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DECENTRALIZATION IN THE SLOVAK REPUBLIC – HISTORY AND CONTEMPORARY ISSUES[1]

I.

One of the primary groups within the structure of public administration is made up of territorial self-government, which fulfils tasks within its designated governed area as part of its original competence.

Along with it, the tasks of the state are also performed by local state government in designated regions. Where it is impossible to do otherwise, the tasks of the state are performed by territorial self-government, in the form of conferred state administration, which is performed in the name of the state and at its expense.

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As it can be inferred from our initial notes on this matter, it is clear that territorial self-government primarily represents the independent decision-making of the citizens of a municipality or city about their own matters within their territory.

The territorial self-government units in the Slovak Republic (hereinafter: SR) are municipalities, or municipalities of an urban character, i.e. cities, at the lowest level. In the cities of Bratislava and Košice, these are also their individual parts. In general, this form of territorial self-government is referred to as local self-government.

The next level is the regional self-government, represented by the higher territorial unit known also as a self-governing region. In the SR, there are eight such units.

Territorial self-government has a fairly rich history in the SR. It began to form in the Austro-Hungarian Empire and its dynamic development could be seen in Czechoslovakia up until 1948.

However, in the years 1948–1989 territorial self-government in the current understanding of the term practically did not exist.

From the year 1945 onwards, entities representing local state power/authority began to form, known as national committees. From the year 1948, these were controlled and structured in a centralised manner.

Since the year 1989, we have been returning to the original form of self-government, which began forming via decentralisation as a direct opposite to the paternalistic centralisation of the previous period.

The result of these efforts was, once again, the existence of a dual form of public administration, where self-government plays a crucial role.

The creation of self-government in the SR was the result of decentralisation.

Two of the key terms connected with its establishment are public administration and decentralisation, which we shall analyse below.

II.

The first term is public administration. A positive definition of this concept is always connected with certain issues, so we will first attempt to define it negatively. This negative definition is a staple among experts on administration, and defines public administration as all that does not fall under judicial power or legislative power.

When applying this definition, we are left with state government, self-government and those entities of public and private law which carry public administration. We shall make use of this definition in the following text, due to the fact that these structures carry out public administration, which is, unlike private government, defined by public interest.

The very term of public interest is mercurial, undergoes constant change based on the subjects and activities involved. It is determined materially, temporally and personally. Its contents are set out in several legal acts. Despite the non-existence of a universal definition for the term, we do consider it a legal term. However, due to the limited space and the nature of this paper, we will not elaborate upon it further.

The second key term is decentralisation. We shall, again, begin with its negative definition. Decentralisation is the exact opposite of centralisation.

With regards to the structure of the subjects of public administration and their activity, we can then state that decentralisation in public administration had four basic forms:
- political,
- territorial,

– market,
– administrative.[2]

Despite the efforts of many experts in the theory of public administration who attempt to define the boundaries between the individual forms of decentralisation, they are not always successful. At times, it may even seem as an excessive or redundant activity.[3] We agree with the opinion presented by Viktor Nižňanský.

In the following paragraphs, we shall attempt to define these four forms in a concise manner. We cannot of course deplete all that these terms encompass with such little space.

Political decentralisation is defined as the transfer of decision-making competences from higher entities to lower ones, with the primary goal being to bring these closer to the citizens and increase their share on the governing of public matters.

Territorial decentralisation focuses on the performance of local or regional government. It primarily involves extending the capabilities of local and regional territorial units. In the SR, its development began once again in 1989 in a vertical manner, moving from the higher entities to the lower ones.

Market decentralisation focuses on evaluating economic indicators and their value. Its primary determining factor is the transfer of decision-making competences from entities of public law, including the allocation of public production and public goods, onto business and non-business subjects, which can be both natural and legal persons of private law, as well as non-governmental organizations, i.e. non-public entities.

[2] J.M. Cohen, S.B. Peterson, *Administrative Decentralization. Strategies for Developing Countries*, West Hartford: Kumarian Press, 1999, p. 43 ff.
[3] V. Nižňanský, et al., *Tretia etapa decentralizácie verejnej správy na Slovensku*, Bratislava: VŠEMVS, 2014, p. 50.

Administrative decentralization is the transfer of competences during the exercise of public administration and fulfilment of public interests from hierarchically higher entities to entities lower in the hierarchy.[4]

Even with a brief and simplified look at these individual forms of decentralisation, we can claim that it is completely redundant to make distinctions between them, and that conversely, it is far more important to view decentralisation as a unified whole. This is because these individual transfers of competences and the competence during the support tasks of public administration are mutually interconnected and always represent the transfer of competences either in a vertical or horizontal manner from one entity to the next. The main question seems to be the application of legal responsibility, namely whether it is applied as horizontal or vertical responsibility.

From what has been stated so far, we can then classify decentralisation into three distinct forms, as it was characterised by administrative theorists during the interpretation of the Act No. 71/1967 Coll. on Administrative Procedure, which was later used by a separate group of experts in their textbook on administrative law in the SR:

– deconcentration,
– delegation,
– devolution.[5]

For completeness, we must state that the source cited in footnote no. 7 also mentions the terms of prorogation and attraction, but these apply to individual decision-making activity.

We shall now focus on the three forms of decentralisation, as set out above.

[4] We were inspired by the publication by D. Klimovský, *Základy verejnej správy*, Bratislava Wolters Kluwer, 2015, p. 249 ff. However, we need to note that we do not accept the opinion that devolution is a type of decentralization. We believe that in this case it is entrusting of competence or transfer of competence. The theory of administrative law abandons these notions.

[5] M. Gašpar, *Československé správne právo*, Bratislava: Obzor, 1967, p. 28 ff.

Deconcentration represents the transfer of competences from created entities positioned higher in the hierarchy to entities lower in the hierarchy, i.e. those that are closer to the citizens. The transfer goes from top to bottom, and moves to entities that are directly subordinate of the entities from which these competences are transferred. The entity higher in the hierarchy exercises control over the lower entity, supervises it and may cancel the transfer of competences at any point.

Responsibility is fully applied from the superior towards its subordinate, from the entity higher in the hierarchy to the one positioned lower.

Delegation is a specific form of transfer of competences during which entities of state power and state administration, based on a decision of these entities, move a part of their competences onto other subjects, which can exercise public administration and are state and non-state in nature. A typical example is the transfer of competences onto public law corporations, institutions, establishments, but also subjects of private law. This transfer is made via a normative act and, apart from the competences and responsibility, the subject in question must also shoulder a substantial amount of the financial costs. These finances are provided to it from the state during the transfer of competences, but they are also gained from the subjects that are governed by it.

Devolution is a specific type of competence transfer. We can see it applied next to individual administrative acts, and it is the vertical transfer of competences, but from the bottom upwards. If we are to even consider devolution,[6] we will make use of our above-presented claim that decentralisation is the opposite of centralisation. We mean that it is a very specific form of transfer, which is not exercised in a vertical but in a horizontal manner. In practice, this is a transfer of competences from one entity to another, to an extent that it can be viewed as a complete imparting of competences, including the

[6] According to the Dictionary of Foreign Words, devolution is a transfer of decision-making from a lower to a higher authority; M. Ivanová-Šalingová, Z. Maníková, *Slovník cudzích slov*, Bratislava: SPN, 1990, p. 205.

imparting of total responsibility to another governing entity, up to reaching absolute, even financial independence. After this step, the responsibility is applied both in a vertical and horizontal manner (the central entities impart a fraction of their competence to territorial self-government).

We believe that in this situation, it would be much more appropriate to use the terms such as "imparting" or "entrusting", rather than devolution. There is a clear difference between the theory of administration and the science of administrative law.

III.

One of the manifestations of decentralisation in the SR is the fact that legal acts must clearly set out whether any competence of territorial self-government is an original competence or a delegated one. Without this designation, the principle of legal certainty would not be fulfilled. Deciding whether such competence or competences are part of self-government has practical consequences. These consequences can be classified as material and formal.

One of the material consequences can be the fact that, while exercising the delegated competence of state government, a territorial self-government entity should behave differently than during the exercise of original self-government activities. When exercising delegated competence of state government, the regulating and controlling aspects of administration come to the fore, while during the original performance of self-government, the organisational aspects of administration are more prominent.

The controlling nature of public administration is connected with the authoritative influence of public administration. New goals and tasks are achieved while exercising such competence. The regulating nature represents the use of authoritative influence in order to maintain the desired state of public administration. In opposition to that, the organisational nature of public administration is not linked to its

authoritative influence, but rather a partnership-like relations, where public administration provides certain services to the public.

First among the formal consequences are the identifiers attached to decisions in individual cases. If a decision is once issued in the area of self-government, it bears the symbols of the territorial self-government unit. If the decision is issued during the delegated competence of state administration, it is marked by state symbols (the state national emblem). The second formal consequence is who will bear liability for exercising the activity in question. During original self-government activity, the territorial self-government unit itself bears liability. During delegated performance of state government, the state is the entity that bears liability, even though the activity itself is performed by an entity of territorial self-government. This also designates who is liable for potential damage.

A formal consequence of this differentiation between the performance of self-government and performance of state government is also who decides on appeals against the decisions of the municipality or the higher territorial unit. In the case of delegated performance of state government, the entity which may rule on the appeal is a local state government entity (District Office). In the case of self-government, an appellate entity does not basically exist as municipalities and higher territorial units are independent public law corporations, which do not have a superior entity. In practice, courts themselves started the go-to method of seeking "appeal" via a claim within the framework of administrative courts.

To prevent confusion as to which activity constitutes self-government and which state government competence, two rules are applied in practice.

The first rule is clear. The statute itself designates which activities are self-government and which are state government ones. The distinction is stipulated in the relevant statute *expressis verbis*, and therefore there are never any doubts as to which group any given activity falls under.

Administrative bodies and courts cannot in any way circumvent such a rule using interpretation.

In practice, however, it is possible that a statute does not expressly state whether an activity falls under state government or self-government competence. This may lead to many problems in practice, from questions about the financing of such activities to liability for any illegal actions that may be committed. Due to this, the SR makes use of a "universal interpretation rule".

According to the universal interpretation rule, if the statute does not clearly define an administrative activity as self-government or state government one, it is assumed that such an activity falls under original self-government. This rule has its basis in several statutes. It is defined in the Act No. 369/1990 Coll. on Municipal Establishment, but also in the Act No. 416/2001 Coll. on Transfer of Certain Competences from the Bodies of State Government on Municipalities and Higher Territorial Units. This rule is, therefore, applied to both of these territorial self-government units.

It must be said that in practice, this rule has found its home in the Slovak legal order and has not caused any issues. However, a change occurred in 2011, when the Supreme Court of the Slovak Republic (hereinafter: SCSR) issued several decisions which changed the *status quo*.

Based on the decision R 87/2012, the decision of a municipality to impose a fine for infringement must always be considered an individual administrative act issued within administrative procedure, which affects the rights and legally protected interests of natural persons, that is, after the depletion of all regular methods of appeal, reviewable by a court acting within the scope of an administrative court, in accordance with Head II, Section V of the Code on Civil Court Procedure.

Based on the decision R 88/2012, in a procedure concerning an administrative offence, as well as once concerned with an infringement, a municipality acts as a body of government (not as a body of self-gov-

ernment). This means that, in such a procedure, it has the standing of an entity of delegated state government, and therefore a local state government body has the power to rule on appeals against such decisions.

However, we consider these SCSR decisions contentious.

The first decision sets out that if a municipality decides on a sanction for an administrative offence, a court can be asked for judicial review only if all regular methods of appeal have been used. If this were an area of delegated competence of state government, it would not raise any concerns, as an appellate procedure would first go through a local state government entity. In case of self-government, however, there is a problem because there is no appeal allowed to be filed in this area, as we have discussed earlier. Municipalities are independent and have no superior body.

For that reason, the SCSR in the second decision found that during the process of administrative punishment, municipalities always have the standing of an entity within delegated performance of state government. In other words, procedures of administrative punishment are always considered delegated exercise of state government, and never the exercise of self-government. Therefore, as the result of the judicial decisions, the appeal is possible, and the competent local state government body (District Office) will decide it.

Although it might seem that these decisions have a certain *ratio*, we do not identify with them. Firstly, the statement that administrative punishment is always considered a performance of state administration is problematic. We are of the opinion that this conclusion has no actual footing in natural law. Due to this, it is the legislator's task to decide what falls within the purview of self-government and what does not.[7]

[7] Compare the opinions of the Czech theorist V. Sládeček-Sládeček, *Obecné správní právo*, Praha: ASPI, 2009, p. 300.

This stance of the court could be understood if the law did not designate the sort of activities, but this was not the case. The SCSR, *en bloc* proclaimed that all procedures of administrative punishment are exercising of state government, regardless of the will of the legislator. We believe that in this way, the courts have manifestly stepped outside of their boundaries within the system of delegation of powers and have affected the legislative power in excess of their own powers.

Also, we are of the opinion that this is not the only breach of the delegation of powers. The executive power has been affected like this in much the same manner. According to the Constitution of the Slovak Republic, the competences of self-government may only be changed via an amendment to the Constitution, a constitutional act, a statute or an international treaty.[8] It is not possible to affect the competences of self-government entities via individual decisions, which the decisions of courts fall under.

Based on these decisions of the SCSR, the Slovak legislator amended the Act No. 180/2013 Coll. on the Organisation of Local State Government. In effect, as of 1 July 2016, the District Office located in the seat of the region rules on the appeals against the decisions of municipalities and higher territorial units, unless stated otherwise within special statute. This is true both for delegated exercise of state government authority and for self-government. It is also stipulated that the District Office may never change the decision of the municipality or higher territorial unit that the appeal has been lodged against. This is a direct application of the principle of cassation, wherein the entity ruling on the appeal cannot change the decision, only affirm it or reverse it.

We do not consider this change appropriate for two reasons. The legislator went even further than what was the original intent of the court and stipulated that any decision of self-government entities can be reviewed by a body of state government. Realising perhaps that this

[8] See Section 67 (2) of the Constitution of the Slovak Republic, Act No. 460/1992 Coll. Ústava SR.

might not be in accordance with rule of law principle, the legislator chose to base the appellate procedure on the principle of cassation.

We also do not consider the modification based on new legislation[9] to be sufficient. What is relevant to note is that state government and self-government represent two completely different sets of entities. Questions arise as to the liability in these cases. Only self-government can be responsible for the performance of territorial self-government. But, who will be liable for an unlawful decision that is later affirmed by a state government body? Will it be the state? Will it be the territorial self-government entity? The law provides no answer to this question.

IV.

In conclusion, it must be stated that defining the boundaries between original competences and the competences conferred is extremely problematic. In the conditions of the SR, this is reliant on decentralisation, as territorial self-government was re-constituted based on a political decision, as a system of vertical and horizontal decentralisation.

With vertical and horizontal decentralisation, there is the possibility that in the case of small municipalities there might be no one to carry out delegated state government competences. This is because this delegated exercise is often of a specialised nature, and the small municipalities rarely have the expertise on hand to perform it.

The decision-making of Slovak courts is also problematic, which in the end culminated in the current unfortunate legal formulation concerning the appeals against self-government decisions. We are of the opinion that this change disrupts the principles of decentralisation. It is therefore necessary to, *de lege ferenda*, make changes to this legislation and bring decentralisation to its original meaning.

[9] Act No. 161/2015 Coll. Správny súdny poriadok.