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Supervision of public prosecution service over public administration: the case study of Slovakia

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Abstract. *The system of decentralized public administration creates a vital environment for better interaction between the state, its sub units and citizens. Despite all benefits, the growing nature of bureaucratic procedures and power distribution seem to attract more attention, mainly from the reasons of unprecedented mechanisms of control. The aim of the paper is to demonstrate the potential of Public Prosecution Service in Slovakia to control the decentralized public administration being provided with a statutory power to monitor the field of public administration as a whole. The paper is conceived as a case study of methods of prosecutorial supervision and their practical application in Slovakia.*

Key words: *Public Prosecution Service, control, public administration supervision, decentralization, Slovakia*

Raktažodžiai: *Valstybinė prokuratūros tarnyba, kontrolė, Viešojo administravimo stebėsena, decentralizacija, Slovakija.*

Introduction

The authors of the paper deal with the issue of lawfulness monitoring exercised by one of the most important law protection authority - Public Prosecution Service of the Slovak Republic. The attention is paid to the issue of decentralization of public administration in the Slovak Republic and related processes. Its purpose is to empower the position of individual territorial units of non-state nature. These units have their own system of elected authorities and administer the matters concerning a particular community of people brought together on a territorial basis (a municipality, a higher

territorial unit). They act relatively independently and autonomously. However, at the same time this creates a relatively large space for a diverse illegal activities by the competent self-government bodies, particularly having the form of adoption of legislative administrative acts (generally binding regulations) conflicting with the legislation of higher legal force (laws, constitution) and issue of individual administrative acts (decisions) failing to respect relevant statutory provisions. The Public Prosecution Service and its supervisory activity significantly contribute to the detection of mentioned unlawful acts of self-government bodies. The authors analyze the issue of the non-criminal competence of Slovak public prosecution service, methods and legal instruments of lawfulness monitoring and point out to several legislative changes in this field that have been done from January 1, 2016.

The system of public administration and its reforms in Slovakia

The logic of public administration systems is delineated to provide the citizens, support enterprises as well as education and public welfare. This is the essential and original approach envisaged in triple E: economy, efficiency and effectiveness (Gulick, Urwick, 1937). The later approaches include more administrative tasks for the managerial systems such as planning, organizing, staffing, directing, coordinating, reporting, budgeting (comp. Malíková, Jacko et al., 2013). The system of public administration in Slovakia is composed of three pillars:

1. Public administration,
2. Self-governance,
3. Public corporations.

It can be stated that each subsystem cooperates with other subsystems when exercising agenda entrusted by the state which leads to a complementary interaction (Klimovský, 2009).

The modern theories of public administration reflect the urge to relate it more towards the citizens. The real practice of former Soviet countries shows that direct transformation from non-democratic to democratic form of government is not predominantly as smooth and short as envisaged. Successful countries have undergone the decentralization process in order to emphasize the development of self-governing principles as well as creating a new platform for citizens to engage and participate at public affairs. Such are the foundations of open society principle. It is thus necessary to underline that we refer to such public administration which follows the basic principles of its tasks. In this context we accentuate the role of local governments, self-governance and their elected bodies which significantly aid the development of democracy and rule of law within the Slovak Republic. There is none universally applicable definition to capture all elements of public administration. There are several reasons of such ambiguous approach to public administration but in general *„the problem of public administration is not the inability to find a universally applicable definition but the fact that we are well aware of its weaknesses* (Rosenbloom, 1986: 5).

We may encounter several de facto identical definitions of public administration as the management of public affairs implemented by the executive branch of power. Peter Horváth defines public administration as organizational activities exercised by state through its institutions but also by other non-state bodies that have the nature of public authorities (Horváth, 2007). The duty of states and their central administration in the system of public administration is limited solely to the role of the overseer of legality with the right to issue legally binding rules and regulations for lower instances (Švikruha, 2012). The public administration and its reform process in Slovakia lacks behind well-established systems of government dominantly in the Western Europe. We may claim there was no ideal political environment and vice-versa, it may be observed as unstable from economic, social and political perspectives which ultimately resulted into great society polarization (Nižňanský, 2002). It was rather impossible to approach constructive changes in the system of public administration that would be beneficiary both by effectiveness and by economic sustainability. Changes made in the early stages of public administration reforms in Slovakia had the character of political power resolutions and preferences rather than citizens´ interests. Several threats that endanger the public administration as well as the whole political system can be identified as following: citizens are driven apart from public administration, what results in the lack of socialization of citizens with the institutions of public sector, high corruption rate in public sector, and finally the legitimacy crisis of the principles of representative democracy.

The decentralized public administration in Slovakia: the effects and control

The major purpose of local government is to bring and deliver variety of specific services in a specifically delineated geographical area. Then, the local governance is considered as a more complex category or concept of administering and executing the collective action at the particular local level. This includes various institutions of local government, networks, community organizations and informal norms that provide for the development and interaction between citizens and state, collective decision making and delivery of local public services. The local governance is a complex set of arrangements for the local, municipal and most often the community life. It provides for the basic elements of public life and local service but it should also encompass to provide for life and liberty of the ordinary people, enhancing the civic engagement by giving the variety of opportunities to participate in the local events and calls, supporting the sustainable local and regional development. From this perspective, the local governance is about providing and well-being in the particular locality or municipality (Švikruha - Mihálik, 2014). In the Slovak Republic the public management is distinguished and differentiated into the following categories:

- Determination of policy development and standardization at the national level

- Implementation and policy standards are subject to control from the state level
- Particular services and provisions are exercised and executed by the regional and local level governments.

The structure, amount and type of the competences to be allocated to decentralized units are subject to central government. In case of political decentralization we may consider the increased sovereignty of the forms and models of civic and political participation in decentralized units (Litvack-Seddon, 1999). In other case, the decentralization brings fiscal and market decentralization and deconcentration. This approach is utilized by other authors (Burki-Perry-Dillinger, 1999) who understand the process as limiting the range and scope of political and decisive agenda predominantly at the central level of the state. This is in line with the definition of decentralization as the institutional approach in which the competence delegation and responsibility of the public functions are derived from centralized governments to lower, subordinated and almost independent state organizations or private entitites (Litvack – Seddon, 1999). The decentralized governance thus transfers tasks and duties to regional and local levels located below the central level since the modern public administration is unable to ensure all the services only from one center. A very important role of decentralization is to guarantee the structure and maintain a rigid competences allocation. The primary aim is then to develop particular political processes in order to support constructive balance among the centralized and decentralized competences in the governance system. We need to take into account the large scale and long term approach to deepen the subsidiarity principle as well as the development of complex and quality governance model. It may be then expected that the lower level competences would bring higher political engagement in public affairs as well as the relations between the state and citizens would be emphasized and improved to effectively provide the public services.

There are some limits and barriers involving the criticism of decentralization and the rates of its effectiveness. First, decentralization may bring deeper regional disparities and limits economic sustainability. Second, decentralization may lead to inappropriate changes in the organizational structures introducing new roles and responsibilities for lower levels of administration. Decentralization cannot be considered as ultimate and general fix for the public administration problems. Decentralization may cause a contradiction between the financial allocation of sources and technical capacities which are essential for the implementation process (Hutchinson-LaFond, 2004). Some of the negative effects of the decentralization are often vested in the discrepancy between the devolution and mechanisms to control those who have been granted the new powers. Systematic change requires new mechanisms in competences and financing as well as new model of control. The modern state also requires modern public administration tools to preserve the general interests: clear competence delegation, responsibility and accountability of public institutions towards the citizens, quality legislation and law enforcement including professionalism and ethics of public servants.

Public Prosecution Service and its supervision over the activities of local governments

The competence of the Slovak Public Prosecution Service is specifically defined in the Act no. 153/2001 Coll. on the Public Prosecution Service, as amended (hereinafter referred to as "APPS"). The provisions of this Act indicate that the Slovak public prosecution office does not exercise its competences only in the traditional criminal law field (Klimek, 2015), but also in the non-criminal field - in the field of civil procedure and public administration. It is this latter feature that is a specific feature of Slovak Public Prosecution Service and which distinguishes Slovak Public Prosecution Service from other similar offices in many other countries. In the context of our paper, we will pay further attention to the issue of competence of Public Prosecution Service in the non-criminal field - in public administration, which is referred to generally as the exercise of the competence in the so-called *"non-criminal extrajudicial field"* (Čentéš, 2013: 24). It includes specifically the supervision over law observance by public administration authorities, which are defined in § 20 sect. 2 of APPS. In terms of legal definition, one of the subjects that are subject to control of legality by the Slovak Public Prosecution Service is local self-administration bodies which are an issue we are dealing with in this paper. For this reason, when we use the term "public administration authorities" in the next text, we have in mind also local self-administration bodies. Slovak APPS establishes four basic methods by which the Public Prosecution Service performs a supervisory function in the public administration - the review of the legality of administrative acts of public administration authorities exhaustively listed in the Act, the review of the procedures of public administration authorities, the conduct of inspections of law observance and the exercise of an advisory vote in the meetings of public administration authorities. In this paper, our attention is paid to first two methods mentioned - the review of the legality of administrative acts and the review of the procedures of public administration authorities. The main aim of supervision is to determine whether the laws are consistently observed and respected and whether someone is not limited in the exercise of his/her rights. We must point out that, when exercising supervision, the public prosecutor does not examine the effectiveness, efficiency and appropriateness of decisions and procedures of public administration authorities or the decisions and measures of public administration authorities, the issue of which depends solely on the assessment of the technical state of matters. In other words, the only purpose of prosecutorial supervision is to consider the question of the legality of the procedures and decisions of public administration authorities. It should also be emphasized that supervision cannot replace the activity of public administration authorities - the public prosecutor does not alter or annul their decisions. The public prosecutor is not even entitled to impose sanctions for breach of the regulations by public administration authorities (Beneč, 2002: 1454). Supervision, therefore, is only a survey of the legality of the procedures and decisions of public administration authorities and their comparison with the status envisaged in the law.

The review of the legality of administrative acts of public administration authorities is the basic method of supervision over public administration exercised by the Public Prosecution Service. Under § 21 sect. 1 let. a) of APPS, the object of reviewing the legality are five forms of administrative acts of public administration authorities - decisions of public administration authorities, measures of public administration authorities, measures of public administration authorities with general effects, resolutions of public administration authorities and finally, generally binding regulations issued by public administration authorities. From the legal definitions of above-mentioned forms of activities of public administration authorities we can deduce that, when exercising supervision, the public prosecutor is entitled to examine not only normative administrative acts, but also individual administrative acts (acts of law application), and some other forms of activities of public administration (e.g. managing acts). In this respect, it should be pointed out that the above-mentioned exhaustive demarcation of administrative acts of public administration indicates that prosecutorial power of review cannot be applied to one other important form of public administration activities - *the administrative agreements (public contracts)*. The administrative agreements (public contracts) are in fact a specific form of activity of public administration. The scientific literature usually defines them as bilateral or multilateral administrative acts which establish, change or cancel administrative law relations (Hendrych, 2012: 238). Administrative agreements are always aimed at fulfilling the tasks of public administration. Unfortunately, the legal wording of § 21 sect. 1 let. a) of APPS does not mention administrative agreements. Similarly, the given statutory wording excludes from the possibility of prosecutorial review also other form of public administration activities - the so-called *factual act*, or *immediate intervention* of public administration authorities. These are also not mentioned in § 21 sect. 1 let. a) of APPS. At the same time, these forms of public administration acts cannot be subsumed under any of the defined administrative acts - e.g. the decisions of public administration authorities, the measures of public administration authorities, the measures of public administration authorities with general effects, the resolutions of public administration authorities and finally, the generally binding regulations issued by public administration authorities. In practice, that means that if e.g. the municipality makes an administrative agreement (public contract) with another subject (other municipality), making of which the law does not allow or foresee, the Public Prosecution Service is not able to respond to such unlawful conduct of a body of territorial self-administration in a legally relevant way. Similarly, if a member of a municipal police conducts an immediate intervention, for example opens an apartment and enters into it without meeting the legal prerequisites (reasonable concern that the life or health of a person is seriously endangered), this will constitute an unlawful act to which public prosecution will not be also able to respond effectively. For this reason it would be desirable to extend the list of administrative acts exhaustively defined in § 21 sect 1 let. a) and include some other forms of public administration activity, which would also be subject to reviewing powers of the Public Prosecutor. The review of the proce-

dures of public administration authorities is a method of prosecutorial supervision, which affects the procedural aspects of the case (Beneč, 2004: 586). Under the law, a procedure of public administration authorities is a procedure in the administrative proceedings when issuing administrative acts as well as inactivity of the public administration authority. Since APPS defines administrative proceedings as proceedings of public administration authority leading to the issue of individual administrative acts and normative administrative acts, it can be concluded that in this case, the legislator based the legal definition of administrative proceedings on its understanding in the broad sense. In the traditional sense, which is also recognized by the legal doctrine, the administrative procedure is only the procedure (laid down by a law) of administrative bodies, parties to proceedings, participating persons and others persons in issuing, reviewing and forced execution of judgments - individual administrative acts, which decide on the rights, legally protected interests and obligations of specific natural persons and legal persons in particular legal relationship in the field of public administration (Vrabko et al., 2013: 55). From the doctrinal point of view, therefore, in principle, the administrative procedure is a process leading to the issuance of decisions (as individual administrative acts), not legal regulations (as normative administrative acts). On the contrary, however, APPS grants to public prosecutors broader powers - power to examine also procedures of public administration authorities, which precede the issuance of individual administrative act and normative administrative act.

However, in connection with afore-mentioned we can find a problem of interpretation - a problem with the legal understanding of terms *"individual administrative act"* and *"normative administrative act."* APPS does not define these terms and it is legally doubtful whether all administrative acts exhaustively defined in § 21 sect. 1 let. a) can be subsumed under any of these terms. In connection with the classification of administrative acts, the legal theory distinguishes not only normative administrative acts and individual administrative acts, but also many other administrative acts of public administrations authorities with different legal characteristics and legal consequences. Normative administrative acts are usually defined as administrative acts that create new rights and obligations of the administered subjects (Vrabko et al., 2013: 197). They are general, abstract, addressed to an indeterminate number of a group of persons. They aim at the outside of public administration, not the inside of public administration organization. On the other hand, individual normative acts are understood as a concrete form of public administration activities resulting from deciding of administrative body on the rights, legally protected interests or obligations of a concrete subject in a position of a party to the procedure (Machajová et al., 2014: 186). Such administrative acts therefore either establish, change, cancel or declare rights, legally protected interests or obligations of specifically identified recipients.

However, on the basis of legal characteristics of a measure with general effects, we can deduce that it is neither the legal regulation nor the decision. Since it is an administrative act aimed at the inside of the structure of the public administration

authorities, it is neither normative nor individual administrative act. In a legal theory, the managing administrative acts tend to form a specific (separate) group of administrative acts referred to as *"administrative acts establishing the rights and obligations issued within the organization and management of public administration"* (Vrabko et al., 2013: 202). Similar case is also the resolution of local self-administration bodies, legal nature of which is not entirely clear. Legal theory considers the resolution in the public administration to be an act which is not of the nature of act in the procedural regime of administrative procedure but it is another form of public administration activities. This is generally called *internal act of a collegiate body*, which contains a determination of tasks to ensure the continued operation of public administration (Madar, 2002: 1596).

Therefore, the resolution is an act of public administration authority, which is not issued in the regime of administrative procedure. It is another form of public administration activities. At the same time, however, it may be noted that although the legal theory, in principle, agrees that resolution is an internal act aiming at ensuring operation of public administration, it cannot be said that there are no resolutions that establish, change or cancel the rights and obligations of legal entities (i.e. they have de facto the nature of individual legal act). In some cases, the resolution itself can be considered to be an individual administrative act constituting, changing, cancelling or declaring individually identified rights or obligations of subjects of law (Beneč, 2010: 22). As an example we can mention a resolution of the municipal council on determining salary of the mayor, a resolution of the municipal council on determining salary of the main inspector. Such resolutions clearly and directly constitute, change or cancel individually identified right (right to salary) and therefore in material terms, it is necessary to consider them as individual administrative acts. In the context of the APPS text, it should be added that it is only a non-binding judgment of legal theory. The truth is that APPS does not specify what kind of resolution the legislator has in mind, and therefore it would be appropriate to consider the legal classification of resolutions in a similar way as measures (resolutions with individual effects and resolutions with general effects).

It can be concluded that the review of the procedures of public administration authorities as a method of prosecutorial supervision cannot be applied to all administrative acts mentioned in § 21 sect. 1 let. a), but only to those that fulfil the characteristics of an individual administrative act and normative administrative act, i.e. decisions of public administration authorities, measures of public administration authorities (with individual effects), generally binding regulations issued by public administration authorities, or if necessary also resolutions that authoritatively interfere with the legal sphere (rights, legally protected interests and obligations) of the individual. Using *a contrario interpretation*, we can also deduce that the review of the procedures of public administration authorities as a method of prosecutorial supervision cannot be applied to procedures leading to the issuance of public measures with general effects and resolutions of local self-administration bodies that are not affecting the rights, free-

doms and interests of natural persons or legal persons (i.e. resolutions of a managerial nature). In addition, the review of the procedures of public administration authorities cannot be used either in relation to concluded administrative agreements (public contracts), as these are included neither in the § 21 sect. 1 let. a) nor in any other provision of APPS. Our claims that the reviewing competence of Public Prosecution Service is excluded in relation to mentioned administrative acts (forms of public administration activities) also follows from the constitutional command contained in Art. 2 sect. 2 of the Slovak Constitution, under which public bodies may act only on the basis of the Constitution, within its limits, and to the extent and in a manner laid down by law.

Conclusions

1. Slovak public prosecutor is entitled to examine not only normative administrative acts, but also individual administrative acts (acts of law application), and some other forms of activities of public administration (e.g. managing acts). However, public prosecutor is not entitled to exercise supervision over all forms of public administration activity. Prosecutorial power of review cannot be applied to one important form of public administration activities - the administrative agreements (public contracts) and the so-called factual act, or immediate intervention of public administration authorities.
2. The review of the procedures of public administration authorities as a method of prosecutorial supervision cannot be applied to all administrative acts mentioned in § 21 sect. 1 let. a) of APPS, but only to those that fulfil the characteristics of an individual administrative act and normative administrative act. Therefore, it cannot be applied to procedures leading to the issuance of public measures with general effects and resolutions of local self-administration bodies that are not affecting the rights, freedoms and interests of natural persons or legal persons.
3. The solution to problems mentioned above is to adopt a new law amending APPS. The new law should explicitly stipulate that public prosecutor is entitled to examine also the administrative agreements (public contracts) and the so-called factual act, or immediate intervention of public administration authorities. Next, the new law should also stipulate that the review of the procedures of public administration authorities as a method of prosecutorial supervision relates also to public measures with general effects and resolutions (with general effects).

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Prokuratūros priežiūra viešajame administravime: Slovakijos atvejo analizė

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Anotacija

Šiame straipsnyje nagrinėjamos valstybės prokuratūros galimybės kontroliuojant išplėstą ir decentralizuotą viešąjį administravimą, pasitelkiant Slovakijos pavyzdį. Autoriai analizuoja viešojo administravimo decetralizavimo koncepciją ir būtinybę valdyti bei vertinti savivaldos modelį Slovakijoje. Autoriai taip pat siekia atsakyti į klausimą ar viešosios prokuratūros tarnybai turėtų būti suteikta įstatymų numatyta teisė koordinuoti visą viešojo administravimo sritį kaip visumą ir ar ši kompetencija neturėtų būti patikėta kitoms valdžios institucijoms. Buvo prieita prie išvados, kad esant platesniam kontrolės mechanizmų spektrui, padidėja decentralizuotos administravimo sistemos vaidmuo ir tikslas siekiant užtikrinti didesnį skaidrumą, veiksmingumą, demokratinį valdymą ir glaudesnį valstybės tarnautojų santykį su piliečiais.

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