POSITION OF THE HEAD OF STATE IN THE PROCESS OF EXERCISING THE POWER OF APPOINTMENT

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1. INTRODUCTION

The head of state, as one of the basic constitutional institutes, is an institutional and symbolic expression of the sovereignty and unity of the state, and also a part of what is called the power triangle. Although the head of state is not explicitly (except for the presidential form of government) the immediate bearer of one of the classic powers in the state, he occupies an important position in the system of the separation of powers. He is also the institute through which changes are made in the distribution and balance of the power in the state, due to diverse constitutional arrangements.

In the course of the history, constitutional models have been formed either with a strong or weak head of state. The starting point to evaluate the position of the head of state in a given constitutional system are the powers (authorities) and responsibilities conferred and defined by the constitution, under which the specific position of power of the head of state is established. The head of state can co-create the dynamic and flexible constitutional system, when he is allowed to exercise few, but extremely important powers, such as:

– the right to dissolve the chamber of deputies,
– the right to veto which can be overcome by the qualified majority vote,
– the power to appoint high non-political officials (especially judges, ambassadors, military officers),
– the right to appoint (and change) the prime minister together with the parliament.

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For the sake of flexibility, the system calls for greater independence of the head of state in the process of exercising of his powers conferred by the constitution. On the other hand, the need for stability forces the constitutional officials to seek consensus, which can be achieved mainly through the position of the head of state, as a functional arbitrator, who is able to respond effectively to changing societal needs.

A greater degree of independence, however, does not mean a greater degree of non-responsibility. The development of modern constitutional systems proves that the broadly conceived non-responsibility of the head of state is a monarchical anachronism, which in a democratic form of government loses its justification. The application of wider responsibility towards the head of state is not only the demand of the modern state of the rule of law, but it is also the requirement for the efficient functioning of the mechanism of state power and the balancing of power relations within the constitutional system.

Powers conferred on the head of state by the constitution are classified mainly according to the degree of autonomy of the expression of will, and in this respect, divided into separate or autonomous powers and bound or shared powers, for which the intended legal effects can only be achieved by legal acts of the head of state in collaboration with other public bodies.[1]

The scope of shared competences is significant if the constitutional framers constitute a weak head of state which is typical of the traditional parliamentary form of government. In the forms of government characterised by the powerful position of the head of state, by contrast, many powers shared in the classical parliamentary system are set as autonomous.

The decision-making process of the head of state is unambiguous only if the constitution expressly confers competences or requires responsibilities. In other cases, it is necessary to shape the constitutional status of the president by amending the relevant provisions of the constitution or by interpretation of the constitutional (or even sub-constitutional) norms. In systems with long-standing traditions, where the living constitution is an essential part of the constitutional system, the decision-making process is also regulated by unwritten rules.

The powers of appointment belonging to the head of state denote his powers and responsibilities in the process of forming of the public authorities. When exercised, the degree of his autonomy can be different in the relation to the holders of individual branches of power. The degree of his autonomy is logically restricted in the exercise of those powers that are linked to the expression of will of other state authorities. However, the texts of different constitutions are sometimes problematic and not always clear as to the degree of consideration, the degree of autonomous discretion, the limits of this discretion and even the exact obligation to appoint. Constitutions generally use expressions like "make appointments", "has authority to appoint", "ernennt", "nomination", "designado", "mianuje". This problem is characteristic of the Slovak constitutional system as well, even if there are views that the terms "appoint" or "make appointment" indicate clear imperative, because,

[1] See, for example, L. Orosz, K. Šimuničová, *Prezident v ústavnom systéme Slovenskej republiky*, p. 23 et seq.

if the constitutional framers had intended to give the head of state discretion, they would have used the phrase "President can appoint upon the recommendation".[2]

Specific decisions, therefore, entail conflict situations between the highest state authorities, which are resolved (or should be resolved) by the interpretation of the state authority empowered by the constitution to provide the authoritative interpretation: constitutional courts, or supreme courts (depending on the form of constitutionality control). Based on the scope of interpretation, the interpretation of constitutional institutions can be declaratory, but also constitutive, even associated with the law-making process (e.g. if departing from the literal meaning of the text or bringing more new features into interpretation), which may lead to changes in the constitution or even form of government.[3] Such practice is typical of systems with rigid constitutions with a long-standing tradition (e.g. the United States). In the continental Europe such type of interpretation is usually unacceptable, and more attention is paid to the borders of interpretation. In the process of interpretation of the constitutional text, the boundaries are determined by the concrete text and language, but also by the need to maintain consistency, coherence, rationality and necessity to preserve the procedural rights of the parties. Further, international commitments and the jurisprudence of international tribunals are also taken into account, as well as the case law of the interpreting body.

However, there are situations in our legal culture when the boundaries of declaratory interpretation are crossed. The question is therefore: how far can the authorities go in the process of creative interpretation of the constitution? The answer is not easy, especially, in a period when one encounters increased degree of politicisation of law. Authorities interpreting the constitution are in their essence hybrid bodies, which are also linked with politics, just like the constitution. Secondly, the answer is not simple owing to the nature of the terms that the constitution contains. The constitution is the most abstract legal rule and its text is often open, allowing flexibility in response to the diversity of social reality and development. The text often remains open and vague, due to lack of political consensus in the process of creation of some constitutional institutions. Thirdly, the answer is not easy because individual cases usually have the character of hard ones and concern issues on which the constitution often remains silent.[4]

The interpretation of the constitution and constitutional acts should primarily be consistent, although, one cannot ignore the fact that the interpretation process itself is subject to evolution. Despite this, it is inappropriate for the interpreting body to give different answers to an analogous, comparable questions in a short time-span without providing any rational and convincing reasons why it has departed from its own case law (e.g. because of changes in social circumstances or because of the need to correct its own decision).

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[2] See, for instance, T. Herz, *Rozsah politického uváženia prezidenta*, Justičná revue, č. 8–9/2010, pp. 869–936.

[3] T. Ľalík, *Interpretácia ústavy a úloha ústavného súdu*, available at: http://www.academia.edu/18283296/Interpret%C3%A1cia_%C3%BAstavy_a_%C3%BAloha_%C3%BAstavn%C3%A9ho_s%C3%BAdu.

[4] *Ibid.*

In relation to the interpretation of the scope of discretion of the head of state in parliamentary systems and forms derived from them, it is widely accepted that discretion may be wider if the head of state acts within the scope of executive power.[5] If he is seen mainly as a part of the executive branch, he has a superior position over some of the appointed state bodies (e.g. as the Commander-in-Chief of the Armed Forces).

A narrower scope of discretion is expected in cases, where the head of state exercises his powers to appoint with regard to the proposal of the constitutional authority which falls outside the sphere of the executive branch and is not directly or indirectly subordinate to it (e.g. when the judges are appointed upon recommendation of judicial councils). The narrowest range of discretion is expected if the head of state decides on the proposal of the parliament which has a dominant position in the system of constitutional bodies, in the parliamentary form of government also due to respect for the principle of the sovereignty of parliament.[6]

2. APPOINTING AUTHORITY IN THE SPHERE OF EXECUTIVE POWER

At present, the head of state is usually subsumed under the executive power, his position in this field, however, considerably varies in different systems. In classical parliamentary forms of government, one can see the tendency to extricate the head of state from the field of the executive power and to strengthen his arbitration function as the fourth force instead, which becomes very important in the process of resolving conflicts between the parliament and the nowadays increasingly strengthened government. In systems where the head of state performs only representative functions (notably most monarchies), he is not entrusted with the powers of the executive (usually, limited to the right to be informed or consulted) or his powers are reduced to formal confirmation of the will of another authority. In this case, the possibility to interfere with the executive ultimately depends only on the degree of personal influence of the head of state. In semi-presidential systems (including new hybrid models), the head of state is dominant; in presidential systems, the head of state is the sole representative of the executive.

Powers that can significantly affect mutual relationships between the head of state and the government are bestowed upon the head of state, in particular, the power to appoint and dismiss members of the government, as well as the power to introduce mandatory regulations and the decision-making powers. Powers on the government's side are especially those which require countersignature for the issued acts and sometimes the powers to initiate (and possibly create) acts issued by the head of state.

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[5] For instance, in the Slovak constitutional system, the President according to the case law of the Constitutional Court no. I. ÚS 39/93 has "in fact a dominant position" within the executive power.

[6] A dissenting opinion of the judges Ján Luby and Ladislav Orosz in the decision no. PL. ÚS 4/2012, available at: www.ustavnysud.sk/vyhladavanie-rozhodnuti#!DecisionsSearchResultView.

With regard to the relation between the government and the head of state, in systems based on the parliamentary form of government, the process of forming the government and the degree of participation of the head of state in this process is especially important. The exclusion of the head of state from this process is exceptional (e.g. in Sweden and Israel) and rather atypical of current democracy.

Several factors influence the scope of free will of the head of state in this process, such as real balance of power in society in the light of the results of parliamentary elections (usually, the head of state only formalises by his act the will of the strongest parliamentary fraction), the method of formation of the government and the designation of the prime minister, constitutional traditions, etc.

The position of power and the authority of the head of state are predicated mainly on the possibility to influence the composition of the government. It is generally accepted that the authority of the prime minister to organise the work of the government includes the power to determine its composition. The question whether the head of state must necessarily accept the proposals for the members of the government, or whether any of them may be rejected (e.g. for political reasons), is often a major dilemma in modern constitutional structures.

The appointing powers of the head of state with the possibility to reject a proposed candidate for the post of a member of the government under certain conditions may in this case be an important power control mechanism (i.e. the democratic checks). In the Slovak constitutional system, the choice of the president to decide autonomously whether to accept the proposal for the post of minister was, in the past, a matter of dispute between President Michal Kováč and Prime Minister Vladimír Mečiar (the appointment of Ivan Lexa as minister). Although, in this case the Constitutional Court in its decision no. I ÚS 39/93 confirmed the competence of the president not to appoint a candidate, following the constitutional change based on the Constitutional Act no. 9/1999 Coll., one fraction of the professional community opted for the obligation of the president to appoint the recommended candidates. By reason of setting up the democratic checks in relation to the appointing authorities, it may be useful to provide the head of state with the authority to reject the appointment of candidates proposed by the prime minister for two major reasons: in cases of unlawful procedure in proposing candidates and in the event any reasonable doubt arises about the personal guarantees of the proposed candidate to show respect for the Constitution.[7]

3. APPOINTING AUTHORITY IN THE SPHERE OF THE JUDICIARY

Comparing the position of the head of state in the system of separation of powers and his relation to the legislative and the executive, one can certainly notice that the mutual relations to the judiciary, including mutual checks and balances, are considerably limited. It is associated with the principle of independence of the judiciary and the need to remove any political influence on the sphere of justice. Since the

[7] P. Holländer, *Základy všeobecné státovědy*, Plzeň, 2012, p. 388.

head of state is often a representative and nominee of a particular political party, and its non-partisan approach after the elections remains just an illusion in many states, the ongoing process of complete detachment of the judiciary from the head of state is an understandable and desirable phenomenon.

The study of relations between the head of state and the judiciary is also special, because this relationship cannot be classified according to the forms of government or by existing models, as in the case of other powers. While in relation to other powers certain patterns that are typical of different forms of government have gradually developed there, in relation to the judiciary, different solutions are manifested that are not always classifiable according to a form of government (except for the dominant position of the president in the presidential form of government represented by the United States).

The selection and appointment of judges can be accomplished in several ways: upon recommendation of the executive body, either by the government, the ministry or head of state, or by elections, by co-opting of councils composed of judges and non-judges. In some countries such methods may be combined, or alternatively, may be applied to various posts of different types of courts.

In presidential forms of government, represented by the constitutional system of the United States, the nomination of judges by the president is implemented at the federal level. The president nominates all candidates for federal judges. Of course, the greatest interest and attention is paid to the nomination of judges of the U.S. Supreme Court. The opportunity to nominate a judge of the Supreme Court is often used as an opportunity for important political gestures. For example, President Ronald Reagan hoped that the first woman nominated for the position of a judge of the Supreme Court would impress the women's movement.

The final step in the judicial appointment process of federal judges is taken by a majority vote by the Senate. Historically, a practice in the U.S. Senate has developed, known as senatorial courtesy, according to which the Senate confirms only those presidential appointees approved by both senators of the state of appointee or by the senior senator of the president's party. However, while such "polite" behaviour is common in approving judges of district courts, senators did not give up the possibility to refuse the president's nominee for the position of the judge of the Supreme Court. The chance of success of the president in this regard is about 79%, but the majority of refusals dates back to the nineteenth century.[8]

At present, an important question arises in the United States as to who will replace the deceased Supreme Court Judge Antonin Scalia, one of the most influential conservative lawyers of the recent period. Even more interesting is the fact that after Scalia's death, the distribution of power between the conservative and liberal judges in the Supreme Court is broadly balanced. President Barack Obama did not have many possibilities to enforce his candidate, as it was not allowed by the Republican majority in the Senate, regardless of the fact that in comparison with the parliamentary and semi-presidential systems, the U.S. President has definitely

[8] *Outline of the U.S. Legal System*, Bureau of International Information Programs, United States Department of State, 2004, pp. 142–151.

a stronger position, and he is generally considered the most powerful politician of the planet.

Similarly, in semi-presidential and hybrid systems, the head of state has a strong position, but this position is reflected more in relation to the government, in some cases also to the parliament, and less in relation to the judiciary. Generally speaking, the Western European countries proceed by weakening the interference of the head of state with the process of appointment of judges, even if it is not the rule; e.g. the French President as a guarantor of judicial independence has multiple options how to interfere in the process.

In a classic parliamentary form of government, the role of the head of state in the process of appointing of judges can be manifold. He may either not participate in this process or only formally confirm the appointment of judges nominated by other bodies, mostly judicial councils or the executive, or the higher courts.

Unlike in the case with the judges of ordinary courts, the head of state is often granted the power to appoint judges of the constitutional court. The appointment of judges of the constitutional court can take many forms: most often, it is made in such way that individual state officials, including the head of state, have the power to appoint one fraction of the judges. The head of state can act autonomously or upon the request of other bodies. For instance, the Italian President appoints one-third of the judges of the Constitutional Court, his Austrian colleague appoints one section of the judges of the Federal Constitutional Court, although, on the recommendation of the Federal Government. Another option is to grant the head of state a certain degree of autonomy in the selection of judges from a submitted list of candidates.[9]

4. APPOINTING AUTHORITY IN RELATION TO PARLIAMENT PROPOSALS

The relations between the head of state and the legislative authorities are determined by the form of government, constitutional traditions and overall concept of the position of the head of state, either as a fourth (neutral) power (with important arbitration functions) or as part of the executive or as a subject with mostly representative powers.

As the formal head of state with representative powers, he has only several important powers to eliminate constitutional crises, which are, in addition, usually conditioned by the requirement of countersignature by the government. Moreover, in the classical form of the parliamentary government, his position shifts to a subject dependent on the parliament (and political parties) in the process of establishing and removing from office. In other cases, the relationship between the head of state

[9] In accordance with critical opinions regarding the method of appointing judges of the constitutional court by the president (e.g. in the Czech Republic), judges, who are argumentative representation, should be elected by a qualified majority in the parliament and include the opposition, based on the argument of "No argumentative representation without dissenting votes," see: R. Alexy, *Constitutional Rights and Constitutional Review*, lecture given at the Faculty of Law of Charles University in Prague, 15 October 2012.

and the parliament is more balanced owing to the tools provided to both public authorities.

The head of state, as a part of the executive, may act as a competing power against the legislative branch (in the presidential form of government), where the most effective brake is the veto. In the semi-presidential form of government, the head of state is the dominant power provided with more powers against the parliament by the constitutional system, such as the right to veto, but also the right of legislative initiative, strong dissolution right and emergency powers in crises.

The head of state viewed as the fourth (neutral) power is typical of the parliamentary form of government, which seeks to model the highest state authorities in a way that neither of them is in the dominant position to others and the power relations are organised in the form of a flexible quadrilateral. This requires a slight strengthening of the right to veto (raising the threshold required to break the veto over ordinary majority) and expansion of the opportunities for dissolution of the parliament with some necessary space for an independent assessment of the situation by the head of state.

The powers that significantly affect the mutual relations between the head of state and the parliament are, on the part of the head of state, the right to veto and the dissolving power against the parliament, and on the part of the parliament, the powers to elect and dismiss the head of state and to prosecute him in the event of liability for breach of standards, or alternatively, the power to approve some decisions of the head of state (typical especially of the presidential form of government). These powers have recently been extended to include also the powers of the head of state to initiate legislation and the power of the head of state to convene and adjourn meetings of the parliament, predominantly in emergency cases (especially in the Central and Eastern Europe).

It is not an easy task for the constitutional framers to equip both authorities with the above-mentioned powers in a way to make the operation of the constitutional system balanced, effective and able to eliminate crises. However, it generally turns out that the complex social processes ongoing from the second half of the last century to the present day lead to the creation of mixed constitutional systems that are modelled through the empowerment of the head of state. This is done through the strengthened right to initiate legislation, strengthened right to veto, expanded power to dissolve the parliament, by delegated legislation and legislative powers in emergencies.

In systems with the parliamentary form of government, the narrowest scope of discretion of the head of state is assumed when he decides to appoint state officials upon the proposal of the parliament.[10] Apart from judges, this mostly concerns the attorney general (if the prosecutor's office is created as the *sui generis* body and the attorney general is elected by the parliament), further, it affects the ombudsman, the heads of audit institutions (e.g. the Czech President appoints the President and

[10] According to the above-mentioned dissenting opinion of the judges Orosz and Luby to the decision no. PL. ÚS 4/2012.

Vice-President of the Supreme Audit Office upon the proposal of the Chamber of Deputies), etc.

Breaking the legitimately expressed will of the parliament by another constitutional body without an express constitutional framework can be taken into account only exceptionally. It must be done for such constitutionally acceptable reasons which cannot challenge the dominance of the parliament in the system of constitutional bodies, and which correspond to functions and obligations the constitution confers on the head of state in the exercise of his nominating powers.

In Slovak conditions, the Constitutional Court took the view that in relation to the powers of the President, the notarial character of the powers could not be derived in general, not even for the parliamentary form of government (e.g. PL. ÚS 14/06). This opinion, including the possibility of potential broad interpretation of the powers of the head of state, was the platform for decision-making in the jurisdictional dispute between the President and the Parliament about the appointment of the Attorney General.

The Constitutional Court provided an interpretation of Article 102 para. 1(t) and Article 150 of the Constitution (PL. ÚS 4/2012-77), under which the President is obliged to consider the Parliament's proposal for the appointment of the Attorney General; and if he is elected in accordance with law, he must, within a reasonable time, either appoint the proposed candidate or to inform the Parliament about his rejection to appoint this candidate. The President may not appoint the candidate merely "by reason of non-compliance with the legal requirements for appointment or because of a serious circumstance related to the person of the candidate, which raises reasonable doubt about his ability to act in the way that would not threaten the dignity of the constitutional function or of the entire body of which that person is to be the supreme representative; or in a manner consistent with the actual mission of that body, if it would result in the violation of the proper functioning of the constitutional authorities. The President shall provide the reasons for non-appointment and they must not be arbitrary."[11]

This interpretation of the Constitutional Court has in essence extended the "exploratory" right of the President to investigate the personality of the candidates as well. This decision is of fundamental political and constitutional significance, since it is also related to the question of the form of government and its potential to shift to semi-presidentialism.

Reservations against such broad-ranging possibilities of discretion of the President have emerged not only from one part of the professional community, but also from the dissenting opinions of some judges of the Constitutional Court. The dissenting opinion of the judge Gajdošíková favoured a minimum range of discretion of the President, the judges Mészáros, Orosz and Luby expressed the possibility for the President not to appoint a candidate merely because he fails to comply with the legal requirements for the appointment or due to any particularly serious circumstances relating to the person of the candidate which raises reasonable doubt about his ability to act in a way that would not reduce respect for the constitutional function

[11] http://portal.concourt.sk/pages/ viewpage.action?pageId=1277961.

or the entire body of which that person is to be the supreme representative; or in a manner that would be consistent with the actual mission of that body, if it would result in the violation of the proper functioning of the constitutional authorities. The President must provide the reasons for the non-appointment, and these must not be arbitrary (Orosz, Luby). According to the judge Mészáros, the President may refuse to appoint the candidate merely by reason of special constitutional significance relating to the person of the candidate, which would mean that the proper functioning of the constitutional bodies would be obstructed (Article 101 para. 1, second sentence of the Constitution of the Slovak Republic).[12]

According to these opinions, the President should remain a neutral authority, even if he exercises the powers which do not require countersignature and he should interfere only in case of structural constitutional defects, which does not deny the neutrality, quite the opposite, it respects it. In such case, he would act as the last constitutional policy, the use of which could be envisaged only on rare occasions of almost state-security nature, e.g. if it is additionally proven that the candidate has been actively involved in human rights violations during the period of unfreedom.

The issue of the scope of discretion of the head of state in the process of selection and appointment of judges of the Constitutional Court in the Slovak constitutional system is at present the subject of dispute between the head of state and the Parliament. The head of state has refused to appoint five out of six candidates elected by the Parliament. With regards to the Decision of the Constitutional Court no. PL. ÚS 4/2012, a significant part of the professional community favours the option of a wider range of the President's discretion in deciding on the appointment of the Constitutional Court judges (the same situation as in the case of the Attorney General). On the other hand, there could be doubts as to what extent the current situation is covered by the resolution no. PL. ÚS 4/2012, because the fact that the Slovak Parliament proposes a double number of the candidates and the President only appoints several judges can be seen as a distinguishing element from the case of appointment of the Attorney General, just because Article 134 of the Constitution envisages this discretion, i.e. it allows the President to choose half of the proposed candidates. If Article 134 allows greater discretion for the President, the conditions for refusing to nominate candidates for judges of the Constitutional Court under this Article of the Constitution should, therefore, be restricted, as in the case of Article 150 referring to the Attorney General.

However, other opinions pinpoint the fact that when interpreting the power of the President to appoint the Attorney General, the Constitutional Court created a relatively wide margin of discretion of the President and, according to that, Article 134 para. 2 of the Constitution provides the President with the discretion not only to choose judges proposed by the National Council, but even with the possibility to reject them completely. On the contrary, Article 150 of the Constitution confers on the President only the opportunity to appoint the Attorney General or to reject the candidate. The fact that in the latter case the President has the double number of candidates for the vacant positions does not exclude the situation that

[12] *Ibid*.

in relation to any proposed candidate there are reasons not to appoint them in accordance with the decision no. PL. ÚS 4/2012. In order to maintain consistency and predictability of the Constitution interpretation, it seems reasonable to hold the view that if in one case the President has the option to reject any candidate, he should have this possibility also in the latter case. The differences between the two cases are not of such serious nature that would lead to radically different conclusions.

The Constitutional Court itself, however, when deciding on the interpretation of the powers of the President to appoint judges of the Constitutional Court, in its decisions no. III. ÚS 571/2014 and no. PL. 4/2015, essentially denied any space for discretion of the President, or alternatively, it limited the discretion of the President concerning the appointment of judges of the Constitutional Court to choose from two candidates proposed by the Parliament for one vacant position.[13] By its plenary decision, the Constitutional Court rejected the President's proposal for the interpretation of Article 134 para. 2 in conjunction with Article 2 para. 2 of the Constitution, due to the absence of conflict, because in the opinion of the Plenum, this issue was already settled by the decision of Third Senate of the Court no. III. ÚS 571/2014. The Constitution does not grant any general legally binding effect on the Senate decisions (not even in the decision no. III. ÚS 571/2014), and therefore, the dispute between the President and the National Council could not be resolved. The legally binding effect applies only to findings declared in proceedings concerning the interpretation of the Constitution (Article 128, last sentence).

The following disputed issues remain to be resolved:

– whether the decision of the President not to appoint a candidate for the judge of the Constitutional Court, which was not legally annulled by the Constitutional Court, should terminate the nomination of the candidate proposed according to Article 134 section 2 of the Constitution, and if so,
– whether such a state in connection with two vacant positions for the judges of the Constitutional Court imposes a constitutional duty on the Parliament to propose the expected number of candidates to the President, in accordance with Article 134 para. 2 of the Constitution. The substance of the dispute lies also in divergent opinions whether the President is obliged or authorised in matters of appointment of judges of the Constitutional Court to follow the generally binding interpretation of the Constitution, which the Constitutional Court declared in its decision no. PL. ÚS 4/2012 of 24 October 2012. Both processes relate to the appointing authority of the President and are linked to a proposal of the National Council, and in both cases the President has an obligation to ensure the proper functioning of the constitutional bodies.

As regards the interpretation of the President's appointing authority, attention should be paid to Article 101 para. 1, second sentence of the Constitution, according to which the President has the obligation to ensure the proper functioning of the constitutional bodies, as this obligation is also present in the exercise of these powers. Two conclusions can be drawn here: it is the obligation of the President to

[13] *Ibid.*

refrain from acts that would jeopardize the proper functioning of the constitutional authorities, e.g. to disarm the state body by not appointing the candidates. Secondly, this also has a positive side: to ensure that the respective functions will be occupied by competent people, experts, which can open a possibility for a decision not to appoint unsuitable candidates for particularly serious reasons, even at the cost that the position will be vacant for a while. This is the essence of the so-called function of a constitutional fuse.

5. CONCLUSION

In relation to the exercise of the powers of the head of state, the Slovak constitutional practice clearly manifests the problem of "duplicated democratic legitimation" if both the Parliament and an executive-type of body (in this case the President) are elected by popular vote. Both constitutional authorities may have different political preferences; they may even stand in opposition to each other, in spite of the fact that they come from the same political party. The popular vote provides the President with strong democratic legitimacy, and if his powers are slightly enhanced by the Constitution, he can attempt to become an active political player with the potential to change the system to semi-presidential.

It is obvious that the increased presidential legitimacy cannot be ignored (probably not even within the constitutional interpretation), but indirect granting of powers may have the potential to change the text of the Constitution. In my opinion, the conclusions in the decisions of the Constitutional Court, which provide a wide scope for the exercise of the appointing authority of the head of state, should be corrected via the Constitutional Court's future case law.

In respect of the problems concerning the appointment of judges of the Constitutional Court *de constitutione ferenda*, it would be appropriate to pay attention to the following issues:

– tightening up the criteria for candidates for judges of the Constitutional Court, because the requirement of 15-year legal practice and age does not suffice as a guarantee for professionalism and quality,
– providing the President with either a discretionary option in the process of selection of a fixed number of judges of the Constitutional Court (e.g. the Italian President appoints three judges of the Constitutional Court), as it is in the case of the appointment of the members of the Judicial Council, or another option: electing candidates for judges of the Constitutional Court in the Parliament by 2/3 or 3/5 majority and setting out the duty of the President to appoint the candidates.

The essential requirement is that the chosen model of the constitutional system should correspond with the political culture of the society. Otherwise, the existing level of the political culture will "overwhelm" the individual institutes, or alternatively, deform their operation. The ideal situation is when the constitutional structure limits and forms the political culture within the democratic patterns, and not the opposite, i.e. when the political culture deforms the constitutional structure.

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POSITION OF THE HEAD OF STATE IN THE PROCESS OF EXERCISING THE POWER OF APPOINTMENT

Summary

The head of state is a fundamental constitutional institute, standing on top of the hierarchy of the highest state authorities. He has a unique significance for the existence and functioning of the state, in particular, because he expresses the sovereignty of the state and its integrity. The constitutional status and power of the head of state are created depending on his relationship to the supreme constitutional authorities representing the legislative, executive and judicial powers. The article analyses the position of the head of state in the exercise of his nominating powers. It highlights the most significant problems associated with the interpretation of those powers. In this context, it is important to define the scope of possibilities of the head of state to propose independently, review and possibly reject candidates for the posts of representatives of various state authorities. These options vary depending on whether the head of state is acting in relation to the proposals of executive bodies, other independent bodies or the parliament.

Keywords: head of state, power of appointment, separation of powers, discretion

POZYCJA GŁOWY PAŃSTWA W PROCESIE REALIZACJI POSIADANEGO UPOWAŻNIENIA DO MIANOWANIA

Streszczenie

Głowa państwa jest podstawową instytucją konstytucyjną, stojącą na szczycie hierarchii najwyższych władz państwowych. Ma ona wyjątkowe znaczenie dla istnienia i funkcjonowania państwa szczególnie ze względu na to, że wyraża suwerenność państwa i jego integralność.

Tworzenie konstytucyjnego statusu i usytuowania władzy głowy państwa jest uzależnione of jego relacji z naczelnymi organami władzy ustawodawczej, wykonawczej i sądowniczej. Artykuł poddaje analizie pozycję głowy państwa w zakresie wykonania przyznanych uprawnień. Podkreśla najistotniejsze problemy związane z interpretacją tych uprawnień. W tym kontekście ważne jest zdefiniowanie zakresu możliwości głowy państwa w dziedzinie samodzielnego proponowania, sprawdzania i ewentualnie odrzucania kandydatów na stanowiska reprezentujące poszczególne władze państwowe. Możliwości te różnią się w zależności od tego, czy głowa państwa odnosi się do propozycji organów wykonawczych, innych niezależnych organów czy parlamentu.

Słowa kluczowe: głowa państwa, upoważnienie do mianowania, podział władz, swoboda decyzji

LA POSICIÓN DEL JEFE DEL ESTADO EN EL PROCESO DE EJECUCIÓN DE LA FACULTAD DE NOMBRAR

Resumen

El Jefe del Estado es una institución constitucional básica que está en la cumbre de la jerarquía de las autoridades estatales más importantes. Tiene el significado excepcional para la existencia y funcionamiento del país, dado que expresa la soberanía del Estado y su integridad. La creación de la posición y ubicación del poder del Jefe del Estado depende de su relación con los órganos generales del poder constitutivo y judicial. El artículo analiza la posición del Jefe del Estado en cuando a la ejecución de facultades que le fueron atribuidos. En este contexto, es importante definir el ámbito de posibilidades del Jefe del Estado en cuanto a la propuesta, verificación y eventual rechazo de los candidatos para los puestos que representen los poderes públicos. Estas posibilidades son diferentes en caso el Jefe del Estado se pronuncie sobre propuestas de los órganos ejecutivos, de otros órganos independientes o del Parlamento.

Palabras claves: el Jefe del Estado, facultad de nombrar, división de poderes, libertad de decisión

ПОЗИЦИЯ ГЛАВЫ ГОСУДАРСТВА В ПРОЦЕССЕ РЕАЛИЗАЦИИ ПОЛНОМОЧИЙ ПО НАЗНАЧЕНИЮ НА ГОСУДАРСТВЕННЫЕ ПОСТЫ

Резюме

Глава государства является основным конституционным институтом, находящимся на вершине иерархии высших государственных органов. Данный институт имеет исключительное значение для существования и функционирования государства, являясь выразителем его суверенитета и целостности. Формирование конституционного статуса и позиции главы государства зависит от его отношений с главными органами законодательной, исполнительной и судебной власти. В статье анализируется позиция главы государства в том, что касается использования имеющихся у него полномочий. Особое внимание уделено проблемам, связанным с интерпретацией этих полномочий. В этом контексте важно определить объем полномочий главы государства по выдвижению, верификации и возможному отклонению кандидатов на должности, представляющие

различные ветви государственной власти. Эти возможности варьируются в зависимости от того, рассматривает ли глава государства предложения исполнительных органов, других независимых органов или же парламента.

Ключевые слова: глава государства, полномочия по назначению на государственные посты, разделение властей, свобода принятия решений

POSITION DES STAATSOBERHAUPTES BEI DER UMSETZUNG SEINER ERNENNUNGSERMÄCHTIGUNG

Zusammenfassung

Das Staatsoberhaupt ist die grundlegende Verfassungsinstitution, die an der Spitze der Hierarchie der höchsten staatlichen Behörden steht. Es hat eine große Bedeutung für die Existenz und das Funktionieren des Staates, insbesondere weil es die Souveränität des Staates und seine Integrität zum Ausdruck bringt. Die Schaffung des Verfassungsstatus und des Ortes der Macht des Staatsoberhauptes hängt von seinen Beziehungen zu den obersten Organen der Gesetzgebungs-, Exekutiv- und Justizgewalt ab. Der Artikel analysiert die Position des Staatsoberhauptes bei der Ausübung der gewährten Rechte. Hebt die wichtigsten Probleme hervor, die mit der Auslegung dieser Befugnisse verbunden sind. In diesem Zusammenhang ist es wichtig, den Umfang der Möglichkeiten des Staatsoberhauptes im Bereich des Selbstvorschlags, der Prüfung und möglicherweise der Ablehnung von Kandidaten für Positionen zu definieren, die einzelne staatliche Behörden vertreten. Diese Möglichkeiten variieren je nachdem, ob sich das Staatsoberhaupt auf die Vorschläge von Exekutivorganen, anderen unabhängigen Gremien oder dem Parlament bezieht.

Schlüsselwörter: Staatsoberhaupt, Ernennungsermächtigung, Gewaltenteilung, Entscheidungsfreiheit

POSITION DU CHEF DE L'ÉTAT DANS LE PROCESSUS DE MISE EN ŒUVRE DE SON AUTORISATION DE NOMINATION

Résumé

Le chef de l'État est l'institution constitutionnelle de base qui se situe au sommet de la hiérarchie des plus hautes autorités de l'État. Il a une signification unique pour l'existence et le fonctionnement de l'État, notamment parce qu'il exprime la souveraineté de l'État et son intégrité. La création du statut constitutionnel et la localisation du pouvoir du chef de l'État dépendent de ses relations avec les organes suprêmes du pouvoir législatif, exécutif et judiciaire. L'article analyse la position du chef de l'Etat dans l'exercice des pouvoirs accordés. Il souligne les problèmes les plus importants liés à l'interprétation de ces pouvoirs. Dans ce contexte, il est important de définir l'étendue des possibilités du chef de l'Etat en termes d'indépendance de proposer, vérifier et éventuellement rejeter des candidats à des postes représentant les différentes autorités de l'État. Ces possibilités varient selon que le chef de l'État se réfère aux propositions des organes exécutifs, d'autres organes indépendants ou du Parlement.

Mots-clés: chef d'État, autorisation de nomination, séparation des pouvoirs, liberté de décision

RUOLO DEL DI CAPO STATO NEL PROCESSO DI ESERCIZIO DEL POTERE DI NOMINA ATTRIBUITO

Sintesi

Il capo di Stato è la fondamentale istituzione costituzionale posta al vertice della gerarchia delle massime autorità statali. Ha un importanza particolare per l'esistenza e il funzionamento dello stato, soprattutto a motivo del fatto che esprime la sovranità dello stato e la sua integrità. La creazione dello status e della collocazione costituzionale dell'autorità del capo di Stato dipende dai suoi rapporti con le massime autorità del potere legislativo, esecutivo e giudiziario. L'articolo sottopone ad analisi il ruolo del capo di Stato nell'ambito dell'esercizio dei poteri attribuiti. Sottolinea i problemi più importanti legati all'interpretazione di tali poteri. In tale contesto è importante definite l'ambito delle possibilità del capo di Stato nel settore dell'autonoma proposta, verifica ed eventuale rifiuto dei candidati ai ruoli che rappresentano le singole autorità statali. Tali possibilità sono diverse a seconda se il capo di Stato faccia riferimento alle proposte delle autorità esecutive, di altre autorità indipendenti o del Parlamento.

Parole chiave: capo di Stato, potere di nomina, separazione dei poteri, libertà di decisione

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