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The Public Prosecution of the Slovac Republic - a law protection authority

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A country governed by the rule of law needs an effective system of legal and political guarantees of legality. The activities of the State must be based and carried out under valid law. Superiority of the constitution and legislation is an inherent principle of the rule of law that prevents arbitrariness and brings legal certainty. As CH. L. Montesquieu said "every man vested with power is apt to abuse it and to carry authority as far as it will go". The only solution is to create an effective system of guarantees against abuse of power and abuse of law. And one of such significant guarantees against abuse of public power in Slovakia is the Public Prosecution of the Slovak Republic. There is a historical background to the present position of the institution of public prosecution. With its long history, it has fulfilled various tasks before achieving its present-day profile and shape. Taking into consideration the focus of this article, the main attention will be drawn to constitutional and legal status of the Public Prosecution of the Slovak Republic.

1. Constitutional aspects of the status of the Public Prosecution

The Constitution of the Slovak Republic defines the Public Prosecution as an organic part of the system of legal safeguards of legality in the democratic country governed by the rule of law[1]. Within the scope of its powers, the Public Prosecution protects the rights and legally protected interests of individuals, legal entities and the State. This means that pursuant to the Constitution, the Public Prosecution of the Slovak Republic is not limited

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[1] I. Palus, L. Somorova, *Statne pravo slovenskej republiky*, Kosice 2010, s. 477.

just to the protection of legally protected interests of the State – the Public Prosecution of the Slovak Republic is not subordinated to any executive governmental authority (unlike in cases of State Attorney Office or "Staatsanwaltschaft").

The Public Prosecution is defined in Chapter Eight of the Constitution under the heading "Public Prosecution of the Slovak Republic and the Public Defender of Rights", separately from the provisions defining other public authorities of governmental power. This may be supported by the Explanatory Report/Reasoned Statement to the Constitution, according to which "Based on the principles of constitutionality, superiority of legislation and priority of judicial protection of constitutional rights and freedoms of the citizens, the Public Prosecution is an organic segment of the system of legal safeguards of legality in a democratic state governed by the rule of law. The Public Prosecution plays its role in the protection of State interests, and also of the rights and legally protected interests of individuals and legal entities by providing for legal responsibility and affording remedies in cases of unlawfulness. The Public Prosecution does not substitute any authority of executive or judicial power. For clear and precise definitions of the status and powers of the Public Prosecution, these must be explicitly laid down by the Constitution [...]. With regard to the scope of its powers, the Public Prosecution is neither a part of the judiciary, nor of any other authority of state administration. Therefore the draft of the Constitution takes it for granted to preserve this system of the Public Prosecution headed by the General Prosecutor of the Slovak Republic who is to be appointed by the head of the State upon the proposal of the Slovak National Council (today the National Council of the Slovak Republic)".

In his Commentaries to the Constitution, Ján Drgonec holds that the Constitution provides for the creation of public prosecution service in quite a special constitutional and legal form. The constitutional rules, having the nature of blank delegation/authorization, regulate the powers and/or significant matters of any constitutional body, as laid down by law. This situation is the result of the disputes held over the powers and purposes of public prosecution service in a state governed by the rule of law, mainly with regard to a possible transformation of an autonomous public prosecution service to a state attorney office, a subordinated executive agency, and also in respect of keeping the powers of public prosecution in non-criminal area. Without unambiguous answers to these issues at the time of construing the original text of the Constitution at the beginning of the nineties, a political agreement was made on the basic structure of Chapter Eight of the Constitution. This agreement, however, cannot forever substitute the constitutional rules[2].

[2] J. Drgonec, *Ústava Slovenskej republiky. Komentár*, Šamorín: Heuréka, 2004, s. 771.

The Constitution has established the Public Prosecution as an autonomous/separate agency of public authority not included in the judicial, executive or legislative branches of government. The Public Prosecution is not part of the judiciary as it has no judicial powers and no authority to decide cases in the name of the State. It has no right of legislative initiative, as it is not vested with the right to pass laws. Only the General Prosecutor has the right to submit to the Government of the Slovak Republic legislative proposals and amendments. The Public Prosecution does not represent the executive, as it has no power to make any rules or regulations or to impose legal sanctions in cases of violation of legal rules. Thus the system of the offices of the Public Prosecution represents a separate system, not subordinated to any judicial or executive authority. Therefore, it is also contained in a separate Chapter of the Constitution. Basically classified as a *sui generis* authority, the Public Prosecution is defined in Chapter Eight of the Constitution.

The Public Prosecution has neither legislative powers, nor the powers of public administration through which the laws are being executed, and it has no characteristics of the judiciary that is the finder of law. As the Public Prosecution is undoubtedly an authority of state/governmental power that cannot be included within the legislative, executive or judicial branch, does it mean, it is the fourth branch of power? In our view, in order to change the theory of governmental power to the so called four governmental branches of power, it would be necessary to amend the Constitution in which these governmental powers are specified. With regard to the contemporary legal situation, the Public Prosecution represents an authority functioning within the present system of the division of governmental powers and it cannot be included, without any reservations, in any of the three branches of government[3].

Basic legal structure and status of the Public Prosecution are contained in Chapter Eight, Title One, Articles 149–151 of the Constitutions. Under these constitutional provisions:

1. The Public Prosecution of the Slovak Republic protects the rights and legally protected interests of natural and legal persons, and of the State.

2. It is headed by the General Prosecutor appointed and recalled by the President of the Slovak Republic on the proposal of the National Council of the Slovak Republic.

3. The details concerning the appointment and recall, the powers and duties of public prosecutors, as well as the organizational structure of the Public Prosecution are laid down by law.

The Public Prosecution, construed under the Constitution as a universal authority charged with the protection of law, acts in the public interest. Its

[3] S. Surek, *Prokuratorsky dozor vo verejnej sprave – vybrane problemy*, [v:] *Obcan a verejna sprava. Ustavnopravne aspekty*, Kosice 2007, s. 93.

tasks are to protect the rights and lawful interests of natural and legal persons and of the State. That means the Constitution does not limit its scope of competence only to the enforcement of State interests or to its powers within the system of criminal justice. The Public Prosecution, an agency of enforcement of the protection of rights and legally protected interests, plays an irreplaceable role in the system of state/governmental authorities.

With its competence defined in this manner, the Public Prosecution is clearly included in the system of law protection authorities. The scope of its powers is obviously not limited only to the protection of the interests of the State, but the emphasis is also placed on the protection of the rights and interests of other legal entities, as guaranteed by law. With regard to the means used for the protection of law, the Public Prosecution can be included among the law protection inspection authorities overseeing compliance with the law and legality (within designated scope), seeking violations of law, and detecting their perpetrators.

In this context, a question frequently arises whether the Public Prosecution is independent or not. With regard to its definition, it should be emphasized that neither the Constitution, nor any other generally binding statutory regulation currently in force in the Slovak Republic defines the Public Prosecution as an independent authority. The Constitution grants independence only to those authorities expressly enumerated in the Constitution (see e.g. Article 60 (1), Article 141 (1) and Article 151a (1) of the Constitution). Where independent standing is not granted to an authority by the Constitution, it is not expressly laid down[4]. Here it may be mentioned that the Public Prosecution as authority of enforcement of the protection of rights and legally protected interests has irreplaceable function within the system of State/governmental authorities. It can perform this function and its powers granted by law without the having the attribute of "independent" (authority).

Based on the foregoing facts, the following partial conclusion can be made: the Public Prosecution, construed by the Constitution as a separate/ autonomous public authority, fulfills – apart from its irreplaceable functions in criminal justice as a supervisory authority in pre-trial proceedings and as prosecutor in judicial proceedings – various tasks outside the system of criminal justice, mainly by watching over lawfulness in the conduct of public administration authorities. In addition, it has also duties in civil proceedings where it is so required by the public interest. The Public Prosecution may,

[4] J. Čentéš, *Prokuratúra v Slovenskej republike – ústavné limity a pôsobnosť v trestnej oblasti, Zborník príspevkov z medzinárodnej konferencie „Verejná žaloba v ústavnom systéme"*, „Státní zastupitelství" 2008, č. 11–12, s. 18–26.

therefore, be considered a universal authority charged with the protection of objective law in the public interest. This distinguishes it from Staatsanwaltschaft in Germany or Austria, and similar states gencies subordinated to a central governmental department as in the Czech Republic (State Attorney Office – státní zastupitelství in Czech)[5].

2. Legal aspects of the status of the Public Prosecution

With regard to Articles 149 and 151 of the Constitution, it may be said that the principles determining the organizational structure of public prosecution, and the functional relations in exercising its powers are based on legal and not constitutional principles. Due to this, the legislator has much more regulative discretion in providing for the status, activities and organizational structure of the Public Prosecution than in providing for the status, activities and organizational structure of the judiciary. And in creating the principles of organizational and functional relations concerning the exercise of the powers of the Public Prosecution, the legislator may also modify and change these principles, quite naturally, respecting also other provisions of the Constitution, including its Articles 149–151.

Legal status of the Public Prosecution is laid down in § 2 of Act 153/2001 Z. z governing public prosecution as amended as follows: "Public Prosecution is a distinct, hierarchically arranged uniform system of state/governmental authorities headed by the General Prosecutor, with public prosecutors acting in subordinate and superior relations".

Autonomous position of the Public Prosecution

Autonomous position of public prosecution is reflected in the fact that it fulfills its tasks independently from other public authorities. Moreover, no other public authority has the right to give orders to the General Prosecutor or any other public prosecutor. And no other public authority is entitled to fulfill the tasks that belong to the exclusive jurisdiction of the Public Prosecution and the public prosecutors (e.g. to bring formal accusation or to make meritorious decision in pre-trial proceedings concerning the accused).

Under Article 149 of the Constitution (and also § 3 (1) of Public Prosecution Act), the Public Prosecution is charged with the protection of the rights and legally protected interests of natural and legal persons, and of the State. In this connection it may be stressed that within its jurisdiction/authority the Public Prosecution must take measures in the public interest in order to

[5] Z. Koudelka, *Zmìny postavení státního zastupitelství*, „Státní zastupitelství" 2008, s. 58.

prevent violation of law, to identify and eliminate unlawful conduct, to restore the rights that have been violated, and to impose liability for such violations. In exercising its powers, the Public Prosecution must use all lawful means in order to secure, without any other interference, consistent, efficient and expeditious protection of the rights and legally protected interests of natural and legal persons and of the State.

The necessary condition for the implementation of these legal rules is the fulfillment of the basic duties of public prosecutors as they are set forth in § 26 (1) of Act 154/2001 Z. z. on prosecutors and prosecutor candidates. From among such duties, it may be useful to mention here the duties laid down by the Constitution of the Slovak Republic, the constitutional laws and other statutes and other generally binding statutory regulations, as well as the orders imposed by superior prosecutor's office, provided that the public prosecutor has been duly informed thereof – § 26 (1) (a); the duty to protect the public interest and to do service in the public interest – § 26 (1) (b); to perform official duties conscientiously, impartially, and without undue delay – § 26 (1) (c); the duty not to be influenced by any individual or partial interests, the interests of any political parties or political movements, not to act under any pressure of the opinion of the general public or the media, and to refuse any interference, pressure, influence or request that might threaten the impartiality of prosecutors – § 26 (1) (d); the duty to act in an objective manner with due regard to all significant circumstances, without considering whether they are beneficial or not to any person or the party to the proceedings – § 26 (1) (e).

Based on the preceding information, it may be useful to emphasize the necessity to respect the autonomous status of the Public Prosecution, so that it could continue to perform its duties in the public interest without any interference[6]. Such respect for the autonomous position of the Public Prosecution is a precondition for public prosecutors to exercise their powers impartially and free of any intervention from any third persons.

Hierarchy of the Public Prosecution

As for the hierarchical structure of the Public Prosecution, the following facts may be emphasized. The Public Prosecution does not denote a single governmental authority, but a fixed system of governmental offices. The Public Prosecution consists of the following governmental offices: the General Prosecution Office of the Slovak Republic, Regional Public Prosecution Offices (8 in number) and District Public Prosecution Offices (54 in number).

[6] A. Poszewiecki, *Wybrane zagadnienia stosunku państwa do samorządu terytorialnego w Rzeczpospolitej Polskiej*, [v:] *Uzemna samosprava ako forma verejnej moci*, Kosice 2012, s. 25.

In regard of the hierarchical structure of the system of governmental/ state offices, it should be mentioned here that public prosecutors act in accordance with the superiority/subordination relations. The hierarchical structure of the Public Prosecution is an essential condition for its proper functioning as an authority of legal protection, as its powers include the protection of rights and legally protected interests of individuals, legal entities and the State.

When speaking of superior public prosecutors, it is necessary to distinguish between vertical and horizontal superiority. On the vertical line, superior public prosecutors include all public prosecutors of public prosecution offices of a higher rank, including the head public prosecutors, i.e. the General Prosecution Office is higher in hierarchy than a Regional Prosecution Office and a Regional Prosecution Office is considered to be of a higher rank than a District Prosecution Office. On the horizontal line the head public prosecutor is superior to all public prosecutors of the particular prosecution office in which they serve. Horizontal superiority is defined by law also by the term of immediately superior public prosecutor in relation to ordinary public prosecutors. The superiority/subordination relationship means that a public prosecutor of a lower prosecution office is subordinate to a public prosecutor of a higher prosecution office, and that all of them are subordinate to the General Prosecutor, the head of the Public Prosecution.

The hierarchical structure of the Public Prosecution is also reflected in orders given by a superior public prosecutor who is entitled:

– to instruct a subordinate public prosecutor how to go on in the proceedings and in the performance of his/her duties,

– to act in place of a subordinate public prosecutor otherwise authorized to act so.

It may be also emphasized that there are important legal safeguards against the abuse of public prosecutors depending on their superiors arising from the hierarchical structure of the public prosecution offices. The Prosecution Act actually provides for:

– written form of the instruction given to a subordinate public prosecutor;

– the public prosecutor's right to refuse to act as instructed where it is inconsistent with the law or his/her legal views;

– the subordinate prosecutor's duty to refuse to act as instructed where a crime or any minor, administrative or disciplinary offence might be committed by complying with such instruction;

– the subordinate prosecutor's option to refuse to act as instructed, where his life or health or the life or health of a closely related person might be directly threatened by complying with such instruction.

Aiming to perform the public prosecutor's duties in a proper and efficient manner, the superior public prosecutor is authorized to give instruc-

tions to subordinate public prosecutors to control and direct their activities. Under § 6 (1) of the Public Prosecution Act a superior public prosecutor has the right to instruct a subordinate public prosecutor how to act in the proceedings or in performing his/her tasks. The subordinate public prosecutors have the right to refuse to act as instructed where they believe that the instruction is inconsistent with the law or their legal views. Such instruction, however, must be in the official, i.e. in written, form.

At the same time there is an obligation stipulated by law for all public prosecutors receiving unlawful instructions, to disregard them and subsequently to address another superior public prosecutor. It follows from the foregoing that on the one hand, the written form is important so that a subordinate public prosecutor may not be punished for not complying with an unlawful instruction, and on the other hand, so that he/she may prove the instruction was unlawful. Similarly important it is to have the safeguards precluding abuse of the subordinate public prosecutor's right to refuse to act upon an unlawful instruction. Therefore, the law imposes the duty upon the subordinate public prosecutor to seek withdrawal from the case by showing his/her just cause in writing. The public prosecutor is required to show what in the instruction he/she has considers inconsistent with law or with his/her legal views. Such legal rule tends to avoid unreasonable requests of public prosecutors seeking to be withdrawn from some cases. In any case, the superior public prosecutor must grant such request and subsequently assign another public prosecutor to deal with the case, or the superior public prosecutor may deal with the case by himself/herself.

And a subordinate public prosecutor does not have to do as instructed by a superior public prosecutor also where by doing as instructed, the subordinate public prosecutor might directly and seriously threaten the life or health of himself/herself or a person closely related to him//her. The serious harm to life or health must be immediate, such as threat of death or serious bodily harm. or threat to health that might cause hardship to the usual life of the public prosecutor or a person closely related to him/her. A subordinate public prosecutor may fail to do as instructed also upon objective grounds, e.g. when during the proceedings the situation in the evidence taken has changed, or when by complying with the instruction, the public prosecutor may commit a criminal, minor, administrative or disciplinary offence. According to law, a disciplinary offence means a faulty non-compliance with, or breach of, the public prosecutor's duties, or a conduct that may bring reasonable doubts about the prosecutor's conscientious and impartial decision-making, or a conduct that may diminish the weight and significance of the Public Prosecution. In addition, where the subordinate public prosecutor believes that by complying with the instruction, any harm may be caused, he/she must draw the superior public prosecutor's attention to such harm.

It may further be mentioned here that by Act 220/2011 Z. z., amending Act 153/2001 Z. governing public prosecution as amended, the so called negative instructions are now prohibited both in criminal cases (such option existed before with reference to the Special Public Prosecutor, i.e. the head of the Office of Special Public Prosecution acting also as the General Prosecutor's Deputy, and also with reference to special public prosecutors of the Office of Special Public Prosecution), and in civil cases, through which, as mentioned in the Reasoned Statement/Explanatory Report to this Act, the procedural independence of public prosecutors may be supported. Under this Act, a superior public prosecutor has no right to instruct a subordinate public prosecutor not to commence criminal prosecution, or not to bring criminal charges, or not to take the accused into pre-trial custody, or to refer the case to be dealt with by another authority, or to discontinue the criminal proceedings, or not to make formal accusation, or not to make a regular or extraordinary appeal to the detriment of the accused. Similarly also in civil cases, a superior public prosecutor now cannot order a subordinate public prosecutor not to initiate civil proceedings, or not to join the civil proceeding already commenced, or not to lodge an appeal against the decision of a civil judicial proceedings, or not to make a protest or a notice. At the same time, Act No. 220/2011 Z. z. also prohibits the superior public prosecutors from doing so in these cases by themselves, or making a decision ordering another public prosecutor to do so. Such acting is possible only by the immediate superior public prosecutor. For the sake of entirety it may be stated here that this change has been criticized by the General Prosecution Office, and that the General Prosecutor's First Deputy made a submission to the Constitutional Court to deal with the consistency of some provisions of Act 220/2011 Z. z. with the Constitution, and the Convention on the Protection of Human Rights and Fundamental Freedoms (for more details see www.genpro.gov.sk). Thus, by its Finding PL.ÚS 105/2011 (Collection of Laws No. 308/2011), the Constitutional Court suspended some of the challenged provisions, however, without making a decision in the case.

Based on his own experience, the author of this article believes that the hierarchical structure of the Public Prosecution is an inevitable condition of the uniform application of statutes and other generally binding rules and regulations, and the uniform exercise of the policy in the criminal justice. The hierarchical structure of the Public Prosecution is a prerequisite for its proper functioning. The European Committee on Crime Problems (CDPC – Council of Europe), under which the experts of the Council for Cooperation in Penology (PC-CR), having examined the issues concerning the status of public prosecution in the system of criminal justice and its tasks in the system of criminal justice in the Council of Europe member states, came to the same conclusion. This is also shown in *Recommendation Rec(2000)19 of*

the Committee of Ministers to member states on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, and the Explanatory Report to this Recommendation.

3. Powers of the General Prosecutor

Unlike other public prosecutors who do not have the same status, the General Prosecutor is a constitutional officer of the Slovak Republic. The General Prosecutor may be prosecuted or detained in custody only with the consent of the Constitutional Court of the Slovak Republic. The Constitutional Court may also conduct disciplinary proceedings against the General Prosecutor. The office of the General Prosecutor may be held for seven years without a possibility for the same person to be reappointed. The General Prosecutor is appointed and recalled by the President of the Slovak Republic upon a proposal by the National Council of the Slovak Republic.

The element of superiority of the General Prosecutor lies in his "directiveness". The General Prosecutor controls and supervises the activities of all public prosecution offices. The General Prosecutor appoints and recalls all public prosecutors taking office, with the exception of the Special Public Prosecutor who is elected by the National Council of the Slovak Republic (Parliament) upon the General Prosecutor's proposal. For the purposes of the task performance, the General Prosecutor issues service regulations, and gives orders and instructions binding on all public prosecutors, public prosecutor candidates, assistants of public prosecutors, and other employees. In the interests of uniform application of statutes and other generally binding statutory regulations, the General Prosecutor gives opinions binding on all public prosecutors, and also issues other legal and organizational rules promulgated in the Collection of Laws of the Slovak Republic.

Act 220/2011 Z. z. brought a new regulation concerning the right to give legal opinion. Specifically, this right remained with the General Prosecutor, however, he makes an opinion not on his/her own discretion, but only on the initiative of the Commission for Giving Legal Opinions. The Commission consists of six members, three of which are appointed and recalled by the General Prosecutor, and the other three are appointed and recalled by the Minister of Justice of the Slovak Republic. The General Prosecution Office has criticized this change, and the General Prosecutor's First Deputy made a submission to the Constitutional Court to commence proceedings concerning consistency of some of the provisions of Act 220/2011 Z. z. with the Constitution and the Convention on the Protection of Human Rights and Fundamental Freedoms. Through its Finding 308/2011 Z. z., the Constitutio-

nal Court suspended some of the challenged provisions, however, without making a decision of the case.

The General Prosecutor has significant powers also in relation to other governmental authorities, namely the National Council of the Slovak Republic, the Government of the Slovak Republic, the Constitutional Court of the Slovak Republic, the Supreme Court of the Slovak Republic[7].

The General Prosecutor submits annually to the National Council the Report on the Activities of the Public Prosecution to inform the National Council on legality. To the Chairperson of the National Council the General Prosecutor makes proposals to make and amend laws, proposing also his/her nominations of judges to the Constitutional Court to be elected by the National Council.

The General Prosecutor has the right to make proposals to the Government to make and to amend laws.

The General Prosecutor has the right to make submission to the Constitutional Court

a) to commence proceedings concerning consistency with statutory regulations,

b) to start proceedings concerning interpretation of constitutional statutes in controversial cases,

c) complaining against unconstitutional or unlawful parliamentary elections or the elections to local self-government authorities, and against the election results,

d) complaining against unconstitutional and/or unlawful elections, or recall of the President of the Slovak Republic,

e) complaining against the results of referendum or plebiscite to recall the President of the Slovak Republic,

f) suggesting to review the decision concerning the dissolution or suspension of a political party or movement.

Before the Constitutional Court has decided a matter concerning consistency with statutory regulations, the General Prosecutor must give his/her opinion on the matter dealt with by this Court, where such opinion has been requested by the Chairperson of the Constitutional Court.

Before a decision made by the Constitutional Court in matters concerning the review of the dissolution or suspension of the activities of a political party or movement, the General Prosecutor must give his/her opinion on the matter when so requested by the President of the Constitutional Court or the Chairperson of the Senate/Panel of the Constitutional Court dealing with the matter.

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[7] S. Surek, *Interpretacne pravidlo – ano ci nie?*, [v:] *Uzemna samosprava ako forma verejnej moci*, Kosice 2012, s. 95.

The General Prosecutor has the right to make submissions to the Supreme Court proposing observations aiming to achieve uniform interpretation of laws.

Under special laws and subject to the conditions set by these laws, the General Prosecutor has the right to submit to the Supreme Court also

– extraordinary appeals,

– special cases of extraordinary appeal against final judgments in civil cases,

– proposals seeking dissolution of a political party or movement, and proposals to suspend the activities of a political party or movement.

The General Prosecutor may attend the plenary sessions of the Supreme Court. The General Prosecutor also appoints and recalls one member of and his/her substitute to the Commission, decides on the protection of a threatened witness, protected witness, or any person closely related to them, and exercises also other rights and duties under special laws and international treaties promulgated in a manner set by law.

Conclusion

Based on the information presented in this article it may be concluded that the Public Prosecution of the Slovak Republic is a component part of the constitutional system of government of the Slovak Republic. It is in the interest of the state governed by the rule of law to have the authorities properly and carefully performing their tasks. Where the activities of public authorities unlawfully interfere with the rights and legally protected interests of natural and legal persons, the State is obligated to create a system of control mechanism to protect them. One of such mechanisms is the Public Prosecution, an organic element of the system of safeguards of legality in a democratic state governed by the rule of law, the role of which is irreplaceable. Within its scope of competencies there is also the protection of rights and legally protected interests of natural and legal persons and of the State.