup> consisted of three steps: first, a state treaty to be signed

<sup>13</sup>*Budovani Statu 3* ('The Making of a State', *Surveys of Czechoslovak Politics*), published by the International Institute for Political Science, Masaryk University, Brno.



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by two national councils which would delegate the sovereign power of the two national republics to the Federal Assembly. Second, the Federal Assembly, on the basis of this constitutional initiative (which was fully legitimate according to the existing federal constitution), would draft and approve a new federal constitution. Third, the new constitution would be ratified and accepted by the two national councils and, in addition, possibly confirmed by a referendum organized separately in the Czech Republic and the Slovak Republic. This solution was apparently unsatisfactory from the legal point of view and was criticized by its opponents as a 'cat-and-dog' approach, as an attempt to constitute an imaginary creature from incompatible elements. What was unclear – the lack of clarity was not an unintended by-product of incompetent legislative work here, but was intentionally and consciously introduced by the legislators – was the legal interpretation of the proposed procedure: the relation between the international and domestic (or constitutional) dimensions of the problem. Should the state treaty which was to be concluded as the first step have been seen as a treaty between two independent subjects of international law in the sense of the Vienna Convention? Or, rather, should it have been understood as a political declaration of the will of two nations to live together in one state, a declaration having its meaning and interpretation only within an already existing legal order? Where was the ultimate source of state sovereignty, in the National Republics or in the Federation? We can have, after all, either one or two sovereign states. Did not the proposed solution imply a strange state where sovereignty is divided and where a one-state system and a two-state system are to coexist?

The second alternative is the one which was adopted by Klaus and Meciar after the 1992 elections, which was discussed in the previous section. This alternative was posed in the following terms: the first alternative was 'unclear' and therefore should be rejected. The logic of this argument was based on the presupposition that a solution of the Czecho-Slovak puzzle was feasible and could guarantee the necessary stability only if defined through a traditional and transparent scheme. If it was not possible to satisfy the legitimate demands and claims of both national political communities within the legal framework created by one constitution, the only solution was a legal 'div-

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orce' and the transformation of the problem in the sphere of international relations regulated by international law.

We are at the beginning of the new legal history which emerged on 1 January 1993, when the Czecho-Slovak divorce, prepared during the last months of the common state, came into force. So far, things have gone fairly smoothly, but many questions remain to be answered. What impact will the split of Czecho-Slovakia have on the geopolitical situation at the 'heart of Europe'? What course will be taken in Czech-German and Slovak-Hungarian relations? How will Czechs and Slovaks be able to overcome the certain psychological shock of being separated now after decades of being together? What about the Czech minority in Slovakia and the Slovak minority in the Czech Republic, and what about hundreds of thousands of people who live in mixed families and are genuine 'Czechoslovaks'? Is it indeed so certain that the international framework will succeed where the domestic arrangements apparently failed? What about the possibilities of economic and political cooperation in the 'rejoining of Europe'? What will happen if the European situation deteriorates dramatically, if a 'black hole' opens again in the East, leaving Central Europeans trying to escape its influence and provide safeguards for their own nations through a place in the geopolitical space of the West?

We can now see the development of new political and civic identities on both sides of a newly created Central European border. The fact that the split of Czecho-Slovakia has radically dynamized the Czecho-Slovak differentiation is natural and, in essence, positive. What is disturbing, however, is that this process is progressing along ideological lines. The fundamental fact of post-totalitarian development is that the false consciousness which dominated an enslaved totalitarian society has not disappeared with the elimination of communist ideology, but has remained, still ready to be filled with new ideological content. A belief which now surfaces frequently in the Czech political environment and even finds spokespersons on the official Czech political scene is dangerous and should be de-mythologized as soon as possible; it is the belief that the Czech Right, which proved victorious in the June 1992 elections, is correct, and that Czechs, by nature endowed with a Western, i.e., European, mentality should go to the West, while the less European Slo-

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vaks, who succumb easily to the trap of state socialism and populist nationalism, are doomed to stay in the East.

Even more problematic and very dangerous flaws appear in the legislation. The most egregious example is the new Czech Citizenship Law. Article 18 of this law states, as I already mentioned, that in order for 'Slovak nationals' to acquire Czech citizenship, it is necessary to prove two years registered residency and five years with no criminal record. The effect of the law is to discriminate against Romany ethnic groups in particular.

In the years following the Nazi Holocaust, many Romanies moved from Slovakia to the Czech lands.<sup>14</sup> According to the 1969 Czechoslovak Constitution (which remained in effect as far as citizenship was concerned until the end of 1992), these Romanies continued to have Slovak citizenship and nationality in addition to their Czechoslovak citizenship, despite living in the Czech part of what was Czechoslovakia. This is also true for their children and grandchildren who were born in the Czech lands, many of whom have never been outside Bohemia and Moravia. This additional 'Slovak citizenship' and 'nationality' was, in practical terms, a meaningless concept before 1993 and therefore it was not anticipated that it could have negative consequences. Because, according to 1991 Czech government figures, 19% of convicted criminals are Romanies and an estimated 50% of adult Romanies have a criminal record (the other question, which is not touched upon here, concerns reasons of Romany criminality and the social significance and implications of this phenomenon), we can estimate that a large part of the Romany population in the Czech Republic simply will not be eligible for citizenship and will become stateless by the end of this year. Very rough estimates indicate that at least 200,000 people will have to go through the lengthy and humiliating bureaucratic process of naturalization in their own homeland, a process in which many of them cannot succeed. In addition, if we take into consideration the rapidly growing climate of hatred against Romanies in Czech society, which seems to be 'ethnically cleansed' more than ever, and the inability of the post-totalitarian society to find and implement an alternative, non-discrimi-

<sup>14</sup>The basic information about the situation of Romanies in CSFR can be found in Human Rights Watch, *Struggling for Ethnic Identity: Czechoslovakia's Endangered Gypsies*, New York 1992.

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natory and integrationist solution for the Romany problem, we do not need to be overly pessimistic to imagine that we will soon be in an explosive situation with possibly disastrous consequences.

Despite the fact that Czechs and Slovaks (plus national minorities of Hungarians, Romanies, Poles, Germans, Ruthenians and Jews) now live in two different states and that their relations are regulated by international law, they cannot easily separate themselves; their civic societies are perhaps doomed, perhaps blessed, to live next to each other. They simply have to cooperate in all possible ways in the realization of their political goals and, of course, primarily in their economies. But the problems and questions connected with their citizenship and with their new political identities after the disappearance of the common state demonstrate that much more is at stake here. They have no other choice but to struggle together against the paralyzing effects of false consciousness; to cultivate open political cultures through mutual dialogue; to manage mutual conflicts and to settle mutual disputes in order to strengthen the rule of law and recreate civil societies in both states; and to assist each other in all possible ways to fulfill the great task now confronting them: how to dissolve the past and reunite themselves by the end of the millenium, not in a common state (whose era is now finished) but as Europeans, within a European context that will be determined, in part, by them.

# International Law and the Construction, Liberation, and Final Deconstruction of Czechoslovakia

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*Martin Palous*

Czechoslovakia's existence and fate are inextricably tied to the history of international law. The Czechoslovak state is, in fact, an offspring of Woodrow Wilson's vision of a rule of law in international affairs. Czechoslovakia's first president, Tomáš Masaryk, embraced the Wilsonian ideal explicitly at the creation of the Czechoslovak state in 1918:

The history of Europe since the eighteenth century proves that, given democratic freedom, small peoples can gain independence. The World War was the climax of the movement begun by the French Revolution, a movement that liberated one oppressed people after another, and now there is a chance for a democratic Europe and for freedom and independence of all her nations.<sup>1</sup>

The twentieth century, however, put the Wilsonian ideal to the test. In the 1980s, Masaryk's optimistic vision of a democratic Europe seemed to be completely forgotten, and the situation of Central Europe was perceived by Milan Kundera, living in exile in Paris since the repression of the reform movement in Czechoslovakia in 1968, as a tragedy:

Central Europe as a family of small nations has its own vision of the world, a vision based on a deep mistrust of history. History, that goddess of Hegel and Marx, that incarnation of reason that judges us and arbitrates our fate, that is the history of conquerors. The peoples of Central Europe are not conquerors. They cannot be separated from European history, they cannot exist outside of it, but they represent the wrong side of history, they are its victims and outsiders.<sup>2</sup>

And yet, a decade after Kundera's gloomy utterance, it is possible to look back on the development of international law in the twentieth century and see in it one of the main sources of Czechoslovakia's resistance to a facile fatalism. Charter 77, which laid the foundation for the "Velvet Revolution" of 1989, drew its energy and inspiration from international laws and norms that endowed individuals with political rights and the legal "protection" to defend those rights. Although democratic Czechoslovakia dissolved as a unified state in 1992, one can recognize even in that dissolution the reflection of a legal environment that had become more real and relevant to the lives of ordinary people than the abstract speculations of Woodrow Wilson had ever been at the beginning of this tumultuous century.

In this chapter I examine three decisive moments in the career of Czechoslovakia: its creation, its emancipation from Soviet hegemony, and its peaceful yet painful division into two sovereign states. I offer the Czechoslovak experience as a mirror through which to see international law in reflection. As I look through that mirror, I realize that I may be seeing law in a way that is not immediately meaningful to the reader who has, in all probability, grown up and lived in a political setting that is more secure, established, and less subject to the arbitrary forces of history than the one in which I have grown up and lived. International law for me has never been an "epiphenomenon," as realists (who in their vast majority live and write in the United States) have been wont to argue. For me, international law has always been real. It has been a real hope, and it has been a real resource for those of us who have looked to it to attain those elementary goods that are so indispensable to felicitous living. Two such goods come to mind immediately: some regularity in life and a degree of fairness. Nothing, not even the Czechoslovak divorce of 1992, has ever led me to believe that international law is superfluous or "epiphenomenal" in our struggles to acquire those two elementary goods.

#### AT THE CREATION

In retrospect, the nineteenth century was a Golden Age in European history. It was a period of certainty and stability. The belief in progress, in the unlimited power of human reason, and in the infinite improvability of human affairs with the help of science and technology became a dominant factor in the political life of all European

societies. Steady economic growth changed radically the social situation of all strata of the European population. Compulsory education practically eliminated illiteracy and promoted the unprecedented democratization of national political societies. Prudent balancing of power and skillful diplomacy by the major European powers was a safeguard of peace. For ninety-nine years (between 1815 and 1914) there was no general military conflict in Europe.

The Czech national revival and the birth of the modern Czech nation as a reaction to the policy of Austrian modernization has to be seen in the context of this general European progress. Czechs, who sometimes opposed their Austrian rulers bitterly, remained prudently realistic, keeping in harmony with the dominant spirit of the epoch. Even though the hallmark of the Czech national program was political emancipation, Czech policy during the nineteenth century was characterized (except in 1848) by loyalty to the Habsburg monarchy. No matter how tense conflict between Prague and Vienna became and no matter how much Czechs desired change, the empire's existence was generally taken for granted. Generations of Czech politicians believed that the best way to protect Czech national interests was to work for the transformation—not the destruction—of the imperial order. The stabilizing effect of a powerful empire in Central Europe was recognized as a necessary precondition for the development of an autonomous Czech national existence in a cultural, political, and economic sense.

Only the horrors of the First World War showed how illusory and transient these European certainties were. The political order stood on feet of clay, and the self-confident optimism that had characterized European society in the previous century died together with hundreds of thousand victims on the battlefield. Old values were swept aside. The internationalist spirit of nineteenth-century Europe, the cosmopolitanism of European elites, and the transnational solidarity of liberal intellectuals and socialist workers evaporated.

The outbreak of war also caused a radical turn in Czech national policy. The concept of "Austroslavism"—whose main feature was loyalty toward the Habsburg Empire—was replaced by the idea of disengaging from the old monarchy and establishing an independent, sovereign Czechoslovak republic. The most energetic proponent of independence was Tomáš Masaryk. In his assessment of the state of Europe at the beginning of the twentieth century, Masaryk was cer-

tainly an "idealist." His political program was based on the conviction that the war was more than a traditional conflict between European states. The peace based on a balance of power had become irreparable. Far more was at stake than the restoration of a balance of power in Europe. At stake were the spirit of relations between European nations, and the political culture that would dominate human affairs in the twentieth century. A revolution, similar to the one that had given birth to the United States and established on the territory of the British colonies a "New World Order" (*Novus ordo seclorum*), was, according to Masaryk, making its way now to the old continent. A New Europe of free, democratically ruled nations was striving to replace the traditional, hierarchical European order of more or less authoritarian states. The future political architecture of Europe would be shaped by the newly emerging democratic spirit, more integrative approaches, and the development of a peaceful international legal order, which would eliminate war from the realm of international politics.

Under these circumstances, full state sovereignty became the main objective of Czech national policy. The solution to the "Czech question" consisted in "making a state," in the establishment of a republic based on an open, cultivated civil society committed to humanistic ideals. Subordination under the federalized empire of Austria-Hungary had to be replaced by a policy of cooperation with the West and with those countries that promoted the progressive development of Western, that is, European, civilization. The proper place of the small Slavonic nations in Central Europe was, according to Masaryk, on the side of the "democratic" Western powers. In order to become a full-fledged member of the community of European nation-states, the Czechs had to transcend their "smallness."<sup>3</sup> They were advised to go beyond promoting their limited, idiosyncratic needs and interests and to adopt a broader, more general point of view; to introduce courageous, generous, alert, and diligent policy; and to fulfill their particular Central European task in the ongoing creation not only of a New Europe, but also of a New World Order.

Masaryk's approach to the events of his time was very close to that of Woodrow Wilson. Wilson's foreign policy appealed to moral principles and sought to "make the world safe for democracy," which presupposed the democratization of a hitherto "anarchic" international system. From the point of view of Central European nations, the



most attractive feature of Wilson's plan was its provision of autonomy for them and the proclamation of their inalienable right to "self-determination." Wilsonian idealism, however, did not prevail at the Paris Peace Conference. For France and the United Kingdom, the main question was not how to "make the world safe for democracy," but the future of Germany and the restoration of an acceptable balance of power in Europe.

#### THE IMPOSSIBLE IDEALISM OF CZECHOSLOVAKIA'S CREATION.

From the point of view of Masaryk's political program, the result of the postwar reconstruction was far from satisfactory. The internationalist expectations were not fulfilled. Although the League of Nations was created—without the United States—its capacity to influence international developments was much less than was originally expected. The unwillingness of European states to surrender sovereignty in favor of large-scale cooperation and integration paralyzed practically all initiatives to create a system of collective security in Europe. Instead of reestablishing the balance of power, France and Great Britain contributed to the profound destabilization of politics in Germany. The revision of the Versailles Treaty became a major German political objective in the interwar period and opened the door to the ultranationalism of the National Socialists.

Czechoslovakia, created with the consent of the victorious powers and recognized as a sovereign, independent state in the treaties of Saint-Germain (1919) and Trianon (1920), ultimately depended on the power constellation in Europe. As long as the Wilsonian spirit prevailed and the League of Nations appeared to succeed in laying the foundation for a new world order, the prestige and security of Czechoslovakia were great. The return of balance-of-power politics, however, caused Czechoslovakia's situation to deteriorate. One of the reasons that the Czechoslovak state—originally the "favorite child" of the Paris Peace Conference—came to be more fragile and vulnerable was a certain inconsistency that was present already at its very foundation.

On the one hand, there was the Masarykian-Wilsonian internationalist spirit. As a result, the foreign policy of Czechoslovakia put great emphasis and many hopes on international institutions and international law. On the other hand, however, the foundations of the

new state corresponded to the traditional nineteenth-century concept of state sovereignty. According to the interpretation that became the cornerstone of Czechoslovak legal doctrine, Czechoslovakia owed its creation to a "legal revolution" against the Austro-Hungarian monarchy. It was domestic legislation, the so-called reception norm,<sup>4</sup> that was the "source of law" (*die Grundnorme*) for the new legal order.<sup>5</sup> In spite of the fact that the international protection of minorities (there were five special treaties on minorities with the allied or newly created states signed during the Paris Peace Conference) was undoubtedly an important step in the "democratization" of European politics after the First World War, no international provisions or agreements were considered as binding within the domestic system of law. The Czechoslovak constitution (enacted by the Czechoslovak parliament in 1920) was conceived as an expression of free will of an independent nation. On the level of municipal law, the international obligations of Czechoslovakia were simply not taken into consideration.<sup>6</sup>

The problem of the German minority and the fact that Sudeten Germans never fully accepted the idea of the Czechoslovak state and, in fact, did not participate in its foundation turned out to be the Achilles heel of interwar Czechoslovakia. The Munich crisis of September 1938, for all its ruthlessness, nevertheless laid bare the lack of political imagination and flexibility that Czechs and Slovaks had shown over the previous twenty years in trying to solve this politically sensitive problem. It demonstrated not only the lack of interest of great European powers in protecting small nations but the endemic inability of Czechoslovak politicians to introduce the courageous and creative approaches that Masaryk had called for. It showed that Masaryk's internationalism and his desire to resolve the "Czech question" in terms of "world question" had become ensnared in the traditional European realpolitik.

#### THE LEGAL AMBIGUITY UNITING CZECHS AND SLOVAKS

In addition to the resurgence of realpolitik in Europe, the viability of the new Czechoslovak Republic was compromised by the legal ambiguity that characterized relations between the Czechs and the Slovaks themselves. According to Masaryk, the Czechs and the Slovaks, despite all their actual differences, were required by the very logic of progressive reform in European politics to amalgamate into a unified

political nation. There is no doubt that this concept, sometimes referred to as "Czechoslovakism," had a clear pragmatic justification: the fiction of a unified Czechoslovak nation strengthened the position of both Czechs and Slovaks in the negotiations with the Allies concerning postwar arrangements. Masaryk, however, had another, more idealistic reason to promote the ideal of a unified nation. What mattered in the current historical situation was not the protection of cultural heritage and the struggle for narrowly defined national interests. What was at stake here was the ability of the two peoples to live together, to commit to the same ideals and values, and to enter and inhabit a common space in a national political culture. Only as Czechoslovaks could the Czechs and the Slovaks become inhabitants of Masaryk's "New Europe."

Such a conceptualization blurred the most important aspect of "cohabitation" of Czechs and the Slovaks. The Slovaks, when they gave their consent to the creation of the Czechoslovak state, were driven by a set of motives that was different from that of their Czech counterparts. In contradistinction to the idealistic self-understanding of the Czech political cause, which espoused the overarching concept of "world revolution," Slovak interests were defined in the more realistic terms of national existence and self-preservation. This difference between the Czech and Slovak points of departure introduced an asymmetrical element into their relations. Czechs, the dominant element in the new Czechoslovak state, were more committed to its "reason." The central dogma of their version of Czechoslovak policy, both domestic and international, was the unconditional protection of Masaryk's state-ideal. The Czechs refused to do anything that might problematize the constitutional perpetuity of Czechoslovak statehood. From the Slovak perspective, the existing state of affairs was transitory. Their aim was to secure a shelter for the still weak and vulnerable shoot of their modern political identity and existence in the family of European nations. From the very beginning of the common state, the key element of the Slovak political program was autonomy and the preservation of a Slovak cultural identity. Whereas the Czechs grounded their position in the dogma of constitutional perpetuity, the Slovaks called repeatedly for constitutional change. Their goal and ambition was to "repair" the original foundation of the state. They challenged the assumption that the constitution was to be a permanent one. They insisted unequivocally on their right to self-

determination and held the view that the only possibility for creating a "more perfect union," to paraphrase the American founding fathers, was to build it anew on two independent pillars, Czech and Slovak, endowed with full state sovereignty.

#### THE MYTH OF CONSTITUTIONAL PERPETUITY DURING AND AFTER WORLD WAR II

Czechoslovakia's inability to make the relationship between Czechs and Slovaks more symmetrical without undermining the political and legal foundations of the state was not so much the result of an arrogant paternalism of Czech toward Slovak, nor of the nationalism of the Slovaks, as it was the result of the inability on both sides to escape, under the conditions of existing European political order, the troublesome issue of agreeing on the instrumental or foundational and perpetual character of the Czechoslovak constitution. The fear of creating a legal precedent and deciding the issue once and for all weighed more heavily than differences of culture and interest in the politics of unification.

The "Parish Republic," the long-desired "independent" Slovak state that allied with Nazi Germany, was, for sure, the worst possible result of the Slovaks' endeavor to force the issue of their accession to national sovereignty. On the other hand, the dogma of constitutional permanence also led Czech political leaders, particularly President Eduard Benes, to serious political mistakes and miscalculations. During the war years, Benes determined that Czechoslovakia's most important diplomatic challenge was to restore the prewar republic by gaining international recognition for his government in exile and international agreement to declare the Munich Agreement null and void *ab initio*. He was driven by the conviction that the kind of diplomatic activity he had undertaken with Masaryk and Stěfánik during World War I, which led to Czechoslovak independence, could be repeated again. But Benes failed to recognize that his counterparts now not only consisted of American "idealists" and European "realists," with whom he was used to dealing, but also included Stalin's Soviet Union. He also underestimated resistance against Nazis at home and other signals that suggested that postwar European politics would be very different from what he was used to. But his greatest failing was his unwillingness or inability to "use" the crisis of war to

redefine Czecho-Slovak relations. The Slovak national uprising of August 1944 might have meant a new beginning in the legal history of Czechoslovakia. It could have been treated as a focal event leading to the formation of a new, more symmetrical Czechoslovak legal order, as some Slovak lawyers tried to argue after the war.<sup>7</sup> But Benes's rigid legal construction—the state coming out of the war had to be identical with the state that was illegitimately destroyed by the Munich Agreement—blocked any discussion regarding the possibility of constitutional change. It is not Benes's "modernism"—to borrow a term from Nathaniel Berman in this volume—but his "Victorian" legalism that threatened the Czechoslovak experiment in national coexistence.

In a way, Benes got what he wanted. Following World War II, the Czechoslovak state was recognized as identical with the prewar republic by all major European nations, including the Soviet Union, and Czechoslovakia was once again allowed to sit at the side of the victorious powers. Unfortunately, within three years, symbolic victory turned sour: the permanence of Czechoslovak statehood was recognized, but given a content that was discontinuous in the deepest possible sense with Masaryk's spiritual heritage.

In an irony of history, the Communists, after they seized power in February 1948, revealed themselves to be true heirs of the political traditions of prewar Czechoslovakism. As good pupils of Masaryk and Benes, whom they otherwise despised for ideological reasons, they struck to the dogma of constitutional permanence. The Communists seized power and interpreted the takeover as complying with the existing legal order. It proceeded, according to the official Communist interpretation, "in compliance with valid constitutional provisions . . . combined with distinctively revolutionary means."<sup>8</sup> Even the proclamations of the action committees, though revolutionary organs, were later legalized as "in compliance with the law, even in the cases in which they were otherwise at variance with appropriate provisions and regulations."<sup>9</sup> Constitutional changes during the Communist regime (the constitution was revised to make the state a "people's democracy" in May 1948; a "Socialist Constitution" was enacted in July 1960; and the Constitutional Act of October 1968 transformed the unitarian Czechoslovak state into a federation) never suggested that the revolutionary Communist government was enacting legislation that was "discontinuous" from the former, now over-

turned, legal order. In fact, the opposite was true. The Constitution of 1948 explicitly declared its continuity with the first Czechoslovak constitution of 1920. Although the Communists destroyed the concept of state that Masaryk and Benes had developed—a state built on the ideals of humanism and on the principles of the rule of law and political democracy—and although they transformed the whole Czechoslovak political system to conform to the demands of Marxist-Leninist ideology, they stuck to the concept of constitutional continuity and presented the revolutionary state as an entity that was legally identical to the “bourgeois,” pre-Munich republic.

#### THE INTERNATIONALIZATION OF HUMAN RIGHTS AFTER THE WAR.

After World War II, Europe had to rebuild its political structures again. From the perspective of Central Europe, the reconstitution of a balance of power gave rise to a situation that was incomparably worse than the situation after World War I. The Soviet Union emerged from the war as the superpower, and within a few years the Continent split into two antagonistic, ideologically defined blocs. Central Europe became a part of the “socialist camp” dominated by the Soviets, and its ambition to become a part of “Western civilization” came, at least temporarily, to nothing. The Communist leaders who seized power with the assistance of Moscow never missed an opportunity to stress the burden of geopolitics in the new Europe and declared that “eternal friendship” with the Soviet Union was now a vital national interest.

There is no doubt that, from the point of view of the West, the bipolar structure had significant virtues. It enabled Western Europe to make tremendous progress toward integration. Atlantic partnership with the United States provided a guarantee of security and helped to safeguard a common heritage of “Western”—now in geographic terms “Euro-Atlantic”—values: democracy, liberty, and the rule of law. If the formation of a united Europe was really a utopian illusion under the conditions of the Versailles Treaty, in the geopolitical situation of the Cold War it seemed to have become attainable.

But the West’s fortune was Central Europe’s misfortune. A new Europe was being born in the decades following World War II from which it was excluded. And yet, there was another process here,

which must be taken into consideration: the idea of a universal rule of law progressed, even under these unfavorable circumstances, in a way that could not fail to have important consequences for the peoples of Central Europe. After the Charter of the United Nations, dedicated "to the achievement and observance of human rights and fundamental freedoms,"<sup>10</sup> was signed in June 1945, the Universal Declaration of Human Rights was adopted by the General Assembly on December 10, 1948, as "a common standard of achievement for all peoples and all nations."<sup>11</sup> The declaration could obviously only "declare" the principles that all states were to observe. Consequently, the next step had to be to adopt covenants containing "legal obligations to be assumed by States, and measures of implementation."<sup>12</sup> The crucial point, extensively debated during the drafting process, concerned the compatibility of such international agreements with Article 2(7) of the UN Charter, which protected the sovereignty and independence of member states and rejected interference in their internal affairs. What were to be deemed "matters essentially within the domestic jurisdiction of a Member State" was often a theme of heated debate. But, in spite of all the shortcomings of the Cold War international system, international legal discussion was moving gradually in the direction of the deepening of internationalization:

We all recognize that every nation has a right to regulate its own internal affairs. . . . At the same time, however, we must recognize the right—and the obligation—of the United Nations to be concerned with national policies in so far as they affect the world community! This is particularly so in cases where international obligations embodied in the Charter are concerned.<sup>13</sup>

The other sensitive issue having an impact on the question of state sovereignty concerned the formal mechanism to be used in the consideration of complaints of human rights violations—for instance, whether the right of complaint should be given to member states only or whether complaints by nongovernmental organizations or petitions of individuals should be considered. In the end, it took eighteen years before the Covenants (the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights) were finally approved by the General Assembly in December 1966. The ratification process dragged on another ten years. It is interesting in this context that the last ratification (thirty-five ratifica-

tions were required) that was needed in order for the Covenants to be entered into force came in 1976 from Czechoslovakia.

The process of internationalization of human rights changed the international political situation of Europe profoundly, despite all the constraints and limitations imposed on international politics by the reality of the Cold War and in spite of resistance by the Soviet Union and its allies to make concessions on the issue of state sovereignty and the inadmissibility of interference in a state's internal affairs.

Until 1945 the manner in which a State treated its own nationals was, apart from the limited circumstances in which humanitarian intervention was permissible, a question within its own jurisdiction and competence with which other States had no right to concern themselves. Since then, however, the legal position has changed. Human rights, or any other matter with regard to which States have accepted international obligations, cease to be issues solely within their domestic jurisdiction. Other States have a legitimate interest in seeing that these undertakings are respected. The fact that the undertakings in question concern a State's duty to respect the right of its own citizens in no way qualifies the fundamental principle that a State must perform its international obligations and cannot invoke national sovereignty as a pretext for failing to do so.<sup>14</sup>

It is my contention that it was the promotion of human rights through international law that significantly undermined the stability of the political architecture of the Cold War and that allowed Central Europe to reoccupy its lost position in the "center" of European politics.

#### CHARTER 77

The first visible sign that the situation in Central Europe had changed was the rise of dissident movements and civic initiatives in the 1970s. Movement success in opposing the systematic violations of human rights by Communist regimes was very low at the beginning. Although Western countries occasionally expressed their concern about "prisoners of conscience" and demanded their release for "humanitarian reasons," the Cold War balance of power placed limits on what Western governments were able and even willing to do. But through



movement activity there reemerged in Central Europe the nucleus of a civil society, a *parallel polis*.<sup>15</sup> This reemergence carried Central Europe to the center stage of European politics as movements revealed weak points in "advanced or late totalitarian systems."<sup>16</sup> This placed European political discourse in a new perspective. On January 1, 1977, a group of 242 Czechoslovak citizens announced their decision to set up Charter 77:

[A] free, informal and open community of people of different convictions and faiths, and belonging to different professions, who are united by the will to strive, individually and collectively, to achieve respect for civil and human rights in our country and throughout the world—rights asserted for all humanity by the two mentioned international covenants, by the Final Document of the Helsinki conference and by numerous other international documents opposing war, violence and social or spiritual oppression, and announced comprehensively in the Universal Declaration of Human Rights of the United Nations.<sup>17</sup>

Obviously this action could have no real impact on the stability or instability of the Czechoslovak socialist state. Nevertheless, the hostile reaction of the Communist government and the subsequent persecution of the signatories of the document indicated that the representatives of the totalitarian regime felt instinctively that the established rules of the game were being placed at risk, though the Chartists were very careful to avoid any possible political interpretation of their activity.

Charter 77 is not an organization; it has no rules, permanent bodies or formal membership. It embraces everyone who agrees with its ideas, participates in its work and lends it support. It does not form the basis for an oppositional political activity. Like many similar citizens' campaigns in different countries, West and East, it seeks to promote the general public interest. It does not aim, therefore, to set out its own program for political or social reforms or changes. It wishes instead, within its own sphere of activity, to conduct a constructive dialogue with the political and state authorities, in particular by drawing attention to various individual cases where human and civil rights are violated, by preparing documentation and suggesting solutions, by submitting other proposals of a

more general character aimed at reinforcing such risks and their guarantees, by acting as a mediator in various conflict situations caused by injustice, and so forth.<sup>18</sup>

The philosopher Jan Patočka, one of the first spokespersons of Charter 77 (along with Václav Havel and the former Czechoslovak minister of foreign affairs Jirí Hájek), explained clearly “what Charter 77 is and what it is not.” According to him, what the signatories had in common was not anything political, but a certain *moral stance*, the conviction that human society cannot function satisfactorily if it does not rest on a moral foundation. Without this moral foundation, society finds itself in danger of losing its integrity altogether, that is, of losing that from which springs the very meaning of its existence. For, Patočka said, morality

does not exist just to allow society to function but simply to allow human beings to be human. Man does not define morality according to the caprice of his needs, wishes, tendencies, and cravings; it is morality that defines man. . . . Participants in Charter 77 do not take upon themselves any political rights or functions, nor do they want to be a moral authority or the “conscience” of society; they do not raise themselves above anyone or pass judgement on anyone; their effort is aimed exclusively at cleansing and reinforcing the awareness that *a higher authority does exist*, to which they are obligated, individually, in their conscience, and to which states are bound by their signatures on important international covenants; that they are bound not only by expediency, according to the rules of political advantage and disadvantage, but that their signatures there mean that they accept the rule that politics are indeed subject to law and that law is not subject to politics.<sup>19</sup>

For almost thirteen years Charter 77 was able to act under the totalitarian regime, as it tried to construct “a constructive dialogue with the political and state authorities” on all sorts of issues concerning human rights. It certainly did not get any positive response from the state, and their efforts to convince the government of Czechoslovakia that human rights should be respected because they create the moral foundation of modern society failed completely. At the same time, however, something else that was essential for the renaissance of politics in a closed society was being achieved through the charter’s

activities. Even though the charter entered the world with apolitical assumptions, it established an independent community, an independent place for free discussion, free exchange of information, free educational and cultural projects, free initiative, and possibly even free political action.

It would be naive to overestimate the role the dissidents played in the political processes that led to the final collapse of Communism. But two points are worth making. The first concerns the impact that the very existence of the "parallel polis" had on the domestic political situation. Despite the fact that the number of its "citizens" was originally very small, the decision to start telling the truth in public and to stop participating in the complicated system of lies, self-censorship, and maneuvering so common in the everyday reality of the "normalized" Czechoslovakia "delegitimized" the Communist regime.<sup>20</sup> It did so, moreover, at an unfavorable moment for the regime, that is, when it was itself becoming aware of impending political crisis and seeking steps to counter that crisis with improved economic performance while leaving intact the regime's foundations and basic principles.

Second, the activity of the Charists and of other political action groups in Central Europe influenced international developments, particularly as they affected the evolution of the Conference on Security and Co-operation in Europe (CSCE), created in 1975 at Helsinki. Central Europeans greeted the creation of the CSCE Helsinki process with skepticism. No one expected it to produce anything more than modest progress in "détente" and cooperation between the two rival camps. Because the signatories had ratified the principle of "non-intervention in the domestic affairs of signatory states," because the status quo in Europe was confirmed in an international document, and because of the whole atmosphere of the conference and the way its results were interpreted by those in power in the socialist camp, no one believed that the Helsinki process constituted a breach in the foundations of the Cold War architecture of Europe. It was only the appearance of independent activists, appealing to the provisions of the Helsinki Final Act, that gave the Helsinki process new meaning. That activity made the principle of noninterference untenable. Activists forced governments to recognize that the "human dimension" was an important factor in interstate relationships between the East and the West. Activist groups offered themselves up as

yardsticks with which to measure the implementation of the human rights provisions of the Helsinki Accords. The activists used their own bodies to construct an obstacle in the path toward any kind of rapprochement between East and West that would overlook the rights of individuals in the Socialist bloc.

#### THE DIVORCE

In 1989 the Velvet Revolution helped bring down the bipolar political architecture of Europe. But it caused the question of coexistence between Czechs and Slovaks to resurface with acuity. In 1992, the experiment in coexistence ended as Slovaks seceded from the united republic. Given Czechoslovakia's genuine democratic tradition and its desire to assume actively the task of promoting a certain "Enlightenment" and cosmopolitan vision of European politics, the split is tragic and paradoxical. But on closer examination, it reveals certain truths about the relevance or applicability of that particular vision.<sup>21</sup>

The legal solution of the problem of coexistence quickly showed itself to be the number one problem of Czechoslovak transition to democracy. The stabilization of the new democratic order and the politics of economic reform were surprisingly assigned second place. There was no other way to rebuild the existing legal order and "rejoin Europe" without correcting the asymmetry that characterized all the past constitutions of Czechoslovakia and to design and approve a new, more symmetrical model. Debates regarding that model, which started between the Czechs and the Slovaks only a couple of months after the fall of the Communist regime, turned around two alternatives. The first was based on the legacy of the "First Republic" and the dogma of the legal continuity of the Czechoslovak state. Its Czech proponents accepted the principle of decentralizing reforms, as long as such reforms accepted the overarching principle of "subsidiarity," so fashionable (and contested) in today's Europe. The Slovaks, however, insisted unequivocally on the concept of "legal discontinuity" and demanded a "genuine federation" between Czechs and Slovaks that would be built anew, placed on two independent pillars, each endowed with full state sovereignty, which would then accept delegating some power, determined through negotiation, to the federation.

The dispute could not be resolved within a municipal legal order

that was seen as static and synchronous and derived from one focal norm. One could adopt one solution or the other, but no compromise between the two solutions was legally possible. The only possibility of a solution was out of reach of both Czech and Slovak negotiators. That solution involved somehow mapping the Czecho-Slovak dilemma onto the broader context of European politics and looking for a new, more creative, "integrative" solution that synthesized the international and domestic dimensions of the problem. Such a solution was actually discussed, but rejected and forgotten. It would have required several steps. First, two national representative councils would have had to confirm the common will of Czechs and Slovaks to live together and delegate sovereignty to the Federal Assembly. This would have met the Slovak demand that Slovak sovereignty be given formal recognition. But it made possible differing Czech and Slovak interpretations of the legal foundation of the new unified state. In the Slovak interpretation, the state would have resulted from a treaty between two independent subjects of international law. According to the Czechs, it would have stemmed from a political declaration that derived meaning only within an already existing municipal legal order. It was fully legitimate according to the existing federal constitution and was compatible with the principle of legal continuity in the Czech sense. It was a creative ambiguity. Second, the Federal Assembly, on the basis of this initiative, was to draft a new federal constitution, defining the powers to be delegated to the two national parts of the federation. Third, the new constitution was to be ratified and accepted by the two national councils.

The disappearance of Masaryk's state is a loss for all sorts of reasons, but it is not a catastrophe or "tragedy" in Kundera's sense of the word. The Czecho-Slovak divorce was peaceful and smooth and was praised and admired by outside observers, especially when compared with other fragmentations that occurred in post-Communist Europe. The divorce is a fait accompli and must now be seen as an integral part of the Czechoslovak transition. Czecho-Slovak relations are no longer defined in the framework of a constitutional legal order, but are regulated by the instruments and provisions of international law. The goal now is to achieve stability in the "heart of Europe" through the active participation of both Czechs and Slovaks in the process of European integration.

#### CONCLUSION

The tumultuous history of Czechoslovakia in the twentieth century is coterminous with efforts to create a genuine rule of law in international affairs. Czechoslovakia itself emerged as a "legal fiction" designed to give substance to such reformist efforts, while Czechoslovakia's collapse in 1938 paralleled the collapse of such efforts. But the Velvet Revolution revealed the prolonged existence of a real demand for the reconstitution of an international legal order that embodies certain Enlightenment principles, while the divorce of Czechs and Slovaks reminds us how much of that order remains a fiction.

Nevertheless, the legal environment to which we belong today is characterized by a greater degree of internationalization than at any time in the past. European integration has only reinforced regionally the trend toward internationalization at the global level. From the early 1950s, the European Convention on Human Rights set the standards of achievement within the region and also defined the instruments and measures of implementation. Today, membership of Central European countries in the Council of Europe makes them an integral component of the great European experiment, despite the fact that they have only been admitted as "associates" within the European Union and may have to wait a while before being admitted to full membership. Nevertheless, "ratified and proclaimed international agreements on human rights and fundamental freedoms by which the Czech Republic is bound are immediately binding and have priority before the law."<sup>22</sup> The primacy of international law over municipal law is no longer a utopian demand of pacifists, but an integral part of European political reality. The coexistence of Czechs and Slovaks within such an international legal environment is no less a culmination of Masaryk's vision than his failed dream of the constitutional perennality of a unified Czechoslovakia.

#### NOTES

1. Tomáš G. Masaryk, *The Making of a State* (New York, 1969), 372.
2. Milan Kundera, "The Tragedy of Central Europe," *New York Review of Books*, April 26, 1984.
3. Cf. Gellner's excellent review of *Co jsou Češi* by Jan Patočka: Ernest Gellner, "Reborn from below: The Forgotten Beginning of the Czech National Revival," in *Times Literary Supplement*, May 14, 1993.

4. A detailed analysis of the problem can be found in Václav Pavlíček, "O kontinuitě a diskontinuitě" (On continuity and discontinuity), published, unfortunately in Czech only, in *Právní praxe* 41, no. 4 (1993): 190-95 and 41, no. 5 (1993): 249-64.

5. According to the normativist paradigm, which was dominant in the newly created state, the legal order is equal to a set of legal norms derived from one "focal point," from one supreme norm that represents the genuine source of law. In that sense, one can clearly distinguish between the *continuity* of law—which persists as long as a certain focal norm (usually the constitution of a state) remains valid—and the *discontinuity* of law—which occurs when, due to the "legal revolution," the old normative order is replaced by the new one: "From the legal point of view, the revolution is a strictly negative and formal concept. It means the denial of continuity between two sets of state norms, between prerevolutionary and postrevolutionary legal orders, which as far as their content is concerned, are valid in the same state territory, for identical legal persons and in the same time. Because the old and the new legal orders are two mutually isolated sets of legal norms, what is not valid between them is the principle *lex posterior derogat priori*. The prerevolutionary law is nonexistent from the point of view of the postrevolutionary legal order, and it is not necessary to abrogate it explicitly. On the contrary, what is necessary if the prerevolutionary law is to be kept valid after the legal revolution is its explicit reception by the revolutionary legal order." Zdeněk Neubauer, *Kontinuita našeho ústavního práva* (Continuity of our constitutional law), (Prague: Právník, 1945), 6:236; quoted in Pavlíček, "O kontinuitě," 191 (my translation).

6. The problem was recognized by the leading Czech lawyers of the interwar period. However, they could only state that despite the fact that World War I caused, indeed, the fundamental change here, the valid legal order of Czechoslovakia leaves this fact unnoticed. František Weyr, for instance, discusses at length the questions of legal monism and dualism and, subscribing to the former, maintains that there has to be a clear normative relation between municipal and international law. Recognizing the unequivocal primacy of municipal law over international law, he says, the international treaties, in order to have binding legal power, have to be explicitly integrated into the normative system created by the state constitution. The possibility of the primacy of international law, the position enhanced by some postwar pacifists, seems to Weyr still very weak and a kind of pie in the sky. Although Weyr mentions the fact that Czechoslovakia, as a newly created state, found itself in a certain contradiction—it was an inter-

national legal act (Saint-Germain Treaty) that brought it into existence and de facto enabled it to create its municipal law—he washes his hands: “Czechoslovak lawgivers cannot be blamed for the fact that the pacifistic endeavors of the peace conferences were not brought to completion and that the principal discrepancy between the ideology of internationalism and state sovereignty remained unsolved after the war.” František Weger, *Československé právo ústavní* (Czechoslovak constitutional law), (Prague, 1937), 80.

7. For instance, Štefan Luby, “Obnova práva,” *Právní obzor* 1 and 2 (1946): 11, 12; quoted in Pavlíček, “O kontinuitě,” 262.

8. *Výklad Ústavy ČSFR* (Commentary on the Constitution of CSFR) (Prague: Svoboda Praha, 1987).

9. Ibid.

10. U.S. president Harry Truman in his closing speech at Dunbarton Oaks in 1944; quoted in A. H. Robertson and J. G. Merrills, *Human Rights in the World*, rev. ed. (Manchester, Eng.: Manchester University Press, 1992), 24–25.

11. The operative part of the mentioned resolution, quoted in Robertson and Merrills, *Human Rights*, 26.

12. Ibid., 27.

13. The U.S. ambassador Henry Cabot Lodge, in a statement of the American position in March 1960 concerning the policies of apartheid of South Africa, quoted in *ibid.*, 30.

14. Ibid.

15. The term *parallel polis* was used for the first time by Václav Benda, a Czech dissident-philosopher, in an article published in the samizdat periodical *Informace o Chartě* (Information about the Charter) in May 1978. Benda's article provoked an extensive discussion around the subject. In 1986 the Canadian historian Gordon Skilling organized a questionnaire on the theme and received eighteen replies from the Chartists. They were gradually published in *Informace o Chartě* and then as a collection in a samizdat edition. In 1991 they appeared in English: *Civic Freedom in Central Europe: Voices from Czechoslovakia*, ed. Gordon Skilling and Paul Wilson (New York: Macmillan, 1991).

16. The term *advanced or late totalitarian system* was occasionally used by Václav Havel to describe, for instance, the situation in Czechoslovakia after the crisis in the period 1969–89 (cf., for instance, *Stories and Totalitarianism: Open Letters, Selected Prose, 1965–1990*, ed. Paul Wilson [London: Faber and Faber, 1991], 328–50).



17. Charter 77 Declaration from January 1, 1997, *Ten Years of Charter 77*, ed. Vítězslav Prečan (Hannover: CSDS, 1986), 101.

18. *Ibid.*

19. Jan Patočka: "What Charter 77 Is and What It Is Not (Why Right Is on Its Side and No Slander or Forcible Measures Can Shake It)," in *Good-By Samizdat: Twenty Years of Czechoslovak Underground Writing*, ed. Marketa Goetz-Stankiewicz (Evanston, Ill.: Northwestern University Press, 1992), 143–44.

20. Properly speaking, there is no doubt that the Communist regime—not recognizing the principle of rule of law, not respecting human rights, and mutilating the principle of parliamentary democracy—can never be considered as legitimate. On the other hand, the ability to gain the "consent of the governed," to convince people that the only alternative left is to coordinate themselves to its political leadership and social engineering, was considered as the most important guarantee of stability of the regime, as the key "scientific" proof of accuracy of its doctrine and unshakable evidence of its "legitimacy." In exercising the leading role in society—first using terror and ideology, and later much more lenient and less visible methods of oppression—the Communists never missed an opportunity to organize the "spontaneous" manifestations of the people's support for their cause. They never stopped convincing people about the righteousness of their political program—not only in order to enlighten still ignorant masses, but also in order to have the social reality, by its nature uncertain and unreliable, under their control and to "legitimize" their own erratic steps and transactions.

21. A detailed account of the split of Czechoslovakia can be found in Martin Palouš, "The Czechoslovak Divorce: 'Velvet' Settlement or Muted Coexistence," in *Beyond Government: Extending the Public Policy Debate in Emerging Democracies*, ed. Crawford D. Goodwin and Michael Nacht (Boulder, Colo.: Westview Press, 1995), 187–203, and *Questions of Czech Citizenship: Citizenship East and West*, ed. André Liebich and Daniel Warner, with Jasna Dragonic (London: Kegan Paul International, 1995), 141–64.

22. The Constitution of the Czech Republic, Article 10.