

**JUDICIAL REFORM:
THE PROSECUTION OFFICE AND
INVESTIGATION AUTHORITIES
IN THE CONTEXT OF EU
MEMBERSHIP**



CENTER FOR
THE STUDY OF
DEMOCRACY

This is the second publication of the Center for the Study of Democracy dedicated to the judicial reform in relation to the place and the role of the prosecution office and the investigation service. It presents the experience of the European Union Member States and the candidate countries as regards the organization and the structure of the prosecution office and the investigating authorities. It contains contributions from representatives of the courts, the prosecution offices and the investigating authorities of Spain, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Hungary and the Czech Republic as well as judges, investigators, representatives of the legislature and the executive and non-governmental organizations in Bulgaria. The publication aims to continue the broad public and expert discussion on the different options to reform the judiciary in Bulgaria, following the successful models implemented in other countries.

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JUDICIAL REFORM – STATE OF PLAY AND OPPORTUNITIES

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Judicial reform, along with corruption and organized crime, continues to be one of the serious challenges to Bulgaria's accession to the European Union (EU). Bulgaria was not included in the fifth wave of enlargement of the EU in 2004 not least because of unsatisfactory progress in these areas.

However, advancing judicial reform is not simply a precondition set from the outside and it should not be considered within the context of future membership only. The consistent introduction of complex reforms is also a serious domestic political challenge to the establishment of rule of law and market economy. The poor efficiency and the slow administration of justice and investigation, the lack of transparency and responsibility have negative effect on the economy, the security of the rights of individuals, the public confidence in the accessibility, objectivity and fairness of the institutions. Criminal prosecution and justice in respect of severe crimes – above all organized crime, economic crime and corruption, in particular political corruption – are not efficient. The need to solve these problems demands the establishment of an active, stable and incorrupt system for administration of justice and law enforcement as a political priority. This is a precondition for the success of reforms in all other spheres – the social sphere, the economy, and governance in general.

At the same time, Bulgaria has undertaken serious foreign policy commitments for reform of the judiciary, ensuing first of all from the negotiations on chapter 24 *Cooperation in the field of justice and home affairs* and the EU Accession Treaty.² The monitoring and evaluation instruments of the European Commission contain a summary of the assessments of the implementation of these commitments and the requirements for full membership of Bulgaria. According to the expert assessments, the implemented reforms only partially meet the requirements, while the reform in the pre-trial phase in Bulgaria should be continued in order to attain compliance with the EU efficiency criteria.³ The findings of the lack of measures for optimization of the structure of the judiciary, for practical improvements in the pre-trial phase, for the transparency and accountability of the prosecution office, are quite clear. The recommendation is to continue the reforms, which should lead to an improvement of the efficiency and the accountability of the judicial system.⁴ The achievement of concrete results in this

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² The negotiations on chapter 24 ended on 29 October 2003, and the Accession Treaty was signed on 25 April 2005.

³ See Report of the First Monitoring Mission (peer review) to Bulgaria after closure of accession negotiations under chapter 24 in the fields of Justice and Home Affairs in Bulgaria, presented in July 2004; 2004 Regular Report of the European Commission on Bulgaria's progress towards accession.

⁴ See 2005 Comprehensive Monitoring Report – Bulgaria, European Commission, 25 October 2005.

and other fields (border control, anti-corruption, and fight against organized crime) will influence the decision on the scheduled accession of Bulgaria on 1 January 2007 or its postponement. At the same time, the assessments and recommendations, made by the EU, should not be automatically accepted merely to fulfill, sometimes just as a formality, another commitment. The implementation must take into account the national context and adjustments should be made where this is needed to attain credible results.

Judicial reform in Bulgaria started in the early 1990s as part of the ongoing process of transition to democracy. Unlike political and economic reforms, reforms in the judiciary were much slower, explained to a certain extent by the conservatism inherent and necessary for any judiciary. The pace and substance of judicial reforms in Bulgaria were also influenced by other aspects of the transition process and by a set of external factors.

First, the official proclamation of the independence of the judiciary in the new Bulgarian Constitution (1991) and the consequent enactment of legislation on the judicial power – the Law on the Judiciary (1994) and the Law on the Supreme Administrative Court (1997), prompted **the political parties to seek indirect channels of influence**, which in the initial years of transition were ensured through **sweeping staff replacements** at all levels – from the rank-and-file to the senior positions. This process is now being repeated, but already at the level of governance of the judiciary – through the tussle for votes on the Supreme Judicial Council (SJC), which is more pronounced in the election of the parliamentary quota. As a body empowered to administer and govern the judiciary, the SJC plays a decisive role in respect of the members of the judiciary – it takes decisions on granting and withdrawal of the status of irremovability, lifting of immunity, imposing of disciplinary penalties. The SJC appoints and dismisses magistrates, including in senior positions, determines and nominates the applicants for the highest positions in the hierarchy of the judiciary – chairs of the Supreme Court of Cassation (SCC), the Supreme Administrative Court (SAC) and the Prosecutor General. The temptations to exert influence, pressure and to make bargains, including political, in the process are quite substantial. These are materialized through mechanisms driven by informal ties, although the judicial and the political “nomenclature” deny that political influence is possible referring to the formal independence of the judiciary.

Second, ensuring political support in parliament and in the government is not sufficient for lobbying on behalf of certain economic interests. In an environment where the rule of law – with some of its basic principles including judicial control over the acts of the executive, settlement of legal disputes in court and equitable access to justice – is increasing, those seeking profit through improper influence on government must also ensure they have “adequate support” within the bodies of the judiciary. This turns into one of the channels for spread of corruption in the three branches of the judiciary – the investigation service, the prosecution office and the courts. The role of the **judiciary** as last instance of control, particularly where the redistribution of national wealth is affected, makes it an intersection **of conflicting political and economic interests and breeds for corruptive pressure**. The surveys among the general public and the businesses in Bulgaria during 1998 – 2004 done through the Corruption Monitoring System of *Coalition 2000*, a Bulgarian public-private anti-corruption initiative, registered traditionally high levels of corruption pressure in the judiciary, despite the relative decrease of

those values in 2004.⁵ The sluggish and inefficient functioning of the judiciary provokes corruption actions even where a party to a court case is convinced of the merits of its case. This is all the more frequent when attempting to ensure impunity for the crimes committed. It is not by chance that the notion of association of individual magistrates and representatives of the criminal world has settled firmly in the public opinion.

Third, the influence of political and economic interests on representatives of the judiciary and the proliferation of corruption practices became possible due to the **lack of mechanisms for accountability and control – both internal and external – of the work of the judiciary**. From the very beginning of the transition process the efforts to overcome the political domination over the court, the investigation and the prosecution, inherited from the communist system of governance, pushed the reforms mostly towards guarantees for their independence. The result turned out to be establishment of a pattern of formally fully independent judiciary, which remained, however, completely without accountability and control, thus vulnerable to informal influences. The lack of clear mechanisms for accountability and control is also one of the reasons why independence is quite often interpreted as untouchability. The most recent surveys and evaluations on the judicial systems in transition countries done by influential international institutions also pointed out that during the 1990s a priority in obtaining donor support has been granted to the efforts to strengthen the independence of and depoliticize the judiciary rather than to the introduction of standards for its accountability, efficiency and free access.⁶ The public opinion and the business in these countries believe their judicial systems are not efficient.⁷

Fourth, little harmonization was ensured between regulatory and judicial reforms. Quite often the speedy enactment of new legislation is carried out without the necessary measures to enhance the implementing capacity of the courts, and in the sphere of criminal law – the capacity of the prosecution and the investigation as well. This trend is usually facilitated by the need to adopt huge volumes of legislation in compliance with the requirements for harmonization with European law within relatively short periods of time. At the same time, the legislative process itself suffers from lack of sufficient transparency, democratic participation and civil control. On the one hand, this has negative effect on the quality of enacted laws, and on the other, it provides conditions for certain private or corporate interests to unduly influence legislation to the detriment of the public interest, and in any case it hinders administration of justice.

Fifth, the persistent lack of political will and consensus on the need for radical judicial reform and its priorities has had an extremely negative effect. Along with that, **the prevailing part of the judiciary reacted skeptically to all attempts to change the status quo**. On the one hand, the lack of control and accountability were defended under the pretext of protecting the constitutional model of the judiciary and the principle of its independence. On the other, as a result of the defense of narrow guild interests, a poorly working model was consolidated.

⁵ See Anti-Corruption Reforms in Bulgaria, Center for the Study of Democracy, Sofia, 2005, pp. 18-22.

⁶ See Judicial System in Transition Economies: Assessing the Past, Looking to the Future, James Anderson, David Bernstein, Cheryl Grey, The World Bank, 2005, pp. XII-XIII, p. 14.

⁷ Ibid. according to data from the World Economic Forum, Global Competitiveness Report 2004.

In fact, it was the constitutional model itself – by placing institutions with various purposes, functions and role in criminal justice (the court, the prosecution and the investigation) within the judiciary – that stood in the way of creating a common platform for reforms, and quite often led to conflicting views and ideas.

Sixth, the issue of **the need for complete judicial reform** with strong emphasis on its anti-corruption aspects was put forth at the end of the 1990s by the **non-governmental sector in Bulgaria** – *Coalition 2000* through its annual Corruption Assessment Reports, the *Judicial Reform Initiative* through the Program for Judicial Reform (2000), the Center for the Study of Democracy – through the Judicial Anti-Corruption Program (2003), etc. The result of these efforts was the beginning of a public-private partnership with the bodies of the judiciary and the executive, mostly in the field of drafting strategic and program documents, but still underdeveloped in respect of the process of their implementation.

Seventh, **international influence** and pressure are highly important for the progress of judicial reform in Bulgaria. Most often they have a favorable effect on home policies and are prerequisites for undertaking any reforms and for their success.⁸

Although external factors may come in different modalities, what they have in common is the concern of the foreign partners and the international organizations for the fate of democratic reforms. **The real danger of export of instability and crime from the emerging to the developed democracies raised** the concern about the effectiveness of criminal justice. Thus, accelerating judicial reform and attaining concrete results became relevant not merely as a requirement within the EU integration process, but also within the more general context of security – regional, European and global.

Alongside its positive effect on the judicial reform, this international dimension also revealed certain downsides. For example, there had been insufficient synchronization and coordination of efforts in support of the reforms, sporadic setting of priorities and short-lived requirements, unrealistic expectations for quick results from the changes, etc. They in turn had negative effect on the systematic nature, the consistency and the long-term prospects of the reform.⁹ Thus, optimizing external influences and support should contribute to the progress of reforms.

When deciding on urgent priorities and the future approach, **several important domestic and international circumstances** that came to being in the last couple of years should be taken into consideration.

One, the Declaration on the Guidelines to Reform the Bulgarian Judicial System, signed by the political parties represented in parliament (April 2003). It officially launched and laid the **foundation of the first constitutional reform**, outlining its major guidelines for the purposes of:

⁸ In recent years the Regular Reports of the European Commission played an important role, as well as the evaluations provided by a number of international organizations and institutions – the Venice Commission, the World Bank, the International Monetary Fund, the American Bar Association – Central European and Eurasian Law Initiative through the Judicial Reform Index for Bulgaria (volume I, 2002; volume II, 2004), the Accession Monitoring Program of the Open Society Institute, the United Nations Development Program (UNDP) – Bulgaria, etc. They provide analyses, criticism and proposals for further development of the judicial reform.

⁹ For details, see Corruption Assessment Report 2003, *Coalition 2000*, Sofia, 2004, pp. 90-91.

- achievement of high administration of justice standards (fairness, speed, efficiency, accessibility and transparency);
- independence, impartiality, competence and responsibility of the magistracy;
- real division and mutual check of powers;
- increasing public confidence in the judiciary.

This declaration is an expression of the agreement between the parties presented in the parliament, to implement constitutional reform on issues of importance for the judiciary, such as enhancement of the mechanisms for coordination and interaction between the prosecution office, the investigation and the executive, changes in the structure and functions of the judiciary, and building up its implementing capacity.

The declaration was not exhaustive of the subject, but it laid the foundation for search of broad-based consensus for achieving these objectives. This potential has remained almost unutilized, but undoubtedly it would be required for the purposes of the forthcoming constitutional and legislative reforms in this field.

Two, the **Constitutional Court has issued several interpretative decisions** on proposed constitutional changes as regards the judiciary. **The principle foundation, established by consensus of the parties represented in parliament, concerning the priorities of the judicial reform, was greatly narrowed** by Decision No. 3/2003 of the Constitutional Court on constitutional case No. 22/2002, which defined the boundaries of the authority of an ordinary National Assembly (ONA) to modify texts of the Constitution, and to differentiate it from the authority of a Grand National Assembly (GNA).

Pursuant to Article 158, paragraph (3) of the Constitution, an ONA may not resolve on the “form of state structure” and the “form of government”, because such competence has been granted exclusively to the GNA. The Constitutional Court assumed unexpectedly broad interpretation of the phrase “*form of state structure or form of government*”, as well as of what is considered a change in these. According to the interpretation the form of state structure is determined by “the territorial integrity and the characteristics of the state as unitary state with local self-government, in which autonomous territorial formations are not allowed”. The form of government, in turn, is determined by its being a parliamentary or presidential republic or a monarchy, as well as by the system of all basic constitutional institutions, established by the GNA, their existence, their place in the relevant branch of power, their structure and mode of formation, and their remit. This is also done with a view of retaining the balance between the institutions in compliance with the basic principles of the state – sovereignty of the people, political pluralism, division of powers, rule of law, and independence of the judiciary.

This interpretation resulted in narrowing the scope of the possible constitutional, and hence legislative, reform in respect of the judiciary. What thus remained feasible was to focus on measures for its institutional strengthening by revising the immunity and irremovability of magistrates and the mandates of administrative managers. The lack of broader consensus between the political parties represented in parliament further narrowed the possibility to undertake

a number of changes which could contribute to the implementation of efficient judicial reform.

With its subsequent Decision No. 8/1 September 2005 on constitutional case No. 7/2005 (issued upon request from the SCC), the Constitutional Court revised to a certain extent its definitive position on structural changes in the judiciary. The five queries for interpretation it received, all dealing with the form of government, focused on whether it would constitute a change in the form of government, if a text in the Constitution would read that: 1. The court is the basic holder of judicial power and it is the sole administrator of state justice; 2. The prosecution office is restructured and its powers within the judiciary are only related to upholding the indictment in court; 3. The investigation service is restructured and the investigators become investigating magistrates; 4. The prosecution office, the investigation service and the Ministry of Interior (MoI) implement the government policy in the fight against crime and their activities are monitored by the National Assembly; 5. The SJC is restructured and the manner of its formation is changed. The decision ruled that changes in the Constitution as referred to in the first four queries “do not constitute changes in the form of government and may be introduced by an ordinary National Assembly, provided they do not disrupt the balance of powers and are in compliance with the basic principles of the current constitutional model of the state – rights of the individual, sovereignty of the people, political pluralism, rule of law, division of powers and independence of the judiciary”. The query under paragraph 5 was discarded as inadmissible.¹⁰

That revision of the previous ruling was rather cautious. The qualifications in the decision allow for different interpretations, including narrowing ones, which could have a long term impact. For example, since there was no interpretation of the basic principles of the constitutional model of the state, they could be vested with different substance. This, however, could have negative consequences, in particular with respect to the division of powers and the independence of the judiciary. Under the pretext of compliance with these principles the necessary reforms could be limited or frustrated. The same applies to the balance of powers, which has been legally and factually disrupted in the Bulgarian model, and so changes, rather than preservation of the status quo, are required. From this point of view it is not possible to assert conclusively that the stance of the Constitutional Court would facilitate and speed up the judicial reform. It is a matter of political will and political responsibility for these decisions to be taken within the legislative branch.

Three, some **moderate amendments to the current Constitution** were adopted.¹¹

The amendments to Chapter 6 of the Constitution, adopted on 24 September 2003, were the first step towards the breaking of the obviously inefficient model and towards overcoming the limitations to serious legislative changes in the field of the judiciary, set by the decisions of the Constitutional Court.

¹⁰ The decision was signed with dissenting opinion by Justice Roumen Yankov. The dissenting opinion substantiated the inadmissibility of the request as a whole. One of the reasons stated was “the fact that there is no request for interpretation of constitutional principles, norms or provisions, but rather a request as to in what terms should the existing structure of the judiciary as stated in the Constitution be changed by an ordinary National Assembly”.

¹¹ For details, see *The Bulgarian Constitutional Reform within the Context of the Accession of the Republic of Bulgaria to the European Union (2003 – 2005)*, Center for the Study of Democracy, Sofia, 2005 (www.csd.bg).

The bill provided for changes in three constitutional provisions on the judiciary – immunity, irremovability of magistrates and mandates for appointment to head administrative position in the judiciary, new wording of Articles 129, 131 and 132 of the Constitution and a transitional provision for settlement of existing cases. The objective of the amendments was to strengthen the guarantees for efficient and impartial administration of justice as a first step in the process of judicial reform.

In their new wording the modified principles of limited (functional) immunity of the magistrates and time-limited terms for administrative managers in the bodies of the judiciary, as well as the corrections to the institute of irremovability, reproduce the structural problems of the judiciary in its current model. They apply to the same extent to its three components – the courts, the prosecution office and the investigation service, disregarding the different status of the judges, the prosecutors and the investigators, ensuing from their different authority and functions in trial, the differences in the degrees of transparency, policies for selection, appointment and career promotion. At the same time, the introduction of these partial changes before other needed reforms in the judiciary and the other branches did not help the obtaining of better balance and coordination of the branches of power.¹²

Thus, in spite of the consensus by which the amendments were adopted, their importance should not be overestimated. **The constitutional debate in the parliament** was narrowed merely to the requirements set by EU accession, but **did not provide the foundation for larger scale changes which are possible within the limits of Decision No.3 of the Constitutional Court. These could be implemented by an ordinary National Assembly** – for example, introduction of mechanisms for accountability of the units and bodies of the judiciary, and the Prosecutor General in particular, introduction of the figure of “independent prosecutor” – an official outside of the prosecution office system, with prosecutorial functions vested in him to investigate corruption crimes, committed by magistrates, etc.

The second phase of the constitutional reform referred mostly to changes ensuing directly from future EU membership, whereas all important issues of the judicial reform, including those of the organization and structure, and the potential convening of a GNA for enactment of changes in the form of government, were not even put to discussion.

At the same time, there are areas where reform – although not directly related to the judiciary – could have still facilitated its work, could have enhanced human rights protection and restriction of the channels for proliferation of corruption in the bodies of the judiciary and other government institutions – for example, the constitutional consolidation of the ombudsman institution (incl.

¹² The term of office principle has actually been introduced by the SJC, elected in December 2003, with members appointed according to the then-existing procedure based on quotas. This procedure, in particular the election of the parliamentary quota by a simple majority, allows for indirect influence of the ruling majority on the appointment of heads of courts, prosecution offices and investigation services, and also the making of decisions of importance for the judiciary. In turn, the representatives of the various bodies of the judiciary, elected within its quota, quite often lobby for the interests of their own institution. All of the above hinders the formulation of a uniform and objective stance of the Council members. The appointments of administrative managers more often than not are the result of unscrupulous compromise and are made in the absence of required mandatory criteria and alternative candidates, especially in prosecution offices and investigation services.

election by qualified majority, the right to refer to the Constitutional Court) and of alternative methods of dispute resolution, more stringent requirements to lawyers for compliance with professional ethics and discipline, etc. Considering the prevailing attitudes of the public and policy makers these are both possible and needed.

For years reforms have been haphazard and superficial with little practical results. Thus, what is needed now is a comprehensive approach, comprising further constitutional, legislative, structural and institutional reforms. Building a consensus on the broadest possible range of basic issues relevant to the judicial reform is a prerequisite for establishment of legal and institutional stability and confidence in the institutions investigating crimes and administering justice. It would also put an end to a practice – quite typical for the period of transition – where political intervention and corrupt pressure become substitutes for independent and professional decisions, as well as an end to conflicts between the institutions, including conflicts between the various bodies of the judiciary.

The future constitutional changes, based on a broad consensus, should achieve two complementary objectives: consolidate a working model of division and **balance of powers**, where **the judiciary** is both independent and accountable, and where **the Constitutional Court** acts above all as guardian of the constitutional consensus with fewer opportunities for biased interpretations of the constitutional norms which impair the supremacy of the legislative branch.

Civil initiatives for reforms in the judiciary

In response to the strong need for changes and in clear contrast to the position of the executive that judicial reform has been completed, in the late 1990s the *Judicial Reform Initiative* was launched. The initiative, with the Center for the Study of Democracy as its Secretariat, united the efforts of Bulgarian professional associations and non-governmental organizations involved in judicial reform, among them the Union of Bulgarian Jurists, the Bulgarian Judges Association, the Chamber of Investigators in Bulgaria, the Legal Initiative for Training and Development, etc., representatives of government institutions, including magistrates, and experts. In 1999 – 2000 the Initiative developed a Program for Judicial Reform in Bulgaria, which outlined its priorities: development of the legislative basis of the reform, enhancement of the professionalism and responsibility of magistrates, modernization of the work of the bodies of the judiciary and their administration, opening of the judiciary to society.

As a result of the public-private partnership, the major priorities of the program were included in the Strategy for Reform of the Bulgarian Judicial System, adopted by the government in October 2001. The partnership continued successfully also in the work on the Judicial Anti-Corruption Program, initiated by the Center for the Study of Democracy. The program was prepared by leading Bulgarian jurists, including magistrates, and was the result of the joint efforts of leading non-governmental organizations, representatives of governmental institutions and experts. The document was published in the fall of 2003 and contained a number of specific proposals for reform of the judiciary, which were further developed in 2004 – 2005 and presented to the attention of politicians, experts and civic organizations.

The proposals of the Center for the Study of Democracy for reforming the judiciary referred to the **principles of organization, governance and structure of the judiciary**. They are targeted on achieving accountability, promptness, effectiveness and more effective counteraction against crime, and formation of independent and efficient judiciary in compliance with advanced European standards through constitutional and legislative changes, which could bring about:

- Introducing clear-cut checks and balances between the branches of power by having **the National Assembly elect the Presidents of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General** by a qualified majority and for terms exceeding four years; the National Assembly should have the power to remove those officials before their term expires and decide on lifting their immunity only under conditions and following a procedure strictly defined in the Constitution; a logical follow-up to this principle would be **the possibility to make these magistrates (in view of their administrative responsibilities) answer parliamentary questions in cases specifically provided for and under a procedure established in advance**. This way, the National Assembly could play a vital part in ensuring the checks and balances among the three powers, without interfering with the independence of the judiciary¹³. This is necessary because the judiciary is subject to control to a far lesser extent in comparison to the legislative and the executive branches, but at the same time it holds the authority of control in respect of the decision making process. This refers in particular to administrative justice – in respect of control over decisions of the executive, and to the role of the Constitutional Court (although being a body situated outside of the judiciary) – in respect of interpretation of the will of legislators.
- **Decentralization, transparency and accountability of the public prosecution system** by changing the hierarchical model to which it is confined at present; putting in place better guarantees for the independence of prosecutors when they decide on individual files or cases, which is in fact independence of any superior prosecutor or the administrative manager; *e.g.* requiring that any instructions given to a prosecutor should be in writing, giving the prosecutors the right to object against the instructions given by a senior prosecutor or withdraw from the case in the event of disagreement; introducing stringent sanctions to put an end to the unlawful practice of giving oral instructions to prosecutors down the line, etc.; **regular and *ad hoc* reporting by the Prosecutor General** to the SJC, or alternatively to the National Assembly, if the proposal to have the Prosecutor General elected by parliament is accepted.
- Introducing the institution of a **public official empowered by the law to exercise prosecutorial functions**, or alternatively a team of such officials outside the hierarchical structure of the prosecution as it stands currently. Those officials should be elected by the National Assembly, to perform long term functions (*e.g.* instituting preliminary proceedings, investigating,

¹³ Arguments to that effect are included in Decision No. 1 / 14 January 1999 of the Constitutional Court. It draws attention to “the necessary connection between the legislative and the executive branches” and points out that “... division of powers does not mean they should not cooperate and function in coordination. On the contrary – the three branches are bound by relations of mutual control and deterrence, set forth in the Constitution. The division of powers should not lead to isolation, but to cooperation and interactions between them”.

bringing and maintaining charges of suspected **crimes committed by high-level politicians and magistrates**, or of suspected **corruption within the judiciary etc.**) or elected for a specific case; those officials should avail of the immunity of magistrates.

- A general review of the **immunity**, provided to a wider spectrum of individuals (members of parliament, members of the Constitutional Court, individuals in senior positions in the executive).
- Strengthening of the magistrates' right of independent decisions by limiting **the control exercised by superior magistrates as regards magistrates at lower levels** and excluding any direct intervention in the resolution of cases or improper pressure by senior magistrates on those at lower levels.
- Changing of the **status of the SJC and the procedure for forming its membership** (including the number of its members, their election and term of office, and the eligibility requirements) – the members should only be elected by the bodies of the judiciary and the chairperson should be elected by the National Assembly and report to the Assembly both regularly and on invitation; if the parliamentary quota in shaping the SJC is retained, the election by parliament should be by a qualified majority.
- Change in the constitutional model – **situation of the investigation and the prosecution outside the judicial branch**,¹⁴ while adopting a model based on a wide consensus.¹⁵ Under the current constitutional model – **separation of the organizational, personnel and financial management of the investigation and the prosecution from those of the courts within the SJC**.

Regardless of the fact that the structural changes alone could not solve all the problems facing the judiciary, their implementation or non-implementation should determine to a great extent the substance of the future decisions on governance, functions and principles of organization of the judiciary, as well as the entire procedural legislation.

- The gradual introduction of the European requirements for **the size of the budget** of the judiciary (in the countries of the European Union the budget of the judiciary usually amounts to 2 – 4% of the gross domestic product, and in Bulgaria for the year 2004 it was only 0.54%¹⁶; for 2005 the increase is only by 12%¹⁷), and also of stringent rules and transparency in its appropriation in implementing the priorities of the judicial reform, and not for *ad hoc* tasks or group interests.

¹⁴ For details, see Judicial Anti-Corruption Program, Center for the Study of Democracy, Sofia, 2003; Corruption Assessment Report 2003, *Coalition 2000*, Sofia, 2004.

¹⁵ The proposal for a new model of the judiciary, where the investigation service (and in one of the alternatives – the prosecution office as well) should be excluded from the judiciary, is subject to review due to the forthcoming restriction of the scope of activities of the investigation and transfer of major functions of the investigation service to police investigation bodies within the MoI as provided by the new Criminal Procedure Code, which is to come into force as from 29 April 2006.

¹⁶ See Judicial Reform Index for Bulgaria, volume II, American Bar Association – Central European and Eurasian Law Initiative, Sofia, 2004.

¹⁷ About 0.56% of the gross domestic product of Bulgaria calculated on the grounds of data included in Basic Macro-Economic Indices of the Macro-Framework of the State Budget by the Agency for Economic Analysis and Forecasting as of August 2005.

- Introduction of **uniform statistics** on crime – about the opening and progress of criminal cases, including corruption crimes. There is no such statistics as of now.¹⁸ Currently the Ministry of Justice, the Ministry of Interior, the Supreme Prosecution Office of Cassation and the National Investigation Service keep their own statistics based on different indicators and criteria, which hinders the obtaining of reliable information, efficient interaction and undertaking of appropriate measures.¹⁹
- Accelerated introduction of **new technologies** in the judiciary – introduction of computers, automated systems for keeping court files, electronic system for management of case files, etc.,²⁰ and avoiding the possible duplication of funding projects in the same area.²¹
- Adoption of legal regulations **allowing conducting proceedings in electronic form** both by the parties to the case and by the court.²²
- In connection with the need to strengthen the role of **the Constitutional Court as guardian of the constitutional-legal consensus and as warrantor of compliance with the constitution**, there was a proposal to replace the existing quota principle for election of constitutional justices with election only by the National Assembly (retaining the participation of the judiciary and the President of the Republic in the process only with possibility for nomination of some of the constitutional justices) by qualified majority, such that is required for enactment or amendments to the Constitution. A decision in this respect could contribute to strengthening the independence of the Constitutional Court and could provide guarantees against politicizing constitutional justice.

¹⁸ The lack of uniform statistics is part of the larger problem of lack of working mechanisms for exchange of information between the individual components of the judiciary and between them and other competent authorities involved in the fight against crime and corruption. The Uniform Information System against Crime, provided for in the Law on the Judiciary, is still not operational. The actual introduction of the system has been postponed again and again, which further hinders the fight against corruption.

¹⁹ For the purpose of overcoming this problem experts from the Center for Study of Democracy and *Coalition 2000* have prepared a system of indicators for the collection of statistical data on the work of judicial bodies and of the Ministry of Interior in detecting and prosecuting corruption offences. The proposal for indicators, presenting the recommendations of the institutions concerned (see Anti-Corruption Reforms in Bulgaria, Center for Study of Democracy, Sofia, 2005, pp. 41-43), was submitted to the Anti-Corruption Coordination Commission, but it has not been used yet in its work as expected.

²⁰ The National Automated System for management of court files has been approved by the SJC in 2003, but the number of the courts where it has been introduced, is fairly small. At present the system is really operational in 15 courts (in 2004 the announced number was 27 with expectations for some 55) compared to the total number of courts – 153. However, even where the court file keeping systems have already been transferred on electronic media, there are no reliable guarantees for protection of the information and the documents processed and stored in electronic format, thus the risks concurrent with the prevailing paper document turnover, are retained.

²¹ The software of the National Automated System has been developed under a project of the US Agency for International Development and has been delivered to the SJC. Later on, a tender was called by the Ministry of Justice under the PHARE Program, with LOT-1 about “system for management of the movement of court case files”.

²² Proposal for regulative provisions within the judiciary on acceptance and issue of electronic documents, signed with universal electronic signature (draft laws on amendments to the Civil Procedure Code, the Criminal Procedure Code, the Criminal Code and the Law on Electronic Document and Electronic Signature) has been adopted by the Council of Ministers in late 2004. The proposal was prepared by an inter-departmental expert group, including representatives of the Center for the Study of Democracy.

These proposals have been presented at various public forums with participation of representatives of the three branches of power, experts and non-governmental organizations; they have also been submitted to the responsible governmental institutions. Initially they received support mostly at the expert level, but a substantial portion of the proposals is already present in a number of political party programs. To be effected, these would require explicit support in parliament.

Government policy for reform of the judiciary

After a long period of denying the need for reform and undertaking partial changes, as from 2001 the government, and recently the judiciary as well, have undertaken actions in response to urgent domestic and international challenges.

- The first official attempt to set the judicial reform on more comprehensive conceptual foundation was the Strategy on the Reform of the Bulgarian Judicial System adopted on 1 October 2001 by the government and the program for its implementation approved in March 2002. The highlights of these documents coincide to a great extent with the objectives and measures set forth in the Program for Judicial Reform, elaborated within the Judicial Reform Initiative.

In the first two years after the adoption of the strategy the implementation of measures set forth therein did not result in substantial progress of judicial reform. The judiciary continued to get negative assessments of its work both from the civil society and from the European institutions and other international organizations. Therefore, and in view of Decision No. 13/2002 of the Constitutional Court, which declared as non-constitutional a number of the newly approved changes in the Law on the Judiciary, in the spring of 2003 the government updated both the strategy and the program for its implementation.

The Supreme Judicial Council adopted a Strategy for the Fight against Corruption in the Judiciary (February 2004) with the objective to obtain stability in the administration of justice; enhancement of public confidence in the judiciary; ensuring conditions for enhanced transparency and efficiency in the work of the bodies of the judiciary; introduction of effective mechanisms for detection and penalizing corruptive practices among magistrates; provision of prerequisites for intolerance to corruption in the judiciary by the population; ensuring active civil participation in the prevention and detection of corruptive practices in the judicial system.

The measures outlined in the strategy and set forth in detail in the program for its implementation for 2004–2005 are targeted at reform of the daily work of the magistrates and include strengthening the managerial capacity of the SJC, consolidation of the status of the magistrates, control mechanisms against corruption in the judiciary, ensuring transparency of the activities of the judicial bodies, automated allocation of cases, etc. The strategy provides also measures for reform in the activities of the administration of the judiciary, inclusive of stronger control of the processing of documents, facilitated access to administrative activities in the judiciary and improved mechanisms for appointment, career development and enforcement of administrative sanctions in respect of judicial employees. A separate section deals with measures

for promotion of the efforts of the judiciary to prevent corruptive practices, including through the media.

- The Council of Ministers adopted in December 2004 a National Concept for the Reform of Criminal Justice in the Republic of Bulgaria. Immediately after the approval of the National Concept, in expression of agreement on the major priorities, the Prosecutor General, the Director of the National Investigation Service and the Minister of Justice signed a joint declaration in support of the concept and in expression of readiness for joint action for its implementation.
- The legislative initiative of the government in the field of the judicial reform most often refers to amendments to the basic law on the structure of the judiciary – the Law on the Judiciary. It has been repeatedly amended since its enactment in 1994, but it could not attain its objective to develop an independent, efficient and incorrupt judicial system. The amendments of 2002 failed because most of the changes were declared non-constitutional.

Substantial amendments to the Law on the Judiciary were adopted in the 2003 – 2004 period. They developed further the amendments introduced to the chapter *Judicial Power* of the Constitution and suggested solutions to a number of problems – introduction of the principle of competition, attestation, legislative consolidation of training and measures for enhancement of the qualification of magistrates and the establishment of the National Institute of Justice, etc.

In implementation of the commitments undertaken in connection with the membership in the EU, in October 2005 a new Criminal Procedure Code was enacted.²³ The most substantial new provisions in the code concern the pre-trial proceedings and collection of evidence. Investigation within the pre-trial phase (including cases related to organized crime, economic crime and corruption) shall be carried out by police investigators – investigation bodies within the MoI. The range of crimes which will continue to be investigated by investigators, has been reduced to crimes against the Republic, crimes against peace and humanity and crimes committed by persons holding immunity, which account for about 3% of the total number of *corpus delicti*. The new texts consolidate the role of the prosecutor as *dominus litis* of pre-trial proceedings. The figure of the supervising prosecutor is introduced, who should implement day-to-day control and management of investigation. There are a number of new instruments and principles which should guarantee higher quality, efficiency and swiftness of the penal process: the possibilities for transformation of the preliminary investigation into police investigation and for return of the case by the observing prosecutor due to breach of procedure have been excluded; new methods for collection of evidence have been included – investigation by undercover agents, controlled delivery and escrow transaction; reduction of terms through introduction of quick trial, immediate court proceedings, hearing of the case in court now upon request not only by the accused, but by the victim as well, summary court investigation before the first instance; expansion of the range of crimes to which the institute of plea bargaining could be applied, etc.

The new Criminal Procedure Code was enacted in response to the European requirements as regards procedural norms and rules, but it did not solve the structural and organizational problems of the judiciary, which in the end

²³ Promulgated in the State Gazette, No. 86 / 28 October 2005, in force as from 29 April 2006.

will continue to exert negative influence on the process of further reform. The coming into force of the new procedural norms before implementation of the constitutional changes in the structure and management of the judiciary, in particular in respect of investigation and the prosecution office, as well as in respect of overcoming the lack of accountability and the lack of control over the judiciary, could hinder and even block the application of some of them. The major shortcoming of this approach is that the reform of the procedural law preceded changes in the Constitution, which, if adopted, would affect the main actors in the penal process, such as the bodies of investigation and prosecution, and would require changing the procedural law yet again.

Thus, the dynamics of the reform measures continues to be influenced not by the inherent logic of the required changes, but by external considerations and opportunistic reasons.

In conclusion, foremost on the agenda of judicial reform in Bulgaria is the **revision of the balance of powers** and in particular the structure and organization of the judiciary, achieving higher efficiency, swiftness and transparency in the work of the courts, the investigation and the prosecution, establishment of mechanisms for accountability and control against the abuse of authority and corruption within the judiciary itself, and mechanisms for control by the other branches of power.

These changes, set within the context of the entire process of legal and institutional reforms, are needed not only for Bulgaria to meet formally the criteria for accession to the EU. In reality, it would mean that the judiciary and the law enforcement bodies will be able to provide efficient protection of human rights and freedoms, of the economic and social development, while responding adequately to the expectations for restriction of corruption and organized crime on the national level and will play an active role in counteractions against transborder crime.

JUDICIAL REFORM: CONSENSUS INSTEAD OF POLITICAL RHETORIC

Ognian Shentov²⁴

The judicial reform in Bulgaria has entered an especially crucial stage. It is obvious that the time of perfunctory measures and empty political rhetoric has passed. The parliament must adopt key amendments to the Constitution, the procedural and the statutory laws which should make possible the settling of all problems that the Bulgarian judiciary is still facing.

In Bulgaria it was the non-governmental sector that initiated the debate on the necessary structural and organizational reforms of the judiciary during the transition period. More than six years ago, the Center for the Study of Democracy established the Judicial Reform Initiative (JRI), which brought together professional associations, NGOs, public institutions' representatives, and experts. Back then the dominant opinion was that judicial reform had been accomplished and the authorities considered the idea almost heretic. Within the JRI, however, we developed a comprehensive Program for Judicial Reform. Continuing this public-private effort we later produced the Judicial Anti-Corruption Program. In recent years the Center for the Study of Democracy has repeatedly and consistently promoted its ideas for multidimensional changes that would both meet public expectations and comply with EU requirements for a judiciary that works swiftly and effectively.

Today judicial reform has been made a priority by the main political parties in Bulgaria. Moreover, it is being regarded as a yardstick by which Bulgaria's preparedness to join the EU is to be measured.

Several positive changes have already been made. The first cycle of amendments to the Constitution adopted in September 2003 modified some provisions of critical importance for the judiciary, such as the irremovability and immunity of magistrates and the length of service of the administrative heads of judicial bodies. The second stage of constitutional reform did not go beyond some mandatory amendments related to Bulgaria's pending EU membership and left out any organizational or structural problems of the judiciary.

Regrettably, the vital level of consensus both between political parties and among magistrates about the major course of judicial reform and the model of judiciary that would best suit Bulgaria has not been achieved yet. Consensus is missing with regard to such a basic issue as the place of the investigation and the prosecution within the national system of institutions and as to their internal organization. Effective mechanisms for interaction and information exchange between the separate units of the judiciary and between the whole judicial system and the other institutions involved in counteracting crime have yet to be introduced.

There are still some skeptical views concerning the judicial reform underway. They are most often grounded in the circumstance that there is no *acquis*

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communautaire in this field. Such view, however, disregards not only the internal need for reform in Bulgaria, but also the EU recommendations for following the best EU practices, as well as measuring against a number of objective indicators such as: the length of the various proceedings, statistics on the speed and efficiency of criminal proceedings, the number of cases remitted by prosecution offices and courts, the number of sentenced individuals as a proportion of the indictments, and last but not least, the commitments of Bulgaria to the EU under the negotiation chapter *Justice and Home Affairs* and the risk that a safeguard clause may be enforced in case Bulgaria fails to fulfill these commitments.

MODERNIZATION OF THE PRE-TRIAL PHASE OF CRIMINAL PROCEEDINGS

*Margarit Ganev*²⁵

The issue of the pre-trial phase of the criminal process has become a major focus of Bulgaria's public agenda due to its key importance to the country's successful integration into the European Union. Its fundamentality is recognized by our European partners and the Bulgarian institutions directly involved with the problem alike since society critically needs reform in this sphere. The non-governmental sector plays a key role in the discussion of improving the pre-trial phase of the criminal process.

The Ministry of Justice has set clear goals concerning the improvement of the pre-trial phase of criminal proceedings and works actively to implement them. In order to achieve a broad public consensus and formulate the basic reform principles in this field, in December 2004 the ministry adopted a National Concept for the Reform in the Criminal Proceedings in the Republic of Bulgaria. Shortly after that, in recognition of their agreement on the basic priorities, Bulgaria's Prosecutor General Mr. Nikola Filchev, the National Investigation Service Director Mr. Angel Alexandrov and the Minister of Justice Mr. Anton Stankov signed a Joint Declaration on Cooperation in Reforming Criminal Justice. The declaration and the principles employed by the ministry in its work on key legislation in the area are a demonstration of our willingness to achieve consensus over the forthcoming reforms. One such leading principle is to seek the contribution of practicing magistrates in the process of implementing the reform since only through such cooperation and sharing of views the reform can be brought to yield its effects.

It is a fact that all parties recognize the public need for modernizing pre-trial criminal proceedings. This need is emphasized in all EU recommendations to our country as a future member. The modernization of the Bulgarian judiciary is closely monitored and our EU partners regularly share their findings and recommendations. The report of the European Parliament's Committee on Foreign Affairs clearly articulates the problem areas in the section devoted to political criteria. It places special focus on the pre-trial phase of the judicial process and the office of the Prosecutor General which is to be developed so as to ensure the transparent, accountable and efficient running of the investigation services and the prosecution offices. Another recommendation concerns the establishment of a reliable mechanism for the dismissal of corrupt and incompetent magistrates. The report also expresses regrets that the criminal justice reform planned to include a fundamentally amended Criminal Procedure Code cannot be accomplished under the current parliament. The rapporteur for Bulgaria calls for further efforts to follow the promising results already achieved with regard to these issues.

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EU MEMBERSHIP CRITERIA IN THE AREA OF JUSTICE, FREEDOM AND SECURITY: LESSONS LEARNED FROM THE FIFTH ENLARGEMENT – PREPARING FOR THE SIXTH ENLARGEMENT

Jonathan Faull²⁶

It is indeed a unique and historic moment, now that Bulgaria successfully concluded accession negotiations with the European Union and signed the Accession Treaty.

The conclusion of negotiations clearly signaled that Bulgaria belongs to the **EU family**. This has called substantial economic and political reforms, demanding from the country until the day of accession enormous efforts: building out of past structures a modern democracy enforcing the rule of law and a modern administration; transposing and implementing a vast body of new legislation and last but not least putting in place an independent, efficient and reliable judicial system.

The signature of the **Accession Treaty** in Luxembourg on 25 April 2005 brings the fifth enlargement to completion, following on the heels of the ‘big bang’ of 1 May 2004. This fifth enlargement – of which Bulgaria and Romania are an integrated part – has in many aspects been a **historical process**. Never before so many countries joined at once. This has forced the EU to also thoroughly reflect upon and take measures to improve its internal organization and decision making procedures. If there is one lesson to be learned from that, it is that beyond any doubt, the EU needs **to continue to engage in evolutions** to take the best advantage of this enlargement and to be ready for the next enlargement. The EU will need to further reinforce its institutions and policies in order to ensure Europe’s capacity to act and function efficiently. The Constitutional Treaty is therefore an important step in the right direction.

All this is indispensable as enlargement is and should remain a **win-win situation** where both interests of the citizens of candidate countries and of EU and its citizens should be fully respected. In order to guarantee this, there is a constant need to monitor and improve structures and mechanisms in place. Another reason for doing so is the ongoing evolution of the EU *acquis* and in particular the *acquis* in the area of Justice, Freedom and Security.

Indeed, the focus of Vice President Frattini, as Commissioner responsible for Justice, Freedom and Security, and of my services is to take forward the building of a European area of freedom, security and justice. With the ongoing fifth enlargement round with 12 new member states and the sixth enlargement currently being prepared, this objective has taken on an even greater resonance. The accession of ten plus two mainly Central and Eastern European Countries as well as future enlargement rounds bring along a number of challenges, not only because of the variety of law enforcement structures that will enrich the EU as an area of freedom, security and justice, but also because the new members will allow the EU to put even more weight in the ongoing global security debate.

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This being said, the revised principles governing the negotiations for the sixth enlargement **do not** mean that the actual criteria for membership have drastically changed. The negotiations will still be based on own merits and the pace will depend on **the candidate's** progress in meeting **the requirements for membership**. Also **as it was in the past**, negotiations are opened on the basis that a candidate meets the political criteria set by the Copenhagen European Council in 1993, later essentially enshrined in Article 6(1) of the Treaty on European Union and proclaimed in the Charter of Fundamental Rights. The Union **will continue** to expect candidates to continue to fulfill the political criteria by working towards constant improvement of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. **As it was in the past** the Council may, on the basis of a recommendation from the Commission and after having heard the candidate country concerned, suspend the negotiations in the case of a serious and persistent breach by the candidate of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded.

The most important **novelty**, however, is in the increased number of chapters to be negotiated and in particular in the fact that a new chapter entitled *Judiciary and Fundamental Rights* is being added to the list of chapters to be negotiated. This is reflecting the fact that the **Charter of Fundamental Rights** will become an integrated part of the **Constitutional Treaty** once the latter will be agreed upon by all member states. The Constitutional Treaty covers the institutional architecture of the Union and aims at bringing the EU closer to citizens through, in particular the integration of the Charter of Fundamental Rights.

As such, the Charter of Fundamental Rights is **not** listing new *acquis*. It is a codification of existing fundamental rights which have been part of the EU *acquis*. These rights apply in the case of implementation of EU *acquis*. For example: the charter lists the prohibition of torture. If an EU citizen exercises his right of free movement and ends up in a prison of another EU member state, then in case this citizen is badly treated by the police, he can invoke a breach of the EU *acquis*, namely the prohibition of torture. As such the European Court in Luxembourg would be in a position to condemn the member state in which this incident happened. The fact that these rights are now put in a charter which is to become an integrated part of the EU Constitution if approved, gives an additional moral weight to existing *acquis*. It will beyond any doubt put additional pressure to candidate countries to start reforms in these areas **well in time before accession**.

Hence, another lesson learned from the fifth enlargement is that fundamental and structural reforms touching upon the efficiency and accountability of a democracy and the full respect of the rule of law cannot be left to the very end of the pre-accession process. It is a fact of life that the EU has become a more and more integrated community of states. The quality of the functioning of the EU and of implementing the *acquis* across the EU will in the end depend on its weakest link and that link we want to be as strong as possible.

In practice, the negotiations in this new chapter *Justice and Fundamental Rights* will deal with **the judiciary, anti-corruption policy, fundamental rights and citizens' rights**. As far as the judiciary is concerned, the negotiations will be dealing with questions of independence, quality and efficiency of the judiciary, the right to an effective remedy, right to a fair and public trial, right to be judged

in a reasonable time, right to a legal aid, presumption of innocence, rights of defense etc.

The section dealing with anti-corruption policy will, just like it was before in the old chapter 24, deal with aspects of legislation, implementation measures and international instruments.

The most substantial part of this new chapter will be the part dealing with actual fundamental rights, such as: right to life, perspectives for a general abolition of the death penalty, right to the integrity of the person which includes, prohibition of torture and inhuman or degrading treatment or punishment, respect of private and family life and communications, protection of personal data, freedom of thought, conscience and religion including the right to conscientious objection, freedom of expression including freedom and pluralism of the media, freedom of assembly and association including freedom to form political parties, rights of the children, etc.

The smaller part of this chapter will deal with so called EU citizens' rights which entails right to vote and stand as a candidate at elections to the European Parliament, right to vote and stand as a candidate in municipal elections, right to petition to the European Parliament and freedom of movement and residence and diplomatic and consular protection.

The fact that all this is formally to be negotiated and monitored will not be an easy ride, neither for the EU, nor for the candidates concerned. However, it also means that as of its accession to the EU, Bulgaria will need to be in a position to implement all this, as it exists already in the current EU legal framework. This brings us back to Bulgaria's preparation for accession and the time it has left to meet all commitments it agreed upon.

Bulgaria is at a turning point on its way towards accession and that significant and visible progress has to be delivered without delay. Bulgaria needs to demonstrate that it is sharing the values of the EU. In order to achieve in particular the reforms in the judicial system, Bulgaria needs cross party unity and a clear and long-term vision of how one of the corner stones of the democracy should function. Reforming the pre-trial phase in line with EU requirements will require hard work in a short period of time. It will be crucial in this respect that corporatist interests be overcome.

But I am confident that Bulgaria will succeed as it is indeed our shared ambition to ensure Bulgaria's accession to the EU as a full-fledged Member State in January 2007.

THE SPANISH JUDICIARY: STRUCTURE, ORGANIZATION, GOVERNMENT

Ignacio Pando Echevarría²⁷

This presentation refers to the structure, organization and governance of the Spanish judiciary with a special focus on the criminal jurisdiction.

Before examining these items, it is necessary to describe the territorial structure of Spain, as the judicial organization follows it. Spain is divided, since the adoption of the 1978 Constitution, in Autonomous Communities – *comunidades autónomas* – (17 and two autonomous cities), formed by one or more provinces (*provincias*). The provincial division of Spain precedes the Constitution (it was adopted in 1832), and there are fifty provinces. Each province is composed of a number of municipalities, which are the base of the administrative organization. In the judicial structure, provinces are divided into judicial districts (*partidos judiciales*), usually following historical or population criteria in the surroundings of the bigger cities.

Judiciary governance

According to article 117.1 of the Spanish Constitution, justice is administered only by judges and magistrates and the exercise of judicial authority in any kind of action is vested exclusively in the courts and tribunals laid down by the law.

Although Spain is divided into Autonomous Communities, the judicial power (*Poder Judicial*) is unitary. The Autonomous Communities do not have their own judiciary and their courts are courts of the State.

The judiciary is an autonomous power and it is governed by the **General Council of the Judiciary** (*Consejo General del Poder Judicial, CGPJ*). The Judiciary Organic Law of 1985 regulates the Council. This Organic Law provides for the operation and internal administration of courts and tribunals as well as the legal status of professional judges and magistrates.

The General Council of the Judiciary is a constitutional body composed of 20 members and a President who is also appointed as the President of the Supreme Court. The Congress and the Senate propose the members. Twelve of the Council's members must be judges and magistrates of all levels of the judiciary and eight members are chosen amongst lawyers of acknowledged competence with more than fifteen years of professional practice. The members of the Council are appointed for a five-year period and they cannot be reelected with the exception of the President.

Though it is the governing body of the judiciary, it is not a part of the courts system and its **functions** are merely governmental or administrative. The CGPJ selects and trains judges and magistrates (Judicial Training School depends on it), investigates and imposes disciplinary measures against judges, decides about promotion, transfers, suspension or retirement, and all the other topics related to the judicial career. Likewise, it has functions in internal organization of the

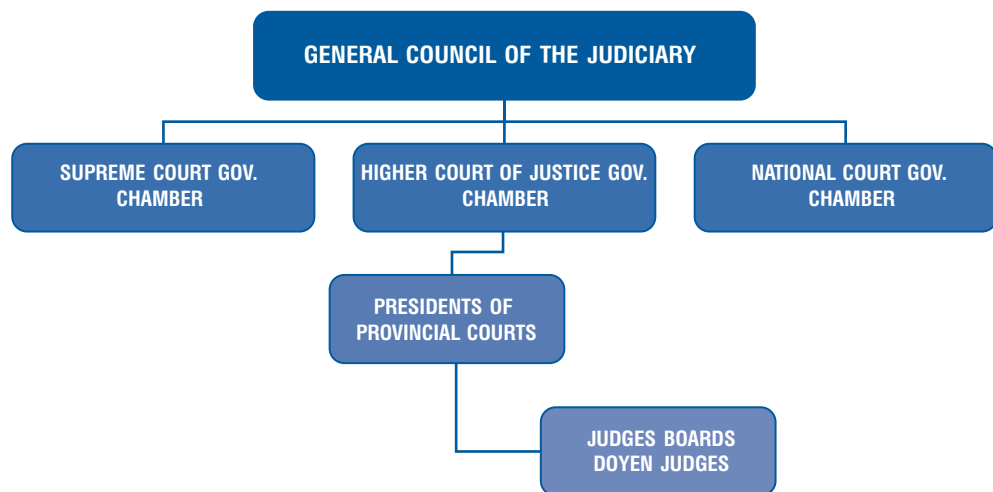
²⁷ Mr. Ignacio Pando Echevarría is a Senior Judge of the Regional Court of Avila. He holds a Law degree from the University of Madrid. Mr. Echevarría has occupied different judge positions. He is also member of the Spanish Association for International Judicial Cooperation.

courts, inspection and statistics, and it has to inform the government about any legislation referring to judicial organization, to procedural rules affecting fundamental rights, or to criminal and penitentiary rules.

In some cases, the CGPJ delegates its powers to other governing bodies, which are called Governance Chambers (*Salas de Gobierno*). There is one chamber in the Supreme Court, one in the National Court, and one in each Higher Court of Justice.

Under these chambers, the presidents of the provincial courts have been delegated governing functions in their provinces; and finally, in each judicial district there are the Judges Boards (*juntas de jueces*) and the Doyen Judges (*jueces decanos*), with organizational functions within their districts.

As their competences are governmental and not judicial, these institutions are hierarchically organized, so the superior governing bodies can give compulsory instructions or orders to the inferior.

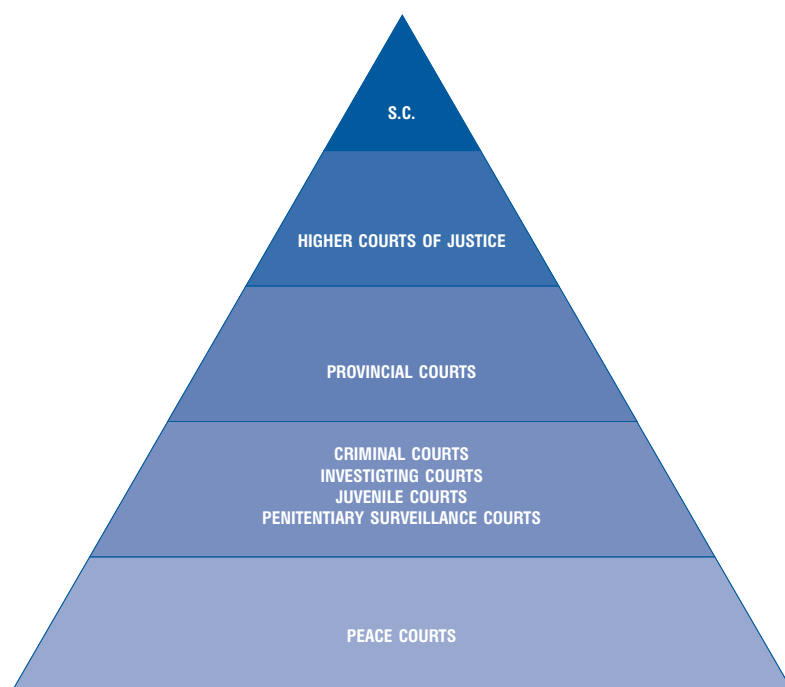


Structure and organization

Courts in Spain are divided in five different jurisdictions: civil, criminal, administrative, labor, and military (this one just for military offences committed by military staff in military facilities, or in cases of siege). Each one of these jurisdictions has a specific organization.

The jurisdiction is classified into different levels, from the base to the top, like a pyramid, as follows:

1. On the **first level**, there are the courts of peace (*Juzgados de Paz*) served by lay judges. There is one in each municipality where there is no investigating court. The competence of this court is to judge less important offences – *faltas* – such as insults or trivial threats.



2. On the **second level**, there are investigating courts (*juzgados de instrucción*), criminal courts (*juzgados de lo penal*), juvenile courts (*juzgados de menores*), and penitentiary surveillance courts (*juzgados de vigilancia penitenciaria*). From this stage upwards professional judges serve all the courts.
- I. In each judicial district there is one or several (depending on the population) **investigating courts**. The investigating judge has four different functions:
- He hears the appeals against judgments of the courts of peace.
 - He tries all the minor offences committed in the town where the court is located and all the minor offences committed in the judicial district that are not in the competence of the lay judge.
 - He is the judge of constitutional guarantees. The investigating judge permits actions that affect constitutional rights (free movement, privacy, etc.). In this capacity he issues arrest warrants or search and seizure warrants, he decides about interceptions of communications or entering in private premises. He also decides on the situation of arrested people, keeping them in custody or setting them free, with or without bail.
 - Finally, he is the one who conducts criminal investigations. In Spain, following the French legal system, criminal investigation is run by the investigating judge, who orders investigations that he thinks are necessary and controls the activities of police investigators, who are functionally under his command. Of course, at this stage, the prosecution and the defense counsel can participate in the proceedings (in fact participation of public prosecution is obligatory).
- II. **Criminal courts** are single-judge courts with provincial jurisdiction. Each province can have one or more, depending on the population, as it happens

with the other courts at this stage. Their competence is to try offences with punishment up to five years of imprisonment (driving while intoxicated, less serious frauds, thefts over 300 €, robbery or burglary, professional negligence, inflicting bodily injuries, etc.)

- III. **Juvenile courts** have provincial jurisdiction, too. Their competence is to try any kind of offences committed by people over fourteen and under eighteen years of age. In the special proceedings for young people and as an exception to the general rule, investigations are conducted by the public prosecution.
 - IV. Finally, **penitentiary surveillance courts** have the function of controlling the execution of sentences and supervising decisions of the prison services relating to the inmates. Their jurisdiction covers one or several provinces, depending on the number of prisons and their capacity.
3. The **third level** is composed of the **provincial courts** (*audiencias provinciales*), one in each province. They have both civil and criminal jurisdiction and depending on the population of the province and the number of inferior courts, they can be divided into sections. The sections are three-judge courts that judge and decide together. Provincial courts have three functions in criminal proceedings:
 - a) To hear appeals against judgments of the inferior courts (*juzgados*) of its province.
 - b) To try at first instance serious offences with punishment over five years of imprisonment (murder, manslaughter, serious fraud, drug trafficking, rape, grievous bodily harm, etc.).
 - c) To judge under the proceedings of jury trial. In this case (criminal law establishes the offences triable with this proceedings) a single judge of the provincial court presides over the court and passes the sentence after the nine-juror jury pronounces the verdict.
 4. A **fourth level** includes the **Higher Court of Justice** (*Tribunal Superior de Justicia*). Each Autonomous Community has one of these courts at the top of the judiciary in the community. The courts are divided into Chambers (*Salas*), one for civil and criminal affairs, other for administrative affairs and a third for labor affairs. There is a fourth chamber, the Chamber of Governance (*Sala de Gobierno*), whose functions are not judicial but managerial.

The Civil and Criminal Chamber, in criminal justice, is competent in three subjects:

- a) To investigate and try at first instance offences committed by members of the regional (Autonomous Community) legislative assembly or the regional government, as well as judges serving in the Autonomous Community for office-related offences.
- b) To judge the appeals against judgments of the jury trials that, as we have just seen, are carried out at first instance by the provincial courts.

- c) To judge the appeals against judgments of the provincial courts. This competence has been recently introduced by an amendment to the Judiciary Organic Law, but it is not in force yet, as implementation of the new function is required, because the present chamber does not have the capacity to deal with such number of new proceedings. Nowadays, in order to fulfill the European Convention for Human Rights standards about the second instance, the special revision appeal (*recurso de casación*) held before the Supreme Court is widely admitted, so that in fact it is almost as popular as an ordinary appeal.
5. The **fifth and last level**, and the apex of the judicial pyramid, is the **Supreme Court** (*Tribunal Supremo*). The Supreme Court is situated in Madrid, and it is divided into five chambers, one for each jurisdiction (civil, criminal, administrative, labor and military). There are fifteen judges in the Criminal Chamber (or Second Chamber – *Sala Segunda*), but the courts are of three or five members (depending on the gravity of the appealed sentence). The plenary court is an exception and convoked by the president of the chamber.

The second Chamber has the following functions:

- a) To investigate and try offences committed by the presidents and members of the government, Congress, Senate, Supreme Court, Constitutional Court, judges serving at the National Court and Higher Courts of Justice, and other higher officials, except HM the King, who does not bear any constitutional responsibility.
- b) To hear the special revision appeals (*recurso de casación*) against judgments of provincial courts at first instance and judgments of the Higher Court of Justice at first or second instance. Following the system of the French “cassation”, this appeal can only be held for specific reasons established in the Criminal Proceedings Law that makes it different from an ordinary appeal. These reasons might be infraction of law and infraction of proceedings. The lack of appeal against judgments of the provincial courts at first instance (until the amendment enters into force) compels to interpret those specific reasons in a wider way.
- c) To revise final sentences (*recurso de revisión*), if new elements or evidence that could prove the innocence of the convicted appear. This is the only court empowered for such revision as it is an exception to the principle of irreversibility of final judgments.
6. Inside the judicial pyramid, but with jurisdiction over the whole Spanish territory, is the **National Court** (*Audiencia Nacional*). This court, whose seat is in Madrid, has in criminal justice a similar composition to the judiciary of a province, but extended to all the territory. It has six Investigating Courts (*juzgados centrales de instrucción*), one Criminal Court, one Juvenile Court and one Penitentiary Surveillance Court, at the lower level, and a Criminal Chamber divided into four sections.

The competence of the National Court is not only conferred for territorial reasons, but also for the kind of offences. As to territorial reasons, it is competent

to try offences committed outside Spanish territory, and serious offences, such as fraud or drug trafficking committed by an organization, which affect several provinces. For the kind of offences it is competent to try terrorism, offences against the Crown, against the constitutional way of governance and higher bodies of the nation, and counterfeiting offences.

After the amendment of the Judiciary Organic Law, an Appeal Chamber has been created to hear the appeals against judgments of the Criminal Chamber.

7. The **Constitutional Court** (*Tribunal Constitucional*) is not a part of the court system. It is a politically independent institution with its own rules and rights. It is the supreme interpreter of the Spanish Constitution.

It is composed of twelve members: four nominated by the Congress, four nominated by the Senate by a majority of three-fifths, two by the Government and two by the General Council of the Judiciary. Constitutional Court members are elected among magistrates and prosecutors, university professors, public officials and lawyers, all of them with at least fifteen years of practice in their profession. Their term of office is nine years and they are renewed every three years by thirds.

The Constitutional Court has jurisdiction over the whole territory and its functions include control of the compliance with the Constitution of the laws, the protection of fundamental rights recognized in Part I, Chapter II, articles 15 to 29 of the Spanish Constitution (Fundamental Rights and Public Liberties); the disputes between the state and Autonomous Communities or among Autonomous Communities themselves; and the control of the compliance with the Constitution of the legislation of the Autonomous Communities.

However, a natural person can appeal to the Constitutional Court when he considers that a final judgment violates fundamental rights, because a special appeal called "*recurso de amparo*" is established, which allows individual citizens to ask for protection of this high court.

8. Finally, as Spain is party under the European Convention on Human Rights, defendants can bring their case before the **European Court of Human Rights** in Strasbourg.

THE ROLE OF THE PROSECUTION IN STRENGTHENING DEMOCRACY AND THE RULE OF LAW: AN AMERICAN VIEW

*Thomas H. Peebles*²⁸

As many of our Bulgarian partners know, one of our leading priorities at the United States Embassy in Sofia is providing assistance to Bulgaria designed to strengthen the rule of law and establish strong criminal justice institutions. In Bulgaria, I also represent the United States Department of Justice, which assists partners across the globe in building robust systems of justice where the rule of law prevails.

The Department of Justice supports a holistic approach to building the rule of law and strong criminal justice institutions. For any system of justice to be effective, we have learned that all actors in the system must be effective – police, investigators, prosecutors, judges, the bar, prison officials – and we have assisted each of these functions in our programs throughout the world. I would like to concentrate on the prosecution function and share the United States Department of Justice’s vision of how a strong prosecution service fits into a democratic society.

It is certainly a fair question to ask why the United States would have an interest in assisting prosecutors in other countries, especially those in countries with a different legal heritage, such as Bulgaria.

First, an effective prosecutorial function is an indispensable component of the rule of law; the rule of law is an essential component of democracy; and democracy contributes to the peace, stability and prosperity of our world.

Second, the United States knows that crime today is among the most global of modern phenomena, that the dangers of transnational crime and international terrorism often converge, and that we in America are as vulnerable as any other country to acts of terrorism. The United States needs strong criminal justice partners throughout the world in its own fight against transnational crime and terrorism. Neither the United States nor any other country can fight transnational crime and terrorism by itself.

In the United States, prosecutors are part of the United States Department of Justice, an executive branch agency of our federal government. In Bulgaria, they are part of the judicial branch, independent of the Executive. But where prosecutors fit administratively is less important than how they function professionally. Moreover, although each legal system asks its prosecutors to execute their professional functions in a slightly different manner, I am convinced that what unites prosecutors in democracies across the world’s spectrum of legal systems is far, far greater than what separates them.

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In every democratic legal system I know, the prosecutor is responsible for presenting to an independent tribunal the case for sanctioning those accused of violating the rules which hold the democracy together. The prosecutor therefore needs to be the leader of a team, generally composed also of police or investigators, dedicated to assuring that criminals are prosecuted successfully, fully and fairly, pursuant to a process which comports with what we in the United States term due process of law.

Many of the world's legal systems are finding what we have learned by experience in the United States, that the prosecutor is most effective if he or she can be involved in some significant manner in the investigative process that precedes the trial. The prosecutor brings particular expertise to the investigative process in determining the shape and form of the case to present in court. He or she is well situated to assure that the rights of the individual are respected throughout the entire criminal justice process.

What then is our vision of the effective prosecutor in a democratic society?

First, the United States Department of Justice knows that its own prosecutors and those of its partners must have a high degree of technical skill to prosecute the complex sort of crime that most threatens us today, including terrorist crime. This requires professional competence and, very often, training in sophisticated areas of criminal law.

Second, the United States Department of Justice insists that its prosecutors have a strong ethical compass and be sensitive to basic human rights, and it also seeks to raise the ethical and human rights awareness of fellow prosecutors around the world. Given the extraordinary authority which a democracy vests in a prosecutor to lead the process of sanctioning those accused of violating democracy's rules, the prosecutor must be ever aware of the ethical limits imposed on his function, and the human rights which those involved in the criminal process nonetheless continue to enjoy.

Finally, more and more, we are finding that prosecutors need to be aware of the world-wide dimensions of their work. Today's prosecutors are members of an elite, global fraternity of crime fighters. They need to be aware of the responsibilities which membership in this elite group imposes. The perspective of today's criminal is truly global, and that of today's prosecutor simply cannot be any less.

As we dedicate resources at the United States Embassy to fortify the rule of law and strengthen Bulgarian criminal justice institutions, we remain ready to work with our partners – Bulgaria's prosecutors – and wherever possible in collaboration with our colleagues from throughout the European Union, in bringing this vision to Bulgaria.

PLANS FOR REFORM OF THE CRIMINAL INVESTIGATION PROCEDURE IN SLOVENIA

*Marko Šorli*²⁹

The European Convention on Human Rights and Fundamental Freedoms lays down the unbreachable principles to which the codes on criminal justice of member countries must adhere.

The text of article 6 of the Convention, as interpreted by the European Court of Human Rights, prescribes that the administrator of criminal justice must respect some basic demands. These are the guarantees that any person accused of having committed a crime: a) be judged by an impartial judge; b) be presumed innocent until the final decision; c) be in a position to exercise his defense in the best possible way; d) has his case decided in a reasonable time. In the quest for setting up a criminal justice system best responding to the said principles the law makers have already striven to reconcile the guarantees with the requirement of efficiency of the system.

Experts know that this is a very hard task and that all attempts that have been made never attained a satisfactory level.

The search for the best solution usually matches the alternative models, one called the inquisitorial and the other accusatorial or adversary. Both these models, if properly designed, are fully compatible with the tenets of a democratic state.

The choice to give preference to one or another should, therefore, be made taking into account other aspects such as circumstantial elements of socio-cultural character, legal tradition and the need of substantial equity and practicability.

Within the judicial organization of certain states, a singular role is that of the investigating judge. The investigating judge, who has a hybrid status being both judge and investigator, is part of the judicial landscape where criminal proceedings of the accusatorial type are found. At present, he is found, in particular, in France, Spain, Luxembourg, Belgium, the Netherlands, San Marino and Slovenia as well. The investigating judge does not try the perpetrators of offence but investigates the criminal cases coming before him and plays an active part in obtaining the evidence, while at the same time having significant coercive powers. Advocates of the model of the investigating judge consider that an investigating judge is better to investigate the inculpatory and exculpatory evidence than the police or the prosecutors' office.

Others note the difficulty of combining the role of investigator with that of impartial judge and propose the example of the investigating judge: this is a judge unconnected with the investigation who merely decides on coercive measures or settles disputes between parties. It is a concept which implies a gradual move towards a more accusatorial type of criminal procedure.

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The composition and the internal organization of the court system

The organization of the court system is provided for in the Courts Act.³⁰ The court system in Slovenia includes three instances. In the first instance, criminal cases may be tried either by regional courts or by district courts. In regional courts, cases involving criminal offences punishable by a fine or imprisonment for up to three years are heard by a single judge following the rules on summary proceedings. The most prominent features of summary proceedings are identical to those in regular proceedings, with the exception that summary proceedings do not contain the investigation phase. Instead, only certain investigative acts are conducted, when necessary.

District courts try cases involving criminal offences punishable by fifteen or more years of imprisonment before panels of five judges (two professional and three lay judges), and cases of criminal offences punishable by three to fifteen years of imprisonment before panels of three judges (one professional or presiding judge and two lay judges). The same applies to special cases of criminal offences committed by the press or other mass media.

In the second instance cases are heard by higher courts (appellate courts), where a panel of three professional judges decides on appeals against decisions of the regional and district courts.

The organization of the investigation and criminal procedure

The initiation of the criminal procedure depends on the type of criminal offence in question. Most criminal offences are presented *ex officio*, which means that only the state prosecutor may initiate the procedure. However, if the state prosecutor finds that there are no grounds to prosecute for a criminal offence *ex officio*, he or she has to instruct the injured party within eight days that the party may initiate or continue the prosecution by himself or herself.

Slovenian criminal procedure consists of four phases: the pre-trial procedure, the filing of the charges (indictment), the trial and the judicial review procedures (appeal against judgments of the court of first instance and the so-called extraordinary remedies). The pre-trial procedure consists of two parts: preliminary proceedings (with the police as the *dominus litis*) and the investigation phase as the predominantly judicial phase, with the investigating judge in charge.

The criminal procedure usually starts with the filling in of a report for an offence to the police or a state prosecutor. After the police investigation (usually informal interviews with the suspect and witnesses, the investigation of the scene of the crime, the examination of the real evidence, search of the premises, etc.) the matter is transferred to the state prosecutor. The state prosecutor decides whether a well-grounded suspicion exists to call for a formal investigation (in cases of serious or complex criminal offences) or to file the so-called direct indictment (without the investigation phase).

³⁰ O.J. 19-779/94 in 45-2161/95.

In case the investigation judge starts the investigation, the investigation is conducted with the purpose of gathering evidence for the prosecutor to decide whether to file an indictment or drop the case. The investigating judge, who is bound by the inquisitorial maxim, conducts the investigation at his or her own initiative. In the investigation phase, the investigating judge has most of the investigative powers, although he or she may transfer these to the police for the execution of certain investigative acts. The state prosecutor does not have any investigative powers himself or herself, but he or she may request that the police conduct certain investigative acts.

The investigation phase being concluded, the file is submitted to the state prosecutor who may decide either to file an indictment or drop the case. After filing the indictment, the defendant or the trial judge may file an objection to the charging document if in his or her view there are no grounds to proceed. The objection is then decided by a panel of three judges (not including the trial judge). When the indictment becomes final, the case is submitted to trial.

The trial is organized mostly in the accusatorial manner; however, the court is bound to seek the truth. The trial closes after the pronouncement of the judgment, which can be a finding of guilt, acquittal or rejection of the charge. If there is no appeal, the judgment becomes final fifteen days after the judgment has been served on the accused in regular proceedings and eight days after the judgment in summary proceedings.

The appeal may be filed by the accused, certain of his or her relatives, the state prosecutor and the injured party. The appeal is decided by the court of second instance. The final judgment may also be reviewed, usually by the Supreme Court, through extraordinary legal remedies.

The investigation in preliminary proceedings is primarily conducted by the police; therefore, the police collect most of the evidence. Some of the police investigative acts may be conducted on their own initiative (e.g. investigation of the scene of the crime, identity check, fingerprinting). However, the investigation judge, whose activity is otherwise rather limited in this phase, has to issue written orders for the police to conduct certain investigative acts encroaching upon the rights and freedom of citizens (e.g. telephone tapping and search of the premises).

The character of the pre-trial phase

The character of the pre-trial phase depends on the investigation phase in question. During the entire investigation (in broader terms), the investigative powers are monopolized by law enforcement authorities. Citizens have no investigative powers themselves, which is a clear reflection of the strict inquisitorial principle.

In preliminary proceedings the police may act as an autonomous investigating agent when carrying out the so-called informal investigative acts. In this sense, the preliminary proceedings are organized on the basis of the inquisitorial principle. For all formal investigative acts (e.g. search of the premises and telephone tapping) a written order of the investigating judge is necessary, which could be viewed as an accusatorial element limiting the investigative powers

of the police. Whenever suspects are deprived of their liberty, they are to be informed of their rights.

The investigation phase is also organized on the basis of the inquisitorial principle, since the investigating judge has the task of establishing completely and according to the truth the facts relevant for issuing a lawful decision (the inquisitorial maxim). The investigation phase also involves some accusatorial elements. For example, the defendant is presumed innocent, he or she may exercise all of his or her rights, he or she may attend all of the investigative acts conducted by the investigating judge, and may suggest that certain investigative acts be conducted. The whole process of deciding on pre-trial detention is organized in an adversarial manner, with the obligatory presence of the defense lawyer. There are strict rules providing the legal conditions under which the formal investigative acts may be conducted. In case the police do not adhere to those rules, the evidence thus gathered is subject to exclusion.

The end of pre-trial stage

The stage of trial in the narrow sense begins with the prosecutor's submission of the indictment to the court. In the wider sense, the pre-trial stage is deemed to have been concluded when the indictment filed by the competent prosecutor becomes final. After that moment the trial court is seized and preparations for the trial begin.

The role of the investigating judge

The investigating judge has a dual function. First he or she exercises the investigative function in which he or she collects the evidence for the prosecutor to decide whether to file an indictment or drop the case. The investigating judge therefore has many *ex officio* investigative powers. In the course of his or her investigative duties, the investigating judge interrogates offenders, examines the witnesses and obtains other evidence. The second function, one which has been expanding of late, is the protection of the rights and liberties of the defendant, since more and more of the powers of the investigating judge also concern the issuing of orders (e.g. for searches of the premises and telephone tapping) on the proposal of the state prosecutor. The investigating judge also decides on pre-trial detention. The investigating judge may never be the trial judge in the same case.

The investigating judge orders pre-trial detention upon the request of the state prosecutor.³¹ The hearing is organized in an adversarial manner.

Plans for reform

The Slovenian Code of Criminal Procedure has been frequently criticized by academics and legal practitioners. There is no coherent model of the procedure. Its basic idea of separation between the preliminary proceedings and the court proceedings, designed during 1960's, is obviously an obsolete one. Major political and social changes also occurred in the period of the so-called transition:

³¹ The general provision is article 20(1) of the Constitution and a more specific provision is article 201(1) of the Code of Criminal Procedure.

the mentality of all the institutions involved in criminal proceedings changed, there is much more serious crime, including organized crime, and a once stable social system has been falling apart. On the other hand, the code has been amended much too frequently because of the Constitutional Court's otherwise welcome liberal decisions, but partial amendments only tore apart what was left of the once coherent model. The system is also inefficient mostly when dealing with serious criminal offences. For this reason, in 2001 the Ministry of Justice financed a research project with the task of designing a new model of criminal procedure. The model research concluded at the end of 2003 and the new, much more adversarial model is now under discussion.

In the last coherent model of the Code of Criminal Procedure (from 1967), the police was the *dominus litis* of the procedure, and the state prosecutor played a relatively insignificant role in the preliminary phase of the proceedings. In the investigation phase it was the investigating judge who was in charge. With the last ten years of change, the relationship and therefore the balance among those authorities began to change. The state prosecutor is slowly becoming more important and should become even more active since he or she is getting more and more powers, giving the state prosecutor the position of the leading authority in the procedure. With the proposed changes to the role of the state prosecutor, who had had most of the investigative authorizations at his or her own initiative *ex officio* before, the role of the investigating judge would also change immensely.

The investigating judge is partly losing the role of the investigator and is gaining the function of protecting the rights and liberties of the defendant, since more and more of his or her powers also concern the issuing of orders for e.g. searches of the premises and the tapping of telephones on the state prosecutor's proposal. He or she is therefore becoming the analogue to the justice of freedoms. These two functions have been severely criticized since it is not possible that the one, who is responsible for the investigation in a certain phase of the procedure (again a manifestation of the inquisitorial maxim) may act as an impartial judge in the same proceedings. The institution of the investigating judge is therefore one of the serious weak points of the procedure in Slovenia. It either does not investigate properly, since it becomes the impartial judge, or it does not function as the guarantor of rights and liberties of citizens. The latter is much more frequently the case, since it is not possible to start from the neutral point, when (later on) one has to be active in the investigation. Also the attitude of the investigating judges, who sometimes view themselves as the helping hand of the prosecutors, is contradictory to the role of the "pure" judiciary.

In the adversary system the only judge intervening in the procedure is the trial judge. He does not take part in the investigations and, with limited exceptions, plays a passive role. The evidence collected by the defense counsel and prosecutor are presented by them.

However, even defense attorneys often claim that by losing the institution of the investigating judge, poor defendants would often lose the only authority that would collect evidence in favor of the accused. We could therefore say that, as much as its role is schizophrenic, the answer to the question of abolishing the institution itself is not simple. In a way, the investigating judge still corrects the perhaps too enthusiastic police investigation, by collecting evidence also for the

defense (in search of the truth) and by suggestions to drop the case when there are no grounds to prosecute.

The introduction of a preliminary procedure controlled by a judge is one possibility to form the investigative phase of the criminal procedure. However, it is not cogent to fulfill the demands of a criminal procedure respecting human rights and the rule of law by splitting the investigative competence between the prosecutor and the investigating judge. On the other hand, the introduction of a preliminary procedure controlled by a judge is not far from the legal traditions of Continental Europe. The legal system of Austria, until recently, contained a similar procedure. Most of the Swiss cantons follow the system of splitting competencies. In the French legal order, the principle of the preliminary procedure controlled by judges has been the tradition since the Napoleonic reforms at the beginning of the 19th century. Apart from the legal procedure in France, the criminal legal systems of Luxembourg and Belgium also accept the investigating judge. In the Netherlands, this system can be found in an extenuated form.

A procedure can be made, fully harmonized with human rights and rule of law requirements that transfers investigative competencies from the investigative judge to the public prosecutor. In such model of the criminal procedure there is no preliminary judicial investigative phase. In this regard, the German Criminal Procedure Code can serve as model.

The German Criminal Procedure Code obliges the prosecutors' office to investigate the facts *ex officio* as soon as it learns of the suspicions of criminal act with the intent of determining whether a perpetrator should be indicted. Judicial investigations might take place only on the basis of this indictment. For the purpose of the indictment, the Code charges the prosecution office to undertake the necessary investigations – either by itself, or by the law enforcement agencies. The preliminary judge, who is ordinarily located in the district court, is acting only on the request of the prosecutor, if the law foresees an expressed judicial decision or if the prosecution office considers a judicial investigative action as necessary. Such preliminary decisions are reserved for the judiciary, which empowers the prosecution office and the police to intervene in the freedom of movement, the protection of private property, the protection of individual integrity and the individual secrecy of mail and telecommunication. Here the law demands a judicial decision. Beyond this, the prosecutors' office can ask for judicial investigations as far as the prosecutor considers these judicial actions necessary. As the prosecutors' office is ordinarily allowed to investigate the facts through its own faculties, judicial investigations are exceptionally undertaken in circumstances such as:

1. There is danger of the loss of evidence. In this case, witnesses and court experts are interviewed to gain a judicial protocol that can be used in the main trial as a written document.
2. A judicial inspection of evidence, places and persons is required.
3. To gain a more veracious statement of a witness or court expert, especially under oath.

Such judicial investigations are a rare exception in criminal investigation practice.

By examining the Slovenian Criminal Procedure Code, one notes that it contains the following procedural phases:

- Firstly, the police investigations are devoted to collecting information. In this phase, the probable witnesses are designated and are interviewed by the law enforcement agencies for information purposes only. This procedural phase leads to the result that the collected information and witness statements give the factual reason for a suspicion and enable the police authorities to charge the defendant officially.
- Secondly, the judicial investigations, which are started by a reasoned prosecutorial request formed on the basis of information and facts collected by the law enforcement agencies. The request has to demonstrate which facts presume a criminal act and why the judicial investigation is necessary.
- The filling of the charges (indictment).
- The judicial investigations then lead to the main trial before the court, if the defendant is indicted. In this phase of proceeding the witnesses and the court experts are interviewed for a second time.

The German criminal procedure code reduces these parts of the proceeding to two main procedures, namely:

- The proceedings preparatory phase which is in the hands of the prosecutor. In this preparatory phase, all the evidence which is necessary for the indictment is collected.
- The main trial before the court, which is exclusively directed by the judge.

The German procedure seems more effective because it is shorter. The conciseness is only achievable by ensuring that the evidence collected by the police and by the prosecution office on the one hand, and the evidence raised by the judiciary on the other are considered equally valid. Thus, an indictment based exclusively on evidence collected by the police is possible.

However, the more formal procedure in Slovenia could probably be more appropriate to the demands of the rule of law because the judiciary directs the preliminary procedure. If this procedure is not changed, the efficiency deficits must also be overcome. The French criminal procedural system is the starting point of the Slovenian procedural model directed by the investigating judge. However, the Slovenian model has withdrawn from this classical system. The differences become clear when the third phase of the criminal procedure, the main trial, is taken into account. The French main trial is mostly based on the results which were gained in the judicially directed preliminary phase. The French main trial uses these results. Therefore, the French main trial is designed for the use of written documents and protocol statements of the witnesses or experts. The witnesses are ordinarily not interviewed directly in the main court. Their statements, which the investigative judge has recorded in the preliminary phase of the trial, are read out and serve as evidence. In general, the French main trials are more concise than the Slovenian trials in which the taking of evidence is formally repeated. Of course, the French proceedings are more concise than the

German proceedings before the main court. In the German main trial, the judge accepts the evidence for the first time, and this takes time.

If we take the legal situation of Slovenia into account, we can assess that the gathering of evidence is unnecessarily repeated in the criminal proceeding. This is an important gap in effectiveness.

Apart from these aspects, the existing legal provisions of the 1994 Criminal Procedure Code produce too many actors. There is the investigating judge in the second investigative phase in whose hands the investigations are given and who is charging the law enforcement agencies. There is the police authority that is accountable in the first phase of the proceeding and is executing the judge's orders in the second part of the proceeding. The judicial accountability does not exclude that the law enforcement agencies act *ex officio* looking for further evidence during the judicial investigation. Furthermore, there is the prosecution office that, following Article 160 a of the Criminal Procedure Code, is directing the investigations and is determining their scope. However, this office is not able to intervene directly in the judicial investigations. There is a need for a conductor in this orchestra of players. The prosecution office might be this conductor. Article 160.a of the Criminal Procedure Code gives the prosecutor the power to influence the police work. Their powers are indeed not well delineated. If following article 169 par. 1 of the Criminal Procedure Code the investigating judge decides whether to open the formal investigation, he is quite free and independent to direct it as he sees fit. Currently, the prosecutor is restricted to motions and requests (article 168, par. 1 of the Criminal Procedure Code). He does not have legal authority to direct the activities of the investigating judge.

The proceedings need co-ordination, if the players in the crucial second phase – which provides the basis for an indictment – are acting independently of each other. As we have seen, the legal possibilities to co-ordinate are extremely weak.

The German criminal procedure code is clearer. It gives the prosecutors' office a clear mandate of leadership and establishes its pre-eminence in the investigation. The law enforcement is legally restricted to providing assistance to the prosecutor. Its investigative authority is limited to cases on-the-spot and in which there is a danger of lost evidence. The law expresses the dependence of police authorities by ordering that the law enforcement agencies to which police authorities belong be unconditionally obliged to follow the prosecutor's directions.

Under the legal pre-conditions in Slovenia, the necessary co-ordination between the charged authorities demands an agreement. An agreement implies the consensual will of the participants and is achieved on the basis of negotiations. In addition to this, the question of virtual accountability is linked to this legal situation. The German law concentrates accountability on the prosecutor and does not give any opportunity to evade this responsibility. The prosecutors are very aware of this situation. A critical public reminds it to them often enough. The Slovenian Code allows gaps in the accountability of the investigators, even if all the players in the field of investigations are willing to co-ordinate. So it is a simple question of who is responsible if the attempts to co-ordinate the investigation fail. The code does not recognize the collective of the participants in the co-ordination process as a legal counterpart. Because of the gaps in the legal system and depending on the particular case and also political exigency,

the players in the field try to evade responsibility. This means that the proceedings remain without a direction and without concepts or structures. The proceedings dissolve. The danger is at hand that perpetrators are escaping their just punishment.

The procedure foreseen by the 1994 Criminal Procedure Code is cumbersome and has in many ways too many formalized legal complications. It is not effective. Especially, clear ties leading to accountability are missing.

I advocate a model of pre-trial procedure in which the key player is the state prosecutor, who carries out the procedure in order to be able to decide on whether to institute a criminal prosecution before the courts. The police are not independent but completely or to a large extent subordinate to the prosecution body. The judge appears primarily as judge guarantor, i.e., a judge who protects people's rights and freedoms and only exceptionally intervenes in order to protect evidence, but never *ex officio*, only on the proposal of the prosecution or defence. The rights of the defence are systematically built into the procedure. The pre-trial procedure is the only phase of the preliminary procedure, since after an intermediate, preliminary or control phase, which is in the hands of the courts, it leads either to court proceedings or ends, either because the conditions are not met for further proceeding or through redirection into one of the forms of alternative reaction to the commission of a crime.

For the most part countries that reformed their criminal proceedings in the last quarter of the 20th century opted for such a type of pre-trial procedure. They normally ended (or very much limited) investigation as a typical institute of a mixed (but actually inquisitorial) procedure and attempted to introduce a number of adversarial elements, so that the criminal proceedings would be organised as a contest. It is a difficult search for new balances in criminal proceedings. On the one hand, the breakthrough of adversarial procedures is a fact, but on the other, their weak points cannot be ignored. The transplanting of a foreign model did not seem acceptable, also because of their own legal culture and traditions, so reforms tended towards the introduction of a modified (reformed) adversarial procedure.

It is essential for this type of procedure that procedural motions are relatively clear and pure. The state (public) prosecutor is pronounced in his role of prosecution body, since the pre-trial procedure is conceived as "his" procedure; it is supposed to serve primarily his needs, i.e., the collection of data for deciding whether to prosecute. Since the prosecution office is a state body, irrespective of the branch of power into which it is classified and what its function in the procedure is, it is required to be objective.³²

The state prosecutor conducts the pre-trial procedure either alone or through the subordinate (court) police; there are often certain (more important) tasks retained only for him, which he has no authority to transfer to the police.

The connection between the prosecution body and the court police is functional and not organizational. The court police are linked to the prosecution office

³² This requirement can theoretically be set at various levels, but it would be in conflict with the prosecutor's procedural role for it to be set too high: normally, e.g., it is required that he ensure the protection of evidence he comes across in his work that may be of benefit to the defence, but more rarely he is bound to autonomous activity towards seeking evidence to the benefit of the defence.

in the exercise of their function, otherwise remaining a constituent part of the police. Other police forces do not have the authorities of the court police, except for performing urgent activities (which is understood narrowly). The prosecutor must always have available the necessary (agreed) number of trained members of the court police and it cannot be conceived that the senior management of the police could withdraw them for carrying out other duties.

In this model of pre-trial procedure the state prosecutor also controls the police.

The judge appears in this type of pre-trial procedure in two roles:³³ primary, i.e., in the role of judge – guarantor or judge of freedoms; and secondary, i.e., in the role of a judge who may exceptionally protect evidence. The first is relatively familiar in Slovenia and means that the judge decides on the permissibility of acts which (sufficiently deeply) encroach on people's rights and freedoms, primarily the accused but may also partially be of other participants in the procedure. In principle, any police authority in investigating a suspected crime can mean an encroachment on people's rights, at least the general freedom of behavior and the right to privacy, and many other rights more deeply and over a very wide spectrum,³⁴ as far as the most serious encroachments which signify a profound encroachment on the right to personal liberty. The use of the most serious of these³⁵ may only be permitted by a judge, under conditions specified in law, and this represents his role as guarantor.

The other task of a judge in the pre-trial procedure is protecting evidence. It is a fact that a situation can arise in which evidence cannot be taken at trial, and must therefore be taken in advance, thus protected.³⁶ It is an exception, which for this reason must be used narrowly.³⁷ Such protection of evidence can be proposed by both sides, but a judge may never carry it out *ex officio*.³⁸ The scheme is in principle adversarial: the parties being guided by their own interests, are active, while the court is passive: more so if it must grant a motion and less so if it may actively judge whether conditions are met for protecting evidence. There are therefore sufficient possibilities for a balanced arrangement of this question. This further means that the court does not participate in the prosecution and does not operate on the side of the criminal charge. In brief, it is a court activity that, in terms of content, is familiar in the Slovenian procedure today.

I propose the following changes: the introduction of an adversarial (accusatorial) procedure and a mixed system of prosecution (with the principle of expediency

³³ It must be stressed here that this is normally two different judges, since the functions are in conflict and if they were not separated, there would be similar difficulties as those with which we are confronted today with the investigating judge.

³⁴ Only as an example, let me mention encroachment on physical integrity (taking tissue for later analysis), privacy at a higher level (house search), assets (temporary seizure of objects, material benefits or property suspected of having been obtained illegally), freedom of movement (specifying a place of residence or a ban on approaching a person or object), personal liberty (custody) etc.

³⁵ In the distinction, which is crucial, it is necessary in particular carefully to weigh the interest of protecting people's rights and freedoms, but also a suitably effective procedure.

³⁶ Attention must be drawn here that it will not normally be the same person (judge), since the two functions are different in nature.

³⁷ Theory draws attention here that a wide interpretation of the need to protect evidence could change this procedure into a kind of concealed investigation, which would be in conflict with the conceived arrangement.

³⁸ There is not actually such a risk in this procedure, since it is almost impossible for a situation to arise in which a judge would himself consider that some evidence should be protected – a judge namely is entirely unaware of such evidence.

for less serious offences), greater application of the adversarial principle with all important questions, the abolition of (judicial) investigation, amended starting points for ordinary and extraordinary means and the introduction of a special judge who would decide on the enforcement of penal sanctions. Major changes would occur mainly in the pre-trial procedure, which would be in the hands of the state prosecutor and (court) police, on personal (custody) and material (house search) restrictive measures, on which a judge guarantor would decide in an adversarial hearing. The judge guarantor would no longer perform investigatory activities. The state prosecutor would have available great scope for rejecting or abandoning a prosecution, but such a procedure would not include plea bargaining.³⁹ The main phase of such a model of procedure would be a classical trial, which would be organized as a contest of equals before a passive court.

Such a fairly radical change to the mixed criminal procedure would certainly be in accordance with the requirements for greater democratization of the procedure and, at the same time, would also bring greater transparency and internal concordance of the criminal procedure. In adopting an accusatorial model of procedure, probably not all institutions known in modern accusatorial procedures would enter into consideration, e.g., the aforementioned plea bargaining. It is necessary to bear in mind that more than two hundred years of tradition of mixed procedures in continental Europe have brought many good solutions, which should be retained in such a changed criminal procedure. The need for justice and a search for the truth (irrespective of how such a notion is defined) are certainly part of the continental (though less so the Anglo-Saxon) legal culture and arrangement of the criminal procedure as a contest between two parties would certainly be alien to this culture.

Investigation is conceived in a procedure before a district court as the first and generally compulsory phase of a normal criminal procedure. An investigation is typical and with its main protagonist (investigating judge) certainly the most characteristic institution of the inquisitorial procedure, which mixed procedures have taken over. The basic condition for it is a higher level of probability (well-founded suspicion that a particular person has committed a criminal offence).

A decision on reform of the criminal procedure might become, together with a rearrangement of the pre-trial procedure, a decision on ending investigation as a special phase of the pre-trial procedure. Almost all countries that have radically changed the arrangement of their criminal procedure in recent decades have given up investigation. So many theoretical and practical problems and contradictions have accumulated in it that, viewed from today's perspective, it is very difficult to defend.

Summary

The actual distribution of competence in the criminal proceedings of Slovenia is not satisfactory at all. The splitting of the whole proceeding into at least three phases is not a constitutional demand. The distribution of tasks between police, prosecution office and judiciary offers too many players the opportunity to act or to omit the necessary actions. And in addition to this, the procedure law gives

³⁹ Such plea bargaining could be allowed, if the entire procedure was under the control of the courts, which would also finally decide on whether to accept a guilty plea or not and whether the accused is aware of the significance of pleading guilty.

only small legal remedies to appeal if the judge omits the necessary actions. This situation does not favor effectiveness, but rather slows the process down. In the case that all players are acting, the legal tools to co-ordinate and direct are not foreseen. The present system promotes the procedural ineffectiveness even further. In addition to this, there are no legal objectives which prevent the necessary changes.

If the system is reformed, one or another legal system might be used as a model. In any case, the German system in which the investigative power is concentrated in the prosecution office is not the worst. Compared to the existing system in Slovenia, it is clearly more effective. If the present system in Slovenia is changed, at least the following aspects should be considered. The reform has to reduce the number of procedural phases. This result should be achieved by the elimination of the investigating judge. The procedure must be reduced to the constitutional requirements. Where human rights and freedoms in a criminal procedure action are in question, there and only there, a judicial decision is indispensable. Reducing the judicial powers will strengthen the investigative authority of the prosecutor and enable him to direct, steer and design the proceeding from the very beginning. In any case, the reform must clarify the relations between the police and the prosecutors' office. It has to stress the pre-eminence of the prosecutor.

STATUS, ORGANIZATION, ROLE, AND FUNCTION OF THE PUBLIC PROSECUTOR'S OFFICE (PUBLIC PROSECUTORS) IN THE CZECH REPUBLIC

Jana Zezulová⁴⁰

Introduction

Article 80, par. 1 of the Constitution of the Czech Republic characterizes the public prosecutor's office as an organ representing public prosecution in criminal proceedings; it also performs other tasks the law sets forth. By Act No. 283/1993 Coll., on the public prosecutor, in effect since 1 January 1994, the public prosecutor's office has been organized as a system of public offices assigned to represent the state in cases established by law. This system replaced the former office of public prosecution, which was blamed for being too similar to Soviet models, further that it was "omnipotent" (the "guardian of justice" concept), and that it formed a kind of "fourth" power in society (next to the legislative, executive and judicial powers). On the other hand, it is important to note that after the origin of the public prosecutor's office, some of the control mechanisms, which could have prevented privatization crimes and encroachments into the economic sphere ("tunneling", bank collapses, etc.), which occurred in the Czech Republic in the first half of the nineties, were no longer enforced. The so-called universal supervision by the Office of Public Prosecution was discontinued without any replacement. However, as far as this involves the criminal section, the replacement of the Office of Public Prosecution by the public prosecutor's office has not been very apparent because the legal authority of the public prosecutor's office (and public prosecuting attorneys) has remained practically the same.

Status and scope of the public prosecutor's office, particularly in the area of crime

The tasks of the public prosecutor's office established by the Constitution of the Czech Republic, further augmented by Act No. 283/1993 Coll., on the public prosecutor's office, as amended primarily by important legislation conveyed by Act No. 14/2002 Coll., according to which the public prosecutor's office (§ 4):

- Is the organ of public prosecution in criminal proceedings;
- Fulfills other tasks that originate from criminal regulations (particularly supervision over preserving legality in preparatory proceedings);
- Conducts supervision over maintaining legal regulations in places where arrests, imprisonment, deterrent treatment, deterrent or institutional training are performed and in other places where, in accordance with legal authority, personal freedom is restricted (special laws currently amending the supervision over places where arrests, imprisonment, deterrent

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and institutional training are performed) within the scope, under the conditions, and by the method established by law;

- Has been given the task, in compliance with its legally allotted activities, to participate in crime prevention and to provide assistance to the victims of criminal acts;
- Acts in proceedings other than criminal (this involves a very extensive compendium of capabilities, as a rule, proposals for initiating criminal proceedings, possible involvement in already initiated proceedings, for example, a petition for repudiation of paternity in cases when the period established by law has already expired, if it has been deemed to be in the public interest, or a petition before a panel of judges, if the public interest has been affected in a serious way – these petitions are submitted by the Supreme Public Prosecutor).

The Constitution of the Czech Republic ranks the public prosecutor's office among the organs of executive power, into that part dedicated to the government. It is not ranked among ministries or other executive organs of state power, but the public prosecutor's office stands alongside these bodies. Some opinions (e.g. expressed in commentaries to the Constitution of the Czech Republic) state that the public prosecutor's office is an executive power, which as such respects the policies of the government in the scope of its activities. Therefore, it has been incorporated by law into a department of the Ministry of Justice.

According to other opinions (e.g. an actual commentary to the Law on the Public Prosecutor's Office), it is possible to see it as a *sui generis* body, mixing features of the executive and the judiciary power, a "transition" to judicial power. The trend is definitely toward this position. The public prosecutor's office is not even an administrative office or an organ which could be focused on implementing government policy. Its status in the system of public power is specific. The public prosecutor's office represents an organ for criminal justice. Public prosecutors as those who carry out the tasks of the office (and who by law have already been granted the relevant legal authority by the law not transmitted from a decision by the relevant prosecutor general), are significant agents in criminal prosecution (and, to a limited extent, non-criminal justice). The public prosecutors must ensure protection of the public interest (not the closely related concept of state interest).

In the area of criminal proceedings, this involves prosecution before the court of certain persons justifiably suspected of having committed a criminal act. Also in proceedings before the court (where the public prosecutor otherwise takes the position of a party), the public prosecutor's office defends the public interest. It may not concentrate solely on achieving a judgment against the accused at any price. It may, for example, propose acquittal of the accused, advance evidence on behalf of the accused, or even submit an appeal in his/her favor. Finally, from this standpoint, public prosecutors assume a conspicuous role in that they significantly share in safeguarding human rights and basic freedoms in preparatory proceedings.

Judges active in preparatory proceedings for deciding on serious encroachments on these rights and freedoms also play a very significant role here (in the Czech Republic, there is no such institution like a court of inquiry). The role of public

prosecutors, however, is no less significant. The concept of a court of inquiry (typical, for example, for France, the Netherlands, Belgium, Portugal, Spain, Switzerland and, until the end of 2007, Austria; discontinued in Germany and Italy) was rejected precisely because it was contradictory (the judge investigates and brings up charges for a criminal act, but on the other hand he/she should also guarantee rights and due process), costly, and in preparatory proceedings would cast doubt on the dominant role played by the public prosecutor. If this model were applied with a court of inquiry, the public prosecutor would not bear full responsibility for performing preparatory proceedings, even though he/she would submit the indictment and perform the prosecution before the court.

The Czech Republic has a system in which the public prosecutor plays a decisive role. He/she controls the activities of the police performing investigative work on criminal acts, both from the standpoint of guaranteeing human rights and basic freedoms and respecting laws and other legal regulations. The role of the police from this standpoint is critical (in the Czech Republic, no model exists in which the public prosecutor formally authorizes police officers to investigate; the police have their own special independence and the public prosecutor oversees them). Control of police activities is also implemented for the purpose of speed and efficiency during preparatory proceedings.

In contrast to this – unlike some other amendments – considering the fact that we have a mandatory system with principles of legality (the principle of opportunity is applied only as an exception – although we still have a material conception of the criminal act, which allows an act of an inconsequential nature not to be judged as a criminal act) – the public prosecutor's office does not establish priorities for police activities or principles for applying a punitive policy, nor does it have an influence on the organization of the police. This appertains completely to the Ministry of the Interior. The position of the public prosecutor's office in preparatory proceedings may be expressed by a concise statement: public prosecutors are procedurally, not functionally, the superiors of the police.

In preparatory proceedings a public prosecutor holds the dominant position and is responsible for the course of proceedings in regard to legality, facility, and speed. He/she conducts supervision over police activities, deciding on corrective measures directed against the decisions of police organs. After completing preparatory proceedings, all important decisions lie with him/her – submitting indictments, discontinuing criminal prosecution, approving settlements, withdrawing from criminal prosecution of youth, relegating matters to an infraction or some other administrative delinquency or disciplinary (punitive) offence.

In proceedings before the court, the public prosecutor assumes the position of a party. But it cannot be said that this involves an entirely equal position to the party of the defendant. This does not mean that these two parties to the process should not be equal (then the justice system would not work or the proceedings would be contradictory), but it means the public prosecutor also performs the role of defender of the public interest in proceedings before the court. He/she may not conceal evidence favorable to the accused. In justifiable cases, he/she must even propose the issuance of a plea of not guilty of a criminal act. This takes into account, for example, the fact that the public prosecutor (particularly necessary for youth) may propose the application of some sort of departure, i.e. the conditional cessation of criminal prosecution, settlement, or withdrawal from

criminal prosecution of youth. The Czech procedural system is continental, not Anglo-American (adversarial). In matters before the court, the public prosecutor has increased responsibility acting in the position of a party and must proceed toward the accused with an unbiased and open mind.

Organization of the public prosecutor's office, the position of the Ministry of Justice

According to the Constitution, the administrative organ for the public prosecutor's office is the Ministry of Justice. An amendment to the Act on the Public Prosecutor's Office, the executed Acts No. 14/2002 Coll. and No. 192/2003 Coll., expressly set down the principle that the Ministry of Justice always performs the administration of the public prosecutor's office. This involves organization, personnel, financial and economic affairs, control and revision of economic management, attending to complaints, education, determining crisis management and security tasks, directing and employing information technology.

In any matter and at any time, the Minister of Justice may demand information from anyone in the public prosecutor's office, if the information is required for the performance of tasks by the Ministry or by a member of the government (e.g. inquiries, representing the Czech Republic in proceedings before the European Court for Human Rights). Furthermore, responsible cooperation has been legally established by anyone in the public prosecutor's office in the field of applying Act No. 82/1998 Coll., on responsibilities for damages caused during the exercise of public power by decision or incorrect official procedure.

The Minister of Justice, however, is no longer (as it was prior to Act No. 14/2002 Coll.) functionally superior to the Supreme Public Prosecutor. The Ministry of Justice also no longer performs supervision over the activities of the Supreme State Prosecutor's Office, as it did in accordance with previous amendments. As a result, neither the Minister of Justice nor the Supreme Public Prosecutor or individual public prosecutors may render binding instructions. Only the Supreme Public Prosecutor may issue instructions of a general nature (such as explanatory positions related to resolving specific application problems). This involves interdepartmental organizational regulations related predominantly to the district process (e.g. correct procedure during supervision over preparatory proceedings, the procedure according to the Judiciary Law in matters of youth), and only exceptionally for material rights (establishing the procedure to assess cases for the possession of drugs for one's own use, prosecuting criminal acts committed for racial reasons, etc.).

The system of public prosecutor's offices in the Czech Republic is four-tiered. It consists of 86 precincts (and districts in the capital city of Prague), 8 regional (a judicial region is distinguished from an administrative one – there are 8 judicial regions and 14 administrative ones – the district of the capital city of Prague is a region both administrative and judicial), two superior (in Prague and Olomouc) and the supreme organ of the system – the Supreme Public Prosecutor's Office. The main work of the public prosecutor's office is performed by the district and regional public prosecutors. While the precinct public prosecutor's offices act universally in all criminal matters, the action of the regional public prosecutor's office (the Municipal Public Prosecutor's Office in Prague) has in its domain

more serious criminal acts (e.g. murder, grand theft, and harmful, economic, financial and property crimes accompanied by great damages or performed with a special qualified method). In the first stage, the superior public prosecutor's office operates only exceptionally (for some criminal acts in the field of banking and financial crime with damages of a minimum 50 million CZK, i.e. around 1.7 million Euro, criminal acts directed against the financial interests of the European Union, etc.). The Supreme Public Prosecutor's Office performs supervision over the activities of the superior public prosecutor's office, determines the legal relationship with foreigners (with the exception of direct relations), etc. It may also revoke (this involves the exclusive legal authority of the Supreme Public Prosecutor's Office) unlawful decisions of lower public prosecutors on discontinuing criminal prosecution and delegating matters to some other organ in cases of infraction, some other administrative delinquency or a punitive (disciplinary) offence. In no way is the position of the Supreme Public Prosecutor similar to the system characteristic, for example, of Germany or Austria, where there is an Attorney General entirely separate from the system of prosecuting attorneys (and he/she fulfills tasks only in proceedings on extraordinary corrective measures – in the Czech Republic, this involves an appeal and a complaint for violation of the law). The Supreme Public Prosecutor's Office is the actual superior member of the entire system of public prosecutors.

Conclusion

As noted above, the public prosecutor's office (or public prosecutors) plays a significant role in criminal (preparatory) proceedings. This has been underscored after substantive amendment to the Rules of Criminal Procedure in 2001 (which is occasionally noted as a re-codification of the criminal procedure, because it includes practically three hundred changes in the valid Rules of Criminal Procedure, some of which have been very significant).

RELATIONSHIP BETWEEN PROSECUTION OFFICE AND POLICE IN THE CZECH REPUBLIC AFTER AMENDMENT OF THE RULES OF CRIMINAL PROCEDURE AND THE POLICE ACT OF 2001

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Introduction

This paper focuses on some aspects of the relationship between the prosecution office and the police. This issue can be viewed firstly from the point of national legal regulation (which is necessarily different in various countries) and secondly from the international point of view.

In this respect articles 21 to 23 of Recommendation of the Committee of Ministers (Rec) (2000) 19 of 6th October 2000, regarding the role of public indictment in the criminal justice system, stipulate that, in general, public prosecutors should scrutinize the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police. Countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, should take effective measures to guarantee that the public prosecutor may:

- a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;
- b. where different police agencies are available, allocate individual cases to the agency that he/she deems best suited to deal with it;
- c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;
- d. sanction or promote sanctioning, if appropriate, of eventual violations.

States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional cooperation between the public prosecution and the police.⁴²

Otherwise, however, articles 22 and 23 of the Recommendation reveal the compelling gap between the two systems – the continental and the Anglo-American one. In countries applying the continental type of law the prosecutors

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⁴² Cf. art. 21 – 23 of Rec (2000) 19.

control, or at least supervise the police activity, issue instructions to the police regarding specific matters or issue instructions generally focused on implementation of criminal policy (with special emphasis on forms of criminality causing the biggest problems in the given country and historical situation – organized crime, drug crime, economic and financial crime, money laundering control, bribery, extremely grave criminal acts, offences against morality including criminal sanctions against pornography, commercial sexual abuse of children and trafficking in people, and the like).

While the prosecutors have all these or even additional competences towards the police (sometimes even authorization to determine which policemen can perform the investigation, authorization to propose their disciplinary punishments in the event of breach of duties), a question rises whether the prosecutors are able to perform all these extensive powers in respect of the police at all. In the countries applying the Anglo-American system the main point is – besides meeting the general duties provided in Article 21 of the Recommendation (i.e. the check of police investigation prior to commencement of criminal prosecution and providing for protection of fundamental rights and freedoms within the police activity) – to achieve an efficient co-operation of the two independent bodies involved in criminal procedure – prosecution office and police. Both models indicated above have their advantages and disadvantages. The continental concept is based on the idea that the police activity interferes in sensitive spheres of the life of people and society; therefore it must be subject to control. This may often result in refusal to take personal responsibility and transfer of accountability to prosecutors (even responsibility for the investigation itself). The Anglo-American conception puts emphasis on independence and responsibility of the police and prosecutors, while the control of the police activity is applied to an accurately defined extent only. It may result in a situation that this concept would appear to be insufficient as regards certain extremely grave forms of criminality; the prosecutors are given some more competences (as to the control of the police) at least in respect of these forms of criminal acts.

Detailed analysis of the strong and weak points of the above-mentioned policies is not the objective of this contribution. The fact is – as stated by declaratory memorandum to the Recommendation – that both systems have become closer to each other recently. The criminal process in Europe has been undergoing a very complex period. There are difficulties in proving criminality properly in spite of employment of the most advanced investigating methods. The effectivity of criminal proceedings has decreased as a consequence of inability to affect the gravest forms of criminality (this applies particularly to organized crime). Therefore, both systems try to use the positive knowledge and experience of the other system. This trend is inherent to the Czech Republic too; it has been fully confirmed by extensive amendment of the Rules of Criminal Procedure, Criminal Code, the Police Act and other acts of 2001.

Retrospective view

Legal regulation effective in the Czech Republic before 2001 could be characterized as application of a uniform type of control for all crimes irrespective of their gravity (e.g. murders were cleared according to almost the same control model as the less grave crimes). Prosecutors performed a full-valued supervision of the investigation stage only (after commencement of

criminal prosecution by notification of accusation to the specific person). At the stage of procedure before commencement of criminal prosecution they had very limited competences (to require data from banks, tax bodies, security-administrating bodies and organizations, to follow the course of verification of suspicion of crime, in exceptional cases to influence the course by issuing appropriate instructions). At the stage of investigation which, according to the Czech terminology of criminal proceedings, followed after commencement of criminal prosecution, they had extensive powers (to issue instructions regarding the investigations, to review files, to have reports on important acts submitted, to carry out an individual act or the entire investigation, to send back the case to be supplemented, to remove the case from an investigator and assign it to another one, to cancel the investigators' unlawful acts, and the like).

The police investigators who were responsible for proper and complete investigation of the case held a very strong position. They were authorized to issue binding instructions even to the police bodies. These bodies played a rather auxiliary role, with their activities focusing more on verification of suspicion of criminality. This resulted in danger of duplicity, when one policeman was verifying the matter and the other policeman was investigating the same. The same acts were often repeated (especially interrogation of persons).

Although it was generally stated before 2001 that the prosecutor performing supervision in pre-trial criminal proceeding was *dominus litis* of this stage of the proceeding, the legal regulation and the resulting practice did not quite confirm such conclusion. Numerous obligations were imposed on a prosecutor that essentially enabled him to ensure that only persons for whom the suspicion of commitment of crime had been sufficiently substantiated were prosecuted and that the fundamental rights and freedoms of such persons in pre-trial proceeding would be fully respected; thus the prosecutor was able to create favorable preconditions for public criminal suit in a trial by court. Such a model, however, could work satisfactorily only in those ideal cases in which no conflict situations occurred between the bodies responsible for criminal prosecution, when the positions of prosecutor and police investigator were occupied by persons combining their efforts to clear up a criminal case so that it can be closed in an adequate manner (bring a case before court, conditional discontinuance, refer the case to another body, and the like). It is unfortunately quite realistic that such conflicts may develop (which is just the case of less idyllic relationships among prosecutors, investigators and police bodies; we also have to mention the level of professional training of the prosecutors and policemen, the policy on which their activity has been based in pre-trial proceeding and the practice applied on the basis of such policy).

Moreover, there was an apparent imbalance of the roles of the prosecuting attorney and the police investigator. Investigators were unquestionably those who influenced the course of pre-trial proceeding to an absolutely decisive extent; starting from notification of accusation, decision against which person some securing measures shall be taken, to closing the investigation and assessing whether petition for indictment shall be submitted or the matter shall be closed up on merits in a different manner (especially by discontinuing the criminal prosecution or referring the case to another body). This is not to say that all the positive efforts of the investigators aimed at having a case file including everything substantial would be spent in vain. The point is, however, that the relationship between the prosecutor and investigator can never be the

relationship of equality, should the regulation of pre-trial stage of proceedings achieve the expected purpose. It is the prosecutor who is responsible for the result of pre-trial proceedings and it is also the prosecutor who represents the public indictment before court. Therefore, he must definitely be the decisive agent in this stage of proceeding.

Problems could be found not only in practice (the investigator notified of the accusation conducted the whole investigation, while the prosecutor's role was not always active enough). Another problem lay in the fact that the legal regulation provided for such an accentuated position of the investigators, *inter alia*, by emphasizing the investigator's obligation to proceed impartially and objectively towards the accused, for example to collect also evidence questioning the accused person's guilt and by regulating the institute of denial to meet the instruction given by prosecutor to the investigator. Investigators often construed the inconsistency between the prosecuting attorney's instruction and the law from the fact that the prosecuting attorney required a larger amount of acts to be performed within pre-trial proceeding (he mostly did so in conformance with requirements of courts that sent the case back for additional investigation). The investigator had numerous powers available in respect of police bodies – the application thereof, in consequence, may have resulted in the fact that most acts within pre-trial proceedings were carried out not by the investigator himself, but the police bodies which, in conformity with the amendment of the Rules of Criminal Procedure of 1993, should have only an auxiliary role. Moreover, competence disputes often occurred between both units of the police of the Czech Republic that fulfilled tasks in criminal proceeding. The disputes sprang here from the different approaches to the matter, and in the situation when the investigators and police bodies were united into a single police organization the Rules of Criminal Procedure did not provide sufficient opportunity to the prosecutor to resolve such conflicts.

Basic features of the relationship between the prosecutor and the police according to amendments of the Rules of Criminal Procedure and the Police Act of 2001

The amendment of the Rules of Criminal Procedure implemented by the Act No. 265/2001 Coll. has become the fundamental turning point of the last five decades even from the point of relationship between the prosecution office and the police because the general declaration of the principle that the prosecutor is the "master" of pre-trial proceeding is accompanied by a very detailed regulation of the issues aimed at fulfilling this general principal.

Above all, the amendment has significantly shifted the prosecutor's activity far into the so-called "pre-process" stage of procedure. Namely, it has changed the definition of beginning of the pre-trial proceedings which no longer start by commencement of criminal prosecution or implementation of urgent or nonrecurring acts, but already by the police body issuing the record of commencement of criminal proceeding acts in order to clear up and verify the facts reasonably attesting that a crime has been committed.

It is supported by the fact that the amendment has shifted the regulation of operative searching means (fictitious transfer, surveillance of persons and property, and use of police agent) from the Police Act No. 283/1991 Coll. as

amended by later regulations into the Rules of Criminal Procedure. Only regulation of “supporting” operative searching means remained in the Police Act (safety technology, cover documents, use of informer, etc.). Similar regulation is contained in the Customs Act because the customs bodies fulfill the tasks of police body in respect of crimes committed by breaching the customs regulations.

An extremely detrimental practice occurred particularly in consequence of the amendment of the Rules of Criminal Procedure of 1993 (which focused the attention of the prosecutors primarily to the stage after commencement of criminal prosecution). The prosecutor assumed no essential responsibility for verification of criminal complaints and other suggestions for criminal prosecution up to the moment preceding the commencement of criminal prosecution or implementation of the above-mentioned urgent or nonrecurring acts; this was mainly due to the fact that the prosecutor was given no real competences within this stage. Only after the pre-trial proceeding had commenced in the case, could he start performing the supervision over complying with the law within this proceeding.

Since the amendment of the Rules of Criminal Procedure has come into effect in 2001, the prosecutors have performed supervision over the complying with the law from the very beginning of the criminal case, i.e. from the moment when the record of commencement of criminal proceeding acts prepared by the police body has been served on them (or as soon as they learn that the police body has performed the necessary urgent and nonrecurring acts – e.g. search of crime scene – and subsequently has issued the said record).

It required an essential change in philosophy of approach to supervision in pre-trial proceeding. By then, the supervision focused rather on review of written materials delivered from the police, determination of complaints, settlement of requests of the accused and injured persons for review of the investigator’s procedure, implementation of inspections in some more significant matters, while greater emphasis was put on written form again. The amendment of the Rules of Criminal Procedure should have resulted in increased activity of prosecutors to the effect that they would concentrate to a larger extent on regular and consistent co-operation with persons doing service in the police body and field work (including participation in the acts performed by the police body).

It is, however, very difficult to achieve such change in understanding the supervision of the prosecutor in pre-trial proceeding. It is, *inter alia*, due to the fact that the amendment has strengthened significantly the prosecutor’s position in the whole pre-trial stage of the process, but on the other hand it makes much higher demands on quality and level of this activity. Although the requirements generally increased in respect of prosecutors, the personnel and material background for their activity was not always adequate. After January 1, 2002, when the quoted amendment came into effect, there were frequent difficulties resulting from insufficient number of prosecutors (about 20% less than needed) and office staff of the prosecutors’ offices.

In conformity with the changed policy of supervision over pre-trial proceeding is the fact that the amendment vests in the prosecutor the exclusive power to determine all methods of termination of pre-trial proceeding (apart from sovereign authorization to submit indictment, motion to approve the settlement and to discontinue conditionally the criminal prosecution, discontinuance and

suspension of criminal prosecution and referral of the case to an other body have been added). It should be the task of the police to verify the criminal complaints and other suggestions for criminal prosecution and to investigate offences subject to the exceptions provided by law (which is the investigation of offences committed by policemen and members of the Safety Intelligence Service where the investigation is conducted by a prosecutor). The prosecutor is the official securing the administration of justice in criminal proceedings until submission of indictment.

The organization of the police investigation has become the most discussed part of the amendment.

Based on the amendment, a joint Criminal Police and Investigation Service has been formed.

In terms of the restructuring of the general criminality and economic criminality departments, groups of staff were established (called documentalists, or criminalists, or operative staff) involved in detecting general and economic crimes. One investigation department has been formed in each division (out of the former investigators). The activity of these two groups was closely interconnected as they were managed by a single chief.

The benefit of this structure consisted in the improvement of mutual co-operation of the operative staff and staff involved in investigation, which was particularly obvious in more complex or grave cases. In less grave matters, summary proceeding with lower amount of clarified facts was conducted according to the amended Rules of Criminal Procedure.

When performing the tasks in criminal proceeding, the police body is bound only by instructions of the prosecutor to which it is subordinate within the process. Its operating subordination within the police is not affected thereby. The concern expressed in discussions over the amendment of the Rules of Criminal Procedure, i.e. that the policemen acting in criminal proceeding in the suggested role will be given instructions not only by the prosecutor, but also by internal police officials, is fundamentally inadmissible. Superiors-in-rank within the police are responsible for education, material and personnel background, they may provide methodological assistance and perform operating inspection. During these activities they must not interfere with the prosecutor's power to issue instructions and check on the work of the police body.

Conclusions

It follows from the aforementioned that the Czech legal regulation of mutual relationship between the prosecutor's office and the police is fully based on principles inherent to the continental type of proceedings. It means that the prosecutor controls and checks on the police to the extent to which they fulfill tasks in the criminal proceeding. It should be added that the possibility for objections to instructions of the prosecutor was cancelled by the amendment of 2001.

On the other hand, the prosecution office cannot issue general instructions to the police, nor can it formulate the principles of criminal policy or its implementation

in practice. This is the task of the Police Headquarters and the Ministry of Interior. Prosecutors participate in the education of the policemen, but the decisive role here belongs to the Police Headquarters and Ministry of Interior again. The prosecutor may remove the case from a police body and assign it to another police body. He is not authorized, however, to decide which persons shall be on duty in the police body. He may give rise to disciplinary punishment, but it is not a proposal on which the disciplinary body has to decide. It is really a mere suggestion, not a proposal.

The Czech criminal procedure theory attaches to the opinion of the continental penal theory that the police activity interferes with the citizens' rights and freedoms, processes personal data, and all of this requires that the police be subject to supervision. Upon fulfilling the tasks in criminal proceeding it is fully justified that this supervision is performed by the element playing a dominant role in pre-trial proceeding – i.e., the prosecutor.

Supplement: Police organs conducting preparatory proceedings in the Czech Republic

According to the Czech Criminal Code (§ 12 par. 2), police organs are departments of the Police of the Czech Republic and in proceedings for criminal acts committed by the police, the department of the Ministry of the Interior for Inspection Activity (also titled, Inspection for the Ministry of the Interior), while the same position is assumed held in:

- a) matters of criminal acts committed by members of the armed forces by authorized organs of the Military Police;
- b) matters of criminal acts committed by members of the Corrections Service of the Czech Republic by authorized organs of this service;
- c) matters of criminal acts committed by members of the Security and Information Services by authorized organs of the Security Information Services;
- d) matters of criminal acts committed by members of the Office for Foreign Relations and Information (after amendment No. 539/2004 Coll.) by authorised organs of the Office for Foreign Relations and Information (like for the case of the Security and Information Services, this involves intelligence or reporting services);
- e) the position of police organs is also held by the authorized customs organs in matters of criminal acts committed by violation of customs regulations, import and export restrictions, or transit of goods, as well as in cases when it involves a criminal act committed by members of the armed forces or armed forces staff and services, as well as by violation of legal regulations when removing and purchasing goods in member states of the European Community, if these goods have been transported across the state borders of the Czech Republic and in cases of violation of tax regulations, if the customs organs are the tax administrators according to special legal regulations.

Unless established otherwise in the Criminal Code, the aforementioned bodies are authorised to assume all tasks for criminal proceedings belonging to the activities of a police organ.

The concept “police organ” in the Czech Criminal Code is of a kind of legislative abbreviation. It does not merely refer to organs of the Police of the Czech Republic. When the law employs this expression (“police organ”), it is also for the sake of simplicity, in order to avoid continuous mention of the specific role performed by all the aforementioned organs.

The Czech procedure setup, however, is different (in the context of preparatory proceedings), as it is partly the procedure prior to initiating criminal prosecution (verification), and partly the investigation (the procedure after initiating criminal prosecution is conducted in the Czech Republic by issuing a decree for initiating criminal prosecution, while previously this had been communicated to the suspect personally).

This segmentation is significant also with respect to the fact that the police organ may act in the relevant stage.

In the context of the procedure prior to initiating criminal prosecution, all the aforementioned police organs may be active, although only the police organs of the Police of the Czech Republic have entirely universal (general) scope. All the others have authority that is considered only for some criminal acts.

Investigations may be held only by the organs of the Police of the Czech Republic or by public prosecutors. These may always conduct investigations and in some cases – if it involves a criminal act by police, members of the Security and Information Services or the Office for Foreign Relations and Information – even compulsory investigations may be held by the public prosecutor. Investigations may not be conducted by other police organs. These may conduct individual tasks in the context of cooperation (e.g. with the public prosecutor carrying out the investigations, if he/she is not sufficiently capable to conduct the investigation alone), in the context of requisitioning or when established by law. The public prosecutor may entrust this competence, for example, in an abbreviated (simplified) form for preparatory proceedings by the police, which in the meantime have performed abbreviated preparatory proceedings and the public prosecutor has directed the performance of the investigation.

Investigations are performed by the Criminal Police Service and investigations by the Police of the Czech Republic in the departments established by special legislation (in departments with territorial restrictions on activities and in departments with authority throughout the territory of the Czech Republic – e.g. the National Anti-Drug Headquarters, the Department for Detection of Organized Crime, the Department for Detection of Corruption and Financial Crime).

The procedure prior to initiating criminal prosecution is performed primarily by police incorporated into the basic departments of the police (district police departments, railway police, transport police), the Inspection of the Ministry of the Interior, authorized sections of the Military Police, Customs Administration, etc.

Police organization is based on regulations from the Ministry of the Interior and the procedure when performing tasks in criminal proceedings is bound by the instructions of the head of police. The public prosecutor's office takes only an advisory role in relation to these internal (organizational) regulations. The content of these regulations may not be affected immediately (nor the organization of the police in criminal proceedings). Instructions of a general character issued by the Supreme Public Prosecutor are binding only for public prosecutors, not directly to police officers (the police). Considering the fact that the public prosecutor proceeds according to these instructions of a general nature, the activity of the police is indirectly affected. For example, if the instructions of a general nature establish a binding procedure when compiling a proposal for arresting the accused, the activity of the police is undoubtedly governed by these regulations (e.g. they must provide for the tasks of submitting the documents noted in the instructions of a general nature as required for an arrest).

The position of the police officer conducting tasks in criminal proceedings has been limited, so that it is bound by the instructions of the public prosecutor; in other matters related to the performance of services a police officer is bound by the instructions of his/her superiors. The amendment contained in § 3a par. 3 of the Police Act ensures that after the voluminous amendment to the Rules of Criminal Procedure, the principle of procedural independence of the police has been preserved for conducting tasks in criminal proceedings. The director of the police departments performing inspections for the police could also significantly affect police officers; principally, however, their orders may not contradict the instructions of the public prosecutor or inhibit their purpose. Superiors in the police also ensure the activities of the police both materially and with personnel and resolve, for example, questions about the training and specialization of police officers.

In conclusion, it is important to add that the public prosecutor may also employ the cooperation of the police in proceedings after the submission of an indictment. For example, if they need to furnish certain evidence for prosecuting the indictment. The court may require the police to deliver written material (decisions) or to delegate persons for performing a task.

ORGANIZATION AND FUNCTIONS OF THE PROSECUTION OFFICE IN HUNGARY

*Tamás Jávorszki*⁴³

At first it is necessary to describe in brief the Hungarian judicial system, to make clear the situation of the prosecution service within it.

Hungary's court system is based on four levels as a result of the reform which was launched in 1997. At the first level the local courts deal with the first instance cases. The second level is the network of 19 county courts and the Municipal Court of Budapest. These courts hear the appeals submitted against the decisions of the local courts, but in cases specified by the Code on Criminal Procedure they act as courts of first instance. As a result of the reform a third judicial level was inserted between the county courts and the Supreme Court, namely the Courts of Appeal. The five Regional Courts of Appeal which were established in two steps, in 2003 and 2005, hear appeals from the county courts. On the top of the judicial organization is the Supreme Court, which shall assure the uniformity of the administration of justice by the courts and its resolutions concerning uniformity shall be binding for all courts.

Under the Hungarian Constitution judges are independent and responsible only before the law. Judges may not be members of political parties and may not engage in political activities.

The functioning of the judicial system has undergone a reform of historical importance. The aim of the reform was to develop a judicial system, which is in conformity with the criteria for admission to the European Union. In preparing the new laws, the convention and the recommendations of the Council of Europe in respect of the functioning of the judicial system and, furthermore, the decisions of the European Commission and Court of Human Rights with regard to the fairness of justice were duly taken into consideration.

In order to separate consequently the judiciary from the executive, the administration of the courts was transmitted from the Minister of Justice to the newly established National Council of Justice. It was another main element of the reform. The President of the Supreme Court is the President of the Council. The National Council of Justice is in charge of the selection, promotion, evaluation and training of judges and is also responsible for the elaboration of the budgetary chapter for the judiciary. The National Council of Justice is entitled to submit its budget proposal directly to the Parliament.

The prosecution is a centralized body within the judicial system and is independent from government. The Prosecution Service is a hierarchical organization, operating on the basis of a strict internal hierarchy, with the Prosecutor General on top, who leads and directs the whole organization according to Act V on the Public Prosecution of 1972. The Prosecutor General is elected by Parliament, upon proposal by the President of the Republic, for a six-year term. His deputies are appointed by the President of the Republic for

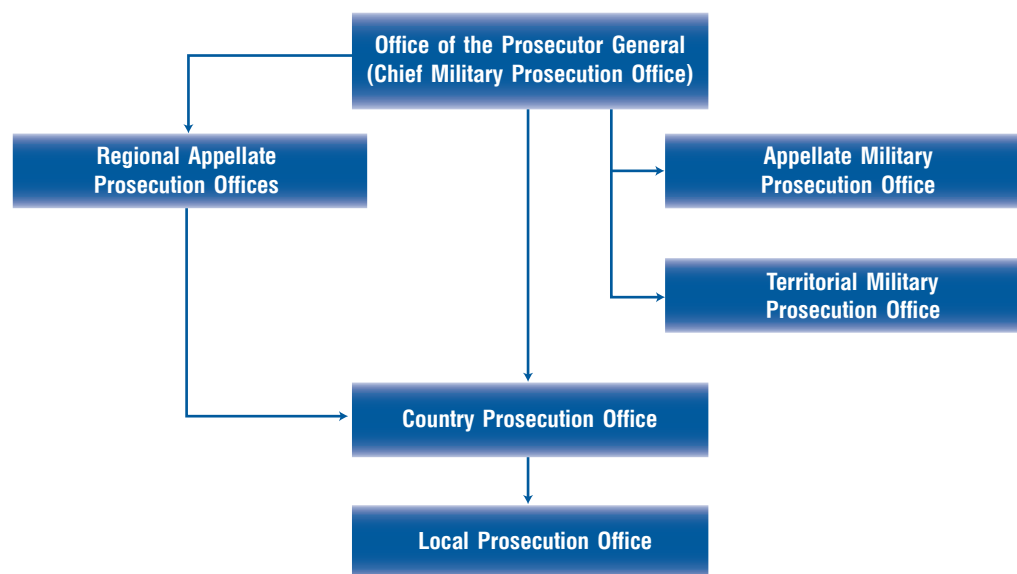
⁴³ Mr. Tamás Jávorszki is Deputy Chief Public Prosecutor of Somogy County in Hungary. He holds a Law degree from the University of Pécs, Faculty of Law and Political Science, a Certificate of European Community Law and an Economic Criminal Law degree from ELTE University of Budapest.

an indefinite period of time. All other public prosecutors are appointed by the Prosecutor General for an indefinite period of time. Under the Constitution – similarly to judges – public prosecutors may not be members of political parties and may not engage in political activities. Except teaching, scientific, artistic and other similar activities they shall not pursue any wage-earning activity.

The Act on the Public Prosecution establishes its organization:

- a) Office of the Prosecutor General;
- b) 5 Regional Appellate Prosecution Offices attached to the Courts of Appeals and the Appellate Military Prosecution Office;
- c) 19 County Prosecution Offices and the Prosecution Office of the Capital besides 5 Territorial Military Prosecution Offices;
- d) Local Prosecution Offices.

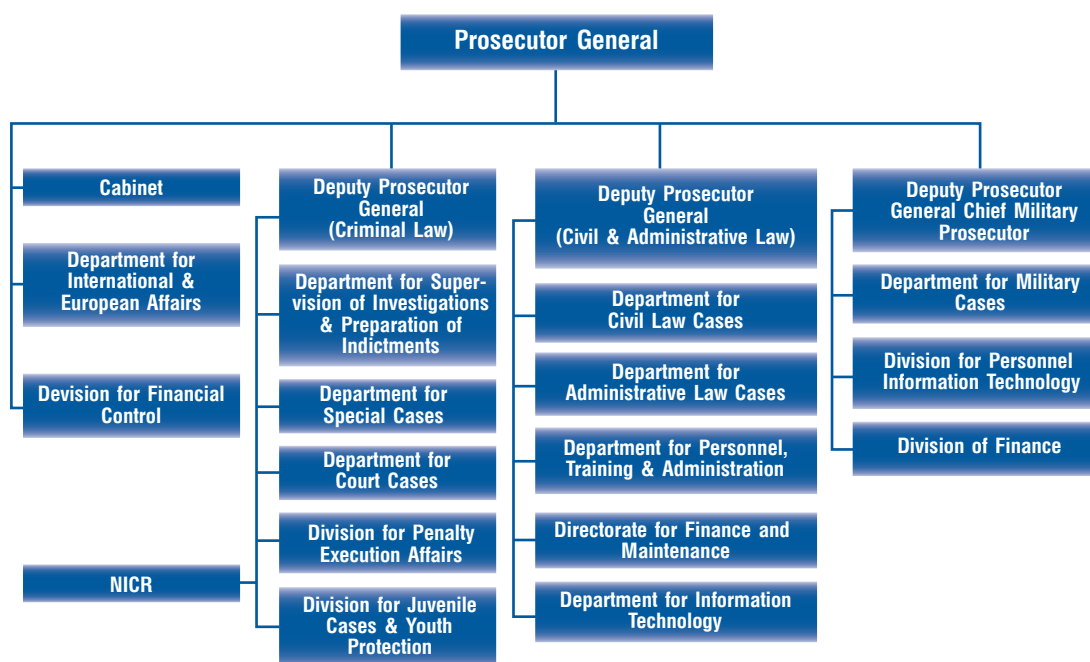
Organization of the Public Prosecution



The Prosecution Service is – unlike in a number of European countries – an independent organization, which – in contrast to the courts – does not form a separate branch of power, but is still an independent organization existing on the basis of the Constitution.

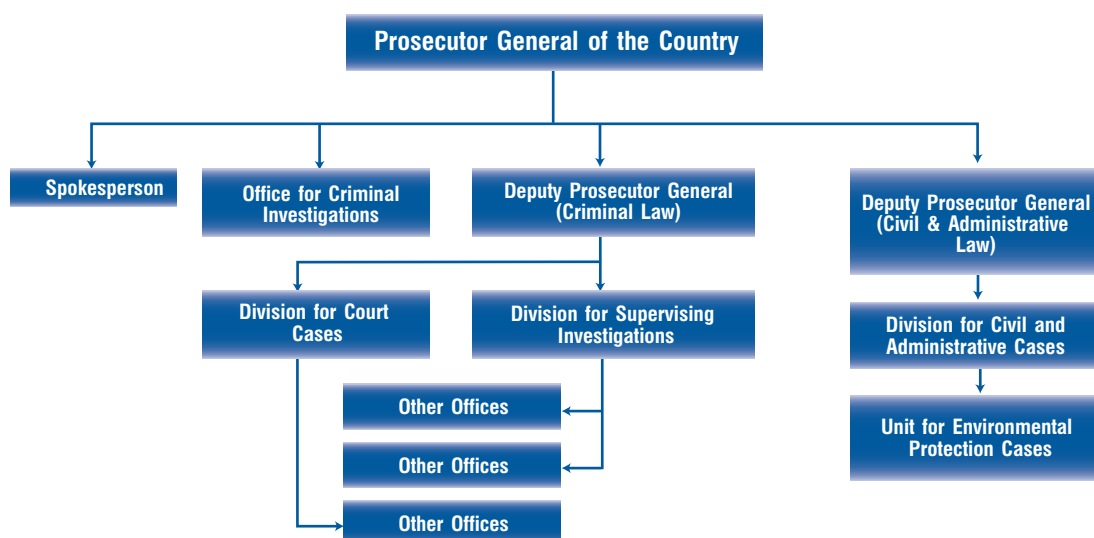
The Constitution stipulates that the Prosecutor General is responsible to the Parliament: he/she submits general reports annually and can be asked questions by any Members of Parliament in plenary or in standing committee sessions. The Parliament may accept or reject the Prosecutor General's answer by voting. But according to a decision of the Constitutional Court [3/2004 (II. 17.)] the Prosecutor General is not politically accountable to the Parliament for individual decisions taken by him while performing his/her duties. Consequently, the rejection of his/her answer given to a question does not affect his/her status.

Organization of the Office of the Prosecutor General of the Republic of Hungary



No other bodies, including the Parliament or any of its committees, are empowered to revise decisions taken by the Prosecution Service, or to force the Prosecution Service to change its decision. The independence of the Prosecutor General and the Prosecution Service is ensured also through the right of the Prosecutor General to draw up the Prosecution Service's chapter in the Central State budget, which the Minister of Finance shall present unchanged to the Parliament.

Structure of the Country Prosecution Office



The preparation for EU accession was a complex task: it included internal reforms, the installation of modern information technology infrastructure (including networks), training in EC and third pillar law, intensive language training for the middle-aged generation of prosecutors (prosecutors belonging to the younger generation already speak one or more foreign languages), and last but not least, the integration of the Hungarian prosecutors into the mechanism of the European judicial co-operation.

A comprehensive structural reform was implemented within the Prosecution Service with a view to responding to the new challenges of the 3rd millennium. The need for more effective fight against new forms of crime (especially organized, economic, environmental crime and corruption), as well as the increasing workload and the complexity of cases made it necessary to establish new units and redistribute human and financial resources within the Prosecution Service.

The main elements of this reform were as follows:

- Establishment of the Central Prosecutorial Investigation Office at the Budapest Chief Public Prosecution Office, with nation-wide competence to investigate cases of national importance;
- Establishment of the Division of Special Cases at the Office of the Prosecutor General to exercise reinforced supervision over the investigation of especially complex cases, such as corruption, organized and economic crimes;
- Laying down the structural framework to ensure the integration of the Prosecution Service into European judicial co-operation through establishing a new department dealing with European affairs at the Office of the Prosecutor General and through designating prosecutors within all county offices to facilitate direct contacts in mutual assistance cases.

The workload of the prosecutors has increased since the reform but their performance has improved or preserved its high quality. Prosecutors' offices have been functioning smoothly, without any backlog.

The scope of powers of the public prosecutors can be divided into two principal groups. The first group relates to the criminal justice, the second one covers the entirety of the public prosecutors' other activities aiming at ensuring the respect of legality.

A new Code on Criminal Procedure (Act XIX of 1998 on Criminal Proceedings) entered into force on 1 July 2003. Under the new Code, the powers of the prosecutor were significantly increased. The inquisitorial type of criminal proceedings mixed a lot of adversarial elements with a more active participation of the prosecutor in the penal proceedings. The prosecutor fully directs the phase of investigation and instructs the investigating authorities. The prosecutor shall order or perform an investigation to establish the conditions for accusation. The prosecutor shall instruct the investigating authority. The investigating authority shall perform the instructions of the prosecutor regarding the investigation of the case by the deadline and inform the prosecutor verbally or in writing – as instructed – on ordering the investigation and the status of the case.

The prosecutor:

- a) may order an investigation, assign the investigating authority to conduct the investigation, and instruct the investigating authority to perform – within its own territorial jurisdiction – further investigative actions or further investigation, or to conclude the investigation within the deadline designated by the prosecutor;
- b) may be present at the investigative actions, and may examine or send for the documents produced during the investigation;
- c) may amend or repeal the decision of the investigating authority, and may consider the complaints received against the decision of the investigating authority;
- d) may reject the complaint, terminate the investigation and order the investigating authority to terminate the investigation;
- e) may refer the proceedings in his own competence.

The prosecutor shall act as public accuser. Public prosecutors have the “monopoly of accusation” with regard to all offences where the law does not entitle the victim to conduct private or substitute private prosecution. This means that a court may not decide on the criminal responsibility of an individual unless a charge (accusation) against him has been brought before the court by the public prosecutor. The Prosecution Service has the exclusive right to decide whether to prosecute or not, that is, whether to bring the case before the court or not, and whether to drop the case in the court phase or not.

The prosecutor shall represent the charge before the court, or decide on the postponement or partial omission of filing an indictment. The prosecutor may drop or modify the charge. In the course of the judicial phase, the prosecutor may examine the documents of the case and may have the right of motion in any issue arising in connection with the case in which the court has the right to decide.

The prosecutor shall oversee lawful enforcement of coercive measures ordered in the course of the criminal proceedings and entailing the restriction or deprivation of personal freedom.

The investigation of certain criminal offenses is in the exclusive competence of the prosecutor’s office. In other words, the police have no power to investigate in these cases. These crimes, for instance criminal offences committed by a judge, a prosecutor, a clerk or secretary or executive of the court or the prosecutor’s office, an inspector at the prosecutor’s office, murder or violence against the enumerated officials; criminal offences committed by persons enjoying immunity due to holding a public office (these persons are for example the Members of Parliament, judges of the Constitutional Court, ombudsmen); criminal offences committed by the members of the police if the offence is not subject to the military law; from among criminal offences against the administration of justice: false accusation, misleading the authority, false testimony, obstruction of official procedure, non-disclosure of extenuating circumstances.

ORGANIZATION AND FUNCTIONS OF THE PROSECUTION OFFICE IN LATVIA

*Rudite Abolina*⁴⁴

Recent political, economic and social developments in Europe and the world in general have resulted in important institutional changes for a lot of countries. And this is undoubtedly true for Latvia that joined the EU in May 2004.

This is an outline of some most essential reforms in the field of justice introduced right after the restoration of Latvia's independence, during the period the country prepared for the EU membership, and since our accession to the EU. I will also dwell on how the Prosecution Office of Latvia was founded and what activities it carries out.

The Prosecution Office of the Republic of Latvia was set up in 1990, on September 26, soon after the state regained its independence. In 1994, when the Parliament adopted the Law on Prosecution Office, major innovations were made, and that Law, with some later amendments, has been in effect since then.

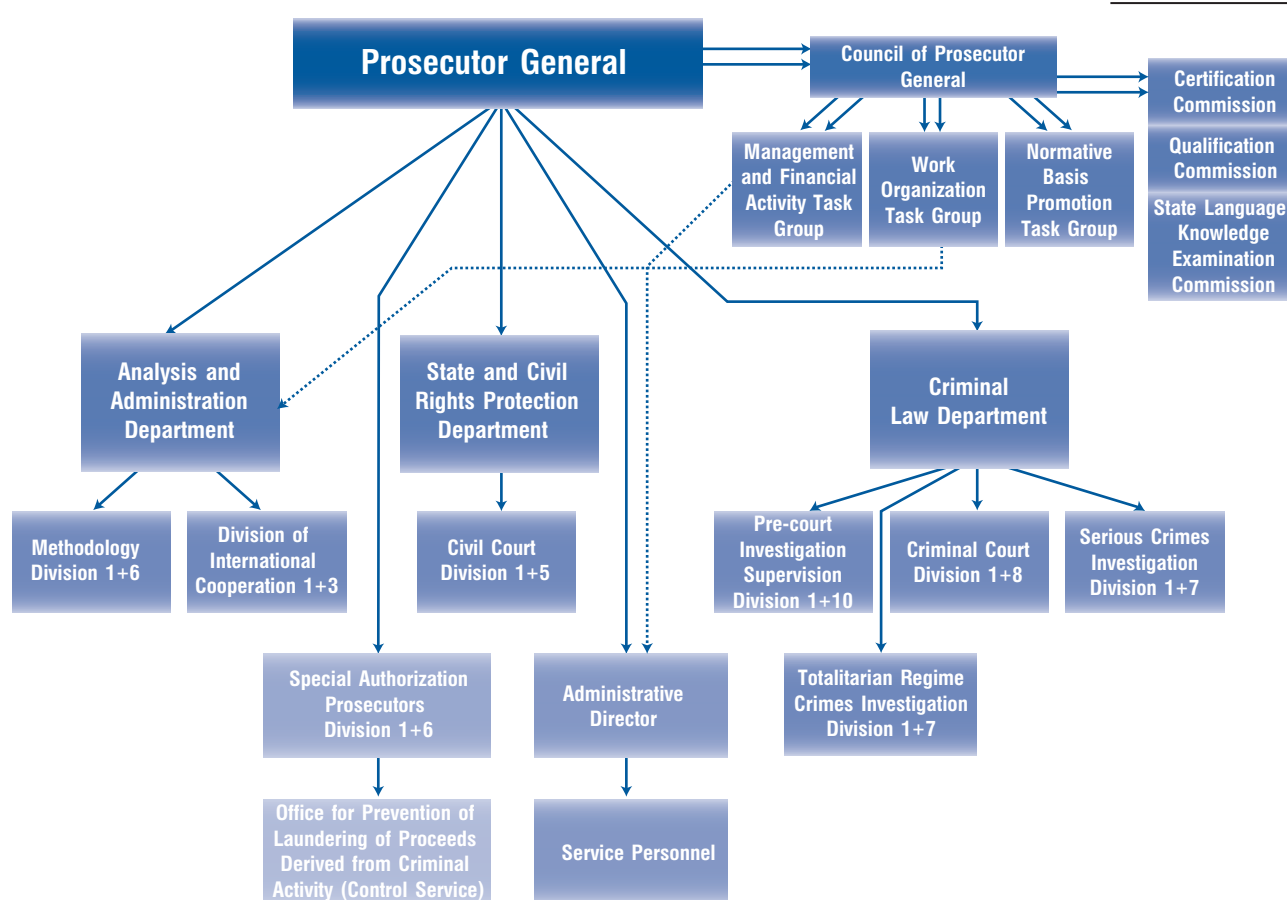
The Latvian Law on Prosecution Office has become an attempt to incorporate all basic principles contained in the UN Guidelines on the role of prosecution. And it has to be noted that certain provisions formulated later in the Recommendations (2000) 19 of the Council of Europe had already been entered in our Law of 1994.

According to Article 1 of the Law, the Prosecution Office of the Republic of Latvia is an institution of judicial power which is one of the possible models mentioned in the Recommendations.

Our Prosecution Office is a uniform, centralized three-tier system, consisting of the Prosecution General Office, regional and district (or city) court prosecution offices. Such a structure corresponds to the Latvian three-tier judicial system. The Law also empowers the Prosecutor General with authority to establish, in the event of necessity, specialized branch prosecution offices. The criminological situation in the country and the specifics of criminal investigation should serve as grounds for creation of such specialized branch prosecution offices. Thus, in light of the present situation, there operate 6 structures of the kind, among which are: a specialized prosecution office dealing with corruption and organized crime; a prosecution office for customs matters; a specialized prosecution office prosecuting cases of financial and economic crimes, etc. Prosecutors working in these branch offices receive special training indispensable for their particular lines of activity.

The Prosecution Office also supervises the operation of a special service, combating money laundering. The head of the service is appointed by the Prosecutor General.

⁴⁴ Ms. Rudite Āboliņa is Head Prosecutor of the Work Analysis and Management Department of the Prosecutor's General Office of Latvia since February 1, 1996. She has also worked as an investigator in the Ministry of Interior and as a prosecutor in different sections. She is also Vice-Chairman of Central/East European Board of *Europe 2000*. Ms. Abolina was a reporter to various international conferences and holds different certificates.



All departments and divisions of the Prosecution Office are administered by Head Prosecutors appointed to their positions for a term of 5 years by the Prosecutor General who, while making his decision, has to take into account the statement of the Attestation Commission.

The maintenance of the Prosecution Office and its financial administration is secured by the Administrative Director and the technical personnel.

The Prosecutor General, who is at the top of the Prosecution Office hierarchy, conducts and controls activities of all prosecution offices and, in accordance with budget allocations, determines the inner structure of the institution as well as its staff.

The Prosecutor General is appointed by the Latvian Parliament for a term of 5 years following the recommendation of the Supreme Court Chair. The Law provides for criteria a candidate has to comply with to be considered for the position, as well as reasons why the Prosecutor General may be dismissed before his/her term in office is over (for example, if the Prosecutor General has violated any of restrictions envisaged by a special Law on Prevention of the Conflict of Interests in the Work of Public Officials, or has committed a crime, etc.) And, what is even more important, the Law determines the procedure for such a dismissal. In our opinion, it is the procedure itself that reveals whether the Prosecutor General of the state is assessed as a political figure or a professional.

The question of the Prosecutor General's dismissal before his term in office expires is not considered only by the Parliament – that is, by politicians. A very important role here is played by the Supreme Court that carries out the examination of the Prosecutor General's work and renders its own legal assessment. If judges of the Supreme Court do not find violation of any laws in the Prosecutor General's activities, the Parliament loses its rights to consider the said question.

The Prosecutor General's Office consists of departments. Currently there are 3 of them, which could be provisionally referred to as: Criminal Law Department, Department for Protection of Rights and Legal Interests of Persons and the State, and Department dealing with prosecutors' work management and analysis. Head prosecutors in charge of these departments are responsible for their respective lines of activity within the whole country; they simultaneously hold the position of deputies to the Prosecutor General, and one of them performs Prosecutor General's duties in case of his/her absence.

With such an organizational structure the principle of "prosecutor's independence" stipulated by the Law proves to be very important. Every prosecutor investigating a case is independent in his/her decisions which he/she takes individually, proceeding from the laws and his or her beliefs and convictions. A prosecutor holding a higher position can give instructions to a prosecutor below him or her in rank with regard to assembly of evidence for a concrete case, but he cannot instruct the latter in how to qualify the criminal offence, nor how to evaluate the evidence.

Prosecutors take independent decisions whether to bring or drop charges against a person. The main principle provided for by the Law is that a senior prosecutor has the right to take over into his/her jurisdiction any case, although he/she has no right to instruct his subordinate prosecutor to perform actions contrary to the conviction of the latter. There is a special provision in our Law on Prosecution Office stipulating that the prosecutor shall be independent in his/her activities from any influences of other public and administrative institutions or officials and shall comply only with the Law. In case there is an attempt to influence a prosecutor in order to interfere with the investigation or so that an unlawful decision is taken by him or her, the Law envisages criminal liability.

The Law also guarantees that in case of a prosecutor's detention, arrest or any other human rights restricting measures, the Prosecutor General shall be immediately notified to exclude the possibility of illegally pressurizing the said prosecutor.

The Prosecutor General appoints prosecutors for an unlimited term of authority, mainly proceeding from the principles of professional and ethical adequacy. The unlimited term of authority serves as another safeguard for prosecutors' independence.

If in the first years after the restoration of Latvia's statehood it was difficult to find candidates for the position of a prosecutor, the situation has drastically changed now. A very strict selection procedure involving prosecutors' Qualification and Attestation Commissions has been worked out. A person can be appointed to the position of a prosecutor only having acquired a degree

in Law and completed in-service training at the Prosecution Office, as well as having passed a special qualification examination and received a positive statement by both above mentioned commissions.

The Law allows rotation of staff within the institutions of judiciary. Thus the prosecutors have the right to transfer to work as judges, while judges have the right to become prosecutors. The Law authorizes the Prosecutor General to establish Prosecutor General's Council, to which Head Prosecutors in charge of Departments and Head Prosecutors of judicial regions are members. This is an advisory body that considers major organizational and work problems of the Prosecution Office. The Council establishes Attestation and Qualification Commissions whose decisions are vital in the appointment of a candidate to a prosecutor's position, as well as any kind of promotion in the course of his/her career.

In accordance with the Law prosecutors shall fulfill the following functions: supervise the field work of investigative agencies; organize, conduct and perform pre-trial investigation; initiate and conduct criminal prosecution; prosecute on behalf of the state in all courts; submit protests; supervise execution of penalties securing due course of law.

Our legislation successfully balances the distribution of tasks and authority between investigative agencies, on the one hand, and the prosecution office on the other. There are at the moment 10 institutions (such as the State Police, Financial Police, Security Police, etc.) entitled to carry out pre-trial investigation. Since the State Police deal with the largest amount of investigation, I would like to focus more on the work of this public structure using it as an example of interaction between the prosecution office and an investigative agency.

It has to be noted that there is no administrative link between the two institutions. However, they practice very close cooperation when it comes to matters of procedure. The police are responsible for the collection of confirmed admissible evidence and disclosure of crimes, while the task of the prosecution is to organize and supervise the process of investigation following the Criminal Procedure Law and to give instructions to the police which are obligatory for the latter. Besides, as the Law stipulates, a prosecutor is the only person who, upon receipt of all documents from the police, evaluates all evidence existing in a case and decides whether or not to initiate criminal prosecution against a suspect.

It is noteworthy, however, that the police, provided they do not agree with the prosecution, have rights to appeal a prosecutor's decision to a higher-ranking prosecutor.

To investigate cases of most dangerous or serious and specific crimes joint investigation teams involving both police officers and prosecutors are formed.

Since the prosecution is responsible for the lawfulness and effectiveness of the pre-trial investigation process in general, prosecutors have the mandate to supervise compliance with the law by the police. Having revealed any violations of the law, prosecutors can either apply to the police administration notifying them of a concrete violation, or initiate a disciplinary or criminal case against the offender.

There is no legal provision in Latvia which would consider investigation of any particular criminal offence as a matter of priority. However, it does not exclude the possibility for the Prosecutor General using his/her authority to sanction investigation of some particularly urgent crimes as priority cases *de facto*.

The prosecutor's competence extends the boundaries of an exclusively criminal sphere. The Law obliges the prosecutor to carry out examinations in the following cases:

- If the rights and lawful interests of persons who have restricted ability to defend their rights (for example, disabled persons, minors, etc.) are to be protected;
- If the President of the State, the Parliament or the government entrusts the prosecutor with the task of examining facts concerning violation of the law;
- Upon receipt of information on a possible violation of the law which poses threat to the State the necessity for an examination is recognized by the Prosecutor General or a Head Prosecutor.

Besides, in the event the possibility of an unlawful action has been stated, the prosecutor issues a written warning on impermissibility of the violation of the law in the future.

The prosecutor also has the right to submit a protest concerning unlawful normative or legal acts, as well as take all the necessary measures to protect the rights and lawful interests of the state, local municipalities, or the above – mentioned persons. I have to stress here that the interests of victims of criminal offences to which the prosecutor is a guarantee, are defended in accordance with the order specified by the criminal procedure.

In light of the fact that the Latvian Law provides for a relatively wide range of rights for the prosecutor in the so-called non-criminal sphere, we are interested in the way this question is and will be addressed in other countries taking into account the decisions of the Prosecutor Generals' Conferences. To that, we have to admit that the very concept of a "non-criminal sphere" is interpreted differently in different countries.

With regard to the international cooperation in legal matters, it has to be noted that the Prosecution Office's role here is that of the main subject of international mutual assistance in the field of criminal law, and a prosecutor from the Prosecutor General's office is designated as Latvia's Eurojust representative in the Hague.

At the last meetings of Prosecutors General in Slovakia and Germany the Code of Ethics for prosecutors and its elaboration was in the focus of attention.

As far as Latvia is concerned, the Prosecutor General's Council endorsed the respective Code of Ethics in 1998. The document contains provisions and principles of professional conduct non-compliance with which results in sanctions of a moral character (such as reprimand or apology in public, etc.) In cases of gross violation of ethical norms the law envisages disciplinary liability.

Besides the Code of Ethics, the Law on Prosecution also specifies violations for which a prosecutor is subject to disciplinary liability, as well as possible disciplinary penalties. In cases when more severe penalties are imposed (demotion in position, for example, or dismissal) the Prosecutor General, who has the right to impose any disciplinary penalty on any prosecutor, shall first receive a statement of the Attestation Commission with regard to the prosecutor in question.

In accordance with the Recommendations R (2000) 19 the law shall provide for the conditions of prosecutor's work, that is – remuneration, pensions, and other social guarantees. The Latvian Law on Prosecution stipulates that prosecutors' remuneration shall be equal to 90-95% of the remuneration received by judges of corresponding ranks.

In 1999 a special Law on Long-Service Bonus Pensions for Prosecutors was adopted, where the conditions for this kind of pension were specified in detail. The Law also stipulates that the State shall provide prosecutors with the mandatory life and health insurance.

In many respects the Latvian Law on Prosecution is in tune with the provisions of Recommendation R (2000) 19. However, I wouldn't claim that all necessary changes have been completed as far as the structure of the prosecution office or the scope of the prosecutor's authority is concerned. We have only set the foundation for further development.

STRUCTURE, ORGANIZATION AND FUNCTIONS OF THE PROSECUTION IN THE REPUBLIC OF LITHUANIA

*Robertas Dlugauskas*⁴⁵

Legal Basis of the Activity of the Prosecutor's Office

The new Code of Criminal Procedure was adopted on March 14, 2002, and came into the in force on May 1, 2003. It replaced the Code of Criminal Procedure that was in force since 1961. The earlier code was amended a lot after 1990 when the Republic of Lithuania became independent.

A new Criminal Code also entered into force on May 1, 2003.

The reform of criminal justice conditioned the constitutional status of the Prosecutor's Office. Seimas adopted the new version of article 118 of the Constitution of the Republic of Lithuania on March 20, 2003. By this reform the constitutional status of the Prosecutor's Office as an independent national institution ensuring legitimacy and assisting court in the administration of justice has been consolidated. The provisions of the Constitution prove that the independence of the Prosecutor's Office has been recognized now as a prerequisite of impartial prosecution.

At the same time the status of the Prosecutor's Office was coordinated with the provisions of the European Council Recommendations [Rec. (2000) 19], the conditions to implement the new Criminal Procedure Code were created and the institution of the Prosecutor General gained an objective independence.

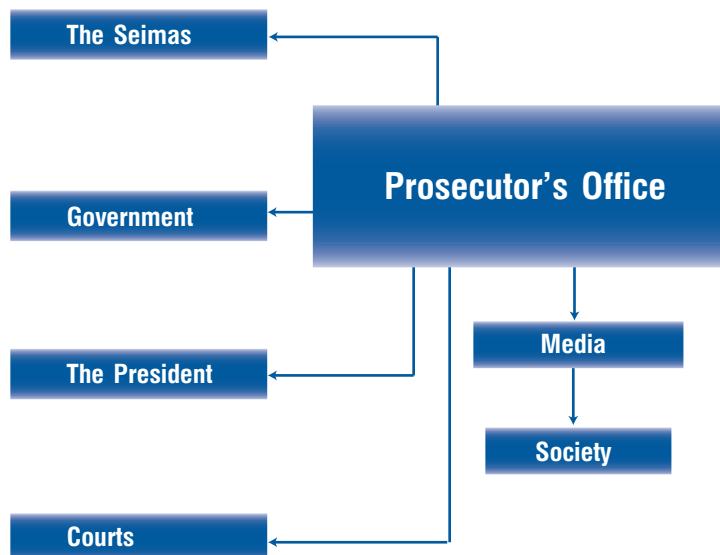
When detailing the provisions of the Constitution, the Seimas of the Republic of Lithuania adopted also a new edition of the Law on Prosecutor's Office of the Republic of Lithuania on April 22, 2003. This law defines the status, functions, composition, legal basis and control of the activities of the Prosecutor's Office, the competence limitations, rights and obligations of the prosecutors, service in the Prosecutor's Office, conditions of transfer to another post and official responsibility, social guaranties, application and use of personal means of protection, etc.

Status of the Prosecutor's Office

Following the status of a prosecutor as an independent constitutional and procedural subject, which was provided for by the Constitution and Code of Criminal Procedure, it was established in the Law on Prosecutor's Office that the prosecutor makes his decisions independently by considering the laws and the principle of rationality, respecting the personal rights and freedoms, regarding the presumption of innocence, also the principle that all the persons are equal before the law and before institutions despite their social or

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family position, their office, occupation, beliefs, creed, origin, race, sex, nationality, language, faith or education.



When implementing his functions a prosecutor is independent and obeys only the Constitution of the Republic of Lithuania and the laws. It is forbidden for the national or municipal institutions, public organizations and mass media or other natural and legal persons to give the assignments or obligations not provided for by the laws to the Prosecutor's Office or in some other way to interfere into the activities of the prosecutors.

The institution of prosecutor is depoliticized and safeguarded against any financial influence – a prosecutor may not hold any elective or other posts and work in other institutions, enterprises or organizations except doing scientific or pedagogical work. A prosecutor may not receive another salary except the salary of a prosecutor, remuneration for creative activity, scientific or pedagogical work in the higher schools, for the work in the groups or committees preparing draft acts of law if this work is not included in the capacities of a prosecutor. The exemption of pedagogical work is reasonable: thus, prosecutors can put their special experience at the disposal of educational purposes. The general restrictions the prosecutors are subject to reflect their important position which makes it necessary to avoid any external influence. Accordingly, the salary should be high enough to release the prosecutor from the necessity to obtain an additional income.

Control over Activities of the Prosecutor's Office

The prosecutor's office is headed by the Prosecutor General of the Republic of Lithuania. He is accountable for his activities to the President of the Republic and the Seimas of the Republic of Lithuania.

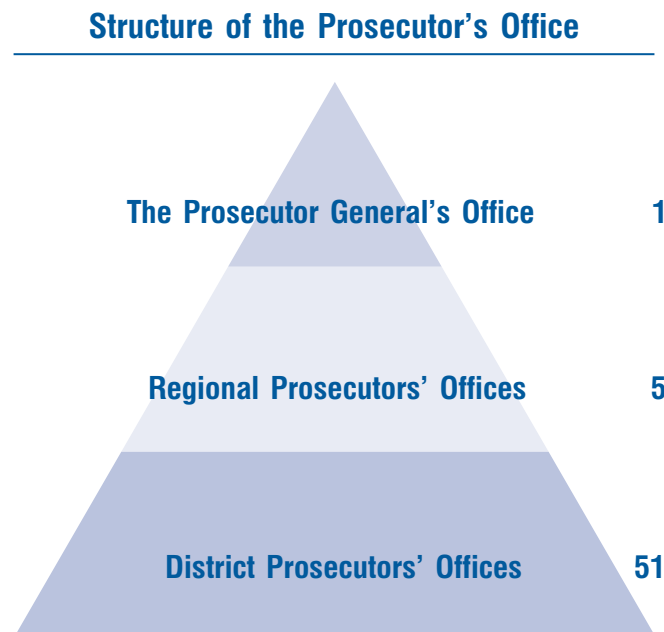
The Seimas of the Republic of Lithuania sets the priorities for the activities of the prosecutor's office and exercise parliamentary control over the activities.

Procedural actions of prosecutors are controlled by the superior prosecutor and the court. The superior prosecutor establishes violations of procedural laws and reverse unlawful decisions.

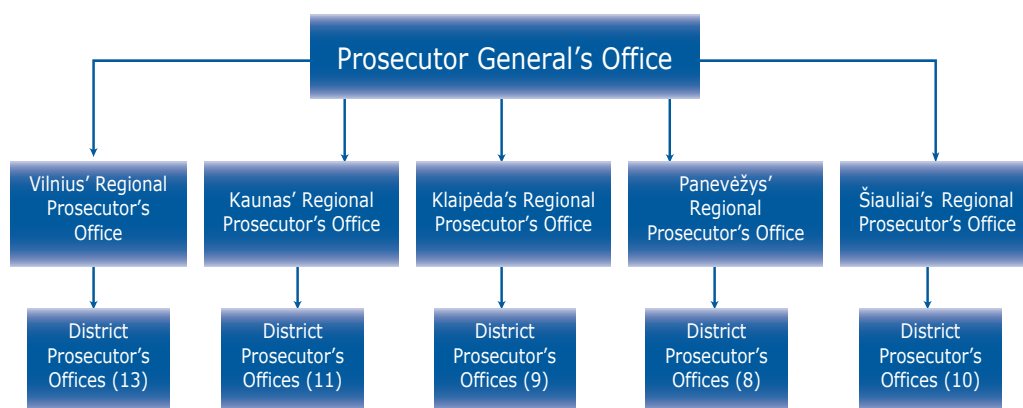
The economic and financial activities of the Office of the Prosecutor General and territorial offices of prosecutors shall be controlled by the Prosecutor General (the prosecutors authorized by him), the State Control and other authorized state institutions. The Prosecutor General shall submit information about the prosecutor's office to the government of the Republic of Lithuania and the public.

Structure of the Prosecutor's Office

Prosecutor's Office of the Republic of Lithuania consists of the Prosecutor General's Office and territorial prosecutors' offices.



Territorial prosecutors' offices include regional and district prosecutors' offices. Currently there are 5 regional (Vilnius, Kaunas, Klaipėda, Panevėžys, Šiauliai) and 51 district prosecutors' offices in the Republic of Lithuania. The territorial jurisdiction of prosecutors' offices is in accordance with the jurisdiction of courts.



The prosecutor's office consists of:

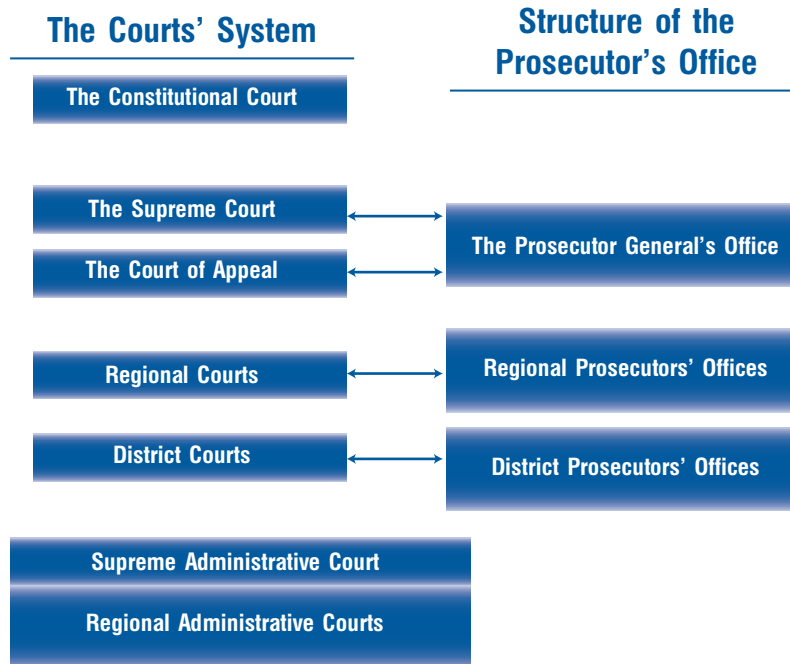
- Prosecutors;
- Public servants of the prosecutor's office: assistants to the chief prosecutor, assistants to the prosecutor, chief specialists, senior specialists, specialists and other public servants;
- Employees.

Prosecutor General's Office

In the Prosecutor General's Office a department and divisions are functioning. The Prosecutor General and the Deputy Prosecutors General according to their respective competence head the Prosecutor General's Office.

The Department of the Office of the Prosecutor General is headed by the chief prosecutor of the department, while its division is headed by the chief prosecutor of the division.

An advisory body – the Collegial Council of the Office of the Prosecutor General of the Republic of Lithuania is formed at the Office of the Prosecutor General. The Prosecutor General chairs it and its members are Deputy Prosecutors General and chief regional prosecutors. Other prosecutors may also be included in the Council by decision of the Prosecutor General. Judges, heads of law enforcement and other state institutions or their authorized representatives may also be invited to the meetings of the Council.



Territorial Prosecutors' Offices

The Prosecutor General establishes, reorganizes and liquidates the territorial prosecutors' offices, determines their status, structure, competence and territories of operation, having regard to the territorial jurisdiction of the regional and district courts determined by law.

The territorial prosecutor's office is headed by a chief prosecutor.

Functions of the Prosecutor's Office

The prosecutor's office is a state institution performing the functions established by the Constitution of the Republic of Lithuania, the Law on Prosecutor's Office or other laws. The prosecutor's office helps to ensure lawfulness and assists courts in the administration of justice. The prosecutor's office shall, based on the grounds and according to the procedure prescribed by law:

- 1) Organize and direct pre-trial investigation;
- 2) Conduct pre-trial investigation or individual actions of pre-trial investigation;
- 3) Control the activities of pre-trial investigation officers in criminal proceedings;
- 4) Prosecute on behalf of the state;
- 5) Supervise the submission of the judgments for enforcement and the enforcement thereof;
- 6) Coordinate the actions of the pre-trial investigation bodies pertaining to investigation of criminal acts;
- 7) Protect the public interest;
- 8) Examine, within its competence, petitions, applications and complaints submitted by individuals;

- 9) Take part in the drawing up and implementation of national and international crime prevention programs;
- 10) Take part in the legislative process;
- 11) Fulfill other functions prescribed by law.

Functions of the Prosecutor General's Office

The Office of the Prosecutor General:

- 1) Guides the territorial prosecutors' offices and supervises their activities;
- 2) Forms a uniform practice of pre-trial investigation of criminal acts and supervision of procedural steps;
- 3) Conducts pre-trial investigation and prosecutes on behalf of the state in criminal cases of exceptional significance;
- 4) Organizes pre-trial investigation carried out at central pre-trial investigation agencies, directs the investigation and supervises the procedural steps of the agency officers;
- 5) Forms a uniform practice of prosecution on behalf of the state in criminal cases and takes part in the hearing of cases by appeal or cassation;
- 6) Co-ordinates the actions of pre-trial investigation agencies in the investigation of criminal acts;
- 7) Protects the public interest and forms a uniform prosecutorial practice in the sphere;
- 8) Organizes the prosecutors' professional training and in-service training and offers them methodological assistance;
- 9) Communicates with foreign state agencies and international institutions in the manner established by international treaties, laws and other legal acts;
- 10) Makes arrangements for financial provisions and provision of technical resources to the prosecutor's office and ensures the social guarantees of the prosecutors;
- 11) Analyses the activities of the prosecutor's office and manage its statistical data;
- 12) Discharges other functions prescribed by laws and international treaties.

Functions of the Regional Prosecutors' Offices

Within the framework of their competence, the regional prosecutor's offices shall:

- 1) Organize and direct pre-trial investigation;
- 2) Conduct pre-trial investigation;
- 3) Supervise the activities of pre-trial investigation officers in the criminal proceedings;
- 4) Prosecute on behalf of the state in criminal proceedings;
- 5) Take part in the hearing of cases by appeal;
- 6) Supervise submission of sentences for execution and their execution;
- 7) Co-ordinate the actions of pre-trial investigation agencies investigating criminal acts;
- 8) Protect the public interest;
- 9) According to the procedure and on the grounds established by laws and international treaties, draw up requests for legal assistance for and execute the requests filled by foreign state agencies and international institutions;
- 10) Discharge other functions of the prosecutor's office.

Functions of the District Prosecutors' Offices

The functions of the district prosecutor's offices are the same as regional prosecutors' offices (without function 5).

Organization of Activity and Control over It

Prosecutor General's Office

Prosecutor General's Office (PGO):

- Leads the activity of territorial prosecutors' offices and exercises control over it;
- Manages the work of the public servants at the prosecutor's office and employees at the PGO, controls the process of employment at the territorial prosecutors' offices;
- Manages personal data and personnel files of prosecutors, of persons who expressed their wish to work at the prosecutor's office, of public servants and employees of the PGO.

Prosecutor General (Deputy Prosecutor General), Chief Prosecutor (Deputy Chief Prosecutor) of the Department/Division at the PGO:

- Defines the areas of activity of prosecutors at the PGO;
- Organizes or issues orders on control, performance of inspection on certain subject within the PGO and territorial offices;
- May assign the prosecutors at the PGO or any territorial office the examination of any claim, request or application;
- May propose to pay bonuses to prosecutors and employees of the prosecutor's office.

Prosecutor General (Deputy Prosecutor General):

- Orders to perform a complex inspection at any territorial prosecutor's office;
- Determines the standard forms of statistical and other periodical reports;
- Employs the person to work as public servant at the prosecutor's office or as employee at the PGO.

Territorial Prosecutors' Offices

Territorial Prosecutors' offices execute tasks of management of the prosecutor's office, procedural activity, organization of work of the prosecutors and personnel of the prosecutor's office, exercise control, perform inspections.

Chief Prosecutor (Deputy Chief Prosecutor) of the territorial office:

- Defines the spheres of activity of each prosecutor; however, the specific sphere of activity is assigned to the prosecutor for the period no longer than one year;
- Gives orders on control, inspection and reporting about execution of specific functions of the prosecutor's office;
- Has a right to assign the prosecutor the examination of any claim, request or application;
- Employs individuals and decides upon their tasks;
- Upon the consent of the Prosecutor General (Deputy Prosecutor General) sets the salary and other payment to the employed persons.

Control of the Prosecutors

The Chief Prosecutor (Deputy Chief Prosecutor) of the Department/Division at the PGO controls the performance of functions assigned to the prosecutors at the PGO.

The Chief Prosecutor (Deputy Chief Prosecutor) of the territorial office controls the execution of functions by the prosecutors of the territorial office.

Accountability

By the 20th January of each year, annual analysis of the state of criminality in the city (region) as well as of the situation related to procedural activity of district prosecutor's office and pre-trial investigation authorities supervised thereby by that district prosecutor's office are prepared and submitted to the PGO and regional prosecutor's office.

By the 10th February of each year PGO prepares and submits to the collegium the annual analysis of the state of criminality in the Republic of Lithuania and its regions, as well as of the situation related to procedural activity of prosecutor's office and pre-trial investigation authorities.

The collegium sets the priorities and strategy of the activity of Prosecutor's Office and also confirms the annual analysis mentioned above. The Prosecutor General submits the account to Seimas, which either confirms it or not.

Competence of the Prosecutor's Office

The competence of the prosecutors is set in the Competence Regulations of the Prosecutor's Office and the Prosecutors approved by order No. 1-108 of the Prosecutor General of the Republic of Lithuania, dated October 07, 2003.

Competence of the Prosecutor General's Office

The prosecutors of the Prosecutor General's Office organize and lead the pre-trial investigation when the criminal act is investigated by the central pre-trial investigation institutions of the Police Department, Special Investigation Service, State Security Department, Financial Crimes Investigation Service, Fire and Rescue Department, or when the investigation is conducted by the pre-trial investigation officers of the central institutions of the National Border Protection Service, Customs, Military Police, who are working in Vilnius.

The prosecutors of the Prosecutor General's Office also conduct pre-trial investigation of particularly important criminal cases.

Competence of the Regional Prosecutors' Offices

The regional prosecutors organize and lead or conduct by themselves the pre-trial investigation in the criminal cases falling in the jurisdiction of the regional court when the criminal act is committed in the city or region of the office of the regional prosecution service or such acts are investigated by the pre-trial investigation officers, working in the city of the Regional Prosecutor's Office or when the criminal acts are investigated by the territorial subdivisions of organized crimes investigation of the State Security Department, Special Investigation Service or Police Department present in that city.

Competence of the District Prosecutors' Offices

In all other criminal cases the prosecutors of the District Offices organize and lead pre-trial investigation or conduct the investigation on their own.

Specializations of Prosecutors

In certain fields, specialization of prosecutors has been recognized as necessary.

Organized Crimes and Corruption Investigation Department

By Order No. 149-k of the Prosecutor General, dated April 2, 1993, a special unit was established in the Prosecutor General's Office, the Organized Crime and Corruption Investigation Division.

In the year 1995, by order of the Prosecutor General the Organized Crime and Corruption Investigation Divisions were established in the Vilnius', Kaunas', Klaipėda's, Panevėžys' and Šiauliai's Regional Prosecutor's Offices.

By Order No. 23 of the Prosecutor General, dated February 14, 2001, the structure of the Organized Crime and Corruption Investigation Division was changed, it became Organized Crime and Corruption Investigation Department (OCCID), comprising 19 prosecutors. The Organized Crimes and Corruption Investigation Divisions (OCCIDi) of the Regional Prosecutors' Offices consist of an average of 7 prosecutors.

The OCCID of the Prosecutor General's Office and the OCCIDi of the regional offices are specialized structural subdivisions which, according to their competence, have the following functions:

- They conduct or organize and lead the pre-trial investigation of the criminal acts, characteristic to organized crimes and corruption; control the procedural activity of the pre-trial investigation officers in the Police Organized Crime Investigation and Special Investigations Service divisions, pursue public charges in the courts when hearing the finalized cases of the said subdivisions of the Prosecutors' Offices and pre-trial investigation institutions, coordinate the actions of the pre-trial investigation institutions against the criminal acts characteristic to organized crime and corruption.
- By the decision of the heads – Chief Prosecutors – of the Organized Crime and Corruption subdivisions of the Prosecutors' Offices, the prosecutors in these subdivisions: conduct pre-trial investigation; organize and lead the pre-trial investigation conducted by the territorial subdivisions of the Police Organized Crime Investigation Service and the Special Investigations Service. The prosecutors who conducted, organized and lead the pre-trial investigation, act as public chargers when hearing the cases in the courts of first, appeal and cassation instances.

Pre-Trial Investigation Control Division

By the order of the Chief Prosecutor (October 8, 2003 Instruction No. 4 on Organizing the Work of the Pretrial Investigation Control Division) of the Pre-trial Investigation Control Division of the Prosecutor General's Office, the prosecutors of this Division specialize in organizing pre-trial investigation, conducted in a certain stage of the pre-trial investigation. They are also commissioned to analyze and generalize the state of pre-trial investigation and prosecutorial control of a certain category of criminal cases in the state. E.g. one prosecutor leads the pre-trial investigation in the criminal cases regarding violation of intellectual property rights when the Criminal Police Bureau of the Police Department conducts the investigation, they also inspect, analyze and generalize the state of pre-trial investigation and prosecutorial control of such category of criminal cases in the state.

Public Charges Division

The prosecutors of the Public Charges Division specialize according to subject (separate issues of the criminal and criminal procedure laws commissioned to them), they prepare methodical recommendations, read the reports at the meetings of the prosecutors of the Division, at the seminars organized by the Training Methodical Division, generalize the practice of the prosecutors and courts on different matters, present proposals regarding formation of public charges practice, prepare methodical materials on the issues of application of material and procedural legal provisions, examination and evaluation of evidence, preparation of final speeches, filling in appeals etc.

Territorial Prosecutors' Offices

In the territorial Prosecutors' Offices most of the prosecutors specialize in working with certain pre-trial investigation institutions or their subdivisions. In some places separate subdivisions have been formed controlling only procedural activity of the pre-trial investigation institutions investigating criminal acts in respect of economic and business procedures; some of the prosecutors work only in the field of juvenile crimes.

Both, the prosecutors who conduct the pre-trial investigation and the ones organizing and leading it also specialize according to the nature of the criminal acts, e.g. crimes against human life and health, property, economic and business procedures, the financial system etc. It should be noted that such specialization of the prosecutors is noticeable not only in the organized crime and corruption but also in other subdivisions, conducting, organizing and leading pre-trial investigation, as well. At the same time, it is important to state that such specialization is possible only if a certain number and variety of criminal acts is present in a certain region.

The spheres of activity of prosecutors in district prosecutor's office are defined by the Chief Prosecutor (Deputy Chief Prosecutor) of the territorial office.

Civil Cases Division

The task of the prosecutors from the Civil Cases Division is to protect the public interest in civil cases.

THE PUBLIC PROSECUTION AUTHORITY IN POLAND – ORGANIZATION AND TASKS IN COMBATING CRIME

*Julita Sobczyk*⁴⁶

The tasks of the public prosecuting authorities have been formulated in the Law on Public Prosecution Authorities of June 20, 1985.

The Prosecutor General is the chief prosecuting authority, to which prosecutors of common and military structural units of prosecuting authorities are subordinated. The function of Public Prosecutor General is performed by the Minister of Justice.

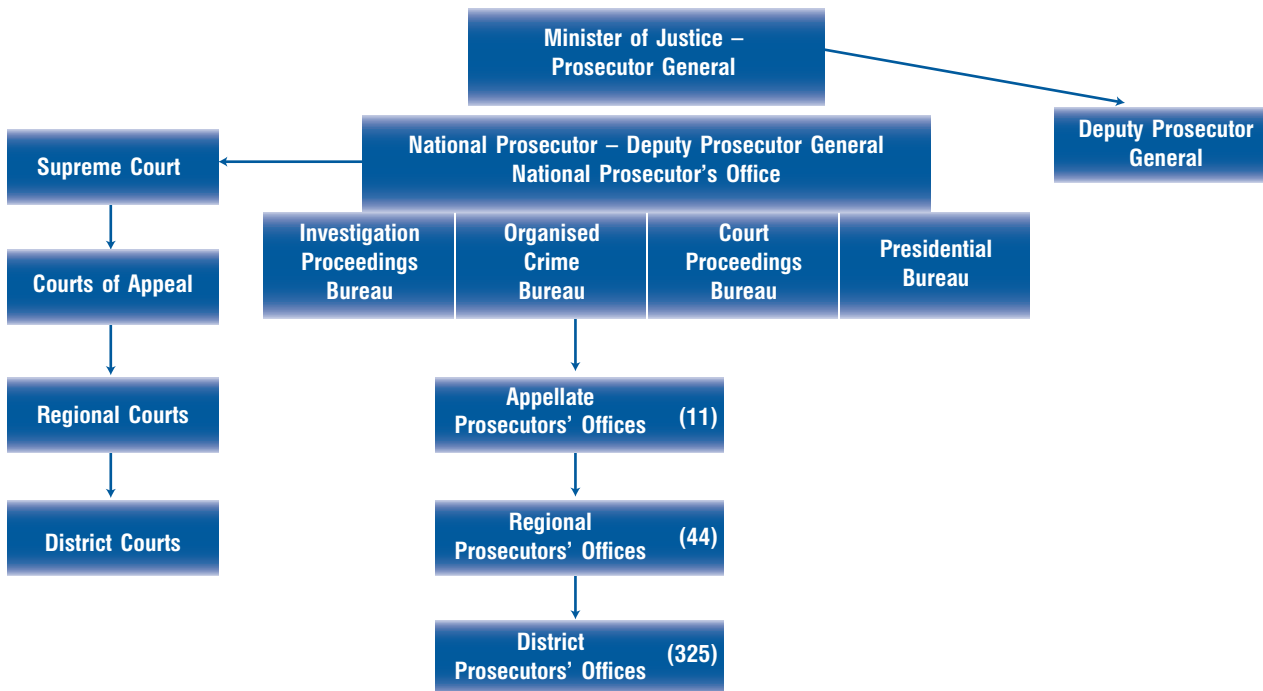
The Minister of Justice determines regulations providing for the internal official procedures of the prosecuting authorities and defining their internal structure. The internal official procedures of military prosecution authorities and their internal structure are determined by the Minister of National Defense in consent with the Minister of Justice.

Structural units of the Public Prosecuting Authorities include:

- National Public Prosecution Office, which is organizationally incorporated into the Ministry of Justice, managed by the National Public Prosecutor, being at the same time a deputy to the Prosecutor General;
- 11 appellate public prosecution offices managed by appellate public prosecutors;
- 44 regional public prosecution offices managed by regional public prosecutors;
- 325 district public prosecution offices managed by district public prosecutors.

⁴⁶ Ms. Julita Sobczyk is Prosecutor in the National Prosecutor's Office of Poland and Supervisor for the process of IT transition and implementation at new IT technology for the prosecutor's offices in Poland. She occupied positions of prosecutor in different prosecutor's offices and was also Chief of the Economic Crime Department at the District Prosecutor's Office in Warsaw.

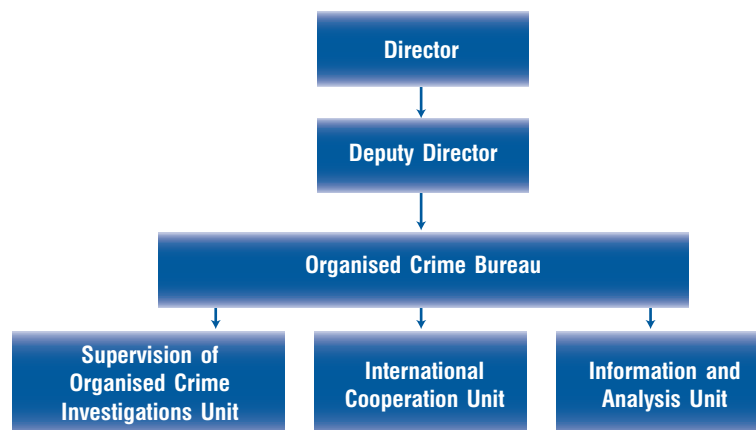
Administration of Justice, Judiciary and Prosecution



The National Public Prosecution Office consists of departments, managed by Directors, i.e.:

- The Preparatory Proceedings Bureau, the basic tasks of which include coordination of official supervision over preparatory proceedings performed within appellate public prosecution offices;
- The Organized Crime Bureau, established for the purpose of coordinating prosecution of this, most dangerous form of crime and for international cooperation in combating organized crime;

Organized Crime Bureau



Organized Crime Units in Regional Prosecutor's Offices: Białystok, Bydgoszcz, Gdańsk, Gorzów, Wielkopolski, Jelenia Góra, Katowice, Kraków, Kielce, Lublin, Łódź, Opole, Olsztyn, Poznań, Rzeszów, Szczecin, Warszawa, Wrocław, Zielona Góra

- The Judicial Proceedings Bureau, performing the prosecuting tasks associated with participation in proceedings before the Supreme Court and Supreme Court of Administration;
- The Presidential Bureau, performing organizational functions of the National Public Prosecution Office, considering the complaints filed in respect to activities conducted by the prosecuting authorities, organizing and performing visits and inspections of appellate public prosecution offices.

Military prosecution authorities comprise:

- The Supreme Military Prosecution, managed by the Chief Military Prosecutor who, at the same time, is one of the deputies to the Prosecutor General;
- Regional military prosecution offices and district military prosecution offices.

Deputy Prosecutors General are appointed from among prosecutors of the National Public Prosecution Office and recalled by the Prime Minister on motion of the Prosecutor General. A motion relating to the Chief Military Prosecutor is filed by the Prosecutor General in consent with the Minister of National Defense.

Prosecutors performing other functions within the public prosecution structures are appointed and recalled by the Prosecutor General.

The Prosecutor General appoints the prosecutors in all structural units of the public prosecution authorities, with appointment of military prosecutors requiring motion of the Minister of National Defense.

The following eligibility requirements have to be met by the would-be public prosecutors: being a Polish citizen, having full civil and citizen rights, graduation from university law studies, completing a three year prosecution or judicial practice, passing a public prosecutor or judge examination and completing a term of military service provided for in the regulations on military service of professional soldiers in units of military prosecution. The minimum age requirement for becoming a public prosecutor is 26 years.

The Prosecutor General manages the activities of the public prosecution office personally or through his deputy, issuing regulations, guidelines and orders. He may also undertake any activities belonging to the scope of activities of public prosecution or recommend their performance by the subordinated prosecutors, unless the Law provides that such activity may be performed by the Prosecutor General only.

Superior public prosecutors may order the public prosecutors subordinated to them to perform activities belonging to their scope of activities, unless the Law reserves such activities exclusively to their competence and may also take over activities conducted by the public prosecutors subordinated to them.

In performing their activities provided for in the applicable laws, the public prosecutors are independent and should be guided in their work by principles

of neutrality and equal treatment of all citizens. Independence of the public prosecutor is guaranteed by the appropriate provision of the Law on the Public Prosecution System (Art. 8.1). Such independence is external and the public prosecutor will act independently of any other authorities or persons; internal independence is greatly restricted and provided for in detail in the applicable laws.

The public prosecution authorities operate according to the principle of hierarchical subordination, i.e. a public prosecutor is obliged to obey the regulations, guidelines and orders of his superior public prosecutor.

However, any order concerning the content of a process action has to be issued by the superior public prosecutor in writing with appropriate justification on demand of the public prosecutor whom such an order refers to. Under exceptional situations, in which an obstacle exists to serving such an order in writing, it is permitted to transmit it orally and to confirm it forthwith in writing.

Any order concerning the content of a process action issued by a superior public prosecutor other than the direct superior of the given public prosecutor may not deal with the manner of concluding preparatory proceedings and proceedings in court. Hence, such an order may be issued by the direct superior of a public prosecutor, only. This principle constitutes quite a difficult barrier for intervening by the Prosecutor General or the National Public Prosecutor into decisions of public prosecutors conducting preparatory proceedings.

The absolute subordination to orders of their superiors is difficult to achieve, particularly in trial, because a changing situation during the trial may make an order issued in advance obsolete. Thus, a provision of the Law allows the public prosecutor to make independent decisions related with continuation of the trial when new circumstances are disclosed.

The superior public prosecutor is authorized to take over the case and to perform actions belonging to the duties of the subordinated public prosecutor and also to change or modify any decision of the subordinated public prosecutor. Any change or modification of a decision which has been disclosed to the parties, their attorneys or defenders and to other authorized persons may take place only in accordance with the procedure and principles provided for in the Law.

During proceedings in court, the public prosecutor is not dependent on the behavior of other parties and participants in the trial and, in particular, is not bound by motions of parties having rights of action, e.g. the auxiliary prosecutor or claimant.

Statutory tasks of the public prosecuting authorities are performed by the Prosecutor General and by the public prosecutors subordinated to him. In supervising prosecution of crime these tasks include the conducting or supervising of preparatory proceedings, participation in judicial proceedings by performing in court the functions of a public attorney for the prosecution, and also supervision over the carrying out of the criminal verdicts and decisions of deprivation of liberty.

The notion of “prosecution of crime” used both in constitutional provisions as well as in the Law on the Public Prosecution System comprises all aspects of combating crime, i.e.:

1. performing of the basic purposes of preparatory proceedings – determination whether a criminal offense was committed in fact, comprehensive explanation of circumstances of the matter, detection of the offender and, when required, his capture, as well as collection and preserving of evidence for court use which constitutes preparation of the indictment;
2. actions which lead to the penalizing of the offender by sustaining the indictment in the first instance court and preparing and lodging appellate measures from court verdicts, including the carrying out of the declared punishment.

If a justified suspicion arises that a criminal offense has been committed, the public prosecutor acting in accordance with the applicable laws, initiates and performs preparatory proceedings or orders the initiation and performance of such proceedings to another authorized body, supervising the proceedings in the latter situation. The duty of the public prosecutor in initiating proceedings in respect to offenses prosecuted officially emerges directly from the principle of legality – one of the fundamental principles of the Polish legal system. The same duty rests also on police authorities. Rulings of the public prosecutor during preparatory proceedings are binding for the authority which conducts such proceedings.

Preparatory proceeding may be performed as an investigation which is compulsory in cases which are examined by the regional court in first instance and in other cases provided for in the Code of Criminal Proceedings. In other situations investigation is conducted when the case is important or complex. Investigation is conducted by the public prosecutor.

In other cases preparatory proceedings are conducted as an inquiry which may also be initiated and conducted by the public prosecutor, but is usually done by the police on its own initiative or upon order of the public prosecutor. Inquiries may also be initiated and conducted by other duly authorized State authorities within the scope of the applicable laws (i.e. Frontier Guard, State Commercial Inspection, State Sanitary Inspection, tax offices, tax inspectors).

The principles of conducting preparatory proceedings and the position of the public prosecutor in this phase of penal proceedings are provided for in the Code of Criminal Procedure and in a number of detailed laws.

Upon initiation of an investigation, the public prosecutor may order it to be performed in entirety or in a defined part by the police or another authority. The entire investigation may be vested with such authorities particularly when it will be necessary to extensively use the remaining at their disposal operational and technical resources.

In vesting the conducting of entire or partial investigation with the police or other authorities, the public prosecutor issues guidelines and determines the date by which the investigation schedule is to be submitted. The schedule

is then reviewed by the public prosecutor, who may introduce changes and modifications or name those actions which will be done by him or in which he intends to participate.

It is the duty of the public prosecutor to regularly review the files of the case, particularly when actions expressly reserved by the law to the public prosecutor are to be made, e.g. issue of a decision of presenting charges, announcing the charge to the suspect and interrogating him.

In situations provided for in the applicable laws, the public prosecutor will apply coercive measures in respect to the suspects. However, the public prosecutor is obliged to apply to the court for the imposing upon the suspect of a coercive measure in the form of temporary arrest. The court will issue a positive decision when the application of such a measure will ensure correct continuation of the preparatory proceedings. The Law provides in detail for the prerequisites of temporary arrest.

As provided for in Code of Criminal Procedure, the public prosecutor is a public attorney for the prosecution before all courts. He is authorized to institute and sustain or just Sustain the indictment in cases submitted to court by other prosecutors. Other State authorities are also entitled to perform the actions of a public prosecutor, however within their statutory authorization, i.e. in cases expressly provided for by laws and only in cases of simplified proceedings.

In performing his public attorney functions, the public prosecutor is a party in the litigation, but with special rights – he does not restrict his actions to the narrowly understood personal interest, but represents the state and, thus, may perform actions in the public interest, including those in the interest of the other party (e.g. he may appeal the verdict also to the benefit of the convicted person).

The changes in social, political and economic relations as well as the democratic changes initiated in 1989 led to accelerated growth of individual entrepreneurship, an increase in the number of businesses, and brisker exchange of goods and services with other countries. These positive effects were, unfortunately, accompanied by a continuous increase in the number of criminal offenses committed.

In the first years of democratic changes the crimes and methods of committing criminal offenses also underwent a major change. Crimes so far unknown in Poland appeared, such as terrorism, organized crime, particularly pervasive smuggling of highly profitable goods, such as drugs, alcohol and arms, brutal violence with use of firearms, explosives, attempted assassinations of judges and public prosecutors.

The gradual growth of crime, and particularly of organized crime, greatly diminished the feeling of security among people.

The problem of rendering the Public Prosecution more efficient, the question of its position in the system of the state authorities and the limits of the Public Prosecution Office's and each prosecutor's independence – these are the main questions of particular interest of many professional groups, not only of the prosecutors in Poland.

Considering the issue of the position of the Public Prosecution within the system of the state bodies, one has to take into account the tradition of the country concerned. Therefore, in order to comprehend the problem pertaining to the position and the relationship with other state powers, it is necessary to present – very briefly – the overall model of the functioning of the Public Prosecution in Poland.

The proper realization of the Public Prosecution's statutory duties depends on its position and relationship with other authorities of the state. The basic task conferred upon the Polish Public Prosecution is conducting of the investigation and supervision of all preparatory proceedings conducted by the Police and other authorized bodies, and also exercising the function of the public prosecutor (accuser) in the courts.

The gravity and significance of these functions determine the position and relationship of the Public Prosecution Office with other state powers and define the conditions of fulfilling its duties impartially and free of any undue interference. Ensuring that public prosecutors are able to perform their professional duties and responsibilities in the conditions guaranteeing them independence should be the fundamental problem of considering the institutional position of the Public Prosecution Office. The following concepts have to be examined:

1. The Public Prosecution is an independent body within the state authorities, headed by the Prosecutor General as an independent authority, not subordinated to any other power. The Prosecutor General and the rest of prosecutors are appointed by the National Council of Judiciary and Prosecution, eventually the National Council of Public Prosecution, which has now been disbanded.
2. The Public Prosecution is subordinated to the Parliament or the President, in that these bodies are authorized to decide on the appointment of the Prosecutor General and other prosecutors on all levels of the hierarchy,
3. The Public Prosecution Service is a part of the executive power – the Government. The Minister of Justice is also Prosecutor General.

According to most Polish prosecutors, the first proposition would be the most suitable in the present situation. Every concept needs establishing due institutional safeguards in order to guarantee the independence from other state powers. The principle of independence is one of the fundamental principles of proper functioning of the Public Prosecution.

The question of the scope of independence of each prosecutor, especially in the decision-making process, may be debatable. In this context many questions arise, such as whether:

- to abandon the principle of uniformity and hierarchical subordination of the Public Prosecution,
- to allow prosecutors to perform their tasks enjoying full or limited independence, for example while acting during the trial phase.

At any rate, the power with which the prosecutor is equipped, being authorized to decide on prosecution of the person concerned, needs ensuring the necessary conditions of performing his or her duties free from any interference both from inside and outside. This would advocate the prosecutor's independence.

RELATIONSHIP BETWEEN PUBLIC PROSECUTORS AND THE POLICE IN POLAND

Julita Sobczyk⁴⁷

1. Polish criminal procedure assigns the Prosecution Office a key role (*dominus eminens*) in preliminary proceedings and this is reflected in the provisions of article 298 § 1 of the Code of Criminal Procedure. These explicitly assert that prosecutors conduct preliminary proceedings. The very clear implication is that although at this stage the investigation can be conducted either directly by a prosecutor or by the police or some other agency, in these latter cases the prosecutors remain nevertheless in charge and the proceedings are carried out under their superintendence.

As provided for by the Code of Criminal Procedure, and specifically by article 326, prosecutor's supervisory role extends to that part of preliminary proceedings that is not conducted by him. The supervisory authority also extends to review proceedings.

The ultimate responsibility for the proper conduct of investigation and inquiry lies with the prosecutor, who is the accuser before all courts and exercises supervision over preliminary proceedings conducted by the police and other state bodies.

2. It is Prosecutor's Office that is responsible for ensuring that the police respect all statutory rules and procedures during criminal investigation.

The prosecutor supervises the preliminary proceedings conducted by the police and this supervision is procedural insofar as relevant provisions of the Code of Criminal Procedure govern it. The relationship between the supervising and supervised organs, however, is not one of subordination, but a functional one. Entrusting prosecutors with the supervision of preliminary proceedings conducted by the police is tantamount to statutorily affirming the superiority of the prosecutor in that relationship, and this in turn authorizes the prosecutor to direct the work of the law enforcement agency responsible for the investigation. The subordination of the police to the prosecutor applies only to preliminary proceedings and is confined in scope to measures implemented in the progress of the investigation. It does not extend to other activities of the police when acting autonomously as a separate organ of the state.

According to article 326 of the Code of Criminal Procedure the prosecutor is obliged to ensure that the entire proceedings, which he supervises, are conducted correctly and efficiently.

In particular, the prosecutor, by virtue of his supervisory function, has the power to:

- demand information on the intentions of the body responsible for conducting the preparatory proceedings (including the police), indicate the direction of the proceedings, and issue relevant orders;

⁴⁷ See note 46.

- request that materials collected in the course of preparatory proceedings be presented to him;
- participate in actions carried out by the body/person conducting the proceedings, carry them out in person, or personally take over and proceed with the case;
- issue orders, rulings or instructions, and amend and reverse orders and rulings issued by the person conducting the preparatory proceedings.

In the event that an agency other than the prosecutor does not follow an order, ruling or instruction issued by the prosecutor supervising the proceedings, on the motion of the latter, a superior of such an official shall institute official proceedings whose results shall be communicated to the prosecutor.

3. The police do not have an obligation of prior consultation with a prosecutor in all criminal matters. The police are authorized to individually conduct investigations and inquiries specified in the provisions of the Code of Criminal Procedure. Supervision over the proceedings is exercised by a prosecutor. In case of important criminal matters a prosecutor may give guidelines to the police, take over proceedings for personal conduct or reserve for himself the execution of specific actions in a given case.

Prosecutor's instructions are binding on police officers.

There is one important exception to the rule.

By virtue of Article 308.1 of the Code of Criminal Procedure, within the limits necessary to secure evidence of the offence against loss, distortion or destruction, the police, in cases not amenable to delay, may always independently carry out the necessary inquiries. This can be done even before the issuance of the order on the institution of the investigation or inquiry and they can in particular inspect, if necessary, with the participation of experts, conduct searches and the other actions set forth in Article 74 § 2 (1) with respect to the suspect, as well as undertake all other necessary actions, including taking blood and excretory samples for tests. Upon completing such activities in cases in which investigation is mandatory, the person conducting the inquiry shall refer the case to the state prosecutor without delay.

In cases not amenable to delay, and particularly if a delay might result in the effacing of traces or evidence of an offence, a person suspected of committing the offence may be examined by the police independently as a suspect prior to the issuance of an order on the presenting of charges, if there are grounds for the issuance of such an order. The examination shall begin by informing the suspect of the contents of the charge.

In such cases the prosecutor shall, no later than 5 days from the day of the examination, issue an order on the presentation of charges, or by refusing its issuance, shall discontinue the proceedings.

A prosecutor may issue to the police detailed instructions in the scope of procedural actions performed or planned in given proceedings.

4. A prosecutor has power to issue detailed instructions to the police in all cases and in most of them (especially serious ones) he does so.

Article 15 of the Code of Criminal Procedure stipulates that the police and other organs involved in criminal proceedings carry out instructions issued by the prosecutor and conduct, under his supervision, investigation within statutorily defined scope.

Overseeing the conduct of proceedings, a prosecutor regularly examines the files of the case. In cases where the investigation, in whole or in a specified part, is entrusted to the police, a prosecutor sets out deadlines for performing particular operations contemplated in the adopted investigation plan.

Besides the competences ensuing from the supervisory powers that allow the prosecutor to frame and directly influence the course of the preliminary proceedings, the Prosecution Offices also have the right to instigate proceedings. Issuing instructions to instigate proceedings, the prosecutor, in written guidelines for the police or other competent body, specifies the offence and the charges as well as the actions to be performed together with a timeframe for carrying out the investigation.

5. Police officers request the consent of a prosecutor in case of application of operating techniques such as eavesdropping or controlled purchase.

As to the means of coercion a prosecutor's commanding role in the investigation is most crucial.

- *Arrest and detention awaiting trial*

The police is authorized to arrest/apprehend a suspected person for a period of 48 hours if there is a reason to suppose that he has committed an offence, and reasonable fears exist that such a person may go into hiding or destroy the evidence of his offence or if his identity could not be established. The arrested person should be informed immediately about the reasons for his arrest and his rights. His or her explanations should be heard.

The prosecutor must be notified immediately.

Immediately after collecting the necessary evidence, in case that the legal prerequisites for pre-trial detention referred to in Article 258 of the Code of Criminal Procedure occur, a motion to the prosecutor should be made, requesting him to obtain a preliminary detention order from the court.

The arrested person, upon his demand, shall be given the opportunity to contact a lawyer by any means available and to talk directly with the latter. The person who made the arrest may reserve the right to be present when such a conversation takes place.

By virtue of Article 250 § 1 of the Code of Criminal Procedure, detention awaiting trial may only occur on the basis of an order from the court, upon a motion from the prosecutor. The court, and in the preparatory proceedings also the prosecutor, shall supervise the carrying out of the arrest as the preventive measure (Article 256 of the Code of Criminal Procedure).

- *Seizure of objects and searches*

Objects which may serve as evidence, or be subject to seizure in order to secure penalties regarding property, criminal measures involving property or claims to redress damage, may be surrendered when so required by the court (during the trial phase) or the prosecutor (during the preparatory proceedings), and in cases not amenable to delay, by the police or an other authorized agency (Article 217 § 1 of the Code of Criminal Procedure).

If the surrender is demanded by the police or another agency, the holder of the objects liable to surrender has the right to make, without delay, motion to a court or a prosecutor to present justification of the authorization decision and the person must be informed about his/her right.

The holder shall be served, within 14 days of the seizure of the objects, an order of the prosecutor authorizing the action (Article 217 § 4 of the Code of Criminal Procedure).

A search may be made of premises and other places in order to detect or detain a person or to ensure his compulsory appearance, as well as to locate objects which might serve as evidence in criminal proceedings, if there is good reason to suppose that the suspected person or the objects sought are to be located there (Article 219 § 1 of the Code of Criminal Procedure).

By virtue of Article 220 § 1 of the Code of Criminal Procedure a search may be conducted by the prosecutor, or, with warrant issued by the prosecutor, by the police, and, also in cases specified in law, by another agency. The person on whose premises the search is to be conducted should be presented with a warrant issued by the prosecutor.

In cases not amenable to delay, if it has not been possible to obtain the order prior to seizure, the police must present a warrant from the chief of unit or an official identity card. The agency should then apply, without delay, to the court or the state prosecutor for approval of the search. The person on whose premises the search was conducted should be served, within 7 days of the search, an order of the court or the state prosecutor authorizing the action if he demands one. This person must be informed about his/her right to demand authorization of the search.

6. The police may individually apply special methods of investigation consisting in carrying out operating actions taken for the purpose of prevention, detection, establishment of culprits, and also obtaining and preserving evidence of publicly prosecuted deliberate offenses according to the principles specified in the Law on the Police with the exception of cases described in item 5.

According to the Article 19 of the Law on the Police dated April 6, 1990 with later amendments (in force from March 19, 2002) in the course of preliminary investigation carried out by the police in order to prevent, detect, identify perpetrators and obtain and secure evidence of intended crimes prosecuted by a public prosecutor (e.g. against life as specified in Articles 148-150, corruption and other serious crimes specified in the Criminal Code like illegal production, possession and trade in firearms, ammunition, explosives, drugs or psychotropic

agents or their precursors as well as nuclear and radioactive materials) when other measures have proved ineffective or there is every likelihood that they will be ineffective or useless, a district court, at the written request of the Chief Police Commander made after having received a prior written permit of the Prosecutor General or at the written request of the voivodeship police commander, made after having received a prior written permit of the appropriate district prosecutor, may order the so called operations audit. This may include use of special techniques as correspondence checks, deliveries checks, use of technical means to obtain information and evidence secretly and to record it, in particular telephone calls and other information conveyed by means of telecommunication networks.

In cases of urgency, where any delay could result in the loss of information or the obliteration or destruction of the evidence of a crime, the Chief Police Commander or voivodeship police commander having received a written permission from the competent prosecutor may institute an operations audit while at the same time applying to the appropriate district court for an order on that matter. In the event that the court fails to grant such permission 5 days after the initiation of the operations audit, the instituting body shall stop the operations audit and destroy the evidence collected thus far in the presence of a committee to be evidenced by a report.

An operations audit may not last longer than 3 months. The district court may, at the written request of the Chief Police Commander or voivodeship police commander made after having received a written permission of the appropriate attorney, allow a onetime extension of the audit for not longer than 3 months, if the causes of the audit still persist. The participation of the prosecutor in the court sitting is also guaranteed.

Where, in the course of an operations audit, reasonably justified by the appearance of new circumstances that are critical for the prevention or detection of a crime or identification of perpetrators and securing evidence, the district court at the request of the Chief Police Commander made after having received a written permission of the Prosecutor General, may allow an extension of the operations audit, even when the periods mentioned above have elapsed.

The police body informs the appropriate prosecutor of the results of the operations audit upon its completion, and when so requested, about its course.

Where evidence is obtained that justifies the institution of criminal proceedings, the Chief Police Commander or voivodeship police commander passes on to the appropriate prosecutor all the materials collected in the course of the operations audit, and, if applicable, with a request to initiate criminal proceedings.

The prosecutor appropriate for the seat of the police body in charge of the activities specified in the Law on the Police shall be promptly notified of the institution of the operations audit. The prosecutor may order the cessation of the activities at any time.

According to Article 22 of the Law on the Police, the police can use informers.

7. A prosecutor may always take over – as he deems fit – in whole or in part specific criminal proceedings from the police or another body authorized to conduct criminal proceedings.

There are some strictly specified situations when the prosecutor is obliged to run the investigation by himself. According to Article 311 § 2, the prosecutor conducts investigation when it is against suspect who is: judge, prosecutor, police officer, Internal Security Agency officer and Intelligence Agency officer as well as in murder cases.

8. The prosecution service may not set priorities in regard to institution of investigation and inquiries. In the Polish system of criminal law there prevails the principle of legalism, causing a necessity of prompt institution and conduct of criminal proceedings in all matters specified by the legislator as subject to prosecution by virtue of office
9. The Prosecutor General, by virtue of the Law on the Prosecution Service, has a right to issue guidelines in the scope of preliminary proceedings that are binding on all bodies authorized to conduct preliminary proceedings, including the police.

General guidelines of criminal policy for the police are formulated by the Commander General of the Police and the Minister of Internal Affairs and Administration.

10. The police are generally obliged to report to a public prosecutor all offenses identified by them, in line with the principle of legalism. Therefore, they are obliged to observe principles connected with the necessity of institution and conduct of criminal proceedings prosecuted by virtue of office immediately after having obtained information about the same. Failure to observe these principles may lead to disciplinary or criminal responsibility of a police officer.

While at the stage of preliminary proceedings there is a very close cooperation with the police – cooperation that undoubtedly affects the final scope and nature of the proceedings – once the proceedings are concluded, the substantive decision on how to bring to a close the given inquiry or investigation (by way of issuing a final decision on whether the case should go for trial) rests solely with the Prosecution Office.

That concerns also the decision whether to instigate investigation. If the police decides not to instigate an investigation, materials of such case must be sent to the prosecutor who makes the final decision.

In practice this means that sooner or later all cases must come to the prosecutor's office to enable him to make a final decision or – in serious cases – to examine the files, decide in matters of coercion or make other crucial decisions.

11. The police may not decline execution of a prosecutor's instruction in the matter of institution of criminal proceedings. The Law on the Police specifies that in case of unjustified failure to execute an order within the set time frame or scope, on demand of a court or a prosecutor the superior of the police officer institutes against him disciplinary proceedings.
12. Complaints about the police conducting criminal proceedings (investigation/ inquiry) are dealt with – depending on the kind of complaint and official negligence – by the Commander General of the Police, a prosecutor and

a court. The police possess its own structures, situated by the Commander General of the Police, responsible for conducting proceedings connected with complaints against the actions of policemen. Complaints against policemen conducting investigations or inquiries may also be dealt with by a prosecutor in a situation, where an act of the policeman may require criminal responsibility, or by a court, when they concern actions of the police in preliminary proceedings supervised by a court (e.g. detention).

13. The police and the prosecution service have press services conducting appropriate activity to inform society through the media. At the same time there occur cases of disclosure to media representatives of information from conducted criminal proceedings, which in the system of criminal law in Poland constitutes an offense and every time requires clarification by means of criminal proceedings.
14. In some important criminal cases joint teams are appointed made up of prosecutors and police officers or possibly officers of financial, customs, fiscal and other bodies. A doubtless benefit of such cooperation is the rapid and comprehensive coordination of actions in proceedings and the full utilization of the means of the bodies participating in a team. However, note should be taken that officers of the police and other services are not subordinate to a prosecutor, they are only obliged to follow his instructions related to the conducted proceedings.

ORGANIZATION AND STRUCTURE OF THE STATE PROSECUTOR'S SERVICE IN THE REPUBLIC OF SLOVENIA

Robert Renier⁴⁸

Introduction

Following the 1995 judiciary reform on the basis of the State Prosecutor's Office Act amendment and all other amendments of this act, thorough changes were made to the State Prosecutor's Office of the Republic of Slovenia. The Slovenian Constitution has a special chapter dedicated to the State Prosecutor's Office, immediately following the chapter concerning the administration of justice. On the basis of the Constitution as well as on a Constitutional Court judgment, the State Prosecutor's Office is defined as a *sui generis* body, and as an independent state body. Based on provisions stipulated in the State Prosecutor's Office Act, it is defined as an independent body being a part of the judiciary. Although many might like to see it within the executive branch of government, it falls, due to its nature, organization and performance of its powers, within the judiciary.

The main change that the 1995 reform brought was that the State Prosecutor's Office, previously featuring a strict hierarchy and strict respect for subordination, was now reshaped into an institution where the performance of the powers of the State Prosecutor's Office was passed on to the level of an individual – to state prosecutors as judiciary officers of different levels and no longer as an institution. Thus the state prosecutors are independent in their work and decision making process and are bound only by the Constitution and law. When deciding on a matter, neither state prosecutors of a higher rank, nor heads of District State Prosecutor's Offices, nor a State Prosecutor General can influence the decision of a state prosecutor with any kind of instructions whatsoever. In this respect, the status of a state prosecutor has much approached the status of a judge.

The requirements, position and rights of a state prosecutor as well as his/her salary are identical with the requirements for the appointment, rights and salary of judges of the same rank, while the State Prosecutor's Office Act, in the relevant chapters, largely refers to the provisions of the Judicial Service Act.

Since 1995 the state prosecutors of the Republic of Slovenia have had permanent tenure. State prosecutors – with the exception of the State Prosecutor General who is appointed by the National Assembly of the Republic of Slovenia – are appointed for permanent tenure by the Government of the Republic of Slovenia (while judges with permanent tenure are appointed by the National Assembly).

Organization and structure of the State Prosecutor's Office

The powers vested in state prosecutors are, in the Republic of Slovenia, carried out by prosecutors at three instances: district state prosecutor, higher state prosecutor and the supreme state prosecutor. The powers of these are based upon the powers vested in them by the State Prosecutor's Office Act and other laws. In addition to the state prosecutors of the above defined three instances, the

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state prosecutor's office is also carried out, in particular at the first instance, by assistant state prosecutors (district and higher), whose powers do not originate in the Act, but rather in an individual power-of-attorney given by a state prosecutor to whom the assistant has been assigned. The number of the assistant district state prosecutors is significantly lower than the number of the state prosecutors themselves. The assistant district state prosecutors also have a permanent appointment and are appointed by the Government of the Republic of Slovenia by the same procedure as state prosecutors. Assistant state prosecutors' salaries are harmonized with those of local court judges. In addition to the assistants, the state prosecutors are also assisted by specialist staff – graduate lawyers who have passed the bar examination, and other suitably qualified staff. Only state prosecutors and their assistants within their powers-of-attorney granted, can act during the preliminary procedure and in the court criminal proceedings.

The powers of state prosecutors particularly depend upon the following three circumstances: the state prosecutor's position, the office in which they work and before which court they can act, which means that they have to respect territorial and subject matter jurisdiction of the court and state prosecutor's office to which they have been appointed or assigned to work.

Taking into account the above-mentioned circumstances, as a rule the supreme state prosecutors can act before the law courts of all instances in the Republic of Slovenia, the higher state prosecutor before the local, district and higher courts, and the district state prosecutor before the local and district law courts. The latter have the exclusive competence to decide upon all criminal matters at the first instance courts (the local courts for criminal offences for which a penalty of up to 3 years of imprisonment is prescribed, and the district courts for all other criminal matters).

The organization of the Slovenian State Prosecutor's Office is unified and does not distinguish specialized state prosecutors, e.g. military or other specialized state prosecution, while the organization is divided into two types of state prosecutors' offices, i.e. 11 district state prosecutor's offices and the supreme state prosecutor's office. The latter comprises 4 internal departments: criminal, appellate, revision, and the department for civil and administrative matters. It also comprises three external departments, held by higher state prosecutors who defend appeals before the higher courts in Maribor, Celje and Koper. Within the Supreme State Prosecutor's Office of the Republic of Slovenia, there is also a legal information centre and a specialist centre in order to ensure specialist assistance in the field of taxation, finance and accounting. There is also a Group of prosecutors for special matters operating within the Slovenian Supreme State Prosecutor's Office whose task is to handle complex cases of various types of criminal offences with elements of organised crime. State prosecutors of various ranks may be assigned to work in the Group of prosecutors for special matters, and their appointment is for a period of 6 years.

In the Republic of Slovenia there are, in the first instance, state prosecutors who have been appointed or assigned to work in a district state prosecutor's office, and they appear before the first instance courts within the territorial jurisdiction of a specific state prosecutor's office, as well as those state prosecutors appointed to work in the Group of prosecutors for special matters who appear before the first instance courts in the territory of the entire Republic of Slovenia.

At the second instance, state prosecutors of the appellate department of the Supreme State Prosecutor's Office of the Republic of Slovenia of the head office, as well as three external departments, appear before the four Higher Courts.

At the third instance there are supreme state prosecutors of the Slovenian Supreme State Prosecutor's Office, who appear before the Supreme Court of the Republic of Slovenia.

The state prosecutors are completely independent in the decision-making process and are bound only by the Constitution and the law. However, even though there are no obligatory instructions for dealing with specific criminal matters, the state prosecutors have to follow the general instructions of the State Prosecutor General which refer to the uniform application of the law and unification of prosecution policy, as well as the obligatory instructions concerning the state prosecutor's office issued by the head of the relevant state prosecutor's office within the framework of their powers.

State prosecutors are responsible for their work and their work is subject to regular expert inspection. The inspection may be carried out by the head of the relevant state prosecutor's office within the framework of their authorities. However, it is also regularly inspected by the Supreme State Prosecutor's Office of the Republic of Slovenia by auditing the work of district state prosecutors' offices, by inspecting the court records and pointing out errors made. However, complaints about the work of state prosecutors can also be filed by parties taking part in criminal proceedings and others.

Judiciary inspection of the work of the District State Prosecutor's Office and the Supreme State Prosecutor's Office may also be carried out by the Ministry of Justice. Their inspection includes the work of the head-office of the State Prosecutor's Office, statistical data and other data collection concerning the work of state prosecutors, training, preparation of regulations concerning organization and work of state prosecutors, etc. However, the inspection may not entail intervention into the legality and professional correctness of the state prosecutors' work concerning concrete decisions in criminal and other court proceedings. The judiciary inspection may be denied by the head of the state prosecutor's office, if he or she believes that inspection would represent an illicit interference into the autonomy of the state prosecutor.

In spite of the autonomy of state prosecutors in the decision making process, the State Prosecutor's Office is nevertheless a hierarchically structured body. Therefore, a superior state prosecutor or a state prosecutor with a higher rank may take over an individual matter or perform an act under the authority of a lower level state prosecutor. The decision for the takeover of an individual case must be in writing and with an explanation of grounds, one copy of which must be sent to the State Prosecutor General. The state prosecutor who has taken up a case within the authority of a lower rank state prosecutor, can take the matter up alone or assign it to another state prosecutor. The State Prosecutor General may also choose to assign another state prosecutor's office to take over a certain case if he or she assesses that this will facilitate the criminal court proceedings.

The State Prosecutor General may, within his or her authority, relocate a state prosecutor, upon his or her written consent, to work at another State Prosecutor's

Office, the Supreme State Prosecutor's Office of the Republic of Slovenia, the Ministry of Justice, or the Group of state prosecutors for special matters. In addition, if so required by the urgent nature of work, he or she may relocate a state prosecutor without the above-mentioned written consent, but only for a period of time not exceeding 6 months.

When speaking of the organization of the state prosecutor's office, the State Prosecutor's Council should also be mentioned, as it has a special role in the selection and appointment process, in the assessment of the state prosecutors' work, deciding on their promotion and remuneration, and giving opinion on the appointment of heads of state prosecutor's offices, after being appointed by the Government following the proposal of the Minister of Justice for the period of six months. The Council consists of seven members, of whom four are elected from among district (2), higher (1) and supreme state prosecutors (1) for a period of five years, one of the heads of the state prosecutor's office being appointed by the Minister of Justice for the same period as the State Prosecutor General and his or her deputy. By its nature, the State Prosecutor's Council has the same role as the Court Council in the judiciary.

The role and authority of state prosecutors on the basis of the Criminal Procedure Act

The role and authority of state prosecutors on the basis of the Criminal Procedure Act may be split into two areas: the role and authority of state prosecutors in the preliminary procedure and in relation to the police, and the role of state prosecutors during the criminal proceedings in relation to the investigative judge and the court.

The role and authority of State prosecutors in the preliminary procedure

The role of state prosecutors in relation to the police has undergone some changes in the last few years. Following Recommendation R (2000) 19 of the Council of Europe concerning the role of state prosecutors in relation to the police, and on the basis of provisions stipulated by the Criminal Procedure Act, the role of state prosecutors in relation to the police has become more dominant. In 2001 an Agreement on exercising the authority concerning the relationship between state prosecutors and the police, referring to detection and prosecution of offenders, was adopted. The act was replaced in 2004 by a Decree issued by the Government of the Republic of Slovenia on cooperation of state prosecutors and the police in detecting and prosecuting perpetrators of criminal offences. On the basis of these the role and powers of state prosecutors has been additionally defined.

The police force is as a rule autonomous in carrying out its function of detection of offenders and acts *ex officio*. However, it is obliged to inform immediately the first instance state prosecutor's office of all suspected criminal offences in order to enable state prosecutors to take part at an early stage of the preliminary procedure. Thus the police are obliged to inform the state prosecutor's office of any detection of a criminal offence within three days, and immediately in the case of grave crimes where immediate procedure actions are required, e.g. crime

scene search, etc. This is possible as a district state prosecutor's office operates on a 24-hour basis.

A state prosecutor may, based on their own judgment and autonomous decisions, direct the work of police in the preliminary procedure by giving the police obligatory instructions and suggestions, expert opinion and legal assistance in the phase of information and evidence gathering relating to legally relevant facts, taking part in activities in procedural and other actions in the preliminary procedure, and making decisions concerning further police measures against a suspect kept in detention which are obligatory for the police, e.g. whether a suspect is to be immediately released or brought before the investigative judge.

In the event that no directions are given by a state prosecutor, the police will act independently within the framework of their legal powers. The state prosecutor's interest in taking an active part in directing the preliminary procedure is mainly in the case of the gravest forms of organized crime and commercial crime. In practice, most cases refer to individual guidance or instructions given to the police by a state prosecutor, thus the police in most cases act autonomously within the framework of their legal powers. The responsibility for the successful detection of crimes still lies within the police. The state prosecutors' role cannot take over responsibility for the work of the police, although some might wish so.

One of the important aspects of the state prosecutors' authorities in the preliminary procedure is their role in the issuance of directions to implement secret investigation measures to be carried out by the police. Thus a state prosecutor may, on the basis of a proposal by the police, permit the use of certain secret investigation measures which invade the fundamental human rights of the individual, and may file motions for special secret investigation measures to be granted by an investigative judge when such authority is vested in the investigative judge. The authority of granting secret investigation measures, which interfere with fundamental human rights of the citizens, is thus split depending on the degree of the interference with fundamental human right, between the state prosecutor's office and an investigative judge. The state prosecutor may grant secret observation and concealed operations including fake documents, permit an entrapping purchase by police, entrapping receipt or delivery of a gift, or entrapping receipt or delivery of a bribe. In addition, the state prosecutor may, in executing the measures, grant a temporary suspension of arrest of a suspect, if the life and health of a third party are not under threat.

The authority of the investigative judge is to grant a warrant, on the basis of a proposal by the state prosecutor, for secret police observation and operations when technical devices for voice broadcasting and recording are used, when technical devices are to be placed in a vehicle or other closed space, when the measure is to be carried out on private premises, if with the consent of the owner of the premises, and when such measures are to be carried out against a person who is not a suspect. The investigative judge's powers also include a warrant to monitor electronic communication by tapping and recording, inspection of letters and other post, inspection of banks' computer systems and of other legal entities who carry out financial and commercial activities, and the tapping and recording of conversations, if so consented by at least one party to the conversation.

On the basis of a motion filed by a state prosecutor, the investigative judge may issue a warrant to an operator of an electronic communication network

to provide data about the communication traffic, a telephone number, the identification data of the electronic communication service users, and other information about the communication services performed. On the basis of a motion by a state prosecutor, the investigative judge may issue a warrant to a bank, saving financial institution or saving crediting institution to provide confidential data and to deliver documentation about remittances, deposits, the balance of the account, and transfers on the suspect's accounts or other persons involved in the commitment of a criminal offence.

The authority to deal with secret investigative measures is vested in Heads of District State Prosecutor's offices and their deputies, as well as the members of the Group of prosecutors for special matters.

After a preliminary procedure has been completed and criminal record has been filed by the police, however, prior to the initiation of criminal court proceedings, state prosecutors have a special authority when they partly overtake the judicial role. These are special alternative forms of criminal procedure, which replace the classical criminal prosecution before the law courts.

Thus Slovenia's state prosecutors more and more carry out the criminal diversion consisting of a special hearing held at the District State Prosecutor's Office, whereby the state prosecutor, in the presence of the suspect and the injured party, after reaching an agreement by both parties, orders the suspect to remedy or settle the damages, payment through the state prosecutor of a set amount to humanitarian purposes, carrying out community work, or payment of alimony. In 2003 alone, the sum collected in this way for humanitarian purposes, amounted to SIT 77,5 million, or EUR 330.000.

The other alternative form is mediation in criminal cases, when the district state prosecutor submits the case to a special mediator who tries to reach a settlement between the offender and the victim of a criminal offence. The use of such alternative forms of resolving criminal matters is possible for all criminal offences for which a punishment of up to three years of imprisonment is prescribed by law, and some other listed criminal offences for which a higher imprisonment penalty is prescribed by law. Annually, state prosecutors in the Republic of Slovenia disburden the law courts by at least 15 judges of the first instance courts.

Role and powers of state prosecutors in criminal proceedings

In criminal proceedings state prosecutors' role is twofold: first, they have a role of a state body, and second, in representing the interests of a party in a criminal proceeding. Taking into account the fact that the Criminal Procedure Act of the Republic of Slovenia retains the elements of the continental procedure with an ever-increasing number of elements of the adversarial procedure, the role of the state prosecutor during the procedure is more and more distant from the role of a state body, and moving towards the role of a party in a dispute about a criminal case. More and more emphasis is in practice put to the equality of both parties in a criminal procedure.

Thus the state prosecutor may file requests to initiate an investigation to be conducted by the investigative judge. During an investigation, instituted by

the court, the state prosecutor takes part in procedural actions as a party in the proceeding, gives the investigative judge proposals also which witnesses should be examined, and files detention motions against suspects. The investigative judge cannot order custody against a suspect on an *ex officio* basis, but only on the basis of a motion by the first instance state prosecutor. The state prosecutor may also propose house arrest, prohibition to approach a certain person or place, house search, and all other investigation acts.

In accordance with the Criminal Procedure Act, the state prosecutor files indictments and other charges with the first instance courts and represents them before the court during the criminal proceedings, attends main hearings or other procedural acts before the law court (the main hearing cannot be carried out without the presence of the state prosecutor), lodges appeals against non-final court judgments, and extraordinary legal remedies against final court decisions.

The state prosecutor is also vested with powers in civil and administrative procedures. In this role and in particular as the first instance state prosecutors, they appear more as an exception, except before the Supreme Court, when the supreme state prosecutor files requests for protection of legality in civil procedures in a larger number.

As for mutual legal assistance in criminal cases, the district state prosecutors of the Republic of Slovenia have, on the basis of the Criminal Procedure Act, the authority to carry out international legal assistance independently. In carrying out this function they may address state prosecutor's offices abroad directly, without the intervention of the Supreme State Prosecutor's Office. This method expedites and facilitates the efficiency of the mutual legal assistance. Additional assistance to state prosecutors can be obtained from Slovenia's representative in Eurojust and through the contact point in the EU judicial network, being a representative of the Supreme State Prosecutor's Office. Thus, legal assistance may be transferred through diplomatic channels, through the Ministry of Justice, Interpol, the Ministry of the Interior, the Office for Prevention of Money Laundering, as well as directly between law courts and state prosecutor's offices.

The state prosecutors of the Republic of Slovenia are, on the basis of the positive experience so far concerning legal assistance in direct contact with state prosecutor's offices in other countries and due to the efficiency of such work, exceptionally inclined towards this fastest and extremely efficient form of mutual legal assistance. Unfortunately, some European legislations do not permit such fast and direct mutual contacts between the prosecution bodies, resulting in a major hindrance for the provision of efficient international legal assistance.

Conclusion

From the above presentation of the organization and structure of the State Prosecutor's Office in the Republic of Slovenia and the powers vested in the state prosecutors, it is evident that the institution is to a large extent autonomous and the state prosecutors are independent in their decision-making. This prevents to a large extent any direct influence of daily politics on the work of the state prosecutors or even its possible abuse for criminal purposes.

There are different views whether such a system is good or not. Some often do not like it. Many want the State Prosecutor's Office in the Republic of Slovenia to be essentially more subordinated to the executive branch of power, thus providing a direct influence on the work of state prosecutors as well as influencing a state prosecutor's decision in individual cases.

The prevailing opinion is that legal certainty is more firmly ensured with the autonomous role of the state prosecutor.

Of course, such a role puts us, as state prosecutors, into a position of great responsibility from the point of view of our professionalism and the correctness of our decisions, the quality and success of our work, as well as criticism by the public.

General features

The Public Prosecution Office shall protect the rights and interests guaranteed by law to individuals, legal entities and the state (article 149 of the Constitution of the Slovak Republic). Within the scope of its power, the Public Prosecution Office is obliged in public interest to take the measures in order to prevent, identify and disclose any breach of law and eliminate it, remedy any violation and impairment of rights and draw appropriate conclusions. When exercising its powers, the Public Prosecution Office is obliged to use all the statutory means available to secure impartial, consistent, effective and prompt protection of the rights and interests guaranteed by law to individuals, legal entities and the State.

Public Prosecution of the Slovak republic

The Public Prosecution of the Slovak Republic is an independent governmental authority which defends the rights and interests protected by law of individuals, legal entities and the state. It has its own budget within the state budget of the Slovak Republic. It is also a hierarchically organized unified system headed by the Prosecutor General of the Slovak Republic in which the individual prosecutors act in terms of subordination and superiority. The position and the competence of the Public Prosecution of the Slovak Republic and the position of the Prosecutor General are regulated by article 149 of the Constitution and by the Public Prosecution Act No: 153; the position of prosecutors and their rights are provided for in Act No. 154/2001 COll.

The Public Prosecution is obligated to take measures to prevent, find out and eliminate the law violation, restore the violated rights and lay appropriate charges.

The Public Prosecution of the Slovak Republic has decision-making, supervising and control powers.

Position of the Prosecutor General

The Prosecutor General is at the head of the Public Prosecution. He or she is appointed and recalled by the President of the Slovak Republic on the basis of a proposal of the National Council of the Slovak Republic for a period of five years and maximum two consecutive mandates. He or she is a constitutional official heading a central authority of the Slovak Republic.

The Prosecutor General's instructions and orders as acts on organization and management are generally binding upon the Public Prosecution of the Slovak Republic.

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Entitlements of the Prosecutor General

In the area of criminal law, he or she is entitled to contest the final decision of any criminal proceeding authority, including the court. He or she can also contest the decision of the civil court by an extraordinary admissible review. The Supreme Court of the Slovak Republic makes decisions concerning these reviews.

The Prosecutor General is entitled to nominate judges for the Constitutional Court. He or she can address the Constitutional Court in case he/she considers any law or generally binding decision of a public administration authority contradicts the Constitution of the Slovak Republic. He or she has no legislative initiative, but can initiate amendments to the existing laws or adoption of new ones through the Chairman of the Parliament. When invited, he or she is obliged to participate in the plenary session of the Parliament or its committees. Once a year he or she has to submit to the Parliament a report on the Public Prosecution activities. The Members of Parliament are not entitled to interpellate the Prosecutor General.

The Prosecutor General can take part in the sittings of the government with a consultative vote. The Government cannot order the Prosecutor General to fulfill a particular task, it can only recommend or ask him or her to do so.

Public prosecutor

The person to be appointed public prosecutor must be an impeccable citizen of the Slovak Republic with permanent residence in its territory who is at least 25 years old, has made practice training during the determined period of time, has passed successfully the prosecutorial examination and has sworn before the Prosecutor General.

Tasks of the public prosecutor

The powers of the Public Prosecution Office are exercised by the individual prosecutors through:

- a. the pursuit of criminal proceedings conducted against individuals suspected of having committed crimes and through overseeing compliance with laws in the pre-trial proceeding;
- b. overseeing compliance with laws in all the establishments where the individuals deprived of their personal freedom or the individuals whose personal freedom was limited upon a decision made by a court of law or by any other competent authority are kept;
- c. exercising their powers in the court proceeding;
- d. representing the state before the courts of law if so prescribed by a separate law;
- e. overseeing compliance with laws on the part of public administrative agencies;

- f. participation in preparing and taking preventive measures which aim to prevent a breach of laws and other generally binding regulations;
- g. participation in eliminating, preventing and combating the causes and conditions of crime;
- h. participation in drafting legislation;
- i. performing other duties and obligations if so prescribed by a special law or by an international treaty declared in the manner prescribed by law;
- j. filing an instigation of civil trial or entering a civil trial already initiated concerning declaration of somebody's death, education of minors, registration in the Company Register, bankruptcy, etc.

The prosecutor shall not express any interpretative views or opinions on laws to other bodies or to any other legal entities and individuals.

The prosecutor shall perform his duties and obligations in accordance with laws and when doing so he shall use all the statutory means available. When performing his duties and obligations, the prosecutor must:

- a. to his best knowledge abide by and apply the Slovak Republic Constitution, constitutional laws, laws, international treaties declared in the manner prescribed by law and other generally binding regulations,
- b. respect and protect human dignity, fundamental human rights and freedoms and avoid any discrimination whatsoever,
- c. protect public interest,
- d. always act fairly, impartially and without any undue delays.

The public prosecutor fulfills his or her tasks by legal proceedings against the persons which are under suspicion of committing a crime and by supervising the legality of preparatory proceedings, during which he or she is entitled to give binding instructions to the investigators, require the report of the course of investigation, participate in acts carried out by investigators and make decisions in any case connected with. Only the public prosecutor is entitled to bring an action against a person, order the property seizure of the accused, give an exhumation warrant and carry out a preliminary investigation in proceedings connected with extraditions. He supervises the legality of laws and regulations restricting the individual's liberty. He represents the state as a proprietor in legal proceedings, supervises the legality of acts and decisions of the state or local authorities and other legal entities in the extent they were authorized by law to make decisions of the rights and duties of individuals and legal entities in the sphere of the public administration, participates in measures aimed to prevent the violation of law and other generally binding regulations and to eliminate the causes and conditions for criminal offences, participates in consultative committees for the creation of laws for or crime prevention and suppression.

The public prosecutor does not provide interpretation of the laws to other authorities, legal entities or individuals and does not provide solicitor services.

The military prosecutor carries out the criminal prosecution against members of the armed forces, who have committed crime, and supervises the legality of preliminary criminal proceeding against members of the armed forces.

The Office of the Prosecutor General of the Slovak Republic keeps a Criminal Register and gathers, processes, keeps and gives information about persons lawfully convicted in criminal proceedings, persons against whom the prosecution was lawfully conditionally discontinued and the agreements concluded in criminal proceedings.

Entitlements of the public prosecutor

The public prosecutor is entitled to inspect the legality of generally binding decrees of municipalities, amendments, resolutions and other legal acts issued by the public administration authorities. He or she is entitled to inspect the legality of procedures and decisions of the public administration authorities in particular cases.

The public prosecutor may challenge the generally binding decrees of municipalities, other legal acts and decisions of the public administration authorities issued in particular cases, if they violate the law or other generally binding regulations, before the authority which has issued this unlawful decision or before its superior authority. The public prosecutor suggests to the public administration authorities or to their superior authorities to correct the violation.

The public prosecutor is excluded from the inquiry and decision making of the case, if due to his or her relationship to the case, to the parties of the proceeding or to their barristers, there are doubts that he or she may be prejudiced.

Organizational structure of the public prosecution

The organizational structure of the public prosecution corresponds to the organizational structure of the courts of the Slovak Republic.

System of the Public Prosecution Office

The public Prosecution Office consists of the following units:

- a. the General Prosecution Office of the Slovak Republic, which is the supreme body in the system of public prosecution – a part of it deals with corruption and organized crime and another part of it – with military prosecution;
- b. 8 regional prosecution offices which are the superior authorities of the district public prosecution offices in their territory;
- c. the High Military Prosecution Office;
- d. 55 district prosecution offices;

- e. circuit military prosecution offices.

The hierarchical organization of the Public Prosecution Office is an indispensable condition for the proper work of Public Prosecution as a law protection authority. It enables a uniform application of laws and other generally binding legal regulations as well as uniform invocation of criminal policy. Within the organization the individual prosecutors are subordinated to the superior prosecutors who are subordinated to the Prosecutor General. The superior prosecutor is competent to issue instructions how to proceed or to decide.

A superior prosecutor shall have the right to:

- a. instruct his subordinate prosecutors how to proceed with handling the matter and how to perform their tasks,
- b. exercise the powers originally vested in a subordinate prosecutor or decide that the aforesaid powers will be exercised in the acts of another subordinate prosecutor.

The instruction given to the subordinate prosecutor shall always be in writing. The subordinate prosecutor is obliged to act under instruction if not otherwise provided.

When appearing before a court of law, the subordinate prosecutor is not obliged to act under the superior prosecutor's instruction, provided that there is a change in the facts or evidence presented in the court proceeding.

The subordinate prosecutor is obliged to disobey the orders and instructions, provided that by obeying the same he would commit a crime, offence or tort or provided that his activity could be considered a professional misconduct; the prosecutor's disobedience of the instructions and orders must be duly reasoned in writing.

The first instance is represented by 55 district public prosecutions and the second instance by 8 regional public prosecutions. The judge-advocate department operating in the Slovak Republic Forces is a part of the public prosecution of the Slovak Republic. It is represented by 3 district judge-advocate departments of the first instance and a higher-level judge-advocate department of the second instance.

The organization of the courts and prosecution offices does not correspond to the division of territorial administration units of the state on the district level.

The basic salary of prosecutors corresponds to the salary of judges. The Board of Prosecutors of Slovak Republic is their coordination body, which consists of chairmen of the respective Boards of Prosecutors.

Staff of the Public Prosecution Office in Slovak Republic in 2000

According to the planned number, 728 prosecutors, 689 technical-administrative employees and workers work in the Public Prosecution Office in Slovak Republic

(except the military section of the Public Prosecution Office). This state was achieved after reducing the number of employees in compliance with the Act No. 63/1999 Coll. on the state budget for 1999 and Annex No. 1 of Government Resolution No. 141/1999. The actual number of technical-administrative staff and manual workers in the Public Prosecution Office was in compliance with the planned state for 2000. In 2000, a total of 645 prosecutors worked in the Public Prosecution Office, i.e. 88,59% of the planned number. The planned number of prosecutors hasn't been changed since 1990, even though the registered crime is rising and becoming more serious. 83 prosecutors are needed to reach the planned number, 11 less than 1999 when 94 prosecutors were missing. 15 prosecutors are on maternity leave, 3 prosecutors are doing their military service and two have been removed from office, so that the Public Prosecution Office is currently short of 103 prosecutors capable to work. There are 310 women (48,06%) among the 645 prosecutors.

In the year 2000 a total of 14 prosecutors left the Public Prosecution Office (4 prosecutors left their work for disability reasons, 4 prosecutors died, 6 left for another employment).

By 31 December 2000 there were a total a 93 trainee-prosecutors in the Public Prosecution Office of the Slovak Republic, including 8 trainee-prosecutors doing their military service and 5 trainee-prosecutors on maternity leave. 26 trainees, 12 of whom women, were appointed prosecutors.

The interest for the profession is on the rise and 240 applications were sent in 2000 to the Public Prosecution Office of the Slovak Republic. Only 40 applicants were accepted. Regarding the selection, even intellect and personality are considered besides knowledge of law and language proficiency.

A total of 118 positions were planned within the Military Section of the Prosecution Office in the year 2000, of which 68 for professional soldiers and 50 for civil employees. In reality 46 jobs were occupied by professional military officers (67,6%). The positions of the civil employees are currently fully occupied. 30 prosecutors were appointed instead of the planned 41, that is 73%. In 2000, 4 trainee-prosecutors were working in the Military Section of the Prosecution Office too. Compared to 1999 when the number of military prosecutors was 27, their member has increased by three prosecutors passing the prosecutor's exam in Banská Bystrica, Bratislava and Prešov.

STRUCTURE AND ORGANIZATION OF THE POLICE IN POLAND

*Dariusz Jankowski*⁵⁰

The police is created as a unified armed force, serving society and having the task of protecting the safety of people and maintaining public safety and order.

The essential tasks of the police include:

- 1) protection of people's life and health, as well as their material possessions against unlawful attempts for breach of these values;
- 2) protection of public safety, including maintenance of order in public places and on public transport, in road traffic and on waters in common use;
- 3) initiation and organization of activities in order to prevent crime and petty offences and co-operation in this respect with state and self-government agencies and public organizations;
- 4) detection of crimes and petty offences and pursuit of their perpetrators;
- 5) supervision over municipal guard (town guard) and over specialized armed security services in activities defined in separate regulations;
- 6) control over compliance with public order and administrative regulations related to public activity or applying in public places;
- 7) co-operation with the police forces of other countries and their international organizations on the basis of international agreements as well as separate regulations;
- 8) collection, storage and transmission of crime-related information;
- 9) management of database containing information on DNA test results.

The police also implements tasks arising from international agreements, according to the rules and scope prescribed by them.

The police force consists of the following types of services: criminal, preventive and supporting service dealing with organizational, logistic and technical matters.

The Court Police is part of the police service. Detailed scope and rules governing the Court Police structure are specified in a regulation issued by the Minister of Interior in consultation with the Minister of Justice. The police force also consists of: Higher Training Police School, training centres and police schools, special prevention detachments and anti-terrorist sub-detachments, research and development units.

The central authority of the government administration in charge of matters of protection of the safety of people and maintenance of public safety and order is the Chief Commander of the Police, subordinated to the Minister of Interior.

⁵⁰ Mr. Dariusz Jankowski is Legal Adviser in the Legal Bureau of the Polish Police Headquarters. He holds an MA in Law.

The Chief Commander of the Police is appointed and dismissed by the Prime Minister on a motion of the Minister of Interior.

Government administration agencies competent on the territory of voivodships (provinces) for implementing police tasks are:

- 1) voivod with the voivodship commander of the police acting on his behalf or the voivodship commander of the police acting on his own behalf in matters of:
 - a) performing inquiry activities, investigation activities and prosecution of petty offences,
 - b) issuing of individual administrative documents, if the appropriate legislation so requires,
- 2) powiat (county) commander of the police,
- 3) commander of a police station.

The voivodship commander of the police is appointed and dismissed by the Minister of Interior on motion of the Chief Commander of the Police, after obtaining the opinion of the voivod. The county commander is appointed and dismissed by the voivodship commander, after obtaining the opinion of the starost. The commander of the police station is appointed and dismissed by the (county) commander after obtaining the opinion of mayor or mayors.

The voivodship commander, in consultation with the Chief Commander of the Police, establishes a railway, water or air police stations or other specialized police stations as needed. The commanders of the specialized police stations are subordinate to the territorially competent voivodship commander.

Police commanders submit annual reports of their activities and information on the state of public order and safety to competent voivods, starosts (mayors), voits (mayors of towns) as well as powiat (county) councils and gmina (commune) councils. If hazard to public safety or violation of public order takes place, the reports and information shall be submitted to the bodies forthwith on every request. The voivod or starost can demand the appropriate commander of the police to restore the state of law and order or to take actions in order to prevent violations of law and eradicate the hazards to public safety.

The Minister of Interior specifies in a regulation:

- 1) the armament of the police,
- 2) the uniform of the police,
- 3) rules and methods for wearing uniform and orders, decorations, medals and badges,
- 4) provisions governing uniform,
- 5) design of banner and the procedure in which it is given,

- 6) design of police badges and detailed rules and procedure in which they are given to the police officers.

The Chief Commander of the Police specifies the rules determining the number of jobs in the police forces. Costs of operation of the police forces are born by the part of the state budget provided for internal affairs. Units of territorial self-government, state organizational units, associations, foundations, banks, and insurance institutions can participate in financing, investment, modernization, and renovation expenditures, as well as the costs of maintenance and operation of organizational units of the police, and also in the purchase of necessary goods and services.

The financial resources constituting 20% of the income obtained by the State Treasury from forfeit of goods or material profits derived from crimes and petty offences against property and tax offences detected by the police forces are transferred to the incentive fund to awards for police officers who directly contributed to their detection.

Within the limits of its objectives, in order to investigate, prevent and reveal crimes and petty offences, the police force performs the following activities: inquiry, investigation, as well as administrative and order-keeping operations. The police force also implements various activities at the request of the court of justice, public prosecutor, agencies of state administration and territorial self-government authorities. The scope of such activities is specified in separate regulations.

THE HUNGARIAN LAW ENFORCEMENT SERVICES

*Robert Gergely*⁵¹

The structure of Hungarian law enforcement authorities and the criminal proceedings are very complicated. The new Hungarian Act of Criminal Procedure has been in force since July 2003. Until now five different Criminal Procedure Acts have existed in our country. The new Act significantly differs from the former codes as far as its structure is concerned and it was made so that the international requirements are also taken into consideration for example: primarily human rights and fundamental liberties on the basis of the Treaty of Rome, furthermore the practice of the Court of Human Rights in Strasbourg.

I. Fundamental principles of Hungarian criminal proceedings law

These fundamental principles are as follows:

- Prosecution, defense and sentencing are separate functions.
- It is the exclusive right of the court to ascertain the liability of a person in committing a criminal offence and to impose punishment therefore.
- The charge is proven by the accuser. Facts not proven beyond a reasonable doubt may not be contemplated to the detriment of the defendant.
- The defendant has the right to defense.
- It is the responsibility of the court, the prosecutor and the investigating authority to initiate and conduct the criminal proceedings if the conditions set forth in the Criminal Procedure Act prevail.
- Criminal proceedings may only be initiated upon the suspicion of a criminal offence and only against a person reasonably suspected of having committed a criminal offence.
- Everyone will be presumed innocent until convicted through a final court verdict.
- No one may be compelled to give self-incriminating testimony or to produce self-incriminating evidence.
- Criminal proceedings are conducted in the Hungarian language. Not knowing the Hungarian language can't serve as grounds for discrimination. In criminal proceedings all people involved may use, both verbally and in writing, their native language, or, pursuant to and within the scope of an international agreement promulgated by law, their regional or minority

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language, or – if not in command of the Hungarian language – another language defined by the party concerned as a language spoken.

II. Investigating authorities

In Hungary the investigating authorities conduct the investigation upon the order of the prosecutor or they do it independently. Regarding the subjects of criminal procedure the most significant changes in the new Criminal Procedure Act affect the public prosecutor. The public prosecutor has become the main leader of the investigation, either through his personal investigation, or through somebody else's investigation in execution of the prosecutor's order.

The investigating authorities conduct the investigation or perform certain investigative actions independently, if the criminal offence was detected by, or the complaint filed with, the investigating authority itself, or the offence came to the notice of the investigating authority in another way.

1. *The Police Force of the Republic of Hungary*

The general investigating authority is the Police Force of the Republic of Hungary.

In order to protect public security and internal order, the police carries out crime prevention, criminal prosecution, public administration and law enforcement tasks set out in the law. Its main functions are:

- Exercise the general powers of investigating authority, pursue crime prevention and investigation activities;
- Assist in preventing and investigating offences;
- Perform authority functions in relation to the manufacture, distribution and use of certain substances and devices endangering public security;
- Perform traffic authority and law enforcement tasks;
- Perform law enforcement tasks relating to the maintenance of order in public areas;
- Protect the life and corporeal integrity of persons who are very important for the interests of the Republic of Hungary and guard selected establishments;
- Authorize and supervise personal and property protection and private investigation activities – except for law enforcement authorities;
- Perform law enforcement tasks referred to its competence in the case of emergency or danger.

A. Organization and legal status

The police is an armed public law enforcement authority performing crime prevention, criminal prosecution, public administration and law enforcement functions. The central unit of the police having national competence is the National Police Headquarters. There are three directorates in the National Police Headquarters: Criminal Investigation General Directorate, Public Security General Directorate and General Directorate for Economic Resource Management and Administration.

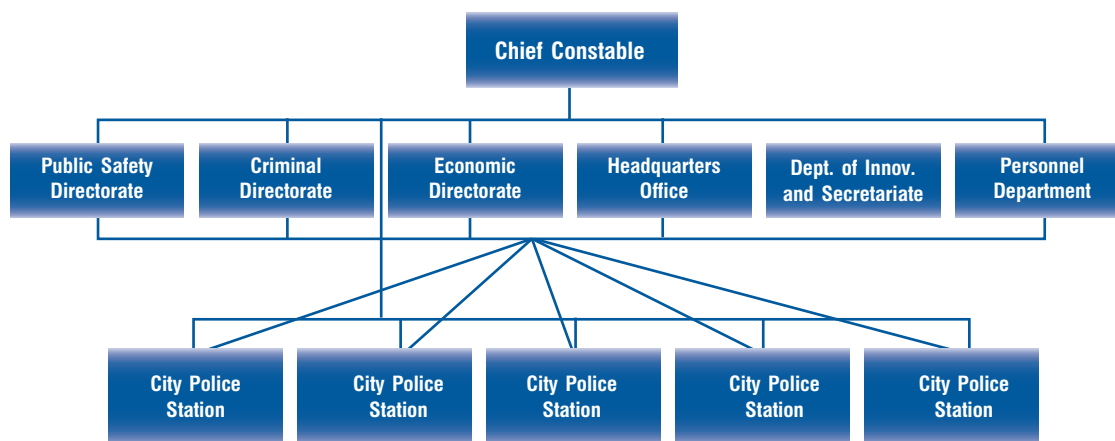
The Criminal Investigation General Directorate gives professional advice on the investigation, and supervises the overall investigation process.

The National Bureau of Investigation is a division of the Criminal Investigation Directorate. It is authorized to conduct investigation in any case or in any place when such need arises. They investigate the most dangerous crimes and have exclusive rights to conduct investigations in the following cases: money laundering, international drug and weapon smuggling and related international crimes. They concentrate on covert data gathering.

Another division of the Criminal Investigation Directorate is the International Law Enforcement Cooperation Centre. Every request of a Hungarian law enforcement agency to a foreign authority shall be forwarded by this department and such a request from a foreign authority shall be received by this Center. All the information concerning international crime is flowing via this Center including EUROPOL data.

The regional units of the police are the chief police departments directly subordinate to the National Police Headquarters. There are 19 county police units and the Budapest Police Headquarters. Each county headquarters has a criminal investigation service. They investigate serious crimes, for example: homicide, kidnapping, blackmail, armed robbery and crimes against property of considerable value.

Organizational Chart of the Country Police Headquarters



The local units of the police are the police stations subordinate to the chief police departments which have independent competence. There are 131 city police stations and 22 district police stations in Budapest. Every police station deal with

investigation in less serious crimes for example: pick-pocketing, deterioration of property, shoplifting, burglary, battery, trespassing, etc.

B. Management of the police

The operation of the police is directed by the Minister of Interior.

The police have a separate chapter in the section of the Ministry of the Interior within the state budget.

The Prime Minister appoints and revokes the National Chief Police Commander at the proposal of the Minister of Interior. The candidate for the position is interviewed by the relevant parliamentary committee which decides on the candidate's aptitude.

The Minister of Interior:

- Represents the police at the sittings of the parliament and the government;
- Prepares the drafts of laws, international treaties and other high-level government decisions affecting the operation, functions and authority of the police or participates in the preparation of the same;
- Ensures the performance of tasks determined in order to protect public security and internal order;
- Regulates the activities and the operation of the police by issuing orders and by other legal means of public administration;
- Keeps contacts in order to promote the international cooperation by the police and its improvement;
- Takes care of controlling the police.

C. The staff

The staff of the police may consist of regular police officers, public officials and civil servants. The total number of the Hungarian police is about 38,000 and about 8,000 of them deal with inquires. The rules of the employment of regular police officers, public officials and civil servants can be determined in separate laws. Regular service contract can be made with Hungarian nationals who have full capacity of action, permanent residence and a clean police record, who are fit for armed service, meet all the other educational, health and physical requirements and have a good reputation.

D. The relations between local governments and the police

Before the establishment or dissolution of a police department or police station, it is also necessary to have the agreement of the local council.

Before appointing the head of a police department or police station, the opinion of the representative body at the local municipality is sought by the person exercising the right of appointment. When the head of a chief police department

is to be appointed, the opinion of the representative body of the county municipality is sought. If a removal becomes necessary, the local municipality should be informed simultaneously with the notification of the person concerned.

The head of the police department annually reports to the representative body of the local government, about public security in the settlement, the measures taken to improve public security and the tasks related therewith. The chief police commander makes an annual report at the request of the county or capital municipality.

The local municipality may conclude a contract with the head of the chief police department operating in the area of its administrative competence to discharge particular tasks relating to local public security, to coordinate the activities of the police and the local municipality and to promote the establishment, expansion and development of the police unit operating in its area of competence. The police may refuse to conclude such a contract, if it would violate the law or contradict the instructions of the head of the superior police unit, if its financial and material resources are not guaranteed or if the content of the contract is professionally unfounded.

2. Other investigation authorities

The Hungarian Customs and Finance Guard conducts the investigation of the following criminal offences:

- a) violation of international legal obligations, violation of obligations related to the movement of internationally controlled products and technologies, foreign trade without a license, misuse of excise duty, smuggling and receiving smuggled goods;
- b) false marking of goods, usurpation, violation of copyright or associated rights, evasion of technical measures guaranteeing copyright or associated rights, forgery of data relating to copyright or associated rights and violation of rights protected by industrial patent law, if such offences involve goods subject to customs or excise duty;
- c) social security or tax fraud, fraud, if such offences involve taxes, contributions or budget subsidies falling within the competence of the Customs and Finance Guard;
- d) forgery of public deeds, private deeds, unique identification marks and stamps;
- e) drug abuse through import into Hungary, export from Hungary or transport through the territory of Hungary and misuse of substances used for drug production, if the offence is detected or the complaint is received by the Customs and Finance Guard.

The Customs and Finance Guard is directed by the Minister of Finance. It is an armed public law enforcement authority; it operates on three levels of organization, which, after the reorganization completed in 2004, are the following:

- The Directorate General of the Customs and Finance Guard: the top of the organizational hierarchy that controls the middle-level divisions. After reorganizations it works with smaller staff, but is in possession of a wide range of powering.
- Middle-level organizations: in compliance with the EU standards regional directorates were set up in 2000, which specialize in customs and excise responsibilities, and supervise lower level organizations. Another special middle-level organization is the Central Criminal Investigation Directorate with the investigation offices under it.
- Lower-level organizations: they include the inland head customs offices, the customs offices on the borders, the regional excise centers and the regional investigation offices. After Hungary joined the EU the borders with Slovenia, Austria and Slovakia have become internal borders and the number of customs administration officers at the borders has dropped.

The Hungarian Border Guard are responsible for the following criminal offences: prohibited entry or stay in Hungary, facilitation of unlawful stay in Hungary, trafficking in human beings, damaging border marks and forgery of public deeds in respect of travel documents. The investigation in these cases shall be conducted by the Border Guard, if the offence is detected or the complaint has been received by the Border Guard.

The Border Guard is directed by the Minister of Interior. Until this year the Border Guard was the member of armed forces, but after parliament's decision it became an armed public law enforcement authority. It has had investigative licence since 1997. The total staff is about 12,000 people, but only 400 officers are involved in investigations. The whole organization comprizes the Hungarian Border Guard Headquarters and 10 directorates alongside the border. According to some experts, the Border Guard should be integrated into the police. Others say that it is not necessary. However, because of the tightening of the borders, the necessary steps should be taken by the government.

3. Competence and jurisdiction of the investigating authority

The competence and jurisdiction of the investigating authorities is stipulated in the relevant legislation. In the event of a conflict of interest among the investigating authorities listed in the law, or, if an offence falling within the competence of the police or the Customs and Finance Guard is combined with an offence beyond the competence of the given investigating authority and the procedure cannot be practicably separated, the acting investigating authority shall be designated by the competent prosecutor. The prosecutor may also designate as the acting investigating authority an investigating authority which would not otherwise be competent in the investigation of the offence.

Upon the agreement of their heads and the consent of the prosecutor, the investigating authorities may set up a joint task force to investigate a specific case or a specific group of cases.

III. Investigation process

The investigation starts either based on data coming to the cognizance of the prosecutor or the investigating authority within his official competence or the member of the investigating authority in his official capacity, or on a complaint.

The investigation is ordered by the prosecutor or the investigating authority, who/which prepares a memorandum thereon. The memorandum indicates the underlying criminal offence – if the person against whom the complaint was filed is known – the subject person of the investigation and the starting date of the investigation.

The decision on ordering an investigation could be adopted within three days following receipt of the complaint, unless the complaint is rejected. The investigating authority notifies the prosecutor of the investigation ordered or complaint rejected within twenty-four hours.

The investigation may commence without an order, if the prosecutor or the investigating authority implements an investigatory action in order to secure the means of evidence, identify the suspect, prevent the suspect from absconding, concluding the criminal offence or committing of a further criminal offence or for other high-priority reasons.

Anyone may lodge a complaint concerning a criminal offence. It is obligatory to lodge a complaint as failure to do so constitutes a criminal offence. Generally, the complaints are made with the prosecutor or the investigating authority verbally or in writing. The complaint may be received by other authorities and the court as well, but they forward it to the investigating authority. If the complaint required prompt action, its receipt may not be rejected.

The investigation shall commence within the shortest possible period and conclude within two months following its order or start. If justified by the complexity or an insurmountable obstacle, the deadline of the investigation may be extended by two months by the prosecutor, and after the lapse of that deadline, by the county prosecutor general up to one year from the commencement of the criminal proceedings. After one year, the deadline of the investigation may be extended by the Prosecutor General.

In order to establish the identity, locate or arrest the offender or to find means of evidence, from the time the investigation is ordered until the documents thereof are presented, subject to a judicial permit, the prosecutor and the investigating authority may, without informing the person concerned:

- a) keep under surveillance and record the events in a private home with a technical device;
- b) learn and record with a technical device the contents of letters, other pieces of mail as well as communications made by telephone or other means of communication;
- c) learn and use data transmitted and stored by way of a computer system.

Covert data gathering is permitted by the court at the motion of the prosecutor in compliance.

There has been a new member in the criminal procedure in Hungary since 2003. This is the investigating judge. His role is closest to the investigation authorities because prior to the filing of the indictment, the responsibilities of the court of first instance are performed by the investigating judge. The investigating judge decides on the following:

- before the indictment is filed, on motions concerning the coercive measures falling within the competence of the court;
- permitting and terminating covert data gathering;
- after the termination of the investigation, on resuming the same;
- at the motion of the prosecutor, on declaring the witness specially protected;
- hearing the specially protected witness and the witness whose life is in imminent danger;
- hearing the witness under the age of fourteen, if there is reasonable ground to believe that questioning at the hearing would adversely affect the witness's personal development;

The prosecutor, the suspect and the counsel for the defense may file a motion for an evidentiary procedure, if there is reasonable ground to believe that the means of evidence thus obtained would not be available in the course of the court procedure, would significantly change by that time or would lose its quality as a means of evidence.

STRUCTURE, ORGANIZATION AND FUNCTIONS OF THE INVESTIGATING AUTHORITIES IN LITHUANIA AND THEIR RELATIONS WITH THE PROSECUTION IN THE FRAMEWORK OF CRIMINAL INVESTIGATION

*Petras Ragauskas*⁵²

Pre-trial investigation institutions

Pre-trial investigation in Lithuania is conducted by the police,⁵³ the State Border Guard Service, the Special Investigation Service,⁵⁴ the Financial Crime Investigation Service,⁵⁵ the Military Police, the State Security Department, the State Fire Prevention and Rescue Department and the Customs Department. These institutions conduct the pre-trial investigation in respect of criminal acts which come to their notice when discharging their primary functions provided for in the laws regulating their activities.

Pre-trial investigation is also conducted by:

- 1) heads of correctional institutions and detention centers – where a criminal act is committed by the employees of these institutions in the course of their work or at the work place, also in respect of criminal acts committed in the place where these institutions are located;
- 2) captains of ships on a long voyage – in respect of criminal acts committed by the members of the crew and passengers during a long voyage.

After the commencement of the pre-trial investigation the prosecutor either performs the actions of the pre-trial investigation himself or directs a pre-trial investigation institution to perform them, the Prosecutor's Office could also act as pre-trial investigation institution (in the broad sense of the term).

Powers of the prosecutor in the pre-trial investigation

As it was mentioned, the prosecutor has the right to conduct by himself the whole of the pre-trial investigation or its separate steps.

Where the pre-trial investigation or its separate steps are conducted by institutions of pre-trial investigation the prosecutor is obliged to supervise the course of pre-trial investigation conducted by these institutions.

The prosecutor gives directions to these institutions and repeals unlawful or unfounded decisions made by them.

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⁵³ The police is the main pre-trial investigation institution with broadest general (according to the formula "everything but...") competence.

⁵⁴ The Special Investigation Service carries out activities for detection of corruption-related crimes and conducts pre-trial investigations in this field.

⁵⁵ The Financial Crime Investigation Service carries out activities for detection of criminal acts related to money laundering, VAT embezzlement, illegal receipt and use of EU funds and conducts pre-trial investigations in these fields.

The following decisions may be issued only by the prosecutor:

- 1) on the joining and separation of the investigation;
- 2) on the discontinuation of the proceeding;
- 3) on the termination of the proceeding by drawing up the indictment.

Only the prosecutor may make an application to the pre-trial judge for conducting steps within his competence.

Actions of pre-trial investigation institutions before the commencement of a pre-trial investigation

If a complaint, a statement or a report about a criminal offence is received by a pre-trial investigation institution or a pre-trial investigation institution itself establishes elements of a criminal offence, the institution is obliged to commence a pre-trial investigation immediately and, at the same time, to notify a prosecutor about it.

Upon receiving such a notification, the prosecutor has to determine who must conduct the investigation. The prosecutor may make a decision:

- 1) to conduct the entire investigation or perform its separate actions by himself;
- 2) to instruct the pre-trial investigation institution which notified him about the pre-trial investigation it commenced to perform the actions of a pre-trial investigation;
- 3) to instruct another pre-trial investigation institution to conduct the pre-trial investigation.

The prosecutor has the right to form an investigating group of several officers of the same pre-trial investigation institution or of officers from different pre-trial investigation institutions.

Rights and duties of pre-trial investigation institutions during a pre-trial investigation

When conducting a pre-trial investigation, the relevant institutions have the right to perform all the actions provided for in the Code of Criminal Procedure, with the exception of those which may be performed solely by the prosecutor or a pre-trial judge.

Pre-trial institutions must:

- 1) comply with all the instructions;
- 2) report to the prosecutor at the time the latter schedules the course of the pre-trial investigation.

Conclusion of the pre-trial investigation

When the prosecutor decides that sufficient information has been gathered during the pre-trial investigation in evidence of the culpability of the suspect he should draft the indictment.

When the pre-trial investigation or the majority of its actions have been conducted by a pre-trial investigation institution, the prosecutor may order that the pre-trial investigation institution submit a short written report about the actions it has carried out.

The pre-trial investigation is dropped only upon prosecutor's decision (in most cases this decision must be confirmed by the pre-trial judge). None of the pre-trial institutions is empowered to drop the investigation.

General background

Historical overview and future vision of investigation in the Slovak Republic

The 2001 Accession Partnership for the Slovak Republic sets a number of priority objectives to be achieved in the fields of fight against corruption and organized crime, including the need to ensure the accountability and transparency of investigation procedures, better coordination between the services and agencies involved, and the intensification of law enforcement bodies staff training (including police officers and prosecutors).

In the Monitoring Report published on 5 November 2003, the European Commission highlights the need to pursue the building up of efficient and reliable judiciary and police organization that meet the standards of administrative capacity. In particular, the Report states: "Continuous attention is needed concerning co-operation and co-ordination between the police and the prosecuting and judicial bodies as well as rationalization of tasks and competences between the Police and the Judicial Police".

Police Forces and the tasks of the Presidium of the Police Corps

The Police Corps is managed by the Ministry of Interior of the Slovak Republic and according to the law it is an armed security corps with duties in the field of internal order, security, and fight against crime, including organized and international crime. It also has other tasks in coherence with international affairs.

The activities of the Police Corps are controlled by the Slovak parliament and the Slovak government. The Police Corps is legally governed by the Constitution, laws, regulations and international agreements.

A separate part of the Ministry of Interior is the Presidium of the Police Corps. At the head of this authority is the President of Police, who manages the Presidium and the directors of regional police directorates. He is responsible for the tasks of the Presidium and is directly accountable to the Minister of Interior.

The main activity of the Police Corps is the protection of citizens' rights and liberties. The basic principles are: the right of life, the inviolability of the person, property and privacy. This has a strong link to the right of personal and property security.

Investigation is part of police work, incorporated in the activity of many special police departments. It belongs to the pre-trial stage of the criminal procedure. The activities of investigators are performed in strict compliance with the Code of Criminal Procedure. Most investigation tasks in the police sector are

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performed by the Office of Judicial and Criminal Police, a central part of the Presidium of Police Corps.

Office of Judicial and Criminal Police

The Police Corps has adopted a new organizational structure. Since January 2004 investigators have joined criminal detectives and a separate authority, the Office of Judicial and Criminal Police was set up. Its director is accountable to the first vice-president of the Presidium of the Police Corps.

The Office of Judicial and Criminal Police issues methodological directions to be used by Police Corps, divisions where investigators or investigating police officers operate.

The investigators of the Office of Judicial and Criminal Police, exercise control of the status quo and quality of the investigation of individual criminal acts by the offices of the judicial and criminal police at the regional police directorates and at district level (district directorates) and recommend in a written form to the investigator or investigating police officer the execution of concrete investigation acts for examination of the status quo or for removing procedural errors. The investigators of the offices of judicial and criminal police at the regional directorates have similar functions.

Investigators at regional offices investigate crimes punishable by at least 8 years of imprisonment or by “extraordinary punishment” (25 years of imprisonment or a life sentence).

The procedures of investigation and summary proceedings (newly introduced from 1 January 2004) is established in Law No.141/1961 – Code of Criminal Procedure. The Code of Criminal Procedure is the only law governing the procedures of investigation. According to this law the investigation is executed by an investigator of the Police Corps while summary proceedings are executed by the police authority.

The police authority is defined as the responsible authority of the Police Corps. In the sense of Art. 12 of the Code of Criminal Procedure an equal status as a police authority of the police corps is assigned to:

- the responsible authorities from the Military Police for investigation of criminal acts of army personnel;
- the Prison and Justice Guard for criminal acts of the officers of this Guard and criminal acts of the imprisoned persons;
- the responsible authorities from the Railway Police for criminal acts of the officers of the Railway Police and acts committed in proximity to railway sites;
- the customs authorities in case criminal activity against customs legislation and the authorized tax office, of criminal activity violating tax legislation; and

- the captains of ships for criminal acts committed on board of ships.

Investigation procedure

Article 12 of the Code of Criminal Procedure establishes the status of the investigator and the police authority as the law enforcement agent executing the investigation (Art. 161). According to Art. 164 of the Code the investigator and police authority work on their own initiative so that all facts important for the judgment of the case are clarified as soon as possible, including the identification of the perpetrator and the results of the criminal acts. Excluding the acts where a prosecutor's agreement is needed, all decisions of the investigators and police authority about the procedure are done independently and both authorities are responsible for the legal and timely execution of it.

An investigation is not held when summary proceedings have to be applied but the accused person is momentarily in investigative jail, in the prison or held for an examination at a health institution; if the case is led against minors, persons that are missing or against a person that is officially not responsible or with limited responsibility; and in cases when there is physical or mental disability of such a person or possibility of mental disease; or in cases of prosecutors' order. The same applies to the parallel existence of criminal acts if the investigation must be executed minimally for one of this parallel acts. The procedures done before the start of the punishment should not be repeated by the investigator and police authority, if it was executed in coherence with the actual chapter of the Code of Criminal Procedure. In this way the duplicity of execution has been removed.

Summary proceedings are designated for the criminal offences punishable by imprisonment for up to three years. Summary proceedings are performed by the police authorities included in the police force units at district level. A significant change in relation to the police authority is its authorization to bring a charge in matters where the police authority is competent to act.

Under the Code of Criminal Procedure, summary proceedings are to be ended not later than two months after bringing a charge. If summary proceedings are not concluded within this period, the prosecutor may order investigation if circumstances demand it. The Code of Criminal Procedure does not lay down any time period for termination of investigation. The police force investigator and the police authority proceed during his/her investigation upon their own initiative to clarify all the facts important for reviewing the case, including the perpetrator and the crime consequences, within the earliest possible time and to a proper extent. Their further procedure is laid down in the act as follows "if the prosecutor or police authority considers the investigation concluded and its consequences sufficient to make a charge...". Two months for termination of summary proceedings is the only time period mentioned in the act and even, after expiration of this time, the prosecutor may order investigation. In the cases of custody investigation, the time periods are determined according to the length of custody.

In the course of investigation the investigator and the police authority collect evidence for examining the case, the perpetrator, the right of the person aggrieved for damage compensation, as well as the reasons leading to committing

the crime. He/she must ensure that the investigation is without detriment as to quality, observe the legality and effectiveness of the procedure and its completion within the earliest possible time.

A significant change concerns the commencement of criminal prosecution because if the notification does not include the facts excluding the perpetration of crime, the investigator or the police authority are due to initiate the criminal prosecution without any delay. Only in the cases in which the notification is to be completed, the investigator or the police authority must complete it without delay and initiate the criminal prosecution not later than thirty days after the receipt of notification.

After completion of investigation, unless agreed otherwise, the investigator or the police authority submits to the prosecutor the documents of the case with the proposal to bring a charge or with the proposal to end the criminal investigation or approve reconciliation on probation. After receiving the documents, the prosecutor shall get acquainted with the file and review if the evidence is sufficient to bring a charge. If the results of the investigation justify the bringing of the defendant to court, the prosecutor shall bring a charge.

As to the observation of legality, the prosecutor is empowered to give binding instructions both to the investigator and the police authority. He is empowered to examine if the investigator or the police authority initiates the criminal procedure on time, to participate in the investigator's or the police authority's execution of operations and to cancel illegal or unfounded decisions and measures taken by the investigator and the police authority and replace them with his own decisions. He is empowered to withdraw the case from the investigator or the police authority and assign it to another investigator. In case of summary proceedings, he may order to perform investigation, if circumstances require it.

The prosecutor's status and supervision powers before the commencement of criminal procedure and in preliminary procedure were strengthened, and he is exclusively empowered to supervise the observance of legality in the investigator's and the police authority's activities, even before the commencement of criminal procedure.

Control and transparency of individual investigative operations and the overall investigative procedure is provided by individual measures stipulated in the Code of Criminal Procedure, in particular by means of supervision of the prosecutor over the observance of legislation before the commencement of criminal prosecution and in preliminary procedure and by means of the parties in the criminal proceedings which may actively interfere with the investigative procedure through their proposals.

The principal legal document amending the position of the Office for Justice and Criminal Police is the Act on the Police Force. As amended by Art. 2, Par. 1, item d) the task of the Police Force performs the investigation and summary proceedings of crimes under the Code of Criminal Procedure. The special position of investigative authorities (investigators and the police authority) is envisaged in the Code of Criminal Procedure (Art. 161).

The legal status of investigator of the Police Force who ensures the fulfillment of the tasks in the area of investigation and protection of rights and freedoms of all

persons participating in preliminary criminal procedure is also derived from the legal status of the offices.

Under Art. 34 of Act No. 73/1998 Coll. on Civil Service of the Police Force Members, of the Slovak Information Service, the Corps of Prison and Judicial Guard of the Slovak Republic and the Railway Police, as later amended, the policeman is designated as the investigator by the Minister of Interior. The policeman designated for investigator may only be a person who:

- has a master degree in the area of law or security services;
- has passed the relevant final investigation exam.

If the condition of education required is not met, the minister may exceptionally designate the police officer as the investigator, if the latter has a master degree in a different area and has successfully passed the relevant investigation exam.

According to Art. 164, Par. 4 of the Penal Code the investigator or the police authority takes all the decisions on the investigative procedure and operations independently and is fully responsible for their legal and timely execution, with exception of the cases in which the approval of prosecutor is needed.

The investigator's status and the tasks are governed by Act No. 171/1993 Coll. on the Police Force as later amended. The investigator is, in the cases being investigated by him, procedurally independent and is bound only by the acts and other generally binding legal regulations of prosecutor and court to that extent which is covered by the Code of Criminal Procedure (Art. 7, Par. 7).

Concerning the cases he investigates, he is empowered to ask the Police Force to perform operations needed for the investigation which he is not able to provide by himself owing to the nature of these operations, in compliance with acts and other generally binding legal regulations.

The investigator in investigations and the police authority in summary proceedings are procedurally dependent only on the Constitution, constitutional acts, acts and other generally binding regulations, international treaties signed by the Slovak Republic, to the extent described in the Code of Criminal Procedure and the instructions and orders of the prosecutor and the court.

Other investigation authorities

The Bureau for the Fight against Organized Crime deals with investigations of serious organized crime committed by the organized and terrorist groups, e.g., terrorism, racism, extremism, drugs, trafficking of persons and their sexual exploitation, illegal business with nuclear material and weapons, as well as serious violation in the area of tax frauds, legalization of the profits from criminal activity, illegal financial operations on the capital and financial market and financing of the terrorism on the territory of Slovak republic.

The Bureau for the Fight against Corruption performs investigations of criminal groups, serious economic crime and cases in the competence of the

“special prosecutor” (corruption among elected or appointed officers of the state administration, embezzlement of property and financial funds related to, international donations and state reserves, activity of banks and normal performance of the banking system, illegal financial operations).

The Bureau of the Border and Alien Police of the Presidium of Police Corps performs investigation of illegal border crossing or people trafficking.

All in all, the methodological activity of the Office of the Judicial and Criminal Police is a significant tool of the Presidium of Police Corps, it is mainly targeted at identifying errors in the process of investigation, at proposing effective measures for higher quality of the investigation and at unification of the investigation approaches to the various types of criminal activity.

PROSECUTION AND INVESTIGATIVE AUTHORITIES IN ROMANIA: CURRENT STATUS AND FUTURE REFORMS

*Monica Otavă*⁵⁷

Romania is increasing its efforts to integrate in the European Union and harmonize its national legislation with the European regulations. In the process of accession a very special attention was paid by the Romanian government to the reform of the judiciary.

The Romanian Public Ministry is placed by the Romanian Constitution in the chapter about the judicial power. Article 131 of the Constitution defines the role of the Public Ministry. In judiciary activity the Public Ministry represents the general interest of society and protects the rule of law as well as citizens' rights and freedoms. The Public Ministry acts through prosecutors constituted in prosecutor's offices according to the law. The prosecutor's offices, attached to the courts, lead and supervise criminal investigations of the judicial police.

The working principles of the Romanian Public Ministry are the principles of legality, impartiality and hierarchical control. The principles are also provided for by the Romanian Constitution and the Law on Judicial Organization. The Constitution was changed by a referendum in 2003 and the Law on Judicial Organization, the Law on the Statute of Magistrates and the Law on Mutual Judicial Cooperation were adopted in 2004.

The prosecutor's offices are independent in relation with the courts of law and other public authorities according to a provision in the Constitution.

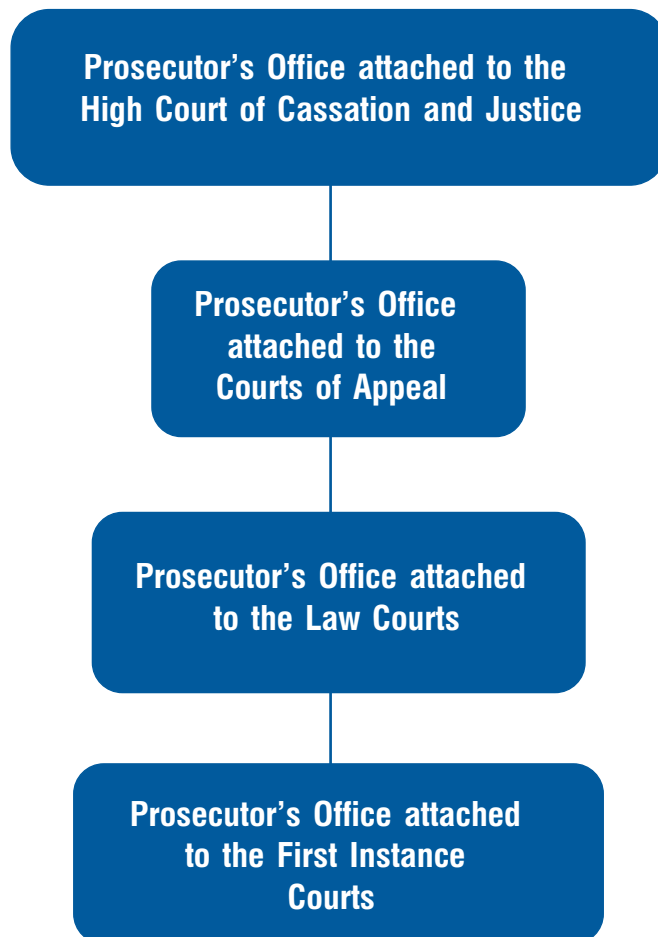
The duties of the Public Ministry provided by the Law on Judicial Organization are to:

1. Carry out the criminal investigation within the conditions provided by the law and participate as per law in resolving conflicts through alternative means;
2. Lead and coordinate the investigative activities carried out by the judiciary police, lead and control the activity of other investigative bodies;
3. Institute proceedings before courts of law for the trial of criminal cases;
4. Undertake civil action in the cases provided by the law;
5. Participate in the court sessions as per law;
6. Protest judicial decisions, if necessary;

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7. Protect the rights and legitimate interests of minors, disappeared persons and other citizens as per law;
8. Contribute to preventing and fighting crime under Justice Ministry's coordination in order to pursue a common criminal policy;
9. Conduct studies on the causes and conditions for criminality and propose solutions and amendments to the criminal legislation in this area;
10. Perform all other duties provided by the law.

The Public Ministry has a pyramidal structure with different competencies for each level. On the top is the Prosecutor's Office attached to the High Court of Cassation and Justice. Then there are the 15 Prosecutor's Offices attached to the Courts of Appeal, the 41 Prosecutor's Offices attached to the Law Courts and the 177 First Instance Prosecutor's Offices attached to the First Instance Courts.



In the framework of the institutional reform the main measure was to set up several structures for combating organized crime, corruption and terrorism at the level of the Romanian Public Ministry as well as at the level of the Romanian Police and other state bodies.

The National Anticorruption Prosecutor's Office was set up in 2002 as a prosecutor's office specialized in investigating corruption and related crimes. It

is an autonomous unit of the prosecutor's office and it is very important that it has a multifunctional team of professionals (police, finance, etc.).

In November 2004 the Directorate for the Investigation of Organized Crime and Terrorism was created, within the General Prosecutor's Office. It is under the direct coordination of the General Prosecutor of Romania. This directorate comprises specialized offices by organized crime types (financial crime, drug trafficking, trafficking in human beings, cybercrime, etc.). It is led by prosecutors and employs different types of professionals: financial, customs, banking, IT, etc. We figured out that making people work together in the same institution is a better approach to combating this kind of crime.

At the level of the Prosecutor's Office attached to the High Court of Cassation and Justice new offices were created: Bureau for Protection of Intellectual Property Rights, Office for Juvenile Criminality and Independent Service for Combating Trans-Border Macrocriminality (a structure, which is dedicated to processing information in combating high-level economic crime and financial and banking crime).

The functional reform included the introduction of new means of investigation. They were introduced in the Romanian system in 2000 in special law adopted for combating corruption. New means of investigation are also provided in the special law against trafficking in human beings, money laundering and organized crime. The new means of investigation include putting bank accounts under surveillance, surveillance and interception of communications, access to IT systems, using undercover agents and insiders. These means of investigation are now provided for in the new Criminal Procedure Code, which was adopted in 2003.

Romania has special legislation on the protection of witnesses, victims and experts and a new Law on Mutual Judicial Cooperation, related to the new provision of the European Arrest Warrant. The Criminal Procedure Code was also improved. Now only can a judge order the arrest of the offender, there is also a special procedure provided for under authorization of the judge.

The next steps include the implementation of the new National Strategy for Combating of Organized Criminality, adopted in December 2004, and the consolidation of international cooperation. Romania is on the way to sign an agreement with Eurojust and already has a point of contact for Eurojust at the General Prosecutor's Office.

STRUCTURE AND RESPONSIBILITIES OF THE INVESTIGATION AUTHORITIES OF THE ROMANIAN POLICE AS PART OF THE JUDICIAL SYSTEM

*Iulian Mihai Novac*⁵⁸

At present, the Romanian Police is passing through a period of reorganization. The completion of the institutional reform according to the recommendation of the European Union has two new objectives:

1. The organization of the Romanian Police under the following 3 sections:
 - Public Order and Security;
 - Criminal Investigation;
 - Organized and Territorial Crime Control.
2. The decentralization of decision-making through raising awareness of the managerial act for all the police stations.

The General Inspectorate of the Romanian Police is the central police unit, a legal person with general territorial competence, which leads, guides and controls the activity of the subordinate police units; it investigates and examines severe and organized crime, economical, financial and banking crime or other infractions which are supervised by the Prosecution Department of the High Court of Justice and Cassation, besides all other responsibilities established by law.

The General Inspectorate of the Romanian Police is organized in general boards, departments, services and offices created by order of the Minister of Administrations and Internal Affairs.

The following departments have investigation responsibilities according to law:

- The Criminal Investigations Department;
- The Frauds Investigations Department;
- The Independent Service of Weapons, Explosives and Toxic Substances;
- The Department of Criminal Investigations;
- The General Department of Organized Crime and Anti – Drugs Control;
- The Department of the Transport Police.

The Criminal Investigations Department has in its jurisdiction the prevention and control of crimes against the person, patrimony, public property, authority and crimes generating prejudice in society with the exception of organized crime.

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The Criminal Investigations Department is responsible for international co-operation in the field of crime prevention through the Focal National Point, the Interpol National Office and the International Relationship Service, with similar structures from other countries and qualified international organisms directly on the basis of the approval of the General Inspector of the Police.

The Frauds Investigations Department uses through specific means to prevent the serious frauds related to organized crime, corruption and other frauds which affects the Romanian economic environment and the fundamental rights of the citizens.

This way, the police officers of the Frauds Investigation as a structural part of the Judicial Police are, besides the basic responsibilities, specialized in activities of finding the infractions and collecting the data necessary to institute criminal proceedings.

The criminal investigations and the solutions, which are provided according to law, are carried out under the Prosecutor's leadership and control and under his order in cases in the area of economic and financial crime. At the same time, it carries out acts of criminal proceedings established by the prosecutor.

The Independent Services of Weapons, Explosive and Toxic Substances has responsibilities in the following fields:

- prevention, detection and finding of the infractions of the Weapons and Ammunition Regime, authorization of the legal and natural persons to possess weapons and ammunition, granting import and export license of weapons and ammunition;
- prevention, detection and disclosure of crimes related to explosive materials and granting import and export license for the explosive materials;
- making sure that the laws concerning toxic substances are followed, and granting license to legal persons for the import of tear-gas.
- cooperates with similar foreign institutions and with the international organizations with responsibilities in the field of weapons, explosives and toxic substances.

The Department of Penal Investigations is part of the General Inspectorate of the Romanian Police and is subordinated to the general inspector deputy of the Romanian Police and professionals to the Prosecution Department of the High Court of Justice and Cassation. It is the central unit which has general competence in the field of criminal investigations of the judicial police to which all the related departments from the territorial sections are subordinated.

After all the changes of the Criminal Procedure Code have become operative since 1 January 2004, the Department of Criminal Investigations took part into the process of the implementation of the new laws giving specialized assistance to the correspondent territorial police units.

The strategy of the Department of Penal Investigations contains the following short and long term main objectives:

1. Continuation of the institutional reform through the implementation of the concept of organization and functioning of the judicial police and making clear the position and the duties of the criminal investigation officers within this institution.
2. Increasing the percentage of the pre-judicial recovery of damages caused to public or private property.
3. Reinforcement of the cooperation with the operative departments to determine the whole criminal activity of the investigated people, through mixed teams to investigate the complex penal causes which impose a great number of examinations and informative – operative activities.
4. Harmonizing the cooperative relationship and the partnership with the Prosecution Department to enable the efficiency and legality of the research through:
 - continuous relation with the supervising prosecutors and meetings with top officials of the police and the Prosecution Department;
 - creating common rules in order to improve the cooperation, the efficiency and the finality of criminal investigation and establishing common indicators of statistical assessment for the criminal phenomenon;
 - common thematical inspections of the police and the Prosecution Department in the units with special problems and operational situations;
 - a unitary system of statistical evidence for the proceedings at the police or the Prosecution Department;
 - a unique electronic system to monitor the criminal cases causes in the judicial system – unique number dossier (police, prosecution department, courts of law).

The General Department of the Organized Crime and Anti-Drug Control (D.G.C.C.O.A.) is a specialized department of the Administration and Internal Affairs Ministry in the organization structure of the General Inspectorate of the Romanian Police.

D.G.C.C.O.A. is a department with general territorial competence, which is not a separate legal person or credit ordinator and is subordinated to the adjunct of the General Inspector of the Romanian Police.

D.G.C.C.O.A. has to control, guide and sustain the activity of all the territorial centers, services and offices of organized crime and anti-drug control and has to improve their activities and duties.

D.G.C.C.O.A. belongs to the structure of the General Inspectorate of the Romanian Police and has 3 operative departments: the Department of Organized Crime Control, the Anti-drug Department and the Operations Department.

Within these departments there are services specialized in working fields; the D.G.C.C.O.A. also has services and offices at its direct subordination.

D.G.C.C.O.A. has territorial structures with working fields which correspond to the central structure, having territorial competence similar to the Prosecution Departments of the High Court and Territorial Law Courts.

In the General Directorate of the Police of Bucharest there are: the Organized Crime Control Department and the Anti-Drug Department and 6 offices, one for each district, which are subordinated from the operative point of view to the General Directorate of the Police of Bucharest and, from the professional point of view, to the Organized Crime and Anti-drug Departments Bucharest.

D.G.C.C.O.A. is mainly a leading, coordinating, guiding and control structure for the territorial units. It can carry out investigation and research over infractions within its competence.

To carry on the duties of its competence the General Department of the Organized Crime and Anti-Drug Control uses the following investigative activities:

- it leads, co-ordinates, guides, supports and controls the specific activity carried out by the territorial units;
- it supervises the work of under-cover agents and the use of technical means of surveillance with the purpose of a strict observance of law;
- it carries informative and operative activities to identify and supervise people or organized groups of delinquents which prepare, commit or have committed offenses related to organized or drug crime;
- it supervises the counterfeit, forgery and circulation of national or foreign currency, credit cards or checks;
- investigate cyber crime;
- investigates internal or international drug traffic or the traffic of essential chemical substances and illicit drugs consumption;
- investigates trading in people and organs, illegal international adoptions, illegal migration;
- investigates illegal operations with strategic materials;
- investigates trading in stolen cars;
- investigates money laundering when it is related to General Directorate's competence.

The General Direction cooperates with similar foreign structures and with similar international organizations which are either directly authorized or through the Interpol National Office, the Directorate of European Integration, the International Programs and Cooperation Department from the General

Inspectorate of the Romanian Police, and through the SECI Center (through the National Focal Point of the Ministry of the Administration and Internal Affairs), in activities such as:

- it carries on informative and operative activities in cooperation with similar foreign structures in order to annihilate some criminal networks which make the object of activity of the General Directorate of Organized Crime and Anti-drug Control, according to the national legislation and the internal rules;
- the obtained data and information are stored, analyzed and exploited efficiently by the General Directorate and territorial units;
- the controlled drugs deliveries and the common police activities are carried out under the coordination of the General Directorate of the Organized Crime and Anti-drug Control with the approval of General Inspector of the Romanian Police and the authorization, of the General Prosecution Department of the High Court of Justice;
- provides the enforcement of relevant laws, conventions and procedures;
- any other activities dealing with the international cooperation in the field of illicit drug trafficking control and organized crime are realized through compulsory opinion or advise of the General Department of the Organized Crime and Anti-Drug Control.

Inside the General Directorate of Organized Crime and Anti-drug Control the Strategic Material Service (SMS) was authorized by the National Committee for the Nuclear Activities Control (CNCAN); SMS has duties and rights as a unit authorized and trained to combat, nuclear materials and radioactive sources trade.

SMS is the structure in charge of all police investigations dealing with the seizure of nuclear materials or radioactive sources, or of any existent or potential situation of nuclear materials trade. Under these circumstances all the local or central authorities will appeal to the above mentioned structure. In case any security measures are needed the SMS – Nuclear Unit must be notified at once.

The SMS – Nuclear Unit is in charge of investigations and is the only authority which makes decisions on seizure and temporary removal of the materials in a warehouse authorized by CNCAN.

The transition of the seized material on the country territory and its manipulation is made by SMS – Nuclear Unit, which is authorized by CNCAN for this reason; it has the means, training and necessary equipment for this activity. The physical protection of the transport is also provided by SMS – Nuclear Unit.

The Department of Transport Police of General Inspectorate of the Romanian Police incorporates 3 services: the railway transport police, the of air and water transport police, the police for public security and travelers protection and an analyzing and secretarial department with the following competence: to organize and coordinate the activity of providing the public order, to defend the rights of the citizens, of the public and private property, to prevent and reveal the

infractions related to all types of transport.

At present, with the exception of the Transport Police there are 2 more structures (in Bucharest and Constanta) which are subordinate to local police units and the General Directorate of the Police of Bucharest and there are offices and services in the other districts.

This unit operates through specific means: about 11,380 km of railway, a network of 1,690 km navigable waters 1,075 km of which belong to the international Danube River, 91 km artificial canals, 35 harbors – 3 being seaports, including Constanta, the 3-rd European biggest port, a network of 17 airports – 8 being opened for international transport of goods and passengers, all of these being part of an European Infrastructure situated on the 4-th position.

THE REFORM IN CRIMINAL JUSTICE IN BULGARIA – THE HARD TO FIND BALANCE OF AUTHORITY AND RESPONSIBILITY

Yonko Grozev⁵⁹

The Bulgarian Constitution regulates to a large extent the structure of the institutions with authority in respect of criminal justice, establishing three separate institutions with certain powers in the process of investigation, raising charges and presenting them in court. These are the police, the investigation service and the prosecution office. The Bulgarian judicial system has the unique peculiarity where the investigation, the prosecution, and the courts are subordinate to one managing body, the Supreme Judicial Council. This structure, according to the Bulgarian Constitution and the legislation, analyzed below, was established in the early 1990s (in 1991) with the idea to attain in this way independent and unbiased administration of justice, thus setting an absolute wall between the bodies responsible for the administration of justice and the other, politically colored, bodies of state power – the executive branch and the parliament.

The result was the establishment of several autonomous bureaucracies, which are to a great extent self-governing, and that is one of the major problems that need to be solved. There are many and different views as to what extent the autonomous nature of these different bureaucracies forms the basis of the problems and the need of reform, but all presentations on this subject inevitably consider this issue.

Throughout the years many changes have been made to the Criminal Procedure Code, which to a large extent were led by the desire to guarantee the basic rights of suspects and defendants through providing enhanced competitiveness to the trial, changing the earlier tradition to set the burden of the criminal trial on the preliminary proceedings.

Other elements of the changes involved restriction of the authority of the prosecution in undertaking measures restricting fundamental rights. Some of these changes were made in consequence of decisions of the European Court of Human Rights. A number of procedural requirements deadlines and judicial control were introduced to achieve higher efficiency of the criminal proceedings.

The paradox is that in some of the cases the obtained results were quite the opposite, which again raises the question of where the problems are now and why the reform of the criminal proceedings is such an important issue, from the point of view both of the accession to the European Union and of the domestic political agenda.

The major complaints and comments of the observers are that the system works reasonably well concerning conventional crime, but fails in the face of more complex crime (organized crime, financial crime), i.e. the type of crime where serious interests have been affected. There is serious resistance by

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the investigated and defendants and, according to the general observations, the success of the system in investigating and prosecuting such crime is not particularly visible.

Some of the remarks made refer to the lack of good coordination between the institutions – the police force, the Ministry of Finance, in the cases where it has authority in respect of the investigation, the investigation service and above all – the prosecution office. The rather extended duration of proceedings is another item of criticism when concerning the system, especially levelled at more complicated cases. Corruption is also one of the factors quite frequently mentioned as a serious problem of the system. In a sense, this is an integral aspect of the lack of possibility to handle in particular such serious and severe crimes.

The system presented a set of paradoxes.

In the first place, as mentioned before, the Constitution and the legislation provided for the Bulgarian criminal justice system and the structure of the institutions therein to be completely independent of the political powers. Under such circumstances one could expect and there were expectations for higher impartiality and better depolitization. The paradox is that in reality the system is highly politicized.

There were expectations for bureaucratic automation of work, for bureaucratic anonymity. Instead, we have extreme publicity and continuous disputes, conflicts and exchange of accusations between the institutions in public. The established situation could never be particularly favorable for effective work.

The second paradox is that the politicians keep saying how concerned they are about the fight against crime and how important it is to make this fight efficient. At the same time the undertaken reforms are targeted mostly at restricting the authority of the leading institution in the criminal proceedings – the prosecution office. The most recent example of that is where by special legislation, governing the forfeiture of criminal assets, typical functions of the prosecutor were granted to a special committee, elected in a complicated manner by the parliament, which in the opinion of most professionals has no particular chances of successful functioning.

The last paradox – a system intended to be autonomous and completely separated from the executive and legislative branches, a self-governing system created as such particularly in order to be independent, appears to have serious problems with its dependence on private and other interests, including political ones. Corruption is again a part of this problem. Here comes the question – what was the parliament doing all this time with the reform?

Another paradox is that in Bulgaria the system is being continuously reformed, while it continuously reiterates the same feeling of lack of efficiency and effectiveness. The parliament is enacting legislation which reforms something most of the time. The main line of implementation of the reform by the parliament is, as mentioned earlier, to restrict the powers of the prosecution and to attempt to make management decisions through rules of procedure. Ever shorter terms for completion of the investigation are introduced together with more restrictive requirements about “when” and “how” to conduct

investigations. This approach to the reform reflects clearly the feeling of the political powers – the parliament and the executive – that they do not have sufficient control over the efficiency and the work of the institutions empowered to conduct criminal proceedings. Due to the lack of authority to manage this process through staff-related decisions or directly, they are trying to manage it through rules of criminal procedure. However, it is not very surprising that such management through the criminal procedure has quite the opposite effect. It hinders to the extreme the process of investigation and creates many procedural and additional barriers, of which naturally the other party in the proceedings is trying to make the maximum to its own benefit. As a result, in complicated cases efficiency is even lower, particularly because of efforts to manage the proceedings through the Criminal Procedure Code.

The other problem is, as mentioned earlier, the paradox of the politicized system. The system is seemingly depoliticized, but at the same time it is quite clear that it maintains political relationships with various political subjects involved. The problem is that these political relationships are illegal, they are not public, all political arrangements and agreements within the system and the political influences occur under the surface rather than on the grounds of official authorization, and therefore they preclude the chance political responsibility to be sought. Thus, politics becomes to a great extent a portion of the mode of operation of the system, but it never leads to what usually is the mechanism of control in politics, namely – political responsibility through democratic process.

These problems focus mostly on the structure and organization of the institutions related to the preliminary proceedings. These are also the hottest debates in respect of what the reforms should be in order to improve the performance of the preliminary proceedings. It is not particularly surprising that the representatives of the institutions related to the criminal procedure are not willing to seek solutions to the problem in the very organization of these institutions, but instead they seek such solutions in the Criminal Procedure Code. However, it is obvious and getting even clearer that such isolation of the investigation service and the prosecution office from the political process, the lack of powers of the executive or the legislative branches formally consolidated in the legislation, and the respective lack of opportunities to seek political responsibility, are serious problems. The failure to seek solution in this aspect comes to a certain extent as a result of the experts' attitudes. The experts in this case are lawyers and lawyers are by nature suspicious of politics as something devoid of principles, not quite clean and finally in serious contradiction to the basic rules of work of the legal profession, which are adherence to the law and the facts in this specific case.

This position, however, fails to take into account one serious fact, namely, the great opportunities to carry out policy in the field of criminal proceedings. The Center for the Study of Democracy published quite recently a survey, according to which some 700,000 crimes occur per year in Bulgaria. The number of persons sentenced is about 30,000 per year. This huge variance between committed and penalized crime is actually the large field for policy making in penal proceedings. There it would be possible for the government to put forward various priorities, to seek various possibilities to overcome the problem of crime in one way or another. However, Bulgarian governments have been deprived in principle of this possibility due to the fact that they have absolutely no formal control over the implementation of criminal policy. Criminal policy in Bulgaria has been

entrusted entirely to the authority of the autonomous bureaucracies, which do not have and do not bear political responsibility.

It is not very surprising that under the circumstances these bureaucracies react in a standard way: they report formal criteria, such as number of cases, and their accountability before society always amounts to increase in the number of proceedings. This increase, however, is in the area of conventional crime, where it is easier to investigate and prosecute. As a result, the circle is closed – thus conventional crime becomes the cross point where the efforts and resources for combating crime are concentrated, while where the public discontent and claims to the system are most expressed – in respect of organized, financial and economic crime, there is no particular concentration of resources and efforts. This continuously leads to divergence between the public understanding of what should be happening in the criminal proceedings and what the institutions of criminal proceedings present and do.

There are ideas, which are part of the above mentioned discussion, to change the *status quo*. These ideas point in several directions. Some of them are right, others – to a certain extent. Under no circumstances one could assert that there is only one possible solution or that the structural changes in the bodies of preliminary proceedings alone would bring about some result. There must be a set of measures that should inevitably include simplification of preliminary proceedings, cutting of the endless number of hindering procedural rules and concentration of the defense of the rights of the accused and the defendant in the court phase of the trial. Thus, more efficient performance in the preliminary proceedings will be achieved.

Second, it is necessary to introduce political control and to provide possibilities for the political authorities to define priorities in the implementation of the criminal justice policy. Here again the decision is very hard to make, because the risk of overpoliticizing and granting too much power to the politicians is substantial and some colleagues from various countries have warned us against taking such a risk. Anyway, the current state of affairs, where the executive and the legislative branches have absolutely no formal authority in respect of implementation of the criminal justice policy, is obviously unproductive.

Last, but not least, the joint management of the courts along with the investigation and the prosecution needs to be abolished. One of the paradoxes being a result from the establishment of a single governance body for the three units of the judiciary was the undermined independence of the court. At present one of the trial parties, namely the prosecution to the trial, exerts excessive influence over the careers of judges. The other element which contributes to the undermining of the independence of the court is the fact that these units have a common budget. In the event of assessment of the legitimacy of the actions of the other units of the judiciary – the investigation and the prosecution, and where such an assessment is linked to certain budgeting consequences, adjudication of damages, this is also another factor with negative effect on the assessment of the court and its independence in respect of the other parties.

In Bulgaria we are facing a rather complicated problem, with no clear answers. Nonetheless, there are several particular steps that need to be taken: simplification of the preliminary proceedings and introduction of mechanisms

for political control and respectively political responsibility, which is non-existent at present in respect of the bodies of preliminary proceedings.

In conclusion, the Bulgarian experience could also be useful in a certain sense in view of the comparative survey of the criminal law systems, namely – the complete isolation of the investigation service and the prosecution office from the political process does not always lead to independent and unbiased justice.

JUDICIAL REFORM IN BULGARIA – DOMESTIC AND FOREIGN CHALLENGES

*Nelly Koutzkova*⁶⁰

A quick review of the development of criminal investigation in Bulgaria reveals that before World War II this country had a typical European system of criminal proceedings – the prosecution offices were at the courts and there were investigating judges typical for such continental system. After the 1944 communist takeover changes have been gradually introduced in the structure of the administration of justice as well. Thus, in the period after 1944 the prosecution office was a separate institution governed by the Law on the Prosecution Office, while the investigators worked in principle with the Ministry of Interior, only a few of them working with the prosecution office. In 1979 a uniform investigation structure was established with the Ministry of Interior. Bulgarian investigators have always been jurists, with higher education in law. The Bulgarian model resembled very much the Soviet one.

After the democratic changes with the purpose of discharging any party influence, the constitutional legislators decided to establish an independent judiciary, comprising the investigation service and the prosecution office. At the time when the decision was made most of the people working in the judicial system were very satisfied with it. Even the depolitization of the courts started with signature campaign initiated by the youngest judges at the Sofia District Court, aimed at ensuring independence of the court.

There are people who believe that the current structure of the judicial system has been created with malicious intent and deliberately by the Grand National Assembly, so that an inoperational judiciary should be established, which would not be able to prosecute the crimes of the former communist regime. This is an opinion shared by many people, but a substantial part of my colleagues, me included, do not agree with it – on the contrary, we believe the motives of the constitutional legislators were noble and intended to create exactly a system of investigation and administration of justice which would not yield to political influence. It is not by chance that the Law on the Judiciary forbids judges, prosecutors and investigators to be members of any party.

Along with the democratic changes in the country, the crime rates also increased. The criminologists know that in an authoritarian state the crime rates are far lower, while in a democracy there is an initial increase of conventional crime. With the process of privatization and development of market economy an increase of economic crime is also observed. We are self-critical enough to be aware of and to admit aloud that the Bulgarian judicial system did not prove sufficiently adequate to the challenges of growing crime.

At the same time reforms have been continuously made in the country – one reform on top of another. The criminal laws were repeatedly amended (the Criminal Code and the Criminal Procedure Code), on the one hand – in order to comply with the European Convention on Human Rights and Fundamental

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Freedoms, and on the other hand – in view of the need to speed up the investigation and enhance its performance.

In 2000 a new step was taken. Police investigation was introduced, because the investigation offices were so overwhelmed with cases that their work grinded to a halt. The police started to investigate and for a few years now we have had the chance to assess their results. What we see is that on the one hand the police, being a militarized structure, operate faster. On the other hand, however, the evidence collected by the police are quite often collected in violation of the procedural law and when such a case is put to trial the court reads out non-guilty verdicts due to invalid evidence. The idea of transfer of the prosecution office to the executive is the subject of public discussion namely in view of the problems of criminal justice. The reason is that at present the political class, the people in power, bear no responsibility – they may not be held liable for failure to handle the problems of crime, because the judicial system is outside of the political system. On the one hand, this is true, on the other hand, however, this is a very good excuse for the government, when they fail to handle this problem of society and make excuses at the expense of the independent judicial system.

At present Bulgaria is on the eve of elections, some of the parties will include the reform in criminal investigation in their programs and the idea of transferring the prosecution office to the executive will be launched as well.

In December 2004 the Bulgarian Judges Association conducted a survey of some 1,000 judges on their opinion about the place of the prosecution office. About 85% of those polled believed the prosecution office should not be within the judiciary, but more than half of those 85% believed it should not be in the executive either, and that it should rather be some independent structure. In this sense the view of the Bulgarian judges is closest to the Slovenian model. The major consideration against placing the prosecution office within the executive is that in such a way a misbalance of powers may occur.

Of course, it is up to the constitutional legislators to decide whether to carry out reforms or not. In 2003 the Constitutional Court issued a decision proclaiming that the transfer of individual components of the judicial system is a change in the form of government and that could only be done by a Grand National Assembly. On the one hand, this is an obstacle to radical reforms; on the other hand, it is another good excuse for the politicians to say they are powerless to handle the problems of criminal prosecution in Bulgaria.

The other major problem before the judiciary in Bulgaria is the counteraction to corruption. Corruption exists in every state; there is corruption in Bulgaria as well. Corruption is everywhere. The point is whether the levels of corruption are so high as to allow corruption to govern the state. It is most frightening to have corruption in the judicial system, because this is the system designated to combat crime and corruption in particular.

The principle of competing for a job in the judicial system was introduced as an anti-corruption measure. Throughout 1993 – 1994 a massive outflow of judges, prosecutors and investigators was observed. Most of them preferred to become attorneys-at-law, since this profession was more attractive in financial terms. In this period the judicial system was literally bled dry. At that time competitions were not even discussed, because there were no applicants. Later on, however,

the newly formed law schools started to produce more and more jurists, the Bar was overfilled and the reverse process began – there were many who wanted to work in the judicial system. In 2003 competitions were introduced for all applicants for positions in the judiciary. This legislative decision was welcomed by the magistrates because there is no better mechanism than the competition, even when there are objections against some particular competitions, and that is the first step to staffing the system with good professionals.

Regretfully, in 2004 the legislators took a step back and the competitions remained only applicable to junior judges, junior prosecutors and junior investigators. This allowed the Supreme Judicial Council and the bodies entitled to proposing appointments to select people without clear criteria and without preliminary verification of their professional qualifications. The members of the judiciary including the Judges Association responded with indignation to that, but so far there are no results.

In view of countering corruption, the Supreme Judicial Council, which comprises investigators, prosecutors, judges, as well as university professors and several attorneys-at-law, established an anti-corruption commission intended to handle investigation of cases of corruption in the judicial system. This was intended to mean administrative and not criminal investigation. The commission has no powers to instigate preliminary proceedings or to indict magistrates. The commission started to work quite seriously in connection with a rather scandalous case, involving accusations of corruption. However, what followed was that upon proposal by the prosecution office (the Prosecutor General and his representatives in the council) amendments were introduced to the Internal Rules of the Supreme Judicial Council and the powers of the commission to counteract corruption were seriously restricted. This means that within the Bulgarian judicial system there are problems at organizational level, at legislative level as well as at the level of the administrative body of the judicial system.

I cannot help but express my concern about how Bulgaria will become a part of the European area of freedom, security and justice and how Bulgaria will send its representative to Eurojust; a representative who will be a prosecutor and who will have the power to bind the national prosecution office with the decisions of Eurojust. I hope that after the elections the newly elected members of parliament would be able to implement a radical reform, because the requirements of the European Commission to Bulgaria are rather strict, including the requirement for yet another set of amendments to the Criminal Procedure Code.

The Bulgarian Minister of Justice promised in public that the draft of the new Criminal Procedure Code will be presented to the parliament by the end of May 2005, with the idea to be enacted by the end of the year.⁶¹ However, Bulgarian judges are not familiar with the ideas of the new Code. So far it has not been discussed with the professional guilds in the way other amendments were discussed, and therefore we cannot offer a particular opinion. The only concern that we could share is that in the long run the fast changes could end in new problems.

Finally, each state has its own unique system. The point is not where exactly the investigation and the prosecution should be placed, who will have the power

⁶¹ The new Criminal Procedure Code was adopted on October 14, 2005 (promulgated in State Gazette No. 86 of October 28, 2005) and enters into force on April 29, 2006.

to investigate and what the competent bodies should be. The important thing is that the fight against crime should be efficient. Or, as a Bulgarian proverb says, "It's not important whether a cat is black or white, what is important is the cat to catch the mice".

THE PROBLEM OF THE CONSTITUTIONAL PLACEMENT OF THE PROSECUTION OFFICE

*Roumen Nenkov*⁶²

I am rather surprised that although we are discussing the placement of the prosecution office and the investigation service in view of the judicial reform, this discussion is attended by representatives of the investigation only. In the prosecution office there is a conservative group which does not want even to communicate.

Naturally, as a Bulgarian I would like the process of accession to the European Union to continue, ending up with the acceptance of Bulgaria as a full member without any safeguard clauses. However, I am afraid that at present it is more important to tell the truth – whatever it is, although it may be painful.

As a state and as Bulgarians we often become our own enemies, failing to point out the substantial problem. Several years ago, under considerable pressure by the society, a debate on possible amendments to the Constitution started. It ended with the adoption of some amendments in 2003. At that time everybody was saying the big problem was that magistrates (according to the Bulgarian Constitution magistrates are the judges, the prosecutors and the investigators) had unrestricted immunity, and that immunity created prerequisites for corruption and was an obstacle to the judicial reform. Now, a question comes forth – what happened after the immunity of the magistrates was reduced to functional immunity? Actually, nothing changed substantially, what was also my forecast at the time, namely – it was all merely deluding people. Before the amendments the Supreme Judicial Council acted as a grand jury in respect of all crimes committed by magistrates, now it acts as such only for a very limited range of crimes, but nevertheless the number of cases has not increased.

Now we start talking about reform again, we make commitments in respect of the European Union membership, we promise that in two months we shall have a final draft of a new Criminal Procedure Code, and we boast of our new concept.

First, the new concept is not much different from the concept of 1999 and it may be summarized as follows: a model of criminal procedure where the pre-trial phase is guided by the prosecutor with police officers and investigators working for him/her cause. The place of the investigators is determined by the need to have a more independent structure available, because apart from street crime, Bulgaria also has organized crime, financial crime, business crime, and corruption, which are typical for the powerful people. It would be appropriate to have a special structure, although a small one, to deal with such investigations.

The second mistake is that we fail to properly define the problem. The big problem is not with the investigation, because it operates under the procedural guidance of the prosecutor. The investigator does what he/she is told by the

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prosecutor and there is no doubt about that. Since 1999 we have had a decent model, which was further developed and so that 90% of the cases are being investigated by the police and maybe less than 10% are being investigated by the investigation service.

Now a new Criminal Procedure Code⁶³ is to be prepared and I would assist to that process as a professional. We need to define precisely the provisions, the ideas about alternative case resolution means need to be developed further, to distinguish between the disputable and indisputable in the trial phase, the law of evidence should be relieved from unnecessary formalities, etc. The truth is that we simply do not tell the truth, we continue to deceive ourselves. The problem of the Bulgarian judicial reform is not the criminal proceedings. The big problem of the Bulgarian reform is structural and it is related to the Constitution and the system of checks and balances, as perceived in the Constitution.

So far, in the course of 15 years, no political party has won two consecutive rounds of elections. And I have asked myself whether the reason was purely an economic one. One of the reasons is that all political parties come forth with the slogan that they will curb corruption and reduce crime to some acceptable limits. However, when a political party comes to power it turns out that it has no mechanism to achieve that because the mechanism of the state accusation, which otherwise is a typical function of the executive, is not a subject to it. The reform of the Bulgarian Communist Party was said to require the waiver of the principle of democratic centralism. But it was at least called "democratic". At present there is one structure which has full hold of the state accusation and this structure is extremely powerful. Within this structure there is no democracy in decision making. Decisions are taken by a single person. Investigators have all the reasons to say they do whatever the prosecutor tells them to do.

What we have is a pyramidal structure with all the power in the hands of a single individual. The question, however, is a structural one because it does not refer to the personality of that individual. There were problems with the former Prosecutor General, there are problems with the present one, there will be problems with the next one as well because there are no conditions for external control, there is no balance of powers.

When the matter refers to the court, the court proceedings are public. The court is controlled by the two parties in the public proceedings – there is defense, the lawyer, on the other side stands the prosecutor. They have opposing interests. Apart from the procedural law, the court adheres also to rules approved by the Minister of Justice, referring to the case-flow. That is, there are 8 or 10 books, registers, etc. There is no answer to the question why the executive has not assumed so far its functions in respect of control of the case-flow in the pre-trial phase of the process. Therefore, if the investigator has two months to conduct the investigation (a requirement related to the reasonable terms and the efficiency of the administration of justice in the pre-trial phase), no one should infringe on his case. If the observing prosecutor is willing to help, he could perform some of the procedural actions for the investigator, as he is entitled by law, or may attend all procedural actions. The case may not be taken from the hands of the investigator as long as he has to conduct the investigation. No one bothered to show that the state has not set any rules on the case-flow

⁶³ See note 61 on page 146.

in the pre-trial phase and that one need not wait for the creation of a Uniform Information System for Counteracting Crime because the first thing to be done is to have a uniform system on paper. But there is no such thing on paper. In reality, this is the meaning of control by the other branches, but they have not assumed authority over the pre-trial phase of the process.

This is all about what the Deputy Prosecutor General stated in public, namely – that the court has too much power. The huge power is in the pre-trial phase, which is behind closed doors. There, just one instance of preliminary proceedings may destroy human fates. Our friends in Europe know that case when the prosecution took the liberty to act arbitrarily in respect of the court, bringing the police in the court's premises. This was an unprecedented incidence of arbitrariness, and we know what the substantial criminal law stipulates. We cannot react because the same decision of the Supreme Judicial Council, enforced at the time with police, has not been implemented by the prosecution itself and since we have a lot of power, I would like to ask: may the court request the assistance of the police in order to implement that decision? Of course it may not. Let them accuse us of having too much power.

Therefore, I believe it is high time to rub salt in the wound and to say: the problem is with the constitutional placement of the prosecution office. The constitutional placement of the prosecution office does not belong together with the court, because justice need not be merely done, people should know it is done. First, the court may not share a meal, the same common finances, the same common budget, the same common buildings, with one of the parties in the process. Second, the practice of the present Supreme Judicial Council as well showed that the common selection of prosecutors, investigators and judges is absolutely wrong and leads to substantial mistakes, because the idea of the principle of competition in practice is not applicable to the centralized structures and there was not a single competition for investigator and prosecutor with managerial functions. Inasmuch as there were controversial applications for the court, they were settled by the 1/3 of representatives of the prosecution and the investigation.

I am not a great optimist, but I believe I would live to see a better Bulgarian Constitution. There is no other system like ours in Europe. If the system was good, it would have been introduced in at least one other country. But there is no such country. Even where prosecutors and investigators have the status of magistrates, because they must have relative independence, they are never in the same administration with judges in terms of staffing and in terms of material labor conditions. Although we keep repeating one and the same thing, after all we don't want to solve our own problem. There must be political will in order to solve this problem. I am just ringing the bell, but I am not the one to form the political will.

THE REFORM DEMANDS QUALITY LEGISLATION AND QUALITY STAFF

*Roumen Kirov*⁶⁴

Bulgaria is not more dangerous than other European countries and should anything happen to a foreign national in Bulgaria, he or she shall obtain justice following a preliminary investigation.

What gives me grounds to think so? It is the figures. In a recent TV broadcast the Deputy Minister of Foreign Affairs said that currently about 2 million Bulgarian nationals live abroad and there are some 500 Bulgarian nationals in foreign prisons. But if some re-calculations are made, it would be established that Bulgaria is actually not exporting crime. Even if there were not 2 million, but 1.5 million Bulgarian nationals abroad, that means there are some 33 prisoners per 100,000 persons. These prisoners have been placed where they are not by Bulgarian jurisprudence, but by a foreign jurisprudence. In Bulgaria at present there are about 9,000 prisoners (i.e. sentenced persons, not arrested) considering the population of nearly 8 million. I don't have data for all European countries, but according to Spanish colleagues in Spain there are some 50,000 prisoners and a population of less than 50 million. If a re-calculation is made it will confirm again that Bulgaria does not compare so badly.

The famous writer Anatole France said, "I am not afraid of bad laws, when I am going to be tried by good judges". If this is true, and I believe it is, the opposite is also true – good laws may not be applied by bad people. This means that the reform should aim in the first place and above all at selecting decent staff. This task is not too hard, because in the system of investigation, regardless of its placement, work some 1,000 persons. If the government manages to select 1,000 reputable, well-trained, loyal and hard-working citizens, and keep up that level, things would not look so bad in the investigation.

I cannot accept, although I would have to, arguments such as – our friends said this should be done so, the European Union wants this to be done so, NATO said this should be done so: that means it is true. This kind of talk reminds me of the near past, because I have been working as investigator since 1982, when some questions – why do we do so in Bulgaria – received the answer: because they do so in the Soviet Union, which means it is true. The reform should aim, on the one hand, to produce legislation of good quality, and on the other hand, to produce and appoint persons of good quality who shall apply the legislation, and in the case of judges – shall administer justice as well. The main parameters, which should be subject to research and analysis before proceeding with a reform, are the following:

- The number of criminally responsible persons (mostly male, because crimes in Bulgaria, regretfully, are committed mostly by men);
- Committed and registered crimes per 100,000 criminally responsible persons;

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- Persons involved in combating crime and punishing (investigators, judges, prosecutors, police officers, officials of the Ministry of Finance involved in preliminary investigation, auxiliary staff, etc.);
- Funds spent for detection and punishment of each crime as a portion of the gross domestic product, and the period of time from the registration of a crime to its punishment.

When these parameters are correctly calculated and compared to similar parameters in comparable countries, e.g. from the European Union, only then it would be possible to assess whether the Bulgarian system operates better or worse and only then it would be possible to identify the weaknesses. Otherwise the finding that Bulgarian pre-trial proceedings are slow could be true, but it is not supported and proven by any figures.

The other thesis is that there is no pressure on behalf of the European Union, but we are rather running after the chariot of the stronger one, which is quite a tiring exercise. At the same time, that running does not necessarily mean moving in the right direction, because the stronger may also get in the wrong direction. Of course, Bulgarian people want to have better counteraction to crime, better administration of justice, better law enforcement, and the people deserve it, because after all it is the people who pay the salaries of investigators, judges and prosecutors.

And yet, it had to be explained to the Bulgarian people that in Bulgaria there is growth in the rates of certain types of crimes. The number of rapes in this country is approximately the same as in 1989, and even lower, because the population is getting older. The number of murders is approximately the same, for nearly 20 years there are 300 murders per year (except for traffic accidents, where the situation is tragic) and of these 300, 320 or 330 murders some 30, 40 up to 50 are contract killings. About 1,200 persons die every year in traffic accidents. If we manage to reduce the number of the mafia murders by 10% per year, that would mean 3 persons saved, whether alleged or real mobsters. If we manage to reduce by 10% the traffic accidents with fatal outcome, that would be 100 – 120 persons. This merely comes to prove once again that where statistics is used it may present a true picture only if the figures have been properly selected.

Therefore, I would like to appeal to the politicians (I respect them very much and I do not share the opinion of Larochefoucauld, who said that politics is food for pigs) before proceeding with any reform, to make efforts and to collect, read and analyze the statistical data. This would not take much time or money.

For example, there is horrendous growth in tax crimes. Before 1989 there were no tax crimes, merely because there was no private property. I cannot accept the thesis, shared by Greek colleagues, that before 1989 in Greece there was not a single Bulgarian in prison, while there are 100 now, i.e. a 100-fold increase. Every year some 200,000 Bulgarian nationals visit and work in the Republic of Greece. Bulgaria cannot export Nobel laureates only.

As for corruption, it has been mentioned as early as at the time of the historian Procopius, in his book *The Secret History*. There he describes the time of Justinian, who was allegedly a great legislator. In the overt history he praises him, but

in the secret history he says – we are fed up with corruption. So the theme of corruption was present even at that time.

There are four weak points, four critical points, where an investigator comes across corruption. The **first** point is the immediate work of the investigator on the subject of investigation. It is related to contact with people, some of whom are interested in exerting corruption pressure. There are two dependencies here: cases of corruption are in straight proportion to the number of persons exerting corruption pressure, i.e. they are willing to give money or something else, and somehow in inverse proportion to the number of investigators not willing to accept the bribe. Even if there are 5 million persons willing to offer a bribe to investigators, if there is not a single investigator willing to take it, there would be no corruption case. There would be corruption pressure, but no corruption case. Therefore, the selection of staff is most important. It is a known fact that competitions are a good thing, but a competition may not offer an answer whether a person is reputable when taking a job. A person may be a brilliant lawyer, but then he may become a brilliant practitioner in corruption, and that would be horrible. For the time being, I have no answer to this question. A good jurist, a good expert in law, may not always be a reputable person. There should be some additional control, additional accountability. Personally, I am ready to take a lie-detector test every year.

The **second** point of corruption pressure is relevant to cases of construction works in our system (e.g. construction of buildings). This refers to a small number of people, mostly in managerial positions. This activity should be taken out of the judicial system, but the Constitutional Court decided otherwise. Let other institutions deal with the construction of buildings, repairs of buildings, etc. This would not enhance the independence of the judiciary in any way. I am not referring to any similarities to what is happening in the Court of Justice in Sofia at present, but it would be far better if the refurbishment of the Court of Justice was done by a body outside the system. The same applies to the buildings of the investigation, of the prosecution, etc. To say the least, the people would not be in doubt whether there has been any tender or not and whether there has been corruption or not, etc.

The **third** type of corruption occurs at and in connection with the appointment of magistrates. I am an ardent supporter of the competitions and since I was on the examination boards, I should say that the competition for investigators did not attract so many persons as that for judges. More people want to work in the court, unlike the years before 1989, when no one wanted to take a job as a judge. Eight persons competed for one position of junior investigator, and they were very well trained lawyers. It is another matter whether those who received high grades would later on become good judges because excellence in law does not suffice for being a good judge.

The **fourth** point is the point of interaction between the investigator and the persons, who generally have no interest in the process. These are experts, translators and interpreters, etc., who are paid in the very course of the investigation. Regretfully, there are cases where investigators share money with persons to whom they pay. But there is a cure for that as well – probably guilds of experts should be established, with members who are not just anybody, but highly qualified and with the required knowledge. They shall be selected, nominated and controlled by the managing bodies of these guilds. At present,

however, the investigators are paying BGN 4,000 for 400 international bills of lading (CMR), which is approximately BGN 10 per page, while the text of these bills of lading is the same. These are the four weak points of the investigation.

In conclusion, the investigators do not influence the professional careers of the judges in the Supreme Judicial Council. The Supreme Judicial Council has 25 members, where two of them have been elected from the quota of the investigators. The opposite is quite true, namely the judges may affect the professional career of the investigators, because there are many more judges in the Supreme Judicial Council. The judges are eight, six elected and two by right. In reality there is no way the two investigators could influence that much the careers of the judges. The opposite is quite true, but the investigators do not fear that because it is assumed that the members of the Supreme Judicial Council are the best. Meanwhile, in spite of all, within the Supreme Judicial Council, which comprises both investigators and prosecutors, some problems occurring between the guilds are solved as well. A prosecutor is familiar with the work of the judge, a judge is familiar with the work of the prosecutor, a prosecutor is familiar with the work of an investigator and an investigator is familiar with the work of the prosecutor, therefore such control could be exercised. For example, the performance of a judge on civil cases would not improve if the investigation and the prosecution are not in the same system, and the data indicates that 2/3 of the total number of cases are civil cases.

I absolutely disagree that the executive cannot influence the counteraction of crime. At least 90% of all investigations are conducted in the system of the Ministry of Interior. The Ministry of Interior possesses all the special intelligence means and the resources for their use. And the Ministry of the Interior is in the executive.

ABOUT THE JUDICIAL REFORM AND THE RESISTANCE AGAINST IT

Emanuil Yordanov⁶⁵

The experience of other European countries shows quite clearly that the Bulgarian investigation service is the only structure of its kind in Europe. There is no other such structure. At the same time, in respect of the prosecution office, not only in Europe, but from all that we know about other countries, it is obvious that each country has a solution of its own. There are various types of structure of the prosecution office. This means that in Bulgaria the issues of the structure and placement of the investigation and the prosecution should be solved in view of the expectations of society for more serious counteraction to crime. The thesis that the executive has no possibilities to influence the criminal procedure is true to a great extent. This is my position not only as a politician, but also as a lawyer, who has been working continuously since 1987. In the course of my practice I have had the chance to observe the various forms of organization of the judiciary, the various versions of the Criminal Procedure Code, including at the time when lawyers were entitled to join the criminal procedure only at its trial phase. Without efficient interaction among the Ministry of Interior, the investigation and the prosecution, one could not expect good results.

What do we have now in Bulgaria? The Ministry of Interior, the investigation service and the prosecution office are pulling the cart each in its own direction, and I am quite certain about my conclusion. The institutions throw the ball of responsibility to one another and it is very hard to follow and find out the broken thread. The Law on the Judiciary has a section devoted to the *Uniform Information System for Counteracting Crime*, but it remains on paper. Naturally, there are people who have no interest in the completion and putting into operation of this system because it would show quite clearly the problems in the criminal proceedings and which units in particular have weaknesses.

I am far from trying to put the blame on only one of the structures. In my practical experience I have seen that at times the problems are within the Ministry of Interior, at other times the problems are within the investigation, and at yet other times the problems are within the prosecution. I do not share the opinion that it is shameful that none of the prosecutors is taking part in this debate. This is easy to understand because the present leadership of the prosecution perceives any idea of judicial reform as an obscenity targeted directly at it. It is quite clear that any politician, who dares to seek real reform in the judiciary, will encounter strong resistance from the high levels of the investigation service and the prosecution office. This should not be forgotten.

When we seek changes, we have to seek them in a very efficient dialogue. Let us hear each other's arguments, because each of us could make a mistake, but when we work together we can achieve results satisfactory to all.

Personally, I am concerned about the fact that the judiciary has very low rating, it does not enjoy the support of the people and many accusations of poor

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performance are addressed at many of our colleagues, but in most of the cases these accusations are unjustified. I know many capable investigators, prosecutors and judges in Bulgaria, there are many decent people working in this system and they all together have to bear the liabilities of a small group of people who are a disgrace to the judiciary. For these reasons we are obliged to seek a real reform and such reform should bring about results.

PROBLEMS OF INVESTIGATION IN BULGARIA

*Mihail Genov*⁶⁶

When putting forward the issue of one-sided reform in the investigation, the question should better be put forward as follows: Isn't it better to wait for France and Italy to abandon the figure of the investigating judge, so that a common model could be followed? The reason such a structure exists in these countries is the conclusion made more than two centuries ago that the police are not able to handle the complexity of all cases, i.e. the police may solve many cases, but not all.

In Central Europe, for example in Germany and Italy, there are investigating prosecutors, who also take on the most difficult cases. This does not mean that the police are unreliable. The prosecutor in the countries which recently introduced reforms is rather a supervising prosecutor, i.e. a prosecutor who provides guidelines, but does not have the skills to personally conduct investigation actions on a high professional level.

What is the Bulgarian investigator? This figure fills in a certain niche as it combines three capacities.

In the **first** place, he is a detective, unlike the Spanish, the Dutch, the Belgian, the Swiss and the French investigating judge. He can work on the spot, elaborate records of inspections on site, and interrogate witnesses – activities that the magistrates in the said countries do not perform.

Second, he is an accuser. The investigator is the first magistrate to bring up indictments. It is incorrect to believe the prosecutor is the first to bring up indictments in Bulgaria. The prosecutor reviews the materials of the investigator and presents the bill of indictment, which is indeed a form of duplication and waste of energy. The first legal qualification, however, is made by the Bulgarian investigator.

Third, the Bulgarian investigator has access to materials and is familiar with the special intelligence means, i.e. he has a competence which is unthinkable for an investigating judge or an American attorney. He has sufficient professional skills and sufficient powers to handle the case assigned to him, i.e. to find out the truth about the case. This is particularly important because all three instances and all three levels of the prosecution may become absolutely unnecessary, if they do not have at their disposal the objective truth, revealed due to the professionalism of the investigator.

In all the talk about reform, there is no trace of self-criticism, criticism or discomfort about the imperfections of performance. The findings that there are problems in criminal justice are actually true. However, they are the result of many factors, the main being the institutional ones.

First, this is the squandering of resources. All systems have investigating magistrates (judges). In Germany, for example, there is such a magistrate who

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monitors the preliminary proceedings. The Bulgarian model has borrowed a lot from the German practice. Our judges, however, have to issue detention warrants first and then hear the case upon its merits. This should not be done by one and the same judge, but in a small town with one judge such an absurd problem can occur quite easily.

Second, the amateur-judges, because they are amateurs, have no idea of investigation, have never conducted any investigation and will never gain experience, are hindering the investigation. It would be much better if there is an investigating judge who, if without experience initially, in a year, two or three would become an extraordinary good “professional” and would be able to understand all 15 measures that restrict the rights of citizens and whether there are sufficient reasons to apply them or not. The investigators need an investigating judge and the lack of such judge is hindering the investigation.

In the city of Sofia there are two detention buildings. This results in squandering of resources, e.g. gas, human effort, etc., to take the arrested persons to the courtroom. Why not have in these two places two judges on duty so the detained person can be brought from one corridor to the other and the issue resolved quickly? Such practice exists, for example, at the American-Mexican border. There the person detained may even remain in the cell and the judge makes the interrogation via video conference connection.

The lack of double subordination of the police comes next. All civilized countries with a two-tier investigation procedure (the police and some more specialized body), apply the principle of double subordination of the police. The police is subordinate to its own head as well as to the respective magistrates. This principle is not applied in Bulgaria. A question arises: for whom do the police work? It turns out that the police work basically for themselves, and the investigator has no idea whether its performance is good or not, and has no access to whatever the police work on.

On the other hand, there are three hypotheses of huge practical value, where the lack of such double subordination prevents seeking liability from persons against whom strong evidence has been collected.

The first hypothesis concerns an indicted person who wants lenience. He shall be tried in court, but he is willing to tell about other participants. This information does not need legalization; this is not information from a police informer. The indicted person signs the information asserting that he is telling the truth and is willing to cooperate for verification, e.g. in what office and on which computer fake invoices have been printed, where the drugs storehouse is, where the print shop for counterfeit banknotes is, etc. There is no mechanism by which the Bulgarian investigator could oblige the police to provide certain information. He may ask for such information and the police will decide whether to respond to the request or not. Sometimes the response to a request for information is delayed for six months.

In the second hypothesis there is a prisoner who wants reduction of his sentence. Again, there is no mechanism by which his recollections could become evidence, i.e. the magistrates cannot obligate the police.

The third case is immunity, which is wide-spread in America, i.e. an offender who is willing to tell about more serious crimes in return for guarantee that the prosecution would not indict him. Of course, he is taking a serious risk. In Bulgaria, due to this peculiarity a lot of data is lost.

During a meeting with French magistrates, when asked what hindered most their work, all Bulgarian representatives unanimously pointed out the lack of evidential force of the materials from the preliminary proceedings. Thus, after the interrogation of a witness by the appropriate body, no decisions can be taken on the grounds of his testimony. He is called for a second time, sometimes for a third time, and even more. This is a problem which substantially delays the process, and there is a saying that deferred justice is actually waiver of justice.

Then come the three instances (including appeal and cassation) which, however, are quite different from the American concept for these methods of appeal. The American appeal is hard to access, while cassation is almost inaccessible. This ensures stability of the acts of the court. In Bulgaria four years may pass before an act of the court comes into force. This creates tension in society.

In Bulgaria there is no *ad hoc* indictor, *ad hoc* investigating body, or *ad hoc* judge. For example, a judge who has worked for 30 – 35 years wants to take on cases in a court district with staff deficit. Why not allow this judge, who is an established professional, to pass judgment in some form as a first instance? This could also be very serious waste of human resources, because a junior judge would need 10 years to attain such qualification.

There are no institutional mechanisms to guarantee the responsibility of magistrates for sloppy performance. There are magistrates who work negligently and superficially. For example, there are prosecutors who do not read the materials on the case, who would write a ruling not taking into consideration the relevant volume and page of the court files etc. Should there be inspections at the end of the year, the magistrates would be more devoted to their profession and, if they don't have the calling, they would develop one in order to stay. The institute of inspection is familiar in Germany. This is a verification of the correctness of the court acts for the purpose of attestation of the respective magistrate, rather than for the purpose of appeal and questioning the force and effect of the act.

The lack of internal hierarchy and teamwork in the bodies of investigation falls within the same group of factors. In the American system there are instances where attorneys (i.e. prosecutors) work in teams of three. In Bulgaria a young investigator is as independent and equal as an investigator with 15 years length of service.

What is indeed a young magistrate? He has a diploma, he has passed through competitions and he is entitled to be what? Just a beginner. Experience in this profession is gained slowly and, if that person works in a team with a more experienced magistrate, he would be supported, trained and supervised against corruption, he would master easily the know-how of this profession. The lack of teams and the lack of inspections generally hinder the work of magistrates.

In conclusion, when efficiency is the target, figures verified through the experience of another system for a long period of time should be used. We

must not experiment with something new and unfamiliar, but take something operational in another country, and with considerable results. No gaps and vacuum should be produced in the legal provisions, although that may not be the decisive reason and could even be the third or fourth reason in order, but could block the optimal results that might have been achieved.

ABOUT THE PLACEMENT OF PROSECUTION AND INVESTIGATION IN THE STRUCTURE OF THE JUDICIARY AND ITS ADMINISTRATION

*Daniela Dokovska*⁶⁷

According to the data from a survey conducted by the Center for the Study of Democracy about 700,000 crimes are committed annually in Bulgaria. Most of those constitute latent crime. This substantial aggregate of latent crime is due mainly to the lack of trust in institutions and in the first place among them – the police. These are citizens who have become victims of crimes but have not called the police, because they do not rely on the police. This substantial aggregate of latent crime is not directly relevant to the activities of the bodies of the judiciary.

It has been a great error to spread in public for years now the theory that the investigation is an obstacle to the efficiency of the criminal procedure. The fact that in our country exist bodies of investigation which have characteristics different from those of the investigating bodies in other countries is no hindrance to the criminal proceedings. This is an incorrect statement, having probably some political rather than legal context. The existence of the figure of investigator in Bulgaria is not an obstacle to the process, on the contrary – in many cases it is an advantage. There are even less reasons for reproaching the investigators at a time when only 5% of the cases are being investigated by them. The fact that the bodies of investigation have been demonized in this country is a matter of politics.

Now, when there is a debate on whether the prosecution and the investigation belong to the judiciary, it is important not to allow any mistakes and confusion in respect of institutions such as the investigating magistrate, the investigator as regulated by the Bulgarian law, and the investigating judge. These institutions have nothing in common. The Bulgarian Constitution does not provide for the existence of investigating judges in the criminal procedure because such a figure presumes a competition in the pre-trial proceedings between the prosecutor and the defendant of the indicted. In our country, however, the prosecutor by virtue of the Constitution directs the activities of the investigating body. The investigating bodies work for the prosecutor, so that he would be able to prove his theory in court, if he finds reasons to place charges with a bill of indictment. No comparison can be made between the investigator, such as he exists in our system, and the investigating judge, who exists in Germany, or the judge on liberties, who exists in France and many other countries. The latter is a judge, not an investigating body, and participates in the trial, not in the pre-trial phase.

Many things can be said on these issues, but the serious problem that persists concerns the structure of the judiciary. It is clear that the prosecution has its extremely important role both in the pre-trial phase – the prosecutor as the head of the investigation – and in the trial phase, where the prosecutor is the person who raises and maintains the charges before the court.

It is clear that the prosecution and the investigation have their common tasks, which are quite different from the tasks and the functions of the court. In this

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sense the existence of a common Supreme Judicial Council of judges, prosecutors and investigators gives rise to many problems. The existence of such common Supreme Judicial Council compromises the independence of the court, at least for two reasons:

- **First**, it does not seem appropriate for public prosecutors to elect judges and chairs of the courts.
- **Second**, it looks extremely illogical when there is a trial about the responsibility of the state and the prosecution is referred to as the body which caused the damages, these damages to be paid from the budget of the judiciary, i.e. of the court as well.

It is possible to point out more negative aspects resulting from the existence of the Supreme Judicial Council in its present form. The Council itself and its overall activities seem to give rise to strong negative attitudes in society.

In this respect the idea of the judges from the Supreme Court of Cassation, which was announced in the media, deserves serious attention. It refers to the formation of a Supreme and really Judicial Council, which should administer the judges, and a separate council, which could be the staff body of the prosecutors and investigators. This seems to make more sense and could be more efficient. I believe that if the politicians want to approach these problems with due responsibility, they should give up their political quota in the Supreme Judicial Council. Who needs this quota? Let the judges elect judges, let the prosecutors and investigators elect prosecutors and investigators. What is the reason for such intervention in the selection of staff? This can only politicize the system and lead to some form of political influence on it.

JUDICIAL REFORM CONTINUES WITH THE REFORMS OF CRIMINAL PROCEEDINGS

*Anton Stankov*⁶⁸

Some people are still questioning the need for judicial reform. Why does the word “reform” sound so unnerving? And for me, it does – almost as much as “war” does. Indeed, the reform of the Bulgarian judiciary was at times so aggravated as to resemble hostilities.

But there are two factors that necessitate the reform and I will expressly repeat them because we, as law practitioners, sometimes forget we are not the only ones with expertise or the only ones doing any work. There are people judging our work as well.

Judicial reform is needed first of all for the sake of the ordinary Bulgarian citizen. It is common knowledge that popular dissatisfaction with the work of the judiciary is growing. And it has nothing to do with media manipulations; it is provoked rather by our own actions. We need to be self-critical.

The British are also conducting a criminal justice reform at the moment. They seem to have some attitudes similar to ours – from the perspective of the separate institutions things seem to be perfectly alright as each of them claims to do their job in the most appropriate way. When this shifting of responsibility upon the other parties involved in criminal justice is done repeatedly, it means that the system as a whole does not work satisfactorily. And it runs counter society’s needs. But our colleagues in the UK, however similar their attitude, employed their traditions, their culture and mentality which are older and quite different from ours. They engaged in intensive negotiations between the involved institutions for eighteen months, arrived at some mutually acceptable decisions and now a commonly approved reform is underway.

The second factor that necessitates the Bulgarian judicial reform is that we are pressed for time. We do not have eighteen months at our hands to arrive at a consensus. Bulgaria is determined to enter the EU on 1 January 2007. Bulgaria, not the Bulgarian government or the Bulgarian parliament, was undertaking to sign the Accession Treaty on 25 April. I don’t know of a person, a party or a politician who would publicly and openly stand in opposition to our country’s EU membership.

So we are obliged to pay heed to what EU experts have repeatedly told us through the Commission’s regular reports since year 2000. They have been saying that the judicial system has problems and they have named them time and again. These statements, however, have been formulated due to the information we ourselves have given to EU officials and experts. So their calls for reform are modeled after our own views.

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Currently the drives for reform, especially in criminal justice, are at their strongest since year 2000. Several successful amendments have been made in the Criminal Procedure Code so far, concerning coercive measures, trial phase activities, etc. But the changes sought in the pre-trial phase of the criminal process were not achieved.

I must remind you why they failed. They failed because of deliberate and coordinated efforts to obstruct the reform we proposed. I will refer to several Constitutional Court rulings following inquiries made by certain magistrates. Of course, everyone in a democracy is entitled to seeking and practicing their rights. Yet this may be done for the satisfaction of limited institutional, or even sometimes private, interests. The Constitutional Court rulings on the amendments to the Law on the Judiciary and on proposed structural changes of the judiciary all slowed down judicial reform. But we have not given up. We will persist in our endeavor to achieve a major goal – the adoption of a new Criminal Procedure Code.

Why should there be an entirely new Criminal Procedure Code? It is true that we have heard some positive feedback from legal experts on the good points of the current Code. Several parts of the Criminal Procedure Code comply with EU standards in full. Yet, there is a fundamental recommendation that it fails to comply with – the removal of the overlap between the powers of prosecutors and investigators that leads to competition between them. The latest amendments to the Criminal Procedure Code we tried to push were made in September last year. The discussions over it could have been over by now, had parliament exerted the political will to effect these reforms. Since amendments to the Criminal Procedure Code need to be fundamental, it had to be written anew in very short terms. I am quite at ease now that we will manage before our EU entry deadline and I am quite certain that the solutions the new Criminal Procedure Code will offer will be in full compliance with EU requirements.

Amendments to the Criminal Procedure Code are made within the framework of the current constitutional model. I do not exclude the possibility, however, that the next parliament may engage in a structural reform of the judiciary contrary to Constitutional Court decisions. This is of course a strictly personal forecast. If this happens, the Draft Criminal Procedure Code could very speedily be edited and put for deliberations since in basic terms it is already prepared. The Draft Criminal Procedure Code will officially be completed on 15 May. So this is not the right time to discuss it outside the working group that is deliberating it, even with organizations such as the Judges Association, the Association of Prosecutors and the Chamber of Investigators. When the ideas in this draft become a draft law officially approved by the Council of Ministers, you will be able to speak and discuss it at large. Neither the announcement, nor the adoption of the new Criminal Procedure Code will put an end to the debates.⁶⁹

I would like to assure you that the attitude of our EU partners towards us is very positive and supportive. We are obviously in the run-off to our EU membership. What we have started off will be finished by the next parliament. We have planned it this way – the Strategy for Judicial Reform is scheduled to conclude by the end of 2005.

⁶⁹ See note 61 on page 146.