

**Constitution-Making in Post-Communist Countries:
A Case of the Czech Republic**

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1. Introduction

The constitution-making process in the post-Communist countries represents a multi-faceted problem. One factor is common to all of them: after decades of life under the exact opposite to liberal democracy, nations in Central and Eastern Europe, and even more so those which had been a part of the Soviet Union, face a daunting and unprecedented task of building, all at the same time, political democracy, civil society, and market economy.

On the other hand, there are factors which are idiosyncratic to individual countries, like the particular character of the local ancien regimes, e. g. the Czechoslovak or East German ones were more restrictive than those in Poland or Hungary, or the legacy of more distant past, the pre-Communist history: while in some of the "new democracies" there used to be at least some elements of the rule of law, democratic representation and civil liberties, in others these had never been experienced.

While the "established democracies" have been able to gradually improve their political systems for generations with little or no discontinuity, the "new democracies" face a difficult, unprecedented task of creating/restoring a democratic system over a short period of time; the social structure is still volatile there, with individuals hardly having developed different interests and positions in social topography. The now fully enfranchised electorate is expecting something really positive to come rather soon. As the Polish case has shown,¹ the process of constitution-making and ratification may be rather protracted and it is likely to extend beyond the next parliamentary elections. Some political actors will be less interested in having a new constitution than others, and this may lead to a further slowdown of the process. Although a good constitution should benefit the broad community rather than only serving interests of one or more political "factions", in practice the legislators and their parties mostly pursue above all their particular political interests even in constitution-making.

2. The Historical background and the 1920 Constitution of the Czechoslovak Republic

The present-day efforts to modify the Czech constitution should be seen on the background of earlier constitution-making on the Czech territory from the birth of Czechoslovakia in 1918 until her demise on the last day of 1992.

What were the historical factors of Czech constitution-making? When independent Czechoslovakia was born in October 1918, it was able to continue the tradition of the rule of law

* In order to avoid technical difficulties, all non-English diacritics have been edited out.

which had been developing in the Austrian part of the monarchy since October 1860, when the "October Diploma" was issued by Emperor Francis Joseph I, introducing relatively liberal parliamentarism, although with clear limits due to suffrage restrictions and the "curial" system in the Imperial Council (i. e. the Austrian legislative body). Another landmark was the February Patent in 1861 (in fact a new Austrian Constitution), which showed, unlike the October Diploma, unitarian rather than federalist tendencies and instituted bicameralism. In 1896, a new curia was established, enfranchising the remaining male citizens aged 24 or more. The last reform of the Imperial Council came in 1907, when universal, direct, equal male suffrage was established as well as secret ballot, while the curial system was abolished.

The experience with the Austrian rule of law² and a degree of democratic control gave the citizens of Czechoslovakia a more favorable starting position in 1918 for a democratic development in the interwar period than to most countries in Central and Eastern Europe. Another, equally important but often underestimated factor, was the contribution of the United States to the formation of Czechoslovakia and American experience of the first Czechoslovak president and the new state's founding founder, Thomas G. Masaryk.

Just sixteen days after Czechoslovakia's independence was declared (note the Jeffersonian language), the first Czechoslovak constitutional document was passed, the so-called Provisional Constitution (November 13, 1918). Created by the Revolutionary National Committee, it stipulated that Czechoslovakia would become a republic whose head would be the president. In March 1920, the Provisional Constitution was replaced by the Constitutional Charter of the Czechoslovak Republic,³ which remained in force as the country's constitution until the occupation by Nazi Germany in 1939 and again after the war until May 1948. The prewar constitution was modeled on the constitutions of the United States and France. It was based on the theory of natural rights and the doctrine of the separation of powers (executive, legislative, judiciary). It should be noted here that the Czechoslovak 1920 constitution was the first in continental Europe that contained the principle of judicial review, giving this right to the Constitutional Court; the first Austrian Republic followed on Oct. 1, 1920. The 1920 constitution was co-written by prof. Frantisek Weyr, an adherent of the Brno school of legal philosophy which had strong links with Hans Kelsen.

Under the 1920 Constitution, Czechoslovakia became a unitary, not a federal state, and a parliamentary democracy rather than presidential.

As Czechoslovakia was a multi-ethnic state with minorities living in territorially distinct habitats, a special attention was given to the protection of minority rights. The constitution framers had in mind the multi-ethnic character of the country when they adopted the principle of proportional representation. They believed that it would prevent disenfranchisement of the minorities whose numbers taken together exceeded the number of the Czechs. As some non-Czechs, especially the Germans, were resentful against the new state, the main Czech parties, in a perceived self-defense, formed a consensual (and soon petrified) coalition system which left little room for political struggle for power. The total of eighteen parties were able to obtain seats in the interwar lower chamber, the Assembly of Deputies. With the exception of the first elections in 1920, which were won by the Czechoslovak Social Democratic Workers' Party (25.7% of votes, 74 seats), for the rest of the interwar period the Czech politics was dominated by the center-right Republican Party of Farmers and Peasants (led until his death by Antonin Svehla). It is remarkable that its dominance was based on 13.6 to 15 percent of voters' support only. Forming coalitions, it had to rely on a number of smaller parties. Some parties, like the Social Democrats or the (Catholic) Czechoslovak People's Party, often held ministries for more than a

decade, being able to reward their members with even lower-ranking posts in the civil service. This situation made individual areas of public sphere, like railroads, virtual fiefdoms of such parties. In spite of the above and other deficiencies, during half a century of Nazi and Soviet rule between 1939 and 1989 the prewar democratic regime assumed some characteristics of a legendary dream.

The prewar Constitution created bicameralism with a relatively large number of legislators: the lower house, the Assembly of Deputies, had 300 members, the upper house, the Senate, 150 members, all elected in accordance with the principles of general, equal, direct suffrage and the secret ballot. For the first time, women were given the right to vote, not as a result of any particular struggle on their part but rather as a natural expression of the modernist mood of the time and vocal efforts for "de-Austrianization".

Other principles included the independence of the judiciary, freedom of speech, freedom of congregation, and the protection against unwarranted house searches. Although the country was multinational, the "Czechoslovak language" – a self-serving construct, an entity mysteriously appearing in two forms, the Czech and the Slovak languages – was given priority in many spheres of public administration, although in others, like education, there were many German, Hungarian, and other institutions at all levels, making the Czechoslovak education system before the war more tolerant of ethnic minorities than for instance the French after World War Two.

3. Postwar Czechoslovak developments: the 1948 and 1960 Constitutions

After the defeat of Germany, Czechoslovakia formally returned to the prewar Constitution, which was complemented by presidential "decrees", some of them substantially affecting the character of the ostensibly restored state: accelerated transfer of the vast majority of the Czechoslovak Germans and – to a lesser degree – the Hungarians, nationalization of not only large-scale companies but also of the movie industry, the way the Czech collaborators with the Nazis were dealt with. The volatile situation, in which freedom of speech and pluralism of parties coexisted with the fact that there were no opposition parties permitted and that the political struggles were taking place inside the coalition government – culminated in the Communist takeover in February 1948. Less than three months later, a new "9th of May Constitution" was adopted by the Czechoslovak National Assembly.⁴ Although it did not yet explicitly establish the leading role of the Communist Party, it abolished the principle of the separation of powers. All the power was placed in the hands of the "working class" and industrial as well as agricultural sectors were to be "socialized" (i. e. expropriated). When president Benes was asked to sign it, he rather resigned.

In 1960, the 1948 constitution was replaced with the "Constitution of the Czechoslovak Socialist Republic" in which the leading role of the Communist Party of Czechoslovakia" – which had existed de facto since 1948 – was explicitly stated. In addition, the seal of Czechoslovakia was changed. There were no political changes brought about by the 1960 constitution.⁵

In 1968, the year of the Prague Spring which brought not only more freedom of expression but also gave more room for the articulation of Slovak national ambitions, the 1960 constitution was amended by the Constitutional Law No. 143/1968 on Czechoslovak federation. Czechoslovakia thus became, at least formally, a federal state consisting of two ethnically

defined parts, the Czech and Slovak Socialist Republics, respectively. Although the federal system gave the Slovaks more say and – owing to the structure and rules of voting in the Federal Assembly – the right to veto any proposals unfavorable to their cause as they perceived it, in practice the Czechoslovak top legislative body continued the tradition of unanimousness until 1989.

The above amendment also envisaged the establishment of the Constitutional Court; in the following years of the "normalization" backlash the Constitutional Court became unmentionable and all references to it were deleted even from printed editions of the Constitution. The Czechoslovak Constitutional Court was established *de facto* only in 1991, after the demise of communism.

4. From the collapse of Communism to the splitup of Czechoslovakia

In the swift collapse of the regime in 1989, which went perhaps all too smoothly, the democratic forces replaced the Communists after a week of peaceful demonstrations during which not a single windshield was shattered. Rather than trying to draft a new constitution, the victors opted for a piecemeal reform by deletions of untenable paragraphs. I argued elsewhere⁶ that this approach had grave consequences for the future of Czechoslovakia as an informal coalition was soon formed between the Slovak patriots/nationalists and the Communists which, playing by the rules of the 1960 Constitution, was able to stall the urgent reform legislation by three years.

As early as in December 1989, two provisions of the 1960 Constitution were deleted: the leading role of the Communist Party (which had ceased to exist anyway) and the education of youth in the spirit of Marxism-Leninism. The democratic forces insisted, perhaps excessively, on the absolute legality of the power transfer. Such a legality was bound to proceed in accordance with the terms of the dying regime whose essence, in fact, had been an exact opposite to the rule of law. Rather than replacing the whole legislative body, the Federal Assembly, with a provisional body which would lead the country to the first free elections in decades, the way of "co-optation" was chosen. The total number of legislators remained the same as was defined in the old constitution, while the nominees of the democratic forces replaced the most discredited pre-1989 legislators selected for ouster by their own Communist Party and its figurehead allies.

The trouble began less than two months into 1990 as President Havel demanded a change in the name of the state by deleting the middle word from the official "The Czechoslovak Socialist Republic". In the Federal Assembly, his demand precipitated the so-called hyphen war as the Slovak deputies demanded a name "Czech-Slovak Republic". This demand was rejected on linguistic grounds by most Czech deputies. The Federal Assembly spent several weeks in the spring of 1990 discussing the name change, wasting precious time and finally arriving at the clumsy "The Czech and Slovak Federal Republic". This meant not only a diversion of the agenda, but also led to the rise of an informal coalition of the Slovak national-minded legislators and the Communists which – using the above veto powers – was in the subsequent months able to bring the reform process to a virtual standstill.

The fact that the federation consisted of two veto-entitled parts, in itself a fact of great potential volatility, caused growing unease in the two uneven-sized parts of Czechoslovakia. A mutual estrangement of Czechs and Slovaks, the two main ethnic entities, ensued. Each

considered important a different agenda: while most of the nationally rather lukewarm and economically more advanced Czechs demanded a speedy economic reform, the majority of the Slovaks emphasized "loose federation" (i. e. as few binding links with the Czech half as possible) and "social guarantees" (i. e. avoidance of inherent risks of market economy). This was reflected especially in the developments following the elections in June 1990 (in which the Czech and Slovak democratic reform movements (Civic Forum and Public Against Violence, respectively) scored a decisive victory. During 1991, both movements broke up, giving rise to regular political parties. The Czech-Slovak political relations became increasingly tense as in each part of the nation new parties became prominent: in Slovakia, the VPN follow-up Movement for Democratic Slovakia (HZDS) was formed by the patriotic/nationalistic leader Vladimir Meciar who came up with a growing list of demands from "Prague" (seen as a distant capital), while the reform-minded Czechs were giving increasing support to internationalistic, liberal economist Vaclav Klaus, the leader of the Civic Democratic Party (ODS), the strongest follow-up formation of the Civic Forum. There was no important party significantly present in both parts of the nation; even the – ideologically internationalist – Communists split into two separate parties, the Czech remaining faithful to the traditional doctrine, the Slovak embracing reformism similar to that witnessed in Poland or Hungary. The two different agenda sets led to the final blow to the integrity of Czechoslovakia in June 1992, when parties with two mutually incompatible programs scored decisive victories in each part: in Slovakia the patriotic/nationalistic, anti-reform HZDS of the Prime Minister Meciar won with 37.26 percent, in the Czech Republic, the vigorously pro-reform ODS led by the upcoming Minister of Finance Vaclav Klaus prevailed with 29.73 percent.⁷

Immediately after the 1992 parliamentary elections, Meciar came with further decentralization demands which would turn Czechoslovakia into what he called a "loose confederacy": on the one hand he wanted to keep joint armed forces and currency, on the other hand he wanted to have independent Slovak foreign (!) and economic policies. What Meciar really seems to have wished to achieve was an increase in "moneyline" transfers from the richer Czech Republic to the less developed Slovakia. However, his negotiation partner, the new Czech Prime Minister Klaus, called the former's bluff: calling the new demands totally unacceptable, he declared that if the Slovak nation really wished to get a divorce, it was completely acceptable and what remained was to talk about the modalities and technicalities. From the beginning of the divorce procedures it was clear that – unlike in Yugoslavia – the split-up would proceed without violence and smoothly, even if with an aftertaste.

Critics of the split-up have been pointing to this day that a major constitutional change such as a breakup of the country was not sanctioned by a referendum. However, the rump 1960 constitution which had become a torso by then as a result of dozens of deletions,⁸ there was no referendum provision. The respective election winners, Mr Meciar and Mr Klaus, had obviously no political interest to launch a lengthy legislative procedure which would introduce the instrument of popular vote into the Czechoslovak legal system: they were clear election winners and they enjoyed high scores in the polls. On the other hand, the populations in each part consistently supported the preservation of Czechoslovakia. The two leaders found themselves on board of the same ship in the summer of 1992. If a referendum on the split-up took place, the polls suggested, in all probability the continuation of Czechoslovakia would be confirmed. This would have de-legitimized the position of the two election victors, leading to a long period of uncertainty, they could add. In spite of the demands by Vaclav Havel, who resigned as president on July 20, 1992, and also by the election losers in both parts of Czechoslovakia, the country was

destined to break up without a referendum. The date of the divorce was set as January 1, 1993.

5. The 1992 Constitution of the Czech Republic

While the constitutional reforms in other post-communist countries, like Poland, required a lot of time and the process of their ratification was by no means smooth,⁹ the Slovaks and the Czechs acted quite swiftly in this respect. On September 1, 1992 already, two-and-a-half months after the elections and four months before the partition of the federation, the Slovak National Council declared a separate constitution. It reflects the Charter of Fundamental Rights and Freedoms passed by the Czechoslovak Federal Assembly in 1991 and provides for a unicameral legislative body called the National Council of the Slovak Republic, consisting of 150 deputies chosen in direct general election. The head of the state, the president, was to be elected for a five-year term by a three-fifths majority of the National Council.¹⁰

The Czechs were in a hurry, too. They knew that their future state would need a constitution, and there was a consensus to get rid of the rump 1960 constitution for good (by that time, out of its 106 Articles, 89 had been abrogated and most of the rest re-written!). The framers – two teams of legislators who benefited from the advice of legal scholars – wrote a constitution quickly enough for it to be passed by the Czech National Council on December 16, 1992.

The Czech Constitution¹¹ is a relatively compact document which drew inspiration, above all, from the 1920 Czechoslovak Constitution (in the Electoral Law, there is a clear influence of the United States Constitution – one third of the Senate being replaced every two years – and the German "Basic Law" (the establishment of the parties' 5 percent cutoff in Assembly of Deputies elections). The structure of the 1992 Czech Constitution is based on the theory of the separation of powers. It consists of eight chapters and the Bill of Fundamental Rights and Liberties: the Preamble and the statement of fundamental principles (republicanism, democracy and government by the sovereign people, minority protection, rule of law, direct applicability of international treaties on human rights, territorial integrity, citizenship, Prague as the capital city, state symbols like the seal, colors, flag, presidential flag and national anthem, constitutional changes and modifications). There are chapters specifically devoted to individual branches of power: the legislature (Chapter Two), the executive (Chapter Three), and the judiciary (Chapter Four), followed by four chapters devoted to the Supreme Auditing Office, the Czech National Bank, the Territorial Self-Governing Units and the final provisions (dealing especially with the transitional period until the full establishment of the Czech Republic).

5.1. Legislative Power (Chapter 2)

Several basic principles are formulated: Parliament is bicameral, consisting of the 200 members of the Assembly of Deputies elected for four years, and of the Senate, consisting of 81 members. Exactly as in the United States, one third of the Senate is elected every four years for a six-year term. While the Assembly of Deputies is elected by the system of proportional representation, the 81 Senators are elected in 81 districts using the first-past-post system. The seat of the legislator is incompatible with the office of the president or a judge. However, there is no incompatibility in case of a legislator becoming a member of the government.¹² The

legislators must carry out their mandate directly and are not bound by any "instructions", i.e. they are, according to the Constitution, free to act regardless of their party affiliation or even after they may have been expelled from the party on whose ticket they ran. Chapter Two gives an exceptionally wide-ranging immunity to legislators, covering not only session and committee speeches but also ruling out any criminal proceedings against a legislator unless "handed over" by his colleagues. If they decline to do so, such a criminal prosecution shall be foreclosed forever. (Art. 27)

The Senate substitutes the role of the Assembly if the latter is dissolved but in this position it has no right of legislative initiative in constitutional matters, concerning the state budget, an electoral law, or international treaties. (Art. 33)

The Assembly of Deputies may be dissolved by the president under specified conditions: e. g. if the Assembly failed to give the vote of confidence to a newly appointed government whose prime minister has been proposed to him/her by the Chairperson of the Assembly. (Art. 35) The president, although himself or herself indirectly elected by the joint session of parliament, is thus given a very great power.

In comparison to the constitutional protection in the United States, the Czech Constitution can be changed, modified or amended rather easily: the consent of by three fifths of all Assembly deputies and three fifths of the present Senators is required. (Art. 39)

Any legislative initiatives must be presented at the Assembly of Deputies. While individual deputies have this right, the Senate may come up with such an initiative only as a body. Also, the government (but not its individual ministers) and representative bodies of "higher self-governing regions" (foreseen by the Constitution, to be launched on January 1, 2000) have this right. (Art. 41)

Another indication of the weaker position of the Senate vis a vis the Assembly is Art. 42: The budget is deliberated by the Assembly of Deputies only. Although all other bills are discussed in the Senate, a negative Senate vote can be overridden by a simple Assembly majority. (Art. 47).

The president may return to Parliament all acts but those of constitutional character. In such a case, the Assembly of Deputies votes again. Again, to override President's veto, only a simple majority of the Deputies is needed. (Art. 50)

5.2. Executive Power (Chapter Three)

The executive power is carried by the president and the government. Unlike the American system of government, where president is the chief executive, the Czech parliamentary democracy adheres to the European continental concept, making the indirectly elected president a partner (or competitor) of the government. The president is defined as the head of state with specifically enumerated prerogatives. He/she is elected by a joint session of the two Parliament chambers and – continuing the tradition of the prewar 1920 Constitution – is not responsible for the way s/he carries out his/her duties. (Art. 54) The president, who must be at least 40 years of age, can be reelected only once. This limitation is not taken from the U.S. Constitution (Amendment 22, 1951) but from the Czech 1920 Constitution which had the same provision, exempting, however, the first president and Czechoslovakia's Founding Father Thomas G. Masaryk. President's term of office extends to five years. (Art. 57).

In Art. 62, president's duties are enumerated: s/he appoints and recalls the Prime Minister and other government members, dissolves the Assembly of Deputies, entrusts the outgoing

government with the continuation of its work until a new government is appointed, appoints from among judges Chairpersons and Vice-Chairpersons of the Constitutional and Supreme Courts, grants pardons, commutes sentences, is entitled to "order that a criminal proceeding not be instituted or, if it has been instituted, that it be discontinued, and order that a criminal record be expunged". The president also has the right to return to Parliament all acts but constitutional, to appoint the President and Vice-President of the Supreme Auditing Office and members of the Banking Council of the Czech National Bank.

In Article 66 it is stated that the President is granted a broad-ranging immunity: s/he may be prosecuted for high treason only before the Constitutional Court if charged by the Senate. If found guilty, s/he can lose office and become ineligible for the office. For criminal acts committed during the period in office, the President may never be criminally prosecuted.

Although the Government is defined in the Constitution as "the highest body of executive power" (Art. 67), much less space is devoted to it than to the president. The Government is responsible to the Assembly of Deputies, i. e. must receive the vote of confidence. (Art. 68) The Government takes its decisions collectively, by majority voting, the fact which often strained coalition governments between 1992 and 1997. In that period, Prime Minister's opinion was sometimes overridden by the votes of the ministers of the two smaller coalition parties, KDU-CSL and ODA, the former being a traditional Catholic- and rural-based party, while the latter was a tiny party originally founded by conservative dissident intellectuals but soon joined by many political pragmatists who were not comfortable in Klaus's ODS.

5.3. Judicial Power (Chapter Four)

In this chapter, the independence of the judicial power is strongly stated. The judges are protected against removals or transfers to other courts. It should be noted here that unlike the U. S. Constitution (Art. III, Section 1), the 1992 Czech Constitution contains no provision to prevent the lowering of compensation to judges; this was much debated during the last fall when Parliament voted in favor of spending cuts, scratching one of the fourteen salaries paid to public officials, judges included. In another respect, judges have received – maybe too early – lifelong tenure. Whatever happens in society, the courts must go on, and the post-1989 democratic regime took over most serving judges, except of those most discredited. This fact has been subjected to sharp criticism by those who became "disappointed" after the initial euphoria had faded.

The Czech constitutional system gives a key role to the Constitutional Court. The jurisdiction of the Czech Constitutional Court, consisting of 15 judges appointed for 10 years (unlike in Germany, their tenure is renewable), is enumerated in Article 87: in the first place, it has the authority to annul legal enactments or their provisions if inconsistent with the Constitution or international human rights declarations which are made a part of the Czech constitutional system in Article 10. The Constitutional Court also deals with constitutional complaints by individuals or representative bodies as well as the jurisdictional disputes between state bodies and bodies of self-governing regions. The decisions of the Constitutional Court are binding on all authorities and persons. (Art. 89)

To deal with cases of non-constitutional character, there is a system of courts defined in Article 91 consisting of four levels: the Supreme Court and the Supreme Administrative Court, superior, regional, and district courts. It should be noted that the Supreme Administrative Court has not been constituted to this day.

In Article 93 it is stated that judges are appointed by the President of the Republic for an

unlimited term.

5.4. Other constitutional provisions

In Chapter Five, rights and duties of the Supreme Auditing Office are enumerated, in Chapter Six, those of the Czech National Bank.

Chapter Seven provides for the "territorial self-government". There are two levels of territorial structure defined there: basic "municipalities" and "higher territorial self-governing units", lands or regions. (Art. 99). This provision led to bitter political disputes. The strongest party of that time, the ODS, was openly skeptical about the need for the higher territorial self-governing units (HTSU's), arguing with the size of population (10.3 million, compare to California's 31.9 million), with the huge costs involved with the setting up of new territorial authorities and warning against adding another layer to the bureaucratic Moloch, most of the other parties were in favor. Some argued with the need for decentralization (an argument that goes particularly well in Czechia because of an age-old dislike or even resentment felt by the rural and small-town population against "Prague centralism", others argued with the benefits of keeping regional traditions. Under time pressure, the ODS gave up and accepted the principle of the HTSU's but for several years did not move a finger to implement Article 99 by means of a constitutional act envisaged in Article 100 ("Higher self-governing regions may be created or dissolved only by a constitutional act.").

It was only in 1998, after the ODS had lost power, that the constitutional act was passed, dividing the Czech Republic – under the pressure of the European Union, which has no interface for assistance to states which are not subdivided – into 14 regions. The act will come into force on January 1, 2000. The European Union was not satisfied by this decision, however, as the regions were too small for its economic assistance programs. To provide a suitable interface with the EU, some of the not-yet-created regions will be merged for this purpose into larger entities called by Brussels, in its supreme wisdom, NUTS II.

6. Developments since 1993

Since the present Czech Constitution was passed, almost seven years have elapsed and two Assembly of Deputies elections have taken place.

After the split-up of Czechoslovakia, the existing Czech government continued to exercise power in the new, smaller state.¹³ Due to the proportional electoral system and traditions in some areas of the country which make the position of the KDU-CSL very stable if stagnant, no party came out of the 1992, 1996 and 1998 elections strong enough to be able to form a government on its own. The center-right coalition governments of the (liberal-conservative, or center-right) ODS of Prime Minister Klaus suffered from increasing internal bickering as the minor parties (ODA and KDU-CSL) complained about the arrogance and neglect of the Prime Minister and the major party, while the ODS criticized its partners for trying to wield much more power than would correspond to their electoral support and sometimes accused them of outright extortionism. In 1997, the coalition broke up, ostensibly over a scandal connected with the financing of the ODS.¹⁴ In the aftermath of the breakup, a cabinet of experts was sworn in by the

president for a transitional period until early elections were held in June 1998.

The 1998 Assembly of Deputies elections brought about several changes in Czech politics, some of them with important consequences for the constitutional development. In the first place, perhaps, the xenophobic-populist "Republican" party failed to make the 5 percent cutoff.¹⁵ The other party commonly labeled as "extremist", the Communist Party of Bohemia and Moravia (KSCM), however, held its ground. In the light of a string of scandals and the bleak-looking economic situation, it was surprising that the former coalition partners (the ODS, the KDU-CSL, and the US¹⁶) obtained more votes and seats than in 1996 (their combined seats rose from 99 to 102, out of 200). The mutual relations between the leaders, however, had become so sour that the renewal of the 1992-97 coalition was impossible.

In the 1998 elections, the Social Democrats (CSSD), the oldest Czech party¹⁷ which was absorbed by the Communists in 1948 and banned ever after until 1989, obtained more votes and seats than any of their competitors.¹⁸ The Social Democrats scored a spectacular success after 1992, stealing a substantial number of voters from the Communists. In 1996 already, the Social Democrats – under a new leader and a popular, one-liner cracking economist Milos Zeman – became the second largest party. However, they were short of coalition partners as the Communists were (and still are) unacceptable to them. In 1998, the Social Democrats' support rose still further. With the center-right coalition being beyond repair, a total deadlock became possible. There were fears that Zeman might be forced to accept the Communists as coalition partners.

7. Opposition Agreement: a Czech innovation?

One of the smaller former coalition parties, the KDU-CSL, was ready to enter into a Zeman's cabinet, but the other, the US, obstinately refused. There was a theoretical possibility of great coalition CSSD/ODS, but after a tough and ideological although not dirty campaign this was only a remote possibility as these parties were perceived and perceived themselves as antagonistic. Instead, to everyone's surprise, including the president's, the leaders of the two strongest coalition parties agreed on an "Agreement on the Creation of a Stable Political Environment in the Czech Republic" (soon dubbed "Opposition Agreement").¹⁹ In Article I of the Agreement, the two parties undertook to respect the right of the party which came in first in the elections to form the Government of the Czech Republic. The second party was bound by the Agreement to enable the formation of the new Government by the non-participation of its deputies when a vote of confidence in the Government was taken. On the other hand, the party which came second was given (in Article II) the right to be respected as Government's opposition.

The ODS and the CSSD also undertook to respect the opposition party's right to fill the post of Chairman in both houses of Parliament and to act in concert in setting up its statutory bodies (Articles III and IV).

More importantly, the two parties agreed in Article VI not to initiate a vote of no confidence in the Government during the term of office of the Assembly of Deputies and not to support such proposal by other political entities. However, such an obligation did not extend to votes taken on specific acts of legislation, including the budget.

Article VII of the Opposition Agreement has direct relevance to constitutional changes.

The two parties undertook to put forward "within 12 months draft amendments of the Constitution and other laws" to "define with more precision the powers of the different constitutional bodies, procedures of their institution" and "in keeping with the constitutional principles of the Czech Republic, enhance the significance of the competition of political parties". The CSSD as well as the ODS each formed a commission which consisted of politicians but consulted with experts. These commissions, led by deputy party chairs, worked out their drafts for constitutional changes and subsequently discussed them with their counterparts from the other party.

In Article VIII, the two parties undertook to consult foreign and domestic policy issues before they were debated in Parliament.

The two parties also undertook not to conclude any coalition with a third party which would enable such a party to enter the Government (Article IX).

The Opposition Agreement was made for unlimited time. It could be abrogated by either party in case of breach by the other.

What is the significance of the Opposition Agreement? Why was it signed? What can be expected from it?

On one level, the agreement was signed by the two largest parties after rather excruciating experiences with the smaller parties. While Klaus still remembered very well his difficulties with the junior coalition partners, Zeman had just had fruitless negotiations with minor parties, one of which (the US) categorically refused – pointing to its conservative principles – to join Zeman's left-wing government and tried instead to resuscitate the old coalition. Such a new lease of life was hardly possible, however, as both the US and the KDU-CSL were willing to make a coalition with the ODS only if the latter dumped Klaus. This strategy could not work as loyalty to Klaus had been a "defining factor" of the rump ODS after the 1997 events. Moreover, both leaders of major parties had a grudge against the president. Klaus never thought much of Havel's "unpolitical politics"²⁰ and remembered very vividly president's unceremonial criticism of Klaus before the joint session of Parliament in early December of 1997, when Klaus seemed to be on his knees. Now Klaus was back, coming close second after the Social Democrats and well ahead of the rest, thwarting all hopes of his rivals who had expected his imminent political burial. And Zeman must have been less than pleased by the president using his influence to see another center-right coalition come into being. This would have robbed Zeman of the greatest triumph of his life: after all, it was the party which he personally led to electoral victory!

Entering the Opposition Agreement, Zeman and Klaus decided to play an "as if" game: within the Czech constitutional system, which they pledged to reform, the two Anglophiles embarked on an ambitious plan of establishing a duopoly of the Government and "Her Majesty's Opposition" (see e. g. Article II of the Opposition Agreement), reducing the rest of the parties to endless waiting in the anteroom of power. The ODS took the British-style game seriously enough to form a complete "shadow cabinet".

As could be expected, the Opposition Agreement was immediately sharply criticized by the other political parties and by the President. This criticism was joined by most press commentators and opinion magazines.²¹ The critics charged, often very emotionally, that the agreement was against the Constitution, that it was a deadly blow to democracy, that it curtailed the political choice. Perhaps more convincingly, the critics made charges of cynicism on part of the ODS, pointing to the final stages of Klaus's election campaign when he "mobilized" against the Left and had posters put up with a slogan "Either Klaus or Slide to the Left", while several weeks later he signed the Opposition Agreement and made it possible for the Social Democrats to

form a new minority government.

Despite predictions that the Opposition Agreement would be short-lived, it has held for more than a year and both parties claim they intend to keep it beyond the next elections in 2002. The agreement certainly brought about political stability and kept the rivals (minor parties and the president) out. After the initial wave of criticism, the minor parties began with a new strategy: they made renewed demands to re-create the center-right coalition. Their precondition was no more the ouster of Klaus. Instead, they demanded that the ODS abrogate the Opposition Agreement. This demand seems hardly realistic as the price for such a move would be very high: the ODS would find itself once again at a mercy of the minors and, in addition, could be easily discredited as the party which broke the agreement only in order to come back to power. If no coalition agreement materialized, there would be another period of instability, the ODS feared, and the history would repeat itself: first a cabinet of experts (appointed by the re-empowered president), then the second consecutive early elections, possibly with a very low turnout.

Not surprisingly, the two signatories of the Opposition Agreement have not shown any readiness to abrogate it. They would have little to gain and very much to lose. Although the economy is shrinking, it is far from a major crisis which could justify acceptance of another piece of advice given to the two major parties: to stop playing the government-and-opposition game and honestly admit their intimate relationship by forming a grand coalition. Again, such a step would be very risky for both Klaus and Zeman: by sharing the board of the same ship, they would leave the wide field of opposition politics to smaller parties which could, especially if the economy remained stagnant, become a real challenge. Moreover, not too long ago in Germany and until this day in Austria the grand coalitions have produced a widespread feeling of a lack of alternatives and skepticism towards the democratic system.²²

The Opposition Agreement faces other threats, however. It has already been mentioned here that the Social Democrats managed – partly due to aggressive and often earthy rhetoric – to woo a number of votes from the Communists in 1996 and even more in 1998. When Zeman's government gained power, it enjoyed moderate support in the polls. After all, it was the first change of government in the Czech Republic based on election results and Zeman's was the first left-of-center government since 1989. Also, the public was fed up with various scandals related to privatization and party financing which had seriously compromised the image of the two civic parties, the ODS and the ODA. The former had been seriously weakened, though not mortally wounded, while the ODA was put out of political business. After a year in power, however, the Social Democrats have the lowest support in five years, while the Communists have risen from the ashes and have evened out with the Social Democrats or even overtaken them. The ODS now leads in the polls by a wide margin of as many as 11 percentage points. It should be pointed out here that the Czech Communists are different from post-Communist parties in countries like Poland or Hungary: even if deprived of their "big brother", they have kept their label, never renounced their ideology or even their history. They did make some vague apologies to the nation for the wrongdoings though. In the elections after 1989, they consistently scored between 11 and 13 percent. There is a real possibility that they overtake the Social Democrats in 2002 elections and become the second strongest party.

The other, more immediate threat to the plans of constitutional changes results from a fact of nature: the recent death of one of the architects of the Opposition Agreement, Senator Vaclav Benda, a former dissident who spent five years behind the bars before 1989. At the end of August, there will be a by-election in Benda's district which, if won by a member of other party than ODS or CSSD or by an independent, may deprive the signatories of the Opposition

Agreement of their three-fifths majority in the Senate needed for any amendments of constitution. (Art. 39)

Such a development could have grave consequences. In order to work as it should, democracy needs at least two parties competing for power but being both a part of the democratic "regime". If a two-party system emerges with one party being "external" to the regime, the voters will always return, out of fear, the other party to power. This is bound to lead to petrification, if not corrupt practices of the only party tolerable to the broad spectrum. This is precisely what was happening for decades in postwar Italy. Scared of the Communists, the Italian voters consistently returned the Christian Democrats, in spite of the fact that their ethical standards gradually deteriorated, to put it mildly. Resulting from the present Czech setup, the ODS could play the role of the Italian Christian Democrats. Of course, such a development, which is no more than a real possibility yet, would bring about the end of the Opposition Agreement.

7.1. Finding the way out of the deadlock? Discussions on the system of representation

Since the 5-percent cutoff was introduced into the Czechoslovak electoral law in 1990, voters have given less and less support to parties with slim chances of success. This can be explained by the psychological effect of the electoral system (term of Maurice Duverger). At first, many citizens did not understand the working of the cutoff and in large numbers supported parties which were bound to fail.²³ These votes are assigned to those parties which reached the minimum 5 percent of votes or more. At first, there was a large disproportion between the percentages of votes and the distribution of seats in the Assembly of Deputies. Because due to the above "learning process" ever fewer votes are "lost", the minimum percentage of votes necessary for the formation of a majority government has been rising. This can be shown on the percentages achieved by the three coalition parties in 1992 and 1996: while in 1992 the three parties obtained 42 percent of votes and reached a relatively comfortable majority of 105 seats out of 200 in the Assembly of Deputies, their support rose by 1996 to 44 percent but brought them only 99 seats, not enough to form a majority government. Professor Miroslav Novak, a Czech political scientist teaching at Charles and Fribourg Universities, speaks of "proportionalization" of the Czech electoral system.²⁴ It is now numerically impossible to form a two-party coalition other than grand. Because of the character of the parliamentary parties – and animosity between their top politicians – stable three-party coalitions are almost unthinkable. It gradually dawned on the ODS politicians, the main champions of the change of the Assembly of Deputies electoral system as defined in Article 18 of the Czech Constitution, that there is a number of possibilities within the framework of the proportional system. Instead of a major change in the Constitution, for which one Opposition Agreement signatory, the CSSD, was not ready, a modification in the electoral law should bring about "majority rule" effects and possibly bring about "stable environment".²⁵

While the main point on the ODS agenda concerning constitutional changes was and still officially is a change of the electoral system for the Assembly of Deputies, the CSSD showed much stronger interest in the modification of president's prerogatives, conditions for the dissolution of the Assembly of Deputies, and legislators' broad immunity, which is covering even drink-and-drive offences and has been very unpopular with the voters. The Opposition Agreement is not specific about electoral system. On the day of its signing, the ODS leader Klaus demanded a change of Article 18 but the CSSD quickly responded in the negative.²⁶ Instead of

changing Article 18, the two parties agreed in the late spring of 1999 to make such changes in the electoral law that would "enhance the majority-rule principle". There are two such changes proposed: (a) the present method of assigning seats (Hagenbach-Bischoff) should be replaced with one of other formulas, either D'Hondt²⁷ or Imperiali,²⁸ and (b), the number of electoral districts is to be increased from nine to thirty-five.

The deliberations on electoral system (or formula) changes have not been completed. In June 1999, these efforts suffered a setback as the two negotiating teams appointed under Opposition Agreement by the ODS and by the CSSD, respectively, failed to come to agreement in electoral law matters. The top leaderships of the two parties responded by replacing the teams. The Chairperson of the Senate, Ms. Libuse Benesova, has become the new ODS top electoral reform negotiator. She immediately announced that she would try to achieve a constitutional change which would enhance the role of the Senate, above all giving legislative initiative to individual Senators, and perhaps more say in budget matters.

7.2. Changes of the Constitution agreed by the ODS and the CSSD

The draft document²⁹ reflects, above all, the wishes of the Social Democrats. The changes should affect the relationship within the executive branch between the president and the government, the way Prime Minister is appointed and the government constructed, the role and prerogatives of the outgoing government, and the conditions for the dissolution of the Assembly of Deputies. Also, several minor changes are to be introduced.

The prerogatives of the president as defined in Article 62 should be limited in several aspects: while presently the president can appoint any judge a member of the Supreme Court, the proposal envisages that the president can appoint – from among the Supreme Court judges – its Chairperson and Deputy Chairpersons as proposed by the Senate.³⁰ Similarly, the president shall appoint the President as well as Vice-President of the Supreme Auditing Office as proposed by the Assembly of Deputies. S/he will be able to nominate the Governor and Vice-Governors of the Czech National Bank from among the Banking Council members only.

Presidential prerogatives in Article 67 should also be curtailed: after Assembly of Deputies' elections, the president shall ask the leader of the political party which obtained most seats to construct a government within 30 days. The duopolistic tendency of the Opposition Agreement can be seen from the next change: in case the leader of the strongest party turns president's request down or fails to construct a government or if the government led by the strongest party loses the vote of confidence, the president shall ask the leader of the political party that obtained the second highest number of seats to form the government within 30 days. The president shall appoint the government without delay, immediately after he has been presented a list of proposed ministers.

At the end of 1997, the Czech Republic had two governments, the outgoing government of Klaus, and the new Tosovsky government of "experts", in fact a mixture of unpolitical officials and members of the small center-right parties which had left the coalition a short time before. It was by no means clear which of these governments was entitled to and responsible for what. The Constitution change draft tries to prevent the repetition of this problem by making it obligatory for the president to entrust the outgoing government with the continuation of its work until a new government is appointed, and, at the same time, by imposing some limitations on the outgoing government: it may take only such measures that cannot be postponed, it must not present bills of constitutional character, a budget bill, it must not ask in the Assembly of Deputies

for a vote of confidence. The commission of the outgoing government ends at the moment the new government has taken oath.

There are limitations to be imposed on the legislators' immunity: while the text of the Constitution in Article 27 (paragraph 4) states that "Deputies and Senators may not be criminally prosecuted except with the consent of the chamber of which they are a member. If that chamber withholds its consent, such criminal prosecution shall be forever foreclosed," the proposed modification deletes the second sentence. Similarly, the president and the Constitutional Court judges are to be deprived of their privileged "forevers" (Articles 65 and 86, respectively).

8. Conclusion

As the experience of the United States in the late 18th century has shown, the first constitution after a major change need not be satisfactory and may have to be overhauled or even replaced. The countries which have emerged from the collapse of communism in the late 20th century have taken different paths. The former German Democratic Republic was an exception as it was merged with the Federal Republic, the jurisdiction of whose 1949 Basic Law was simply extended to include "the new lands". Czechoslovakia tried what proved to be impossible in the longer term: to live with the inherited Communist-era constitution, subjecting it to dozens of changes and deletions. In Poland after 1981 and in the Russian Federation after 1991, completely new constitutions began to be drafted. The process of ratification was by no means easy there, though, and the ratified texts (Polish Constitution adopted by national referendum in May 1997, the Constitution of the Russian Federation approved by the constitution-making assembly in July 1993 and carrying the date of December 12, 1993) reflected the political balance of forces in the Polish and Russian societies of the time and, as Wiktor Osiatynski explains,³¹ interests of particular political players rather than any overarching national interest.

The Czech constitution was prepared in a different situation. It became clear in the summer of 1992 that Czechoslovakia would be peacefully divided at the end of the year. Moreover, the Slovaks swiftly passed their constitution in September. The legislators were distracted by the technicalities of the divorce and under great time pressure. In that situation, they handed over the task of drafting a new constitution almost entirely to experts. Unlike in Poland or Russia, the constitution-making process did not become a subject of political struggle of various factions. The 1992 Constitution was largely inspired by the prewar Czechoslovak Constitution of 1920.³² This can be seen very clearly from sections dealing with the role of the President or from the system of proportional representation. At the same time, innovations were introduced: for the sake of balance, the different systems of representation for the Assembly of Deputies and for the Senate (probably a genuine Czech contribution), and the Czech electoral law contains an American-inspired provision that one third of the Senators be elected every two years.

Almost seven years since the ratification of the Constitution of the Czech Republic and almost ten years since the collapse of the Communist regime, it is possible to assess the Constitution's functionality. In general, it can be stated that the Constitution has worked reasonably well. It has been adhered to and two of the three institutional changes envisaged there have been or are in the process of being implemented (the establishment of the Senate and of the higher territorial self-governing units). The only institution which – regrettably – has not materialized so far is the Supreme Administrative Court.

On the other hand, the two Assembly of Deputies' elections which have taken place since 1993 failed to bring clear majorities with an unequivocal mandate. In July 1998, the two strongest parties attempted to overcome the resulting deadlock and achieve "stability" by the above-analyzed Opposition Agreement, in which changes in the Constitution are envisaged. However, there is a general reluctance of the political sphere as well as the public to make too hasty changes. The modifications agreed upon by the ODS and the CSSD will be far from fundamental. Moreover, the chief political players have come to the conclusion that the most serious crisis which has occurred during the first seven years of the Czech Republic, the repeated deadlock after the elections, can be resolved by changes in the electoral law rather than by those of the constitution.

¹ For analysis of the Polish constitutional developments after 1989, see Wiktor Osiatynski, "A Brief History of the Constitution", *East European Constitutional Review*, Volume 6, Numbers 2 & 3 (Spring/Summer 1997). For a very critical assessment of the new Polish Constitution, see Pawel Spiewak, "The Battle for a Constitution", *Ibid.* In the same issue, Ewa Letowska presents a more balanced view of the new Constitution. See her article "A Constitution of Possibilities".

² – Testified to, among others, by the Prague Jewish writer Max Brod in his memoirs.

³ For a full Czech text of the 1920 Czechoslovak Constitution, see http://noviny.psp.cz/cgi-bin/aspi/aspi_12_new?WVCNC+735+0+o.

⁴ For a full Czech text of the 9th of May Constitution of the Czechoslovak Republic (1948), see http://noviny.psp.cz/cgi-bin/aspi/aspi_12_new?WVCNC+10669+0+o.

⁵ For a full Czech text of the original 1960 Constitution of the Czechoslovak Socialist Republic, see http://noviny.psp.cz/cgi-bin/aspi/aspi_12?WVCNC+15498+0+o+11.12.1967.

⁶ See Milos Calda, "The Roundtable Talks in Czechoslovakia", pp. 135–177, in *The Roundtable Talks and the Breakdown of Communism*, Jon Elster, ed., Chicago and London 1996.

⁷ Slovak and Czech National Council results, respectively. Data from Karel Zaloudek, *Encyklopedie politiky*, Praha 1996.

⁸ For a full Czech text of the final shape of the 1960 Constitution, see http://noviny.psp.cz/cgi-bin/aspi/aspi_12_new?WVCNC+15498+0+o.

⁹ For the story of the drafting and ratification of the present Polish constitution, see ...

¹⁰ In the meantime, the Slovak Constitution has been changed in favor of a direct election of the President by the people.

¹¹ For excellent commented edition of the Czech Constitution of 1992, see Dusan Hendrych, Cyril Svoboda et al., *Ustava České republiky*, Praha 1997. For a reliable English translation of the text of the 1992 Constitution, see <http://www.libra.concourt.cz/legmat/CONSTIT.html>. For a more general but a bit brief treatment of the Czech Constitution, see Vladimir Klokočka, *Ustavni zřízení České republiky*, Praha 1997.

¹² Compare with the British constitutional system, where Government ministers must be

members of Parliament, making the former a Parliament committee.

¹³ It should be noted here that until the demise of Czechoslovakia, the country had three governments: Federal, Czech and Slovak.

¹⁴ All the parties that emerged after 1989 have had a financing scandal, usually connected with payments made by the beneficiaries or even would-be beneficiaries of privatization projects. On the other hand, the parties which had existed prior to the 1989 collapse and had been able to create greater resources, have a much cleaner record in this respect.

¹⁵ Another notable failure, in spite of some impressive pre-election poll ratings, was the "Senior Citizens' Party for Life's Guarantees".

¹⁶ US (Freedom Union), the party formed by the ex-ODS members who left after the 1997 party-financing scandal and which, for all practical purposes, had replaced the ODA in the political spectrum.

¹⁷ It was founded in 1878 as an autonomous section of the Austrian Social Democratic Party.

¹⁸ The CSSD obtained 32.31 percent (74 seats), the ODS 27.74 percent (63 seats), the Communists 11.03 percent (24 seats), the KDU-CSL 9.0 percent (20 seats), and the US 8.6 percent (19 seats). All the other parties failed to make the 5 percent hurdle.

¹⁹ For full English text of the Opposition Agreement, see <http://www.vlada.cz/vlada/dokumenty/opozsml.eng.html>. The original Czech text can be found at <http://www.ods.cz/980709-opsml.html>.

²⁰ This term – as well as "civil society" is used by President Havel to emphasize activities of voluntary associations rather than the role of the bodies resulting from regular electoral process.

²¹ For an analysis of the 1988 elections and a very critical assessment of the Opposition Agreement, see Radim Marada, "Party realignment, cloakroom politics, and civic culture. The 1998 Czech Elections", in *East European Constitutional Review*, Fall 1998.

²² This happened in West Germany in the late 1960s under Kiesinger-Brandt government when the "extraparliamentary opposition" of left-wing radicals thrived. Presently in Austria, the grand coalition leaves much room to the "Free Party" of the right-wing nationalist Jörg Haider.

²³ Some of these parties were, at least in the name, surprisingly monothematic, like "Beerdrinkers' Party" (soon a sister party was founded in Poland) or "Independent Erotic Initiative", a grouping which set itself the task of fighting "puritanism" and "hypocrisy" seen as leftovers of the Communist era.

²⁴ See his article "Mala politologicka uvaha o vladni stabilite" in *Parlamentni zpravodaj* 1/1996.

²⁵ See Petr Fiala and Frantisek Miks, "Změna volebního zákona a ustavy", *Proglas* 5-6/1999, pp. 1–4.

²⁶ It should be added that the senior constitutional expert of the CSSD, Professor Zdenek Jicinsky, happens to have authored the Socialist constitution of 1960.

²⁷ Also called "the largest average formula". The number of votes won by each party is divided by the number of seats held by the party, plus one. The first seat is awarded to the party with the highest number of votes, since, no seats yet having been allocated, the initial denominator is one. When a party wins a seat, its formula denominator is increased by one and hence the party's chances of winning the next seat are reduced. The available seats are awarded one at a time to the party with the greatest average. Party totals, not candidate totals, are used in the calculations. No transfer of ballots takes place. The d'Hondt formula, presently used in Sweden, Denmark and Norway, has a slight tendency to over-representation of large parties, while the probability of small parties to gain legislative representation is reduced.

²⁸ This formula is used in Italy. The total popular vote is divided by the number of parties plus two.

²⁹ The draft has been made available to the author by the Parliamentary Club of the ODS.

³⁰ Important modifications are shown here underlined.

³¹ See Wiktor Osiatynski, "A Brief History..."

³² According to Petr Krejci, political advisor of the parliamentary caucus of the Civic Democratic Party, the draft-makers were in such a hurry in November and early December that took over some provisions of the 1920 constitution verbatim.