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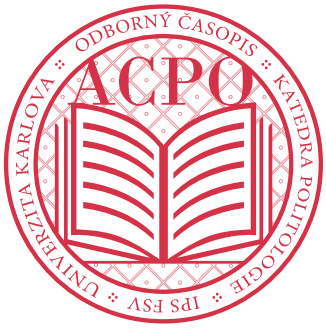



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# Direct election of the president and its constitutional and political consequences

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**Abstract:**

The introduction of direct presidential elections in the Czech Republic was motivated mainly by the bad experience associated with the last indirect election in 2008 and efforts to respond to the long-standing desire of the Czech public for election of the president by popular vote. The intention of the constitution-maker was not a transition to a semi-presidential system, but rather to maintain the existing parliamentary form of government. The key factor for the constitutional position of the president remains the provisions of the Constitution stating that the president is not accountable for the discharge of his office and that the government is accountable for the majority of the head of state's decisions. Many specific restrictions of the presidency follow from constitutional conventions created over the course of the last 20 years of the independent existence of the Czech Republic and partially relate to rules existing in other parliamentary systems. President Miloš Zeman, vested with stronger legitimacy as a result of direct election, in some cases attempted to change these constitutional conventions and to interpret his powers in an expansive manner.

**Keywords:**

Direct election; head of state; constitutional conventions; parliamentary system; semi-presidentialism

## 1. President of the Czech Republic in a parliamentary form of government

The Constitution of the year 1992 established the Czech Republic as a parliamentary democracy.[1] Our constitutional system stems from the first Czechoslovak Republic of 1918–1938, also a parliamentary democracy, as well as from the Third Republic in France of 1871–1940, which was the model used for the constitution of the first Czechoslovak Republic.

In a parliamentary form of government (a parliamentary democracy), political power belongs to the parliament and the government. The head of

[1] According to the explanatory report on the government proposal of the Constitution (Czech National Council print Ref. 152 of 1992) *"it (the Czech Republic) is a parliamentary democracy"* where *"the parliament dominates over executive power, in particular the government, which is accountable to the Parliament for its acts"* which *"relates to the traditions of the first republic"* (Czech National Council 1992).

state is the representative of the state, guarantor of order, and mediator of political disputes, but it is not the role of the head of state to implement its own policy. This fact is respected by the Constitution, which explicitly states that the president is not accountable for the discharge of his office (Article 54, paragraph 3), where the government is accountable for the majority of the decisions of the president (Article 63, paragraph 4). With the exception of a limited group of exclusive presidential powers (certain powers granted by Article 62 of the Constitution), in order to be able to exercise power the president requires a countersignature of the prime minister or a member of the government authorised by the prime minister. This is the case for presidential powers under Article 63, paragraph 1 of the Constitution as well as for powers arising from ordinary laws. A presidential act that has not been countersigned is not valid. The government is accountable for countersigned presidential acts. The government is politically accountable: an inappropriate countersignature may result in a vote of no confidence in the Chamber of Deputies (the lower house of Parliament). The criminal liability of the countersigning member of government is also conceivable.

The president cannot make a valid act under Article 63 without the countersignature of the prime minister (or a member of the government authorised by the prime minister); issues arise, however, when the government wishes the countersigned act to be passed but the president fails to act. It may be inferred that if the government is accountable for the exercise of a certain power, it is at the same time accountable for the *failure to exercise* the power; it applies generally in law that harm may result not only from acting but also from failing to act (omission). Some authors infer that a president that is not accountable is, in these cases, basically bound by the will of the government with which the president shares such competence. Thus the president has a duty to approve the proposal of the government to make a certain decision, unless it is an exceptional case, for example if the president justifies withholding his decision by claiming that the act is unlawful (Antoš 2011: 32). In cases when the president decides about the public rights of individuals, the administrative courts inferred their competence to review the presidential decisions as well as a possible failure to act.[2]

The president plays an important role in the division of government into branches and system of checks and balances. The limitation of presidential power – which may briefly be referred to as the principle of a non-accountable head of state – is evident from the principle of government by the people and specifically the principle of representative democracy. This characteristic is not affected by the change in the manner of election of the president introduced by Constitutional Act No. 71/2012 Sb., replacing

[2] This was specifically the case when then President Václav Klaus ignored some governmental candidates for judgeships without issuing an explicit rejecting decision. The administrative courts decided that this was an illegal failure to act (Supreme Administrative Court 2008).

election of the president by both houses of parliament (the Chamber of Deputies and the Senate) with direct election (the Constitutional amendment became effective on 1 October 2012; the first direct presidential election was held in January 2013).

This conclusion is based on four arguments (Wintr 2015: 68): (a) the government, accountable to the Chamber of Deputies rather than to the President, is still the supreme body of the executive power under the Constitution; (b) it follows from the provisions of the Constitution stipulating that the Czech Republic is a democratic state respecting the rule of law (Article 1, paragraph 1 of the Constitution) and that the government serves all citizens (Article 2, paragraph 3), that authority is connected with accountability, and the Constitution still explicitly states that the president is not accountable and that the government is accountable for the majority of presidential acts; (c) the explanatory report on the Constitutional Act No. 71/2012 Sb., as well as the parliamentary debate at the time when the act was adopted, clearly show that the will of the legislature was to maintain the principle of representative government; and (d) also in the opinion of the Constitutional Court expressed after this change of the Constitution, *"the constitutional system of the Czech Republic is based on the system of representative democracy (Article 2, paragraph 1 of the Constitution) and the representative form of government, and this is not affected by the introduction of the direct election of the president"* (Constitutional Court 2013).

What remains unclear, however, is what the impact will be of two political factors on constitutional practice: (a) a higher degree of democratic legitimacy of the president elected directly by the people and therefore elected by the majority of voters (as opposed to the legitimacy gained in the past through indirect election by the majority of directly elected members of Parliament), and (b) the election of a strong personality,[3] clearly determined to act in an activistic manner in the office and to strive for an expansive interpretation of his powers.[4]

Constitutional law is not limited to the text of the Constitution and other laws; to a considerable extent, it is formed by the judgments of the Constitutional Court in particular, as well as by the practice of constitutional

[3] As revealed by comparative studies in the region, the manner of election of the president is not the key variable determining the strength of the president's position or the extent of the president's conflicts with other political players (cf. e.g. Baylis 1996: 297-323).

[4] This determination of President Miloš Zeman is best revealed by his steps after the resignation of the government of Petr Nečas in June 2013, when he ignored the demonstrated will of all the political parties represented in the Chamber of Deputies and appointed a *de facto* presidential government led by non-party member and ex-minister of Zeman's former government, Jiří Rusnok, whom he later appointed to the Bank Board of the Czech National Bank.

bodies which may become constitutional conventions.[5] It depends therefore primarily on the other constitutional bodies (in particular the Chamber of Deputies, the Senate, the government, and the Constitutional Court) – as to their attitude towards possible deviations from existing practice or conventions. If the bodies acquiesce to it, if they do not intervene, the constitutional position of the president may shift as a result of such practice of the constitutional bodies without any changes to the text of the Constitution.[6]

An alternative model to the parliamentary republic that is most frequently discussed in this context is a semi-presidential republic (a presidential republic is out of the question as it is incompatible with the principle of liability of the government to the Parliament that is enshrined in the Constitution). In his interesting book entitled *Současná česká politika* (*Contemporary Czech Politics*), political scientist Michal Kubát defines the semi-presidential system as follows: *"In semi-presidentialism, executive power is two-headed, where both of its components, that is the president and the government headed by the prime minister, in reality govern the country. In addition to being the head of state, therefore, the president holds executive power but must share it with the prime minister. The president and the prime minister are autonomous of each other, because each of them relies on a different legitimising basis. The president is independent of Parliament as he is elected separately from Parliament and is not politically accountable to it. On the other hand, the prime minister (and the government) is derived from Parliament and is politically accountable to it. This means that it may operate only with the consent of the Parliament. The president may under certain circumstances dissolve the Parliament"* (Kubát 2013: 25-26). The author concluded that the Czech Republic clearly remains a parliamentary system even after the introduction of direct election of the president, because the president does not have real power. He may exert influence, but he does not have power, that is the possibility to govern, i.e. to adopt decisions which someone must submit to. That power rests with the government, which is accountable to the Chamber of Deputies (Kubát 2013: 62-63).

Giovanni Sartori analyses the semi-presidential system as a system of two engines in contrast to the parliamentary or presidential system, which have

[5] The constitutional conventions are not a source of law and therefore are not legally binding; however, in the past the Constitutional Court attached certain legal relevance to the constitutional conventions (Constitutional Court 2001). In the court's opinion, if there are several possibilities of interpretation of a certain provision of the Constitution, as a rule priority is given to the interpretation reflecting long-term practice (constitutional convention).

[6] As aptly stated in this context by J. Elster, the existence of a constitutional convention is conditional upon the conviction of the political players that if they violated the convention they would clearly have to face a negative reaction from other players. "*If violating (a constitutional convention) … causes no reaction … it never existed in the first place*" (Elster 2007: 28).

only one engine: When one engine stops working the other may take over; however, the danger consists in the possibility of both engines working against each other (Sartori 1997: 153). The president in a semi-presidential system is not only a representative, guarantor, and mediator, but also one of the policymakers.

It cannot be excluded that the Czech constitutional system will tend to shift towards a semi-presidential form of government. This is indicated by strong respect for the office of the president since the times of the so-called "President-Liberator" T. G. Masaryk, who was the first Czechoslovak president (1918–1935), the combination of the charismatic revolutionary leadership of V. Havel with the office of the president (1989–2003), the repeated election of distinctive characters of Czech politics for the office of head of state, long-term tolerance for a rather expansive interpretation of the powers of individual presidents by their institutional milieu and the general public (disputes over discretionary powers or the time limit to act, frequent foreign-policy activities deviating from the government line) (Kysela, Kühn 2007), certain crises of the parliamentary system (*inter alia* eight governments over the course of 10 years between 2003 and 2013, often supported by shaky or no majorities at all), as well as the already mentioned combination of direct election of the president and the activistic attitude of the first winner of such an election. The appointment of the "presidential cabinet" headed by Jiří Rusnok in July 2013 was certainly a step in that direction on the part of President Zeman. In an interview for a prominent Czech daily, he reacted to the objection that by doing so he had breached the existing constitutional conventions by saying that *"the notion of constitutional conventions is totally idiotic, because if they really were constitutional, then they would be somehow enshrined in the Constitution. They are only conventions. The president, despite being directly elected, cannot change the Constitution; however, he certainly has an inviolate right to change conventions that are not enshrined in the Constitution"* (Právo 2013). Future developments of the system thus, as mentioned above, in fact depend on the reaction of other constitutional bodies and political players.

The semi-presidential system would hardly be feasible in the Czech Republic without changing the Constitution. The Czech president does not have powers as does for example the French president: he can neither dissolve Parliament[7] of his own accord nor bypass it by means of a

[7] The president may dissolve the Chamber of Deputies only under conditions that are difficult to fulfil and the exhaustive list thereof is provided in Article 35 of the Constitution. Since the formation of the Czech Republic there have been three serious political crises that resulted in a snap election. In all of these cases, however, the deputies decided on dissolution (or reduction of the term of office), as the Constitution does not provide the president with sufficient authority to dissolve Parliament. After the amendment of the Constitution in 2009, the most practicable path towards a new election is provided by Article 35, paragraph 2 of the Constitution, under which the president dissolves the Chamber of Deputies upon the proposal of three-fifths of the deputies.

referendum. And it is totally out of question for him to issue decrees. Appointment of the government irrespective of the Chamber of Deputies therefore has potential to create problems rather than to solve them; in order to be able to govern efficiently, the government needs to enforce laws, and this cannot be done against the will of the Chamber of Deputies. The system would be blocked and fall into intractable conflicts. It is important to remember that even a strong French president appoints a prime minister from the opposing political camp if the latter has a majority in Parliament (so-called cohabitation[8]).

The parliamentary system and the semi-presidential system are of course only theoretical models, and constitutional and political reality may be anywhere between them or outside those two models. However, they are proven, elaborate, and functioning systems providing a certain guarantee of stability and foresee ability for the running of the state and politics in general. Based on the above-mentioned, we conclude that (a) the Czech Republic remains a parliamentary republic rather than a semi-presidential one, and (b) a semi-presidential system could not work well in the Czech Republic without further significant changes to the Constitution to strengthen the power of the president (Kubát 2013: 78).

## 2. Reasons for the introduction of direct election, the form of constitutional change, and the course of the first presidential election

The story of direct election of the Czech president probably began on 8 February 2008 in the Spanish Hall of Prague Castle. This is not to say that there had not been any proposals to change the manner of presidential election before;[9] rather it was the scandalous course of the last parliamentary election of the president that created the environment in which the proposal to introduce direct election succeeded.

The first day of that election was marked by procedural disputes as to whether a secret ballot or recorded vote should be used in the election. Between eight and nine in the evening, there was a nervous recorded vote for a president by a show of hands, in the course of which the television microphones in the hall recorded various vulgarisms that echoed for a long time among the public. There was also information about threats or blackmailing. The president was not elected in the first two rounds of the election on 8 February 2008, nor in the third round held on the following day, a Saturday. Václav Klaus was elected for his second term of office in the third round of the second election on 15 February 2008.[10]

[8] Such a situation occurred in France in the years 1986–1988, 1993–1995, and 1997–2002.

[9] For an overview of such proposals c.f. e.g. Kysela 2008; Kudrna 2011.

[10] For a detailed description see Wintr 2010: 389-398.

The government of Petr Nečas on 30 June 2011 submitted a proposal to introduce direct election of the president, and on 20September 2011 the proposal was introduced to the Chamber of Deputies by Minister of Justice Jiří Pospíšil (Civic Democratic Party; Občanská demokratická strana - ODS). His speech is interesting for its complete absence of reasons for changing the manner of election of the president; according to Pospíšil, the government submitted the proposal "*in accordance with the government's policy statement*". The minister went into more detail only on the issue as to whether the proposed change to the Constitution should result in strengthening of the president: *"The Czech Republic, which is in principle a parliamentary republic, may have a directly elected president without it being necessary to change the powers of individual constitutional bodies of the Czech Republic. This is based in principle on comparative experience, where a similar system of division of government as in the Czech Republic works, for example, in Austria, Slovakia, and many other countries that are parliamentary democracies where the president does not have a more significant or let us say dominant position. Therefore, the proposition – that in case of a change of election of the president, in case of the introduction of direct election, there should be* a priori *a change in powers in order to strengthen the position of the president – does not apply. If this happened, we would shift from a parliamentary democracy to a semi-presidential system, which is by no means the intention of the coalition government"* (Chamber of Deputies 2011a).

None of the deputies and senators supported abandoning the principle of parliamentary government. On the contrary, the constitutional amendment resulted in a partial weakening of the powers of the president (the power to discontinue prosecution and to order that prosecution not be commenced was transferred from independent powers to countersigned powers). Furthermore, all motions to amend that were submitted by the opposition (in particular by deputies of the Czech Social Democratic Party (Česká strana sociálně demokratická - ČSSD) and the Constitutional Law Committee of the Senate) were directed at weakening rather than strengthening the powers of the president.

The government bill amending the Constitution (amended by the Prime Minister Bohuslav Sobotka (ČSSD) in relation to presidential pardon and immunity) was adopted on 14 December 2011 by the Chamber of Deputies by 159 votes out of 192 deputies present (Chamber of Deputies 2011b). The Senate passed the amendment of the Constitution by 49 votes out of 75 senators present on 8 February 2012.

In the meantime, the government started drafting the implementing statute to regulate the election of the president. It was submitted to the Chamber of Deputies on 27 February 2012. The Chamber of Deputies passed it on 13 June and the Senate adopted it on 18 July. However, Act No. 275/2012 Sb. to regulate the election of the president of the republic had (and still has) at least two weak points. The first is related to the assessment

of whether the requirement of 50 000 signatures of citizens supporting the particular candidate was met; the second consists in the actual impossibility to efficiently check whether the candidates complied in the election campaign with the limit of expenditures of 40 million CZK (and 50 million CZK if they advanced to the second round).

While the latter issue was eventually brushed aside and doubts concerning the funding of the winner's campaign in particular have never been dispelled, the former issue resulted in a scandal, proceedings before the Supreme Administrative Court, and nearly in postponing the first direct election.

Under Articles 56 and 57 of the Constitution, a candidate for president must be a citizen of the Czech Republic, eligible for election to the Senate and therefore older than 40, and nominated by at least 20 deputies, 10 senators, or a single citizen, *"providing that such nomination is supported by a petition signed by at least 50 000 citizens eligible to vote for the president of the republic."* The president is elected through a two-round system based on an absolute majority; if none of the candidates receive an absolute majority of valid votes, a second round is held within two weeks with the two most successful candidates and the candidate receiving more valid votes is elected.

Groups of deputies nominated Karel Schwarzenberg and Přemysl Sobotka, a group of senators nominated Jiří Dienstbier, and the remaining candidates submitted to the Ministry of Interior the petition sheets by 6 November 2012.

The Ministry of Interior proceeds in accordance with s. 25 subsections 3 to 6 of the act to regulate the election of the president. The petition must be signed by at least 50 000 citizens who state their name, surname, date of birth, and permanent address. The Ministry of Interior first excludes incomplete details and then verifies the correctness of details on a randomly selected sample of 8 500 citizens who signed the petition. If incorrect details are identified in the case of at least 3% of the citizens who signed it, the Ministry carries out a check of another sample of the same size: *"If the Ministry of Interior finds out that the second sample displays errors in fewer than 3% of citizens who signed the petition, the Ministry of Interior will not include citizens of both samples in the total number of citizens who signed the petition. If the Ministry of Interior finds out that the second sample displays errors in 3% or more of citizens who signed the petition, it will reduce the total number of citizens who signed the petition by the number of citizens corresponding in terms of percentage to the error percentages in both samples that were checked"* (Act No. 275/2012 Sb).

The Ministry of Interior concluded on 23 November that the number of signatures on the petition sheets of presidential candidates Jan Fischer, Taťána Fischerová, Vladimír Franz, Zuzana Roithová and Miloš Zeman was sufficient. The candidatures of Jana Bobošíková (the Ministry accepted 45 428 signatures out of the total 56 191), Vladimír Dlouhý (38 686 signatures

accepted out of 59 165) and Tomio Okamura (35 750 signatures remained out of 61 966) were rejected. All three turned to the Supreme Administrative Court.

In the meantime, a fierce media debate began. As early as 23 November, the media (Klesla, Koděra 2012) began drawing attention to a doubtful procedure used by the Ministry of Interior, which interpreted s. 25 (6) of the act in a manner that resulted in combining the percentage error rates of the first and second samples and reducing the total number of signatures by this sum rather than an average error rate. In the case of Jana Bobošíková, the error percentage of the first sample was 7.7% and of the second sample 11.5% (Supreme Administrative Court 2012). The error percentage in both cases exceeded 3%, and so the Ministry should have reduced the total number of 56 191 signatures by *"a number of citizens corresponding in terms of percentage to the error percentages in both samples that were checked".* In the case of Jana Bobošíková, the average identified error percentage in two samples having 8 500 signatures was 9.6%. After deducting this share, Jana Bobošíková would still be left with a sufficient 50 810 signatures. The Ministry of Interior, however, combined both error percentages and by so doing reduced the total number of signatures for her candidacy by 19.2%, which meant that she fell below the 50 000 signatures required by the Constitution.

The Supreme Administrative Court decided in favour of Jana Bobošíková. However, even the correct calculation did not help Vladimír Dlouhý or Tomio Okamura overcome the minimum threshold of 50 000 signatures. While Vladimír Dlouhý acquiesced, Tomio Okamura, a senator, filed a constitutional complaint on 27 December. The Constitutional Court was put under time pressure, because the first round of presidential election was planned to take place as early as 11–12 January.

The Resolution of the Supreme Administrative Court Vol. 11/2012 of 13 December 2012, which was challenged by the constitutional complaint filed by Tomio Okamura, was remarkable in many respects. It is one of the first decisions of the Supreme Administrative Court containing a dissenting opinion; this option has been granted by s. 55a of the Rules of Administrative Procedure Act since January 2012 to the election panel and the extended panel of the Supreme Administrative Court. The common dissenting opinion of three judges revealed that the election panel dismissed the proposal of Tomio Okamura by a narrow majority of 4 to 3 votes.

The three dissenting judges considered the act to regulate the election of the president as unconstitutional and preferred the option of suspending the procedure and filing a motion to the Constitutional Court to cancel the act. This would almost certainly make it impossible to hold the election on the planned dates. The main objection against the implementing statute was the fact that it does not enable checking the authenticity of the signatures; the check is then limited to checking that a citizen of the name, surname, date of

birth, and permanent address exists and that such a citizen is not included in the petition sheets of a particular candidate more than once.

The majority of four judges of the election panel reviewed the procedure applied by the Ministry of Interior and concluded that after the correct application of s. 25 of the act, Tomio Okamura would have 48 859 valid signatures, which is below the threshold set by the Constitution. The election panel also mentioned another fact to the disadvantage of Tomio Okamura: he clearly had the highest error percentage of all candidates (19.4% in the first sample and almost 23.0% in the second sample).

As mentioned above, Tomio Okamura filed a constitutional complaint on 27 December 2012. In its judgment Pl. ÚS 27/12, the Constitutional Court dismissed Okamura's complaint on 10 January 2013, one day before the first round. It dealt in detail with all the complainant's objections, including questioning the constitutionality of the requirement for 50 000 signatures itself. The Constitutional Court stated: *"This number is based on consideration of the constitution-maker, which clearly reflects the fact that the constitutional system of the Czech Republic is based on the system of representative democracy (Article 2, paragraph 1 of the Constitution) and a parliamentary form of government, and this remains unchanged even after the introduction of direct election of the president. The specific number of petitioners reflects the consideration with respect to the minimum sufficient support of a candidate as an expression of the earnestness of his candidature. (…) This is why it is not possible to accept the objection of the complainant that he was discriminated against compared to other candidates nominated by groups of deputies or senators, because the relevance of their support for candidature results from the mandate of deputies and senators, who themselves were elected by a certain number of voters. This also reflects the principle of a parliamentary form of government that is preserved despite the introduction of direct election of the president"* (Constitutional Court 2013).

The Constitutional Court also rejected the complainant's theory that the Ministry could arbitrarily manipulate the complainant's sheets. The Constitutional Court did, on the other hand, concede that the weakness of the act to regulate the election of the president lies in the impossibility of authenticating the signatures: *"The act to regulate the election of the president contains a loophole that could be evaluated as unconstitutional, as it does not require the verification of genuine, unmistakeable, and individualised demonstration of will of the petitioner, that is authentication of the signature. If the purpose of the petition is to identify relevant support and the earnestness of the candidature, it is not possible to do so only by a manner that leaves it unclear whether the petitioner really provided his own details and signature or whether he provided the details of his family members or other persons whose personal details in the scope required by the act to regulate the election of president are known to him. (...) The Constitutional Court is convinced that the legislature will remedy this defect*

*in the act to regulate the election of the president as soon as possible and will close the loophole in such a manner that authentication of the demonstration of will of the petitioner is ensured whether* a priori *during the collection of signatures or* ex post *in the course of checking the petition sheets. While doing so, the legislature also has the opportunity as a constitution-maker to change the wording of the Constitution and reduce the required number of supporters"* (Constitutional Court 2013).

This is truly a problem for future elections. A reasonable reaction would be to reduce the required number of signatures for the presidential candidate from 50 000 to for example 8 000 but to impose the duty to collect the signatures in a manner that can be authenticated, such as at the post office or through the so-called data boxes, which is a special system used in the Czech Republic for authorised and registered on-line communication between state agencies and individuals.

In any case, this defect of the law was not detrimental to the complainant because, as stated correctly by the Constitutional Court, an actual check on the authenticity of the signatures in the petition sheets would rather definitely deteriorate the position of the complainant.

The first round of the presidential election was held on the planned dates of 11–12$^{th}$ January 2013 and Miloš Zeman and Karel Schwarzenberg advanced to the second round of the election. After a fierce election campaign between the first and second round, in the end Miloš Zeman was elected president on 25 January 2013.

## 3. Powers of the president and the impact of direct election on the exercise of powers

The powers of the president may be classified into representative, guarantor, and mediator; some powers have the character of checks in the division of government (this is an ideal classification, a specific power, such as calling an election, may have both a representative and a mediating aspect) (Wintr 2008: 24-34).

Primarily representative in nature is the majority of presidential powers under Article 63, paragraph 1 of the Constitution (the president represents the state internationally; concludes and ratifies treaties; is the commander-in-chief of all armed forces; receives, appoints, and removes ambassadors; calls a parliamentary election; appoints and promotes generals; confers and awards honours and distinction; and appoints judges); some powers under Article 62 (summons the session of the Chamber of Deputies, signs bills into law); and powers arising from laws (primarily the appointment of professors and rectors of universities). These are the classic powers of a head of state as the highest representative of the country, personifying the state internally and externally, in which the republican heads of state relate to a similar role of kings. Purely representative powers may be exercised for example by the president of Parliament (or one of its chambers) or prime minister; however, they are involved in everyday political conflicts, which makes it more difficult

for them to fulfil the symbolic role of representatives of the entire country, of all citizens.

Mediator powers are primarily the power to appoint and remove members of government and to accept their resignations, and the power to dissolve the Chamber of Deputies in cases defined by the Constitution. The text of the Constitution gives the president a certain degree of discretion in exercising these powers, which may be used by the president to contribute to the efficient and smooth solution of political disputes. It is assumed that allowing Parliament to elect and remove the government and its members directly without involvement of the head of state as a mediator could be dangerous for political stability as well as for compliance with the principles of limitation of governance (division of government). This is why the presidential power to appoint and remove the government and its members is at the head of Article 62 of the Constitution as well as core to the interest of the public. However, sometimes the actual exercise of these powers by the president threatens to be a complication rather than facilitation of the operation of the system.

The president as the head of state also plays an important role of keeper of values that form the basis of the state; the president is the guarantor of order. This function of guarantor explains the power of the head of state to return bills to Parliament and to file motions to repeal laws to the Constitutional Court. The sense of guarantee may also be attributed to the right to grant a pardon. The guarantee dimension is also present in some of the already mentioned powers, primarily in the appointment of members of the government and accepting their resignation, perhaps also in the ratification of treaties, as chief command of the armed forces, and in the appointment of generals; the head of state as the top representative of the people guarantees that persons will not be appointed nor decisions adopted that would endanger the sovereignty, integrity, and democratic order of the republic. The guaranteeing powers of the president represent the guarantee of order, constitutionality, morality, or national interest. They represent one more guarantee that may not be necessary but which is certainly beneficial to have.

The power of the president to appoint judges of the Constitutional Court and of general courts, to appoint the president and vice-president of the Supreme Audit Office, and to appoint the members of the Bank Board of the Czech National Bank does not have only a representation character, but also plays an important role as a balancing element in the division of government. It would not be desirable to vest the power to appoint members of independent bodies of the judicial and executive branch in the Chamber of Deputies or in the parliamentary government; such a solution would make the Chamber of Deputies too powerful. This is why these powers of appointment are either shared by several state bodies, including the president, or vested in the head of state, who stands outside of the everyday political arena. The nature of a check in the division of government

is also present in other already discussed powers of the president, in particular granting pardons, returning bills, and dissolving the Chamber of Deputies.

## 4. The role of the president as a key in forming government

The president is vested with important powers in forming the government. The government is formed after every election to the Chamber of Deputies, as the government has the duty to resign after every constituting session of the Chamber of Deputies (Article 73, paragraph 2 of the Constitution). In such case the president has a duty to accept the resignation and to charge the government with performance of their offices on a temporary basis until the new government is appointed (Article 73 paragraph 3 and Article 62 (d) of the Constitution).

Under the Constitution, the formation of the government commences with the appointment of the prime minister by the president. The Constitution does not stipulate who is to be appointed by the president; however, it should clearly be a person able to (or at least having a chance to) gain, together with the government, the support of the majority of the Chamber of Deputies. In most cases, the person identified by the party with the highest number of mandates in the Chamber of Deputies was appointed.[11]

The Constitution does not even state the time limit within which the president must appoint the prime minister. Nor, in general, does the Constitution impose any time limits on the procedure of forming the government; in this way, the Constitution leaves room for political negotiations of the representatives of parliamentary parties as well as the president. However, there is a strongly prevailing interpretation that the president and the prime minister have a duty to take the relevant steps without undue delay.[12] The procedure of President Zeman after the snap election of the Chamber of Deputies held on 25—26 October 2013 was questionable. The president delayed the appointment of the prime minister until the formal signature of the coalition agreement and more than one week after that, on 17 January 2014 (83 days after election), he appointed the chairman of the winning Czech Social Democratic Party (ČSSD), Bohuslav Sobotka. The government was appointed on 29 January 2014, as a result of which the "presidential cabinet" headed by Jiří Rusnok was in power for

[11] This is true of eight cases in the years 1996, 1998, 2002, 2004, 2005, 2006 (twice; the first Topolánek government failed to gain confidence in the Chamber, the second coalition government did gain confidence), and 2014. However, in four cases this did not happen; three times a non-party member was appointed to lead a caretaker government and once, in 2010, the president appointed the chairman of the party having second largest number of mandates, who had already agreed on a majority coalition.

[12] Cf. e.g. the opinion of Tomáš Herc in (Rychetský et al. 2015: 583), or Pavel Molek in (Bahýľová et al. 2010: 840).

nearly six long months after the cabinet had lost a confidence vote in the Chamber of Deputies.

The president then appoints other members of the government on the advice of the prime minister and charges them with the management of ministries or other offices (Article 68, paragraph 2). The president is therefore bound by the advice of the prime minister: he cannot appoint as member of government a person not proposed by the prime minister, and he cannot charge a member of the government with the management of a ministry or other office unless advised to do so by the prime minister. The president may decide not to proceed in line with the prime minister's advice and reject his candidate only in very exceptional cases. In the parliamentary form of government, the prime minister and the government majority in the Chamber of Deputies, respectively, are politically accountable for the composition of the government. It is appropriate for the president to delay the act of appointment in particular if the immediate appointment of a minister could result in an unconstitutional situation. In this manner, in November 2005 President Klaus refused to appoint David Rath as Minister of Health until he resigned from the office of the president of the Czech Medical Chamber, because *"a member of the government must not perform activities the nature of which contradicts the performance of their office"* (Article 70 of the Constitution).

When forming Sobotka's government, President Zeman indicated that he might refuse to appoint other members of government also on political grounds. This opinion, however, was subject to strong criticism from both politicians and experts. In the end, the president accepted all nominations of Prime Minister Sobotka and by doing so *de facto* confirmed the constitutional convention of the president appointing all nominated members of government, if there are no legal impediments to their appointment. President Zeman even appointed as deputy prime minister and minister of finance Andrej Babiš, the chairman of the ANO movement, who had failed to submit a negative lustration certificate.[13]

Government members take charge of their offices at the point when the deputy prime ministers and ministers are appointed upon nomination of the prime minister. This is when the resigning government, performing its offices on a temporary basis, terminates its activities. Within 30 days of appointment, the government appears in the Chamber of Deputies and requests the chamber to vote on a matter of confidence. If the government fails to gain sufficient support of the absolute majority of deputies present, it fails to gain confidence and thus the government has a duty to resign (Article 73, paragraph 2 of the Constitution). The president accepts the resignation

[13] The Lustration Act is still in effect in the Czech Republic, preventing former registered collaborators of the communist secret police (*Státní bezpečnost*) from holding offices. The relevant provisions are not totally clear as to whether they apply also to members of the government, and in this respect there are various contradictory interpretations. Traditionally, however, the act applied to government members.

and charges this government with holding its offices until a new government is appointed. The described procedure is then repeated: the president appoints the prime minister and then appoints other members of the government upon his nomination. Within 30 days after the appointment, the government appears in the Chamber of Deputies requesting the chamber to vote on a matter of confidence. If even the second government fails to gain confidence, the president appoints a prime minister of the third government upon nomination of the Speaker of the Chamber of Deputies (Article 68, paragraph 4 of the Constitution). If even this third government fails to gain confidence, the president may dissolve the Chamber of Deputies. After amendment of the Constitution by the Constitutional Act No. 319/2009 Sb., a three-fifths majority of all deputies may also enforce dissolution of the Chamber of Deputies at any time before the president's dissolution after a third failed attempt to form a government.

Up until the year 2013, the formation of the government was in line with the principle of parliamentary government. After the introduction of direct election of the president and the election of the activistic President Miloš Zeman, who after the resignation of Prime Minister Petr Nečas appointed in July 2013 a *de facto* presidential cabinet, it became clear that this system is dysfunctional and endangering to the constitutional principle of parliamentary government. In particular, the second presidential attempt to form a government does not make sense. If the president has two attempts to form a government and decides to act irrespective of the will of the majority of the Chamber of Deputies, for several weeks or even months there may be a government in power which relies only on the confidence of the president rather than of the Chamber of Deputies, which contradicts Article 68, paragraph 1 of the Constitution. In addition, such a government without a majority in the Chamber of Deputies cannot govern efficiently, because the vast majority of ideational political steps are taken through adopting and amending laws. Such a situation also creates considerable potential for abuse, among other reasons because it evacuates the purpose of the countersignature of presidential acts by the prime minister and the accountability of the government for such acts; if the presidential acts are countersigned by the prime minster of a government relying solely on the confidence of the president, the countersignature ceases to be a check against the wantonness of a constitutionally non-accountable president.

The models of forming government in Poland and Germany are better suited to the principle of parliamentary democracy. The Polish system is similar to the Czech one, but is restricted by relatively strict time limits and already the second attempt to form government is vested in Parliament. The German system goes even further and does not enable the appointment of a chancellor who is not elected by the Bundestag. The Polish system thus leaves room for presidential initiative; the government appointed by the president, however, cannot govern without the majority in the Sejm for longer than one month. The German system does not enable solely

presidential cabinets.[14] The government and individual members of it may resign at any time, the government does so on the basis of a resolution, a member of the government resigns in writing through the prime minister. With the exception of for example a mandatory resignation of the government (in particular, in case of vote of no confidence), the president is not obliged to accept the resignations. On the contrary, as a mediator of political disputes the president may, by rejecting a resignation or postponing its acceptance, leave room for further political negotiations. This option was used by President Klaus at the beginning of April 2005 when he probably prevented a fatal disagreement in the government coalition by postponing the acceptance of the resignation of the Christian Democratic party ministers and in the end accepted only the resignation of the entire government of Prime Minister Stanislav Gross, which enabled continuation of the government coalition even though headed by a different prime minister. The postponed acceptance of resignation may also be appropriate in some critical situations for the state. However, it is clearly impossible for the president to keep a minister who does not want to remain in office as "forced labour" for a long time by delaying the acceptance of his resignation.

According to the Constitution, the Czech prime minister is the first among unequals in his government.[15] The government is a collegiate body deciding as a board with the absolute majority of all members of the government (Article 76 of the Constitution); the prime minister has one vote, just like any other member of the government. However, the prime minister determines the composition of his government – chooses all other members of government (the president appoints them upon nomination by the prime minister) and, more importantly, may remove any deputy prime minister or minister. The president has a duty to approve the proposal of the prime minister to remove a member of the government.[16] If the prime minister resigns, his resignation is deemed the resignation of the entire government (which was the case with the resignation of Prime Minister Klaus in November 1997 and in other cases, including the resignation of Prime Minister Nečas in June 2013). The factual position of the prime minister in the political system depends on the current political circumstances and on the political power of the person holding the office of prime minister (in Czech politics, we could use as a test the question of what happens when

[14] In reaction to the negative experience with presidential cabinets in the period of crisis of the Weimar Republic (1930–1933).

[15] Cf. known typology in (Sartori 1997: 102-103).

[16] Therefore we may consider unconstitutional the conduct of President Václav Klaus in April 2011 when he did not approve the proposal of Prime Minister Petr Nečas to remove Deputy Prime Minister Radek John and Minister of Education Josef Dobeš (he removed the first one after 10 days and did not remove the second one at all). The text of Article 74 of the Constitution clearly does not give the president any discretion or the possibility to delay such removal.

the prime minister proposes removal of a minister from another coalition party without the consent of that party).

## 5. Conclusion

The introduction of direct election of the president in the Czech Republic was motivated mainly by the bad experience associated with the last indirect election in 2008 and efforts to respond to the long-standing desire of the Czech public for election of the president by popular vote. The intention of the constitution-maker was not a transition to a semi-presidential system, but rather to maintain the existing parliamentary form of government. This conclusion is supported by extensive evidence, including the explanatory report concerning constitutional amendment and the course of debate in Parliament when the amendment was adopted, and also the contents of the constitutional amendment, which did not extend the powers of the president in any manner. The key factor for the constitutional position of the president remains the provisions of the Constitution stating that the president is not accountable for the discharge of his office and that the government is accountable for the majority of his decisions. Many specific restrictions of the president follow from constitutional conventions created in the course of the last 20 years of the independent existence of the Czech Republic and partially relate to rules existing in other parliamentary systems. President Zeman, vested with stronger legitimacy as a result of direct election, in some cases attempted to change these constitutional conventions and to interpret his powers in an expansive manner. There are no appropriate constitutional grounds for such shift. However, the president might still succeed unless other political players, in particular the government and the Chamber of Deputies, keep him within his constitutional limits.

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