

Sanctioning Powers of the Swedish Public Prosecution Service and Police

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1 Introduction

According to the traditional constitutional view, the Public Prosecution Service (PPS) is considered to be a part of the executive power within a State, along side the legislative power (Parliament) and the judicial power (Courts). From another perspective, the PPS is a part of the criminal justice system. Within the criminal justice system, the PPS represents the interests of the State. The main task of the PPS is to see to it that the committed offences are brought to courts, as well as to provide the courts with sufficient information (evidence) to make it possible to issue a correct and just sentence.

This basic view applies also in Sweden. The Swedish legislation concerning relations within the criminal justice system shows, however, some special features, which will be discussed in this article. These features are related to the principle of the division of powers mentioned above. What is it about? Briefly, the Swedish regulation concerning the tasks of the PPS does not respect the rules following from the principle of division of powers. The PPS, which is a public authority, undoubtedly belonging to the executive power within the State, has been entrusted with considerable judicial powers. The PPS is empowered, without any judicial intervention, to impose penalties on the perpetrators of offences. Even if Sweden is not the only European country¹ which has adopted such a solution, the regulation is very unusual and raises some important questions.

Below, the question is posed, whether it is possible to find an explanation for the solution. After that, the sanctioning powers of the PPS are put into a wider context by presenting the legal preconditions of the sanctioning powers in relation to other possible decisions of the PPS during a prosecution of criminal offences. Some issues connected to this solution are discussed at the end of the article.

2 The Overloaded Criminal Justice System and Search for New Solutions

Recently published results of a large comparative research study into the PPS in Europe² have established a number of features common to all the European

1 A similar regulation has been adopted in Finland. There are some historical reasons why this has occurred in Finland in particular. Both countries, Sweden and Finland, share a long common legal history. Also other Nordic countries have adopted similar solutions.

2 Jörg-Martin Jehle – Marianne Wade, *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*. Springer. Berlin – Heidelberg 2006. The project included Germany, England and Wales, France, Poland, the Netherlands and Sweden, in the second step also Switzerland, Croatia, Hungary and Turkey. The publication is of significant value, among other things, by providing rich empirical material, making it possible to get a good picture as far as the real functioning of the PPS in the participating countries is concerned. Another publication which could be mentioned in this context is *Tasks and Powers of the Prosecution Services in the EU Member States*, P.J.P.Tak (ed.) (Wolf Legal Publishers. Nijmegen 2004.). This book focuses rather on the legal regulations concerning the PPS in the countries included in the project. The project covers more European countries.

countries participating in the project. The research shows, among others things, that the position of the PPS within the criminal justice systems in all the studied countries has recently become stronger in relation to the other subjects included in the system. The more powerful position of the PPS results mainly from widening the possibilities for the PPS to finish prosecution, either by simply dropping prosecution, or by taking different measures instead of bringing the case to court.

What is the reason behind the development? The research project does not directly address this question. The type of adopted measures, however, suggests that the main reason for the strengthening of the PPS's position is an ambition to find new ways to diminish the case flow to the courts. To put it in other words, behind the mentioned tendencies lies continuously increasing criminality. Especially so-called mass criminality is important, that is, the number of offences (e.g. road traffic offences, customs offences, tax offences, etc.), which as individual cases are not very serious, but which as a whole may represent a difficult social phenomenon.

The problem of the overloaded criminal justice system is not a new one. Mainly during the 1970s, there were intensive discussions on this topic under the heading "Diversion and Mediation". The issue was also the main topic at the world congress of the AIDP³ in the early 1980s.

By that time, it had become obvious that something had to be done to prevent a collapse of the judiciary. To bring new necessary financial resources to the judiciary would be too expensive; the politicians would not hear of it. Other ways were looked into. Especially in the U.S., but also in other countries, various experiments with "mediation centers", "reconciliation centers", "neighborhood justice centers", etc., took place. Some of those experimental solutions have survived in one or another form (e.g. different forms of mediation), whereas others have disappeared. Thus, the most visible result of the discussions in the seventies and eighties has been the strengthening of the PPS's position within the criminal justice system. Given the high professional qualifications of prosecutors, it was considered acceptable to entrust the PPS with significant powers to handle offences, while maintaining a reasonable level of safeguards concerning the legal rights of individuals (legal certainty).

By widening the PPS's powers, the emphasis was placed on procedural instruments aimed at diminishing the caseload in courts. Possible solutions in the area of substantive law, such as decriminalization or categorization of offences according to their seriousness, were discussed in Sweden to a much lesser extent. Another solution of this kind, and at least in my opinion a very suitable one, namely an introduction of the material notion of crime, has never been discussed, even if one finds some embryos of such a solution both in Sweden and other countries (e.g. in Austria). The restrained attitude towards this solution may be understandable, given that this solution has been compromised through its use in the former communist countries.

Some of the legal instruments, which nowadays are used to strengthen the powers of the PPS, had been introduced into Swedish legislation much earlier, in

3 Association Internationale de Droit Pénal.

a time when the problem of overloading in the criminal justice system was not as urgent as now. For instance, *the penal order* and *waiver of prosecution* (see below), were adopted in 1942. At that time, the reason for introducing those legal devices was not, in the first place, case overload, but an effort to avoid judicial prosecution of bagatelles.

The increasing criminality may explain why the measures aimed to diminish the caseload of courts have been taken. It does not explain, however, why the Swedish legislature, unlike other comparable countries, has chosen the unusual solution of entrusting the PPS with broad judicial powers. The issue was not discussed very much during preparation of the law.⁴ However, in studying the Government bill, one is left with the impression that the solution was not entirely uncontroversial. Originally, the regulation in question was framed in such a way that the PPS could impose a fine of no more than 50 Swedish crowns (which was later, during the preparatory works, changed to 100 crowns). If the penal order were to concern a higher amount, it had to be submitted to court. This rule became law when the Code of Judicial Procedure (CJP) came into force in 1948. It was not until later, through the first amendment to the legal provisions concerning the penal order, that the PPS's obligation to submit a penal order to the court was abolished.⁵ It was apparent from the Government bill containing this amendment that the most fervent advocate of this modification was the PPS itself. The statement of the PPS was fully quoted in the bill. The PPS argued, first of all, that if the obligation to submit penal orders to the court were to be removed, it would spare judges much labour. Furthermore, and interestingly, it would also spare labour for prosecutors. According to the PPS, to draft a penal order demands less work than to prepare an indictment and then to appear in court (I return to this argument below). The last argument was that the PPS already carried out judicial powers, anyway. What the PPS referred to was the PPS's decisions *not to prosecute* in court, that is, not to indict the suspect for certain offences.⁶ Some other instances, especially courts, opposed the view of the PPS, but the bill was passed, notwithstanding.

Since the first amendment (1954), the legal provisions concerning the penal order have been changed nearly twenty times. Some of the changes were unimportant, but since the 1960s, the penal order framework has been utilized to achieve a step-by-step widening of the PPS's judicial powers. The most important changes in this development were, perhaps, the following: the amendment of 1968, making it possible to issue penal orders for offences which not only carried fines, but also imprisonment in the range of penalties; the amendment of 1995, introducing the possibility for the PPS to decide, under certain circumstances, on forfeiture and private claims compensation; and the amendment of 1996, which empowered the PPS to impose a conditional sentence on the suspect. Besides, the severity of penalties, which were possible to impose by penal order, has continuously increased; from 20 day-fines in the

4 Government bill no. 1942:5.

5 Act no. 1954:432, Government bill no. 1954:200.

6 Government bill no. 1954:200, p. 27.

year 1948, to 200 day-fines (i.e. the full range of fines) and/or conditional sentence of today. The latest step (2006) was entrusting the PPS with power to impose criminal sanctions on legal entities (“company fine” up to 500,000 crowns).

Since 1954, when the appropriateness of entrusting the PPS with judicial powers was briefly discussed, this matter of principle has never been taken up in connection with the preparation of new legislation in this field. Questions of procedural economy dominated fully. In the Swedish literature, the issue received only marginal attention.⁷

The second way to avoid prosecution in court, even if legal preconditions for indictment are given is the right of the PPS to decide on *waiver of prosecution* (refraining from indictment, *åtalsunderlåtelse*). Under which circumstances the PPS can take this measure is described below. Suffice it to say here that the waiver of prosecution was introduced in Swedish law in 1948. Similar to the penal order, since 1948, the possibility to decide on waiver of prosecution has been gradually widened. The same reasons were behind this widening as were behind the development of the penal order, that is, procedural economy.

To complete this presentation of measures which have been adopted in Sweden for the purpose of keeping minor offences outside the courts, the “order for breach-of-regulations fine” (summary fines order, *föreläggande av ordningsbot*) shall be mentioned. The “order for breach-of-regulations fine” was introduced in the legislation in 1966 by a particular statute. Since 1968, the regulation has been incorporated into the Code of Judicial Procedure, into the same chapter as the penal order. The “summary fine order” may be issued by the police for minor offences, mainly committed in road traffic, in customs procedures, etc. This kind of measures is very common in many countries. However, what is different in Sweden in comparison with other European countries is the fact that the police, by means of “order for breach-of-regulations fine”, impose a penalty for an offence in the legal sense. There is no legally defined category of offences called “breach-of-regulations” in Swedish law.⁸

3 The Main Features of the Swedish Legislation Relevant for Understanding the PPS Powers

Understanding the sanctioning powers of the PPS requires a short explanation of the legislation concerning termination of prosecution in general.

As mentioned above, the Swedish law knows no legally defined categorization of offences. All violations of public law are offences (“*brott*”) in the legal sense, regardless of the seriousness of the forbidden act. Thus, a murder

7 An interesting article concerning the topic is Fredric Wersäll, *Åklagare och polis som domare* (The Prosecutor and Police as Judges). The 36th Nordic Law Meeting in Helsinki 2002 part 1. pp. 639-651.

8 The term “order breach-of-regulations fine” is taken from the translation into English of the Code of Judicial Procedure, published by the Ministry of Justice.

belongs, legally, to the same category of violations as, for instance, speeding on the road.

At the same time, the PPS (and the police) are bound by the principle of legality. According to law, prosecution shall be initiated as soon as – a crime is reported or for some other reason – there is cause to believe that an offence subject to public prosecution has been committed.

Under such circumstances, it is quite obvious that the law has to contain rules which make it possible to keep a significant number of offences outside the judiciary.

It is possible to distinguish between four different ways in which prosecution of offences can be terminated (or not initiated at all) before the case would reach the court. I am speaking about offences that have been cleared up, that is, about cases in which conviction of the suspect could be expected. Situations where offences are not prosecuted in court (or the pre-trial prosecution is dropped) because of lack of evidence or for other reasons that prevent a trial (further prosecution) are not taken into account.

(1) The first rule that should be mentioned, even if it does not play a very important role in practice, is the right of the police to refrain from prosecution of petty offences. The police, as mentioned above, are bound by the principle of legality. There is one legal exception to the principle of legality as regards police activity. According to Sec. 9 of the Police Act, a police officer may refrain from his general obligation to report all offences, if the offence in question, in view of the circumstances in the specific case, is of a trivial nature and it is obvious that no other sanction than a fine would be imposed on the offender. To refrain from reporting an offence means, practically, that the offence will not be prosecuted.

The other ways to terminate prosecution may be decided only by the PPS.

(2) The possibility to drop investigation with respect to public interest follows from Chap. 23, Sec. 4a CJP. According to this provision, preliminary investigation may be discontinued (a) if continued inquiry would incur costs not in reasonable proportion to the importance of the matter and, at the same time, the offence, if prosecuted, would not lead to a penalty more severe than a fine, or (b) if it can be assumed that prosecution in court will not be instituted pursuant to the provision on waiver of prosecution (see below), or on special examination of prosecution.

Public interest is not named *expressis verbis* in this provision; however, public interest has to be considered the main ratio of the provision.

(3) Furthermore, the PPS is empowered to finish prosecution by a decision on waiver of prosecution (*åtalsunderlåtelse*) (Chap. 20, Sec. 7 CJP). The waiver of prosecution means that the PPS refrains from further prosecution, that is, from bringing the case to court, and stops the proceedings. No other action is taken.

The waiver of prosecution is possible (a) if it may be presumed that the offence would not result in any other sanction than a fine, (b) if it may be presumed that the sanction would be a conditional sentence and special reasons justify waiver of prosecution, and (c) if, with respect of circumstances, it is

manifest that no sanction is required to prevent the suspect from further criminal activity or the institution of a prosecution is not required for other reasons.⁹

The waiver of prosecution as a legal device contains some peculiar features that make it difficult to define its essence. The prosecutor may waive prosecution, that is, refrain from indictment against the suspect, *after* the suspect has been indicted.¹⁰ Prosecution may not be waived during trial, if the defendant objects. However, nothing is said about the effect of the suspect's attitude if the decision is made before the trial. A waiver of prosecution may be withdrawn if special reasons so require. Nothing is said about what kind of reasons there should be or how long after the decision on waiver it is possible to withdraw it. (It is not unusual in practice that the waiver of prosecution is applied repeatedly for new offences of the same person). Finally, the decision on waiver of prosecution is recorded in the criminal register of the suspect. The number of waivers of prosecution is also recorded in criminal statistics as successfully finished prosecutions of persons who committed crime, along side the number of judgments and penal orders¹¹. The most accurate description of the waiver of prosecution might be that it is a non-sanction, which is handled, in some respects, as a sanction.

The fourth way of finishing a criminal procedure without judicial intervention is by sanctioning offences through decisions of the PPS (or the police). The regulation is described in the following paragraph.

Before that, two short remarks should be added.

In the substantive criminal law, there are a number of provisions saying that the particular offence shall be prosecuted only if there is a substantial public interest in prosecution. The majority of the crimes of this category are property crimes, but also, for instance, the negligent causing of bodily injury or illness and other offences belonging to this group. In practice, this regulation means that the prosecutor has discretionary power to decide whether the prosecution of an offence will be initiated or not. If the prosecution has been initiated and it appears that the prosecuted offence belongs to this category, the prosecution may be dropped. If a prosecution concerning such an offence has been instituted in court, the prosecutor shall state reasons for the prosecution, that is, he has to establish the existence of the substantial public interest in the particular case.

The second remark concerns the elements of the material notion of crime which are possible to find in Swedish criminal law regulation. There is a number of offences in the criminal laws that shall not be prosecuted if the offence in the individual case is "ringa", that is, of minor or negligible seriousness. This way of limiting prosecution is typical for the material notion of crime. In the systems,

9 Besides, the waiver of prosecution is also possible if the suspect has committed another offence and no further sanction in addition to the sanction for that offence is needed in respect of the present offence, or if psychiatric care or other kinds of special care is rendered.

10 It is possible, if it shows there are circumstances that, had they existed or been known at the time of the prosecution, would have led to waiver of prosecution.

11 The table in question is called "Persons found guilty of criminal offence by principal sanction".

which have accepted the material notion of crime, such a rule is applied generally.

4 Sanctioning Powers of the PPS and the Police

4.1 Penal Order

The three above-described ways of finishing prosecution represent exceptions from the principle of legality. That is, in all three situations, the law allows the PPS (and the police) to refrain from the obligation to prosecute. The rules allowing prosecution only if there is a substantial public interest in prosecution are of the same nature. The only rule representing a solution within the substantive law is the rule concerning “ringa” (petty) offences.

These rules are, of course, very important as far as the limitation of caseload in courts is concerned. It is, however, obvious that the most important thing from this point of view is the sanctioning powers of the PPS and the police. This is well illustrated by statistics. In the year 2007, the number of persons sentenced by judgment was 62,405. The penal order was used against approx. 41,000 persons. It may be added that the number of persons registered for waiver of prosecution (refraining from indictment) was approx. 21,000. Moreover, the police imposed fines on suspects in approx. 180,000 – 200,000 cases (see below).¹²

The history of the penal order in Swedish law, especially the continuous widening of its applicability, has been described above in Part 2. In the following, the contemporary regulation is commented upon.

The penal order may be issued on condition that:

- 1) A person is suspected of an offence in respect of which the fines are included in the range of penalties; and
- 2) The particular offence does not deserve a penalty severer than fines¹³ or a conditional sentence¹⁴. (Chap. 48, Sec. 4 CJP)

By means of the penal order, the prosecutor may also decide on private claims compensation of the victim, if the claim consists of the payment of money, and on forfeiture of property, if it is justified by the offence. (Chap. 48, Sec. 2 and 5a CJP)

When a penal order is submitted to the suspect for approval, the suspect shall be informed that, if the order will not be approved, prosecution may be instituted after the expiration of the period specified. The requirement of approval of the penal order by the suspect is interpreted in such a way that it is not necessary

¹² Kriminalstatistik 2008.

¹³ There are no restrictions in respect to the severity of the fine penalty. The full range of fines may be applied by the penal order, that is 30 – 150 (by numerous offences 200) day-fines, in the amount 50 – 1000 Swedish crowns).

¹⁴ The conditional sentence is a kind of sanction that may be imposed on the suspect if the offence committed actually deserves imprisonment, but, for different reasons, a sanction which does not mean deprivation of liberty still may be applied. That is, the conditional sentence is an alternative sanction to the imprisonment.

that the suspect had confessed his guilt of the offence, but just the fact that he/she has committed the act. (This distinction may be important, for instance, in cases where the defendant declares himself to be non-guilty due to justification of his act).¹⁵

The penal order is a very powerful instrument in the hands of the PPS. Viewed purely pragmatically, it is undoubtedly an effective way to keep the case flow to courts within reasonable bounds. However, the question is how far the development toward more and more judicial powers for the PPS may go. At what point can we say that justice in Sweden is in the hands of the executive power of the State?

In my opinion, the practical advantages, which the Swedish solution undoubtedly shows, should not overshadow the idea behind the division of powers and functions within a State. The division of powers is not only a smart way to govern the State. It is also, and mainly, a safeguard against misuse of power, in the first place a safeguard for citizens. The citizens have no other possibilities to defend themselves against injustice by authorities, if any, than to appeal to another authority. It is important that there is not a direct unity of interests between the authorities in question. Using penal order the PPS, belonging to the executive power within the State, takes partially over the tasks that normally belong to the judiciary. To accept it is also to accept the inquisitorial procedure, to the extent covered by the penal order.

It might be argued that it does not matter, if nobody protests; it is a sign that the regulation works well. Do we really know it? As far as I know, no research has been done on this subject. The lack of protests itself does not say so much. In some respects, the penal order in its contemporary form could be, at a glance, advantageous for all parties. The courts do not need to handle the cases, for prosecutors it is easier to draw up the penal order than to prosecute in court (see the PPS's statement above), and for the suspects, the procedure is speedier than waiting for trial.

It is especially the attitude of the suspect that is worth discussing. The fact that the penal order is submitted to the suspect for approval is sometimes interpreted in such a way that the suspect voluntarily accepts the sanction, he agrees to it. I believe that we gain a more realistic view if we ask a second question, namely, what alternatives has the suspect? I think it is as a matter of principle improper to speak about voluntariness in connection with the application of public law sanctions. Similarly, I consider it improper to speak about the suspect's "satisfaction" with penal order proceedings, because it is simpler and speedier than trial. It is certainly one of several aspects. There are, however, other questions that can be more important for the suspect. Considering that penal order proceedings are often carried out without legal representation of the suspects and that the suspects do not always understand the matter, it is not improbable that a significant number of suspects become

15 Under some circumstances, the penal order shall not be issued: if it does not include all known offences of the suspect, if the offence does not fall under public prosecution, or if the victim claims other damages than payment of money.

puncertain and accept a penal order, even if they feel that the order is unjust. They do not protest, because they do not know what they can protest against, and their only wish is to get it all over with anyway.

The regulation of the penal order also contains elements that could be questionable from the point of view of the role of prosecutors. As mentioned above, the conditions of issuing a penal order include two criteria. First, the fines have to be included in the range of penalties. It is especially the second criterion, which says that the penal order may be based not only on this formal criterion, but also on expectations in respect of what a probable penalty would be if it had been imposed by court in a trial, which raises questions. The combination of wide discretion together with the already mentioned fact that drawing up a penal order is labour-saving in comparison with prosecution in court requires high personal integrity among prosecutors.

4.2 Summary Fines Order

The police are empowered to impose a sanction on the offender by means of a summary fines order (*föreläggande av ordningsbot*) (Chap. 48 CJP). The summary fines order is a final decision on criminal responsibility for an offence and is reported to the criminal register.

According to the law (Chap. 48, Sec. 13 CJP), a summary fines order may be applied to offences punishable by fines assessed directly at a set amount, that is, not by day-fines or other kinds of fines. Which particular offences may be punished by the summary fines order, that is, by the police, follows from the Regulation determining which offences may be punished by the police by means of the summary fines. The Regulation has been issued by the Prosecutor General in consultation with the National Police Board.

The Regulation contains a list of the offences, as well as the amounts that shall be imposed for each one of the offences on the list. The most offences that can be prosecuted in this way are offences in road traffic and offences in connection with border crossing. More detailed instructions concerning proceedings by imposing the summary fines by the police have been published by the National Police Board.

The police may impose a penalty for an offence by means of a summary fines order only if the offender has confessed to the offence and accepted the summary fines. If the offender has consented to the summary fines, the decision of the police has the same consequences as the judgment of the court and is reported to the criminal register.

If the offender does not consent to the summary fines order, the police hands over the case to the PPS. The PPS may issue a penal order, if the preconditions for it exist, or bring the case to court.

This kind of sanctioning is very common – and quite indispensable given the quantity of offences in question – in many countries. Sweden differs from other countries only by the fact that the police impose sanctions for *crime* in the legal sense.