COMMISSIONER FOR HUMAN RIGHTS

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Constitutional Tribunal

Warsaw

Application
of the Commissioner for Human Rights

Pursuant to Article 191 para 1 pt. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended) and Article 16 para 2 pt. 2 of the Act of 15 July 1987 on the Commissioner of Human Rights (Journal of Laws of 2015, item 1648, as amended),

I request to declare

the non-consistence of:

1) Article 7 para 2-5 in conjunction with Article 13 para 1 and 2 of the Act of 28 January 2016 - Prosecution Service Act (Journal of Laws, Item 177), to the extent that it obliges a prosecutor to execute orders put forward by the Minister of Justice holding a function of the Prosecutor General, and related to the content of a procedural act with the rule of citizens' trust in the state and law, arising from Article

2 of the Constitution of the Republic of Poland and Article 149 para 1 of the Constitution of the Republic of Poland;

2) Article 8 para 1 in conjunction with Article 13 para 2 of the Act mentioned in pt. 1, to the extent that is entitled the Minister of Justice holding a function of the Prosecutor General to amend or repeal a decision issued by a subordinate prosecutor, with the rule of citizens' trust in the state and law, arising from Article 2 of the Constitution of the Republic of Poland and Article 149 para 1 of the Constitution of the Republic of Poland;
3) Article 9 para 2 in conjunction with Article 13 para 2 of the Act mentioned in pt. 1, to the extent that is entitled the Minister of Justice holding a function of the Prosecutor General to take over cases conducted by subordinate prosecutors, with the rule of citizens' trust in the state and law, arising from Article 2 of the Constitution of the Republic of Poland and Article 149 para 1 of the Constitution of the Republic of Poland;
4) Article 12 para 1 of the Act mentioned in pt. 1, in the part reading as follows, "and in duly justified cases, also to other persons" from Article 2 and Article 47, Article 51 para 2 in conjunction with Article 31 para 3 of the Constitution of the Republic of Poland;
5) Article 12 para 2 in conjunction with Article 12 para 2 of the Act mentioned in pt. 1, to the extent that it enables the Prosecutor General - without the requirement to obtain consent from the prosecutor conducting the proceedings - to communicate information from pre-trial proceedings to media personally or through another authorized prosecutor, considering an important public interest, with Article 2 and

Article 47, Article 51 para 2, in conjunction with Article 31 para 3 of the Constitution of the Republic of Poland.

Statement of reasons

Pursuant to Article 1 para 1 of the Prosecution Service Act, prosecution is composed of the Prosecutor General, State Prosecutor, other deputies of the Prosecutor General and prosecutors of general organizational units of the prosecution and prosecutors of the Institute of National Remembrance - Commission for the Prosecution of Offenses against the Polish Nation. The Prosecutor General is a supreme body of the prosecution. Prosecution realizes tasks in the scope of prosecution of crimes, and upholds the rule of law (Article 2 of the Prosecution Service Act).

The function of the Prosecutor General is held by the Minister of Justice. The Prosecutor General must meet the requirements stipulated in Article 75 para 1 pt. 1-3 and 8 (Article 1 para 2 of the Prosecution Service Act). Therefore, a Prosecutor General (and as a consequence also a Minister of Justice), can be a person that: 1) holds the Polish nationality only, and exercises full civil and civic rights, and was not duly convicted for intentional crime prosecuted by public indictment; 2) is of an impeccable moral character; 3) has graduated in law from a higher educational institution in Poland and obtained the master title, or from a foreign institution recognized in Poland; 4) did not perform professional service, did not work in or cooperate with state security bodies, mentioned in Article 5 of the Act of 8 December 1998 on the Institute of National Remembrance - the Commission for the Prosecution of Offenses against the Polish Nation (Journal of Laws of 2016, item 152), and was not a judge, who while adjudicating violated the office dignity and breached judicial independence, what was recognized with a final judgment.

The solution adopted by the legislator, consisting in the fact the the Prosecutor General function is to be held by the Minister of Justice, is a return to the solutions applicable before the Act of 9 October 2009 on amending the Act on Prosecution Service and some other acts (Journal of Laws No. 178, item 1375, as amended), however the return is made with certain modifications, which exert direct influence on justification of prosecutors' independence in the scope of exercising basic statutory actions in the form of prosecuting crimes and upholding the rule of law.

Article 7 para 1 of the Prosecution Service Act stipulates that a prosecutor - while exercising his actions specified in the Act - is independent, with a reservation to para 2-6 and Article 8 and Article 9. Hence, the prosecutor's independence - declared by the legislator - is faced with highly considerable limitations in the scope of prosecuting crimes and upholding the rule of law. Pursuant to Article 7 para 2 of the Prosecution Service Act, a prosecutor is obliged to exercise orders, instructions and commands from the supreme prosecutor. An order considering the content of a processual act is issued by a supreme prosecutor in writing, upon the prosecutor's request - together with a justification. If any barriers in delivering the order in a written form emerge, it is permissible to communicate the order orally, but the supreme prosecutor is obliged to confirm it in writing immediately. The order is included into the case's reference files (Article 7 para 3 of the Prosecution Service Act). If the prosecutor does not agree with the order related to a procedural act, they can request to amend the order or exclude it from the act or case. The request is submitted by the prosecutor in writing, together with a justification, to the supreme prosecutor, who issued the order. A final decision on exclusion is made by the prosecutor, who is an

immediate supervisor of the prosecutor, who issued the order (Article 7 para 4 and 5 of the Prosecution Service Act).

In turn, Art. 8 para 1 of the Prosecution Service Act stipulates that the prosecutor, who is an immediate supervisor, is entitled to amend or repeal a decision issued by the subordinate prosecutor. Amendment or repeal of the decision must be made in writing, and is included into the case files. Amendment or repeal of the decision delivered to the parties, their representatives or defenders and other entitled entities, may take part only with preservation of the mode and principles stipulated in the Act (Article 8 para 2 of the Prosecution Service Act). Moreover, pursuant to Article 9 para 2 of the Prosecution Service Act, the supreme prosecutor may take over cases conducted by subordinate prosecutors and perform their actions, unless statutory provisions state otherwise.

The solutions implemented in the scope stated above prove significant differences towards the legal status that was applicable previously. Before the Prosecution Service Act entered into force, the prosecutor was also obliged to realize orders, instructions and commands issued by the supreme prosecutor. However, they must not have been related to the procedural act content (Article 8 para 2 of the Act of 20 June 1985 on the Prosecution Service - Journal of Laws 2011 r. No. 270, item 1599, as amended). Furthermore, what is obvious as the Prosecutor General was not at the same time the Minister of Justice, the prosecutors were not provided with orders, instructions or commands issued by an active politician. The political factor also did not have any impact on repeal or amendment of the decision made by a subordinate prosecutor or taking over a case conducted by a prosecutor. What is more, only the immediate supreme prosecutor was entitled to amend or repeal the

prosecutor’s decision. This situation changed, when the Prosecution Service Act entered into force.

Article 13 para 1 of the Prosecution Service Act stipulates that the Prosecutor General administers the prosecution operations personally or through a State Prosecutor and other deputies of the Prosecutor General, by issuing orders, instructions and commands. Orders and instructions issued by a Prosecutor General have a character of general acts of internal administration. Pursuant to Article 60 para 1 of the Prosecution Service Act, the instructions related to methodology of pre-trial proceedings bond all bodies entitled to conduct the pre-trial proceedings. The commands may be related to an individual case carried out by the prosecutor, hence they shape the procedural situation of an entity, and refer to their rights and freedom directly.

According to Article 13 para 2 of the Prosecution Service Act, the Prosecutor General is a supervisor of prosecutors of general organizational units of the prosecution, and prosecutors of the Institute of National Remembrance. It means that a prosecutor is obliged to exercises an order pertaining to the content of procedural acts, issued by a politician, i.e. a Minister of Justice, holding the function of the Prosecutor General. This politician is entitled to amend or repeal the decisions issued by the subordinate prosecutors, and to take over cases conducted by the subordinate prosecutors. As a results, the Prosecutor General can give orders to all subordinate prosecutors, pertaining to the contents of particular procedural acts in individual proceedings, including also the manner of finishing the proceedings and contents of actions undertaken by the prosecutor within the course of a trial procedure. A person that is active in the field of politics can pose a factor deciding on e.g. searching, detaining or submitting an application for a pre-trial detention.

It ought to be notice in the context mentioned above, that a prosecutor cannot exercise a Member's mandate (Article 103 para 3 of the Constitution of the Republic of Poland). While pursuant to Article 97 para 1 of the Prosecution Service Act, within the terms of holding the function, the prosecutor cannot be a member of any political party or take part in any political activities.

In its judgment of 10 April 2002 (ref. No. K 26/00, OTK of 2002, No. 2/A, item 18), the Constitutional Tribunal laid down that "the requirement for political neutrality of certain segments of public service means first of all that it is not permissible to motivate realization of constitutional and statutory tasks by interests of political groupings. Purpose of the the non-party political approach is to remove the threat resulting from the fact of organizational and political bonds between the persons holding public functions and a political party. Provision of this non-party political approach of public services is not possible if persons holding such functions are members of political groupings."

However, the prohibitions stipulated in Article 97 para 1 of the Prosecution Service Act do not related to the Prosecutor General, who the legislator provided with a wide array of resources for influencing the content of processual decisions made by prosecutors, who adopted the non-party political approach. Such a conclusion is directly suggested by Article 1 par 1 of the Prosecution Service Act, which differentiates the Prosecutor General from other prosecutors. What is more, the Prosecutor General do not need to fulfill the general conditions that are required to be called for the prosecutor's position (op. cit. Article 75 of the Prosecution Service Act). Thus, it ought to be concluded that in this scope it preserves appropriateness of the opinion expressed by the Supreme Court of Justice in its resolution of

26 September 2002 (ref. No. I KZP 24/02, OSNKW of 2002, No. 11-12, item 100), ordering to differentiate the term “Prosecutor General” from the term “prosecutor”.

Here, it must be stressed that the Minister of Justice, holding the function of the Prosecutor General, is a member of the Council of Ministers (Article 147 para 1 of the Constitution of the Republic of Poland). Therefore, external independence of the Prosecutor General, who - as a politician - is obliged to realize the interests of their political grouping, suffers further additional limitations. The Minister of Justice, holding the function of the Prosecutor General, is obliged to realize the policy stipulated by the Council of Ministers (Article 7 para 3 of the Act of 8 August 1996 on the Council of Ministers - Journal of Laws of 2012, item 392, as amended), and their speeches represent a position compliant with arrangements made by the Council of Ministers (Article 8 of the Act on the Council of Ministers).

According to the Commissioner for Human Rights, the legislating decision - consisting in delegating the office of Prosecutor General to the Minister of Justice, combined with providing the Prosecutor General with a legal possibility to interfere into the content of procedural acts undertaken by the subordinate prosecutor - requires assessment in terms of its compliance with constitutional standards. In doing so, the legislator created a situation, where a political factor can make e.g. decisions on detaining, searching or revealing details or an image of a suspected person, i.e. the procedural decisions that interfere directly with such constitutional goods as personal freedom (Article 41 para 1 of the Constitution of the Republic of Poland), the right to privacy (Article 47 of the Constitution of the Republic of Poland) or inviolability of home (Article 50 of the Constitution of the Republic of Poland). However - what is emphasized by T. Grzegorczyk

(op. cit. „Niezależność prokuratury i prokuratorów w świetle znowelizowanej ustawą z dnia 9 października 2009 r. ustawy o prokuraturze” *(Independence of prosecution and prosecutors in the light of the Act on Prosecution Services amended by the Act of 9 October 2009)* , Prokuratura i Prawo of 2010, Issue 1-2, p. 28) – “a minister - regardless of their wider or narrower expertise in the field related to a given ministry - is a politician, while not only the courts but also the prosecution should be as far as possible from political affairs in their operations. When it comes to the sphere, which the prosecution and courts operate in, the politicians’ issue should be only posed by creation of statutory regulations and executive acts - through their participation in legislative and executive bodies - and not interference in the contents of particular actions undertaken by prosecutors and courts.”

It must also be kept in the field of visions that the legislator, while providing the Minister of Justice, holding the office of the Prosecutor Genera, in the right of in-depth interference in the contents of procedural acts undertaken by particular prosecutors, at the same time decided that qualifications required from the person holding such a function (Art. 75 para 1 pt. 1-3 and 8 in conjunction with Article 1 para 2 of the Prosecution Service Act) significantly deviate from those required from an ordinary prosecutor. It is enough to graduate in law from a higher educational institution in Poland and obtain a master title, or from a foreign institution recognized in Poland, to be able to issue orders related to procedural actions undertaken by experienced and extensively more qualified prosecutors. The solution adopted in this scope by the legislator illustrates the advantage of political motivations over the content-oriented ones to the fullest extent. Professional experience and qualifications must give way to the will imposed by a political factor that leads the prosecution.

In the light of the above, the prosecutor's independence in exercising the actions stipulated in the acts, declared by the legislator in Article 7 para 1 of the Prosecution Service Act, suffers extensive limitations. When it comes to relation with the Prosecutor General, being at the same time the Minister of Justice, this independence actually transforms into a total lack of resistance to impact exerted by a political factor. The prosecutor is obliged to exercises the politician's orders, and the politician is entitled to amend or repeal the prosecutor's decision, they may also carry out the processual actions for the subordinate prosecutor.

In the letter of 12 January 2016 (ref. No. PG VII G 025/399/15), presenting the opinion to the draft Act - Prosecution Service, the Prosecutor General of that time concluded that "(...) the Prosecutor General, being - pursuant to Article 13 para 2 of the project - a supreme prosecutor to the prosecutors of general organizational units of the prosecution and prosecutors of the Institute of National Remembrance, is also entitled to interfere in the proceedings, despite the fact they they are member of the government as the Minister of Justice. It means that the prosecutors will be fully dependent from the executive power while making decision in particular cases, what is inconsistent with the so-called <<Roman Charter>> (opinion No. 9 of the Consultative Council of European Prosecutors about European standards and rule that govern the prosecutor's status) and the Bordeaux Declaration (a common opinion No. 4 of 2009 of the Consultative Council of European Prosecutors and the Consultative Council of European Judges). The declarations listed above emphasize strictly and clearly that there is a need to guarantee prosecutors' independence from executive bodies and the parliament, while making decisions in particular cases. The documents suggest that court is the only institution that should be

entitled to control prosecutors. <<Bordeaux Declaration>> stipulates, among others that << in order to maintain an independent position of prosecutors, it is necessary (...) to provide such working conditions so the professional career does not depend on external factors (beyond the prosecution), especially from the executive power.>> Hence, it ought to be concluded that the prosecutor's independence in realization of their statutory tasks, declared in the draft, remains illusory. When it comes to the matter of providing the prosecutors with the independence attribute and its scope, it is often raised that prosecution is a structure organized on the basis of a hierarchical subordination, and such an organizational form requires to provide the supreme, supervising and administering prosecutors - i.e. prosecutors that control work done by others - with rights to interfere in the work. In this context, the prosecutor's independence is comprehended only as a necessity to eliminate the influence on their operation, exerted by the external factors, and not as independence from supreme or superior prosecutors. However, doubts are risen by introduction of the right to amend or repeal each decision issued by a prosecutor, therefore also of an incidental decision, by the Prosecutor General, who will be a supervisor, but not a direct supervisor, the Minister of Justice, i.e. a representative of executive power, what means that the procedural actions may be interfered by a person, who is not a prosecutor, just a holder of the Prosecutor General's function.

Article 6 of the Prosecution Service Act stipulates that a prosecutor is obliged to undertake actions specified in the Act, while following the principle of objectivity and equal treatment for all citizens. Therefore, preservation of the principle of objectivity and equal treatment for all citizens and preservation of the political neutrality rule. However, the challenged provisions of the Prosecution Service Act do not guarantee preservation of

political neutrality in the scope of actions undertaken by the prosecution. Political neutrality assumes that a given person's behavior cannot be determined with their own political, ideological beliefs or interests of a party or grouping. In case of a prosecutor, the non-party political approach ought to be understood in such a manner that they do not take any part in the "political game", and they are not a hostage of this "game". This political neutrality is obviously not guaranteed by a politician leading prosecution, equipped with extensive rights to interfere in the contents of procedural actions undertaken by particular prosecutors. As a result, lack of the mentioned neutrality must also reach the proceedings conducted by the prosecutors, and it means obvious danger for the principle of objectivity and equal treatment for all citizens, declared in the Article 6 of the Prosecution Service Act. This threat grows substantially if it is noticed that the obligation stipulated in Article 6 of the Prosecution Service Act, bonds the prosecutors, but it does not bond the Prosecutor General (as this persons - as it has already been mentioned - is not a prosecutor, they only hold the function of the Prosecutor General).

According to T. Grzegorczyk (op. Cit., pp. 31-32), "independent prosecution is a state body, operating within the field stipulated in the Act, in a manner that is first of all independent from executive and legislative bodies, i.e. not exercising orders issued by the bodies, not yielding to pressure from public opinion and media that shape it, what does not mean that it fails to react towards communications of the <<Fourth Estate>>. Prosecution functions in reality at the meeting point of a judiciary power, as adjudicating in cases brought by the prosecutor, or carried out with their participation, and an executive power, as the institutions subordinate to the latter also prosecute crimes, what is the main task of the prosecution, and they carry these actions out under supervision of the prosecution, but it

itself should operated independently from those two powers, although in some systems it is embedded into the framework of judiciary power." The challenged regulations do not guarantee independence of prosecution and prosecutors understood in such a manner. Furthermore, they fail to provide an institutional guarantee of independent fulfillment of duties by particular prosecutors, and they do not ensure transparency of the procedural decisions issued by the prosecutors.

Hence, Article 7 para 2-5 in conjunction with Article 13 para 1 and 2 Prosecution Service Act to the extent that it obliges the prosecutor to execute orders put forward by the Minister of Justice holding a function of the Prosecutor General, and related to the content of a procedural act should be confronted with the rule of citizens' trust in the state and law and the principle of legal security, arising from the principle of a democratic state with the rule of law, stipulated in Article 2 of the Constitution of the Republic of Poland. Such an evaluation ought to be also applied in case of Article 8 para 1 in conjunction with Article 13 para 2 of the Prosecution Service Act to the extent that it entitles the Minister of Justice holding the function of the Prosecutor General, to amend or repeal a decision issued by the subordinate prosecutor, and also Article 9 para 2 in conjunction with Article 13 para 2 of the Prosecution Service Act, in the scope, in which it entitles the Minister of Justice holding the function of the Prosecutor General to take over cases conducted by subordinated prosecutors.

The rule of citizens' trust to the state and the law established, is based on legal certainty, i.e. such a set of features attributable to law, which provide an entity with legal security (judgment issued by the Constitutional Tribunal on 14 June 2000, ref. No. P 3/00, OTK of 2000, No. 5, item 138). This principle is also called a rule of state loyalty towards

the addressees of legal norms. It stipulates a legislator's obligation to provide the addressees with legal provisions of maximum predictability of decisions issued by public bodies. The challenged regulations violate the rule of citizens' trust towards a state and the established law. On one hand, the legislator, bearing in mind the prosecutors' duty to respect the principle of objectivity and equal treatment of all citizens in matters pertaining to their basic rights and freedoms (e.g. personal freedom, inviolability of home, dignity, good name) declares independence of prosecutors. On the other hand, these basic freedoms and rights attributable to a unit become dependent on a political factor's will, which is not objective out of its nature. Therefore, transparency of issuing the procedural decisions by prosecutors is interfered by factors that do not lay in the legal field. Meanwhile - what was stressed by the Constitutional Tribunal in its judgment of 10 April 2002 (ref. No. K 26/00, OTK of 2002, Issue 2/A, item 18) - "adequate fulfillment of a task that consists in persecuting and accusing offenders, requires formal and legal guarantees that a persecutor follows only legal purposes, when conducting individual cases. The prosecutor's disqualification from being a member of a political party remains in a functional relation with the constitutional disqualification of a judge from being a member of a political party. Both these prohibitions establish a system of eliminating political premises from court trials. Disqualification of the prosecutors from membership in political parties should be also perceived in the light of the fact that the function of a Prosecutor General is held by the Minister of Justice, i.e. a person with a political position. The discussed prohibition plays a role of a barrier between the policy of prosecuting crimes, determined by the Prosecutor General, and actions undertaken by the prosecutor, related to conduct in individual cases".

Since in the light of the quoted opinion of the Constitutional Tribunal, the Minister of Justice, who plays a role of a Prosecutor General, can determined the policy of prosecuting crimes, their competences - as a politician - cannot be related to the procedural actions undertaken in individual cases by particular and independent prosecutors. As the legislator crossed the boundary - in relation to the challenged regulations - specified by the Constitutional Tribunal, according to the Commissioner for Human Rights, the rule of citizen's trust to the state and law, resulting from the democratic state with the rule of law, was violated (Article 2 of the Constitution of the Republic of Poland). Certain conditions were established, allowing the prosecutors to consider also beyond-legal issues in individual cases, deriving from political beliefs of a person holding a function of the Prosecutor General. Therefore, the challenged regulations fail to provide an entity with required legal security, since the procedural decisions issued in such cases may become distorted through influence from a political factor. In all regulations, in which the legislator allocates certain rights to a prosecutor, the action can be undertaken upon the Prosecutor General's request - a political factor itself. It is even more concerning, if the Code of Criminal Procedure - amended as of 11 March 2016 - is taken into consideration, especially the added Article 168b, and the new wording of Article 237a of the Code of Criminal Procedure. According to the new regulations, this is the prosecutor, not the court, who is entitled to issue a permission on application of the material acquired during an operational control, within proceeding related to other accusations or other persons that those, which were covered by the court's permission to perform the operational control. Therefore, while taking the above statement into consideration, it must be noticed that there is a possibility of the Prosecutor General's influence on the actions performed in the scope of operational control, i.e. related

to a highly sensible space in terms of human rights and freedoms. Moreover, the Prosecutor General, pursuant to the regulations challenged in the application, will have a possibility to make decisions in the scope of such actions as: search, detention or application for a pre-trial detention warrant issued by the court.

It must be noticed that expansions of the Prosecutor General's rights were not referred in any manner whatsoever to enhancement of the unit's rights, so it can protect its rights and freedoms. No additional entity was introduced (e.g. an examining magistrate), characterized with independence, who would be able to exercise real and effective control over prosecutors' operations, including the Prosecutor General.

The arguments mentioned above demonstrate difficulties in precise reconstruction of the status, position and role of the Prosecutor General. As it has been proven above, combination of positions of the Minister of Justice and Prosecutor General not only intensifies the doubts in the scope of systemic position of the prosecution, but also burdens it with strong political influence. Out of its definition, the Minister of Justice is a political body, what means that according to current legal regulation, the Prosecutor General also adopts such a feature. In the scope of rights awarded to the Prosecutor General, i.e. the possibilities of issuing orders related to the contents of procedural actions, it undoubtedly poses a violation of the rule of citizen's trust to the state and law. As it has been remarked rightly in the report by the Council of Europe, "as any other citizen, a public officer should be provided with full citizens' rights. Regarding the necessity to separate political and administrative functions, states used to limit significantly or even nullified the officers' rights in this scope. Hence, there is a contrast between the obligation of neutrality and a possibility of free participation in a political life" (*Report on the Status of Public Officials,*

[in:] *The Status of Public Officials in Europe*, Recommendation No. R (2000) 6, New York 2000, p. 55; cf. A. Śledzińska-Simon, *Prawa polityczne urzędników*, Warszawa 2010, p. 218). On one hand, the legislator disqualifies a prosecutor from being a member of a political party and to undertake political activities - in Article 97 para 1 of the Prosecution Service Act - and at the same time provides the Prosecutor General - a political body pursuant to the applicable Act - with a possibility to issue orders for prosecutors, related to the content of procedural acts, i.e. directly referring to the manner, which the proceedings are carried out in. The Prosecutor General can also amend and repeal decisions issued by the subordinate prosecutors. Therefore, it is appropriate to state that the Prosecutor General, in the scope, in which they can interfere in the procedural acts, is a prosecutor in functional terms, so they should be free from political influences.

It must be agreed with A. Śledzińska-Simon, who - while referring to German and French patterns - notices that the prohibition to undertake political actions ought to be interpreted as a premise of an obligation to maintain moderation and restraint: "Holding a leading position in a political party, or representing it outside, suggests that a person, who demonstrates their political beliefs so openly, cannot be fully objective in performance of their official duties, especially, when their are related to issuance of discretionary decisions" (A. Śledzińska-Simon, *Prawa polityczne urzędników (Political rights of public officials)*, Warszawa 2010, p. 248). American legislation stresses that public engagement should be avoided by persons, who work in such fields of state bodies operation as security and law execution (A. Śledzińska-Simon, *Prawa polityczne urzędników (Political rights of public officials)*, Warszawa 2010, p. 264).

This was the position occupied by the European Court of Human Rights, in combined cases of *Barski v. Poland* and *Święczkowski v. Poland* (a decision on inadmissibility of 2 February 2016, case No. 13523/12 and 14030/12), stating that the duty to resign from position in public service (broadly understood civil service), as a result of making a decision to apply for a political decision, is of a proportional character, especially in the light of the purpose, which is non-party political character of the public service (cf. the judgment delivered by the European Court of Human Rights of 2 September 1998, in case of *Ahmed and Others v. the United Kingdom*, case No. 22954/93). The Strasbourg Court has been stressing consequently that everyone should have an opportunity to choose between engagement in politics and involvement in non-political social activity. Combination of the functions of the Minister of Justices and Prosecutor General, and provision of the latter with competences in the scope of procedural actions, caused that achievement of the objective - non-party political approach of prosecution - has become impossible.

Article 7 para 2-5 in conjunction with Article 13 para 1 and 2, Article 8 para 1 in conjunction with Article 13 para 2, Article 9 para 2 in conjunction with Article 13 para 2 of the Prosecution Service Act, ought to be evaluated in the challenged scope also from the perspective of their compliance with Article 149 para 1 of the Constitution of the Republic of Poland. Pursuant to Article 149 para 1 of the Constitution of the Republic of Poland, ministers administer particular departments of government administration or fulfill tasks delegated by the Prime Minister. Article 24 para 1 pt. 2 of the Act of 4 September 1997 on Branches of Government Administration (Journal of Laws of 2015, item 812, as amended), stipulates that the department of justice covers cases regarding prosecution, notary public, legal profession and legal counselors, to the extent arising from separate laws. It is revealing

that in the Article 24 para 1 pt. 2 of the Act on Branches of Government Administration, prosecution has been listed together with notary public, legal profession and legal counselors, i.e. professional associations exercising broad autonomy (Article 17 para 1 of the Constitution of the Republic of Poland). The department of justice covers issues of those associations and prosecution to the extent arising from separate laws. It can be concluded that issues of prosecution, notary public, legal profession and legal counselors, are not included in the department of justice, because of their autonomy and independence. They are not related to the operational sphere that is adequate for the governmental administration. Therefore, a minster administering a given department must no have any influence on the course of those cases.

In the light of the above, it should be concluded that issues of prosecution are covered by the Minister of Justice, but also to the extent of realization of their constitutional competence that consists in leading a department of governmental administration. Within the scope of this leadership, the Minister of Justice is entitled to act in legal forms that are adequate for governmental administration, this they have a right to issue regulations (Article 149 para 2 of the Constitution of the Republic of Poland), dispositions (Article 93 para 1 of the Constitution of Poland, or individual administrative acts. The Minister can also determine a policy adopted by the department of governmental administration under his leadership. However, in constitutional terms of "leading a department of governmental administration", the minister has no competence (in this case the competence of the Minister of Justice holding a function of a Prosecutor General) to provide prosecutors with orders related to the content of procedural actions. They also have no competence to amend or

repeal the prosecutor's decision, or to take over the case. These actions exceed the scope of leading governmental administration.

Prosecutor's operation in criminal cases remains in strict correlation with the system of justice, and the institution of legal proceedings in criminal cases takes place upon the legally entitled accuser's request (Article 14 para 1 of the Code of Criminal Procedure). A public accuser before all courts, as stipulated by Article 45 para 1 of the Code of Criminal Procedure, is the prosecutor. Furthermore, a prosecutor conducts or monitors the pre-trial proceedings (Article 298 para 1 of the Code of Criminal Procedure), the objectives of which are stipulated in Articles 297 para 1 of the Code of Criminal Procedure. Police and other bodies, in the scope of criminal proceedings, exercises orders issued by the prosecutor, and carries out a probe or investigation supervised by the prosecutor, to the extent stipulated in the Act (Article 15 para 1 of the Code of Criminal Procedure).

Moreover, prosecution upholds the rule of law, and in this scope, the undertaken actions are intended to protect legal order and secure realization of the constitutional rule of law (Article 7 of the Constitution of the Republic of Poland). Therefore, the prosecutor also acts as a body that control legality of operation of other public authority bodies.

Hence, the prosecutor is a state body that operates in the legal sphere, existing between executive and judicial powers, but they are not a body of governmental administration. While exercising their statutory tasks in the scope of prosecuting crimes and upholding the rule of law (Article 2 of the Prosecution Service Law), the prosecution certainly does not realize tasks characteristic for public administration, and it does not act in legal forms that are adequate for that administration. Thus is is justified to submit an application stating that the framework stipulated in Article 149 para 1 of the Constitution of

the Republic of Poland fails to embrace the challenged competences of the Minister of Justice holding a function of the Prosecutor General, related to intrusion into the content of procedural action undertaken by particular prosecutors in individual cases. These competences exceed the scope stipulated in Article 149 para 1 of the Constitution of the Republic of Poland, referring to the minister's tasks which consist in "leading a department of governmental administration".

From the perspective of Article 149 para 1 of the Constitution of the Republic of Poland, it is of great significance that, first of all, the prosecution is not an organizational structure that composes the governmental administration, and second of all, the tasks realized by the prosecution do not fall in the scope of governmental administration. This justifies an allegation that the Law on prosecution, covered in the scope of this application, do not comply with Article 149 para 1 of the Constitution of the Republic of Poland.

It also should be stressed that the Office for the Commissioner of Human Rights received an application to analyze and consider justifiability of referring to the Constitutional Tribunal with a request to control the Article 12 of the Prosecution Service Act. This regulation introduced a particular possibility of publishing information related to specific cases, including those from the pre-trial proceedings. The entity authorized to publish the information is the Prosecutor General, National Prosecutor or other stipulated prosecutor, while in case of media, the information can be communicated by the Prosecutor General and managers of the prosecution organizational units.

The legislator does not introduce into the system of law a legal definition of notions "information related to particular cases", or "information from pre-trial proceedings".

However, bearing Article 156 of the Code of Criminal Procedure in mind, which stipulates the matter of files publications, it seems that since the legislator uses another term in the Prosecution Service Act, it cannot be concluded that revealing information on particular cases or on pre-trial proceedings may be based on publication of files. The scope of information available for publication according to the principles stipulated in Article 12 of the Prosecution Service Act is certainly defined imprecisely, what may trigger numerous difficulties not only in its application but also control. On one hand, it may be stated that the scope of publication of information on a particular case is narrower than publication of files, and on the other, it cannot be excluded that some information not included in the case file will be published out of any reason, so the scope of information will be broader than the extent resulting from publication of files.

There are at least few doubts based on Article 12 of the Prosecution Service Act. First of all, there is a need to point an allegation related jointly to Article 12 para 1 and 2 of the Act. These provisions allow to communicate information on a particular case to "other person", not being a state authority, and to media. As a consequence, it is possible to communicate information about participants of given proceedings, including the suspect, victim, representatives, as well as other persons taking part in the proceedings. It will be also possible to publish information on evidence in the cases, including such sensitive as e.g. data coming from billings. Such a state of affairs triggers serious doubts of a constitutional nature, especially in the context of Article 47 and Article 51 para 2 in conjunction with Article 31 para 3 of the Constitution of the Republic of Poland.

It is also significant that the legislator has already regulated the problem of files publication one, by introducing proper instruments into the penal procedure. He delegated

the power to make decisions - in relation to pre-trial proceedings - to the body conducting proceedings, in some case requiring a consent issued by a prosecutor, if the proceedings are conducted by another entity. While considering the manner of publication of files, on the basis of Article 156 para 5 of the Code of Criminal Procedure, at first is must be verified whether the publication will not threaten the need to secure the proper course of proceedings or an important interest of the state, and finally - in case of the "other person" - whether special circumstances have arisen.

The structure stipulated in Article 12 of the Prosecution Service Act resign from leaving the decision in a particular case at a discretion of the body conducting the proceedings, and delegates it to the Prosecutor General and the National Prosecutor, thus at leas in case of the Prosecutor General - as proven above - a political factor, for which the well-being of the pre-trial proceedings does not always need to pose a priority.

Undoubtedly, publication of information on a particular cases, and information from pre-trial proceedings collides in Article 47 of the Constitution of the Republic of Poland, which states the right for legal protection of a private and family life, dignity and a good name, and with Article 51 para 2 of the Constitution of the Republic of Poland, forbidding the public authority to obtain, collect and publish other information on citizens than those necessary in a democratic state ruled by law.

On the basis of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights held that leakage of non-public information from files of a criminal case to the press, may be perceived as interference in the proceedings participant's right to respect of their private life (judgment by European Court of Human Rights of 3 February 2015, in the case of *Apostu v. Romania*,

No. 22765/12). According to the Court, it was especially significant that publication of information in the media took place at the state of pre-trial proceedings. Therefore, the applicant had no opportunity whatsoever to undertake a direct action intended to protect his good name, as the subject of the case was not under court investigation at that time. No court control made it impossible at this stage for the applicant to challenge authenticity or accuracy of phone conversations, the records of which were included in the files. Moreover, he had no influence on interpretation of those materials.

It should be noticed that the Court, in the referred case, did not evaluate lack of influence from a court factor on particular actions in the pre-trial proceedings. This lack is permissible, as the court factor has a possibility to verify the material collected during the pre-trial proceedings, and this verification takes place at an adequate stage. However, if revealing of information on a particular case is permitted, a preceding possibility of the court to verify the material collected during the pre-trial proceedings is somehow excluded. Such a state of affairs may exert significant influence on personal goods of the proceedings' participants, especially those anchored in Article 47 and Article 51 para 2 of the Constitution of the Republic of Poland. As observed by the European Court of Human Rights in the case of *Apostu v. Romania:* "(...) the judge that settles in the matter of such an application will need to balance out the right to respect the private life with the freedom of expression and information. Therefore, access to information in an authorized manner, becomes the subject of court control. However, there is no such a possibility in the subject case, since information has already leaked to the press". Bearing it in mind that Article 12 of the Prosecution Service Act not only fails to stipulate the court control, but it directly excludes the requirements to obtain a consent from the body conducting the proceedings, it

must be concluded that in this case Article 47 of the Constitution of the Republic of Poland and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms are violated.

It is impossible not to notice that not only the Constitution of the Republic of Poland but also law of the European Union is oriented on protection of proceedings' participants, especially their right to protect private life. Pursuant to Article 16 para 1 of the Treaty on the Functioning of European Union, "each person has a right to protect their personal data". This provision was reflected in the Directive of the European Parliament and of the Council 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Pursuant to Article 21 para 1 of the Directive: "Member States shall ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, Member States shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim". Furthermore, "in order to protect the privacy, personal integrity and personal data of victims, Member States shall, with respect for freedom of expression and information and freedom and pluralism of the media, encourage the media to take self-regulatory measures" (Article 21 para 2 of the Directive). As it has been observed in the preamble to the Directive, "protecting the privacy of the victim can be an important mean of preventing secondary and repeat victimisation, intimidation and retaliation and can

be achieved through a range of measures including non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of the victim".

The above does not mean that information on proceedings cannot be made available to public opinion at all. Purpose of the EU legislator is to provide a proper standard for protection of the proceedings' participants, especially the victims, not to expand the scope of their suffering and other difficulties. It should be observed that publication of information on particular proceedings, at the stage of pre-trial proceedings, should be applied only in special circumstance, also because such a proceeding has not been finished yet, and the competent court has not expressed it opinion on the offenders' fault.

Literature of the subject considers the problems related to access to files in the pre-trial proceedings, stressing it can be of certain importance for the proceedings' participants to provide them with such access, especially for those victimized and suspected, who obtain a possibility of effective realization of their right to defend. It is suggested that the pre-trial proceedings "can be neither fully confidential (recognized as a plane for inquisition in its pure form), excluding any participation of the parties and their right to proceedings information, nor contradictory, in a form of a wide participation of the parties in each act, which they are willing to participate in". Further, the authors claims that: "Actually, the controversies in the subject mentioned above have never (also on the basis of the Code of 1928) been related to the alternative: pre-trial proceedings completely confidential or totally contradictory, but to drawing the line, to which the rights of the parties to information and participation at the pre-trial stage of the proceedings realize the constitutional rights and freedoms, and may serve to objectify results of such proceedings, but if the line is crossed, they may pose a significant threat for realization of objectives of this phase of the criminal

process" (R. Ponikowski, *Granice jawności wewnętrznej i zewnętrznej przygotowawczego stadium postępowania karnego*, [in:] J. Skorupka (ed.), *Jawność procesu karnego*, Warsaw 2012). These remarks suggest a specific stress between the objectives of the pre-trial proceedings and access to the files at this stage. There are not doubts that the proceedings' participants ought to be provided with access to those file in a relatively wide scope. Other persons should obtain access to the files and corresponding information only in special situations. Such situations are already regulated by Article 156 para 5 of the Code of Criminal Procedure. It must be borne in mind that the body conducting the proceedings has the best knowledge, when it comes to forecasting the consequences of providing access to the file to another person. Regarding the attribute of independence, the entity should not be influenced by any other factors than the well-being of the proceedings. Therefore, not only the well-being of pre-trial proceedings is protected, but also the fundamental rights and constitutional freedoms, such as the right for legal protection of private and family life, and dignity and a good name, and limitation on publication of information about citizens.

Article 12 of the Prosecution Service Act, in the challenged scope, stipulates a possibility to communicate information from a particular case to persons not holding functions of a public authority body, if such information can be significant for state security, its proper functioning, and information from pre-trial proceedings, bearing in mind the important public interest.

At first, attention should be paid to combination of possibilities to communicate information from a particular case to persons not playing functions of public authority bodies, is such information can be significant for state security and its proper operation. As it seems, this is the manner, in which the legislator makes an attempt to suggest one good

instituted by the constitutional principle of proportionality, justifying limitations in the scope of utilizing constitutional freedoms and rights. The legislator stresses that state security is one of the premises that may support the limitations in the field of freedoms and rights attributable to a human and a citizen. According to B. Banaszek, the term security, used in accordance with the constitutional proportionality principle, must be comprehended according to Article 5 of the Constitution of the Republic of Poland, which says about citizens' security (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 220). It is suggested in the literature that citizens' security means not only to counteract the threats to the public order, life, health and property of the citizens, but also to provide for ecological and energetic safety (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 73).

In the above context, the premise of state security, enabling publication of information from a particular case, seem to be completely justified, but only if the information addressee is the public authority body. It is hard to find justification for revealing information from particular proceedings, regarding state security, to a particular person, who does not play a role of a public authority body. It ought to be noticed that a body responsible for provision of internal and external security of a state is the Council of Ministers (Article 146 para 4 pt. 7 and 8 of the Constitution of the Republic of Poland). The proportion of the relation of a person not being a public authority body with actions intended to provide state security, seems doubtful. It is understandable that in some cases, actions undertaken by an individual can influence the level of security. However, in such cases, the public authority bodies that are entitled to get acquainted with information on a particular case, should use the knowledge to - in accordance with national law - influence

the decisions made by a given individual. The Commissioner for Human Rights does not believe it is justifiable in such situations to publish information from a given case. These doubts are even more justified that the decision made on the basis of the Article 12 para 1 of the Prosecution Service Act, does not fall under court control, what means that it brings a significant risk of abuses.

The premise of state security is blurred to such an extent that it can suggest its any given interpretation, leading to violation of protected goods that arise from Articles 47 and 51 para 2 of the Constitution of the Republic of Poland. It is suggested in the literature of the subject that state security cover numerous internal and external aspects. Security is most often understood as the feeling of lack of danger (D. Rotfeld, *Bezpieczeństwo Polski a bezpieczeństwo Europy*, [in:] A. D. Rotfeld (ed.), *Międzynarodowe czynniki bezpieczeństwa Polski*, Warsaw 1986, p. 10). State security can be considered in numerous aspects, while talking about the state's political, military, economic, social, cultural, ideological or ecological security ((R. Zięba, *Kategorie bezpieczeństwa w nauce o stosunkach międzynarodowych*, [in:] D. B. Bobrow, E. Haliżak, R. Zięba (ed.), *Bezpieczeństwo narodowe i międzynarodowe u schyłku XX wieku*, Warsaw 1997, p. 6). With so broad understanding of security, it will be always possible to find a proper justification for fulfillment of the premise from Art. 12 para 1 of the Prosecution Service Act, and - as a consequence - for publication of information on a particular case.

Similar doubts arise in case of a completely unspecified premise that allows to communicate information on particular cases conducted by the prosecution, to other persons, in a form of "especially justified case". This premise causes that specific realization of a legal form stipulated in Article 12 para 1 of the Prosecution Service Act, is

carried out through actions undertaken by the Prosecutor General (National Prosecutor or another authorized prosecutor). At the stage of law application, these prosecutors have a total and unrestrained decisive freedom in specifying whether there is an especially justified cases entitling them to communicate information on particular cases to other persons. The stressed decisive freedom in using the "especially justified case" premise, were not subjected by the legislator to any form of external control. Therefore, Article 12 para 1 of the Prosecution Service Act does not provide legal protection of a private life (Article 47 of the Constitution of the Republic of Poland) at the stage, when the Prosecutor General (National Prosecutor or another authorized prosecutor) makes a decision on communicating the decision on a specific case to other persons.

It must be noticed that the legislator fails to introduce any protection from potential abuses, which could consist in court control over communication of information to a person not being a public authority body, and what is more, it limits considerably the responsibility of persons, who make such decisions. In accordance with Article 12 para 4 of the Prosecution Service Act, liability for any claims that arose in relation to the actions stipulated in Article 12 para 1 and 2, is borne by the State Treasury. The persons, who are provided by the legislator with a possibility to communicate information related to particular cases, and information from pre-trial proceedings, bear liability according to the principle of adequate application of regulations from Articles 119-121 of the Code of Labor, i.e. liability in a highly limited scope.

Similar threats are related to the fact that the Prosecutor General is provided with a possibility to communicate information from pre-trial proceeding to media, bearing in mind the public interest. Communication of information may take place without consent of the

entity conducting the pre-trial proceedings. It is hard to identify the *ratio legis* of this solution, so it fits the framework stipulated by the Constitution of the Republic of Poland, especially if the Article 156 para 5 of the Code of Criminal Procedure is recalled, which enables the entity conducting the proceedings - who has the best knowledge about its well-being - to publish the files. Therefore, a statement that Article 31 para 3 of the Constitution of the Republic of Poland can pose a basis for maintenance of allegation of constitutionality of Article 12 para 2 of the Prosecution Service Act is doubtful as this provision is neither necessary nor useful, as the objective in a form of fulfilling the public interest may be realized according to principles stipulated in Article 156 para 5 of the Code of Criminal Procedure, without prejudice.

Communication of information to media, on the basis of Article 12 para 2 of the Prosecution Service Act, not only triggers a similar risk to that from Article 12 para 1, for the basic goods of a human, but also multiplies the threat, as the media, regarding their nature, publish information while not being necessarily driven by the well-being of the proceedings' participants. It also should be notices that the legislator fails to determined the term "media", what causes that it can be interpreted widely, in a manner convenient for a person interpreting the provision. In situations that trigger a threat for human rights and freedoms, such provisions should be construed in such a manner so they are precise, and they minimize the risk for an individual.

There is also a problematic relationship between Article 12 para 2 of the Prosecution Service Act and Article 13 of the Act of 26 January 1984 on Press Law that should be observed. It is unknown whether the structure of communicating information from pre-trial proceedings applied the requirement to obtain a permission from an applicable prosecutor,

regarding an important social interest, for publication of personal details and images of persons, against which the pre-trial proceedings are taking place. Furthermore, the legislator fails to determine whether in such cases the construction from Article 12 para 4 of the Press Law applies, according to which the decision on revealing the personal details and images of persons, against which the pre-trial proceedings are taking place, can be complained against. As it seems, there are no convincing basis to state that Art. 13 of Press Law is not applicable for constructions from Article 12 para 2 of the Prosecution Service Law. It is emphasized in the literature that communication of information to media representatives cannot be understood as a permission to disseminate this information in the scope of the publication. As M. Kuźma stresses rightly: "Permitting a journalist to get acquainted with the case files do not pose a permission to publish them, i.e. for public dissemination of information from the case files. Regulation of the Article 241 para 1 of the Penal Code penalizes public dissemination, without a permission, of communications from pre-trial proceedings, before they were revealed in the court proceedings. Purpose of the regulation is to prevent a situation, in which early publication of information from the pre-trial proceedings hinders or renders it impossible to realize objectives of the criminal proceedings, especially hindering determination of significant circumstances of committing a criminal act, identification of the offender" (M.Kuźma, *Udział mediów w procesie karnym*, [in:] J. Skorupka (ed.), *Jawność procesu karnego*, Warszawa 2012; cf. M. Stanowska, *Udostępnianie dziennikarzom akt sądowych i prokuratorskich*, Przegląd Sądowy 2001, issue 10, p. 80). Analysis conducted by the quoted author was related to Article 156 of the Code of Criminal Procedure. However, there are no basis speaking against the reference of those remarks to the Article 12 of the Prosecution Service Act.

It should be stressed in this place that the Commissioner for Human Rights challenges Article 12 para 2 in conjunction with Article 12 para 3 of the Prosecution Service Act to the extent that it considers the Prosecutor General, as he believes that these are directors of organizational units of the prosecution who guarantee greater security of the well-being of the proceedings and their participants, regarding their involvement in cases carried out in the unit and knowledge of proceedings.

Such a state of affairs guarantees that the challenged regulation violates Articles 47 and 51 para 2 of the Constitution of the Republic of Poland in a manner incompliant with the proportionality principle instituted by Article 31 para 3 of the Constitution of the Republic of Poland. The principle of a democratic state of the rule of law is also violated, especially the resulting principles: citizen's trust to a state and adequate specification of regulations. According to the Constitutional Tribunal: "Previous case law of the CT grounded a position that Article 2 of the Constitution also covers the principle of protecting the citizens' trust to the state and established law. It is - as it was stressed in previous decisions - an obvious feature of a democratic state with the rule of law, because «a democratic lawful state protects trust to the state and established law». This principle means first of all the necessity to protect and respect rights that were obtained duly, and to protects interests arising in the conduct (cf. among others, CT case law of: 2.3.1993, K 9/92, OTK 1993, Issue 1, item. 6), but it also prohibits the legislator to create such normative structures, which are unworkable, pose an illusion of law, and as a consequence just an appearance of protection of those property interests, which are functionally connected with the content of the established subjective rights (judgment delivered by CT, of 19 December 2002, K 33/02; cf. CT judgments: of 25 November 1997, K 26/97 and of 13 April 1999, K 36/98).

What is more, the legislator cannot introduce into the legal system such constructions, which pose an illusion of protection of basic human and citizen rights, all the more the regulations, which threaten such rights directly. Always when there is such a risk, there is a need to implement proper protective measures, which are undoubtedly not provided by the Article 12 of the Prosecution Service Act.

The regulations stipulated in the Art. 12 of the Prosecution Service Act also bring certain doubts from the perspective of specification of law. The principles of decent legislation pose one of the most important directives in a democratic lawful state. The regulations should be formulated in a correct, precise and clear manner, especially when it comes to protection of rights and freedoms (judgment delivered by CT of 11 January 2000, K 7/99). A situation, when the legislator uses imprecisely defined terms brings significant threat to rights and freedoms, which a given provision collides with. Such a state of affairs is observable especially in relation to premises of state security and important public interest, stipulated in the Article 12 of the Prosecution Service Act.

Taking into account the above, therefore I submit as at the beginning.