DEVELOPMENT AND COMPARISON OF THE RELATIONSHIP BETWEEN HEADS OF STATE AND JUDICIAL POWER IN EUROPE

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Abstract

We assess the development of the relationship between the institution of the head of state and judicial power as it has developed from the patrimonial state through individual other epochs of the history of monarchical power to the present. The original concentration of all power in the hands of the monarch is gradually changing so that, in the process of revolutions, monarchs leave legislative, executive and judicial powers to the decision-making framework of parliaments and governments. This process takes on a special form in the era of so-called constitutional monarchies at the turn of the 18th and 19th centuries. Special history then concerns the development of the judiciary, when the modern ministries of justice (from the 19th century) and after the Second World War even special bodies such as the Supreme Council of the Judiciary perform important functions precisely in relation to the judiciary in the selection of judges, their appointment and promotion to positions, in matters of a disciplinary nature, etc. Modern systems of a republican nature basically place the function of the president in a position like that of the head of state as in modern constitutional monarchies. Presidents and monarchs therefore, even in relation to the judiciary, mostly remain in the position of the highest body of the state, which confirms the personnel proposals of other bodies of the division of power by means of an appointment decree. Special attention is paid to the character of the relationship examined here in the Czech Republic and its constitutional system.

Keywords

head of state, the monarch, judicial power, constitutional monarchies, ministries of justice, appointment of judges, president, division of power

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Introduction

The history of the state and law, and thus of course also the new democratic constitutional systems, are inextricably linked with the development of the separation of powers. However, in feudal history, the key place in the system of power was long held by its executive component. Originally, as is widely known, the European patrimonial state (around the year 1000) concentrated all power in the monarch's hands, including what we modern call the power to enact laws, to execute these laws and to decide (judge) through numerous other periods of European development. matters in dispute. Further European history then proceeds along the path of estate monarchies to monarchical regimes of the absolutist type, which once again mean the concentration of power of the monarch already "fortified" by the bureaucratic apparatus, as well as the gradual development of departmental state administration organized by the ministerial line (branch) system of state management.[2] However, since the 12th century in Europe, the aristocracy entered into competition with the monarch, and through "their" assemblies, as the first parliaments, became both an agent cooperating with the monarch and also his opponent, which often led to civil wars. The situation changes only with the development of the so-called constitutional (parliamentary) monarchies, i.e., basically from the English revolution with previous periods and the Dutch revolution. This primarily means the gradual withdrawal of the monarch from the environment of executive power, in favour of a government created through political means after each parliamentary election. But it also means the gradual, almost complete deprivation of monarchs of executive functions, and therefore the constitutional installation of the monarch in a symbolic role as a statutory representative of the continuity and immutability of the state with a personal essence connected to the inheritance of the throne. A special development represents the development of the judiciary, namely in two separate systems in the form of the judicial culture of England and the judiciary of continental European culture. Both lines also mean the development of relations between monarchical and (in continental Europe) presidential heads of state and the judiciary.[3]
So how is the development of the system of state power in terms of the development of the judiciary? The historical development of monarchies, as they can be doctrinally followed, is based on a centralized concentration of power, where the actual or judicial resolution of conflicts is concentrated in the person of the monarch, or in a dedicated part of the "royal court", where the monarch establishes the institutional form of the so-

2 To this, the author in: KLÍMA, K. et al. *Státověda*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2011, p. 56.

3 However, the development of modern states is linked to republican systems that put presidents at the head of the state, when their position in the division of power usually already respects the democratic essence of power, which consists in a parliamentary form of government. However, the nature of the US constitutional system foreshadows a different model of division of power, in which the president is, on the contrary, the concentration of executive power. However, it is also necessary to consider the turbulent power development of the 20th century itself, in which we situate the establishment and development of the concept of international public law, and therefore also the institution of so-called heads of state.

called judicial curia for this purpose.[4] Due to the stratified division of society, especially in the conditions of the so-called estate state (in Europe from the 13th to the 14th century), the decision-making of disputed matters is thus concentrated on the nobility and, from the material side, often on matters of a property nature. Thus, criminal matters cannot have a territorial, and therefore all-citizen, form, given the fact of serfdom and servitude in the countryside and the current inner-walled closure of cities (where, however, the concept of local "administrative" law develops, but also the so-called right of suffering, as in communal-legislative rights granted to cities under royal privileges). In Europe, the situation is changing with the gradual abolition of serfdom, and the associated movement of the population and new social conditions for the further development of the division of power related to, and given by, the environment of the so-called constitutional monarchies (see below).

The constitutional situation of the so-called constitutional monarchies is therefore a special stage of development, as a constitutionally based limitation of monarchical power, which also concerns the administration of justice (that is, especially from the point of view of its relationship to the administration of justice). It is thus necessary to examine the social origins of the modern concept of heads of state and how their relations with the judicial system develop: in the environment of monarchical systems, from typical absolute monarchies to various versions of constitutional monarchies, including the current Western European, Scandinavian, or Spanish constitutional present. As a basic hypothesis, it is possible to state that the monarch is first a centralized "owner" of state power in the structure of the so-called patrimonial state, so that through the monarchical status state and later the period of absolute monarchies, he then transitioned to the system of constitutional monarchies. Based on the examination of the essence of the so-called constitutional monarchies, we examine a certain "movement" of the monarch within them, in the form of his "retreat" from the environment of executive power, up to a position where his power is completely limited and the powers are constitutionally defined as symbolic constitutive, formally legal, and therefore not executive. And in this environment, the judiciary also develops as a special function of public power.[5]

As a "preliminary" question, the development of the concept of the so-called "head of state" must also be addressed in this study. The term "head of state" is undoubtedly historically connected with the original historical identification of the state with the monarch[6], on whose behalf all institutions of monarchical power function. If, for the purposes of our study, we take the development of the elements of contemporary modern statehood from the point

4 On the development of the judiciary in the individual stages of the development of feudal statehood (from the so-called patrimonial state, through the estate state to the absolutist state) J. Bílý, in: SCHELLE, K. a TAUCHEN, J. (eds.). *Encyklopedie českých právních dějin*. XIV. svazek. Soudnictví. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2019, p. 27 to 110.

5 The development of the central executive power thus includes the emergence of a government as a representation of the political majority in a gradually directly elected parliament (example: the development of the English bicameral parliament and the political grouping of Tories and Whigs, as the foundations of the future competitive political system).

6 On a side note, it is interesting that the word base "monarch..." does not appear in the names of states either in the past or in the present, in history and in the present, monarchs have various names such as: king, prince, grand duke, shah, raja, emir, sultan.

of view of time as a criterion, then the first monarchical persons – the heads were medieval kings. The social justification of the imposed awareness by them was based on the premise that they have a "divine" origin, which then legitimizes their powerfully concentrated position (Dei gratia). The concept of T. Hobbes, in the context of his "invention", i.e., the concept of the so-called social contract, states that "the people gave the king power". In the period of the so-called estate state, also in Europe, the inheritance of the monarchical function and its life-long nature are ordained by a powerful decision. This is also undoubtedly a key justification for maintaining property continuity, as well as the related succession of power. If we find out the genealogies of the European constitutional monarchies now, we will come to an argumentative proof of the pan-European marriage policy of uniting the royal families, gradually developing from the estate monarchy.[7] Thus, the premise of monarchical infallibility and supreme justice is logically connected with monarchism. But at the same time, this also led to the anchoring of their positive legal irresponsibility, and therefore also the privileged superiority of the monarch, including the consequences of social inequality in relation to others.[8]

For the development of the modern European judiciary, it is necessary to follow the historical and gradual transition from absolute monarchies to constitutional monarchies, as well as the development of republican systems (in the last two hundred years or so). In this regard, in relation to Czech history, the analysis can be connected primarily with the development of the Austro-Hungarian Monarchy, which influenced the judicial power and judicial decision-making of the First Czechoslovak Republic, and thus, in its consequences, post-war Czechoslovakia, and finally the judicial system of the Czech Republic.[9] This is also related to the new development of the relationship of heads of state to the judicial system itself and to the entire justice system. Namely, the position of monarchs and presidents changes to a great extent due to the development not only of Europe, but also of the world in the twentieth century (and especially after the First World War). This moment connected with the so-called Paris Agreements between 1918 and 1919 relates to the actual emergence of international public law, as a supranational system of relations based on international treaties. Treaties thus become the main source of the newly developing supranational normative system and the quantitatively developing concept of state sovereignty, when

7 It can be very surprising, but it is genealogically demonstrable that medieval marriage and property political power "transactions" trace the line of kinship from the Czech "miller" princess Ludmila, through Charles IV, some Habsburgs (Marie Theresa, Joseph II.), etc., up to the current royal families of European constitutional monarchies (and not only, as traditionally, only the Grand Duchy of Luxembourg), but perhaps also the Windsor dynasty.

8 The development of philosophical thinking is also related to the factual, and thus state-legal, development of monarchies and monarchism, which reflects critically and thoughtfully on the question of how to solve socially in relation to the controlled subject, i. e. to the subjects (of all social strata). So, Herodotus divided states into monarchies, aristocracies and democracies, Socrates into kingdoms, aristocracies, tyrannies, and democracies. Plato's, Aristotle's, and especially Cicero's concepts also bring "government of the people" into perspective modelling, so that Ch. Montesquieu already built the so-called plenocracy construct on the platform of division into a monocratic system (as a monarchy), which is already connected with the idea of a "republic".

9 A particularly important moment in the development of the Austrian monarchy is the adoption of the so-called December Constitution in 1867, when after 1848 the constitutional and legal situation finally stabilized and meant for the judiciary a whole series of institutional and legal amendments of a modernist nature, including, for example, the establishment of the Supreme Administrative Court in in 1875, to which the author in: Prosincová ústava v komparativním kontextu vývoje ústavnosti v Evropě. *Právník*. 2017, roč. 156, č. 12, p. 1060 to 1071.

states become the main subjects of international law. This raises the question of the way states are represented in external relations. Therefore, the national reality of the power system, i.e. both the form of the state and the associated political regime, determines which institution or functionary is legitimized to represent the state externally. This legitimacy is then gradually confirmed by the written constitution in the development of constitutional systems. It is so obvious that the essence of the symbolism of the external representation of sovereign states and the importance of the position of the head of state in international relations lies in this fact.[10] However, political factors related to who manages the country, i. e. who has post-election political-communal legitimacy, have a fundamental influence on the actual external representation of the state.

It is also a fundamental question how and when historically the concentration of certain external functions of states in one person arose, which was of course always associated with the person of the monarch in the context of historical development. Powerful state units have waged wars since ancient times, and their rulers thus organized the army as an instrument of generally fundamentally expansive interests. Declaring war, war operations of armies, supreme command of armed forces, but concluding peace treaties and capitulation thus became the usual external action of monarchs, and in the twentieth century, presidents as well.[11] A significant turning point in the development of international relations is precisely the gradual development of relations, which means cooperative contacts, negotiations and negotiated solutions, which puts heads of state in the position of the top representative in external relations. In that sense, one of the modern institutes of public international law bound to heads of state is the ratification of international treaties.[12]

10 According to the adequate doctrine: Among the most important national bodies for international relations, to which international law grants a representative character, is the head of state……", cf. to that in: ONDŘEJ, J. *Mezinárodní právo veřejné, soukromé, obchodní.* 5., rozš. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2014, p. 183. The main representative of the territorial sovereign is the head of state, i. e. the monarch or the president, in the more recent form it has mostly become established to consider the prime minister directly from general international public law representing the given state. For this, cf. in: ČEPELKA, Č. a ŠTURMA, P. *Mezinárodní právo veřejné.* Praha: C. H. Beck, 2008, p. 448.

11 From this point of view, the role of one of the American presidents in the internal conflict of the USA called the "War of the North against the South" in the sixties of the 18th century is certainly remarkable. The role of the US presidents in connection with the end of World War 1 and especially with the leadership and conclusions of World War 2 becomes more obvious.

12 The "Všeobecný slovník právní" from 1889 already gives a definition of ratification when it states that "ratification in international law means confirmation of a treaty concluded by authorized representatives with another state, which the head of state has the right to grant", cf. to this reprint, Volume Four, Wolters Kluwer, 2012, p. 42.

The idea of the republic, the concept of the presidency in democratic republics and a certain change in the relationship of heads of state to the judiciary.

The idea of a "republic" as a "common good" has been known since ancient Greece, when philosophers started from the premise that no power unit can rule forever. The main theoretician of the republican establishment was Cicero, who connected this idea with the concept of "democracy". However, the implementation of a republican system until the 13th century is unknown, with monarchical systems rarely using the term "state" (however, the well-known French monarchically self-centered slogan: "l´état, c´est moi" is famous). Historically, the "republic" is the antithesis of the monarchy, which can be proven by the circumstances of the outbreak of the French Revolution in 1789, and especially by According to the Constitution, the USA has always been and will be the head of the Union, i.e. a federalized state, and it is understood as such, but the concept of the US presidential system has undoubtedly influenced the concept of heads of state in Europe as well. Undoubtedly, the phenomenon of the establishment of the institution of the president in the constitutional system of the First Czechoslovak Republic, its development in subsequent constitutional periods, and the political-declarative document, i. e. the Declaration of the Rights of Man and Citizen. Historically, the very first "official" (and long-term stabilized) republic system was the so-called 1st French Republic, and during the 19th century, republican systems were created in Latin America, based on decolonized and free states. Even at the beginning of the 20th century, only three states existed as republics in Europe itself.[13] The end of the 1st World War is typical in Europe that some new states are created as republics (such as the Czechoslovak Republic, Poland, the Federal Republic of Austria, etc.),[14] but only after the 2nd World War do other states leave the monarchical establishment (such as Italy, Romania, Bulgaria, Yugoslavia, Albania, and only in 1967 also Greece, so that the democratized Spain, on the other hand, restored the monarchy together with democratic constitutionalism).

The establishment of the United States of America (USA) in 1787 and the associated phenomenon, i.e. the emergence of both the presidential function and the concentration of executive power, are of completely original importance for the modern development of judicial power, and especially the explicit separation of the judicial system, including the functions of the judiciary, from the executive power, as well as the US Supreme Court. The context of the armed struggle, especially by the new generations of English settlers

13 If we were to conclude which historically more developed system in Europe influenced modern republicanism and the concept of the head of state in this system, then it is mainly the development of French republicanism in their conception of the 1st to 4th republics.

14 In connection with solving the question of the emergence of modern republican systems, the state-forming nature of the nations that gradually freed themselves from the colonizing or enslaving powers of the originally absolutist monarchical nature of Europe (England, France, the Netherlands, Spain, Portugal, Denmark, Belgium) must be considered. which in Europe itself was Austria-Hungary, Prussian Germany and Tsarist Russia. It is so logical that even when an independent state was established, ethnic emancipation associated with its own historical territory was usually emphasized rather than the republican character. Thus, it is undoubtedly connected with the acquisition of independence by Poland after the First World War, modern Greece, or Ukraine after the collapse of the Soviet Union (after 1990).

against the English king, caused the necessity of a confederal and later also a federative connection with the necessity of the concentration of executive power in the hands of one person. At the same time, only the second president of the USA, T. Jefferson, considered the concept of the republic to be the government of all. According to the Constitution, the President of the USA has always been and will be the head of the Union, i. e. a federalized state, and is understood as such, but the concept of the US presidential system has undoubtedly influenced the concept of heads of state in Europe as well. Undoubtedly, the phenomenon of the establishment of the institution of the president in the constitutional system of the First Czechoslovak Republic, its development in subsequent constitutional periods, and the distinctiveness of the presidency in the new constitutional democracies in Europe after 1990 are undoubtedly connected with this. The reality of the world's first federation also means the building of judicial systems in individual states USA, and therefore the vertical organization of the judicial system, in which, in addition, since 1803, judicial review of constitutionality in the form of the so-called judicial review has been enforced throughout this system.[15]

The concept of the position of the head of state and its powers in (current) European constitutional states in relation to the judiciary.

Although we follow the current state of both constitutional monarchies and republics, we must first deal with the current constitutional monarchies. At the same time, the fact that the current European monarchies are basically constitutional monarchies and of a parliamentary nature must be established as a fundamental premise. It is also important that these monarchies are systems where the constitutional essence is not a formally set division of power, but the system functions based on competitive democracy and as a so-called parliamentary-cabinet form of government. The gradual development of the world and Europe, i.e., democratization and political-competitive parliamentarization, caused the monarch's status to be limited in all spheres of state power, i.e., monarchs historically lost legislative, executive, and judicial powers.[16] So, what are the current and traditional functions and therefore the powers of monarchical heads. They can be divided into powers as follows: a) symbolic, traditional, b) formally constitutive, c) realistically executive, d) "braking", controlling. The reality of the English so-called Westminster system, when the king: a) appoints the prime minister, b) appoints ministers, ambassadors, judges, and senior civil servants on the proposal of the prime minister, c) declares war

15 This is best done by J. Blahož, in: BLAHOŽ, J., BALAŠ, V. a KLÍMA, K. *Srovnávací ústavní právo*. 5., přeprac. a dopl. vyd. Praha: Wolters Kluwer, 2015, p. 343, 346, 350 et seq., resp. 356 et seq.

16 In contemporary European monarchies, the legal system grants monarchs several powers: summoning parliament and opening its sessions, appointing the prime minister and government ministers on his proposal, appointing and dismissing commanders of the army and navy, concluding and denouncing international treaties, declaring war, concluding peace, supreme command of the armed forces, awarding honorary titles and ranks, right of pardon, etc. In most cases, the monarchs thus lost the possibility of independent exercise of competences, which was transferred to the prime minister or the government, or to individual ministers.

and concludes international treaties,[17] can be considered as a certain historical model. However, the exercise of these powers is based on a certain formalism, when there is no discretion of the monarchs, i.e. – the monarch decides by basically confirming an initiative coming from another constitutional subject of a political nature.[18]

It is therefore a question of what the function of monarchs in relation to the judicial systems of contemporary European constitutional monarchies is. If we consider the administration of justice in a democratic environment as the exercise of independent power and the position of monarchs in European constitutional monarchies as institutions standing outside the political-competitive environment, and therefore also the "separation of power", then the role of monarchs vis-à-vis the judicial system can be considered very important not only symbolic, but on the contrary, state-building creative functions. This manifests itself primarily in several powers of appointment, or establishment, of judicial officials and functionaries.[19]

It is necessary to deal with the concept of separation of powers and the powers of the head of state in contemporary European republics, and specifically in relation to judicial power. Presidents in European constitutional democracies are indisputably a modern phenomenon[20] in a comparison of developments after the Second World War, which significantly developed in a kind of historical second stage only after 1990, i. e. with the advent of dozens of so-called new democracies.[21] First, it is necessary to ask the question, what is the position of the presidents in the division of power, are they part of it, do they stand outside it (or even above it)? And subsequently to specify the relationship of presidents to the judicial system and the courts and judges themselves. It is also necessary to single out group criteria of the powers of presidents in European democratic

17 In addition, it is also the bee of the so-called British Commonwealth of Nations, in cooperation with the provincial governments of these states, it also appoints the governors-general of these countries, it is the bee of the Church of England, the annual introduction of parliament by the so-called Crown speech.

18 It is therefore a question of what the reason for the relative stability of European constitutional monarchies is. There is no doubt that the fact of hereditary and ancestral immutability and non-transferability of the function of the monarch to an "unknown" person guarantees a certain constitutional stability of the system. Proponents of monarchical systems emphasize that the monarch is not just one of the state bodies, it is an expression of dynastic continuity, respect for the dynasty, and therefore also for loyalty, is transmitted from generation to generation, and does not enter the diversity of political life in society. According to A. Lawniczak, the monarchy is the personification of statehood, its immutability, it is a living symbol of a political community of a higher order, etc., cf. In: ŁAWNICZAK, A. *Monarchiczne i republikańskie głowy państwa w Europie*. Wrocław: Kolonia Limited, 2011, p. 167.

19 According to the Constitution of Belgium, magistrates, and judges of general courts of first instance are appointed to their positions by the king, based on a double proposal submitted by these courts and by the so-called provincial councils (Article 151 of the Constitution). The King appoints and dismisses members of the public prosecution service at the courts and tribunals (No. 153). According to the Constitution, the King can pardon or mitigate the punishments defined (No. 110).

20 Except for the more than two-hundred-year-old French constitutional law "laboratory", which manifested itself first in the alternation of monarchies and republican systems, from 1870, then gradually in the regimes of the so-called 3rd, 4th, and now also the 5th Republic, that's how they functioned after the Second World War presidents only in France, Italy, Finland, Germany, and Austria. We can thus speak of a certain renaissance of presidencies, and therefore also of an acceleration of the comparative effect of our article.

21 At the same time, of course, the fact of parallel existence of presidents in systems of concentrated political power in the so-called socialist states (in Czechoslovakia, Poland, Romania, Socialist Federal Republic of Yugoslavia, etc.) cannot be considered.

republics, such as: a) relations between the president and parliament, b) the relationship between presidents and direct democracy (i.e. national), c) powers of presidents vis-à-vis governments, d) powers of presidents in relation to judicial power and the administration of justice, e) the position of presidents in relation to the defence and security of the state, as well as the relationship between presidents and the foreign relations of the state.[22] So: a) in contemporary European constitutional democracies, it is essential that the head of state is in principle excluded from legislative power, however, in relation to parliaments, he has certain organizational measures connected to his "operation". This is manifested primarily in the acts of the head of state aimed at convening the parliament, and the situation with its constitutionally based instrument, in the form of a possible dissolution of the parliament, can be set up in different ways. The constitutional possibilities of presidents to initiate laws (the so-called legislative initiative), veto laws (usually with a sist effect) or the possibility to "challenge" laws in constitutional courts with suspicion of their unconstitutionality can be considered potentially activist, i.e., with obvious interventions in the legislative process. b) in constitutional systems where the concept of direct democracy is based, it is primarily important who announces the referendum, whether consultative or decision-making. If this is within the authority of the head of state, it is then decisive whether it is a formally dispositive act in his person or a purely reasoning (i.e., politically) decision-making act. c) Constitutional democratic systems are, as already mentioned, based on competitive democracy, and therefore the context of the post-election political situation, the political structure of the parliament, or coalition agreements, and therefore the habits of the so-called leadership. Presidents thus politically habitually respect the results of the elections and therefore appoint the prime minister and ministers as the immediate political staffing presents. d) The constitutional foundations of judicial power are conceptually based on the systemic independence of the judicial or prosecutorial structure. However, even the judicial system cannot be separated from the overall constitutional power system of the countries, especially in terms of economic-budgetary, personnel, responsibility, and e. t. c. If we consider the prerogative of parliaments to be essential in setting the constitutional and legislative foundations of judicial systems, then the centre of gravity of the independence of the judicial system is its separation from the executive power, i. e. from the government, as much as possible. This is certainly the experience of constitutional monarchies, which transformed the originally completely privileged and creative powers of monarchs vis-à-vis the judiciary into a certain guarantor of the independence of the judicial system, which is manifested in several conceptual constitutionally creative solutions (see below).

22 A special question concerning the powers of republican heads of state is the constitutional relationship of presidents to the armed forces and thus to the defence of the state, including the potential activity of presidents in situations of states of war or even the conduct of defensive conflicts. Constitutions usually state that presidents are commanders in chief of the armed forces, while the public law systems of democratic states usually do not include them in the organizational and operational structure of the army as a special state institution. A certain exception is thus made by states where the president is part of the top bodies of the political-military type, such as the so-called Defence Council, while leading and coordinating their activities, cf. in: Collective. Constitutional conflictology. Constitutional mechanisms for coping with political crises. Kiij, Institute of Gromadan Society, 2008, p. 113.

Position and function of heads of state in relation to judicial power, including several reflections on the constitutional system of the Czech Republic.

Therefore, neither monarchs nor presidents have judicial power for a long time, but after the Second World War, with the development of constitutionalism (i.e., both the number of democratic states and the concept of separation of powers), some constitutionally specific relations of presidents to judicial systems developed. It is also important that the constitutions usually regulate presidents in separate chapters or chapters of the constitution, which formally confirms that they are not part of the division of power in the post-modern era of constitutional law. However, if we are dealing with the constitutional composition of the relationship between heads of state (including "modern" monarchs) and the judiciary, it is necessary to assess how the systemic independence of the judiciary is regulated in the current constitutions.

At the same time, it is necessary to consider that the framework of power also includes constitutional courts, which are not a usual part of the general judicial system but perform a completely different function (protection of constitutionality in the entire constitutional system). In the approach to the solution, it is also necessary to consider that the judicial system must also be managed, especially (and at least) in its financial-budgetary, personnel, ethical-disciplinary and day-to-day administrative-operational components. It is therefore a question of how to constitutionally resolve the relationship between executive power, i.e., governmental power and line ministerial power. The point is that both government policy and possible political interests, including individual interests, should be separated as effectively as possible, thus separating them from the administration of the justice system in the above-mentioned administrative segments. Therefore, if we proceed from the premise (indicated above) clearly confirming that the heads of state are not part of the division of power, which means that in principle they do not have executive powers of a personal-discretionary decision-making nature, then it is obvious that precisely in relation to judicial power there must be an external systemic by guaranteeing the constitutionality of a number of necessary operational procedures that are necessary in the internal and external framework of the judicial system.

A certain initial comparative insight into the current constitutional systems of the democratic part of Europe must accept the fact that after World War II, a certain conceptual solution to the independence of the judiciary was found. Thus, special constitutional bodies enter communication with heads of state, in the form of the so-called Supreme Councils of the Judiciary as special collegiate constitutional institutions guaranteeing

the independence of the judicial system.[23] The second group of this study is the states where the administration of courts is governed by other procedures. In the first group, heads of state (namely monarchs and presidents) basically communicate in several ways. On the one hand, they are also the bees of the highest councils of the judiciary (only applies to presidents: in Italy, France), and they can preside over them. Furthermore, a certain number of proposed persons also partially participate in their establishment. What is important then is that, on the proposal of these bodies or other special bodies, they appoint judges to positions, or they also promote judges to higher instances.[24] The second group of states consists of constitutional systems where the administration of the judiciary does not reflect the post-war development in the form of an institutional solution to the independence of the judiciary in the form of the institution of "supreme councils of the judiciary", which can be attributed mainly to the historical-traditionalist contexts of the republican solution to a large extent of a post-monarchical nature, and a possible administrative continuity, especially in 1918, founded by the First Czechoslovak Republic on the previous administration of the Austro-Hungarian judiciary.[25] Based on the provisions of the Treaty of Saint-Germain, the established Federal Republic of Austria responds to the concept of central administration of the judiciary with a similar style of administrative continuity even in a federal context.[26] According to the Basic Law of the Federal Republic of Germany, the legal status of judges is regulated by a special federal law, whereby (according to Article 98, paragraph 4) the states can determine that the appointment of judges in the states is decided by the state minister of justice together with the Committee for the Election of Judges.[27] The comparative exceptionality of the constitutional system of the Czech Republic performs several functions in relation to the judicial power not only in conjunction with other constitutional bodies, but also independently (see below for the comparative constitutional-legal exceptionality of the Czech Republic).

23 For more than twenty years, the author of this study has been continuously engaged in a comparative investigation of the role of the so-called supreme councils of the judiciary and especially their role in improving the principle of systemic independence of the judiciary. Bodies of this type operate in Belgium (Article 151, § 2 of the Constitution), in France (according to Article 64, even as an "auxiliary body" of the president), in Italy (according to Article 87 of the Constitution, the president also chairs the Supreme Judicial Council), in Portugal (amended in Article 217 of the Constitution), in Spain the so-called General Council of the Judiciary is the "managing body" of the judiciary (Article 122, paragraph 2 of the Constitution), in the constitutions of the so-called new democracies, bodies of this type operate in Lithuania (Art. 112 of the Constitution), in Slovakia (Art. 141 of the Constitution, in Slovenia (Art. 131 of the Constitution), etc. For a comparative discussion see, for example, in: KLÍMA, K. *Ústavní právo srovnávací.* Praha: Metropolitan University Prague Press, Wolters Kluwer, 2020, with 100 et seq.

24 However, only in Portugal, according to Article 217, the Supreme Council of the Judiciary decides on the appointment, assignment, transfer, and promotion of judges, and according to Article 218, it is chaired by the President of the Supreme Court. Similarly, in Greece, where the president appoints judges (Article 88, paragraph 1 of the Constitution, after a previous decision of the Supreme Council of the Judiciary (cf. Article 90, paragraph 1 of the Constitution). (In Portugal, the Supreme Council of Public Prosecutions also operates separately).

25 To that K. Schelle, in: Encyklopedie právních dějin ...., ibid., p. 141 et seq.

26 Thus, according to Article 86 of the Constitution, the judge is appointed by the federal president at the proposal of the government or, based on the president's authorization, by the federal minister, while they request proposals for candidates from the senates, which are called to do so by special regulations.

27 Even a comparison of the German and Austrian constitutional federal concepts of judicial organization shows a significant difference in systemic decentralization (Germany) versus centralization (Austria).

Through the comparative lens mentioned above, it is also possible to assess the powers of the President of the Czech Republic in relation to the judicial power of the Czech Republic, i.e., to provide a certain comparative audit. The concept of the Constitution of the Czech Republic from the point of view of the monitored issue (i.e., the relationship between the head of state and the judiciary) partly departs from the concept of the division of powers of modern (modern, post-war). The Constitution of the Czech Republic primarily placed the head of state within the framework (head) of "executive power" (see Article 54 et seq.),[28] which, although some traditional cooperative powers of the president and the government or its ministers were foreseen, but it also means, in fact, relatively significant creative discretionary activity of the president vis-à-vis the judiciary system. The President of the Republic is systematically included in the third chapter of the Constitution (the so-called executive power), i.e., together with the "government" and the public prosecutor's office (with relation to the government). The Constitution does not determine in any way the mutual position of the two bodies, nor who is the supreme body of the executive power. This is only Article 67, paragraph 1 of the Constitution, according to which the government is the supreme body of executive power, while the government exercises the state administration of the entire country to an unlimited extent. The Constitution divides the powers of the President of the Republic into powers that are subject to the co-signature of the Prime Minister (cf. Article 63, paragraphs 1 and 2 of the Constitution), and there are also, however, some completely exclusive powers of the President (cf. 62 of the Constitution), "in which it is appropriate to separate the President from executive power".[29] However, the acts of the President of the Republic, which concern the government as a whole, as well as the appointment and dismissal of individual members of the government, are not subject to countersignature.

Of the independent and creative activities of the President of the Republic that relate to the judicial power, it is necessary to highlight his autonomy in proposing judges of the Constitutional Court and their subsequent appointment (after the approval of the Senate), and in particular the exclusivity in the appointment of its chairman and vice-chairman, the same applies to the chairman and vice-presidents of the Supreme Court (in the case of officials of the Supreme Administrative Court – here a reference to § 13 paragraph 2 of the Administrative Court Code).[30] In that context, the president's completely free discretion is applied, not requiring any justification from him, but he cannot dismiss the judge or the officials of these courts. Therefore, neither the Constitution nor the laws establish the necessity of consulting the president with the representatives of the government or ultimately with the representatives of the judiciary.[31]

28 This can probably be explained by several contemporaneous contexts of the preparation of the Constitution of the Czech Republic in the year when Czechoslovakia was divided, and even in the end its approval (in December 1992) was rushed. Even in the approach to the concept of separation of powers, the non-respect of the theoretical principles of classical constitutionalism by the creators of the constitutional text at the time was shown.

29 See more in: KLÍMA, K. et al. *Komentář k Ústavě a Listině*. 2., rozš. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2009, p. 463.

30 Similarly, this exclusivity also applies to the president and vice president of the Supreme Audit Office and members of the Banking Council of the Czech National Bank, including its governor.

31 Similarly, this exclusivity also applies to the president and vice president of the Supreme Audit Office and members of the Banking Council of the Czech National Bank, including its governor.

In the current constitutional systems of Europe, the issue of pardons is not an exceptional power of presidents.[32] Therefore, special attention should be paid to the issue of granting pardons by the President of the Czech Republic, firstly in individual cases, when the President of the Republic "pardons and mitigates the punishments imposed by the court, orders those criminal proceedings not be initiated, and if initiated, that they not be continued, and obliterates the conviction" (Article 62 letter g) of the Constitution.[33] Thus, three forms of this intervention are foreseen, i.e.: agration, abolition and rehabilitation, which by the nature of the matter thus means that the president's intervention itself is de facto an act of the executive power. However, the right to "grant amnesty" (according to Article 63, paragraph 1, letter j)) is already included under the powers of the so-called countersigned.[34] The president's amnesty decision, and above all its scope, is a potentially clear interference with judicial power. It thus has logical connotations related to the independence of the exercise of the right to a fair trial, as it presumptively refers to persons (presumably) justly convicted.[35]

For comparative reasons, it is necessary to stop at the method of appointing officials of the highest judicial instances of the Czech Republic, including an institution standing outside the general judicial system, i.e., the Constitutional Court of the Czech Republic. Although the President appoints the officials of the Constitutional Court, he cannot dismiss them.[36] The appointment relationship of the President of the Republic towards the judges of the Constitutional Court (when initiating their establishment, and their appointment after approval by the Senate) acquires a special connotation in connection with the constitutionally potential liability instrument, which is a possible constitutional lawsuit by both chambers against the President of the Czech Republic for "serious violations of the constitutional order of the Czech Republic". This "unconstitutional" act,

32 Thus, according to Section 105 of the Finnish Constitution, the President can grant a pardon, after the approval of the Supreme Court of Justice. In contrast, according to Article 13 of the Swedish Constitution, pardons are granted by the government.

33 The Constitution of the Czech Republic itself does not recognize the concept of grace, but it can be referred to § 366 of the Criminal Code. However, the term "mercy" is mentioned in Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms, where Article 3 talks about "mercy" in connection with a miscarriage of justice, i.e., when the judgment was overturned.

34 Amnesty should be considered as such an act of application of law that exhibits certain normative elements. Decisions on amnesty are published in the Collection of Laws, they are binding on all law enforcement authorities, and as a result, it is a personal enforceable law. The President's legal act is collective in nature and thus applies to an unspecified number of persons, and therefore there is no legal right to amnesty. The president's decision on amnesty cannot even be annulled by legal procedure. For this, cf. in: Komentář k Ústavě a Listině ...., ibid.: p. 493.

35 The amnesty intervention is a widespread intervention affecting the entire prison system and, in its persons, causally subordinate to this decision. Given that every decision of an independent court in a criminal case is completely individual in its character and the course of the process, as well as its length, the length of the sentence determined by the court is also individual, also including the discretion of the courts on conditional suspension of the execution of the sentence, monetary penalties, etc. The amnesty decision thus potentially destroys the constitutional principle of the equality of natural persons in terms of the impact of state power measures on their personal status.

36 The usual principle "he who appoints also removes" does not apply, which is a principle applied fundamentally in public administration, the Constitution of the Czech Republic does not deal with relationships in one hierarchically organized system. The eventual authorization of the President of the Republic to dismiss officials of the Constitutional Court would grant him an unacceptable influence on the conditions within the court, including the influence on the decision-making of judges of the Constitutional Court in causal matters.

from the substantive point of view, is completely indefinite and legally unpredictable (starting with possible excesses of a political nature, potentially both administratively and criminally defective behaviour of the president) would be judged by the Constitutional Court. However, the interference of the head of state in the appointment of constitutional court functionaries is not entirely typical in the Czech judicial system, but it is comparatively common in Europe.[37] In connection with the appointment of officials of the Supreme Court of the Czech Republic, the provisions of Article 62 letter f) The Constitution for the President of the Republic to proceed according to his own discretion. The provision is supposed to be a certain guarantee of the independence of the judicial system and the supreme institution of general courts,[38] however, in the context of the fact that the president consults these personalistic considerations (may or may not) with the Minister of Justice, even here, in the intentions of European constitutional law comparativism, we come across the absence of an independent body of a non-judicial type, that is, the so-called Supreme Council of the Judiciary, or another initiative body outside the sphere of executive power.
Of the powers of the president related to the judicial power, and not independent, it is necessary to focus on the "appointment of judges", meaning in the judicial doctrine "to the first positions". A judge must meet the legal requirements (cf. Act No. 6/2002 Coll., on courts and judges, as amended). Given that the President's decision appointing a judge is a countersigned authority, the Constitution requires the co-signature of the Prime Minister, or a member of the government authorized by him for the validity of such a decision, it is a decision for which the government bears responsibility. Therefore, also in the process of selecting suitable candidates, these selections are under a certain "management" of the Ministry of Justice, with the responsibility of the government of the Czech Republic. However, as is known, the actual selection process takes place in the regional courts. The completion of the said process is the appointment by the president, which is more or less ceremonial in nature, but the judge's promise associated with it is constitutive in nature. Its possible non-composition (or composition with reservation) would give rise to the fiction that the judge was not appointed (regulated by Section 62, Paragraph 4 of the Act on Courts and Judges). The appointment of a judge takes place in writing, a so-called decree of the President of the Republic. The Constitution guarantees the irrevocability of judges, while the conditions for the termination of this function are set by law, and all this occurs without any possible interference of the head of state. From the point of view of a comparative summary, it is possible to fundamentally state that the Czech legal regulation in terms of the "selection of judges for the first position" is completely different from the constitutional practice of most continental European judicial systems, namely ending with the administrative role of the justice administration body.[39]

37 For comparison, for example, Slovak legislation, cf. in: BRÖSTL, A. et al. *Ústavné právo Slovenskej republiky.* 3. upravené vydanie. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2015, p. 235 et seq.

38 Detailed interpretation in: SLÁDEČEK, V., MIKULE, V. a SYLLOVÁ, J. *Ústava České republiky: komentář.* Praha: C. H. Beck, 2007, item no. 9, p. 442.

39 In this context, we refer to the Dutch model of this solution, where candidates for judges are selected by the so-called National Commission for the Selection of Judges (composed of 12 members, of which 6 must be judges, the other 6 represent various professions, including at least one lawyer and one public prosecutor). This Commission is appointed by the so-called Judicial Council of the Kingdom of the Netherlands. Approved candidates for judges are then appointed by the King by decree, with the Ministry of Justice only checking beforehand whether they meet the legal requirements. see also J. Odehnalová, in: Inspirativní momenty nizozemského výběru soudců. Soudce, year XXIV, 11/2022.

Some synthesizing (yet open) conclusions.

The key question in this comparative study was the position of the head of state in the system of democratic constitutional power, including comparisons of the powers of heads of state in relation to judicial power. The development of constitutionalism in Europe after the Second World War has already considerably surpassed both the classical philosophical (and thus also the "textbook") concept on which European democracies are based, namely a kind of "tripartite" power. However, the heads of state of European constitutional monarchies and republics are linked by several constitutionally based contacts to all articles of the constitutional system belonging to the de facto division of power, including ties to the judicial system. Most of these powers can probably be considered symbolic-representational, and in the system formally creative, but some of the powers may have an initiative and decision-making character. However, it is necessary to separate the European constitutional monarchies from the republics and the powers of their presidents even in the European present. If the constitutional monarchy and the de constitutione do not actually proclaim the "separation of power", then the only possible statement is that the monarch is formally outside the system of de facto division of power but is "operationally" connected to the functioning of the constitutional system. In constitutionally democratic republics, the position of presidents is evidently "stronger", which is certainly historically influenced by several factors.

Historically and modern, republics are far more connected with constitutionalism, i.e., with written constitutions, so they have several reasons to include presidents in the real operation of the constitutionally set division of power.[40] If we observe their constitutional relations to the judicial power in this way, then the fact that the presidents (although often directly elected by the citizens) make the bodies essentially non-political proves that their appointing (inaugural) powers are supposed to be in effect a confirmation of the constitutionality of the procedure of those bodies which the judicial officer legitimately selected for a position or function in a procedure according to the constitution and laws. From the point of view of constitutional comparative studies, especially in relation to judicial power, the potentially constitutionally stabilizing factor of the activity of heads of state is confirmed overall. So how to put the relationship between the President of the Czech Republic, the Czech judicial system, its bodies, and judges into the comparative audit presented here. If we conceive of the judiciary as independent according to the Constitution of the Czech Republic, then the Czech legal system regulating the powers of the head of state in relation to the judiciary, and above all the role of the central bodies of state administration, and all this in the light of European constitutional comparative studies, show that in some aspects (see above) from what is conceptually usual in Europe and clearly deviates.

40 However, Z. Koudelka aptly notes: "…..The former position of the monarch in the constitutional monarchy was largely transferred to the heads of state of the new republics emerging in the 19th and 20th centuries.", cf. in: Encyclopaedia of legal history. VII. Volume, ibid ….., 2017, p. 770.

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