Degrees of (In)Dependence

On the Uncertain Systemic Status of the Public Prosecutor's Office

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From a systemic point of view, the Polish Public Prosecutor's Office is very peculiar. This is especially true if one considers the changes accompanying its functioning over the past two decades. The Polish Constitution does not provide for the Prosecutor's Office as a distinctive constitutional body, such as the Supreme Court, the Supreme Chamber of Control, or the Ombudsman. The only potential anchor for a prosecutorial body is Article 146(4) of the Constitution, which states that the Council of Ministers shall ensure the internal security of the State and public order. This establishes the government as the constitutionally responsible authority for policing and law enforcement.

For years, there has been a debate about making the Prosecutor's Office an authority that is arguably located between the classic uniformed services (the police), public administration (tax offices), and the judiciary. In Polish scholarly discourse, two positions prevail regarding the place of the prosecutor's office in the system of state organs – subordination to the executive, or quasi-independence based on an organic statute with the strong influence of parliament. In this blog, I will explain how PiS has exploited Poland's adoption of the former model, and evaluate the promise and perils of a proposal to cure the current defects by rendering the prosecutor's office (more) independent.

An Uncertain Systemic Role

Following a short period where the functions of the Minister of Justice and the Prosecutor General were separated, Poland returned in 2016 to its old model of complete systemic subordination of the prosecutor's office to the executive, manifested in the personal union of the Minister of Justice and the Prosecutor General. Aside from the political advantages of this model, the reform's author, Zbigniew Ziobro, pointed out that there must be a strong and democratic-based supervision over such an important authority as Prosecutor's Office. The executive has its legitimacy from the parliamentary majority, thus is the most suitable to effectively perform that task.

However, it is still not entirely clear what the systemic status of the Public Prosecutor's Office is. It is certainly not just an office subordinate to the Ministry of Justice. Rather, given its procedural role and its competencies, it constitutes a sort of a "super-office" or "super-reviewer" of other bodies of the executive. Thus, it is not only responsible for conducting criminal investigations and filing indictments, but also participates in civil or administrative proceedings, given that the Public Prosecutor can participate on the rights of a party or participant in any proceeding conducted by the authorities and public administration, courts and tribunals.

To fulfill its role, the Public Prosecutor's Office must retain a certain level of independence from the politics of the day. Yet, throughout Law and Justice's rule this has been strategically hollowed out, utilizing Office's staffing hierarchy and personnel decisions. This has been achieved by abusing the already present mechanisms of official supervision in this hierarchical structure, and new legal grounds have been added to allow, among other things, the arbitrary deprivation of investigations from prosecutors.

Undermining Prosecutorial Independence

A prosecutor shall be independent in performing the activities provided for by law. However, at the same time, they are obliged to carry out the orders, directives, and instructions of a supervising prosecutor. The

supervisor has the right to change or revoke the decisions of their subordinates and may take over their cases and perform their activities. One such high-profile case occurred in the case of the so-called "envelope election", the unsuccessful attempt to hold presidential elections at the peak of the COVID-19 pandemic in mid-2020 using a postal vote system. On April 23, prosecutor Ewa Wrzosek of the Warsaw-Mokotów District Public Prosecutor's Office opened an investigation regarding the crime of creating a danger to the life and health of a large number of people by taking steps to hold presidential elections during the pandemic period. On the same day, the investigation was closed by her supervisor, prosecutor Miroslawa Chyr. A day later, the National Prosecutor ordered disciplinary proceedings against Wrzosek for "obvious and flagrant violations of the law."

Prosecutors as Informants

What is more, the supervisor prosecutors can provide information on specific cases to any person or entity, including the media, without obtaining the consent of the prosecutor responsible for a particular investigation. The law also ensures that the Treasury will bear any potential claims arising from such activities. Newsweek journalists found that the Prosecutor General has exercised this power, and in 2017, for example, the president of the ruling party, Jaroslaw Kaczynski, received information about 13 pending cases. As a result, politicians of the ruling party or journalists working in the pro-government media could have unfettered access to investigations and their secrets. And when someone suffers damage because of this – the Treasury is responsible, not the prosecutor who disclosed the information.

Rewarding Loyalists, Punishing Dissenters

All personnel decisions in the Prosecutor's Office are subordinate to the Prosecutor General (politician) and the National Prosecutor (trained prosecutor). They have almost unlimited freedom in allocating the Prosecutor's Office staff. Among other things, they may delegate a prosecutor to the Ministry of Justice or another organizational unit subordinate to the Minister of Justice, to another organizational unit of the Prosecutor's Office (for more than six months per year only with the consent of the Prosecutor), and due to staffing needs, without his consent for 12 months per year to the Public Prosecutor's Office in the locality where the delegate resides. The lack of specific criteria for the indicated delegation (as well as for its revocation) means that this power has become a tool for rewarding the faithful and punishing recalcitrant prosecutors.

One of the most notorious cases is that of Mariusz Krason, an experienced prosecutor from Krakow. In 2019, he was sent from the regional prosecutor's office (highest level) in Krakow to the district prosecutor's office for Wroclaw Krzyki-Zachód (lowest level) about 300 kilometers from Krakow. After six months, he should have returned to the most critical investigations in the regional prosecutor's office in Krakow. Instead, he was sent to another assignment – to the district prosecutor's office in Krakow's Prądnik Biały (lowest level). He worked there until July 2020. In January 2021, he received a decision on another transfer to the prosecutor's office in the Podgórze District of Krakow (lowest level). He was known for his criticism of the actions of the current leadership of the prosecutor's office and his activities in the association of professional prosecutors, Lex Super Omnia (LSO), which was critical of the changes in the prosecutor's office under Zbigniew Ziobro. He eventually won in court, which ruled that the transfers were illegal and discriminatory. Meanwhile, other LSO prosecutors were treated similarly – for example, Lex Super Omnia head Katarzyna Kwiatkowska was moved from the capital city of Warsaw to the small town of Golub-Dobrzyń.

The LSO produced a detailed report on demotions, transfers, and other methods of formal and informal pressure on prosecutors and its mirror image, a report on rewards and benefits (transfers to higher units and instant promotions) for prosecutors sympathetic to the new power in the prosecutor's office.

The New Amendments

The Polish Parliament, with the votes of the ruling majority, has just recently introduced amendments to the Law on the Public Prosecutor's Office that immeasurably strengthen the role of the National Prosecutor at the expense of the Prosecutor General. This follows a resolution that requires the President's consent to appoint and dismiss the National Prosecutor and other Deputy General Prosecutors. Taken together, these changes mean that little will change. In a situation in which the president comes from the political environment of Law and Justice – the political influence of this group on the Prosecutor's Office remains.

The above-described "evils" of the current political oversight of the Prosecutor's Office are well documented and analyzed.

An Independent Office?

To remedy this state of affairs, it is not enough to once again separate the functions of the Prosecutor General from the Minister of Justice. However, it is not a miraculous cure for the Prosecutor's susceptibility to political co-optation but a mostly a symbolic statement. A deeper reflection on the systemic position of the Prosecutor's Office is also necessary.

In this respect, the LSO has advanced a far-reaching and comprehensive draft amendment designed to strengthen the Prosecutors Office's independence. It recommends the Prosecutor General be appointed by the President for a six-year term; to abolish the subordination of prosecutorial units; to restrict the transfers of prosecutors between units; to improve transparency in appointments and promotions; and to place limits on the issuance of guidelines, orders, and instructions to subordinate prosecutors. The project is comprehensive and contains strategic to concrete solutions related to the daily experience of prosecutors "on the front line."

It clearly recognizes the need to change current features of the Public Prosecutor's Office that are incompatible with the demands of a democratic constitutional state. In particular, the current subordination of criminal policy and the conduct of individual prosecutions to ad hoc political goals and the use of arbitrary (or even non-existent) criteria does not build citizens' trust in the state. An individual prosecutor must face real consequences for their conduct (whether disciplinary or criminal) if they abuse their function or, more importantly, perform it in an unreflective or questionable (from the merits perspective) manner.

However, its basic premise, i.e., the statement that the Public Prosecutor's Office shall be a part of the administration of justice independent from the legislative and executive authorities leaves open who should be responsible for overseeing the Prosecutor's actions/functions. To make the Public Prosecutor's Office completely independent of politicians would create a body whose independence is only guaranteed by the statutes (not by the Constitution) while performing an essential function of the state (the prosecution). In doing so, it undeniably shares responsibility in the sphere of ensuring public order with the executive. The model envisioned by the LSO might create some fundamental tensions, which may undermine the entire path of making the office less prone to ad hoc political demands. In particular, the executive may have different criminal policy priorities and a different view of the dangers to society from a particular type of crime than an independent Prosecutor General. This tension could undermine the effective and rational pursuit of a cohesive internal security policy.

The Fact and Threat of Polarization

The biggest obstacle to reforming the Prosecutor's Office, however, is the vast polarization within the structures of the Prosecutor's Office (prosecutors loyal to the current leadership and the so-called recalcitrant ones from associations such as the LSO). Undoubtedly, any move (especially in terms of personnel) will be perceived by one side as political/personal revenge. On the other hand, one cannot ignore the clerical mentality of the prosecutors, who have been brought up in a system designed by hierarchical subordination and lack of effective responsibility for individual procedural decisions. Specific problems can certainly be remedied, at least nominally, by implementing most of the LSO's demands outlined above. Still, their practical

application and verification will require not only good-will but also a severe change in the mentality of those involved in the possible transition process to the new model.

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