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METAMORPHOSES OF PROSECUTORIAL SUPERVISION OVER PUBLIC ADMINISTRATION

Abstract
The competence exercised by public prosecution service can be in general divided into two fields. The first field is the so called "criminal competence" of public prosecution. It is a competence which is typical for public prosecution offices of all countries and whose exercise is not in any way questioned. The representatives of the scientific community tend to agree that through the exercise of that competence public prosecution offices carry out an irreplaceable role in criminal proceedings, whether in their pre-trial phase or in the trial phase. The second field of competence is referred to as the so-called "non-criminal competence" of public prosecution office. The author of this contribution deals with the competence of public prosecution service in the non-criminal field (public administration). In the first part of the contribution the author discusses theoretical basis of the non-criminal competence of public prosecution service. Then he analyses non-criminal competence of Slovak public prosecution service and points out to some problematic issues.

KEY WORDS: public prosecution, public administration, lawfulness, supervision, control

INTRODUCTION

The non-criminal competence of public prosecution includes various powers of public prosecution offices allowing them to act in another field, such as criminal law. This is particularly the competence in the civil law field and public administration field. Here, it should be noted that unlike the criminal competence, the views of experts on the need of the non-criminal competence of public prosecution vary and are not unanimous. Necessity of competence of public prosecution in the

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non-criminal field is often called into question and therefore is traditionally object of countless professional debates (Horváth, Machyniak). This is also one of the reasons why the powers of public prosecution offices in individual countries are not regulated in the same way. In terms of legal regulation of competences of public prosecution we can say that it is possible to find countries in which the scope of competence of public prosecution is narrow (it applies only to the area of criminal procedure) and countries in which the scope of competence of public prosecution is broad (it includes also non-criminal field).

1 TRANSFORMATION OF SLOVAK PUBLIC PROSECUTION SERVICE AFTER 1989

As already mentioned, the doctrine maintains varied opinions on the question of competence of public prosecution. Differences in opinions on the issue visibly arose in the European countries especially after the fall of the Iron Curtain in 1989. In this period many changes in the organisation and competence of public prosecution services had been realised in the former countries under the Soviet influence (the so called Soviet or socialist model of public prosecution). The socialist model of public prosecution was conceived as a model with a very strong impact on all fields of social life. Although it was formally created as the independent state organ, in fact it was closely linked to the ruling Communist Party, which in many cases abused public prosecution service for the purpose of enforcing their own political and ideological interests. In terms of competence the Soviet model of public prosecution was created not only as the authority that carried out tasks in criminal proceedings, but also as the authority responsible for guarding socialist legality. Therefore it was provided with extensive powers in the field of civil, administrative and constitutional justice. It can be said that the socialist public prosecution service ("prokuratura") was replacing state organs performing tasks that are in democratic countries following the rule of law entrusted to the constitutional and administrative judiciary.

Due to the efforts to remove socialistic components of justice after 1989 many experts began to call for the change of the previous concept of public prosecution and its transformation into the public prosecution office with competences only in the criminal proceedings and representing the state in court ("statne zastupitelstvo"). Not only some experts but also some politicians took the line that the competence in the non-criminal field should have been either completely abolished or strictly limited. Nowadays, many voices calling for the elimination of the non-criminal competence of public prosecution have not faded away and from time to time some politicians and some experts express negative attitudes to the non-criminal competence of public prosecution.

E.g., Osmančík is very reserved to the competence of public prosecution in the

non-criminal field, because he thinks that in the pluralistic society the subjects (individuals) are autonomous and therefore they are able to defend their rights at their own discretion and decision without any state guardianship. According to him, the primary responsibility of state includes prosecution of crimes endangering important values of society. However, since the state is a bearer of variety of rights, in the non-criminal field the public prosecution service should represent the state in civil, commercial and administrative courts in property and fiscal matters (1991, p. 105). Golema is also negative towards the competence of public prosecution in the non-criminal field. On the ground of existence of constitutional justice, administrative justice and the Supreme Audit Office he expresses doubts on the need for monocraticly governed public prosecution office as the authority supervising legality in the democratic state following the rule of law. According to him, public prosecution service is irreplaceable in the control of legality in criminal proceedings, in the investigation, in bringing charges in court and in representing the state in court. However, he explicitly states that the public prosecution service should not exercise far-reaching control which, in addition, cannot be effectively exercised (1992, p. 36). Zoulík clearly rejects the concept of public prosecution office as the executor of paternalistic state care of observance of law. Although he admits that outside the field of criminal law there are certain areas in which the public interest in strict observance of law is present, at the same time he claims that the public prosecutor's participation in civil proceedings is disparate element that gives rise to many complications. He also says that the competence of public prosecution in the field of public administration has no place (1993, p. 159). On the question of competence of public prosecution in the non-criminal field, Svoboda has similar view. On the one hand, he recognises the right of public prosecution office to intervene in civil proceedings, on the other hand, he takes critical view on the competence of public prosecution in public administration field. He casts doubts on the assertions of some experts pointing out that the deprivation of competence of public prosecution office in the public administration caused "white spots", i.e. places without any supervision of legality (1994, p. 138). Nedorost and Ondruš also reject non-criminal competence of public prosecution. They maintain that this type of competence could restrict the free will of acting subjects (ASPI).

On the other hand, it should be noted that despite the existence of critical voices not only in the period shortly after 1989, but even today there are voices still calling for maintaining the competence of public prosecution in the non-criminal field. Maintenance of this type of competence is generally justified by the necessity of existence of an authority representing the interests of weaker subjects, respectively representing the whole society (public) interest in observance of law in other areas of social life such as criminal law. E.g. Spáčil is negative towards the concept of public prosecution without any powers in the non-

criminal field (civil procedure). Allegations about undemocratism of competences of public prosecution service in civil procedure, according to him, are frivolous and unjustified. According to him, it is necessary that public prosecution service as the guarantee of legality has the possibility of participating in at least non-contentious civil proceedings (1991, p. 45). Šúrek advocates the necessity of the existence of the non-criminal competence of public prosecution, particularly in non-contentious administrative proceedings. He claims that there are cases where the illegality of the decision in administrative proceedings is for the benefit of the party and therefore it is not objected by petition to court. In these cases the state, according to him, must also have an interest in observance of the law, interest in gaining knowledge of violation of the law, as well as efficient means to enforce the law (1995, p. 2). Bacho, despite strong belief in obsoletion of the concept of public prosecution service as universal guardian of legality, considers public prosecution to be irreplaceable authority in the performance of tasks in the non-criminal field (1992, p. 38). Balaš is also positive towards competence of public prosecution in the non-criminal field and at the same time he notes that the public prosecutor's supervision over the observance of law by public authorities and reviewing the decisions of administrative courts are not mutually exclusive, but rather are complementary (1990, p. 56). Similarly Vaľová argues that if the public prosecution did not carry out supervision over the activities of government bodies, most democratic requirement - the equality of citizens before the law - could not be guaranteed for all citizens (1990, p. 63). Šabata, one of the newer authors, is of the opinion that the public prosecution is required to solve the problems of citizens and reducing its competence only to the criminal field would limit the possibilities and ways of solving problems that arise in society. If we want public prosecution to have its prestige in society, it should be able to help ordinary citizens. And that is not possible just through the criminal law, which applies the principle of subsidiarity of repression and which is only a mean of last resort (ultima ratio) (2009, p. 15). To newer voices speaking for maintaining the competence of public prosecution in the non-criminal field belong voices of Fenyk and Dávid. Fenyk states that the abolition of general supervision and its non-replacement by other adequate institutes causes weakening of citizens' confidence in law enforcement. The competence of public prosecution in criminal procedure only is therefore unsustainable in the long term (2001, p. 25). Dávid deals with the competence of public prosecution in the civil law field. He notes that participation of public prosecution in civil proceedings is very important because in the proceedings it protects interests of society above the interests of individuals, which could cause injury to others (2008, p. 17).

We believe that the exercise of powers of public prosecution in the non-criminal field is extremely important. Non-criminal competence of public prosecution significantly contributes not only to ensuring the rule of law in a

democratic state, protection of property and interests of the state and of public interest or public order, but also to the protection of the rights and freedoms of individuals, especially of those who are unable to protect and defend their rights (e.g. the minors, consumers). Thereby it enables and helps to improve citizens' feeling of legal certainty. Execution of the non-criminal competence ensures that public prosecutors may also participate in the solution of ordinary life problems of citizens and they are not turning into authorities that are remote and alien to ordinary citizens. After all, in a democratic state following the rule of law state institutions should serve in the first place to citizen and help him / her to solve life problems. We cannot agree with the opinions that consider all citizens to be autonomous entities able to defend their rights at their discretion and decision without any state guardianship. The real situation is that in every state there are always some individuals that do not have this ability and therefore they need help. Just for this reason, there must be an authority that would help them to solve these problems.

It should also be noted that although the exercise of the non-criminal competence of public prosecution does not reach the significance of exercise of criminal competence (which has always dominated activities of public prosecution offices of all countries), non-criminal competence is closely linked to the criminal competence. In many cases, non-criminal competence refers to criminal competence, arises from criminal competence or forgoes criminal competence. In addition, non-criminal competence also contributes to eliminating the causes and conditions of criminal activity, and it is among the major objectives of exercise of public prosecution competence as a whole.

2 LEGAL INSTRUMENTS OF PROSECUTORIAL SUPERVISION DE LEGE LATA

After finding of illegality in the procedure or administrative act of the public administration authority, the public prosecutor is entitled to use some of the legal means of supervision over compliance with laws and other generally binding regulations by public administration authorities. Slovak legal order recognizes several legal instruments by which the public prosecutor (or Prosecutor General) exercises supervision over the observance of law by public administration authorities.

On the basis of the criteria of the type of proceedings before the public authority to which such legal instruments of supervision relate, we can distinguish three groups of legal instruments of prosecutorial supervision, namely: 1) legal instruments relating to the administrative proceedings (a protest of public prosecutor, a notice of public prosecutor), 2) legal instruments relating to the administrative judicial proceedings (an administrative action, an action to the

administrative court, an intervention in proceedings before the administrative court, a cassation complaint, an action for reopening the trial, an opinion to the Supreme Court of the Slovak Republic) and 3) legal instruments relating to the proceedings before the Constitutional Court of the Slovak Republic (a motion for initiation of proceedings for the conformity of generally binding legal regulation issued by the public administration authority). This classification of legal instruments of supervision takes into account only the type of procedure in which the legal instrument can be applied.

A protest of public prosecutor can be characterized as a legal instrument by which the public prosecutor requires the repeal or amendment of a specific administrative act that is contrary to the legislation. Although it does not contain a legal order to repeal or amend an administrative act, it is a qualified form of a motion that the author of the administrative act must deal with and in due time handle in a manner prescribed by a law. The public prosecutor is entitled to file his protest against administrative acts defined in § 21 sect. 1 let. a) of APPS. Therefore, a protest may be aimed at 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. The condition is that these administrative acts violated the law or other generally binding legal regulation. Knowledge that can result in the prosecutorial protest can be obtained either on prosecutor´s own monitoring activities, including inspections of law observance or on the initiative of the parties to the administrative proceedings or any other natural or legal persons (Babiaková, 2006, 527).

Under § 28 sect. 1 of APPS, a notice of public prosecutor is a legal instrument of supervision that can be filed by public prosecutor to the public administration authority in order to eliminate violations of laws and other generally binding legal regulations, which has occurred in the proceeding of the public administration authority when issuing administrative acts or in case of inactivity. Therefore, the reason for filing a notice is the need to eliminate the infringement of law, which occurred either in the proceeding of a public administration authority without issuing a decision, inactivity of a public administration authority or in the proceeding resulting in the decision, if filing a notice is required by the public interest and it is not necessary to take other measures, e.g. to file a protest (Hoffmann, 2010, 92). Filing a notice relates to those cases in which there has been a violation of generally binding legal regulations, but there was no reason to file a protest of public prosecutor. In connection with the differences between a notice and a protest, Beneč stresses that a notice "does not aim at the repeal of individual or normative act, but it is a legal instrument of protection of objective law with the aim of ensuring that the authorities under the supervision of the public prosecutor fulfil properly their duties laid down by laws and other generally legal regulations." (Beneč, 2004, 589).

An administrative action and an action to administrative court may be referred to as secondary legal instruments of supervision because their exercise is possible only if a protest or a notice has not led to elimination of illegality. They are legal instruments stipulated in the provisions of the Act no. 162/2015 Coll. Administrative Proceedings Code. They represent legal instruments that can be used within the framework of administrative judiciary. Unlike previous legal instruments, they can lead to authoritative placing a duty on competent authority (e.g. municipal council) to eliminate illegal state (e.g. to harmonize generally binding regulations issued by local self administration bodies with laws

Finally, the last legal instrument of supervision, which is available to an ordinary public prosecutor when exercising his supervisory activities, is an intervention in proceedings before the administrative court. The content of this legal instrument of supervision is the right of the public prosecutor to intervene in any proceedings before administrative courts including proceedings in cassation. The public prosecutor who intervened in the proceedings should be as 'amicus curiae' of service to the Administrative Court in its decision-making in particular through submission of qualified opinions and proposals, respectively reference to relevant case law, and possible application problems associated with some of the cases. The public prosecutor therefore does not intervene in the proceedings in relation to a party.

CONCLUSION

The exercise of non-criminal competence by the public prosecutors can be regarded as a positive element, primarily due to the short-term experience in democratic institutions and the persistence of negative remnants of the former totalitarian regime. Despite the formal establishment of democratic institutions (Horváth, p. 13), particularly in post-communist countries there is still a need for existence of an authority to supervise the legality of public institution's practices and at the same time to defend the public interest and the rights of those who are unable to fully defend their rights. It should be noted that the exercise of non-criminal competence of public prosecution must have its limits and it should not interfere in such things, which are not of public interest. The scope of non-criminal competence should not be defined too broadly and it must respond particularly to those cases in which the interference of state organ is necessary in the all-society interest. Public prosecutors must not act in a way that would give rise to groundless distortions of personal autonomy of private parties to the dispute. The legislation must define the powers of public prosecutors exhaustively and they must not be conceived in a way that allows public prosecutors to interfere unreasonably in the wide range of social relations, as it was in the socialist model of public prosecution.

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