

# THE QUESTION OF CONDUCTING DIRECT ELECTIONS OF THE PRESIDENT IN THE CZECH REPUBLIC (A Live Issue for Already 20 Years)\*

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Received 20 October, 2011; accepted 9 December, 2011

***Abstract.** The Czech Republic today belongs to the minority of European republics whose presidents are elected indirectly. It is a paradox that, even when direct election of the President has stable support not only of the majority of Czech society but also of the majority of parliamentary parties, this issue is constantly only discussed.*

*Should direct election gain passage in the Czech Republic, there are formally better preconditions for this than there were in the past. With regard to the fact that a change in the manner of the election of the Head of State hides in itself the potential to impact the functioning of the whole constitutional system, it is worth it to follow how this problem conceived in the Czech Republic.*

*This article is devoted to the standing of the President of the Republic in the contemporary Czech constitutional system and to considerations about direct election from the year 1918 to the present. Attention is also devoted to the difficulties which it is necessary to come to terms with during a potential change in the manner of the election of the President if the current balance of powers between the constitutional organs is to remain preserved.*

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\* This article was composed and translated with financial support within the framework of the research programme MSM 0021620804. Translation was done by James Critz, Ph.D.

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**Keywords:** *constitutional law, president, head of state, direct elections, constitutional system, division of powers, check and balances, Czech Republic.*

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## Introduction: Permanent Topicality of Direct Election of the President in the Czech Republic

The Czech Republic currently belongs to the minority<sup>1</sup> of the European republics whose presidents are elected indirectly. At the same time the question of direct election has been a relatively live issue for the Czech public for almost twenty years. It has been debated very strongly among politicians at the parliamentary level for approximately the last ten years.

It is a paradox that, even when direct election of the President has stable support not only of the majority of the Czech society<sup>2</sup> but also of the majority of parties in Parliament, this matter has continued to be only a point of discussion. The discussions, as will be shown later, run in specific waves, and only very rarely is this constitutional problem treated in all its breadth.

In the Czech Republic there is only one more popular constitutional issue and that is the extent of immunity provided parliamentary Deputies and Senators. In contrast to the change in the manner of election of the Head of State, the possible narrowing of parliamentary immunity is, from a specialist's point of view, interesting, but not such that it can substantially influence the functioning of the whole constitutional system of the State. The possibility of direct election of the President hides this potential in itself.

Therefore it is worth it to devote attention to the question of possible direct election of the President, and as well to the manner in which this problem is conceived in the Czech Republic. A further reason is the reality that after last year's elections to the Chamber of Deputies those political parties which have direct election of the President as a major point in their program became stronger and we are dealing with one of the points of the Government's agenda.<sup>3</sup>

A relatively significant factor in the Czech Republic – judging from experience over the past years – is also the reality that presidential elections are approaching soon.<sup>4</sup> The question of the manner of the election of the President has always been a more real political topic with the approaching end of the electoral period of the current Head of State, and particularly at a time when a second term was ending and it was necessary to resolve the question of the election of a new person to this highest office.

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1 The other countries are Albania, Estonia, Italy, Latvia, Hungary, Malta, Moldavia, Germany, Greece and Switzerland.

2 See one of the latest public opinion studies on this theme: <<http://bit.ly/prez-pool>>.

3 Conducting direct election of the President of the Republic became a component of the current government program announced on 4 August 2010.

4 The second term of the current President in office, Václav Klaus, will end on 7 March 2013.

If a direct election were to be approved in the Czech Republic, there are formally better preconditions for this now than existed in the past. What the final result, however, will be is difficult to guess. Nothing changes the reality that one is concerned with the greatest constitutional issue that has been opened in the Czech Republic since its origin in 1993.

## 1. Position of the President in the Czech Constitutional System

Although, as will be shown later, the Czech political representation in practice focuses its attention almost exclusively on the mechanism of the election of the Head of State, it is not possible from the constitutional perspective to separate this matter from the position which the President occupies in the framework of the constitutional system.

### 1.1. Nomination of Candidates and the Manner of Election of the President

The President of the Czech Republic is elected indirectly, by Parliament. This is one of the elements of the Czech constitutional system which it is possible to identify as a traditional trait. From 1918 to the present that is throughout the whole period of the existence of Czechoslovakia and the following Czech Republic the President has always been elected in this manner.<sup>5</sup>

According to the current version of the Constitution a person can become President of the Czech Republic if he is eligible to be elected to the Senate of the Parliament of the Czech Republic. A person can seek candidacy if he is a citizen of the Czech Republic and has reached an age of at least 40 years. To this is also added the legal condition that requests that the candidate have full capacity for legal acts.

A group of at least ten parliamentary Deputies or at least ten Senators must nominate a candidate for the presidential elections.

The elections must take place during the last thirty days of the functional term of the preceding President, or within thirty days from the moment when the presidential

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5 With respect to the theme and also the extent of the problem it is possible in this text to deal only sketchily with the position of the President of the Czech Republic in the framework of the whole constitutional system. For those who are interested, the following publications may be useful: Mesonis, G. Čekijos Respublikos Prezidento konstitucinis statusas. In: *Prezidentas valstybinės valdžios institucijų sistemoje* [The Constitutional Status of the President of the Czech Republic. In: The President in the System of Official State Institutions]. Vilnius: Leidykla MES, 2011, p. 341–354; Kindlová, M.; Petrův, H.; Kudrna, J.; Antoš, M. *Introduction to Czech Constitutional Law*. Prague: Charles University, 2009; Janstová, K. K postavení prezidenta republiky v ústavním systému ČR – vybrané problémy. In: *Ústava České republiky v praxi. 15 let platnosti základního zákona* [On the Standing of the President of the Republic in the Constitutional System of the Czech Republic - Selected Problems. In: The Constitution of the Czech Republic in Practice. 15 Years of the Basic Law's Being in Effect]. Praha: Leges, 2009, p. 150–184. The above listing is only a set of examples and points to publications which should be more easily accessible to the reader. Further titles are given in the bibliography at the end of this article.

office has been vacated. The elections are announced by the Chairman of the Chamber of Deputies.

The President is elected at a joint meeting of both chambers of Parliament.<sup>6</sup> The Constitution counts on up to three rounds of voting.

In the first round of voting that person is elected from the candidates who has obtained a majority of more than half of all the Deputies and more than half of all Senators. Should no one obtain such a majority, that candidate who has obtained the largest number of votes in the Chamber of Deputies and the candidate who has obtained the greatest support in the Senate move into the second round.<sup>7</sup> At most two candidates are thus able to take part in the second round; but, should the situation be one in which only one candidate enters the second round, this does not prevent election.<sup>8</sup>

In the second round that candidate is elected President who has obtained a majority of more than half of the votes of the Deputies present<sup>9</sup> and a majority of more than half of the Senators present. The votes in the second round of voting are counted separately in both chambers. If not even one of the candidates fulfils this condition, a third round takes place.

Both of the two candidates from the second round participate in the third election round. There that one of the candidates who achieves a majority of more than half of the votes of the Deputies and Senators present is elected. In the third round the votes of the members of both chambers are counted *together*.

If no President is elected even in the third round, new elections take place. It is necessary to nominate new candidates for these. The repeat candidacy of a person from the preceding election is not excluded.

The elected candidate becomes President at the moment of his taking the oath of office. This is combined with a joint meeting of both chambers of Parliament and as such can take place at the earliest on the day after the ending of the functional electoral term of the preceding President. If the oath of office is not made, or is made with qualifications, he is looked on as though he was not elected at all.

From the above it is clear that in the Czech Republic the classic mechanism of indirect election of the President applies. Parliament has the whole process under its own control in all phases, from nomination, through election, and up through the taking of the oath of office. From the Parliament's setting the President up the more important status of Parliament in the framework of the constitutional system of the Czech Republic can also be seen. Although the Constitution, in Art. 2, talks about the three branches of power, it does not mark them as being of equal value and, on the contrary, in its

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6 Apart from the taking of the oath of office by the President of the Republic, this is the only case where both chambers of the Czech Parliament have joint proceedings. The joint meeting is presided over by the Chairman of the Chamber of Deputies and is conducted according to the order of procedures for the Chamber of Deputies.

7 A maximum of 14 days can elapse between the individual rounds of the presidential election.

8 This could happen if the same person would be the most successful one in both chambers of Parliament.

9 In each chamber at least one third of the full number of members must be present. As a rule there is almost full participation.

overall construction puts Parliament into the most significant position and, above all, its Chamber of Deputies.

## 1.2. Question of the Position of the President of the Republic – a Strong or Weak President?

The manner of the election of the Head of State in the Czech Republic rather shows a weak President. His position in the framework of the constitutional system is derived from Parliament. His mandate is thus undoubtedly weaker than would be in the case of direct elections.

The method of election itself however does not, in and of itself, make a determination about the strength of the President. Decisive is the reality of what kind of legal power is the Head of State empowered with, and above all, to what extent is he able to independently exercise this. To what extent the written Constitution and its actuality coincide also plays a role.<sup>10</sup>

As far as the presidential legal powers are concerned, these are above all concentrated in two lists presented in Art. 62 and Art. 63 of the Constitution of the Czech Republic. It is possible to say, in brief, that the President, in comparison with other countries, does not have any untypical powers at his disposal, nor even, on the other hand, any unusual limitations.

A second question is key one: how much is he able to step forward as an independent actor and „make policy“. In this direction the Czech Republic departs in essence from a parliamentary form of government, in which the Government is the creator of policy and the Head of State, rather, implements policy.

It is only possible to infer the existence of this model from the overall construction of the constitutional system, since it is not directly spoken of in the Constitution. The following constitutional characteristics are decisive.

First, in Art. 54 of the Constitution there is anchored a principle according to which the *President is not held accountable for the performance of his office*. It is necessary to describe this principle systematically and bring it into accord with the principle of republicanism, which determines the state system. In a republic there exist two fundamental rules. According to the first of these every citizen has equal ability to run for public office. At the same time, according to the second principle, in specific contrast to a monarchy, each public official in the performance of his office is held accountable. A situation where the Head of State was given legal powers but did not carry any responsibility for their performance would be in conflict with the principles of a republic.

For this reason the Constitution of the Czech Republic uses the institution of countersigning. When the President of the Republic issues a decision in the application of his legal powers, Art. 63 of the Constitution requires the countersignature of the Prime Minister or of a designated government minister. The countersignature means

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10 For the purposes of this article only skeletal information will be given; those interested in details can use some of the publications listed here in the footnotes or in the bibliography.

the transfer of government responsibility for presidential decision making.<sup>11</sup> The Government itself is held responsible in the performance of its function to the Chamber of Deputies.

The legal powers enumerated in Art. 62 of the Constitution raise a specific issue and a division in readings. Countersigning is not necessary for their performance. A clear majority of them, however, at the same time, are not sovereign powers of the President of the Republic only. We can divide the legal powers mentioned into several groups. Some the President is able to carry out only under specific conditions, precisely set forth in the Constitution, when a different public authority is unable to act and a presidential decision is unable to cause any damage, but on the other hand he is able only to help rouse the whole constitutional system.<sup>12</sup> If need be, there exists a safety mechanism in the sense that in the event of lack of action on the part of the President someone else carries out the necessary act.

It is true that in these cases the question of potential responsibility for non-performance is not consistently resolved, but this is bridged in that in reality it is not possible for a situation to occur where responsibility for the non-functioning of the constitutional system could fall on the President.

The President is able to execute other legal powers only in conjunction with another constitutional organ, on his request<sup>13</sup> or with his agreement.<sup>14</sup> If the fundamental principle is to be preserved that it is not possible in the Republic that no one carry responsibility for the acts of a specific public official, and also the principle excluding the accountability of the President, according to Art. 54 of the Constitution, then there is only one possible interpretation, and that is that accountability in the cases mentioned is borne by those organs that submitted the bill or expressed agreement. The President cannot act without their cooperation, and it is thus possible to argue that here there existed a responsible organ which obtained cooperation. In the case of a different explanation we will come into a basic conflict with one of the fundamental principles of the Czech constitutional system – which is not acceptable. If more possible interpretations exist, then it is necessary to select one that would not lead to internal contradiction in the interpreted rule.

By no explanatory method, however, is it possible to bridge the gap in the fact that the naming of members of the Bank Board of the Czech National Bank and granting of a pardon is only in the hands of the President of the Republic. Certainly the first of the

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11 At this point it is appropriate to note that not every legal power is realized through a decision. I will return to this problem later.

12 See, for example, Art. 35, related to the dissolution of the Chamber of Deputies. In the Czech Republic this is essentially possible only if the Chamber of Deputies itself wants its own dissolution, or, on the other hand, it is completely deadlocked. Should there be interest in more detail, see my earlier article on this theme: Kudrna, J. Dissolution of the Chamber of the Deputies in the Czech Republic – the origin and essence of applicable Constitutional Legislation. *Jurisprudence*. 2009, 3(117): 69–110 [interactive]. [accessed 12-11-2011]. <[http://www.mruni.eu/en/mokslo\\_darbai/jurisprudencija/archyvas/dwn.php?id=226123](http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/archyvas/dwn.php?id=226123)>.

13 At the suggestion of the Chamber of Deputies the President names the President of the Supreme Audit Office.

14 The judges of the Constitutional Court are named by the President with the agreement of the Senate.

mentioned legal powers is so significant that it should continue to be dealt with on into the future.

The problem described here, however, is not the only one to reckon with in interpreting if the position of the Czech President is strong or weak.

Among the presidential legal powers special attention is merited by those which are related to the foreign policy of the State. We find this in Art. 63 para. 1 letters a + b of the Constitution. According to these provisions the President, on one hand, represents the State on the outside, and, on the other, negotiates and ratifies international agreements.

In the Czech constitutional literature it has been repeatedly presented that foreign policy is the domain of the Government, and particularly with reference to Art. 67 of the Constitution, under which the Government is the highest organ of executive power and moreover an organ, in contrast to the President, held accountable.<sup>15</sup>

Such an explanation, however, does not have to be completely non-debatable. The one organ in connection with which the Constitution mentions the domain of foreign policy is the President of the Republic.

There is the question here of whether the author of the Constitution did not have in mind entrusting foreign policy, although not completely without limits, to the authority of the President of the Republic, let us say, to make his role in this area more significant and give him room for specific activity.

The legal powers mentioned rather uniquely belong among those powers that are *countersigned*. This means that the Government has the last word in these matters. On the other hand, however, the statements of the Constitution gives the President the *initiative*.

The only way to bridge this area of friction is exercising of the power of the President and the Government in mutual accord and on the basis of *self-limiting* on both their sides.

Contradictory points of view can only damage the State and its international position. Even though the Government can block any kind of decision of the President in international matters, it does not at the same time have any instrument to force the President to accept its view. Simply put, the President is not just „the other party“ in these affairs.<sup>16</sup> The current text of the Constitution does not make such an interpretation possible.<sup>17</sup>

15 As an example, it is possible to mention the viewpoint put forth by L. Vyhnánek, namely: Šimiček, V., *et al.* *Ústava České republiky. Komentář* [The Constitution of the Czech Republic. Commentary]. Praha: Linde, 2010, p. 754.

16 For more detail see: Kudrna, J. *Ústavní postavení prezidenta republiky v zahraničních vztazích*. In: *Ústavní systém České a Polské republiky po přistoupení k EU* [The Constitutional Standing of the President of the Republic in Foreign Relations. In: The Constitutional System of the Czech and Polish Republics after Entering into the EU]. Praha: Leges, 2011, p. 120–142.

17 Particularly for clear formulations of the passages mentioned from Art. 63 of the Constitution and for missing provisions as well which would narrowly define the position of the Government and President and restrict the second of these. I have in mind, for instance, the period of time stated in Art. 126, para. 3 of the Constitution of the Polish Republic and Art. 146, para. 1 of the same document. The first provision talks about how the President of the Republic fulfils his tasks in the bounds of and according to principles expressed in the Constitution and laws. The second says that the Council of Ministers leads internal and foreign politics of the

Thus it is not able to simply place the President of the Czech Republic as a weak President, such as would correspond to a parliamentary form of government.

In assessing the standing of the President in the Czech Republic it is moreover necessary to give attention to one factual element, and this is the question of „non-performance“. That is a situation where the organ does not carry out the power entrusted to it but also „makes policy“. Such a situation is not in essence supposed to occur. In the Czech Republic, for example, Art. 2 para. 3 of the Constitution, which states that the organs of public power must act within the bounds of the legal rules, excludes this generally. Their responsibility is to perform within the limits of the rules and in the manner set forth. Still this does not always occur in this way. In particular the current President, Václav Klaus, with pleasure, does not speak about non-performance but about „utilizing *his right* to not act.“<sup>18</sup>

Ways out of this situation in the framework of the existing constitutional system are vexing. Especially because the Constitution states that the President is not held responsible in the performance of his function. The procedure of *impeachment* is known in the constitutional system of the Czech Republic, but this is however applicable only in the more serious cases where, due to the President's part, the sovereignty or the territorial integrity of the state or its democratic foundations are endangered. It is not possible in practice to use this approach in ordinary cases.

At the same time there does exist a temporary way out in some situations, although not ideal;<sup>19</sup> it is not possible to overcome other situations in this way and it can potentially threaten to block the whole constitutional system. Thus it is possible to mention the peripetia around the stalling of the signature ratifying the Treaty of Lisbon, the result of which was the President's forcing a promise at the last moment for future exceptions for the Czech Republic from the Charter of Fundamental Rights and Freedoms of the European Union.<sup>20</sup>

It is possible to summarize all the elements mentioned above by saying that the President of the Czech Republic cannot be unequivocally placed among weak presidents. The Constitution of the Czech Republic establishes a system in which the Government has the deciding initiative and control over executive power, but the President has certain room in which he can influence the policy of the State. And this even in the case where

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Polish Republic. Not even these provisions prevent conflicts between the Polish President and Government, but the conflict is often a matter of unwillingness to accept a certain interpretation, never a necessary consequence of a defect in a rule.

- 18 The President repeatedly used this argument, mixing the rights of the individual and legal powers of a state organ when he refused to sign or veto a law that had been submitted. The Constitution counts on a signature or a veto; the President, however, talks about “not using his right to sign or veto”.
- 19 For example, an unsigned (or unvetoes) law was repeatedly published in the Collection of Laws, with reference to the reality that the law is the expression of the will of the people, that is a sovereign power, and the presidential signature, according to the current Czech Constitutional version does not have an operative character. In support, a practical argument is also used according to which waiting for a signature, for which the President has 15 days according to the Constitution, would mean recognizing the President has in fact an absolute right of veto over laws. Which would be in blunt conflict with the Constitution.
- 20 For more on this theme, see, for example: Braun, M. Understanding Klaus: The Story of Czech Eurorealism. *EPIN – Working Paper*. 2009, 26 [interactive]. [accessed 12-11-2011]. <[www.ceps.be/ceps/download/2706](http://www.ceps.be/ceps/download/2706)>.

he will be moderate and will proceed in the spirit of the principle self-restraint, so that he avoids escalation of conflict with the Government.

The inadequacy of the current version of the Constitution on the position of the President of the Republic lies in the inconsistency of a solution regarding his possible accountability for the performance of his function.<sup>21</sup> Complete non-accountability of the Head of State is not balanced by full possibility of control on the part of the remaining constitutional organs. This creates a space in which the President is able to go beyond the framework of the Constitution without the threat of real sanction. It depends then only on the character of the President, whether he will grasp the opportunity and begin to promote himself at the expense of the stability of the whole constitutional system.

It is necessary to take all these realities into consideration when thinking about direct elections. Direct election does not in itself carry new legal powers, but it raises the democratic legitimacy of the office – and by that strengthens the status of the President – and makes it possible for the President to become a significant political actor thanks to the fact that he will seek the votes of the electorate with his own political agenda.

## 2. Considerations and Proposals for Direct Election in Czechoslovakia

### 2.1. Direct Elections up to 1989

The topic of direct election of the Head of State is not essentially a new one on the territory of today's Czech Republic. It goes along with the considerations of politicians from the very origin of the independent Czechoslovak state in 1918. The consideration of this manner of election of the Head of State already existed at that time, towards which at the beginning, certainly under the influence of his residence in the USA, President Masaryk inclined.<sup>22</sup> This variant, however, did not make headway given the strong status of the National Assembly, the manner in which the rise of the organs of the independent state occurred, and the constitutional trends at the time.

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21 The contemporary condition, where only decisions are countersigned, is something of a hybrid between the Czechoslovak Constitution of 1920 and the Constitution of 1960. In the first case the President was not held responsible in the performance of his function but each exercise of the President's legal power demanded a countersignature, unless it was not a result of a decision in the legal sense of the word. The Constitution of 1960 did not demand countersignature in all cases, but the President was accountable to the National Assembly. According to the Constitution today, the President overall is not held responsible for the exercise of his function, but there are a series of cases where he exercises his legal powers but does not formally ask for countersigning, nor even consultation. See, for example, representing the state externally, according to Art. 63 para. 1 letter a. In this role the President, while, as we say, "making policy", expresses a point of view, but it is not a matter of a "decision" in the legal sense of the word. While in pre-war Czechoslovakia these activities required preceding consultations with the Government and its agreement, and after 1960 there was accountability to the National Assembly, today such a possibility is not given.

22 For details, see: Broklová, E. *Prezident Republiky československé. Instituce a osobnost* [The President of the Czechoslovak Republic. The Institution and Person]. Praha: Masarykův ústav AV ČR, 2001, p. 43.

In the post war period there was an effort to take up the original version of the Constitution of Czechoslovakia again as much as possible, and the question of direct elections was not in the order of the day. After 1948, when there was a take-over of power by the Communist Party and, in consequence, the elimination of free elections, direct election would be counter to the rising trend.

During the preparation of the federalization of Czechoslovakia in the short period of democratic loosening up in 1968, direct election was not given consideration.<sup>23</sup>

Not even the proposal of the new federal Constitution, which was prepared in 1988, envisioned direct elections.

## 2.2. First Serious Discussion of Direct Election of the President – Battle for a Further Development of the „Velvet Revolution“ 1989

Direct election of the President of the Republic became a topic of very serious, not only political but also nationwide discussion for the first time in Czechoslovakia on 11 December 1989 and approximately a week following. It was a matter of a fundamental conflict in a further phase of the on-going process of the democratization of the Czechoslovak state and society, when the key question of how to carry over the „power of the people“ into the upper constitutional organs of the State was being dealt with. At issue was nothing less than fulfilment of the demands of the on-going protests of the public against further continuation of the government of the Communist Party.

Why did this occur on 11 December 1989, and what preceded it, and for whom? The Czechoslovak protests against the government of the Communist Party began on a massive scale on 17 November 1989. It is possible to say that during the first week, at the latest with the momentum of the announcement of a general strike, the power struggle was decided. The period of the political phase of picking power came into existence. In it was necessary to bring together two opposing facts. The democratic forces were determined that the taking over of power and further transformation of society should run its course through legal means. A problem however lay in the fact that all state and constitutional institutions were occupied by representatives of the old regime, who did not express very great willingness to take measures directed towards liquidation of the established order. In this direction the democratic forces ran up against a fundamental problem, how to assume power with the help of the pressure from the street but at the same time avoid excesses and, as far as possible, carry out changes in the existing legal and constitutional framework.

On 10 December 1989, after he named a new government of „national reconciliation“ formed from representatives of the opposition and the Communist Party, the current President, G. Husák, abdicated. On the following day, during their proceedings, the club of Communist representatives in the Federal Assembly accepted the request that the

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23 Otherwise, with a direct election of a central functionary conducted by way of a national “referendum”, the Federal States can have a problem when it is necessary to balance the interest of the whole country with the interest of individual member States of the Federation.

next President of the Republic be elected in the form of a „popular referendum, such that the people of this Republic would decide on the Head of State.“<sup>24</sup>

With this request an interesting situation appeared, where the Communist Party requested the maximally possible democracy and participation of the people in the transformation of the constitutional organs, and the opposition movement, advocating democracy, insisted on an indirect election, which the Federal Assembly would conduct in its old form, i.e., as had emerged from the elections in 1986.

The purpose of the request of the Communist Party is clear from today's perspective.<sup>25</sup> In this manner it could, theoretically, be able to gain time and could surely achieve a fissure in the thinking of the democratic movement. It seriously considered the candidacy of Václav Havel. There was however a problem in the sense that Václav Havel was not known to the wider public to such an extent that the election would run smoothly and with the clear result of wide support. The Communists were thinking of nominating their own last Prime Minister, Ladislav Adamec, who, with his constructive stances, obtained true popularity in the course of the November events of 1989. They also considered the possibility of the nomination of Alexander Dubček, whose public recognition and popularity were also not insignificant, especially in Slovakia, and he was also for a certain time considered as a possible opposition candidate. All this would complicate further development. At least theoretically, because a direct election for practical reasons was not realizable because both constitutional and also legal form were missing.

Therefore an apparent „reversal of roles“ occurred. The opposition movement, in the interest of democracy, insisted on indirect election, and with the old Parliament. Against this the Communist Party promoted the more democratic direct election as an instrument, thanks to which it (the party) would be able to partially reduce its own weakening state.

Direct election became a key point of the conflict in the week from 11 to 17 December. During that week the representatives of the club of Communist delegates advised the preparation of an appropriate proposal for a change of the Constitution and of the electoral law, which, however, was not acted upon in Parliament nor even made public. This political conflict ended after the interference/action of the head of the government of „National Understanding“, Marián Čalfa, with the leadership of the Communist delegates, the result of which was their agreement with the further course of changes in the state, including the election of Václav Havel as President of the Republic.<sup>26</sup>

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24 See the news article, Komunističtí poslanci: Volba prezidenta lidovým hlasováním [Communist Delegates: Election of the President by Popular Vote]. *Rudé právo*. 12. prosince 1989, p. 1.

25 At least in hindsight. The Czechoslovak public, to say the least, does not need to understand the whole sphere of conflict in the early days. According to the orientation soundings of the Institute for Public Opinion Research conducted on 12 December 1989 as part of the Federal statistics of the institute with a sample of 292 respondents more than 80% of those surveyed expressed in favour of “election of the President by all citizens by popular vote”. News article Čtyři pětiny pro referendum. (“Four fifths for referendum”), *Rudé právo*, 14 December 1989, p. 2.

26 Those interested in more detailed information can make use especially of the publication: Suk, J. *Labyrintem revoluce* [Labyrinth of Revolution]. Praha: Prostor, 2003. Especially p. 212–228.

It is possible to say in summary that direct election of the President of the Republic, in mid-December, became the instrument of a „rear guard action“ of the Communist Party, which managed to make very effective use of it.

### 2.3. Proposals for the Constitution of the Independent Czech Republic in 1992

The Constitution for the future independent Czech Republic was approved relatively hastily. The prepared work was initiated in full in the course of September 1992 with the idea that the future Constitution should be in effect at the latest from 1 January 1993. The political decision that the proposal be prepared by a government committee and that only this proposal will be acted on in the Czech National Council<sup>27</sup> was approved relatively soon. Alternative proposals could be submitted, but they did not have a political chance of being acted on.

Apart from the government bill four<sup>28</sup> more or less comprehensive bills for the Constitution were prepared. The following bodies submitted these: Liberal-Social Union (LSU), Czechoslovak Social Democracy (ČSSD), Left Block (LB), and Czech Crown (KČ). Only the first two proposals took direct election of the Head of State into account. The Left Block bill allowed for election by Parliament; the last proposal, prepared by the Czech Monarchists, did not, for understandable reasons, consider election at all.

The Liberal Social Union proposal<sup>29</sup> envisaged a relatively strong President. His influence in the sphere of foreign policy was supposed to be similar to how it is today; the bill at the time gave relatively large room for action by the President, and with this even for potential conflict with the Government. A large majority of legal powers according to the proposal required countersignature for their realization. However, countersignature was not counted on, even with a different kind of cooperation on the part of other organs, in the case of the naming of the following constitutional actors: the judges of the Constitutional Court, President and Vice-President of the Supreme Audit Office, the President of the Supreme Court and members of the Bank Board of the Czech National Bank.

The President should not be held accountable in the performance of his office. On the contrary, it is the Government that is supposed to carry all manner of responsibility for his speeches and actions related to the performance of his office. And this even for activity for which countersignature should not be required.

The one measure coming into consideration as an instrument for eliciting presidential accountability is supposed to be *impeachment*, conceived just as in the current version of the Constitution.

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27 The Czech National Council was the representational body (parliament) of citizens of the Czech Republic in the framework of the Czechoslovak Federation.

28 Known to the author at this time.

29 Parliamentary Publication ČNR no. 205, electoral term 1992 – 1992 [interactive]. [accessed 12-11-2011]. <[http://www.psp.cz/eknih/1992cnr/tisky/t0205\\_01.htm](http://www.psp.cz/eknih/1992cnr/tisky/t0205_01.htm)>.

The manner of election was conceived by the authors of the bill very interestingly, since it was not concerned with the combination of indirect and direct election. Eventually the mentioned manner was supposed to arise only in the case where the President would be elected by the National Assembly.

The conditions for electability should be the same as today that is citizenship in the Czech Republic and an age of at least 40 years. The National Assembly should elect the President; in so far as this was not possible, direct election should come into play. In the first round that candidate is supposed to be elected who achieves at least three fifths of the votes of all Deputies and three fifths of the votes of all Senators. Should no one be elected in the first round, those candidates should advance into the second round who achieved the largest number of votes in each of the chambers. Should there be more of them, then all would advance. Should only one candidate, on the contrary, advance into the second round, then the candidate who obtained the second largest number of votes in the Chamber of Deputies should advance along with him. In the second round that candidate should be elected who would obtain a majority of more than half of the votes of all Deputies and of all Senators. In the event that no one would be elected President even in the second round, a third round in the form of a referendum should take place. The two most successful candidates from the second round should enter into this round and that person should be elected who obtains a majority of more than half of all submitted votes.

The bill of the LSU is a very interesting combination of the different methods of election which it treats. These are today, however, of very little practical value. In the wider connection this proposal has weak places in that it would establish a relatively strong President but it would not counter-balance his legal powers with appropriate accountability.

The bill of the ČSSD<sup>30</sup> was submitted for discussion by its club of Deputies to the Czech National Assembly on 19 November 1992. As has already been mentioned, even this bill was not incorporated into the agenda of the proceedings.

Also this bill counted on a relatively significant role for the President in the area of foreign policy. Opposite this, in the area of the execution of the remaining legal powers the Government was supposed to play a very strong role. Almost every presidential decision was supposed to be countersigned. The question of cooperation again remained open in the case where the execution of legal power does not consist of issuing a decision. Nor, according to the ČSSD bill, should the President be held accountable in the execution of his function.

The possibility of impeachment of the President on the basis of a serious infringement of the law was supposed to be a significant balance to this reality, and never just a violation of fundamental constitutional values. This would potentially enable discovery of equilibrium between legal powers and the (non)accountability of the President of the Republic during their performance.

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30 The complete text was published here: Jiřínský, Z.; Mikule, V. *Návrh Ústavy ČR, který podali poslanci ČSSD 19. 11. 1992 ČNR* [Amendment to the Constitution of the Czech Republic, which the ČSSD delegates submitted 19 November 1992 to the Czech National Council]. *Právněhistorické studie*. 2005, 37: 225–275.

Any citizen of the Czech Republic who has reached an age of at least 35 years is able to be elected President. Candidates should be nominated by a group of at least ten delegates of the (one chamber) National Assembly, or by a group of at least ten thousand and at most twenty thousand voters.<sup>31</sup>

The election should be basically direct. In the first round that candidate should be elected who obtains a majority of more than half of the votes of all eligible voters. Should a President not be elected, a second round should take place within 14 days, in which a vote would be taken among the two most successful candidates from the first round. If one of the candidates steps out, then the candidate with the next highest number of votes should step into his place. In the second round it should be necessary to again achieve a majority of more than half of the votes of all eligible voters in order to be elected. It was necessary to obtain the same support even when only a single candidate participated in the election. Should a President not be elected, new elections should take place within fourteen days.<sup>32</sup>

The ČSSD proposal would have led to a somewhat weaker President than the LSU bill, and it would link the legal powers of the President much better with his accountability for their use. The proposed manner of election is more practical than a combined election. But it hides one weak place, and this is the adherence to attaining a majority from *all eligible voters*. Balancing of this requirement is the extension of the performance of the office of the existing President until the time of the new election. It is possible to predict that if this proposal were approved, there would be very frequent, long „serving of extra time“ on the part of the preceding President.

In 1992 the election of the President of the Republic by Parliament was in the end approved, and this above all with reference to the existing constitutional tradition. A bigger discussion, not just about direct election, did not take place, and this was above all for reasons of time.

### 3. Proposals for Conducting Direct Election in the Independent Czech Republic

As has been already indicated, direct election of the President was not – with the one exception of December 1989 – in Czechoslovakia more widely debated as a concrete proposal. Although in the framework of political life this variant was mentioned from time to time as „a possibility“, up to 2001; thus for all of one decade, it was a matter of a more or less marginal idea. Still, the proposal of a comprehensive revision of the Constitution from 1999<sup>33</sup>, which was jointly prepared by two Czech dominant parties,

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31 The election law should contain a detailed provision within the bounds of these constitutional barriers.

32 According to the constitutional amendment the existing President should remain in his office until this time, provided he is not elected the new President, without regard to the formal end of his electoral term.

33 Parliamentary Publication PS č. 359, III. volební období [The III Electoral Term] [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=3&CT=359&CT1=0>>.

ODS (Občanská demokratická strana) and ČSSD, counted on preserving indirect election of the President of the Republic.

At this point it is appropriate to present the actual reasons which influenced the attitude of the Czech political parties on this question of the direct election of the President. The first of these is the traditional character of *indirect* election. With it is also connected the traditional, relatively strong standing of political parties, respectively the weak influence of direct involvement of citizens in the Czech Republic. The political parties, with some exceptions, are closely intertwined with indirect elections, and the possibility of closing cabinet agreements suits them. The exception mentioned can be small, middle parties, which under certain circumstances do not have to be needed for an agreement and their chance to influence a vote is then low.

A second factor is the ability of political parties and their candidates to find support in an eventual direct election. Here it is the specific positioning especially of the Communist Party, whose candidate had hardly any chance of success,<sup>34</sup> but whose voters are ready to support a leftist candidate put up by ČSSD. In indirect election however part of the Communist Deputies gathered support for a rightist ODS candidate. An indirect election then offers the Communist Party more possibilities. Therefore, the Communist Deputies in essence also never supported any of the submitted bills for conducting direct elections.

Candidates of the rightist ODS have the potential in direct election, for instance during elections to the Senate, to obtain support of voters in the first round of voting; but in the second round there has very often been a negative vote against ODS. The reason has often been how the ODS candidate is defined in comparison to the wider acceptability of the candidate running against him, even for voters of other parties. ODS has a greater chance for success in indirect elections, thanks to the possibility to close a concrete agreement on support.

ČSSD has relatively even chances in both types of elections, provided internal disunity does not affect it. Smaller middle of the road parties are able to obtain similar results in both manners of election, as long as there is no agreement among the large parties „over their heads“.<sup>35</sup>

A third factor in the game is, in the Czech Republic, the still relatively high authority linked with the presidential office. Although an election is a democratic act, very often it is tied to „finding a suitable candidate“.

At the turn of the century all three described factors came together. After 1998 a minority ČSSD government existed, which arose thanks to tolerance from the ODS party. Part of the agreement of these two parties was that there would be a revision of the Constitution and of some of its related provisions especially that a reform of elections to Parliament would come about. A large amendment to the Constitution was submitted

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34 In contrast to 1989, when the chance for a total victory was of course slim, but entrance into the second round of the election was not ruled out.

35 On the attitudes of the individual political parties in 2001, see, for example, this analysis by Jiří Pehe, advisor to President Václav Havel [interactive]. [accessed 12-11-2011]. <<http://www.pehe.cz/clanky/2001/kdo-zvoli-pristihoprezidenta>>.

in 1999, essentially an amendment to the election law a year later.<sup>36</sup> At the beginning of February 2003 moreover the second term of President Havel was supposed to end. The question of who would be President became a very real one.

It is appropriate to emphasize that in the Czech Republic considerations on this theme were linked almost exclusively to the question of his person, not of the President as an institution.

The first of the political entities who opened the theme was the so-called Coalition of Four, made up of smaller centrist parties.<sup>37</sup> These parties also set the question of direct election of the President as its number one program issue. Eventually the Communist Party and ČSSD followed. ODS does not give consideration to direct elections in its program. In the last two years the ad hoc parties Public Affairs (Věci veřejné VV) and TOP09 do give consideration to direct elections.

### 3.1. 2001 and the Electoral Term 2002-2006<sup>38</sup>

The first bill for an amendment to the Constitution which was supposed to establish direct election of the President of the Republic was submitted by the Coalition of Four in 2001.<sup>39</sup>

This bill is limited in a way which will be typical for almost all further bills submitted. The authors of the bill do not in any way deal with the question of the legal powers of the Head of State nor the manner in which they are exercised. They do not even deal with the question of inferring accountability for actual deeds and possible acts which the President of the Republic performs. The *complete unaccountability* of the Head of State should be preserved here, with very strict conditions for initiating a possible *impeachment*, but at the same time a relatively strong position of the President empowered partially with legal powers which he is able to carry out on his own without cooperation with other constitutional organs.

The amendment bill is essentially concerned with only the mechanism of the election of the Head of State. Each citizen of the Czech Republic who has reached the age of forty years should be eligible. Each candidate, whether already proposed by a political party or citizens, should obtain the support of at least twenty thousand voters. It is necessary to appraise this requirement, which overall balances the chances of each candidate where an advantage should not exist for Parliamentary political parties, as markedly democratic.

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36 The constitutional amendment did not achieve the necessary support in the Senate, the electoral reform was approved, but abolished in 2001 by the Constitutional Court as unconstitutional.

37 See, for example: <[http://zpravy.idnes.cz/oda-naborila-snahy-ctyrkoalice-o-jednotne-prosazovani-primevolby-prezidenta-1hj-/domaci.aspx?c=A000603114429domaci\\_jkl](http://zpravy.idnes.cz/oda-naborila-snahy-ctyrkoalice-o-jednotne-prosazovani-primevolby-prezidenta-1hj-/domaci.aspx?c=A000603114429domaci_jkl)>.

38 The association of the year 2001 with the following electoral term of the Chamber of Deputies, from the view point of examining proposals for conducting direct election of the President of the Republic makes sense because in this year the delegates of the Coalition of Four submitted its first bill of amendment of the Constitution, which they later asserted in modified form after the elections, when they were now members of the government coalition.

39 Parliamentary Publication PS no. 1109 from the III electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=3&CT=1109&CT1=0>>.

The election itself should take place through a system of absolute majority, counted from the valid votes submitted. In the case of an equal number of votes in the second round a drawing of lots should decide.

The Government in its point of view towards the bill expressed several fundamental conditions. Above all it did not agree with the point that each candidate must have the support of a petition, because it had fears that a situation could arise where no one fulfilled the relevant conditions and there was not then any candidate. Further the Government expressed the conviction that it is not possible to change the election mechanism, because it would come to a revision of the presidential legal powers and their exercise. The Government also refused the possibility of using a drawing of lots in the event of an equal number of votes in the second round of the election.

The bill was rejected on its first reading, precisely two months after its submittal.<sup>40</sup>

The bill described here became the basis for a further draft,<sup>41</sup> submitted a year later by a group of representatives of the government coalition.<sup>42</sup> This bill differed from the previous one in one aspect. The nomination of candidates for President should be disclosed to a group of at least ten Deputies and one of at least ten Senators. Otherwise the bill did not differ from the preceding one and again did not aspire to change the legal powers or accountability of the President of the Republic.

The Government expressed observations on this bill and pointed above all to the disproportion between the low number of legislators who could nominate candidates and the relatively high number of citizens whose signatures were requested. Further the Government recommended solving the question of the non-accountability of a directly elected Head of State and, with this, the related matter of immunity. The Government considered the drawing of lots in the event of an equal number of votes in the second round as debatable.

The bill was rejected after a month and a half, again immediately on its first reading.

Representatives, this time only the Freedom Union-Democratic Union (US-DEU) submitted practically an identical bill at the beginning of 2003.<sup>43</sup> It differed from its predecessor only in that it reduced the number of signatures requested under a petition of citizens to ten thousand.

The Government responded to the bill with basically the same remarks as towards its predecessor. Moreover it recommended dealing with the question of immunity as a complex matter, including Deputy and Senatorial immunity. Emphasis was also put on the urgency of solving the question of presidential powers and accountability for exercising them.

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40 Its chances of being accepted, no matter what they might be, still lowered the proposing of a mechanism of nomination of all candidates to a form of petition and linking of the proposal for limiting Deputy and Senatorial immunity.

41 Parliamentary Publication PS no. 90 from the IV electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=90&CT1=0>>.

42 Their components were the two parties forming the original Coalition of Four, which fell apart just before the 2002 elections.

43 Parliamentary Publication PS no. 172 from the IV electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=172&CT1=0>>.

The bill was rejected after two years on its third reading.

In exactly the same time period a bill of their own was also prepared by the ODS representatives, submitted for processing on 22 October 2002.<sup>44</sup> Not even this bill dealt with anything else than just the election mechanism. Just like the first bill of the Coalition of Four party from 2001 it requested support in the form of a petition with signatures of at least twenty thousand eligible voters for nomination. Nominations by members of Parliament was not supposed to be possible.

For the election a system of relative majority was supposed to be used.<sup>45</sup> That candidate should be elected who obtains the most votes in the first round of the election. For the unlikely event that more candidates obtained the same number of votes in the first round, a second round was counted on, into which only those candidates would advance who had an equal number of votes.

The Government expressed disagreement with this bill for similar reasons as with the preceding proposals, and moreover completely rejected the method of voting selected. According to their point of view it is unsuitable for the office of Head of State for it to be occupied on the basis of less support than one half of participating voters.

The bill was rejected after one month immediately on its first reading.

The four bills described above were submitted before the election of the new President, Václav Klaus, on 28 February 2003. Not quite half a year after this election, specifically on 10 June 2003, the coalition government of ČSSD, the People's Party and US-DEU submitted their own draft amendment.<sup>46</sup>

This bill differed from its predecessors primarily in that it not only limited the mechanism of election but attempted to partially also solve the question of the accountability of the President of the Republic, his legal powers and the manner of their execution.<sup>47</sup>

In so far as one is concerned with the question of the nomination of candidates for direct election, which the Government repeatedly criticized the preceding bills for, there should be the support as its requirement of at least twenty Deputies or at least ten Senators or at least ten thousand qualified voters. The Government thus held to the lowest number of voters, preserved the minimal number of Senators and doubled<sup>48</sup> the number of Deputies.

44 Parliamentary Publication PS no. 95 from the IV electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=95&CT1=0>>.

45 The authors of the bill justified this manner of election by saying that it prevents a negative vote that is a vote against one of the candidates.

46 Parliamentary Publication PS no. 349 from the IV electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=349&CT1=0>>.

47 In reality it was an attempt at a comprehensive revision of the Constitution, because the bill further aspired to make changes in the following areas: narrowing the immunity of Deputies, Senators and judges of the Constitutional Court, exclusion of a judge holding office again on the Constitutional Court, expansion of the range of laws for whose passage the agreement of both chambers of Parliament was needed, and of some powers of the Government in its relation with Parliament, changes in the scope of activities and powers of the Supreme Audit Office and of the Czech National Bank.

48 By this it also reached a certain balance in the standing of both chambers, when there were approximately 2.5 times more Deputies than Senators.

The system of absolute majority, which would be counted from the submitted valid votes, was selected for the election. The system, a classic two round one, was updated with the possibility of a third round taking place in the event that both candidates in the second round achieved an identical number of votes. In this way the Government avoided the use of lots, on which the bills of the delegates of the former Coalition of Four counted.

In the matter of the (non)accountability of the Head of State there should be a change consisting in the exclusion of the provision on non-accountability. On the other hand, however, the bill did not contain any new mechanism for developing the responsibility of the President in the case of his infringing on legal rules. The mentioned change of legal power was for the most part only a revision of legislative-technical details. The single substantial change would be the inclusion of the power to name members of the Bank Board of the Czech National Bank in the group of countersigned legal powers.

It is necessary to appraise even this bill as inconsistent, since it does not resolve the key question connected with the eventual strengthened position of the mandate of the President of the Republic.

The bill was rejected after a year and a half on the third reading, when in the end not even all the Government delegates supported it.

In the mentioned electoral term there was no further proposal submitted for conducting direct election of the President of the Republic. This term also relatively well provides evidence what the attitude of the political parties in the Czech Republic was towards this issue. Direct election is more of an electoral theme than an actual agenda matter. Rather fundamental is moreover the ignorance of embracing this problem in its complexity. Limiting of the problem of direct election only to the mechanism of election, justified by no underlying argument that a change in legal powers is not necessary, or because the contemporary position of the President should be preserved, bears witness moreover to the non-comprehending of the rules of the functioning of the whole constitutional system of the State.

#### 4. The Electoral Term 2006-2010

The period after the elections in June 2006 was not so rich in the number of amendments to the Constitution in the matter of direct elections. It is possible that this was caused also by certain absorption of the preceding relatively hectic development. Also there is the reality that the presidential election was relatively distant at the beginning, and the political parties did not feel the acuteness of this issue.

A group of ČSSD Deputies submitted the first bill on 16 October 2007.<sup>49</sup> The amendment for the most part derived from the above described government bill of 2003, which in some areas evolved still further.

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49 Parliamentary Publication PS no. 332 from the V electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=332&CT1=0>>.

The nomination of the presidential candidates was recognized for a group of at least twenty Deputies or of ten Senators, and also of voters who submit a petition with at least ten thousand signatures of voters. The election should take place according to the system of absolute majority, with a potential third round in the event where two candidates in the second round obtain an identical number of votes. For the unlikely case that this balance should be repeated even in the third round, the bill expected the calling of new elections.

In the matter of presidential legal powers the bill modifies and clarifies some provisions. As a change in content it is possible to consider the bill on conditional naming of members of the Bank Board of the Czech National Bank by countersignature. Part of the right to grant amnesty, specifically total forgiveness, should be placed among those powers requiring countersigning.<sup>50</sup> The area of foreign policy should not be affected by the bill.

(Non-)accountability for exercise of the office of the President should be completely excluded from the Constitution. Moreover there should be a widening of the circumstances for initiating the procedure of *impeachment*. New is that this should be possible also for reasons *other*<sup>51</sup> *than breach of constitutional rules*, and on the proposal of the Chamber of Deputies.

The Government assumed a markedly negative stance towards the bill. It found fault with it first in that the bill was submitted without the necessary public and specialist discussion about the problem of direct election of the Head of State taking place. Further the Government considered it a fundamental inadequacy that the reality that some legal powers of the Head of State are limited, while direct election should lead, on the contrary, to strengthening of his mandate. It considers the limiting here as „materially unjust“. The Government considered the recognition of a new procedure widening *impeachment* of the Chamber of Deputies but not of the Senate as not well-founded. The final basic criticism of the Government dealt with the fact that it is not possible to assess the bill if an appropriate implementing the electoral law is not submitted at the same time.

Thanks to the widening of the possibilities for impeachment the bill would at least partially balance the mandate of the President strengthened by a direct election. In so far, however, as it should come to political misuse of this procedure, the President would be, just as in the case of other bills, strengthened especially in the area of foreign policy.

The bill reached the third reading and in the end no vote was taken on it, because the last session occurred two days before the Parliamentary elections of 2010.

The described position of the Government is at first sight surprising, especially with respect to its criticism of the limiting of some of the legal powers of the President of the Republic. It seems that the Government desired a strengthening of the President. The contemporary consensus on the Czech political scene, however, said that the President

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50 That is to use the power so that criminal prosecution would not be commenced, and if it had begun, so that it would not continue further. The power to pardon and lessen imposed punishments (agratiation), and the right to annul a conviction (rehabilitation) should remain preserved as not requiring countersignature.

51 Meaning different than the reason for convening impeachment for treason. This power was supposed to be preserved henceforth for the Senate.

should not be strengthened, that his role as given in the constitutional system should be remain preserved.

An explanation can consist in the fact that the Government at the time was formed by ODS and two smaller centrist parties (the Popular Party and the Green Party), since ODS, as the dominant member of the Government had been building a negative position with respect to the direct election of the President for a long time. It is not possible to understand the criticism mentioned as a fundamental change in attitude toward the positioning and role of possible direct election of the President, but as a purposeful argument used in the given moment against an existing bill.

The form of a bill of its own, which the Government submitted on 17 February 2009, also presents support on behalf of this explanation.<sup>52</sup> This bill completely departs from the ranks of the other bills described and is a curiosity in that *it does not contain any electoral mechanism at all*. This was one of the fundamental objections of the Government which it had brought against the preceding bill – but now it was as though this had ceased to apply after a year and a quarter.

The Government does not present in its supporting argument for its own bill the reason for taking such a position. It is possible, however, to fill this out on the basis of media reports. The main cause for not resolving this key matter was a fundamental conflict between the parties of the government coalition over this question. While ODS insisted on the requirement of a system of relative majority, for reasons already described above, both smaller centrist parties insisted on the system of an absolute majority. In order for the Government to formally fulfil its own program announcement, where it promised debate on direct elections, it decided to exclude this matter completely from the Constitution. And this even at the cost of undercutting its own comment on the preceding Deputies' bill of 2007, for which it criticized the absence only of an implementing law.

In the end the bill did not bring any essentially new solution. It acknowledged the nomination of candidates by the groups of at least twenty Deputies, ten senators, or voters with a petition supported with at least twenty thousand voter signatures. The legal powers of the President were not supposed to be otherwise modified; non-accountability for exercise of the office should continue to be preserved.

The somewhat absurd approach of the Czech politicians towards direct election of the President, which increased in intensity precisely between the years 2007 and 2009 is characterized by the bill of 28 May 2008<sup>53</sup> by the representatives of the Green Party, members of the government coalition of the time. Its content was a proposal for announcing a referendum – something the Czech constitutional system in essence otherwise does not use at the national level – specifically on whether the citizens want the President to be elected directly in accord with the bill submitted. The referendum, as interpreted from the formulation of the bill, should have a consultative character.

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52 Parliamentary Publication no. 747, V electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=747&CT1=0>>.

53 Parliamentary Publication no. 524, V electoral term [interactive]. [accessed 12-11-2011]. <<http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=524&CT1=0>>.

The bill concerned itself only with the nomination of candidates and the mechanism of the election. In this part it completely carried over the bill of the Deputies of ČSSD already described above. The remaining issues should not be dealt with.

This bill was nothing else than an explication of the political position of the Green Party, which considered the direct election of the President as one of its key program issues. The submittal of this bill in the end led to the preparation of the basically contentless government bill described above.

The Deputies of the Green Party withdrew their bill a year and a half after its submittal.

It is possible to assess the electoral term 2006-2010 by saying that it showed the conflict in full light between the declarations of the Czech political scene and the readiness and ability to keep their promises. Only the bill submitted by the Deputies of ČSSD reached the needed level, even though it also did not solve all the problems that might surely arise with conducting a direct election of the President.

## 5. From 2010 to 2011

The political situation in the Czech Republic essentially did not change after the May elections to the Chamber of Deputies from the point of view of political support for direct election of the President; the basic separation of powers remained protected. Direct election resonated however with the Czech public and beyond as one of the themes on how to strengthen the influence of the voters on politics. Therefore this theme, just as it had been in the past, was again opened up. The Government even incorporated the conducting of direct elections into its agenda announcement.

In the autumn Senate elections ČSSD, which achieved a majority of more than half the seats in its chamber, was very successful. Thus it of course happened that any potential amendment for a change of the Constitution would have to be, from the beginning, created through compromise. Therefore a session was convened of all parties represented in the Chamber of Deputies, except for the Communist Party.

The first session of Deputies of the parliamentary parties mentioned took place on 17 February 2011.<sup>54</sup> The first issue on their agenda was the question of the manner of nominating candidates, of the electoral system and the extent of interference with the presidential powers.

The previous bills were a way out and an inspiration for the system of nomination in the sense that a model had been proposed where each candidate would have to submit a petition supporting his candidacy. Nominations should also be open to the public, but, in contrast to the period almost ten years before, the agreement of the negotiators was

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54 Because no concrete constitutional law bill had been prepared so far by them, it is possible to only refer to reports in the media. For example: <<http://www.ceskatelevize.cz/ct24/domaci/115694-prima-volba-prezidenta-dostala-obrys/>>.

fundamentally more conservative, since they decided beforehand on a count of fifty thousand signatures.<sup>55</sup>

In the matter of the electoral system the system of absolute majority, or the so-called Australian electoral system, which is one round and in which each voter arranges the candidates in the order of his preference, was considered. The Australian electoral system proposed by the Public Affairs Party did not gain footing, and the system of absolute majority obtained support. The reason was, above all, its familiarity to the voters from the Senatorial election and also its understandability and simplicity.

Although the Social Democrats proposed a more fundamental interference with the powers of the President, this bill did not draw response and a rather minimal variant came into consideration consisting in the regulation of the right to pardon, at least partially, through countersignature and ensuring participation of the Government in the naming of members of the Bank Board of the Czech National Bank.

At the second meeting of the negotiators, which took place on 2 March 2011,<sup>56</sup> the above mentioned outcomes were approved and the question of the possible accountability of the President for exercise of his office was debated. The ČSSD bill was relatively extensive in this direction; it took account not only of the possibility of *impeachment* of the President for serious infringement of constitutional rules, but also the possibility of his recall in the form of a popular vote, following the Austrian example. The possibility of recall did not carry wider support, but the extension of the procedure for *impeachment* did.

During spring the proceedings continued, although with less intensity; but a different problem appeared, and this was the attitude of the Senators. In the Czech Republic the Senate is not a relatively weaker parliamentary chamber than the Chamber of Deputies. The election of the President of the Republic is one of a small number<sup>57</sup> of powers where its position is comparable to that of the Chamber of Deputies. The negotiators, especially from the Chamber of Deputies, did not include in their calculations the fact that the Senate would be deprived of one of its most visible legal powers, and this without compensation of any kind. The issue arose whether an already achieved compromise had a chance of making it through the Senate. This question is unresolved.

Further sessions should be held of course in the fall, in so far as the development of proceedings connected with the approving of the State budget will permit this. The persons participating in the proceedings acknowledge that it is unlikely that direct election would be approved so that it could be used as early as February 2013.

55 In the course of the proceeding a variant was also considered of one hundred thousand signatures.

56 See, for example, the report on their progress here: <<http://zpravy.e15.cz/domaci/politika/prima-volba-prezidenta-bude-dvoukolova>>.

57 Among the legal powers in which the Senate is irreplaceable are: the passing of Constitutional laws, international agreements and some laws in which the position of the Senate can be affected (among other things, all election laws), also approval of candidates to the Constitutional Court, supervisory powers in connection with deployment of armed forces, proclamation of extraordinary legal conditions and particularly election of the President of the Republic. Under ordinary conditions the Presidential election belongs among the most prestigious powers.

## Conclusions: Direct Election – a Consideration *de lege ferenda*

As has already been shown above, I hold the view that direct election is not dealt with in the Czech Republic as a sort of constitutional-legal problem but it has been approached from the side of the political parties in a somewhat populist way and not completely convincingly in so far as their will to really establish direct elections.

Even though the question of the manner of election is certainly important, they consider solving the problem of the legal powers of a directly elected President as key, and this *in tight connection with the functioning of the other constitutional organs*. General agreement tends towards the idea that the President should not be strengthened. Rather unjustly however the outcome from this is that it is not necessary to resolve the question of legal powers.

The contrary is true. A directly elected President will automatically be strengthened, and this through the manner of his election. He will be President with his own political program, and voters will expect of him that he will also fulfil this agenda. With a view to his relatively strong legal power in foreign affairs and the example of the activism of the current Czech President, it is possible to very easily imagine a candidate who makes a campaign promise to, for example, „protect the country from the euro“. With a view to the fact that the negotiating of international agreements and their ratification falls into the domain of the President, everything will depend on him alone, without regard to the will of Parliament and the Government. The approach towards delaying ratification of the Treaty of Lisbon, even if agreed on the basis of his authority and in accord with the conditions of the President, is testimony to this.

If the strengthening of the President should come about, this will happen only due to the fault of the Government. With this also there will be a shift of the centre of gravity of power in the contemporary constitutional system of the Czech Republic, and nothing will be as it was before. In fact, in the case of an activist President, the system in the manifestations of its own functioning is able to shift relatively significantly in a direction towards a semi-Presidential system.

This issue should be resolved beforehand. Either the President, of course with all its consequences, should be strengthened, or the Constitution should be amended with a provision from which it will be clear that it is the Government which is the creator of internal and foreign policy, as is the case in Poland. It should be established that the exercise of all powers is conducted in cooperation with other organs.

Just under these circumstances would it be possible to say that a directly elected President in the Czech Republic would not become stronger but his status corresponding to a Parliamentary system of government would remain preserved, as is desired.

The issue of compensation for the Senate should be worked out. The naming of members of the Bank Board of the Czech National Bank should be granted to it, as has been the case with naming of the judges of the Constitutional Court. Transfer of control over the naming of members and leadership of the Supreme Accounting Office from the Chamber of Deputies to the Senate would have a meaning of its own. This organ would

thus give up a little to everyday politics and to the Government,<sup>58</sup> which would only benefit this top level regulatory institution.

In so far as the electoral system is concerned, in spite of sympathy for the Australian electoral system, the system of absolute majority is considered advantageous given its familiarity in the Czech Republic. In the matter of nomination however the number of fifty thousand supporters for „independent“ candidates would be too high for the Czech Republic. Neighbouring Poland, a country with a population approximately four times larger, requires only 100 thousand supporters. However, each candidate must submit a petition for his own support. No difference is made among those who nominate, and each candidate has identical starting conditions.

Lowering the number of signatures to twenty thousand and the requirement of these for each candidate would be more suitable even in the Czech Republic. Moreover a certain activation of the political parties in collecting signatures and their having greater connection with the public might follow as a result.

This framing highlight shows that conducting direct elections would mean something more than only a „technical amendment“. In reality it will be so extensive an interference that it would fully legitimize the submittal of a comprehensive bill for a new Constitution.

It is only possible to guess whether direct election of the President will be established in the Czech Republic. Current experience shows that this will probably never happen, because the political parties generally use this theme if they want to get the attention of the public. For the Czech Republic, however, this does not have to be bad news, because no direct election is better than a bad direct election.

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58 The current version of the Constitution does not exclude the situation that the very same majority which voted confidence in the Government can propose someone for the offices of President and Vice-President of the Supreme Audit Office. The exclusion of this possibility could be good for its independence.

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## ČEKIJOS RESPUBLIKOS PREZIDENTO TIESIOGINIŲ RINKIMŲ ĮGYVENDINIMO KLAUSIMAS (AKTUALUS JAU 20 METŲ)

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**Santrauka.** Čekija šiandien priklauso Europos valstybių mažumai, kuriose prezidentai renkami netiesiogiai. Tačiau tiesioginių rinkimų klausimas aktualus Čekijos visuomenei jau beveik dvidešimt metų. Parlamento lygmeniu politikai šį klausimą ypač aktyviai diskutavo pastaruosius dešimt metų.

Paradoksalu, kad nors prezidento tiesioginių rinkimų sistema sulaukė ne tik visuomenės, bet ir daugelio parlamentinių partijų palaikymo, šis klausimas kol kas tebėra diskusijų objektas. Diskusijos vyksta dėl specifinių šios idėjos aspektų, tačiau retai ši konstitucinė problema yra analizuojama išsamiai.

*Pokyčiai prezidento rinkimų sistemoje padarytų didelį poveikį visam konstitucinės sistemos funkcionavimui, todėl būtina analizuoti, kaip ši problema suvokiama Čekijos Respublikoje. Atkreiptinas dėmesys, kad 2010 m. vykusių Žemųjų Parlamento rūmų rinkimų rezultatai parodė, kad savo pozicijas sustiprino tos politinės partijos, kurios savo rinkimų programose vieną iš tikslų kėlė tiesioginių prezidento rinkimų sistemos įvedimą.*

*Formaliai tiesioginiams prezidento rinkimams Čekijos Respublikoje šiuo metu yra susiklosčiusios tinkamesnės aplinkybės nei praityje. Tačiau sunku nuspėti, koks bus galutinis rezultatas. Deja, bet realybėje niekas nesikeičia, nors tai yra svarbiausias konstitucinis klausimas, keliamas Čekijos Respublikoje nuo jos įkūrimo 1993 m.*

*Straipsnyje analizuojamas Respublikos prezidento statusas šiuolaikinėje Čekijos konstitucinėje sistemoje, taip pat prezidento rinkimų ir galios klausimai, aptariami tiesioginių prezidento rinkimų klausimai nuo 1918 m. iki šių dienų bei nagrinėjami aktualūs Konstitucijos pakeitimai. Nemažas dėmesys skiriamas sunkumams, kurie, autoriaus nuomone, kils pasikeitus prezidento rinkimų sistemai, bet išlikus dabar galiojančiai valdžių padalijimo sistemai.*

**Reikšminiai žodžiai:** konstitucinė teisė, valstybės vadovas, tiesioginiai rinkimai, konstitucinė sistema, valdžių padalijimas, stabdžių ir atsvarų sistema, Čekijos Respublika.

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