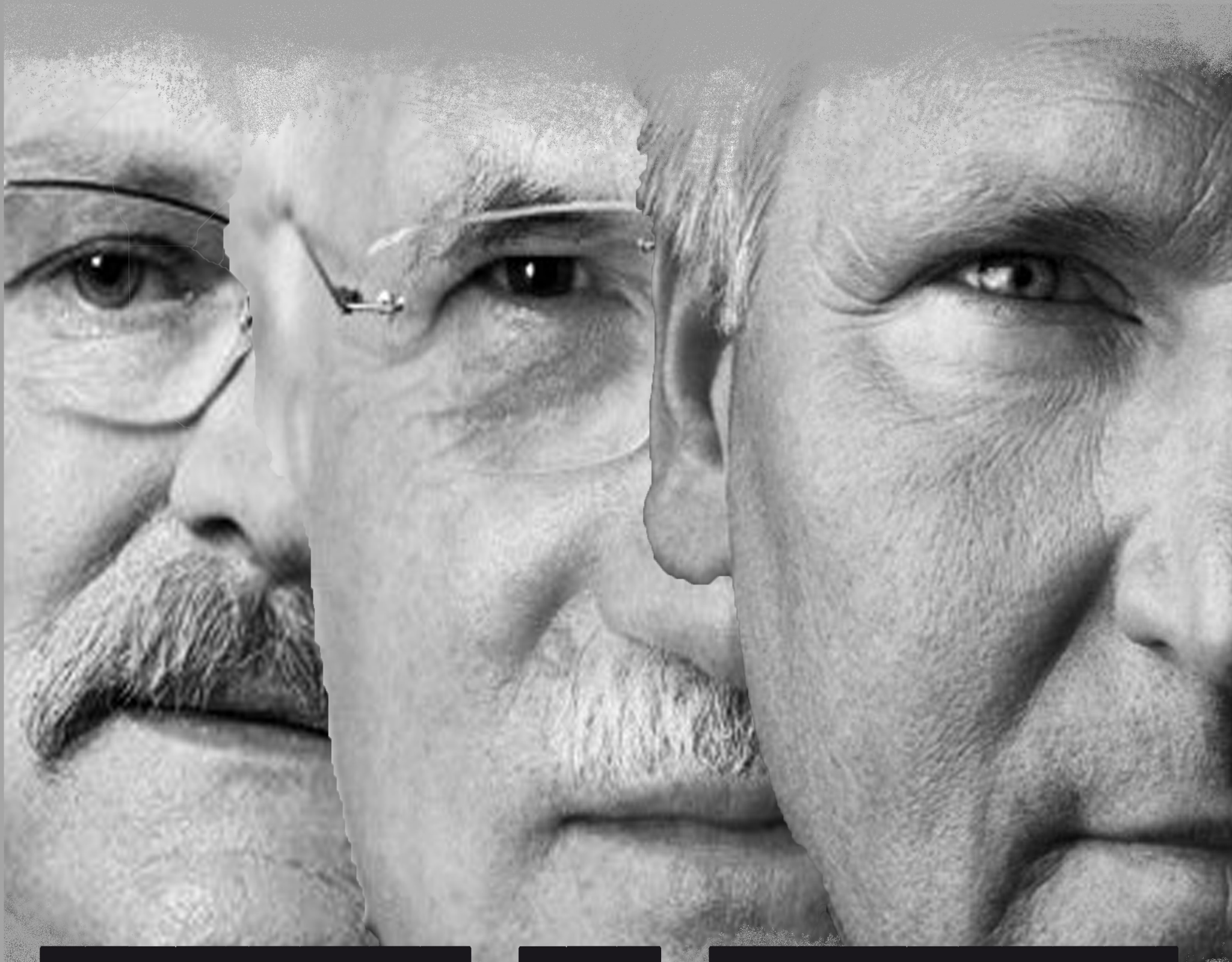


Faculty of Social Sciences
University of Ss. Cyril and Methodius in Trnava



**RETHINKING THE PRESIDENCY:
CHALLENGES AND FAILURES**

**Blanka Říchová, Radoslaw Kubicki,
Aaron Walter (eds.)**

Faculty of Social Sciences
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Edited by

Blanka Říchová
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Aaron Walter



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PRESIDENTS – INSTITUTIONAL GROWTH IN CENTRAL EUROPEAN POLITICS

The position of president was one of the institutions with which in the countries of Central Europe, there was no particular problems during the initial years of transformation. It was counted on that this institution would be a natural part of the newly constructed institutional conditions of a functioning democracy and that it would – should the experiences from history allow – build on the status of this institution from the years prior to the enforcement of socialism. In some cases, such as in Czechoslovakia, it was the tradition and the possibility to look up to the historically first democratic leadership model created after the collapse of the Austro-Hungarian Empire that played a crucial role. The first president, T. G. Masaryk evoked the image that all the following elected presidents in a democracy or more precisely a democratising environment must have; above all morally strong values and as a result of that, individuals that are highly valued and respected, and individuals that almost all the people of the country can identify with regardless of the newly established constitutional rights (any critical views of the acts of the president were after 1989 considered rather incorrect sometimes even heretical). Hence during the first years of the transition the president appeared not only as an important moral authority but also as a significant constitutional institution whose competences and influence apply exclusively or preferentially to the constitutional text. The rules of the game, the political space that is so difficult to defy and get hold of, in which all politicians move, that plays a fundamental role also for the evaluation of political impact and for determination of the possibilities and limits of the factual influence of a particular individual in various political systems.

But the president is also an important and significant political actor bound not only by the formal rules of the constitution. As it has been frequently documented over the last quarter of a century by the changes in the political environments of Central European countries, presidents have managed to strengthen their influence not through compliance of the rules but rather through their interpretation (quite often based on the saying „whatever is not expressly forbidden, is allowed“). In the conference proceedings of the international conference called *Presidential Powers and their Transformation in Political Systems* that took place in December 2014 at the University of Ss. Cyril and Methodius in Trnava one of the key issues

of presidential powers is its constitutional roots. It can be documented by Ladislav Orosz and Zdeněk Koudelka analysing the legal control of presidential acts in Slovakia and in the Czech Republic which are complemented by the detailed analysis of the Polish situation in the years 1995-2005 carried out by Arkadiusz Modrzejewski.

The interpretation of set constitutional rules as a base to strengthen and draw attention to presidential influence on the current situation, aspiration to increase their presence in the political arena (in some cases almost at all times) against other politicians in the political environment, where instead of bipartisanship, partisanship occurs have showed significant trends of the transformation of the Central European political systems after the formal disposal of the socialistic model of leadership – a prime example of this can be the Czech political environment after the election of Miloš Zeman in the first direct presidential elections in 2013 as documented by Pavel Šaradín in his contribution. The Czech Republic is not an exception.

Practically all Central European countries have had to more or less gradually cope with the fact that rather than the constitutional framework defining the competences of presidents it was for the new “holders of the post” their personal abilities to increase their presence in the system, use various ways in order to draw attention to their own influence and their political ambitions despite the fact that these were not always carried out in a constitutional way. It cannot be stated that the French Fifth Republic model would be a direct inspiration for new Central European politicians claiming participation in democratic leadership including ambitious personalities applying for presidential office. As the analysis carried out by Michel Perottino shows it is the French system which as a comparative example exploits the flexibility of the constitutional model. Regardless, it is obvious that the tendencies to strengthen the role of the executive body in the new Central European democracies proved to be significant (this fact is documented by the detailed analysis of the position of the Polish president by Jerzy Jaskiernia). This was also mostly connected with the introduction of direct presidential elections as documented by Miloš Brunclík, Peter Horváth or Viera Žúborová and Pavel Šaradín.

While political studies' analyses the praxis of presidential systems (naturally the American system) or the so called Semi-presidential models of leadership such as the French Fifth Republic model for the classification of the political leadership of the presidents, the issue of character of the presidential leadership in the parliamentary system has not yet been sufficiently explored. Hence the aim of this composition of analyses

devoted to the topic of presidential leadership in the parliamentary system in Central European nations. The result of case studies dedicated to Slovak (text by Peter Horváth and Viera Žúborová), Polish (the already mentioned analysis by Jerzy Jaskiernia and Arkadiusz Modrzejewski) as well as the Czech political scene (the contribution by Miloš Brunclík) illustrates, the extent to which the political speeches of the presidents and their active interventions into politics can influence other constitutional and political actors and the impact (quite often morally problematic) they have on the society as a whole. The findings of the analyses of the American presidential office that emphasize the necessity and analytical righteousness of differentiation between the influence of the president and his political success need to be fully accepted. The success is always related to the space in which the president can or more precisely must move within the context of the constitutional definition. Hence it is dependent on other political actors. Can the same be valid also in the Central European political environment? This is also an issue to which the authors of this publication try to offer in relevant analyses.

We strongly believe that the conference proceedings consist also of inspirational case studies in the context of analyzing the personal characteristics of various individuals who acted as presidents or act as presidents in Central Europe. The existing analyses of the presidential leadership offer a very colorful picture. For example Jeffrey E. Cohen in his work called *Presidential Leadership in Public Opinion. Causes and Consequences* gathered a total of thirteen differentiated definitions connected with presidential leadership. What else can Central Europe offer? Is it worth widening the existing scope or is it more appropriate to make use of the already existing "supply" and try to apply some of the already gained knowledge onto the democratizing post-Soviet Bloc? The authors that participated in our collection tried not to widen an already wide existing set of definitions and hence they chose the contributions in the shape of case studies. Their analyses imply that in democratization – regardless both of the historical burden of particular countries and societies as well as the constitutional anchoring of the role of the presidents in individual cases (that is the easiness or difficulties to change the constitutional texts) – there is a consensus with well-established democratic systems: the personal characters of the presidents are for the process of system change of a non-omission value. In addition a significant effort of the president to push-forward their own interests, to form their own public opinions and attitudes that can in some cases be even called controversial, which is done either by the use of unclearly defined

presidential powers (seen in the Polish or Czech cases) or by “cooperation” with other constitutional institutions such as the case in Slovakia, predominates the majority of the analyzed cases.

Despite all the effort to capture the complexity of the problems of presidents in transitive processes the readers will no doubt not fail to see that even the complexity of case studies that is presented does not cover all the relevant issues connected with the position and role of the presidents in the Central European countries of the previous twenty-five years. We have also encountered the fact that a significant part of the information concerning the position and role of the presidents is connected with the issue of their factual influence and “measurable” impact on the public. Only a minimum of sources gives way to more in depth analysis of expectations with which the beginning of a concrete institutional career of each president can be connected; especially as it distinctly applies to those directly elected presidents such as in the Czech or Slovak case. In these cases it proves the point that voters often positively value the so called *strong leader*, who is an individual that presents to the public topics or acts in conflict in relationship to other political actors rather than use their influence to help to solve existing problems. The popularity of such presidents rises with at least part of the voters who are convinced that the other politicians, mainly the representatives of political parties, are corrupt and incompetent, while in the president they do not find these characteristics. Presidents though do not function in a vacuum. It is not possible without the connection to politicians with whose help or against whom they can and must pursue their interests. And that is mainly why the issue of influence of the presidents is fundamentally connected with their relationship to political parties as well as to other constitutional institutions and actors. A more specific impression can be created based on the text by Miloš Brunclík who dedicates his study to the Czech political environment or Peter Horváth who analyses the relationship of the president and the parliament in Slovakia.

The process of democratization that has lasted over two decades shows how significant the influence the position of the president has had not just the sole constitutional framework of their competencies that cannot be defined in detail due to understandable reasons or the personal character of the actual presidents but the whole political system and mood in society. Presidents often choose such ways of pursuing their own influence that are allowed by the other actors. The process of pursuing democratic procedures is not and never has been binding on one singular

constitutional text. The changing needs connected with specific holders of political posts and their interests have proved to be very flexible. Why linger on one model of leadership that was set out at the beginning of the process of transition? Why not change the principles which democracy is being built on? The transition is change and change is life. That can in short embrace a significant flexibility of the politicians and their attitudes to the basic constitutional scheme – what was handy at the beginning can be cast away with reference to the new and in the eyes of the “reformers” of course for the future offer more promising needs of changing society and its politics. The Czech case can be seen as an example where gentle political adaptation to specific political needs in a situation occurred; when practically no political actor knows exactly what the change – in this case the change in the way of the election of president from indirect to direct— would bring. And also, both the uncertainty of opinion and the shift in public focus (similar to development in Uzbekistan where in the last fifteen years the ways to elect presidential candidates has been changed several times) upon the office of Czech president.

Currently it is still absolutely impossible to generalize the reasons for changes in constitutional frameworks of democratizing countries. What can be generalized though is the fact that a system change is a historic moment that opens the room for changes in the regime.

And it was this fact that was the motivation for the meeting of specialists from the field of political science that took part at the Faculty of Social Studies at the University of Ss. Cyril and Methodius in Trnava in December 2014 with the aim to evaluate a quarter of a century’s formations of democratic models of leadership in Central European countries. The outcome of the event is the following conference proceedings put together from selected contributions. Readers have the opportunity to get closely acquainted with concrete issues and problems that the individual countries of the region have had to battle with or have been battling with. The analysis of the position of president does not then end in itself but documents the systematic character and the level of democratization in this geographical area historically connected with the social structure of leadership; wishing similar but factually - with regard to the continuity or rather discontinuity of its development. The conference proceedings are a composition of case studies, all of which point to evidence of the democratic transition as a complex process of which the presidential office is its keystone. The constitutional framework defining and specifying this institution in combination with the inner political scene and its changes including the personal characters of the occupants of the presidential

office allow us to confront democratizing developmental trends and evaluate a quarter of a century's development of countries in Central Europe in the context of its intended outcomes and quite often idealistic images of society concerning their fulfillment with proclamations of the politicians influenced by political praxis. The position and role of president is then not abstract or narrowly defined but complex.

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MY IMPORTANT KEY EVENTS

Mr. Chairman, honorable guests, ladies and gentlemen.

My ten years in office as the President of Poland was during a period of difficult challenges for the country and it was linked to fulfilling very serious tasks and duties in my function as a head of state. In Poland at that time the government of the various different parties had very different politics – the politicians in the political spectrum were one minute Left, and the next minute Right.

As the President of the Polish Republic during those years I had many times provided the dialogue in the internal disputes of these politicians and also strove to lead a single common policy of foreign-political questions in the international forum. I searched for compromise, something along the lines of joining and participating but at the same time keeping independence on both the national and international level. Despite the common events of different Government coalitions we were successful in establishing both the political continuity in Poland, and membership in international organizations; we joined NATO and we became a member of the European Union.

I assumed the office of the president after two completely atypical and also completely different electoral periods; those of presidents Wojciech Jaruzelski and Lech Wałęsa. My predecessors were in office either after a new constitution had already come into force and it was unnecessary to cooperate with the political opposition or the political circumstances had significantly changed and were quite different than the past. In fact, only then in Poland did we begin to carry out a specific Polish version of cohabitation amongst the branches of government. It was not easy, especially in the instances of which the basis of the breakdown between the political parties were both clearly established in terms of partisanship, which was centered upon and connected historically.

I consider some key events during my time in office as: Firstly, and most important, the independence of the Polish Constitution, not because I was one of its creators and I had also taken up under the auspices of a national referendum, which confirmed it, but mainly for the reason, that it was the basis of law, from which we were able to anchor the stabilisation of the Polish economy.

Due to the radical change of the economy, the subject of change affected almost everything else: effectiveness, modernisation, structure of

production, and openness to the world. Also, there was a change in the structure of ownership. All the difficult structural changes were put in place during the process of the gradual integration of Poland to the world economy and also to the economy rating of the European continent.

I would like to remind once more, that the development of the rebirth of Poland into the dynamic and developing part of our Continent would not have been possible without the integral completion of the accession negotiations with the European Union. No less important was the strengthening position (prestige) of the state and building the political image of Poland which is friendly with its neighbours and partnership in relation to the superpowers. I would like to highlight, that all these happened under the conditions, when the Constitution of the Polish Republic offered the Polish president the ability to preside in a wider area of competence exclusively in the area of foreign policy.

Next, briefly, I outline the importance of the problems which existed at that time; there were some serious ones such as, protection of the governments' stability and also the protection of the plurality of the media. In the latter I have often pointed and made reference to four thematic areas, which the media paid, in my opinion special attention and caution. In my mind, these are primarily Polish-German relations, the relationship of the State to the Polish Catholic Church, Polish-Russian relations and Polish-Jewish relations.

I know for sure that my actions as president never threatened democracy or the democratic practices of Poland. But what does the word "practice" mean? Is it defined mainly according to public opinion? I remember very clearly and precisely that my activity in the relationship to the government and parliament, but also to the political parties, was often defined by political analysts and commentators as being moderately active. Today, almost 10 years later, I myself now have the right to judge, that my style of governing and the model of cooperation with other nations and political bodies was a time during which my two elected terms in office enjoyed a significant social acceptance. I can see the obvious advantages of this acceptance in not attending or being drawn into domestic political conflicts, in distancing Poland from the chaos and excessive everyday unpredictability of politics, or the political rituals carried out in the Lower House of the Polish parliament.

Dear honoured guests.

After 1989 the main conditions and factors which had been for the past century underlining the situation in Poland changed, in particular its international position on foreign policy. Perhaps Poland has never had

better external conditions for its internal development. Above all the neighbours of our state changed and we were no longer found ourselves sandwiched between two imperial powers, which were joined against us for centuries and were threatening our independence. That is also the source of the sweeping change of direction on our view on foreign policy. The period of my presidential term was a time, in which Poland had good, or we can also say more correctly relations with its closest neighbours and our culture and science was really known to have a good reputation around the world. However, it would not have been possible without the hardships and issues that we experienced and faced; not all of the steps or actions that we took brought the expected results. However, I am deeply convinced that the present is a very suitable starting point in dealing with not only with the position of the President in the Polish political system, but also with reflection on one of the most crucial periods in the history of my country.

Dear friends.

Our meeting today was also my personal opportunity to express my heartfelt thanks for the honor, which I was granted at the University of Ss. Cyril and Methodius in Trnava. It will always stay in the honourable place in my memory, as will your hospitality. I would like to end with this message to the University, to its highest representatives, to teachers and also to students I wish you all the very best of success for the foreseeable future. Through you I am also sending the warmest and sincerest heartfelt greetings to all citizens of the Slovak Republic.

Aleksander Kwaśniewski
Former President of Republic of Poland (1995-2005)

PRESIDENCY OF ALEKSANDER KWAŚNIEWSKI IN POLAND (1995-2005): COMPETENCE, DECISION-MAKING, AND POLITICAL THOUGHT

Arkadiusz Modrzejewski

Abstract

The paper is dedicated to political thought and decisions of Aleksander Kwaśniewski, the president of the Republic of Poland between 1995 and 2005. I will present Aleksander Kwaśniewski as a political decision maker and political visionary focusing on his activity in internal and international politics. He was an architect of the Polish political and constructional system and one of the most influential politicians in Poland. He created new attitudes of the head of state. His presidency was during the time of political stabilization and consolidation of Polish democracy. Dialogue and conciliation were features of his political character. He tried to avoid political conflicts however he represented a clear political doctrine. He defined himself as a social democrat and social liberal. Indeed, the analysis of his speeches, interviews and publications reveals his political vision and situates him as a representative of the centre-left. International politics was a next important sphere of his activity. During his presidency Poland became a member of NATO and the European Union.

Key words:

Presidency of Aleksander Kwaśniewski. Poland. Political thought. System transformation.

Introduction

Aleksander Kwaśniewski has been the 3rd Polish president since the collapse of the communist system and the 2nd one elected in the general election. His ten-year presidency (both terms of office) deserves a special attention. The fact that he was awarded a title of *doctor honoris causa* by fraternal Slovak University of Ss. Cyril and Methodius in Trnava induced me to focus on this very important person for a Polish transformation and democracy. Because of the specific and sublime ceremony of awarding of Aleksander Kwaśniewski the title of honoured doctor which accompanied the conference where my paper was presented, it does not have a critical character. I would rather concentrate on his achievements in internal and external politics. I have to mention here that during his presidency, the Polish constitution was established and the Republic of Poland became a member of NATO and the European Union. Almost a decade has passed since the end of his term of office. That is why we can look at achievements

of Aleksander Kwaśniewski from a certain perspective and distance. I am interested in Aleksander Kwaśniewski as a political architect who clearly and unequivocally showed assumptions of own political strategy and vision.

His political thought is contained in numerous speeches, commentaries, letters as well as books and interviews. We can also learn from his political decisions and actions. And decisions and actions are actually the most precise measure of political intentions. They show how strong the attachment of a politician to declared ideals is and what is their ability to compromise. But they can also reveal if the politician is either a person with expressive convictions or a populist readily declaring empty election promises. So, decisions and activities could be treated as a source for the research focused on political thought similarly to program documents, publications, speeches etc. Political thought is targeted at a political practice in a particular dimension. It is connected with precise time and place. In this sense it is an opposition of political philosophy that is characterised by a universal message (Karnowska, 2011: 8-9). Distinguishing both categories – political thought and political philosophy – we will treat Aleksander Kwaśniewski as a political strategist who has his own political vision and a determined ideology but not in a fundamentalist way. Of course I use this term in its neutral meaning. Aleksander Kwaśniewski is not a political philosopher however he is a political visionary. Political philosophy is not his ambition; he is a practician, although we can find some philosophical inspirations in his political thought and practice. For example we can find there some references to a classical liberal philosophy as well as to a conception of social democracy.

1 Model of presidency – general reflection

The Polish political system based on democratic principles has been ultimately shaped during the presidency of Aleksander Kwaśniewski who was one of the main architects of the Polish political and constitutional order. We can describe him as an *architect* of Polish democracy not only because he was a chairman of the constitutional commission in the Polish parliament – *Sejm* or because he was the president who signed the Constitution of the Republic of Poland (1997). In my opinion his political attitude and establishing of unwritten patterns of behaviours as the head of state pertain to other constitutional institutions is more important than his work in the constitutional commission or than signing the Constitution.

He gave the Polish presidency a specific character which was not directly implied from the constitutional norms but from the way of the holding of the office. Briefly speaking, he established unwritten patterns of the attitude of the head of state and determined for president a conciliatory role while social and political conflicts appear. Avoidance of the presidential model promoted by some political factions, especially from the right wing of the political scene, protected the Polish political system against authoritarian attempts which we can observe in the post-soviet republics. Aleksander Kwaśniewski was an advocate of the parliamentary system as a democratic form of power in the states of the system transformation. Presidential power could be used by persons with authoritarian tendencies to marginalize a political opposition, to violent an independence of judiciary, to dominate a parliament and ultimately to take a full of power in the state (Riggs, 1997: 253-278). However not all authors, e.g. Samuel P. Huntington, are sure that any reliable and convincing evidence exists which could prove a thesis that the parliamentary system is a more appropriate form of power for countries transforming their political systems (Huntington, 1995: 278-279).

The term of office of Aleksander Kwaśniewski had begun before the new Polish Constitution was established and started to take effect changing the Polish political system into the parliamentary democracy. However in opposition to his predecessor Lech Wałęsa, Aleksander Kwaśniewski did not reveal any authoritarian inclinations. An authoritarian attitude was not a feature of his character. After a few years of taking the office, he stated: *"After a presidency of Lech Wałęsa that was an ideological and politically violent presidency, I proposed a brand new style of presidency for Poles. I wanted to be a president who does not divide people but who links them. I did not want to cause wars between politicians but I wanted to extinguish conflicts and disputes. I wanted to avoid provocations but I wanted to search conciliation, also with politicians who have radically other views than mine"* (Kwaśniewski, 2001). Imposing his own will and opinion was not necessary to dialogue and compromise declared and realized by Aleksander Kwaśniewski. He underlined it during his inaugural speech upon taking office as the president of the Republic of Poland. He redefined there the role of president declaring: *"I am going to establish in a Polish political life a permanent principle of negotiations and dialogue"* (Wygraliśmy przyszłość, 2008).

The presidency of Aleksander Kwaśniewski was not neutral or colourless limited to the representative sphere although the Constitution established in 1997 strengthened a position of the parliament as well as

government and prime minister in relations to the head of state. In this time the political system was transformed into the parliamentary republic though some constitutional institutions derive from a semi-presidential system which was characteristic for Poland in the first years of the system transformation (till 1997). That is why the Polish political system is sometimes defined as a rationalized parliamentarism. We should state here that Aleksander Kwaśniewski proposed some institutional solutions strengthening a power of the president, particularly in politically critical times and during the unstable roles of parliamentary minority. For example he proposed the president take some competitions regarding the constructive vote of no confidence. In his proposition the president could appoint a candidate for prime minister when parliamentary factions are in conflict and cannot do it (Godlewski, 2006: 136-137).

In the light of article 126 of the Constitution of the Republic of Poland established on 2 April 1997, the President of the Republic of Poland is “the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority”. The President “shall ensure observance of the Constitution” as well as “*safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory*” (The Constitution of the Republic of Poland, 1997). The principal role of the president concerns the function of political arbitrage. It is specifically magnificent in the time of threats of fundamental constitutional values and principles, i.e. sovereignty, territorial integrity and democracy. It is important also in the time of revealing dysfunctions of the state power. During the discussion about competencies of the president in the political system of the Republic of Poland the role of arbitrator and authority who can “be active in potential political conflicts”, who stabilizes “constitutional order” and who can be a protector of “elementary values for existence of the nation and state” is very often underlined (Skrzydło, 2003).

The strong position of the president in the system of the power in Poland is undoubtedly a result of the way of election in the procedure of general election. Direct legitimacy which the president gets from the nation entitles him/her to an active participation in political life as a mentioned arbitrator in the political disputes as well as an initiator of political and legislative actions. The president elected in the general election is not accountable to the parliament. He or she is independent of parliamentary majority; he or she is not also a political hostage of their own political faction. The significant range of presidential competences concerns foreign policy as well as issues of defence and national security. And although from the formal point of view the president does not have

any real tools to manage armed forces, he or she as their “supreme commander” as well as a guard of national defence and external security of the state, can use the political instruments for the realization of the mission appointed by the Constitution [Skrzydło, 2003: 312-316]. Something that Aleksander Kwaśniewski did during his presidency.

2 Political thought, decisions and activities - selected aspects

During the presidency of Aleksander Kwaśniewski his political vision matured. In my opinion it is important to present his clear vision of internal politics indirectly and partly explained in the above section on the presidential model promoted while he was the president of Poland as well as to present his attitude in foreign policy or wider in international policy which Aleksander Kwaśniewski became an active actor. Due to a short character of this paper I will only pay attention to several the most important issues.

Internal politics

Speaking about domestic policy, I would like to present achievements of Aleksander Kwaśniewski where his features of character and political attitude were clearly revealed. Apart from the above mentioned influence of Aleksander Kwaśniewski on a forming of the model relation between the head of state and other state authorities, I would have to refer also to his opinions on the topic of relations between a state and religion – I mean mainly the Catholic Church, his conception of social and economic relations as well as widely understood identity problematic that also determines his attitude to the heritage of real socialism and to Polish People’s Republic. The last issue was a main axis of the political disputes in Poland during the transformation period.

Reflecting upon relations between Aleksander Kwaśniewski, the President of the Republic of Poland and government and parliament, one notices that his presidency occurred in the time of dynamic changes which were happening on the Polish political scene. Polish political system, especially party system, was unstable. While Aleksander Kwaśniewski was the president Polish political system was diametrically remodeled. He was the head of state in the time of rules of his political friends from *Sojusz Lewicy Demokratycznej* (Democratic Left Alliance) as well as adversaries from the right wing. Despite his deep-roots in post-communist formation which Kwasniewski was a co-founder, he created a non-partisan

presidency free from ideology and ideological disputes. But he was free from neither political sympathy nor pretty clear political views. Despite the involvement in political interests, he was still able to become an independent arbitrator and authority whose the role is distinctly defined by the Constitution.

In this place I have to mention the determination of protection of the Constitution that characterized his presidency. Janina Paradowska, one of the most prominent Polish columnists describes Kwaśniewski's attitude: "*Considering ten years of presidency of Aleksander Kwaśniewski, we can easily point at the fundamental elements. Primarily I think about protection of the Constitution*" (Paradowska, 2005: 10). His determination in this matter had to be huge if he was able to defend an independence of constitutional financial institutions – I mean the Council of Monetary Policy and the Polish National Bank – against his own political fraction with Leszek Miller, the prime minister who was a leader of the left wing. I will not obviously interpret this fact as a heroic act. But mention let us notice an expressive prostate attitude of President Kwaśniewski. As a guarantor of the Constitution he protected it heedless political bonds which link him with political followers. So, he was characterized by ability to prefer the common good of the state above any form of cronyism or triviality and particular political interests. However, as the columnist notices, he was not consequent in his constitutional principlism. The lack of the consequence – in Paradowska's opinion – was revealed during the famous political scandals, co-called *afera Rywina* (*Rywin Affair*) and *afera Orlenu* (*Orlengate*). Both scandals contributed to marginalize the left wing in the Polish political life. In this time, Aleksander Kwaśniewski called by the parliamentary special commission sent inconsistent signals according to a call of the president for investigation by the commission. It was not his mistake that he did not come for the investigation but that he did not decide to ask the Constitutional Court about the interpretation if the parliamentary commission does not violet a presidential immunity calling the head of state for the investigation (Paradowska, 2005: 16-17).

Treating the presidency of Aleksander Kwaśniewski overall but not from the prism of the single mistakes, lapses or failures, we can notice his undeniable input in the forming of the Polish constitutional order as well as in the stabilization of political system (Kasińska-Metryka, 2000). Of course we can meet opinions which are in opposition to that presented above. They accuse Aleksander Kwaśniewski of particularism. Despite political adversaries these opinions can be met also among intellectualists. For example, famous and respected Polish columnist Roman Graczyk

accuses Aleksander Kwaśniewski that during presidency of Lech Wałęsa he was preparing a draft of constitution limiting prerogatives of the president. The situation was changed – in Graczyk’s opinion – when Aleksander Kwaśniewski became the president of Poland. Then his political followers tried to influence the parliamentary constitutional commission to strengthen a power and competences of the president. This activity, as Graczyk asserts, was undertaken by Aleksander Kwaśniewski as well (Graczyk, 1997: 170-172).

The relation between the state and Catholic Church is one of the essential topics of political disputes in Poland. The Church has strongly influenced political, social, economic and cultural life of Poles for centuries. Its social role increased in periods of Polish national life when the Polish nation did not exist or was enslaved by external powers. Moreover, socialism, its real sense of the term, strengthened a position of the Church in Polish society. It was an enclave of freedom where people could function in a parallel way to the communist reality. New democratic authorities tried to compensate the Church for the lost privileges and goods during communism. Even more, earlier in their decadent period, communist authorities launched institutional mechanism to restore property to the Church trying to propitiate Catholic hierarchy. Generally, the positive role in the Polish way of democratization is undoubted. That is why some decision makers saw it necessity to help the Church in reconstructing its public position. Aleksander Kwaśniewski also noticed the importance and relevance of the Catholic Church in Poland as well as personally the pope John Paul II. He was conscious to the input of the Church and John Paul II in Polish transformation. That is why he stated during one of the papal visits in Poland: *“Let it sound clearly: the changes would not exist if not [for] Your Holiness and the Catholic Church in Poland”* (Wygraliśmy przyszłość, 2008: 26).

But expectations of the Church were not appeased. The Church was not satisfied. Favourable for the Church regulations and decisions initiated the other ones. The Church became a huge political and economic institution in Poland what inevitably led to the confrontation with anticlerical powers. The attitude of the ruling left in 1993-1997 and 2001-2005 was ambiguous in this matter (Modrzejewski, 2011: 144-146). From the one side, politicians from the Left formulated policy to limit the influences of the Church. They demanded to reject a concordat between the Holy See and the Republic of Poland as well as to establish clear constitutional norms regarding to secular character of the Polish state. From the other side, in the left wing some conciliatory voices appeared trying to

extinguish tension in relations with the Church. President Kwaśniewski belonged to the second group of the left wing. He wanted to fulfill expectations of both conflicted sides – the Church and the Polish left. Even as a leader of *Sojusz Lewicy Demokratycznej* (*Democratic Left Alliance*) before the taking an office of the president, he expressed his opinion in one interview that agreement between the Church and the left is necessary (Kwaśniewski, 1995). The projects of the Constitution as well as the concordat were very important issues in Kwaśniewski's conciliatory activity (Sowiński, 2014: 666-667). It was a pragmatic compromise. Kwasniewski realized that he could not discourage moderate Catholics. That is why he supported a project of the preamble of the Constitution by Tadeusz Mazowiecki, the first non communist prime minister. He recommended it to his own political faction, of which, a majority had a negative attitude to the Church and the Catholic hierarchy. He was convinced that the confrontation with the Church could contribute to the loss of some strategic political and international aims, e.g. integration with the European Union. The influence of the Church on Polish society was very strong during the presidency of Aleksander Kwaśniewski. So, a support of the Church hierarchy was an ingenious element of pro-integration strategy. He especially avoided a confrontation with the moderate part of the Polish Catholic hierarchy that represented a pro-European attitude. Efforts of Aleksander Kwaśniewski found an appreciation among representatives of co-called *open Church*, i.e. Catholic intellectualists who are important, however more and more silent, voice in the Polish Church. Rev. Adam Boniecki, the former editor-in-chief of the "progressive" *Tygodnik Powszechny*, is one of them. He respects the achievements of Kwasniewski in relation with the Catholic Church. The Catholic clergy noticed that conciliatory attitude of Aleksander Kwaśniewski according to the Catholic Church and religion in general as too much friendly and amicable exposes him to criticism of own left formation. But "The president – Boniecki says – chose this way being aware that he cannot provoke the conflicts. Political parties can be conflicted with the Church. But the head of the state cannot be" (Boniecki, 2005).

The next important issue that I would like to mention is the attitude of Aleksander Kwaśniewski to economic issues. For the readers from out of Poland and other countries of the former Soviet bloc it could be curious and even strange that the former activist of the party that is colloquially determined as communist one became a politician of the modern social democratic left whose liberal opinions also regarding economic issues are

coincided with the mainstream European left. But it should not be astonishing. It also became a part of the Western left powers which from the socialist positions evolved in direction of the moderate social democratic liberalism that is just defined often as a social liberalism. It is not accidental that Tony Blair, the former British prime minister and the most prominent leader of the European left, who was clearly oriented toward the free market economy, became a mentor of Aleksander Kwaśniewski. President Kwaśniewski determined himself as a social democrat who wants to be a social liberal similarly to Tony Blair (Kwaśniewski, 2000a).

This declared social liberalism is primarily a political attitude but not a philosophical construction. Why a politician who defines himself/herself as a social liberal is free from methodological doubts which can be source of theoretical problems for a political philosopher or a political scientist and historian of political thought who would have a problem with bonding of divergent political and philosophical visions. But what were as a fire and water while the modern political ideologies were forming, today has been synthesized by political practice. Due to the fact that a long co-existence of the liberalism and social democracy, the co-existence of various ideas derived from both ideologies implemented in the contemporary political life of the modern, or better postmodern, Western societies have been a stable element of their political, social and economic systems. That is why we can say that the model of political thinking which could be determined as the social liberalism is in fact a result of the specific “centripetal” evolution of different political ideas (Godlewski, 2002). Political program and activity of Aleksander Kwaśniewski and his political formation is also a product of this evolution which was of course deeper than in the circle of the Western politicians because he derived from a party with a communist heritage.

The economic program sketched by Aleksander Kwaśniewski concerns elements of both, social democracy and liberalism, i.e. sensitivity to the social issues which is obviously a sphere of social democracy as well as the faith in free market that is a pillar of liberalism. It is in fact a program of *the third way*, however free from mistakes which appeared during a realization of the idea of the *welfare state*. Aleksander Kwaśniewski as the president believed in liberal fundamental assumptions that “*the social justness is primarily is an equality of opportunities but it is not an equality of redistribution*”. He was convinced also that it is necessary to “*find a new balance between rights and responsibilities, between individual and collective responsibility. It means that the role of the individual activity,*

enterprises and creativity as well as self-organization and self-help which are a realm of institutions of civic society have to be strengthened. [...] Free market activity – however controlled and regulated – cannot be eliminated and necessary social solidarity should not destroy competitions desirable in many branches. [...] The new role of the governance should not be similar to a traditional left vision. But from the other side it should not refer to the second extreme, i.e. a classical model of laissez fair” (Kwaśniewski, 2000b: 121-122). So, the proper role of state power is, in opinion of Aleksander Kwaśniewski, an activity for a macroeconomic stability, support of technological and productive innovation, promotion of export as well as an efficient control of the international movement of capital (Kwaśniewski, 2000b: 122).

At the end of this part of my consideration I would like to pay attention to the attitude of Aleksander Kwaśniewski regarding the past. His first presidential campaign in 1995 was held under the slogan: “Let’s choose a future” (Polish: *Wybierzmy przyszłość*). The slogan in some sense reoriented the public debate from discussion about the problems with the (communist) past to the discourse about the new shape of the Polish state and society. It was of course a marketing ploy. However, in my opinion the choice of the slogan was not only a smart marketing strategy but it also revealed the pragmatic character of Aleksander Kwaśniewski and his presidency. While promoting the slogan he seemed to propose his adversaries to stop a main dispute about the past and to concentrate on current cases which decide about quality of public institutions and life of people. Of course he did not avoid becoming involved in discussion on his political genealogy and identity. He was without a doubt the most important Polish politician who could not legitimate a “Solidarity” genealogy. Before the democratization of the country he was a member of The Polish United Workers' Party (Polish: *Polska Zjednoczona Partia Robotnicza*); in the 1980’s he held the high offices in communist state. Being in his thirties he was a minister for youth affairs. When he won the presidential election in 1995 the alarmist theories appeared announcing the return to the communism. In a quite moderate tone, Radosław Sikorski, later to become a minister of foreign affairs and currently the speaker of the Polish parliament, wrote in the American magazine *Foreign Affairs* about “*the end of era of Solidarność (Solidarity) in Poland*” (Sikorski, 1996).

Aleksander Kwaśniewski did not forget about his past as well as activity in the structures of the communist party and the instructions of the state governed by communists and their allies. But he discerned a necessity to settle with the past what was a condition of national reconciliation. As he

confessed in one of his books: “self-critical reflection is an obligation of all. A critical settlement with the past, with a bad tradition is a duty of politician as well as each political formation that wants to participate in democratic conditions”. And he continued his consideration further: “*We can find many great and invigorating acts in the tradition of the Polish left-wing. But we have to confess honestly that many crimes and wickedness made in Poland under banners of the left. Only words of apology are proper here*” (Kwaśniewski, 2000b: 175). On 9 November 1993 being a leader of *Sojusz Lewicy Demokratycznej* Aleksander Kwaśniewski said “*We apologize!*” in his own name as well as the name of his political faction (Kwaśniewski, 1993). In this way he has symbolically finished the settlement of his own formation with communism. He noticed, realized and expressed the harm the communist system did towards many people. During one of his presidential speeches he stated indirectly: “*Communism was a huge tragedy for millions*” (Wygraliśmy przyszłość, 2008: 466).

International strategy – integration with the Euro-Atlantic structures

The sphere of foreign policy was an important aspect of political activity of Aleksander Kwaśniewski. I will mention only pivotal issues which appeared in the political program of his presidency. Of course we can find more essential aspects of activity of Aleksander Kwaśniewski on the international scene. But it would require monograph rather than a modest article. From the historical point of view both issues are surely magnificent. While Aleksander Kwaśniewski was the president, the Republic of Poland became a member of NATO and the European Union. It was a historical paradox that the president derived from the post-communist formation integrated Poland with the West, introducing Poland to the Euro-Atlantic structures. Paradox seems to be higher due to the post-communist party that Aleksander Kwaśniewski co-created is one of the most pro-European political powers in Poland. Polish post-communists have been oriented for integration of Poland with Euro-Atlantic structures since the beginning of the Polish transformation. Initially they were skeptical about Polish membership in NATO but in the second half of the 90s they became proponents of accession to the military alliance. In 1995 Aleksander Kwaśniewski in the above mentioned interview expresses his conviction that “NATO is only one actual organized and efficient system of the security” [Kwaśniewski, 1995: 124]. He gave a positive to a question of journalist asking whether Poland should access the alliance by all means.

His international activity as the head of state was focused on convincing member states of NATO that Poland is an important link and actor of the European security system. He also tried to convince the Russian side that the integration of Poland with NATO is not directed against Russian and that it is not a threat for Russian interests. In 1996 during his speech before the Northern Atlantic Council he substantiated the Polish aspiration to be a member of NATO. He stated: *"It is not our intention to establish a new divisions in the European continent. Contrary, we want to overcome these ones which still exist. Enlargement of NATO will mean a wider area of security and stability in Europe. It will strengthen a democracy"* (Wygraliśmy przyszłość, 2008: 390). In parallel he promoted also the idea of integration of Poland with the European Union, seeing in organizations, i. e. in NATO and EU, a complex project for the Polish and European security as well as guarantee of development and democracy (Wygraliśmy przyszłość, 2008: 400-401). Both these aims were realized during presidency of Aleksander Kwaśniewski.

Aleksander Kwaśniewski saw Poland as an active member of NATO and the European Union being not only a beneficiary but a subject of integration process and acts implying from the treat mutual commitments. He expressed it strongly in the time of war of the USA and their allies against terrorism. During one conference dedicated to terrorism he presented his opinion: "Europe really is becoming a common continent where we all use from the security and development but also we are co-responsible for our fate and share a risk of fight against all kinds of danger" (Kwaśniewski, 2002). Although the decisions made commonly by the president and Polish government were and still are controversial, we can notice that they were a consequent realization of a strategic vision.

It is worth mentioning something else. Aleksander Kwaśniewski saw Polish efforts to be a member of NATO and the European Union in the wider geopolitical context. His vision of integration did not finish in Poland and countries culturally linked with the West. Before Poland became a member of NATO and the European Union he assumed the possibility of enlargement of both organizations by other countries. Some of them as Bulgaria and Romania became full-fledged members of NATO and the European Union. But in 1997 Aleksander Kwaśniewski was sure that the inclusion of Ukraine, if the Ukrainian people express a will, to the orbit of the Euro-Atlantic structures, will increase and improve European security. That is why he declared a support of efforts of "the neighbours of Poland" (Wygraliśmy przyszłość, 2008: 410-411). These words are taking a new and proper meaning in the face of events which currently happen in

Ukraine. We can treat these words as a proof of political maturity and understanding of international politics. The ability of predication is a desirable but unfortunately also deficient feature of politicians.

Conclusions

Aleksander Kwaśniewski belongs to the most important contemporary Polish politicians. We cannot overemphasize his influence on the shape of the Polish political system and Polish political culture as well as on geopolitical situation of contemporary Poland. Obviously he was not a man without faults. He did not avoid mistakes and wrong decisions but we can look appreciatively at his constant achievements. I was wondering where we should search his success. I think that his personality is a key to understanding. Vaclav Havel, the former president of the Czech Republic and great Central European intellectualist, stated that the features of the character of Aleksander Kwaśniewski were one of the reasons why he memorialized him. Havel mentioned his gaiety and openness which helped in the public life as well as in international politics and diplomacy (*Wygraliśmy przyszłość*, 2008: 22). Aleksander Kwaśniewski was not and he is still not a type of ideologist, closed in his own claustrophobic world, isolated from the real world and its problems. This attitude is possibly a characteristic for revolutionists, destructors, but not for people who want to gain aims in peaceful and conciliatory way. It needs rather moderation and pragmatism which Aleksander Kwaśniewski did have. Thinking how I could define his political attitude I acknowledged that the most adequate will be the term *anti-ideological pragmatism*. However, he is not a person who could be recognized as devoid of ideals. During his presidency he clearly defined political orientation. But he was sure that his activity should be guided by realism, not ideology. And in this attitude we find his successes in internal and international politics.

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PRESIDENTIAL POWER AND AUTHORITY IN THE SLOVAK REPUBLIC ACCORDED BY THE SLOVAK CONSTITUTIONAL COURT

Ladislav Orosz

Abstract

In the introductory part of this contribution the author outlines the position and functions of the constitutional courts in modern democratic states of law with particular accent to constitutional-political influence of their competency to give authoritative interpretation of the Constitution. On such a basis the author further seeks to answer the question set out in the topic of his contribution through the analysis of three selected decisions of the Constitutional Court of the Slovak Republic concerning the constitutional statutes of the President of Slovak Republic [Decision of the Constitutional Court No. I. ÚS 39/93 from 2nd of June 1993 (recall of members of Government on the proposal of Prime Minister), Decision of the Constitutional Court No. PL. ÚS 14/2006 from 23rd of September 2009 (recall of vice-governor of National Bank of Slovakia), Decision No. PL. ÚS 4/2012 from 24th of October 2012 (recall of General Prosecutor)] and their constitutional-political consequences.

Key words:

Constitution of Slovak Republic. President of Slovak Republic. Constitutional Court of Slovak Republic.

Introduction

After World War II there was a movement in constitutional-political models of modern states which manifested a tendency to strengthen significantly judicial branch in system of the highest constitutional bodies and “judicialisation” of public life (see Smekal, 2013: 12 et seq.). Nowadays, judicial authorities make decisions on any number of disputes which the solution of which until recently was reserved for politics or the subject to political rules. The causes of this phenomenon have to be accredited to the increased authority of national constitutions as well as to crucial changes of their nature – coming from merely confirming documents to the fundamental rules containing applicable law and also to stronger guarantees of fundamental rights and freedoms to the shaping rule of law as basis for order of effective revision process, i.e. judicial review of state’s action, whereby where there is a law there could also be conflict regarding the law and it is the primary role of courts to provide for dispute resolution (Kysela, 2007: 132).

On the European continent there are indications of constitutional jurisdiction taking off in an unprecedented boom, this area exists mainly in the form of specialized and concentrated model of constitutional review that also applies to the Slovak Republic. In addition the Constitution of the Slovak Republic (hereinafter “the Constitution”) in its original wording enshrined an extremely strong status of the Constitutional Court of Slovak Republic (hereinafter “the Constitutional Court”) that furthermore strengthened significantly (Gajdošíková et alia, 2008: 223 et seq.). The Constitutional Court is equipped with a full range of powers enabling constitutional-legal review of conflicts between the highest constitutional authorities. Particularly, it is necessary to point out its power to interpret the constitution and constitutional laws that is pursuant to Article 128 of Constitution generally binding and for that reason it puts a final touch to constitutional regulation.

In the last quarter of a century one of the dominant spheres, in which the court in the exercise of its powers in relation to resolving constitutional-political conflicts entered into, was the constitutional role of the President and his relations to other constitutional authorities, and particularly in the mid 1990’s in response to a deepening conflict between then President M. Kováč and then Prime Minister V. Mečiar (Orosz, Šimuničová, 1998: 127 et seq.) and subsequently in the last decade, particularly in relation to resolving some conflicts arising between President I. Gašparovič, and the government coalition acting during the period between 2002 and 2006 (government of M. Dzurinda) and subsequently during the period between 2010 and 2012 (government of I. Radičová). The situation noted above was caused not only by frequent occurrence of conflicts arising between the President and other constitutional authorities, but also by conceptual shortcomings of original wording of Constitution regulated the status of President. When deciding on constitutional status of the President within the legal framework set out it was clearly demonstrated that Constitution-makers were short of knowledge on functioning of modern democratic states particularly in crisis situations such as (constitutional and governmental crisis, or conflicts between constitutional authorities).

Weaknesses of the original constitutional wording were in the following period corrected by adopting constitutional changes (some of those changes in my opinion did not turn out well), as well as by making decisions of the Constitutional Court related to the interpretation of constitutional norms, bearing in mind that such decisions even generally binding cannot be exempted from critical evaluation. In this context we

cannot ignore the fact that the Constitutional Court is in the Constitution characterized as an independent judicial body set out to protect the Constitution (Article 124 of the Constitution), but at the same time, it is an integral part of the socio-political environment in which constitutional political conflicts arise, and also for that reason it is illusion to believe that such judicial body is absolutely immune to such an environment (although it should undoubtedly be).

In recent decades, a large group of political scientists, constitutionalists, and political commentators has engaged in discussion on whether the Slovak President has within the structure of supreme constitutional authorities a weak or strong position, however no one has come up with a clear and generally accepted answer to this question. The dominant opinion, mainly that of politicians, as well as of political commentators (obviously incorrect in my personal opinion) tends to characterise the Slovak President as weak and that is probably also due to the assessment lacking the importance of case law of the Constitutional Court.

Following my findings I formulate through the analysis of three selected decisions of Constitutional Court related to powers of the President also key objective of my contribution, that is to find out what impact those decisions on interpretation of Constitution have, or may have for real constitutional status of President, or whether they are able to modify significantly such status.

1 Right or Obligation of the President to Recall a Member of Government on the Proposal of Prime minister

The first of the decisions worth analysing is the Decision of the Constitutional Court No. PL. I. ÚS 39/93 from June 2nd of 1993 responding to a motion of then President M. Kováč regarding the interpretation of Article 116 § 4 of the Constitution of Slovak Republic. President M. Kováč submitted the motion related to the dispute on whether the President is obliged to comply with the proposal of the Prime Minister to recall a member of government (then Prime Minister Mečiar submitted a proposal to the President for the removal of M. Kňazko from government). The Constitutional Court in the operative part of decision noted that, *"Article 116 § 4 Constitution of the Slovak Republic does not entail any obligation to the President of the Slovak Republic to recall any member of government on the proposal of the prime minister."*

In its reasoning the Constitutional Court also pointed out that if the Prime Minister submits to the President a proposal for removal of member

of government, then *“the President of the Slovak Republic shall be obliged to deal with such proposal. Such obligation shall be fulfilled once the President of Slovak Republic decides on acceptance or refusal of such proposal.”* From the view of the issue discussed in this contribution there is another important legal opinion expressed in the resolution. The Constitutional Court also noted, that...*“even though the government...is the supreme body of the executive power (Article 108), the constitutional role of the President of the Slovak Republic is in fact prevalent against the constitutional status of the government. Without the will and direct rule of the President membership in the government can neither be formed nor dissolve following the relationship between President and government.”*

From that statement it is shown that the Constitutional Court in its decision highlighted the dominance of the President in relation to Prime Minister explicitly during creation of government, however from this decision can be implicitly drawn also the Presidential dominance in the exercise of his other competences, which shall be carried out in cooperation with the government, or individual members of the government.

The Constitutional Court in its decision pointed towards understanding the President as at least medium-strong that is not typical for classical parliamentarianism. At the moment it's not worth arguing about whether the dispute could be assessed by the Constitutional Court differently taking into account more broader grammatical and systematic interpretation in its decision-making, especially the whole conception of Title VI of the Constitution (executive power) and mainly with all due respect to the creation of government, which was in accordance with the original wording of Constitution characterised as „Supreme Executive Power Authority (Article 108)“. More importantly nowadays is the question, whether the resolution of the Constitutional Court on the interpretation of Article 116 § 4 of the Constitution has become obsolete due to further development of the political and constitutional system. The part of the second amendment of the Slovak Constitution executed by Constitutional Act N. 9/1999 Coll. (this amendment introduced the direct election of a President by citizens) was also the change of Article 111 of the Constitution of which the original text states *“On the recommendation of the Prime Minister the President of Slovak Republic appoints and dismisses other members of the government“*...In relation to this constitutional change, the relevant part of explanatory memorandum to a draft amendment to the Constitution (parliamentary text No. 58) states that *„The proposed text of regulation emphasizes constitutional relations*

between the President and the Prime Minister and reacts also to reasoning of resolution of the Constitutional Court of the Slovak Republic No. PL. ÚS 39/93 from June 2nd 1993. The provision declares the right of the Prime Minister to submit to the President the proposal for appointment of members of government and the obligation of the President to respect such proposals of the Prime Minister."

From the above analysed a reasonable conclusion can be drawn that the constitution-makers overcame (or broke) the resolution of the Constitutional Court No. PL. I. ÚS 39/93. But it should also be noted that in reasoning part of the resolution of the Constitutional Court No. PL. I. US 39/93 following legal opinion can be found this, *In light of the motion to provide for the interpretation of Article 116 § 4 provision of Article 111 is irrelevant as this provision relates to original creation of government as a whole body ... The subject-matter of conflict relates only to the content of provision of Article 116 § 4..."* As stated above it may be presumed that constitution-makers outlined in explanatory memorandum to draft amendment to Constitution (parliamentary text No. 58) explicitly their intention to overcome the resolution of the Constitutional Court No. I. US 39/93 however they did not, reflecting such intention in the constitutional text and thus they left uncertain the question on whether the President must or must not accept the proposals of the Prime Minister for the appointment and the removal of other members of the government (!).

The statement of the Constitutional Court itself, on the question of whether amendments to the Slovak Constitution made in accordance with the Constitutional Act No. 9/1999 Coll. "broke" analysed legal opinion expressed in the resolution No. I. ÚS 39/93 indicates legal opinion expressed (although in other contexts) in reasoning of Resolution No. PL. ÚS 14/06-38 from September 23rd, 2009 (hereinafter "resolution PL. ÚS 14/06"), according to which *"... conclusion of Constitutional Court on „in fact the dominant“ position of the President within the government (resolution of the Constitutional Court No. PL. I. ÚS 39/93),... however, was associated only with his power to create a government under the legal regulation in force before the Constitutional Act No. 90/2001 Coll took into effect."*

2 Obligation to Verify of the President in the Performance of his Power to Appoint

Another resolution of the Slovak Constitutional Court regarding the interpretation of provisions in the Constitution under Article 128 of the

Constitution, relating to the President, and his power is resolution No. PL. ÚS 14/06-38 from September 23rd 2009, on the basis of the government motion, the Constitutional Court has given the interpretation of Article 102 § 1 (h) Constitution with regard to the dispute on appointment of a Deputy Vice-Governor of the National Bank of Slovakia (hereinafter " vice-governor"). Dispute arose in the context of the fact that President I. Gašparovič refused to appoint a candidate for the Office of Vice-Governor proposed by the government and approved by a National Council, for reason that he did not meet the requirements provided for the performance of his position (in particular according to the conclusions made by the President where he found that the Vice-Governor nominee did not fulfill by law the established requirement of professional practice).

The government sought within its motion following interpretation of the relevant provision of the Constitution *"According to Article 102 (h) Constitution of the Slovak Republic the President of the Slovak Republic is to oblige to appoint a Vice- Governor of the National Bank of Slovakia on the proposal of the Slovak government, approved by National Council of the Slovak Republic. The President of the Slovak Republic shall be entitled to examine whether the proposal which was submitted followed the procedure expected and set out by generally binding legal regulations; however, there is no right to examine the content of this proposal."*

The Constitutional Court did not identify itself with the opinion of the government and gave the following interpretation of the Article 102 § 1 (h) Constitution: *"The President of the Slovak Republic assesses in exercising his power under Article 102 § 1 (h) sentence before a semicolon of the Constitution, whether a candidate for the Vice- Governor of the National Bank of Slovakia proposed by the government and agreed upon by National Council pursuant to Article 7 § 2 of the Act No. 566/1992 Coll. about the National Bank of Slovakia as further amended qualifies for appointment to this function pursuant to Article 7 § 4 of this act. In the case that he comes to the conclusion, that the designated candidate does not meet satisfactory requirements, the President will fail to satisfy the proposal of government."*

From previous statements it is shown that despite the fact that the prerequisites for appointment of the Vice-Governor were already examined by the Government - who made the proposal and the National Council- who provided the approval of such a proposal, the President of the Slovak Republic, as a body finalising the appointment process, of taking up the Office of Vice-Governor by issuing the appointment act is not only legitimate, but also obliged to assess whether the proposed candidate meets the conditions laid down by the law, and only on this basis he can or

cannot comply with the proposal of the government, i.e. in relation to the legal conditions set out for the appointment to public office the President always has an obligation to verify.

From legal opinions voiced in reasoning part of the resolution in context of the aim pursued by this contribution I think it is necessary to point out first of all, the legal opinion of the Constitutional Court according to which: *"...in relation to the powers of the President it cannot be generally drawn their notarial nature, their nature is not affected even by principle of parliamentary form of democracy invoked by the government itself."* The stated legal opinion seems to suggest that the Constitutional Court respects the President, in general in the exercise of his power enjoys a certain margin of discretion, as confirmed by another legal opinion drawn from the reasoning of relevant resolution, according to which: *"the margin of political discretion of President within his power to appoint may include assessment and judgment of legal conditions set out for exercising particular office, however, according to the Constitutional Court, such an assessment is not dependent to political discretion."* The above cited also shows that the Constitutional Court of the Slovak Republic already in the resolution PL. ÚS 14/06 clearly distinguished in the context of the exercise of power of the President to appoint between political deliberation [discretion, (deciding upon one's own judgment)] and assessment of fulfillment of the legal conditions (verification function).

I felt the need to point out the quoted part of reasoning of resolution No. PL. ÚS 14/06-38 from September 23 rd 2009 the first of all due to the adoption of resolution No. PL. ÚS 4/2012-77 from October 24, 2012 (hereinafter „resolution PL. ÚS 4/2012“) concerning the power of the President to appoint the General Prosecutor (see below), in which the Constitutional Court was unjustly accused not only by politicians and publishers, but also by renowned constitutional lawyers that it failed to respect its own case-law. On the other hand, it is necessary to point out the another legal opinion stated in the resolution PL. ÚS 14/06, according to which: *"the authorisation to assess compliance with the legal conditions cannot be equated with arbitrariness and confused with political candidacy assessment."* Cited legal opinion is not of an unimportant meaning as it implied the limits of discretion of the President in the performance of his competence to appoint, further dealt with by Constitutional Court in its resolution PL. ÚS 4/2012.

3 The Limits of Discretion of the President in Performance of his Powers to Appoint

The proceedings before the Constitutional Court No. PL. ÚS 4/2012 was initiated by a group of members of the National Council (at the time of filing the action, coalition members) in connection with the act of then President Ivan Gašparovič by which he with the significant delay from the time when the candidate for office of the General Prosecutor J. Čentěš was elected by the National Council (June 17th 2011) but had not been decided on the appointment of such candidate for the Office of General Prosecutor. Certain parliamentary members pushed for following interpretation of Article 102 § 1 (t) and Article 150 of Slovak Constitution, which provides the power of the President to appoint the general prosecutor *“The President of the Slovak Republic in exercising its powers under Article 102 §1 (t) in conjunction with Article 150 Constitution of the Slovak Republic shall without undue delay decide about proposals of the National Council of the Slovak Republic for the appointment of a candidate into office of the general prosecutor. When deciding on this proposal it is compulsory for the President of the Slovak Republic to assess and justify, whether the designated candidate for appointment to the office of the prosecutor fulfills the criteria for appointment to this function, provided for by the legislation and in accordance with the legislation, and that it has been a candidate for appointment to office of the prosecutor selected in accordance with the provisions of the legislation which govern this choice.”*

From the statement cited above it is shown that a certain members of parliament were of the opinion that the President does not have the right of discretion in exercising his powers in appointing the general prosecutor, that is to say, that his power has only notarial nature and shall be limited to an assessment of whether a candidate elected by the National Council meets the conditions laid down by the law and that the candidate has been selected in accordance with the law.

The Slovak Constitutional Court did not identify with those certain members of parliament and made in the resolution No. PL. ÚS 4/2012-77 from October 24th 2012 the following interpretation of provisions of the Constitution: *“The President of the Slovak Republic is obliged to deal with the proposal of the National Council of the Slovak Republic for the appointment of the general prosecutor of the Slovak Republic under Article 150 Constitution of the Slovak Republic, and if he was elected in accordance with the law and legal procedure, within a reasonable time either to appoint*

the proposed candidate, or to notify the National Council of the Slovak Republic, that this candidate will not receive the nomination.

Reasons not to appoint a candidate can only be justified for the reason that the candidate does not meet statutory requirements for appointment, or because of a serious matter relating to candidates, which reasonably calls into question his ability to carry out function and responsibility in the way which doesn't lower the standards or credibility of the constitutional functions or the whole body, in which the chosen candidate is to be a leading person, leading figure, or in a manner which is not in contradiction with the mission of the authority, if as a result of this fact, it can be disturbed proper functioning of constitutional authorities (Article 101 § 1, second sentence of Constitution of the Slovak Republic).

The President shall give the reasons for not appointing the candidate and those must not be arbitrary."

In the reasoning of the resolution cited above the Constitutional Court pointed out the differences between proceedings No. PL. ÚS 4/2012 and No. PL. ÚS 4/06, when it said: *"The possibility of refusal to comply with proposal to appoint and possibility to ask for candidate different from one designated by the National Council on grounds that he/she does not meet the statutory requirements for the performance of his/her duties, are not contested in this proceeding as stated by the Constitutional Court in its previous case law in relation to the interpretation of Article 102 §1 (h) Constitution (PL. ÚS 14/06) ..."*

The Constitutional Court has evolved the right of the President to discern the first of all from his/her direct legitimacy arising from the way the President takes up his/her office, stating that *"powers of the President are similarly as powers of the National Council regulated by the Constitution and his/her legitimacy is derived from constitutional provisions and from his/her mandate follow from democratic election. Moreover, since the constitutional Act No. 9/1999 Coll. came into effect (starting from 1999 the election of the President is direct) the President as well as Members of the National Council are elected directly by people."* The Constitutional Court ruled that the change of legal regulation governed the election of the President (from the Parliament election to direct one) *"had the effect of reinforcing his/her democratic legitimacy ... although this change didn't itself cause strengthening his/her powers. In fact considering the nature of relevant issue such change is not capable of justification of restrictive interpretation of powers of President."*

Limits of discretion by the President for the appointment of the General Prosecutor were concluded by the Constitutional Court also from the

status of prosecution authorities under the structure of public authorities and their tasks, the court itself stated that *"in order to secure ... impartial status of public prosecutor's office, that is a prerequisite for its proper functioning, the Constitution makers entrusted more constitutional bodies with the choice of the General Prosecutor assuring thus democratic legitimacy of candidate selected for the performance of such office."* In the just mentioned context, another legal opinion distinguishing the function of the National Council and the President in process of establishing the office of the General Prosecutor expressed in reasoning of resolution of Constitutional Court No. PL. ÚS 4/2012 needs to be noted. The Constitutional Court in this context, stated: *"... While the choice of candidate for the appointment of the General Prosecutor from all persons nominated belongs to the National Council, which decides on candidate for the office of General Prosecutor by election from the candidates nominated by members of the National Council, the President, in exercising his/her function, expresses his/her opinion to particular person chosen. The purpose of his/her discretion therefore does not lie in selecting a candidate from all persons that comply with statutory requirements, but in assessing the suitability of person selected for taking up the office, execution of such discretion has to correspond to the fundamental responsibility of the President that is to ensure proper functioning of constitutional authorities."*

Even that the "shift" in the generally binding interpretation of power of the President of the Slovak Republic to appoint undoubtedly arose from the resolution of the Constitutional Court No. PL. ÚS 4/2012, it can be concluded on the basis of an analysis of dissenting opinions of judges the court to this decision (besides the joint dissenting opinion of author of this contribution and judge Ján Luby, see also dissenting opinion of Judge Lajos Mészáros and "opposite" dissenting opinion of Judge Iveta Macejková), that the subject key debate in the plenary session of the Constitutional Court was not so much the question of whether the President had absolutely free (political say) discretion in exercising his/her power to appoint the General Prosecutor (only dissenting opinion of judge Ľudmila Gajdošíková shows opposite), but the question of the scope (limits) of such discretion.

The fact that the discretion of President in the exercise of his/her power to appoint is in significant way limited confirms wording of paragraphs 2 and 3 above cited interpretation of the Constitution given by the Constitutional Court. The Court in the reasoning of the analysed resolution commenting on the limits of Presidential discretion inter alia stated *"The scope of his/her discretion, although exceeds an assessment of*

whether a candidate, who was proposed to the President by the National Council, meets the conditions stipulated by law, any other reasons, for which the President would decide not to appoint the candidate proposed must comply with his/her obligation to ensure proper functioning of constitutional authorities” and “... may not be arbitrary as the ban on arbitrariness is one of the principle of Rule of Law (PL. ÚS 52/99, PL. ÚS 49/03, PL. Constitutional Court 1/04, PL ÚS 12/05).”

Particularly extremely essential is the fact that the Constitutional Court has created in resolution PL. ÚS 4/2012 real space for the public, as well as judicial control, on whether the Slovak President in real legal-political practice respects the limits of discretion by prescribing his/her duties “*at least briefly disclose his/her reasons lead to the conclusion. Obligation to disclose the reasons for not appointing the candidate for the office of General Prosecutor”* justified by court by requirements of “*transparency of execution of state power, or principle of public reviewing of execution of state power by citizens, from which this power is derived (Article 2 § 1 Constitution)*” The Constitutional Court also points out that this principle is considered as an integral part of the general principle of democratic and rule of law within the meaning of Article 1 §1 Constitution.”

Even though in the dissenting opinion I have presented my disapproval to the scope of discretion that the majority of the plenary session of the Constitutional Court in resolution PL. ÚS 4/2012 provided for the President for the performance of his/her power to appoint and, therefore, I would not have a more fundamental reason for its defence, it seems desirable to respond to the criticism of the cited resolution. This criticism showed up immediately after the Court’s resolution on the interpretation of the Constitution was publicised and especially after President I. Gašparovič on December 28th 2012 decided not to appoint as candidate from the National Council, Jozef Čentéš to the office of General Prosecutor. The President decided after the resolution of Court No. PL. ÚS 4/2012 was published in the Collection of Laws of the Slovak Republic (on 15th of December 2012) generally binding, i.e. it was the decision that could be used by the President with regard to his scope of discretion provided for him by the Constitutional Court while executing his power to appoint.

Even the resolution PL. ÚS 4/2012 of the Constitutional Court can be assessed as an additional movement of the Constitutional system of the Slovak Republic to a strong President, in terms of his/her real power will essentially be observed in how the Constitutional Court itself will honour its own decisions. At the present time the court is already dealing with the task of deciding on complaints of several complainants, who objected

(among other things) the breach of their fundamental right to access to public office under the same conditions as referred to in Article 30 § 4 Constitution on the basis of decisions by former President I. Gašparovič (complaint of Čentéš will be probably decided at the time of publishing of this paper), as well as by the incumbent President A. Kiska (complaints of the National Council elected candidates to the office of judges of the Constitutional Court that incumbent President refused to appoint); in the complaints Presidential decisions issued during the time that the resolution PL. ÚS 4/2012 Constitutional Court already obliged Presidents to be questioned. It is not necessary to specifically emphasize that, if the Constitutional Court would admit extensive (and tolerant) interpretation of reasons, for which the President does not have to appoint a candidate for public office contained in the resolution PL. ÚS 4/2012, this could lead to a further expansion of authority of the Office of the Slovak President, which could eventually represent an intervention in value based principles of the Slovak Constitution.

Conclusion

On the basis of the statements mentioned above, it is necessary to try to answer the question raised in the title of this paper. If the answer to this question be brief, it would be “Yes, the President of the Slovak Republic has a strong position thanks to the Constitutional Court of the Slovak Republic, though in no way due mainly to the Court.”

If I had to analyse the answer in greater detail, I would emphasize that first of all, the President of the Slovak Republic has a strong position thanks to the constitutional regulation offering him relatively generous space for autonomous decision-making, contrary to constitutional regulation in other states based on recent parliamentary models of government, most of his decisions are not to be countersigned by chairman of the National Council, or by other members of the government. A high level of autonomy in the exercise of the powers of the President of the Slovak Republic is, moreover legitimized by the way in which he is established by direct election by citizens of Slovak Republic. It should also be underlined that the real strengths of each (and also the Slovak) President in a particular historical time and in the particular state is always significantly determined by force of personality, their authority, and in general respect, and also to a large extent by his (political) relationship to a dominant political group, or perhaps more precisely by

what the dominant political group tolerates, or lets him do, or in what he is "motivated."

Nothing special is in the fact that the Constitutional Court of the Slovak Republic contributes to constitutionally relevant ways to determination (the precise) position of Slovak President. Taking into account the principles expressed in the introductory part of this paper it can be argued that, from a global perspective this is the standard phenomenon (Smekal, 2013: 16) and, in addition also the execution of his constitutional functions deduced from Article 124 Constitution of the Slovak Republic (the Constitutional Court of the Slovak Republic is an independent judicial body for the protection of constitutionality). Only upon the basis of the above assumptions we may then analyse how and to what extent the decisions of the Constitutional Court of the Slovak Republic impact in a particular socio-political reality of the Slovak Republic in strengthening the real constitutional-political position of the decisions made by the President of the Slovak Republic. Even though at present time I perform the duties of a Judge of the Slovak Constitutional Court and thus my right to introduce the court's decision is limited I have tried, in this paper to bring closer three of the decisions of the Constitutional Court concerning the constitutional role of the President, which can be illustrated by the Constitutional Court of the Slovak Republic through its case law an insignificant contribution to gradually rising power scales of the President of the Slovak Republic in the structure of constitutional authority. This is a clear trend, which, in my opinion, although it does not call into question value foundations for the Slovak Constitution, but may from this point of view, cause some concern and therefore case law of Constitutional Court should be subjected to the most objective legal evaluation.

Under the democratic rule of law judicial decisions are respected, this does not mean, however, that they are exempted from criticism. Criticism is desirable, therefore no constitutional authority (not even Constitutional Court) can be regarded as infallible, and not just because such authority is a part of controversial social environment in which it operates and is not (and probably couldn't be) completely immune. In addition all criticism, aimed at judicial decisions may bring its reward or change to resolution and this is mainly in the form of self-reflection of judges and, possibly, relevant valuation and breaking previous case-law.

One of the major risks associated with judicial decision-making in political disputes is high judicial activism, which is also why it is desirable to have in decision making clear (real-to-grip) boundaries. The former Vice-President of the Constitutional Court of E. Bárány tried to define such

boundaries, demonstrating the complexity relating to judicial interpretation constitution, when he mentioned “*a Judge of the Constitutional Court, when making decisions in controversial value related cases finds himself in a difficult situation. The Judge must choose what values shall apply, those that can be found in the wording of the Constitution, the ones he believes in, or those that prevail at the time of the decision in the society? ... The decision should be based on what he finds in the wording of the Constitution, in conjunction with his beliefs and values taking into account the values the society adheres to*” (Bárány, 2013: 115–116). The Constitutional Court itself has tried to set out the limits of its decision-making, just to illustrate I mention the legal opinion presented in this paper, resolution PL. ÚS 4/2012, according to which, “*the aim of the Constitutional Court is not to substitute decision of the legislators of the constitution expressed by provisions of the Constitution, but to interpret them.*” It is another question whether the quoted principle can be really maintained by Constitutional Court in different cases (!).

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JUDICIAL CONTROL OVER PRESIDENTIAL ACTS IN THE CZECH REPUBLIC

Zdeněk Koudelka

Abstract

The judicial review of acts by the President of the Czech Republic can be exercised by the Constitutional Court. It is not correct to issue judgments of a recommendatory nature. The President of the Republic is primarily a constitutional institution and not an administrative body. The President does not pass decisions in the administrative proceedings and it is a custom that he provides no statement of reasons for his/her decisions. A legal custom cannot replace a legal condition in establishing the competence of a state authority, which also concerns the entitlement to address proposals that have to be considered by the recipient.

Key words:

Judicial control. Constitutional Court. President of the Czech Republic. State authority.

Introduction

In the system of law, the President, or the Head of State in general, is traditionally perceived as an institute of Constitutional Law. However, everything is subject to changes and therefore the President became a subject of Administrative Law as well. Most recent case related to this issue is a dispute on not-appointing judicial candidates to the function of judges. The President refused to appoint the candidates markedly younger than 30 years of age, which is a statutory condition, while he did not use the statutory exception for the group of nominees from the ranks of judicial candidates, which was a possibility but not a necessity for the group of candidates from the ranks of judicial candidates. Other categories of lawyers were not granted a statutory exemption¹. The question is: Is the President an administrative body and are Presidential acts subject to a judicial review in the administrative judiciary proceedings? The Supreme

¹ Article 60, Section 1 of Act No 6/2002 Coll. on Courts of Justice and Judges, as altered by Act No.192/2003 Coll. and by Art.X of this Act.

Administrative Court² provided a positive response to this question, though its decision is not widely respected.

To establish the jurisdiction of the administrative judiciary, the Supreme Administrative Court had to subsume the President under the concept of an administrative body, because the Court is primarily determined to review the administrative bodies' individual legal acts. The Codes of Administrative Judicial Procedure provide that *courts of administrative justice decide on complaints against decisions made in the sphere of public administration by an executive authority, the autonomous unit of a local administrative authority, as well as by a natural person or legal entity or another authority if entrusted with decision-making about the rights and obligations of natural persons and legal entities in the sphere of public administration (hereinafter "administrative authority")*³. For the purposes of jurisdiction of the administrative judiciary, the definition of an administrative body is therefore determined by two aspects: first, it is primarily an Executive body (organizational point of view) and secondly, it has to be concerned with a review of actions in the public administration field, the sole condition of being an Executive authority is not sufficient.

1 The President and the Executive power

There are other theoretical concepts of classifying the position of the President in parliamentary democracy than those which classify the President as a part of the Executive power. Peter Kresák exempts the Head of State from its traditional ranking as the Executive power and specifies it - under the influence of Bagehot and Redslope - as a neutral power, which is not supposed to be regarded as a part of the Executive power, but as a specific unit of power which settles possible disputes between the Executive power (the Government) and the Legislative power (the Parliament). This concept invokes the neutral position of the Head of State also in the political sphere (see Kresák, 1996; Klíma, 2005; or Cibulka, 2008: 180). However, this is virtually incompatible with the nature of the

² The Supreme Administrative Court Decision N.605/2006 in the Collection of The Supreme Administrative Court Decisions (4Aps 3/2005) and Decision of 21.5.2008, 4Ans 9/2007-197.

³ Section 4 para. 1 let. a) of the Codes of Administrative Judicial Procedure N. 150/2002 Coll.

presidency. Being simply a non-party individual does not imply that the person in the Presidential post is politically neutral. Political neutrality is affordable for a monarch who is delegated to his/her office by mechanisms which are not associated with direct or indirect support of political parties. Also Václav Pavlíček argues that arguments classifying the President of a Republic as a part of the Executive power in order to consider his/her acts to be the acts of the Executive power lack legal ground. The lack of legal ground is concluded from a comparison of the Constitutional Charter of 1920, where the President is ranked as a part of the Executive power, with the Constitution of 9th May 1948, where the position of the President was regulated in a separate position. The position of the President is virtually the same under both documents (Pavlíček, 2008: 134). Nevertheless, the systematic placing of the President in both the Constitution of Bohemia, Moravia and Silesia and the Constitution of Slovak Republic in the head called "The Executive power" is evident. However, the notion of Executive power is not always the same.

Systematically, the position of the President is accommodated in one Chapter of the Constitution together with the Government - the Chapter called "The Executive power". The fact that the Head of State is a part of a branch of power, while the supreme body of this power is an organ different from the President (the Government), gives rise to a certain contradiction.⁴ Vladimír Zoubek deals with this contradiction by arguing that, in a narrow sense, the Executive power - the supreme body of which is the Government - consists of the Government, Ministries and other administrative bodies. The concept of the Executive power in a narrow and a larger sense seeks to join the theory of the Head of State as a neutral power with the systematic ranking of the President as a part of the Executive power. It leaves the President within the Executive power but emphasizes the distinction between the President and the rest of the Executive power (its Governmental branch). Therefore, the President is

⁴ Art. 54 para. 1 and Art. 67 para. 1 of the Constitution of the Czech Republic N. 1/1993 Coll. (hereinafter referred to as "The Constitution of Bohemia, Moravia and Silesia"). Art. 101 para. 1 and Art. 108 of the Constitution of the Slovak Republic N. 460/1992 Coll. (hereinafter referred to as "The Constitution of the SR"). In Slovakia, the Government was originally referred to in Art. 108 of The Constitution of the SR as the supreme body of the Executive power, until altered by the Constitutional Act N. 90/2001 Coll.

not a part of the Executive power in a narrow sense (Gerloch, Hřebejk, Zoubek, 1993: 107).

The Constitutional Court of the Slovak Republic characterized the relationship between the President and the Government as relatively dominant under a similar constitutional arrangement.⁵ As a result, the original characteristic of the Government in the Slovak Constitution has been changed from the “highest” Executive power body to the “supreme” Executive power body. In mountains, there are always several summits while one of them is the highest one. Similarly, the notion of the highest executive power body implies that all the other executive power bodies are subordinated to it, while the supreme body is important but at the same time there can exist other bodies which are not subordinated to it. There can be several supreme bodies. Similarly, there are three supreme bodies in the Judicial power: the Constitutional Court, the Supreme Court and the Supreme Administrative Court. Perhaps, one could claim that the Constitutional Court is the highest body because it has authority to abolish all other courts’ decisions (although it continually emphasizes, that it is not the fourth instance of the judicial proceedings). However, such a hierarchic relationship does not exist between the Supreme Court and the Supreme Administrative Court; they are both supreme Judicial power bodies.

The question is whether, with the concept of the Executive power in a narrow and a larger sense, the Executive power in the Codes of Administrative Judicial Procedure is to be perceived in a narrow or a larger sense as classified by the Constitution. Unfortunately, the Supreme Administrative Court judgment does not deal with this issue. Considering that it reviews an Act of the President, it may be implied that, while the Court does not provide arguments about theoretical concepts concerning the position of the President in parliamentary democracy (which would be suitable for a judgement reviewing an act of the President), it perceives the Executive power in the Codes of Administrative Judicial Procedure pursuant to the concept of the Executive power in a larger sense.

In the First Republic of Czechoslovakia, a dispute also existed concerning the possibility of considering acts of the President as administrative acts which are subject to a judicial review. Some believed

⁵ Resolution N. 5/93 of the Collection of Judgements and Resolutions of the Constitutional Court of 1993–1994 (Zbierka náleзов a usnesení Ústavného súdu), p. 30.

(Hoetzel, Weyr) that certain acts were subject to the Supreme Administrative Court's judicial review, while others opposed this idea (Sobota) (see Hoetzel, 1929: 34; Weyr, 1937: 191; Sobota and coll., 1934). The dispute was settled by the Supreme Administrative Court when it rejected a complaint against the decision of the President on early retirement as inadmissible (see Rychetský, 2008: 149). The legislator reacted by amending the law which allowed for the possibility of reviewing acts of the President. However, it provided that a legal action could not be taken directly against the President, as the President was represented by a competent Minister.⁶

2 The President and the Public Administration

The second condition required in order to establish the jurisdiction of the administrative judiciary is an activity in the field of public administration. Again, there is a variety of possible interpretations. It is necessary to emphasize that even though the President is an Executive body, his rights are not limited to this sphere only. Similarly, the Parliament, which is a Legislative body, has many competences which are not part of its legislative activity – e.g. establishing other State authorities (Government confidence vote, election and appointing into certain functions) or exerting control powers (supervision of usage of intelligence technology, the closing account of the State Budget). The well known organizational and functional methods of approach could be used in this respect. For example, from the organizational point of view, the community (municipality) authorities are the bodies of local self-government administrative units, while from the functional point of view they could be considered as state administration bodies (if they exercise the delegated powers of the community), or as self-government administration bodies (if they exercise separate powers of the community).

The President of the Republic does not act only as an executive power body but also as the Head of State.⁷ The concept of the Head of State includes exercise of all powers, or more precisely exercise of individual

⁶ Section 2 para. 2 of the Act N. 36/1875 of the Reich Law Establishing the Administrative Court altered by Act N. 164/1937 Coll.

⁷ Art. 54 para. 1 of the Constitution of the Czech Republic N. 1/1993 Coll., Art. 101 para. 1 of the Constitution of the SR N. 460/1992 Coll.

acts within these powers which are provided for in the Constitution and statutes. From the functional point of view, signing an act or using a suspensive veto is a part of the legislative process. In these cases the President does not act as an administrative body carrying out public administration but as a subject of the legislative process which is regulated by the Chapter of the Constitution dealing with the Legislative power. Similarly, the President's right to grant pardons and amnesties represent the powers of a Head of State, who has significant competences within the Judicial power as well. The 1920 Constitutional List explicitly subsumed these rights under the Judicial power.⁸ From the organizational point of view, the President is classified as an Executive power body. However, from the functional point of view, it is not possible to subsume all of the acts falling within his/her competence automatically into the sphere of public, or more precisely, state administration. While concerning certain competences this fact is not disputed, disputes will take place in relation to some other competencies.

The relationship of the President as the Commander in Chief of the Armed Forces and the Ministry of Defense, which is a central administrative body for state administration of the army, may serve as an example.⁹ The President is the Commander in Chief of the Armed Forces.¹⁰

⁸ Section 103 of the Constitutional List introduced by the Act N. 121/1920 Coll. Also F. Adler asserts that some of the President's rights fall within the legislative power while others fall within the Judicial or Executive power – see *Slovník veřejného práva československého* (Dictionary of the Czechoslovak Public Law), vol. III, Brno 1934, p. 543 et seq.

⁹ Section 16 of the Act on the Establishment of Ministries N. 2/1969 Coll.

¹⁰ Contemporary regulation which is in force in Bohemia, Moravia and Silesia provides the President, according to the Czechoslovak tradition, with the supreme command not only over the army, but over all the armed forces. Shortly after formation of the independent Czechoslovakia, the temporary constitution provided that the President was the Supreme Commander of the Army. This was altered by the Act N. 271/1919 Coll. as a position of the Supreme Commander of all Military Forces. This regulation was taken over into the Constitutional List of the 1920 which conferred to the President the right of the Supreme Command over all the military forces, which is a larger concept than the army. It was also taken over into the Constitution of the 9th May 1948. The Constitution of the 1960 used a new term "Supreme Commander of Armed Forces" instead of "Military Forces". This was virtually taken over also by the Czech and Slovak Constitution. Thus the Czech Constitution refused a limited concept of the Supreme Command only over the army, which was established in the Constitution of the Slovak Republic of the 1939. The relevant provision of

This results in a special relationship with the Minister of Defense, who has competence over the state administration of the Department of Defense but does not have the competences of the Supreme Commander. In practice, it is difficult to determine which particular acts are the administrative acts and which are the commander acts. Despite the variety of theoretical perspectives on the border between commander competence and administration of the armed forces (Šín, 1995: 8), if in doubt, it is necessary to give priority to the supreme commander's competence. This follows from the fact that the armed forces are built upon the concept of a single command and hierarchical obedience and disturbance of this principle threatens the armed forces' combat efficiency.

The acts of the President may be perceived not as public administration acts but as the constitutional acts of the Head of State also in the field of Executive power. Appointing or not appointing a judge is not an act of a mere state administration but a constitutive act of the Head of State concerning the personnel basis of the Judicial power.

3 Authoritative and Non-authoritative Administration

Moreover, in the field of public administration it is necessary to consider whether an act represents authoritative or non-authoritative administration. When performing the public administration, the State or other public law corporations act as legal persons and carry out common private law activities. The competence of the public administration is not subject to a review by the administrative judiciary, as its review falls within a jurisdiction of the civil judiciary. In this respect, a judgement of the Constitutional Court, which increased the number of disputable judgements on the judiciary, as it abolished the Supreme Court judgement

the Constitution employs the term "Supreme Commander of Armed Forces", so it is an independent individual function which is, pursuant to the Constitution, performed by the President on the basis of virilism. Pursuant to the Military Service Act, the armed forces consist of the army as its fundamental element, of the public armed corps, which are determined by the Government, and - in the time of emergency - also of the public security corps. Section 10 let. b) of the Act N. 37/1918 Coll. and its alteration by Act N. 271/1991 Coll. Section 64 para. 1 subpara. 10 of the Constitutional List. Section 38 para. 1 let. i) of the Constitution of the Slovak Republic 1939. Section 74 para. 1 subpara. 12 of the Constitution of the Czech Republic 1948. Art. 62 para. 1 subpara. 11 of the Constitution N. 100/1960 Coll. Art. 61 para. 1 let. k) of the Constitutional Act on the Czechoslovak Federation 1968. art. 102 let. j) of the Constitution of the Slovak Republic.

on the disciplinary procedure held against a public prosecutor, is relevant.¹¹

The Court held that the relationship between the public prosecutor and the State, including its termination, is an employment relationship, where both parties have an equal legal position. This was an important question, since the constitutional complaint against Supreme Court judgements was lodged by a district public prosecutor who had held the position of a disciplinary public prosecutor before.¹² The opinions of the Supreme Court and the Supreme Public Prosecutor's Office for the Constitutional Court provided that the disciplinary procedure has a public law nature and that the Chief Public prosecutor acts as a public authority body which is not entitled to lodge a constitutional complaint.¹³ Therefore the constitutional complaint should have been refused. However, the opinion of the Supreme Public Prosecutor's Office i.a. permitted for a potential interpretation that the relationship of the public prosecutor and the State is an employment relationship which can be terminated, i.a., by removing the public prosecutor from his office in the disciplinary procedure. In this case the Supreme Public Prosecutor does not act as a public authority. He/she acts as an employer on behalf of the State in the employment relationship. The State can lodge a constitutional complaint if it is in a position of legal person, including the position of employer, when it does not act from a position of power.¹⁴ The Constitutional Court identified itself with this opinion as it admitted the complaint.

The disciplinary procedure is also a part of an employment relationship, which is regulated in the Labour Code unless the Public

¹¹ Judgment N. 79/2006 of the Collection of Judgments and Resolutions of the Constitutional Court (I ÚS 182/05)

¹² District Public Prosecutor of Plzeň-město Antonie Zelená lodged a constitutional complaint as a disciplinary public prosecutor, despite the disputable legal opinions. Section 8 para. 3 let. d) of the Act on the Proceedings Concerning Judges and Prosecutors N. 7/2002 Coll.

¹³ On the impossibility of lodging the constitutional complaint by public authority bodies see Filip, Holländer, Šimíček, 2001: 297.

¹⁴ Resolution N. 24/2004 of the Collection of Judgments and Resolutions of the Constitutional Court (IV. ÚS 367/03). In this resolution the Constitutional Court admitted a constitutional complaint of the State, represented by the Ministry of Foreign Affairs, against the judgement concerning an immediate termination of employment relationship. However, the Court then refused the complaint for other reasons.

Prosecutor's Office Act does not provide for otherwise.¹⁵ However, it is necessary to accept that, specifically in relation to the disciplinary procedure, such interpretation is at least unexpected. In the employment law, elements of private law overlap the elements of public law while, especially in the case of public prosecutors and judges, the elements of public law in the private law employment relationship are strengthened. The disciplinary procedure, which has a nature of a punitive disciplinary procedure with adequate subsidiary use of the Codes of Criminal Procedure¹⁶, represents an element of public law. However, despite its public law characteristics, the Constitutional Court acknowledged the disciplinary procedure to be a part of a basic private law employment relationship, where the state acts as a legal person (not as an authoritative subject of the public authority) and has an equal legal position with the employee, which includes the benefit of protection by the Constitutional Court in constitutional complaint proceedings.

The Constitutional Court's decision implies that the relationship between the public prosecutor and the State is primarily an employment relationship. This relates to determining the substantive-law essence of an employment relationship, however, it has also procedural consequences relating to the courts' jurisdiction. Resolution of disputes related to employment relationships falls within a jurisdiction of the District Courts' Senates consisting of one judge and two lay judges who are elected by local councils (a labour-law senate),¹⁷ unless the law provides for a different jurisdiction, e.g. in the case of disciplinary procedure.

¹⁵ Section 18 para. 6 of the Public Prosecutor's Office Act.

¹⁶ Section 25 of the Act on the Proceedings Concerning Judges and Prosecutors.

¹⁷ Section 7 para. 1 and Section 36a para 1 of the Civil Procedure Act N. 99/1963 Coll. A similar approach was adopted by the Prague Metropolitan Court when, in the administrative judiciary, it rejected an action against a decision of the Ministry of Health in the case of removing the director of an institution receiving contributions from the State Budget from office by the Resolution N. 1007/2007 of the Collection of Resolutions of the Supreme Administrative Court (reference number 5Ca 139/2006-80). Therefore, the case concerning cancellation of the Minister of Justice's decision which removed the President of the District Court Praha-Západ from office on the 3rd February 2005 was decided in June 2005 also by the Prague Metropolitan Court which had no jurisdiction in the administrative judiciary. However, the Minister accepted the court's decision and has not used remedial measures.

The Constitutional Court's decision has interesting consequences for proceedings in cases concerning judges. The function of a judge is also performed within an employment relationship.¹⁸ The Labour Code and other labour-law legislation shall be applied adequately to the employment relationships of the judges.¹⁹ In contrast to public prosecutors, the Courts and Judges Act provides only an adequate use of a special labour-law legislation. However, this does not imply any change to the definition of their relationship with the State as a private law employment relationship with legal equality of the parties. Also the judges of the Constitutional Court perform their functions in an employment relationship which is regulated by the Labour Code, unless the Constitutional Court Act provides for otherwise. Moreover, in the case of judges of the Constitutional Court, the application of the Labour Code is not even reduced by the concept of adequacy.²⁰ If, according to the Constitutional Court, the disciplinary procedure which terminates the function of a public prosecutor or a judge is an act of labour law, then similarly the appointment of a judge or a public prosecutor is also an act of the labour law.

However, the Supreme Administrative Court, without any reference to the legal opinion of the Constitutional Court, derived its jurisdiction also over the disputes on the basis of an entitlement to sue, which is not necessarily linked to the existence of specified public substantive rights of the plaintiff, as it is sufficient, if it affects the legal sphere of the plaintiff, which, by itself is a vague concept. The Supreme Administrative Court repeatedly held an attitude which enables it to broaden the sphere of its jurisdiction almost unlimitedly.²¹ Therefore the Supreme Administrative Court's decision on not appointing the judicial candidates to the function of judges²² intervenes into the sphere of the labour courts, not the administrative courts. No employer, not even the State, is obliged to

¹⁸ Section 84 para. 1 of the Courts of Justice and Judges Act N. 6/2002 Coll.

¹⁹ Section 84 para. 4 of the Courts of Justice and Judges Act N. 6/2002 Coll.

²⁰ Section 10 of the Constitutional Court Act N. 182/1993 Coll.

²¹ The decision of 21. 5 2008 4 Ans 9/2007-197 was based on a Resolution of the Large Senate of the Supreme Administrative Court N. 906/2006 of the Collection of Resolutions of the Supreme Administrative Court (6A 25/2002).

²² Judgement of the Supreme Administrative Court 4 Aps 3/2005, 4 Aps 4/2005 and 4 Ans 9/2007.

employ someone only because he/she has an interest in acquiring certain function. Together with the judicial candidates, the legal conditions for being appointed to the function of a judge are met by thousands of public prosecutors, attorneys-at-law, articling attorneys-at-law, assistants of judges, assistants of public prosecutors or court distrainers, their candidates and articling clerks. The judicial candidates do not have a priority to be appointed to the position of a judge over the other lawyers who meet the statutory conditions for being appointed a judge.

When taking labour-law related decisions concerning judges, the President does not, according to the legal opinion of the Constitutional Court, act as an administrative body, but as an individual who in the position of an employee on behalf of the State as a legal person in an employment relationship. The employment relationship of the judges and the public prosecutors is more affected by elements of public law, which however do not change its labour-law essence. This could be qualified as being close to a service relationship, where the administrative courts have jurisdiction but only if the law explicitly provides for it.

However, such a concept, which represents a logical implication of the Constitutional Court's opinion, does not correspond with the Courts of Justice and Judges Act. The Courts of Justice and Judges Act provides for a subsidiary use of the Code of Administrative Procedure in the proceedings concerning a relocation of judges.²³ The Code of Administrative Procedure are used for the authoritative - not the private law - decision-making of the State. Therefore, if the law provides for the use of the Code of Administrative Procedure, it concerns the public law decisions of the State, but not the private law decisions. This approach served as a basis for the Chairperson of the Regional Court and a group of judges of the Ústí nad Labem Regional Court who, in 2006, disagreed with a relocation of a judge from the District Court to the Regional Court and asked the Supreme Prosecutor to bring an administrative action in public interest against the decision of the Minister of Justice concerning this relocation for representing a violation of law.²⁴ The decision was canceled by the new Minister of Justice.²⁵

²³ Section 73 para. 2 of the Courts of Justice and Judges Act.

²⁴ The Supreme Public Prosecutor's Office 1NZC 509/2006 and 1 NZC 510/2006.

²⁵ Decision of the Minister of Justice Jiří Pospíšil of the 7th November 2006 which, in a summary proceedings pursuant to Section 97 para. 3, Section 98 and Section 178 para. 2 of

The Constitutional Court's decision is even more surprising when applied analogically to judges and the acts of the President towards them. Appointing judges and selected judicial officers is regulated in the Constitution.²⁶ It is difficult to accept that when the Head of State carries out his/her constitutional competence, he/she does not act as a state authority body but as an individual acting on behalf of the employee.

4 Deciding on the Basis of a Proposal

The Supreme Administrative Court fabricated that, on the basis of a legal practice, a sort of proceedings is initiated by the delivery of a nomination to the function of a judge to the President. The President shall act without unreasonable delay, while the candidates have a legitimate expectation that a decision upon their nomination will be taken. Although the Court does not specify the type of proceedings, if it identified the President as an administrative body in order to establish its jurisdiction over the matter, presumably it meant the administrative proceedings. However, neither the Courts of Justice and Judges Act nor the Constitution provide that somebody nominates the candidates for the function of judges to the President. Unless it is explicitly regulated by law, it is certainly possible for anyone to address any kind of proposal to the President. However, from a legal point of view, such a proposal will only qualify as an inducement which the President may consider but is not obliged to do so. It will not qualify as a petition, which does not have to be admitted but must be considered.

The Supreme Administrative Court fabricated that the Government's proposal was addressed to the President on the basis of a custom. However, the Government has not discussed any nomination of the candidates for the function of judges. The constitutional practice solely provides that the Government discusses the candidates before their appointment and makes a recommendation for countersignature to the Prime Minister. It is a resolution of recommendation, as the

the Codes of Administrative Procedure N. 500/2004 Coll, cancelled the decision of the Minister of Justice Pavel Nĕmec of 28. 6. 2006 N. 321/2006-PERS-SO/3.

²⁶ Art. 62 let. e) and f) and art. 63 para 1 let. i), para. 2-4 of the Constitution N. 1/1993 Coll. For appointing and recalling the President and Vice-President of the Supreme Administrative Court applies Art. 63 para 2 of the Constitution.

countersignature is an individual right of the Prime Minister, not a collective right of the Government. This recommendation is addressed to the Prime Minister, not to the President (Bartoň, 2008: 120-125). The judicial candidate does not participate in the discussion in the Government. The candidate is not even provided with any official information on the matter. He/she can obtain information from the Government website like anybody else. Moreover, on their commencement of employment, the judicial candidates sign a declaration which provides that they acknowledge they have no legal entitlement to be appointed to the function of judges. Therefore, a successful passing of the judiciary examination cannot raise a legitimate expectation of a decree of appointment.

A constitutional practice may significantly broaden the text of legal regulations and the Constitution but it must not replace it. The custom is not a binding legal usage, in the case of which it is accepted that the latter legal custom supersede the former. The Constitution provides that the competence of administrative bodies is determined in legislation.²⁷ As regards to the petition, which obliges the administrative body which it is addressed to consider the petition at least, it is an exercise of the competence of the body that addresses the petition. Such an exercise of competence must have an explicit legal basis. For instance, anyone can address an inducement to the Supreme Public Prosecutor to bring an administrative action in public interest. Such inducement may be taken into consideration, however, it is not an obligation. It is only the Public Defender of Rights who is legally entitled to address this inducement. The Supreme Public Prosecutor is not obliged to admit this inducement, nevertheless, he/she is obliged to reason its rejection.²⁸ A custom cannot give raise to the existence of a Government body's competence which is not anticipated by the legislation or by the Constitution. A very different situation concerns the appointment of the Governor of the Czech National Bank by the President, where the Constitutional Court used a constitutional practice for interpreting the appointive power of the

²⁷ Art. 2 para. 2 and Art. 79 para. 1 of The Constitution of Bohemia, Moravia and Silesia. Art. 2 para 2 of The Constitution of the SR.

²⁸ Section 66 para. 2 of the Codes of Administrative Procedure N. 150/2002 Coll. Section 12 para. 7 of the Public Prosecutor's Office Act N. 283/1993 Coll. Section 22 para. 3 of the Public Defender of Rights Act N. 349/1999 Coll.

President²⁹. In that case, the constitutional right of the President to appoint members of the Bank Board of the Czech National Bank and the legal right of the President to appoint the Governor and the Vice-Governor of the Czech National Bank were not disputed. The constitutional practice only concerned the question of whether the latter right of the President is independent and subject to countersignature or whether it follows from the former right and is not subject to countersignature.

The Supreme Administrative Court further fabricated that, in the relationship between the President and the Government, the final decision belongs to the Government in the cases when the countersignature of the President's decision is required. However, the continuous practice indicates the opposite. The President has rejected a number of proposals which the Government and both Chambers of the Parliament are entitled to raise, e.g. inducement of the Government to remove a member of the Czech Securities Commission from office or nominations for State Decorations.³⁰ From the legal point of view, a proposal is an initiative of one subject towards another subject, while the addressed subject has the right to take a free decision on the proposal. If an initiative has to be admitted by the addressed subject, then it is not a proposal but an order. The President is not bound by any orders³¹, unless the Constitution explicitly provides for otherwise.³²

4.1. Instances of non-appointment by the President on the basis of a proposal

4.1.1. Appointment of a member of the Government

The President appoints and recalls the Prime Minister and other members of the Government, entrusts them with the direction of individual ministries and accepts their resignations. The President is obliged to recall the Government from office when it receives a non-confidence vote in the Chamber of Deputies of the Parliament or when its

²⁹ Judgement N. 285/2001 Coll.

³⁰ Section 8 of the State Decorations Act N. 285/2001 Coll.

³¹ Art. 101 para. 1 of The Constitution of the SR explicitly provides that the President is not bound by any orders.

³² Resolution of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic on the impossibility of performing the function of the President. Art. 66 of the Constitution of Bohemia, Moravia and Silesia.

proposal on confidence vote is dismissed. The non-confidence vote concerns only the collective responsibility of the Government, not a responsibility of its individual members. This differs from the Slovak legislative regulation which retained an individual responsibility of Ministers to the Parliament, which had been applied in the Czechoslovak Federation. It fully corresponded with the rule of Parliament, a system of government which was applied at that time.³³ The President is constitutionally free to appoint the Prime Minister while, of course, the political reality has to be taken into account. Other members of the Government can be appointed and authorized to manage the individual Ministries only on the basis of a proposal of the Prime Minister. However, decision on appointment is an act of the President and represents an expression of his/her will. Therefore he/she is entitled to dismiss the Prime Minister's proposal and require a new one (see Bárta, 2007: 141-142). The will of the President must not be absent, as he/she is legally responsible for appointing the Government and may be charged with treason. The legal responsibility exists only in relation to office holders who can use their will to influence the decision.

Contrary opinions,³⁴ which are based on an assertion that the President cannot dismiss the Prime Minister's proposal on appointing the Ministers, use arguments about the essence of parliamentary democracy. However, the parliamentary democracy as a form of Government is based on the fact that the Government is responsible to the Parliament but it is not a Committee of the Parliament. Constitutionally, its existence rests on two authorities – the Head of State (appointment) and the Parliament (vote of confidence). Both conditions have to be met in order to provide for a stable functioning of the Government, while for a short-term functioning an appointment by the Head of State is sufficient (e.g. in the cases of dissolving the Parliament or appointing a transitional Government). If the Government was dependent only on the Parliament and the Head of State could not express his/her will in appointing its members, then it would not be a parliamentary democracy but a rule of Parliament, where the

³³ Art. 116 para. 1 and 3 of the Constitution of the SR.

³⁴ For a contrary opinion, however not constitutionally reasoned, see Pehe, 1998: 2 and Pavlíček, 1998: 2. Formulation of the Art. 62 let. a) and Art. 68 para. 2 of the Constitution of Bohemia, Moravia and Silesia is different from Art. 74 which provides for an obligation to recall a member of Government on the basis of a proposal of the Prime Minister.

Parliament is a supreme body of the unified state authority, not only of the Legislative power. However, this system of Government, which was applied in Czechoslovakia in 1960-1962, mostly as a virtually one-party totalitarian system (1960-1989), was not adopted by the succession states of Czechoslovakia.

The attitude of the President, Václav Klaus in October 2005, when he conditioned the appointment of David Rath to the function of Minister of Health by his resignation on the function of the President of the Czech Medical Chamber and rejected the Prime Minister's proposal on his appointment until this step was taken, may serve as an example of a negative attitude to appointing a member of Government on the basis of a proposal by the Prime Minister. The President appointed Rath only on the 4th of November, 2005 after his condition had been met. In the meantime, the Vice-Chairman of the Government Zdeněk Škromach was authorized to temporarily manage the Ministry and he appointed Rath to the function of the First Deputy Minister of Health. In June 2004, the President Václav Klaus also rejected the proposal of Prime Minister Vladimír Špidla (Czech Social Democracy Party) on the appointment of Zdeněk Koudelka (Czech Social Democracy Party) to the position of Minister of Justice. He agreed with the proposal, however, due to worsening of the Prime Minister's position in his own political party, he decided to recall the act of appointment which had already been scheduled and decided to wait, as the resignation of the Prime Minister was expected. This took place within a few days. The President accepted it on the 1st of July, 2004 when a new Government of Stanislav Gross (Czech Social Democracy Party) was appointed. On the 4th of August 2004, the President authorized the Prime Minister in appoint, Špidla, to manage the Ministry of Justice.

It is a well-known fact, that in 1993 the Slovak President Michal Kováč refused to appoint Ivan Lexa (Movement for Democratic Slovakia) to the function of the Minister of Administration and Privatization of the National Property on the basis of a proposal of the Prime Minister Vladimír Mečiar (Movement for Democratic Slovakia).³⁵ The disapproval of the President was partly evaded after accepting the resignation of the former Minister,

³⁵ The President has not given reasons for the non-appointment: „Pán Lexa nespĺňa predpoklady na vykonávanie tejto funkcie a nemá ani moju osobnú dôveru“. (Mr. Lexa neither meets the conditions for performing this function nor enjoys my personal confidence) see Budování států, 1993a; Budování států, 1993b: 17.

Ľubomír Dolgoš (Movement for Democratic Slovakia), the President authorized Prime Minister Mečiar to manage the Ministry from the 22nd of June 1993. The Government appointed Lexa to the function of an Assistant Secretary of the Ministry and he was practically in charge of the Ministry until the Government fell in March 1994. The Slovak Constitutional Court in Košice provided that without an expression of the President's will, no formation or cessation of membership in the Government cannot take place, and that the President is obliged to consider the proposal of the Prime Minister but not to admit it.³⁶ In Bohemia, Moravia and Silesia, the Constitution obliges the President to admit a Prime Minister's proposal on removing a member of the Government from office.³⁷

In 1953 in the chancellor system of Germany, the President of the Federal Republic Theodor Heuss in 1953 also rejected the proposal of Chancellor Konrad Adenauer to appoint Thomas Dehler to the function of the Minister of Justice.³⁸ In Austria, the President Thomas Klestil refused to appoint some Ministers of the far-right Freedom Party who were nominated in 2000 by Chancellor Wolfgang Schüssel to his first coalition Government. However, this happened during preliminary consultations whereas Schüssel was aware of the controversy of his coalition partner, who was diplomatically boycotted by the EU. This was why Schüssel wanted to ensure an agreement with the President on the personal composition of the Government in advance.

³⁶ This decision settled a dispute between the President Michal Kováč and the Prime Minister V. Mečiar concerning removing the Minister of Foreign Affairs Milan Kňažko from office. In this situation, the Art. 116 para. 4 of the Constitution of the SR does not explicitly provide for an obligation to recall Ministers on the basis of a proposal of the Prime Minister in contrast with Art. 74 of the Constitution of Bohemia, Moravia and Silesia. This interpretation is applicable also today in relation to appointing members of the Government. Resolution N. 5/93 Zbierky nálezov a uznesení Ústavného súdu 1993-94 (of the Collection of Resolutions and Decisions of the Constitutional Court of the Slovak Republic of 1993-1994), p. 30.

³⁷ Art. 74 of the Constitution of Bohemia, Moravia and Silesia.

³⁸ T. Dealer (FDP) had nevertheless performed this function in the first Adenauer's Government in 1949-1953. The successor of President T. Heusse (1949-1959), President Heinrich Lübke (1959-1969) accepted the proposal of Konrad Adrenauer (CDU) on the appointment of members of the Government. However, he expressed his political distance from the proposed minister of nutrition, agriculture and forestry Werner Schwartz (CDU, 1959-1965) and minister of foreign affairs Gerhard Schröder (CDU, 1961-1966) (see Herzog, 1983)

4.1.2. Appointing other public officials

On the 13th of June 2006 Václav Havel refused a proposal of the Chamber of Deputies of the 25th of October 2002 on appointing both the President of the Supreme Audit Office, Lubomír Voleník, and its Vice-President František Brožík. The reasoning of the decision provided that the President wanted to receive proposals from the newly elected Chamber of Deputies (elections of the 14th -15th June 2002). Finally, Voleník was appointed whereas Brožík was not. If the President is allowed to dismiss a proposal of the Chamber of Deputies, then he is definitely allowed to dismiss a proposal of the Prime Minister, because in a parliamentary republic, the Prime Minister does not have a stronger position than the Parliament or its Chamber, to which the Government is responsible to. The President is even entitled to dismiss proposals on appointment or removing from office which are subject to his/her countersignature. This is demonstrated by President Václav Havel's refusal in March 2000 to remove a member of the Presidium of the Czech Securities Commission, Tomáš Ježek, from office on the basis of the Miloš Zeman Government's proposal.

The power of the President to dismiss the proposal is fully supported by the distinction of the legislative regulation on appointing and recalling the President of this (today already abolished) body and the President of the Czech Statistical Office and of the Office for the Protection of Competition. The Presidents of these bodies are appointed and removed from office by the President on the basis of a proposal of the Government, in contrast with the presidents of other central administrative bodies, who are appointed directly by the Government. The purpose of this distinction is to ensure more independence from the Government. The Government may have interest in a "modification" of unfavourable statistics or in influencing the control over its own public procurements by the Office for the Protection of Competition. If the President was to be a mere notary who stamps decisions of the Government, then an introduction of this difference in appointing and recalling the Presidents of central administrative bodies would not make any sense. There is no such difference between the representatives of central administrative bodies in Slovakia as all of them are appointed by the President.³⁹

³⁹ Art. 102. para 1 let. h) of the Constitution of SR.

On the 30th of January 2002, President Václav Havel refused (postponed ad infinitum) to appoint Peter Mikulecký to the function of the Rector of the Hradec Králové University. Mikulecký was nominated to this function by the Academic Senate of the University on the 25th October 2001. Havel refused to appoint him because of dubiousness concerning his lustration. Finally, Mikulecký gave up his nomination on the 11th March 2002.⁴⁰ This competence of the President of the Republic is subject to countersignature.⁴¹

It is irrefutable political fact that the Government has to reckon/count with the supposed negative reaction of the Head of State concerning a nomination for an appointment. The Slovak case of appointing Ivan Lexa to the function of the President of the Slovak Information Service. Lexa was first nominated by the Government to the function of the first President of this Service already in 1993. The then-President Michal Kováč refused this nomination and in April 1993 Vladimír Mitro was appointed the first President of the Slovak Information Service (*Budování států*, 1993c: 12-13). For the second time, the Prime Minister Vladimír Mečiar wanted to appoint Ivan Lexa to this function in 1995. A negative attitude of President Michal Kováč to the appointment of this person had been known before as he refused to appoint him to the function of the President of the Slovak Information Service and a Minister too. The Government therefore enforced an amendment to legislation. The right to appoint the President of Slovak Information Service was passed from the President to the Government, which was authorized to do so on the basis of the Prime Minister's proposal.⁴² This enabled the appointment of Ivan Lexa. It is also known that on the 6th of June 2006 the Slovak President Ivan Gašparovič refused to appoint Vladimír Tvarožka to the function of the Vice-Governor of the National Bank of Slovakia. Tvarožka was nominated by the

⁴⁰ Peter Mikulecký had a negative lustration certificate enacted in 1995; in 2002 the Ministry of Interior enacted a new lustration certificate which was positive. However, the first negative certificate has not been explicitly abolished.

⁴¹ Art. 63 para. 2 and 3 of the Constitution of Bohemia, Moravia and Silesia. Section 10 para. 2 of the Higher Education Act No. 111/1998 Coll.

⁴² Section 3 para. 2 of the Slovak Information Service Act No. 46/1993 Coll., in the wording of the Law No. 72/1995 Coll. By the law No. 256/1999, the power to appoint the executive manager was given back to the President of the Republic who makes the appointment on the basis of a Government's proposal.

Government with the consent of the National Council of the Slovak Republic.⁴³ The President reasoned his decision by asserting a lack of the required five-year financial practice as he did not acknowledge his function of an adviser of the Vice-Chairman of the Government for the Economic as an appropriate practical experience in the field. The government which did not agree with the decision of the President submitted a petition to the Constitutional court to interpret bindingly the intent in the Slovak Constitution. According to the government the President has to accept the draft of the parliament which was initiated by the government in parliamentary democracy. The President has only a notarial position – he verifies if the draft was enacted within a relevant procedure. The Constitutional court stated that the President can refuse a candidate who does not fulfill the conditions for the discharge of the vicegovernor's office in the National Bank of Slovakia.⁴⁴

The Hungarian President László Sólyom refused in June 2007 a Government's proposal to grant a State Decoration (Honor) to the former Prime Minister Gyulo Horn because of his participation in suppressing the 1956 uprising.⁴⁵ The President's attitude was confirmed by the Constitutional Court.⁴⁶

Concerning the appointment of Generals by the President on the basis of a proposal of the Government and with the countersignature of the Prime Minister, the case of the Chief of Police Vladimír Husák, who was nominated to be appointed the rank of Major-General, is relevant.⁴⁷ The police action against a 1st of May demonstration had been criticized before the appointment scheduled on the 8th of May 2006 and the President

⁴³ Section 7 para. 2 of the the Slovak National Bank Act No. 566/1992 Coll.

⁴⁴ Resolution of the Constitutional Court of Slovakia of the 23 rd September 2009, Pl.ÚS 14/06-38.

⁴⁵ Horn's older brother was killed by the rebels and in the interview for a German magazine Horn described his participation in the anti-Soviet militia as a defence of the legitimate order.

⁴⁶ The Constitutional Court stated that the President in not obliged to award State Decorations (Honors) to everyone who is proposed by the Government, he/she does not have to "ravish" his/her conscience (the moral integrity of the President is to be protected). The President is entitled to examine whether the proposal to award State Decoration in not contrary to the constitutional value order. The decision of the Hungarian Constitutional Court AB282/G/2006.

⁴⁷ Resolution of the Government No. 187 of the 22nd February 2006.

dismissed the Government's proposal. Actually, the Prime Minister Jiří Paroubek asked the President to do so, although the Government did not take its proposal back. Also the Slovak President Ivan Gašparovič dismissed the Government's proposal to appoint the Director of Prison and Judicial Guard, Marie Kreslová the rank of General. The President refused to specify his reasons.

5 A Statement of Reasons in the Decisions of the President

In order for any decision of the President to be subject to a court review, it has to be reasoned. However, it is a constitutional custom that the President does not enact his decisions in the course of administrative proceedings and that he usually gives no statement of reasons or, better to say, it is up to his/her discretion. It is a custom to provide a short statement of reasons for awarding State Decorations (Honors) but not for their non-awarding. Only if it is explicitly provided for in the Constitution, the President must provide a statement of reasons for his/her conduct, which is the case of returning an Act to the Chamber of Deputies (a suspensive veto) (Pavlíček, 2008: 146).⁴⁸ In other cases, the President provides no statements of reasons for his decisions, which is good, as some of the decisions may be politically sensitive - e.g. non-appointment of an ambassador who was proposed but the name was withdrawn, revoking of an ambassador, awarding State Decorations (Honors) etc.

6 Non -enforceability of decisions of the administrative courts

The President of the Czech Republic has extensive power, immunity and is accountable only to the Constitutional Court in the treason trial.⁴⁹ Any other sanction of the President is inadmissible. If we define immunity not as a personal privilege but as a protection of the exercise of the President's function, then this special accountability to the Constitutional Court has to include not only the President's personal conduct but especially the decisions which represent an exercise of his/her constitutional powers. This constitutional conception/understanding of the President leads to the

⁴⁸ Art. 50 para. 1 of the Constitution, Act. No. 1/1993 Coll.

⁴⁹ Art. 54 para. 3 and Art. 65 of the Constitution No. 1/1993 Coll.

effect the President shall not be perceived as an administrative authority but as a purely constitutional institution.

The courts, as a State body are entitled by State power to decide legal disputes; the enforceability of their decisions is essential. Non-enforceability of the statement of claims in a suit gives reason for a rejection of the suit. Only in criminal law are there exemptions from the principle that a court judgment must be enforceable – this is in the case of deciding upon a complaint concerning a breach of law which is lodged to the detriment of the accused, where the court can only find that the law was violated by the preceding final decision of the Court or of the Public Prosecutor but it cannot abolish the illegal decision (an academic judgment).⁵⁰ This follows from the principle of the prohibition of a change for the worse and from the principle of equal position of parties to the dispute, as the complaint can only be lodged by the State represented by the Minister of Justice. Similarly, there exists an extraordinary possibility to continue – on the proposal of the accused – in the court proceedings even after the pardon or amnesty of the President had been granted. In this case, the Court can decide only on the question of culpability but cannot impose a penalty.⁵¹

The essence of the decision-making process of the Courts rests in the enforceability of the Court's sentence, in case it should not be executed voluntarily. From this point of view, it is surprising that the Supreme Administrative Court has derived its jurisdiction over the case concerning the appointment of judges, although it has admitted the possibility that its decision represents only a moral challenge for the President.⁵² Of course, it is not a mere moral challenge, as the State authority or the Court is not moral bodies but bodies of power. However, let's assert that it is a challenge, i.e. a recommendation. We come to the conclusion that the Courts do not decide, according to the classic categorisation, by judgements of constitutive and/or declaratory nature that are enforceable, in case the sentence should not be executed voluntarily, but also by newly discovered judgements of a recommendatory nature. The Supreme Administrative Court has "usurped" the power to judge the Head of State

⁵⁰ Sections 268 – 269 of the Penal Proceedings Code No. 141/1961 Coll.

⁵¹ Section 11 para. 3 and Section 227 of the Penal Proceedings Code No. 141/1961 Coll.

⁵² Judgement of the Supreme Administrative Court No. 905/2006 in the Collection of Judgements of the Supreme Administrative Court (4Aps 3/2005).

within the framework of administrative judiciary without having the instruments necessary for enforcing its decision. The classical mode of decision enforcement cannot be employed in relation to the President because nobody but the Constitutional Court is entitled to impose a penalty to the President. Whereas the defective conduct of the President of the Republic was found to rest in a failure to act, i.e. a non-monetary performance that nobody else can substitute by a substitutive performance, it is not possible to enforce the judgment by imposing disciplinary penalties because the President of the Republic cannot be subject to such penalties. The essence of a competence is the execution of power. If the Supreme Administrative Court had “usurped” the authority to judge the President without any possibility of enforcing its judgments, it is not an execution of its power but powerlessness. This fact shows that the administrative courts are not designated to review the acts of the President (i.e. to judge the President) because they lack the authority to provide for a potential enforcement of their decisions. Thus, the President of the Republic does not have to comply with the decisions of the Supreme Administrative Court as they are not enforceable by power.

The Constitutional Court is the state body which is entitled to judge the President in various types of proceedings. If someone disputes the character of acts by the President for being in conflict with the Constitution and therefore violating the person’s fundamental rights and freedoms, including the right to hold public offices, he/she may turn to the Constitutional Court and lodge a constitutional complaint. This was the case of the Chairman of the Supreme Court of the Czech Republic Iva Brožová who disagreed with the President’s decision on her removal from office. Although the President cannot be removed from his office in the proceedings on a constitutional complaint, as in the case of treason proceedings before the Constitutional Court which is initiated by the Senate, the Constitutional Court has better opportunities to control the President than other courts. In the case of the Chairman of the Supreme court, the Constitutional Court has decided first to abolish a part of the Courts and Judges Act which concerned the competences of those who appoint the court officers to remove them from office as well⁵³. It was the part of the Act that the President has relied upon when removing the

⁵³ Judgement No. 397/2006 Coll.

Chairman from her office, and consequently abolished the removal the Chairman of the Supreme Court from office itself.⁵⁴ Moreover, the Constitutional Court seems to be more suitable for assessing the acts of the Head of State because judging the President is an important matter not only in the legal respect. Therefore a wider range of judges should stand behind the decision. This is possible in the case of the Constitutional Court which, being aware of the importance of disputes to which the President is a party or just a subsidiary party, has devolved the proceedings on constitutional complaints upon the assembly of 15 judges even though the statutory competence belongs to the Senate.⁵⁵ However, this procedure is not possible at the Supreme Administrative court which has 30 judges but decisions are taken by a 3-member panel in the Senate. Consequently, only two judges can take a decision on questions of principal constitutional importance. Decision-making in the Senate of the Supreme Administrative Court is not constructed for dealing with fundamental constitutional relationships within the State.

Even the jurists who accept the possibility of a judicial review of the acts of the President prefer a review by the Constitutional Court and not by the administrative courts (Gerloch, 2008: 39). This is the case notwithstanding the fact that the Constitutional Court has rejected the constitutional complaint in the given dispute as being premature.⁵⁶ The resolution seems rather to be the means of getting rid of the case, as the Courts has not dealt with the merits of the case. Similarly in Poland (appeal of the Board for Television and Radio Broadcasting) or in Germany (dissolving the Bundestag) (Wagnerová, 2008: 102), the actions of the President have been reviewed by the Constitutional Courts.

On the contrary, some favour the conclusion that no Court is entitled to review the non-appointment of a judge because there is no legal title for being appointed. If there is no subjective right to be appointed to the function of a judge, it is not possible to interfere into the constitutionally

⁵⁴ Judgement No. 159/2006 of the Collection of Collection of Judgements and Resolutions of the Constitutional Court (II.ÚS 53/06).

⁵⁵ Art. 1 para. 1 letter e) of the Communication of the Constitutional Court No. 185/2008 Coll.

⁵⁶ Resolution of the Constitutional Court of the 24th November 2005, I.ÚS 282/05. In a similar dispute concerning a judicial candidate the Court passed the Resolution of the 20th December 2006, I.ÚS 284/05.

granted rights and the jurisdiction of the Constitutional Court concerning the constitutional complaints proceedings is not established (see Sládeček, 2008: 39; Bartoň, 2008: 124). This upholds the original standpoint of the Prague Metropolitan Court which characterised this act of the President as a constitutional, not a administrative, act which is therefore not subject to the judicial review in the administrative proceedings. The Court therefore rejected the suits.⁵⁷ It was forced to change this standpoint only as the consequence of the Supreme Administrative Court's legal opinion which was legally binding for the Metropolitan Court.

Conclusions

The judicial review of acts by the President of the Czech Republic can be exercised by the Constitutional Court. It is not correct to issue judgments of a recommendatory nature. The President of the Republic is primarily a constitutional institution and not an administrative body. The President does not pass decisions in the administrative proceedings and it is a custom that he provides no statement of reasons for his/her decisions. A legal custom cannot replace a legal condition in establishing the competence of a state authority, which also concerns the entitlement to address proposals that have to be considered by the recipient.

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⁵⁷ Resolution of the Prague Metropolitan Court of the 16th June 2005. File No. 5Ca 148/2005-9, Resolutions 7Ca 146/2005-21 and 6Ca 145/2005.

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THE PRESIDENTIAL MODEL IN THE REPUBLIC OF POLAND – CONSTITUTIONAL FOUNDATIONS AND POLITICAL PRACTICE

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Abstract

The author analyzes the model of the presidency in the Republic of Poland. Generally, the Constitution of the Republic of Poland of 2nd April 1997 is based upon the parliamentary system of government but the position of the Polish president is to some extent stronger than in a typical parliamentary system (e.g. in Italy) but not reaching a position of the head of state in a semi-presidential system. Mechanisms of cooperation between the Polish President and Council of Ministers, based upon the conception of Executive dualism, generally work well as long as the president behaves as an arbiter. Serious challenges occurred to that model in the time of cohabitation between President Lech Kaczyński (connected with Law and Justice) and Prime Minister Donald Tusk (Civic Platform) 2007-2010. The main question of the article remains whether the Constitution should be prepared for such a scenario when a President behaves in different direction than envisaged by the Constitution.

Key words:

Poland. Constitution. President. Council of Ministers. Executive dualism.

Introduction

The entrance of Poland on a democratic path in 1989 was the final stage of the Polish struggle for democracy and constitutionalism (see Fijalkowski, 2010: 199). The post-1989 systemic transformation of the Polish socio-political system has taken place in an unusual way (Prażmowska, 2010: 78). It was a part of the 1989 revolutions in Central and Eastern Europe: from communism to pluralism (compare McDermott and Stibbe, 2013).

Its origin was the Round Table Agreement, which led to April 1989 to amendments in the Soviet-style Constitution of 1952. There was, however, relatively little discussion of the concrete model of the system of government to be adopted. Rather, the discussion focused largely on specific institutions and structures of state powers that needed to be established pursuant to the April 1989 Amendments. The scope of suggested reforms depended on political interest of two main participants in the Round Table talks: the liberal-democratic opposition, allied under the banner of Solidarity on the one hand (so called “opposition’s side”) (Cirtautas, 1997: 38), and the Polish United Workers Party and his allies

(so called Government's side) - on the other (Sanford, 2002: 41). In a view of the intense political tensions at that time, there was no opportunity for a thorough analysis of the complex problems involved. However, there was a general consensus that the principle of separations of power should distinguish the new political system from that of the communist era. The opposition considered this principle a symbol of transition from a totalitarian regime to a liberal democracy (Suchocka, 1999: 131-132). Second important principle was the political pluralism which enabled free and fair elections. It was the basis to create a representative government (Popławska, 1999: 155). In a broader sense, it was part of the process to establish an accountable government (Rose-Ackerman, 2005: 89).

As a result of the Round Table Agreement the presidency was reinstated. The Polish president was elected by the National Assembly (joint parliamentary session of deputies and senators headed by the Marshal of the Sejm). General Wojciech Jaruzelski was elected as a first President by the National Assembly. The highly complex social and political conditions of the time were conducive to the need for universal and direct elections of the head of state. The Act on Presidential Elections in Poland passed on 27 September 1990 (see *Dziennik Ustaw* of 1990, No. 79, item 465, with subsequent amendments) and introduced direct elections for the first time in the history of Poland. The provisions of the act were largely based on the legal solutions adopted by the Fifth Republic of France. According to them, the electorate and political parties enjoy the right to nominate their candidates. The mandate and the repeat ballot were none of the candidates have received a majority of votes require an absolute majority of votes. In order to be nominated, the support of 100,000 voters were required. In 1990 presidential elections six candidates were registered. Mr. Lech Wałęsa, Solidarity's leader, won in the second round and became the first president of the Republic of Poland to be directly elected.

In most states of Central and Eastern Europe region the new constitutions brought about a general characteristic of the state as a law-based state, most often with a supplementary description of this state as sovereign, independent, unitary, indivisible, democratic, social and welfare (Sokolewicz, 2001: 20). It also included a modern conception of executive power. The road to transform these values to the Polish constitutional system was not an easy one (Hayden, 2013: 37). Partial reforms, including separations of powers, were introduced through the Constitutional Act of 17th October 1992 (so called Small Constitution). But it took an additional five years to establish new Constitution of the Republic of Poland.

1 Genesis of the Constitution of the Republic of Poland

The Constitution of the Republic of Poland of 2nd April 1997 was a crucial step in the process of consolidation of the political system of the Republic of Poland. After unsuccessful attempts to pass the Constitution in the so called “contract Sejm” (1989-1991) and 1st Term Sejm (1991-1993, dissolved by President Lech Wałęsa after a vote of no-confidence for the Government of Ms. Hanna Suchocka), the Sejm of the 2nd Term (1993-1997) received the chance to prepare and vote the Constitution. The situation during the 2nd term of the Sejm was not easy due to the 5% threshold for parties and 8% threshold for coalition, rightist political forces creating division and as a consequence almost 35% of the electorate was not represented in the Sejm. The Democratic Left Alliance (SLD) won the election and created the coalition. From the formal, legal point of view everything was correct, but from the psychological and political viewpoint some analyst claimed that the parliament was not morally qualified to pass a fundamental law of the Republic of Poland. The National Assembly (including both parliamentary houses: Sejm and Senate) established the Constitutional Committee, chaired originally by Aleksander Kwaśniewski, and – after he became President – by Mr. Włodzimierz Cimoszewicz and Mr. Marek Mazurkiewicz, prepared and voted on the new Constitution. It was approved by the National Assembly, and accepted in the referendum by the Nation. The road to the final text of the Polish Constitution brought about several compromises, oriented toward inclusion of proposals offered by the Catholic Church and opposition forces. It is important to note that the labour movement “Solidarity” offered its own project and was asked to treat that project as an alternative for what had been prepared by the Constitutional Committee. The Solidarity proposal was however contrary to the Constitutional Law on Preparation of Constitution and was rejected.

Despite various breakdowns of work on a uniform draft constitution in the Constitutional Committee, it was successfully concluded within a period of three years. As a consequence of the talks started at the beginning of January 1997 with participation of SLD (Democratic Left Alliance), PSL (Polish People’s Party), UW (Union for Freedom) and UP (Labour Union), and following the appeal to the Constitutional Committee addressed by the President of the Republic, Aleksander Kwaśniewski, who was concerned about the crisis in the work of the Committee, the wording of amendments was determined as a result of mutual concessions. The

amendments took into account proposals for wider scope of the free of charge principle in education, basic health care (proposed by UP), for leaving unsettled the question of territorial division and three-level structure of local government in the Constitution. The concept of the family farm as a basis for the structure of agriculture was also introduced (in accordance with the proposal of PSL), as well as the principle of overriding the President's veto by the three-fifths majority of votes in the Sejm (instead of a two-thirds majority originally drafted).

On the 2nd of April 1997 the third reading of the constitution was held in the National Assembly. It was devoted to the consideration of the report of the Constitutional Committee on the proposals of amendments to the Constitution offered by the President of the Republic. The National Assembly voted to approve most of those amendments which received support from the Constitutional Committee. In a final voting, 451 members of the National Assembly (out of 497 of members present) voted for the Constitution, 40 were against and 6 abstained. In their speeches given after the final vote in the National Assembly, the President of the Republic, the President of Assembly and presidents of the major parliamentary caucuses recognized the Constitution as a reasonable compromise and a modern basic law which takes into account universal trends of contemporary constitutional theory and the values shared by the Polish Nation.

The President of the Republic declared a nationwide referendum to be held on 25 May 1997, and soon confirmed this by issuing as appropriate order. The campaign before referendum was characterized by explicit polarization of forces between political parties represented in Parliament and extra-parliamentary opposition (mostly: Election Action "Solidarity" (AWS) and the Movement of the Reconstruction of Poland (ROP, of former Prime Minister, Jan Olszewski) with also a harsh tone of remarks made by adversaries to the Constitution, accompanied in part by Roman Catholic Church. The harshness of their position was not always supported by substantial arguments. The objections most often raised to the Constitution by its opponents concerned the disposal of sovereign rights of the Nation (in connection with Article 90), rejection of the concept of natural law as a basis of legal order in the State, limitation of the rights of parents to rear their children in accordance of their [e.g. parents'] convictions.

The results of the constitutional referendum held on 25th May 1997 on the basis of the Act of 29th June 1995 regarding a national Referendum, published in the proclamation by the National Electoral Commission, show

that 42.68 percent of those having the right to vote (28,324,965) participated in the voting and that 12,139,790 valid votes were cast (with 1068 invalid votes). 6,398,316 votes (or. 52.71 percent) were cast for the Constitution and 5,571,439 votes were cast against (45.89 percent of valid votes). The validity of the constitutional referendum was approved by the Supreme Court by its decision of 15 July 1997 after consideration of all protests lodged against the referendum.

The Constitution of the Republic of Poland came into effect on 17th October 1997 (after the expiration of the 3-month period following the day of its promulgation). Certain provisions, specified in Article 236(2) and 237(1), came into force on a later date. It is important to remember that work on the preparation of Polish constitution coincided with Poland's wish to join NATO. From this point of view it was important to properly shape the authority between the president and the government on matters of national security issues (Michta, 1995: 148).

The important determinant while preparing the constitution was without any doubt the Polish preparations to join the European Union. During constitutional-writing process, Poland's on-going integration with the EU was having an impact on the organization, tasks and manner of functioning of the public authority, including the executive power: the President and the Council of Ministers (Grzybowski, 2005: 85) and their competences (Biernat, 1997: 1188). The Constitution, especially in Article 90 (Jaskiernia, 2007: 108), has formally opened the way for the Polish accession to the EU (Barcz, 1999: 7). Some authors described Poland as a "EU driven democracy" (Bodnar, 2010: 11). Several issues important to the European integration was however not properly addressed by the Constitution (Jaskiernia, 2009a: 13-23), and still expect to be addressed (compare Biernat, 1998: 399; Jaskiernia, 2004: 46).

The new Constitution allowed for the formulation of its basic tenets which, in the majority of cases, constituted a reversal to the principled existing before 1989. And hence:

- 1) The principle of a state ruled by law indicated a negation and annulment of the state ruled by ideology, and subjecting politics to the rule of law;
- 2) The principle of sovereignty of the nation replaced the principle of sovereignty of people defined through "discretionary recognition" and subject to its "working" and "class" character;
- 3) The principle of the party pluralism eliminated a system based on the functioning of a single political party as a government superstructure;

4) Vesting some powers with the local government terminated the territorial omnipotence of the state;

5) Equality of forms of ownership and freedom of economic activity put an end to the former bureaucratized economic system (Bałaban, 2001: 46-47).

The Constitution of 1997 has been a successful implementation of several basic democratic principles, offered on the theory of constitutional law (Banaszak, 2005: 34). It also included important democratic standards, offered by the Council of Europe (Jaskiernia, 2001: 63), European Union (Jaskiernia, 2000: 22) and OSCE (Jaskiernia, 2014: 12).

2 Position of Presidency in the Constitution of the Republic of Poland

Establishing the formula of executive power was one of the basic challenges in the Constitution-writing process. There were several options: 1) presidential system, 2) semi-presidential system, 3) parliamentary-cabinet system with a stronger presidency than in typical model and 4) parliamentary-cabinet with a weak presidency. Finally, the National Assembly decided to choose the third model even though some authors suggested elements of semi-presidentialism in the Polish political system (The Impact of Semi-Presidentialism..., 2013: 87).

Actual model of Presidency in Republic of Poland is a result of long debate on the seeking most rational model of political system of the state (Dudek, 2013: 19). It is worth to explain what type of motivations lies upon this decision and how that model works in political practice of the Republic of Poland (Kaczyński, 2012: 119). The presidential government has no antecedent in the Polish tradition of government. The European version of democratic systems, whose experiences formed the basis for the work on the constitution, combining parliamentary and extra-parliamentary groups, also remains distant from the model of presidential government. In the course of work preceding the final stage of preparations of the new constitution (1993-1997) (Pytlik, 2005: 16), the concept of the presidential system was most evident in the draft proposed by the Constitutional Committee of the Senate of the 1st Term. Even the draft submitted by President Lech Wałęsa departed from a presidential model. In the Polish political practice developed after 1989 there was no political infrastructure conducive to a presidential model. In particular, it lacked a stable bipartisan or two-block party system (Grzybowski, 1999: 147).

It is also worth to analyze how the system of dualism of executive power (president, Council of Ministers) functions in political practice in the Republic of Poland. Experiences of the countries of Central and Eastern Europe brings about different scenarios: from conflict to cooperation, with tendency to adopt semi-presidential constitutional frameworks. Researches emphasized, e.g. a critical role which the party systems play in the evaluation in intra-executive relations across the region. Variations in the political status of cabinet, in the character of parliamentary composition, and in the constitutional powers of the president affect both the type and frequency of intra-executive conflicts (Protsyk, 2005: 158). System of central administration in Central and Eastern Europe brings about some differences and similarities on the matter how executive power is organized and how functional are relations between the president and government (Salamun, 2007: 274).

Several issues dealing with the perception of presidency in Poland came however not from the problems of constitutional law construction, but from the political climate, dealing with the communist past and post-communist reality, in which different political forces expected different political behavior from the holder of highest office in Poland (Zuba, 2013: 103). Also difficulties to establish a stable party system have an obvious influence (Stanley, 2014: 1296).

The Polish model of the Constitution of 2nd April 1997 undoubtedly corresponds – in its most substantial aspects – to the parliamentary system (Grzybowski, 1999: 151-157). It is characterized by a dualistic Executive, composed of a President of the Republic, chosen in universal elections, and a Council of Ministers in which there is a parliamentary majority. Each of these bodies has its independent competences and functions, even if several acts of the President require countersigning by the Prime Minister. Article 144(2) provides that *“official acts of the President [...] shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefore to the Sejm”* (Sarnecki, 1996: 24). The requirement of countersignature reflects the Parliamentary nature of the system of government, as it serves to control and enforce parliamentary accountability, borne – in this case – by the Prime Minister. Its purpose is to limit the discretionary powers of the President, along with requiring co-operation with the Prime Minister and the appropriate minister in respect of foreign policy (Piotrowski, 2008: 63).

Similar limitations relate to certain aspects of presidential control of the armed forces. In accordance with Article 134(2), *“The President of the*

Republic, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defence". In a period of war, the President of the Republic shall, pursuant to Article 134(4), appoint – and dismiss – the Commander-in-Chief of the Armed Forces on request of the Prime Minister. The President of the Republic, upon request of the Minister of National Defence, confers military ranks as specified by statute. All the above requirements distinctly illustrate the lack of full autonomy of the President, even if his function in relation to the armed forces has been defined as the "supreme commander".

The manner of electing the President determines his political functions and scope of powers that are vested in him. Universal elections provide a legitimate source of the political position, role and functions of the head of state. These are specified in Article 126 of the Constitution where the following functions are defined: a) the President is the supreme representative of the Republic of Poland (Jaskiernia, 2011a: 344); b) the President is the guarantor of the continuity of the State authority; c) the President shall ensure observance of the Constitution (Jaskiernia, 2010a: 297); d) the President shall safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory. This conception of presidential powers was originally introduced in the Small Constitution (1992) (Ciapała, 1999: 129), and exemplified in the Constitution of 2nd April 1997. It created the base to distinguish groups of powers of the President: 1) The powers of the President as the Head of State; 2) Presidential powers concerning political arbitration and the balancing of powers; 3) Other presidential powers (Mojak, 1999: 324).

While the Constitution does not provide for dominance of the President over the whole executive, the role of the President is to be an arbiter in relations between the government and parliament and, sometimes between the parliament, government and the nation. So understood, presidential arbitration includes, in particular, such power as the President's right to dissolve parliament (discretionary or applied in circumstances specified by the Constitution), the right to order a nationwide referendum, the right to veto legislation (veto of a suspensive character), as a right to apply to the Constitutional Court for adjudication regarding the constitutionality of acts of the parliament. A wider and more strongly defined the role of arbiter also contains dynamic actions taken by the President in order to avoid government crisis and during the formation of government, especially after parliamentary elections. The powers and actions of the mentioned categories may be interconnected (see Grybowski, 1999: 140).

Provisions of importance for any characterization of the functions of the President and government are also contained in Article 146(1) of the Constitution, which reads: "The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland", as well as to the second paragraph of that Article, stating that "*The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government*". It does not, however, indicate a monopolistic position of the government in shaping and directing the pursuit of internal and foreign policy. Nevertheless, the presumption of competence requires that the jurisdiction of other state bodies, including the President or the Sejm, must ensue from concrete constitutional provisions. The jurisdiction of the Council of Ministers is based on a permanent (namely constitutional) presumption of competence.

As a representative of the state in foreign affairs, the President exercises his passive and active rights including ratification and renunciation of international agreements (in some areas he may do so upon the previous consent of Parliament as expressed in an Act), and maintenance of direct and personal international contacts (paying official visits, maintaining political relations with heads of other countries). In this respect, the President is obliged to co-operate with the Government and the Minister of the Foreign Affairs to ensure co-ordination of activity on an international scale (see Skrzydło and Mojak, 2001: 296).

The problems has been arising from the conception of dualism of executive especially in the time of divided political power between President Lech Kaczyński (connected with the Law and Justice party- PiS) and Prime Minister Donald Tusk (from Civic Platform - PO) in 2007-2010. In the area of foreign affairs, where we have to sharing authority of the President and Council of Ministers (Jaskiernia, 2010b: 3). One of the conflicting issues was a question who should represent Poland in the European Council, in the broader context of the membership of Poland in the European Union (Grzybowski, 2004: 48). It would be important to analyze to what extent this conflict, finally solved by the Constitutional Tribunal, put a shadow on functionality of dualism of the executive branch, established by the Polish Constitution. President L. Kaczyński has cited the argument that he is e.g. "*supreme representative of the Republic of Poland*" but Prime Minister stressed e.g. that "*Council of Ministers conduct foreign affairs*". The constitutional conflict was resolved by the Constitutional Tribunal (Decision on 20 May 2009, 78/5/A/2009). The Tribunal decided that general competency to represent Poland in the European Council belongs to the Prime Minister as a representative of the Council of

Ministers. However it might be situations where subject of meeting of the Council of Ministers deals with the competences of the President (e.g. protection of sovereignty) and in such a case President may represent Poland. But even in such a situation he should present position agreed by the Council of Ministers who should however consult such a position with the President.

The conflict, characteristic during the period of cohabitation between PiS and PO from 2007-2010, brings about some more detailed division of the competences of the President and the Committee of Ministers, offered through the interpretation of the Constitution by the Constitutional Tribunal. But after 2010 the problem of representation of Poland in the European Council did not bring any quarrels. It was agreed between the two institutions that the President represents Republic of Poland in NATO's summits and Prime Minister represents Republic of Poland in the European Council.

Direct election of the President provides a factor which somewhat balances the numerous limitations on the independence of its activities. This also prevents the situation in which a new parliamentary majority determines how the political profile of government would be confronted in which a President whose legitimacy derived from a parliamentary majority in a previous term of office.

Whilst upholding the position of the President strengthened by direct and universal election, the Constitution simultaneously limits his/her powers to influence the functioning of the government. This means maintaining the principal features of the parliamentary model. Unlike the Constitution of the Russian Federation, the prerogatives of the President relating to the appointment of the Prime Minister and members of the Council of Ministers, and their recall, as well as making partial "regroupings" within its composition, are narrowed (compare Kruk, 1998: 12).

The creation of a Council of Ministers completely corresponds with the construction of the parliamentary government. Formally, the initiative of designating a Prime Minister originates with the President who, on request of Prime Minister, appoints a Council of Ministers headed by the Prime Minister, and accepts the oath of office of their members (so called "first constitutional step" - Article 154(1-2) of the Constitution). The government so appointed submits a programme of its activity, together with a motion requiring a vote of confidence. The Sejm passes such a vote of confidence by an absolute majority of votes within the constitutional time limit of 14 days following the taking oath by the government. In the

event that a government has not appointed in accordance with this procedure, or has failed to obtain a vote of confidence by an absolute majority of votes, a repeat attempt to appoint a Prime Minister and select the composition of the of the composition of government will be made by the Sejm (so called “second constitutional step” – art. 154(3) of the Constitution). Absolute majority is required. In such an attempt has also failed, the initiative returns to the President (so called “third constitutional step” – Article 155(1) of the Constitution). However, the requirement for an absolute majority of votes for passing a vote of confidence is replaced by the requirement for a simple majority of votes. Only in the event of failure of such an attempt (Article 155(2) of the Constitution), should the President shorten the term of office of the Sejm (and the Senate) and order a new, early elections.

It is worth noting that the authors of the Constitution do not allow further stages in the formation of a government, including the repeated initiative of the Sejm with vote of confidence granted by a simple majority of votes and, particularly, they do not admit the formula of presidential government, based only on the confidence of the head of state, with a “tested” lack of confidence obtained even from a simple parliamentary majority. This means the strengthening of the “parliamentary” element and – to a certain degree – departure from semi-presidential models. The requirement of obtaining an absolute or at least simple majority of votes during a vote of confidence limits the powers of President of the Republic, both in designation of Prime Minister and in the course of forming a government. The President must take into account the results of parliamentary election and the position of any Sejm majority, rather than its own political and personal preferences (Grzybowski, 1999: 153-154).

Certain competences of the President may be undertaken without specifying circumstances and frequency of use of them. This includes: the right to introduce the legislation, the right of suspensive veto and the right to initiate control of the constitutionality of statutes.

The President has a right, pursuant to Article 122(5) of the Constitution, to refer a bill, with reason given, to the Sejm for its reconsideration (so called presidential suspensive veto). Sejm may override the veto by at least 3/5 majority (60%). It is a traditional function of the president. However the discussion appeared during the period of 2007-2010, during cohabitation of President Lech Kaczyński and Prime Minister Donald Tusk to what extent this level of rejection is not too high. Because President Lech Kaczyński ostensibly supported PiS Government, led by his brother, Jarosław Kaczyński, and often used the veto to stop

Government's initiatives bringing important reforms, the question has been risen to what extent it is functional element of political system to expect the 60% majority in Parliament to run the country (Jaskiernia, 2009b: 181). Critics have stressed that in some Scandinavian countries there existed minority governments which successfully ran the country. In this climate of confrontation the Civic Platform (PO) introduced the bill to lower the percentage to override the presidential veto to a full majority (at least 50%+1 voting deputies) (Jaskiernia, 2010c: 86-103). However, PO did not pursue this idea after the tragic death of President Lech Kaczyński in Smoleńsk's airline crash (10 April 2010), because the election of President Bronisław Komorowski from PO ended the cohabitation period and opened a close cooperation between the President and Prime Minister.

The Polish President also has the right to apply to the Constitutional Tribunal for examination of the conformity of a bill with the Constitution – Article 123(3). But once the Tribunal has decided on the constitutionality of the law, the President must sign it.

It is important to stress that they are alternative instruments for the President: if he decided to veto a bill, it may not go with it to the Constitutional Tribunal and *vice versa*. Additionally, from his/her authority the President may “launch” whether he/she does so on his/her own initiative or is prompted by certain political circles or by a segment of the public opinion – the reasons for use these competences remain unspecified.

Situations in which the President of the Republic may order the shortening of the term of office of the Sejm (and, hence, the Senate) are limited to two circumstances determined by provisions of two articles. First concerns the situation, mentioned before (Article 155(2) of the Constitution), of the failure to appoint the Council of Ministers pursuant to Article 155(1) of the Constitution, i.e. as a result of failure to give a vote of confidence (taken by the simple majority of the Deputies to the Sejm) to the government designed by the President of the Republic. In such a situation, the Constitution introduced an obligation to shorten the term of office of the Sejm and, in consequence, the Senate. The second occasion concerns the situation that within four months of the day of submissions of its draft to the Sejm, the Budget Bill has not been presented to the President of the Republic for signature. In this situation the President retains however some discretion to exercise of the power to shorten the term of Sejm (and Senate) vested to him. He only may shorten the term, but is not obliged to do that.

The Constitution of 2nd April departs from regulations applied by the Constitutional Act of 17th October 1992, which allowed for a peculiar coincidence of jurisdiction and accountability between President and the Council of Ministers. This relates, especially, to provisions of Article 32(4) and Article 51 of the Constitutional Act of 1992. Pursuant to Article 32(4) of Constitutional Act of 1992, President exercised “general supervision in the field of international relations”, while under Article 51 “the Council of Ministers shall conduct the internal affairs and the foreign policy of the Republic”. The provision of the current Constitution do not contain the presidential function (competence) of “general supervision in the field of international relations”, which is difficult to distinguish from the “conduct of foreign policy” falling within the jurisdiction of the Council of Ministers. The provision empowering the President to exercise “general supervision with the external and internal security of the state” (Article 34 of the Constitutional Act of 17th October 1992) was also discontinued because of the difficulty in precise and unequivocal distinction from the jurisdiction of the Council of Ministers in respect of the “conduct of the internal and foreign policy of the Republic” and of ensuring “the external and internal security of the State” (Article 51(2) and Article 52(2)(8) of the Constitutional Act of 17th October 1992).

The requirement of Article 61 of the Constitutional Act of 17th October 1992 that any motion to appoint the Ministers of Foreign Affairs, of National Defence and of Internal Affairs should have been presented by the Prime Minister after consultation with the President, but was repealed. Hence, currently, the President does not share responsibility (whether of political nature and to public opinion) for personal appointments to the top offices in these significant government offices.

Resignation from office taken from Article 61 of the Constitutional act of 17th October 1992 in the new Constitution has a special meaning. Article 61, giving formally only the right to consultation of candidates for those three portfolios (not binding for the Prime Minister), has been interpreted by the legal adviser to the President Lech Wałęsa, prof. Lech Falandysz as a base to construct a “presidential portfolios”. Under this concept of extended interpretation of Constitution, favoring the president of the Republic, described as a “falandization of law”), the President had not only competence to consult the candidates for those portofios, but *de facto* decided, who will be nominated and, after that, controlled those ministers. From this point on you we may suggest that in years 1992-1995, during President Lech Wałęsa’s term of office, we had in Poland, to some degree, a semi-presidential system – not in the light of the Small Constitution, but in

the light of constitutional practice. This competence of the President was eliminated in the Constitution of the Republic of Poland to avoid wrong interpretations.

The principles of a democratic system also require the principles of bearing responsibility of the President for the manner of exercising presidential powers and the compatibility of the same with the law of the land. The statutory position of the presidency is determined by the principles and the manner of holding the President responsible (Dziemidok-Olszewska, 2012: 129). It is a standard principle of a parliamentary system that the President demonstrates political neutrality and political non-responsibility. Presidential accountability is defined by the Constitution in Article 145(1). Under these provisions, the President may be held accountable before the Tribunal of State for infringement of the Constitution and statue of for commission of the offense. Accountability of the President is, therefore, of two-fold nature: 1) liability for constitutional tort, and 2) criminal liability for commission of an offense. The scope of "constitutional torts" covers President's criminal liability for any breach of criminal law, that is to committing an act which under criminal law is considered an offense (see Skrzydło and Mojak, 1999: 183-184).

Due to the specific statutory position and the nature of possible accusations, the Constitution lays down adequate principles of legal accountability. In this respect, bringing the President before the Tribunal of State as a sole body with the proper jurisdiction to try him can be considered as a presidential prerogative. In this case of the President's liability for offenses committed, irrespective of their type and the nature of guilt, the Tribunal of State has jurisdiction to try and to award punishment on the President (see Skrzydło and Mojak, 2001: 300).

Conclusions

There is no doubt that the Presidency of the Republic of Poland is functioning in the framework of the parliamentary system. The position of the President has however to some extent stronger than in typical parliamentary system (e.g. in Italy). But it is not yet a semi-presidential system however some interpretation of "presidential portfolios" during the period of 1992-1995, under Small Constitution of 1992, included elements of semi-presidential system. Elimination of consultation with President candidates to those three portfolios (foreign affairs, internal

affairs, defence) by the Constitution of 1997 eliminated the possibility to such a contra-constitutional interpretations.

The construction of the Presidency of the Republic of Poland, under the Constitution of 1997, has been tested, and proven to be positive (Kruk, 2011: 84). It creates base for functional co-operation of the President and the Prime Minister. Most serious test of functionality of the constitutional system of Poland occurred during the period of cohabitation of President L. Kaczyński and Prime Minister Tusk 2007-2010. Once the president escaped from the role of arbiter and mediator, upon which Constitution of the Republic of Poland was based, and started openly to support opposition government led by Prime Minister Jarosław Kaczyński, the constitutional system ended being functional. In such a circumstances the question has risen to what extent a veto-power of the President and its overriding with 3/5 majority is logical? Some argue that it is not rational to expect the government to have 60% majority to pursue important reforms. Because the situation changed after 2010 with the death of President L. Kaczyński and election of President B. Komorowski, the proposals to lower the level of overriding presidential veto to a full majority (more than 50%+1 voting deputies) was not finalized. However the problem remains to what extent the Polish Constitution is prepared for the situation when the President is not behaving as an arbiter but supporting the opposition in the parliament (Jaskiernia, 2011b: 91).

What is important, the Constitution even taking into account the cohabitation period of 2007-2010 made possible an effective cooperation of the Republic of Poland within the European structures after the Treaty of Lisbon (Wojtyczek, 2012: 65).

From that point of view we may not suggest that Polish democracy is in crisis (Blokker, 2014: 46) even as such suggestions has been presented by the Law and Justice party (PiS) before 2005 parliamentary elections when PiS criticized the so called "Third Republic of Poland" (based upon Constitution of 1997) and suggested introducing the "Fourth Republic of Poland". However a discussion of choosing an optimal system of government, including the position of President, still continues. When the process of creating a new Constitution of Poland would begin, the problem of the rationality of veto power might be a subject to further analysis then. But we should remember that changing the Constitution of Poland is extremely difficult. Only in two cases (European warrant; disqualification for the Parliament candidate who commits crimes) the Constitution of 1997 has been changed. It was not successful in several other areas, e.g. dealing with introducing the so called European Clause, necessary in the

Constitution dealing with the membership of Poland in the European Union. In such a situation chances to successfully introduce fundamental constitutional reforms, changing the position of President, appear very limited.

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THE SLOVAK PRESIDENT AND PARLIAMENT: A COMPLEX HISTORICAL ARRANGEMENT

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Abstract

The power and authority of the Slovak President and Parliament since the creation of the Slovak Republic in 1993 has become the topic of serious political debate. From the original powers written in the Slovak Constitution to its new authority since 1999, the natural relationship between the Slovak President and parliament and the Slovak President and the Government has undergone necessary changes in their mutual complex relations that cannot be limited to constitutional definition, but has the importance of their historical roles. Moreover, the historical roles and changes to the Slovak Constitution has become the topic of serious political debate. On the other hand, the Slovak President and the Slovak National Council and the Slovak President and the Government is proof positive of the continued stability of the Slovak political system as well as its continued evolutionary democratic growth.

Key words:

President of Slovak Republic. Constitution. Authority. Power. Constitutional Court. National Council.

1 The President of Slovak Republic: general provisions

The current constitution of the Slovak Republic was adopted on the basis of the legislative assembly of the Slovak National Council, on 1st of September 1992.¹ It came from the creation of a separate state, the Slovak Republic, which arose from two successor states after the collapse of the Czech and Slovak Federal Republic on January 1st, 1993.² Since its

¹ It was announced in the Collection of Laws n. 460/1992 Coll., 1st of October 1992, when with the exception of some Articles went into effect. The Slovak Constitution is divided into the preamble and 9 parts, which are divided into Articles and paragraphs. The structure of Constitution of the Slovak Republic is the following: the Preamble, General provisions (First part), Fundamental rights and freedoms (Second part), Economy in the Slovak Republic and Supreme Audit of the Slovak Republic (Third part), Legal self-governing bodies (Fourth part), Legislative power (Fifth part), Executive power (Sixth part), Judicial power (Seventh part), Office of the public prosecutors in the Slovak Republic (Eight part), Transitory and final provisions (Ninth part)

²Constitutional Law No 542/1992 Coll. about the cessation of Czech and Slovak Federal Republic

adoption in 1992 it has been constantly amended and updated no fewer than 11 times³ the last of those amendments was made at the beginning of 2014. The role of the President under the constitutional system of the Slovak Republic and the execution of his powers have been altered a total of four times⁴ due to the changes and amendments made to the constitution, when compared to the original text, its position and the layout of relations between the highest state authorities has been significantly modified.

In truth, the formation of a government, and the position of the President since the creation of the Slovak Republic has become the topic of serious political debate. These issues have been ongoing since 1993 and under increased pressure since two of the highest representatives of state in the formative years - Michal Kováč as President and Vladimir Mečiar as Prime Minister - often came into mutual conflict, which with its scope and intensity has affected Slovakia. This opinion clash represented one of the fundamental constants inside the political development of Slovakia between 1993 and 1998. Government proposals for the Constitution of the Slovak Republic in 1992 contained a combination of components derived from the first Czechoslovak Constitution dating back to 1920, and from the constitution of 1960 (as amended by Constitutional Law of the Czechoslovak Federation) and the international conventions on human rights (Drgonec, 2001: 7). The Constitution laid up specific powers of the Slovak president that while specific, also has created periods of tension.

2 Powers of President

The powers of the President of the Slovak Republic were modified in the Constitution of the Slovak Republic under Article 102, but also in other provisions.⁵ Article 102 provides that the President shall represent the Slovak Republic externally, negotiate and ratify international treaties. He

³ According to constitutional law n. 244/1998 Coll., n. 9/1999 Coll., n. 90/2001 Coll., n. 140/2004 Coll., n. 323/2004 Coll., n. 463/2005 Coll., n. 92/2006 Coll., n. 210/2006 Coll., n. 100/2010 Coll., n. 356/2011 Coll. and currently the last constitutional law n. 232/2012 Coll.

⁴ In the years 1998, 1999, 2001 and 2011.

⁵ Art. 7, Art. 82 §. 2, Art. 87, Art. 95, Art. 110, Art. 111, Art. 112, Art. 115, Art. 125a, Art. 125b, Art. 134, Art. 135, Art. 138, Art. 141a . 1, §. 145, Art. 146, Art. 147, Art. 150. Further: Čič & kol., 2012, p. 553

may delegate the negotiating of international treaties to the Government of the Slovak Republic or, upon the consent of the Government, to its individual members. Moreover, and important to the development of the office, the president may submit to the Constitutional Court of the Slovak Republic a proposal for a decision on the conformity of a negotiated international treaty, for which the consent of the National Council (parliament) of the Slovak Republic is necessary, with the Constitution or with a constitutional law.

The Slovak president has the power to receive, appoint and recall diplomats. Additionally, the president may convene the opening session of parliament, and dissolve parliament if parliament, within a period of six months from the nomination of a Government of the Slovak Republic, has not passed its Programme Proclamation, or if parliament has not passed within three months of the formation of a Government a draft law with which the Government has a vote of confidence, or if parliament has not managed to hold a session for longer than three months or if a session of parliament has been adjourned for a time longer than allowed by the Constitution.

Furthermore, the President shall dissolve parliament in the cases that after a plebiscite on the recall of the President, the President has not been recalled, and during war. The Slovak president has the power and authority to sign laws, appoint and remove the Prime Minister and other members of Government, and charge them with their official duties of Ministries and accept their resignation; he shall recall the Prime Minister and other Ministers in cases defined in Arts. 115 and 116⁶. Finally, and

⁶Art. 115 Constitution of the Slovak Republic:

„ (1) In the event that the National Council has passed a vote of no confidence or overrules its motion for a vote of confidence, the President shall recall the Government.

(2) In case the President has accepted resignation of the Government, he shall delegate all powers to be exercised continuously until a new Government is appointed.

(3) If the president of the Slovak Republic shall withdraw government according to paragraph 1, by the decision declared in the Collection of Laws of the Slovak Republic, it entrusts implementation of competence to the appointment of the new government, but only to the extent of the Article 119(a), (b), (e), (f), (m), (n), (o), p) and (r); performance of government pursuant to Article 119 letter (m) and (r) is in each individual case bound to the prior agreement of the Slovak Republic. “

Art. 116 Constitution of the Slovak Republic:

important to the continuation of the official duties of the Slovak president after the Constitutional amendment change of 1999, the president shall appoint and recall principal officials of central bodies, and higher state officials and other officials in cases laid down by law; appoint and recall rectors of universities, appoint university professors and shall appoint and promote generals, while conferring decorations (honors) unless another authority has been delegated by him to do so. Additionally, the president may exercise the authority to pardon and offer amnesty, and is commander in chief of the armed forces. The president has the authority to formally declare war on the basis of a decision passed by parliament is attacked or if it follows from obligations from international treaties and collective defence against attack,, order the mobilization of the military forces, declare a state of war or declare an exceptional state of emergency and their conclusion.

The president may also declare a referendum, and may return to parliament a law with comments up to 15 days of delivery of an adopted law, likewise the president shall inform parliament of the state of the union and of major political issues. This involves giving the president the right to request of the Government and of its members information necessary for the accomplishment of tasks and shall appoint and recall judges of the Constitutional Court of the Slovak Republic, the President and Vice-President of the Constitutional Court of the Slovak Republic; shall accept the oath of judges of the Constitutional Court of the Slovak Republic

„ (1) Member of the Government shall be individually accountable for the discharge of his or her function to the National Council of the Slovak Republic.

(2) A member of the Government may submit his or her resignation to the President of the Slovak Republic.

(3) The National Council of the Slovak Republic may also take vote of no confidence in an individual member of the Government; in such case the President of the Slovak Republic shall recall the member of the Government.

(4) A motion for the recall of a member of the Government may also be presented by the Prime Minister.

(5) In the event of the Prime Minister's resignation, the whole Government shall resign.

(6) If the National Council of the Slovak Republic has passed a vote of no confidence in an individual member of the Government, the President of the Slovak Republic shall recall the member. The recall of the Prime Minister shall result in the resignation of the Government.

(7) If the President has accepted the resignation of a member of the Government, or if he has recalled a member of the Government, he shall designate another member to be temporarily responsible for fulfilling the duties of the resigning member.“

and the oath of the General Prosecutor. This also means that the president shall appoint and recall judges, the Chief Justice and the Deputy Chief Justice of the Slovak Republic, General Prosecutor and three members of the Judicial Council of the Slovak Republic; shall accept the oath of judges and pursuant to Art. 102, para. 1 (letter c) and (letter j) if it concerns the granting of amnesty, and to (letter k), is valid if signed by the Prime Minister of the Government of the Slovak Republic or a Minister authorized by him; in these cases, the Government of the Slovak Republic is responsible for the decision of the President. Relations between the President and Parliament are set out by the framework of a parliamentary form of government.

3 The relations of the President and Parliament

These mutual relations have undergone several major variations since the initial acceptance of the Constitution of the Slovak Republic. A typical feature of parliamentary form of government is that the executive power is subordinate to legislative power. For the head of state, this often means that the position is incorporated into executive power, together with the government, however, such subordination does not currently apply to the Slovak president.

In the proposal of the Constitution that was put forth in 1992 the relationship between the President and Parliament was to be formulated under a vice versa agreement according to the proposed Article 101(4) where the President shall be responsible for the execution of its functions to the Slovak National Council (parliament) (Orosz, Šimuničová, 1998: 57). Also the explanatory message to the Government proposal of Constitution of the Slovak Republic on the office of the President stated that "responsibility of the President for the execution of its functions to Slovak National Council emphasizes that the constitutional obligation to pass reports on the state of the Slovak Republic and of any serious political issues to the Slovak National Council (Chovanec, 2002: 379)."

Convening the meetings and dissolving the National Council of the Slovak Republic

The traditional duty in the parliamentary form of government is the power of the President to convene a meeting of parliament. This power is specified under the section about legislative power, in which it is stated that a session of Parliament will take place within thirty days from the official declaration date of the elections. The provision also states that in

the case that this does not occur then the constituent meeting must be held on the thirtieth day after the official declaration of election results.⁷ In a review of the powers of Presidents between 1918 to 1922 we can conclude, that Presidents should have in the relationship to the parliamentary meetings powers, which are more extensive, because they not only convene the sessions of the legislature, but also the ordinary and extraordinary meetings.⁸

As such, the President's role is considered in countries with established parliamentary forms of government to be one mainly as an arbitrator with the aim to be an active facilitator particularly in the case of any constitutional and political crisis, and having the right to exercise other authoritative roles which exist to dissolve the parliament, it can be assessed as jurisdiction applying in the conditions of a permanent crisis between the Government and Parliament (or between political parties which are represented in Parliament). In this then, the head of state's role and powers are limited by both scope of autonomy and timescale:

- if Parliament within a period of six months from the appointment of its Government has enacted its policy statement,
- if Parliament did not decide within a period of three months about the proposals of government law, with which the Government has brought forward any questions which are associated with trust,
- if Parliament, in its entirety, has not been active for a period which exceeds more than three months, although its meetings are without interruption.
- if meetings of Parliament were suspended for a longer period of time than that which is currently permitted by the Constitution.⁹

In the original version of the Constitution from 1992 the President was entrusted solely with this authorization and power of decision, the other rules and amendments related to this entrustment of decision-making were incorporated into the constitution and passed into law in 1999. All of these alternatives of dissolving the legislative assembly are bound by the final decision of the President, as the head of state, but does not have to do so in those cases. Whereas, filling any outlined situation would most likely

⁷ Article 82(2) of the Constitution of the Slovak Republic

⁸ See the relevant provisions of constitutions from years 1920 and 1948

⁹ According to Article 102(1)(e) Constitution of the Slovak Republic

cause a constitutional crisis or would be equivalent to that magnitude of the situation, the President as an arbitrator should decide between political basis. For example, by setting up a new government coalition, or possibly dissolving the legislative assembly and to organize parliamentary elections which would occur earlier than anticipated. However if this were to happen it would mean that the legislative branch would not be able to exercise its powers of control. If there happened to be such a situation which would arise and the President decided to solve the crisis, this then in fact would probably more than likely mean that he would take a stance which would see him stand in support of the government, which would be in effect until the period of time for which the creation of the new government would take place, which in turn would not be until after the exceptional parliamentary elections, carry out its mandate with no effective control.

Time constraints or limits of this optional power to dissolve parliament is bound by the last six months of the functional period of the head of states term in office. Equally it is bounded for the period during emergencies, such examples being war or a state of emergency.¹⁰ According to the explanatory message to this adjustment is the ban on the dissolution of the legislative assembly normally fused in the constitutions other states. In emergency situations it is practically impossible to ensure that after the dissolution of parliament free democratic elections would be held. In addition, in emergency situations it would not be possible to ensure the powers of control for the legislative assembly at the time when it would be very necessary, regardless of the fact that a meeting of such a body would be very difficult (Drgonec, 2001: 153-154).

In only one case is the decision of the President in relation to dissolving parliament connected to this obligation and that is in the case that the president was not by popular vote elected president, therefore on that basis must withdraw the decision to dissolve Parliament.¹¹

In the current political depiction of the Slovak Republic since its establishment in 1993 there has not been any situations when it would have been possible to imagine the political and constitutional situation in

¹⁰ This restriction related to an emergency situation in the country was adopted by amendment of Constitution No 90/2001 Coll.

¹¹ Article 102(1)(e) Constitution of the Slovak Republic

this way. All the conflicts in relations to the coalition and the opposition were resolved so that the operation of the parliament was not paralysed or ineffective for a longer period of time.

Signing laws and the right of veto

Unlike the powers of the President of Czechoslovakia since 1960, the Slovak President did not have, as constitutional lawyers had granted the right of making law(s) (legislative power) (further see Orosz, Šimoničová, 1998: 58 and Kura, 2003: 64-66). Such authority was explicitly expressed in the government proposal of the Constitution, but it was not kept during the approval of its text (Orosz, Šimuničová, 1998: 58). There remained however, a certain constitutional problem in the fact that in the part devoted to the National Council (Parliament) of the Slovak Republic it was stated that the proposal of the law may be lodged by parliamentary committee, the members of parliament and the Government,¹² on the other hand, the President was eligible to give proposals of law and other measures to the legislative assembly.¹³ Michal Kováč during his term in office never exercised the right to use this. In the opposite case there would be likely to have a situation, with which it had to deal with the constitutional court and to interpret its ruling on this issue. Outlined potential constitutional problems were also realized by the legislators and the authorisation of the president on the submitting proposals for laws from the constitution have been deleted.¹⁴

Changes and extensions of presidential powers occurred between 1993 to 1999. The possibility of the President to enter into the legislative process guarantees him the power to sign laws and the authority to return back to parliament laws with comments for re-examination.¹⁵ The legal signature of the President according to law is understood in two meanings: as the "Registration" of the constitutional factor to the law and the possibility to influence the legislative process (Kura, 2003: 64). According to the original version of the Constitution, the President not only had the

¹² Art. 87. §. 1 Constitution of the Slovak Republic (in its original form)

¹³ Art. 102 §. 1 let. o) Constitution of the Slovak Republic (in its original form)

¹⁴ According to adjustment of the Constitution by constitutional law n. 9/1999 Coll.

¹⁵ Art. 102 §. 1 let. f) & Art. 87 §. 3, or. Art. 102 §. 1 let. o) & Art. 87 §. 2 Constitution of the Slovak Republic

right to veto law(s), but could also return for reconsideration.¹⁶ In addition to this authorisation, which was depending on its decisions, it was also standard practice and political protocol that the law(s) was also returned to parliament for re-examination, if the government requested to do so.¹⁷

This provision to the constitutional text was accepted as an alternative to the proposed and rejected government proposal to the new Constitution (without any mention in the explanatory memorandum).¹⁸ I. Palúš and Ľ. Somorová state on this fact, that it was a non-standard solution, which made the president in this context act like a postman between the Government and Parliament (Palúš, Somorová, 2002: 253). Since the president had relative rights towards laws and constitutional acts, it was necessary to gain an absolute majority from Parliament members (at least 76 votes), and a constitutional majority (at least 90 votes) for this change. Even when an increased quorum did not occur, it was a necessary part of parliamentary rules of procedure. On the other hand, there is the question of whether the president requires a bigger quorum as its first approval is not too drawn in the legislative process and whether it is not breaking the balance between the authorisations of the bodies within the constitutional structure.

This issue was modified by its re-instatement in the Constitution since 1999. The new interpretation of the authority of the president was the responsibility of the president to return to any renegotiation if even if no request by the government was made, as well as the power of the president to return to Parliament proposed law(s) and the right of veto over them. However, any laws returned to parliament by the president, together with comments may still be approved in its original form (without acceptance of the presidents comments), non-approved as a whole or approved with comments by the president.

The right of veto towards law(s) by the president and those adopted by parliament was used quite often by the first three Slovak Presidents. In total Michal Kováč used it in 38 cases (of which of its own decision in 25 cases, at the request of the government in 9 cases and in 4 cases of decision directed by the President and also government), Rudolf Schuster

¹⁶ Article 102(1)(a) Constitution of the Slovak Republic (in its original form)

¹⁷ Article 87(4) Constitution of the Slovak Republic (in its original form)

¹⁸ Article 87(4) Constitution of the Slovak Republic (in its original form)

returned back to Parliament 103 laws (Orosz, Šimuničová, 1998: 97). President Ivan Gašparovič in his first term as President between 2004 to 2009 took advantage of this authority 48 times. He was also persistent with this during his second term when he returned to Parliament 51 laws. For the two terms President Gašparovič held in office he returned fewer laws back to Parliament than his predecessor Rudolf Schuster during a period of five years. So, while relations between parliament and the Slovak President has remained largely consistent with original intent, the relations between the Government and the president has seen periods of tension.

The relations between the Government and The President

According to the fact that the office of the President and the Government, as institutions, are constitutionally arranged under the same constitutional head. The biggest issue between them however remains to this today, specific relations between them. Even the important change during Constitution adjustment in 1999 was about this topic. While each holds clear understanding and interpretation of the other competences, existence and cooperation has been difficult.

The process of creating a Government cabinet, the President participates in the first phase of the formation by nominating a person for Prime Minister and according to the Prime Ministers proposal also the appointing of other members to the Government. At the end of this process parliament provides the vote of confidence based on the program announced by the new Government.

From a constitutional point of view, the president holds the authority to nominate the Prime Minister. The President's autonomy comes directly from the Slovak Constitution and is absolute. The only condition for this is that the person who is nominated has to have Slovak citizenship and has to fulfill the requirements to be electable to National Council of the Slovak republic, and also needs to be 21 years of age. The main principle of the parliamentary form of the government, the supremacy of the Parliament over the Government is requesting that the President has to respect the results of the parliamentary elections, current status of the scope of political powers in parliament and the person who he will choose to be President of the National Council has to be a person which is able to gain the support in legislative branch for program announcements of the Government. Another tradition of the parliamentary form of Government is to authorize the head of the strongest political subject form the parliament to construct the Government (in practice it does not mean the

nomination of the Prime Minister). In the case that it would be unsuccessful, it would be the responsibility of the next leading political subject in line. It is necessary to underline that this method is from a political point of view logical but the head of state is not tied to it. It could in essence probably just explain the character of the political culture in the country. Currently presidents have always chosen this method of creating the Government and always authorized the leader of the winning subject of the parliamentary elections. It also happened in 2002 and 2010, when the winner of the elections were not able to establish the governing coalition. Presidents in these cases authorized the creation of a new Government from the leaders of the opposition, Mikuláš Dzurinda and Iveta Radičová, respectfully.

In relation to naming the other members for the Government the President does not have autonomy and he needs to act in accordance with the proposals of the Prime Minister. At this point it was a really big change when compared to the previous version of the Constitution. According to the previous version and according to the constitutional explanation of the Constitutional Court of Slovakia, the president was tied by the proposal of the Prime minister in the case of nominating the other members of the government. This liability was not absolute, the President could not nominate the member of the Government on the basis of his own opinion, but he could reject proposals put forth. This was the case in November 1993 when President Michal Kováč did not want to nominate Ivan Lexa to the post of minister of privatization on the recommendation of Vladimír Mečiar. In his reasons stated for not accepting the proposed candidate President Kováč stated that: "he is not fulfilling the condition, because he knows him personally and did not have his trust."

The President had similar powers in the case of deciding members of the Government. The duty or authority to deny a proposed member of the government is stated in the Constitution and in the cases that the National Council vote of confidence against a member or the member lost reelection. However if the proposal to deny the proposed member to a position in the government was passed on by the Prime Minister, it is compulsory for the President to deal with this case. However after judging the case he could still decide if he will agree with this proposal and he will recall the member of the Government or if he would not comply and would not deny the member of Government the proposed position. This mechanism is not typical for the parliamentary form of governing, in which the Prime minister has the main influence on the creation of his Government as observed in Great Britain for example. The President could

have direct influence on the activity of the Government and could also be directly involved in specific cases of government crisis. That's why this power to judge the proposals of the Prime minister for nominating and calling of the members of the government and the possibility to refuse proposals was removed during the adjustment of the Slovak Constitution. The following is a phrase quoted directly from the original text of the constitution article number 111: "On the proposal of the Prime minister the President of the Slovak Republic is appointing and recalling the other members of the Government and authorize them with running the ministries, " this was changed to: " According to proposal of the Prime Minister the President of the Slovak Republic is appointing and recalling the other members of the government and authorize them with running the ministries."

When put into context the power of the Slovak presidency has remained strong. If the head of state recalls the members of the government, until the appointment of a new member of government the president will choose the member. In this case the Slovak President is under no obligation to meet the proposal of the Prime minister. Even when this is not very important and also very time limited it could be an awkward situation especially for the Prime Minister. A typical example is the situation in May 2001, when former President Rudolf Schuster after recalling the Minister of Interior Ladislav Pittner, did not agree with the proposal from then-Prime Minister Mikuláš Dzurinda, that until a new Minister of Interior would be appointed, Dzurinda himself would lead the ministry. The President authorized for this function the Minister of Justice Ján Čarnogurský instead.

The provisions of the constitution which have not changed or amended are the cases of recalling the Government in the case of a vote of confidence to the government or the Prime Minister (which has the same result) from Parliament. This provision is typical for parliamentary form of the Government and it was not necessary to change it. So if Parliament will pass the vote of confidence towards the government (or its Prime Minister), the President is obliged to respect this political outcome and recall the government. The recalled Government is obliged then to exercise its duties until a new Government is appointed. The same mechanism is in place in case the Government will pass after the first session of a newly elected National Council of the Slovak Republic the obligatory resignation of office. The adjustment of the Constitution approved by the law n. 356/2011 C.c from October of 2011 after the electoral defeat of the Iveta Radičová Government were required to remain in their official positions

until a new government was appointed. In connection to this adjustment, debates started about introducing a semi presidential system in Slovakia. Robert Fico stated that a government like this would be completely without competence, according to which lots of members of coalition argued that the government would still be functional. For the reason that this change in constitution is limited to the specific case of a very short duration, these statements about semi-presidential system in Slovakia are not in place and the Slovak Republic would remain even after this adjustment a parliamentary democracy.

A common feature of the powers of the all Presidents in relation to the Governments since 1920 has been their duty to lead the government if necessary. In this way the authority was put in the Constitution of the Slovak Republic in 1992, into the same legal Article together with the government under language of executive power. However, while useful in the cases where the Prime Minister is forced to resign, or the Government loses a vote of confidence, such joint executive authority may lead to conflict between the President and the Prime Minister.

This was the political situation in Slovakia from 1993 to 1998, which saw severe parliamentary conflict, between President Michal Kováč and then-Prime Minister Vladimír Mečiar. This interesting time provides insight into how the use of powers was used by the respective head of state and the head of government. While the president may attend and request to chair government meetings, the president is not part of the cabinet. Furthermore, while not a member of the cabinet the president may make decisions and present proposals in his function as head of state. Likewise, the President also has the power to veto law(s) until such time as they are reconsidered by Parliament whom votes to pass the law(s) over presidential objection, at which time the President must accept the law. The President does not have the authority to overrule the government in these cases because the fundamental principles of the parliamentary form of government holds the responsibility of the government towards Parliament, not towards the President.

Therefore, the best characterization of the parliamentary system is this: the Government should govern and the President should represent. That is why it is also good from the view of political culture, that even during the crisis of trust between the Government and President in the mid-1990s, President Michal Kováč did not actively use his executive powers. The right to attend the government sitting, without the right or request to chair it, was only exercised twice in the five year period between 1993 - 1998, the first time was in 1993 after Kováč was elected and again in 1994 and

after the commencement of the government of Jozef Moravčík. In both cases it was within a ceremonial role. However, due to the realities of Slovak politics, and in an effort to give the Slovak president powers in compliance with the theory of parliamentary democracy, this right was taken from the head of state in an amendment to the Constitution in 1999.

In relations to the government the President kept the possibility to request from the government, or from individual member's information, which are related to performance of the government. The above mentioned crisis between the Government and the President during the period of 1993 to 1998 indicated also the need to submit the explanation of this authorization by the Constitutional Court of the Slovak Republic. It regarded the assessment of cooperation between the bodies of the executive power (The President and the Government) into the applications of their powers based upon constitutional principles. From the Court's findings, it indicates (and this status is also currently valid), that the head of state has the right to request from the government and its individual members reports belonging to their scope without need to closely specify their purpose. On the other hand there is no time limit in which the requested report has to be delivered. The Constitutional court stressed the need of normal functioning relations between the constitutional players. This announcement also confirmed that the examination of the mutual relations between the bodies of power can not be limited to constitutional definition, but also the importance of the roles that the other persons involved have. Thus, it is important to discuss the unique situation of substituting the head of state.

Substitution of the Head of State

The Constitution of the Slovak Republic in its reading from 1992, defined four alternatives, during which the substitution of the head of state could happen:

1. if the President is not elected,
2. if the function is released and the head of state is not elected yet,
3. when the newly elected president has not yet been sworn in under oath,
4. if the president can not carry out its duty of office for serious reasons.

In any case that the Constitution would bestow some powers into the hands of Government which could be authorized to carry them out by the Prime minister. Concretely the powers like negotiations of the

international treaties, receiving and delegating of ambassadors, granting amnesty, transition of the role of leader over the armed forces automatically falls to the Prime Minister. A more serious event is the application of the Constitutional provision on the selected powers of the President, which are applied during the time when the function of the head of state is not possible to carry out its duty. Specifically, it is about the circle of un-substitutable powers, the possibility of recalling parliament during the first six months since elections in the case that there was three unsuccessful attempts to form a Government, signing of laws, appointing and recalling the President of the National Council and the other members of the Government, appointing and recalling the heads of the central bodies and higher state functionaries in the case that it was established by law, the appointing of the university professors and rectors of the universities and also the appointing and promotion of generals.

Current constitutional change is the result of three of the following adjustments of the original text from 1992. Said powers can be divided into three Categories: non-substituted powers, powers confided in the Government, and powers confided to the President of the National Council of the Slovak Republic. The first category dealt specifically with powers of laws signed, the conferral of honorary degrees, granting of mercy and amnesty, the right to request information from the government, giving reports on the state of the Slovak Republic, and finally the authorization of recalling the government. Specific power is confided to the Government; representation of the nation abroad, negotiation and ratification of international treaties, submission of said treaties to the Constitutional Court for review, authority of the Prime Minister as commander and chief of the armed forces, delegating, receiving and the recall of diplomats, declaring national referendums, and returning to parliament for renegotiation specified laws. Unique powers are confided to the President of the National Council of the Slovak Republic. These powers are convening a quorum of parliamentary members, both appointing and recalling the Prime Minister and the other members of the Government, appointing and recalling the heads of the constitutional bodies, higher state functionaries and other functionaries in the cases established by law. Also he has power appointing and recalling rectors of the universities and appointing the university professors, the appointment and promotion of generals, terminating war on the basis of Parliamentary vote, and the appointment and recall of the President and the Vice-president of the highest court of the Slovak Republic, Attorney General, and three members of the Judicial Council of the Slovak Republic. Additionally, he holds the

power to receive promises from judges, to appoint and recall judges of the Constitutional Court of the Slovak Republic, the President and Vice President of the Constitutional Court and receiving the promises of the judges of the Constitutional Court of the Slovak Republic.

From the point of view of the stability of the Slovak political system, an important adjustment took place in 1998. Until then there had not been an option to accept the resignation of the government (including the obligatory quorum session of the new National Council) and create a new one. This was an option after 1998 and the term of office of Slovakia's first president Michal Kováč, who previously could not authorize laws, since no new government had existed. The formation of M. Dzurinda government in autumn 1998, which consisted of the representatives of the Slovak Democratic Coalition, Party of the Hungarian Coalition, Party of the Democratic Left and the Party of the Civic Understanding, was already under the authority of the Speaker of the Parliament Jozef Migaš.

Conclusions

The power and authority of the Slovak President and Parliament since the creation of the Slovak Republic in 1993 has undergone necessary changes in their mutual complex relationship that can not be limited to constitutional definition, but has the importance of their historical roles. Moreover, the historical roles and changes to the Slovak Constitution has become the topic of serious political debate.

While there has been and will likely be continued unique periods of tension between the Government and the President specifically or the President and parliament in broader themes, the respect of the office and power and authority granted will remain constant. From the original powers written in the Slovak Constitution in 1993 to its new authority since 1999, the relationship between the Slovak President and the Slovak National Council and the Slovak President and the Government is proof positive of the continued stability of the Slovak political system as well as its continued evolutionary democratic growth.

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THE PRESIDENTIAL CABINET IN THE CZECH REPUBLIC: A SYMPTOM OF PARLIAMENTARY REGIME PROBLEMS

Miloš Brunclík

Abstract

The paper seeks to explain the rise of a presidential cabinet, which was established in the Czech Republic in June 2013. This kind of cabinet was formed exclusively by the head of state without taking regard to parliamentary parties and contrary to their will. The presidential cabinet has been often associated with the direct election of president, since the cabinet was appointed by the first ever popularly elected President Miloš Zeman. However, the paper shows that causes of the cabinet are multifold: including strong presidential powers in the government formation process, legitimacy advantage, weakness of parliamentary parties and high levels of anti-party sentiment in the Czech society.

Key words:

Presidential cabinet. Parliamentary regime. Government. Czech Republic.

Introduction

In June 2013 a new cabinet led by Jiri Rusnok was appointed in the Czech Republic. Its technocratic nature was seemingly by no means a novelty in the modern Czech political history: the Czech Republic had witnessed two technocratic cabinets (1998 and 2009-2010) before. However, a new and at the same time a crucial feature of this cabinet was that it became the first presidential cabinet in the Czech Republic, as it was appointed by the president contrary to preferences of parliamentary parties and regardless of constitutional conventions. Indeed, whereas all the previous cabinets could rely on a parliamentary majority or were at least tolerated by it¹, the Rusnok cabinet was formed exclusively by the president. In other words, for the first time the cabinet was formed outside the parliament. Thus, the parliamentary nature of the Czech political regime was undermined.

¹ A minority cabinet led by Mirek Topolánek failed to receive vote of confidence in the Chamber of Deputies in 2006. However, it was not a presidential cabinet and its failure was caused primarily by inability of parliamentary parties to form viable government.

The aim of this article is to address the following questions: How can the rise of the 2013 presidential cabinet be explained? Was it a pragmatic reaction to a government crisis, or was it an attempt to strengthen the role of the president and set a precedent, whereby the president has the last word on the result of the government formation process? The article proceeds as follows. First, the context of the rise of the 2013 presidential cabinet in the Czech Republic is described. Second, the concept of the presidential cabinet is explained. Subsequently, the article deals with the issue of how the rise of the cabinet can be interpreted. The article uses comparative theoretical and empirical literature in order to identify the most important factors that stand behind the Rusnok cabinet.

Context of the 2013 presidential cabinet

Following the 2010 elections to the Chamber of Deputies (the lower parliamentary chamber) a majority three-party center-right government was formed by the Civic Democratic Party (ODS), TOP 09² and Public Affairs (VV). Petr Necas (ODS) became the prime minister. However, soon after the government was established, bitter conflicts among the parties and various scandals within the ODS and VV started to plague the government. However, it was not until 27th June 2013, when the Necas government fell. The government crisis was triggered by a far-reaching police operation to arrest several politicians (including three ODS MPs), businesspeople and lobbyists charged with bribery and money laundering. Necas bowed to mounting pressure from the opposition and his own coalition partners and stepped down over the scandal (The Independent, 2013).

Whereas opposition parties - mainly the Czech Social Democratic Party (ČSSD) and the Communist Party of Bohemia and Moravia (KSČM) - wished early elections, the former government parties preferred another three-party government. They were even able to collect 101 signatures (Chamber of Deputies has 200 members) to demonstrate their unity and preparedness to form their new cabinet.

When a cabinet crisis is to be settled, or following parliamentary elections, a constitutional convention assumes that the Czech president invites representatives of parliamentary parties to discuss alternative

² Acronym for the Czech terms tradition, responsibility and prosperity.

solutions to the government crisis. Up to this point, Milos Zeman acted in line with general expectations and conventions. Yet on 25th June 2013 Zeman broke with the conventions and despite having been informed by the parliamentary parties that a technocratic cabinet was not acceptable for them, he appointed Jiri Rusnok the new prime minister. Two weeks later (July 10th) further cabinet members were appointed and the first presidential cabinet was formed (BBC, 2013). Milos Zeman was at pains to gather enough support for the Rusnok cabinet prior the vote of confidence, which is required by the constitution. However, the cabinet failed to win the confidence vote on 7th of August 2013, as a majority of MPs voted against the cabinet. Even though the cabinet was forced to resign according to the constitution, it could stay in office, since the president in line with the constitution authorized this cabinet to execute its office “temporarily until a new government is appointed”(art. 62). The decision about the new government assumed by the constitution was still up to the president. In between early elections were held and shortly after the results were officially proclaimed, a new parliamentary majority willing to form a coalition cabinet emerged. However, the president made no effort to expedite the appointment of the new cabinet. After a widespread political and public pressure Zeman eventually appointed the new cabinet that could enjoy support of parliamentary majority on the 29th of January 2014.

Presidential Cabinets

Starting with the principal-agent theory (e.g. Strøm, 2000, see also below) it is possible to distinguish between parliamentary cabinets and presidential cabinets. This distinction applies to both parliamentary and semi-presidential regimes, where cabinets are accountable to the parliament³. The parliamentary cabinets result from an agreement of

³ This paper adopts the concept of semi-presidentialism suggested by Duverger (1980, 166) and/or Sartori (1997, 131-135), for whom the criterion of presidential power is crucial. Agreeing with this approach, Czech scholars classify the Czech Republic as a parliamentary regime even after the popular election of the president was introduced to the Czech constitution. However, a more recent approach defines semi-presidentialism as a system, where „a popularly elected fixed term president exists alongside a prime-minister and cabinet, who are responsible to parliament (Elgie, 1999, 13). Hence, Elgie regards the Czech Republic as a case of semi-presidentialism.

parliamentary parties. The role of head of state in the government formation process is usually only formal. On the contrary, the presidential cabinets reflect presidential will, whereas parliamentary parties play no or very limited role in the government formation process (see Protsyk, 2005a; Schleiter, Morgan-Jones, 2005: 3; Schleiter, Morgan-Jones, 2010: 1424).

As it has been hinted above, further two major types of cabinets can be distinguished: political cabinets (composed of representatives of political parties) and technocratic cabinets (composed of persons, who are not affiliated to any political party) (for a more detailed discussion see McDonnell, Valbruzzi, 2014). The technocratic cabinets tend to be often presidential cabinets. P. Schleiter and E. Morgan-Jones have even found a strong correlation between presidential cabinets and a high share of non-partisan cabinet ministers (Schleiter, Morgan, Jones, 2010: 1424-1427). Similarly, Amorim Neto and Strøm (2006) argue that presidential influence over the cabinet formation process can be measured through the share of non-partisan ministers in cabinets: the greater is the role of president in the government formation process, the higher is the share of non-partisan ministers in the cabinet: "Since popularly elected presidents ... often need or want to extend their appeal beyond their respective political parties, they may well be inclined to promote politicians independent of, and untainted by party politics" (Amorim Neto and Strøm, 2006: 624). In other words, unlike parliamentary cabinets, presidential cabinets are often technocratic governments that lack partisan links to a governing group in parliament. Consequently, such cabinets face weak ex ante and ex post checks on their actions. Cabinet members - technocrats (non-partisans) - are not so constrained by their aspirations for re-election and they are therefore likely to be less concerned with ex post accountability. They tend to be more loyal to the president, since they are not accountable to political parties (see Raunio, Wiberg, 2003: 321; Strøm, 2003; Schleiter, Morgan-Jones, 2005: 6).

Even though occurrence of presidential cabinets in parliamentary regimes is rather rare, it is possible to find a couple of examples: for example the cabinets of Ciampi (1993), Dini (1995), Monti (2011) in Italy were created almost exclusively from the presidential initiative, while political parties were excluded from this process (Grimaldi, 2011: 111; Marangoni, 2012). However, there is an important difference between the presidential cabinets in Italy on the one hand and the Rusnok cabinet on the other hand. Whereas the former cabinets were clearly endorsed by an

overwhelming parliamentary majority, the latter was created contrary to the will of parliamentary parties.

Why presidential cabinets are formed?

The following section is based on theoretical literature, which can facilitate an explanation of presidential cabinets⁴. Two groups of factors are discussed. First, the paper deals with a formal institutional setting. It focuses on a) direct presidential elections, b) timing of elections, which at times might give the president “legitimacy advantage” over parliament, and c) the constitutional procedure regulating the government formation process. Second, the paper discusses the nature of the Czech party system, as the outcome of the government formation process depends not only on constitutional rules and presidential powers, but also on the ability of parliamentary parties to push through their candidate. The analysis shall enquire into a) parliamentary fragmentation and the relationship between the president (and his partisanship) and the character of a partisan majority in parliament, and b) levels of anti-party sentiment among the public, since it is assumed that if parliamentary political parties are perceived negatively by the public, a non-partisan (technocratic) cabinet is more likely to be appointed.

Direct elections

Milos Zeman became the first president elected in direct elections in January 2013. Thus, a seemingly simple and logical answer to the question of why the Rusnok cabinet was formed would be that it is a consequence of the direct election of president. Indeed, Zeman’s predecessors – Václav Havel and Václav Klaus, who were elected in a parliamentary vote - never

⁴The author is inspired by the approach offered by Tavits, who juxtaposes direct presidential election, as one of the key factors that is conventionally seen as the driving force behind presidential activism on the one hand, and set of contextual factors that are subsumed under the concept of structure of political opportunities (Tavits, 2011; see also Schleiter, Morgan-Jones, 2005; Protsyk, 2005a). This framework is not constant, but it is rather changing. “As the opportunity framework changes, the boundaries of political arena will expand or contract, changing the availability of incentives and opportunities for presidents to act” (Tavits, 2011: 36). Tavits understands political opportunity framework as consisting of two parts: a) constellation of partisan preferences, and b) strength of other institutions, notably parliament and government (Tavits, 2011: 36).

attempted to form their own cabinets completely ignoring parliamentary majority.

It is frequently argued that directly elected presidents enjoy greater legitimacy and popular authority and therefore tend to be much more active in politics. For example, Arend Lijphart asserts that in parliamentary democracies a “popular election may provide the head of state with a democratically legitimate justification to encroach upon or take over leadership of government” (Lijphart, 1999: 141, see also Baylis, 1996). Moreover, Metcalf claims that directly elected presidents are “more powerful and more dangerous for democratic consolidation than those elected by the assembly” (Metcalf, 2002: 2). Hence, the popular election is supposed to lead to a more independent president in relation to a parliament, whereas indirectly elected presidents are much more tied to assemblies and less likely to act independently and unexpectedly (see Linz, 1997: 4).

The argument about the greater independency and activism of directly elected presidents fits the principal – agent theory. According to this theory, the agent acts on behalf of the principal and the former is also accountable to the latter, who may punish or reward the agent for his performance in office. According to Strøm an ideal form of parliamentarism is characterized by a single chain of delegation, with parliament being the only directly elected body, to which government is accountable. However, the direct presidential election clearly undermines this model. In parliamentarism the delegation relationships “take the form of a long and singular chain, whereas under presidentialism they look like a grid” (Strøm, 2000: 270). In other words, competition between two directly elected agents (parliament and president) break the chain of delegation from electorate to the government, which can find itself between *Skylla* and *Charibdis* (see also Schleiter, Morgan-Jones, 2005: 6). Consequently, one could assume a clear difference between behavior of a directly elected president, who is accountable to voters, on the one hand, and behavior of an indirectly elected president, who is accountable to the parliament, which elected him. Both the president and the parliament may compete for the control over the government formation process. The president in the former case is much more likely to act independently of the assembly (parliamentary majority) and more in line with wishes of the general public. He does not feel constrained by the parliament, since he was not elected by it. The president in the latter case is more likely to remain loyal to the parliament and to defer to parties that control parliamentary majority (for discussion on this point see Tavits, 2011: 33-

34). Amorim Neto and Strøm claim that “popular election enables the head of state to emerge outside party politics” (Amorim Neto and Strøm, 2006: 624). Indeed, as soon as Zeman was elected by the popular vote, he kept repeating that he had received his mandate from voters, whom he was accountable to. Conversely, he indicated his intention to be independent of both the parliament and the government. Shortly after having been elected into the office, Zeman delivered his speech before the Chamber of Deputies in which he planned to be an active president, who would not automatically sign anything submitted to him. He literally said he “would really not be a machine for signatures” (Zeman, 2013). Also, the way the Rusnok cabinet was appointed corresponds with the above scholarly assumptions.

Legitimacy advantage

In summer 2013 Zeman could enjoy another favorable factor that was associated with his legitimacy derived from the popular election – “legitimacy advantage”, the term coined by Oleh Protsyk (Protsyk, 2005a: 735-739; see also Shugart, Carey 1992: chapter 12; Schleiter, Morgan-Jones, 2010: 1424-1426). The legitimacy advantage is a result of non-concurrent electoral cycles of the president and the parliament. This means that the most recently elected branch of a political system (parliament or president) enjoys the legitimacy advantage, because its mandate from voters is newer. Hence, the actor with the most recent mandate has an additional leverage in the bargaining process over the nascent cabinet. “The government branch, which went through the electoral test more recently, is tempted to claim its political superiority and even to demand extra constitutional powers on the grounds that its legitimacy has more recent origins” (Protsyk, 2005a: 738). Enjoying the legitimacy advantage the president is more likely to nominate a cabinet without much regards to parliamentary majority. The president may appoint his “own” cabinet and argue that the parliament is less legitimate and that it ignores popular will. As it has already been argued above, presidents, who wish to control the government formation process, tend to appoint non-partisans in the cabinet. Similarly, Schleiter and Morgan-Jones (2005) argue that “governments formed in the immediate aftermath of elections should overwhelmingly be partisan and reflect the voters’ verdict. Technical cabinets might be expected to occur most frequently when new governments need to be formed between elections” (Schleiter and Morgan-Jones, 2005: 12).

All these arguments proved correct with the 2013 presidential cabinet in the Czech Republic. Zeman's mandate from January 2013 was significantly "fresher" than the mandate of the Necas cabinet and the Chamber of Deputies (2010). Zeman appealed to voters, who had recently elected him in the office and justified his unexpected steps in the government formation process on the grounds of an extremely low popularity of the cabinet troubled by various scandals and problems. When Zeman was elected, he resorted to the tactic of challenging the legitimacy of former cabinet's parties. He would compare "strengths" of presidential mandate and the mandate of cabinet parties. The presidential mandate was regarded as stronger out of two reasons. First, Milos Zeman received some 2,7 million votes in the second round of the 2013 presidential elections, which was more than the three cabinet parties received in the 2010 parliamentary elections, when they got 2,5 million votes together. The legitimacy advantage clearly rose to the surface, when the coalition parties were quick to nominate Necas's successor – Miroslava Nemcova (ODS). The coalition parties demonstrated their readiness to assume the reins of government again. The response from the Prague castle was sharp, however. The president's chancellor, Vratislav Mynar, reacted to this move by the coalition parties as follows: "Probably none of them (former right-wing government parties – author's note) realizes that we are in 2013 and the will of the people is quite different from 2010. I come from public opinion surveys measuring popularity of the cabinet and the Chamber of Deputies...It is therefore impudent that this coalition again demands the mandate (to form another cabinet – author's note)" (Ovcacek, 2013).

Government formation process

The key precondition for a president to nominate (and or appoint) any cabinet are formal constitutional rules that specify the presidential role in the government formation process. The government formation process can be understood as a product of a "tug-of-war" (i.e. bilateral bargaining) between president and parliament (Protsyk, 2005b: 137; Protsyk, 2005a: 724, Schleiter, Morgan-Jones, 2010).

The Czech constitution gives the president a great power in this regard, as it allows for presidential cabinets. First, the president is free to appoint a prime minister at will (art. 62 and 68). He can appoint almost anyone, since the constitution by no means constrains the president in his choice. According to Article 68 the president further appoints other members of cabinet on the prime minister's proposal (for details see Pavlicek, 1996:

143; Koudelka, 1999: 6, Simicek, 2003: 163). Second, immediately after the new government is formed, it can assume its powers. On the face of it, there is an important check on the presidential power to appoint a new government: the new cabinet must appear within 30 days after its appointment before the Chamber of Deputies and ask for confidence. However, the cabinet de facto does not need to win the vote of confidence in order to remain in power. Indeed, even if the cabinet loses the confidence vote, the president authorizes this cabinet to execute its office “temporarily until a new government is appointed” (art. 62). And the new cabinet shall be again be appointed by the president. Given no time framework to appoint the new cabinet the president may procrastinate to appoint the new cabinet, while his cabinet can work almost undisturbed.

In 2013 Zeman became the first president to take advantage of this constitutional provision that allowed him to appoint his own cabinet, even though it contradicted the constitutional convention mentioned above⁵, since until 2013 it was generally assumed that the cabinet must be formed with assent of parliamentary majority. This strong presidential power in the government formation process stands out among most of other European countries. Only presidents of few countries (e.g. France or Russia) are stronger in this regard. Indeed, even in several countries, whose president is generally regarded as more powerful than the Czech president (e.g. Romania, Lithuania or Croatia), a presidential cabinets appointed contrary to the will of parliament are out of question, as constitutions of these countries specifically provide that a government may take its functions only after it has been approved by the parliament.

Party system

The extent to which the president and the parliament get their own way in the government formation process depends also on the strength/weakness of the rival actor. Two key variables are relevant in

⁵ It is interesting to note how President Zeman reacted to critics, who argued that in appointing the presidential cabinet, Zeman broke the constitutional convention. He replied to this critique: “The concept of constitutional conventions is completely idiotic, because if it were indeed constitutional conventions, it would have been enshrined somehow in the constitution. It’s just a convention. A president, directly elected, cannot change the constitution, but obviously he has a sacred right to change conventions that are not enshrined in the constitution” (iDNES, 2013).

this regard: degree of parliamentary fragmentation (e.g. Shugart, 1998; Protsyk, 2005b; Tavits, 2011) and relationship between the president and the parliamentary majority in terms of their partisanship (e.g. Duverger, 1978). The weaker (i.e. more fragmented) the parliament, the stronger is the president. A weak parliament may be caused by fragmentation of parliamentary parties, their inability to generate a working majority and/or to discipline their own members (see Protsyk, 2005a).

Several assumptions can be inferred from the theoretical literature on regimes with a dual executive, and particularly on the relationship between the president and the parliament (e.g. Duverger 1978). If the president and the parliamentary majority come from the same party or belong to the same alliance, the president would probably nominate a prime minister from there. The president may form “his” cabinet if he is the leader of the party that holds a parliamentary majority. In the opposite situation – the president and the parliamentary majority being from different political camps - one could assume that the president shall respect the parliamentary majority, which will result in cohabitation: the president shall appoint a government, which will reflect the parliamentary majority. The reason is that a clear parliamentary majority is a strong deterrent for the popularly elected president’s claims to appoint his presidential cabinet. Alternatively, the president may try to appoint his own cabinet despite the parliamentary majority, as he may not be willing to appoint a cabinet, which would formulate and pursue policies that would clash with policies and ideas put forward by the president. In general, cohabitation provides an important incentive for the president to be more active in the government formation process. As P. Schleiter and E. Morgan-Jones argue “presidential influence on the cabinet can be most readily observed when the aims of president and assembly diverge” (Schleiter, Morgan-Jones, 2005: 8; c.f. Amorim Neto, Strom, 2006).

One could expect that Zeman appointed “his” cabinet, because of the absence of a parliamentary majority. However, the opposite was true. Despite the fact that the lower parliamentary chamber was undoubtedly highly fragmented, three parties were still able to command a (slim) majority of 101 seats, which in addition proved by a collection of 101 signatures of respective MPs. Zeman was a political party member and

leader of a new left-wing party SPOZ (Strana prav obcanu – Zemanovci⁶), which was established in 2009, but never gained parliamentary representation. Thus, the president could have hardly appointed partisan presidential cabinet composed of the SPOZ members, whose legitimacy would be extremely low and would probably cause public outcry. Instead, most of the cabinet ministers were non-partisans, who were presented as independent experts in order to provide the cabinet with some legitimacy derived from their professional background. Since several of the ministers later joined the SPOZ and became leaders of candidate lists in the 2013 parliament elections, SPOZ became a government party without any MP in the Czech parliament (see Prvni zpravy, 2013). It could be argued that having no presidential party in the parliament, Zeman by-passed the parliamentary majority, which was not in conformity with his political preferences, and appointed the Rusnok cabinet, which on the contrary complied with Zeman's policies.

Moreover, the Rusnok cabinet can be understood as Zeman's attempt to get his own party in the cabinet, which in turn would strengthen his power in the political system. However, this attempt failed, because SPOZ suffered a crushing defeat in the October election, when it gained only 1,5 per cent of votes. Nor did Zeman succeed in taking control over the CSSD⁷ through his close allies in the party following the parliamentary election (for details see Reuters 2013).

As for the degree of parliamentary fragmentation, this indicator is operationalized in terms of the effective number of parties that takes account of not only the number of parliamentary parties but also their relative size (Laakso, Taagepera, 1979). The table below shows the trajectory of the ENP in the Czech Republic. Since the 2002 elections, there has been a trend towards higher ENP. Milos Zeman thus took clearly advantage of significant parliamentary fragmentation, which became even greater after the VV split in two parts: the ENP reached a value of 4,5 shortly after the 2010 elections, but it increased to 5,6 in 2012-2013. In order to make the picture complete, the ENP was calculated even after the

⁶ The party label may be translated as "the Party of Civic Rights – Zeman's followers".

⁷ Zeman was the social democratic prime minister between 1998 and 2002. And even after he left the party, he had a large number of supporters within the party.

2013 parliamentary elections that confirmed the previous trend towards the higher ENP.

Table 1: Effective number of parties after elections to the lower parliamentary chamber

1996	1998	2002	2006	2010	2013*	2013
4,1	3,7	3,7	3,1	4,5	5,6	5,6

Source: author's calculation

Note: * ENP after the VV split in two parts.

Capitalizing on anti-party sentiment

The technocratic nature of the cabinet could be explained as a result of the absence of presidential party in the parliament and Zeman's effort to retain full control over cabinet ministers, who were loyal to Zeman and who were not tied to political parties. This explanation can be completed with the view that Zeman - in order to provide some legitimacy to the cabinet - which was formed contrary to the will of parliamentary parties appointed the cabinet of experts (i.e. technocrats). A technocratic solution was presented as a viable alternative to "partisans amateurs", who carry out ministerial functions because of their partisanship, although they may not be experts in the respective portfolios.

One of the indicators that reveal the nature of the relationship between parties and voters is the degree of anti-party sentiment. This factor is direct attitudinal evidence on what the contemporary public actually thinks about political parties (e.g. Poguntke, 1996; Dalton, 2005). It can be argued that the higher degree of anti-party sentiment, the more likely is the president to appoint a technocratic cabinet, which tend to be much more positively received by the general public. On condition that parties are negatively perceived by the public, the president can be more inclined to appoint his presidential technocratic cabinet and in turn increase his own popularity. Hence it is possible to assume that the Rusnok cabinet was appointed in times of a high degree of anti-party sentiment.

Indeed, the overall climate in the Czech society in terms of its attitudes towards political parties was rather negative and was clearly favorable to appointing the Rusnok technocratic cabinet. The analysis uses data from regular sociological surveys conducted by The Public Opinion Research (CVVM). The results (Table 2) from the data collected in September 2013 show a high level of the anti-party sentiment (CVVM, 2013a). About 80 per

cent of people believe that political parties are (1) interested in what people think only shortly before elections, (2) corrupt, and (3) interested only in benefits for their own members. The 2013 results are consistent with previous surveys. The Czech public's attitudes have been quite stable in recent years.

Table 2: Evidence of the anti-party sentiment in the Czech Republic

	3/2005	10/2007	10/2008	9/2009	9/2010	9/2012	9/2013
Political parties are essential corrupt	70	71	76	73	81	87	83
Political parties are interested in what people think only shortly before elections	84	82	80	78	82	81	83
Political parties seek mainly benefits of their members	80	78	70	76	81	78	81
Democracy cannot work without political parties	52	49	52	55	45	48	49

Note: The table shows percentage of people in surveys, who agree with statements in the first column.

Source: CVVM, 2013a.

Although, Zeman could have not benefited from a sudden rise of anti-party sentiment in the Czech Republic, one could argue that Zeman's appointment of a technocratic cabinet composed mostly of non-partisans was a logical reaction to the already high level of anti-party sentiment in the Czech Republic. From another survey it follows that the Rusnok cabinet was much more positively received than the previous government led by Petr Necas (CVVM, 2013b).

Conclusion

Appointing the Rusnok cabinet, Zeman came up with an innovative pattern of creating a cabinet (presidential technocratic cabinet), which has never appeared before and thus broke an important constitutional convention that a cabinet must be supported or at least tolerated by parliamentary

majority. On the face of it, the direct election is the most important part of the explanation of why the 2013 presidential cabinet was appointed, but the analysis has resulted in a more complex answer. The direct popular election introduced in 2012 undoubtedly endowed the president with a stronger mandate, which gave him a significant legitimacy advantage over the Chamber of Deputies in summer 2013. The president became a more powerful player in the Czech politics.

The explanation of this cabinet must also take account of the so-called legitimacy advantage enjoyed by the president, and also the rules that regulate the government formation process in the Czech Republic. The Czech rules give the president great discretion in appointing the prime minister. The Chamber of Deputies can control the government formation process, but its powers in this regard seem weak: even though the government fails to receive confidence in the Chamber of Deputies, it may remain in office until a new government is appointed. But the new government shall be again appointed by the president. In-between the presidential cabinet can work without being legally constrained in its decision-making and policies. Although the ENP obviously increased, the 2013 presidential cabinet could not be interpreted as a result of the rising ENP in the Czech Republic and inability of parliamentary parties to form parliamentary majority. Despite the fragmentation, there were three parties commanding parliamentary majority. The nature of partisanship of the president on the other hand and the Chamber of Deputies helps explain, why Zeman did not appoint a partisan presidential cabinet, but rather the technocratic presidential cabinet. Zeman could also capitalize on the high level of the anti-party sentiment.

In sum, the Rusnok cabinet could be conceived as a symptom of the problems of the Czech parliamentary regime, which were aggravated by the direct presidential elections that strengthened the president, whose powers in the government formation process had already been strong. The fact that the Czech political regime faces troubles can be illustrated by efforts of several parliamentary parties to curtail presidential powers. Paradoxically enough, these parties supported the constitutional amendment that introduced the popular election of the president.

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THE PRESIDENTIAL MODEL IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

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Abstract

The article presents a discussion of the political position of the Polish President in the Constitution of the Republic of Poland. The basic issues related to the rights of the president are described. The purpose of this article is to point at the problems resulting from the inconsistent model of the presidency and political disputes resulting from this inconsistency. The authors think that, in order to strengthen the executive power, one needs to decide either to strengthen the role of the Prime Minister or the President, since the current model is not conducive to the stabilisation of executive power. The authors are of the opinion that presidential power needs to be strengthened.

Keywords:

Constitution. Presidential Model. Sejm. Senate. Cabinet Council. Semi-presidential system.

1 Position of the President in Poland

The office of the President of the Republic of Poland has been in existence since 1922. The restoration of this office after the abolition of the State Council was the result of the so-called agreements of the "Round Table" in 1989 and the amendment of the Constitution of the Polish People's Republic of July 1952. The amendment to the Constitution of 1990 made a fundamental change in the political position of this office because it unequivocally introduced a principle that the President will hold this office as a result of general elections (Winczorek, 2000: 167). Both so-called "The Small Constitution" of 1992, as well as the basic law currently in force, despite the introduction of important changes in the analyzed issue, did not result in a substantial "coup" in respect to the form of this office. Therefore, without any reservations, one can agree with the statement that "the basic shape of the office of President of the Republic of Poland has not changed since 1989".¹

¹As noted by Prof. P. Winczorek: "The Constitution uses the equivalent names: The President of the Republic of Poland and the President of the Polish Republic. In everyday use, there are also the names: the President of RP and the President. In the latter case, this name may also include the office of the Mayor or President (Chairman) of an organization".

The political position of the Polish President and his tasks were defined in Art. 126 sections 1 and 2 of the Polish Constitution of 2 April 1997. In light of the above regulations, the president is the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority. The president shall ensure the observance of the Constitution, safeguard the sovereignty and security of the state and the inviolability and integrity of its territory, and while performing his duties is subject to the principle of legality (Art. 7), as he is obliged to act only to the extent and in accordance with the terms set out in the Constitution and laws (Art. 126, section 3).

The President of the Republic of Poland is elected by the Nation in general, equal, direct elections and secret vote (Art. 127, section 1). Moreover, he is elected for a five-year term and may be re-elected only once (Art. 127, section 2), so he can be the President for ten years continuously². A Polish citizen who on the election day is at least 35 years old and uses full voting rights to the Sejm may be elected president. Putting forward a candidate can be only in the form of written support of at least 100,000 citizens having the right to vote in the Sejm, ie. an active right to vote (Art. 127, section 3). The candidate who has received more than a half of the valid votes, and in the case of the re-vote the one who has received more votes is elected President of Republic of Poland. The term of office begins on the date of taking the office, and the validity of the choice is confirmed by the Supreme Court (Art. 129, section 1). The electorate has the constitutional right to report against the validity of the election under the terms specified in the Act.

In accordance with Art. 132 of the Polish Constitution, the President shall hold no other offices nor perform any public functions, except those that are related to the duties of his office. As a representative of the state in foreign relations, the Polish President shall ratify and terminate

² In accordance with the comment: "It is therefore concluded that the person holding the office of the President of Republic of Poland for two consecutive terms can no longer be a candidate for elections, in which he could be selected for the third time. However, this does not prevent the election to the office of the person who was already been President for two terms, after the years in which the presidential term of a different person took place". Winczorek, 2000: 170. Moreover, "The provision of Art. 170 section 2 does not prevent the multiple candidacy of the same person to be president if this candidate has not been chosen."

international agreements notifying the Sejm and the Senate about that fact, shall appoint and dismiss plenipotentiary representatives of the Republic of Poland in other countries and at international organizations, accept credential letters and letters dismissing the accredited at him diplomatic representatives of other countries and international organizations. (Art. 133, section 1).

The President of RP is the supreme head of the Polish Republic Armed Forces, and the specific competencies in this area are specified by law. In peacetime, the supremacy is exercised through the Minister of National Defence. At the time of the war, on the request of the Prime Minister, the Polish President shall appoint the Supreme Commander of the Armed Forces, whom he may, in the same manner, dismiss (Art. 134, sections 1, 2 and 3). An advisory body to the president in the internal and external security of the state is the National Security Council, which in itself has no decision-making powers. The composition of the National Security Council is the President's prerogative resulting from Art. 144, section 3 item 26.

The President of the Republic of Poland under Art. 137 shall grant Polish citizenship and express in the form of a decision his consent to renounce the citizenship. In addition, the president shall confer orders and decorations (Art. 138), apply the act of grace in accordance with Art. 139, deliver a Message to the Sejm, the Senate or the National Assembly presenting his views on the most important affairs of the state. In matters of particular importance, the President of Poland may call the so-called Cabinet Council, which is created by the Council of Ministers chaired by the President of the Republic of Poland (Art. 141, section 1).

Regulations (Art. 92), issued under martial law (Art. 234), and the acts of an internal nature in the form of ordinances belong to the basic legal forms of decision-making by the Polish President within the constitutional and statutory competence in accordance with Art. 142, section 1. Furthermore, in the scope of implementation of other competencies, the President shall issue decisions as individual acts of a sovereign nature. The Chancellery of the President of the Republic of Poland is an auxiliary body of the President of RP. The Statute of the Chancellery defining its structure and principles of action is awarded by the president, who as part of the implementation of the vested prerogative shall appoint and dismiss the Head of the Chancellery (Art. 143).

Art. 144 of the Constitution is the expression of a norm establishing in a fundamental way the President's position in the political system. Exercising his constitutional and statutory competences, the Polish President shall issue official acts, which, for their validity require the

Prime Minister's signature, who by signing the act shall be responsible to the Sejm. The acts exempted from the obligation to countersign are called prerogatives, for which the President of Poland shall bear a constitutional responsibility. These include: ordering elections to the Sejm and the Senate; convening the first meeting of the newly elected to the Sejm and Senate; shortening the term of the Sejm in the cases provided for in the Constitution; legislative initiative; ordering a nationwide referendum; signing or refusing to sign the law; ordering the publication of the law and international agreements in the Official Gazette of the Republic of Poland; delivering a Message to the Sejm, the Senate or the National Assembly; a request to the Constitutional Tribunal; a request for the control by the Supreme Chamber of Control; designating and appointing the Prime Minister; accepting the resignation of the Council of Ministers and delegating provisional duties to the Council; a request to the Sejm to hold responsible a member of the Council of Ministers before the State Tribunal; dismissal of the minister, who has been expressed no confidence by the Sejm; convening the Cabinet Council; giving orders and decorations; appointment of judges; applying the act of grace; granting Polish citizenship and giving consent for the renunciation of Polish citizenship; appointing the First President of the Supreme Court; appointing the President and Vice-President of the Constitutional Tribunal; appointing the President of the Supreme Administrative Court; appointing Presidents of the Supreme Court and Vice-Presidents of the Supreme Administrative Court; a request to the Sejm for the appointment of the President of the Polish National Bank; appointing members of the Monetary Policy Council; appointment and dismissal of members of the National Security Council; appointment of members of the National Council of Radio and Television; establishing the statute of the Chancellery of the Polish President and the appointment and dismissal of the Head of the Chancellery of the Polish President; issuing regulations under the terms of Art. 93; renouncing the office of the President of the Republic of Poland.

The President of the Republic of Poland for infringement of the Constitution, laws, or committing an offense may be held responsible before the Tribunal of State pursuant to Art. 145. Impeaching the President of Poland may happen by a resolution of the National Assembly passed by a majority of at least 2/3 of votes of the members of the National Assembly on the request of at least 140 members of the National Assembly. On the date of adopting the resolution to impeach the President of the Republic of Poland before the Tribunal of State, holding the office by

the President of Republic of Poland shall be suspended, and the provision of Art. 131 apply *mutatis mutandis*³.

In accordance with Art. 10, section 2 of the Polish Constitution, the President belongs to the executive authority. Resulting from that provision, and dating back to the times of Montesquieu and Locke tripartite division of powers is the foundation of modern democratic states and prevents any kind of abuse resulting from the manifestations of desire to autocracy. The Polish constitutional law doctrine reminds of the fact that the principle of separation of powers was known to the Constitution of May 3, 1791, and the Constitution of 1921. The Constitution of RP of 1935 abandoned this principle, and the Constitution of the People's Republic of 1952 accepted the principle of the authority unity. The modern separation of powers between the legislative (the Sejm and Senate), executive (the President and the Council of Ministers) and judicial (courts and tribunals) is the result of the amendment to the Constitution of 1952 made in December 1989 (Winczorek, 2000: 21).

³ In accordance with Art. 131 of the Constitution of RP: 1. If the President of the Republic of Poland is temporarily unable to exercise authority, he shall notify the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic of Poland. When the President of RP is not in a position to inform the Marshal of the Sejm about the impossibility of holding the office, then the Constitutional Tribunal on the request of the Marshal of the Sejm decides on the confirmation of the obstacles to the exercise the office by the President. If the temporary inability of holding the office by the President of RP is declared, the Constitutional Tribunal shall entrust the Marshal of the Sejm with temporary performance of the duties of the RP President. 2. The Marshal of the Sejm shall, until the election of a new President of the Republic of Poland, perform the duties of the President of the Republic of Poland in case of: 1) the death of the President of RP, 2) resignation from office by the President of the Republic of Poland, 3) the annulment of the election of the President of the Republic of Poland, or other reasons for not assuming the office following the election, 4) a declaration by the National Assembly concerning the President's permanent incapacity to exercise his duties due to poor health, under the resolution adopted by at least 2/3 of votes of the statutory number of members of the National Assembly, 5) impeachment of the President of the Republic under the judgment of the Tribunal of State. 3. If the Marshal of the Sejm cannot perform the duties of the President of the Republic of Poland, the Marshal of Senate shall take over these responsibilities. 4. The person performing the duties of the President of the Republic of Poland cannot decide on shortening the term of the Sejm.

2 Does Poland need to change the presidency model?

From time to time, in the discussions on the presidential model in Poland there are proposals for change, most often aiming at strengthening the role of the President, and thus introducing a presidential system (Konstytucja Solidarna, 2014). In intention of the authors of such proposals, it has to lead to an increase in the efficiency of executive power in Poland. In a sense, one can agree with the thesis that the model of Polish presidency is the resultant of several concepts and its inconsistency leads from time to time to compete within the executive power.

Direct presidential elections mean that the Polish Prime Minister, despite his apparent dominance, continually has to pay special attention to rival executive competition from the president. The president's strong political position is in part due to popularity and electorate sympathy from presidential elections. Also, in contrast to the prime minister, the scale of gradual decline in confidence during the tenure is smaller in comparison to the president, which is directly connected with a much smaller public responsibility for difficult public decisions. In this state of affairs, the expectation frequently appears that with the decline in popularity of the Head of Government, the popular President would have apolitical struggles leading then to a change of the Head of Government.

Such conflicts were observed in Poland between Aleksander Kwaśniewski and Leszek Miller, and they resulted from competition for political leadership within their own political camp. Until the political power of the Prime Minister is significant, and the President's interest in interference in the government action is moderate, we have to do with a cooperation. Such a situation was observed during the tenure of Donald Tusk as the Prime Minister, and Bronisław Komorowski as the President. No open conflict between the two over power was observed, notwithstanding one could feel the increase of tension and more and more independence from the President. Therefore, Prime Minister Donald Tusk's transition to use his power within the context of European Union bodies extinguished a smoldering, and perhaps growing in importance, political conflict with the office of the Polish President.

Experience in Poland indicates that the popularity of the prime minister sooner or later falls to a level at which the discussion of a successor will be loudly discussed in the media. The conflict between the two parts of the executive power seems to be the inevitable.

The problem of a weak state, manifested by a low level of efficiency of the government constantly fighting for social support in the election with the competitors of other political options as well as within the same

political camp, may be broken by deep constitutional changes consisting in a change of the presidential model towards the parliamentary model or perhaps in a radical increase of the role of Prime Minister. In the future, following an amendment of the Polish Constitution, either the position of the Prime Minister or of the President should be strengthened. The problem is which way to choose – a parliamentary or presidential system?

In the doctrine, for a long time the systems of rule with different presidency models have been distinguished. The most common systems are⁷:

1) a presidential system - is based on the consistently performed separation of powers and the existing balance between the legislative and executive power. The Parliament has the legislative power, the executive, however, is not equipped with the right of legislative initiative. The only opportunity to submit own legislative projects results from the possession of a parliamentary fraction. In a presidential system, both the legislature and the executive are derived from separate general elections, so they have the same legitimacy to govern. The completion of the action of powers is separated from each other: the executive power cannot solve the parliament and the legislative power cannot refute the executive on the basis of political causes (there is a lack of the political responsibility of the executive before the parliament). A classic example of the presidential model is observed in the USA – a system of mutual independence:

a) the legislative power has its own mandate, which comes from an election, being the source of its legitimacy;

b) the head of the executive power has their own mandate, which comes from an election, and which is the source of legitimacy

2) a parliamentary system - based on the equality of the legislative and executive powers, co-operation between these powers and the existence of different means of mutual interaction of these powers. Mutual interaction mechanisms include on the one hand, the political responsibility of the government to parliament, and on the other hand - the right of the executive (government) to dissolve the parliament. Therefore, the characteristic feature of this system is the necessity to obtain by the government the support of a parliamentary majority (the feature is not present in the presidential system, in which the functioning of the executive power is based on the independent electoral legitimacy). In this basic - classic - model many modifications were made, which affected the change of the balance existing between the legislative power and executive power. The parliamentary model can be shaped towards the creation of the legislative power superiority or towards strengthening the executive

power, as the stability of governments has an intrinsic value. Regardless of the differences in determining the relationship between the executive power and legislative power one can distinguish at least:

- a) the right of the executive to participate in the legislative process (right of legislative initiative),
- b) the existence of political accountability of the executive to the parliament,
- c) the right of the executive to dissolve the parliament (despite criticism, such a power prevails)

3) a semi-presidential system (semi-presidential, mixed) - the emergence of this system was influenced by the desire to revive - in a modified form - the institution of the head of state. In this model, there are elements of both the presidential and parliamentary system, eg. the choice of the head of state in the general elections was taken from the presidential system, leaving the government (head by the Prime Minister), which to exercise its function has to enjoy the confidence of parliament. The President shall ensure the observance of the constitution, be the guarantor of state independence and integrity of its territory and ensure - through his arbitration - the proper performance of the duties of public authorities. In order to perform these tasks, the Polish Constitution ensures the head of state a number of rights, which are not used by presidents in the parliamentary countries, and the President of the United States even does not have them. An important feature of the semi-presidential system is therefore providing the president with a wide range of competencies and the position of authority as superior in relation to other organs of the state. This system exists in France and Finland.

Mutual relations between the President and the government in the Polish Constitution are not consistent in terms of implementation to any of the existing models in modern democracies. It is a mixture of a parliamentary and presidential system. This situation causes that the Polish constitutional solution bears the hallmarks of an eclectic solution, and thus is also an inconsistent solution.

In the present Constitution there exists the model of a parliamentary system of the parliamentary and cabinet system variety. And this leads to the conclusion that the concept of the president "representing" the government policy created in the environment of the Prime Minister is the closest to the structural assumptions of our basic law. This brings closer the structure of the Polish presidency to the structure appropriate to both the Italian and German constitutions. It should be remembered that the way of electing the President needs to comply with approved overall

constitutional solutions and cannot be in contradiction with the logic of the basic law. There is no rational justification to the situation in which a weak president would have strong democratic legitimacy, as there is no logical justification to the situation in which a strong, democratically elected, legitimate president, would hand orders and cut ribbons only, and would not actually use power and authority. Unfortunately, the Polish Constitution lacks this logic and consistency of electing a president. It stands out clearly from the overall system of solutions. The system of general election of the President brings a significant element of the presidential system into the Polish political system, but it is not common to the logic of the Polish constitutional system solutions. The way to repair this situation could be the abandonment of the general elections of the President harmonized with possible changes to the powers of the government, of the Prime Minister and the President although this is not an optimal solution, and it seems that more arguments speak for changes in the opposite direction - strengthening the role of the President. Abandonment of direct presidential elections theoretically would limit the destructive impact of excessive political instability and eliminate one of the fields of uncertainty for the Head of Government, positively affecting the stability of this political position. It seems, however, that such a decision would not be popular with voters who would treat it as depriving them of the significant right to directly elect the Head of State.

A change in the other direction seems to be a more optimal solution - introducing a full presidential system in Poland. Firstly, the executive division would be eliminated. Secondly, the political instability of the head of government would be greatly reduced, since the President, as the Head of Government, would be much less dependent to a parliamentary majority in the freedom of shaping the personal composition of the government and creating personal political goals of his cabinet. Of course, there can be no assurance that a greater political stability of government would give it greater strength, but there is a greater chance for a change. The modification of the principles of Polish policy, which is the introduction of the presidential system, appears to be the most effective solution for improving the quality of rule although it is difficult to assess how likely it would be. Perhaps, Polish history is an obstacle because, generally, we do not have experience with strong one-person centers of political power, but rather with the constant fear of "*absolutum dominium*". The experience of Eastern European countries (Russia, Belarus) also indicate that Polish public opinion may fear the strong power of the President, which could constrain democratic freedoms. The experience of

Finland with their strong presidency model, shows, however, that there is no automatic correlation, and a strong President does not automatically constitute a threat to the parliamentary system and liberal democracy.

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ALWAYS THE SAME, BUT CONSTANTLY CHANGING. A COMPARISON OF THE POSITION AND THE ROLE OF THE PRESIDENT IN FRANCE SINCE 1958

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Abstract

The French president is, as we know, one of the strongest heads of state in the European Union. Ever since the founding of the Fifth republic in 1958 (or maybe more correctly since 1962, after the change of the constitution and the adoption of direct election of the French president) there have been minimal constitutional changes¹, though the position and the role of the president has in reality changed, even if his powers (meaning here his powers formally recognised by the constitution) have remained. This is because his political position and official role are very different. This article deals with this apparent paradox and evokes this plural reality. On this basis we try to enlarge the perspective on the position and role of French presidents in general.

Key words:

Fifth republic. Transformation. Semi-presidential model. Gaullistic tradition.

1 Different presidential periods

The French president is considered to be one of the most powerful heads of state in Europe. Even if there has been very few changes to the French constitution related to the president and his powers since 1958 (respectively since 1962), his position in the context of the French regime is in fact changing quite dramatically not regarding his constitutional powers or constitutional position, but his political position and his capacity to decide (or to lead the country). We should for instance start with the analysis of the changing presidencies (or presidential eras) since the beginning of the Fifth republic. All in all there were seven presidents: Charles de Gaulle, Georges Pompidou, Valéry Giscard d'Estaing, François Mitterrand, Jacques Chirac, Nicolas Sarkozy and finally François Hollande.

¹ Formally since 1958 there have occurred twenty four changes to the French constitution. Just a few of these revisions have an important impact on the political regime. The change in the fall 1962 is from this author's point of view the most important, because to some extent it "froze" the political power of the president in the way beneficial to Charles De Gaulle and for his successors since.

All these presidents used very differently the institution that is the French presidency and changed some aspects, based upon their personality but mainly on the basis of their legitimacy and political strength, that changed during their mandate (at least in a very evident way in the cases of *cohabitation* when the president has had to deal with an oppositional majority in the National assembly, the lowest chamber of the French Parliament²).

In the cases of F. Mitterrand and J. Chirac the situation of weakened presidential position is obvious considering the three phases of cohabitation they had to face. On the one hand the first cohabitation was of course quite important and it has to be seen as a precedent that sets the rules. We have to remember the Mitterrand formula, that he will apply “the constitution, only the constitution, but all the constitution”. This means that the president will not be able to politically supersede his institutional and constitutional position when he takes advantage of the support from the majority in the lowest chamber. But even more until this first practical case which came almost thirty years after the beginning of the regime, there were some ideas that the regime will not be able to deal with such a situation and it would eventually collapse³. On the second hand the three periods of cohabitation were very different indeed. And this remark fits with a more general comment that all parts of each presidential periods were in fact different.

The fact remains, that in reality the presidencies are very different from one another based upon several factors. Among them one of the most important is naturally the support that the president does or does not have in the National assembly. This is especially true if a solid and disciplined majority of deputies on which the president’s government can rely on does

² Such a situation occurred three times in 1986-1988, 1993-1995 (both during Mitterrand's presidency) and 1997-2002 (under the Chirac presidency, with a specific situation due to the fact that Chirac dissolved the National assembly only to avoid a cohabitation about one year before the end of the deputies mandate. This third cohabitation was also the longest one).

³ The classical gaullistic understanding of cohabitation is that the president loses his legitimacy and has to resign (de Gaulle asked for the confidence of the French not only by using the referendum, but also in the case of the election of the National assembly, telling quite clearly what he will do in the case of a “bad answer” in the election).

exist; a majority which recognizes the superiority of the president and his right to lead and to govern through various possibilities.

This majority plays a key role, even if this role seems to be less important than, for instance, the charisma of the the president. Without a firm and disciplined majority of deputies, even a strong president will be both practically and politically weak. For instance we shall remember that a new government is not obliged to ask for the confidence of the National assembly and it should start to work just after the president signs the nomination of its members. Nevertheless it is in fact impossible for a government to act against the majority and in reality all Prime Ministers ask for a vote of confidence out of politeness. During the cohabitation period nevertheless the Prime minister has to ask for the confidence and his government can really work only after the vote is held, because such a government does not have the support of the president.

2 The system is established

The position of the French President from the beginning of the Fifth Republic is clearly dominant. During the first period (1958-1962) this dominancy was found in the person of Charles de Gaulle who retains a specific historical legitimacy. Another point that was a large factor and a key role in the de Gaulle's dominance of French politics as President: the war in Algeria and the promise given by Charles de Gaulle to solve this very crucial and complicated problem. This problem was also the starting point of his comeback, because he was seen by the insurgents (during the crisis of the 13th of May 1958) as the last and only guarantee for a French Algeria. During the next months and years he nevertheless turned to another answer to solve the problem and had to face a very strong opposition within the ranks of his supporters and even members of his party (this opposition resulted in a rebellion in April 1961 and the first and last use of Article 16 of the French Constitution).

This specific situation resulted in the concept of reserved domains (defense, foreign affairs and Africa, especially Algeria), where the presidents decisions cannot be criticised. The possibility of a return to a parliamentary system that contains a large part of the political elite was ended by the decision to change the French Constitution and to adopt the direct election of president. This new rule implied that after de Gaulle, his successors will be able to wield a lot of power, and because this legitimacy offers a large degree of authority to govern in the sense of that offered in the Bayeux discourse of June 1946. Briefly, the president will be cut of

from the parties and play the role of an arbiter. Paradoxically de Gaulle's perspective on the legitimacy of the president over that of parliamentary parties (and of the extinction of the parties) was contrary.

The decision that de Gaulle took at the fall of 1962 was in reality much more crucial than just changing the constitution. The political crisis in which the country found itself in October was comparable only with the crisis in 1877, when president MacMahon tried to impose a specific interpretation of his position (and in fact quite similar to the dualistic – or also called Orleanistic- responsibility of the government during the fifth republic, when the government is accountable before the president and the lowest chamber of the Parliament). In the late 1870's the struggle was won by the Republicans who imposed a strict parliamentary vision on the institutions. This crisis is very well known thanks to the memorable formula of Léon Gambetta who invited the president to submit himself to the parliamentary majority or to be dismissed (in the end MacMahon did both). In 1962, after the president announced he would use the legislative referendum (Article 11) to change the constitution, the deputies reacted the only possible way: they voted against the government and for the first and last time in the history of the Fifth Republic they obtained the resignation of the Pompidou's government. De Gaulle nevertheless refused the resignation and instead dissolved the National assembly. This meant that the French voters had to accept or reject the proposal in the referendum and after that they voted for their deputies. In other words the French voted twice but the second election was influenced by the first, according to the binary logic of the referendum. This situation changed a lot and imposed presidential supremacy and the majority fact (*fait majoritaire*).

This modification of the French Constitution implied a radical transformation of the presidency, not for de Gaulle himself, because he had very specific historical legitimacy, but it was intended for his successors. This transformation was criticised considering how it was done, ie. by a referendum, when de Gaulle very clearly imposed himself and his solution by a political blackmailing, when he presented the two possible (and for him classical) solutions: the direct election and his stay on the one hand or the status quo without him on the second hand. All in all, and despite a quite strong and clear democratic opposition (P. Mendès-France, F. Mitterrand) this interpretation was imposed as a logical and legitimate one, even if some of the targets were not hit (especially the disappearance of political parties, which if compared to the sixties were much more powerful and indispensable).

A strong personality, which is able to impose the necessity of the change and the change itself, a political situation, which allows the change, these are the evident factors of the whole case⁴. The main target was nevertheless hit, in the sense that the situation changed in favour of a stronger presidency and blocked the eventuality of a progressive evolution of the Fifth Republic in a more parliamentary regime. The only possibility of such an evolution towards a less semi-presidential regime was initially imaginable only in the case of the victory of the Left. This became real in May-June 1981, when François Mitterrand won the presidential election. His program in 110 points seemed that there were no other solution than the destruction of the gaullistic republic (which Mitterrand had criticised intensely since its beginning). The Left nevertheless did not change any relevant points, with the exception of electoral rules for the lower chamber in 1985 (when for just one time a proportional voting system was used), to avoid electoral defeat for the Left and allow the president to face instead a relatively weakened majority from the Right.

There are some remarks to be done here: firstly, even if de Gaulle intended to fulfill some objectives with the direct election of the president, all his successors never have had the same position he had, due to his very specific legitimacy, but mainly because de Gaulle recognised, at least formally until April 1969, that he (the president) was accountable before the people (this is a crucial point). This means that once again, in contradiction with the letter of the constitution, he considered that the president is politically responsible. Even if we can develop some (critical) questioning about de Gaulle's practice in office, the final negative answer to the referendum on the regional and senate reforms in April 1969 for example led to the immediate resignation of de Gaulle, one observes that this accountability is very dramatic. And therefore all de Gaulle's successors were denied this solution. This is the first significant difference in the position of the president. But secondly we have also to take into account the fact, that not only the written constitution matters and that some political rules should be even more important, especially when we analyse the position of the president. In brief, when there is a broad

⁴ Also with the very deleted role of the Constitutional council. This specific situation is quite different and incomparable with the central-European situations after 1989, where the right played a very different role.

consensus, the president has to be strong (and to govern), nothing can stop him, especially under the condition when he has a large majority of disciplined and devoted deputies (and the presidential party, for instance in the form of the gaullistic *parti des godillots*).

Over this quite evident distinction before and after 1969 (in terms of de Gaulle and his successors), each presidency was in reality very different from the other, and even within a presidency the situation should have evolved quite drastically (even if we let aside the three cohabitations). The more efficient criterion of distinction is, once again, the political situation in the National Assembly, especially within the presidential party, and regardless to the president's style (for instance Sarkozy's hyperpresidency, which is in reality, as mentioned by Guy Carcassonne, a mediatic hyper-presence).

For instance we can imagine to classify all the presidents and their positions on the base of their successive governments, their relation to the president and the majority they held based in the National assembly. The results will give us a more colourful image of a presidency which is not always so powerful and corresponding to an ideal-type of semi-presidentialism *à la française*. Valéry Giscard d'Estaing was quite a weak president, so was also François Mitterrand in the years 1988-1993. The situation of the actual president therefore is maybe one of the worst since 1969, even if we can also argue, that François Hollande promised to be a "normal" president, and if we interpret this normality as a step back to the models of the Third and Fourth republics.

In fact, when we speak about the French presidency, we have to deal *volens nolens* with the modern classical typology of a semi-presidential regime, starting with Maurice Duverger. Even if this classification, in all its versions (endorsed by R. Elgie or A. Siaroff), is a success worldwide, in France some criticisms appear unusable in the scientific world. Most of scholars prefer to use adjectives which correct the original parliamentary regime. This should be explained considering the fact that under the surface of a semi-presidential regime is the truth: a (a more or less well functioning) parliamentary regime, which definitely reveals cohabitation situations. One of the most important critics is nevertheless even when we apply Duverger's three basic criteria, the category of semi-presidential is too heterogeneous to be useable as relevant and sufficiently distinct from the basic parliamentary regime.

The historical point of view will at least discover two points that are going in the same direction. The first one is the discourse of Michel Debré; who was one of the most important writers of the Fifth Republic's

constitution, in front of the State council (*Conseil d'Etat*) in August 1958, just before the text was officially presented by Charles de Gaulle. At that time he argued and explained that this constitution is truly a parliamentary one, a constitution where the rationalisation of the parliamentarism was pushed as far as it was possible. Of course, one can say, that it was just a false discourse claiming something that did not exist and would not. But such a remark did not take into account the situation in 1958, the role of M. Debré and above all it underestimated the State council. We have also to remember what Robert Elgie (2009) noticed: the notion of semi-presidentialism appeared in the US in December 1958, even if M. Duverger evoked, that the first who used this term was Hubert Beuve-Méry, even if he seems to have used it before.

Naturally, there is at least two ways to understand this notion, legally and behaviourally. From the first point of view to the second is marked by direct election, but also by both the two other criterions mentioned above. The fact nevertheless is, that if we stay with the logic of M. Duverger, the scholar who offers the etiquette of parliamentary or semi-presidential regime has a very large capacity to interpret reality. The problem is on the notion of quite high powers or powers which are not supposed to be contrasigned by the prime minister or a minister. The fact is, that this notion of semi-presidential regime was created to fit to just one case, which is supposed to be so different that it was created to generate its own ideal-type. The fact is also that when one speaks about a semi-presidential regime (and if we do not use the enlarged criterions proposed for instance by R. Elgie), all will think about a strong president who can govern effectively. A situation that occurs occasionally in the democratic world, though not quite enough with the Fifth Republic since 1969... though it fits very well with the image of a Gaullist presidential republic. With that said, we should avoid here a debate on the nature of the Czech regime since the change of the ir Constitution and the adoption of the direct election of the president. If we can understand the logic of the rejection of such a classification based on the R. Elgie criterions (due to the too broad approach of the problem), we are much more skeptical when some rejection of the classification on the basis of the Duverger model, when it is admitted for countries where the president is quite detached and powerless even in comparison of some presidents of parliamentary regimes.

Nevertheless, we can argue, that since 2000 (2002), when the length of the presidential mandate was reduce from seven to five years and when it was decided to reorganize the electoral agenda by pushing the

parliamentary election after the presidential one, we have a more solid semi-presidential regime than ever. It should be right, when we analyse the Sarkozy presidency, but not so about the second Chirac government (2002-2007) and it is not useful regarding the Hollande's presidency which is, as we wrote above, very far away from the behaviouristic point of view, even if the constitution remains without change.

The French case shows that we cannot separate the behaviouristic analysis and the legalistic, to some extent the second is quite stable but unreliable to give a realistic analysis, while the second is unstable and depending on various elements which have to be taken into account, giving scholars a very large possibility of interpretation. Naturally we can use such an interpretation to ensure that the analysis of the semi-presidency is within the understanding of the constitution (P. Avril) which may explain the constitutional reality that indicates is it not reduced only to the written rights and politics.

Considering the question of the typology, there is in fact a sort of paradox: the semi-presidential regime is very carefully used by French constitutional lawyers and political scientists, even if the term has passed into the common language and seems to be used broadly, especially in the media. This should be seen also as a generational evolution, when the first generation was quite unwilling to admit Duverger's classification, then we passed to another generation which was much more open and then, at least since the 1980's we observe a constant disapproval of the classification as too broad or too inaccurate to be used as a scientific category. To some extent we can assume that Gicquel's model was used much more, especially by distinguishing between prime minister-led parliamentary regimes and presidential ones. The notion of a presidential-led parliamentary model and to some extent as of a form of pathology, of the parliamentary regime is much more broadly used than the Duverger's semi-presidential model. Even if the notion is used, it seems that it is in fact in a less systematic way than we use to explain the Central European area since 1989. For instance Jean-Luc Parodi is much more insistent on the presidential than on the semi-presidential regime, which is not (above all) used as a category useable for comparison as in the case of Duverger and his partisans or even the "pos-duvergerist" tradition (from Elgie to Siaroff). Marie-Anne Cohendet for instance (but also Bastien François) rather use the notion of "birepresentative" parliamentary regime (*regime parlementaire biréprésentatif*) (Cohendet, 2011). Finally, considering the fact that Duverger's typology only complicates the situation, most French authors will use some adjective or paraphrase to avoid using the word

“semi-presidential”: the French (parliamentary) regime will be called “presidentially corrected” or presidentialised. The list of leading constitutionalists and politicians who have done this is quite long, but we have to cite at least Jean-Louis Quermonne, Guy Carcassonne or Olivier Duhamel. Guy Carcassonne in a quite founded and convincing way explained that the Fifth Republic is (its real “nature”) not presidential or semi-presidential but a parliamentary regime (Carcassonne, 2005). Carcassonne reminds us that only by the winning of the parliamentary elections is power offered.

The explanation of such an ironic or paradoxical situation, when the semi-presidential category is mainly refused in France, lays perhaps in the still crucial position of constitutionalists and their influence on French political science, especially those parts of political science which specialize in the political system or regime. For this tradition, it is unconceivable to speak about a form of regime without starting from a classical (comprehensive) definition of the parliamentary and presidential regimes and their distinction. This part of the reasoning is in fact missing in the large part of Central-European political science, which focus only on the semi-presidential regime, and naturally as their focus should be (at least partly) impressed and conditioned by the then and now realities of their own experience, thoughts and visions.

Conclusion

The semi-presidential model seems to be a quite well defined category for some constitutionalists or political scientists (even if we should debate on the question of the presidential powers that have to be taken into account), but it is also seen as a too broad category by (French) political scientists. This is particularly true especially when we underline the unsaid fact (and a fact that is too often forgotten), that the (“real”) semi-presidential model de facto matches only with one concrete regime, ie. the French Fifth Republic (Quermonne and Chagnollaude, 1991). Some things nevertheless should be remembered: first the strength of precedence (the “gaullistic way”) and the fact that it is in reality a quite short and very specific experiment, which is undermined by some other factors (European integration, the change of the society and so on). Here we have to take into consideration the play of different combinations in Parodi’s interpretation. Second the question of the specificity of the moment, or in other words, the “big bang” which created this possibility of the Fifth Republic, from the 13th of May (1958) crisis (which permitted the

comeback of de Gaulle) and above all the crisis in the fall 1962, which definitely ensured the durability of the models layout and logic (the incapacity for the political elite to bring back some practices learned and used in the frame of the precedent republics). But this durability doesn't imply that it is always the same model, the same layout and above all the same logic at work.

Finally, even if in Central Europe we face another way of thinking and another practice of the rule of law (an "Austrian" tradition quite largely different from the French case), that we cannot interpret too strictly the actual situation for instance in the Czech Republic. The situation depends largely on some not so objective factors, such as the political situation but also the personalities in power and their own political relationships. In other words what would have been the text of the French Constitution without Charles de Gaulle? What would have been the situation with another president than Miloš Zeman (and we have to take into account also his relations with medias, political parties and so on)? In the first case it is a question of political science fiction. In the second case the answer is open to interpretation and we will see what happens. Nevertheless, the window of opportunities and number of possible situations are quite large.

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DEMOCRACY OR AUTHORITARIANISM – CHALLENGES FOR PRESIDENTIAL SYSTEMS IN DEVELOPING COUNTRIES

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Abstract

Democratic political regimes formed in the “third wave of democratization” stand before a hard task of overcoming this period of instability. The institutional composition, embracing the organization of political conduct, is one of the factors that may influence the future of democratic institutions in developing countries. It may not be the dominant factor but in difficult interal-environmental conditions it can appear to be the decisive element for the future of democracy in these countries. This article attempts to answer an important question, why some of the nations which face the process of transformations democratization have fallen and what factors increase the risk of a “collapse of democracy” and “back to authoritarianism”?

Key words:

Democratization. Transformation. Freedom House. Political instability. Political regime. Uncertainty.

Introduction

In the period between 1972 and 1992 the number of democratic political systems has more than doubled, from 44 to 107. Of the 187 countries in the world, over half – 58 percent – have adopted democratic government. With the collapse of communism, moreover, democracy has reached every region of the world for the first time in history. And it has become “the only legitimate and viable alternative to an authoritarian regime of any kind” (see Huntington, 1991: 21-26). In 1989 Francis Fukuyama wrote the essay *The End of History*. This article was written in a period of unpredictable changes in history. With the collapse of the Soviet Union, Socialism, which was the main threat and alternative to Liberalism was defeated. In this new situation, Fukuyama argued that History (in the grand philosophical sense) was turning out very differently from what thinkers on the Left had imaged. The process of economic and political modernization was leading not to communism, as Marxists had asserted and the Soviet Union had avowed, but to some form of liberal democracy and a market economy. He wrote that history appeared to culminate liberty: elected governments, individual rights, and an economic system in which capital and labor circulated with relatively modest state oversight.

1 Regime stability and transformation

The year 2014 feels very different from 1989. The dynamic characters of changes we are observing in the contemporary world make us ponder the condition of democracy. The members of *Freedom House*, an independent watchdog organization monitoring freedom around the world, point to the fact that in the first decade of the 21st century global erosion of democracy is clearly visible. In the report *Freedom in the world 2010: global erosion of freedom* the authors indicate that the year 2009 was the fourth in a row when the level of freedom around the world decreased, the first time since 1973 when the studies of the subject began. In the report *Freedom in the world 2014* the number of countries designated as Free in 2013 stood at 88 representing 40 percent of the world's political systems and 40 percent of the global population. The number of Free countries decreased by two from the pervious year's report. The number of countries qualifying as Partly Free stood at 59, or 30 percent of all countries assessed, and they were home to 25 percent of world's population. The number of Partly Free countries increased by one from the previous year. A total of 48 countries were deemed Not Free, representing 25 percent of the world's polities. The number of people living under Not Free conditions stood at 35 percent of global population, though China accounts for more than half of this figure. The number of Not Free countries increased by one from 2012 (see www.freedomhouse.org).

In the report *Freedom in the world 2014* investigators also noted that: fifty-four countries showed overall declines in political rights and civil liberties, compared with 40 that showed gains; for the eight consecutive year, *Freedom in the World* recorded more declines in democracy worldwide than gains; some leaders effectively relied on “modern authoritarianism”, crippling their political opposition without annihilating it, and flouting the rule of law while maintaining a veneer of order, legitimacy, and prosperity; central to modern authoritarians is the capture of institutions that undergird political pluralism. Seeking to dominate not only the executive and legislative branches, but also the media, judiciary, civil society, economy, and security forces. The problem in today's world isn't just that authoritarian powers are on the move but that many existing democracies aren't doing well either.

The process of “the democratic recession” breeds the questions of the causes of this phenomenon. In his work published in the beginning of nineties (1991) and titled *The third wave. Democratization in the late twentieth century* Samuel Huntington considered the range and permanency of democracies formed in the effect of “the third wave of

democracy". Huntington defines a "wave of democratization" simply as a group of transition from nondemocratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period (Huntington, 1991: 15). He considered the possible existence of inevitable, long-range and global trend of embracing the whole world with the democratic political system. He asked: Is political democracy as a form of government limited, with some exceptions, to several rich and/or Western societies? Or is democracy, for a large number of countries, something temporary, occurring in turns with the variety of authoritarian forms of government? Huntington points to potential causes of decline of the third wave of democratization such as failures of democratic governments or an international recession similar to the events of 1929-1930.

Reverse waves are obviously traumatic times for political freedom and human rights in the world. They may also be especially dangerous times for world peace. The first reverse wave gave rise to the expansionist fascist regimes that brought on the Second World War. The second reverse wave occurred during the peak of the Cold War and witnessed a number of regional conflicts and civil wars in which some established democracies fought directly or through surrogates and vigorously backed certain anticommunist authoritarian regimes. The research by Freedom House shows that the first decade of the 21st century was the time when the third wave of democracy collapsed. Nowadays we are experiencing the phenomena that challenge the trust for democratic systems and it appears that the classic model of the democratic regime (parliamentary democracy) is on the downward slide or at the very least suffers a profound crisis of trust.

Why is this happening? Seymour Lipset pointed to the fact that the stability of a political regime depends on its efficiency (the way governments solve the problems considered to be crucial for the society) and on its legitimization (ability to create the conviction that the existing social institutions are possibly the best for society). Liberal democracies, like other political systems, are not free from the threat of delegitimization. Obviously, in stable and long-standing, consolidated democracies the threat of delegitimization and the possibility of mass anti-system actions is lower. In case of countries undergoing political transformation it is plausible that with time the possibility of decision making in democracy is going to dissipate. How many times is the society willing to switch one political party or coalition to another in the hope of one succeeding in the task of solving the problems of the country? At a

time the society may feel disappointed not only by the failure of the democratic governments but also by the failure of democratic processes. In that situation the reactions against the government or the dominating political structure may change to anti-system reactions. When the conviction that democratic options have dissipated arises, the impulses, for some political leaders, to create a new, authoritarian solutions may appear. The perpetuating incapability of ensuring prosperity, welfare, righteousness, internal legal order or external security may challenge the legitimization of democratic governments and cause the gradual resignation from further democratization and the return to some forms of authoritarianism.

The risk of vanishing for the processes of democratization is especially high today. The financial crisis of 2007+, conflicts and threats appearing in the international environment with economical and political instability connected to it create a very harmful context for the solidification of democracy. Erosion of democracy in developing countries is fostered, in the first place, by the lack of pro-democratic values and behaviors but the institutional political regime is also very important. The most important feature of democracy is the institutionalization of the decision making processes. It includes the catalogue of structures and procedures securing from the arbitrary decisions made by an individual or a narrow group of people. In democratic countries we may find various institutional and legal solutions that are meant to prevent the appropriation of power and arbitrary decision making. Generally the type of political model depends on the political relations between the two decision making structures: the parliament (legislature) and the government (executive). The key formal criterion of distinguishing the basic political model is the method of the national Constitution and the responsibilities of the Executive. With its application we make the division to parliamentary and presidential regimes. According to Juan Linz a parliamentary model in the strict sense is one in which the only democratically legitimate institutions is parliament; in such a model, the government's authority is completely dependent upon parliamentary confidence. Parliamentary systems may include presidents who are elected by direct popular vote, but they usually lack the ability to compete seriously for power with the prime minister. In presidential systems an executive with considerable constitutional powers – generally including full control of the composition of the cabinet and administration – is directly elected by the people for fixed term and is independent of parliamentary votes of confidence. He is not only the holder of executive power but also the symbolic head of state and can be

removed between elections only by the drastic step of impeachment (Linz, 1990: 52).

Democratization means the transition from authoritarianism to liberal democracy, reflected in the granting of basic freedoms and political rights, the establishment of competitive elections and the introduction of market reforms. What is characteristic is the fact that in numerous cases of the countries undergoing the institutional change, countries that are usually classified as “the grey zone”, countries between democracy and authoritarianism (or non-consolidated democracy) are those which in the period of institutional change introduce, to their constitutions, the institution of president endowed with significant power and authority. According to Juan Linz and Alfred Stepan definition of consolidated democracy is as follows: *behaviorally*, a democratic model in a territory is consolidated when no significant national, social, economic, or institutional actors spend significant resources attempting to achieve their objectives by creating a nondemocratic regime or by seceding from the state. *Attitudinally*, a democratic model is consolidated when a strong majority of public opinion, even in the midst of major economic problems and deep dissatisfactions with incumbents, holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life, and when support for anti-system alternatives is quite small or more-or-less isolated from pro-democratic forces. *Constitutionally*, a democratic regime is consolidated when governmental and nongovernmental forces alike become subject to, and habituated to, the resolution of conflict within the bounds of the specific laws, procedures, and institutions sanctioned by the new democratic process (Linz, Stepan, 1996b: 15). Consolidated and non-consolidated democracies differ in the degree in which they achieve the following five criteria: in civil society, there has to be freedom of association and communication; in political society, there has to be free and inclusive electoral contestation; there must be a rule of law and spirit of constitutionalism; the state apparatus has to be run, according legal-rational bureaucratic principles; economic society has to be organized around respect for property rights, and conditions must be in place to permit economic growth (Linz, Stepan, 1996a: 10-16).

2 The risk for democratization

An important question is why some of the nations which face the process of transformations democratization is fallen and what factors increase the risk of “collapse of democracy” and “back to authoritarianism”? One of the

factors is a institutional model of the political system. Democracy may take various institutional and organizational forms. Presidential systems, or semi-presidential systems, are among the few models of democratic political regimes. Choosing a model of political system is important for the processes of consolidation of democracy. Institutional theory argues that institutions determine actor's preference, resources and strategies. Of course the degree of concentration of political power not only depends on formal institutions, but also on the social structure, actors strategies and political culture. There is a many structural factors that may affect democratic consolidation but the design of democratic institutions is a one of the most important. The vast majority of the stable democracies in the world are parliamentary regimes, where executive power is generated by legislative majorities and depends on such majorities for survival. By contrast, the only presidential democracy with a long history of constitutional continuity is the United States (Linz, 1990: 52).

How come that this particular model furthers "the withdrawal from democracy"? In his classic essay "The Perils of Presidentialism" Juan Linz, writing about the threats connected to the presidential model in the developing countries, points out that the only stable presidential democracy, having a long history, is the democracy of the USA but in case of parliamentary democracy the chances for stability and consolidation of democracy are higher. Especially in the countries of deep social divisions and the large number of political parties where the parliamentary model increases the possibility of consolidation of democracy and the spread of pro-democratic attitudes. Linz wrote his article to make a kind of warning for the countries undergoing the process of institutional change. The empiric observations confirmed his anxiety. In numerous cases, if in a political system some charismatic leader appears, the leader capable of gaining much social support, it may lead to the extension of presidential powers (i.e. in the form of a new constitution) and therefore create the foundation for the development of some forms of authoritarianism, for example the higher position of some other forms of supreme power than the parliament. The result of such activity is the erosion of the party system, degradation of parliament and granting excessive powers to the president.

In the developing countries the existence of a strong presidential center, accumulating power in one hand, was a tempting alternative to the parliamentary-cabinet systems and the appropriation of public space by the disputes of parties. In the countries of "the third wave of democratization", where the presidential model was adapted, regardless

the fact that the constitutions of these countries proclaimed the principles of the division of powers and the rule of law, the political practice concentrates power in the hands of an individual and the standards of the division of power is not always present. In the effect the “modern authoritarianism” appears and the entities like legislature, executive but also the mass media and the institutions of civil society are dominated by the center of power.

In the first decade of the 21st century we are experiencing a political regression and the collapse of the third wave of democratization. The large number of countries that were undergoing the institutional change in the eighties or the nineties are still unconsolidated democracies or “the grey zone” countries between authoritarianism and democracy. It is difficult to prejudge about their further direction of changes. It is going to be determined by various factors. However, we have to remember that according to Linz’s hypothesis the acceptance of the presidential model increases the risk of “withdrawal from democracy” by creating a negative institutional context for the processes of consolidation of democracy. The existence of a focal center of power may foster the actions aiming at depriving the parliament of political significance. In that case the parliament only legitimizes the decisions made apart from it. In the present international situation the strong state and the concentration of power may become a response to the external threats connected to globalization and may be perceived as the only effective instrument of solving the existing problems; as the instrument of implementing national interests and national security.

Furthermore, not only the authoritarian elites are not interested in introducing democratic institutions that could diminish their power but many societies are also not interested in introducing democracy, which is often associated with chaos and the domination of public space by corrupt party politicians. In these conditions the political system with strong presidential power seems to be the political alternative ensuring effectiveness in solving social problems. For the political elites and the large part of society, power that is not limited by the rule of law or democratic responsibility appears to be a good solution in times of a growing sense of threat and uncertainty.

Conclusion

Democratic political regimes formed in the “third wave of democratization” stand before a hard task of overcoming this period of

instability. The institutional composition, embracing the organization of political conduct, is one of the factors that may influence the future of democratic institutions in developing countries. It may not be the dominant factor but in hard environmental conditions it can appear to be the decisive element for the future of democracy in these countries. Linz's thesis, who thought that the presidential model, due to its specific traits, increases the risk of undemocratic behaviors, demands empiric confirmation. The fact is that in most countries described by Freedom House as partly free or non free the dominating role in the institutional composition is the role of president. This is why the parliamentary-cabinet model is a safer institutional solution for "younger democracies". It protects from the appropriation of power by a strong center and fosters the spread of pro democratic values and behaviors connected to negotiations, finding consensus and the respect of the rights of the opposition. Parliamentarism provides a more flexible and adaptable institutional context for the established and consolidation of democracy. Parliamentarism can help establish democratic behavior and create conditions to resolve a political conflict in a democratic way while the presidential system (even the semi-presidential systems) create conditions which may contribute to concentration of power.

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IS THERE AN AMERICANISATION OF POLITICAL CAMPAIGNS IN SLOVAKIA? PRESIDENTIAL ELECTIONS 2014

Viera Žúborová

Abstract

The starting point for this research was and still is the continuing debate about the development of political campaigns in recent years, which are often referred to the term „Americanisation“. First, this development presupposes, that all changes, techniques and tools campaigns are taken directly from the United States , but on the other hand, the changes are seen as a part of the general developments in the field of policy, media and society, which are grouped under the term „Modernisation“. The driving force of this article is to inquire in more detail why these trends occur and which affects them. What is most important about the extent to which these convergent to „young democracy“ as the Slovak Republic is. In pursuit of answers to these questions, it is necessary not only to identify the main characteristics of this process, but to set an adequate methodological framework and try to explore its properties in the Slovak environment and specifically, in the context of the presidential elections in 2014, of course, with regard also to the other options, which primarily serve for comparison.

Key words:

Modernisation. Political communication. Americanisation. Presidential election. Slovak Republic.

Introduction

In recent years, great attention has been given to new trends, tools as well as the concepts, which affect the communication of candidates, as well as the actual management of electoral campaigns in individual countries of the world. For example, in the 1990s, research began with the aim to focus on the different techniques and strategies that have been used in election campaigns in countries across the world (USA, Latin America, Eastern Europe, Russia, Australia, South Africa and others). Even Plasser (2002) states that in order to be able to understand the spread of American campaign techniques, it is necessary to keep track of individual changes in the countries exactly as it said the dominant group of respondents (84%) in the context of the dramatic change of leadership and the style of campaigns in recent years. Even the United States has been identified as the "generator" of the electoral trends. In scientific terms, the development is characterized by the concept of Americanisation.

The term "Americanisation" first appeared in the beginning of the nineteenth century, when its interpretation was closely connected with the penetrating forms of Americanisation in the context of the entity, culture, and material objects (Van Elterne, 2006: 3). With the concept of political communication the term began to be used in relation to its development and transformations at the end of the twentieth century and the beginning of the twenty-first [(Negrine, 1996; Norris, 2000; Plasser and Plasser, 2002)]. Americanisation is thus seen as "a directive one-way and convergent process of electoral campaigns and their practices, in which other countries - respectively the relevant actors within the system - are trying to adapt to the American style of campaigning power in the context of political communication" [Plasser and Plasser, 2002: 16]. In other words, the use of marketing techniques, its aim in the analysis of the situation, as well as the control of efficiency in the election campaigns in relation to public opinion, has become more widely used among candidates.

The term "Americanisation" is briefly defined through the five basic elements, which are (Negrine, 1996; Blumler and Kavanagh, 1999):

1. the electoral campaign focusing on political personalities and their traits;
2. the use of research in public opinion political actors;
3. the central role of PR consultants and political marketing;
4. by the broadcasters led by the media agenda and to raise topics;
5. the professionalisation of communication actors - where politicians and journalists are in mutual interaction.

Moreover, Americanisation is generally understood as a process which is exported along the whole of the world, then adapted evenly into countries regardless of their national context. Swanson and Mancini indicate the main features of Americanisation through specific elements; these include (Swanson and Mancini, 1996: 14 -17):

1. personalisation policy: charismatic leaders replace the traditional symbolic links created in last years, the political parties and traditional ideologies;
2. "scientificisation" policy (politicians): production, scope and ownership of ideas is checked by experts, scientists, experts which aim for rationalisation. The main goal is to look how attractive and actionable policies becomes election victory;
3. the separation of the party from society: political subjects are losing their relationship with society because of their separation of the presentation based on ideology towards the presentation based on the opinions of public;

4. the independence of communication structures: independence and gradual increase in the power of how the media forces political actors to adapt a custom-made commercials.

From the point of view of comparative studies, the term and its expression is an effective tool for the comparing of individual electoral campaigns of different countries from the point of view of innovation, the use of marketing instruments in the context of political communication strategies of political actors. However, amongst academics there is frequently heard the opinion that this concept is not completely compatible with all the specific features of the political and social system of most countries. For example, Plasser (2002) perceives the concept of "Americanisation" political campaigns as "fleeting" and understands it through two basic approaches:

1. modernisation approach, which is Americanisation perceived only as a consequence of the beginning and dynamic development in the framework of the media system and the relationship between constituents and political entities;
2. the diffusion approach, when Americanisation is seen through the transnational spread of Americanisation and the implementation of its concepts and strategies in election campaigns, which is seen through two models globally:
 - 2.1 the so-called shopping model (purchase model);
 - 2.2 the so-called adaption model (accommodate model).

His approaches as well as models Plasser responded primarily to the fact that in general, in the context of election campaigns is evident the mixing of global (Americanisation) practices with certain national characteristics. The phenomenon can be influenced by a series of factors such as media structure, the party and electoral system (rules and regulations). Currently, the process is known under the term "hybridization".

The concept is so built on Plasser's shopping models, (shopping model) using on the one hand, professional marketing forms (Americanisation) and on the other side of the domestication - traditional forms of political communication specific for each country (Blumler and Gurevitch, 2001; Kaid and Holtz-Bach, 1995; Plasser and Plasser, 2002; Voltmer, 2006). In general, we can say that the discussion conducted in the context of political campaigns and the development in recent years reflects not only the changes seen in the direct adaptations of American techniques (selective), but also the changes associated with the general development affecting policy, media and society.

The basic characteristics of the "Americanisation" trends in campaigns

Looking for as a general term what is "Americanisation" in this study, as well as the possibilities of comparison and analysis, it is necessary to emphasize several existing properties that are associated with it. To the basic character traits of Americanisation belongs:

- (a) the so-called catch-all policy;
- (b) personalization;
- (c) the so-called media-centricity (media targeting);
- (d) professionalisation;
- (e) political marketing.

From the perspective of the so-called catch-all policies, several authors suggest a change in the conduct of campaigns currently in transition, or a shift within the frame of strategies benefitting from ideology to catch up "all" policies (Kavanagh, 1995, Swanson and Mancini, 1996, Swanson, 2005). As Swanson (2005) states, the shift was primarily caused by a gradual weakening of the ties between candidates and citizens (constituents). In other words the so-called catch-all policies allow you to present a more efficient and wider targeting on diversified segments within the company, candidates may even take an opposite ideological policy while reaching potential voters. The objective of these characteristics (catch-all) is the induction of consequences in the time of the elections, or begins to increase, the position of individual candidates, who are in a position to aggregate electoral support in the time of the elections.

The another visible shift in this context presents the leaders of political parties to the national forefront - "presidentialisation" - through television, which focuses increasingly on the activities of leaders in the framework of the election campaign. The trend of targeting the leaders themselves has been visible in recent years in Europe, where the role of the traditional parties and their stable constituency has experienced a decrease, and vice versa the capacity of particular politicians to collect support from various social groups has risen. Whole processes were perceived and referred under the term personalisation policy. In other words, this term is considered to be one of the main elements of both modernisation and Americanisation of campaigns, when the choice of the electorate is "dependent" from his relationship toward the individual candidates (Swanson and Mancini, 1996: 16).

The personalisation policy is closely connected with another characteristic of the Americanisation and this is the so-called "media-centricity" (media targeting), in fact the actual medium that has helped to increase the position of candidates in political campaigns. The media are understood as autonomous power centres, which are in competition with other centres of "power." In the context of political interactions, candidates had to be adapt to the logic of the media, in particular in achieving media coverage. On the other hand, media coverage would require candidates, which the parties produce. This dependence upon the media, especially on TV has created a dominant mediator of political messages.

With the need for candidates to be seen as a leader within their campaigns, the need for talented professionals increased, professionals who might develop appropriate strategies towards targeted potential voters. Swanson and Mancini (1996), this process associated with the term "scientification" policy or "*the professionalisation of politics*", where is seen a growing number of experts feeding knowledge and techniques, the procedures in the framework of the campaigns, which until recently were carried out by a political party's apparatus.

The last characteristic mark of Americanisation is the increase of "political marketing", in recent years. Several authors argue that identification of the target group of the electorate - the voters, the concentration of the means of campaign to these objectives (group of companies) was taken directly from marketing techniques. In addition, surveys of the market, i.e. target voters, has helped candidates appeal towards the target group.

It should be stated that the above characteristics constitute an adequate basis towards a comparison of the practical from the theoretical perspective, the characteristics of which will be analysed in the example of the Slovak republic, based upon the last presidential election, which was considered groundbreaking in the framework of the use of U.S. political campaign techniques for the management of certain candidate campaigns. However, it must be noted that these techniques are not a novelty in the Slovak campaigns and indications of their adaptation to the campaign are visible in the past (in the context of the presidential elections in 2009, the choice of Saturday as voting day, and on the election campaign of Iveta Radičová) therefore the following analysis will focus on specifics of the other options that can make the creation of a more comprehensive perspective.

The media and the electoral system in conditions of the Slovak republic

By looking at the "Americanisation" and its ability to adapt to the political and media system in the individual countries Pippa Norris (2004) notes how individual barriers such as the mediasystem (its structure and role of public broadcasting) and the electoral system or electoral regulation which defends this concept are overcome.

We can similarly perceive besides said barriers the political culture itself, or rather the behaviour of the candidates. In other words, those American candidates can occur at any time, at any place and in any television, apart from those of European, who are rather under the control of party leadership.

Similar limits or barriers can be seen in the comparison of the media system of the United States and the Slovak Republic. While in the USA the dominant sector is more the commercial area, in the Slovak Republic there is a little more balance, even though there still is the perception that the strong power of public broadcasting in the context of politics.

Second, a significant difference between the U.S. and Slovakia is on the policy of public broadcasting time. If in the U.S. the time is unlimited, within the Slovak Republic, public TV (and radio), including the so-called holder of the license for voice or television broadcast *"may allocate maximum of one hour to a campaign from the broadcasting time for a candidate, maximum of 10 hours from the broadcasting time so, that none of the candidates is disadvantaged by the determination of the time"* (Act no. 46/1999).

It is similar also with the length of the campaign, as the official start of the campaign in Slovakia begins 15 days before the choice and ends 48 hours before the start of the votes, the American campaign 'season' starts within each candidate's announcement for political office, and "culminates" one year prior to the actual choice. Similar differences can be found in several other particulars, for example in the official "limitation" of campaign charges, negative attacks, and insulting of candidates, etc.

Research design and methodology

The main question in this research was the effort to link marketing ideas and techniques, to similar electoral trends found in different electoral systems of democratic states across of the world. As already mentioned above, we analyse the presidential elections in Slovakia, which took place in the year 2014, to answer this question. Whether you can (not) perceive

the impact of Americanisation trends in the management of foreign election campaigns. Specifically in the framework of the present article, we discuss the analysis of electoral spots that were broadcasted on TV, but also the selection based on those, which were (and are) freely available on youtube.

When creating the research design and the determination of the methodology, it was necessary not only to avoid one perception or prejudice of the analysed campaigns. In other words, there are two views, which look to an in-depth interview in different ways. One group prefers them, because they offer a unique view of the studied problems "from the inside", from the specific persons who are interested. Others exhort only to one-way information, or misleading information, which may mislead the researcher. My efforts were attempted in-depth interviews with the main actors of campaigns, but they unfortunately were not held. At this moment many foreign experts forget the culture of the country in which the research has to be carried out, or the unwillingness of the involved people to help expand the research areas.

For this reason it is our point of view to dominantly focus on the analysis of the data through the selected point - contents analysis. The choice of the analysis content was intentionally selected because this approach is able to examine, in layman's terms, under the surface, individual data. With other words, using content analysis is more suitable since it allows the researcher a more detailed look at messages, ads, and other monitored communication types.

As Paltridge (2006) allege, discourse analysis are looking on language pattern in the context of (along) the text and considered over the mutual relationships between the language and the social and cultural context in which it is used. It should be stated that discourse analysis are not homogeneous approach, it is their countless and therefore is always the need for adequate options of one type, which is able to comprehensively analyze the US studied the issue of whether, in the context of a set of research questions etc.

In the conditions of the Slovak Republic following the Americanisation trend has been elected the so-called critical discourse analysis. It appears to be adequate, since it helps uncover hidden values, positions, and perspectives. In other words, it reveals to us not only the relations within the policy, but also thinks over why the discourse is used and what are its consequences.

From the point of view of the selection of an adequate conceptual framework, Fairclough (1989, 1992, and 1995) model of CDA (critical

discourse analysis), which consists of three mutually linked processes of analysis tied to the three mutually linked dimensions of discourse is chosen:

- (a) the subject of the analysis (including verbal, visual);
- (b) processes in which the object is created or received (writing, speaking, designing, reading, listening, viewing) by people;
- (c) the socio - historical conditions that influence these processes.

According to Fairclough each of these dimensions requires a different kind of analysis:

- 1.) the analysis of the text (description);
- 2.) analysis processing (interpretation);
- 3.) social analysis (explanation).

Useful in this approach is the fact, that it will allow us to focus on the characters that form the text, the specific choice of language, their sequence and layout. The approach also provides the possibility of the entry of the researcher into the analyzed text. Within the frame of the presented article we will not only focus on the detailed analysis of the text in the context of linguistics (grammar, wording of the text), but also on the visual analysis of the image that is presented. We will tend the concrete text, which is related as well as the "social practice", which looks in the broader context of the communicated text.

On sampling the TV ads that are going to be consequential analyzed through a three-dimensional model from Fairlough, we follow a specific set of criteria, in order to choose an adequate and equivalent number of ads for all potential candidates. One of the criterion was an adequate number of selected ads, whereas in the TV broadcast were published only two electoral spots of the candidates, not a sufficient number, therefore, our attention focuses on the electoral spots, which were created for social media, the internet and other modern media player mediums (youtube, vimeo etc). Another criterion in the selection of the relevant electoral spots was the choice of those ads that systemize a variety of information, discourses, or the main topic within one of the spot as a whole. The third criterion, which depends more on the subjective view of the researcher, is the relevance of individual electoral spots from the point of view of the individual candidates, and media coverage.

After the presentation of the methodological framework of the presented text, there is a need to draw out the basic research questions that will be included in the text analysis. The goal is not only to point out the possibilities of the adaptation of Americanisation elements in the

conditions of the Slovak Republic, but also to clarify some of the questions that go hand-in-hand with the main objective, such as:

- a) Is there a specific discourse that is perceived across all the analysed texts?
- b) Does the image create within the ad the "imaginary" text, which the words don't tell us?
- c) What kind of Americanisation trends have been used in the relevant candidates in selected ads?
- d) Where there any differences in the discourses of the candidates in the context of their starting positions in the campaign?

Before we begin with the analysis of the selected election ads there is a need to clarify some of the issues that can arise within the research. The research focuses on five basic characteristics of "Americanisation", but it does not offer and clarify the term as a post-modern campaign, and thus also the conclusions from Pippy Norris. Since the research assumes the impact of the media in the development of campaigns, there is no further explanation. We are aware of the fact, whether we accept the importance of the media within the election campaigns, but this is not our goal although it opens up the possibility for further research.

Political and electoral genesis of the Slovak presidential elections in 2014

In the presidential elections in Slovakia on the 15th of March 2014, fifteen candidates stood for office. Since neither one of the candidates for president received the majority of the total majority of valid votes from eligible voters, there was held the second round of the presidential elections on 29th of March, where two candidates advanced, independent candidate Andrej Kiska and the then prime minister and leader of the political (government) party smer-SD, Robert Fico. As the target is, to clarify the submitted contribution to what measure and if at all Americanisation elements were present in the Slovak Republic, or within the management of electoral campaigns, the research focused on these two successful candidates, who progressed to the second round.

According to several analysts, the campaign was in its beginnings characterized as predominantly calm. However, a negative campaign towards Andrej Kiska did not escalate just before the election day, but also after, between the opponent and the favorite, chairman of the government of Robert Fico. The candidate, who advanced to the second round as it was already presented above, was an independent candidate Andrej Kiska.

Currently on his person was developed a strong negative campaign and how Spáč notes (2014), it was nourished mainly from the Robert Fico's party. The negative campaign was primarily focused on two themes. One of them was the indictment of Andrew Kiska for loansharking, since it has been known in public, that in the past he operated a loan company. The second theme, which has also been constantly nourished by the prime minister, was its association with the Church of Scientology. Despite this discrediting campaign, it did not have the expected effect after the end of the first round, whereas public opinion polls talked about 10% to 12% popularity of the prime minister ahead of Mr. Kiska in reality the prime minister ended up with about less than 4% behind Kiska.

Another election topic that dominated the framework of the election campaign was associated with the position of presidential candidate Robert Fico, and potential negative impact of power in the hands of one government party and that impact on the overall functionality not only of the executive, but also on the political system. This point of view remained despite the prime minister himself evaluating positively such a possibility since it would offer stability across the executive and legislative authorities, including the society as a whole and political stability.

In the framework of the second round the discreditation campaign of Smer and Robert Fico still continued, for example immediately after the declaration of elections (the next day) he issued a press conference where he presented additional materials about his rival. Within this period he opened the next election agenda, or more negative directed communication, which attacked not on the program of the candidate, but more his character. He characterized Andrej Kiska as an unexperienced man, or "the adventurer", which did not have any experience with domestic or foreign policy (mentioned in the context of the question of recognition of Kosovo).

It was expected that similar style of the rhetoric would also be also used by Andrej Kiska. Instead, he informed only about the filing of complaint on the prime minister for false accusation of usury, however he devoted to the positive presentation of his person, which has not been changed already from advising of the candidacy for president of the Slovak Republic. On the 29th of March 2014 the second round of the presidential elections was held, with Robert Fico as the slight favorite while others favored Andrej Kiska in the context of its possibilities to increase the number of potential voters and their votes from unsuccessful candidates.

The winner of the second round of the presidential election was Andrej Kiska, with 1 307 065 votes (59,38%), Robert Fico obtained 893 841 votes

(40,61%). Many analysts believed that the victory indicated a total apathy of voters, high mistrust in political parties, or the threat of concentration of power in the country, or the overall presentation and targeting of both candidates. To ensure that we were able to more understand the different discourses, through which they tried to present the candidates in the electoral campaign it is necessary to analyse the electoral spots (ads), which shaped the overall picture - the image. For interpretation of the obtained data from the content analysis, we will also work with research polls, which were conducted before as well and after the elections, including the research focusing on the nonverbal communication of the selected candidates.

The results and interpretation

The main goal of the presented article, as it has been already mentioned in the sections above refers to the extent in which Americanisation elements were within the presidential election campaign in the Slovak Republic. As it was already stated in the framework of the research proposal we will analyze the electoral spots of the selected candidates.

Analysis of the individual electoral spots (ads) will be based on the three-dimension model of Fairclough (1992), it will analyze not only visual but also verbal elements within the individual ads.

Robert Fico: "I'm ready"

The first campaign advertisement of the 2014 Slovak presidential election was titled *"All is about experience. Please vote wisely"*. The advertisement shows Robert Fico only in his office and begins with photo frames on his desk with famous statesmen, with the Constitution of the Slovak Republic, with working people where Fico is shown in the same work clothes of "blue-collar" workers. Behind him we can also notice four dominant subjects, the first is the national flag of Slovak Republic, then the flag of European Union. The third is the national emblem of Slovak Republic and the last one, hanging on the wall is a painting picture displayed traditional Slovak village. On the desk behind him we can also see various historical sculptures including the Christian Saints Cyril and Methodius and also Svatopluk the Great, a ruler of Great Moravia. (see a closer Figure 1).

Figure 1: Election spot a candidate for president of the Slovak Republic
Robert Fico



Source: Youtube (<https://www.youtube.com/watch?v=wDoo7pWB-5I>)

When analysing the wording of the advertisement we notice that Robert Fico is not trying to open many discourses in the ad rather he is focused on one main / dominant political discourse that is related to two sentences. At the beginning of the advertisement (00:30 of total duration) unknown voice is speaking about Robert Fico as: "*A competent, experienced and respected international respected statesman with a deep relationship to Slovakia, who is active and promotes common solutions in the interest of the people.*" Later the voice speaks the candidate himself with the words: "*Slovakia needs a cooperation, political peace, submission of the social partners and the good name abroad. I'm ready.*"

The first sentence talks about a professional politician, which is respected by all and until people will vote him, he will promote the common interests on behalf of the people, as it has a deep connection to Slovakia. In the second sentence, which presents Robert Fico by himself, are used the strong words like "*cooperation*", "*political peace*", "*reconciliation of the social partners*".... Currently these words have become dominant within the electoral discourse of the prime minister in the context of its positive presentation.

Also we have to point out the hidden warning (negative appeal) by the candidate the last seconds of the spot (00:27 - 00:29) graphically displayed is a red frame with a spoken sentence again by an unknown man, "*it is about the experience, vote wisely*". According to the grammatical sentence

structure, in the first sentence he presents himself in the singular of the third person and in the second sentence in the singular in the first person, in that moment during the address with strong words Fico looks directly into the camera, trying to identify with the voters.

In general, we can say that both text and image promote Robert Fico as an experienced politician who is a responsible person in the relation to the society and state (image of a leader in his office) and also as a person / leader who is nationally oriented (Slovak flag, state emblem, images and motives of traditional elements related to history of Slovaks). These discourses are not ideological colored and thus may be more appealing towards the wider population. The main message of the entire electoral spot was that Robert Fico is the only one who can guarantee stability and order in the country and promote (to the voters) common solutions. From the perspective of three-dimensional model, especially in the context of the last dimension of socio - historical conditions, we can say that so catch-all policies were visible through all his campaign.

Robert Fico was presented as the main guarantor of stability and cooperation. In the last days of the first and second round he was trying to develop another discourse, which was also visible within the analysed spot and thus distinguished him from Andrej Kiska. Robert Fico is not only trying to discredit his opponent, but to present himself as an experienced and competent politician who will not only provide good reputation abroad, but also cooperation and political "peace" within the country.

Andrej Kiska: The heart, the mind, the nature

The second campaign spot was titled "*Heart, mind, character*" (total duration 00:35). The electoral spot displayed Andrej Kiska through pictures in different kind of positions and environments. The whole presentation is made of photos and starts with the first picture, where the candidate lies on the floor and plays with the children, the next photo has the emotional appeal and shows Kiska with the sick boy, similarly-themed motif is also pictured in the photos of the family, where he stays next to, but he is not looking into the camera, he is looking at a child in the arms of his mother (see a closer Figure 2).

Similarly, as in the spot of Robert Fico, this advertisement showed Andrej Kiska in his office, which is not appeared as a dominant part of the whole electoral spot. It is also otherwise furnished (live and in colour). We can't observe any dominant state symbol in his office as in the case of Robert Fico. The only symbol, which takes us through the video, is a

symbol of the "Good Angel ", which Andrej Kiska has been a part of from the beginning as its founder.

From the perspective of the word formulation, it is necessary to perceive the ad as a completely different discourse than Robert Fico. Within the frame of the election spot he begins with the phrase *"For eight years I devoted to charity....."* and continues with a negative reference to the malfunctioning health service and social system. Though subsequently he introduces himself as a proficient manager who has accomplished several successful projects and knows what "the economy helps and what it harms".

The main message, which has gradually recast into his election discourse, is very positive, motivated message: *"I will always stand on the side of people, because then people will be behind me. And so the president can prove a lot."* Andrej Kiska presents himself as "one of us" (voters), he tries through strong words to capture each individual within the society. He does not define himself as a professional politician, he rather uses the clear and conspicuous words, which highlight his character *"Heart, mind, character"*.

From the perspective of the grammatical structure of sentences Andrej Kiska presents himself during the whole election spot only in first person singular. But interesting is the fact, that even when he is looking directly into the camera, Andrej Kiska does not talk directly, he is just looking in it without words and smiling, his voice heard as a voiceover.

Figure 2: Election spot of a candidate for president of the Slovak Republic Andrej Kiska



Source: Youtube (https://www.youtube.com/watch?v=dX_TVt0IG14)

The whole election spot is trying to present Andrej Kiska as "not the" traditional politician, who contrary to the politicians i.e. Fico, understands the problems of ordinary people. This is the point of this particular election advertisement; to present the basic message and the choice of a candidate, who cares about people. It is also about the choice of the first independent and non-party candidate who has sufficient knowledge to help people, who is a good manager and who worked for eight years in charity. Andrej Kiska is also trying to take specific character attributes, but they do not affect the context of the address, rather they are (as well as in the case of Robert Fico), the so-called catch-all policy. The given similarity in targeting we can see even in the absence of specific ideological colours along the whole election spot, including both speech and image.

From the perspective of the three-dimensional model, from the point of view of the last socio - historical dimension, we can conclude that the positive rhetoric of Andrej Kiska on when the classroom change in leadership and the implementation of the policy has not been changed even after the discrediting campaign by Smer and Robert Fico that was visible in both election rounds. As Grigorij Mesežnikov noted (2014): *"He endured a discrediting campaign against him and he did not let it provoke himself. He could handle as well with the hit below the belt against him"* and he presented himself as a politician of the new generation, who will provide for the people with usual problems and defend them.

Macro - level of Americanisation

Analysis of both electoral spots has tried not only to answer the main purpose of the submitted contribution regarding the Americanisation of the election campaigns in conditions of the Slovak republic, but also to answer some of the questions below regarding the research scope.

- a) Does specific discourse that is perceived across all the analysed texts exist?
- b) Does it create an image within the ad, the "imaginary" text, which is not told by the words?
- c) What kind of Americanisation trends have been used by relevant candidates in selected ads?
- d) Was there any difference in the candidate discourses in the context of their starting positions in the campaign?

We can say, in the context of the existence of a specific discourse, which may be visible across the analysed texts (including those that have been

chosen for the characterisation of a comprehensive perspective on the creation of individual discourses) in the campaign advertisements, that both candidates tried to create a dominant discourse, presented during the actual election campaign as well. On the one hand, it was the discourse of the traditional, stable and competent politician in the form of Robert Fico, in comparison; it was the voting discourse of the common man, intellect, with heart and character in the form of Andrej Kiska.

From the perspective of the candidates image, it can be point out, that they largely kept the same discourse they presented verbally, although Andrej Kiska had amore emotional video compared to Robert Fico. While Fico presented himself as a capable politician in the blazer and tie, Andrej Kiska chose more casual clothes, without a jacket and without a tie. A common tactic used by politicians in Western democracies. In fact, a similar outfit was chosen by David Cameron in Britain's 2010 parliamentary elections. In his campaign spot, Cameron chose to display a sign of absolutely comfort and openness towards to the listeners as he wore a shirt with sleeves rolled up) In terms ofthe visualsignal presented byAndrejKiskathere was the"intentional"naturalness, inducing a relaxed atmosphere. In terms of targeting voters, it was left up to the voting segmentamongst Slovak voters to perceive the differences. Although both candidates were trying to target through the so-called cath-all policies, without an ideological message, visually and subconsciously they were different. While Robert Fico presented himself as a professional politician, an experienced leader and was visually presentedwith citizens, belonging to the "social" vulnerable population (workers, pensioners, women in factories etc) he created through this indirectly and arguably intentionally a visually ideological message.

On the contrary, Andrej Kiska was seen as a candidate with a mid profile, but without a clear ideological profile, which was connected with his catch-all policies. As a result, Kiska tried during the entire election period and negative attacks against himselfto evoke a positive feeling towards the audience and potential voters. He created an image through which people saw him as a man who traveled to the United States but later returned to Slovakia and conducted a successful business. His philanthropic activities were perceived positively (the Foundation of Good Angel) with which people identified themselves. We can assume that the overall marketing strategy was targeting thosepotential voters disappointedwith the established political parties and highlighting the constantly presented theme of Kiska as the first, independent and nonparty candidate for president.

While comparing the campaign spots of the two selected candidates, it is clear that the main differences are in the creation of the electoral discourses and targeting the direction of potential voters. The electoral discourse from the prime minister of the Slovak Republic and Smer party leader was built on the identical base as the presentation and promotion of the party, since the party presentation has always been created by Robert Fico. Not only in the analysed voting spot, but also in others there is a similar and dominant theme: a story of a man who travels through Slovakia, listens to the workers in the mines and factories, hands out flowers to women, discusses with students, mourns in memory of the victims and heroes of the Second World War (See a closer look: FICO2014 Youtube.com).

Andrej Kiska tried to present himself not only as an independent candidate but most of all a non-party candidate which is a positive alternative against the "by the same politicians with the same promises that are still around".... against "politicians who play the same games...", against the politicians, who listen to the party headquarters and those subsequently listen to the sponsors...." (See a closer look: Who is afraid of Kiska I, II, III, IV, Youtube.com).

I can assess from the point of view of Americanisation trends, that the election campaign of Andrej Kiska was much stronger not only on the professional side, but also more effective in the context of targeting society as a whole (catch-all). His election strategy was targeted at the presentation of the candidate, who is not only non-party and (also financially) independent, but who wants to help other people. Overall, Andrej Kiska was self-confident in his campaign as well as throughout the second round and resolved to change not only the view of the president but also on policy. He was not as common as Róbert Fico, for which I think the choice of such a presentation is arguably a step forward. The targeting and clarity of the broadcast message (a common solution in the interests of the people) was present. From the point of view to the use of media Robert Fico held a dominant position who used his position of prime minister and presented his image of the candidate for president through this profile. On the other hand, Andrej Kiska was more active in the internet and social networks, he published comments on the social network Facebook. Robert Fico also tried to use social networks, but his dominant attention was seen on television. In the context however of social media he made a couple of short videos in which he talks with the vice-chairman of the party Marek Mad'arič about his childhood, about Smer, the party of social democracy, about his career to name a few.

Also presented in the videos is the perception of patriotism in the form of flags, a bust of Milan Rastislav Štefánik etc. However, I have to say that these short videos rather provoked a stir (for example on the issue of Christianity) as the creation of a positive message, though his videos also became the inspiration for parodies and memes.

Conclusion

The Americanization of campaigns is slowly starting to make her way in the Slovak political life. Nowadays it is more usual that catch-all policies are applied in any level of the political system. But on the other hand, I must point out that the concept “Americanization” has its limits in the relations to the Slovak political system and political environment. For example Voltmer (2006) pointed out, when the modern, western and “Americanised” campaign tools and techniques are adapted in the post communism environment we can observe deformation of them. In other words, the traditional Americanised tools and techniques are mixed together with domesticated and so called “hybridization” of political communication appears in this regions (Voltmer, 2008).

In general, we can say that Americanisation will never be fully applied in the Slovak Republic; rather we perceive its use with the domestic instruments of leadership campaigns.

One of the main assumptions is the fact that Americanisation shall apply to the fullest in the country, in which political parties do not play up such an important role and where the electoral system is a majority, which is typical for the USA and in presidential elections. Therefore, for example, can you talk about the fact that Andrej Kiska was able to adequately apply almost all of the tools described as Americanisation, though he stood for president under a majority electoral system and without party affiliation. While Robert Fico was not able to fully exploit the catch-all policies. I claim that it took place due to fact, that he was targeting mainly voters from his party through dominant party pillars despite the fact that from the point of proportional votes in the recent years, he received much more votes than the second round.

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SLOVAKIA

**DIRECT PRESIDENTIAL ELECTION IN THE CZECH
REPUBLIC –
THE CZECH EXPERIENCE**

Pavel ŠARADÍN

Abstract

The first direct presidential election in the Czech Republic took place in January 2013. Lengthy political discussions on this change were concluded in 2011. This contribution aims to examine the adoption of this law and the role of the political parties in this process. We believed that after more than a 10-year long discussions about the introduction of direct presidential election did not take into account some critical voices. The aim of this article is to examine the main and significant aspects that were ignored in the Czech debate. These aspects are related to the citizens trust in politics, the integrity and transparency of the electoral process, campaign financing, and the relations to the political parties and individual candidacy.

Key words:

Direct presidential election. Czech Republic. Political parties.

Introduction

The first direct presidential election in the Czech Republic took place in early 2013 (Charvát, Just, 2014; Šedo et al., 2013). It was preceded by a relatively lengthy debate concerning the adoption of this type of election. Its advocates pointed out the negative experience with the last two indirect elections won by Václav Klaus, which were accompanied by blackmail, MPs hiding during the vote, unclear statements and probably also bribes. The citizens sensed the undignified circumstances of such an election, and opinion polls supported the direct election of the head of state. Its opponents argued that a directly elected president would be unnatural with regard to the character of the parliamentary model, and would probably also increase his/her power especially vis-a-vis the government. Often the question arose as to whether undignified political manoeuvring represented a sufficient reason to introduce a direct election. The campaign is always more intense, attacks and disputes among candidates may arise, and this would be reflected in the positions of their supporters.

During the 2010 parliamentary election, most relevant political parties' programmes pledged to support a direct election. The government led by PM Petr Nečas incorporated a new political subject with a successful

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marketing strategy, Public Affairs (Věci veřejné - VV), which based its political programme on the introduction of direct presidential election and instruments of direct democracy. Their demand found its way into the programme declaration of the government, but the party broke up soon after and it became evident that it was a subject financed by businessmen (nicknamed "godfathers"), who were attempting to influence the Czech political process.

The objective of this paper is to show how political parties approached the making of the law on direct election, and it argues that the motivations behind this act were not so much the benefit of society as a whole but rather a prevalence of personal and party interests, thus identical to the previous proposals for direct presidential elections. The position from which I argue is that political parties should aim to increase the functionality and fairness of the democratic parliamentary system, and not to destabilize it by consolidating one of its components. Even though the direct presidential election debate also embraced the possible proliferation of civic engagement, it largely ignored arguments that it could reduce voters' interest in parliamentary elections and other concerns. If a new, distinct type of election such as direct presidential election, the focus of the voters might shift in that direction. To confirm such an assumption will require more time. The only solid reason to introduce a direct election was the situation in Slovakia, where it was not possible to elect a head of state for several months until the voters chose one in a direct election. After the departure of Václav Havel, a strong candidate acceptable to the majority of the political spectrum failed to appear.

The Direct Presidential Election Debate

The debate concerning whether direct presidential election should replace the indirect system had appeared previously in the early 1990s. It subsided and resurfaced one or two years before the elapse of Václav Havel's second term. Havel was the first Czech president in 1993 elected by deputies of the Lower Chamber, only because the Senate was not constituted until 1996. The deputies elected Václav Havel in the first round, though with less votes than expected mostly due to MPs from the Civic Democratic Party (Občanská demokratická strana - ODS). A more complicated situation arose during the second election in 1998. The PM Václav Klaus (ODS) resigned in November 1997, mostly due to financial scandals in his party, which put an end to his government. President Havel commented on the previous development in Czech politics in a speech delivered to MPs.

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Besides other matters, he emphasized: “It seems to me that our greatest mistake has been arrogance. Since November [1989], the transformation processes here have taken place more or less continuously and have not been adversely affected by great political changes, in many respects we have been ahead of others – or at least it first seemed that way. This probably went to our heads. We behaved like a prefect, a star student or a spoilt only child who felt justified in looking down on others and patronizing everyone.” (Havel, 1999) The president was mainly criticising ODS and Václav Klaus, which caused him to lose the support of the party before the forthcoming presidential election. Consequently, he won in the second round by one vote only.

As mentioned above, the debate concerning direct elections resurfaced at the end of Havel’s second term. Several proposals were tabled, but we know that with the obvious exception of the last attempt, they all failed. The first proposal, presented by the Coalition of Four, appeared in 2001. This alliance of four small liberal and centre-right parties formed an opposition to the cooperation between the governing Czech Social Democratic Party (ČSSD) and ODS, who entered into an alliance after the early 1998 elections and signed an Agreement on Creating a Stable Political Environment in the Czech Republic, which enabled ČSSD to form a minority government (1998–2002). One of several proposals for introducing direct presidential elections came in autumn 2002 from ODS, who previously had not endorsed direct elections, but having lost the parliamentary election Václav Klaus, who had initially been somewhat hesitant, finally decided not to run for party chairman. As a result, some MPs wished to capitalize on Klaus’s popularity among right wing voters and proposed a one-round, direct election. The chances of their candidate succeeding would have been minimal in a two-round election. These proposals did not entail significant changes in the president’s authority.

Other initiatives appeared with the negative impression left by Klaus’s first election as president. However, the proposal submitted in 2003 did not appear on the agenda of the Chamber of Deputies until two years later, when the negative impression had partially subsided. Attempts to revise the Constitution culminated in early 2004 and included direct presidential election. The ODS proposed the so-called French model, which would allow more than two candidates in the second round, thus increasing Klaus’s chances of winning, expecting his opponents’ votes to crumble. The ČSSD prepared a more vigorous proposal which would weaken the jurisdiction of the directly elected president. Presented shortly before the end of Klaus’s term, the proposal fell through, as did a later proposal in 2009.

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Most proposals failed for essentially the same reason – the MPs could not agree on a one-round or two-round election. Each party pursued its own interests, while the disputes themselves could have served as a disguise for the parties' reluctance to support a direct election.

A second serious political crisis appeared when Mirek Topolánek's government lost a vote of confidence in March 2009. The crisis - coupled with a rising wave of distrust of the established political parties - gave rise to a number of initiatives, which succeeded thanks to very well managed political marketing. One was the aforementioned Věci veřejné. Their programme stated: "Above all, VV emphasizes direct democracy, which we understand as maximum participation of citizens in the exercise of power. Thus, we promote direct election of regional governors, mayors and the president." The ODS, VV and another right wing party with strong marketing support, TOP09, formed a coalition government, thus the programme declaration mentioned the government's commitment to direct presidential election together with direct election of mayors and possibly regional governors. The government passed a vote of confidence in summer 2010 but did not have much time to adopt the respective bill. The state of affairs in the Chamber of Deputies did not correspond with this urgency, and the bill received a lukewarm welcome. We should however state that like its predecessor, this coalition government did not complete its term due to a number of scandals and accusations, and resigned in summer 2013.

In 2011, the constitutional lawyer Jan Kysela contemplated the main aspects of direct presidential election in the periodical *Přítomnost*. He argued that political parties justified the introduction of this institution with reference to demands from citizens and noted that such a top position generally required someone who would stand above the parties: "The trouble is that this mission is not very attractive for an electoral campaign. In other words, a perfect president and direct election are somewhat incompatible unless it would not involve promises of any sort, just considerations of credibility, qualities and abilities of the candidates. Given the low probability of such an expectation, we can expect either unrealistic promises or promises which the winner will deliver via his/her political party and the posts it occupies in various public offices" (Kysela, 2011: 15). Another rarely discussed issue related to possible intensification of political conflicts is caused by the introduction of a new strong cooperation, for instance between the government and the newly elected president.

Adoption of the Bill on the Direct Election of the President

Public opinion constantly favoured direct election, with a stable rate of support at around 60%. The media also systematically pressured politicians and considerably contributed to a situation where no-one wanted to be held responsible for the potential failure to adopt the new law. The second election of Klaus was especially imprinted on the public memory – rumours of bribery, the fact that a ČSSD MP changed his position, a Green Party MP suddenly could not be found, etc. People believed that if they had the chance to make the decision, such fraudulent practices would not occur. As early as in 2010, disputes arose between the government and the opposition, ČSSD. ČSSD demanded a change to some presidential authority, mostly those potentially contributing to a corrupt environment, and demanded presidential immunity bound only to the execution of the presidential term. We need to emphasize that ČSSD had been the most vocal supporter over time of direct presidential election. Prime Minister Petr Nečas's comments on its demands were published in the daily newspaper *Mladá fronta Dnes* under the headline: “PM Nečas: ČSSD clearly does not want direct election”. As stated above, the Chamber of Deputies accepted the proposal for direct election of the president with a lukewarm attitude, yet it passed. Thanks to opposition ČSSD, the proposal received 39 votes over the compulsory 120-vote threshold and easily passed the required constitutional majority. Three ODS MPs voted against, the KSČM (Communist) MPs abstained, possibly because direct election stripped it of one item open for vote trading, which the party made use of with Václav Klaus. The demands of the ČSSD were not met unconditionally, thus some MPs had hopes that the Upper Chamber would reject the proposal. The media spoke to the Senators and started to speculate on who would vote for and against. *Mladá fronta Dnes* published the headline “Clouds over direct presidential election. Only 36 Senators pledge to vote YES”. The hesitation among some ČSSD Senators to support the proposal was probably caused by their request that the members of the Czech National Bank's Board were appointed only after the nominees' approval in the Senate, which the government rejected. PM Nečas argued that such a demand was unacceptable because the Bank Board should not lose its independence during times of economic turbulence. Indirectly elected President Václav Klaus likewise disagreed that the Bank Board members should be appointed solely by the head of state.

The Senators upheld the direct election, and in February 2012 the ministers of the Czech government adopted a statutory instrument for the law on direct presidential election. Its probably most significant aspect was

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the decision to organize the election in two rounds. Most political scientists warned that direct presidential election could have negative consequences for the political system.

Other than the law on direct election, the mode of financing the campaigns of the individual candidates was also important. The Bill ordered that election accounts were opened and electoral committees of 3-5 members were set up, charged mostly with overseeing the financing of the electoral campaign. The electoral accounts should be transparent, and the Bill regulated that “all” payments related to the election were to be conducted through this account. It also established deadlines for closing the accounts and disposing of the remaining finances. After a series of scandals related to political party financing, this could have been the first law aiming at preventing any lack of transparency. It also established ceilings for campaign funds up to of 40 million CZK in the first round and an additional 10 million in the second round. Nevertheless, several candidates failed to observe this aspect.

We witnessed several violations of the law, mostly by the winner of the election, Miloš Zeman, and one of his opponents, former PM Jan Fischer. They both received funding after the presidential election had ended, and in some cases the real contributor was not disclosed. Jan Fischer repaid the liabilities with a donation only when Miloš Zeman appointed him a minister in the caretaker government after the resignation of Petr Nečas’s government (summer 2013).

Let us not omit another important aspect of the presidential election. Whilst politicians and voters requested transparency and even more so a lack of negativity, the very opposite happened. The campaign was quite radical (Červinková, Kulhavá, 2013), with a large degree of force and high intensity, conducted not only in the media but also on social networks (Jeřábek, Rössler, Sklenařík, 2013), involving personal attacks, and specifically the second round between Zeman and Karel Schwarzenberg (TOP 09) divided Czech society into two camps. This personal and ideological chasm outlived the presidential election and remains present in society.

The first round of the presidential election had two front-runners, the former PM and ČSSD leader Miloš Zeman, and also the former PM of the caretaker government, Jan Fischer. Fischer’s vigorous start lost momentum just before the election, and instead the TOP 09 candidate Karel Schwarzenberg reached the second round, but then failed to win over more voters and supporters, while the mobilization by Miloš Zeman succeeded.

Conclusion

As shown above, the more than 10-year long discussions about introducing direct presidential elections in the Czech Republic did not take into account critical voices. Already during the terms of indirectly elected presidents Václav Havel and even more so Václav Klaus, conflicts with the government emerged, and their decisions at times collided with the Czech Constitution. The case of Klaus should have served as a warning that a directly elected president could justify his/her measures by means of a direct mandate from his/her voters. Many pointed out that it represented the greatest constitutional change since the establishment of an independent Czech Republic.

A significant aspect ignored in the Czech debate was the possible loss of citizens' trust in politics, which requires integrity and transparency of the electoral process. Robert M. Hardaway described this aspect in the example of the US Supreme Court decision which prevented the recount of votes in Florida in the 2000 U.S. presidential election. The dispute over how this American state voted lasted for over a month. The likely winner was Albert Gore, but the American voter will never find out what really happened. Hardaway quotes Justice John Paul Stevens, who disagreed with the decision of his colleagues: , " (...) *the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.*" (Hardaway, 2008: 25).

The violation of the financing rules in the election campaign of Miloš Zeman did not represent a gross violation, but indicated how vigorously he would implement his position as a directly elected president. The intention in this paper is not to examine the acts of a directly elected president; that requires a separate paper. But, I have shown that the introduction of direct presidential elections was mostly motivated by political interests, a constitutional balance was secondary. In conclusion, we can state that

- 1) The reasons given for introducing a direct presidential election were not sufficiently weighty to justify such a constitutional change. The election campaign deeply divided society, and this continued into the first half of the president's term.
- 2) Once the legislators had agreed to go through with the direct election they should have further reduced the president's powers, in order to stabilize the government and especially the parliament within the overall system. The level of political conflict has intensified in the Czech Republic, especially between the government and the president.
- 3) The Bill proved deficient in many aspects, for instance the financing of electoral campaigns. The newly elected president himself violated

the rules.

- 4) Pressure from the media, citizens and activists can be counter-productive. Promoting a change without knowing the content of such a move is equal to giving a blank cheque.
- 5) It is too early to say whether or not this will lead to higher civic engagement. In either case, the voter turnout was lower than in the 2010 parliamentary election. Coincidentally, the 2013 parliamentary election had a lower voter turnout than in 2010.

A second direct election could rectify some (legal) shortcomings related to individual candidacy, campaign financing and direct elections itself, but given that the political parties are busy with other issues, it is not likely at this point.

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The position of president was one of the institutions with which in the countries of Central Europe there was no particular problems during the initial years of transformation.

It was counted on that this institution would be a natural part of the newly constructed institutional conditions of a functioning democracy and that it would – should the experiences from history allow – build on the status of this institution from the years prior to the enforcement of socialism.