FORMATION OF THE CZECH REPUBLIC AND SLOVAKIA

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Abstract: *In this article we present some of the problems connected with the formation of the First Czechoslovak Republic from the legal point of view. Our aim is to point out that the First Czechoslovak Republic could not arise for the Slovaks on the 28th of October, 1918. Our argumentation is firstly based on the historical discussion (descriptive level) which was held in the past, but at the same time we try to formulate conclusions applicable on other similar cases within nowadays discussion (prescriptive level). In the beginning of the article we analyse the thesis according to which the First Czechoslovak Republic was created on the 28th of October, 1918, while trying to come to terms with the arguments that support this legal fiction. Consequently we analyze the thesis that the First Czechoslovak Republic could not be legally created for the Slovaks on the 28th of October, 1918, because at that time the Czechoslovak Republic did not execute its effective power on the Slovak territory. To support this thesis we use also the stable practice of the Supreme Administration Court. At the end of the article, we try to summarize all the previous arguments and draw the attention to the lack of explanatory power of the legal fiction claiming that the Czechoslovak Republic was created on the 28th of October, 1918.*

Keywords: *Act No. 11/1918 Coll. of Laws, Czechoslovak Republic, Normative theorie, 28th October 1918, the Supreme Administrative Court of Czechoslovak Republic*

SUBJECT EXPOSURE

In the legal science community,[1] the date of 28 October 1918[2] is considered to be the date of formation of the first Czechoslovak Republic (or, more precisely, the Czechoslovak state as the republic was not solemnly proclaimed until 14 November 1918, at the first National Assembly session). The most frequent argument to support the thesis that the first Czechoslovak Republic must have been established on that date is the proclamation and wording of the Reception Standard, Act No. 11/1918 Coll. of Laws and Orders, on the formation of an independent Czechoslovak state[3] in combination with the public proclamation of the state by the so called Czechoslovak People's Proclamation.[4] The provisions of

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[1] See KLIMEK, A. *Vznik Československa říjen 1918.* Praha, Litomyšl: Nakladatelství Ladislav Horáček -Paseka, 1998.

[2] "The issue of formation of an independent state in 1918 became one of the most debated legal and historical issues – if we were to announce the capital D Day in our history, 28 October would certainly be one of the leading candidates". HORÁK, O. *Liechtensteinové mezi konfiskací a vyvlastněním. Příspěvek k poválečným zásahům do pozemkového vlastnictví v Československu v první polovině dvacátého století.* Praha: Nakladatelství Libri, 2010, p. 26. "There has never been written so much about any other day in this country." KLIMEK, A. *Říjen 1918. Vznik Československa.* Praha: Paseka, 1998, p. 182.

[3] The wording of the act on the formation of an independent Czechoslovak state was published in the Collection of Laws and Orders of the Czechoslovak state only additionally under Number 11 with certain changes to the contents. The hand-written text by Rašín is currently deposited in the Archives of the National Museum in Prague, Alois Rašín's collection, case 14, inventory No. 813-814.

[4] "Your age-old dream became reality! Today, the Czechoslovak state became one of the independent cultural states of the world! ... Czechoslovak people, all you do, you do as a new member of a big family of independent free nations from this moment on." KLIMEK, A. a kol. (eds.). *Vznik Československa 1918.* Praha: Ústav mezinárodních vztahů, 1994. pp. 332–334.

the Act on the Formation of Independent Czechoslovak State form a legal basis: (a) for material continuity of the newly established Czechoslovak law with the law of the collapsing Austria-Hungary,[5] as well as (b) for formal discontinuity, and thus for constitutional separation of Czechoslovakia from Austria-Hungary. A new normative centre from which the acquired Czechoslovak legal order began deriving its applicability became the Reception Standard itself.[6] This fact formed a tradition which most likely caused the formation of the Czechoslovak Republic to become one with the legal formation of the Czechoslovak Republic.

If you disregard the formation of the first Czechoslovak Republic[7] and take a look at the state's formation from a broader perspective, you can see that, although the formation of the state is connected with the legal formation of the state,[8] these two terms are by no means identical and they cannot be substituted. Various forms of state formation are recognized, such as political formation of a state,[9] international formation of a state,[10] factual formation of a state,[11] casual formation of a state,[12] historical and political formation of a state,[13] calendar formation of a state, legal formation of a state, and probably others. Although we have most likely not listed all forms of state formation, it is important that from the said demonstrative listing, a conclusion can be made that legal formation of state seems to be one of the specific forms of state formations in the general/individual system. The term state formation is more general in comparison to the term legal formation and, therefore, the opinion that the term state formation is identical to the term legal formation of state is incorrect. The said distinction will be respected in the text below; the subject of the analysis will be the legal and factual formation of the Czechoslovak state in the territory of Slovakia and their mutual confrontation and interaction. The study's objective will be to defend the thesis based on which the first Czechoslovak Republic could not have been legally formed on 28 October 1918 in all of its later-recognized territory, assuming that the

[5] HORÁK, O. Vznik Československa a recepce práva. K právní povaze a významu z.č. 11/1918 Sb. s přihlédnutím k otázce recepce právního řádu. *Právněhistorické studie.* 2007, No. 38, p. 153 and GÁBRIŠ, T. Vznik právneho poriadku prvej ČSR. *Acta Facultatis Iuridicae Universitatis Comenianae.* 2007, No. 25, p. 107.

[6] GÁBRIŠ, T. Teoretické a metodologické východiská unifikácie v 1. ČSR. In: *Sborník příspěvků z konference Monseho olomoucké právnické dny.* Olomouc: Universita Palackého v Olomouci, 2006, p. 232.

[7] Debates about the interpretation of the state's formation culminated in 1924 in the pages of newspapers (in particular, *Národní osvobození* and *České slovo*).

[8] "Opinions about the character of the revolutionary proclamation as this act (Act No. 11/1918 – note) is sometimes called, differed. It could be understood either as a constitutive act but also as a declaratory act because, in factual terms, it was the reflection of the real situation in the streets of coup dęetat Prague and other large cities, the result of upheaval culminating on 28 October 1918 when the public learned about the note of the Austro-Hungarian Minister of Foreign Affairs Gyula Andrássy of 27 October to the American president Woodrow Wilson, i.e. about acceptance of the truce conditions." HORÁK, O. *Liechtensteinové mezi konfiskací a vyvlastněním. Příspěvek k poválečným zásahům do pozemkového vlastnictví v Československu v první polovině dvacátého století.* Praha: Nakladatelství Libri, 2010, p. 27. We can safely state that there was no such revolutionary ardour in Slovakia on those October days; moreover, the people in Slovakia did not even know about the proclamation of the new Czechoslovak state until 30 October (and, after that date, it was known only in some Slovak political circles).

[9] DNISTRJANSKY, P. Právni vznik československého státu. *Právník.* 1929, Vol. 68, pp. 358–359.

[10] BROWNLIE, I. *Princípy medzinárodného verejného práva.* Eurokodex, 2013, p. 22.

[11] LACO, K. *Ústava predmníchovskej ČSR a ústava ČSSR.* Bratislava: Pravda, 1966, pp. 127–145.

[12] WEYR, F. *Teorie práva,* Praha: Orbis 1936, pp. 93–94.

[13] WEYR, F. *Československé právo ústavní,* Praha: Melantrich, 1937, pp. 75–81.

law is a social fact[14] and the state is not just a legal but also social conception.[15] Therefore, the following argumentation is not descriptively oriented and it does not intend to capture discussions on this subject comprehensively but rather to show the reasons why the thesis about the legal formation of the Czechoslovak Republic in the territory of Slovakia on 28 October seems unconvincing from the perspective of the current legal science.

FIRST VIEW: CZECHOSLOVAK REPUBLIC WAS FORMED ON 28 OCTOBER 1918

The Normativists' argument

The argumentative structure of the normativist approach is based on the reception institution which was directly incorporated in the act on the formation of an independent Czechoslovak state, No. 11/1918 Coll. of Laws and Orders. In the *Public Law Dictionary*, reception is defined as "the *deliberate acquisition of a certain law (the contents thereof) from one legal order to another, where the legal order should be understood in its broader sense – in the sense of a legal situation*".[16]

The aforementioned definition is based on two basic terms. The first one is material continuity which is characterized by adoption of the contents of a legal order. The second one is formal (dis)continuity, or rather what the definition calls "a legal situation". In the case of the evolutionary development of legal order, material continuity is accompanied by formal continuity. An example is the classic codification of a certain area of law, which results in adoption of a new code with an identical regulation of some of the original legal institutions. At the same time, formal continuity is typical by no change of legal situation as the new standard or regulation still derives its applicability from the original normative centre. The formation of Czechoslovakia is an example of a revolutionary development of legal order. Complementary to material continuity is the change of legal situation which led to replacement of the original normative centre by a new one, being the aforementioned Act No. 11/1918 Coll. of Laws and Orders and the Act on Formation of an Independent Czechoslovak State (the Reception Standard).

Article 2 of Reception Standard 2 regulated the institution of reception,[17] the purpose of which was to provide for continuity of the legal order of the dissolving Austria-Hungary with the legal order of the Czechoslovakia under formation. The said legal continuity seems as material; in connection with František Weyr's proposition, too, the formation of the Czechoslovak Republic was characterized by adoption of the contents of the legal order of one state to the legal order of another state which represented time continuity of the

[14] KÁČER, M. *Prečo zotrvať pri rozhodnutom. Teória záväznosti precedentu*. Praha: Leges, 2013, p. 16.
[15] PROCHÁZKA, R., KÁČER, M. *Teória práva*. Bratislava: C. H. Beck, 2013, pp. 29–31.
[16] Slovník veřejného práva československého. Part III. Entry: Recepce. p. 715.
[17] Article 2 of Act No. 11/1918 Coll. of Laws and Orders reads: *"all existing national and imperial laws and orders shall continue to apply for the time being*" For interpretation see also MALÝ, K., SOUKUP, L. *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě*. Volume 2. Praha: Nakladatelství Karolinum, 2010, p. 878.

previous one.[18] Therefore, it is not continuity in formal terms as, after declaration of the Reception Standard, legal standards could no longer derive their applicability from the basic law – the constitution of the dissolving state[19] in purely formal legal terms. Material continuity contained in Article 2 of the Reception Standard was therefore accompanied by formal discontinuity. The conclusion from this argumentation is that Czechoslovak standards were of identical content to standards of the dissolving Austria-Hungary; however, in formal terms, they started deriving their applicability from the Reception Standard as a new "centre" of the Czechoslovak legal order.

From the text and headline above, you can see that the subject of the following analysis is not an evolutionary development of the Czechoslovak legal order. The collapse of Austria-Hungary and the formation of the Czechoslovak Republic were and still are a representative case of revolutionary[20] development of legal order. If we focus on the analysis of the legal formation of the Czechoslovak Republic and not only on stating how the Czechoslovak Republic and its legal order were formed, it means if we try to answer the question of from when the Czechoslovak Republic was in legal existence, it is necessary to determine the time when Czechoslovak legal standards began to apply. The reason is that applicability is considered as an expression of existence in law, which means that determination of the time when legal standards began to apply is the determination of the beginning of their existence. Normativism school protagonists who generally applied the deduction method of knowledge of law claimed that the time when legal standards began to apply is the time when the state was legally formed. This thesis was directly derived from a notion that law and state are two sides of the same coin, as, by getting to know the law, the student gets to know the state, and vice versa.[21] Having applied the said link between applicability of legal standards and legal formation of the state to the case when one state collapses and another one is being formed, and the contents of the legal order of the collapsing state are adopted in the legal order of the forming state (material continuity accompanied by formal discontinuity), it was only understandable that the normativists' argumentation was oriented to and built on the conception of change of the so-called *"normative centre*" of legal standards in this respect. Change of the *"normative centre*" was always effected through revolution, which was manifested as formal discontinuity when one *"normative centre*" was replaced by another.[22] The problem was, however, that the *"normative centre*" was presented as a meta-normative principle in terms of conception. It means it was not legal but non-legal, which made the whole structure of normative theory relations even more complicated. If we take a normativist approach to law, meaning if we consider it as a purely formal system separated from the reality of social life, as a final result we get three levels, letęs call them *"realities*", whose interrelations cannot be precisely defined. On one hand, we have a causal reality which is separated from

[18] Slovník veřejného práva československého. Part II. Entry: Kontinuita právní. p. 365.
[19] For details, see Ibid., pp. 364–366. For closer explanation see also MALÝ, K. et al. *Dějiny českého a československého práva do roku 1945*. Praha: Linde, 2005, pp. 328–330.
[20] *"Revolution is a negation of law, meaning a negation of its existing centre."* WEYR, F. *Teorie práva*. Praha: Orbis, 1936, p. 233.
[21] WEYR, F. *Teorie práva*. Praha: Orbis, 1936, pp. 228–229.
[22] Ibid., p. 233.

legal (normative) reality. On the other hand, for the sake of justification of the validity/existence of legal reality, the normativists made up the third meta-normative reality ruled by the normative centre which was, however, impossible to be experienced by any available way, and not even by the normative method. In philosophy, we would probably call the meta-normative reality metaphysics, which means something beyond the borders of our experience. The question is why, in this case, we must postulate the existence of meta-normative reality at all if it is in fact impossible for us to experience or get to know it. The only possible justification for the existence of a meta-normative level is purely methodological. Even physicists tend to create and postulate the existence of objects which are not observable by currently available means, for example the strings of some dimensions that are, in principle, unobservable. In spite of this we expect that they exist and even form the basis of the whole observable world around us.[23] The unknowable meta-normative level and *normative centre* might be similar to this. Normativists postulated this level to maintain internal consistence of individual theses of normative theory and the separability of legal and causal realities. The *normative centre* is their axiom, Newton's point on which they built their interpretation of the world. Finally, the *"normative centre*" becomes a purely hypothetical conception used by the normativists to justify the validity of legal standards in their pyramidical structure of legal order.[24] After all, we can encounter hypothetical levels of interpretation in social science, too; for example, the social contract theory which is used as justification of existence of the state and the transfer of power from sovereign people to their representatives.

Although František Weyr formulated the normative theory as purely legal cognition which has nothing to do which the empirical world, even he could not resist and he did not hesitate to use his theory as an evaluatory criterion of reality. He found the equivalent of his *"non-legal normative centre*" and *"unknowable*" meta-normative principle in the Reception Standard.[25] In its preamble, it was proclaimed that "the *independent Czechoslovak state was born*" (a proclamation of formal discontinuity). It was followed by Article II regulating the legal order's reception (expression of material continuity). The contents of the proclamation in the Reception Standard represented a revolutionary change of the normative centre in terms of the normative theory, and that's why the proclamation of Reception Standard on 28 October 1918 was considered as the beginning of the legal existence of the first Czechoslovak Republic.

[23] The reason why they are unobservable is the fact that the strings do not reach the size of the Planck length. *"Planck length is, however, the smallest possible dimension which might be observed in principle or, respectively, precisely determined (in the case of shorter lengths or time intervals smaller that the time required for the light to overcome that distance (Planck time), classical ideas about continuous space and time are invalid and so, the existence of strings smaller than this size cannot be verified. In spite of that, strings should be the basis of everything that is observable."* DÉMUTH, A. *Filozofické aspekty dejín vedy*. Trnava: Trnavská univerzita v Trnave filozofická fakulta, 2013, p. 17.

[24] Thomas Aquinas and Aristotle thought similarly. They justified the existence of this world by stating that if the world is a set of causes and consequences and each consequence has its cause, going on and on indefinitely would be against the principles of logic as the world must have its beginning, which means there must be an initial cause which justifies the existence of other things in the world.

[25] WEYR, F. *Teorie práva.* Praha: Orbis, 1936, p. 230 a 233, and also in WEYR, F. *Soustava československého práva státního*. Praha: Fr. Borový, Nakladatelství v Praze, 1924, pp. 81–83.

ARGUMENT AGAINST THE NORMATIVISTIC APPROACH TO THE FORMATION OF THE CZECHOSLOVAK REPUBLIC

Note that in legal science, the main subject of dispute concerning the formation of the Czechoslovak Republic is just the conception of the so called *"normative centre"*[26] as a non-legal principle from which other legal standards were to derive their applicability. In general, we can say that the individual conceptions of legal scientists who were involved in the subject of the formation of the Czechoslovak Republic and considered the date 28 October 1918 as its formation date can be classified into two groups. On the one hand, there were normativists maintaining the position of legal idealism separating the normative world from the causal one. On the other hand there were lawyers with more sociological tendencies who considered the state, law and society as mutually conditioning and influencing an inseparable union and who were called also classic legal positivists.

František Weyr was a normativist and, so, it is understandable that his argumentation was based on the division of the world into normative and causal worlds.[27] Division of these worlds led him to believe that the issue of legal formation of state was an issue exclusively belonging to the normative world, not the causal world. The result was a proposition that just like the normative world is separated from the causal world, the legal formation of state is separated from the causal one. As the legal formation of state was connected with the term normative centre, as we have mentioned above, further legal existence of state was connected also with another fundamental proposition appearing in normative theory. It was the thesis that the terms standard and legislator can be derived only if the existence of an original standard which had the position of the *"normative centre"* within the legal existence of state was postulated. This implies that legal formation of each state is always necessarily subject to satisfaction of certain conditions (including, but not limited to, the existence of an original standard which, at the formation of a new state, is accompanied by the necessity of change of the normative centre, i.e. necessity of change, or rather creation of the original standard of the forming state). Causal formation of state is thus principally different from legal formation. According to František Weyr, causal formation is a result of, in principle, an indefinite series of causes[28] which culminated, in the case of Czechoslovakia, in independence and proclamation of the Reception Standard in the Old-town Square in Prague.[29] It is obvious that the normativist conception is based on a strict separation of form from content, where their mutual influence is excluded in advance. Law was thus understood as a pure and formal phenomenon detached from society, where legal formation of state was only subject to change of normative centre, without proving whether the change in the respective territory actually happened, or not. And that was the reason for many interpretation problems related to the fact that the

[26] WEYR, F. Sukcesořství československého státu a recepční zákon č. 11 z r. 1918. *Časopis pro právní a státní vědu*. 1938, Vol. 21, p. 2.

[27] It is the classic division of the world into the world of causality (the natural world – "that what is") and the world of norms (the normative world – "that what should be").

[28] WEYR, F. *Teorie práva*. Praha: Orbis, 1936, pp. 92–93.

[29] WEYR, F. *Soustava československého práva státního*. Praha: Fr. Borový, Nakladatelství v Praze, 1924, pp. 75–81.

Reception Standard should have entered into force and effect upon its proclamation date, as was provided in the Reception Standard itself; however, it is clear that concerning Slovakia, its force and effect are debatable.[30] The normativist view as a theoretical construct seems acceptable; however, it cannot explain some contradictions and paradoxes bringing about legal-historical events. In our opinion, the proposition separating causal and legal formations of state is internally consistent; however, it is an abstraction which does not reflect reality.[31] States being formed by revolutions are not formed and it seems that they cannot be legally formed in a moment but during a process.

Our conviction is based on the following reasons.

Applying Weyr's optics, Act No. 11/1918 Coll. of Laws and Orders and the so called Reception Standard come closest to the *"normative centre*" concept. If the Reception Standard is a normative centre of the Czechoslovak legal order, it had to perform two functions in the sense of the normative theory. Firstly, it had to contain provisions clearly showing the occurrence of formal discontinuity. Secondly, it had to determine which received standards are applicable and become a part of the Czechoslovak legal order together with it, which was supposed to demonstrate that it was the original standard. At first glance, it therefore seems that by proclamation of the Reception Standard and formation of the National Committee, all conditions required for legal formation of the Czechoslovak Republic and its public administration also in the territory of Slovakia were satisfied. The problem clearly manifests only after we realize that the Reception Standard did not explicitly contain the provisions (the so-called derogation clause) able to cancel application of those legal regulations which would be in conflict with it.[32] The derogation clause was contained only in Article 1 (1) of the Deed of Constitution of the Czechoslovak Republic, Act No. 121/1920 Coll. of Laws and Orders.[33] And, according to František Weyr, one of the fundamental characteristics of an original standard was just the ability to determine applicability limits of the applicable standards derived from it. In other words, it had the capacity to determine that standards of lower legal force must be in compliance with it because acts of a lower legislator are always limited by borders determined by a higher legislator within the scope of his activities.[34]

However, the derogation capacity of the Reception Standard was questionable as the Reception Standard itself did not explicitly contain any derogation clause. It was only later when the presence of the so-called implicit derogation clause was stated by jurisprudence

[30] Also according to Hart, the prerequisite for the applicability of standards is not only that they passed the system criteria of applicability but also the fact that public persons respect and apply these standards. HART, H. L. A. *Pojem práva.* Praha: Prostor, 2004, p. 122.

[31] At this point, the question arises concerning what we want the legal science to be like, whether we build it as a system of unattainable Platonic ideas, or as a conception of defined Aristotle categories.

[32] For details, see BEŇA, J. *Vývoj slovenského právneho poriadku.* Banská Bystrica: Univerzita Mateja Bela, 2001, p. 19 a 22.

[33] The respective paragraph of Article I of the Introductory Act of the Deed of Constitution of the Czechoslovak Republic reads: *"Acts conflicting with the Deed of Constitution, parts thereof and acts amending it shall be invalid."*

[34] Weyr as well as Kelsen created a hierarchical structure of legal order, in which the standard of lower hierarchical order must have been in compliance with a higher standard. WEYR, F. *Teorie práva.* Praha: Orbis, 1936, pp. 126–127.

and legal science.[35] I am pointing out this fact just because effects of any derogation clause, either explicit or implicit, may be seen as a normative power causing termination of application – the existence of standards which are in conflict with it. In particular, the statement of "tacit derogation" can be found in decisions of the highest courts of the first Czechoslovak Republic.[36] The Supreme Administrative Court of the Czechoslovak Republic[37] stated, in its award of 30 April 1924, that, by Article 2 of Act No. 11/1918 Coll. of Laws and Orders *"legal order applicable in that part of the Czechoslovak Republic which was formerly a part of the kingdom and countries represented at the Reich Council remained applicable there; however, in Slovakia and Transcarpathia, meaning in the territory previously forming a part of the Hungarian state, the Hungarian legal order remained applicable; in both countries only to the extent that the existing Austrian, or respectively Hungarian, legal order does not conflict with the changed state-legal situation and unless changed by a new standard of the Czechoslovak state."*[38] The Supreme Administrative Court of the Czechoslovak Republic presented similar statements in its award No. 3931 of 2 March 1927, No. 6356 (Bohuslav) and award No. 6913/19 of 13 January 1920, No. 297 (Bohuslav): *"By the Act of 28 October 1918, the independent Czechoslovak state was proclaimed and the National Committee was declared as the executor of state sovereignty of this state (Art. 1) and all pub-*

[35] Based on a literal language interpretation, "any and all" acts would remain valid – it would be a complete reception. Based on the very essence of the matter, it would not be possible and it would be in conflict with the sovereignty of the new state. The first Republic's legal scientists, including but not limited to František Weyr, Jaromír Sedláček, František Rouček, Zdeněk Peška, Jaroslav Krejčo, Jan Krčmář, Ervín Hexner and Bohumil Baxa, and the justice represented by the Supreme Court and the Supreme Administrative Court, were well aware of that and their view were generally not so different. Therefore, they used a restrictive interpretation and corresponding argumentation in various modifications". HORÁK, O. *Liechtensteinové mezi konfiskací a vyvlastněním. Příspěvek k poválečným zásahům do pozemkového vlastnictví v Československu v první polovině dvacátého století*. Praha: Nakladatelství Libri, 2010, p. 30.

[36] The Supreme Court concluded that the Reception Standard and its contents, most of all its preamble, implicitly assumed derogation from these legal standards which were in conflict with the existence of the newly formed state. Compare the decision of the Supreme Court of the Czechoslovak Republic No. R II 28/28 of 3 February 1928, no. 7751 (Vážny, year 10, p. 177) or the decision of the Supreme Court of the Czechoslovak Republic no. R I 530/30 of 4 September 1930, No. 10.107 (Vážný year 12, p. 1077). For details, see LACLAVÍKOVÁ, M. *Pramene súkromného práva platného na území Slovenska, ich postavenie, význam a uplatnenie s prihliadnutím na rozhodovaciu činnosť Najvyššieho súdu československej republiky (1918-1938)*. Dizertačná práca. Trnava: Trnavská univerzita v Trnave. Právnická fakulta, 2006, p. 55–59.

[37] See also the award of the Supreme Administrative Court of the Czechoslovak Republic No. 16748 of 15 December 1921, no. 1065 (Bohuslav): *"By the said Act (No. 11/1918 Coll. of Laws and Orders – note), upon the nation's sovereign will, connections with other Austrian and Hungarian territories were broken, the existing Austrian and Hungarian law was repealed for the territory of the new state and a new law of the Czechoslovak state was introduced, for the time being by the reception of the Austrian and Hungarian law, unless in conflict with the new state."* Award of the Supreme Administration Court of the Czechoslovak Republic No. 18511/27 of 2 November 1929, No. 8211 (Bohuslav): "*As of 28 October, all acts of the former monarchy ceased to apply in the territory of the Czechoslovak Republic, the old legal order ended and by Act No. 11/1918, the Czechoslovak state introduced its own new legal order. This opinion implies that it is excluded to consider the acts applicable in the Czechoslovak republic as the acts of the former Austrian state and that it is further excluded to construe the words "acts of the former Austrian state" as the acts applicable in the Czechoslovak republic, although these acts did not, through the reception, acquire new material content but their contents are the same as the ones of the acts applying in the former Austrian state."*

[38] Award of the Supreme Administrative Court of the Czechoslovak Republic No. 11065/23 of 30 April 1924, No. 3538 (Bohuslav).

lic authorities and institutions were subordinated to its exclusive authority (Art. 4). Although the same Act, Art. 2 kept the existing laws and orders applicable, it is not possible to presume that this provision, although it makes no closer differentiation, intends to keep unchanged the applicability of all acts, even those which would mean rejection of the just proclaimed state independence of the Czechoslovak state or any lessening of the powers of the National Committee established by this Act." The effects of any derogation clause may be seen in society only provided that the state performs its jurisdiction efficiently. It means that even the effects of implicit derogation may not be recognized with any act which is equivalent to a Reception Standard until revolution, i.e. formal change of the normative centre, is effected also actually. An actually effected revolution may be considered to be the situation when the state that proclaimed independence started performing administration over a certain territory through bodies which the state appointed.[39] In the case of legal formation of the Czech Republic, it was not until individual bodies of governmental administration in the territory of Czechoslovakia started accepting and applying the law adopted by the National Committee and its successors or, respectively, their representatives.[40] The previous reasoning implies that until the revolutionary formation of Czechoslovakia was completed also actually by proclamation of the Reception Standard and it was clear that the new state would keep its domestic and international legal position, the postulate of an implicit derogation clause was just a myth. Besides, history is rich with legal documents, even of a constitutional nature, which were revolutionary proclamations but did not contain any explicit derogation clause[41] but, as they did not become effective, it was not required to postulate the existence of an implicit derogation clause. We based our considerations on the fact that separation of Czechoslovakia from the collapsing Austria-Hungary was associated with three unchangeable facts. The first one was the proclamation of the Reception Standard in the Old-town Square in Prague on 28 October 1918; the second one is its proclamation without an explicit derogation clause; and the third one was actual completion of Czechoslovakia's separation from Austria-Hungary. If we forget for a moment that the Czechoslovak Republic maintained its position in Central Europe in the end and we set off on a journey of intellectual experiment with no need to explain the extent of reception of Act No. 11/1918 Coll. of Laws and Orders as the revolution would not be actually completed, just like in 1848, we would end up at a place where Act No. 11/1918 Coll. of Laws and Orders would be just another revolution attempt which could not have been implemented. This would, at the same time, remove the necessity to postulate the

[39] See the example of the Aaland Islands, where the committee of lawyers appointed by the League of Nations issued an opinion that the Republic of Finland was not legally formed until it was strong enough to start executing administration through its own bodies (May 1918), so it might not have been formed yet on the day when it proclaimed independence (15 November 1917). See Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question. In: *ILSA* [online]. October 1920 [2014-08-25]. Available at: <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>. The same argumentation can be found with BROWNLIE, I. *Princípy medzinárodného verejného práva.* Eurokodex: 2013, p. 22.

[40] By representatives, I mean namely the so-called failed Skalice Government and the Ministry with the power of attorney for administration of Slovakia.

[41] An example is the proclamation of Slovak independence in 1849 or adoption of the Stadium Constitution and the following dethroning of the Hapsburgs.

existence of an implicit derogation clause which would explain the conflict between the fact of the Czechoslovak Republic's formation and the general reception of the original Austro-Hungarian standards.

Based on the above-mentioned facts, we reached the conclusion that, at the time of its proclamation, the Reception Standard did not satisfy all requirements determined for an original standard (representing both static[42] and dynamic[43] approaches), neither in normative, nor factual terms, and, so, we cannot assert that based on the Reception Standard, Czechoslovakia was legally created on 28 October 1918 in all of its territory as recognized later. For that reason, we cannot characterize it, at the time of proclamation of independence of Czechoslovakia, as an original standard, even if seen from the point of view of normative theory, or to attribute it the position of a normative centre.[44] We believe that, in legal and historical terms, the non-existence of a derogation clause was removed only by the constituent activities of the temporary National Assembly, even though courts started to claim later that an implicit derogation clause had been contained already in the Reception Standard. The requirements to be satisfied by an original standard were not satisfied until adoption of the Deed of Constitution of the Czechoslovak Republic, Act No. 121/1920 Coll. of Laws and Orders. The introductory act to the Deed of Constitution explicitly repealed these regulations which were in conflict with the Deed of Constitution and the establishment of the Czechoslovak Republic and categorically all previous constitutional acts, even though their provisions might not have been in direct conflict with the Deed of Constitution. Adoption of the Deed of Constitution meant satisfaction of the conditions determined for the occurrence of a *"normative centre*". Therefore, we must state that the normative theory does not give a satisfactory answer to the question of when the Czechoslovakian Republic and its organization-normative substrate were legally established, not even if you follow the purely formal-logical line of argumentation.

Another similar argument against normative justification of legal formation of the first Czechoslovak Republic on 28 October 1918 was Stanislav Dnistrjanskyj's approach. His sociologically-oriented considerations clearly show that he criticized František Weyr and normativists for their logical inconsistency. His argument in principal was that if we accept the opinion that a standard may not be a cause in the causal world, how can the causal world be the cause of creation of standards. It is clear that the Reception Standard was, based on the majority opinion, the centre and basis of material continuity of the Czechoslovak legal order. According to Stanislav Dnistranskyj, it might not have been, in principle, just a revolutionary act which would be beyond the law itself – it could not have been the so called non-legal centre. In his opinion, the thesis of separation of the normative and causal worlds is invalid because by analysing the Reception Standard, it unavoidably reaches the *contradictio in adjecto,* where the law is formed from a non-legal centre or, respectively, non-law.[45]

[42] All standards derive their applicability from the original standard

[43] Standards of a lower legal power must be in compliance with the standards of a higher legal power, where all norms of the legal system must be in compliance with the original standard. In the case of conflict, the original standard can derogate standards derived from it.

[44] WEYR, F. *Teorie práva*. Praha: Orbis, 1936, p. 126.

[45] DNISTRJANSKY, P. Právni vznik československého státu. *Právník*. 1929, Vol. 68, p. 359–360.

In Stanislav Dnistrjanskyj's opinion, legal formation of state is never separated from the life of society – nation, meaning from its political formation. This was proven by the very formation of the Czechoslovak state. Besides which, the Reception Standard stated that "the *Czechoslovak state was born*". And it was the connection of law and society on which Stanislav Dnistrjanskyj based his opinion that national society had an immediate effect on the formation of the new state in legal terms. In the national territory, a national government[46] was formed, and the Reception Standard and its revolutionary proclamation were not and could not have been the non-legal centre of formation of the Czechoslovak state but they were its legal centre.[47] The reasons were the following:

1) The Reception Standard was a demonstration of the free will of the Czechoslovak nation to form its own state;

2) According to Dnistrjanskyj, by proclamation of the Reception Standard, power was actually transferred from original bodies and they were then subordinated to a new superior representative body – the National Committee.[48]

Although Dnistrjanskyj's opinion is closer to ours as it does not separate the legal and social realities, his conclusions about the actual transfer of power, as far as the territory of Slovakia is concerned, are incorrect. It is a historical reality that the National Committee did not take the power, team or efficient administration over the whole territory of Czechoslovakia in one and the same moment. It is generally agreed that in the territory of today's Czech Republic (except for several areas of North Bohemia)[49] power was taken from Austrian authorities almost immediately following the proclamation of independence; however, it was not this clear in the territory of Slovakia. Taking the power from the Hungarian authorities was completed in our territory only in the middle of 1919. The moment of actual occupation which is connected with an efficient exercise of state power was significantly delayed in Slovakia, in comparison to the Czech countries. During the existence of the first Czechoslovak Republic, the Supreme Administrative Court of the Czechoslovak Republic tried to cope with the said problem.

HOW AND WHEN DID THE EFFICIENT EXERCISE OF THE CZECHOSLOVAK STATE POWER BEGIN IN THE TERRITORY OF SLOVAKIA?

In respect to the question asked, we must go back again to the analysis of decisional practice of the Supreme Administrative Court of the Czechoslovak Republic as it took

[46] Ibid., p. 364.

[47] Rouček has a similar opinion: *"all legal provisions apply in the Czechoslovak Republic only from the authority of this revolutionary proclamation, either legal standards issued after that proclamation…, meaning including the said Act No. 11, or before that proclamation… Also, legal standards received under this proclamation from Austria or Hungary apply only from the authority of that proclamation."* ROUČEK, F. – SEDLÁČEK, J. *Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a Podkarpatské Rusi*. Volume I. Praha: Eurolex Bohemia, s.r.o., 2000, p. 28.

[48] In this respect, Klineberger states that after the collapse of Austro-Hungary, national territories were proclaimed state territories and sovereign power was transferred into the hands of a national individuality in each such territory. KLINEBERGER, B. Stát jako subjekt práv. *Právník*. 1919, Vol. 58, p. 146.

[49] KLIMKO, J. *Vývoj územia Slovenska a utváranie jeho hraníc*. Bratislava: Obzor, 1980, p. 91; LACO, K. *Ústava predmníchovskej ČSR a ústava ČSSR*. Bratislava: Pravda, 1966, p. 141.

a polemic approach to the question *"whether it is possible to separate the actual – material and formal- legal aspects of state formation, or not*" (in this case, actual and formal-legal formation of the Czechoslovak Republic). On one hand, the Supreme Administrative Court was of the opinion that for *de iure* state formation, it is required that the state is capable of an efficient exercise of its own state power. Thus, a part of its decisions was based on the consideration of accepting the legal formation of state on 28 October 1918; however, only provided that, in the respective territory, actual transfer of power and occupation connected with the administrative institution took place at the same time. In particular, note the fundamental decision of the Supreme Administrative Court in which it expressed its approach to the question of the Czechoslovak Republic's formation in its territory:

"Concerning the former Kingdom of Bohemia, Margravate of Moravia and Duchy of Silesia in their historical borders, the state power of the Czechoslovak Republic did originate by the collapse of the former Austro-Hungarian Monarchy, meaning by the coup d'etat on 28 October 1918; however, concerning Slovakia which was a territory belonging to another state until then, it originated only during the process of actual occupation of individual counties. Occupation of each individual county is deemed effected only when the central administration was established in that county, meaning when County Governor entered his office."

The aforementioned decision of the Supreme Administrative Court of the Czechoslovak Republic was based on the following facts:

In November 1918, a distillery operator gave out 397 hectolitres of spirits to economic workers as a compensation for salary and then another 103 hectolitres of spirits to law enforcement authorities and people of the town where the distillery was located (a total 500 hectolitres of spirits). For doing so, the Tax Office imposed a tax in the amount of 6709 crowns and 30 cents on that operator. Having used all proper remedies available which did not lead to remedy or change of the decision of the Tax Office in the operator's opinion, the distillery operator decided to lodge a complaint with the Supreme Administrative Court to review the legality of the procedure of the tax administration bodies. He thereby demanded protection of his individual rights which were allegedly violated by the decision of state administration bodies.[50]

The basic question asked by the Supreme Administrative Court of the Czechoslovak Republic when solving the case was concerning the extent, i.e. the actual exercise of the Czechoslovak state power in the territory of Slovakia. In its opinion *"...for the assessment of this case, it seems decisive whether at the time when the said quantity of spirits left the complainant's distillery or warehouse, the state power of the Tax Office of the Czechoslovak Republic over the respective territory has been already established, because if a part of the 500 hectolitres of spirits left the distillery or the warehouse sooner, it was not yet under the authority of the Tax Office of the Czechoslovak Republic and so no consumption tax may be demanded from it."* From this quotation, it is clear

[50] Decision of the Supreme Administrative Court of the Czechoslovak Republic of 24 March 1921, No. 470. Quote according to: BOHUSLAV, ref. 2. Praha: Právnické vydavatelství v Praze, 1923, pp. 129–130.

that the Supreme Administrative Court considered as the key finding in this matter whether the Tax Office already had the authority established to impose a tax on the distillery operator, or not. In its opinion, however *"no proof could be found in the administration files about that fact*" and, therefore, *"the merits of the decision in question were insufficiently established and the challenged decision must be cancelled, in accordance with Section 6 of the Act on the Administrative Court."*[51] Ultimately, the reason for cancellation of the Tax Office's decision by the Supreme Administrative Court was the fact that the Tax Office did not examine at all whether the Czechoslovak Republic exercised power over the respective territory at the time when spirits were given out by the distillery operator, meaning whether, at that time, a governor appointed in his office by the Minister with power of attorney to administer Slovakia had actually entered office, or not.

The Supreme Administrative Court made a similar statement in its award No. 3336/21 (Bohuslav): *"Concerning the former Kingdom of Bohemia, Margravate of Moravia and Duchy of Silesia in their historical borders, the state power of the Czechoslovak Republic did originate by the collapse of the former Austro-Hungarian Monarchy, by means of the coup d'etat on 28 October 1918; however, concerning Slovakia which was a territory belonging to another state until then, it originated only during the process of actual occupation of individual counties. Occupation of each individual county is deemed effected only when central administration was established in that county, meaning when the County Governor entered his office,"* but also in award No. 5242 of 14 March 1925, No. 4520/25 (Bohuslav): *"Concerning the effect of acts and orders of the Czechoslovak Republic in the territory which was passed to the republic from the Hungarian state, the Supreme Administrative Court expressed several times a legal opinion (see Bohuslav 2863 adm.) that the effect depends on the time when central administration was established and the governor entered his office in the respective part of the territory."*

By generalizing the said case law of the Supreme Administrative Court, the formation of the Czechoslovak Republic was dependent upon satisfaction of two conditions:

Proclamation of independence of the Czechoslovak Republic by Act No. 11/1918 Coll. of Laws and Orders, which can be identified as a formal-legal condition of the formation of the Czechoslovak Republic;

Actual transfer of power, which is the material-legal condition of the formation of the Czechoslovak Republic;

which meant *de iure* formation of a sovereign Czechoslovak state in the respective territory. It is common knowledge that some parts of the territory of the Czechoslovak Republic later internationally recognized were not directly subordinate to the National Committee right from the proclamation of the Reception Standard. The most significant was the process of incorporation of the territory of Slovakia into the Czechoslovak state, which was distinctly gradual. An efficient exercise of the Czechoslovak state power cannot

[51] Ibid., pp. 129–130.

be seen in some areas of Slovakia until the first half of 1919.[52] In this respect, the case law of the Supreme Administrative Court makes us consider the strong argument doubting the generally accepted proposition that the Czechoslovak Republic was formed by the proclamation of the Reception Standard, on 28 October 1918, throughout the whole territory as recognized later.

The Supreme Administrative Court of the Czech Republic was not consistent in its case law. The other part of the Supreme Administrative Court's decisions, which later proved to be opinion-forming (with a statement in the form of a tacit reception), determined strictly that the date of legal formation of the Czechoslovak state and its state power was on 28 October 1918. Interesting awards in this respect are the award of the Supreme Administrative Court of the Czechoslovak Republic No. 114 fin. (Bohuslav): *"The state power of the Czechoslovak Republic actually began with the coup d'etat on 28 October 1918,"* and award No. 823 of 26 April 1921, No. 4372 (Bohuslav): *"The formation of the Czechoslovak state was a united act and the state power of the Czechoslovak Republic actually began with the coup d'etat on 28 October 1918 when the National Committee actually seized the state power, combining all the highest state power in all its functions in its hands. Legal sanction was then imposed on - the actual condition – the former entity's opinion, illegal like in the case of any coup d'etat – the will of the Czechoslovak nation as the state sovereignty holder. The state sovereignty forming the very essence of the nation was a state-forming source of the Czechoslovak Republic, but not international or peace treaties on which the existence of the state is not dependent as such and which have an absolutely different purpose… By that state-forming act, the city of Bratislava ceased to be a part of the territory of the former Austro-Hungarian Empire, or the Hungarian Country just like other parts of Slovakia forming a part of the Czechoslovak Republic, and all state-legal ties of that city to the Hungarian territory were cut which thereby became foreign to that city. The circumstance, as objected by the complainant, that during the Hungarian Bolsheviks' invasion in May and June 1919, the actual exercise of sovereign rights of the Czechoslovak Republic was temporarily repressed and large parts of the Slovak territory could not change the said condition.*" Similarly, the award of the Supreme Administrative Court No. 2501 of 16 June 1923, No. 10.466 (Bohuslav): *"The Czechoslovak state was born on 28 October 1918 in the whole territory*

[52] For example, in Tekov County from 31 December 1918, in Prešpor County not until February 1919, Abau-Turnian County not until 12 March 1919 and Komárno County not until May 1919, although the Minister with the power of attorney for administration of Slovakia appointed individual County Governors (except for Abau-Turnian County) already on 11 December 1918. The Official Journal of the Ministry with the power of attorney for administration of Slovakia, No. 1, Year 1, p. 3. The Governors in the said counties entered their offices later, not as soon as they were appointed. An indirect proof of entry into office of the Governor who was subordinated to the Ministry with the power of attorney for administration of Slovakia is that with his entry into office, the Official Journal released also in Hungarian, the Hungarian equivalent of the terms Chief Governor (föispán) and Vice-governor (alispán) was no longer used; they used the term Governor (zsupán) instead. See the Official Journal of Tekov County 1919, No. 1, p. 1, Official Journal of Komárno County and the City of Komárno, 1919, No. 3, p. 25, No. 13 pp. 73–78, No. 15 p. 82, No. 16, pp. 102–103, No. 18, p. 141. Sokolovský elaborated on the use of the words Governor (župan) and County (župa) within the Slovak public administration who presented convincing arguments that the words Governor and County, although they are much older, did not appear in the laws until after 1918, meaning with the formation of Czechoslovakia. SOKOLOVSKÝ, L. Grad-Španstvo-Stolica-Župa. *Slovenská archivistika.* 1981, Vol. 16, No. 2, pp. 112–116.

which the state claimed from the beginning and the extent of which was later recognized internationally by peace treaties," and award No. 9409 of 27 May 1924, No. 3666 (Bohuslav): *"Sovereignty of the Czechoslovak state did not cease even at the time of the Bolsheviks' intervention in Slovakia in relation to the territory occupied by the Bolshevik government. Any actions taken at that time in Slovakia by the Bolshevik government are non-effective towards the Czechoslovak state."*[53]

In the sense of the award of the Supreme Administrative Court of the Czechoslovak Republic No. 16.748 of 15 November 1921, No. 1065 (Bohuslav): *"A state-forming act is already the revolution Act of 28 October 1918 when the National Committee actually seized state power, combining in its hands all the highest state power in all of its functions throughout the whole territory of the Czechoslovak state, and expressing the will of the Czechoslovak nation as the holder of state sovereignty by the said Act. By the said Act, upon the nation's sovereign will, connections with other Austrian and Hungarian territories were broken, the existing Austrian and Hungarian law was repealed for the territory of the new state and a new law of the Czechoslovak state was introduced, for the time being by the reception of the Austrian and Hungarian law, unless in conflict with the new state. Based on the opinion of the former state entity, this formation of state was revolutionary, just like any coup d'etat; however, the new state was recognized as a legal state by a peace treaty... Not from the ratification of peace treaties but from 28 October 1918 when sovereignty of the Czechoslovak state was proclaimed, its territory was separated..."*

Inconsistent case law in such an essential issue is, in our opinion, sufficient proof of the unclear, revolutionary and unstable situation in the Slovak territory. Even the highest courts were unable to adopt a harmonized and consistent approach to the issue of the legal formation of the Czechoslovak Republic in the respective territory. The question of whether the precise date, hour or minute of legal formation of state under revolutionary (or military) conditions can be determined remains still open. In these times, it is not just a useless fiction preventing fair decisions in matters. We have reached a conclusion that it is just a legal construct – fiction – making it easier to understand the state in domestic and international political terms (in particular its formation and related legal consequences) – and that the formation of state may not, in the sense of our conclusions, be determined as a moment but as a process.

RATHER A PROCESS THAN A MOMENT OF FORMATION OF CZECHOSLOVAKIA IN THE SLOVAK TERRITORY.

In terms of international law, the Czechoslovak Republic acquired legal personality already at the time from June to September 1918 when it was being gradually recognized by several Treaty Powers. In terms of domestic state law, the formal-legal formation of the Czechoslovak Republic was postponed until 28 October 1918. Under the Reception Standard, among other things, the original Hungarian public and municipal organization of

[53] See also HLAVIČKA, M. K otázce doby vzniku suverenity Č.S.R. v jednotlivých dnešních jejich částech. *Právník*. 1922, Vol. 61, p. 168.

public administration was acquired in the territory of Slovakia, which was not precisely delimited until adoption of the Trianon Treaty. The Slovak National Council attempted to become the supreme body in the territory of Slovakia under the Martin Declaration. The Council intended to enshrine its position and powers as a counterpart to the National Committee. Both from objective and subjective causes, efficient subordination of execution of public administration under the Council's administration was out of the question. Any change in public administration through the Slovak National Council was therefore inconceivable. The main objective causes of the marginal position of the Slovak National Council in the Slovak public administration system were the issue of territorial delineation of the new state in the receding worldwide conflict and the geographic location and real political reach of the Slovak National Council in Slovakia. The main subjective causes of the Slovak National Council's failure were no doubt its insufficient administrative background connected with the incapacity to grasp revolutionary moods in Slovakia and secure the subordination of local national councils under the Martin centre. Objective and subjective causes then prevented the Slovak National Council from becoming the equivalent of the National Committee in Bohemia and the Council's position as the superior revolutionary and representative body of the Slovak nation gradually ceased. A definite progress in solving the problem of the Council's position and subordination of public administration to central bodies in Prague[54] was the formation of the Ministry with power of attorney for administration of Slovakia under Act No. 64/1918 Coll. of Laws and Orders, which, through its activities,[55] achieved that the Slovak National Council was cancelled by order No. 9/1919 first, later followed by local national councils cancelled by order No. 272/1919,[56] which entered into effect on 23 January 1919 and which was the end of revolutionary bodies formed by the activities of the Slovak National Council.

The Ministry with power of attorney for the administration of Slovakia was formed by Act No. 64/1918 Coll. of Laws and Orders, on extraordinary and temporary provisions in Slovakia,[57] adopted by the National Council of the Czechoslovak Republic on 10 December

[54] The National Committee passed Act No. 37/1918 Coll. of Laws and Orders (the so-called Temporary Constitution) by which it turned itself into a temporary revolutionary assembly by extending its membership basis. Under the Temporary Constitution, the Temporary National Assembly was the highest legislator. The highest executive body was the Government. Upon passing the Temporary Constitution, the accumulation of executive and legislative power in one representative body and its division among the legislative assembly and the Government moved the establishment towards the form of a republic. See Act No. 37/1918 Coll. of Laws of Orders, Section 14 et seq. Another indirect proof of such movement was referenced in Section 13 where we can find the ruling of judgements in the name of the republic.

[55] The Ministry with power of attorney for administration of Slovakia had a task to "eliminate the influence of Hungarian irredentist officers, and so, the Minister's orders were focused on changes in county and town councils, limitation of Hungarian self-governing municipal bodies, with the objective of gradual nationalization of the whole political administration." ŠOŠKOVÁ, I. Územná samospráva na Slovensku v rokoch 1918-1989. *Notitiae Novae Facultatis Iuridicae*. 2010-2011, Vol. 16, p. 347. See also VOJÁČEK, L. Vavro Šrobár – Ministr s plnou mocí pro správu Slovenska (1918-1920). *Historický obzor*. 2001, Vol. 12, No. 3-4, p. 89; and LACLAVÍKOVÁ, M. K právnemu základu nariaďovacej činnosti ministra s plnou mocou pre správu Slovenska (1918-1928). In: Karel Schelle (ed.). *Právní a ekonomické problémy současnosti: sborník prací*. Ostrava: Key Publishing, 2007, p. 42.

[56] See HUBENÁK, L. *Dokumenty k dejinám štátu a práva na území Slovenska II*. Banská Bystrica: Trian, 1997, p. 141.

[57] The Act on Extraordinary and Temporary Provisions in Slovakia of 10 December 1918 was published in Slovak version in the Official Journal, Year 1, No. 1, Žilina 1 January 1919, without any serial number.

1918. A legal basis of the Minister's ordering authorities was Section 14 of the said Act, under which the government was empowered to grant a power of attorney to any of its members (in particular the Minister with power of attorney for administration of Slovakia) *"to pass orders and do anything required to keep order, to consolidate the situation and to secure proper state life*." Orders issued by him were effective with his signature only. Section 14 of the Act on extraordinary and temporary provisions in Slovakia was an indirect amendment of the Temporary Constitution – Act No. 37/1918 Coll. of Laws and Orders,[58] in particular the provisions of Sections 17 and 19. Under Section 17 of the Temporary Constitution, the Government was making decisions collectively about, among other things, all matters of a political nature and on the appointment of some high-ranking officers, and, in the sense of Section 19 of the Constitution, governmental orders should have been signed by the Prime Minister and at least nine Ministers. The reason for such a broadly-conceived power of attorney was probably major difficulties in incorporating Slovakia into the new state. The violation of the collectivity principle stipulated in the Temporary Constitution meant in practice that the *"Minister with power of attorney had much larger powers than individual resort Ministers and the same powers as the Government*."[59] After passing the Deed of Constitution No. 121/1920 Coll. of Laws and Orders, the issue of the constitutional basis of the very existence and other ordering authorities of the Minister with power of attorney for administration of Slovakia was being frequently discussed; in fact, during the whole first half of 1920's.[60] In respect to Sections 80 and 81 of the Deed of Constitution,[61] constitutional theoreticians asked the question of whether the ordering right of the Minister with power of attorney for administration of Slovakia under Section 14 of Act No. 64/1918 Coll. of Laws and Orders, on extraordinary and temporary provisions in Slovakia still existed after the Deed of Constitution entered into effect. At the same time, the constitutionality of the very existence of the Ministry with power of attorney for administration of Slovakia was doubted.[62] The Ministry with power of attorney performed

[58] Compare the Stenograph Report on the 8th Meeting of the National Assembly of 10 December 1918. Voting on the Bill was made in two turns in the National Assembly, personally by constitutional majority (2/3rds of members of the National Assembly present and at least 2/3rds of the present members approved) and was adopted pursuant to Section 14 of the Act.

[59] URBANOVÁ, K. Vznik Ministerstva pre správu Slovenska. *Historický časopis*. 1971, Vol. 19, No. 2. p. 212.

[60] For discussion HOETZL, J. Nariaďovacia moc ministra s plnou mocou pre správu Slovenska. *Hospodárske Rozhľady*. 1927, Vol. 2, No. 12, pp. 539–545. LAŠTOVKA, K. Nariaďovacia moc ministra s plnou mocou pre správu Slovenska. *Hospodárske Rozhľady*. 1927, Vol. 2, No. 12, pp. 545–551. WEYR, F. Posudok o jednotlivých otázkach, položených podpísanému, prílohou k tamojšiemu dopisu zo dňa 18. októbra 1927, no. 9545. *Hospodárske Rozhľady*. 1927, Vol. 2, No. 12, pp. 552–579. For details, see LACLAVÍKOVÁ, M. K právnemu základu nariaďovacej činnosti ministra s plnou mocou pre správu Slovenska (1918-1928). In: Karel Schelle (ed.). *Právní a ekonomické problémy současnosti: sborník prací*. Ostrava: Key Publishing, 2007, p. 44.

[61] Section 80 of the Deed of Constitution *"The Government makes decisions collectively and constitutes a quorum if the absolute majority of Ministers, besides the Chairman or Deputy Chairman, are present*." Section 81 of the Deed of Constitution *"The Government makes decisions collectively, namely about: a) governmental submissions to the National Assembly, governmental orders (Section 84) and motions for the President of the Republic to use his right under Section 14, b) all political matters, c) appointment of judges, state officers and officers from VIII class if they belong under central offices, or about proposals for the appointment of officers appointed by the President of the Republic (Section 64(8))*."

[62] HEXNER, E. *Štúdie k problému publikácie všeobecných právnych predpisov*. Bratislava: Vydavateľstvo časopisu „Hospodárstvo a právo", 1936. pp. 75–76.

its activities for more than eight years, until January 1927.[63] From 3 February 1927 to 30 June 1928, the activities of the Ministry with power of attorney for administration of Slovakia were performed by the Slovak section of the Ministry of Interior and then by the Regional Office.[64]

In relation to the ordering powers of the Minister with power of attorney for administration of Slovakia, it must be noted that, in fact, it proves the acceptance of the formal – legal condition of the state's formation on 28 October 1918 *ex post*. Legislator activities at the same time indicate the continued overall instability in relation to the actual control of the Slovak territory and in relation to the legal situation in this territory. This is supported also by the provisions concerning entry into effect regularly repeated in individual orders by the Minister with power of attorney for administration of Slovakia in 1918 through 1919: *"This order will enter into effect immediately after proclamation and applies to the whole part of the territory of the former Kingdom of Hungary which was or will be taken under administration of the Czechoslovak Republic."*

Order of the Minister with the power of attorney for administration of Slovakia No. 38/1919 (No. 865/1919 adm.) on invalid laws, Order of the Government of the Republic of Hungary in the territory of the Czechoslovakian Republic contained also the following call and warning: *"The Government of the Republic of Hungary issues acts and orders and sends them also to the authorities in the territory of the Czechoslovak Republic, pays money, appoints and promotes officers in the same territory. As the Government of the Czechoslovak Republic exercises sovereign state power in Slovakia, i.e. in the whole territory of the former Kingdom of Hungary, which it took under its control, only the Government of the Czechoslovak Republic may issue valid laws and orders in this territory and only the laws and orders issued by it may be executed. Therefore, I order that: 1.) all acts and orders by the Government of the former Kingdom of Hungary passed after 28 October 1918 in Slovakia, are invalid and may not be executed, 2.) the appointment and promotion of officers ordered by the Government of the Republic of Hungary after 28 October 1918 may become effective only upon confirmation by the Government of the Czechoslovak Republic, 3.) state or administrative officers and employees who would execute the orders of the Government of the Republic of Hungary mentioned in points 1.) and 2.) and who would accept a salary or other benefits from the Government of the Republic of Hungary will be immediately removed from office and, after investigation by the Governor's office – if it is proven that they acted negligently or malevolently - I will dismiss them from the office and take away all related benefits (salary, severance pay, pension etc.)."*

Interesting provisions can be found also in the Order of the Minister with the power of attorney from the Government of the Czechoslovak Republic for administration of Slovakia of 1 January 1919 No. 3/1919 Official Journal on temporary regulation concerning judges and court servants (Section 2 *"In the sense of the Act of 28 October 1918, all acts and orders of the former Kingdom of Hungary passed until 28 October 1918 shall temporarily*

[63] VOJÁČEK, L. *Vavro Šrobár – Ministr s plnou mocí pro správu Slovenska (1918–1920)*, p. 89.

[64] See Governmental Order of 28 June 1928 No. 94/1928 Coll. of Laws and orders on transfer of the competencies of the Minister with the power of attorney for administration of Slovakia or his office to the Regional Office in Bratislava (Official Journal, 1928).

apply …"; Section 4 *"Acts and orders of the former Kingdom of Hungary passed on 28 October 1918 or later and acts and orders of the People's Republic of Hungary shall not apply in the territory of the Czechoslovak Republic.*"; Section 5 *"Courts and prosecuting authorities may not suspend their proper operation. They operate following the existing procedures, however, complying with all new regulations, including but not limited to the language of official matters.*").

The actual taking of power from the former Hungarian authorities in the territory of Slovakia, complicated by the occupation of part of its territory, did not happen at a certain moment, as we have mentioned above, but it happened as a process lasting until mid-1919. The Ministry with power of attorney for administration of Slovakia was to assist in more effective taking of offices and exercise of administration (after failed attempts to establish a temporary government for Slovakia). Determination of the precise date became a legislative-technical requirement of the reception of law. This date became 28 October 1918 for Slovakia, although, in reality, by proclamation of the Czechoslovak Republic, only the formal-legal conditions of state formation were satisfied, whereas the material condition of state formation determined by the factual transfer of power (in particular in relation to the territory of Slovakia) was implemented as an ongoing process.

REASONS WHY THE STATEMENT THAT THE CZECHOSLOVAK REPUBLIC WAS NOT FORMED ON 28 OCTOBER 1918 IS ACCEPTABLE[65]

Sociological argument

In the conclusion of the previous section of this article, we have indicated that if we considered the thesis that social reality is not separated from legal reality and that mutual connection and interaction[66] exist between them is correct, then the thesis on the formation of the first Czechoslovak Republic on 28 October 1918 would seem disputable.

There were three basic reasons for that:

1) Reception of law contained in Art. 2 of Act No. 11/1918 was accompanied by the reception of administration regulated by Art. 3. These are two sides to the same coin as the reception of law may not be severed from the reception of administration, as well as material continuity may not be severed from material discontinuity in the case of revolutionary formation of state. We believe, however, that if the purpose of the reception of law under the Reception Standard was most of all adoption of the contents of standards of the legal order of the collapsing Austria-Hungary into the forming legal order of Czechoslo-

[65] Some authors are of the opinion that the formation of the Czechoslovak Republic needs to be assessed also from the perspective of the Martin Declaration. See MOSNÝ, P., LACLAVÍKOVÁ, M. *Dejiny štátu a práva na území Slovenska (1848–1948)* Kraków: Spolok Slovákov v Poľsku – Towarzystwo Słowaków w Polsce, 2014, pp. 47–48. They consider the Declaration as an original document of formation of Czechoslovak statehood. At the same time, they admit that the Slovak National Council did not have objective or subjective prerequisites to become a Slovak equivalent of the National Committee. For details, see HRONSKÝ, M. *Slovensko na rázcestí.* Košice, 1976, pp. 87–96. Its announcements and declaration could not have the same weight as those issued by the National Committee in state-legal terms.

[66] In other words, if you consider the law to be a social fact.

vakia, the purpose of the reception of administration was most of all to secure that public persons who were enforcing the adopted standards be subordinate to the new state represented by the National Committee.

2) In our opinion, if the law is not separated from reality (law is a social fact), then Czechoslovakia could not have been created *de iure* before administration was established in our territory that started to apply the Czechoslovak law in our territory through public persons and ceased applying the law of Austria-Hungary.

3) We believe it would be contrary to legal certainty if we required that the addressees of rights and obligations respect the standards of a state that does not effectively exercise power in the respective territory and do not respect the standards of a state that does exercise power in the respectively territory effectively. The requirement for obedience to the standards of the Czechoslovak state which did not exercise power in the Slovak territory immediately from its proclamation is illogical.

Based on the above-mentioned propositions, we have reached the conclusion that the unique situation in Slovakia and the applicable practice of courts leads us rather to the conviction that identification of legal formation of the Czechoslovak Republic with the moment of proclamation of the Reception Standard[67] may be correct only in the case that we consider the purely formal normativistic thesis on separation of the causal and normative worlds to be correct. The law is, however, never disconnected from life because it stems from social facts.[68] As such, it is necessarily connected to social reality. If we return to the issue of the formation of the Czechoslovak Republic in Slovakia, it is unquestionable that, by proclamation of the Reception Standard, the powers of individual public administration bodies to make decisions and act under the received legal order of Czechoslovakia in the territory of Slovakia were established in formal-legal terms. It was not until the Governor took his office that particular personal dependency of individual public officers to the Ministry with power of attorney for administration of Slovakia could be created, making it possible for public persons to start making decisions under Czechoslovak Law, and not under Hungarian Law. This opinion comes close to the opinion of the current positivists.[69] If we adopt the same approach to assessing the Reception Standard, the proclamation of the Reception Standard represented satisfaction of the formal-legal condition of state formation; however, it was not until subordination of individual authorities under superior bodies of the newly formed Czechoslovak state that sufficient material and personal prerequisites for application of the Czechoslovak Law, meaning for satisfaction of the material condition of the formation of Czechoslovak state were created.

[67] See BEŇA, J. *Vývoj slovenského právneho poriadku.* Banská Bystrica: Právnická fakulta UMB Banská Bystrica, 2001.
[68] KÁČER, M. *Prečo zotrvať pri rozhodnutom. Teória záväznosti precedentu.* Praha: Leges, 2013, p. 16.
[69] According to protagonists of present-day legal positivism, for a legal standard to be applicable, it is required that it meets basic applicability criteria stipulated by the legal system (or rather by the so-called recognition standard) and at the same time, that public officials recognize and comply with the legal standards regulating their operation. HART, H., L. A. *Pojem práva.* Praha: Prostor, 2004, p. 122.

CONCLUSION

There are many things in history, and especially in the history of law, on which historical or legal scientists will never have a uniform opinion. We believe it is right this way as only different opinions, different legal-philosophical bases and approaches and broad scientific discourse may get things going (even break the mould). This is especially true in so-called revolutionary times when something new is built on the ruins of something old. This study attempts, through the selected methodology, selected resources and argumentation, to achieve the condition that our explanation would not be merely a combination of normative sentences about what reality should look like. Our objective was to confront reality with "normativity" and debate about the reality of the legal formation of the Czechoslovak Republic to avoid an idealistic explanation.

The Czechoslovak Republic was formed in revolutionary times and, from our legal-philosophical point of view, it was formed revolutionarily and gradually (even though we respect the opinion and the necessity to determine a certain date, in this case 28 October 1918, in a formal-dogmatic way). We believe that if science is to reach conclusions which result from observation of reality, the fiction of legal formation of the Czechoslovak Republic as a moment seems less convincing than the fiction created by the Supreme Administrative Court of the Czechoslovak Republic. As mentioned above, the state cannot be a certain entity existing exclusively in people's heads. The state is a social conception which means, among other things, that it efficiently exercises its power over people in a certain area under the law. The question that we attempted to answer in this article is therefore focused on the following problem: Can we correctly consider the legal existence of a state if such state does not exercise state power in a certain territory? This possibility definitely exists; however, it does not mean that the formation of state is identical to or is identified with the exercise of state power, but it means that if the state does not exercise its power, its "perfect" legal existence should be debated. Even in terms of international law, states are formed *ipso facto*, differently from international organizations which are formed *ipso iure*. The issue of legal formation of the Czechoslovak Republic may be compared to the situation in Aaland Islands whose status was resolved also by the League of Nations who appointed a committee of lawyers to adopt an opinion on the issue. The resulting statement was that the Republic of Finland was not legally formed until it was strong enough to start executing administration through its own bodies,[70] so it might not yet have been formed on the day when it proclaimed independence (15 November 1917).

[70] Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question. In: *ILSA* [online]. October 1920 [2014-08-25]. Available at: <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>.