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Changes in the Position of the Public Prosecutor's Office in the Czech Republic

Since the transformation of the Prosecution into the Public Prosecutor's Office in Bohemia, Moravia and Silesia (Czech Republic), it has been discussed whether the current model is correct and what both the internal relations between the individual levels of the Public Prosecutor's Office hierarchy and the external relations of the Public Prosecutor's Office as a system with other supreme administrative bodies should be like. Supporters of various models can find foreign examples of these models because the patterns of functioning of the Public Prosecutor's Offices in various European countries are different.

Basically, it is possible to specify several prototypical countries and rank them starting with the one where the Public Prosecutor's Office has the closest connection to the Ministry of Justice and ending with a system characterized by a total separation of these two bodies:

1. *Poland* – Public prosecution is not mentioned in the Polish Constitution at all. The Law on Public Prosecution was changed in the year 2010 and the separated function of the Prosecutor General was established.¹ Prosecutor General is appointed for six years by the President of the republic, the proposal comes from both the Prosecution Land Council and the Justice Land Council. The appointment is not a subject to contrasignation.² The Prosecutor General cannot be appointed repeatedly. Both Land Prosecutor for Civil Prosecution who is appointed by the Prime Minister on the proposal of the Prosecutor General and the Supreme Military Prosecutor are subordinated to the Prosecutor General.
In the period 1990–2010 the Prosecution was subordinated to the Ministry of Justice and the Minister performed the function of the Prosecutor General at the same time.³ This American model was applied also during the Second Polish Republic 1919–1939, when the Minister of Justice performed the function of the Prosecutor General at the same time.
2. *Ireland* – the Supreme Prosecutor is not personally linked to the Government. The Supreme Prosecutor is not a member of the Government. However, he or she is defined as the Government's adviser. He or she is appointed by the President on the proposal of the Prime Minister and is obliged to resign on the Prime Minister's

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¹ On 31 March 2010 Andrzej Seremet took the office of the Prosecutor General.

² It is a controversial matter because the decisions of the President of the republic are subject to contrasignation on the basis of a common law. A change of the Constitution is being considered—it should be directly mentioned in the Constitution that the President of the republic appoints the Prosecutor General without the need of the contrasignation of the Prime Minister.

³ Kudrna, J.–Banaszkiewicz, B.: Postavení prokuratury v právním řádu Polské republiky (Position of the Public Prosecutors's Office in the Polish Legal System). *Státní zastupitelství*, (2008) 11–12.

request. If he or she does not step down, the President recalls him on the proposal of the Prime Minister.⁴

3. *Austria* – the Public Prosecutor's Office is a part of the Ministry of Justice department. There is a Supreme Public Prosecutor's Office in Austria with the Supreme Prosecutor at its head. However, the Supreme Prosecutor's Office operates only within the framework of the Supreme Court and is not a part of the common hierarchical system together with the lower High Land Prosecutor's Offices, which are directly subordinated—as well as the Supreme Prosecutor's Office—to the Ministry of Justice. The Minister is superior both in terms of administration and in terms of competence. This model had been applied in our country since the middle of the 19th century until 1952. The Public Prosecution has been ranked to the judiciary since 2008⁵ by the Amendment to the Constitution. Nevertheless, the administration of the public prosecution has not changed.
4. *Czech Republic (Bohemia, Moravia and Silesia)* – there is a system of the Public Prosecutor's Office with the Supreme Prosecutor at its head who is appointed by the Government. Relations of superiority and subordination exist between the hierarchical levels, particularly between two immediately subsequent levels and with respect to superior levels in the areas specified by law. The whole system is a part of the Ministry of Justice department, while the Ministry is not superior to the Public Prosecutor's Office in terms of competence but it is superior in the matters of administration, especially budgetary administration.
5. *Slovakia* – the Prosecution is an independent system of administrative bodies with the Prosecutor General at its head who is appointed by the President on the proposal of the Parliament. The Prosecution has a separate chapter of the state budget. This model had been applied in Bohemia, Moravia and Silesia since 1953 until 1993.
6. *Hungary* – the Prosecution is an independent system of administrative bodies and it is not subordinate to the Government, as in Slovakia. However, the Constitution provides for the accountability of the Prosecutor General to the Parliament, by which he or she is also elected.⁶
7. *France, Italy* – the Public Prosecutor's Office is a part of the judicial authority.

It is necessary to emphasize that, from the perspective of the current understanding of a material liberal democratic state, a good administration of public matters, which also concerns the Public Prosecution, is determined by the political regime of the state rather than by the legal characteristics of the individual bodies of public authority. It cannot be denied that the Public Prosecution participated on the commission of judicial crimes in our

⁴ Art. 30 of the Constitution of Ireland. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 1st ed., Praha, 1997, 170.

⁵ Judiciary itself is ranked as Part B together with Part A (Administration) to the Catch III of the Constitution which is called Executive Power. Art. 90a of the Constitution of the Republic of Austria from the 10. 11. 1920 in the statutory text of the Constitutional Law No. 2/2008 BGBl.

⁶ Art. 52 para. 2 of the Constitution of the Republic of Hungary of 1949. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 2nd ed., Praha, 2005, 168.; Halasz, I.: Postavenie generálnej prokuratúry v maďarskom ústavnom systéme po roku 1989 (Position of the General Prosecutor in Hungarian Legal System after 1989). *Státní zastupitelství*, (2008) 11–12.

country in the period between 1948 and 1952, while its legal definition originated in the relatively liberal and legally consistent Austrian state of second half of the 19th century and continued to be in force in the democratic first Czechoslovak Republic (1918–1938). On the contrary, the Public Prosecution established according to the Soviet model by the statutes adopted during the period of the worst totality in 1952 managed to function in an organizationally unchanged form after the end of totality within the framework of the democratic state in Bohemia, Moravia and Silesia until 1993 and continues to function in Slovakia or Hungary until today. The outcome of the activity of a state administration body, including the Public Prosecution, is not primarily determined by its legal and organizational regulation but instead by the essence of the regime of the State; whether it is a democracy, totality, dictatorship or even despotism.

However, if we think about possible changes in the legal regulation of the position of the Public Prosecutor's Office in Bohemia, Moravia and Silesia, we can identify three basic areas of change: one of them is formal–constitutional regulation, and two of them are budgetary and personal administration.

Constitutional Regulation

The present constitutional regulation in the Czech Republic is very brief and is limited to one article within the chapter dealing with the executive power in the section regulating the Government.⁷ The Constitution provides—without a possibility of the legislator to change it—that the Public Prosecutor's Office:

1. is a part of the executive power and has to have a relationship with the government. However, this relationship is not further specified.
2. represents the Public Prosecution before the criminal courts.

All other areas of regulation are entrusted only to a statute by the Constitution, including the possibility to extend the competence of the Public Prosecutor's Office on non-criminal issues as well, which is actually realized under the current legal regulation.

There is a requirement to extend the constitutional regulation of the Public Prosecution, e.g. according to the Slovakian model. However, briefness of the Constitution can be an advantage for any institution if the Constitution enables the desired situation to be accomplished by an ordinary statute, as in the Czech Republic. Almost all changes of the regulation of the Public Prosecutor's Office can be realized through amendments of statutes without a necessity to amend the Constitution. The Constitution only provides for the criminal competence of the Public Prosecution in criminal proceedings. Although this can seem obvious, for example the Slovak Constitution paradoxically does not provide for such a competence of the Public Prosecution.⁸ The absolutely dominant activity of the Slovak Public Prosecution in criminal proceedings is provided for only by a statute. Theoretically, the law could withdraw the criminal competence of the Slovak Public Prosecution and entrust it to a newly established Public Prosecutor's Office. The Slovak Public Prosecution which is provided for in the Constitution could therefore be deprived of its competence by a statute and be left with a minor competence to protect the rights of the people and the State without any further specification of measures available to realize its authority. It would become another Public Defender of Rights (Ombudsman) as it would protest against unlawful actions without a capability to provide a remedy for the unlawfulness as it would

⁷ Art. 80 of the Constitution of the Bohemia, Moravia and Silesia No. 1/1993 Coll.

⁸ Art. 149 of the Constitution of the Slovak Republic No 460/1992 Coll.

only be left with a limited entitlement of the Slovak Prosecutor General to file a petition to the Constitutional Court in Košice⁹ e.g. regarding the unlawfulness of generally binding regulations of local self-administration.

Briefness and comprehensibility of the legal language are good qualities of the Czech Constitution. If all the so-called reasonable requirements for amendments of the Constitution (referendum, Supreme Audit Office, local self-administration) were summarized, the Constitution would be extended to the enormous size of the Portuguese Constitution.¹⁰ Moreover, enforcing amendments of the Constitution is always very difficult. Not only the qualified three-fifth majority of all Members of the Chamber of Deputies and the present Senators is required, but the Senate also cannot be outvoted and it is moreover not bound by the 30-day period for discussing the proposal as it is with regard to ordinary statutes. An amendment of the Constitution can therefore easily “fall under the table” without being formally dismissed. This can happen if the Senate does not discuss the proposal until the election of Members of the Chamber of Deputies take place. Due to the principle of discontinuity in the legislative process,¹¹ all the draft laws, including constitutional laws, which had not been discussed until the election of the Members of the Chamber of Deputies have taken place, cannot be discussed in the newly elected Chamber of Deputies. This is also the case with the draft laws returned from the Senate or the laws vetoed by the President of the Republic. The veto of the President or the Senate thus becomes absolute.¹²

Also the statistics shows that everyone who proposes a constitutional amendment asks for its non-acceptance. During the term of office of the Chamber of Deputies from 2002 until 2006, eighteen proposals of constitutional laws have been filed while only three of them have been accepted; two concerning the change of borders with Austria and Germany and one concerning the referendum on the accession of the Czech Republic to the European Union.¹³ During the term of office of the Chamber of Deputies from 2006 until 2009, 11 proposals of the constitutional amendments have been filed while none of them has been accepted.¹⁴ This reflects a stability of the Constitution, which is positive. It can be concluded that if it is possible to achieve a certain objective by a statute, it is necessary to do it in this way and not by extending the Constitution. It can be compared to a situation when someone climbs up to the fifth floor while the door is open with the functioning stairs behind it which he or she could use to get to the fifth floor more easily. If we make another comparison with Slovakia concerning the Public Defender of Rights (Ombudsman), whose position is even regulated together with the Prosecution in Slovakia in the common Chapter 8 of the Constitution, we can see that there is no difference in the content of competence between

⁹ Art. 130 para. 1 let e) of the Constitution of the Slovak Republic.

¹⁰ The Constitution of the Bohemia, Moravia and Silesia has 115 articles. The Constitution of the Republic of Portugal of 2nd April 1976 has 298 articles.

¹¹ Sec. 121 para. 1 of the Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies.

¹² Filip, J.: *Vybrané kapitoly ke studiu Ústavního práva* (Selected chapters. Study of the Constitutional Law). 2nd ed., Brno, 2001, 283.

¹³ Prints of the Chamber of Deputies 4th term of office Nos 20, 50, 81, 90, 95, 115, 172, 192, 208, 249, 349, 485, 513, 609, 914, 937, 980, 1130, prints Nos 50, 249, 609 have been accepted.

¹⁴ Prints of the Chamber of Deputies 5th term of office Nos 16, 42, 134, 146, 169, 192, 332, 381, 524, 747 and 795. Also constitutional law about referendum to particular questions has not been accepted—Prints of the Chamber of Deputies Nos 147, 477, 490. Only the constitutional law No. 195/2009 Coll. about shortening of 5th term of office of the Chamber of Deputies has been accepted.

the Slovak Ombudsman, whose position is regulated by the Constitution, and the Ombudsman in the Czech Republic (Bohemia, Moravia and Silesia), whose position is regulated by a statute only. No constitutional amendments are necessary for changes in the position of the Public Prosecutor's Office. The present Constitution allows to establish the Public Prosecutor's Office which is identical with the Minister of Justice as in Poland, but also to establish the Public Prosecutor's Office which is independent of the Government to a great extent as in Slovakia.

Concerning the extent of the constitutional regulation, all constitutions are generally very brief and usually, in contrast to the Czech Constitution, contain provisions on the appointment of the Prosecutor General into office while the appointment of other Public Prosecutors as well as other organizational issues are left to be regulated by statutes.¹⁵ This is the case of the Slovak Constitution which regulates the Public Prosecution together with the Ombudsperson in Chapter 8,¹⁶ but there are only three articles not subdivided into paragraphs which actually deal with the Prosecution. The text of the one article of the Czech Constitution which deals with the Public Prosecutor's Office, which is however subdivided into two paragraphs, is not much shorter. Moreover, the Slovak regulation actually contains only a provision on the appointment of the Prosecutor General by the President. As regards the content of the constitutional regulation, the Slovak Constitution regulates, if something at all, only a small part of the personal administration concerning the appointment of the chief of the Public Prosecution. Concerning the budgetary administration, constitutions do not regulate this issue.

Budgetary Administration

Money makes the world go round but it is not polite to talk about it on solemn occasions. From this point of view, it does not come as a surprise that the constitutions which regulate the basics of the functioning of the State do not mention money very often, with the exception of the state budget procedure. Only a minority of constitutions contains more detailed provisions dealing with financing of the State. Above all, they regulate the relationship between the State and local self-administrative units.¹⁷ Constitutions do not regulate the budgetary administration of the Public Prosecution; its regulation is left to statutes. The Public Prosecution as a system of state organs always draws its resources from the state budget which is passed by the Parliament. It is crucial whether the Prosecution has a separate chapter of the state budget or whether it is included in the chapter of the Ministry of Justice. Whatever the personal administration of the Prosecution is, the budgetary autonomy strengthens the position of the Public Prosecution in all models and its absence weakens it on the contrary.

¹⁵ A sole exception is the Art. 51 Sec. 2 of the Constitution of the Republic of Hungary of 1949 which even establishes the supervision of the Public Prosecutor's Office over the service of a sentence on the constitutional level. See Klokočka, V.–Wagnerová, E.: *ibid.* 168.

¹⁶ Moreover, since the Chapter 8 of the Constitution of Slovak Republic No. 460/1992 Coll. came into force until the establishment of the Public Defender of Rights by the Constitutional Act No. 90/2001 Coll., the whole chapter dealt solely with the Prosecution.

¹⁷ Chapter 10 of the Organic Law of the Federal Republic of Germany of 23 May 1949 which, compared to a standard constitutional regulation, regulates the public finances in great detail, is an exception in this regard. In: Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 1st ed., Praha, 1997, 273–279.

A separate chapter of the state budget for the Public Prosecution allows for a better satisfaction of the needs of the system with regard to a deeper understanding of its problems and prevents the transferring of the saved money outside the system. It actually removes the well-known pressure on spending everything as the savings would otherwise be transferred to satisfy other needs than those of the Public Prosecution. Moreover, a separate chapter of the state budget for the Public Prosecution fulfills the principle of subsidiarity preferred by the European Union¹⁸ which provides that the public authority including the administration shall, if possible, be performed on the level which is concerned. This is usually presented within the framework of local administration¹⁹ but the principle can be applied to the public administration as a whole including the administration of individual government departments.

As the proverb says, let every man praise the bridge he goes over. It is possible that the Public Prosecutor's Office will tend to be more open to the views of the Minister who decides over financing of its needs. This is one of the reasons why it is preferable to introduce an autonomous budgetary administration of the Public Prosecutor's Office through a separate chapter of the state budget. However, administrative autonomy is connected with responsibility for the entrusted financial resources. In that case, the Public Prosecutor's Office would have to perform all the duties of an administrator of a chapter of the state budget and its management would be controlled like the management of other state organs who are administrators of chapters of the state budget, including the supervision of the Supreme Audit Office. The Public Prosecutor's Office would also have to defend its requirements against both the Minister of Finance and the Government when the state budget is being drafted as well as during the subsequent budget procedure in the Parliament. Currently, the Constitutional Court is the only judicial organ which has a separate chapter of the state budget although the number of employees of the Constitutional Court is by far smaller than the number of employees of the system of the Public Prosecutor's Office. The Office of the Public Defender of Rights or the Office for the Protection of Competition, which are also much smaller, have separate budgetary chapters as well because the importance of a certain budgetary autonomy is accented in these areas, too.

When introducing the budgetary autonomy it is either possible to establish a single chapter of the state budget under the administration of the Supreme Prosecutor's Office or to establish three chapters with a separate chapter for the Supreme Prosecutor's Office and two other chapters for the High Prosecutor's Offices, a part of which would be the budgetary

¹⁸ Art. 3b of the Treaty on European Union and Protocol on the Application of the Principles of Subsidiarity and Proportionality as amended by the Treaty of Lisbon. See Novotná, M.: *Princip subsidiarity v právu Evropských společenství* (Principle of Subsidiarity in the EC Law). *Právník*, (1995) 3. and Marcou, G.: *New Tendencies of Local Government Development in Europe*. In: Bennett, R. J.: *Local Government in the New Europe*. London, 1993.

¹⁹ Art. 4 para. 3 of the European Charter of Local Self-Government No. 181/1999 Coll. determines that the administration of public affairs shall be above all entrusted to the administrative bodies which are closest to the citizens while admitting the responsibility of other subject has to correspond with the scope and character of the task as well as with the requirements of effectiveness and economic efficiency. Slovakia has made a reservation to provide for a non-binding effect of this article because of the strong Hungarian minority in the south of Slovakia. See Kadečka, S.: *Svobodná normotvorba obcí 1* (Free legislation of the local communities). *Moderní obec*, (2000) 9, 35. and Kadečka, S.: *Právo obcí a krajů v České republice* (Law of the municipals and districts in the Czech Republic). Praha, 2003, 8–9.

administration of the subordinated Regional and District Prosecutor's Offices. There is a historical analogy as there was a separate administration of the Supreme Prosecutor's Office and the High Land Prosecutor's Offices (one for Bohemia and one for Moravia and Silesia), to which the Regional Prosecutor's Office was subordinated, during the monarchy and Czechoslovakia although the Supreme and High Provincial Prosecutor's Offices did not have separate chapters of the state budget as they were—independently on one another—connected to the budget of the Ministry of Justice. This was repeated, already with separate chapters of the state budget, in the period from 1969 until 1992 when there was a separate administration of the General Prosecutions of the Republics and their subordinated Public Prosecutions which existed in parallel with the Prosecution General of Czechoslovakia.

Personal Administration

A majority of constitutions do not deal with the appointment of lower-level Public Prosecutors and leave this issue to be regulated by ordinary statutes. Prosecutors are appointed to their functions either by the Minister of Justice or by the Prosecutor General. As regards the Prosecutor General, constitutions often contain regulation of his appointment to function. He or she is usually appointed by the Head of State on the proposal of the relevant body. Appointment of the Prosecutor General by the Head of State corresponds to the appointment of other chiefs of supreme bodies in the European countries.²⁰ Such bodies are usually the Government (the Prime Minister), the Parliament or other body. Even though the subject that makes the proposal differs, the rule for appointing the Prosecutor General provides that an agreement of two subjects is required which ensures greater agreement on the appointment of a particular person. Because the process of removing from office is analogical to the process of appointing, unless it is provided for otherwise, it also ensures greater independence of the appointed person on the appointer as an agreement of a minimum of two subjects is required also with regard to dismissal.

As regards the Czech regulation, a change in the appointment of the Supreme Prosecutor is possible. Currently, the Supreme Prosecutor is appointed by the Government on the proposal of the Minister of Justice.²¹ Although these are two subjects as well, they are politically close. A possible change could provide for the appointment of the Supreme Prosecutor by the President on the proposal of the Government. The appointment would be subject to countersignature by the Prime Minister.²² It is clear, even without an explicit regulation, that the proposal within the Government would be made by the Minister of Justice as a chief of the representing—even though not the governing—department of justice. It is unusual for the Czech statutes to provide explicitly that if the government has a certain right to make proposals, it has to do so on the basis of a proposal of a particular Minister. It is a custom that the suggestion regarding the Government's proposal is made by the Minister

²⁰ The Hungarian Prosecutor General, who is appointed by the National Assembly on the proposal of the President, is an exception. Art. 52 Section 1 of the Constitution of the Republic of Hungary of 1949 which even provides for a supervision of the Prosecutor's Office over the service of a sentence on the constitutional level. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 2nd ed., Praha, 2005, 168.

²¹ Sec. 9 of the Public Prosecutor's Office Act, No. 283/1993 Coll.

²² Art. 63 paras 2 and 3 of the Constitution of Bohemia, Moravia and Silesia.

of the department which is concerned, however, it is not explicitly regulated in the statutes.²³ When the law provides that the decision of the President of the Czech Republic is conditioned by the proposal of the Government, there is no provision regarding the Government being bound by the proposal of a particular Minister.

Of course it is possible to involve the Chamber of Deputies into the system of appointing as well. However, the experience shows that the appointment to positions which are appointed by the Chamber of Deputies become subject to bargaining between political parties and a part of a political trade-off. So we will elect you the Supreme Prosecutor if you elect our candidates into the Czech Television Council etc. Moreover, the experience has already shown that the Chamber of Deputies is sometimes not able to elect the successor, as in the case of the President and the Vice-President of the Supreme Audit Office.²⁴ However, even if the Chamber of Deputies was involved in the appointment process, the Government cannot be excluded from it, even though it is only in the position of a proposer, because the Public Prosecutor's Office is subsumed under the Government within the framework of the executive power in the Czech Republic. It is also not possible, under the current model of personal and budgetary administration of the Public Prosecutor's Office by the Ministry of Justice, that the Minister of Justice would not have an opportunity to at least express his or her opinion regarding the appointment of the Supreme Prosecutor. From a long-term perspective, the mutual permanent conflictual relationship between the Minister of Justice and the Supreme Prosecutor, as it was between the Minister Pavel Němec and the Supreme Prosecutor Marie Benešová in the period from 2004 to 2005, is not sustainable. Such a conflict does not lead to a good administration of the Public Prosecutor's Office. The most suitable solution within the framework of the present constitutional regulation is to make a change in the personal administration of the Public Prosecutor's Office so that the Supreme Prosecutor is appointed by the President of the Czech Republic on the proposal of the Government. Two subjects should also be involved into the appointment procedure of other chief Prosecutors. Preferably, they should be from the Public Prosecutor's Office, i.e. the District Prosecutor would be appointed on the proposal of the Regional Prosecutor. The Regional Prosecutor would be appointed by the Supreme Prosecutor on the proposal of the High Prosecutor and the High Prosecutor would be appointed by the Supreme Prosecutor with the consent of the Minister of Justice or by the President of the Czech Republic with the countersignature of the Prime Minister on the proposal of the Supreme Prosecutor. The President of the Czech Republic appoints not only the Presidents of the Supreme Court and the Supreme Administrative Court but also the Presidents of the High Courts²⁵ (in Prague for Bohemia and in Olomouc for Moravia and Silesia).

²³ For example the President appoints the Chief of the General Staff on the proposal of the Government without being explicitly provided, that it is the Minister of Defense, who initiates the proposal in the government; it is a legal custom. Sec. 7 para. 4 of the Armed Forces Act No. 219/1999 Sb.

²⁴ The President, Lubor Voleník, died on 19 June 2003 and his successor, František Dohnal, was appointed by the President only on 4 November 2005 on the proposal of the Chamber of Deputies of 26 October 2005. The Vice-president, Dušan Tešnar, resigned on 10 September 2007 while the Chamber of Deputies elected the candidate on his position, Miloslav Kala, only on 30 October 2008 and he was appointed by President of the Republic on 13 November 2008.

²⁵ Art. 62 let f) of the Constitution of Bohemia, Moravia and Silesia. Sec. 13 para. 2 of the Administrative Justice Code No. 150/2002 Coll. Sec. 103 para. 1 of the Courts of Justice and Judges Act No. 6/2002 Coll.