Constitutional Basis of Public Administration (Selected Problems)

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KUKLIŠ, P.: Constitutional Basis of Public Administration (Selected Problems). Právny obzor, *102*, special issue, pp. 72-87.

Constitutional Basis of Public Administration (Selected Problems). The paper deals with issues of the proper legal basis for territorial and local self-administration, the position of the Government of the Slovak Republic as a prospective body of state administration (the paper claims it has dual character), the position of Ministers and State Secretaries and their mutual relationship, problematic legitimacy and accountability of the "independent" state administration bodies, or the position of the municipality as a partial expression of civic society and at the same time as a formal state entity. The paper also points out the problems connected with the silence of the Constitution in matters of early elections to territorial self-government bodies. Secondly, paper also deals with selected problems in the operation and activities of public administration entities. It sketches the problems connected with the competence of territorial self-government bodies to issue generally-binding regulations and problems of approximation regulations of the Government and measures of general nature.

Keywords: *constitution, the territorial-administrative structure of the state, public administration entities, local self-government*

Introduction

Public administration is a social system consisting of sub-systems which include state administration, self-government (territorial and professional bodies) and persons or legal entities entrusted with the execution of public or state administration. The implementation of public administration is closely tied to the territorial-administrative structure of the state. According to Art. 3 (1) of the Constitution of the Slovak Republic (the Constitution), the territory of the Slovak Republic is uniform and indivisible. Territorial and administrative units are created to successfully execute the administration based on Law No. 221/1996 Coll. on the Territorial and Administrative Structure of the Slovak Republic. The self-governing territorial units consist of municipalities and higher territorial units (Art. 64, second sentence of the Constitution) while the administrative units are regions and districts. The regions are divided into districts, and municipalities are incorporated into individual districts, based on Governmental regulation No. 258/1996 Coll.

This paper deals with issues of the proper legal basis for territorial and local self-administration, the position of the Government of the Slovak Republic as a prospective body of state administration (the paper claims it has dual character), the position of Ministers and State Secretaries and their mutual relationship, problematic legitimacy and accountability of the "independent" state administration bodies, or the position of the

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municipality as a partial expression of civic society and at the same time as a formal state entity. The paper also points out the problems connected with the silence of the Constitution in matters of early elections to territorial self-government bodies. Secondly, the paper also deals with selected problems in the operation and activities of public administration entities. It sketches the problems connected with the competence of territorial self-government bodies to issue generally-binding regulations, and problems of approximation regulations of the Government and measures of general nature.

Beforehand, however, some further introduction to the basic structure of public administration in Slovakia is required, as it leads to the first issue as pointed out above.

The actual territorial-administrative division of the state is regulated by secondary legislation, i.e. governmental regulation. The Law on Territorial and Administrative Structuring essentially regulates only the number of regions and districts and their names. It also stipulates which towns should become the seats of state bodies operating in the territorial districts of each region, unless provided otherwise by law. That means that changes to the borders of either districts and regions can be enacted by government regulation. This raises some doubts about the proper level of legislation needed for such important changes.

In this context, a positive example is Art. 123 of the Constitution of the Kingdom of the Netherlands: "*Provinces and municipalities may be dissolved, and new ones established by Act of Parliament (section 1). Revisions to provincial and municipal boundaries shall be regulated by Act of Parliament (section 2).*" The Czech legislation is also inspiring. The Czech higher territorial self-governing units were constituted by Constitutional Law No. 347/1997 Coll. on the Creation of Higher Territorial Self-Governing Units. The Constitution of the Italian Republic contains a specific enumeration of the regions in Art. 131, while establishing conditions (e.g. referendum, constitutional law) for merging existing or creating new ones (Art. 132).

The Constitution of the Republic of Poland stipulates that "*the territorial system of the Republic of Poland shall ensure the decentralization of public power*" (Art. 15 (1)), "*that the basic territorial division of the State shall be determined by statute, allowing for social, economic and cultural ties which ensure to the territorial units the capacity to perform public duties*" (Art. 15 (2)). The importance of the cited standards is highlighted by the fact that they are part of Chapter I, whose provisions can only be changed by a special procedure which can lead to a referendum on constitutional changes (Art. 235 (6)). In this way the cited basic provisions are lent greater stability and rigidity.

The issues of territorial-administrative structuring of the state should be given special attention, because the current system of regional self-government did not arise from continuous historical development. It was implemented into the already-existing system of public administration by Law No. 302/2001 Coll. on the self-government of higher territorial units (Law on Self-governing Regions). Further constitutional legislation on the second level of territorial self-government would help to create social consensus in this area, and at the same time it would be one of the guarantees of more stable development of regional self-government in Slovakia.

1. Public administration entities

1.1. State administration

The actual classification of state administration bodies can be considered to be a minor constitutional problem. Under the Constitution, "*the central and local government bodies shall be established by law"* (Art. 122). The question is, what is the constitutional basis of the state administration bodies, which cannot be subsumed under the category of central state administration bodies or under the category of local administration bodies. This issue is regulated by Art. 86 letter e) of the Constitution, according to which the National Council of the Slovak Republic (the National Council) establishes ministries and other state administration bodies by means of legislation.

1.1.1 The Government – a supra-central government body?

The position of the Government of the Slovak Republic (the Government) seems to be slightly unclear from the point of view of the constitutional phenomenon of public administration. The Constitutional Court of the Slovak Republic (the CC) has stated that *"under Art. 108 (1) of the Constitution of the Slovak Republic, the Government of the Slovak Republic is the supreme body of the executive power and not the supreme (central) body of the state administration. While the Government of the Slovak Republic, as one of the constitutional constituents of state power in the Slovak Republic, has a legal basis for its establishment, powers, responsibilities, as well as its dissolution given directly by the Constitution of the Slovak Republic (Art. 108 to 121 of the Constitution of the Slovak Republic), according to Art. 122 of the Constitution of the Slovak Republic, the central and local state administration bodies are established exclusively by Law No. 347/1990 Coll. on the organization of ministries and other central state administration bodies, as amended, and therefore does not include the Government of the Slovak Republic among the statutory bodies in its Art. 1 on central bodies of state administration of the Slovak Republic established by law"* (I. ÚS 11/99).

The CC later stated again that *"the Government of the Slovak Republic cannot be regarded as a central body of the state administration of the Slovak Republic. Therefore, its decisions cannot be the subject of a constitutional complaint under Art. 127 Constitution of the Slovak Republic"* (II. ÚS 31/99).[1] Both above-mentioned decisions were issued in response to a constitutional petition as regulated before July 2001. At the time, the scope of challengeable decisions was limited to decisions by the central bodies of state administration, local administration bodies and bodies of self-government. Perhaps this point of view should not affect the possible constitutional acceptance of the government as a public administration authority.

Constitutional law scholars admit that the constitutional characteristics of the Government as the supreme body of executive power undoubtedly emphasize its

[1] At the time, a constitutional complaint could challenge only decisions of bodies of central state administration, local administration and local self-government.

governing position in the system of public administration bodies.[2] In other words, the constitutional definition of division of powers and the hierarchy of the highest bodies of state administration are based on the fact that the Government is the highest authority of state administration.[3] Similarly, the theory of administrative law characterises the Government as the supreme body of state administration.[4]

If we slightly exaggerate these ideas, it can be argued that the Government somehow makes sense of public administration. However, its mechanical constitutional integration into the public administration system could cause undesirable complications. In many cases, the Government is in a relatively different position from the other public authorities. For example, under Sec. 5d (5) of Law No. 85/1990 Coll. on Petitions, the Government is not obliged to discuss the petition with the petition committee. It can be argued that despite *de constitutione lata*, the dual character of the Government cannot be ignored.

1.1.2. Central State Administration

The Constitution does not regulate the number of members of the Government charged with the management of the ministries. Section 8 (4) of Constitutional Law No. 227/2002 Coll. on State Security in the Time of War, State of War, State of Emergency and State of Crisis stipulates that the Minister for Defense, Minister for Home Affairs, Minister for Finance and Minister for Foreign Affairs are members of the Security Council. This provision constitutes a constitutional condition for the existence of the respective ministries in the central government system.

The Minister manages the ministry and he or she is responsible for its operation. The deputy of the Minister in the scope of his/her rights and duties is the State Secretary (the Secretary). The position and the competences of the Secretary have been challenged before the CC on several occasions. The current legal situation in this area is influenced by a decision of the CC which stated: "*The Constitution of the Slovak Republic regulates the exercise of the constitutional powers of individual constitutional officials and, unless stated otherwise, it determines the duty of their personal execution.*" At the same time, the CC claimed that "*no provision of the second section of the Sixth Chapter of the Constitution of the Slovak Republic permits the transfer of the constitutional powers of members of the Government to another state authority or another constitutional official of the Slovak Republic. The second section of the Sixth Chapter of the Constitution of the Slovak Republic does not contain an appropriate constitutional standard that would allow the exercise of either all or at least some of the constitutional powers of members of the Government of the Slovak Republic by other persons. Thus, the Constitution of the*

[2] ČIČ, M. et al.: *Komentár k Ústave Slovenskej republiky.* [Commentary on the Constitution of the Slovak Republic] Martin: Matica Slovenská, 1997, p. 546; ČIČ et al.: *Komentár k Ústave Slovenskej republiky* [Commentary on the Constitution of the Slovak Republic]. Žilina: Eurokódex, s. r. o., 2012, p. 386.

[3] POSLUCH, M., CIBULKA, Ľ.: *Štátne právo Slovenskej republiky*. [The State Law of the Slovak Republic] Šamorín: Heuréka, 2009, p. 105.

[4] VRABKO M. et al.: *Správne právo hmotné. Všeobecná časť.* [Substantive Administrative Law: General Issues] Bratislava: C. H. Beck, 2012, p. 123.

Slovak Republic does not allow other persons than individual members of the Government (Ministers) to perform the constitutional powers of members of the Government of the Slovak Republic" (PL.ÚS 22/95).

1.1.3. "Independent" state administration bodies with nationwide competences

The establishment of state administration bodies with nationwide competences created certain constitutional problems. As already mentioned, Article 122 of the Constitution recognizes only *central government authorities* and *local government authorities*. The problem of the existence of independent state administration bodies with national competences lies in the fact that the National Council cannot control their activities by the parliamentary interpellation. The reason is that "*a Member of the National Council may address an interpellation to the Government of the Slovak Republic, a member of the Government of the Slovak Republic, or the head of another central body of state administration (...).*" (Art. 80 (1) of the Constitution).

As a rule, "independent" state bodies with regulatory character are public law entities which, according to the law, carry out government administration in defined areas; they are more or less independent from the supreme executive body and they answer to the National Council. There is no reason for independent state bodies to be exempted from the parliamentary control.

A different situation exists in the Czech Republic. The Constitutional Court of the Czech Republic has declared that the Council for Radio and Television Broadcasting should be regarded as a central state administration body: "*According to the Constitutional Court, it is, therefore, necessary to classify as a central state administration body, an authority that fulfills the following criteria: the performance of state administration constitutes a substantial (even if not major) part of the workload of the body, the administrative body performs a national competence and this body is not directly subordinated to another central state authority (...).*" (Pl. ÚS 52/04). In Czech legal theory, it is considered that, despite legislative shifts in the area of positive law, the fundamental problem of constitutional compatibility of the concept of independent administrative authorities, such as their legitimacy, accountability and consistency with the principle of separation of powers, remains unsolved.[5]

The Constitution of Greece is inspiring in this context: "*In cases where the establishment and functioning of an independent authority is regulated by the Constitution, its members shall be appointed for a fixed tenure and shall enjoy personal*

[5] POUPEROVÁ, O.: Ústřední správní úřady – formální, nebo materiální pojetí? [Central administrative authorities – a formal or material concept?] In *Právník,* 2013, No. 1, p. 226; see also POUPEROVÁ, O.: Nezávislé správní úřady [Independent Administrative Agencies]. In *Správní právo*, 2014, No. 4, pp. 209-226; 4; HANDRLICA, J.: Ke koncepci tzv. "nezávislých regulačních orgánů" a k problematice jejich "nezávislosti". [On the concept of the so-called "independent regulators" and the issue of their "independence"]. In *Správní právo*, 2005, No. 4, pp. 222-242; SZEŚCILO, D., JAKUBOWSKI, P.: Independence of regulatory authorities – failed attempt to create fourth branch of Government? Case of Poland https://www.nispa.org/files/conferences/2019/e-proceedings/system_files/papers/independence-of-regulatory-szescilo.pdf (12 November 2019).

and functional independence, as specified by the law (Art. 101a (1)). *Matters concerning the relationship between the independent authorities and the Parliament, and manner in which parliamentary control is exercised, are specified by the Standing Orders of the Parliament*" (Art. 101a (3)).

1.1.4. Local state administration

The fundamental legal basis for the creation, status and competences of local bodies of state administration can be found in Art. 122 of the Constitution and in Law No. 180/2013 Coll. on the Organization of Local Administration. This Law specifies the seat and territorial operation of district offices, and also takes into account the specifics of various sections of state administration. The Law also regulates the competences of the district office in the seat of the region, which (in addition to the district office itself) establishes a special organisational unit, a so-called unit of remedies, to perform tasks related to the management, control and coordination of state administration performance and the performance of state administration at the second level.

1.2. Local self-government

It was stated above that public administration is carried out not only by the state authorities (strictly speaking) but also by the entities of local government. The ratification of the European Charter of Local Self-Government in 1999[6] had significant impact on the current local self-government situation.

1.2.1. Municipality - between civil society and the state?

The phenomenon of a municipality deserves thorough analysis from several aspects. The position of a municipality is interesting in terms of the correlation between civil society and state. A municipality is characterized as a self-governing public corporation which is different from the state. In this sense, it is part of a strongly-structured civil society. On the other hand, the influence of the state on the competences and internal affairs of a municipality is much stronger than other non-state subjects of law.

The municipality as a self-governing corporation has much more permanent character than other legal entities (e.g. associations, commercial companies, but also higher territorial units). It cannot be dissolved on the basis of a decision by its inhabitants. The municipality, unlike other legal entities, always has official competences and it is obliged to deliver certain performance of them.

This means that a municipality is neither a fully homogeneous part of society nor part of the state mechanism in any case. It is possible to assume that a municipality, as a fundamental body in local self-government, constitutes a certain step between civil society and the state. This fact could influence the further development of not only territorial self-government and public administration but also the nature of society.

[6] This was announced by the Ministry for Foreign Affairs of the Slovak Republic in the Collection of Laws under No. 336/2000 Coll., No. 602/2002 Coll. and No. 587/2007 Coll.

That position of the municipality between society and state is mirrored in the non-traditional structure of the Constitution of the Slovak Republic. As a consequence, Chapter Four of the Constitution contains provisions on local self-government (Art. 64-71). In Chapter Two, the Constitution regulates the fundamental rights and freedoms as well as the constitutional (and legal) status of individuals. Chapter Five and the following ones regulate the position and activity of elements of state authority. Hence a logical triad has been created, linking individuals, municipalities (and higher territorial units) and the state. This evokes a conception of the state as the municipality of all the municipalities *(communitas communitatum)*. However, the state has sovereignty in this relationship. The structure of the Constitution of the Slovak Republic, which favors this approach, appears in a certain sense exceptional when compared to most constitutions of sovereign states. They regulate the area of local self-government mostly following the regulation of each particular kind of state power.[7]

1.2.2. Election period of local self-government bodies

In the context of creation of self-government bodies, the matter of their (premature) dissolution is of the highest constitutional importance. However, our Constitution is silent on this matter. The Constitution of the Czech Republic states that "*the law will stipulate under what conditions the new elections to the board of representatives shall be called before the expiration of its term of office*" (Art. 102 (2), second sentence). According to the Constitution of the Portuguese Republic, "*the local authority may only be dissolved on the grounds of serious illegal acts or omissions*" (Art. 242 (2)). The Constitution of the Republic of Poland provides that "*on a motion of the Prime Minister, the Sejm may dissolve a constitutive organ of local government if it has flagrantly violated the Constitution or a statute*" (Art. 171 (3)).

There is also the opposite situation, which raises a constitutional problem of late dissolution. In fact, Law No. 369/1990 Coll. on the Municipal System stipulates that "*the general term of the municipal council shall end when the members of the newly elected municipal council are sworn in*" (Sec. 11 (1), third sentence, while the first sentence indicates that members of the municipal council are elected for a four-year term. The "*mayor's term shall end when the newly elected mayor is sworn in"* (Art. 13 (1), the third

[7] KUKLIŠ, P.: Municipality in a Society: The Case of Slovakia. In *European Review of Public Law*, Vol. 8, 1996, No 2., p. 343; see e. g. GROSPIČ, J.: *K otázkam ústavních základů územní samosprávy.* [On the Constitutional Basis of Local Self-government] In *Právník*, 1995, No. 5; ŘEHŮŘEK, M.: *Štvrtá hlava Ústavy Slovenskej republiky v spoločensko-právnej realite.* [The Fourth Chapter of the Constitution of the Slovak Republic in Social and Legal Reality] In *Právny obzor*, 2002, No. 2; OROSZ, L., MAZÁK, J.: *Obce a samosprávne kraje v konaní pred Ústavným súdom Slovenskej republiky*. [Municipalities and Regions in Proceedings before the Constitutional Court of the Slovak Republic] Košice: Mayor Group s. r. o., 2004; PODHRÁZKY, M. (ed.): *Přehled judikatury z oblasti samosprávy (územní a profesní)* [Selected Case-law in the Field of Self-administration (territorial and professional)]. Praha: Wolters Kluwer ČR, a. s., 2011; TRELLOVÁ, L.: *Ústavnoprávne aspekty územnej samosprávy*. [Constitutional Aspects of Local Self-government] Bratislava: Wolters Kluwer s.r.o., 2018; PALÚŠ, I. et al.: *Formy uskutočňovania obecnej samosprávy*. [The Forms of Local Self-government] Univerzita Pavla Jozefa Šafárika v Košiciach, 2018, pp. 9-55, 123-137.

sentence). The Law on Self-governing Regions also contains a similar provision. It is questionable whether it is appropriate that the ordinary law regulates the term of office of these bodies as the Constitution merely indicates the length of the term. It would be appropriate to adopt a constitutional amendment, similarly as in the case of the President and the Vice-Presidents of the National Council.[8]

Inspiration might be drawn from Art. 35 (3) of the Fundamental Law of Hungary, as it states that "*the mandate of representative bodies shall last until the day of general elections of local government representatives and mayors. If no elections can be held due to a lack of candidates, the mandate of local representative bodies shall be extended until the day of the by-elections. The mandate of mayors shall last until the election of the new mayor.*"

1.2.3. Delegated exercise of state administration

Certain tasks of state administration may be delegated to the municipalities and to the self-governing regions by law if it is more rational and effective (subject to the so-called subsidiarity principle). The state should provide all the funding for the performance of the delegated competences, so there should be no extra costs for self-governing entities.[9]

The Constitution states in Art. 71 (2) that "*the exercise of state administration delegated to a municipality or a higher territorial unit by law is governed and controlled by the Government. Details shall be laid down by law*." In the past, the respective legislation was Law No. 515/2003 Coll. on Regional Offices and District Offices. Part of this law was challenged before the CC. The CC decided that part of one provision did not comply with Art. 71 (2), second sentence and Art. 1(1) of the Constitution. The CC pointed out that "*as to the Constitution, the organisation, management and control of the delegated state administration* [from the state] *to self-government bodies are entrusted to the government.*" (PL. ÚS 11/04). In the opinion of the CC, this provision should be interpreted strictly, and therefore it is not possible (although based on the law) to transfer any organisation and management from the government to the central government authorities. It should be noted that the relevant provision of the current Law No. 180/2013 Coll. respects this decision of the CC.

2. The functioning and activity of public administration

2.1. Generally-binding regulations in the area of original competences of local self-government

The legal basis of the law-making of local self-government bodies in the area of their original competences is Art. 68 of the Constitution, according to which "*in matters of territorial self-government and for securing the tasks of self-government provided by law, the municipality and the higher territorial unit may issue generally-binding regulations.*"

[8] See Art. 89 (3) and Art. 90 (2) of the Constitution.

[9] See Art. 71 (1), the second sentence of the Constitution.

A generally-binding regulation based on this article of the Constitution (as opposed to Art. 71 (2) of the Constitution) is (despite the ambiguous acceptance of this approach)– a primary (original) legislative act in terms of the quasi-pyramidal system of sources of law. This approach is also respected by the Constitution in Art. 125 (1) letters c) and d), the section which deals with the scope of judicial review of normative acts. Any generally-binding regulation issues based on Art. 68 of the Constitution (i.e. in the sphere of the original competence) should be compatible with the Constitution, constitutional laws, international treaties and with laws passed by the National Council. However, any generally-binding regulation issued by a municipality in the sphere of the delegated competences (Art. 71 (2) of the Constitution) should also be compatible with the regulations of the government. Moreover, there is no need for direct authorisation by law for the issuance of regulations under Art. 68, which is not the case for delegated regulations issued based on Art. 71. This means that a local self-government body is authorized to issue original regulations *ex constitutione*, without specific empowerment by law, and it may issue them at any time.

Nevertheless, this competence is limited by the concept of the rule of law. In this context, the limits related to the protection of fundamental rights and freedoms are particularly important. According to the CC, "*the exercise of the legislative power of a municipality affecting a fundamental right or freedom is limited by the relevant constitutional legislation for the fundamental right and freedom in question (...). It is also clear that in assessing the conditions of restriction of fundamental rights and freedoms, it is not sufficient to rely solely on the assessment under that provision in which the rights and freedoms are regulated, as the regulation needs to be reviewed also from the point of view of the general provisions on fundamental rights and freedoms, which are introduced in the second chapter of the Constitution of the Slovak Republic*" (I. ÚS 55/00, and similarly for example decision No. II. ÚS 94/95). The settled case-law of the CC also emphasizes that the original legislative competence of a municipality is limited by Art. 2 (3) of the Constitution, which states that everyone is entitled to do whatever is not prohibited by the law, and he or she may not be forced to do anything that is not prescribed by law.[10]

As mentioned above, generally-binding municipal regulations must be compatible with the Constitution, constitutional laws, state laws and international treaties (Sec. 6 (1) of the Law on the Municipal System). The generally-binding regulations of the self-governing regions must be compatible with the Constitution, constitutional laws, international treaties, state laws, and regulations of the Government (Sec. 8 (1) of Law No. 302/2001 on the self-government of higher territorial units).

In this context it is necessary to draw attention to the disproportionality between the legal limits of compatibility applied to municipal regulations and the regulations of the

[10] See e. g. HEJČ, D.: Zásada zákonnosti jako limit pro ustanovení povinnosti (nejen) k ochraně veřejného pořádku obecně závaznou vyhláškou obce. [Principle of legality as a limit for establishing obligations (not only) to protect public order by a generally-binding regulation of a municipality] In *Právník*, 2019, No. 8, pp. 738-752.

self-governing regions and those applied to other legal acts on the level of ordinary law. The Law on the Self-government of Higher Territorial Units, unlike the Law on the Municipal System, establishes the mandatory compliance of the self-governing regions' regulations with the approximation regulation of the Government. This provision quite clearly contradicts Art. 125 (1) letter c) of the Constitution, according to which the CC decides on conformity of original generally-binding regulations with other legal enactments as mentioned above, however not with regulations of the Government.[11]

The issuing of regulations is entrusted to the municipal councils [Sec. 11 (4) letter g) of the Law on Municipal System] and the regional councils [Sec. 11 (2) letter a) of the Law on Self-government of Higher Territorial Units]. It is questionable whether a municipal council or the council of a region indeed have the exclusive power to issue generally-binding local regulations. For example, a local referendum might be considered to be a concurring means of legislation, i.e. performance of self-government. However, local referendums do not have the limits on the questions which the national referendums have (Art. 93 (3) of the Constitution[12]). Even so, the limit for the validity of thier results is the same as for a national referendum: a majority of voters must participate, and that majority must approve the decision.

2.2. Approximation regulations of the Government

An approximation regulation is an unusual source of law. Its constitutional basis is Art. 120 (2) of the Constitution, according to which "*if laid down by law, the Government shall be authorized to issue regulations on the implementation of the European Agreement Establishing an Association between the European Communities and their Member States on the one part, and the Slovak Republic on the other part, and on execution of international treaties according to Art. 7 (2)*." In this context, following the establishment of the principle of primacy of EU law over the national law, the Constitution also states that implementation of the laws of the EU that require it "*shall be executed by law or a government regulation pursuant to Art. 120 (2).*" This provision is unusual with regard to the concept of the rule of law, because Art. 13 (1) letter c) the Constitution expands the possibilities to impose duties also by government regulation pursuant to Art. 120 (2). For this reason, an approximation regulation can be considered to be a semi-primary source of law while it has problematic democratic legitimacy.[13]

[11] This competence of the CC can be delegated to another court. In fact, such delegation was performed in 2009 except for the review of compatibility with the Constitution. The review is now performed by the administrative courts.

[12] The provision states: "*Basic rights and freedoms, taxes, levies and the state budget may not be the subject of a referendum.*"

[13] KUKLIŠ, P., HODÁS, M.: O súčasnej situácii v slovenskej právnej normotvorbe. [Current situation in the Slovak law-making process] In *Právny obzor*, 2016, No. 6, pp. 477-478, 489-491. See also VETRÁK, M.: Aproximačné nariadenia vlády Slovenskej republiky. [The Approximation Regulations of the Government of the Slovak Republic] In *Právny obzor*, 86, 2003, No. 5, p. 435-455 and PROCHÁZKA, R.: Niekoľko poznámok k aproximačným nariadeniam. [Some Remarks on Approximation Regulations] In *Justičná revue*, Vol. 54, 2002, No. 6-7, pp.722-730.

It is necessary to mention the provision in Law No. 19/2002 Coll. on the conditions of issuance of an approximation regulation by the Government. This provision states that "*details about matters regulated by an approximation regulation can be laid down by a generally-binding regulation of a ministry, another body of central state administration or the National Bank of Slovakia*" (Art. 3 (2)). The original wording of this provision, which regulates the possibility of sub-delegation, was criticized from the point of view of constitutionality, because Art. 123 of the Constitution stipulates that "*the ministries and other bodies of state administration may, on the basis of laws and within their limits, issue generally-binding legal regulations, if empowered to do so by law.*" However, doubts about the compatibility of the current law with the Constitution persist. Moreover, the question of conformity with EU law arises in the ways of its proper implementation.[14]

2.3. Acts of application of administrative law

The application of the norms of administrative law to the facts is an inherent component of everyday activities of public administration bodies. The key legal instrument is Law No. 71/1967 Coll. on Administrative Proceedings. This law is probably the most frequently applied legal instrument from 1968 to the present.

Czech legal theory[15] has defined the constitutional principles which should be followed in administrative procedures. Substantive law is connected with the constitutional principle of legality,[16] principle of material interpretation of constitutional provisions,[17] principle of legal certainty,[18] principle of objectivity,[19] principle of proportionality[20] and principle of equality.[21] Procedural administrative law should follow and respect (among others) the fundamental right to fair trial prescribed by law,[22] the right to participate in proceedings[23] and other procedural rights of the participants, such as the principle of party disposition, the right to be notified of proceedings, the right to

[14] See e. g. HODÁS, M.: Niektoré právno-teoretické problémy preberania smerníc. [Some Theoretical Issues of the Implementation of Directives] In *Komunitárne právo na Slovensku – päť rokov po*. [Community Law in Slovakia – five years after accession] Bratislava: Slovenská asociácia európskeho práva, Bratislavská vysoká škola práva, 2009, p. 43.

[15] For example SVOBODA, P.: *Ústavní základy správního řízení v České republice: právo na spravedlivý proces a české správní řízení*. [Constitutional Basis of Administrative Proceeding in the Czech Republic: right to fair trial and Czech administrative proceedings]. Praha: Linde Praha, a. s. 2007, pp. 348-349. The author's final statement on the correlation of the primary and secondary conceptual attributes of Czech administrative procedure and the constitutional order of the Czech Republic (pp. 352-353) is also inspiring.

[16] Art. 2 (3) and (4) of the Constitution of the Czech Republic (the Czech Constitution); Art. 4 (1) of Charter of Fundamental Rights and Basic Freedoms (the Charter).

[17] Art.1 (1), Art. 9 (1), Art. 87 (1) letters a), b) and d) of the Czech Constitution.

[18] Art. 1 (1) of the Czech Constitution.

[19] Art. 1 (1) of the Czech Constitution.

[20] Art. 4 (4), first sentence of the Charter; Art. 1 (1) of the Czech Constitution.

[21] Art. 1, first sentence, Art. 3 (1) and Art. 4 (3) of the Charter.

[22] Art. 36 para. 1 and 4 of the Charter.

[23] Art. 36 para. 1 and Art. 38 para. 2 of the Charter.

an interpreter, the right to representation and right to legal assistance, prohibition of *denegatio justitiae*, and the right to trial within a reasonable time.[24]

2.4. Measures of a general nature

The instrument of the measure of a general nature is not *expressis verbis* part of the Slovak legal system yet. Nevertheless, it is regulated in fact in several legal instruments, e. g. in Law No. 50/1976 Coll., the Building Law, Law No. 8/2009 Coll. on Road Traffic, Law No. 324/2011 Coll. on Postal Services and in Law No. 351/2011 Coll. on Electronic Communications.

The Czech legal order characterizes these instruments laconically as "*a binding measure of a general nature, which is neither a legal instrument nor a decision*" (Sec. 171 of Law No. 500/2004 Coll. on Administrative Proceedings). The German Law on Administrative Proceedings *(Verwaltungsverfahrensgesetz)* positively defines this institution *(Allgemeinverfügung)* as follows: "*A general measure is an administrative act addressed to a specific group of persons defined on the basis of generally determined or determinable features or relating to the public attribute of a matter or its public use*" (Sec. 35, second sentence).[25] The Austrian legislation does not contain a separate institution of mixed administrative acts. A measure of a general nature *(Allgemeinverfügung)* directed against indefinite addressees and whose subject matter is specific is considered to be a normative administrative act (*Verordnung*).[26]

The CC in this matter held that "*the measures of a general nature are included in the Czech legislation (...) among normative administrative acts and individual administrative acts. They show features of both groups. (...) Acts of mixed nature are standardly enacted in other European countries besides the Czech Republic, at the legislative level, for example, the Federal Republic of Germany (Allgemeinverfügung), Switzerland (Verfügung). (...) Although in the Slovak legal system it is not possible to speak of types of mixed administrative acts having the characteristics of measures of a general nature*

[24] Art. 36 (1) and (4), Art. 37 and Art. 38 (2) of the Charter.

[25] „*Verwaltungsakt ist jede Verfügung, Entscheidung oder andere hoheitliche Maßnahme, die eine Behörde zur Regelung eines Einzelfalls auf dem Gebiet des öffentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach außen gerichtet ist. Allgemeinverfügung ist ein Verwaltungsakt, der sich an einen nach allgemeinen Merkmalen bestimmten oder bestimmbaren Personenkreis richtet oder die öffentlich-rechtliche Eigenschaft einer Sache oder ihre Benutzung durch die Allgemeinheit betrifft.*" https://www.gesetze-im-internet.de/bundesrecht/vwvfg/gesamt.pdf (25 July 2019). In this context, reference should be made to the document of the Council of Europe called Recommendation No. R (87) 16 of the Committee of Ministers on administrative procedures affecting a large number of persons.

[26] SKULOVÁ, S., HEJČ, D., BRAŽINA, R.: Odůvodnění správního rozhodnutí: Revitalizace institutu s dlouhou tradicí. [Reasoning of an Administrative Decision: Revitalization of an Institution with Long Tradition] In *Právník*, 2016, No. 10, p. 906; see also HEJČ, D., BAHÝĽOVÁ, L.: *Opatření obecné povahy v teorii a praxi*. [Measures of a General Nature in Theory and in Practice] Praha: C.H. Beck, 2017; KUKLIŠ, P.: Netradičné právne predpisy? [Unorthodox Legal Acts?] In BREZINA, P., JERMANOVÁ, H. (eds.): *Metamorfózy práva ve střední Evropě VI. Hledá sa Prométheus?* Sborník příspěvků z mezinárodní konference [*Metamorphoses* of Law in Central *Europe VI.*] Plzeň: Západočeská universita v Plzni, Ústav státu a práva AV ČSR, 2018, pp. 199–210.

in a formal sense, since the legislation does not enact this type of administrative acts, undoubtedly mixed administrative acts exist in terms of content, e. g. general permission under the Electronic Communications Law. In the opinion of the Constitutional Court, the nature of a general authorization (an administrative act of mixed nature which also has elements of an individual administrative act) requires a higher level of legal protection against its effects." (I. 354/08).

The CC's finding of a requirement for a higher level of legal protection against the effects of a measure of a general nature, which should be at the level of protection against the effects of a normative administrative act, leads to categorizing this instrument at least as a semi-formal legal instrument of secondary character.

Conclusion

Public administration in the conditions of the Slovak Republic is not ensured only by the above-mentioned entities. There are several other entities that partially carry out public administration. We have to take into account, for example, the direct democratic control of *quangos (quasi-autonomous non-governmental organizations)*.[27]

It is crucial to point out that part of the exercise of public administration seems to be unaffected by constitutional law. For this reason, it is worth considering the principles of good public administration to be of a constitutional nature, the adherence to which should be binding on all public administration entities. It would also be appropriate to establish the constitutional foundations for the activities of professional self-governing bodies. For example, the Constitution of the Kingdom of the Netherlands states that "[the p]*ublic bodies for the professions and trades and other public bodies may be established and dissolved by or pursuant to Act of Parliament. The duties and organization of such bodies, the composition and powers of their administrative organs and public access to their meetings shall be regulated by Act of Parliament. Legislative powers may be granted to their administrative organs by or pursuant to Act of Parliament. Decisions by administrative organs may be quashed only if they are in conflict with the law or the public interest."* (Art. 134 (1) – (3)). "*Rules pertaining to matters in which two or more public bodies are involved shall be laid down by Act of Parliament. These may provide for the establishment of a new public body, in which case Article 134, paragraphs 2 and 3, shall apply.*" (Art. 135) "*Disputes between public bodies shall be settled by Royal Decree unless they fall within the competence of the judiciary or decisions are referred to other bodies by Act of Parliament.*" (Art. 136).

Control of public administration, as well as control by public administration, raises constitutional questions. Local self-government bodies do not have one "management" center, and for this reason it is necessary to ensure a uniform standard of respect for human rights and freedoms throughout the national territory. Perhaps it is not necessary

[27] See e. g. KUKLIŠ, P.: Public Management in the Netherlands from a Slovak Perspective. In VERHEIJEN, T. – COOMBES, D. (eds.): *Public Management Reform. Comparative Experiences from East and West*. European Commission, 1997, pp. 330-331, p. 337.

to recall the ambivalent position of public administration (being both guardian and violator) in relation to human rights and freedoms.

It is appropriate for example to lay down the constitutional foundations of the institution of recovery regime and enforced administration of a municipality (Sec. 19 of Law No. 583/2004 Coll. on Budgetary Rules of Local Self-government). It is also appropriate to pay constitutional attention to many other institutions of the control system, from the substitute performance of some activities (Sec. 5 (3)-(5) and Sec. 18b of the Law on the Municipal System) to the dissolution of a municipal council in the event that it is not possible to perform the tasks of the municipality in another way.[28]

Last but not least, there is also a need to focus on officials and other employees of public administration. Public administration could not be carried out without its staff. This issue might be of constitutional importance and it might deserve constitutional regulation. For example, the Constitution of the Kingdom of the Netherlands states that "*the legal status of public servants shall be regulated by Act of Parliament. Rules regarding employment protection and co-determination for public servants shall be laid down by Parliament.*" (Art. 109). Hence it is advisable to reflect on the constitutional distinction between political positions and positions of civil service and the character of public service in public administration from the point of view of the principle of stability (Sec. 8 of Law No. 55/2017 Coll. on State Service).

Bibliography

ČIČ, M. et al.: *Komentár k Ústave Slovenskej republiky.* [Commentary on the Constitution of the Slovak Republic] Martin: Matica Slovenská, 1997 and 2012 Edition

GROSPIČ, J.: K otázkam ústavních základů územní samosprávy [On the Constitutional Basis of Local Self-government]. In *Právník*, 1995, No. 5

HANDRLICA, J.: *Ke koncepci tzv. "nezávislých regulačních orgánů" a k problematice jejich "nezávislosti"*. [On the concept of the so-called "independent regulators" and the issue of their "independence"]. In *Správní právo*, 2005, No. 4

HEJČ, D.: Zásada zákonnosti jako limit pro ustanovení povinnosti (nejen) k ochraně veřejného pořádku obecně závaznou vyhláškou obce. [Principle of legality as a limit for establishing obligations (not only) to protect public order by a generally-binding regulation of a municipality]. In *Právník*, 2019, No. 8

HEJČ, D., BAHÝĽOVÁ, L.: *Opatření obecné povahy v teorii a praxi* [Measures of a General Nature in Theory and in Practice]. Praha: C.H. Beck, 2017

HODÁS, M.: Niektoré právno-teoretické problémy preberania smerníc [Some Theoretical Issues of the Implementation of Directives]. In *Komunitárne právo na Slovensku – päť rokov po* [Community Law in Slovakia – five years after accession]. Bratislava: Slovenská asociácia európskeho práva, Bratislavská vysoká škola práva, 2009

KUKLIŠ, P.: Municipality in a Society: The Case of Slovakia. In *European Review of Public Law*, Vol. 8, 1996, No. 2

KUKLIŠ, P.: Public Management in the Netherlands from a Slovak Perspective. In VERHEIJEN, T. – COOMBES, D. (eds.) *Public Management Reform. Comparative Experiences from East and West*. European Commission, 1997

[28] See e. g. KUKLIŠ, P., VIROVÁ, V.: *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie)*. [Selected Issues of Local Self-government (from a comparative perspective)] Bratislava: Eurokódex, 2012, pp. 43-44.

KUKLIŠ, P.: Netradičné právne predpisy? [Unorthodox Legal Acts?]. In BREZINA, P., JERMANOVÁ, H. (eds.): *Metamorfózy práva ve střední Evropě VI. Hledá sa Prométheus?* Sborník příspěvků z mezinárodní konference [Metamorphoses of Law in Central Europe VI.] Plzeň: Západočeská universita v Plzni, Ústav státu a práva AV ČSR, 2018

KUKLIŠ, P., HODÁS, M.: O súčasnej situácii v slovenskej právnej normotvorbe [Current situation in the Slovak law-making process]. In *Právny obzor*, 2016, No. 6

KUKLIŠ, P., VIROVÁ, V.: *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie)* [Selected Issues of Local Self-government (from a comparative perspective)]. Bratislava: Eurokódex, 2012

OROSZ, L., MAZÁK, J.: *Obce a samosprávne kraje v konaní pred Ústavným súdom Slovenskej republiky* [Municipalities and Regions in Proceedings before the Constitutional Court of the Slovak Republic]. Košice: Mayor Group s. r. o., 2004

PALÚŠ, I. et al.: *Formy uskutočňovania obecnej samosprávy* [The Forms of Local Self-government]. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2018

PODHRÁZKY, M. (ed.): *Přehled judikatury z oblasti samosprávy (územní a profesní)* [Selected Case-law in the Field of Self-government (territorial and professional)]. Praha: Wolters Kluwer ČR, a. s., 2011

POSLUCH, M., CIBULKA, Ľ.: *Štátne právo Slovenskej republiky*. [The State Law of the Slovak Republic]. Šamorín: Heuréka, 2009

POUPEROVÁ, O.: Ústřední správní úřady – formální, nebo materiální pojetí? [Central administrative authorities – a formal or material concept?]. In *Právník,* 2013, No. 1

POUPEROVÁ, O.: Nezávislé správní úřady [Independent Administrative Agencies]. In *Správní právo*, 2014, No. 4

PROCHÁZKA, R.: Niekoľko poznámok k aproximačným nariadeniam [Some Remarks on Approximation Regulations]. In *Justičná revue*, 2002, No. 6-7

ŘEHŮŘEK, M.: Štvrtá hlava Ústavy Slovenskej republiky v spoločensko-právnej realite [The Fourth Chapter of the Constitution of the Slovak Republic in Social and Legal Reality]. In *Právny obzor*, 2002, No. 2

SKULOVÁ, S., HEJČ, D., BRAŽINA, R.: Odůvodnění správního rozhodnutí: Revitalizace institutu s dlouhou tradicí. [Reasoning of an Administrative Decision: Revitalization of an Institution with Long Tradition]. In *Právník*, 2016, No. 10

SVOBODA, P.: *Ústavní základy správního řízení v České republice: právo na spravedlivý proces a české správní řízení* [Constitutional Basis of Administrative Proceeding in the Czech Republic: right to fair trial and Czech administrative proceedings]. Praha: Linde Praha, a. s., 2007

SZEŚCILO, D., JAKUBOWSKI, P.: Independence of regulatory authorities - failed attempt to create fourth branch of Government? Case of Poland
https://www.nispa.org/files/conferences/2019/e-proceedings/system_files/papers/independence-of-regulatory--szescilo.pdf

TRELLOVÁ, L.: *Ústavnoprávne aspekty územnej samosprávy* [Constitutional Aspects of Local Self-government]. Bratislava: Wolters Kluwer s.r.o., 2018

VETRÁK, M.: Aproximačné nariadenia vlády Slovenskej republiky. [The Approximation Regulations of the Government of the Slovak Republic]. In *Právny obzor*, 2003, No. 5

VRABKO M. et al.: *Správne právo hmotné. Všeobecná časť.* [The Substantive Administrative Law: General Issues]. Bratislava: C. H. Beck, 2012

Legislation

Constitution of the Slovak Republic
Constitution of the Czech Republic
Constitution of Greece
Fundamental Law of Hungary
Constitution of the Italian Republic

Constitution of the Kingdom of the Netherlands
Constitution of the Republic of Poland
Constitution of the Republic of Portuguese
Constitutional Act No. 227/2002 Coll. on Security of State at War, Status of War, Emergency, and State of Emergency
the European Charter of Local Self-Government
German Act on Administrative Proceeding
Czech Act on Administrative Proceeding
Act No. 71/1967 Coll. on Administrative Proceeding
Act No. 221/1996 Coll. on Territorial and Administrative Structure of the Slovak Republic
Act No. 369/1990 Coll. on Municipal System
Act No. 302/2001 Coll. on Self-government of Higher Territorial units (Act on Self-governing Regions)
Act No. 583/2004 Coll. on Budgetary Rules of Local Self-government
Act No. 180/2013 Coll. on the Organization of Local Administration
Act No. 19/2002 Coll. on Conditions of Issuing an Approximation Regulation of the Government
Act No. 55/2017 Coll. on State Service

Table of Cases

Decision of the Constitutional Court of the Slovak Republic No. PL. ÚS 22/95
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Decision of the Constitutional Court of the Slovak Republic No. II. ÚS 31/99
Decision of the Constitutional Court of the Slovak Republic No. I. ÚS 55/00
Decision of the Constitutional Court of the Slovak Republic No. PL. ÚS 11/04
Decision of the Constitutional Court of the Slovak Republic No. I. ÚS 354/08
Decision of the Constitutional Court of the Czech Republic No. Pl. ÚS 52/04

Other

Recommendation No. R (87) 16 of the Committee of Ministers on administrative procedures affecting a large number of persons
Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration