Post-Electoral Changes in Czechia with a Hospitalised Head of State

Zuzana Vikarská

11.10.2021 doi: 10.17176/20211011-181944-0

The Czech Republic held parliamentary elections this past weekend, on 8 and 9 October 2021. The party of the incumbent Prime Minister Andrej Babiš (ANO) was defeated, albeit by a small margin, by a coalition of three established democratic parties, and "change" has become the main narrative of all post-election discussions. Andrej Babiš is on his way out and for the first time in its history, the Czech Republic will most likely be led by a government composed of no less than five political entities. Constitutionally (and traditionally), the President of the Republic is an important player in the post-electoral days, because it is established constitutional practice that he moderates the post-electoral negotiations between the parties, convenes the first meeting of the newly established Chamber of Deputies, and appoints the new Prime Minister and the government. However, President Miloš Zeman was taken to hospital yesterday, on the day after the general elections, and remains hospitalised at an intensive care unit. Could the President's illness at this very crucial moment cause a constitutional stalemate or does the constitution foresee a solution?

Election results: a surprise in many regards

For an outsider, the recent elections may have been perplexing and difficult to understand. Four entities made their way into the Chamber of Deputies: the winning centre-right coalition SPOLU (27.79%, 71 mandates), Andrej Babiš's ANO (27.12 %, 72 mandates), liberal coalition PirátiSTAN (15.62 %, 37 mandates) and nationalist SPD (9.56 %, 20 mandates). Next to the defeat of ANO, the biggest surprise of these elections was the failure of the two well-established parties which remained under the electoral threshold of 5 %: the Social Democrats (4.65 %) and the Communist Party (3.6 %), which will be absent in the Parliament for the first time in the modern Czech history. These elections were the first ones to be held pursuant to the newly amended Electoral Act, after the Constitutional Court ruled in February 2021 that the previous method of dividing the mandates breached the constitutional principle of proportional representation. Interestingly, in these elections, the new electoral system produced slightly less proportionate results than would have come out from the previous system, due to the use of the Imperiali quota in 14 electoral districts. The runner-up ANO gained one more mandate than the winning party because ANO received stronger support in the districts where a mandate was 'cheaper' after the application of the Imperiali quota.

Given that the Czech Republic is a parliamentary republic, the rule is that a newly appointed government must succeed in a parliamentary vote of confidence, i.e. secure the support of a simple majority in the Chamber of Deputies. The two coalitions, SPOLU and PirátiSTAN, having gained 108 out of 200 mandates, seem to be in a steadfast agreement that they intend to form a government together and that they will not even negotiate with any other entity. Given that this agreement has already been put on paper and signed by the leaders of all political parties united in these two coalitions, ANO's hopes for four more years in the executive are melting away. However, a coalition of two coalitions effectively means a government of five different political entities. Hours after the elections, the five players act in unison; but politics is politics and only time will tell whether a five-headed government can handle the country in tough times.

Is there any alternative to a government of the two coalitions, supported by 108 votes in the Chamber

of Deputies? Two options come to mind. First, ANO could attempt to break up the existing coalitions and find some allies: if not to support it directly, at least to walk out of the room for the vote of confidence, in order to lower the threshold of the simple majority. That solution seems unlikely, at least for the time being. Second, Andrej Babiš could try to form a minority government which would not gain confidence of the Chamber of Deputies, and nevertheless govern for months, without parliamentary support. This may sound silly but – unfortunately – that is exactly how Babiš governed from 13 December 2017 to 27 June 2018: with 78 mandates gained in the 2017 elections, with the mandate entrusted to the government by the President of the Republic, yet without the confidence of the Chamber of Deputies. In spite of being illegitimate and contrary to the requirements of the constitution, such government still led the country for more than half a year.

How is that possible? The President. He holds the keys to the government's composition, at least initially. He appoints the Prime Minister, states the constitution without any further instructions. In line with the well-established constitutional convention, the President should appoint the leader of the winning political party, given that he or she is most likely to gain support in the Chamber of Deputies. But if the President entrusted the function of a Prime Minister to his daughter or to a random passer-by, the constitution would not prevent him from doing so; the parliamentary vote of confidence should serve as a safeguard. Article 68(4) of the constitution provides that if the newly appointed government does not receive a vote of confidence, the process starts from the beginning. The President gets one more chance to appoint a Prime Minister (the same one or a different one) and the government again requests a vote of confidence in the Chamber of Deputies. If the second attempt does not succeed either, the Prime Minister is proposed by the Speaker of the Chamber of Deputies.

The trouble is, the Constitution does not set time limits for most of the relevant steps. After the elections, the outgoing government must resign and is entrusted to perform its duties temporarily, until a new government is appointed. But there is no time limit for the President to appoint the new Prime Minister and his or her ministers. Only once the government gets appointed by the President, the clock starts ticking: the government must come forward to the Chamber of Deputies within 30 days and request a vote of confidence. But if the government fails to secure parliamentary confidence, the next step is again not subject to any time limit. Such government must resign, but it will perform its duties 'temporarily' until the President appoints a new Prime Minister and a new government. As mentioned above, this can last for months.

To sum up, after the recent elections, two coalitions are ready to cooperate and form a five-headed government. Numerically, this should work. Politically, this will be difficult. Realistically, the winners of the elections can do nothing without the President's blessing. But is the President ready to act?

An absent President

Only a couple hours after the elections, the 77-year-old President of the Republic, who has been suffering from several long-term diseases, was hospitalized at an intensive care unit. The media and the public are longing for more details about his health situation, but are receiving none. Rumours and suspicions about the President's state of health had been discussed for months already but the events of 10 October triggered some serious talks about the President's inability to exercise his powers. Like many other constitutions around the world, the Czech constitution also contains a clause addressing a situation when the President is incapable of performing his duties, due to severe illness or other serious reasons. Pursuant to Article 66 of the constitution, in such a case the two chambers of the Parliament may adopt a resolution, following which the performance of the presidential duties is divided primarily between the Prime Minister and the Speaker of the Chamber of Deputies. Of these two, it would be the Speaker of the Chamber who would be entrusted with the most crucial duties relating to the resignation of the outgoing government and the appointment of the new Prime Minister and the

government. The Prime Minister, on the other hand, would cover the duties which are normally countersigned, such as ratification of international treaties, appointment of judges, or amnesties and individual pardons. (The speculation whether the criminally prosecuted outgoing PM Andrej Babiš will be tempted to explore the possibility of a self-amnesty, would deserve a separate blogpost.)

Does the President's hospitalisation provide a reason to have recourse to Article 66? And does the public have 'a right to know' the diagnosis of the President, so carefully concealed by his co-workers? Neither politicians, nor constitutional lawyers agree on these very sensitive matters. Let us therefore ask another question: can the absence of the President in the coming days, weeks, or even months, paralyse the post-election procedures foreseen by the constitution?

The answer is simple: we can afford a grace period of about 30 days, but shortly thereafter, we will need either Mr President or someone who could take over his duties. For now, the post-election procedures have been set in motion and although a President could offer his help with moderating the political situation, his presence is not indispensable. The 'old' Chamber of Deputies held its last meeting last week, the citizens have decided about the composition of the 'new' Chamber of Deputies, and the political parties are now negotiating in order to form a new government. Article 34 of the constitution foresees that the President shall convene the first session of the Chamber of Deputies so that it meets no later than 30 days after the elections. Yet, in case the President does not do so, the Chamber of Deputies shall convene on the thirtieth day after the elections anyway, says the constitution. Thus, the inaugural session of the new Chamber of Deputies does not depend on the President's actions.

Yet, everything else does. The constitution states clearly that the outgoing government must submit its resignation to the President after the constituent meeting of a newly elected Chamber of Deputies. That means that the country will need its President on Monday 8 November, at the latest, not only to accept the resignation of the outgoing government, but primarily to appoint the new Prime Minister and his or her government, before the government can appear before the Chamber of Deputies and request a vote of confidence.

A delay of a couple of days can be accepted in extraordinary circumstances but it should not last too long before the democratically elected Chamber gets a chance to support a new government. Given the results of the elections, there are at least 108 members of the new Chamber who have an interest in a smooth handover from the outgoing government to a new one. In this situation, if the President is still unable to perform his duties on 8 November, the legal solution is rather simple, but the political reality is much more complicated. Legally, at the inaugural meeting, the Chamber will first elect its officials, including the Speaker of the Chamber. Then, having a comfortable majority, the Chamber could attempt to activate Article 66 of the constitution. If both chambers of the Parliament agreed that the President is incapable of fulfilling his tasks, primarily of appointing the new Prime Minister and the new government, these powers would be exercised by the (newly elected) Speaker of the Chamber. (The President could challenge the activation of Article 66 before the Constitutional Court; but interestingly, even if the President succeeded and if the decision about his incapacity were recalled by the Constitutional Court, the steps taken by the Speaker of the Chamber and by the Prime Minister in the meantime would remain in force.)

Despite the legal clarity of this procedure, the political reality seems to be much more complicated. The first reactions of the politicians across all relevant political parties have been extremely hesitant and self-restrained. To be honest, nobody is eager to initiate the President's removal from office, probably for both ethical and political reasons. Ethically, the President's health and life may be at stake and everyone seems to be very respectful of this delicate situation. Politically, no one wants to start a new political era by triggering this unprecedented and controversial procedure against the head of state. It remains to be seen how the circumstances unravel in the days to come – but we are certainly witnessing matters that will find their way into constitutional law textbooks.

ABOUT THE AUTHOR

Zuzana Vikarská

Zuzana Vikarská is an assistant professor of constitutional law and human rights at Masaryk University in Brno and a tutor in EU law at Palacký University in Olomouc. She is currently completing a project on preliminary rulings from Czech and Slovak courts, and launching a new EU-funded project on strategic litigation in Central and Eastern Europe.



SUGGESTED CITATION

Vikarská, Zuzana: Post-Electoral Changes in Czechia with a Hospitalised Head of State, Verfassungsblog, 11.10.2021, doi: 10.17176/20211011-181944-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20211011-181944-0.