

BYSTRÍK ŠRAMEL¹

Public Prosecution Service in Slovakia and in the Czech Republic: Common Roots, Different Paths (A Comparative Legal Analysis)²

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Abstract

Public prosecution service has an irreplaceable place in the system of state authorities. However, the years of authoritarian regimes transformed independent public prosecution authorities existing on the territory of Slovakia and the Czech Republic into authorities protecting primarily the regime and persecuting all persons who were non-compliant with this regime. It was not until the fall of Communism in 1989 that a change came – a return to the original mission of public prosecution service (the independent protection of law). However, after the division of the Czechoslovakia in 1993 opinion plurality and the lack of a clear opinion on the nature of the public prosecution service resulted in the creation of two relatively different models – the model of *prokuratúra* in Slovakia and the model of *státní zastupitelství* in the Czech Republic. This is the reason why the author of this paper deals with the constitutional status of public prosecution service in the Czech Republic and Slovakia. He analyses public prosecution service as a constitutional institution in general and then by comparison he focuses on constitutional regulation of the Slovak and Czech public prosecution service. The final parts contain brief evaluation of the current legal status and some possible considerations *de constitutione ferenda*.

Keywords: public prosecution service, constitution, independence, Slovakia, Czech Republic, legal system.

¹ Prof. Bystrík Šramel – Faculty of Social Sciences University of Ss. Cyril and Methodius in Trnava (Slovakia); e-mail: bystrik.sramel@ucm.sk; ORCID: 0000-0001-9061-6201.

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BYSTRÍK ŠRAMEL

Prokuratura na Słowacji i w Czechach: wspólne korzenie, różne ścieżki (porównawcza analiza prawna)³

Streszczenie

Prokuratura jako instytucja prawna zajmuje niezastąpione miejsce w systemie organów państwowych. Co do zasady prokuratury reprezentują interes publiczny w postępowaniu sądowym, w którym mają pełny status procesowy strony. Jednak lata autorytarnych reżimów, czy to nazizmu, czy komunizmu, przekształciły niezależne organy prokuratury istniejące na terenie Słowacji i Czech w organy chroniące przede wszystkim reżim i prześladujące wszystkie osoby nieprzestrzegające zasad tego reżimu. Dopiero po upadku komunizmu w 1989 r. nastąpiła zmiana, a mianowicie powrót do pierwotnej misji prokuratury – samodzielnej ochrony prawa w państwie. Jednak po podziale federacji czechosłowackiej w 1993 r. wielość opinii na temat charakteru prokuratury zaowocowały powstaniem dwóch stosunkowo różnych modeli prokuratury – modelu *prokuratúra* na Słowacji oraz modelu *státní zastupitelství* w Republice Czeskiej. Z tego powodu autor niniejszego opracowania zajmuje się konstytucyjnym statusem prokuratury w Czechach i na Słowacji. Analizuje on prokuraturę jako instytucję konstytucyjną w zakresie ogólnym, a następnie przy pomocy analizy porównawczej skupia się na regulacji konstytucyjnej słowackiej i czeskiej prokuratury. Końcowe części tekstu zawierają krótką ocenę aktualnego stanu prawnego oraz kilka możliwych rozważań *de constitutione ferenda*.

Słowa kluczowe: prokuratura, konstytucja, niepodległość, Słowacja, Czechy, system prawny.

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Introduction: Public Prosecution Service as a Constitutional Institution

Public prosecution service of every democratic state governed by the rule of law carries out tasks which cannot be entrusted to any other state authority. Therefore, it may be noted that public prosecution service carries out in a modern democratic society irreplaceable function, regardless of the form or denomination of its organs. On the present, public prosecution service may be included among the institutions the primary mission of which is to protect the public interest.⁴ This mission makes the public prosecution service to be an extremely relevant authority⁵ which not only in Slovakia but also in the Czech Republic is a constitutional institution (regulated by the Constitution). Although the organisation, competence and status of public prosecution and its organs are contained in several laws (in the field both public law and private law), its basic framework and provisions can be found in both countries at constitutional level. Such a legislative solution of establishing the institution of public prosecution service certainly reflects the fact that public prosecution services

⁴ However, the definition of the term 'public interest' is not entirely clear. Although it is used in Act No. 153/2001 Coll., this Act does not explain it in more detail anywhere. The term public interest is also used in a number of other pieces of Slovak legislation, where the public interest acts either as a justification for interfering with certain rights (e.g. property rights) or as a justification for imposing a sanction. In the area of regulation of the Prosecutor's Office of the Slovak Republic, the term public interest is used as a justification for the need for special protection of certain social values. Despite the above, the vast majority of Slovak laws do not define the content of the term public interest. Such a state is quite natural, as the content of the public interest as a legally vague concept is given by the current state of society's interests existing at a certain time, in a certain place and in a certain space. One of the few existing legal definitions of public interest is the definition of public interest given in Constitutional Act No. 357/2004 Coll. on the protection of the public interest in the performance of the functions of public officials, which in Article 3(2) states that 'the public interest is such an interest that brings property benefit or other benefit to all citizens or many citizens.' Although it is a definition of public interest only for the purposes of the Constitutional Act that does not reflect direct and specific requirements of the Slovak prosecutor's office this definition is an important rule of interpretation for the entire legal order of the Slovak Republic.

⁵ This can be stressed also by the fact the Slovak public prosecution service has prosecutorial monopoly. In some countries, the power to prosecute the same offenses is granted to public authorities as well as to private individuals or public or private organisations. The law grants the power to prosecute to individuals and organisations independently of the prosecutor's decision. In the Slovak Republic, however, such a possibility is not given to private entities. In the Slovak Republic, private entities have no way to influence the decision-making activities of prosecutors. On the possibility of the public to influence the decision-making activities of other authorities in the Slovak Republic, see: T. Alman, *Possibilities of the Public to Influence Decision-Making of Local Self-Government Bodies*, "Political Science Forum" 2020, 9(2), pp. 53–59.

in both countries are still important institutions that due to their powers cannot be regulated by an ordinary law or even a legislative rule.

On the other hand, it should be noted that the mere fact of the constitutional anchoring of public prosecution service is not always accepted unanimously and uncritically. This fact is often a subject of numerous professional debates and polemics that often raise doubts whether the constitutional anchoring of public prosecution is reasonable or not. These doubts were presented by experts especially after 1989, when Czechoslovakia had been in the process of gradual transformation from a totalitarian state into a democratic state governed by the rule of law. In this connection, several experts had expressed an opinion that public prosecution had no direct constitutional ties and did not need a constitutional regulation.⁶ Thoughts on the deconstitutionalisation of public prosecution service of course have their proponents today. Their arguments are based mainly on two aspects of public prosecution – longstanding legal traditions existing in the national territory and the analysis of established constitutional systems of democratic and legally consistent state.

From the legal and historical perspectives, it can be noted that the incorporation of the institution of public prosecution service through the Constitution in the legal system existing in the Czech Republic and Slovakia does not have a long tradition. Constitutional documents valid and effective on both territories⁷ before the onset of socialism in 1948 did not regulate the question of public prosecution service. Public prosecution is not mentioned even in the Constitutional Act of 9 May 1945 No. 150/1948 Coll.,⁸ which laid the foundations of socialism in all spheres of social life. The Constitution as the basic law of the state with the highest legal force mentioned public prosecution for the first time in 1960, when Constitution of the Czech and Slovak Federative Republic⁹ was adopted. Its task was to codify the establishment of a socialist state.¹⁰ As well as other socialist constitutions, the Constitution of the Czech and Slovak Federative Republic was grounded on a positive theory of ‘democratic centralism’ in which state power is centralised in order to better advance the collective interests of the people.¹¹

⁶ F. Zoulík, *Poznámky k postavení prokuratury*, “Právní praxe” 1993, 41(3), p. 165.

⁷ Act No. 121/1920 Coll. which established the Constitution of the Czechoslovak republic; Constitutional Act No. 185/1939 Coll. – the Constitution of Slovak Republic.

⁸ Known as the Constitution of the Czechoslovak Republic.

⁹ Constitutional Act No. 100/1960 Coll.

¹⁰ T. Gábriš, *The Legacy of Socialist Constitutionalism in Slovakia: The Right of the Slovak Nation to Self-Determination*, “Russian Law Journal” 2021, 9(2), p. 80.

¹¹ S. Belov, W. Partlett, A. Troitskaya, *Socialist Constitutional Legacies*, “Russian Law Journal” 2021, 9(2), p. 20.

Slovak Public Prosecution Service (*Prokuratúra Slovenskej republiky*) and Its Constitutional Status

In the Slovak legal system, the institution of public prosecution service has been incorporated directly by the Constitution No. 460/1992 Coll.¹² In the current Constitution, we can find the basic legal regulation of public prosecution service. However, it should be noted that this document does not regulate the institution of public prosecution service in detail. In Articles 149 to 151,¹³ the Constitution provides only a framework regulation of the competence and organisation of the Slovak Public Prosecution Office.

Slovak Public Prosecution Office is ranked among the control authorities of law protection.¹⁴ Its main objective is the protection of objective law and enforcement of public interest. From the nature of means that are given to public prosecution office in order to achieve this purpose is clear that the public prosecutor's office within its competence performs preventive, repressive, restitution and penal activity.¹⁵ Slovak Public Prosecution Office itself is defined as 'an autonomous hierarchically arranged uniform system of state authorities headed by the Prosecutor General in which public prosecutors operate in the superior-subordinate relationship.'¹⁶ In contrast to the former Act on Public Prosecution from 1996, the Slovak Public Prosecution Office is no longer defined as an autonomous state authority, but as an autonomous system of state authorities that are hierarchically arranged, headed by the Prosecutor General. Such a view is right, because public prosecution service, as well as the judiciary is not just one state authority, but a unit composed of several compounds (single territorial public prosecution offices).

In terms of systematic inclusion in the Constitution it can be concluded that the Slovak Public Prosecution Office does not fall within any of the three components of state power. This stems from the fact that every system of state power bodies has its own regulation in a separate chapter,¹⁷ whereby the regulation of public prosecution service is also in a separate chapter (not in the chapter anchor-

¹² Legal regulation with the highest legal force.

¹³ First section (Public Prosecution of the Slovak Republic) of eighth head (Public Prosecution of the Slovak Republic and the Ombudsman).

¹⁴ J. Svák, *Organizácia a činnosť orgánov ochrany práva*, Bratislava 1995.

¹⁵ J. Ivor et al., *Trestné právo procesné*, Bratislava 2010.

¹⁶ Article 2 of Act No. 153/2001 Coll. on public prosecution *de lege lata*.

¹⁷ Status of bodies of legislative power (the National Council of the Slovak Republic) is regulated by Chapter 5 of the Slovak Constitution, status of bodies of executive power (the President of the Slovak Republic and the Government of the Slovak Republic) is regulated by Chapter 6 of the Slovak Constitution and, finally, status of bodies of judicial power (Constitutional Court of the Slovak Republic and Courts of the Slovak Republic) is regulated by Chapter 7 of the Slovak Constitution.

ing the legislative, executive and judicial organ). Such deliberate allocation of the public prosecution service and its separation from the other components of state power is commented by the explanatory report to the Constitution as follows:

Public prosecution service [...] is the organic element of legal safeguards in a democratic state. The protection of interests of the state and the rights and legally protected interests of natural and legal persons is performed by the activity in the application of accountability and ensuring the correction of unlawfulness. It does not replace bodies of executive or judicial power. In order to accurately define the status and competence of public prosecution, it is desirable that they are defined directly by the Constitution [...]. Given its competence public prosecution service cannot be a part of the courts, nor any of the government bodies. Therefore, the proposal envisages maintaining system of public prosecution authorities headed by the Prosecutor General, which will be appointed by the head of state on the basis of the proposal from the Slovak National Council.

Thus, the Slovak Public Prosecution Office is constitutionally created as an autonomous *sui generis* state authority functioning within the separation of powers. However, it cannot be unreservedly included in any of the three compounds of state power. Public prosecution service has no legislative powers (it does not issue primary legal norms), no judicial powers (it does not act on disputes on behalf of the state) and also no executive powers (it does not have ordering powers and does not supervise the efficiency and the effectiveness of implementation of the decisions). Nevertheless, public prosecution service is an authority, which carries certain features of executive authorities (particularly in the non-criminal field) and also judicial authorities (especially in terms of major decision powers of public prosecutor in the criminal proceedings, where already in the pre-trial phase he may issue a meritorious decision). Beneč notes that the status of public prosecution service in the Slovak legal system is thus similar to that of the status in Portugal, Ireland, Norway, Hungary and Ukraine, where the public prosecutor's office is a separate department performing its tasks independently from the executive and judiciary power.¹⁸ However, public prosecution service through its organisation and competence does not replace organs of executive and judiciary power. As follows from the explanatory report to the Constitution, that was also the reason why the competence of public prosecution service has been defined directly at constitutional level.

¹⁸ Š. Beneč, *Ústavné postavenie prokuratúry*, "Právny obzor" 1995, 78(5), p. 385.

Article 149 of the Constitution only very generally defines competence and mission of the Slovak Public Prosecution Office. Under this article, 'The Prosecutor's Office of the Slovak Republic protects rights and the legally protected interests of natural and legal persons and the state.' This provision reflects the view to the public prosecution service as a universal organ of protection of objective law, which does not act only in the interest of the state, but mainly in the public interest.¹⁹ The Constitution itself therefore does not restrict the competence of public prosecution only to represent the state in criminal proceedings²⁰ and the enforcement of its interests, as it is in the case of public prosecution offices of other states. The Slovak Constitution leaves room for the possibility that public prosecution may perform the role also outside the criminal law field. Čič in this regard states that

Maintaining the competence of the public prosecutor's office in the non-criminal field is an expression of the fact that despite institutionalising of other organs of law protection, such as the establishment of the Constitutional Court, the Supreme Audit Office and administrative judiciary, there is still a large number of legal relationships that the state wants to protect for various reasons.²¹

At the present time the non-criminal competence of Slovak public prosecution service can be divided into two main fields – competence in the field of civil law and competence in the field of public administration.²²

The organisation of public prosecution service is generally defined in Article 150 of the Slovak Constitution. This article states that 'the Public Prosecutor's Office is headed by the Prosecutor General who is appointed and recalled by the President of the Slovak Republic at the proposal of the National Council of the Slovak Republic.' This provision of the Constitution expresses one of the fundamental principles of the organisation of Public Prosecution Office, and that is the principle of centralism, under which the whole system of public prosecution service is exclusively subject to Prosecutor General as the supreme authority. (S)he manages the entire activity of the prosecutor's office, and within that (s)he issues opinions and guidelines

¹⁹ On the term 'public interest', see more: P. Ikrényi, L. Jakubcová, *Ústavný zákon č. 357/2004 Z. z. o ochrane verejného záujmu pri výkone funkcií verejných funkcionárov – Komentár*, Bratislava 2020.

²⁰ Criminal justice is the most important field of competence of Slovak public prosecution service. On Slovak criminal justice and its problems, see more: B. Šramel, J. Machyniak, Guľan D., *Slovak Criminal Justice and the Philosophy of Its Privatization: An Appropriate Solution of problems of Slovak Justice in the 21st Century?*, "Social Sciences: Open Access Journal" 2020, 9(2), p. 1–13.

²¹ M. Čič, *Komentár k Ústave Slovenskej republiky*, Bratislava 2013.

²² On the issue of the non-criminal competence of the Slovak public prosecution service, see: B. Šramel, *Netrestná pôsobnosť prokuratúry SR – nutnosť alebo prežitok?*, "Justičná revue" 2012, 64(9), p. 959.

obligatory for all public prosecutors. As well as the constitutional definition of the competence of the Public Prosecution Office, the definition of the organisation is very brief. Other principles concerning the organisation of Public Prosecution Office (e.g. the principle of uniformity of public prosecution, the principle of hierarchical subordination, the principle of monocratic management, the principle of self-government) are expressed only at the legal level. In this sense, therefore, not the Constitution, but a special Act No. 153/2001 Coll. on public prosecution establishes the following system of state authorities forming the system of the Slovak Public Prosecution Office: the Prosecutor General's Office (the central government authority and the highest public prosecution authority superior to other public prosecution authorities), regional public prosecutor's offices (8; public prosecution authorities superior to district public prosecution offices within their territorial jurisdiction) and finally district public prosecutor's offices (45; the lowest level in the system of prosecution). It should be noted that the organisational structure of the public prosecution service corresponds to the organisational structure of the Slovak courts and not administrative and territorial division of the country at district level. It follows that the number of district and regional public prosecution offices depends on the number of district and regional courts, whereby their seats and territorial districts coincide with seats and territories of the competent courts.

Drgonec in his commentary to the Constitution comes to the conclusion that the Constitution establishes public prosecution service in the special constitutional form. He states that constitutional norms have the nature of *bianco* authorisation to regulate the competence and all other important issues of constitutional organ in an ordinary act. This situation, according to him, is the result of disputes about the competence and purpose of the establishment of public prosecution service in the state governed by the rule of law, particularly concerning the possible transformation of *prokuratúra* into *štátne zastupiteľstvo* and also concerning the maintenance of competence in the non-criminal field. At the same time, he adds that the ignorance of unequivocal answers at the time of the original text of the Constitution in the early 1990s led to a political agreement on the framework regulation of Chapter 8, and therefore he is convinced that this agreement cannot replace constitutional regulation forever.²³ With that view I strongly identify, as the extremely brief constitutional regulation of an important institution, such as public prosecution service undoubtedly is, cannot be considered satisfactory. It raises multiple, not just theoretical questions, that ultimately have an impact on a practical level.

²³ J. Drgonec, *Ústava Slovenskej republiky – Komentár*, Šamorín 2012.

Czech Public Prosecution Service (*Státní zastupitelství*) and Its Constitutional Status

The Czech legal system incorporated the institution of public prosecution service (*státní zastupitelství*) also through the legislation of highest legal force, the Constitution of the Czech Republic No. 1/1993 Coll. Similar to the Slovak Public Prosecutor's Office, the Czech Public Prosecutor's Office is not defined in detail at constitutional level. The Czech Constitution contains only very brief outline provisions relating to the institution of public prosecution service. It can be noted that the provisions of the Czech constitutional regulation of public prosecution service are even much shorter than those of the Slovak Constitution, as in Article 80, sections 1 and 2 of Chapter 3 (Executive Power), the legislator refers only to the competence of public prosecution service. In comparison with the Slovak institution of public prosecution service the Czech Constitution contains no mention of the organisation of public prosecution service.

The Czech Public Prosecutor's Office as one of the public authorities is not, like the Slovak Public Prosecutor's Office, defined at the constitutional level, but at the statutory level. Article 1(1) of Act No. 283/1993 Coll. on public prosecution service in this regard states that 'public prosecution service is the system of state offices designated for representation of the state in protecting the public interest in matters entrusted by law to the competence of public prosecution service.' In a similar manner, the Czech public prosecution service is defined by legal science, which states that public prosecution service is the 'organ, which in the exercise of its activity represents public interest, especially the interest of the state.'²⁴ This definition implies that public prosecution service in the Czech Republic is not conceived solely as an organ representing the interests of the state, but as an organ representing wider interest (public interest). In connection with the constitutional anchoring of the basic competence of public prosecution service it can be deduced that the public prosecutor represents the state as the statutory undertaker primary in the field of public law, and not as a private law institution. The representation of private interests is not a fundamental task of the Czech public prosecution. Needless to say, the representation of private interests is not completely excluded from its competence because special acts may exceptionally confer to public prosecution a right to protect private interests of individuals. Even in this case the execution of this task must have the nature of the all-society dimension. This may also include for example cases in which the public prosecutor is entitled to bring paternity action according to the Family Act.

²⁴ K. Klíma. et al., *Komentář k Ústavě a Listině*, Plzeň 2005.

Unlike the Slovak Public Prosecutor's Office, which is not included in any of the three components of state power, the situation of the Czech Public Prosecutor's Office is completely different. From the perspective of a systematic classification of the Czech Constitution, the Czech legislator explicitly constitutes public prosecution service as a part of the executive power, which results from the fact that public prosecution service is directly anchored in the chapter concerning the issues of executive power. Taking into account the formal division of the Constitution and the individual chapters, it should be noted that public prosecution service does not have a special or autonomous status within the executive power. Unlike other constitutional institutions, e.g. the President of the Republic, the issues relating to public prosecution service are not regulated separately, but together with the issue of status of government. From the above mentioned it can be concluded that the Czech public prosecution service is not only part of the executive power, but also has a certain relationship to the government. However, this relationship is not defined in the Czech Constitution.

In connection with the mentioned facts Czech legal science indicates that the anchoring of public prosecution service in the chapter regulating executive power quite essentially adumbrates the fact that public prosecution service is subordinate to the executive power in the field of personnel, organisational and material support of its activity.²⁵ The fact is, however, subject to criticism by many legal experts. Legislation anchoring the ties of public prosecution service with the executive power poses according to experts a *de facto* and *de jure* return to an outdated system doctrine of the nineteenth century, the application of which, especially in the period of social changes in society and the increase of crime (organised crime, corruption etc.) is no reason.²⁶ The organ managing the public prosecution is therefore currently the Ministry of Justice of the Czech Republic, which in terms of historical context can be considered a return to the concept of public prosecution service of the First Republic and the post-war years.

The fact that the Czech Public Prosecutor's Office does not have its own chapter in the Constitution or its own part in the Constitution implies that the Czech legislator did not grant to public prosecution service the same status as the highest constitutional bodies. Its status and importance in the system of state organs is therefore not identical to status and meaning of other constitutional organs, e.g. the president or parliament. Despite this, however, it should be noted that although the Public Prosecutor's Office is systematically included in Chapter 3 regulating

²⁵ K. Schelle et al., *Státní zastupitelství*, Praha 2002.

²⁶ J. Fenyk, *Veřejná žaloba. Díl první: Historie, současnost a možný vývoj veřejné žaloby*, Praha 2001. On corruption, see also: M. Kantorová, *Vývoj právní úpravy trestných činů korupce v Slovenskej republike. Metamorfózy práva ve střední Evropě*, Plzeň 2018.

the executive power, the Czech legal theory usually does not consider public prosecution service to be an organ of executive power, but like in Slovakia, *sui generis* authority. The reason is that the Public Prosecutor's Office significantly differs from other bodies of executive power (respectively, administrative bodies) – its activities, its powers and the manner of execution of powers are different.²⁷ At the same time, it should be noted that the Public Prosecutor's Office as a part of the executive power carries the same features as classic bodies of executive power. This is particularly the manner of its construction. The Public Prosecutor's Office is primarily built on the principles of construction of administrative authorities – the principle of the superiority or inferiority. These principles belong to the traditional principles that unlike the construction of judicial authorities enable the superior organ to interfere with the activities of its subordinate bodies, to instruct them or to withdraw them from a case.

Basic (and *de facto* the only) provision regarding the specific competence of the Czech Public Prosecutor's Office can be found in Article 80(1) of the Czech Constitution, which states that 'public prosecutors shall represent public prosecution in criminal proceedings'. This is the provision that reserves for public prosecution service the competence in the field of public law (in the field of criminal proceedings), directly in the legislation of the highest legal force. Thus, we can see that the Czech Constitution expressly defines and protects the competence of public prosecution service only in the field of criminal law. The other kind of competence (in the non-criminal field) is not mentioned, but this does not necessarily mean that it is refused. The Czech legislator leaves room for other duties of public prosecution service, such as those in criminal proceedings. The already mentioned provision of Article 80 also states that public prosecution service 'shall also perform other duties if the law provides so.' It is this provision that allows public prosecution service through an ordinary act to perform other duties, also in the non-criminal field. It should be emphasised that broadening the scope of competence of public prosecution service is possible only and exclusively through an ordinary act of parliament, not a legislative rule such as government regulation or ordinance of the Ministry.

Article 80(1) of the Czech Constitution does not directly define other fields of competence of public prosecution service, such as the competence in the criminal proceedings. At the same time this provision creates conditions for execution of other competence of public prosecution service. This provision contains constitutional authorisation allowing conferring powers also in the non-criminal field. At the present time, the non-criminal competence of the Czech public prosecution can be

²⁷ K. Klíma et al., *op. cit.*, p. 376.

divided into three basic areas. The first area includes the participation of public prosecutor in the judicial proceeding. In this field public prosecutor has not only the right to institute proceedings but also to join proceedings already instituted. The second area of the non-criminal competence includes the exercise of supervision in places of custody, imprisonment, security detention and institutional protective re-education in school facilities. Finally, the third area of the Czech non-criminal competence of public prosecution includes the exercise of motioning rights in the position of public authority, *in concreto*, in four cases – motion for abolition of company with liquidation, motion for abolition of the cooperative with liquidation, motion for abolition of non-profitable organisation and, finally, motion for renewal of liquidation.

As was indicated, the Czech wording of the Constitution does not contain any provisions concerning the organisation or the construction of public prosecution service. The Constitution defines neither the system of public prosecution service, nor the issue of management or governing of public prosecution service. Article 80(2) simply states that ‘the status and competence of Public Prosecution Office shall be defined by law.’ It depends therefore solely from the statutory regulation how the principles of construction and organisation of public prosecution service will be constituted. In this sense, the law may, for instance, provide that Public Prosecution office shall be organised either as a single centralised body with territorial jurisdiction for the entire state or as a decentralised system of bodies responsible for territory defined by law.²⁸

It should be noted that the lack of expression of at least basic organisational principles of public prosecution service in the current European constitutional texts is an exception rather than the rule. Although the range of the constitutional regulation of public prosecution is not usually very broad in the countries of ‘continental Europe’, it is usually possible to find at least some basic constitutional provisions concerning the way of the management or governing of public prosecution and of appointing the Prosecutor General and other public prosecutors.²⁹

²⁸ On detail, see: M. Tomeš, *Ústavní postavení státního zastupitelství – zamyšlení nad základními principy jeho činnosti*, “Státní zastupitelství” 2008, 6(11–12), p. 87.

²⁹ At the same time, it can be noted that the trend of ensuring the independence of public prosecution services from another branch of state power can also be observed from the latest projects implemented on the territory of the European Union. We can mention in particular the project of the so-called European Public Prosecutor whose external independence and its guarantees are directly defined in Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office. On this issue, see: M. Deset, L. Klimek, *What Do We Need to Resolve After Establishing the European Public Prosecutor’s Office in the Slovak Republic?*, “Slovak Journal of Political Sciences” 2021, 21(1), pp. 79–94.

The organisation of the Czech public prosecution is therefore at present anchored solely on the statutory (not constitutional) level by Act No. 283/1993 Coll. on the Public Prosecutor's Office. In Article 6, this act introduces four-level system of public prosecution service consisted of the Supreme Public Prosecutor's Office (Brno), the High Public Prosecutor's Offices (2: Prague, Olomouc), the Regional Public Prosecutor's Offices (8: 2x Prague, České Budějovice, Pilsen, Ústí nad Labem, Hradec Králové, Brno, Ostrava) and the District Public Prosecutor's Offices (86). It should be noted that the relations between the various levels of public prosecution service are significantly affected by the institution of supervision, the powers of the Supreme Public Prosecutor's Office relating to the entire system of public prosecution as well as the powers of the Minister of Justice superior to public prosecution.³⁰ These powers of Minister of Justice cannot be understood as a form of superiority towards public prosecution service in terms of its competence, but only in terms of matters concerning the administration, notably budget administration. It should be emphasised that, although the organisation of public prosecution service is not directly anchored in the Constitution, it reflects the organisation of the general courts, which is anchored in the constitution. The legislator has chosen such an organisational arrangement of public prosecution service certainly because of the logical connections of the competence of public prosecution service to the competence of general courts. However, the absence of the constitutional anchorage of the organisation of public prosecution service causes that such an organisational arrangement is not a matter of course and can be changed at any time, for instance, to the three-level system of public prosecution service.

Article 80(2) of the Czech Constitution therefore entrusts the special act with the specific legal regulation of the status of Czech public prosecution service in the system of public authorities. This act is the above-mentioned Act no. 283/1993 Coll. on the Public Prosecutor's Office, which came into force on 1 January 1994 and which regulates the status, competence, internal relations, organisation and administration of the public prosecution service. In addition, it also regulates the status of public prosecutors as persons through whom public prosecution operates, legal status of prosecutor's candidates and competence of the Ministry of Justice. This provision is a de facto implementation of the provision of Article 2(3) of the Constitution, under which the state power can be used only in cases, within the limits and in the manner provided by law. As can be seen, in contrast to the Slovak public prosecution, the organisational, as well as the status issues relating to public prosecution service are regulated in one act only. The Czech legislator has not

³⁰ K. Šabata, *Prokuratura nebo státní zastupitelství? (stručné srovnání státního zastupitelství v České republice a prokuratury ve Slovenské republice)*, "Státní zastupitelství" 2008, 6(11-12), p. 35.

entrusted these issues with a number of specific acts, but the regulation is contained in a single normative act only. In view of the complexity of law making, this practice may be considered adequate.³¹

The provisions of sections 1 and 2 of Article 80 of the Czech Constitution thus indicate, that the issues of competence and organisation may be, in principle, at any time and in any case modified by an ordinary act adopted by an absolute majority of votes. It is necessary to emphasise that this act must always respect the principles of public prosecution anchored in the Constitution of the Czech Republic. As the constitutional text is extremely short, the ruling majority is able to change and intervene in issues relating to the competence and organisation of public prosecution arbitrarily. The only exception is a constitutionally established competence of public prosecution in criminal matters and integration of public prosecution in the executive power. These two questions regarding the Czech public prosecution can be changed by a constitutional act only, the adoption of which needs a much more complicated procedure than in the case of an ordinary act.

Conclusions (*Lex Ferenda* Proposals)

Following the comparison of the Czech and Slovak constitutional regulation of public prosecution service, it can be concluded that the Czech Constitution provides higher standards of protection of competence of public prosecution service as the Slovak Constitution. Unlike the very general constitutional regulation of the competence of Slovak public prosecution service ('The Prosecutor's Office of the Slovak Republic protects the rights and the legally protected interests of natural and legal persons and the state.'), the Czech constitution directly anchors the competence of public prosecution service in criminal proceedings ('public prosecutors shall represent public prosecution in criminal proceedings'). Although the remaining part of the competence of Czech public prosecution service may be changed by an ordinary act, according to the requirements of the ruling majority, interference in the criminal law competence is possible only after conducting a rather demanding constitutional procedure.³² In generally, this situation can be evaluated positively.

³¹ However, it should be noted that partial issues of public prosecution service in the Czech Republic are regulated not only in Act No. 283/1993 Coll. on the Public Prosecutor's Office. Besides this Act, mainly the issues of its non-criminal competence are contained also in a number of other acts.

³² In the Czech Republic, the adoption of a constitutional act is possible only by a qualified three-fifths majority of all deputies and senators present.

In Slovakia, the specific competence of public prosecution service, including in criminal law field, is anchored on the statutory level only – in Act No. 153/2001 Coll. on Public Prosecution. This may be not only in the theoretical perspective a source of various legislative problems, but in extreme cases it may contribute also to the disablement of public prosecution service in Slovakia.

On the other hand, it should be noted that the analysis of constitutional regulation of public prosecution service in the Czech Republic and Slovakia also showed that the Slovak constitutional regulation of the organisation of public prosecution service provides a slightly higher level of protection of cardinal organisational principles of public prosecution service. Although Slovak regulation is not also quite satisfactory, the anchoring of one of the principles of its organisation (principle of centralism) directly at constitutional level provides some guarantee of stability of the construction of public prosecution. In the Czech Republic, all guiding principles of the organisation of public prosecution are anchored solely on a statutory level. Although, on the one hand, this state can be under certain conditions advantageous (the achievement of desired state is in the case of statutory regulation certainly easier), on the other hand, there may be a case of abuse of this state by the ruling majority. The absence of some fundamental definitions of guiding principles of the organisation and competence of public prosecution service directly at constitutional level may also be the cause of a number of other problems.

In this connection, reference may be made primarily on the problems that have arisen in recent years in Slovakia in relation to the issues of constitutional regulation of public prosecution. One of the persistent problems in Slovakia is the issue of independence of public prosecution and its (un)defining at constitutional level. Unlike other organs *sui generis* (ombudsman, the Supreme Audit Office) that are expressly anchored as independent bodies, legislator has not conferred an attribute of independence to public prosecution. Even legal definition of public prosecution contained in § 2 of Act No. 153/2001 Coll. on Public Prosecution is not familiar with the term of independence. The Act confers to public prosecution only an attribute of autonomy.

Independence of the Slovak public prosecution service is therefore not currently formally anchored at constitutional level as well as in any other act. Some efforts to confer an attribute of independence to public prosecution service had occurred a few years after the establishment of the independent Slovak Republic, in the adopted Act No. 314/1996 Coll. on Public Prosecution, in which the Public Prosecutor's Office had been defined as an 'autonomous and independent state authority that protects the rights and legally protected interests of natural persons, legal entities and the state.' However, on a proposal by the President the Constitutional Court expressed in his finding PL. ÚS 17/96 the inconsistency of the aforementioned

provision of the Act on Public Prosecution with the Constitution (provision was formally conferring an attribute of independence to public prosecution). The reason why the Constitutional Court thus ruled resulted from the fact that Article 149 of the Constitution contains no words about the independence of public prosecution service. The Constitution directly anchors independence of other bodies such as courts or the Supreme Audit Office, but public prosecution is not directly marked with an attribute of independence.³³ Since the Act on Public Prosecution verbally and formally declared the independence of public prosecution service, the granting of this attribute by an ordinary act was inconsistent with the Constitution. Therefore, it should be noted that legal system of the Slovak Republic, which anchors public prosecution service directly at the constitutional level and does not subordinate this institution to the executive power, the Constitution directly should contain the regulation of its external independence. A part of such regulation should also include the above-mentioned constitutional guarantees ensuring its external independence.

The question of sufficient independence of public prosecution service, specifically its constitutional anchoring is also important in the case of the Czech Public Prosecutor's Office (if not even more important). The inclusion of the Czech public prosecution service in the executive power does not provide sufficient guarantees of independence, more to the contrary. It is necessary to realise that the Czech Public Prosecutor's Office is not a typical executive body, which results mainly from the nature of the object of its activity. The Public Prosecutor's Office as a state body that is entitled to interfere even with the fundamental human rights³⁴ and freedoms should therefore operate independently from the executive power. In an environment that allows for political influence over the operation of public prosecution service, the protection of public interest cannot be successfully and adequately ensured. Individual public prosecutors may be the experts or professionals, but in the case of periodic political changes occurring in the executive power is this certainly important qualification condition considerably relegated to the background. The formal inclusion of public prosecution service in the executive power and its ties with the government in fact reduces conditions for the proper performance of the functions and tasks of public prosecution. The starting point seems to be an adoption of a constitutional act which would give rise to the elimination of ties of public prosecution service to the executive power. The change of the systematic inclusion of public prosecution service in the constitutional wording would break

³³ For details, see: J. Čentěš, *Prokuratúra v Slovenskej republike – ústavné limity a pôsobnosť v trestnej oblasti, "Státní zastupitelství"* 2008, 6(11–12), p. 19.

³⁴ On details, see R. Funta, *Základné práva v EÚ. Európa a Európske Právo*, Bratislava 2016.

the links between the public prosecution service and the executive power and provide space for the autonomous exercise of its functions.

However, if there is not enough political will to change the current constitutional inclusion of public prosecution service, I deem it appropriate that at least the external independence of public prosecution service from the Ministry of Justice of the Czech Republic be strengthened. This step should also be hand in hand accompanied by a strengthening of the responsibility of public prosecution service for its activities. At the present time, the government (the Ministry of Justice) bears political responsibility for the unlawful act of public prosecution service. However, this fact inevitably leads to the loss of individual responsibility of a particular person for his or her activities and, consequently, also to the threat of law-breaking. It is therefore necessary to strengthen responsibility for the activities of not only the Public Prosecutor's Office as a whole but also of individuals (single public prosecutors) who are decision-makers. Against this background, it would be appropriate to extend the present level of constitutional ties of public prosecution service, which currently include only ties to the Ministry of Justice of the Czech Republic. A good step seems to be the introduction of some form of responsibility of public prosecution service for its activities to the legislative body – the Parliament. Strengthening of responsibility relations is necessary mainly because of the fact that public prosecution service also holds significant powers to interfere with the fundamental human rights and freedoms. In addition, as in the case of all other public bodies, the public prosecution service must also be controlled. One form of control in conditions of parliamentary democracy is public control exercised by representatives of the people as the source of state power – through parliamentary interpellation.

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