19 January 2016

Honourable Marek Ast
Chairperson of the Extraordinary Subcommittee for the Private Members' Prosecution Bill

Ref. 116/2016/MPL

Opinion on Private Members' Bills:
Prosecution Service Bill and Prosecution Service Law Implementing Provisions (Sejm Paper 162 and 163)

In connection with the legislative process leading to change in the structure and operation of the prosecution service the Helsinki Foundation for Human Rights (HFHR) hereby presents its comments to the proposed amending legislation. This review will focus on the Private Members' Bill on Prosecution Service (Sejm Paper No. 162) and the related Bill on Prosecution Service Law Implementing Provisions (Sejm Paper No. 163).

1. General Remarks

The Prosecution Service Bill proposes an institutional repositioning of the prosecution service vis-a-vis other public institutions. The Bill seeks to repeal the provisions of the Law of 9 October 2009 that separated the positions of the Prosecutor General and the Minister of Justice. The proposed change is fundamental for one of the country's major public institutions. Yet, the change is tabled as a **Private Members' Bill,** contrary to multiple earlier announcements of Cabinet members. This has a direct bearing on the content and scope of the notes explaining the grounds of the legislative proposal. A nearly 90-page document, the draft law is submitted with 10 pages of fairly general notes. No regulatory impact assessment is attached nor are the financial projection presented[1]The Bill repeals the Prosecution Service Law of 1985. Amended multiple times, the law has lost its clarity and a new prosecution service act has been in the pipeline for two years[2]. The objective has been to 'complete' the 2009 reform[3]. The reform should be completed in order to specify the responsibilities of the prosecution service and its position in the constitutional division of powers.

HFHR holds a view that the prosecutions service system must follow the penal procedure. Given the recent proposal to modify the procedure[4], starting the process with legislating the prosecution service

[1] The notes to the transition legislation point out that "the adoption of this legislation will not entail significant financial consequences for the state budget." More detail is provided in notes to both bills about the impacts of the closing of the military prosecution service, though no specific costs are attached: the proponents claim the policy will generate savings. (Sejm Paper No. 162, p. 97)

[2] In the framework of the process leading to the adoption of the Prosecution Service Law, the Helsinki Foundation for Human Rights presented two reviews of the bill: on 8 November 2012 - http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2013/03/prawo-o-prokuraturze-91112.pdf
and on 6 September, 2013 http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2013/09/prawo-o-prokuraturze-092013.pdf.

[3] The 2009 amendment bill indicated that the amendment was "the first step of a wider reform of the prosecution service and the functionalities of the judiciary with regard to criminal cases; the reform was need to restructure the prosecution service to make ready to embrace the challenges of a modern state". (Sejm Paper No. 617, 6th Tenure of the Sejm).

[4] The Criminal Code Bill and Executive Criminal Code of 22 December 2015 is available at: http://legislacja.rcl.gov.pl/projekt/12280652.

seems inadequate.

2. Positioning of Prosecution Services

There are a number of prosecution service models in Europe and globally. To point at just one that best fits the Polish legal system and experience would be quite challenging. Nonetheless, note that the change in 2009 was a response to earlier negative experience of pressure on specific investigations and prosecution decisions from the politically appointed prosecution service leadership before 2009. **The explanatory notes to the Prosecution Service Bill do not address these types of risks associated with the old model[5].**

The literature points to the French model as a classic arrangement, where "the prosecution service is structurally outside of the executive branch even though the Minister of Justice is a hierarchical supervisor of prosecutors (...) Prosecutors are traditionally classified as *autorite judiciaire."*[6] The opportunity prosecution principle gives prosecutors "a great deal of independence in deciding on the further course of the case". In this model, the Justice Minister instructs the Prosecutor General but the instruction is at a high level and no intervention is specific cases is allowed.[7] In Germany, other the other hand, the prosecution service is fully independent of the legislative branch and reports to the Justice Minister. Both the Prosecutor General and federal prosecutors are appointed by the President of the Federal Republic of Germany upon the request of its Minister of Justice[8].

While no single prosecution service model exists internationally and the positioning of the service varies from country to country[9], several standards have been developed based on international on human rights and liberties. The core standards include the right to a fair trial, presumption of innocence and the right of defence.

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[5] *"The prosecution service that is controlled by the executive, as is the case in Poland today, is not capable of performing its function in a democratic state of law."* A. Gaberle, O nowy kształt prokuratury w Polsce [Towards a New Concept of Prosecution Service in Poland], Państwo i Prawo 8/2007, p. 17

[6] A. Ważny, Usytuowanie prokuratury w niektórych państwach europejskich [Positioning of Prosecution Service in Certain European Countries], Prokuratura i Prawo 7-8/2012, p. 223

[7] A. Ważny, Usytuowanie prokuratury ... [Positioning of Prosecution…], p. 226.

[8] A. Ważny Usytuowanie prokuratury …[Positioning of Prosecution…], pp. 228-229

[9] Conf. K. Kijowski, Pozycja prawno-ustrojowa prokuratury w wybranych państwach Europy Środkowej and Wschodniej [Structural and Legal Position of the Prosecution Service in Central and Eastern European Countries], Prokuratura i Prawo 4/2013, p. 132 sl 50.

The objective of the 2009 law was to *"separate the position of the Justice Minister and the Prosecutor General, and to create a framework to strengthen the independence of the prosecution service by eliminating non-procedural means of controlling the course of specific cases to achieve short-term political goals."* The separation of the two positions was meant to prevent political pressure on the prosecution service.[10] However, in order to lay the foundations of prosecutorial independence **effective checks and balances had to be designed to monitor the performance of the prosecution service** and hold the Prosecutor General accountable for delivery. Today, this is achieved via **annual reports** with written comments by the Minister of Justice. If an annual report is not approved, the Prime Minister may table a motion in the Sejm requesting the dismissal of the Prosecutor General.[11] In addition, the Prosecutor General is expected to provide specific reports on matters of interest related to the protection of the rule of law and commitment to crime prosecution.

The current Prosecution Service Bill (Sejm Paper No. 162) fails to improve the existing model, for example by strengthening the position of the independent Prosecutor General or by giving the Sejm more powers to scrutinise the service[12]. In fact, in seeks to reverse the 2009 policy completely. First, the Bill merges the positions of the **Minister of Justice and Prosecutor General.** According to its proponents, the applicable legislation may violate Article 146 Paragraph 4 Item 7 of the Constitution because it inhibits the Government's capacity to ensure internal security and public order. Interestingly enough, the literature offers an exactly opposite view: "ensuring internal security and public order does not fall under the remit of the prosecution service".[13] The Bill at hand offers no modifications in the area. Public order responsibilities assigned to Police (Article 1 Paragraph 2 Item of the Police Law of 6 April 1990) headed by the Commander-in-Chief of Police, who reports to the Interior Minister (Article 5 Paragraph 1 of the Police Law) and is appointed and dismissed by the Prime Minister upon the request of the Interior Minister (Article 5 Paragraph 3 of the Police Law)[14]. There has never been any unconstitutionality claim over the fact that the Interior Minister is not an *ex officio* head of Police. Hence, the proposed arrangement where the Minister of Justice is an *ex officio* Prosecutor General is not deemed reasonable also in the domestic legal context. **The Helsinki Foundation for Human Rights is of the opinion that the Minister of Justice, an active politician and political party member, who is placed in the role of the Prosecutor General, i.e. head of all prosecutors, may be subject to much controversy, particularly with respect to ensuring adequate protection of criminal investigations.**

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[10] *"A democratic state that aspires to institute the rule of law cannot afford the risk of high-ranking officials in the executive branch abusing the law enforcement services as tools against their political opponents and such opportunities presented to them in the form of enforcement mechanism controlled by them"* A. Gaberle, O nowy kształt prokuratury w Polsce [Towards a New Concept of the Prosecution Service in Poland], Państwo i Prawo 8/2007, p. 4.

[11] A number of modifications were recommended in the debate, including determining a deadline for the Prime Minister to decide on the content and outline of the report.

[12] P. Sarnecki, Sejm a organy prokuratury [The Sejm vs the Prosecution Service], Przegląd Sejmowy 2/2015, pp. 85-101; P. Sarnecki, Możliwości demokratycznej kontroli nad działalnością prokuratury w aktualnym układzie instytucjonalnym [Options for Democratic Control of the Prosecution Service in the Current Institutional Framework], Gdańskie Studia Prawnicze, volume XXVII, 2012, pp. 321-330.

[13] A. Herzog, W kwestii zgodności z Konstytucją nowelizacji ustawy o prokuraturze [On the Constitutionality of Amended Prosecution Service Legislation], Państwo i Prawo 11/2010, p. 111.

[14] Conf. Article 2 and 3 of the Bill; Z. Brodzisz, Ustrój polskiej prokuratury a zasada niezależności prokuratorskiej [The Prosecution Service Structure and Prosecutoria Independence], Prokurator 2/2011.

3. The Position and Powers of the Prosecutor General

The reunification of the posts of Prosecutor General and Minister of Justice has a significant bearing on what will be expected of the Prosecutor General. Under the current law, candidates for the position of Prosecutor General must meet several conditions. In accordance with Article 10a Paragraph 3 of the Prosecution Service Law *„the nominees for the position of the Prosecutor General will be active* ***prosecutors*** *in common or military prosecution service units, in the National Remembrance Institute's Commission for the Prosecution of Crimes against the Polish Nation,* ***with at least ten years of service*** *as active prosecutors or active judges of the Criminal Chamber or the Supreme Military Court Chamber or active common or military court judges with at least ten years of service as criminal judges."*

Meanwhile, the Prosecution Service Bill expects Prosecutor General to meet much lower conditions even in comparison with district or deputy district prosecutors[15]. Yet, it is unclear whether the condition of non-membership of a political party specified in Article 97 of the Bill also applies to the Prosecutor General. The Helsinki Foundation for Human Rights believes that the Prosecutor General's selection/dismissal process alone is of paramount importance for the credibility of the position.[16] In contrast, the Bill makes the appointment of the Prosecutor General inherently non-transparent and left to the discretion of the leadership of the ruling political party. It would seem natural if the process of appointing the top position in the prosecution service were conducted in a manner that breeds confidence in the institution.[17]

One additional concern related to the Bill is that the Prosecutor's General accountability is solely political, i.e. it is exercised by virtue of an effective vote of no confidence to the Minister of Justice. A transparent appointment of the Prosecutor General should be linked to accountability for the prosecution service performance through regular reports and and discussion, e.g. by publicly reporting to Parliament.[18]

In the current framework, annual reports to the Prime Minister serve as a **key tool of assessment and control of the Prosecutor's General performance** and the performance of the entire prosecution service. Unfortunately, the current practice of providing statistical type information and lack of public debate on the report in Parliament or the Cabinet has not been conducive to a public debate on the overall performance of the service at all levels.

Meanwhile, the Bill suggests that ministers in charge of institutions authorised to conduct pre-trial proceedings should report to the Prosecutor General on the performance of these institutions with respect to such pre-trial proceedings.[19] Subsequently, the Prosecutor General would present a report and recommendation to the Prime Minister.

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[15] The Prosecutor General will be expected to meet the requirement set out in Article 75 1 Item 1-3 and 8, i.e. "1. has exclusively Polish nationality and enjoys full civil and citizen's rights and has no criminal record of crimes prosecuted *ex officio*; 2. is of impeccable integrity; 3. has a university degree in law obtained in Poland and holds a Master's degree in law from a Polish or international university recognised in Poland; (…) 8. has no track record of professional career in state security agencies nor has collaborated or been contracted by such agencies listed in Article 5 of the National Remembrance Law, Commission for the Prosecution of Crimes against the Polish Nation of 18 December 1998 (Journal of Laws, Issue 155, Section 1016, as later amended) nor has acted against the dignity of a judiciary position in the capacity of an active judge by violating the judiciary independence, as confirmed by a lawful conviction"

[16] Opinia Europejskiej Rady Konsultacyjnej Prokuratorów (CCPE) z 2014 w sprawie europejskich norm dotyczących prokuratorów, Item 56.

[17] Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A /HRC/20/19, 7 June 2012, Item 109. The current process of selecting the Prosecutor General is much more transparent and it is based on public hearings of candidates by the National Prosecution Council and the National Judiciary Council. Final decisions are made the President of the Republic of Poland.

[18] Report on European standards as regards the independence of judicial system: Part II - The prosecution service (adopted) by the Venice Commission 17-18 December 2010), CDL-AD(2010)040, Section 87.9.

[19] Article 60 Paragraph 2 of the Bill. This arrangement is similar to the one under Article 29 Paragraph 3 of the Prosecution Service Law.

HFHR recommends that annual reporting on the performance of the prosecution service be continued[20], subject to prior consultations with the prosecution bar. The proposed merger of the positions of Minister of Justice and Prosecutor General is based on the political accountability before the Parliament, thus on the balance of power. Thus, there will be no quality assessment of the Prosecutor General, e.g. by expert bodies. Taking into consideration that there will be no regular reporting by the Prosecutor General, quality assessments will only take the form of ad-hoc interventions upon the requests filed by MPs.

[20] In line with Recommendations of the Committee of Ministers of the Council of Europe (2000) 19 on the role of the prosecution service in the judiciary with regard to criminal case, this meets the transparency objective.. ,*"Results of such regular accountability assessments must be publicly disclosed through media or by publishing a report or presented to a selected audience. They may be compiled in the form of reports or summary statistics presenting the completed tasks, objectives, methods of enforcing the crime prosecution policies, given the right for Prosecution Service to make decisions and the financial figures representing public spending as well as future priorities,"* read the recommendations.

The lower standards of the Prosecutor's General selection and lacking quality assessment mechanisms are coupled with significantly extended powers of the Prosecutor General:

- The power to **issue instructions, guidelines and orders** with regard to the nature of specific measures to be taken in any case by any prosecutor (Article 7 Paragraph 2 and 3 of the Bill);

- The power to **revoke or modify decisions** of any prosecutor (Article 8 of the Bill).

The Prosecutor's General Powers to Appoint/Dismiss Prosecutors

Under the proposed Bill, the Prosecutor General will appoint regional, district and local prosecutors upon the request of the National Prosecutor. No competitive selection process will be used to fill vacancies and none of the three types of prosecutorial positions are secured by specific terms of office.

The Prosecutor General, acting upon the request of the National Prosecutor, will also appoint prosecutors in common prosecution service units to the first and the following prosecutorial positions and the appointment to the first prosecutorial position will be subject to a competitive process. While making such an appointment, the Prosecutor General may consult a collegial body of the prosecution service but failure to receive such a review from the body within a statutory deadline will be interpreted as having received a positive review, in accordance with Article 74 Paragraph 2. This process is not sufficiently transparent[21] and largely ignores the prerogatives of the prosecution bar.

Powers to Initiate Disciplinary Proceedings

With regard to disciplinary proceedings, the Bill introduces the long awaited transparency rule. However, it retains the corporative character of disciplinary proceedings. It is our view at HFHR that a mixed model should be considered in which a verdict of the first-instance court can be appealed against in a common court (appellate court with geographic jurisdiction of the Supreme Court). According to the Bill, court control over decisions made by disciplinary courts is deemed as an extraordinary measure and can be achieved by filing a cassation petition to the Supreme Court. If court control were ensured as a matter of principle the system will be better aligned with international law, in particular to right of access to court[22].

The Prosecutor General will exercise disciplinary powers over prosecutors in public prosecution service units (Article 143 of the Bill), will appoint the chair and deputy chair of disciplinary courts (Article 144 Paragraph 2 of the Bill), will appoint the Disciplinary Prosecutor, the First Deputy Disciplinary Prosecutor and 11 Deputies (Article 152 Paragraph 1 of the Bill). Furthermore, the Prosecutor General will also be authorised to:

- comment on any prosecutor's serious omissions, if any, with respect to the efficiency of the any pre-trial proceeding and to demand corrective measures (Article 138 Paragraph l of the Bill);

- flag infringements "if obvious errors in law are identified in any given case" (Article 139 Paragraph 1 of the Bill).

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[21] Report of the Special Rapporteur on the independence of judges and lawyers ..., Item 59.

[22] Conf. Report on European standards as regards the independence of judicial system . . ., Item 87.14; Guidelines on the Role of Prosecutors, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.l at 189 (1990), Item 21

Additionally, in accordance with Article 136 of the Bill[23] it is not clear whether the Prosecutor General himself/herself is subject to disciplinary liability.[24]

Powers to Manage Prosecution Service's Media Relations

The Bill makes a significant modification in terms of public and media communications about developments in the prosecution service. First, it integrates provisions on the process of appointing the spokesperson directly into the law (Article 39 of the Bill). Secondly, the mandate to issue operating rules for prosecution service units includes the requirement to define the media relations policy (Article 36 Paragraph 1 Item 13). Thirdly, the Bill implements the concept referred to in Article 12 Paragraph 2, whereby "the Prosecutor General prosecution service unit managers may communicate to the media either directly or through another appointed prosecutor **information about a pending pre-trial case or about the operation of the prosecution service, except if such information is classified, with due consideration to important public interest".**

The notes to the Bill point out that "*Article 156 Paragraph 5 of the criminal proceedings code will not apply in such cases"*[25]. Moreover, it is argued that the Prosecutor General or another prosecutor authorised by the Prosecutor General will not be held liable under civil law or subject to any financial liability for communicating reliable investigation-based information. However, the language of the provision does not suggest such consequences. In particular, it appears unacceptable to legislate civil indemnity for infringements of the personality rights of the victim or the defendant.

In the Garlicki vs. Poland case before the European Court of Human Rights, which included claims of infringement of Article 6 Paragraph 2 of the Convention, the Court concluded that:

"In the light of the above, the Court is fully satisfied that, not withstanding its relevant case law, national courts firmly and clearly confirmed that the statement made by the Minister of Justice/Prosecutor General violated the personal interest of the applicant and constituted an infringement of the principle of presumed innocence"[26]. In conclusion, the available civil liability mechanisms are an essential safeguard offering protection of the rights contained in the European Convention on Human Rights and constitute an expression of Poland' endorsement of the subsidiarity principles under the Convention.

The Helsinki Foundation for Human Rights wishes to underline that in the light of the Bordeaux Declaration[27] "*it is the public interest (...) that media should be equipped with essential information in order to inform the public about the performance of the judiciary".* Informing the public about the operation of the prosecution service may, amongst others, serve to improve transparency and to inspire confidence in the prosecution service[28]. Media relations should be based on mutual trust. According to the European Court of Human Rights, *"Article 6 Paragraph 2 [of the European Convention on Human Rights] must not be viewed as an obstacle for government to inform the public about pending cases, however the* ***provision requires that this should be done with prudence and***

[23] Article 136 Paragraph 1. *The prosecutor shall be liable for professional offences, including gross contempt of law, compromising the dignity of the office, subject to disciplinary proceedings (disciplinary offences).*

[24] Note that Article 160 Paragraph 1 authorises the disciplinary court to state in the verdict that the decision of the disciplinary prosecutor was clearly ungrounded. It unclear which this rule should not apply to decision made by the Deputy Prosecutor General, thus giving the position by stronger powers.

[25] Deputy Minister B. Święczkowski argued during the first reading of the Bill on 13 January, 2015, that this provision did not prejudice Article 156 Paragraph 5 of the Criminal Proceedings Code.

[26] Ruling of 14 June 201, Complaint No. 36921/07, Paragraph 133

[27] Opinion No. 12 (2009) of the CCJE and Opinion No. 4 (2009) of the CCPE on the relations between judges and prosecutors, 8 December 2009 available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282009%290P12&Language=lanPolish&Ver=original&BackColorIntemet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[28] Opinion No. 8 (2013) of the CCPE *"Relations between prosecutors and the media,"* Item 109-111.

restraint which are essential for the observance of the presumed innocence principle. *In any case, expressed opinions must not be confined to statements by public officials that confirm the applicant's guilt, which would encourage the public to deem such a party guilty or prematurely sentenced before evidence is examined by a competent court."*[29] Consideration could be given to an obligation to notify the individual with respect to whom there is an intention to reveal such information to the media, subject to **prudence and restraint which are essential for the respect for the presumed innocence principle.** (…).[30]

The method of exercising the powers derived from Article 12 Paragraph 2, and the very language of the statutory provision, should include limitations that emanate from the criminal proceedings code or the Press Law[31]. **It is essential that the powers specified in Article 12 Paragraph 2 of the Bill should not be applied as tools in the day-to-day political involvement of the Prosecutor General acting in the capacity of the Minister of Justice.** It is fundamental that no information released to the media violates presumed innocence[32]. Unfortunately, the proposed language of the provision provides no safeguards against such abuse. Incidentally, it is perhaps worthwhile considering integrating media relations policies of the prosecution service in the code of ethics that applies to prosecutors[33].

Prosecutor's General Investigative Powers

The Bill modifies the powers of the prosecution service with respect to control over investigative measures taken by the competent services. The Justice Minister is given a mandate to issue an ordinance on how "prosecutorial control over investigative measures" defined in Article 57 Paragraph 2 of the Bill[34]. We are concerned about the language of Article 57 Paragraph 3 of the Bill that states that *,"The Prosecutor General may request an investigative measure to be taken by the competent service if they are directly connected with a pending pre-trial case. The Prosecutor General may have access to evidence collected in the course of such measures."*

This is a power that should be granted to the case prosecutor or his/her direct supervisor. The Prosecutor General should not be granted this power because of the much power requirements the Prosecutor General has to meet versus the National Prosecutor or any other prosecutor in the public prosecution service. Secondly, the linkage is still unclear between Article 57 Paragraph 3 of the Bill and the trial proceedings and recording conversations, especially given the fact that Article 57 Paragraph 3 of the Bill refers to pre-trial proceedings. The Helsinki Foundation for Human Rights believes that pre-trail proceedings must observe due standards of handling of covertly obtained information, as defined in the criminal proceedings code.

4. Scope and Guarantees of Prosecutorial Independence

The European Court of Human Rights indicated in the *Guja versus Moldova*[35] that courts and investigation agencies in a democratic state rule by law must remain free from political pressure. It is essential in the context of the division of powers and accountability principles. What is fundamental, however, is that prosecutorial independence is not a type of privilege but a guarantee of fair and

[29] Ruling in the *Garlicki versus Poland* case, Paragraph 132.
[30] Opinion No. 8 (2013) of the CCPE *"Relations between prosecutors and the media",* Item 46.
[31] Press Law of 26 January 1984.
[32] Bordeaux Declaration, Item 11: "*Competent authorities shall disclose such information while observing the principle of presumed innocence of the accused, the right to a fair trial and right to privacy and familiy life of all persons who participate in the proceeding".*
[33] Opinion No. 8 (2013) of the CCPE *"Relations between prosecutors and the media",* Item I.
[34] Currently, Article 18 Paragraph 5 of the Prosecution Service Law.
[35] European Court of Human Rights ruling in the *Gu.Ja versus Moldova* case, Complaint No. 14277/04, Paragraph 86.

impartial justice[36]. The key concept is that criminal investigation at the stage in which the prosecutor is involved largely affects the course of the trial. Moreover, prosecutorial independence is key to protecting the rule of law.[37] The independence should entail protection against political pressure and from financial or media pressure.

The literature suggests that "*the stronger the external dependability the more significant the extent of the internal dependability that consists in the power entrusted to supervisors to measures adopted by their subordinate prosecutors".*

Factors that are key to assessing the extent of the independence of the prosecution service include the process of appointing and dismissing prosecutors, the degree of freedom do decide on the course of case investigation and the process of promoting prosecutors.[38]

The Bill stipulates that the principles of prosecutorial independence expressed in Article 7 Paragraph 1 of the Bill may be subject to limitation in a manner specified in Article 7 Paragraph 2 and Articles 8-9 of the Bill. The key difference between the current and the proposed system is that it would now be **possible for the supervising prosecutor[39] to instruct specific course of action in investigating a case**. As a matter of principle, such instruction should be made in writing and integrated into the case file (Article 7 Paragraph 3 of the Bill). In fact, all international guidelines recommend that such instructions must be made in writing.[40]

In case a prosecutor does not agree with the instruction, he/she may demand that it be changed or that he/she be exempted from the measure or the entire case. Article 7 Paragraph 4 provides that "exemption may be granted by the direct supervisor of the prosecutor who issued the instruction". It is not clear who decides on modifying the instruction and on what grounds the decision will be made. An essential requirement should be added that instructions must be lawful[41] and must not compromise the interest of the party at hand[42]. Furthermore, it is critical that such instruction be supported by detailed rational for the protection of transparency in case management.[43]

There seems to be a particular commitment to create safeguards against external instructions issued "outside the prosecution service". Inherently unlawful, they will never be made in writing and they will never be included in the case file[44]. Where the Prosecutor General is an active politician and/or a party member the threat is particularly dangerous. In the light of the above, it is particularly disturbing to see the proposed option for the Prosecutor General to be assisted by community advisors[45], whose qualifications or potential conflict of interest is not regulated even at minimum.

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[36] UN Special Rapporteur on the independence of judges and lawyers indicated that the lack of autonomy and functional independence of prosecutors may undermine the credibility of the prosecution service and lower public confidence in the judiciary, Gabriela Knaul A/HRC/20/19, 7 June 2012; Item 26)

[37] Opinion (2014) of the CCPE *"European standards for prosecutors"*, Item I andXVIII.

[38] A Geberle, O nowy kształt ... [Towards a New Concept] p. 8. The Bordeaux Declaration indicates that in order to ensure prosecutorial independence, there are other factors involved such as the professional position and job-related measures that they choose to take must not be subject to any influence or intervention from outside the prosecution service; their recruitment, career and protection of the formal position must be ensured in accordance with applicable law and regulations and subject to their consent; terms of remuneration must be guaranteed in the law.

[39] Article 13 Paragraph 2, Article 1-8 Paragraph 2, Article 22 Paragraph 4, Article 23 Paragraph 4, Article 24 Paragraph 4 of the Bill.

[40] Bordeaux Declaration, Item 9: "Instructions issued to individual prosecutors should have a written form, should be lawful and be in line with publicly available prosecution guidelines and criteria, as appropriate". Conf.: Opinion no. 3 (2008) of the CCPE on the role of prosecutors outside of the criminal law; Report of the Special Rapporteur on the independence of judges and lawyers ..., Item 74-75.

[41] Opinion No. 9 (2014) of the CCPE *"European standards for prosecutors"*, Item 33.

[42] Conf. Bordeaux Declaration, Item 9.

[43] Recommendations of the Committee of Ministers of the Council of Europe (2000)19, Item 13.

[44] Report of the Special Rapporteur on the independence of judges and lawyers, Item 116.

[45] Article 38 of the Bill.

The Bill extends the right to modify and/or revoke decisions made by the reporting prosecutor. Currently, this right is exclusively granted to the direct supervisor whereas the Bill speaks of the "supervising prosecutor".

Like in the current Prosecution Service Law, the Bill authorises the supervising prosecutor to take over cases from subordinate prosecutors and take the related measures, unless otherwise specified in the said law[46]. In has been pointed out on numerous occasions in the past debates on the prosecution service law that one of the factors that pose a threat to prosecutorial independence is that some cases 'change hands' quite frequently (are repeatedly referred to other prosecution service units)[47]. Reassignment of cases or modifications of case-related decisions should be based on objective grounds that stem from precise statutory provisions[48]. The code of prosecution ethics[49] specifies that "it is unacceptable to abuse the option to exempt a prosecutor from the case and assign the case to a different prosecution service unit out side of the geographic jurisdiction". The current Bill should also incorporate such safeguards of prosecutorial independence.

The increased powers of the Prosecutor General to decide on specific cases managed by rank-and-file prosecutors are not accompanied by increased safeguards against abuse of prosecutorial independence such as an option to file complaints to the proposed National Prosecution Council.

The establishment of the National Prosecution Council in 2010 was to provide a safeguard mechanism to guarantee "the independence of the prosecution from political pressure". Its powers have been extended in relation to the Prosecution Council that existed before the 1990 amendment[50]. Currently, the National Prosecution Council also plays the safeguarding role for appellate, district and local prosecutors and constrains the powers of the Prosecutor General with respect to personal appointments. This setup has essentially turned the National Prosecution into an appointment body within the prosecution service rather than a steward of prosecutorial independence.

However, the diagnosis found the explanatory notes to the proposed Bill appears inaccurate. It suggests that "the National Prosecution Council has ceased to be an advisory body acting solely on merit". As a matter of fact, the proposed setup of the National Prosecution Council will mean it is going to lose much of its current mandate and it can hardly be argued that the Bill is seeking to strengthen its position or make it act more 'on merit'.

The National Prosecution Council will mainly consist of high level prosecution service officials (from National Prosecution Service and regional prosecution service units) and 5 prosecutors seconded by the Prosecutor General. Council members will be appointed to relatively short terms of 2 years. The Council will only have a mandate to review specific issues with a power of issuing opinions. **Article 43 Paragraph 1 of the Bill that states that the National Prosecution Council shall be the steward of prosecutorial independence offers no specific tools to actually enforce the provision[51].** First

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[46] Article 9 Paragraph 2 of the Bill.

[47] *"According to Paragraph 75 Paragraph 2 of the ordinance of the Minister of Justice as of 24 March 2010 on the Rules of Internal Operation of the Prosecution Service Units (Journal of Law Issue 49, Section 296 as later amended) the prosecutor in the capacity of a direct supervisor shall exercise supervisory functions in that he/she may refer a case to another prosecutor. The Council holds a view that such a decision may be exclusively made for the benefit of the proceeding or may result from having identified an inappropriate handling of the case or an inadequate management thereof. This provision shall not obligate the direct supervisor to make the decision in writing or to justify such a decision. The National Prosecution Council believes that this provision may lead to compromised prosecutorial independence. Therefore, it recommends a modification of the said provision by legislating an obligation to make such decisions in writing and provide a rational for them".* (Resolution of the National Prosecution Council No. 142/2012).

[48] Report of the Special Rapporteur on the independence of judges and lawyers ..., Item 80.

[49] Attachment to Resolution No. 468/2012 of the National Prosecution Council of 19 September 2012.

[50] A Herzog, Amendment of the Prosecution Service Law. Commentary, Warsaw 2010, p. 85.

[51] *"Furthermore, the Council expresses a belief that it must be equipped with legal instruments to ensure that it can effectively fullfil one of the most important statutory function of being a steward of prosecutorial independence; in*

and foremost, the Council should be given the power to assess individual complains regarding prosecutorial independence violations. Moreover, the membership should include representatives of all levels of the prosecution service[52] and members should be made more independent of the Prosecutor General.

One of the factors to consider while assessing prosecutorial independence is the track record. The Bill removes terms of office for regional, district and local prosecutors. They will be appointed by the Prosecutor General out of candidates put forward by the National Prosecutor the General Prosecution Service assembly. **No terms of office for the heads of prosecution service units is a major drawback in terms of protecting their independence of hierarchical pressure.** They may be dismissed by the Prosecutor General for any reason, which makes them vulnerable[53]. [53] .

Finally, there will be no quality contests for other prosecutorial positions for reasons of time economy[54]. Unfortunately, this makes the promotion system much less transparent in the prosecution service. Whereas the current system does include regular performance assessments promotions are not tied to assessment results, which makes them appear irrelevant. However, no objective procedures at all means a higher risk of full discretion and abuse that may compromise prosecutorial independence[55].

5. Conclusions

The Bill is a sizeable document and our comments presented are a mere selection and they highlight major provisions. HFHR strongly feels the prosecution service should be modeled to fit the criminal procedure. There are currently no public plans to modify the procedure[56].

It is quite disturbing to observe a major piece of draft legislation that regulates an institution at the heart of the rule of law being put forward as a Private Members' Bill that bypasses all social consultations which would warrant a thorough evaluation of the 2009 Prosecution Law amendment.

It is our belief at HFHR that merging the positions of the Prosecutor General and the Minister of Justice is inappropriate. **There are concerns over possible abuse that was a major rationale for the split of the positions in the 2009 legislation.** The commitment to efficiency must not disregard proper safeguards against all types of external pressure (particularly politically motivated) that may have an impact on human rights and liberties.

The extended powers of the Prosecutor General, including intervention in criminal cases handled by rank-and-file prosecutors, creates a serious threat to the independence of case prosecutors. The Bill does not offer any effective protection mechanism against supervisor pressure on prosecutors. **HFHR is of the opinion that safeguards to protect prosecutorial independence is key to accountability[57].** The Bill does not address ethical considerations. The adoption of ethical standards could address conflict-of-interest or pressure issues[58]

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particular is should be authorised to vet prosecutors. The National Prosecution Council sees a need to regulate the procedure before the Council" (Resolution of the National Prosecution Council No. 142/2012).

[52] Report on European standards as regards the independence of judicial system..., Item 19.

[53] Report of the Special Rapporteur on the independence of judges and lawyers ..., Item 110.

[54] Contests are maintained only for appointments to the first prosecutorial position.

[55] Report of the Special Rapporteur on the independence of judges and lawyers ..., Item 112.

[56] P. Kardas, Rola and miejsce prokuratury w systemie organów demokratycznego państwa prawnego [The Role and Position of the Prosecution Service in a Democratice State of Law] , Prokuratura i Prawo 9/2012, p. 16.

[57] D. Drajewicz, Reforma ustrojowa prokuratury, a zasada sprawności postępowania [Structural Reform of the Prosecution Service and the Principle of Efficiency of Proceedings], Prokurator 2/2011.

[58] Report of the Special Rapporteur on the independence of judges and lawyers ...Item 73; Bordeaux Declaration, Item 11.

Helsinki Foundation for Human Rights views the proposed structural change in the prosecution service may inadequately secure the rights of parties to criminal proceedings and the integrity of the process.

On behalf of the Helsinki Foundation for Human Rights,