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"Prosecution Accountability as a barrier against undue influence (hierarchy, political powers) – Polish experience"

General remarks

Prosecutors are public authorities whose duty is to protect the public interest, to ensure the application of the law where its violation attracts a criminal sanction. In course of their service, prosecutors must respect human rights and procedural guarantees. In the democratic rule - of - law states, prosecutors should defend the general interests of the society even against members of the executive or the legislature.

The role and functions of prosecutors differ from those of the judges what may have an impact on the concepts of independence and accountability may be considered somewhat different as between prosecutors and judges. The main difference is that the judicial decision can be controlled only within judiciary, but cannot be controlled by other powers. Prosecution offices, on the other hand, can be expected by the state to act in a specific way in order to implement public policies contained in legislation or decided upon by the executive. However, in no case, such influence can refer to a decision on prosecuting in an individual case.

The prosecutors must be independent when they decide whether or not to prosecute in a particular case. They must act without any interference from other powers. Prosecutors act on behalf of society, therefore they must be able to initiate and conduct investigations not only against individuals, but also against public authorities, members of Government and of governmental organizations.

Prosecution should be structured in a way to ensure that all procedural guarantees are respected, and decisions are based on the evidence and the law and on no other criteria. Prosecutors must have a possibility to drop any charges when it occurs that they are groundless, without any

interference from their superiors. They must perform their duties impartially and on the basis of law.

The independence of prosecutors must be guaranteed by the law. The independence of the prosecutors cannot exist without accountability.

In the report published in 2015, the European Network of Councils for Judiciary presented the report on "*Independence and Accountability of the Judiciary and the Prosecution"* where the principles of the independence of the Prosecution were discussed, with a set of indicators to be considered while assessing any solution referring to this service. It is a very helpful tool which may assist in establishing independent and accountable prosecution service.

During the presentation, specific principles set in the Report of the ENCJ will be confronted with the solutions adopted in Poland.

Situation in Poland

In 2016, the Polish Parliament adopted the new *Law on Prosecution* (hereinafter "the Law") which merged again positions of the Minister of Justice and the Prosecutor General (after the period 2007 – 2016 when these institutions were separated). The very fact of holding this position by one person is not dangerous *per se,* but the situation depends on competences which are attributed with the Prosecutor General.

The justification of the merger of these two positions was to enhance the efficiency of the prosecutions. However, the Law provides many solutions which do not realize this aim, but they may limit the independence not only of this service, but also of individual prosecutors. The Law determines that the Prosecutor General manages the prosecution and is a superior of all prosecutors, and as such he possesses various competences, including the ones which enable him to intervene in a specific investigation.

Hereinafter, the most controversial solutions provided in the Law will be presented, which may not only undermine the independence of an individual prosecutor, but also may violate the rights to a fair trial of the parties of the criminal proceedings.

Appointment of the Minister of Justice/Prosecutor General

The person who is appointed for the Minister of Justice/Prosecutor General does not have to meet the requirements which are provided by the Law to become a prosecutor. According to Article 75, a person can be appointed a prosecutor if:

- Possesses exclusively Polish citizenship and has full civil and civic rights, and was not finally convicted for the criminal offence committed intentionally which is investigated *ex officio;*
- Is of immaculate character;
- Graduated in law in Poland and obtained master in law or graduated abroad and it was recognized in Poland;
- Is capable because of the health conditions to fulfill duties of a prosecutor;
- Is at least 26 years old;
- Passed the prosecutorial or judicial exam;
- Has been employed as an prosecutor – assessor or judicial assessor for at least one year;
- Did not cooperate with the service of the communist regime;

A person appointed for the position of the Minister of Justice/Prosecutor General is neither required to graduate in law and pass the proper professional exams, nor to pass a judicial/prosecutorial exam.

The ENCJ in its report underlined that appointment or election of the head of the prosecution service (Prosecutor General) should be based on objective criteria of professional competence, leadership, integrity and experience. There should be no political interference, whether formal or informal. The decision on the appointment of the head of the prosecution service is of particular interest and may prove to be more sensitive than in case of the judges. The hierarchical structure of the prosecution service may be exposed to a greater threat in relation to the influences in appointing the Prosecutor General, as from this position a certain authority may be exerted within all the prosecutors' body.

In a similar manner as for the judges (Chief Justice), if governments have some control over the appointment of Prosecutor General, it is important that the method of selection is such as

to gain the confidence and respect of the public as well as of the members of the judicial or prosecutorial system and legal profession and avoid political backgrounds.

Binding instructions for prosecutors

Before the adoption of the Law, the superior prosecutor was allowed to give binding instructions to the individual prosecutor but they could not have referred to the merit of the investigative action (Art. 8 (1) and (2) of the previous Law on Prosecution).

Under the Law, a superior prosecutor is authorized to give binding instructions referring to investigative actions (including but not limited to: initiation, termination, suspension of the investigation) to the prosecutor who conducts a criminal investigation. As results from Article 7 (3) of the Law, orders and instructions referring to the investigative action must be in writing, and upon the request of the prosecutor, with reasoning. In case there is an obstacle to issue the instruction in writing, it may be given orally, but afterwards it must be confirmed in writing. This document shall be attached to the files.

In case if the prosecutor does not agree with the instruction, he may demand a change of it or recusal from the case, what shall be finally decided by the prosecutor superior to the one who issued the instruction (Art. 7 (4) and (5) of the Law).

The above solution is risky because it enables the direct influence of the superior prosecutor on the course of the criminal investigation. It cannot be excluded that the prosecutor responsible for the case will not agree for presenting charges against the suspect, while his superior would order him to do so. It may lead also to unjustified filing of indictments. The right to demand to be recused from the case is not a sufficient remedy against the power of the superior prosecutor, particularly that there is a risk that a prosecutor who would be more inclined to follow the instructions would be assigned to the case. The Law does not provide for another procedure to verify the instruction that was issued.

Possibility to disclose the information referring to the specific investigation

As results from Article 12 (1) of the Law, the Minister of Justice/Prosecutor General, the State Prosecutor and other prosecutors authorized by them are allowed to present to other state institutions, and in justified instances – also to other persons all information not only about the activity of the Prosecution service, but also the one which refers to the specific investigation. The

only justification for such disclosure is that the information is considered to be relevant for the state's security and its functioning. Additionally, such release does not require consent of the prosecutor responsible for the investigation (Art. 12 (3) of the Law).

Furthermore, the Prosecutor General is competent to inform the media about the course of the specific investigation if it is justified with a serious public interest. A decision on it can be also taken by heads of prosecutions offices. (Art. 12 (2) of the Law).

Under the previous regulation, the Prosecutor General was obliged to present to competent authorities the report on the activities of the Prosecution office, but with an exclusion of the information about the specific investigations (Article 10 of the previous Law).

The solution adopted in the Law which regulates the rules of disclosure information from the ongoing investigation may have harmful effect on the position of the parties of the proceedings. Firstly, the prosecutor conducting the investigation, who knows the case best, does not have real influence on the decision whether to inform about the proceedings, and to which extent. Secondly, the Law does not determine the notion "other persons", so the decision to whom the information are disclosed is left fully to the prosecutor. Thirdly, the Law refers to the "media" but does not provide the definition of it. The Law does not prescribe any procedure to challenge the decision on disclosure.

Term of service

The Law introduced new regulations on appointments and dismissal of prosecutors holding managerial positions in the prosecutions. The previous Law provided that heads of relevant prosecution offices were appointed by the Prosecutor General for 6 – year – term without a possibility for reappointment. The opinion of the assembly of prosecutors was required, and in case of the heads of the regional and district prosecution offices candidates for these positions were proposed by the appellate prosecutor (Art. 13).

The previous Law provided strict circumstances when the prosecutor holding a managerial positon could have been dismissed:

- Resignation from the position;

- Permanent disability to perform the duties resulting from the illness which must have been confirmed by a competent medical doctor;
- Conviction with a final judgment for a criminal offence or a false declaration made during the vetting procedure confirmed with a final judgment;
- Improper performance of professional duties, with consent of the National Prosecution Council.

Under the Law, the heads of the prosecution offices on regional, district and circuit level are appointed and dismissed by the Prosecutor General upon the motion of the State Prosecutor, after the candidature was presented to a proper assembly of prosecutors. The State Prosecutor is appointed and dismissed by the Prime Minister upon the motion of the Prosecutor General. Additionally, the opinion of the President of the State is needed. (Art. 15)

As a consequence, the Prosecutor General has very wide competences in the field of human resources. Actually, he has almost unlimited power in appointment and dismissal of prosecutors holding managerial positions within the prosecution. It should be underlined that the Law does not provide tenure, neither the circumstances of dismissal are determined. Such solution is an incentive for prosecutors to be obedient, not independent.

Control over the Prosecutor General

The control over the Prosecutor General is very limited. Under the previous Law, the National Prosecution Council was found which was composed from the Minister of Justice, the Prosecutor General, representatives of the President, the Parliament (of both chambers) and 15 prosecutors elected by their peers. The tenure of this institution lasted 4 years. The Law replaced this council with the National Council of Prosecutors, which consists only from prosecutors, with a 2 – year – tenure. This body has only advisory competences, what is coherent with the principle that the Prosecutor General is responsible for the management of the prosecution. There is no parliamentary control over the actions of the Prosecution.

The ENCJ in its report suggested that independence of prosecution shall be safeguarded by the establishment of a Council for Prosecutors or a Council for Judiciary so as to allow prosecutors to be represented to and protected from other state's powers. Such councils must be representative of the professional body of prosecutors and must include members of civil society.

Right of the Prosecutor General to demand actions before the initiation of investigation

Article 57 (3) of the Law provides that the Prosecutor General may demand from competent authorities that specific surveillance and intelligence actions to be conducted before the initiation of the investigation if they are related with another ongoing investigation. Additionally, the Prosecutor General has an access to the materials collected during such operations.

In principle, surveillance and intelligence actions are conducted secretly. They interfere deeply and directly into the crucial rights of each person, particularly into freedom of communication and right to private life, which are guaranteed by the Constitution. Therefore, it is crucial that these operations are conducted in compliance with the law, based on the criteria of its necessity which is justified by need to prevent a crime (which falls within the category of the most serious crimes), to discover a perpetrator and to collect evidence. All interventions into this sphere shall be performed in accordance with the very strict requirements prescribed by the Criminal Procedure Code. It is not clear what the relation is between the solution provided in Article 57 (3) of the Law and the criminal procedure. The Prosecutor General's competence to demand specific surveillance and intelligence actions (f.e. surveillance of phone conversation, correspondence) may be easily abused.

Disciplinary responsibility of the prosecutor

As results from Article 137 of the Law, a prosecutor shall be held disciplinary responsible for professional misconduct, including an obvious and blatant violation of provisions of the law. However, the exception is provided, and the omissions or misinterpretation of the law by the prosecutor do not constitute a disciplinary misconduct if they had been committed exclusively in the public interest.

Such exclusion of the responsibility for professional misconduct is in violation with the basic principles of the democratic rule of law state which requires that all state institutions must act on the basis of the law, within its limits, in accordance with it. It is particularly surprising in reference to the prosecutors who are obliged to act in the public interest. Therefore, there is a serious risk that the disciplinary proceedings of prosecutors will become illusionary.

The role of the prosecutorial associations

There are few prosecutorial associations in Poland, there is also a trade union of the employees of the prosecution. However, it seems that majority of these organizations have decided to support the situation after the merger of the positions of the Ministry of Justice with the Prosecutor General, and in principle they do not raise concerns about the independence of prosecutors and their accountability.

Many prosecutors, who do not agree with the latest development in the Prosecution office, have been exposed to persecutions such as: dismissal, transfer to a lower position, transfer to other place of service. Disciplinary proceedings are being initiated against them. Some of them decided to form an association, however they have very limited possibilities to act. It is really difficult even to criticize openly what is happening within the Prosecution as any critical statement may be used as a justification for initiation of disciplinary proceedings.

It seems that currently the only way to act for these associations is to prepare a code of prosecutor's ethics, and register all instances where prosecutors do not act as they are required, in the interest of the society, but upon political instructions.