

Judicial Control of the Acts of the President in the Czech Republic

Zdeněk Koudelka

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 the Administrative Law as well. Most recent case related to this issue is a dispute on not-appointing the 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 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 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, as 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.⁴ However, this is virtually incompatible with the nature of

¹Article 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.

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.

⁴ Peter Kresák: *Forma vlády v SR* (The form of Government in the Slovak Republic), in collective volume *Aktuální problémy parlamentarismu* (Current Problems of Parliamentarism), Masaryk university Brno 1996. Accordingly Karel Klíma and coll.: *Komentář k Ústavě a Listině* (A Commentary on the Constitution and the Charter on Rights and Freedoms), Plzeň 2005 or Lubor Cibulka: *Ústavné základy vztahov prezidenta SR a vlády*

presidency. Being simply a non-party individual does not imply that the person on 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 the 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 head. The position of the President is virtually the same under both documents.⁵ 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.⁶ 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 joint 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). The President is not a part of the Executive power in a narrow sense.⁷ The Constitutional Court of the Slovak Republic characterized the relationship between the President and the Government as relatively dominant under similar constitutional arrangement.⁸ 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

SR (Constitutional Basis of Relations between the President and the Government in the Slovak Republic), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 180.

⁵ Václav Pavlíček: *Prerogativy nebo správní akty prezidenta republiky* (Prerogatives or Administrative Acts of the President of the Republic), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 134.

⁶ 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.

⁷ Aleš Gerloch, Jiří Hřebejk, Vladimír Zoubek: *Ústavní systém ČR* (The Constitutional Order of the Czech Republic), Praha 1993, p. 107.

⁸ Resolution N. 5/93 of the Collection of Judgements and Resolutions of the Constitutional Court of 1993–1994 (*Zbierka nálezov a usnesení Ústavného súdu*), p. 30.

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 reviewed an Act of the President, it may be implied that, while the Court did 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 (Hoetzel, Weyr) that certain acts were subject to the Supreme Administrative Court's judicial review, while others opposed this idea (Sobota).⁹ 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.¹⁰ 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.¹¹

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 Execution power body, his rights are not limited to this sphere only. Similarly, the Parliament, which is a Legislative power 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 the 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**

⁹ Jiří Hoetzel: *Akt správní* (Administrative Act), in *Slovník veřejného práva československého* (Dictionary of the Czechoslovak Public Law), vol. I, Brno 1921, p. 34n. František Weyr: *Československé právo ústavní* (Czechoslovak Constitutional Law), Praha 1937, p. 191. Emil Sobota and coll.: *Československý prezident republiky* (The Czechoslovak President of the Republic), Praha 1934.

¹⁰ Judgement of the Supreme Administrative Court N. 19 745/22 of 14.10.1933. Pavel Rychetský: *Soudní přezkum aktů prezidenta republiky* (Judicial Review of the Acts of the President), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 149.

¹¹ 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.

executive power body but also as the Head of State.¹² The concept of the Head of State includes exercise of all powers, or more precisely exercise of individual 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.¹³ 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.¹⁴ The President is the Commander in Chief of the Armed Forces.¹⁵ 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 forces¹⁶, 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

¹² 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.

¹³ 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.

¹⁴ Section 16 of the Act on the Establishment of Ministries N. 2/1969 Coll.

¹⁵ 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 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.

¹⁶ Zbyněk Šín: *Jmenovací a pověřovací oprávnění prezidenta 2* (Appointive and Delegation Powers of the President 2), in *Právní rádce* (Law Advisor) N. 4/1995, p. 8.

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 the public administration acts but as the constitutional acts of the Head of State also in the field of the 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. This 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 judiciary, as it abolished the Supreme Court judgement on the disciplinary procedure held against a public prosecutor, is relevant.¹⁷ 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 the Supreme Court judgement was lodged by a district public prosecutor who had held the position of a disciplinary public prosecutor before.¹⁸ 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 lodge a constitutional complaint.¹⁹ 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.²⁰ 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 Prosecutor's Office Act does not provide for otherwise.²¹ However, it is necessary to accept that, specifically in relation to the disciplinary procedure,

¹⁷ Judgment N. 79/2006 of the Collection of Judgments and Resolutions of the Constitutional Court (I ÚS 182/05)

¹⁸ District Public Prosecutor of Plzeň-město (the city of Pilsen) 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.

¹⁹ On the impossibility of lodging the constitutional complaint by public authority bodies see Jan Filip, Pavel Holländer, Vojtěch Šimíček: *Zákon o ústavním soudu, Komentář* (The Constitutional Court Act, Commentary), Praha 2001, p. 297.

²⁰ 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.

²¹ Section 18 para. 6 of the Public Prosecutor's Office Act.

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 Procedure²², 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 basically 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 the 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),²³ unless the law provides for a different jurisdiction, e.g. in the case of disciplinary procedure.

The Constitutional Court's decision has interesting consequences for proceedings in cases concerning the judges. The function of a judge is also performed within an employment relationship.²⁴ The Labour Code and other labour-law legislation shall be applied adequately to the employment relationships of the judges.²⁵ 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.²⁶ 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 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

²² Section 25 of the Act on the Proceedings Concerning Judges and Prosecutors.

²³ 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.

²⁴ Section 84 para. 1 of the Courts of Justice and Judges Act N. 6/2002 Coll.

²⁵ Section 84 para. 4 of the Courts of Justice and Judges Act N. 6/2002 Coll.

²⁶ Section 10 of the Constitutional Court Act N. 182/1993 Coll.

attitude which enables it to broaden the sphere of its jurisdiction almost unlimitedly.²⁷ Therefore the Supreme Administrative Court's decision on not appointing the judicial candidates to the function of judges²⁸ intervenes into the sphere of the labour courts, not the administrative courts. No employer, not even the State, is obliged to 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 the 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 conception, 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.²⁹ 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.³⁰ The decision was canceled by the new Minister of Justice.³¹

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.³² 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

²⁷ 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).

²⁸ Judgement of the Supreme Administrative Court 4 Aps 3/2005, 4 Aps 4/2005 and 4 Ans 9/2007.

²⁹ Section 73 para. 2 of the Courts of Justice and Judges Act.

³⁰ The Supreme Public Prosecutor's Office 1NZC 509/2006 and 1 NZC 510/2006.

³¹ 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 Codes of Administrative Procedure N. 500/2004 Coll, cancelled the decision of the Minister of Justice Pavel Němec of 28. 6. 2006 N. 321/2006-PERS-SO/3.

³² 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.

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 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.³³ 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 derogates the former one. The Constitution provides that the competence of administrative bodies is determined in the legislation.³⁴ As regards 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.³⁵ **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 appointment of the Governor of

³³ Michal Bartoň: *Rozhodování prezidenta republiky na návrh a rozhodování s kontrasignací – několik poznámek k rozhodnutí NSS ve věci justičních čekatelů* (Decision-making of the President of the Republic on the basis of a proposal and decision-making with countersignature – a few comments on the Supreme Administrative Court decision in the case of judicial candidates), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 120-125.

³⁴ 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.

³⁵ 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.

the Czech National Bank by the President, where the Constitutional Court used a constitutional practice for interpreting the appointive power of the President³⁶. 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.³⁷ 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 orders**³⁸, unless the Constitution explicitly provides for otherwise.³⁹

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 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.⁴⁰ 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.⁴¹ 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

³⁶ Judgement N. 285/2001 Coll.

³⁷ Section 8 of the State Decorations Act N. 285/2001 Coll.

³⁸ Art. 101 para. 1 of The Constitution of the SR explicitly provides that the President is not bound by any orders.

³⁹ 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.

⁴⁰ Art. 116 para. 1 and 3 of the Constitution of the SR.

⁴¹ Accordingly Jan Bárta: *Prezident republiky a jeho pravomoci v ústavním systému* (The President of the Republic and his Competences in the Constitutional System), *Právník* (The Lawyer) 2/2007, p. 141-142.

legal responsibility exists only in relation to office holders who can use their will to influence the decision.

Contrary opinions,⁴² 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 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 the 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 of 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 was rejecting 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 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 function of the 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 has already been scheduled and wait, as the demission of the Prime Minister was expected. The demission took place within a few days. The President accepted it on the 1st July 2004, when a new Government of Stanislav Gross (Czech Social Democracy Party) was appointed. On the 4th August 2004, the President authorized the Prime Minister in demission, 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).⁴³ The disapproval of

⁴² For a contrary opinion, however not constitutionally reasoned, see Jiří Pehe in his opinion "*Prezident může se jmenováním vlády otálet, avšak neudělá to*" (The President can delay the appointment of the Government but he will not do it) in Slovo 15.7.1998, p.2 and Václav Pavlíček in his opinion "*Zeman jede dnes do Lán se seznamem ministrů*" (Zeman is coming to the Lány castle with a list of ministers) in Slovo 16.7.1998, p.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.

⁴³ The President has not given reasons for the non-appointment: „Pán Lexa nesplňa 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). In Budování států (Building of states) N. 6/1993, International

the President was partly evaded as after accepting the demission of the former Minister, Lubomír Dolgoš (Movement for Democratic Slovakia), the President authorized the Prime Minister Mečiar to manage the Ministry since the 22nd 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.⁴⁴ In Bohemia, Moravia and Silesia, the Constitution obliges the President to admit Prime Minister's proposal on removing a member of the Government from office.⁴⁵

In 1953 in the chancellor system of Germany, the President of the Federal Republic Theodor Heuss in 1953 also rejected the proposal of the Chancellor Konrad Adenauer to appoint Thomas Dehler to the function of the Minister of Justice.⁴⁶ In Austria, the President Thomas Klestil refused to appoint some Ministers of the far-right Freedom Party who were nominated in 2000 by the 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 has been diplomatically boycotted by the EU. Schüssel wanted to ensure an agreement with the President on the personal composition of the Government in advance.

4.1.2. Appointing other public officials

On the 13th June 2006 Václav Havel refused a proposal of the Chamber of Deputies of the 25th 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 the 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 countersignature. This is demonstrated by the President Václav Havel's refusal of March 2000 to remove a member of the Presidium of the Czech Securities Commission, Tomáš Ježek, from office on the basis

Institute of Political Science of the Faculty of Law, Masaryk University, p. 13 and N. 7/1993, p. 17. Slovak Wikipedia, subject word "Ivan Lexa".

⁴⁴ 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.

⁴⁵ Art. 74 of the Constitution of Bohemia, Moravia and Silesia.

⁴⁶ T. Dealer (FDP) had nevertheless performed this function in the first Adenauer's Government in 1949-1953. The successor of President T. Heuss (1949-1959), President Heinrich Lübke (1959-1969) accepted the proposal of Konrad Adenauer (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). Roman Herzog: commentary to/on art. 64 of the Organic Statute of the Federal Republic of Germany, Maunz-Düring: Grundgesetz – Kommentar C.H. Beck 1983.

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.⁴⁷

On the 30th January 2002 the 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 2002.⁴⁸ This competence of the President of the Republic is subject to countersignature.⁴⁹

It is an unchangeable 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 President Michal Kováč refused this nomination and in April 1993 Vladimír Mitro was appointed the first President of the Slovak Information Service.⁵⁰ For the second time, the Prime Minister Vladimír Mečiar wanted to appoint Ivan Lexa to this function in 1995. A negative attitude of the 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 of 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 a Prime Minister's proposal.⁵¹ This enabled the appointment of Ivan Lexa. It is also known that on the 6th 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 Government with the consent of the National Council of the Slovak Republic.⁵² The President reasoned his decision by asserting a lack of the required five-year financial praxis as he did not acknowledge his function of an adviser of the Vice-Chairman of the Government for the Economic as an

⁴⁷ Art. 102. para 1 let. h) of the Constitution of SR.

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ Budování států (building of States) No. 4/1993, pp. 12-13.

⁵¹ 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.

⁵² Section 7 para. 2 of the the Slovak National Bank Act No. 566/1992 Coll.

appropriate practical experience in the field. The government which did not agree with the decision of the President of the republic submitted a petition to the Constitutional court to interpret bindingly the 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.⁵³

The Hungarian President László Sólyom refused in June 2007 a Government's proposal to grant State Decoration to the former Prime Minister Gyulo Horn because of his defending participation in suppressing the 1956 uprising.⁵⁴ The President's attitude was confirmed by the Constitutional Court.⁵⁵

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 a major-general, is relevant.⁵⁶ The police action against a 1st May demonstration had been criticized before the appointment scheduled on the 8th of May 2006 and the President 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 the Prison and Judicial Guard Marie Kreslová a 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 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).⁵⁷ 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 *agrément* was withdrawn, revoking of an ambassador, awarding State Decorations etc.

⁵³ Resolution of the Constitutional Court of Slovakia of the 23rd September 2009, Pl.ÚS 14/06-38.

⁵⁴ 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.

⁵⁵ The Constitutional Court stated that the President is not obliged to award State Decorations 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 is not contrary to the constitutional value order. The decision of the Hungarian Constitutional Court AB282/G/2006.

⁵⁶ Resolution of the Government No. 187 of the 22nd February 2006.

⁵⁷ Art. 50 para. 1 of the Constitution, Act. No. 1/1993 Coll. Václav Pavlíček: *Prerogativy nebo správní akty prezidentand republiky* (Prerogatives or Administrative Acts of President of the Republic), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 146.

6 Non –enforceability of decisions of the administrative courts

The President of the Republic has an extensive material immunity and is accountable only to the Constitutional Court in the treason trial.⁵⁸ Any other sanction of the President is inadmissible. If we define the **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 effect the President shall not be perceived as an administrative authority but as a purely constitutional institution.

The courts have sense as the State bodies that 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 the criminal law there are 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).⁵⁹ 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.⁶⁰

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.⁶¹ 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 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

⁵⁸ Art. 54 para. 3 and Art. 65 of the Constitution No. 1/1993 Coll.

⁵⁹ Sections 268 – 269 of the Penal Proceedings Code No. 141/1961 Coll.

⁶⁰ Section 11 para. 3 and Section 227 of the Penal Proceedings Code No. 141/1961 Coll.

⁶¹ Judgement of the Supreme Administrative Court No. 905/2006 in the Collection of Judgements of the Supreme Administrative Court (4Aps 3/2005).

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 the acts of 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 well⁶². It was the part of the Act that the President has relied upon when removing the Chairman from her office, and consequently abolished the removal the Chairman of the Supreme Court from office itself.⁶³ 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.⁶⁴ However, this procedure is not possible at the Supreme Administrative court which has 30 judges but decisions are taken by 3-member senates only. Consequently, only two judges can take a decision on questions of principal constitutional importance. Decision-making in the Senates 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.⁶⁵ This is the case notwithstanding the fact that the Constitutional Court has rejected the constitutional complaint in the given dispute as being premature.⁶⁶ 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. Also in Poland (appeal of the Board for Television and Radio Broadcasting) or in Germany (dissolving the Bundestag)⁶⁷, the acts of the President have been reviewed by the Constitutional Courts.

⁶² Judgement No. 397/2006 Coll.

⁶³ Judgement No. 159/2006 of the Collection of Collection of Judgements and Resolutions of the Constitutional Court (II.ÚS 53/06).

⁶⁴ Art. 1 para. 1 letter e) of the Communication of the Constitutional Court No. 185/2008 Coll.

⁶⁵ Aleš Gerloch: *K problematice postavení prezidenta republiky v ústavním systému ČR de constitutione lata a de constitutione ferenda* (On the position of the President of the Republic within the constitutional system of the Czech Republic *de constitutione lata* and *de constitutione ferenda*), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 39.

⁶⁶ 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.

⁶⁷ Eliška Wagnerová: *Prezident republiky a Ústavní soud* (The President of the Republic and the Constitutional Court), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the

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 granted rights and the jurisdiction of the Constitutional Court concerning the constitutional complaints proceedings is not established.⁶⁸ 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.⁶⁹ 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.

7 Conclusions

The judicial review of the acts of President of the 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 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.

Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 102.

⁶⁸ Vladimír Sládeček: *Prezident republiky a soudní moc: ustanovování soudců* (The President of the Republic and the Judicial Power: Appointing the Judges), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 39. Michal Bartoň: *Rozhodování prezidenta republiky na návrh a rozhodování s kontrasignací – několik poznámek k rozhodnutí NSS ve věci justičních čekatelů* (Decision-making of the President of the Republic on the basis of a proposal and decision-making with countersignature – a few comments on the Supreme Administrative Court decision in the case of judicial candidates), in collective volume *Postavení prezidenta v ústavním systému ČR* (Position of the President in the Constitutional Order of the Czech Republic), Masaryk University, International Institute of Political Science Brno 2008, p. 124.

⁶⁹ 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.