

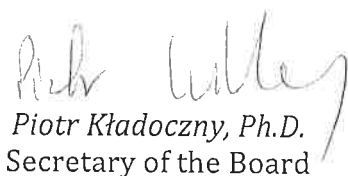
Warsaw, 10 June 2019

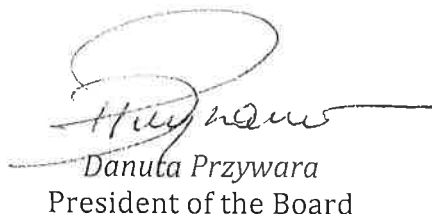
**Mr Jon Fridrik Kjølbro**  
**The European Court of Human Rights**  
**President of the Fourth Section**  
Council of Europe  
67075 Strasbourg-Cedex  
France

**Ref. Kövesi against Romania**  
**Application no. 3594/19**

Pursuant to the letters of Ms. Marialena Tsirli, the Registrar of the Fourth Section of the European Court of Human Rights (hereinafter also referred to as "ECtHR", "Court") dated 10 May 2019 and 21 May 2019, granting leave to make written submission to the Court by the 10 June 2019, the Helsinki Foundation for Human Rights (hereinafter also referred to as "HFHR") with its seat in Warsaw, Poland, would like to respectfully present its written comments in the case of Ms. Laura Codruța Kövesi against Romania (Application no. 3594/19).

On behalf of the Helsinki Foundation for Human Rights,

  
Piotr Kładoczny, Ph.D.  
Secretary of the Board

  
Danuta Przywara  
President of the Board



***Kövesi against Romania***  
**Application no. 3594/19**

**WRITTEN COMMENTS**  
**BY**  
**THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**

**Executive summary**

- Interpretation of the scope and content of Article 6 and Article 10 in the present case should take into account the standards of prosecutorial independence and their importance to the system of human rights protection.
- Effective and impartial prosecution service is one of the foundations of the system of human rights protection. Politicized prosecutors may be unable to carry out objective investigation into human rights violations committed by public officials or may be used to initiate to politically motivated criminal proceedings.
- Despite its significance, the principle of independence of prosecutors is rarely explicitly enshrined in domestic constitutions or binding international treaties. There are, however, many international soft-law documents in this regard.
- Among the most important guarantees of prosecutorial independence are: objective system of appointments and promotions, adequate remuneration and conditions of service, protection against arbitrary removal, fair system of disciplinary responsibility and access to court in cases affecting prosecutors' career. As a principle, also the freedom of expression of prosecutors, in particular with regards to matters related to the rule of law, should be respected.
- The reforms which significantly limited independence of prosecution service were adopted, among others in Poland. These included, primarily, the merger of the offices of Prosecutor General and Minister of Justice, what resulted in granting prominent politician of the ruling party extensive powers which may be used to influence the course of concrete criminal proceedings.

**I. INTRODUCTION**

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights, pursuant to the leave granted by the President of the European Court of Human Rights on 10 May 2019.

2. Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. Among the activities of the HFHR there is a participation in legal actions undertaken for the public interest such as representing parties and preparation of legal submissions to national and international courts and tribunals. The HFHR has an established practice as regards of submission of third party interventions to the European Court of Human Rights (hereinafter: "ECHR") and in representing victims in

proceedings before the Court. In the past we had submitted *amicus curiae* opinions not only in cases against Poland (e.g. *Kuchta i Mętel przeciwko Polsce*, app. no. 76813/16; *M.P. v. Poland*, app. no. 20416/13; *A.K. v. Poland*, application no. 904/18), but also those against other countries, which in our opinion, concerned legal problems important also from the perspective of protection of human rights in Poland (e.g. *Levada Centre against Russia*, app. no. 16094/17; *Baka v. Hungary*, app. no. 20261/12; request of the French Court of Cassation for advisory opinion, ref. no. P16-2018-001).

3. HFHR believes that although the present case concerns directly situation in Romania, the future judgment of the Court may contribute to development of new standards with regards to protection of independence of prosecutors. This would be particularly important for countries where the prosecution service is directly subordinated to Government to the detriment of the effectiveness of criminal proceedings, especially concerning alleged human rights violations by high public officials.

4. The present written comments are divided into three sections. In the first one we briefly analyse the importance of politically unbiased functioning of prosecution service for the protection human rights. Second part presents the most important standards concerning independence of prosecutors, with particular emphasis on security of tenure and access to court in disputes concerning dismissals. In the last part we discuss the problem of excessive influence of the Government on the functioning of prosecution service in Poland and its negative impact on effectiveness of human rights protection.

## II. PROSECUTION SERVICE AND HUMAN RIGHTS

5. Effective and objective prosecution service is one of key components of domestic system of human rights protection. In this context it is worth to remind that although the European Convention on Human Rights does not guarantee the victims of crimes the right to have perpetrators punished with specific sentence, various provisions of the Convention impose on the states positive obligations to carry out an effective investigation into alleged breaches of human rights<sup>1</sup>. Also other human rights treaties impose such obligations. For instance, the Human Rights Committee underlines that the right to life, guaranteed in Article 6 of the International Covenant on Civil and Political Rights, “requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life, including establishing by law adequate institutions and procedures for (...) investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation”<sup>2</sup>. In some international treaties duty of the state to carry out effective investigation into instances of grave human rights violations is provided explicitly<sup>3</sup>.

6. The establishment of effective prosecution service is absolutely necessary to fulfil by the state its positive obligations. One have to keep in mind that “prosecutors do not simply act as an

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<sup>1</sup> See e.g. *Armani Da Silva v. the United Kingdom*, 30 March 2016, app. no. 5878/08, §§ 229-239 ( in the context of Article 2); *Jeronovičs v. Latvia*, 5 July 2016, app. no. 44898/10, § 103 (in the context of Article 3); *Blumberga v. Latvia*, 14 October 2008, app. no. 70930/01, § 67 (in the context of Article 1 of Protocol No. 1).

<sup>2</sup> Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, ref. no. CCPR/C/GC/36, para 19 available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf) (last access: 6 June 2019).

<sup>3</sup> See e.g. Article 16(5) of the Convention on the Rights of Persons with Disabilities.

intermediary between the police and the courts, deciding whether or not a case that has been investigated should also be prosecuted. Their powers extend well beyond these core responsibilities. Under certain circumstances, prosecutors may be the sole decision makers to determine whether a criminal sanction will be imposed. They may also determine, or negotiate with the offender, the nature and severity of the sanction"<sup>4</sup>. This significance of the prosecution service is underlined in many international soft-law documents and public statements of human rights bodies. For instance, the UN Special Rapporteur on the independence of judges and lawyers noted in 2014 that "Prosecutors play a crucial role in the administration of justice (...)" and "are also essential for upholding the rule of law and ensuring that the law applies equally to everyone"<sup>5</sup>. In the same tone, the Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors (hereinafter: "Rome Charter") provides that "Prosecutors act on behalf of society and in the public interest to respect and protect human rights and freedoms as laid down, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the case-law of the European Court of Human Rights"<sup>6</sup>.

7. The effectiveness of performing by prosecutors their functions concerning protection of human rights could be significantly limited in case of excessive subordination of the prosecution service to the Government<sup>7</sup>. As James Hamilton, the President of the International Association of Prosecutors, correctly noted political pressure exerted on prosecutors may cause that they "will not be able to protect the interests of justice, will not be able to respect the rule of law or human rights, and will be powerless to deal effectively with cases of corruption or abuse of State power"<sup>8</sup>. Similarly Polish legal scholars underline that "Independence from the executive authority serves the effective control of the latter in the event of violation of law by the Government or Government administration. Without such independence, the prosecutor's office is only an instrument in the hands of the Government and therefore serves its purposes and may be illegally used against political opponents, while ensuring impunity for the ruling officials. Prosecution service organized in such way certainly does not serve the rule of law and human rights"<sup>9</sup>.

8. Politicization of the prosecution service may also lead to instrumentalization of the criminal proceedings and using them against the political opposition or civil society activists. In the HFHR opinion, this threat cannot be eliminated simply by establishment of independent judiciary. It is true that independent judiciary could prevent convicting person for political reasons, however the mere initiation of criminal proceedings and making this decision public may destroy reputation of the accused<sup>10</sup>. Moreover in various jurisdictions prosecutors have powers which severely interfere with human rights and which, at the same time, cannot be challenged to court.

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<sup>4</sup> S. Voigt, A.J. Wulf, *What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence*, "Journal of Institutional Economics" 2019), vol. 15, issue 1, p. 103.

<sup>5</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 28 April 2014, A/HRC/26/32, para. 64.

<sup>6</sup> Point II of the Rome Charter.

<sup>7</sup> V. Michel, *The role of prosecutorial independence and prosecutorial accountability in domestic human rights trials*, "Journal of Human Rights" 2017, vol. 16, no. 2, pp. 193-219.

<sup>8</sup> Quoted in: *The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, New York 2014, p. 7.

<sup>9</sup> M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury a najnowsze zmiany polskiego porządku prawnego*, „Czasopismo Prawa Karnego I Nauk Penalnych” 2017, z. 2, p. 112.

<sup>10</sup> See e.g. S. Voigt, A.J. Wulf, *What makes prosecutors independent?*, p. 106.

For instance, in case of Poland, there is no right to appeal to court against exhumation order<sup>11</sup>. In 2016 there were serious controversies over the decision of the prosecutors to order exhumation of victims of Smoleńsk air crash – members of families of some of victims opposed against the exhumation, arguing that the prosecutor’s decision in this regard was politically motivated. This situation led to violation of Article 8 of the Convention<sup>12</sup>. In some other cases, prosecutor’s decisions may be appealed to court, however the judicial review has only *ex post* nature and the appeal does not automatically suspend the effectiveness of the challenged decision. This concern, among others, the competence of prosecutor to order search or seizures<sup>13</sup> or to order establishment of receivership over enterprise of the accused<sup>14</sup>. In the latter case, the prosecutor’s decision is immediately effective, but the prosecutor has to ask the court, within 7 days from the decision, to approve the establishment of receivership. However, the decision is annulled only when the court’s decision with regards to non-approval of the receivership becomes final. Therefore, the prosecutor’s decision may be in force for a relatively long period and cause significant financial damage to the accused.

### III. STANDARDS REGARDING INDEPENDENCE OF PROSECUTORS

9. Despite the abovementioned significance of prosecution service for the protection of human rights, the status of prosecutors and guarantees of their independence, unlike analogous issues with regards to judges, are relatively rarely regulated on the constitutional level. Such matters are not regulated, for example, in the constitutions of Poland, Germany or the Czech Republic. On the other hand, there are certain provisions regarding the independence of prosecutors in the constitutions of, among others, Croatia<sup>15</sup>, Lithuania<sup>16</sup> and Montenegro<sup>17</sup>.

10. On the international level, the independence of prosecution service has not been explicitly guaranteed in any of the most important conventions on human rights, although the European Court of Human Rights noted in one judgment that “in a democratic society both the courts and the investigation authorities must remain free from political pressure”<sup>18</sup>. However, many important standards were set in the international soft-law documents. All these documents do not impose on states one model of organization of prosecution service, leaving them relative leeway in this area, focusing rather on guarantees which strengthen independence and impartiality of prosecutors.

11. Within the framework of the UN system, one of the first, and the most influential, documents concerning the issue of independence of prosecutors were the “Guidelines on the Role of Prosecutors” (“UN Guidelines”) adopted in 1990<sup>19</sup>. Point 4 of the Guidelines obliges the states to “ensure that prosecutors are able to perform their professional functions without intimidation,

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<sup>11</sup> Article 210 of the Code of Criminal Procedure. The lack of judicial review of exhumation order was found to be inconsistent with Article 8 of the Convention in the judgment of the ECtHR of 20 September 2018 in the case of *Solska and Rybicka v. Poland* (app. nos. 30491/17, 31083/17).

<sup>12</sup> See: *Solska and Rybicka v. Poland*, 20 September 2018, app. nos. 30491/17, 31083/17.

<sup>13</sup> Article 236 of the Code of Criminal Procedure.

<sup>14</sup> Article 292a of the Code of Criminal Procedure.

<sup>15</sup> See: Article 121a of the Constitution of Croatia.

<sup>16</sup> See: Article 118 of the Constitution of Lithuania.

<sup>17</sup> See: Article 134 of the Constitution of Montenegro.

<sup>18</sup> *Guja v. Moldova*, 12 February 2008, app. no. 14277/04, § 86.

<sup>19</sup> *Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> (last access: 6 June 2019).

hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability". Among guarantees of the prosecutorial independence Guidelines mention: reasonable conditions of service and adequate remuneration (point 6), fair and impartial system of promotion (point 7) and legal regulation of tenure, pension and age of retirement of prosecutors (point 6). Moreover, according to the Guidelines disciplinary proceedings against prosecutors "shall be processed expeditiously and fairly under appropriate procedures" (point 21). The relevant provisions should guarantee prosecutors right to fair hearing and access to independent review of disciplinary decisions.

12. Recommendations set in the Guidelines were further developed in the reports of the UN Special Rapporteur on the independence of judges and lawyers and in particular – in the report of 2012<sup>20</sup> which focused on international and regional standards relating to prosecutors and prosecution services. The Special Rapporteur identified several factors which could affect the independence of prosecutors. One of the most important is a fair system of appointments and promotions. The concrete system may vary depending on the organizational model of prosecution service chosen in given country (e.g. prosecutorial service as part of executive, judiciary or completely independent) <sup>21</sup>, however it should always be transparent and based on competences and skills<sup>22</sup>. It is also advisable to establish a special recruitment body composed predominantly by experienced prosecutors to avoid any political interferences<sup>23</sup>. Another important guarantee of prosecutorial independence is the security of tenure and, closely connected to it, protection against arbitrary removal. In this context, the Special Rapporteur underlines that "the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities"<sup>24</sup>. In particular, prosecutors should have a right to appeal to court against all decisions affecting their careers, "including those resulting from disciplinary proceedings"<sup>25</sup>. Also the significance of adequate remuneration and proper rules concerning issuing of binding instructions to prosecutors was noted<sup>26</sup>.

13. Yet another important UN document concerning standards of prosecutorial is guide on "The Status and Role of Prosecutors" published in 2014 by the UN Office on Drugs and Crime and International Association of Prosecutors<sup>27</sup>. The guide defines the notion of "prosecutorial independence" as "an individual state of mind that enables an individual prosecutor to make decisions rationally and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference"<sup>28</sup>. There are many different models of organization of prosecution service and means used to protect independence of prosecutors<sup>29</sup>. One of the necessary measures of such protection is proper shape of disciplinary proceedings

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<sup>20</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 7 June 2012, ref. no. A/HRC/20/19.

<sup>21</sup> Ibid., paras. 29-34.

<sup>22</sup> Ibid., paras. 59-62.

<sup>23</sup> Ibid., para. 62.

<sup>24</sup> Ibid., para. 70.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., paras. 71 and 73-75.

<sup>27</sup> *The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, New York 2014, available at: [https://www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf) (last access: 6 June 2019).

<sup>28</sup> Ibid., p. 9.

<sup>29</sup> Ibid., p. 9-13.

ensuring that “prosecutors maintain their independence and not be swayed or intimidated by the threat of liability”<sup>30</sup>. The law should define what constitutes punishable unprofessional conduct or professional misconduct<sup>31</sup>. All sanctions should be proportionate to the gravity of prosecutors misbehaviours and the decisions of disciplinary bodies should be appealable<sup>32</sup>.

14. Significant standards were also developed within the system of the Council of Europe. Particularly worth mentioning here is the Recommendation of the Committee of Ministers Rec(2000)19 on the role of public prosecution in the criminal justice system. The Recommendation does not prohibit making the prosecution service subordinated to government. However, the governmental powers should be exercised in transparent way and in accordance with law<sup>33</sup>. Any instructions to prosecutors should have written form and be issued with adequate guarantees<sup>34</sup>. Moreover, instructions to not to prosecute concrete case as a principle should not be allowed<sup>35</sup>. Similarly as in the documents presented above, the Recommendation underlines importance of fair and impartial system of appointments and promotions, reasonable conditions of service (including remuneration)<sup>36</sup>. Prosecutors should be also entitled to seek review of disciplinary decisions by an independent and impartial entity<sup>37</sup>. The importance of the prosecutorial independence is underlined also in the Rome Charter adopted in 2015 by the Consultative Council of European Prosecutors (CCPE)<sup>38</sup>. It states that “The independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged.”<sup>39</sup> Independence of prosecutors should be ensured with the use of proper guarantees. Even if the prosecution service is subordinated to the government, “the state must ensure that the nature and the scope of the latter’s powers with respect to the public prosecution is also established by law, and that the government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law”<sup>40</sup>. Among the most recent documents it is worth to mention Opinion No. 13(2018) of the CCPE on the “Independence, accountability and ethics of prosecutors”<sup>41</sup>. Interesting standards were developed also by the Venice Commission<sup>42</sup>.

15. In addition to soft-law documents adopted within the framework of international organizations, important standards regarding the prosecutorial independence were developed by professional associations of prosecutors. In this regard it is especially worth to mention

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<sup>30</sup> Ibid., p. 32.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid., p. 34.

<sup>33</sup> Rec(2000)19, Article 13(a)-(b).

<sup>34</sup> Ibid., Article 13(c)-(d).

<sup>35</sup> Ibid., Article 13(f).

<sup>36</sup> Ibid., Article 5(d).

<sup>37</sup> Ibid., Article 5(e).

<sup>38</sup> Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, Strasbourg, 17 December 2014, ref. no. CCPE(2014)4Final.

<sup>39</sup> Ibid., point IV.

<sup>40</sup> Ibid., para. 33 of the Explanatory Note.

<sup>41</sup> Opinion No. 13(2018) of the CCPE: «Independence, accountability and ethics of prosecutors», Strasbourg, 23 November 2018, CCPE(2018)2.

<sup>42</sup> See in particular: European Commission for Democracy through Law (Venice Commission), Compilation of Venice Commission opinions and reports concerning prosecutors, Strasbourg, 11 November 2017, CDL-PI(2018)001.

“Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors” in 1999 (“IAP Standards”)<sup>43</sup>. Article 6 of this document provides that “prosecutors should be protected against arbitrary action by governments” and specifies certain means of such protection. In this regard it recommends, among others, that prosecutors should be provided with “reasonable conditions of service and adequate remuneration” (including protection against arbitrary reduction of salaries), “reasonable and regulated tenure, pension and age of retirement”, fair disciplinary proceedings based on law as well as objective and impartial system of promotion. Guidelines provide also certain standards with regards to instructions given to prosecutors, in course of criminal proceedings, by non-prosecutorial bodies. They require that such instructions are transparent, “consistent with lawful authority” and “subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence” (Article 2.2.).

16. What is particularly important in the context of the case of *Kövesi v. Romania*, the majority of documents presented above underline the importance of respecting and protecting the prosecutors’ freedom of expression. For instance, the UN Guidelines provide that “Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights” (point 8). In the same tone, the Rome Charter underlines that prosecutors are free to participate “in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice”, although they should not comment pending cases or undermine the integrity of court (para. 82 of the Explanatory Note). The Recommendation Rec(2000)19 provides that the prosecutors’ freedom of expression may be limited only “in so far as this is prescribed by law and is necessary to preserve the constitutional position of the public prosecutors” (Article 6).

#### **IV. INDEPENDENCE OF PROSECUTORS IN POLAND**

17. In Poland, the reforms carried out by the current ruling party, “Law and Justice” led to significant reduction of the prosecutorial independence.

18. As already mentioned, the Polish constitution does not contain any provisions with regards to organization of prosecution service or status of individual prosecutors. All these matters are regulated on the level of statutes. Until 2010 the office of Prosecutor General was merged with the office of Minister of Justice what led subordination of the prosecution service to the government. This situation had significantly changed in 2010 when the vast reform of the organization of prosecution service entered into force. The offices of Prosecutor General and the Minister of Justice were separated. The former was elected by the President, from among candidates nominated by the National Council of the Judiciary and the National Council of the Prosecuting Authority, for six years term of office. The reform also sought to strengthen independence of prosecutors by, among others, establishment of the National Council of the Prosecuting Authority, composed of 25 members (among whom 17 were prosecutors), entrusted with many important competences, such as selecting candidate for the post of Prosecutor General or participating in the procedure for removal of district, circuit or appellate prosecutors by the Prosecutor General, reviewing and assessment of candidates for prosecutors.

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<sup>43</sup> Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on the twenty third day of April 1999, available at: [https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP\\_Standards.aspx](https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP_Standards.aspx) (last access: 6 June 2019).



Moreover, the law significantly restricted the scope of instructions given to prosecutors by superior prosecutors providing that such instruction could not be related to the content of procedural actions.

19. The model of independent public prosecution was rejected by the "Law and Justice" party after the elections in Autumn 2015. During the legislative works in the Parliament, MPs of the ruling party argued that "(...) it is judges who must be independent, not prosecutor's office (...) The public prosecution is the only instrument in the hands of the executive, through which it can influence the shape of judicial decisions, the shape of the case law, which fosters the sense of social justice"<sup>44</sup>.

20. The new Law on Public Prosecutor's Office<sup>45</sup>, which entered into force in March 2016, reinstated the system of separation of the offices of the Minister of Justice and the Prosecutor General. As a result, the position of the Prosecutor General was taken by Zbigniew Ziobro, Minister of Justice, Member of Parliament and the leader of the "United Poland", one of the political parties which form the ruling coalition. What is important, the Prosecutor General has many competences which may be used to exert pressure on individual prosecutors. The law provides that "the Prosecutor General is the superior of public prosecutors of universal prosecutorial bodies" (Article 13 § 2) and gives him a power to issue written orders and instructions to all the public prosecutors concerning the content of any individual case they are dealing with (Article 7). Such orders and instructions are binding for prosecutor, although, if he/she does not agree with their content, he/she may request them to be changed to exclude him/her from the case. Moreover the Prosecutor General, as a superior public prosecutor, has a competence to change or revoke a decision of a subordinate public prosecutor (Article 8). He may also present to public authorities, and other persons in duly justified cases, information concerning the Public Prosecutor's Office's operations, including those concerning concrete cases, provided that such information may be of importance to the state security or its correct functioning (Article 12 § 1). According to media reports, this competence may be used by the Prosecutor General to present to the leader of the ruling party information from pending criminal proceedings<sup>46</sup>. Prosecutor General has also power to appoint public prosecutors, upon the motion of the National Prosecutor. Yet another far reaching competence of the Prosecutor General is provided in Article 57 § 3 of the Law on Public Prosecutor's Office, according to which the Prosecutor General can request operational and exploratory activities to be undertaken by competent authorised bodies provided that they remain directly pertinent to the preparatory proceedings under way. He may also inspect the materials collected in the course of such activities. As the Venice Commission correctly noticed "This means that a politician, the Minister of Justice, cannot only give direct instructions in each prosecutorial case file in Poland, s/he has also full access to the material in all prosecutorial files in the country."<sup>47</sup>

21. The reform of the prosecution service was criticized, among others, by the Venice Commission, which stated that the merger of offices of the Minister of Justice and the Prosecutor

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<sup>44</sup> Transcript from the 8-th sitting of the Sejm of 8-th term of office, 13 January 2016, p. 20, available at: [http://orka2.sejm.gov.pl/StenoInter8.nsf/0/AEE70CD6372638D9C1257F39005D4608/%24File/08\\_a\\_ksiazka\\_bis.pdf](http://orka2.sejm.gov.pl/StenoInter8.nsf/0/AEE70CD6372638D9C1257F39005D4608/%24File/08_a_ksiazka_bis.pdf) (last access: 6 June 2019).

<sup>45</sup> The law of 28 January 2016 on Public Prosecutor's Office, Dz.U. 2016 poz. 177.

<sup>46</sup> D. Flis, *Ziobro nosi akta do Kaczyńskiego. Dał sobie takie prawo*, "OKO.press", 5 August 2017, available at: <https://oko.press/ziobro-nosi-akta-kaczynskiego-dal-prawo/> (last access: 6 June 2019).

<sup>47</sup> European Commission for Democracy through Law (Venice Commission), Opinion on the Act on the Public Prosecutor's Office as amended, Adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017), ref. no. CDL-AD(2017)028, para. 51.

General "(...) creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law"<sup>48</sup>. According to the Venice Commission, the threats to rule of law associated with the position of the Prosecutor General are further exacerbated by the changes in the organization of the common courts, which gave the Minister of Justice stronger powers with regards to appointment and dismissal of presidents of courts<sup>49</sup>.

22. In addition to legal changes, the independence of prosecutors was threatened by the application of the new provisions. Already in March and April 2016, that is immediately after entrance into force of the new Law, the Prosecutor General transferred 22 prosecutors of the Prosecutor General's Office and 91 prosecutors of Appellate Prosecutor's Offices to lower positions<sup>50</sup>. The decisions in this regard were arbitrary did not provide any reasons for the transfers.

23. Moreover, "Lex Super Omnia", the independent association of prosecutors, informs that it is regularly harassed by the prosecution authorities. Members of the association are facing disciplinary charges for exercising their freedom of expression to criticize politicization of the prosecution service. Many examples of such disciplinary proceedings against members of "Lex Super Omnia" as well as other independent prosecutors are described in the report "A country that punishes" published by the Justice Defence Committee (KOS)<sup>51</sup>. For instance, one disciplinary proceedings, eventually discontinued on the grounds of negligible harm, concerned criticism of legal and organizational changes in public prosecution expressed by prosecutor in a journal interview<sup>52</sup>. Another case concerned participation of the prosecutor in public assembly organized to protest against changes in organization of judicial system, threatening the rule of law<sup>53</sup>. There were also several charges brought against the President of "Lex Super Omnia" – some of them concern his statements published in social media and some his criticism of the "functioning of the prosecution office and the attitudes of the Prosecutor General and the National Prosecutor"<sup>54</sup>.

24. KOS and "Lex Super Omnia" inform also about other forms of harassment against independent prosecutors, such as prohibiting them to participate in educational events organized by NGOs, transferring to lower positions or offices in distant regions and disproportionate burdening with work<sup>55</sup>. At the same time, subservient prosecutors are promoted despite having lesser experience<sup>56</sup>.

25. It is very difficult to assess the impact of the severe limitation of the prosecutorial independence on the effectiveness and objectiveness of criminal proceedings. Nevertheless, one can find some examples which may suggest that prosecutors are nowadays unwilling to carry

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<sup>48</sup> Ibid., para. 111.

<sup>49</sup> Ibid., para. 95.

<sup>50</sup> Information provided by the association of prosecutors "Lex Super Omnia".

<sup>51</sup> Justice Defence Committee, *A country that punishes. Pressure and repression of Polish judges and prosecutors*, Warsaw 2019, report available at: [http://citizensobservatory.pl/wp-content/uploads/2019/03/Raport-KOS\\_eng.pdf](http://citizensobservatory.pl/wp-content/uploads/2019/03/Raport-KOS_eng.pdf) (last access: 10 June 2019).

<sup>52</sup> Ibid., p. 24.

<sup>53</sup> Ibid., p. 25.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., pp. 26-28.

<sup>56</sup> Ibid., p. 28.

out investigations into alleged violations of law by politicians of the ruling party<sup>57</sup>. The best example of this tendency is probably the course of criminal proceedings concerning the Prime Minister's refusal to publish judgment of the Constitutional Tribunal in March 2016. The Prime Minister justified her decision arguing that the judgment was issued unlawfully although the law did not authorize her to review legality of judgments. Many persons and NGOs, including HFHR, submitted to the prosecution office notifications on a potential crime committed by the Prime Minister and other government's officials (abuse of power). The prosecutor refused to open the proceedings stating that "the verification proceedings did not reveal any signs of failure to fulfil duties by the Prime Minister, Minister-Member of the Council of Ministers and the President and employees of the Governmental Centre of Legislation". HFHR appealed against this decision to the court which quashed it and ordered prosecutor to open the proceedings. Moreover, the court ordered underlined that the prosecutor should interrogate persons directly responsible for publishing of judgments. The prosecutor initiated the proceedings, but discontinued them in March 2017. It turned that in the course of criminal proceedings the prosecutor had not interrogate the Prime Minister, although some witnesses testified that it was her who gave an order to not to publish judgments. HFHR could not further appeal against the prosecutor's decision and so it became final.

## V. CONCLUSIONS

In the HFHR's opinion, independence of prosecutors has to be considered as one of key elements of principle of the rule of law, which – although not expressed in it explicitly – is one of the foundations of the Convention<sup>58</sup>. Politicized and biased prosecution service would be unable to investigate alleged crimes committed by public officials and could be used to persecute opponents of the ruling majority. Among guarantees of prosecutorial independence, provided in many international soft-law documents, one of the most important are the security of tenure and protection against arbitrary removal. Similarly, prosecutors should be also protected against unjustified and politically motivated transfers between positions. Primary measure of such protection should be access to court in all cases concerning decisions which affect prosecutor's career, in particular his/her dismissal. HFHR believes that the abovementioned standards of prosecutorial independence as well as requirements stemming from the principle of the rule of law should serve as an interpretative background in the present case.

*The amicus curiae opinion was drafted by Dr. Marcin Szwed, lawyer in the Strategic Litigation Programme of the Helsinki Foundation for Human Rights. Information regarding threats to independence of public prosecutors in Poland were provided to HFHR by the association "Lex Super Omnia".*

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<sup>57</sup> See in particular: Forum Obywatelskiego Rozwoju, *Prokuratura pod specjalnym nadzorem. Kadry i postępowanie „dobrej zmiany”*, 2018, report available (in Polish) at: <https://for.org.pl/pl/d/5d997ee914bb815b878d072e678bf55b> (last access: 10 June 2019).

<sup>58</sup> Cf. R. Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, "Human Rights Law Review" 2018, Vol. 18, Issue 3, p. 489.