

**Research Article**

**THE PROSECUTORIAL MONOPOLY  
OF THE SLOVAK PUBLIC PROSECUTION SERVICE:  
NO ACCESS TO JUSTICE FOR THE INJURED PARTY?**

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**Summary:** 1. Introduction. – 2. Public Prosecutor's Office of the Slovak Republic: The Authority with State Monopoly on Prosecution. – 3. Decision-making Possibilities of the Slovak Public Prosecutor in Pre-trial Proceedings. – 4. Are the Possibilities of Controlling the Decisions of Public

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Prosecutors in the Slovak Pre-trial Proceedings Sufficient? – 5. What is the Way out of the Current Situation? (Considerations *lex ferenda*). – 6. Conclusions.

### **Abstract**

*The recodification of criminal law realised in the Slovak Republic in 2005 brought several new elements to criminal proceedings. One of them was the expansion and significant strengthening of the discretion of the public prosecutor in criminal proceedings. However, this authority of the public prosecutor's office is, in many cases, perceived sensitively and controversially in Slovak society, especially in connection with many cases and scandals, when the prosecutor simply stated that 'the act did not occur'. One of the related problems is the fact that the injured party in the Slovak Republic has essentially no powers that would, independently of the prosecutor's office, ensure the control of the prosecutor's discretionary powers directly through an independent and impartial court. This situation also stems from the fact that the public prosecutor's office has a prosecution monopoly in Slovak criminal proceedings. However, the current prosecution monopoly of the prosecutor's office is not a rational consequence of its historical development in our territory but a consequence of the coup d'état in 1948 and the subsequent onset of the communist regime. The possibility for other entities (e.g., the injured party) to exercise their rights through criminal law institutions has thus been minimised.*

*Based on the above, the aim of this paper is to examine the existing scope of the discretion of public prosecutors in Slovakia, analyse the possibilities of controlling the exercise of these powers, and answer the question of how to improve the current possibilities of the control.*

**Keywords:** *Prosecutor's Office of the Slovak Republic, public prosecution service, prosecutorial monopoly, injured party, discretionary powers*

## **1 INTRODUCTION**

The recodification of criminal law realised in the Slovak Republic in 2005 brought several new elements to criminal proceedings. One of them was the extension of the application of the principle of opportunity in the activities of the Public Prosecutor's Office of the Slovak Republic, which resulted in a significant strengthening of the discretionary powers of the prosecutor in criminal proceedings. It is the discretionary powers that enable the public prosecutor to issue decisions in criminal proceedings, which by their nature often resemble court decisions on guilt and punishment. By adopting such an amendment, the legislator tried to find a way to unburden the courts and resolve cases of the so-called 'trivial offences' outside of time-consuming and costly criminal proceedings before a court. However, according to the current legislation, such a broad conception of the discretionary powers of the public prosecutor raises certain problems, which we would like to highlight in the following paper.

It should be pointed out that Slovak scientific literature is not directly dealing with the issue of prosecutorial monopoly of the Slovak Public Prosecution Service and the possibilities to contest inadequate decisions of the Public Prosecutor. Analysis and examination of this topic in Slovak

scientific papers are completely absent. Slovak legal science only partially deals with the selected elements of the topic examined. Firstly, after the recodification of Slovak criminal law was finalised, we can mention a publication by M Marková, who notes alternative ways of solving criminal cases with reference to the importance of enforcing the principle of opportunity in the Slovak criminal procedure. She pays special attention to trends in diversion proceedings and their possible impact on strengthening the position and consolidating the influence of the injured party and the accused on the course of criminal proceedings.<sup>3</sup> Another author, A Kristková, deals with the principle of legality and opportunity in criminal proceedings. She characterises the basic concepts in general and then specifically in criminal proceedings. She also addresses the new pragmatic notion of opportunity and the application of this principle in the absence of public interest and in cases where the public interest has been weakened but has not disappeared.<sup>4</sup> Similarly, K Kandová, in her paper, aims to verify the validity of the statement about the connection of absolute theories of punishment with the principle of legality on the one hand and relative theories of punishment with the principle of opportunity on the other. To this end, she outlines the main theoretical background of the examined criminal theories, the basic principles of criminal procedure, and other related categories.<sup>5</sup>

A relatively important paper connected with the issue we examine is the paper by I Galovcová. This author states that the decision not to prosecute a suspect represents an alternative way of terminating criminal proceedings in a narrowly defined range of criminal cases. This is another element of opportunity gradually introduced into the criminal process and weakens the principle of legality. The author points out the conditions of application of this procedural institution and reflects on its contribution in relation to the consequences associated with another non-systemic intervention in the criminal code. She is critical of the effort to replace the purpose of the defunct substantive institution of active repentance for corrupt crimes with a procedural institution that interferes with the standard criminal process and its basic principles.<sup>6</sup>

A partially relevant paper is also that of T Gřivna, who deals with the development of the institution of private prosecution in criminal proceedings and its meaning in general, not excluding its comparison with the institution of the consent of the injured party to criminal prosecution. He also deals with foreign comparisons.<sup>7</sup> The issue of private indictment is also addressed by A Tibitzlová, who is critical of this institution. Her paper deals with the institution

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<sup>3</sup> M Marková, *Odklony – alternatívne spôsoby riešenia trestných vecí a ich význam pre racionalizáciu trestného konania i v súvislostiach so zavádzaním prvkov oportunity do trestného poriadku* [transl: *Diversions – alternative ways of solving criminal cases and their importance for the rationalization of criminal proceedings and in connection with the introduction of elements of opportunity into the criminal code*] (Trnava University 2005) 261.

<sup>4</sup> A Kristková 'K legalitě a oportunitě v českém trestním řízení' [transl: *On legality and opportunity in Czech criminal proceedings*] (2014) 18(4) *Trestní právo* 4.

<sup>5</sup> K Kandová 'Trestně procesní zásady legality a oportunity ve světle trestních teorií' [transl: *Criminal procedural principles of legality and opportunity in the light of criminal theories*] (2018) 157(7) *Právník* 582.

<sup>6</sup> I Galovcová 'Rozhodnutí o nestíhání podezřelého – (ne)důvodný zásah do standardního trestního procesu?' [transl: *Decision not to prosecute the suspect – (un)justified interference in the standard criminal procedure?*] (2019) 52(2) *Kriminalistika* 83.

<sup>7</sup> T Gřivna, *Soukromá žaloba v trestním řízení* [transl: *Private indictment in criminal proceedings*] (Karolinum 2005).

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of private indictment in criminal proceedings, and the author, as an opponent of this possibility, focuses on the criticism and possible negatives and disadvantages of this institute.<sup>8</sup>

As can be seen, the existing papers do not pay attention to the fundamental problems arising from the discretionary powers of the public prosecutor and the possibilities to contest inadequate decisions of the public prosecutor. That is why in this paper, we look at this neglected issue more closely, and through the generalisation and abstraction, we are trying to bring new views and opinions to the (essentially non-existent) scientific debate in Slovak jurisprudence.

## **2 PUBLIC PROSECUTOR'S OFFICE OF THE SLOVAK REPUBLIC: THE AUTHORITY WITH STATE MONOPOLY ON PROSECUTION**

In the Slovak scientific literature, the Public Prosecutor's Office of the Slovak Republic belongs to one of the control authorities for the protection of law.<sup>9</sup> Its basic function is the protection of objective law and the defence of the public interest. On the basis of the nature of the legal means granted to the prosecutor's office by Act no. 153/2001 Coll. on the Prosecution Service, we can deduce that this state body performs preventive, repressive, restitution, and sanction activities.<sup>10</sup> The Prosecutor's Office of the Slovak Republic itself is defined as 'an autonomous, hierarchically arranged, unified system of state bodies headed by the Prosecutor General, in which public prosecutors operate in relations of subordination and superiority'.<sup>11</sup>

The Slovak Public Prosecutor's Office performs an important and irreplaceable role in the state, which is clearly formulated not only in the Constitution of the Slovak Republic but also in Act no. 153/2001 Coll. It is the protection of the rights and protected interests of natural and legal persons by the law. It follows from the role thus defined that the Prosecutor's Office of the Slovak Republic serves not only to represent the interests of the state, but in the conditions of the Slovak Republic, it can be considered a universal defender of legality which fulfils its mission in the public interest.

Tasks that fall within the competence of the Prosecutor's Office of the Slovak Republic are performed by the Prosecutor's Office of the Slovak Republic through its bodies – public prosecutors. They exercise the powers of this law protection authority in the following areas:

- A. Prosecution of persons suspected of having committed criminal offences and supervision over observance of the law prior to the commencement of criminal prosecution in the

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<sup>8</sup> A Tibitanzlová 'Kritika soukromé žaloby v trestním řízení [transl: Criticism of private lawsuits in criminal proceedings]' (2015) 14(9) *Trestněprávní revue* 216.

<sup>9</sup> J Svák, B Balog, L Polka, *Orgány ochrany práva [transl: Law protection authorities]* (Wolters Kluwer 2017); J Ivor, P Polák, J Záhora, *Trestné právo procesné I: Všeobecná časť [transl: Criminal procedural law I: general part, 2nd edition]* (Wolters Kluwer 2021); J Mihálik, B Šramel 'Supervision of public prosecution service over public administration: The case study of Slovakia' (2018) 17(2) *Viešoji politika ir administravimas* 192; B Šramel 'Ústavné postavenie prokuratúry SR a niektoré otázky týkajúce sa jej nezávislosti [The constitutional status of the Prosecutor's Office of the Slovak Republic and some issues concerning its independence]' (2012) 64(1) *Justičná revue* 11.

<sup>10</sup> J Ivor, P Polák, J Záhora (n 9).

<sup>11</sup> Art 2 of Act no 153/2001 Coll. on the Prosecution Service as amended by later legislation ('zákon č. 153/2001 Z. z. o prokuratúre') <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/153/20210101>> accessed 7 February 2022.

pre-trial proceedings. In this case, it is the competence of the prosecutor's office in the field of criminal justice. The specific powers of the public prosecutor regarding criminal prosecution and supervision can be found in the Criminal Procedure Code no. 301/2005 Coll. They include, in particular, supervision of the observance of law during the pre-trial proceedings, filing the indictment, filing a motion to approve an agreement on guilt and punishment or filing another motion after the pre-trial proceedings, and, last but not least, securing the rights of the injured party under the Criminal Procedure Code, Act no. 514/2003 Coll. on liability caused during the exercise of public authority, Act no. 215/2006 Coll. on compensation of persons affected by violent crimes, and Act no. 256/1998 Coll. on witness protection.

- B. Supervision of the observance of law in places where persons are deprived of their liberty or persons whose personal liberty is restricted by a decision of a court or other authorised state body. The public prosecutor shall ensure that in places of detention, imprisonment, disciplinary punishment of soldiers, protective treatment, protective education, institutional treatment, or institutional education on the basis of a court decision, as well as in police detention cells, persons are held only on the basis of a decision of a court or other authorised state body on deprivation or restriction of personal liberty. In addition, it also ensures that laws and other generally binding legal regulations are observed in these places.
- C. Exercising their powers in court proceedings. In this case, we can talk about the competence of the prosecutor's office, both in the criminal area and in the civil area. In both of these areas, the prosecutor's office performs important tasks, but these differ in the individual procedures as well as in the means and methods used. Specific powers relating to the representation of a public prosecution before a criminal court are defined in Act no. 301/2005 Coll. – Criminal Procedure Code. In the area of civil proceedings, the public prosecutor acts as a public interest defender before a civil court. In this context, the prosecutor's office is also referred to as a body for the protection of objective law. The individual powers of the prosecutor in this area are defined in the Civil Dispute Code (Act no. 160/2015 Coll.), as well as in the Civil Non-dispute Code (Act no. 161/2015 Coll.).
- D. Representation of the state in court proceedings, if so provided by a special law. These are mainly the cases where the public prosecutor represents the state in filing a motion to initiate proceedings before a civil court and in proceedings before this court in connection with violation of provisions of generally binding legislation concerning the transfer of state-owned property to other persons, especially Act no. 92/1991 Coll. on conditions for the transfer of the state property to other persons and Act no. 278/1993 Coll. on the administration of state property. It can be said that it is partly the performance of functions similar to the so-called financial public prosecutor's office

- existing in the Slovak territory until 1952. In the past, it represented the state in property matters.
- E. Supervision over the observance of law by public administration bodies. In this case, it is the exercise of the powers of the prosecutor's office in the so-called non-criminal area. Within its framework, the prosecutor supervises the observance of laws and other generally binding legal regulations by public administration bodies by reviewing the legality of their decisions and generally binding legal regulations issued by them, conducting legality control, and also exercising an advisory function at public administration meetings.<sup>12</sup>
- F. Participation in the preparation and implementation of preventive measures aimed at preventing violations of laws and other generally binding legal regulations and participation in the elimination of the causes and conditions of crime and in the prevention and suppression of crime. This competence of the public prosecutor's office is not regulated by any special legal regulation – it follows exclusively from Art. 4 (1) of Act no. 153/2001 Coll. This is a general provision, which is reflected in several duties and requirements in the practical activities of the prosecutor. The prosecutor should, in the first instance, exercise his or her duties fairly, impartially, and objectively, respect and protect fundamental human rights and freedoms, and ensure that the criminal justice system operates as efficiently and expeditiously as possible. The public prosecutor must also avoid any discrimination on any grounds, such as sex, race, colour, language, religion, political opinion, national or social origin, membership of a national minority, property, birth, medical condition, disability, or other reason.<sup>13</sup> The public prosecutor must monitor the equality of each citizen before the law and take into account the situation of the suspect and all the circumstances of the case, whether for the benefit or to the detriment of the suspect. In addition, the prosecutor must take into account the interests of witnesses and victims and ensure that they are informed of their rights and the development of criminal proceedings and that the necessary measures are taken to protect them physically and to protect their personal lives. In cases where the perpetrator is a juvenile or the victim is a child, the prosecutor is obliged to pay attention to strengthening the educational influence of criminal proceedings and being particularly sensitive in individual procedural acts.
- G. Participation in law-making. Although the Prosecutor's Office of the Slovak Republic does not have the right of legislative initiative (the right to submit its own draft laws to the National Council of the Slovak Republic for approval), it may indirectly participate in the creation of legal regulations. Act no. 153/2001 Coll. allows the Prosecutor General to submit to the Government of the Slovak Republic suggestions for the adoption of laws

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<sup>12</sup> J Mihálik, B Šramel (n 9).

<sup>13</sup> P Szymaniec, *Exemptions to Generally Binding Laws in the Name of Religious Freedom as a Problem of Contemporary Legal Philosophy and Theory* (Masarykova univerzita 2017).

and their amendments. The prosecutor's office can thus address its practical experience with the application of laws directly to the Ministry of Justice, which, on the basis of its initiatives, can submit to parliament any proposals for the approval of laws.<sup>14</sup> In addition, the Prosecutor General is entitled to submit motions for the adoption of laws, their amendments, and amendments to the Speaker of the National Council of the Slovak Republic. In this way, the prosecutor's office can achieve the transformation of its practical experience with the application of laws in the fight against crime or in the performance of other tasks directly into legislative proposals, which, once approved by the legislature, may eventually become a general statute (Act).

- H. Execution of other tasks, if so provided by a special law or an international agreement declared in the manner prescribed by law. This competence leaves the possibility to extend the competence of the public prosecutor's office for the purpose of execution of other tasks. If it is socially necessary, it is enough to adopt an ordinary law and the Slovak Public Prosecutor's Office may be entrusted with tasks that it has not yet performed. As regards mutual recognition of judicial decisions in criminal law in the European context, such a law is, for example, Act no. 154/2010 Coll. on the European Arrest Warrant, which sets out important tasks for the Public Prosecutor's Office (Regional Prosecutor's Office) in connection with the European Arrest Warrant proceedings. These are the acts of the public prosecutor by which (s)he intervenes into the execution of the European arrest warrant if the judicial authorities of the Slovak Republic are. First, the authorities issuing the European arrest warrant, and second, the authorities executing the European arrest warrant. Not only at the national level but also at the EU level, the public prosecutor plays an important procedural role in the issuing and the execution of the European arrest warrant.<sup>15</sup> Its role has been repeatedly confirmed by the Court of Justice of the European Union.<sup>16</sup> Another example in the area of mutual recognition of judicial decisions in criminal law is Act no. 549/2011 Coll. on the Recognition and Enforcement of Decisions

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<sup>14</sup> J Mihálik, B Šramel 'Constitutional and Legal Foundations for Local Self-Government 'Law-making: Does the Slovak Republic Need More Precise Legal Regulation?' (2019) 17(3) *Lex Localis* 393.

<sup>15</sup> L Klimek, *European arrest warrant* (Springer, 2015).

<sup>16</sup> Judgment of the Court of Justice of the European Union of 27 May 2019 – Case C-509/18 – PF <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=A65CFF1BACD6B67895D40FD473392?text=&docid=214465&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=304505>> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 9 October 2019 – Case C-489/19 PPU – NJ <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=218890&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=305328>> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 12 December 2019 – Joined Cases C-566/19 PPU and C-626/19 PPU – JR & YC <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305450>> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 12 December 2019 – Case C-625/19 PPU – XD <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=221513&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305561>> accessed 13 December 2021.

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Imposing Criminal Sanction Involving Deprivation of Liberty in the European Union. This law regulates national proceedings on, first, transmitting a decision imposing criminal sanction involving deprivation of liberty in another member state of the EU, and second, recognition and enforcement of such foreign decisions, i.e., decisions transmitted from other member states to Slovakia. It is considered as one of the most important national laws incorporating modern issues concerning recognition of foreign decisions of this type.<sup>17</sup> In case the court decides on recognition and enforcement of foreign decision involving deprivation of liberty, it shall consult it with the prosecutor; if the prosecutor does not agree with its decision (on recognition or on non-recognition of the decision), (s)he is eligible to appeal against it.

Of all the above types of competence, the most important competence for the Slovak Prosecutor's Office is the execution of criminal prosecution. In recent years, significant changes have been made in the Slovak legal system, which have led to the strengthening of the power of the prosecutor's office to apply the so-called diversions. Their essence lies in the possibility of the prosecutor's office to decide not to prosecute the perpetrator. However, this power of the prosecutor's office is in many cases perceived sensitively and controversially in Slovak society, especially in connection with many cases and scandals, when the public prosecutor simply stated that 'the act did not occur'.<sup>18</sup> It should be remembered that in the Slovak legal system, the public prosecutor's office is the state body that has a monopoly on the prosecution of criminal offences. This means that an entity other than the Public Prosecutor's Office of the Slovak Republic does not have the authority to prosecute and decide on filing the indictment to a criminal court. The only exception is the prosecution of the President, where the plaintiff is the National Council of the Slovak Republic. In this case, the indictment is filed to the court by the parliament, not by the public prosecutor.<sup>19</sup> However, this is an exception arising from the position of the prosecuted entity (head of state). In all other cases, the Public Prosecutor's Office of the Slovak Republic has this exclusive authority to prosecute or to file an indictment. Such a state monopoly on the prosecution of criminal matters is therefore unlimited. The philosophy of such an approach is based on the fact that only acts of greater seriousness are generally considered criminal, and it is therefore in the public interest that these acts be prosecuted by the state and its authority (public prosecutor's office). Widespread arguments include, in particular, that other entities, e.g., the injured parties are generally interested in damages only and thus, above all, in a civil action, not in a criminal action (indictment). For this reason, the prosecution must be taken over and carried out by an impartial and unbiased state body. On the other hand, the public prosecutor –

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<sup>17</sup> S Ferenčíková 'Analysis and evaluation of the legal regulation, de lege lata, concerning the imposition of a custodial sentence in the Slovak Republic' (2020) 10(3) *Sociopolitical Sciences*.

<sup>18</sup> See, for instance, <https://domov.sme.sk/c/20534115/prokuratura-definitivne-rozhodla-o-weissovi-skutok-sa-nestal.html>; <https://www.topky.sk/cl/100313/1649739/Skutok-sa-nestal-a---Prepusteny-kriminalnik-podla-trestne-oznamenie-na-markizacku-Kovesovu->; <https://www.aktuality.sk/clanok/cbtyzdx/generalna-prokuratura-zrusila-obvinenie-aj-zoroslavovi-kollarovi-podla-namestnika-kanderu-chybaju-dokazy/>; <https://dennikn.sk/2520767/zozilinku-az-mrazi/?ref=tit>; <https://www.sevis.sk/page/index.php/sk/pohlad-pravnika/item/689-skutok-sa-nestal-a-co-moze-robit-poskodeny.html>.

<sup>19</sup> B Šramel, P Horváth, J Machyniak, 'Peculiarities of prosecution and indictment of the president of the Slovak Republic: Is current legal regulation really sufficient?' (2019) 8(3) *Social Sciences: Open Access Journal* 13.



or Prosecutor's Office – does not have unlimited 'influence' in criminal proceedings. As regards its 'breaks', the state guarantees the right to a defence, in particular, as regards suspect or convicted.<sup>20</sup>

It should be noted, however, that in many European countries, the state monopoly on prosecution is not absolute. On the contrary, it is limited to some extent. In this context, O Suchý states that in many European countries, certain types of criminal offences are considered by the legislator to be 'private prosecution offences', and thus their prosecution is left to the discretion of the injured parties.<sup>21</sup> These are mainly criminal offences that have violated legal individual rights, such as insult, defamation, minor bodily harm, violation of domestic freedom, or threat. The legislator here is based on the belief that the prosecution of such acts is not generally in the public interest and is a private matter for persons who have been harmed by crime.<sup>22</sup> In some countries, the power to prosecute the same offences is granted to public authorities as well as to private individuals or public or private organisations. The law grants the power to prosecute individuals and organisations independently of the prosecutor's decision. In the Slovak Republic, however, such a possibility is not given to private entities. In the Slovak Republic, private entities have no way to influence the decision-making activities of prosecutors.<sup>23</sup>

### **3 DECISION-MAKING POSSIBILITIES OF THE SLOVAK PUBLIC PROSECUTOR IN THE SLOVAK SYSTEM OF JUSTICE**

Criminal proceedings are generally characterised by the fact that the bodies active in criminal proceedings and the court are obliged to act *ex officio* whenever the conditions are met.<sup>24</sup> These bodies are obliged to perform individual procedural acts independently of other entities, while they must always act proactively and independently and must not wait for possible suggestions for the execution of a procedural act. This obligation follows from the application of the principle of officiality in criminal proceedings, which is the basic mover of criminal proceedings covering its entire course. The principle of officiality manifests itself from the beginning of criminal proceedings until their end and prevents criminal offences from remaining unpunished and, at the same time, allows for the observance of uniform rules laid down by law in their criminal prosecution.<sup>25</sup>

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<sup>20</sup> P Čopko, S Romža, *Obhajoba obvineného v prípravnom konaní [transl: Defense of convicted person in pre-trial proceedings]* (Vydavateľstvá a nakladateľstvá Aleš Čeněk 2018).

<sup>21</sup> O Suchý 'Odklon v trestním řízení [transl: Diversion in criminal proceedings]' (1991) 130(3) *Právník* 248.

<sup>22</sup> *Ibid*, 249.

<sup>23</sup> On the possibility of the public to influence the decision-making activities of other authorities in the Slovak Republic, see T Alman 'Possibilities of the public to influence decision-making of local self-government bodies' (2020) 9(2) *Political Science Forum* 53-59.

<sup>24</sup> J Jelínek et al., *Trestní právo procesní [transl: Criminal procedural law, 5th edition]* (Leges 2018).

<sup>25</sup> B Šramel 'Privatizácia trestného konania: cui bono?' [Privatisation of criminal proceedings: cui bono?] (2013) 19(6) *Bulletin slovenskej advokácie* 31.

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Closely related to the principle of officiality is the principle of legality, which expresses the prosecutor's obligation to prosecute all criminal offences of which he has become aware.<sup>26</sup> The purpose of the principle of legality is, above all, to ensure the criminal prosecution of all criminal offences and thus to implement the monopoly right of the state to administer justice and to punish offenders. Only the state, through its body – the public prosecutor – is entitled and at the same time obliged to prosecute its citizens and thus protect the whole of society from committing further crimes.<sup>27</sup> In addition, the principle of legality is a basic condition for ensuring the equality of citizens before the law and a basic precondition for achieving a general preventive effect consisting in deterring other persons from committing a crime.<sup>28</sup>

By performing the duties of the public prosecutor arising from the principle of legality, the public prosecutor contributes to the confirmation of citizens that all crimes committed will be prosecuted and fairly punished (preventive and repressive function of criminal law).<sup>29</sup> However, strict adherence to the principle of legality can be in many cases considered to be counterproductive, too harsh, and does not have to lead to the basic purpose of criminal proceedings. Criminal law based on the principles of humanism is not aimed (and cannot be aimed) at excessive or unnecessary persecution of citizens. For this reason, too, the Criminal Procedure Code provides for several exceptions to the principle of legality, including cases where the public prosecutor does not have to prosecute criminal offences ((s)he has the possibility to prosecute, not the duty). This is the case where the legislator grants the public prosecutor the right to decide whether to prosecute a particular person or crime. *De facto*, it is the influence of the so-called principle of opportunity, where the public prosecutor can proceed differently than by filing the indictment. For that reason, (s)he is granted the so-called discretionary powers allowing exercising discretion when deciding how to settle a criminal case. Thus, the discretionary rights result from the principle of opportunity, the application of which has been considerably strengthened, especially after the recodification of criminal law in the Slovak Republic. In this context, the literature emphasises that the penetration of the elements of the principle of opportunity has become a significant trend in modern criminal policy in recent years, not only in the Slovak Republic, but also in many other countries, such as France, Holland, Belgium, Germany, and Great Britain.<sup>30</sup>

The essence of the principle of opportunity, as we have already indicated, is that the public prosecutor does not have to initiate criminal proceedings and prosecute the accused, even if there is sufficient evidence of the guilt. Therefore, under the principle of opportunity, the public prosecutor has the discretion as to whether there is a reason to prosecute a particular offender. In most cases, the prosecutor's discretion is based mainly on an assessment of the degree of

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<sup>26</sup> B Šramel, J Machyniak, D Guľan, 'Slovak criminal justice and the philosophy of its privatization: an appropriate solution of problems of Slovak justice in the 21st century?' (2020) 9(2) *Social Sciences: Open Access Journal* 4.

<sup>27</sup> T Gřivna, 'Několik poznámek k zásadě oportunitu v návrhu věcného záměru nového trestního řádu [transl: A few remarks on the principle of opportunity in the draft of the new Criminal Procedure Code]' (2004) 7(12) *Trestní právo* 3.

<sup>28</sup> K Kandová (n 5).

<sup>29</sup> A Letková, A Schneiderová, 'The Value of Justice in Czechoslovak Criminal Law Norms in the 20th Century' (2021) 2(10) *Access to Justice in Eastern Europe* 91.

<sup>30</sup> M Marková (n 3).

public interest in prosecuting a specific crime and punishing its perpetrator. The principle of opportunity has a number of proponents, arguing in particular that opportunity allows a proportionate response to society's need to punish certain offences, further contributes to material justice instead of formal justice, and facilitates the right to a trial without undue delay.<sup>31</sup> It can also be stated that the principle of opportunity also significantly contributes to the proper conduct of adversarial proceedings before a court, as it prevents trivial cases from being heard in financially and time-consuming court proceedings.

The principle of opportunity applied in the proceedings and decisions of the public prosecutor is expressed in several provisions of the Criminal Procedure Code and is reflected in specific discretionary powers of the public prosecutor. The public prosecutor can use his/her discretion throughout the pre-trial proceedings, even prior to the commencement of criminal prosecution, where (s)he is entitled to suspend the case if the criminal prosecution is irrelevant ('inexpedient').<sup>32</sup> It is the expediency of criminal prosecution that, in the light of the principle of opportunity,<sup>33</sup> is a decisive factor on the basis of which the public prosecutor concludes that there is no need for criminal prosecution. However, the prosecutor cannot decide on the expediency of criminal prosecution on the basis of arbitrary behaviour. On the contrary, his/her discretion must be based on the legal boundaries specified in Art. 215 (2) of Criminal Procedure Code. Thus, if the public prosecutor, after examining the criminal report, concludes that the proceedings specified therein fulfil the characteristics of the factual nature of the criminal offence, (s)he may suspend the case only if the criminal prosecution would be inexpedient. The Criminal Procedure Code lists four legal boundaries (criteria) on the basis of which the public prosecutor evaluates the (in)expediency of prosecution. In the first case, the public prosecutor may assess a criminal prosecution as inexpedient if (s)he considers the sentence in which the prosecution may result to be fully insignificant compared with the sentence for another act the accused has already been charged with. In this case, the opinion of the public prosecutor is based on a comparison of the amount of the sentence that was lawfully imposed on the accused for another crime and the sentence that should be imposed for the given crime if the criminal prosecution was initiated. The second criterion of inexpediency is that the act committed by the accused has already been ruled by another body in a disciplinary, reprimand way or a foreign court or agency, and this decision may be considered satisfactory. When assessing expediency, the public prosecutor evaluates in particular the seriousness of the act committed, the circumstances of the accused, the possibility of his/her re-education, and the protection of society. The third criterion of the inexpediency of the prosecution is based on the fact that the act surrendered to another state for the purpose of prosecution was legally decided by a foreign court or other foreign authority competent to prosecute the offence, misdemeanour, or other administrative offence, and this decision can be considered sufficient. Finally, the last, fourth criterion for deciding on the inexpediency of criminal prosecution is that it is an act committed

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<sup>31</sup> A Jač 'Priblíženie niektorých nových trestnoprocených zásad v slovenskom právnom poriadku, ich komparácia s niektorými zásadami platnými v kontinentálnej Európe [transl: Explanation of some new criminal procedure principles in the Slovak legal system, their comparison with some principles valid in continental Europe]' (2007) 15(2) *Časopis pro právní vědu a praxi* 130.

<sup>32</sup> I Galovcová (n 6).

<sup>33</sup> In the common-law legal system, the principle of opportunity is referred to as 'expediency'. The principle of opportunity can also be described as a principle of expediency.

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by a person in coercion in direct connection with the commission of the crime of trafficking in human beings, the crime of sexual abuse, the crime of ill-treatment person and entrusted person, or the offence of producing child pornography.<sup>34</sup>

Only the four aforementioned legal criteria can be taken into account by the public prosecutor when deciding whether to decide to suspend the case before prosecuting. Other forms of decision-making by the public prosecutor before the commencement of criminal prosecution (e.g., referring of the matter or dismissal of the matter) are mandatory, and the public prosecutor is therefore not able to exercise his/her discretion under the principle of opportunity.

In the pre-trial proceedings, the discretionary powers of the public prosecutor are considerably more extensive than in the proceedings before the commencement of criminal prosecution. As the public prosecutor is considered to be the master of the dispute in the pre-trial proceedings (*dominus litis*), (s)he also has a dominant position at this stage of the criminal proceedings. The law grants him/her many powers over the accused (e.g., to decide on his/her compelling, on his/her detention, etc.), which (s)he can use whenever (s)he deems it necessary. As the master of the dispute, the public prosecutor even has the power to decide on the merits of the accused's criminal case without an indictment being filed and the case thus brought to court. Although many substantive decisions of the prosecutor in pre-trial proceedings are mandatory and the law forces the prosecutor to issue them (transfer of a case under Art. 214 of Slovak Criminal Procedure Code, stay of criminal prosecution under Art. 215 (1) of Slovak Criminal Procedure Code),<sup>35</sup> a large part of decisions is governed by the principle of opportunity, and the public prosecutor is autonomous when deciding whether to close the case without bringing it to court is indeed the right solution.

Thus, in the pre-trial proceedings, the public prosecutor is entitled to decide on the stay of criminal prosecution.<sup>36</sup> However, the prosecutor's discretion in deciding to stay the criminal prosecution cannot be limitless, and the law sets out the reasons that the prosecutor must take into account in his/her decision. These reasons are, in fact, the four criteria used by the prosecutor in assessing the aforementioned expediency of criminal proceedings in deciding to suspend the case during the proceedings prior to the commencement of the criminal prosecution.

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<sup>34</sup> F Ščerba 'Posuzování případů zneužívání dětí prostřednictvím internetu k pornografickým účelům [transl: Assessment of cases of child abuse via the Internet for pornographic purposes]' (2020) 19(3) *Trestněprávní revue* 125.

<sup>35</sup> L Michaľov, M Baločko 'Zastavenie trestného stíhania ako následok neprimerane dlho trvajúceho trestného stíhania [Stay of criminal prosecution as a result of a disproportionately long criminal prosecution]' (2019) 6(1) *Štát a parvo* 94.

<sup>36</sup> In this case, we mean his/her authority arising from the principle of opportunity set out in Art. 215 (2) of the Slovak Criminal Procedure Code. However, in accordance with Art. 215 (1) of the Criminal Procedure Code, the public prosecutor is obliged to decide on the stay of criminal prosecution. There are eight reasons: 1) if it is beyond any doubt that the act, on the grounds of which the criminal prosecution shall be instituted, did not occur, 2) if this act is not a criminal offence, and there are no grounds to transfer the case, 3) if it is beyond any doubt that the act was not committed by the accused, 4) if the criminal prosecution is inadmissible under Art. 9 of Slovak Criminal Procedure Code, 5) if the accused bore no criminal liability for unsound mind while committing the act, 6) the accused juvenile, who at the time of the criminal offence did not exceed the age of fifteen, did not reach such a level of mental and moral maturity that (s)he could recognize his/her illegality or control his actions, 7) if a conciliation is approved between the accused and the injured party, 8) if the culpability of the act expired.

The principle of opportunity is also expressed in the discretionary power of the public prosecutor to decide on the stay of criminal prosecution of a cooperating accused,<sup>37</sup> which is specific in that it cannot be applied to all accused, but only to a cooperating accused (the so-called crown witness). The public prosecutor can do so if there is a criminal prosecution against the accused, who played a significant role in clarifying the corruption,<sup>38</sup> the criminal offence of establishing, masterminding, or supporting a criminal group, the criminal offence of establishing, masterminding, or supporting a terrorist group, or a particularly serious felony committed by an organised group, a criminal group, or a terrorist group or in identifying or convicting offenders of such criminal offences, and the interest of society in clarifying such a criminal offence outweighs the interest in prosecuting the accused.<sup>39</sup> However, it must not be a person who organised, instigated, or commissioned a crime in the clarification of which (s)he participated. Thus, the public prosecutor has the opportunity to decide again whether the termination of criminal prosecution in the pre-trial proceedings is already beneficial, expedient, or necessary. Likewise, his/her professional assessment of the issuance of such a decision against a crown witness cannot be based on arbitrariness, but on careful and thorough consideration and assessment of the seriousness of the crime, the state's interest in clarifying such an act and prosecuting the accused, his/her character, his/her involvement and consequences, his/her ability to clarify such offences, and to identify and convict their perpetrators.<sup>40</sup> In addition, only the public prosecutor, as the protector of the public interest in criminal proceedings, is entitled to assess the degree of the society's interest in prosecuting the accused. Therefore, if (s)he considers that the society's interest in clarifying the crime is not large enough, (s)he will continue to prosecute the cooperating accused and will not apply the institution of staying the criminal prosecution. It should be emphasised that the prosecutor must be particularly careful in issuing this decision, as the decision to discontinue the prosecution creates a *res judicata* obstacle, and any negligent conduct by the prosecutor could result in the offender being acquitted and impossible to prosecute and punish further.

Another discretionary power of the public prosecutor is the possibility to conditionally stay the criminal prosecution.<sup>41</sup> This decision is a form of the so-called 'diversion'<sup>42</sup> when there is some kind of agreement between the state and the offender that if the offender proves him/herself during the probationary period, (s)he will not be punished at all for the crime committed. However, the prosecutor is limited by a provision stating that in no case can criminal prosecution be stayed if the crime has caused the death of a person, if there is a criminal prosecution for

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<sup>37</sup> Z Kyjac 'Posudzovanie vierohodnosti výpovede spolupracujúcej osoby [transl: Assessment of credibility of the cooperating person's statement]' (2021) 73(6-7) *Justičná revue* 829.

<sup>38</sup> M Kantorová, *Vývoj právnej úpravy trestných činov korupcie v Slovenskej republike. Metamorfózy práva ve střední Evropě* [transl: Development of the legal regulation of corruption offenses in the Slovak Republic] (Západočeská univerzita v Plzni 2018).

<sup>39</sup> J Čentěš, A Beleš, 'Regulation of agent as a tool for combating organized crime' (2018) 8(2) *Journal of Security and Sustainability Issues* 152.

<sup>40</sup> Š Minárik et al., *Trestný poriadok: Stručný komentár* [transl: Criminal Procedure Code: Brief commentary. 2nd edition] (Iura Edition 2010).

<sup>41</sup> Art 216 (1) of the Slovak Criminal Procedure Code.

<sup>42</sup> J Klátik 'K historii, pojmu a účelu odklonu v trestnom konaní [On the history, concept and purpose of diversion in criminal proceedings]' (2008) 14(3) *Bulletin slovenskej advokácie* 25; J Zůbek, *Odklony v trestním řízení* [transl: Diversions in criminal proceedings] (Wolters Kluwer ČR 2019).

corruption, or if a criminal prosecution is conducted against a public official or a foreign public official. The application of this procedure is possible only if the accused has committed an intentional or negligent minor offence, for which the Criminal Code provides for imprisonment, the upper limit of which does not exceed five years. In addition, the consent of the accused is required, which must be done in a way that does not raise doubts, either in writing or by oral deposition. An expression of the principle of opportunity can be found in the conditions for the application of this institution. One of the conditions is also that 'the person of the perpetrator in consideration of his/her life so far and circumstances of the case suffice to justify such a decision'.<sup>43</sup> The assessment of the fulfilment of this condition belongs exclusively to the public prosecutor, and the application of the institution of conditional stay of criminal prosecution depends on its evaluation.<sup>44</sup> The criterion for the public prosecutor is therefore the adequacy of this decision in terms of achieving the purpose of the criminal proceedings. The prosecutor's discretion is based on an assessment of the offender's personal circumstances, life to date, and the circumstances of the case.

The recodification also brought the public prosecutor the opportunity to terminate the cooperation with the cooperating perpetrator using a new form of diversion – a conditional stay of criminal prosecution of the cooperating accused.<sup>45</sup> This relatively new diversion in criminal proceedings is close to the aforementioned institution of stay of criminal prosecution of a cooperating accused and provides an opportunity for the cooperating accused not to have the criminal prosecution stayed definitively (thus creating a *res judicata* obstacle). On the contrary, it allows the cooperating accused to prove during the probationary period that (s)he will not actually continue to commit criminal offences. This provision also clearly reflects the principle of opportunity, as the public prosecutor does not have to (is entitled) act in a mentioned way. Moreover, this principle is also expressed in the conditions for the application of the said new diversion, which also include the condition that 'the interest of society in clarifying a crime through cooperation with the accused outweighs the interest in prosecuting the accused'.<sup>46</sup> When deciding whether the public prosecutor applies the institution of conditional stay of criminal prosecution of a cooperating accused, the public prosecutor proceeds on the basis of his discretion. However, it cannot be boundless. On the contrary, the prosecutor must comprehensively consider in particular the relationship between the seriousness of the crime and the interest of the state in prosecuting the offender, must assess the circumstances of the case, the offender, and its role in the crime and its consequences. Last but not least, (s)he must

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<sup>43</sup> Under Art 216 (1) of the Slovak Criminal Procedure Code, other conditions for the application of this diversion also include the fact that the accused declares that (s)he has committed the act for which (s)he is being prosecuted and there are no reasonable doubts that his/her statement was made freely, seriously, and intelligibly, and at the same time the accused compensated the damage caused by the act or concluded an agreement on its compensation with the injured party or took other necessary measures to replace it.

<sup>44</sup> L Bartošová 'Rozsah dokazovania pri využití odklonov v právnom konaní [Extent of evidence taking when using diversions in the pre-trial proceedings]' (2007) 6(5) *Trestněprávní revue* 124.

<sup>45</sup> Art 218 of the Slovak Criminal Procedure Code.

<sup>46</sup> Under Art 218 of the Slovak Criminal Procedure Code other conditions for the application of this diversion include that the cooperating accused played a significant role in clarifying the criminal offence of corruption, the criminal offence of establishing, masterminding, or supporting a criminal group or a terrorist group or a particularly serious felony committed by an organised group, a criminal group, or a terrorist group or in identifying or convicting offenders of such criminal offences, However, it must not be a person who organised, instigated, or commissioned a crime in the clarification of which (s)he participated.

assess whether the person's statement is capable of making a significant contribution to clarifying the most serious crimes and identifying their perpetrators.

The institution of conciliation is another form of diversion in which the principle of opportunity is manifested. The public prosecutor is entitled to close the criminal matter using conciliation in the case of an offence for which the Criminal Code provides for imprisonment, the upper limit of which does not exceed five years. Approval of the conciliation also requires the consent of the accused and the injured party, which does not raise doubts. It should be added that, as with the conditional stay of criminal proceedings, the prosecutor may in no case approve conciliation if the crime has caused the death of a person, if criminal proceedings for corruption are being conducted or if criminal proceedings against a public official or a foreign public official are being conducted. The principle of opportunity is expressed, as in previous decisions, in conditions that provide the public prosecutor with discretion in the application of this form of diversion. As in previous decisions, the prosecutor may decide on conciliation if 'in view of the nature and gravity of the offense committed, the extent to which the public interest has been affected by the offense, the person accused and his or her personal and financial circumstances deem such a decision'.<sup>47</sup>

The prosecutor's discretion is therefore based in particular on an assessment of the manner in which the crime was committed, the degree of culpability, the consequence, the person of the accused, the motive, and the imminent punishment. In assessing the personal and financial circumstances of the accused, the prosecutor takes into account the social environment in which (s)he lives, his/her employment and financial situation, marital status, and possible obligations to pay maintenance.<sup>48</sup>

A characteristic feature of the conciliation is the fact that the accused must deposit a sum of money intended for a specific addressee for public benefit purposes in the court's account (in the pre-trial proceedings to the prosecutor's office). However, this sum of money must not be disproportionate to the seriousness of the offence committed. Here, too, the Criminal Procedure Code leaves the prosecutor room to implement a discretionary decision, as it does not set a specific amount of money needed to execute the conciliation.<sup>49</sup> It is therefore up to the public prosecutor to assess the adequacy of this amount, who must, of course, take into account the specific circumstances of the case, the person of the accused, and his/her personal and property circumstances. For this reason, too, the amount of a specific amount of money is (and should be) be different for different offenders.

Finally, it should be added that the principle of opportunity is, to a certain extent, also expressed in another new type of diversion, namely the guilt and punishment procedure (plea bargain

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<sup>47</sup> Under Art 220 (1) of Slovak Criminal Procedure Code, other conditions for the application of this diversion include the fact that the accused declares that (s)he has committed the act for which (s)he is being prosecuted, and there are no reasonable doubts that his/her statement was made freely, seriously, and certainly, and the accused compensated the damage if caused by the act, or took other measures to compensate for the damage, or otherwise eliminated the damage caused by the crime.

<sup>48</sup> B Šramel 'Zmier (narovnání) ako procesnoprávny prvok restoratívnej justície a problémy spojené s jeho aplikáciou [transl: Conciliation as a procedural element of restorative justice and problems associated with its application]' (2013) 17(11-12) *Trestní právo* 30.

<sup>49</sup> J Čentéš, *Trestný poriadok: Veľký komentár [Criminal Procedure Code: Extensive commentary]* (Eurokódex 2019).

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procedure). However, this is a specific case, as the public prosecutor has the possibility to propose only the imposition of a milder sentence – a sentence of imprisonment reduced by one third below the lower limit of the statutory penalty rate (Art. 39 (4) of the Criminal Code).

#### **4 ARE THE POSSIBILITIES OF CONTROLLING THE DECISIONS OF PUBLIC PROSECUTORS IN THE SLOVAK CRIMINAL JUSTICE SYSTEM SUFFICIENT?**

The scope of the prosecutor's authority to decide not to prosecute a particular offender has increased in recent years to such an extent that the question arises as to whether public prosecutors are not abusing these powers and are not acting contrary to their mission as public interest defenders. This issue often arises in particular in connection with the prosecutor's decisions not to prosecute persons accused in cases of serious crime, where such decisions of the prosecutor are perceived particularly sensitively by the public in particular. It is therefore appropriate to ask what control mechanisms Slovak legal system recognises if the prosecutor's decision not to prosecute the offender appears to be inadequate and raises doubts.

All the above-mentioned substantive decisions not to prosecute the accused are made by the public prosecutor in the form of a resolution. According to Slovak law, such a resolution of the prosecutor in criminal proceedings can be reviewed only within the hierarchical system of the prosecutor's office. If the injured party considers that the prosecutor's resolution not to prosecute the perpetrator is inadequate, (s)he has the right to file a complaint against such a decision.<sup>50</sup> Here, however, begins the fundamental problem, which is the mechanism for deciding on remedies. The injured party first files a complaint with the prosecutor him/herself, who issued the contested decision. If the prosecutor denies the complaint filed by the injured party, (s)he must submit the matter to the superior prosecutor for a decision.<sup>51</sup> And this is where the problem is. As the prosecutor's office is based on hierarchical superiority and subordination, the discretion of the public prosecutor deciding on the merits of a given case can often be influenced by the superior prosecutor. This possibility follows directly from Art. 6 (1) of Act no. 153/2001 Coll., according to which the superior prosecutor is entitled to issue an instruction to the subordinate prosecutor on how to proceed in the proceedings, while the subordinate prosecutor is obliged to comply with the instruction. In such a case, if the superior prosecutor instructs the subordinate prosecutor not to prosecute a particular offender, the relevant prosecutor is obliged to proceed regardless of his/her personal assessment of the case. Of course, the Act on the Prosecutor's Office also contains a system of certain legal guarantees of non-abuse of such a position by a superior prosecutor if the situations provided for by law occur,<sup>52</sup> but they do not address the

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<sup>50</sup> Art 185 of Slovak Criminal Procedure Code.

<sup>51</sup> D Korgo, *Trestné právo procesné [transl: Criminal procedural law]* (Vydavatelství a nakladatelství Aleš Čeněk 2017).

<sup>52</sup> Under Art 6 of Act no. 153/2001 Coll., if the superior public prosecutor issues an instruction to the subordinate public prosecutor, this instruction must be in writing. However, if the subordinate prosecutor considers the instruction to be in conflict with the law or his/her legal opinion, (s)he may request in writing the superior prosecutor to withdraw the case. Likewise, a subordinate prosecutor may refuse to comply with such an instruction if, by complying with it, (s)he would immediately and seriously endanger his/her life or health or the life or health of a person close to him/her. Also, if there is a change in the evidentiary situation in the court proceedings, the subordinate prosecutor need not be bound by the instructions of the superior prosecutor. On the contrary, the subordinate prosecutor is obliged to



situation if both the superior and the subordinate prosecutor are directly affected by the accused or other persons with an interest in the illegal decision. As the remaining two ordinary remedies (appeal, refusal) can only be filed against court decisions,<sup>53</sup> it can be stated that the complaint is the only ordinary remedy used for reviewing the prosecutor's discretion. However, as it is decided in the environment of an office built on the principles of hierarchical subordination and centralism, there can be no guarantee that the control of the exercise of discretionary powers will be sufficient and proper.

The mechanism of extraordinary remedies is also based on the remedy decisions made within the hierarchical system of the prosecutor's office. Even if the injured party is entitled to file a petition for annulment of final prosecutorial decisions made in the pre-trial proceedings (to the detriment of the accused), this petition is decided by the prosecutor's office – the Prosecutor General, who, as the superior of all prosecutor's offices, also may not decide impartially. Another extraordinary remedy against a final resolution (decision) of the public prosecutor is the motion on retrial of proceedings. However, this motion can be filed by the public prosecutor only, not by the injured party. The problem is that if public prosecutors are directly or indirectly affected by the accused or other persons with an interest in not prosecuting, they cannot act properly, impartially, and legally, and there is no one to ensure that the real perpetrator is justly punished. To the detriment of the accused, only the public prosecutor is entitled to file the motion on retrial of proceedings. Finally, extraordinary appeal as an extraordinary remedy can only be filed against court decisions so that in relation to the review of the prosecutor's discretion, this appeal is devoid of purpose.

One of the related problems is also the fact that the injured party in the Slovak Republic has basically no rights,<sup>54</sup> which, independently of the prosecuting authorities, would ensure the control of the prosecutor's discretion directly through an independent and impartial court. This situation also stems from the fact that the public prosecutor's office has a prosecution monopoly in Slovak criminal proceedings.

However, the prosecution monopoly of the prosecutor's office is not a rational consequence of its historical development in the Slovak territory but a consequence of the *coup d'état* in 1948 and the subsequent onset of the communist regime. It was the communist party that rebuilt the prosecutor's office into a body for the general supervision of legality with the right to intervene in all areas of social life. For that reason, the prosecutor's office was also granted a prosecution monopoly and the resulting exclusive power to decide whether to prosecute and whether to file or not to file the indictment. The prosecution monopoly was thus granted to the prosecutor's office as a result of the communist regime's efforts to obtain a criminal law instrument to suppress political and class enemies. The possibility for other entities (e.g., the injured party) to exercise their rights through criminal law institutions has thus been minimised. This step was, of

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refuse to comply with the instruction if by fulfilling it he would commit a criminal offence, misdemeanour, other administrative offence, or disciplinary offence.

<sup>53</sup> E Szabová, *Odvolanie v trestnom konaní [transl: Appeal in criminal proceedings]* (Leges 2015); E Szabová, *Odvolanie [transl: Appeal]* (Leges 2015).

<sup>54</sup> For more information on the status of the injured party, see J Čentéš, M Krajčovič 'Consideration of the effectiveness of flat-rate compensation for damage in insolvency proceedings' (2019) 7(2) *Entrepreneurship and Sustainability Issues* 1435-1449.

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course, logical, as in the socialist establishment, the interest of the people is superior to the interest of the individual.

## 5 WHAT IS THE WAY OUT OF THE CURRENT SITUATION? (CONSIDERATIONS *LEX FERENDA*)

The wide range of discretionary powers of the public prosecutor, the execution of which is, moreover, insufficiently controlled and practically even uncontrollable, of course, creates room for their abuse and various machinations.<sup>55</sup> As we have pointed out in the previous lines, the current system of control of these powers by the prosecutor's office, initiated in principle only by the prosecutor's office and implemented only within the hierarchical system of the prosecutor's office, is insufficient. However, the issue of appropriate and effective control is very important, mainly because the decisions of the prosecutor made on the basis of his/her discretion in the pre-trial proceedings are similar to the court's decisions on guilt and punishment made at the court hearing. The difference is that while the injured party, as a private person with an interest in the outcome of criminal proceedings, can defend him/herself against court decisions (e.g., by filing an appeal)<sup>56</sup> in a higher court, the prosecutor's decisions are judicially non-reviewable, and thus the injured party cannot even defend him/herself at an independent and impartial court.

However, it should be emphasised that Art. 46 of the Constitution of the Slovak Republic stipulates the right of every person to judicial and other legal protection. The mentioned Art. in sect. 2 says that

any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by a law. The review of decisions in matters regarding the fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts.

Therefore, the injured party's inability to go to court in the event of a substantive decision by the public prosecutor can be considered a serious shortcoming of the current legislation. The right to object to illegal and unjust decisions can be ranked among the rights on which the modern legal system of European countries is built.<sup>57</sup>

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<sup>55</sup> See N Bobechko, A Voinarovych, V Fihurskyi 'Newly Discovered and Exceptional Circumstances in Criminal Procedure of Some European States' (2021) 2(10) *Access to Justice in Eastern Europe* 64.

<sup>56</sup> However, it should be noted that the injured party's right to defend him/herself against a court decision is also considerably limited. The injured party may file an appeal against the defendant only in relation to the verdict of damage compensation, never in relation to the verdict of guilt and punishment. However, from the point of view of the strict application of the principle of establishing the facts without reasonable doubt, such a limitation of the injured party's rights does not seem to be very appropriate and from the *de lege ferenda* view an extension of the injured party's right to appeal in relation to the guilt and punishment should be considered.

<sup>57</sup> R Funta, *Základné práva v EÚ. Európa a Európske Právo [transl: Fundamental rights in the EU. Europe and European Law]* (IRIS – Vydavateľstvo a tlač 2016).

In addition, it should be recalled that even Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system adopted by the Committee of Ministers on 6 October 2000<sup>58</sup> states in para. 34 that

interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

The above-mentioned Recommendation of the Committee of Ministers therefore clearly declares its interest in reviewing the substantive decisions of the public prosecutor not to prosecute outside the hierarchical structure of the public prosecutor's office.

The dangers of incorrect decisions by public prosecutors are also addressed in the Venice Commission<sup>59</sup> report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010). It states that

... a second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought. This problem is frequently associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or when powerful interests bring political pressure to bear. In principle a wrong instruction not to prosecute may be more difficult to counter because it may not be easily made subject to judicial control. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem.

For these reasons, it would be appropriate to extend the possibilities for reviewing the decisions on the merits issued by public prosecutors on the basis of the application of the principle of opportunity. Thus, the intervention of authorities other than just prosecutor's offices would be very necessary. It is necessary to introduce a more effective system of control of discretionary decision-making of the public prosecutors, which would prevent (limit) the inadequate procedure and decision-making of the prosecutor. The control systems set out in the Recommendation Rec(2000)19 of the Committee of Ministers as well as in the Venice Commission Report are deeply embedded in the legal systems of the vast majority of European countries. In this context, T Gřivna and P Gřivnová state that there are three basic models of control of the prosecutor's discretion in the world – a subsidiary indictment, a review by a court on the basis of a motion of an authorised subject, and a prior authorisation of the court. These models have in common that the control of the prosecutor's decision-making takes place outside the hierarchical structure of public prosecution offices, which creates the preconditions for an objective and independent assessment of the legitimacy of not prosecuting the perpetrator of a certain crime.<sup>60</sup> All these models represent an effective form of control of the prosecutor's decision-making, and taking

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<sup>58</sup> <<https://rm.coe.int/16804be55a>> accessed 26 January 2022. See also V Bazeliuk, Yu Demyanenko, O Maslova 'Peculiarities of Prosecutor Participation in Private Cases: Ukrainian Experience' (2022) 1(13) *Access to Justice in Eastern Europe* 205.

<sup>59</sup> The full title of the Venice Commission is 'European Commission for Democracy through Law'.

<sup>60</sup> T Gřivna, P Gřivnová. *Prostředky kontroly dodržování zásady legality v trestním řízení [Means of monitoring compliance with the principle of legality in criminal proceedings]* (Bratislavská vysoká škola práva 2008).

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over one of them or a combination of them could probably lead, in Slovakia, to improvement and expansion of the control mechanisms over the prosecutor's decision-making.

A possible inspiration for the Slovak system of control of discretionary powers of a public prosecutor in criminal proceedings could be the regulation of control of discretionary powers of a public prosecutor existing in Poland. In Poland, the control of the public prosecutor's decisions is carried out using the so-called subsidiary indictment.<sup>61</sup> The essence of the subsidiary indictment is, in general, that the injured party has the right to prosecute where the public prosecutor refuses to prosecute or to continue the prosecution. This Polish legal institution can undoubtedly be considered an important instrument for securing an individual's fundamental rights arising from the crime committed.<sup>62</sup> Due to its importance from the point of view of controlling the discretionary powers of the Slovak public prosecutors, it is therefore desirable to get acquainted with this institution and to explain how it could also work in the conditions of the Slovak Republic.

However, under the Polish Criminal Procedure Code, the injured party may act as a subsidiary prosecutor (*oskarżyciel posiłkowy*) only after undergoing a relatively complex procedure. If the public prosecutor has refused to prosecute or has decided to discontinue the prosecution and the injured party is interested in acting as a subsidiary prosecutor, (s)he must file a complaint (*zażalenie*) against such decisions with the institutionally superior public prosecutor, who is obliged to refer it to the court if (s)he does not comply with the complaint.<sup>63</sup> If the court annuls the decision of the public prosecutor, it shall state the reasons for the annulment and, if necessary, the circumstances to be clarified and the actions to be taken. These recommendations are binding on the public prosecutor. However, if the public prosecutor still sees no reason to prosecute, (s)he is again entitled to refuse to prosecute or to decide to stay the criminal prosecution.<sup>64</sup> After issuing the final decision by the public prosecutor, the injured party is entitled to file an indictment in court (*akt oskarżenia*) within one month of receipt of the notification of such a decision by the public prosecutor. The indictment must be prepared and signed by an attorney and must contain the requisites stipulated by law. It should be noted that the court may limit the number of subsidiary prosecutors in a given criminal case, and if the number of subsidiary prosecutors allowed by the court is met, the court may decide that another subsidiary prosecutor may no longer participate in the proceedings. In addition, the court will decide that the subsidiary prosecutor may not take part in the proceedings even if the court finds that such a person is not entitled to file the indictment or if the indictment was filed after the expiry of the time prescribed by law. At the same time, it must be emphasised that if the proceedings were instituted on the basis of a subsidiary indictment, any further involvement of the public prosecutor in the proceedings is admissible.<sup>65</sup> The subsidiary prosecutor is entitled to withdraw his/her indictment and, if (s)he does so, (s)he may not reopen the proceedings. In such

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<sup>61</sup> J Skorupka et al., *Kodeks postępowania karnego. Komentarz [transl: Criminal Procedure Code. Commentary, 5th edition]* (CH Beck 2021).

<sup>62</sup> P Szymaniec, *Bezpieczeństwo a ograniczenie praw jednostki. Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy [transl: Security and the limitation of the rights of an individual. The principle of proportionality and human and civil rights in the legal systems of the EU member states]* (Państwowa wyższa szkoła zawodowa im. Angelusa Silesiusa 2015).

<sup>63</sup> Art 306 of Polish Criminal Procedure Code (*Kodeks postępowania karnego*).

<sup>64</sup> Art 330 of Polish Criminal Procedure Code (*Kodeks postępowania karnego*).

<sup>65</sup> Art 55 of Polish Criminal Procedure Code (*Kodeks postępowania karnego*).

a case, the court will notify the public prosecutor of the withdrawal of the indictment, who may intervene in the proceedings. If this does not happen within 14 days from the delivery of the notification, the criminal proceedings will be stopped.

In the event of the death of the subsidiary prosecutor, the criminal proceedings are not suspended, as the injured party's closest relatives as new subsidiary prosecutors may also intervene at any stage of the proceedings in the same way as their deceased relative.<sup>66</sup> Finally, if the accused has been acquitted or the court has stayed the criminal prosecution, the subsidiary prosecutor bears the costs of the entire proceedings. This provision is intended to help avoid unjustified or unnecessary indictments.

In addition to the subsidiary indictment, it may be mentioned that in the legal systems of some European states, there is another possibility for the injured party to reach a review of the prosecutor's discretionary decisions. This possibility is the so-called 'complaint against the public prosecutor's decision', on the basis of which the public prosecutor's discretionary decision will be subject to judicial review. In this regard, mention may be made in particular of the German system, under which the injured party may, within a period of two weeks, file a motion that the procedure of the public prosecutor be examined by a hierarchically superior public prosecutor. If this motion is rejected, the injured party may further seek a judicial decision within one month in relation to his/her rejected motion. However, the motion must contain the facts justifying filing the indictment. When examining the motion, the court may request from the public prosecutor the material collected so far and may also order an investigation in order to properly examine the injured party's application. If, on examination of the case, the court concludes that criminal prosecution should be conducted and the indictment filed, it will order the public prosecutor to file the indictment.<sup>67</sup> It can be seen that in Germany, the public prosecutor's prosecutorial monopoly is limited to some extent, as the court is entitled, in cases provided for by law, to impose on the public prosecutor its will to file the indictment. However, in terms of the principles on which the Slovak criminal proceedings are based, we do not consider this model to be suitable for Slovak criminal justice system. The intervention of the court and the imposition of its will on the prosecutor would be contrary to the accusation principle, according to which the right to file the indictment is a privilege of the public prosecutor acting in the pre-trial proceedings as the 'master' of the dispute (*dominus litis*).

In the light of the above, we believe that a subsidiary indictment could also be a possible and effective means of reviewing the public prosecutor's wide discretion in the Slovak legal system, through which the injured party could exercise his/her interest in prosecuting and punishing the offender if the public authorities refuse to perform their tasks. Unlike the above-mentioned complaint against the prosecutor's decision, the subsidiary indictment requires a much more active approach of the injured party, and no further involvement of the public prosecutor is required, who, moreover, considers the prosecution to be unnecessary or ineffective due to the absence of public interest. As a result of the subsidiary indictment, no one forces the public prosecutor against his/her will to file the indictment, and thus the public prosecutor also saves

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<sup>66</sup> Art 58 of Polish Criminal Procedure Code (*Kodeks postępowania karnego*).

<sup>67</sup> Arts. 172-175 of German Criminal Procedure Code (*Strafprozeßordnung*).

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time and money associated with the conduct of criminal proceedings.<sup>68</sup> Thus, the state can 'use' the injured party and his/her financial resources for the purpose of examining the correctness of the prosecutor's discretionary decisions, outside the hierarchical structure of the prosecutor's office by an independent and impartial court. The injured party certainly has the greatest interest in the fair settlement of a criminal case and is logically another entity that should be entitled to initiate criminal proceedings before a court. From the point of view of the state theory, the subsidiary indictment also appears to be a fair tool enabling the injured party to partially compensate for what the state and its bodies have failed to detect: detect criminal offences, detect their perpetrators and impose fair punishments.

However, some legal scientists point out that the subsidiary indictment is solely an instrument enabling the injured party to promote his/her individual interest in the criminal proceedings, even though the public prosecutor has ruled that there is no public interest in the prosecution.<sup>69</sup> However, it is precisely the court that can avoid such a situation and, if it concludes that the public interest in the particular case is not present, the injured party as a subsidiary prosecutor will not assert his/her private interest before the court and vice versa, the court will not meet the injured party's wishes, and the criminal prosecution will be stayed. The institution of the subsidiary indictment has its place precisely in those systems where the public prosecutor is endowed with extensive discretionary powers and where it is therefore necessary to create a kind of counterbalance to the public prosecution monopoly. However, its importance can be seen not only in enabling the injured party to exercise his/her rights using criminal law means, but also in the fact that the mere existence of a private indictment can act on public prosecutors as a kind of incentive to fulfil their duties properly, at least subconsciously, and to issue decisions reflecting the public interest in criminal prosecution. It is true that the practical use of the institution of subsidiary indictment is relatively rare in foreign countries. However, it can be concluded that this is the result of the fact that public prosecutors are forced by the existence of a subsidiary indictment to fulfil their obligations properly, and the injured party does not have to resort to private enforcement of his/her interest in criminal prosecution.

The introduction of the institution of a subsidiary indictment would not be in conflict with the Constitution of the Slovak Republic, as the provisions concerning the Prosecutor's Office of the Slovak Republic are relatively general and thus leave room for the introduction of new elements into the public prosecution system. Certain problems could be caused by the accusation principle stipulated in Art. 2 (15) of the Criminal Procedure Code, according to which 'judicial criminal proceedings shall only be initiated on the basis of a motion or an indictment filed by a public prosecutor who represents a motion or an indictment in judicial criminal proceedings'. For this reason, it would be necessary to include the injured party in the current legal formulation of the accusation principle as another entity authorised to file an indictment. As regards the manner and conditions of filing an indictment by the injured party, it would be possible to accordingly use the mechanism provided for in the Polish Criminal Procedure Code. The injured party would be obliged to file a complaint first, which would be decided by the superior public prosecutor, and if he did not satisfy the complaint, (s)he would have to submit it to the court. The court would then examine the complaint and indicate the circumstances necessary for the public prosecutor to re-examine. If (s)he again refused to prosecute, the injured party would be entitled to file an

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<sup>68</sup> T Gřivna (n 7).

<sup>69</sup> Ibid.

indictment in court. Such a procedure would prevent the criminal courts from being overwhelmed by unjustified and unnecessary indictments by the injured parties.

It should also be noted that the institution of the subsidiary indictment is not unknown to Slovak criminal justice system. Until 1950, Act no. XXXIII/1896 on the Code of Criminal Procedure (Ugrian Criminal Procedure Code) recognised several types of prosecutor – besides the public prosecutor, the legal regulation also recognised the main private prosecutor, the supporting private prosecutor, and, finally, the substitute private prosecutor.<sup>70</sup> Under the above-mentioned statutory article, if the public prosecutor's office refused to represent the indictment in a court in cases where it had the right to file an indictment, the injured party could take over the prosecution within eight days of receiving the prosecutor's refusal decision and become the substitute private prosecutor.<sup>71</sup> In general, the substitute private prosecutor exercised the rights of the Public Prosecutor's Office. However, (s)he did not have the rights arising from the nature of the Public Prosecutor's Office (as a public office), e.g., to make claims for mandatory cooperation between authorities, to request the transmission of files in the case, to propose to waive investigations, etc.). After the injured party took over the representation of the prosecution, the case continued at the stage where it was left. An exception was the case where the public prosecutor dropped the indictment only in the appeal proceedings. In this case, the injured party did not become a substitute prosecutor and owned only the rights of the injured party himself. The substitute private prosecutor could not even request a renewal of the continuation.<sup>72</sup>

However, the start of communism in the second half of the 20th century greatly reduced the rights of the injured party in criminal proceedings, and the institution of private/subsidiary prosecution was abolished. Subsequently, the prosecution monopoly of the public prosecutor's office was introduced. It is only to the detriment of the matter that after the fall of communism in 1989, the absolute prosecution monopoly of the prosecutor's office was not abolished, and the private/subsidiary prosecution was not re-admitted as an adequate counterweight. It is understandable, as a difficult process of transformation continues for all state institutions.<sup>73</sup> However, it is precisely this institution that, to a certain extent, makes it possible to correct the necessary negatives of the monocratic and centralist organisation of Slovak public prosecution office and to ensure a certain form of control over the execution of its powers. Unfortunately, the Slovak scientific literature is not devoted to this institution either, and papers in Slovak scientific journals are also completely absent.

## 6 CONCLUSIONS

The purpose of strengthening the discretionary powers of the public prosecutor in criminal proceedings was to unburden criminal courts from resolving a large number of less serious criminal cases and enable them to focus on resolving serious crimes. The prosecutor's

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<sup>70</sup> A Ráliš, *Trestné právo procesné [transl: Criminal procedural law]* (Nakladateľstvo Justitia Bratislava 1942).

<sup>71</sup> Art 42 (1) of the Act no XXXIII/1896 on the Code of Criminal Procedure (*Ugrian Criminal Procedure Code*).

<sup>72</sup> Art 43 (1) of the Act no XXXIII/1896 on the Code of Criminal Procedure (*Ugrian Criminal Procedure Code*).

<sup>73</sup> O Kaluzhna, 'The Struggle for Class Ranks and Prosecutor's Dress during Ukrainian Independence: Historical, Legal, and Cultural Perspectives' (2021) 3(11) *Access to Justice in Eastern Europe* 54.

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discretionary powers are currently so broadly conceived that they allow the prosecutor to issue decisions that are very similar to those of a court on guilt and punishment.

However, the insufficient development of control mechanisms over the exercise of the prosecutor's discretion seems to be a problem. The existing control within the hierarchical system of the prosecutor's office cannot be considered sufficient, for the reasons outlined in the paper. As the decisions of the public prosecutor are currently unreviewable in court and cannot be properly defended, this creates room for the emergence of many negative phenomena, e.g., the abuse of wide discretion. The starting point seems to be the introduction of a system of reviewing the decisions on the merits of the prosecutor not to prosecute outside the hierarchical structure of the prosecutor's office.

An appropriate means of redress could be the institution of a subsidiary indictment enabling the injured party to take over the prosecution where the public prosecutor refuses to prosecute or to continue the prosecution. It can be stated that a similar system of control of the public prosecutor's discretion works not only in other countries of the world but is also recommended in many international legal documents.

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