

Legal Status of the Heads of State in the Czech Lands From the Beginnings of Modern Constitutionalism Until the End of Communist Rule

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ABSTRACT

The story of the heads of state in the Czech Lands during the 19th and the 20th centuries is nothing less than the modern history of the nation itself. Their status and its changes over time tell us also about the struggles, concerns, ambitions, and successes of the Czech people. When looking at the legal position of the heads of state over time, one thing can be stated without any exaggeration: Their real influence always managed to grow through the role they were supposed to play according to the sheer text of the respective constitutional provisions. This article aims to disclose how and why this happened, with a particular emphasis on the constitutional context of this process.

KEYWORDS

head of state, president, Czechoslovakia, Czech Lands, constitution, republic

Statutul juridic al șefilor de stat în Țările Cehe de la începuturile constituționalismului modern până la sfârșitul regimului comunist

REZUMAT

Povestea șefilor de stat din Țările Cehe în secolele al XIX-lea și al XX-lea nu este nimic mai puțin decât istoria modernă a națiunii însăși. Statutul acestora și schimbările în acest statut de-a lungul timpului ne vorbesc, de asemenea, despre luptele, preocupările, ambițiile și succesele poporului ceh. Atunci când analizăm poziția juridică a șefilor de stat de-a lungul timpului, un lucru poate fi afirmat fără nicio exagerare: influența lor reală a reușit întotdeauna să crească dincolo de rolul pe care ar fi trebuit să îl joace conform textului pur și simplu al prevederilor constituționale respective.. Acest articol își propune să dezvăluie cum și de ce s-a întâmplat acest lucru, punând un accent deosebit pe contextul constituțional al acestui proces.

CUVINTE CHEIE

șef de stat, președinte, Cehoslovacia, Cehia, Țările Cehe, constituție, republică

I. INTRODUCTION

The defeat of the Bohemian estates in the Battle of White Mountain (*Bitva na Bílé hoře*) in 1620 marked the beginning of feudal absolutism in the Lands of the Bohemian Crown. In response to the unsuccessful rebellion, Ferdinand II deprived the Bohemian estates of most of their rights associated with the governance of the kingdom and concentrated these powers in the hands of the monarch. The legal justification for these changes was found in the theory of forfeiture of rights (*teorie o propadlých právech*), according to which the estates lost all of their previous rights to the victorious side (the Emperor) by rebelling against him and suffering a defeat.¹

Most of the new rules were legally entrenched in the document called the Renewed Land Ordinance² (German: *Verneuerte Landesordnung*, Czech: *Obnovené zřízení zemské*), which was imposed by Ferdinand and served as a land constitution for Bohemia (promulgated in 1627) and Moravia (promulgated in 1628). The most remarkable changes introduced by the new document were related to the status of the monarch: Article A1 proclaimed the Lands of the Bohemian Crown hereditary for the reigning dynasty, which meant that in case of a Habsburg succession, the estates were deprived of their right to elect or confirm the monarch. Article A8 conferred the exclusive legislative power (*ius legis ferendae*) on the monarch, while Article A20 empowered the monarch to grant Bohemian residential rights (*ius incolatus*), a right that was previously exercised by the Land Diet. Any action that interfered with the rights of the monarch, even the proposal of a new law, was punishable by death.³

This period of forced recatholization, Germanization, and disregard for Czech interests lasting more than two centuries,⁴ which the famous Czech writer Alois Jirásek later termed the Darkness (*Temno*),⁵ had an indisputable impact on the Czech national memory. The literary depiction of the absolutistic era at the turn of the 20th century aggravated the already negative stance of the Czechs toward the Habsburg dynasty and statehood and played a considerable role in the formation of the independent Czechoslovak state and its legal traditions.⁶

The aim of this article is to trace the historical development of the legal status of the heads of state in the Czech Lands from the early beginnings of modern constitutionalism in the 19th century until the fall of the socialist regime in 1989. The article will scrutinize the most important constitutional provisions from this period, primarily examining the origin and termination of their office, their roles, powers,

1 Karel Malý et al. (2010): *Dějiny českého a československého práva do roku 1945* (History of Czech and Czechoslovak Law Until 1945), Leges, Praha, p. 153.

2 Verneuerte Landesordnung des Erbkönigreichs Böhaimb. Original text in German accessible from: [https://gdz.sub.uni-goettingen.de/id/PPN626655234?tify={%22pages%22:\[5\],%22panX%22:0.496,%22panY%22:0.745,%22view%22:%22info%22,%22zoom%22:0.382}](https://gdz.sub.uni-goettingen.de/id/PPN626655234?tify={%22pages%22:[5],%22panX%22:0.496,%22panY%22:0.745,%22view%22:%22info%22,%22zoom%22:0.382}) [accessed 03-12-2021]

3 Malý et al. (2010): p. 154.

4 Ibid.: pp. 149, 154, 155.

5 See: Alois Jirásek (1915): *Temno* (Darkness), Jan Otto, Praha.

6 See for example: Arne Novák (1916): *Zvony domova* (Bells of Home), Fr. Borový, Praha, pp. 131–132.

and responsibility, and the course of events that led to the adoption of the respective provisions. A further goal of the article is to provide insight into the relationship between Czech political circles and the larger society on one hand and the head of the Czech state on the other.

II. LEGAL STATUS OF THE MONARCH FROM THE BEGINNINGS OF CONSTITUTIONALISM UNTIL THE COLLAPSE OF THE AUSTRO-HUNGARIAN EMPIRE

1. First attempts at constitutionalism

The absolutist establishment introduced by the Renewed Land Constitution prevailed in the Czech Lands for almost the whole first half of the 19th century. However, the political upheaval during the Springtime of Nations brought about the first cracks on the façade of the regime. In March 1848, the Viennese revolutionaries forced Chancellor Metternich to resign, while Emperor Ferdinand pledged to issue a constitution and guarantee civil liberties.⁷

The Emperor kept his word: On April 25, 1848, a constitution was issued for the Cisleithanian parts of the Habsburg Empire. The April or Pillersdorf Constitution⁸ (named after its author, Baron Franz von Pillersdorf, the minister of interior at that time) was a rather brief compilation of foreign constitutions that were used as models⁹ for the document.¹⁰ Nevertheless, it significantly altered the position of the monarch compared to the absolutistic model, as it introduced—to some extent—the separation of powers.

According to Articles 10 and 34 of the April Constitution, the legislative power was to be divided between the Emperor and the Imperial Diet, consisting predominantly of elected members (Arts. 34–37). Article 47 of the constitution explicitly listed various issues that could only be regulated by acts of the Imperial Diet. However, according to Art. 15, all the acts of Imperial Diet also required the approval of the Emperor. All the other issues not listed in Art. 47 could also be addressed by the executive power, which remained completely vested in the Emperor. In contrast, the

7 Karel Schelle (2010): *Dejiny českého ústavního práva* (History of Czech Constitutional Law), Key Publishing, Brno, p. 7.

8 Allerhöchstes Patent Nr. 49/1848 25. vom April 1848 Verfassungs-Urkunde des österreichischen Kaiserstaates. In: Sr. k. k. Majestät Ferdinand des Ersten politische Gesetze und Verordnungen für sämtliche Provinzen des Österreichischen Kaiserstaates mit Ausnahme von Ungarn und Siebenbürgen, 46. Band, pp. 145–158. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=pgs&datum=1848&page=187&size=45> [accessed 03-12-2021]

9 The Belgian Constitution of 1831 was the main source of inspiration while drafting the April Constitution. Source: Karel Schelle, Jaromír Tauchen (2013): *Vývoj konstitucionalismu v Českých zemích* (Development of Constitutionalism in the Czech Lands), Linde, Praha, p. 18.

10 Schelle, Tauchen (2013): p. 18.

monarch had no judicial powers; jurisdiction was to be exercised by an independent judiciary.¹¹

The legal position of the Emperor—although substantially weakened compared to absolutistic times—remained relatively strong according to the text of the constitution. Its fifth article upheld the hereditary crown of the Habsburg dynasty, as under the absolutist system. Furthermore, besides powers traditionally associated with the heads of state (granting pardons and titles—Arts. 11 and 13, appointing officers—Art. 11, concluding treaties—Art. 12, command-in-chief—Art. 11, legislative initiative—Art. 15), the monarch could also adjourn or dissolve the Imperial Diet (the constitution contained no limitations in this regard). Pursuant to Art. 8, he was not responsible for the exercise of his governing powers, but his decrees required the countersignature of a minister, who was responsible (to whom, was not disclosed in the text of the constitution). The monarch also had to take an oath on the constitution (Art. 9).

While the primary intention behind the adoption of the April Constitution was to appease the insurgents, this move did not turn out to be successful.¹² As resistance against the document grew, Ferdinand proclaimed it to be provisional, designed only for the period until a definitive constitution was adopted by a constitutional assembly. Soon, however, the draft was completely withdrawn, and the April Constitution never entered into force.¹³

The Imperial Diet, elected in order to adopt a constitution meeting the requirements of liberal circles as well, began its work in July 1848.¹⁴ Despite the extensive political differentiation of its members and the forced relocation to Kremsier (present day Kroměříž, Czech Republic) due to the turbulent situation in Vienna, the Diet managed to come up with a constitution draft.¹⁵ The draft, named the Kremsier Constitution¹⁶ after the location of the assembly, had many similar provisions to the April Constitution with respect to the powers of the monarch, mainly regarding the prerogatives traditionally associated with the heads of state (diplomacy, appointments, chief command, etc.). However, the Kremsier Draft was far more extensive and detailed than the April Constitution,¹⁷ and was more restrictive in terms of the Emperor's prerogatives. The main differences were the following: According to the

11 Stanislav Balík, Vít Hloušek, Jan Holzer, Jakub Šedo (2003): *Politický systém českých zemí 1848–1989* (Political System of the Czech Lands 1848–1989), Masarykova univerzita. Mezinárodní politologický ústav, Brno, p. 21.

12 Schelle (2010): p. 8.

13 Hermann Baltl, Gernot Kocher (1993): *Österreichische Rechtsgeschichte: Unter Einschluss sozial- und wirtschaftsgeschichtlicher Grundzüge: von den Anfängen bis zur Gegenwart*, Leykam, Neudörfl, pp. 195–203.

14 Schelle, Tauchen (2013): p. 19.

15 Ibid.: p. 20.

16 Entwurf des Österreichischen Reichstages welcher in der Zeit vom 22. Juli 1848 bis 4. März 1849 getagt hat, zuerst in Wien, ab dem 22. November 1848 in Kremsier (Mgft. Mähren) ("Kremsier Entwurf"). Accessible from: <http://www.verfassungen.at/at-18/verfassungsentwurf49-i.htm> [accessed 03-12-2021]

17 It contained 122 articles, compared to the 59 articles of the April Constitution.

Kremsier Draft, all acts of the Emperor had to be countersigned by a responsible minister (Art. 44), and this time the text of the draft made it clear that the ministers were to be responsible to the Imperial Diet (Art. 69). Moreover, the draft only guaranteed a suspensive veto for the Emperor against the acts of the Imperial Diet (Arts. 87 and 88), and his right to adjourn or dissolve the Diet was also subject to limitations (Arts. 50 and 51).

Be that as it may, the political trends of the time turned out not to be favorable for a constitution drafted in a progressive manner. The last wave of the Vienna Uprising was quelled by the end of October 1848, and in December Ferdinand abdicated in favour of the young and ambitious new Emperor Franz Joseph. Heartened by the outcome of the Battle of Kápolna, the young ruler issued a new constitution on the March 4, 1849, which pre-empted the draft being prepared by the Diet in Kremsier. Three days later the Diet was dissolved by his orders and the Kremsier Constitution was abandoned for good.

2. Reintroduction of absolutism

The constitution issued by the Emperor on March 4¹⁸ (called either the March Constitution or the Stadion Constitution after the minister of the interior, Count Stadion) still acknowledged the separation of powers to a certain extent, but marked a definite setback in the development of constitutionalism.¹⁹ The legislative power was to be exercised by the Imperial Diet and partly also by land diets, but the position of the “hallowed, inviolable and unaccountable”²⁰ Emperor was so strong that it could heavily interfere with the powers of legislative organs: In contrast to the Kremsier Constitution, the March Constitution left the adjournment or dissolution of the Imperial Diet completely to his discretion (Art. 69) and ensured him the right of absolute veto against the acts of the Diet (Art. 66). Furthermore, article 87 guaranteed him the right to issue regulations that temporarily had force of acts.

According to the March Constitution, the Emperor also had the traditional prerogatives of the heads of state guaranteed by the previous constitutions (appointments, diplomacy, etc.). It also required the monarch to take an oath on the text of the constitution (Art. 13) and the countersignature of a responsible minister for each of his acts (Art. 18). The March Constitution, like the April and Kremsier Constitutions, declared that the crown of each constituent land (thus the lands of the Czech crown as well) was hereditary in the house of Habsburg-Lorraine (Art. 9).

It soon became clear that the March Constitution was only the first sign of a new course in governance that quickly led to the complete abolishment of constitutionalism. After rendering the ministers unaccountable to any political authority except

18 Kaiserliches Patent Nr. 150/1849 R.G.Bl. vom 4. März 1849, die Reichsverfassung für das Kaiserthum Oesterreich enthaltend Reichsverfassung für das Kaiserthum Oesterreich. In: Allgemeines Reichs-Gesetz- und Regierungsblatt für das Kaiserthum Österreich, Jahrgang 1849, pp. 151–165. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1849&page=287&size=45> [accessed 03-12-2021]

19 Balík, Hloušek, Holzer, Šedo (2003): p. 22.

20 Article 14 of the March Constitution.

the Emperor, Franz Joseph deprived the March Constitution of legal effect with a patent issued on December 31, 1851,²¹ and concentrated all powers once again in the hands of the monarch. The following period of neo-absolutism, lasting nearly a decade, began to fall apart owing to diplomatic and military failures and the worrying financial situation of the Austrian Empire.²²

3. Route to definite constitutionalism

In order to guarantee the affluent circles certain degrees of control over specified domains in exchange for their financial assistance,²³ the Emperor issued the October Diploma on October 20, 1860.²⁴ Its second article granted legislative powers mainly in the field of finances to the Imperial Council (*Reichsrat*), previously a mere personal advisory body to the Emperor²⁵ that had developed into a proper legislative authority in the following years.

A significant step in this regard was the February Patent²⁶ issued on February 26, 1861, which laid down the rules concerning the Imperial Council in greater detail. The Imperial Council was transformed into a bicameral body, with a lower house comprising deputies elected indirectly by the Land Diets²⁷ and an upper house made up of the highest nobility and clergy, as well as peers appointed by the Emperor.²⁸ While the February Patent once again paved the way to constitutionalism, it was by no means as ground-breaking as the previous constitutions. Even though the Emperor had to share legislative powers with another body of government again (this time the Imperial Council), which, in contrast to the October Diploma, was now competent in all fields of common (imperial) interest (Art. 10), the dominant position of the Emperor was beyond question. He still had the power to adjourn the session or

21 Kaiserliches Patent Nr. 2/1852 R.G.Bl. vom 31. December 1851. In: Allgemeines Reichs-Gesetz- und Regierungsblatt für das Kaiserthum Österreich, Jahrgang 1852, Stück 2, pp. 25–26. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1852&page=111&size=45> [accessed 03-12-2021]

22 Malý et al. (2010): p. 215.

23 Ibid.: pp. 215–216.

24 Kaiserliches Diplom Nr. 226/1860 R.G.Bl. vom 20. Oktober 1860, zur Regelung der inneren staatsrechtlichen Verhältnisse der Monarchie. In: Reichs-Gesetz-Blatt für das Kaiserthum Österreich, Jahrgang 1860, Stück 54, pp. 336–338. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1860&page=396&size=45> [accessed 03-12-2021]

25 Schelle, Tauchen (2013): p. 23.

26 Kaiserliches Patent Nr. 20/1861 R.G.Bl. vom 26. Februar 1861. In: Reichs-Gesetz-Blatt für das Kaisertum Oesterreich. Jahrgang 1861, Stück 9, pp. 69–311. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1861&page=99&size=45> [accessed 03-12-2021]

27 Articles 6–7 of the Fundamental Law on the Imperial Representation (*Grundgesetz über die Reichsvertretung*), which was the first supplement to the February Patent (*Beilage zu Nr. 20*). Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1861&page=102&size=45>

28 Articles 2–5 of the Fundamental Law on the Imperial Representation (*Grundgesetz über die Reichsvertretung*).

even dissolve the lower house of the Imperial Council without any restrictions (Art. 18) and issue his own ordinances while the Council was not assembled (Art. 13).

However, the political turbulence of the Austrian Empire continued, culminating in the 1860s, which inevitably led to further developments in the constitutional field. The Austro-Hungarian Compromise in 1867 was followed by a series of fundamental acts in the Cisleithanian part of the Monarchy, with many of them directly affecting the position of the Emperor. These series of fundamental acts regulating elementary relations within state governance are together known as the December Constitution.²⁹

The first major change was introduced by Act no. 101/1867,³⁰ which stated that no act of the Emperor was valid without the approval of a minister who was simultaneously accountable to the Imperial Council.³¹ These rules rendered the issuance of arbitrary decisions by the monarch virtually impossible. Act no. 141/1867³² broadened the powers of the Imperial Council and elaborated them in a detailed manner, but also transferred legislative competences to the Land Diets in all questions not listed among those appertaining to the Imperial Council.³³ It did not, however, entail fundamental changes to the relations between the legislature and the monarch. Act no. 145/1867³⁴ contained the most important provisions on the executive power. Its second article stated that this branch of power belonged to the Emperor, who performed his powers through accountable ministers. He was also the commander-in-chief of the country (Art. 5) and held many traditional prerogatives related to his representative function (appointments,³⁵ awarding decorations,³⁶ diplomacy³⁷). Additionally, every Emperor had the duty to take an oath before the Imperial Council after acceding to the throne (Art. 8).

When evaluating the balance of powers introduced by the December Constitution, one could generally say that the Emperor managed to retain a fairly strong legal position. The initial article of the act on the executive gives an indicative insight into the distribution of powers, stating that the Emperor is “hallowed, inviolable and

29 Schelle, Tauchen (2013): p. 28.

30 Gesetz Nr. 101/1867 R.G.Bl. vom 25. Juli 1867, über die Verantwortlichkeit der Minister für die im Reichsrathe vertretenen Königreiche und Länder. In: Reichs-Gesetz-Blatt für das Kaisertum Oesterreich. Jahrgang 1867, Stück 39, pp. 208–212. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1867&page=236&size=45> [accessed 03-12-2021]

31 Schelle, Tauchen (2013): p. 28.

32 Gesetz Nr. 141/1867 R.G.Bl. vom 21. December 1867, wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird. In: Reichs-Gesetz-Blatt für das Kaisertum Oesterreich. Jahrgang 1867, Stück 61, pp. 389–394. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1867&page=417&size=45> [accessed 03-12-2021]

33 Ibid.

34 Gesetz Nr. 145/1867 R.G.Bl. vom 21. December 1867, über die Ausübung der Regierungs- und der Vollzugsgewalt. In: Reichs-Gesetz-Blatt für das Kaisertum Oesterreich. Jahrgang 1867, Stück 61, pp. 400–401. Accessible from: <https://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=1867&page=428&size=45> [accessed 03-12-2021]

35 Article 3.

36 Article 4.

37 Article 6.

unaccountable.” Limitations of the Emperor’s powers in relation to the parliament along the lines of those proposed in the Kremsier Draft had not been introduced: The monarch still had full discretion to adjourn the sessions or dissolve the lower house of the parliament (Art. 19) and he had an absolute veto³⁸ against the acts of the Imperial Council (Art. 13). He also had the right to issue emergency ordinances with the same legal effects as acts of parliament, although the latter had to approve these during its next session.³⁹ Another element favoring the Emperor and restricting liberal aspirations⁴⁰ at the same time was the strong⁴¹ upper house of the parliament (House of Lords—*Herrenhaus*) composed of peers appointed by the monarch and other highly ranked noblemen and clerics.

Owing to the factors infringing the democratic principle and the separation of powers, the December Constitution can be perceived as still bearing certain absolutistic marks.⁴² Despite these shortcomings, however, it should be noted that the December Constitution was the first in the history of the Austrian Empire that was not octroyed by the Emperor but passed in a proper legislative procedure with the approval of the parliament and the monarch as well. Moreover, time showed that the December Constitution was able to strike some kind of balance between the different social classes, as it managed to remain in force until the very collapse of the Austro-Hungarian Empire.

Even though modern constitutionalism was ultimately achieved in the Austrian Empire (and thus in the Czech Lands as well), this cannot be said about the national goals of the Czechs living within the boundaries of the Empire. Simultaneously with the fight for constitutionalism, the Czech nation strove for the acknowledgement and renewal of Czech legal statehood within the framework of the Austrian Empire (i.e., the creation of a separate entity comprising all the Lands of the Czech Crown, resulting into a federal or trialist system of state organization).⁴³ Recurring failures in this regard led the Czechs to an ever-growing dissatisfaction with their position in the state.⁴⁴ The negative stance of the Czechs toward Austrian statehood in its then existing form meant that although the Habsburg monarchs were the lawful heads of state of the Czech Lands during the whole period examined in this article so far, they were rather perceived as foreign rulers representing a system that had oppressed the Czech nation for centuries.⁴⁵ The events of the early twentieth century created a sudden opportunity for the Czechs to radically change the course of their history.

38 Balík, Hloušek, Holzer, Šedo (2003): p. 27.

39 Ibid., see also: Schelle, Tauchen (2013): p. 33.

40 Schelle, Tauchen (2013): pp. 29–30.

41 According to Article 13 all acts of parliament had to pass both the lower and the upper house.

42 Otto Urban (1982): *Česká společnost 1848–1918* (Czech Society, 1848–1918), Svoboda, Praha, p. 224.

43 Malý et al. (2010): pp. 229–231.

44 Ibid.: p. 313.

45 Ibid.: p. 236.

III. LEGAL STATUS OF THE PRESIDENTS OF THE FIRST CZECHOSLOVAK REPUBLIC (1918–1938)

1. Concepts elaborated before the declaration of independence

The outbreak of the First World War brought about profound changes in the political life of the Czech nation. Their politicians had the opportunity to articulate their demands to actors besides representatives of the Austrian state. This also meant that those who imagined a political future of the Czech nation completely outside the framework of the Monarchy now had the opportunity to articulate their ideas freely, though in exile. However, it should be noted that those who had seen the solution in the secession and the creation of a fully independent state were certainly in a minority up until the final phase of the war.⁴⁶

Some circles, such as the conservative Czech nobility and the Catholic political parties, had not envisaged the breakaway of the Czech territories from Austria-Hungary at all,⁴⁷ probably in anticipation of a more effective protection of their interests within the Monarchy. In addition, the majority of the Czech parties properly entrenched in the Austrian political reality preferred the status quo (i.e., the preservation of the Monarchy), as they worried that in case the Austrian Empire fell apart, the supporters of Greater Germany would attempt to unite Austria—including the Czech Lands—with the German Empire.⁴⁸ In line with this, in a joint declaration from May 30, 1917, the Czech deputies of the Imperial Council still demanded “only” the abolition of dualism and the federalization of the Monarchy.⁴⁹

Nevertheless, the first concepts envisioning the breakup of the Monarchy and the restoration of the Czech state in a completely different setting were born just before the outbreak or during the early stages of the war and were associated with two main figures: Karel Kramář and T. G. Masaryk.⁵⁰

The former, who was the leader of the National Liberal Party, developed the so-called “Constitution of the Slavic Empire.”⁵¹ Ambitious as its name may suggest, the pan-Slavist idea of Kramář envisaged the integration of the state of Czechs, Poles, Bulgarians, Serbs, Montenegrins, and Russians into one Empire. The common head of the Empire was to be the Russian Tsar, in whose hands most of governing powers would be concentrated, and whom Kramář also imagined as the Czech, Polish, and Russian monarch at the same time. The Balkan states, however, would retain their own monarchs. Strikingly, Kramář suggested the creation of a near absolutist system, with the Tsar having the power to appoint members of the government

46 Schelle, Tauchen (2013): p. 341.

47 Ibid.: pp. 230, 314.

48 Ibid.: p. 314.

49 Ibid.: p. 345.

50 Ibid.: p. 341.

51 The text of Kramář's draft constitution in Czech is accessible from: <https://suslikova.klanweb.cz/rubriky/ceskoslovensky-politicky-system/kramarova-ustava-slovanske-rise> [accessed 03-12-2021]

regardless of the parliament's will, while the consent of the government would have also been needed to adopt legislative acts. One year after he devised this conception, Kramář was imprisoned. By the time he was released in 1917, the political situation had rendered his plans completely unrealistic.⁵²

Tomáš Garrigue Masaryk, an academic and deputy of the Imperial Council, went into exile at the beginning of 1915 to seek the recognition of the need to create an independent Czechoslovak state by the Allied powers.⁵³ He had first formulated his views on the form of the future Czechoslovak state even before he left his homeland. He also imagined a monarchy, with the person of the ruler being "some western prince."⁵⁴ Masaryk frequently modified his proposals, adjusting them to the course of events and needs current at that time. In one thing, however, he was consistent for years: He stuck to monarchy as the preferred form of government.⁵⁵ Even though Kramář and Masaryk had very different ideas and opinions on international orientation, their initial views on the form of government were in accord.

The Czech and Slovak diaspora in the United States also played a substantial role in shaping the constitutional structure of the future state.⁵⁶ In the 1915 Cleveland Agreement their representatives took a stand in favor of monarchy as well, in concrete terms by creating a common federal unit for the Czech and Slovak nations within the Monarchy.

As it can be seen from the previously mentioned examples, at the beginning of the world war, there were two major concepts for the future Czech (or Czechoslovak) state, and both projected monarchy as the form of government: One wished to remain within the scope of the Monarchy with a Habsburg ruler and the other imagined a monarchy either fully independent or integrated into a larger entity with a ruler from a different dynasty. As the war approached its end, however, things started to change radically.

As the public became increasingly dissatisfied with the conservative stance of the Czech representation in the Imperial Council, the deputies issued a joint declaration on January 6, 1918, in which they demanded the independence of the Czech and Slovak nations in a democratic and sovereign state, without any reference to the Empire or the dynasty.⁵⁷ Another significant step in forming the concrete constitutional structure of the new state was the Pittsburgh Agreement from May 1918, prepared by the Czech and Slovak diaspora in the United States, which declared the will of the two nations to form an independent and democratic Czechoslovak republic. The document, which clearly opted for the republican form of government, was also signed by T. G. Masaryk (even co-authorship is attributed to him) as the representative of the Czechoslovak National Council, which was not long after recognized as the official governmental body of the Czechoslovak nation.⁵⁸ In the final days of the war,

52 Schelle, Tauchen (2013): pp. 342–344.

53 Malý et al. (2010): p. 314.

54 Schelle, Tauchen (2013): p. 344.

55 Ibid.

56 Ibid.: p. 340.

57 Ibid.: p. 347.

58 Malý et al. (2010): p. 316.

on October 17, 1918, Masaryk handed President Wilson the Washington Declaration, where he, in the name of the National Council, categorically rejected the Czechoslovak nation remaining part of the federalized Monarchy, expressed the hostile stance of the nation toward the Habsburg dynasty, and declared their intention as an independent nation to be the creation of a democratic country with a parliamentary republican establishment.⁵⁹

In the spring of 1918, preparatory work on two fundamental acts of the new state began. One, known as the Economic Act (*hospodářský zákon*), was supposed to ensure its economic stability, while the other, called the Political Act (*politický zákon*), was meant to serve as a temporary constitution. Consequently, the latter was intended to outline the basic organization of the state. It stated that the nation would be the sovereign, but it did not proclaim the new state a republic or a monarchy, its third article only declaring that the form of government would be decided in the future. On the other hand, it designated the “interim state president” as the head of the state. This—somewhat inconsistent—approach showed that the document was in the end more in favor of a republican form of government. The interim state president was to be appointed by the already existing representative organs.⁶⁰ The draft also granted veto power to the state president and stated that the executive power would be divided between him and the government (but did not specify this question further).⁶¹

2. Head of state in the constitutions of the First Czechoslovak Republic

The quick collapse of the Monarchy left Czech politicians somewhat unprepared. The Political Act was not yet in a state suitable for adoption as the first legal act of the Czechoslovak state.⁶² As an emergency solution, the Act on the Establishment of the Independent Czechoslovak State (*Zákon o vzniku samostatného československého státu*)⁶³ was adopted on October 28, 1918. This brief act, created only the night before, proclaimed the birth of the new state and established the National Committee as the body representing “the unanimous will of the nation and executor of state sovereignty” (Art. 1), which thus became the sole and supreme legislative and executive entity in the country at once. Its second article stated that the existing Austro-Hungarian legal order would remain in force (hence the act is commonly known as “Reception Norm”). The first article of the Norm left the question of the form of government open by leaving the decision to the future National Assembly in accordance with the opinion of the National Council.

59 Ibid.: pp. 318–319.

60 Namely the National Council (*Národní rada*) as the main body of the resistance-in-exile, and the National Committee (*Národní výbor*) as the main body of the domestic resistance.

61 Schelle, Tauchen (2013): pp. 508–509.

62 Ibid.: p. 510.

63 Zákon č. 11/1918 Sb. ze dne 28. října 1918 o zřízení samostatného státu československého. In: Sbírka zákonů a nařízení státu československého, částka 2, p. 10. Accessible from: <http://ftp.aspi.cz/opispdf/1918/002-1918.pdf> [accessed 03-12-2021]

Final agreement on the form of the Czechoslovak government was reached during the following days at the meeting of the domestic representatives of the National Committee led by Karel Kramář and the representatives of the National Council as the government-in-exile led by Edvard Beneš. By this time, virtually every delegate favored a republic except Kramář, who still held the idea of a Slavic Empire. Nevertheless, he too signed the concluding document confirming republicanism.⁶⁴

As the constitutional order of the Monarchy could not be left in force, the National Committee began working on a provisional constitution that would only remain in effect until the proper constitution was prepared and adopted.⁶⁵ As the new country could not exist without constitutional framework, the need for the new document was urgent. The first Czechoslovak constitution, literally called the “Interim Constitution” (*Prozatímní ústava*)⁶⁶ was adopted on November 13, 1918. The following day, the Habsburg-Lorraine dynasty was deprived of the Czech throne and Tomáš Garrigue Masaryk was elected the first president of Czechoslovakia.⁶⁷

The Interim Constitution was a brief document consisting of 21 articles containing the elementary rules on the bodies of government and their relations.⁶⁸ Articles 7 to 12 dealt with the position of the “president of the republic.” The form of government was only evident from this formulation, as there was no specific provision on the form of government.⁶⁹ Despite the already existing political consensus on the matter, the Interim Constitution chose a reserved approach toward this question, as can also be seen in the wording of its seventh article, stating that “the office of president lasts until the new *head of state* is elected in accordance with the permanent constitution.”⁷⁰ The usage of the term “head of state” instead of “president” showed that the Interim Constitution was reluctant to definitely decide this matter.

The distribution of powers as originally laid down in the Interim Constitution was strongly disproportionate, favoring the parliament at the expense of the president. For this reason, the constitution was immediately subjected to heavy criticism by

64 Jan Kuklík: *Proč nebylo Československo republikou hned od 28. října 1918?* (Why Was Czechoslovakia Not a Republic Right from October 28, 1918?), *Acta Universitatis Carolinae—Iuridica* 2018/3, p. 73.

65 *Ibid.*: p. 74.

66 Zákon č. 37/1918 Sb. ze dne 13. listopadu 1918 o prozatímní ústavě. In: *Sbírka zákonů a nařízení státu československého*, částka 6, pp. 30–31. Accessible from: <http://ftp.aspi.cz/opispdf/1918/006-1918.pdf> [accessed 03-12-2021]

67 Kuklík (2018): p. 77.

68 Jan Kněžínek (2018): *Prozatímní ústava a její proměny* (Interim Constitution and Its Changes) [online], Justice.cz, p. 1. Accessible from: https://www.justice.cz/documents/12681/723595/Jan+Kn%C4%9B%C5%BE%C3%ADnek_Prozat%C3%ADmn%C3%AD+%C3%BAstava+a+jej%C3%ADD+prom%C4%9Bny.pdf/e0962f9b-c2d2-49ed-97a5-c7465bef73a4 [accessed 03-12-2021]

69 Schelle, Tauchen (2013): p. 515.

70 Kněžínek (2018): p. 3.

Masaryk himself⁷¹ and other academics and politicians⁷² as well, foreshadowing the considerable changes it very soon had to undergo.⁷³ These changes introduced in May 1919⁷⁴ were primarily aimed at strengthening the position of the president. In comparison to the original wording, which endowed him mostly with representative duties and left him practically powerless in terms of political competences,⁷⁵ the amendment granted the president a right to appoint and recall the government (Art. 14), to be present and even preside over government sessions, and to request information from their members (Art. 10a). The veto power of the president in Article 11 was also strengthened by extending the deadline for returning bills to the parliament from 8 to 14 days and stipulating that the parliament must confirm the returned bills with an absolute majority of all its members (there was no requirement of a qualified majority beforehand).

The definite constitution of Czechoslovakia was born later than originally anticipated. The process of its birth was prolonged by delays in the finalization of the peace treaties (containing duties for instance in the field of minority protection) and the extensive political debates between the different parties.⁷⁶ On February 29, 1920, the Constitutional Charter of the Czechoslovak Republic (*Ústavní listina Československé republiky*)⁷⁷—a document of sheer political compromises—was unanimously adopted by the still unelected revolutionary National Assembly.⁷⁸ It put a definitive end to the legal and political debates over the form of government by proclaiming Czechoslovakia a “*democratic republic with an elected president as the head of state*” in its second article.⁷⁹

The constitutional position of the president was also subject to lengthy discussions.⁸⁰ Masaryk, of course, advocated the concept of a strong president, having

71 Eva Broklová (2011): *Slušná ústava pro slušné lidi* (Decent Constitution for Decent People), in Jana Čeruchová, Lukáš Šlehofer et al.: *Ústava 1920* (Constitution 1920), Leges, Praha, pp. 48–49.

72 Ibid.: p. 51.

73 Schelle, Tauchen (2013): p. 514.

74 Zákon č. 271/1919 Sb. ze dne 23. května 1919, kterým se mění zákon o prozatímní ústavě. In: *Sbírka zákonů a nařízení státu československého*, částka 58, pp. 373–376. Accessible from: <http://ftp.aspi.cz/opispdf/1919/058-1919.pdf> [accessed 03-12-2021]

75 Kněžínek (2018): p. 4. Ferdinand Peroutka, one of the most important journalists during the First Republic, commented on this issue that “*although the head of state is the president, this head is chopped and placed next to the body.*” See: Schelle, Tauchen (2013): p. 541.

76 Schelle, Tauchen (2013): p. 515.

77 Zákon č. 121/1920 Sb. ze dne 29. února 1920, kterým se uvozuje ústavní listina Československé republiky. In: *Sbírka zákonů a nařízení státu československého*, částka 26, pp. 255–269. Accessible from: <http://ftp.aspi.cz/opispdf/1920/026-1920.pdf> [accessed 03-12-2021]

78 The Revolutionary National Assembly was created in 1918 by the enlargement of the National Committee to 256 and later to 270 members. See: Malý et al. (2010): pp. 322, 324.

79 Karel Malý (2011): *Československá ústava z roku 1920—Otevření cesty k demokratické společnosti* (Czechoslovak Constitution of 1920—Opening the Door toward Democratic Society) in Jana Čeruchová, Lukáš Šlehofer et al.: *Ústava 1920* (Constitution 1920), Leges, Praha, p. 13.

80 Schelle, Tauchen (2013): pp. 541–542.

the largest possible influence on the creation and functioning of the government, while some political circles—for example, the social democrats—opposed such ideas, claiming that these powers should belong to the legislature as the representative of the sovereign.⁸¹ The constitutional committee was also hesitant in this regard, being aware of the merits of Masaryk and wanting to honor his person by granting him decent powers, but also bearing in mind that Masaryk would not be president forever and recalling the grievances the Czechs endured during the reign of Franz Joseph.⁸² In conclusion, it was rather the stance of the president that prevailed.⁸³ As will be specified below, he was able to retain the strengthened position he acquired with the 1919 amendment of the Interim Constitution. Although the First Czechoslovak Republic was undoubtedly a parliamentary republic,⁸⁴ the president played a very important stabilizing role between the state powers.⁸⁵

Articles 56 to 69 of the Constitutional Charter were devoted to the office of the president. Under Article 56, the president was elected by the National Assembly with a three-fifths qualified majority. The term of office lasted 7 years, and nobody could be elected president for more than two consecutive terms except Masaryk, who was deliberately privileged in this regard (Art. 58). Articles 60 and 61 established that in case the president was temporarily unable to fulfil his tasks, his powers would be exercised by the government. Article 61 stated that if this inability lasted longer than 6 months, the National Assembly could elect a deputy president to exercise presidential powers until the president could again fulfill his tasks.

Article 64 Section (1) of the Constitutional charter granted the president not only the representative prerogatives that heads of state usually exercise but also political powers. The former category consisted of the external representation of the state, involving the negotiation and ratification of international treaties (Subs. 1), as well as declaring war and the state of war (Subs. 3). The president also appointed heads of diplomatic missions (Subs. 2), professors, judges, and certain public officers (Subs. 8), granted pardons (Subs. 11), and awarded certain types of benefactions and pensions (Subs. 9).

The latter category involved important competences regarding the government and the National Assembly as well. One of his strongest powers was the right to convene, adjourn, or dissolve the National Assembly (Subs. 4) nearly without any restriction, as the constitution only prohibited dissolution during the last six months of his term (Art. 31). Such a regulation containing no safeguards against the arbitrary dissolution of the parliament was substantially different from the rules pertaining to this question in the French Constitution of 1875, which otherwise served as a source

81 Ibid.: p. 542.

82 Zpráva ústavního výboru k ústavní listině Československé republiky—Tisk 2421. (Report of the Constitutional Committee on the Constitutional Charter of the Czechoslovak Republic—Print no. 2421.) Accessible in Czech language from: https://www.psp.cz/eknih/1918ns/ps/tisky/t2421_01.htm [accessed 03-12-2021]

83 Schelle, Tauchen (2013): p. 542.

84 Václav Pavlíček (2011): 90 let od vzniku Ústavní listina a Československá státní idea (90 Years from the Birth of the Constitutional Charter and the Czechoslovak State Idea) in Jana Čeruchová, Lukáš Šlehofer et al.: *Ústava 1920* (Constitution 1920), Leges, Praha, p. 39.

85 Malý et al. (2010): p. 335.

of inspiration regarding the presidential powers.⁸⁶ The president also had a veto right against the acts of the parliament (Art. 47), but this could be overridden by a qualified majority of the deputies and senators established by Article 48. Furthermore, besides the report on the state of the republic, he could also address the parliament with formal recommendations that he deemed necessary or efficient (Art. 64 Sec. (1) Subs. 6). Another important power of the president was the right to appoint or recall the prime minister and other ministers (Art. 70) and to determine which members of the government would lead particular ministries (Art. 72).

A major factor weakening the constitutional position of the president was the need for countersignature by a member of the government for all of his executive acts (Art. 68). Consequently, it was the government that bore the responsibility for these acts, the president himself not being responsible for the performance of his duties (Art. 66). According to Art. 67, the president could not be criminally prosecuted except for high treason before the Senate after a constitutional charge lodged by the Chamber of Deputies.

Despite some efforts in the 1930s to substantially strengthen the position of the president and introduce a system of a “strong presidency” by making the president the head of the executive and abolishing the responsibility of the government to the parliament,⁸⁷ the text of the constitutional charter was never amended during the existence of the First Republic.⁸⁸ Soon, however, the events leading up to the outbreak of the Second World War turned the constitutional order of Czechoslovakia upside down.

IV. CZECHOSLOVAK HEADS OF STATE DURING THE SECOND WORLD WAR

1. Position of “domestic” heads of state between 1938 and 1945

On September 30, 1938, the president and the government of Czechoslovakia accepted the Munich Agreement, forcing the country to cede its German majority territories to Nazi Germany.⁸⁹ The agreement was problematic in numerous aspects, including the constitutionally defective procedure of its domestic approval, lying in the complete ignorance of the parliament’s consent.⁹⁰ On October 5, President E. Beneš⁹¹ abdicated in order to create space for a more Germany-focused course in politics and emigrated, later to become the main figure of the foreign resistance.⁹² At the end of November, Emil Hácha, the former President of the Supreme Administrative Court, was elected to become his successor.

⁸⁶ Ibid.; see also: Broklová (2011): pp. 51–52.

⁸⁷ Schelle, Tauchen (2013): p. 544.

⁸⁸ Ibid.: p. 522.

⁸⁹ Malý et al. (2010): p. 435.

⁹⁰ See: Schelle, Tauchen (2013): pp. 892–893.

⁹¹ Beneš was elected president in 1935 after the abdication of Masaryk due to health reasons.

⁹² Malý et al. (2010): p. 443.

The Munich Agreement marked the end of parliamentary democracy and started the process of restriction of political rights and freedoms in the country.⁹³ A crucial step in this direction, concerning also the position of the president, was the adoption of the Constitutional Act. No. 330/1938 (the so-called “Enabling Act”),⁹⁴ which granted the head of state the right to issue decrees with the effects of a constitutional act, as well as a similar right for the government to issue orders substituting legislative acts, thus effectively eliminating the role of the parliament.⁹⁵

On March 14, the day when Slovaks declared their independence, President Hácha travelled to Berlin, where he was forced to sign a declaration placing the country in Hitler’s hands. The next day, German forces invaded the remaining part of Czechoslovakia. On March 16, Hitler issued a decree that established the Protectorate of Bohemia and Moravia.⁹⁶ Article 12 of the decree left in force the existing law in the occupied lands, which did not contradict the sense of the takeover of the protection by Nazi Germany, while Article 3 ruled that the Protectorate is a self-governing entity with its own bodies of governance. The decree also guaranteed protection for “the head of the Protectorate’s autonomous administration,” adding that he needs the confidence of the Führer (Art. 4). These provisions meant that President Hácha could formally retain his presidential title only so long as he enjoyed the support of the Führer.⁹⁷

However, the state president of the Protectorate was not only subordinated to Hitler. Article 5 of the decree created the office of the Reich-Protector, the representative of the Reich’s interests in the Protectorate, endowed with virtually unlimited powers toward the bodies of autonomous governance.⁹⁸ According to Article 5 he had the right to veto any act or measure of the autonomous establishment and could also issue legislative acts whenever he deemed necessary.⁹⁹ For this reason, the Reich-Protector enjoyed full supremacy over all bodies of the Protectorate, including the president.¹⁰⁰ In reality, the president of the Protectorate was only a powerless puppet, whom the Nazis used to seemingly legalize and legitimize their control over the occupied lands in the eyes of foreign actors.¹⁰¹

93 Schelle, Tauchen (2013): p. 891.

94 Ústavný zákon č. 330/1938 Zb. zo dňa 15. decembra 1938 o zmocnení ku zmenám ústavnej listiny a ústavných zákonov republiky Česko-Slovenskej a o mimoriadnej moci nariadenovej. In: Sbirka zákonů a nařízení státu česko-slovenského, částka 110, pp. 1205–1206. Accessible from: <http://ftp.aspi.cz/opispdf/1938/110-1938.pdf> [accessed 03-12-2021]

95 Schelle, Tauchen (2013): p. 897.

96 Výnos Vůdce a říšského kancléře č. 75/1939 Sb. ze dne 16. března 1939 o Protektorátu Čechy a Morava. In: Sbirka zákonů a nařízení, částka 28, pp. 373–376. Accessible from: <http://ftp.aspi.cz/opispdf/1939/028-1939.pdf> [accessed 03-12-2021]

97 Eva Janečková (2013): *Státoprávní uspořádání Protektorátu Čechy a Morava 1939–1945* (Constitutional Establishment of the Protectorate of Bohemia and Moravia, 1939–1945), Aleš Čeněk, Plzeň, pp. 116–117.

98 Janečková (2013): p. 66.

99 Ibid.: p. 67.

100 Schelle, Tauchen (2013): p. 899.

101 Janečková (2013): p. 116.

2. Position of the head of state in exile

After the Nazi occupation of the remaining part of Czechoslovakia, several politicians (including Beneš) decided to actively promote the de jure preservation of the country's existence abroad. Their concept was based on the argumentation that the Munich Agreement and everything that followed it was null and void owing to the breach of both domestic and international law. The first body to represent state interests in exile was the Czechoslovak National Committee, founded in Paris on October 17, 1939.¹⁰²

After the capitulation of France, the National Committee moved to London, where it was transformed into a whole system of bodies referred to as “provisional state establishment” (*prozatímní státní zřízení*). It consisted of a president, a government, and the State Council,¹⁰³ in order to resemble the establishment as it was laid out in the Constitutional Charter of 1920, with the president being the central and most important element of this establishment.¹⁰⁴ Edvard Beneš was proclaimed president, with an explanation that his resignation in 1938 was invalid as he was forced out of his office by the Germans.¹⁰⁵

With reference to legal continuity, the president-in-exile assembled the State Council and appointed the government, but the functioning of the establishment was not feasible according to the original constitutional framework owing to the absence of the National Assembly. To tackle this shortcoming, President Beneš issued Constitutional Decree no. 2/1940 on the provisional exercise of legislative powers,¹⁰⁶ which allowed the president to issue decrees with the power of legislative acts upon the proposal of the government (Art. 2), and stated that the approval of the government substituted the approval of the parliament as required by the Constitutional Charter for certain acts of the president until the parliament can be convened again (Art. 1). This meant that the president-in-exile not only exercised all the powers granted to him by the Constitutional Charter of 1920, but he was also the carrier of legislative competence.¹⁰⁷

On July 18, 1941, the Soviet Union and the United Kingdom¹⁰⁸ recognized the provisional state establishment in London as the official representation of

102 Schelle, Tauchen (2013): p. 902.

103 Although the triality may suggest a similar character to the National Assembly, the State Council was an advisory body to the president and a controlling and auxiliary body of the establishment. See: Schelle, Tauchen (2013): p. 905.

104 Schelle, Tauchen (2013): pp. 904–905.

105 Malý et al. (2010): p. 485.

106 Ústavní dekret prezidenta č. 2/1940 Úř. věst. čsl. ze dne 15. října 1940 o prozatímním výkonu moci zákonodárné. In: Sbírka zákonů a nařízení státu Československého, částka 10, p. 36. Accessible from: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=10> [accessed 03-12-2021]

107 Schelle, Tauchen (2013): pp. 905–906.

108 The United Kingdom recognized the provisional government as the official government of Czechoslovakia a year before, on July 21, 1940. This recognition, however, did not pertain to the president and the State Council. See: Schelle, Tauchen (2013): p. 905.

Czechoslovakia, followed by the United States on July 31. On December 3, 1942, a few days before the expiration of President Beneš's original term of office, the government-in-exile unanimously affirmed Beneš as president until new presidential elections could be conducted.¹⁰⁹

V. LEGAL STATUS OF THE HEADS OF STATE AFTER THE SECOND WORLD WAR

1. Czechoslovak presidents during the post-war transitional period

The question of applicable law after the end of the war was considered by Presidential Decree no. 11/1944.¹¹⁰ Its first article stated that the acts adopted until the Munich Agreement constituted the effective legal order of Czechoslovakia, while domestic acts adopted after September 29, 1938 were not part of the legal order. Article 5 of the decree kept the decrees of the president-in-exile in force, adding that they should be subjected to additional approval of the relevant constitutional actors (i.e., the parliament). If the National Assembly took no action in relation to a decree within six months after its first meeting, the given decree then ceased to be valid.¹¹¹ This meant that the Constitutional Charter of 1920, as amended by the presidential decrees, remained in effect even after the Second World War.

After his return from abroad, President Beneš continued exercising his decree powers until October 28, 1945, when the Provisional National Assembly (*Prozatímní Národní shromáždění*) held its first meeting.¹¹² The Provisional National Assembly was elected indirectly through delegates of the National Committees as the representative bodies arising from the liberation struggle created on local, regional, and land levels.¹¹³ As one of its first steps, the provisional legislature confirmed the presidency of Beneš,¹¹⁴ and with the Constitutional Act no. 57/1946 from March 28, 1946, ratified all the presidential decrees issued by him between 1940 and 1945.¹¹⁵

A further important task of the Provisional National Assembly was to prepare the elections for the Constitutional National Assembly (*Ústavodárné Národní shromáždění*).

109 Pavel Winkler: Dekrety prezidenta republiky z období 1940–1945 (Decrees of the President of Republic During the Period of 1940–1945), *Právník*, 1994/8, p. 22.

110 Vyhláška ministra vnitra č. 30/1945 Sb. ze dne 27. července 1945 o platnosti ústavního dekretu prezidenta republiky ze dne 3. srpna 1944, č. 11 Úř. věst. čsl., o obnovení právního pořádku. In: Sbírka zákonů a nařízení republiky Československé, částka 15, pp. 51–54. Accessible from: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=15> [accessed 03-12-2021]

111 See also: Winkler (1994): p. 20.

112 Schelle, Tauchen (2013): p. 1106.

113 Ibid.: pp. 909 and 1107.

114 Ibid.: p. 1107.

115 Winkler (1994): p. 21.

Elections were held on May 26, 1946, with the two Communist Parties together¹¹⁶ acquiring 114 seats of the total 300 in the unicameral parliament. A coalition government consisting of both Communist and non-Communist parties was created, with Communist Klement Gottwald as the prime minister (altogether, the Communists held 9 of the 27 governmental seats). On June 19, 1946, one day after its constituent sitting, the National Assembly unanimously elected Beneš the president of Czechoslovakia.¹¹⁷

As indicated by its name, the most important task of the Constitutional National Assembly was to adopt a new constitution. Several political parties articulated their opinions on specific topics, but only the national socialist party put forth a comprehensive proposal,¹¹⁸ elaborated by Prof. Vladimír Kubeš. The proposal did not suggest substantial changes regarding the constitutional position of the president, often simply paraphrasing the provisions of the Constitutional Charter from 1920.¹¹⁹ One difference regarding the political position of the president that can be accentuated was the increased limitation of the president's right to dissolve the parliament, with the proposal aiming to allow this measure only once per year (Art. 34). It is worth noting, however, that it was the constitutional position of Slovakia, and not the status of the president, around which the main political debate was evolving.¹²⁰ Be that as it may, all these debates turned out to be largely meaningless owing to the political events in 1948.¹²¹

2. Legal status of the presidents during Communist rule

In February 1948, the Communists seized power in Czechoslovakia when President Beneš accepted the abdication of the 14 non-Communist ministers and appointed a new government of K. Gottwald, predominantly consisting of Communists or their fellow travelers. Despite there being no constitutional provision expressly preventing the president from doing so, some academics argue that Beneš breached the constitution by giving in to the terms of Gottwald, which did not correspond with the political realities of the time, and thus practically helping the Communists to acquire full control over the state.¹²²

While the motivation behind Beneš's decision to accept the Communist scheme remains unclear (he received a variety of threats from Czechoslovak and foreign Communists involving discrediting, civil war, or foreign invasion, worsened by the

116 The Communist Party of Czechoslovakia together with the Communist Party of Slovakia.

117 Jan Kuklík et al. (2011): *Dějiny Československého práva 1945–1989* (History of Czechoslovak Law, 1945–1989), Auditorium, Praha, p. 47.

118 The full text of the proposal, along with its explanation in Czech language is accessible from: https://is.muni.cz/el/1422/jaro2015/MP201Zk/um/web/doc/povalecne-obdobi/Kubesuv_navrh_Ustavy.pdf [accessed 03-12-2021]

119 Cf. Article 64 of the 1920 Constitutional Charter and Article 83 of Kubeš's proposal.

120 Jan Kuklík et al. (2011): p. 48.

121 Schelle, Tauchen (2013): p. 1112.

122 Václav Veber: Jak to bylo s demisemi v únoru 1948 (How It Was with the Demissions in February 1948), *Paměť a dějiny*, 2009/1, p. 9.

fact that by this time he was suffering from serious illness),¹²³ he did not remain long in office with the Communists in charge. Shortly after their rise to power, they drew up a new constitution, which was adopted by the National Assembly (now completely under Communist influence) on May 9, 1948. Beneš refused to sign it, and for the second time in his life, resigned his presidential seat.¹²⁴ The National Assembly elected Gottwald president, which meant that the chairman of the Communist Party also became president of the republic. The presidential consent to the constitution was thus finally granted by Gottwald.¹²⁵

The Ninth-of-May Constitution (*Ústava 9. května*)¹²⁶ was solely based on post-war Communist proposals,¹²⁷ yet it still contained many provisions inspired by democratic constitutional traditions. A clear example is the first chapter of the constitution listing various fundamental rights and freedoms of the citizens (though in reality, these provisions were no more than empty proclamations that the Communist leadership did not mean to respect¹²⁸). In addition, it did not proclaim the leading role of the Czechoslovak Communist Party.¹²⁹ Article 6 of the constitution identified the president as the head of the state, who was elected by the National Assembly for 7 years.

The detailed rules pertaining to the status of the president were found in Articles 67 to 79 of the constitution. Formally, the position of the president was very similar to that laid down by the Constitutional Charter of 1920. Most provisions of the 1948 Constitution regarding the presidential powers were practically identical to those in the 1920 Constitution (responsibility, convening and dissolving the parliament, some representative duties),¹³⁰ or were merely paraphrases of the previous regulation (most of the representative duties),¹³¹ sometimes with minor changes (e.g., the deadline for vetoing parliamentary acts was extended to one month, possibility to grant a general pardon).¹³² A notable difference is connected to the recalling of the government as such or individual ministers, which according to the Ninth-of-May Constitution was only possible after their demise (see Art. 74 Sec. (1) Subs. 6), while the Constitutional Charter of 1920 did not contain such a limitation (see Art. 64 Sec. (1) Subs. 7).

123 Ibid.: p. 10.

124 Jan Kuklík et al. (2011): p. 84.

125 Ibid.

126 Ústavní zákon č. 150/1948 Sb. ze dne 9. května 1948 Ústava Československé republiky. In: Sbírka zákonů a nařízení republiky Československé, částka 52, pp. 1081–1108. Accessible from: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=332> [accessed 03-12-2021]

127 Schelle, Tauchen (2013): p. 1302.

128 Jan Kuklík et al. (2011): p. 86.

129 Ibid.: p. 209.

130 Cf. Articles 76–78; 49, 50, and 74 of the Ninth-of-May Constitution with Articles 66–68; 28, 31, and 64 of the Constitutional Charter of 1920.

131 Cf. Article 74 of the Ninth-of-May Constitution with Article 64 of the Constitutional Charter from 1920.

132 Article 58, resp. Article 74 Sec. (1) Subs. 11.

At the end of the 1950s, the Communist cadres came to the conclusion that the country had reached a new phase on its way to Communism and decided for the need to adopt a new, entirely socialist constitution free of the transitional elements characteristic of the 1948 Constitution.¹³³ Accordingly, a new constitution was adopted in 1960, named the Constitution of the Czechoslovak Socialist Republic (*Ústava Československé socialistické republiky*).¹³⁴ While the act itself is regarded as a serious misstep in the constitutional development of the country, it did reflect the political reality of the time better than the previous one.¹³⁵

Interestingly, the socialist constitution also retained the president as the head of the state. Even though there were attempts to replace the presidential office with a collective body,¹³⁶ they turned out to be unsuccessful, and Czechoslovakia remained the only country of the Eastern Bloc with a president as the head of state throughout the whole period of Communist rule.¹³⁷ The representative duties and powers of the president as specified by the 1960 Constitution were almost identical to those found in the previous constitution. The president represented the country externally, was the commander-in-chief, awarded decorations, appointed officials and generals, and granted individual and general pardons (see art. 62).

However, compared to the earlier regulation, his powers toward the legislature and the government were considerably weakened: the presidential signature was still required for every act of the parliament (Art. 62 Sec. (1) Subs. 4.), but there was no mention of any kind of veto right. His right to dissolve the National Assembly also disappeared; only the right to confer and close sessions remained (Art. 62 Sec. (1) Subs. 4.). According to Art. 43, the president was elected by the National Assembly, but the term of his office was shortened to 5 years, and the constitution explicitly stated that the president was accountable to the parliament. Even though this was a notable difference, this provision had only declaratory character, as the Constitution did not contain any rule on his impeachment, removal, or another kind of sanction.¹³⁸ On the other hand, the president's right to appoint or recall the government as a whole or its members remained guaranteed (Art. 62 Sec. (1) Subs. 6.).

The differences between the position of Czechoslovak presidents before and after 1948 thus did not really arise from the changes in the constitutional framework, but rather from the political reality of the Communist period. With the Communist Party being the only real center of power in the country, the president could not act as an independent stabilizing element within the system of state powers, as the office had been during the First Republic.¹³⁹ With the presidential seat always occupied

133 Jan Kuklík et al. (2011): p. 208.

134 Ústavní zákon č. 100/1960 Sb. ze dne 11. července 1960 *Ústava Československé socialistické republiky*. In: *Sbírka zákonů Československé socialistické republiky*, částka 40, pp. 289–309. Accessible from: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=990> [accessed 03-12-2021]

135 Jan Kuklík et al. (2011): p. 208.

136 Ibid.: pp. 210–211.

137 Zdeněk Koudelka (2018): *Prezident republiky* (President of the Republic), Leges, Praha, p. 25.

138 Ibid.: pp. 25–26.

139 Schelle, Tauchen (2013): p. 542.

by either the leaders (K. Gottwald, A. Novotný, G. Husák), or at least members of the Central Committee of the Communist Party (A. Zápotocký, L. Svoboda), the institution of the presidency became a further component assuring Communist rule in the country. On the other hand, the fact that the Communists preserved the presidential office during the whole period of their rule and that their leaders often aspired to this position indicates that the symbolic importance and the prestige of the presidency were acknowledged also in Communist circles.¹⁴⁰

In 1968, the federalization of the republic was carried out by Constitutional Act no. 143/1968,¹⁴¹ which replaced Chapters 3 to 6 (Articles 39 to 85) of the 1960 Constitution. Its provisions regarding the president were entirely based on the previous regulation,¹⁴² thus being nearly identical to those in the 1960 Constitution, with amendments enacted only where necessary owing to changes arising from the federal establishment. For example, according to the new rules the president could dissolve the Federal Assembly, but only in case its two chambers are unable to agree on certain questions (Art. 61 Sec. (1) Subs. d). While the president was the federal head of state, he had no such position (and powers arising from it) toward the federal units, where the presidium of the given national council functioned as the head of state.¹⁴³ According to Art. 122 of the Constitutional Act, the presidium appointed and recalled the governments of the federal units, and in some cases also appointed officers and awarded prizes and decorations.

While there were efforts aimed at the preparation of a new constitutional framework in the late 1980s, the structure and positions of the constitutional bodies remained in effect as laid down by the 1968 Constitutional Act until the collapse of the Communist regime in 1989.

VI. CONCLUSION

While the Czechs had their own monarchic traditions dating back to the Middle Ages, the centuries-long Habsburg rule undermined the sympathy and confidence of the nation toward the monarch. When they finally had the opportunity to determine the nature of the head of state in their own independent country, these experiences played a significant role in the decision to part with monarchic traditions and opt for a republican establishment with a president as the head of state, who lacked a particularly strong position. Looking only at the letter of the law of the respective constitutions could easily mislead one into the conclusion that the presidents of Czechoslovakia were rather representative figures with an inferior position compared to the parliament and the government. Such a conclusion would, however, not

140 Koudelka (2018): p. 25.

141 Ústavní zákon č. 143/1968 Sb. ze dne 27. října 1968 o československé federaci. In: Sbíрка zákonů Československé socialistické republiky, částka 41, pp. 381–401. Accessible from: <https://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=c&id=1528> [accessed 03-12-2021]

142 Schelle, Tauchen (2013): p. 1315.

143 Koudelka (2018): p. 28.

correspond to the relevance of this office in practice, as this was determined by very significant non-legal factors as well.

In the author's opinion, the most important of these factors was the personality of the president. T. G. Masaryk, the main protagonist of Czechoslovak independence abroad, was chosen to be Czechoslovakia's first head of state. Masaryk was often seen as the personification of the country's independence and the best guarantor of its freedom and democratic establishment. Such assumptions were not far from the truth, as Masaryk always respected the rules of the parliamentary establishment and did not use his powers arbitrarily simply to implement his own will.¹⁴⁴ His successor, Edvard Beneš, was Masaryk's companion during the struggle for independence, his designated successor, and the continuator of his legacy. During the hard times of the Second World War, when the country *de facto* ceased to exist, the whole concept of continuous Czechoslovak statehood resided in President Beneš.¹⁴⁵ Although Beneš had a stronger position than the president in a presidential system during these years, he did not abuse these powers and never tried to take advantage of his position in order to create an authoritarian system.¹⁴⁶

Thanks to these factors, the presidential office not only developed strong respect and authority among the public but as far as the author of this article is concerned, the historical events caused the presidential office and the existence of the republic to inseparably blend together. This bond grew so strong that even the Communists did not dare to break the presidential tradition. Quite the contrary, their leaders sought to achieve this position and tried to make use of its popularity among the public.¹⁴⁷ The authority of the president is also accentuated by the illustrative term "Castle" ("*Hrad*"),¹⁴⁸ which is widely used in the Czech language in reference to the president himself or to his policy.¹⁴⁹ The symbolic role of the president's personality also continued after the defeat of Communism, when another figure who played a central role in shaping the modern history of the Czech nation was elected president. His name was Václav Havel.

144 Broklová (2011): pp. 60–61.

145 Koudelka (2018): pp. 19–20.

146 *Ibid.*: p. 20.

147 *Ibid.*: pp. 25–26.

148 The term comes from the place of the presidential seat in Prague.

149 Koudelka (2018): p. 20.