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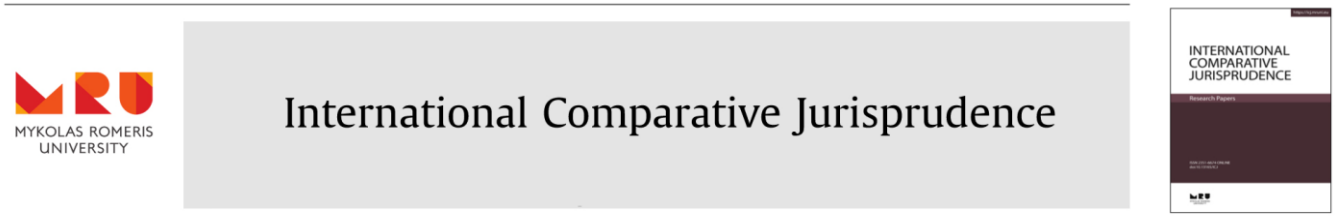

CONSTITUTIONAL STABILITY AND DYNAMICS IN THE CZECH REPUBLIC

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Abstract. This article discusses the stability and dynamics of the Czech constitution, especially the 'frame of government'. First, the circumstances of the adoption of the Czech Constitution from 1993 are described, as well as the initial problems with the implementation of bicameralism. Second, the rigidity of the constitution in formal and material sense is analysed. Here, the article demonstrates that the procedural rules for adopting constitutional acts (qualified majorities in both chambers of the Parliament) have to be considered in connection with the electoral and political system in the Czech Republic in order to get a good picture. By an overview of constitutional acts adopted since 1993, it is shown that the constitutional system has not been subject to major changes and remained rather stable. Two important exceptions, i.e. moments of constitutional development are discussed in detail: the cancellation of early election in the Chamber of Deputies by the annulment of a constitutional act by the Constitutional Court and the introduction of direct election of the President of the Republic and its impact. In both cases, the lack of governmental control over the dissolution of the Chamber of Deputies—arguably the weakest point of the constitutional system—amplified the political crises in the short-term, but did not prevent the return to regular functioning of the parliamentary system. The article, therefore, comes to the conclusion that the Czech constitution is rather stable and functional. The rules ensuring its rigidity have been successful and may serve as an inspiration from the comparative perspective.

Keywords: Constitution; Czech Republic; Constitutional Change; Constitutional Rigidity.

Introduction

Constitutional stability and dynamics can be examined from various points of view, using multiple methods and criteria. One may discuss the durability and replacement of a constitution, the formal (explicit) changes of the constitution and the procedures prescribed for these changes, the informal (implicit) changes of the constitution (judicial interpretation, legislative concretisation), the evolution of the relationship between a constitution and constitutional practice or the breaches of constitution. In this article, we will only deal with one constitution, that of the Czech Republic adopted in 1993 and remaining in force ever since, and we will focus our attention on the formal stability of the constitutional system, rather than, for example, the stability and dynamics of the interpretation of fundamental rights or values of the constitution. The main argument is that the Czech constitutional system is rather stable both formally and empirically. This will be demonstrated on the formal level by analysing the procedure for adoption of constitutional acts (qualified majorities in both chambers of the Parliament) in the context of the electoral and political system and on the empirical level by looking at the constitutional acts adopted since 1993, most of which have impacted the constitutional system only marginally. Two moments of temporary destabilisation resulting directly or indirectly from the adoption of constitutional acts are described and discussed in detail.[2]

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[2] References to secondary sources are limited to sources in English. Regarding primary sources, the list of references includes links to English translations where available.

1. Circumstances of drafting and adoption of the Constitution and their impact on the constitutional system

The process of constitution-making that led to the adoption of Constitutional Act No. 1/1993 Coll., on the Constitution of the Czech Republic (hereinafter also referred to as the 'Constitution') was very far removed from the ideals of democratic constitutionalism. After the June 1992 parliamentary election, it quickly became clear that the leading political parties in the Czech and the Slovak part of the Czechoslovak Federation would not be able to agree on anything else but the dissolution of the federation. It was quickly decided that Czechoslovakia would be dissolved by 31 December 1992.[3] Within this time-frame, the Czech Republic had to adopt its constitution so that it could enter into force by 01 January 1993. This task fell upon the Czech Government and the Czech National Council (the parliament of the Czech Republic as the subject of the Czechoslovak Federation, also newly elected in June 1992). This meant that the constitution had to be adopted in haste, by a body that had not been elected specifically for that purpose (and indeed, the question had not been featured in the election campaign). Furthermore, the main actors of Czech political parties did not stand for election in the Czech National Council, but rather in the Federal Assembly (the parliament of the Czechoslovak Federation). Czech National Council, a 'second-rate' assembly, together with the government, managed to adopt a constitution that has endured without radical changes until the present day and is sometimes even lauded by foreign commentators (e.g. Tuma and Wenzel, 2013).

It is not our aim here to discuss the Czech constitutional system in detail.[4] We will only mention the parts relevant for the purpose of this article.

From the beginning, the Czech constitution consisted of a set of constitutional acts rather than one document. This set is enumerated in Article 112 of the Constitution and bears the title 'constitutional order' (hereinafter also referred to as the 'constitution'). The two main elements of the constitutional order are the Constitution (the standard 'frame of government') and the Charter of Fundamental Rights and Freedoms. The Charter was a constitutional act in the Czechoslovak legal order from 1991. In 1993, it was only republished in the Czech Collection of Acts (official journal) without changing a single word. Furthermore, certain historical constitutional acts on state borders and constitutional acts dealing with the legal and institutional transition from Czechoslovakia to an independent Czech Republic were made a part of the constitutional order. New constitutional acts may be adopted (and therefore introduced to the constitutional order) either as stand-alone constitutional acts or as amendments to the existing constitutional acts.

Because of the limited time to adopt the constitution, several important issues were left open, to be decided by a future constitutional legislator. For example, according to Article 2(2) of the Constitution, a constitutional act may designate the conditions under which the people may exercise state authority directly. Only Article 99 in the original wording stated that the higher territorial self-governing units are either lands or regions, neither of which existed as self-governing units by 01 January 1993. The Constitution also lacked any provisions regarding a state of emergency. While the last two issues have been resolved by the two most important stand-alone constitutional acts adopted since 1993 (Constitutional Act No. 347/1997 Coll., on the Creation of Higher Territorial Self-Governing Units and Constitutional Act No. 100/1998 Coll., the Security of the Czech Republic), no general constitutional act on referendum has been adopted to this day, only a one-off Constitutional Act No. 515/2002 Coll., on the referendum on accession of the Czech Republic to the European Union.

The Constitution transformed the Czech National Council into the Chamber of Deputies. Its central position in the constitutional system was deliberately strongly entrenched in the Constitution, to a certain degree at the expense of the government. The Prime Minister is appointed or dismissed by the President of the Republic on

[3] For an outline of events leading to the end of Czechoslovakia see Mathernova, 1992.
[4] For that, see Pavlíček and Kindlová, 2014.

the basis of a proposal from the Prime Minister. The government is collectively responsible to the Chamber of Deputies and if it is denied the confidence of the Chamber, it must resign (Articles 68, 72 and 73 of the Constitution). There is no individual responsibility of the ministers to the Chamber of Deputies. On the other hand, the rules for dissolution of the Chamber (Article 35 of the Constitution) offer the government a very limited possibility to call early elections in case of instability or political stalemate in the Chamber, as analysed in detail by Kudrna 2009 or Brunclík 2013. Until 2009, dissolution was limited to four cases. Two of them were highly improbable, namely the adjournment of the session of the Chamber for more than 120 days in a year and the failure of the Chamber to form a quorum for more than three months. The possibility to dissolve the Chamber for denying confidence to three newly formed governments in a row (cf. Article 68 of the Constitution) was lengthy and suitable mostly for dealing with crises occurring during the initial formation of the government following the election of the Chamber. Even in the last case, if the government joined the issue of confidence with a bill presented to the Chamber, the dissolution was only possible if the Chamber failed to reach a decision on such a bill within three months. In all four cases, Article 35 entrusted the President of the Republic with the power to decide whether the Chamber shall be dissolved or not, without any formal co-decision power of the government. This was to prove to be a problematic feature of the Czech constitutional system.

The Constitution introduced a bicameral parliament. However, the second chamber of the Parliament, the Senate, did not exist by 01 January 1993. Article 106 of the Constitution envisaged that until the election of the Senate, a Provisional Senate shall exercise its powers. A constitutional act was to determine how the Provisional Senate was to be formed. It was thought that the Czech members of the federal parliament will be transferred into the Provisional Senate, but at the same time, there was a significant political opposition to the very idea of having a Senate. Eventually, no constitutional act on the Provisional Senate was adopted. For that case, Article 106 entrusted the Chamber of Deputies with the exercise of the powers of the Senate until the formation of the Provisional Senate. This lasted until the adoption of a new electoral act and the election of the Senate in 1996.

Could the absence of the Senate have caused a constitutional crisis, especially if prolonged even beyond 1996 without e.g. abolishing the Senate by a constitutional act? The relationship between the Chamber of Deputies and the government would not have been really affected because the Senate does not participate in the formation of the government. In the legislative procedure, any amendment or rejection of a bill by the Senate can be overcome by the majority of all deputies, which should be easy to rally for a majority government. However, the absence of the Senate meant that the President of the Republic had to be elected by the Chamber of Deputies only and not by the Parliament as a whole. The rules were virtually reduced to electing the President by majority of votes cast in the Chamber of Deputies. Furthermore, the judges of the Constitutional Court, appointed by the President of the Republic with the consent of the Senate according to Article 84(2) of the Constitution, had to be appointed with the consent of the Chamber of Deputies instead. Both the election of the President and the appointment of judges to the Constitutional Court were carried out in this manner in 1993. As expected, Václav Havel was elected the President, and there was no political conflict over the composition of the Constitutional Court. The Chamber of Deputies smoothly approved all the nominations made by the President, but one can see that a constitutional system where a majority in the Chamber of Deputies elects the President and then, together with him, appoints the judges of the Constitutional Court, involved less ‘constitutional checks’ than with the Senate added to the equation.

We can resume that the Constitution had to be and was adopted hastily and left certain issues open for the future constitutional legislator to decide and for the legislator to implement. The risk of not implementing the Constitution, in conjunction with the potential of constitutional instability, had been overcome, with some hesitation regarding the establishment of the Senate. The Constitution had one major design flaw, i.e. the limited possibility of the government to bring about the dissolution of the Chamber of Deputies.

2. Rigidity of the constitution and the growing instability of the political system

2.1. Formal rigidity

The formal rigidity of the Czech constitution consists in the requirement to have qualified majorities in both chambers of the Parliament to of a constitutional act, without the Chamber of Deputies being able to overcome the rejection or amendments from the Senate. According to Article 39(4) of the Constitution, the Chamber of Deputies passes the proposals for constitutional acts by the majority of three fifths of all the deputies (120 out of 200), while the Senate passes them by the majority of three fifths of senators in attendance (out of 81). The President cannot veto a constitutional act (Article 50 of the Constitution). With the exception of Article 9 of the Constitution (see below), these are all the special procedural rules for constitutional acts. The constitutional rules of the ordinary legislative procedure have to be applied to the adoption of constitutional acts where appropriate. The following interpretation is adhered to in practice.

Proposals for constitutional acts may be introduced to the Chamber of Deputies by the Government, the Senate, a single deputy or a group of deputies or by the representative bodies of regions, which is the same as with proposals for 'ordinary' acts (Article 41 of the Constitution). As in the ordinary legislative procedure, the proposals for constitutional acts are debated first in the Chamber of Deputies and then in the Senate. However, in the Senate, the 30-day limit to decide on bills does not apply. If the Senate rejects the bill, the procedure ends and the constitutional act is not adopted. If the Senate returns the bill to the Chamber of Deputies with amendments (adopted by qualified majority), the Chamber can either approve the wording of the bill from the Senate (by a qualified majority), or, again, the procedure terminates.[5]

There is one more layer of constitutional rigidity and that is Article 9(2) of the Constitution. This provision states that '[a]*ny changes in the essential requirements for a democratic state governed by the rule of law are impermissible*.' It follows Article 9(1), according to which the Constitution (and, by extension, indeed any other part of the constitutional order) may be supplemented or amended only by constitutional acts. This 'eternity clause' was employed by the Constitutional Court to declare a constitutional act unconstitutional, as we will see below.

Recently, the rules for the adoption of constitutional acts have been supplemented by Act No. 300/2017 Coll., on the Principles of Relations of the Chamber of Deputies and the Senate between themselves and externally (hereinafter referred to as 'Relations Act').[6] According to Section 2 of this Act, if the Senate returns the proposal for a constitutional act to the Chamber of Deputies with amendments, the Chamber may further modify the wording of the proposal (e.g. adopt some of the amendments from the Senate, add new amendments) and return the proposal to the Senate. Then the Senate can do the same. Unless one of the chambers rejects the proposal, it moves like a shuttle between the chambers until both agree on the same wording or until the four-year term of the Chamber of Deputies terminates. This is the '*navette*' method well known from the French legislative procedure. It creates a 'funnel', in which the chambers can reach a compromise on the constitutional change step by step. The aim of this provision, according to the explanatory memorandum, was to facilitate the adoption of constitutional acts that will have broad support in the Parliament.

It is important to note that the Relations Act is not a constitutional act and therefore has to be in accord with the constitutional order. The Relations Act rejects the previously prevailing interpretation of the constitution, according to which the rules for ordinary legislative procedure generally (where possible) also apply for the adoption of constitutional acts. It is based on the assumption that the absent specific rules in the constitution may be filled in by ordinary legislation. In effect, the Relations Act rules out the application of Article 47(4) of the

[5] For details, see e.g. Kindlová, 2018.

[6] Unfortunately, this act has not yet been translated to English. The Czech text is available e.g. at https://www.senat.cz/dokumenty/o_senatu/stykovy_zakon.php

Constitution, according to which no further amendments may be presented to a bill returned to the Chamber of Deputies from the Senate.

By allowing the chambers of the Parliament to swing the proposals for constitutional acts to and fro, the Relations Act decreases the formal rigidity of the constitutional order. The multiple rounds of discussions can span two or even three two-year terms of the Senate (every two years, one third of the senators are elected for six years) and amendments can be added to the proposal at any stage. An already existing proposal for a constitutional act can be used as a 'carrier' for any momentary idea on a constitutional change without having to go through the three readings at the beginning of the legislative procedure in the Chamber of Deputies. In Decision Pl. ÚS 77/06, the Czech Constitutional Court declared the formal unconstitutionality of 'legislative riders', i.e. amendments made in the parliament that have no connection to the subject matter of the bill. However, one can argue that the notion of a legislative rider would be overstretched if it were to include, for example, amendments to a part of the Constitution that had not been the subject of the original proposal. Introduction of new amendments late in the legislative procedure may also follow from the logic of the *navette*—reviewing another constitutional provision may facilitate the consensus in the chambers on the main intended change. This may prove to be problematic at the end of the term of the Chamber, before the election, when the political parties may be more prone to support various populist ideas.[7]

2.2. Material rigidity

The rigidity of the constitution cannot be considered without the political context, the material rigidity of the constitution. Is the constitution in fact amended frequently, or rarely? And how hard is it for the political parties forming the government to reach the majorities required for a constitutional change?

The first question relates to the culture of the constitution and the general willingness or wariness of the political representation to change the basic rules as momentarily desired. Since 1993, 155 proposals for constitutional acts have been submitted to the Chamber of Deputies. Only 29 have been approved by the Chamber and forwarded to the Senate. The vast majority of the rejected proposals were initiatives of individual deputies or groups of deputies (109). Many of them did not have a serious chance of success. Out of the 29 proposals debated in the Senate, nine were rejected and two were amended and subsequently not approved by the Chamber of Deputies. The remaining 18 proposals became constitutional acts. However, only a minority of them affected the constitutional system significantly.

Four constitutional acts merely approved minor and wholly uncontroversial changes of state borders.

One constitutional act (No. 347/1997 Coll.) established regions as the higher territorial self-governing units and two more constitutional acts solely changed the names of two regions. The establishment of regions was not connected with any change in the status or powers of territorial self-government according to the constitution.

Five constitutional acts related to international integration. In connection with the accession to NATO, Constitutional Act No. 110/1998 Coll., on Security of the Czech Republic, together with one constitutional act amending the Constitution, introduced rules on matters of security and defence, which was largely missing from the original wording of the Constitution. Three constitutional acts were adopted in preparation for the accession to the European Union, including the constitutional act on the EU accession referendum and an amendment to the Constitution that introduced the authorisation to delegate public authority to the European Union and

[7] For example, shortly before the last election of the Chamber of Deputies in 2017, the Chamber forwarded to the Senate a proposal for a constitutional act introducing the right to bear arms to the constitutional order of the Czech Republic. It was intended as a reaction to a reform of the EU firearms regulation, which had tightened the rules, and it was not drafted very well from the legislative point of view. The bill has been defeated in the Senate, but the heated atmosphere at the time of elections created much pressure.

widened the gate for international law entering the Czech legal order. These constitutional acts were important, but their impact on the constitutional system did not go much beyond enabling the accession and thus the general effects of EU membership on the functioning of states (e.g. the strengthening of the executive vis-à-vis the parliament).

This leaves us with only six remaining constitutional acts. One of them was a minor change to Article 8(3) of the Charter of Fundamental Rights and Freedoms, extending the period for a detained person to be turned over to the court from 24 to 48 hours. Another limited the general immunity of members of the Parliament from prosecution for criminal offences under Article 27(4) of the Constitution, which originally extended beyond the duration of their term. The original wording was unusual from a comparative perspective and proved to be controversial. (If the chamber withheld the consent with the criminal prosecution of its member, the prosecution was excluded forever.) Last four constitutional acts will be discussed in more detail below. Three of them relate to the shortening of the term of the Chamber of Deputies and the case when the Czech Constitutional Court annulled a constitutional act. The fourth one is the constitutional act that introduced the direct election of the President of the Republic (see below), which was undoubtedly the most important constitutional change since 1993.

We can conclude that once the unfinished or overlooked parts of the constitution were completed (regions, security and defence, European integration), the constitution remained formally very stable, except for the direct election of the President. Most of the other constitutional acts only brought small, partial changes to the constitutional system, or were politically uncontroversial (border changes, names of regions). The constitution, therefore, largely fulfils its role of a set of rules for political decision-making and is not used as an instrument of political competition.

A major constitutional change is hard to achieve, if not motivated at least partially by external factors, such as international integration (on this factor of constitutional change see also Blokker 2013: 136 et seq.). The introduction of a general referendum has been probably the most frequent topic of rejected proposals motivated wholly by a domestic political debate. This can be explained by the material rigidity of the constitution, which is the result of the electoral system and the fragmentation of the political system.

According to Art. 18 of the Constitution, deputies shall be elected for four years according to the principle of proportional representation, while senators shall be elected for a six-year term of office based on the principle of majority rule. Every two years, one third of the senators shall be elected. The electoral law introduces a proportional voting system with a 5 % national threshold for the Chamber of Deputies and an absolute majority voting system in single-mandate districts for the Senate (should no candidate receive the majority of votes, two most successful candidates enter the second round of election). The elections to the Chamber of Deputies and to one third of the Senate have never been held at once. All this means that the political composition of the Senate is not a carbon copy of the Chamber of Deputies. There have been periods of time when the governmental parties also held the majority of seats in the Senate, but even then, the relative strength of those parties in the Senate often differed wildly from that in the Chamber of Deputies. More often, the opposition had the majority in the Senate. At times, a single opposition party held more than two fifths of the seats in the Senate, allowing it to block any proposal for a constitutional act. Table 1 shows that the current government only holds about a quarter of the seats in the Senate.

Table 1: Political composition of the Parliament (as of 1. 6. 2018)

Political party	Chamber of Deputies (200)	Senate (81)
ANO 2011	**78**	**7**
ODS (civic democrats)	24	18
Pirates	22	1
SPD	19	0
ČSSD (social democrats)	**15**	**13**

KSČM (communists)	**15**	**0**
KDU-ČSL (Christian democrats)	10	15
TOP09	7	19
STAN	6	
Non-affiliated/other	4	8

Note: Political parties forming or supporting the government are in bold.

Furthermore, the political system in the Czech Republic, not unlike in many other European countries, is growing increasingly unstable. This is documented by the rising number of political parties in the Chamber of Deputies in the 2010s and by the fact that in the last three elections, there were always two or three parties that newly entered the Chamber. With one exception, a coalition (or support) of at least three political parties was necessary in order to form the government. Indeed, no constitutional act has been adopted since 2013. It also needs to be said that the partisan discipline in the Senate is not nearly as strong as in the Chamber of Deputies because of the direct personal mandate of senators as opposed to party lists in the elections to the Chamber of Deputies.

Table 2: Number of political parties in the Chamber of Deputies

Year of elections	1996	1998	2002	2006	2010	2013	2017
Political parties in the Chamber	6	5	4(5)	5	5	7	9
New parties	0	0	0	1	2	3	3
Parties in the government	3+1	1+1	2(3)	3	3	3	2+1

Note: 'A+B' denotes a minority government of A parties supported by B opposition parties. In 2002, one of the subjects elected in the Chamber was a loose coalition of two parties.

In the 1990s and 2000s, the two biggest parties (ODS Civic Democratic Party and ČSSD Social Democratic Party) combined had more than the 120 deputies necessary for a constitutional change, but they never formed a grand coalition, except for the 1998–2002 term, when ODS 'tolerated' a minority government of ČSSD.[8] This was also the only time when the government and its supporting parties had the majority of 120 deputies necessary to pass a constitutional amendment.

The electoral systems and the political landscape of the Czech Republic contribute greatly to the material rigidity of the constitution. This is an important difference from countries where the political and electoral system allows for a small coalition or even a single party to achieve the majority required for constitutional amendments (Hungary), or countries with a bicameral parliament, where both chambers are elected at the same time with an electoral system that produces similar political composition in both of them (Poland).

3. Major moments of constitutional development

In the last part, we will take a closer look at two major constitutional moments in the Czech Republic under the 1993 Constitution. In both cases, the adoption of a constitutional act caused a political crisis or possibly contributed to it.

[8] Interestingly, this cooperation resulted in a reform of the electoral act that changed multiple parameters of the proportional voting system for the Chamber of Deputies with the aim to over-represent the bigger parties and underrepresent the smaller ones in order to facilitate the formation of stable governments. This was, however, resisted and annulled by the Constitutional Court basically with the argument that it would have distorted the "proportional representation" prescribed for the Chamber of Deputies by Article 18(1) of the Constitution in a way that would have produced electoral results approaching the outcome of a majority voting system. See Decision of the Constitutional Court Pl. ÚS 42/00. Never again was there a major reform of the electoral act.

3.1. Unconstitutional constitutional act – on the verge of constitutional crisis?

The problem with the dissolution of the Chamber of Deputies first materialised in November 1997, when two minor coalition parties left the government because of a financing scandal of the leading governmental party ODS. The government resigned, but no new coalition was formed. The political parties agreed on calling an early election and appointing an interim government labelled as 'caretaker' or 'bureaucratic'.[9] The question was how to get to the election because conditions for the dissolution of the Chamber have not been met. Instead of openly simulating one of the cases in Article 35 of the Constitution, the political parties agreed to adopt a constitutional act that would shorten the term of the Chamber of Deputies and allow calling an early election (and also allow the Chamber to remain in session until the election date). This was carried out without any constitutional challenges.

In March 2009, the only case of a successful motion of no confidence in the government occurred, which was in the middle of the Czech presidency in the Council of the European Union. The government was forced to resign, but no new majority arose. Following the 1998 precedent, a caretaker government was appointed and a constitutional act on the shortening of the term of the Chamber was adopted. The election was scheduled to take place in October 2009. However, in September 2009, the Constitutional Court decided in case Pl. ÚS 27/09 that the Constitutional Act No. 195/2009 Coll., on Shortening the Fifth Term of the Chamber of Deputies was unconstitutional and annulled it. As a result, the scheduled election was cancelled by the court and the Chamber remained in session until the end of its four-year term in May 2010.

The decision of the Constitutional Court was based on a constitutional complaint of one deputy, who argued that his right not to be stripped of his mandate illegally had been violated because the constitutional order did not allow for the shortening of the term of the Chamber by a constitutional act. The Court agreed with this interpretation and launched proceedings on the review of constitutionality of the act. The main reasons for its annulment given by the Court were the individual and ad hoc character (a law should be general) and the retroactive nature of the act. The validity of both arguments is debatable because this was not a typical case of retroactivity or of an individual decision masked as a law. One may wonder whether these violations of rule of law principles warranted the stopping of parliamentary elections that were called well in advance without any signs of foul play in the electoral process. Needless to say, the results of the May 2010 election were much different from the polls ahead of the October 2009 election. By postponing the elections, the Constitutional Court intervened in the political life of the country in one of the most profound ways imaginable.

In retrospect, it is amazing how calmly the political scene deferred to the court's ruling. No major political actor attempted to fuel the fire by, for example, calling for ignoring the court's ruling, which could have resulted in a major political and constitutional crisis. As a reaction, the Parliament adopted a constitutional act that established a new way to dissolve the Chamber of Deputies, adding a new second paragraph to Article 35 of the Constitution. According to the new provision, the President of the Republic shall (has a duty to) dissolve the Chamber of Deputies if the Chamber of Deputies proposes its dissolution by a resolution approved by a three-fifths majority of all deputies. Fearing the cancellation of another election, they refrained from applying this new provision to dissolve the current Chamber of Deputies because it could have been considered retroactive from the point of view of the Constitutional Court's reasoning in the decision.

The ruling of the court was mostly criticised in the Czech legal academia (in English Kudrna 2010), but, more importantly, foreign observers expressed their reservations too (Williams 2011 calling the decision 'fast-food

[9] The interim government is not a special type of government under the Czech constitution. It has the same status and powers as any other government and it too must ask for a vote of confidence from the Chamber of Deputies within 30 days of the appointment. The caretaker government does not usually consist of leading figures of major political parties, although there usually are some partisan ministers. It has a very limited short-term political programme. Such caretaker governments were common in the first Czechoslovak republic (1918–1938), which probably influenced the solution chosen in 1998.

judging', or Roznai 2014, who also provided a comprehensive list of available comments on the case). While most commentators agree that under certain circumstances, the Constitutional Court may review the formal (procedural) constitutionality of constitutional acts and their material compliance with Article 9(2) of the Constitution, many are not convinced that this particular case justified the annulment of the constitutional act.

The dysfunctional regulation of the dissolution of the Chamber of Deputies was only slightly improved by the abovementioned amendment to Article 35. Fast dissolution upon the request of three fifths of the deputies may still be met with the opposition from a blocking minority and does not in any way strengthen the role of the government or the President of the Republic in the process vis-à-vis a potentially paralysed Chamber.

3.2. Direct Election of the President—upsetting the balance of the constitutional system?

Before 2013, the presidential election was indirect, by both chambers of Parliament at a joint session. However, the last indirect election in 2008 was allegedly accompanied by strong political pressures and even bribery and blackmail (although there was no criminal investigation),[10] which caused a collective trauma to the 281 members of the Parliament. This memory, together with opinion polls according to which the majority of citizens desired to elect the president directly, was the main motive for the change.

The aim of the constitutional amendment adopted in 2012 was simply to change the method of election and leave the powers of the president intact.[11] The amendment was not intended to be a move towards a semi-presidential system. This was repeatedly stated in the parliamentary discussion (Wintr, Antoš and Kysela, 2016).

The opponents of the proposal argued that a directly elected president would benefit from a higher degree of democratic legitimacy and this could influence his own interpretation of the presidential powers. However, a directly elected president who came up with a political programme for his candidacy would have no suitable powers for implementing this programme. According to the constitution, the President performs representative functions, appoints the government, judges, can veto legislation, but has no policy-shaping or law-making powers. The President may act as a neutral mediator in the constitutional system, but if he wanted to enter day-to-day politics, he can only do so mostly by means of vetoes and obstruction. As a result, the direct election of the president would further weaken the government.[12]

To add another dimension to the problem, it has been a tradition in the parliamentary republics of Czechoslovakia and the Czech Republic to attribute more than representative significance to the office of the President of the Republic. The public always rested great expectations on the president, from the founders Masaryk and Beneš to Havel. The president is expected to stand above and sometimes against the squabbling parties and to be a moral authority. The informal influence of the president on the constitutional system has been stronger than what one would expect when reading the catalogue of his powers in Articles 62 and 63 of the Constitution and the various conditions for exercise of those powers (countersignature from the prime minister, consent of the Senate, various strict material conditions such as in case of Article 35).

[10] For details, see Just, 2008.

[11] There were some other minor changes to the constitutional act, most notably the right for the Senate to file a constitutional charge against the President of the Republic for high treason before the Constitutional Court was changed so that the President might now also be charged for gross violation of the constitutional order, but only if the charge was approved by three fifths of the senators and three fifths of the deputies. This meant that while the responsibility of the President was broadened materially, it was also narrowed procedurally. In 2013, still according to the old rules, the Senate filed this constitutional charge against president Klaus for various minor points of alleged misconduct that clearly did not fit the notion of high treason. The Constitutional Court discontinued the proceedings once the President's term ended. See the decision of the Constitutional Court Pl. ÚS 17/13.

[12] For a detailed analysis on the position of the President in the constitutional system and the impact of direct election see Kudrna, 2011 and Wintr, Antoš and Kysela, 2016.

The first direct election was held in January 2013. Former social-democrat prime minister Zeman, also an unsuccessful candidate in one of the indirect elections, was elected in the second round of the absolute majority vote. At the time of the election, he was backed by a non-parliamentary Citizens' Rights Party, also called *Zemanites*. He also managed to collect various protest votes. In June 2013, following a scandal of the prime minister,[13] the government resigned, threatened by an impending motion of no confidence. From there, the situation escalated quickly. As the Chamber of Deputies discussed the possibilities of forming a new government, the president proceeded to appoint a new prime minister and a caretaker government without having reached an agreement with the Chamber (unlike the two previous caretaker governments). The government consisted of people close to the president and his party and did not gain the confidence of the Chamber of Deputies. Following this, the president should have appointed a new government according to Article 68 of the Constitution, but the Chamber of Deputies decided not to prolong the agony and voted for its own dissolution according to the provision introduced in 2009. The elections were held in October 2013. A lengthy process of government formation followed. The president certainly did not rush to replace his government with a new one coming with a popular mandate. The new government was appointed in late January 2014.

This entire time, the government that was backed only by the president remained in office. It was indeed limited in its actions because it could not pursue its programme by legislation,[14] but it could and did make many important personal and economic decisions with potentially irreversible consequences. The self-dissolution of the Chamber of Deputies left the government effectively unchecked for more than half a year. The president thus managed to force his own government against the will of the disintegrating Chamber of Deputies. To the president's defence, his argument for appointing a new government at all cost was the necessity to replace the criminally prosecuted prime minister and re-establish public trust in the government and an independent investigation by the police. In the subsequent breakdown of the Chamber of Deputies, it made no sense to appoint a new government that could not have even appeared before the Chamber to ask for a vote of confidence and would be obliged to resign following the election of the Chamber.

The chain of events following the governmental crisis of 2013 demonstrated the potential of a powerful president with a popular mandate vis-à-vis a fragmented Chamber of Deputies, but it also showed that the constitution eventually led the institutions back to 'normal', albeit slowly.

Conclusion

The Czech constitution is rather stable, despite the circumstances of its adoption. The method chosen for ensuring its rigidity has been successful in the sense that constitutional changes require broad support from both the government and the opposition. Czech bicameralism, considered together with the electoral system, may even serve as a successful model of constitutional rigidity. As a result, the vast majority of constitutional acts adopted under the 1993 Constitution impacted the constitutional system only to a very limited extent.

There are occasional conflicts over the interpretation of the constitution and of course many other problems that could not have been mentioned here. The weakest point, i.e. the lack of governmental control over the dissolution of the Chamber of Deputies, amplified two major political crises because it delayed the election and formation of a strong majority government. However, in both cases, the constitution guided the political actors (acting responsibly) out from the danger of constitutional crisis and back to normal.

[13] The Prime Minister's close aide and lover was charged with corruption (receiving expensive gifts from known lobbyists) and with instructing the Intelligence Service to monitor the Prime Minister's wife without any legal authority.

[14] When the Chamber of Deputies is dissolved, the government does not gain any extraordinary legislative powers. It may only propose the adoption of urgent measures to the Senate according to Article 33 of the Constitution. These legislative measures cease to be valid if the newly elected Chamber of Deputies does not approve them at its first session.

Direct election of the President of the Republic potentially weakens the government and, should the fragmentation of the political system continue, an electoral reform may be necessary to regain stability in the Chamber of Deputies. However, the constitution itself has not been the *cause* of serious crises. Its functioning can therefore be evaluated with moderate optimism, giving hope that it will continue to fulfil its role.

References

Blokker, P. (2013). *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. London: Routledge.
Brunclík, M. (2013). Problem of early elections and dissolution power in the Czech Republic. *Communist & Post-Communist Studies, 46 (2), 217-226.*
Constitutional Act No.1/1993 Coll., on the Constitution of the Czech Republic. English translation at http://www.psp.cz/en/docs/laws/constitution.html
Constitutional Act No.110/1998 Coll., on Security of the Czech Republic. English translation at http://www.psp.cz/en/docs/laws/1998/110.html
Czech Constitutional Court Decision from 24.1.2000, Pl. ÚS 42/00. English translation at: https://www.usoud.cz/en/decisions/20010124-pl-us-4200-elections-act/
Czech Constitutional Court Decision from 15.2.2007, Pl. ÚS 77/06. English translation at: https://www.usoud.cz/en/decisions/20070215-pl-us-7706-legislative-riders/
Czech Constitutional Court Decision from 10.9.2009, Pl. ÚS 27/09. English translation at: https://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de/
Czech Constitutional Court Decision from 27.3.2013, Pl. ÚS 17/13. English translation at: https://www.usoud.cz/en/decisions/20130327-pl-us-1713-high-treason/
Elster, J. (1995). Transition, constitution-making and separation in Czechoslovakia. *European Journal of Sociology, 36 (1):* 105-134.
Just, P. (2008). 2008 Czech Presidential Elections: A Commentary. *Central European Journal of International and Security Studies, 2 (1): 127-132.*
Kindlová, M. (2018). Formal and informal constitutional amendment in the Czech Republic. *The Lawyer Quarterly*, 4, 512 et seq.
Kudrna, J. (2009). Dissolution of the Chamber of Deputies in the Czech Republic – the origin and essence of applicable constitutional legislation. *Jurisprudence, 3: 69-110.* Available at: https://www3.mruni.eu/ojs/jurisprudence/article/view/1544/1483
Kudrna, J. (2010). Cancellation of early elections by the Constitutional Court of the Czech Republic: Beginning of a new concept of 'protection of constitutionality'. *Jurisprudence*, 4: 43-70. Available at: https://www3.mruni.eu/ojs/jurisprudence/article/view/1026
Kudrna, J. (2011). The Question of Conducting Direct Elections of the President in the Czech Republic (A Live Issue for Already 20 Years). *Jurisprudence*, 4: 1295-1321. Available at: https://www3.mruni.eu/ojs/jurisprudence/article/view/1682/1592
Mathernova, K. (1992). Czecho? Slovakia: Constitutional Disappointments. *American University International Law Review*, 7(3):471-501.
Pavlíček, V. and Kindlová, M. (2014). Czech Republic. In: Besselink, L., Bovend'Eert, P., Broeksteeg, H., de Lange, R. and Voermans, W. (eds.). *Constitutional law of the 28 EU Member States.* Deventer: Wolters Kluwer.
Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic. English translation at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf
Roznai, Y. (2014). Legisprudence Limitations on Constitutional Amendments: Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act, 8 Vienna J. on Int'l Const. L. 29.
Tuma, G. and Wenzel, N. G. (2013). „People, your government has returned to you!' The Czech Constitution of 1992 as return to constitutional tradition. *New Perspectives on Political Economy*, 9(1/2): 38-52.
Williams, K. (2011). When a Constitutional Amendment Violates the 'Substantive Core': The Czech Constitutional Court's September 2009 Early Elections Decision. *Review of Central and East European Law*, 36:33-51.
Wintr, J., Antoš, M. and Kysela, J. (2016). Direct election of the president and its constitutional and political consequences. *Acta Politologica*, 8(2):145-163.