The prosecution service in the Polish legal system [1]

di Karolina Kremens and Wojciech Jasiński

Abstract: The Polish Prosecution Service is a very powerful entity equipped with various instruments that allow individual prosecutors to deeply engage throughout the criminal process. Even though there is little discretion available to them, as they are bound by the legality principle, Polish prosecutors are important decisionmakers when it comes to the conduct and supervision of criminal investigations. This applies to all criminal investigations as they cannot be conducted by private parties due to the binding force of the officiality principle. Presumably this would not be a problem if the independence of the Prosecution Service would be respected and if the prosecutors would not be fully subordinated to the executive power. However, as the personal union between the Prosecutor General and Minister of Justice has been established in 2016 the independence of the prosecutors from the political influence must be since questioned. This set up, paired up with the highly hierarchical nature of the Prosecution Service where the Prosecutor General and supervisory prosecutors are allowed to give orders in every criminal investigation, forces individual prosecutors to comply with expectations of those who are above them. The existing mechanisms are thus treated as a method of exerting pressure, including political, on prosecutors for the sake of the short-term needs of those who are in power.

Keywords: Public prosecutor; Poland; Criminal investigation; Criminal procedure; Legality principle.

1. Introduction

Polish law operates under the classic Continental law system. As an example of a traditional inquisitorial model[2] Polish criminal proceedings are divided into a long and formal criminal investigation and a trial mainly focused on the reproduction of evidence collected during the investigation. The powers of each individual public prosecutor (*prokurator*) are therefore designed to fit

[1] This work came about within the framework of the Academic Excellence Hub – Digital Justice Center carried out under the Initiative of Excellence – Research University at the University of Wrocław. Authors are grateful to Aleksandra Bodzioch and Barbara Pauli for their remarkable help in editing this chapter.

[2] Note that between 1 July 2015 and 16 March 2016 Poland experimented with an idea of enhanced adversariality in criminal proceedings. See: K. Kremens, *The new wave of penal populism from a Polish perspective*, in E. Hoven, M. Kubiciel (eds), *Zukunftsperspektiven des Strafrechts: Symposium zum 70. Geburtstag von Thomas Weigend*, Baden-Baden, 2020, 126-129 and M. Rocławska, A. Bułat, *Towards an American Model of Criminal Process: The Reform of the Polish Code of Criminal Procedure*, Baltic Journal of Law & Politics 7 (1), Kaunas, 2014, 1-11.

well within such system. Each prosecutor possesses remarkable control over criminal investigation and all police actions taking place throughout it, holding an exclusive power to bring charges against an individual and to prosecute a case. In exercising these powers prosecutors are dependable on the letter of law but even more importantly on guidelines and instructions coming from within the highly hierarchical structure of the Polish Prosecution Service (*Prokuratura*) that divides approximately 6000 prosecutors in three different levels of units led by the Prosecutor General (*Prokurator Generalny*) – the position since 2016 occupied by the Minister of Justice. This makes the Polish Prosecution Service a highly politicized institution that can easily be used for the benefit of those who are in power.

The main source of law of the Polish Prosecution Service is the Prosecution Service Act of 2016[3]. It covers the structure of each prosecution service unit, responsibilities of individual prosecutors as well as the rules relating to their promotion and disciplinary proceedings that might be initiated against them. The powers of the prosecutor during criminal proceedings are governed primarily by the Code of Criminal Procedure[4] while offences that are investigated and prosecuted are defined in Criminal Code[5] and other statutes. Supplemental role to both PSA and CCP is played by the Decree adopted by the Minister of Justice in 2016[6] regulating even in greater detail the internal structure of prosecution service units at all levels and specifying tasks to be undertaken in criminal proceedings.

The inter-institutional position of the Polish Prosecution Service seems to be crucial in understanding the role that individual prosecutors can play nowadays in investigation and prosecution of crimes. This position is somewhat weakened by the fact that the Constitution of the Republic of Poland[7] makes no mention about Prosecution Service. This has been criticized in the past in the literature[8]. However, considering the rule of law crisis that affects Poland since 2016 and how the Polish prosecutors became a governmental instrument subordinated to politicians, the lack of regulation of the prosecution service on the constitutional level should be

[3] *Ustawa Prawo o prokuraturze* [Prosecution Service Act] of 28 January 2016, Dz.U. 2016, poz. 177 (hereinafter: PSA).

[4] *Kodeks postępowania karnego* [Polish Code of Criminal Procedure] of June 6, 1997, Dz.U. 2020, poz. 30 as amended (hereafter: CPC).

[5] *Kodeks karny* [Polish Criminal Code] of 6 June 1997, Dz.U. 2019, poz. 1950 as amended (hereinafter: CC).

[6] *Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury* [Decree of the Minister of Justice on the internal rules of official conduct of common organizational units of the prosecution service] of 7 April 2016, Dz. U. 2016, poz. 508. Note that in Polish system the ministerial decrees are legal binding acts that always must remain in compliance with laws passed by the Parliament.

[7] *Konstytucja Rzeczpospolitej Polskiej* [Constitution of the Republic of Poland] of 2nd April 1997, Dz. U. 1997, Nr 78, poz. 483 (hereinafter: Polish Constitution).

[8] See in Polish: A. Ważny, *Konstytucja bez prokuratury*, Prokuratura i Prawo 9, Warsaw, 2009, 117 and M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury a najnowsze zmiany polskiego porządku prawnego*, Czasopismo Prawa Karnego i Nauk Penalnych 2, Cracow, 2017, 111-113 and in English A. Lach, *The Prosecution Service of Poland*, in P. J. P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Volume 2, Nijmegen, 2017, 599-600.

DPCE online
ISSN: 2037-6677

perceived as least significant of the problems that Poland currently faces[9]. Nevertheless, this leaves the issue of the relation between the Prosecution Service in Poland within the structure of state powers inconclusive, which causes confusion and uncertainty.

The Polish Prosecution Service for many years was located somewhere between the Executive and the Judiciary powers. Yet, since 2016 the position of Polish Prosecution Service has dramatically shifted and currently remains fully subordinated to the executive power through the adoption of the provision that the position of the Prosecutor General is held by the Minister of Justice[10]. This is in no way changed by the fact that the prosecution service remains in many ways structurally and organizationally connected to Judiciary which is seen through the similar organizational arrangements of courts and prosecution offices, the joint system of education and training for both groups within one national school, making it considerably easy to move between two career paths, the same salary as well as similar system of their promotion. However, it is not only the direct link made between the Prosecutor General and Minister of Justice that moved the Prosecution Service closer to the executive power as this arrangement was a feature of the Prosecution Service also in the past[11]. The key issue is the scope of the ministerial powers regarding individual criminal cases and his or her competence to give - directly or through higher ranked prosecutors - instructions to individual prosecutors truly determining the actual subordination of prosecution service to the Executive[12]. This is possible since the Prosecutor General is superior of all prosecutors[13] and may give instructions to any prosecutor regarding conducted investigations or prosecutions, including orders on what the accused shall be charged with in individual case or whether to discontinue a case[14]. This leaves little doubt to where the prosecution service is positioned in the Polish criminal justice system and within the structure of state authorities.

The role that the individual prosecutor plays during criminal investigation and trial explored in this article is thus heavily impacted by the association of the Prosecution Service with the Executive. Hence, this analysis will not run away from critical evaluation of how the political situation after 2016 influenced the shape of the criminal process. One interesting example of political choices made by the governing majority in power until fall 2023 in this regard is the Polish absence within the European Public Prosecution Office scheme and Polish refusal to cooperate with

[9] European Commission for Democracy Through Law (Venice Commission), Opinion on the Act on the Public Prosecutor's Office as Amended, No. 892/2017, Strasbourg, 11 December 2017, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e> accessed 8 July 2023.
[10] Article 1 § 2 PSA.
[11] See extensively on evolution of Polish Prosecution Service in English: T. Marguery, *Unity and Diversity of the public prosecution systems in Europe. A study of the Czech, Dutch, French and Polish Systems. Dissertation*, Groeningen, 2008, 139-299.
[12] K. Kremens, *Powers of the Prosecutor in Criminal Investigation: A Comparative Approach*, New York, 2021, 42.
[13] Article 13 § 2 PSA.
[14] Article 8 PSA.

EPPO[15]. Not surprisingly the approach towards EPPO changed very recently as the Minister of Justice in a newly formed government of the former opposition parties' coalition notified on the 5th January 2024 the European Commission about the Polish accession to the EPPO. Since so far only the notification has been made, the activity of the European Prosecution in Polish national system will not be addressed in this chapter. It also must be noted, that due to the space limit of this work, the article focuses on civilian criminal law setting while issues concerning military investigations and prosecutions remain outside of it, despite involvement of public prosecutors in such type of proceedings.

2. The nature and the scope of prosecutorial discretion

The principle of legality (*zasada legalizmu*) is an essential element of Polish criminal legal system. The principle is determinant to the scope of criminal investigations and prosecutions impacting the role of the Polish Prosecution Service and its relationship with criminal legal authorities. The law provides that the authority responsible for conducting investigations is bound to initiate and conduct proceedings while the authority responsible for prosecuting cases must file an accusation with a court and support it throughout the prosecution[16]. However, distinctively to what is known from e.g. Italian system[17], the principle of legality has not been confirmed in Polish Constitution. This seems not to have any consequences as the crucial importance of that principle for Polish criminal procedure is unquestionable[18].

The principle of legality is applied quite broadly. It is understood as not only obliging the prosecutor to prosecute a case by filing charges against an individual in the court of law if the evidence supports the commitment of an offence but, first and foremost, a prosecutorial duty to commence and conduct investigation. Thus, the term "the principle of mandatory prosecution" known from the common law system, is rarely used in the Polish literature since it could suggest that it is applicable only at the later stage of the criminal process and when the prosecutor is involved[19]. Instead, the principle of legality in Poland applies not only to the prosecutor but also to police and all other criminal legal agencies depending on who commences and conducts the investigation[20].

---

[15] See <https://www.eppo.europa.eu/en/news/letter-sent-european-commission-regarding-polands-refusal-cooperate-eppo> accessed 20 June 2023.

[16] Article 10 § 1 CCP

[17] Article 112 of the Italian Constitution.

[18] See broadly on the understanding of principle of legality in Poland and its importance in: M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warsaw, 2007.

[19] K. Kremens, *Powers of the Prosecutor in Criminal Investigation: A Comparative Approach*, New York, 2021, 84.

[20] Generally, prosecutors are expected to either conduct the criminal investigation or supervise the investigation if conducted by another criminal justice authority (Article 298 § 1 CCP and Article 326 § 1 CCP). Majority of investigations is primarily vested in the hands of the police but other investigating agencies such as Border Guard (*Straż Graniczna*) or Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne*) are also

DPCE online
ISSN: 2037-6677

Thus, Polish law tend to leave the impression that legality principle is strictly applicable and that discretionary powers are very limited. This is somewhat confirmed by the fact that the system lacks the exception from the principle of legality based on the public interest, which is available in other Continental countries such as Italy[21] or Germany[22]. The reason of the absence of such mechanism is that Polish theory of the criminal process accepts the so-called "principle of material legality" which basically means that the criminal process should be initiated whenever the "social harm of the committed offence is greater than negligible", which makes public interest (that can be understood as social harm) a part of the definition of a crime[23]. As a result, the law precludes proceedings from being commenced or continued if the social harm does not reach a certain expected level[24] and, at the same time, if the social harm is considered as greater than negligible, the prosecutor or police has no other choice than to commence investigation. Consequently, the formally non-existing category of discontinuation of criminal investigation due to the lack of public interest might be hidden in this category and therefore invisible[25]. Another example of such hidden rule might be a provision that obliges the prosecutor to discontinue the criminal investigation when there are insufficient grounds to suspect that the offence was committed[26]. This usually means in practice, that there was no evidence found and one can only wonder whether, taking into account overwhelming backlog of criminal cases in Polish system, in all criminal investigations the evidence was searched for intensely enough.

As there is no direct leeway for prosecutorial discretion, called in the Polish legal order the principle of opportunity (*zasada oportunizmu*)[27], there are no specific guidelines how to apply the possible exceptions to mandatory prosecution. The law provides only for a very few of such exceptions and regulates them strictly. The law thus provides that the criminal investigation may be discontinued even if there is evidence that the offence has been committed in case of: 1) immunity[28], 2) convicting the same person for a different major offence which absorbs a lesser offense committed by that person if convicted[29], and 3) proceedings conducted against a state

empowered to do so. In practice majority of investigations is commenced and conducted by other authority than the prosecutor.

[21] Article 411 (1) Italian CCP.

[22] § 153 (1) German CCP.

[23] Article 1 § 2 CC. See more in: M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warsaw, 2007, 257.

[24] Article 17 § 1 (3) CCP.

[25] Cf. K. Kremens, *Powers of the Prosecutor in Criminal Investigation: A Comparative Approach*, New York, 2021, 307-309.

[26] Article 17 § 1 (1) CCP.

[27] Cf. C. Nowak, S. Steinborn, *Poland*, in K. Ligeti (ed.), *Toward a Prosecutor of the European Union, Volume 1: A Comparative Analysis*, London, 2013, 508.

[28] See: Article 10 § 2 and 17 § 1 (8) CCP.

[29] Article 11 CCP. Note that this discontinuation is limited only to misdemeanors punishable by a penalty of imprisonment for up to five years.

witness (*Świadek koronny*) within fourteen days after a judgment against defendants against whom the witness has testified has become final[30].

Specifically, Polish prosecutors, when compared with some of their foreign counterparts, are not given the power to reach settlements with accused that would result in the case not being sent to court or bargain about charges[31]. Also, while in some other states so-called conditional discontinuation of criminal proceedings (*warunkowe umorzenie postępowania*) is a tool used by prosecutors as a form of their discretionary measure, in Poland the prosecutor has no power to do so. Instead, the prosecutor may only file a motion to court requesting such discontinuation[32]. The motion is thus only a form of triggering court proceedings against the defendant, and it is solely within the court's discretion to grant the conditional discontinuation or not.

Despite the lack of formal discretionary measures available to Polish prosecutors, within the last years the prosecutorial powers over criminal process have significantly increased, sometimes even overriding powers of the judge. One example might be the power of withdrawing the indictment from the court that can be exercised by the prosecutor until commencement of the trial and upon the consent of the accused even afterwards[33]. The withdrawal of the indictment ends the case permanently as the resubmission of indictment against the same person for the same crime is inadmissible and the court has no power to block it. Thus, this has become an effective method of releasing some defendants from criminal responsibility which has been proven to be used in politically motivated cases[34].

3. Principle of officiality

[30] This is a special ground for terminating the case related to the need to break the loyalty of organized crime groups and is regulated by the *Ustawa o Świadku koronnym* (State Witness Act) of 25 June 1997, Dz.U. 2016, poz. 1197.

[31] C. Nowak, S. Steinborn, *Poland*, in K. Ligeti (ed.), *Toward a Prosecutor of the European Union*, *Volume 1: A Comparative Analysis*, London, 2013, 524.

[32] Article 336 § 1 CCP; T. Bulenda, B. Gruszczyńska, A. Kremplewski, P. Sobota, *The Prosecution Service Function within the Polish Criminal Justice System*, in J-M. Jehle, M. Wade (eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*, Heidelberg, 2010, 262-263.

[33] Article 14 § 2 CCP.

[34] One striking example is the case against Justyna Helcyk, a member of xenophobic and anti-Semitic organization – ONR that took a part in anti-Muslim and anti-immigrant demonstration held in 2016 in Wroclaw. During this event, called on stage to address the whole group of protesters, she has shouted among others: "We will not let this Islamic carcass destroy the Polish nation". She was quickly indicted by the public prosecutor for committing hate crime (Article 257 CC) and was supposed to be prosecuted. While awaiting commencement of the trial, the prosecution decided to withdraw the indictment from court which resulted in discontinuation of the case. Cf. J. Harłukowicz, *Investigations discontinued, indictments withdrawn – that is how Ziobro is helping hooligans, racists and fascists*, "Gazeta Wyborcza" <http://themis-sedziowie.eu/materials-in-english/investigations-discontinued-indictments-withdrawn-that-is-how-ziobro-is-helping-hooligans-racists-and-fascists-by-jacek-harlukowicz-gazeta-wyborcza/> accessed 21 June 2023.

DPCE online
ISSN: 2037-6677

Under Polish law, criminal investigation remains almost exclusively in the hands of the criminal justice authorities. Most generally, the Polish criminal investigation is designed to be conducted *ex officio*[35], which means that it takes place regardless of the will of the participants to the criminal process, including the victim[36]. Thus, the law provides that whenever there is a reasonable suspicion that the crime has occurred, being either established through the victim reporting a crime or by own information, the prosecutor must commence criminal investigation and conduct it[37]. This is certainly true in case of the biggest group of offences so-called offences investigated and prosecuted *ex officio* (*przestepstwa ścigane z urzędu*). However, the Polish law recognizes also a second group of offences so-called offences prosecuted upon complaint (*przestępstwa wnioskowe*) in which case commencing and conducting investigation and prosecution is possible only if the victim files an official complaint with a criminal investigating authority[38]. Thus, in case of offenses such as criminal threat[39] or theft committed to the detriment of next of kin[40] as well as many other less severe offenses, the actions of the prosecutor are strictly limited by the will of the victim. Yet, from the moment that the victim expresses her expectation that the investigation should be carried out, she loses the control over the case and the proceedings must commence and be conducted regardless of whether subsequently victim changes her mind. Both groups are jointly named public offences which refers to the assumed public interest that the offence in question attacked or threatened. Obviously, the public interest is considered to be lower in case of second group of offences putting them on the private-public edge. It is believed that investigations in case of both types of offences must be carried out *ex officio* as it would be too difficult for the victim to gather enough evidence to prove the case in the court independently[41]. It is also worth noticing that in none of those cases private investigations conducted by suspect or victim are permitted. Thus, the investigative actions tend to be treated as exclusively official domain whenever there is a slight element of public interest in offence in question.

This is in no way contradicted by the existence of a group of offences called **private offenses** or offenses prosecuted by private accusation

[35] Even though the word does not appear in Polish system this can be translated as principle of officiality.
[36] Article 9 § 1 CCP.
[37] Article 303 CCP. Note that in case of majority of offences it is not prosecutor but police as well as other criminal justice agencies that can commence investigation. This is determined by the form in which criminal investigation is conducted an inspection (*śledztwo*) or an inquiry (*dochodzenie*). This distinction is determined by the scope of offence in question – major offences are investigated in a form of inspection where the role of the prosecutor is more significant, as they must undertake some decisions personally during its conduct (e.g. commence the investigation personally or meet with the suspect to preliminarily charge them with a crime and interrogate that person) D. De Vocht, *Poland*, in E. Cape et al (eds), *Effective Criminal Defence in Europe*, Antwerp – Oxford – Portland, 2010, 429.
[38] Article 12 CCP.
[39] Article 190 CC.
[40] Article 278 § 4 CC.
[41] See in more detail in: W. Jasiński, K. Kremens, *Criminal Law in Poland*, Alphen aan den Rijn, 2019, 215-216.

(*przestępstwa ścigane z oskarżenia prywatnego*). This small group consists of only four offences: causing minor bodily harm or a minor impairment to health[42], defamation[43], insult[44], and breach of personal inviolability[45] and leaves totally for a victim responsibility for the conduct of investigation including the necessity to file a private indictment with the court[46]. In all those cases the assumed total lack of public interest in investigating and prosecuting allows for acceptance of actions undertaken by the victim alone. The law allows, however, that the prosecutor who establishes that the public interest is at stake, may commence investigation *ex officio* or even may join the privately initiated proceedings already initiated by the victim[47]. The number of such prosecutorial interferences must be considered as exceptionally rare and confirming the applicability of principle of officiality in Polish criminal proceedings.

4. Public prosecutor as the *dominus* of the criminal investigation

Despite the strong relations established in Polish system between the Executive power and the Prosecution Service there is no organizational dependence of the police on prosecution. The Polish police remains an independent agency nor there is special police unit within the prosecutor's office at the prosecutor's disposal. This applies also to all other agencies that are allowed to conduct criminal investigations. At the same time, the law provides that the police as well as all other criminal justice agencies must obey orders given by the prosecutor in each individual case involved in criminal proceedings[48], which should be considered as a form of functional dependence. However, this rule is applicable more broadly throughout the criminal process which means that to the same extent court during the trial stage may give orders to the police. Therefore, this provision as such is not utterly responsible for building an exceptional relationship between the prosecutor and police. Moreover, the binding force of prosecutorial orders directed at police[49] is somewhat artificial as the police does not formally answer to the prosecutor being organizationally independent. Therefore, if a police officer fails to comply with the prosecutorial order, the prosecutor has no tools to directly discipline said police officer. The compliance is enforced by giving the prosecutor the power to demand, from the superior of that person, the initiation of internal procedures concerning such disobedience[50] which cannot be considered as equally effective.

Yet, despite of the lack of very formal connections between the Prosecution Service and the police, this relationship cannot be considered as

[42] Article 157 § 2 and 3 CC.
[43] Article 212 CC.
[44] Article 216 CC.
[45] Article 217 CC.
[46] Articles 59-61 and 485-499 CCP. See more in: W. Jasiński, K. Kremens, *Criminal Law in Poland*, Alphen aan den Rijn, 2019, 206.
[47] Article 60 § 1 CCP.
[48] Article 15 § 1 CCP.
[49] Article 326 § 3 (4) CCP.
[50] Article 326 § 4 CCP.

DPCE online
ISSN: 2037-6677

loose or weak. Although, the contact between the prosecutor and the police will depend on the dynamics between the engaged individuals as well as unformal and customary strategies set for individual units deemed to cooperate, which is always hard to grasp, the criminal procedural rules play a significant role in defining the nature of this relation. Thus, it is rather the meaningful involvement of the prosecution in the criminal investigation enforcing frequent contacts between prosecutors and police as well as common goal that they have in investigating crimes[51], and not the formal control that the prosecutor possesses over the police, that shapes this relationship.

In the most general terms, the prosecutor is fully responsible for every criminal investigation in Poland by either conducting the investigation or supervising it when conducted by the police[52]. In theory, this allows the prosecutor to retain full control over every single criminal investigation in the country. Whether investigation is conducted personally by the prosecutor or only supervised by her, stems in the first place from the form in which investigation is carried on – inspections (*śledztwa*) or inquiries (*dochodzenia*). In the case of inspections, which are reserved for investigating major crimes – the prosecutor is responsible for conducting the investigation personally[53], while in the case of inquiries – the prosecutor maintains only the supervisory role over the police actions[54]. But even in the case of major crimes, the prosecutor has the power to entrust such inspection fully or partially to the police. Considering that inspections account for only 11% of criminal investigations and out of those 89% of inspections are fully entrusted to the police[55] the personal prosecutorial leadership over criminal investigations in Poland is a myth[56].

Thus, if in practice the prosecutor only rarely leads the investigation, more important question refers to the scope of her supervisory authority over those investigations that she is supposed to oversee. Again, on a formal level these powers are designed quite broadly with an aim to ensure the proper and effective conduct of the entire criminal investigation[57]. The law reserves for the prosecutor, the power to receive information regarding the investigation, to review the case file, to indicate the direction that the proceedings should take and to issue relevant orders towards police and

[51] Note that the law directly states that the prosecution service is bound with two tasks namely investigating crimes and protecting the rule of law (Article 2 PSA) which makes the prosecutor by default responsible not only for prosecution of crimes but also the investigation.
[52] Article 298 § 1 and 326 § 1 CCP.
[53] Article 311 § 1 CCP.
[54] Article 325a § 1 CCP.
[55] See: *Sprawozdanie z działalności powszechnych jednostek organizacyjnych prokuratury za rok 2019*, <https://pk.gov.pl/wp-content/uploads/2020/03/PK-P1K.pdf> accessed 15 June 2023, 1.
[56] K. Kremens, *Powers of the Prosecutor in Criminal Investigation: A Comparative Approach*, New York, 2021, 159-160.
[57] Cf. Article 326 § 2 and 3 CCP. See: T. Bulenda, B. Gruszczyńska, A. Kremplewski, P. Sobota, *The Prosecution Service Function within the Polish Criminal Justice System*, in J-M. Jehle, M. Wade (eds), *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe*, Heidelberg, 2010, 275-276.

decisions directed at suspect or victim, as well as change or even revoke decisions issued by the police. The prosecutor may even personally take part in the conduct of such measures as lineups, show-ups, interrogations and searches if she deems that as necessary. This builds a picture of the prosecutor who may have a strong direct impact on every criminal investigation shaping its course from the day one and deciding on its outcome. But in many cases, it has a somewhat limited effect since the prosecutor may not have time to engage or may not be even aware that the investigation is being conducted until receiving the file after several months when it has become necessary to prolong the duration of inquiry, the duty that belongs to prosecutor. Undoubtedly, shaping the rules in this way has been designed to secure the prosecutor's rights related to periodical control of investigations conducted under her supervision.

The law also provides for decisions and measures that the prosecutor is burdened with exclusively and which cannot be vested in hands of police or any other authority conducting criminal investigation. These are decisions that involve the interference with rights and freedoms of the individual although not such severe interference that would justify reserving them for judicial decision. Thus, warrants regarding seizure of objects[58], interception of mail[59], search[60] or arrest[61] are issued only by the prosecutor, although in exigent circumstances the police is always permitted to react independently and employ these measures without any prior approval. Moreover, when the measures aimed at securing the presence of the suspect in criminal proceedings must be employed, it is the prosecutor that imposes financial surety bonds for accused or orders police supervision[62]. The prosecutor is also obliged to issue some other decisions during investigation which are not necessarily connected with the interference of the rights of the individual. For example, the prosecutor must be present at all crime scenes involving a suspicious death[63], order the autopsy resulting from such a death[64] and attend all autopsies. Only the prosecutor is also authorized to appoint psychiatrists to issue expert opinions concerning suspect's mental health and her ability to stand a trial[65], order confidentiality measures for witness[66] and order preparation of the individual assessment of a suspect which is mandatory in case of felonies and when a suspect is juvenile[67].

The list of decisions and measures that is vested in prosecutorial hands is significantly broader when investigation takes a form of inspection. As the Polish law considers charging a person initially with a crime as one

[58] Article 217 CCP.
[59] Article 218 CCP.
[60] Article 219 CCP.
[61] Article 247 CCP.
[62] Article 249 § 3 CCP. Note that out of the measures that are designed to guarantee that the suspect will not flee only pretrial detention must be imposed by the court. But also, in this case the role of the prosecutor is significant since it is not the police but only the prosecutor that may request the court to impose such measure (Article 250 § 1 and 2 CCP).
[63] Article 209 § 2 CCP.
[64] Article 209 § 4 CCP.
[65] Article 202 CCP.
[66] Article 184 CCP.
[67] Article 214 CCP.

DPCE online
ISSN: 2037-6677

of the most significant moments of criminal proceedings only through that attributing the individual status of suspect (*podejrzany*) with a possibility of fully exercising defense rights[68], in all criminal investigations conducted in case of major crimes, the power to initially charge a person is exclusively done by prosecutor[69]. During inspections the prosecutor is also encouraged to interrogate the only witness of a crime, to interrogate every witness whose sanity is being questioned, to interrogate victims of certain crimes (depriving a person of liberty, robbery, violent theft etc.), to interrogate expert witnesses, as well as those individuals against whom the request for pretrial detention is planned to be filed[70]. Also, in every case involving domestic violence or sexual abuse in which a minor under the age of 15 is planned to be interrogated by the court[71] it is the prosecutor who is obliged to file such request with the court and participate in such hearing[72].

The prosecutorial engagement in criminal investigation must be thus considered as extensive. Certainly, there are many cases in which the prosecutor will not be involved at all until the final decision on the outcome of the investigation must be taken. However, significant number of investigations, especially those concerning more severe and complex crimes, will demand prosecutorial reaction, engagement, and activity during the course of proceedings. That means all cases in which arrest, search or seizure has taken place or all cases concerning investigation of death as well as demanding verification of the sanity of the suspect – the prosecutor will be called to interfere. This makes the prosecutor a significant player of every inspection as well as some inquiries and sustains the perception of the Polish prosecutor as a *dominus litis* of criminal investigation.

5. Hierarchical nature of the Polish Prosecution Service

The Prosecution Service Act of 2016 provides that Polish Prosecution Service is comprised of the Prosecutor General, his deputies among which the National Prosecutor (*Prokurator Krajowy*) holds the most important position, as well as public prosecutors and the group of special prosecutors of the Institute of National Remembrance[73]. The Prosecutor General oversees the whole Prosecution Service, a function that he undertakes in person or through his deputies by issuing a variety of guidelines and instructions[74].

The structure of the Polish Prosecution Service led by the Prosecutor

[68] See: K. Kremens, W. Jasiński, D. Czerwińska, D. Czerniak, *There and back again: a struggle with transposition of EU directives*, in G. Contissa, G. Lasagni, M. Caianiello, G. Sartor (eds), *Effective protection of the rights of the accused in the EU directives: a computable approach to criminal procedure law*, Leiden/Boston, 2022, 159-163.
[69] Article 311 § 3 CCP.
[70] Note that these requirements arise from § 170 (1) of the Decree of the Minister of Justice on the internal rules of official conduct of common organizational units of the prosecution service.
[71] Article 185a and 185c CCP.
[72] § 171 of the Decree of the Minister of Justice on the internal rules of official conduct of common organizational units of the prosecution service.
[73] Article 1 § 1 PSA.
[74] Article 1 § 2 and 13 § 1 PSA.

General, reflects the structure of the Polish judiciary comprised of four levels of lower courts: district courts (*sądy rejonowe*), provincial courts (*sądy okręgowe*) and appellate courts (*sądy apelacyjne*) and the Supreme Court (*Sąd Najwyższy*) situated on the top of this structure. Thus, there are four levels of prosecution offices in Poland. On the lowest level the law puts district prosecution offices (*prokuratura rejonowa*) responsible for investigating and prosecuting the majority of crimes in Poland[75]. On the second level provincial prosecution offices (*prokuratura okręgowa*) are responsible for investigating and prosecuting cases considered to be too serious to be taken care of on the district level[76]. On the third level, the eleven regional prosecution offices (*prokuratura regionalna*) focused on the most serious economic and financial crimes[77]. At the same time, both regional and provincial prosecution offices conduct extensive supervisory activities over the lower-level prosecution offices and prosecutors subordinated, activity that engages more time than actual investigative activity. This also means that many prosecutors on the second or third level do not investigate nor prosecute crimes being involved in administrative and controlling activities.

At the very top of the organizational structure of the Polish prosecution service is the National Prosecution Office (*Prokuratura Krajowa*), headed by the National Prosecutor. Besides many rather administrative and controlling functions the National Prosecution Office contains a special prosecution unit – the Organized Crime and Corruption Department (*Departament do spraw Przestępczości Zorganizowanej i Korupcji*), responsible for prosecuting organized crime, most serious corruption crimes and terrorist crimes[78]. This Department and its eleven regional units remain an independent structure. Although these units are formally established in regional prosecution offices, they are solely subordinated to the National Prosecutor and managed at the national level. The purpose of building up such a separate structure is to preserve from any possible local influence the independence of prosecutors conducting investigations and prosecuting cases involving organized crime and corruption.

Each prosecution office regardless of the level is led by the Head Prosecutor supported by her deputies who hold superior position towards prosecutors within their own units but also towards prosecutors of lower-level offices that fall under their unit's territorial jurisdiction. For example, this makes the Regional Prosecutor of Cracow (as well as her deputies) a superior prosecutor towards prosecutors from Cracow Regional Prosecution Office but also towards prosecutors working in four provincial prosecution offices in Kielce, Cracow, Nowy Sącz and Tarnów as well as in thirty-seven district prosecution offices in that area. Likewise, the Provincial Prosecutor of Kielce is a superior prosecutor towards all those that work in her provincial office as well as all prosecutors from thirteen district offices in the province of Kielce. Within each prosecution office smaller departments and

[75] Article 24 § 2-3 PSA.
[76] Article 23 § 2-3 PSA. The law defines them as "serious criminal, financial and tax crimes".
[77] Article 22 § 2-3 PSA.
[78] Article 19 § 2 PSA.

DPCE online
ISSN: 2037-6677

organizational units may be established[79] led by their directors[80] which only multiplicate the number of superior prosecutors above individual prosecutors.

Such design heavily impacts the degree of internal independence of a prosecutor which is limited by the wide range of methods that allow each superior prosecutor to interfere with the work of their subordinates. At least in theory, the internal independence[81] is one of the guiding principles of the Polish Prosecution Service, seen as the prosecutor's ability to undertake activities and make decisions independently without external pressure and on the part of her superiors. But the principle of hierarchical subordination of lower-level prosecutors to all higher-level prosecutors within the jurisdiction and of each prosecutor to her immediate superior within the unit, significantly undermines the prosecutorial internal independence. This is so since the law allows each superior prosecutor to issue guidelines, orders and instructions that must be carried out by the subordinate prosecutor[82]. This means that numerous higher-level prosecutors, including the Prosecutor General himself, can influence the shape of investigation and prosecution in each individual case on all levels including the lowest ones.

The key to understanding how far reaching is the control over activities of individual prosecutor, is the nature of the instructions that may be given in each individual case. Under PSA, the scope of these instructions is almost unlimited and may concern not only technical issues, as used to be a case before 2016. It can relate to the decision whether to initiate investigation, to discontinue proceedings, to initially charge a person with a crime and even whether to file a case with a court[83]. Admittedly, the law states that each of such orders must be issued in writing, and, at the request of the prosecutor at whom it is directed, must be accompanied by justification which must be reflected in the case file[84]. In any case, the prosecutor has the right to request that the order be changed or to be excused from executing the order or even from participating in a case if she does not agree with the content of such order[85]. However, such mechanism seems to protect the prosecutor only to a limited extent, since a request to be excluded from handling the case simply may be not respected[86].

Another rule that limits the prosecutorial internal independence gives the superior prosecutor the power to amend or even revoke any decision of a subordinate prosecutor[87] and to take over their cases and perform their

[79] Article 25 PSA.
[80] Article 26 PSA.
[81] See: Article 7 § 1 PSA which states that the prosecutor is independent in her actions prescribed by law, although further provisions constitute exceptions to this rule.
[82] Article 7 § 2 PSA.
[83] The possibility of giving instruction of that kind has been criticized in the past. Before 2016 they could only refer to the organizational or administrative issues and only to the extent limited by statute, which was significantly reducing the interference with the independence of an individual prosecutor. See: K. Kremens, *Odpowiedzialność zawodowa prokuratorów*, Warsaw, 2010, 4-5.
[84] Article 7 § 3 PSA.
[85] Article 7 § 4-5 PSA.
[86] Article 7 § 4 PSA.
[87] Article 8 § 1 PSA.

activities[88]. To make the matter worse, there are no rules indicating under what circumstances such decision can be made, for what reasons, in relation to what type of proceedings and there is not even any requirement that such a decision be made in writing and contain any justification[89]. This shape of regulations leads to the conclusion that the prosecutorial independence is actually non-existent and has been effectively replaced by the principle of strict subordination.

One entity that could uphold the prosecutorial independence could be the national council similar to the Italian *Consiglio superiore della magistratura*. Not so long ago, such an authority successfully operated also in Poland. Between 2010 and 2016 the National Council for Public Prosecution Service (*Krajowa Rada Prokuratury*) was created, modeled on the National Council of Judiciary (*Krajowa Rada Sądownictwa*)[90]. The primary purpose of its establishment was to increase the autonomy and independence of prosecutors, particularly vis-à-vis the Executive branch, and to subject the activities of the apolitical Prosecutor General (at that time not the Minister of Justice) to public scrutiny. However, when changes in Polish legal system commenced in 2016 the National Council for Public Prosecution Service was replaced with the National Council of Prosecutors [NCP] (*Krajowa Rada Prokuratorów*). This collegiate body is comprised of prosecutors nominated by the Prosecutor General as well as the representatives of National Prosecution Office and each regional prosecution office[91]. Formally, the main task of the NCP is defined the protection of independence of prosecutors[92]. Yet the powers vested in their hands are limited to expressing opinions which are not significant and very often are not even binding. Among those is the opinion on the candidates for the position of the Director of the National School of Judiciary and Public Prosecution as well as the opinion how the training of future prosecutors should be conducted or opinions on laws relating to the Polish Prosecution Service[93]. At the same time, the Council lacks any powers relating to appointment or promotion of prosecutors nor those who head individual units. Thus, the significance of the NCP is very low as it bears no real power to protect the independence of prosecutors, even if the members of the Council were inclined to do so.

[88] Article 9 § 2 PSA.
[89] M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury a najnowsze zmiany polskiego porządku prawnego*, Czasopismo Prawa Karnego i Nauk Penalnych 2, Cracow, 2017, 118.
[90] Even though the training of prosecutors and judges in Polish system is organized jointly within one national school and their careers are quite similar, the National Council for the Judiciary has no power over prosecutors. Note also that although before 2016 the Polish National Council for the Judiciary was highly esteemed as a body maintaining the independence of Polish judges, its current status has been strongly undermined due to its immense politicization that eventually lead to its removal from the European Network of Councils for the Judiciary in 2021, <https://www.encj.eu/node/605> accessed 21 June 2023. See also: European Court of Justice Judgment of 2 March 2021 in case of *A.B. and others v. the KRS* (C-824/18).
[91] Article 42 § 1 PSA.
[92] Article 43 § 1 PSA.
[93] Article 43 § 2 PSA.

DPCE online
ISSN: 2037-6677

6. Recruitment, promotion and transfer of public prosecutors

In general, there are two ways in which one can become a prosecutor in Poland. The most popular one, is a three-year long training at the National School of Judiciary and Public Prosecution (*Krajowa Szkoła Sądownictwa i Prokuratury*) that jointly educates future judges and prosecutors. The school graduate becomes an associate prosecutor (*asesor prokuratury*) and based on the results of the final very competitive exam the person is allocated to one of the vacant positions awaiting them. The best graduates are allowed to choose the most desired locations within the country. Becoming an associate prosecutor is the first step in a career of each person that wishes to take this path. It is an entry position that allows to verify whether a person willing to become a prosecutor has necessary skills. Each associate prosecutor has slightly less powers in comparison to prosecutors as they can exercise the prosecuting function only in lower criminal courts. They also conduct their prosecuting and investigating functions under the supervision of a more experienced colleagues. This means that e.g. indictment drafted by an associate prosecutor must be accepted by the designated experienced prosecutor.

The law also provides for another possibility to become a prosecutor which is less frequent. Attending the school and holding associate prosecutor position is unnecessary when a candidate applying for the prosecutorial position has a previous three-year long legal experience as a judge or legal counsel or after reaching certain level of experience in academia[94]. All candidates must however take part in open competition for prosecutorial positions that are announced publicly. Based on their competencies they will be evaluated and nominated for the position.

Prosecutors selected by the National Prosecutor are appointed by the Prosecutor General[95]. Before a person is nominated for a prosecutorial position the Prosecutor General may, but is not obliged to, consult such a decision with the local advisory board of prosecutors[96]. To be appointed as a prosecutor the candidate must meet several conditions:

- exclusive Polish citizenship,
- full civil rights,
- impeccable character,
- being a law graduate of Polish law school or foreign law school recognized in Poland,
- no criminal record for intentional public offence,
- health conditions allowing to perform the duties of a prosecutor,
- minimum 26 years of age,
- passed the prosecutor's or judge's exam at the National School of Judiciary and Public Prosecution[97],

[94] This is reserved for those who reached at least the level of habilitation in law.
[95] Article 74 § 1 PSA.
[96] A collective institution composed of 6-9 members chosen among the prosecutors of a given public prosecution unit (regional, provincial), in 1/3 nominated by the head of this unit and in 2/3 chosen by the prosecutors themselves (Articles 48 and 50 PSA).
[97] The passing of the prosecutor's or judge's exam is not necessary in cases where a candidate has passed the bar exam and for at least 3 years performed professional

- was employed as an associate prosecutor or associate judge for at least one year,

- did not perform professional military service, did not work or collaborate with the state security institutions during communist times, or was not a judge who, when ruling, offended the dignity of the office by violating judicial independence, what has been confirmed by a final ruling of disciplinary court[98].

These general requirements are supplemented by additional conditions when the eligible candidate seeks employment in higher-level prosecution units. For example, to become a prosecutor in the National Prosecution Office the eight-year work experience as a judge or prosecutor or twelve-year work experience as an attorney, public notary or a president, vice-president or counselor of the General Counsel to the Republic of Poland is needed. Similarly, if candidate seeks employment in one of the of regional prosecution offices the work experience of six years and ten years respectively are required. In case of Provincial Public Prosecution Office the experience of three-years and six-years respectively is necessary. However, the work experience requirement does not apply to those who seek employment in prosecution service from academia as it is assumed that the experience as law professor appears in lieu of experience as practitioner. In particularly justified cases, in order to ensure the proper implementation of the statutory tasks of the prosecutor's office, the Prosecutor General, at the request of the National Prosecutor, may appoint a prosecutor to perform duties in the National Prosecution Office, in a regional prosecution office or in a provincial prosecution office, disregarding the requirements discussed above[99].

Generally, the PSA provides that for all vacant prosecutorial positions an open competition is held[100]. However, the Prosecutor General in "particularly justified cases", as the law puts it, may appoint a candidate designated by the National Prosecutor without opening a public competition. The statute operates with a very general requirement, which gives the Prosecutor General a very wide leeway in decisions concerning employment policy.

Detailed rules are provided for nominating prosecutors to become heads of all units of the Polish Prosecution Service and their deputies. As the office of the Prosecutor General is held *ex lege* by the Minister of Justice there is no nominating procedure whatsoever. All deputies of the Prosecutor General are appointed from among the prosecutors of the National Prosecution Office and dismissed by the Prime Minister upon the request of the Prosecutor General. Before nominating the deputies, the Prosecutor General must receive the opinion of the President of the Republic of Poland. In case of dismissal, it is even the President's approval that is mandatory[101].

activities related to drafting or applying law in state institutions or holds a doctoral degree in law.

[98] Article 75 PSA.

[99] Article 76 § 5 PSA.

[100] Article 80 PSA.

[101] Article 14 § 1 PSA.

DPCE online
ISSN: 2037-6677

All heads of regional, provincial and district prosecution offices are appointed by the Prosecutor General, upon the proposal of the National Prosecutor[102]. All nominations are reviewed in advance by the regional prosecutors' assembly from the relevant jurisdiction. The review result is, however not binding. The same procedure, except from the review, applies for dismissals of all prosecutors. On the other hand, their deputies are appointed and dismissed by the National Prosecutor or the heads of organizational units of the prosecutor's office authorized to do so[103].

Since the Polish Prosecution Service is hierarchical, the PSA allows to relocate prosecutors between the units. As a rule, this should happen only upon the consent of individual prosecutor that must be transferred[104]. However, the consent is not required if the position the person was holding has been terminated or a prosecutorial unit where the person was working in was liquidated or relocated. The consent is not necessary also when relocation of a prosecutor is a form of disciplinary penalty. In both cases the decision to transfer the prosecutor to another unit against her will must be undertaken by the National Prosecutor.

Apart from the permanent transfer, prosecutor may be temporarily delegated to a different prosecutorial unit or another public entity such as Ministry of Justice or National School of Judiciary and Public Prosecution. This includes also international organs responsible for international cooperation in criminal matters. Short time delegation does not require consent of the delegated prosecutor. Only if the period of delegation exceeds six months, obtaining the consent of the prosecutor is mandatory. However, there is one important exception providing relocation to another office without a consent of the prosecutor if staffing needs justify it[105]. Such decision may be made only by the Prosecutor General or the National Prosecutor[106]. As the law specifies only that the length of such relocation within one year cannot exceed twelve months and is silent on the total length of such relocation, theoretically it may last indefinitely. Although such rule is in a blatant contradiction with the principle of prosecutorial independence, according to the National Prosecutor, the power to delegate prosecutors without any justification and without a chance to successfully challenge such a decision within the public prosecution service structure should not raise any concerns[107].

This analysis shows that all decisions concerning prosecutorial nominations, are centralized in the hands of the Prosecutor General or his immediate deputy - the National Prosecutor. At the same time the system

[102] Article 15 § 1 PSA.
[103] Article 15 § 4 PSA.
[104] Article 94 § 1 PSA.
[105] Article 106 PSA.
[106] For a short period of maximum two months the decision may be made by either the regional prosecutor or the provincial prosecutor.
[107] This was openly admitted by the National Prosecutor in a letter to the Ombudsman where it was stated that the power to delegate the prosecutor is discretionary and no justification is needed. See: Letter of National Prosecutor to the Ombudsman of 7 August 2019, PK IX K 071.86.2019, <https://www.rpo.gov.pl/pl/content/b-swieczkowski-nie-uzasadnil-decyzji-o-oddelegowaniu-prok-krasonia-jak-prosil-rpo> accessed 8 July 2023.

lacks transparency as the procedure is carried almost completely internally without any selection committees and some positions are even filled without an open call. This leaves a wide margin of discretion for the Prosecutor General who by no means guarantee the independence from the Executive power. Even when the law directly demands open call for a prosecutorial position, the very vague exception allows the Prosecutor General to nominate a person against this rule. Also, even if the law provides for a minimum work experience as one of the requirements for the promotion, the Prosecutor General can disregard it. Moreover, there is merely any consultation among the prosecutors from a concerned unit required in cases where the heads of the prosecutorial units are being chosen. These rules were strongly criticized by the Venice Commission during the legislative process of current Prosecution Service Act[108].

The lack of stability and certainty in the employment of individual prosecutors also adds to overall perception of Polish Prosecution Service being micromanaged by politicians for their own purposes. One of the most striking tools to subordinate the independent prosecutors are the discussed rules on delegations used to punish those who are perceived as insubordinate[109]. The flipside of this mechanisms is that those prosecutors who subserviently comply with given orders as an award may be delegated to higher-level units which is always coupled with more prestige and financial success. The scale of delegations shows that for the Polish Prosecution Service this is a systemic problem. In January 2018 out of 5790 prosecutors 959 of them were delegated[110]. This clearly indicates that this mechanism lost its temporary character. This not only results in lack of transparency of the organizational structure of the Prosecution Service, but also negatively affects the working conditions of prosecutors and pose a direct threat to their independence[111].

7. Disciplinary proceedings against public prosecutors

The disciplinary liability is understood in Poland as a separate type of liability which is independent from criminal or civil liability. This is certainly true for disciplinary proceedings for the prosecutors. However,

[108] Opinion on the Act on the Public Prosecutor's Office as amended (Opinion 892/2017), § 81–88.

[109] See report: Królowie życia w prokuraturze „dobrej zmiany" – Raport Stowarzyszenia Prokuratorów „Lex Super Omnia" za rok 2018, <https://lexso.org.pl/2019/08/05/krolowie-zycia-w-prokuraturze-dobrej-zmiany-raport-stowarzyszenia-prokuratorow-lex-super-omnia/> accessed 8 July 2023. Various cases of delegating prosecutors to other prosecution offices (often far from the prosecutors place of residence) were reported by the press. See e.g. "Rzeczpospolita", *Lex Super Omnia o delegowaniu prokuratorów: nie ulegniemy tego rodzaju szykanom*, <https://www.rp.pl/zawody-prawnicze/art8698371-lex-super-omnia-o-delegowaniu-prokuratorow-nie-ulegniemy-tego-rodzaju-szykanom> accessed 8 July 2023.

[110] Ewa Ivanowa, *959 prokuratorów w delegacji, czyli droga armia Ziobry*, „Gazeta Wyborcza", <https://wyborcza.pl/7,75398,23049556,959-prokuratorow-w-delegacji-czyli-droga-armia-ziobry.html?disableRedirects=true> accessed 8 July 2023.

[111] W. Jasiński, *Transparentność działania prokuratury*, in M. Mistygacz (ed.), *Konieczne i pożądane zmiany ustroju prokuratury w Polsce*, Warsaw, 2020, 51.

DPCE online
ISSN: 2037-6677

when a disciplinary offence also constitutes a criminal offence, the disciplinary proceedings can be suspended until the criminal case is finished. In case of some minor criminal offences such as road traffic offences, the law provides that the prosecutor can be only held liable in disciplinary regime. The list of disciplinary offences that Polish prosecutors as well as associate prosecutors can be hold accountable for consists of:

- obvious and flagrant violation of the law,
- acts or omissions that may prevent or significantly impede the functioning of the judicial institution or the prosecutor's office,
- actions that put into question the existence of the official appointment of a judge or prosecutor, or the effectiveness of the appointment of a judge, or prosecutor, or the legitimacy of the constitutional institution of the Republic of Poland,
- public activities that are incompatible with the principle of independence of the prosecutor,
- violation of the dignity of the office of the prosecutor[112].

If the prosecutor acted solely in the public interest his or her action (or omission of an act) cannot constitute a disciplinary offence[113]. The prosecutor can be held liable if a disciplinary offence has been committed between the nomination to the office of the prosecutor until the termination of the employment. However, it also extends to the period prior to taking office, if the prosecutor has failed to fulfill his or her duties or violated the dignity of the state office held at that time or has proved not fit for holding the office of the prosecutor.

The statute of limitations in case of disciplinary offences expires five years from the time of commission of a prohibited act. After the expiry of this period the disciplinary proceedings cannot be initiated, and if initiated, they have to be discontinued. However, if the case was opened within the five-year period the statute of limitations is prolonged to eight years. In case of disciplinary offences constituting criminal offences, the statute of limitations provided in the Criminal Code is applicable[114].

The disciplinary sanctions that the prosecutor (or associate prosecutor) can be punished with include: 1) admonition, 2) reprimand, 3) reduction of the remuneration by 5% - 50% for a period of six months to two years, 4) a fine worth of one monthly salary, 5) removal from the position held (with no chance of regaining the position for a period of three years), 6) transfer to another prosecutorial office, 7) removal from the Polish Prosecution Service (with no chance of rejoining for a period of ten years)[115]. The prosecutor punished with disciplinary sanction cannot be promoted during a fixed period. In case of admonition the no promotion period lasts three years and in case of all other penalties it is extended to five years. The punished prosecutor also cannot participate in any collective institution of the Prosecution Service such as the Assembly of prosecutors or the Disciplinary Tribunal. However, in case of a minor disciplinary offence the disciplinary court may refrain from imposing any penalty. The initiation of

[112] Article 137 Law on Public Prosecution Office.
[113] Article 137 § 2 PSA.
[114] Article 141 PSA.
[115] Article 142 § 1 PSA.

disciplinary proceedings in case of minor disciplinary offences can be even abandoned. In such case a supervisor of the prosecutor can issue an admonition letter. Yet, the sanctioned prosecutor may always appeal this decision to the Disciplinary Tribunal, which decides on whether to sustain the admonition or cancel it[116].

In Poland a mixed model of disciplinary proceedings has been adopted[117], which means that the disciplinary cases are partly dealt with by the special adjudicating panels within Prosecution Service (Disciplinary Tribunal) and partly by the Supreme Court. The Disciplinary Tribunal is hearing the cases as a court of first instance[118]. It is composed of three members elected for a period of four years by the regional prosecutors' assemblies composed of prosecutors elected from the public prosecution offices in a given region[119]. The president and the vice-president of the Disciplinary Tribunal are appointed by the Prosecutor General for a four-year term from among the prosecutors elected as members of the Tribunal.

The appellate disciplinary proceedings against prosecutors take place before the Chamber of Professional Liability of the Supreme Court which is composed of two Supreme Court judges and one lay-judge. Exceptionally, in case of disciplinary offence which constitute criminal offence as well as in cases when the prosecutor is accused of actions that put into question whether he or she actually holds the position of the prosecutor, the effectiveness of his or her appointment, or the legitimacy of the constitutional institution of the Republic of Poland the whole case falls under the jurisdiction of the Chamber of Professional Liability even in the first instance.

The members of the panel for each case are chosen by the president of the Disciplinary Tribunal according to the list of all members of the tribunal and the chronological order of received cases. In justified cases the exceptions to the above-mentioned rules can be allowed. This happens for example when a court member is ill and cannot participate in a given case. The panels undertake their decisions independently[120] but at least one of the panel members must be working in the unit of the same level of the organizational structure of the Polish Prosecution Service as the accused prosecutor[121]. This should provide an understanding of expectations and obligations that the accused prosecutor has been faced with in his work. Similar rules of assigning cases are used in the Chamber of Professional Liability of the Supreme Court.

The disciplinary procedure resembles the one employed in criminal proceedings. It is divided in a pre-trial phase (investigation) and a trial stage. The investigation is conducted by disciplinary prosecutors who are appointed by the Prosecutor General for six years (Prosecutor General's Disciplinary Prosecutor and First Deputy) and four years (Deputy

[116] Article 149 PSA.
[117] On models of disciplinary proceedings against prosecutors see: K. Kremens, *The Model of Disciplinary Proceedings Against Prosecutors – Selected Issues*, Białostockie Studia Prawnicze, vol. 22, no 1, Bialystok, 2017, 33-43.
[118] Article 145 § 1(1)(a) Law on Public Prosecution Office.
[119] See Article 46 § 1 PSA.
[120] Article 145 § 4 PSA
[121] Article 147 § 1 PSA.

DPCE online
ISSN: 2037-6677

Disciplinary Prosecutor acting in each region)[122]. The disciplinary case can be initiated upon the request of the Prosecutor General, the competent regional or provincial prosecutor or *ex officio* by the disciplinary prosecutor. Whenever an investigation is initiated, the competent disciplinary prosecutor is obliged to immediately inform the Prosecutor General's Disciplinary Prosecutor, who may entrust further investigation to another disciplinary prosecutor[123]. In each case the Prosecutor General's Disciplinary Prosecutor or First Deputy may take over the case conducted by any other disciplinary prosecutor[124]. Additionally, the Minister of Justice may appoint a Disciplinary Prosecutor of the Minister of Justice to conduct a specific case concerning disciplinary offence. This case can be opened upon a motion of the Minister of Justice[125].

The investigation aims at gathering evidence regarding the disciplinary offence. If there are no grounds to bring a case before the Disciplinary Tribunal the case is discontinued. This decision is subject to appeal by the prosecutor who demanded the initiation of disciplinary proceedings as well as by the Prosecutor General. If the investigation confirms that there is a justified suspicion of committing a disciplinary offence the case is transferred to the Disciplinary Tribunal by the disciplinary prosecutor who transforms at this point from the "investigator" to the "prosecutor". The disciplinary proceedings in front of a Disciplinary Tribunal as well as in front of the Supreme Court are generally public although when privacy of the third person is at stake the proceedings maybe carried on in camera[126]. As a rule, the final decision finding the defendant guilty is made public and even released on the website of the Supreme Court, unless the disciplinary court decides otherwise[127]. On the other hand, the acquittal is published only if the acquitted defendant so desires[128].

The prosecutor charged with the disciplinary offence is a party to the proceedings and his her position is analogous to the position of the defendant in the criminal trial. She has a right to appoint the defense attorney from among judges, prosecutors and attorneys. However, some other defense rights usually available during criminal proceedings are notably limited. For example, the appointment of the new defense attorney cannot lead to adjournment of the trial[129]. The law also allows to continue the proceedings despite the justified absence of the defendant or her defense counsel unless the good of the proceedings might be impaired[130]. Although these provisions aim at counterbalancing the obstruction of justice, their general character makes them excessively broad.

The right to appeal is granted broadly. The appeal can be lodged by the Prosecutor General, National Prosecutor, the defendant or the

[122] Article 153 PSA.
[123] Article 154 § 1 PSA.
[124] Article 153 § 7 PSA.
[125] Article 153a PSA.
[126] Article 148 § 1 PSA.
[127] Article 160a § 1-2 and 4 PSA.
[128] Article 160 § 3 PSA.
[129] Article 156 § 2 PSA.
[130] Article 155 § 4 PSA.

disciplinary prosecutor[131]. The second instance ruling is final. Nevertheless, the right to appeal from the ruling made by the second instance court convicting the defendant if it followed the acquittal or discontinuation of proceedings rendered by the court of the first instance. The case will be thus heard again but by a different panel of disciplinary court[132].

The described mixed model of disciplinary proceedings is controversial and may have both its proponents and opponents. In Poland such model has functioned during communism and shortly after 1989 in different forms. There are at least several provisions within it that enhance transparency and protect the position of the defendant, such as rules on publicity of the proceedings, publication of disciplinary rulings and transparent rules regarding assigning of cases. Also the members of the Disciplinary Tribunal are elected by the collective prosecutorial institutions (regional assemblies) for the fixed term, which is rare in case of elective positions in the Polish Prosecution Service. On the other hand, the statute allows to conduct the proceedings *in absentia*, which is a significant limitation of the defense rights. The most controversial is however, the power of the Prosecutor General's Disciplinary Prosecutor and First Deputy to arbitrary overtake any disciplinary proceedings or transfer it to another disciplinary prosecutor. Equally problematic is the Minister of Justice's power to appoint his extraordinary disciplinary prosecutor to investigate a given case. These provisions, which allow to choose who will be investigating and prosecuting a disciplinary case, pose a threat of abuse, especially when the Minister of Justice decides to intervene directly.

8. The prosecutor and her relationship with the media

There is a legitimate expectation of the public that the Polish Prosecution Service will function transparently. At the same time, it is true that for the sake of effectiveness of the criminal investigation the prosecutors should not immediately share all information that are interesting to the public. Therefore, a fair balance must be established in order to protect the secrecy of investigations on the one hand and respect for the basic democratic principle of transparency on the other. Yet, the Polish law barely regulates the scope of relationship between prosecutors and the media. Two areas of this relationship can be identified in which the scope of transparency is slightly different. The first one relates to media access to information concerning single criminal investigation. The second relates to information concerning functioning of the Prosecution Service as such.

Generally, the leading principle in accessing information concerning criminal investigation is the confidentiality of the proceedings. Although the parties to the investigation such as victim, suspect and their legal representatives, are granted access to the case file and can even participate in some investigative actions, the media and the public are limited in gaining access to all information. To achieve that, the unlawful public dissemination of information about actions taking place during an early stage of criminal

[131] Article 162 § 1 PSA.
[132] Article 163a § 1-2 PSA.

DPCE online
ISSN: 2037-6677

proceedings before they have been disclosed in court is criminalized[133]. However, in exceptional cases and upon approval of the prosecutor who conducts or supervises the investigation, the case file may be made available to other persons than the parties and their representatives[134]. It is commonly acknowledged that media may be granted access to case files if there is a public interest in informing the society about an ongoing criminal investigation[135]. Granting such access remains in the scope of prosecutorial discretion, however the access denial is subject to the superior prosecutor's review[136].

The rules on access to information about the functioning of the Polish Prosecution Service are shaped independently[137]. Prosecutor General and the head prosecutor of each unit can share with the media the information about the functioning of their respective units as well as information about any ongoing investigation taking into consideration the important public interest at stake except for information flagged as classified[138]. Interestingly, the consent of the prosecutor conducting the investigation is not needed and it is just the head of the unit that decides on whether the information should be disclosed. They can also decide to delegate the power to share information with the media to any other prosecutor as well as nominate a fulltime spokesperson of the unit[139]. The spokesperson can also speak up on information published in media regarding the works of the prosecution service. Thus, it is implied that the information policy is supervised in each prosecution unit by its head. A flip side of that is a general lack of authorization for individual prosecutors to share with the media information about the criminal investigation that they conduct or supervise. This is certainly one of the soft forms of restraining individual prosecutors to speak up and share their thoughts with media freely.

The liability for any civil claims arising in connection with the activities of prosecutors that share information with the media is not borne by the individual prosecutor but by the State Treasury[140]. The individual prosecutor's financial liability for a violation of a third-party right is therefore an internal issue within the Prosecution Service and is limited to three times the amount of the monthly salary. This is a general rule of the Polish Labor Law in cases where the employer takes the responsibility for the actions of its employees.

The shape of the provisions discussed above is in general a consequence of two important principles governing the functioning of Polish Prosecution Service, namely the hierarchical subordination and the

[133] Article 241 § 1 CC.
[134] Article 156 § 5 CCP.
[135] M. Kuźma, *Udział mediów w procesie karnym*, in J. Skorupka (ed.), *Jawność procesu karnego*, Warsaw, 2012, 383.
[136] Article 302 § 1-3 CCP.
[137] There is also one additional provision in the delegated legislation, namely Minister of Justice Regulation of 7 April 2016 - Rules of internal office of organizational units of the prosecutor's office, Dz.U. 2017, No. 1206 with amendment - § 3 of the Regulation.
[138] Article 12 § 2 PSA.
[139] Article 39 § 1-2 PSA.
[140] Article 12 § 4-5 PSA.

unity principle. However, the unity may not be fully achieved in practice as the information policy is shaped mainly at the level of each individual unit. This results in the variety of approaches in contacting media, depending on the preferred policy of the head of the unit or its spokesperson. What is however worrying is that the discussed provisions allow to instrumentalize the information policy of the Polish Prosecution Service. As the links between the Executive branch of the government and the Public Prosecution Service are considered as very close there is an imminent risk that the Prosecution Service will be used as a tool to build support for the Minister of Justice and the party that he or she represents. Being tough in fighting crime and protecting victims are perpetually the topics relevant in electoral campaigns. Therefore, the adopted provisions, leave a place for abuse in 'informing' about Prosecution Service achievement, and allow to accomplish *ad hoc* political goals of the Minister of Justice holding an office of the Prosecutor General[141].

9. Conclusions

The Polish Prosecution Service is a very powerful entity equipped with various instruments that allow individual prosecutors to deeply engage throughout the criminal process. Even though there is little discretion available to them, as they are bound by the legality principle, Polish prosecutors are important decisionmakers when it comes to the conduct and supervision of criminal investigations. This applies to all criminal investigations as they cannot be conducted by private parties due to the binding force of the officiality principle. And even though criminal justice agencies, including police, formally are not subordinated to Prosecution Service, the unique relationship built between prosecutor and police when joining forces in fighting crime, makes the prosecutor a dominating figure throughout each individual investigation.

Presumably this would not be a problem if the independence of the Prosecution Service would be respected and if the prosecutors would not be fully subordinated to the executive power. However, as the personal union between the Prosecutor General and Minister of Justice has been established in 2016 the independence of the prosecutors from the political influence must be since questioned. This set up, paired up with the highly hierarchical nature of the Prosecution Service where the Prosecutor General and supervisory prosecutors are allowed to give orders in every criminal investigation, forces individual prosecutors to comply with expectations of those who are above them. Moreover, regulations related to the recruitment and promotion of prosecutors, their transfers between units as well as disciplinary proceedings contain many disrupting arrangements. Their

[141] W. Jasiński, *Transparentność działania prokuratury*, in M. Mistygacz (ed.), *Konieczne i pożądane zmiany ustroju prokuratury w Polsce*, Warsaw, 2020, 63. The risk of abusing the Prosecution Service information policy is not purely theoretical. This was seen when the Minister of Justice during the press conference publicly accused Polish medical doctor Mirosław Garlicki of killing his patients. The blatant violation of the presumption of innocence under Article 6(2) of the ECHR was confirmed by the ECHR, see: Judgment of 14 June 2011, Garlicki v Poland, appl. no. 36921/07.

DPCE online
ISSN: 2037-6677

common denominator is that they expose, in an unacceptable way, the Prosecution Service to political influence. The existing mechanisms are thus treated as a method of exerting pressure, including political, on prosecutors for the sake of the short-term needs of those who are in power. The arbitrary powers of the Prosecutor General were criticized by the Venice Commission, which pointed out that they constitute a threat to both the principle of separation of powers and the rule of law. Unfortunately, the recommendations of the Commission, as well as other voices of critique from opposition and Polish NGOs for a long time were not taken into account. The situation started to change in January 2024, when the newly formed government publicly announced that the statute which will separate the functions of the Minister of Justice and the Public Prosecutor General[142]. This seems to be a new opening for the Polish Public Prosecution Service.

Karolina Kremens, Wojciech Jasiński
Digital Justice Center
Faculty of Law, Administration and Economics
University of Wroclaw (Poland)
karolina.kremens@uwr.edu.pl
wojciech.jasisnski@uwr.edu.pl

[142]<https://www.gov.pl/web/sprawiedliwosc/zalozenia-nowelizacji-ustawy-dotyczace-rozdzielenia-funkcji-ministra-sprawiedliwosci-i-prokuratora-generalnego> accessed 20 January 2024.