A STATE OF ACCUSATION

THE FUNCTIONING OF THE PROSECUTION SERVICE 2016–2022

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HELSINKI FOUNDATION FOR HUMAN RIGHTS

A state of accusation. The functioning of the prosecution service, 2016-2022

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I solemnly swore as a prosecutor that I will faithfully serve the Republic of Poland, uphold the law and the rule of law, conscientiously fulfil the prosecutor's duties, preserve the confidentiality of information protected by law and that I will conduct myself according to the principles of dignity and integrity.

Prosecutors' oath of office

Introduction

- The changes introduced in 2016 by the new Prosecution Service Act reunited the positions of the Minister of Justice and the Prosecutor General, expanded Prosecutor General's authority over prosecutors, changed the system of the prosecution service and effectively led to the abolition of its independence.
- The new Prosecution Service Act enabled the leadership of the prosecution service to exercise top-down control over selected investigations. The new law provided the Prosecutor General, an active politician, with the power to intervene directly in preliminary proceedings. The Prosecutor General has the right to access the files of every case, give instructions, including those related to specific procedural steps, to prosecutors working on the case, change or revoke decisions of the prosecutor in charge of the case and provide selected individuals with information from ongoing preliminary proceedings.
- The change in the structure of the prosecution service was a sham, and its true purpose was to bring profound changes to the high-level cadres of the prosecutorial system.
- Despite claims of the success of the 2016 reforms, the professional performance of the prosecution service is questionable. The changes resulted in the loss of the prosecution service's control over the inflow of new cases. During the six years following the reforms, the percentage of cases in which law enforcement authorities declined to initiate preliminary proceedings has increased. With each successive year after the new law's entry into force, the number of protracted cases handled by the prosecution service is on the rise.
- An amendment to the Act entailed a change in the practice of application of preventive measures. The number of prosecutorial pre-trial detention requests has increased substantially. The number of cases of lengthy pre-trial detention is also steadily growing.

- The changes to the system have failed to translate into increased public confidence in the prosecution service.
- Since 2016, the increasing political involvement of the prosecution service has also manifested itself in procedural decisions taken by prosecutors which arouse public interest due to the persons or spheres of public life to which they relate. In particular, the prosecution service refused to initiate criminal proceedings or discontinued proceedings in certain cases (e.g. those concerning politicians of the ruling majority). At the same time, in certain other cases, prosecutor's offices brought charges or filed indictments for purely political (or publicity) purposes. Such decisions may cause (and do cause) a reasonable suspicion that certain proceedings conducted by prosecutor's offices are strictly controlled "from the above".
- In addition, there is a tendency for the Minister of Justice/Prosecutor General to use widely publicised cases to achieve his political goals, e.g. by publicly calling for a severe penalty to be imposed by the courts on specific perpetrators.

Timeline

11 November 2009	An amendment to the 1985 Prosecution Service Act entered into force, separating the offices of the Minister of Justice and the Prosecutor General and strengthening the role of the National Council of the Prosecution Service, the National Council of the Judiciary and the President of the Republic of Poland in the appointment of the Prosecutor General. Andrzej Seremet was appointed the Prosecutor General.
October 2015	Candidates for the office of the Prosecutor General were nominated. On 7 October 2015, the National Council of the Judiciary nominated Krzysztof Karsznicki as a candidate for the office of Prosecutor General. On 14 October 2015, the National Council of the Prosecution Service designated prosecutor Irena Łozowicka as a candidate for the same position. President Andrzej Duda did not appoint any of the candidates.
4 March 2016	The new Prosecution Service Act came into effect, re-uniting the positions of the Prosecutor General and Minister of Justice.
March–May 2016	The media reported that more than 124 prosecutors had been demoted (e.g. in the prosecutor's offices of the Silesia region), while giving examples of fast-track promotions of prosecutors.
27 April 2016	The public prosecution service refused to initiate proceedings regarding the non-publication of certain decisions of the Constitutional Court.
23 May 2016	Lex Super Omnia Association of Prosecutors was established, bringing together prosecutors defending the independence of the prosecution service.
October 2016	Fifty-four prosecutors lodged an application to the ECtHR about their reassignment to lower-rank units of the prosecution service.
8–9 December 2017	The Venice Commission issued its opinion on the new Prosecution Service Act. The Venice Commission indicated that the roles of the Prosecutor General and the Minister of Justice should be separated. The Commission also pointed to the excessive powers of superior prosecutors in relation to active proceedings (referring, for example, to their authority to give binding instructions or disclose details of ongoing investigations to the media).
15 May 2019	The prosecutors' assembly at the Regional Prosecutor's Office in Kraków adopted a resolution stating that the independence of prosecutors was limited in law and in fact.

5 July 2019	The National Prosecutor transferred prosecutor Mariusz Krasoń, the initiator of the resolution, to the District Prosecutor's Office Wrocław-Krzyki in Wrocław located about 260 km away from Mr Krasoń's place of residence.
23 April 2020	The investigation into the organisation of presidential elections during the COVID-19 pandemic was discontinued by a superior prosecutor, only 3 hours after prosecutor Ewa Wrzosek officially opened the proceedings.
19 January 2020	Seven prosecutors, including three members of the board of Lex Super Omnia Association of Prosecutors, were transferred to remote units of the prosecution service.

1. The role and competence of the prosecution service

The Polish prosecution service performs more diverse roles than its counterparts operating in other Western European countries. The Council of Europe's recommendations on the role of public prosecution in the criminal justice system[1] define prosecutors primarily as public authorities that, on behalf of the public and in the public interest, ensure the application of criminal law. In their actions, prosecutors should take into account both the rights of individuals and the necessary efficiency of the criminal justice system.

Polish arrangements concerning the system and powers of the prosecution service differ from that model. From the perspective adopted in Poland, which dates back to the 1950s[2], the prosecution service is created to prosecute crimes and uphold the rule of law.

The protection of the rule of law[3], the other objective of the prosecution service, manifests itself in many aspects of prosecutors' activities. In achieving this objective, prosecutors

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1 Recommendation of the Committee of Ministers of the Council of Europe Rec(2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

2 P. Kardas, "Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego", *Prokuratura i Prawo* 9 (2012). The pre-war working rules of the prosecution service, courts of appeal and regional courts (Regulation of the Minister of Justice of 20 July 1935 on the working rules of prosecution service, courts of appeal and regional courts, Journal of Laws No. 55, item 357 as amended) followed a more narrow interpretation of the role of the prosecution service. According to these rules, prosecutors were obliged to ensure that the justice system is lawful and remains in line with the spirit of the law and the requirements of criminal sanctions policy. The Act on the Prosecution Service of the Republic of Poland of 20 July 1950 (Journal of Laws No. 38, item 346) provided that the office of the Prosecutor General of the Republic of Poland was created in order to consolidate the people's rule of law, protect social property and prosecute crimes.

3 The new Prosecution Service Act reversed the priorities of the prosecution service. Protection of the rule of law, hitherto the prosecution service's primary focus, swapped places with the task

not only prosecute crimes but also bring civil actions, intervene in ongoing proceedings, appeal against administrative decisions to administrative bodies or administrative courts or submit extraordinary means of challenge.

1.1. PROSECUTION SERVICE IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

The Constitution of 2 April 1997, in contrast to the previous Polish Constitution (that of the People's Republic of Poland), does not establish a constitutional framework for the role and powers of the prosecution service. The Constitution does not govern the matters of prosecutors' appointments and guarantees of their independence. The highest law merely only provides for the prohibition of combining the position of a prosecutor with the exercise of a parliamentary mandate, and also grants the Prosecutor General the right to initiate proceedings before the Constitutional Court.[4] Some authors argue that the separate sets of rules governing the office of the Prosecutor General and that of the Minister of Justice, and in particular the absence of a provision that would allow the two roles to be performed by the same person, indicate a prohibition on combining these positions.[5]

The Constitutional Court expressed its views on such prohibition in the context of then-applicable constitutional law known as the "Small Constitution". According to the Court, the *incompatibilitas* principle (which prohibits the holding of an executive office and parliamentary mandate) "is a consequence of the basic constitutional principles defining the system of state governance based on the principle of separation of powers, and is supposed to serve the realisation of these principles, including the independence of the legislative and executive branches of the government, independence of judges, and the political neutrality of certain state services".[6] Referring directly to the prohibition of holding of the prosecutorial and parliamentarian post, the Court pointed out that this prohibition ensures "[t]he proper performance of prosecutorial responsibilities and defence against

of prosecuting crime. This change was in no way justified.

4 P. Kardas, "Rola i miejsce prokuratury…".

5 J. Onyszczuk, K. Kwiatkowska, *Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego w nowej ustawie o prokuraturze*, (accessed on: 31.01.2022).

6 See resolution of the Constitutional Court of 6 February 1996, case no. W.11/95, published in OTK ZU 1996 no. 1, item 5, p. 63.

accusations that a prosecutor is being guided in an individual case by other considerations than acting in the name of the law".[7]

Regardless of these views, the lack of constitutional provisions on the prosecution service gives the legislative branch considerable freedom in designing the public prosecution system. The Constitutional Court also pointed out that "the status of prosecutors, as well as the organisation of the prosecution service, has no constitutional grounding equivalent to that of the judiciary".[8] At the same time, however, the Court emphasised that the responsibilities of the prosecution service under the law, including the safeguarding of the rule of law and oversight of the prosecution of crimes, must be interpreted in view of the clause of a democratic state ruled by law.[9]

This principle, in addition to the principle of legality and the civic obligation to respect the law, is the basic point of reference for the assessment of the constitutional status of the prosecution service, and in particular its place within the constitutional system of the state. However, the Constitutional Court has not yet ruled on the relationship between the executive branch and the prosecution service, in particular the role of the Minister of Justice in the management of the work of the prosecution service. In 2016, the Ombudsman and a group of senators[10] requested the Court to review whether reforms of the prosecution service were compatible with the basic principles of the Constitution but no ruling has so far been made on the matter. The applicants withdrew their review requests in protest against the unlawful composition of the Constitutional Court.[11]

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7 Judgment of the Constitutional Court of 10 April 2002, K 26/00, OTK-A 2002, no. 2, item 18.

8 Judgment of the Constitutional Court of 8 May 2012, K 7/10, OTK-A 2012, no. 5, item 48.

9 *Ibid*.

10 The case registered with the Constitutional Court with no. K 19/16.

11 Decision of the Constitutional Court of 13 December 2018, K 19/16, OTK-A 2018, no. 78.

2. The new 2016 Prosecution Service Act

Before 2009, the prosecution service was led by the Minister of Justice who also served as the Prosecutor General. The 2009 reform made the prosecution service largely independent from the government and introduced the separation of the two roles. The newly-appointed Prosecutor General, selected by the President of the Republic of Poland from a pool of two candidates nominated by the National Council of the Judiciary and the National Council of the Prosecution Service, was to guarantee independence and the effective functioning of the prosecution service.

In practice, the reform failed to achieve all its objectives. The prosecution service's reputation was badly affected by the unsuccessful investigations into the Smolensk catastrophe and the Amber Gold fraud scandal. The reform itself was criticised, too, because of the lack of measures that would enable the Prosecutor General to effectively control the work of lower-level prosecutors. A procedure set up as part of the reform, involving the Prime Minister's acceptance of the annual Prosecutor General's report, could have been used to exert pressure on the Prosecutor General. Prime Minister's rejection of the report entitled the head of government to request a parliamentary vote to dismiss the Prosecutor General before the end of their term of office. However, the Prosecution Service Act did not specify the deadline for the Prime Minister's acceptance or rejection of the report and the submission of the dismissal motion to the parliament. This allowed for undue extensions of the report review process and contributed to an atmosphere of uncertainty around the legal status of the Prosecutor General and the prosecution service.[12] Moreover, the separation of the prosecution service from the executive branch was not accompanied

12 E. Ivanowa, "Toczy się gra raportem Seremeta. Dokument leży już pół roku bez oceny Ewy Kopacz", *Dziennik Gazeta Prawna* (accessed on: 26.01.2022).

by the guarantees of the former's financial independence which would enable the effective carrying out of its responsibilities.[13]

These shortcomings served as a justification for the changes in the status of the prosecution service that took place in late 2015 and early 2016. The new Prosecution Service Act became one of the first laws adopted by the new Sejm convened after the October 2015 elections won by the *United Right* coalition.

The new legislation on the prosecution service was presented to the Sejm as a deputy-sponsored bill, which allowed the ruling parliamentary majority to significantly accelerate the legislative process and avoid public consultations or the preparation of a Legislative Impact Assessment report. Although the bill originated from the lower house of the Parliament, Bogdan Święczkowski, then Undersecretary of State at the Ministry of Justice, played an important role at all stages of the legislative process.

The fast-tracked legislative process also guaranteed that the new rules would enter into force before the then-upcoming election of the second "independent" Prosecutor General. In October 2015, two candidates (both prosecutors) were nominated for this position: Krzysztof Karsznicki and Irena Łozowicka but President Andrzej Duda did not appoint any of them.

The official justification for the proposed changes was that the law adopted in 1985 did not correspond with the requirements of the "modern state ruled by law" and with the challenges related to the rise of "modern crime".[14] Moreover, sponsors of the bill argued that the proposed legislation allowed the Council of Ministers (government) to regain the ability to ensure the security of the state and maintain public order.[15] At the same time, politicians of the ruling coalition publicly indicated that the changes would allow for "depoliticisation of the prosecution service in relation to the status quo".[16]

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13 "Prokuraturom zabraknie 50 mln zł. Śledztwa zagrożone?", (accessed on: 26.01.2022).

14 8th Sejm, Parliamentary Paper No. 162, Deputy-sponsored Prosecution Service Bill, p. 88.

15 However, this postulate was contrary to a proposal for an amendment to the Constitution of the Republic of Poland presented by the *United Poland* party, which provided for a general election of the Prosecutor General, see here (accessed on 03.01.2022).

16 Polsatnews.pl, "Ziobro: wzmacniamy odpolitycznienie prokuratury w stosunku do stanu, jaki był dotychczas", (accessed on: 31.01.2022).

The changes introduced by the 2016 Act concerned the constitutional position and powers of the Prosecutor General, organisation of the prosecution service, as well as the provisions concerning the independence of prosecutors and their professional association.

2.1. PROSECUTOR GENERAL/MINISTER OF JUSTICE

The 2016 Act re-merged the positions of the Prosecutor General and Minister of Justice while lowering the criteria that must be met by the Prosecutor General. Under the new legislation, the Prosecutor General was no longer required to have at least ten years of experience working as a judge or prosecutor. On the other hand, the new law did not guarantee that the Prosecutor General/Minister of Justice cannot hold a parliamentary mandate.

A consequence of the new design of the role of the Prosecutor General was the abolishment of the tenure of the office, which strengthened the position of the Prosecutor General and diminished the possibility of scrutiny of his actions.

The new law also provided brand-new powers for the leadership of the prosecution service. The Prosecutor General and the National Prosecutor (the former's high-ranking subordinate) were authorised to supervise operational and intelligence-gathering procedures. Under the new legislation, the Prosecutor General is authorised to access evidence collected in the course of individual steps of procedure. The Prosecutor General was also given the authority to request that relevant services carry out specific operational and intelligence-gathering procedures, insofar as they are directly related to a given ongoing investigation. The new law enables the head of the prosecution service to review the effects of any such procedures.

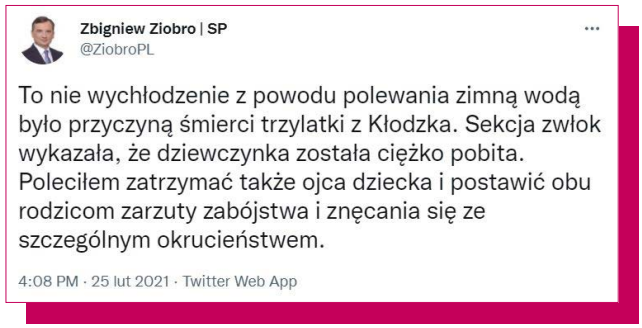
Under the new law, the Prosecutor General also gained the right to lift and change the classified status of a document or other piece of evidence. Practically speaking, this rule allows the Prosecutor General to circumvent the requirements of the Classified Information Protection Act. The only obligations the Prosecutor General must satisfy before lifting or amending the classified status are consulting the administrator of the classified status and informing the Prime Minister about the intention to de-classify or re-classify the materials concerned.

The Prosecutor General and the National Prosecutor (or a prosecutor authorised by either of them) also received the power to provide public authorities or even, in particularly justified cases, other persons, with information about the activities of the prosecution service, including details of specific cases, if such information may be important for the security or proper functioning of the state.

Another change introduced under the new legislation allowed the Prosecutor General and heads of individual units of the prosecution service to personally provide the media with information on active investigations or activities of the prosecution service. This power constitutes a de facto defence against being prosecuted for public disclosure of information on pending preliminary proceedings, an offence defined in the Criminal Code. In this way, the Prosecutor General has received a peculiar public relations policy tool that may be used to create a specific image of the prosecution service and promote populist changes in the criminal law.

An example

In 2021, the Prosecutor General/ Minister of Justice released on social media the results of the autopsy of the three-year-old victim in a high-profile child murder case[17] invoking them as justification for his personal decision to arrest and charge the child's father. As it soon turned out, the detained man was only the mother's partner and not the victim's father.



The new legislation completely disregards the interest of the administration of justice, which is to ensure the effective conduct of preliminary proceedings and respect the principle of the presumption of innocence. In addition, a prosecutor in charge of the proceedings in which information is to be provided to third parties or otherwise publicly disclosed has no right to object to the disclosure of confidential materials. Moreover, no

17 Twitter, Zbigniew Ziobro, https://twitter.com/ZiobroPL/status/1364955457715060736?s=20 (2.02.2022), Wyborcza.pl, Partner matki aresztowany za śmierć 3-letniej Hani. Prokuratura: Dziecko było katowane niemal od narodzin.

right to object is afforded to other parties to the preliminary proceedings concerned. In its opinion issued in 2016, the Venice Commission pointed out that the applicable provisions concerning the release of information to the media did not guarantee sufficient protection for the presumption of innocence and the right to privacy.[18]

Interestingly, while adopting the discussed powers, the lawmakers were aware that in certain procedural settings disclosure of information from active proceedings may cause direct damage to private interests. Indeed, the drafters of the law made sure that the Prosecutor General and other prosecutors would not be held liable for disclosure of information from pending proceedings by introducing the rules that any liability for such disclosure is to be fully and entirely borne by the State Treasury rather than enforced against individual officials.

The origins of the above arrangements can be traced back to the events of 2005-2007 when Zbigniew Ziobro served his first term as the Prosecutor General. In 2008, he was sued for an infringement of personal interests in connection with the infamous comment he earlier made about a defendant in a criminal case at a press conference ("no one else will ever again be deprived of life by this man").[19]

The application of the above exceptions to the principle of the secrecy of the preliminary proceedings was limited by the requirement to show rather general and ambiguous grounds such as an "important public interest" or the information being essentially relevant to the security of the state. In practice, the rule allows the leadership of the prosecution service to make quite arbitrary use of the authority to disclose information, driven by partisan political interests.

In 2016, the HFHR submitted an access to public information request to the Prosecutor General's Office inquiring about the cases when the General Prosecutor used any of the powers described above. The public information request procedure is still pending.

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18 Venice Commission, *Poland – Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session* (Venice, 8-9 December 2017), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e.

19 Wp.pl, "Doktor Mirosław G. wygrał ze Zbigniewem Ziobro" (accessed on: 01.02.2022).

2.2. ORGANISATION OF THE PROSECUTION SERVICE

One of the most important changes made in 2016 was the change of the institutional framework in which the prosecution service operates. The military prosecution service was dissolved in its entirety, and replaced with military departments created at the National Prosecutor's Office and selected regional and circuit prosecutors' offices.

As part of the reform, the lawmakers abolished the appellate prosecutor's offices and the Prosecutor General's Office. Instead, the new legislation set up regional prosecutor's offices and the National Prosecutor's Office. In official communications, these changes were substantiated by the need to adapt the prosecution service to address the evolving responsibilities and nature of prosecution work. Another justification given was the need to unify the nomenclature, which is presently based on a purely "geographical" model, rather than the mixed "geographical and functional" model.[20] However, no justification was given as to why such a change must involve the replacement of an existing institution with another, newly established one, rather than a simple transformation of the former into the latter.

Under a law introducing the new Prosecution Service Act, the General Prosecutor was authorised to appoint (on a motion of the National Prosecutor) the cadres of the newly created National Prosecutor's Office and regional prosecutor's offices from the scratch by recruiting prosecutors from all prosecutor's office of all levels. According to the new legislation, the prosecutors working in the dissolved units of the prosecution service who were not appointed by the Prosecutor General to serve in the new organisational units were to be transferred, by a decision of the Prosecutor General, to another official position, with the appropriate remuneration and retaining a professional title (e.g. "a prosecutor of the former Prosecutor General's Office"), which, however, they may not use while performing their official duties. At the same time, the new law offers no guidance on the criteria to be followed by the prosecution service leadership in deciding on transfers of individual prosecutors to another official position. In other words, the Prosecutor General and National Prosecutor had full discretion in determining the status of the prosecutors of the dissolved units. These changes affected a very large number of high-ranking prosecutors. As many

20 8th Sejm, Parliamentary Paper no. 162, p. 92

as 113 prosecutors employed at the Prosecutor General's Office and appellate prosecutor's offices (33% of all prosecutors working at those units) were not offered a leadership position in the new organisational structure.[21]

The amendment of the Prosecution Service Act was also an opportunity to shorten the term of office of prosecutors holding leadership positions at circuit and district prosecutor's offices. According to information from Lex Super Omnia, this change affected 90% of the leaders of district prosecutor's offices and almost all (44 out of 45) heads of circuit prosecutor's offices.[22]

The new law also changed the rules for the appointment of regional (formerly: appellate), circuit and district prosecutors, vesting the appointment powers in the Prosecutor General acting on a motion of the National Prosecutor. Under the "old" law, the appointments were made by the Prosecutor General on a motion of appellate (now: regional) prosecutors who are now effectively removed from the nomination procedure. At the same time, the new law minimises the participation of the professional association of prosecutors which may only formally "present a candidate" to the competent prosecutors' assembly, without the obligation to give an opinion on the candidate. On the other hand, the National Prosecutor has acquired the competence to appoint and dismiss prosecutors to perform all other roles in the prosecution service, from section heads at district prosecutor's offices to deputy regional prosecutors. In contrast to the previous legislation, the new law did not envisage delegating powers in this area to a regional (appellate) prosecutor.

However, the key change in this respect was the abolishment of tenures associated with these roles. Under the "old" law, holders of leadership positions at prosecutor's offices were appointed for a specific term (6 or 4 years, depending on the unit). At the same time, the previous law prohibited the appointment for successive terms (with the exception of district prosecutors). Most importantly, the prosecutor in charge of a unit (or their deputy) could only be dismissed under certain conditions, the most general of which concerned a situation in which they failed to properly perform their official duties.

21 Lex Super Omnia, *Dobra zmiana w prokuraturze*, Chapter II (accessed on: 21.01.2022).

22 Lex Super Omnia, *Dobra zmiana w prokuraturze*....

Under the new law, the Prosecutor General has been given complete discretion to dismiss prosecutors performing leadership roles, without even considering the condition of improper performance of their duties. The new legislation creates situations such as a circuit prosecutor being dismissed overnight without cause[23] or a prosecutor performing a leadership role losing their position because of certain procedural decisions taken by their subordinates, e.g. the absence of a request for pre-trial detention[24].

2.3. INDEPENDENCE OF PROSECUTORS

Prosecutors' independence is a necessary condition for the effective performance of their responsibilities: upholding the rule of law and prosecuting crimes. It is correctly noted in international law that the independence of prosecutors is not a privilege, but a guarantee of the right to a fair and impartial trial.[25] Against the backdrop of the Polish constitutional system, the independence of the prosecution service must also be perceived as an element of respecting the rule of law and guaranteeing the effective implementation of the principle of legality of actions taken by state authorities.

The new (2016) Prosecution Service Act includes a declaration on prosecutors' independence in taking procedural decisions limited by exceptions provided for by the Act. However, the list of these exceptions has been significantly expanded in the years following the adoption of the new law. Even more worryingly, high-ranking prosecutors, including the Prosecutor General/Minister of Justice has been authorised to directly interfere with decisions of prosecutors, without the obligation to follow any official escalation procedure.

According to the new law, prosecutors are obliged to comply with orders, guidelines and instructions given by their superiors. The 2016 Act considerably broadened the definition of a "superior prosecutor". Regional (formerly: appellate) prosecutors are now considered not only the superiors of prosecutors working at regional prosecutor's offices and leaders

23 Wyborcza.pl, "Zbigniew Ziobro odwołuje szefa bydgoskiej prokuratury okręgowej, którego sam powołał" (accessed on: 01.02.2022).

24 Wyborcza.pl, "Ziobro odwołał szefów prokuratury. Bo nie aresztowali kibola Górnika Zabrza" (accessed on: 01.02.2022).

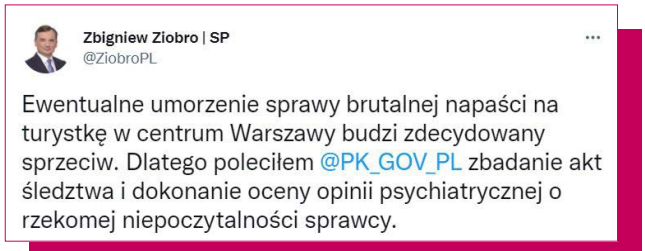
25 Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors ("Rome Charter") (26.01.2022).

of organisational units of the prosecutor's office operating in the area of operation of a given unit. Under the new law, regional prosecutors were granted the status of superior prosecutors in relation to not only all prosecutors working in their unit but also those employed at lower-level units operating in the jurisdiction of the regional prosecutor's office. Powers of circuit prosecutors were expanded in a similar fashion. Most importantly, the National Prosecutor and the Prosecutor General/Minister of Justice also gained the status of superior prosecutors for *all* prosecutors working for the prosecution service.

Even more importantly, contrary to the situation under the "old" law, which provided that supervision of superior prosecutors might not affect any procedural steps taken by their subordinates, no such restriction was laid down in the 2016 Act. This means that superior prosecutors, including the Prosecutor General/Minister of Justice (who is an active politician and parliamentarian), may at any time decide that a prosecutor must charge a suspect with a specific offence, request pre-trial detention, use a preventive measure in the form of professional disqualification, file an indictment or discontinue the proceedings. There are no complete statistics available on the frequency of superior prosecutors directly interfering with the work of their subordinates. According to a reply to a parliamentary question, between March 2016 and 22 December 2017, leaders of the prosecution service (the Prosecutor General or his deputies) issued such orders in 21 cases, giving justification in only 15 cases.[26] Public statements of the Prosecutor General suggest that he used the power to issue binding instructions also after the end of 2017, in particular in high-profile cases.

An example

The Prosecutor General/Minister of Justice informed in social media about a number of cases he personally interfered with by, for instance, ordering to present charges against a person, instructing to present a more serious charge or ordering a psychiatric evaluation to verify the "alleged insanity" of a perpetrator.[27]



26 Reply of the National Procurator to parliamentary question no. 17745 on the instructions regarding the conduct of procedural steps (accessed on 02.02.2022).

27 Twitter, Zbigniew Ziobro (accessed on: 02.02.2022).

In theory, measures that allow the Prosecutor General to directly influence the work of prosecutors should be limited by the application of other legal rules, such as the obligation that any superior prosecutor's instruction regarding the conduct of a procedural step must be issued in writing and – if the prosecutor conducting the proceedings requests so – accompanied by a statement of reasons. However, the lawmakers waived such a requirement in the event of "an obstacle" preventing the delivery of the written instruction of a supreme prosecutor. In the above case, the instruction may be given verbally and later confirmed in writing.

Importantly, a party to the proceedings has no way of finding out that a procedural decision made in a given case was ordered by a superior prosecutor (e.g. the National Prosecutor). Written instructions from a superior as well as verbal instructions confirmed in writing are included in the principal case file. Parties to the proceedings have no access to the prosecutor's reference file on which such an instruction would be recorded. The Venice Commission criticised this state of affairs, noting that in a system in which the prosecution service is linked to executive bodies, a range of safeguards are required to guarantee the autonomy of the prosecution service, ensure the transparency of its operations and protect it from political pressure.[28]

In addition, the Act stipulates that if the prosecutor does not agree with instructions regarding a procedural step, they may request the instructions to be amended or ask to be excluded from the performance of the step or participation in the case. Such a request must be submitted to the superior who gave the instruction together with a statement of reasons. However, a decision on whether to exclude a prosecutor is made by the directly superior prosecutor, i.e. the head of the prosecution service unit concerned.

In the above-mentioned 21 cases in which a superior's instructions have been given, not a single prosecutor to whom they have been directed requested an amendment of the instruction or exclusion from participation in the procedural step or the case.

28 European Commission for Democracy through Law (Venice Commission), Poland. Act on the Public Prosecutor's Office, CDL-REF (2017)048 (accessed on: 26.01.2022).

An example

In March 2018, three prosecutors investigating a traffic accident involving the motorcade carrying Prime Minister Beata Szydło requested to be excluded from conducting the investigation. At the moment when their request was submitted, the proceedings in the case had already been completed, and the prosecutors were to decide on whether to submit a motion for the conditional discontinuation of proceedings or prepare an indictment. According to media reports, the prosecutors wanted to separately investigate the matter of organisation of movement of the Prime Minister's motorcade. They also considered including testimony as to whether the motorcade vehicles used sound signals in that separate line of inquiry. According to TVN24 news channel, a circuit prosecutor did not approve the separate investigation.[29]

According to media accounts, the leadership of the prosecution service can also use other methods to influence final decisions issued in cases they consider important. These methods include appointing a lead prosecutor who is expected to resolve the case in line with superiors' expectations, or influencing the prosecutor's decision by threatening them with a secondment to a lower-level unit or to a location away from the prosecutor's place of residence.[30]

An example

In February 2022, the national daily newspaper *Gazeta Wyborcza* revealed the circumstances of the prosecutorial failure to file a cassation appeal against an acquittal of a man charged with defacing a monument by laying wreaths with a sash with an inscription that the ruling parliamentary majority found provocative. Andrzej Pasieczny, the prosecutor in charge of the investigation, refused to lodge a cassation appeal, saying that the verdict "should be considered correct and proper". As a result of this decision, the case was taken away from Mr Pasieczny and went to another prosecutor, Bogumiła Knap, who also refused to lodge a cassation appeal. In doing so, she sent a letter to the Prosecutor

29 "Prokuratorzy chcą wyłączyć się ze śledztwa ws. wypadku Beaty Szydło" (accessed on: 01.02.2022).

30 Under the Regulation of the Minister of Justice of 7 April 2016 – the internal rules of official conduct of common organisational units of the prosecution service (the uniform text published in the Journal of Laws of 2017, item 1206, as amended), the mechanism of superior's approval may be used by directly superior prosecutors or their deputies.

General in which she informed him about retiring, justifying her decision by the pressures of superiors who tried to force her to file the appeal. She also invoked concerns about the negative consequences of her failure to complaint with the superiors' instructions.[31]

Apart from changing the rules governing the issuance of binding instructions, the new law expanded the procedure for revoking or amending procedural decisions taken by prosecutors. Until the entry into force of the new legislation, a procedural decision issued by a prosecutor could only be amended or revoked by the prosecutor's immediate superior. Under the new law, *any* superior prosecutor may exercise that right. In this case, the decision of the superior is included in the case file.

The last significant exception to the principle of independence of prosecutors established under the new Prosecution Service Act is a superior prosecutor's authority to take over a case conducted by a subordinate prosecutor. Such a case may then be personally conducted by the superior prosecutor or entrusted to another prosecutor designated by the superior. The superior prosecutor may also decide, at any time of their choosing, to hand over the case worked by a subordinate prosecutor to another prosecutor in the same unit or another unit of the prosecution service. The relevant decision of the superior prosecutor is enclosed in the reference file only.

An example

In April 2016, more than 1,700 notifications of a suspected offence were received by prosecutor's offices throughout Poland concerning then Prime Minister Beata Szydło's refusal to publish judgments of the Constitutional Court. Prosecutor Tomasz Nowicki intended to initiate preliminary proceedings in this case. However, before he could make that procedural decision, he was removed from the case which was transferred to another prosecutor. Also, prosecutor Nowicki was transferred to another department. The new prosecutor in charge immediately excluded himself from the proceedings "because of the significance of the case in question, as well as ... the necessity to exclude any, even the most inaccurate and unjustified, suspicions as to [his] impartiality". The third lead prosecutor, Tomasz Kuroszczyk, decided to refuse to initiate the proceedings. The decision was revoked as a result of an HFHR's interlocutory appeal.[32]

31 E. Ivanova, "Mamy dowody na naciski i zastraszenie prokuratorów. *Wyborcza* dotarła do pisma" (accessed on: 15.02.2022).

32 Wyborcza.pl, "Trzeci już prokurator przejął sprawę nieopublikowania wyroku Trybunału Konstytucyjnego" (accessed on: 01.02.2022).

Another relevant conclusion should be made in the context of the independence of prosecutors: the new law fails to provide for any rules on the assignment of cases to individual prosecutors. Meanwhile, the questions of who is in charge of a given case and what are the rules for appointing lead prosecutors are crucial for the final outcome of the case. For this reason, the Rome Charter requires that the assignment and re-assignment of cases to prosecutors should meet requirements of impartiality.[33]

The solutions introduced by the 2016 Act, combined with other means of influencing prosecutors may lead to a situation where the principle of independence of prosecutors under the laws currently in force has a marginal or even purely theoretical dimension. The Venice Commission[34] pointed out that a system in which prosecutors are associated with the executive branch and the Prosecutor General may issue binding instructions to prosecutors requires a significant number of safeguards for the independence of prosecutors. Meanwhile, the legislative changes significantly weakened the checks and balances mechanisms and dismantled a significant part of the existing safeguards. The Commission predicts that this system is incapable of guaranteeing the autonomy of prosecutors and preventing them from being influenced by politicians.

2.4. NATIONAL COUNCIL OF THE PROSECUTION SERVICE

An important novelty introduced by the 2009 Act was the establishment of the National Prosecutors Council, modelled on the National Council of the Judiciary. The body comprised not only prosecutors but also representatives of the Sejm, Senate, President of the Republic of Poland, Minister of Justice and Prosecutor General. Objectives of the Council included safeguarding the independence of prosecutors. The Council was entitled to submit candidates for prosecutorial posts, evaluate the reports submitted by the Prosecutor General and initiate the procedure for the removal of the Prosecutor General from office. At the same time, the Council played an active role in the process of Prosecutor General's

33 Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors ("Rome Charter") (26.01.2022).

34 European Commission for Democracy through Law (Venice Commission), Poland. Act on the Public Prosecutor's Office, CDL-REF (2017)048 (accessed on: 26.01.2022).

appointment, presenting the President of the Republic of Poland with its candidate for the office.

The new 2016 Prosecution Service Act has severely limited the Council's purview, renaming it the "National Prosecutors Council to the Prosecutor General". The new Council has lost the vast majority of the powers vested in its predecessor, becoming a strictly advisory body that can give opinions on the professional qualifications of prosecutors or normative acts concerning the prosecution service. Although the Council nominally remained the body charged with "upholding the independence of prosecutors", the lawmakers did not assign it any real authority in this regard.

The change of the Council's powers was accompanied by a change in its composition. The Council has become a body composed exclusively of prosecutors, including those appointed directly by the Prosecutor General. Under the new law, only some of the Council members are nominated by prosecutors' assemblies of regional prosecutor's offices.

The change of the Council's name and composition became a pretext for the early termination of the term of office of then-incumbent members of the National Council of the Prosecution Service. The new Council's membership includes primarily prosecutors holding senior positions within the prosecution service. Of 22 prosecutors sitting on the Council, only one comes from a district prosecutor's office. There are no publicly released information on the official activities of the Council.[35] So far, the Council has held three plenary sessions; it resolves day-to-day matters by circular vote.

There are significant concerns as to how the Council performs its function of safeguarding the independence of the prosecution service. The Council refused, for formal reasons, to address the case of prosecutors seconded against their will to work at prosecutorial units located away from their place of residence[36]. Meanwhile, it adopted, at the request of the National Prosecutor, a resolution indicating that cases of violations of prosecutors'

35 E. Świętochłowska, "Krajowa Rada Prokuratury w zaniku. Instytucja stała się tworem fasadowym" (accessed on: 01.02.2022).

36 Lex Super Omnia, *Informacja o posiedzeniu Krajowej Rady Prokuratorów przy Prokuratorze Generalnym w dniu 18 grudnia 2018 r.* (accessed on: 01.02.2022).

independence will be dealt with only at the request of the persons directly concerned.[37] However, this procedural avenue has proved ineffective when prosecutor Zbigniew Szpiczko, who was seconded to work 130 km from home, requested the Council's protection invoking important personal reasons.[38] Having considered his case with great delay, the Council decided that the prosecutor's secondment was lawful.

2.5. PROFESSIONAL ASSOCIATION OF PROSECUTORS

The law adopted in 2016 weakened the professional association of prosecutors, restricting its objectives recognised under Polish law. Prosecutors' assemblies of the appellate prosecutor's offices were deprived of any influence on the appointment of regional (appellate), circuit and district prosecutors. The procedure for electing members of assemblies was also changed. Moreover, as from 2020, the prosecutors holding leadership positions are ex officio members of prosecutors' assemblies, which considerably weakens the position of elected delegates representing rank-and-file prosecutors. These changes directly contributed to the marginalisation of the role of the professional association of prosecutors undermined as a result of changes in the status of the National Council of the Prosecution Service (currently, the National Prosecutors Council).

In practice, since 2016, the professional association of prosecutors has played virtually no role in contesting attacks on the independence of prosecutors. The only exception in this area was the May 2019 resolution of the prosecutors' assembly of the Regional Prosecutor's Office in Kraków that acknowledged the legal and practical restrictions on the independence of prosecutors[39] taking the form of influencing their procedural decisions outside any official escalation procedure. The originator of the resolution pointed to situations in which a prosecutor in charge of the proceedings receives letters or telephone calls regarding their case, without the knowledge of their direct superiors (this phenomenon is discussed in more detail in para. 4.1 Selected examples of repressive actions against prosecutors).

37 *Ibid*.

38 M. Jałoszewski, "Prokuratura Ziobry. Zdegradowali niepokornego i wysłali do Suwałk wiedząc, że ma chorą żonę" (accessed on: 01.02.2022).

39 TVN24, "Krakowscy prokuratorzy alarmują o ograniczaniu ich niezależności, uchwałę przyjęli jednogłośnie" (accessed on: 01.02.2022).

2.6. APPOINTMENTS, PROMOTIONS AND SECONDMENT OF PROSECUTORS

Prosecutors of general units of the prosecution service are appointed primarily from among junior prosecutors who have graduated from the National School of the Prosecution Service and Judiciary. Moreover, the Prosecution Service Act maintains the old rule that practitioners of other legal professions and holders of a scientific degree in law may become prosecutors too.

There are different, detailed prosecutorial appointment procedures for first-time appointments and promotions. In the former situation, the Prosecutor General may decide that a candidate will be selected through a competitive process. However, in particularly justified cases, the Prosecutor General may waive this requirement and simply appoint a candidate named in a request of the National Prosecutor.

Since 2016, the Prosecutor General has decided to notify a vacancy or newly created position to be filled at district prosecutor's offices on more than 650 occasions. However, there is no publicly available information on the number and locations of prosecutor's offices where the vacancies or new posts were filled without a competitive process. However, a review of the notices posted by the Prosecutor General shows that such competitions have not been organised at certain units of the prosecution service for the last 6 years. An example of this situation is two prosecutor's offices situated in central districts of Warsaw.[40] The vacancies in those offices have been filled at least several times in the last 6 years without any competitive process having been announced.[41]

However, a notification of a competitive process for filling a prosecutorial post does not guarantee that a candidate so selected becomes a prosecutor. In this context, one should mention a case described by the Ombudsman. The Ombudsman asked the National Prosecutor to explain the situation of a candidate who was selected as the best competitor but was not appointed to a prosecutorial post. In particular, the Ombudsman pointed to the

40 Authors' own elaboration, based on the *Polish Official Gazette* (*Monitor Polski*) from 2016-2021.

41 Authors' own elaboration, based on notifications of the presentation of prosecutorial nominations posted on web pages of the National Prosecutor's Office.

lack of transparent rules for prosecutorial appointments[42], including the absence of a legal procedure that would enable a review of decisions refusing to appoint candidates selected through a competitive process. In response to the Ombudsman's statement, the National Prosecutor indicated that the decision to appoint a candidate is a discretionary decision taken by the National Prosecutor within the latter's authority in the area of staffing policy. The National Prosecutor further recalled that the relevant legislation does not provide for "a requirement to justify the position of the National Prosecutor if the latter decides not to submit to the Prosecutor General a request for the first-time prosecutorial appointment".[43]

The non-compulsory competitive procedure notably applies only to first-time appointments for prosecutorial posts in district prosecutor's offices. Appointments in higher-level prosecutor's offices are fully discretionary and guided by no criteria whatsoever. The appropriate professional experience of a candidate is generally a sufficient eligibility criterion. However, the law allows for waiving even this requirement "in particularly justified cases". This means that the appointment of prosecutors to higher-level units of the prosecution service can only take place through a discretionary procedure that sets no formal criteria and involves only the Prosecutor General and his senior deputy. This means that the Prosecutor General has unrestricted freedom to develop the cadres of the prosecution service, which includes the authority to take away promotion opportunities from any prosecutors who do not prove loyal to the head of the prosecution service.

In a similarly liberal manner, the lawmakers settled the issue of secondment of prosecutors to general units of the prosecution service understood as a temporary transfer to a different official position than the one to which they were originally appointed. Under the new law, the Prosecutor General or the National Prosecutor[44] may assign a prosecutor to another organisational unit of the prosecution service. If the seconded prosecutor agrees, the secondment may last indefinitely. Otherwise, a prosecutor may be seconded for a period of up to 6 months (12 months, if the prosecutor's office to which the prosecutor was temporarily assigned is located in the same city or the city where the seconded person lives). When

42 Rzecznik Praw Obywatelskich (Polish Ombudsman), "RPO: nie ma przejrzystych kryteriów wyboru kandydata na stanowisko prokuratorskie" (accessed on: 17.02.2022).

43 National Prosecutor's reply to the Ombudsman's statement (accessed on: 01.02.2022).

44 Under article 106 § 6 of the Prosecution Service Act, a decision on secondment for a period lasting up to two months may also be taken by a regional or circuit prosecutor.

deciding to second a prosecutor to another unit, the leadership is not required to follow any guidance as to the prosecutor's qualifications.[45] The above legislative framework is used today as a readily available tool to interfere with the independence of prosecutors.

First, in certain cases, secondment may serve as a form of rewarding a prosecutor and securing their "loyalty". Within a mere six months from the beginning of the secondment, the seconded prosecutor receives the right to receive the basic salary at the rate provided for prosecutors of the unit where the prosecutor is temporarily assigned. However, such a privilege differs from a regular promotion and is not given permanently. Moreover, the benefits may be withdrawn at any time if the secondment is terminated early or not renewed.[46]

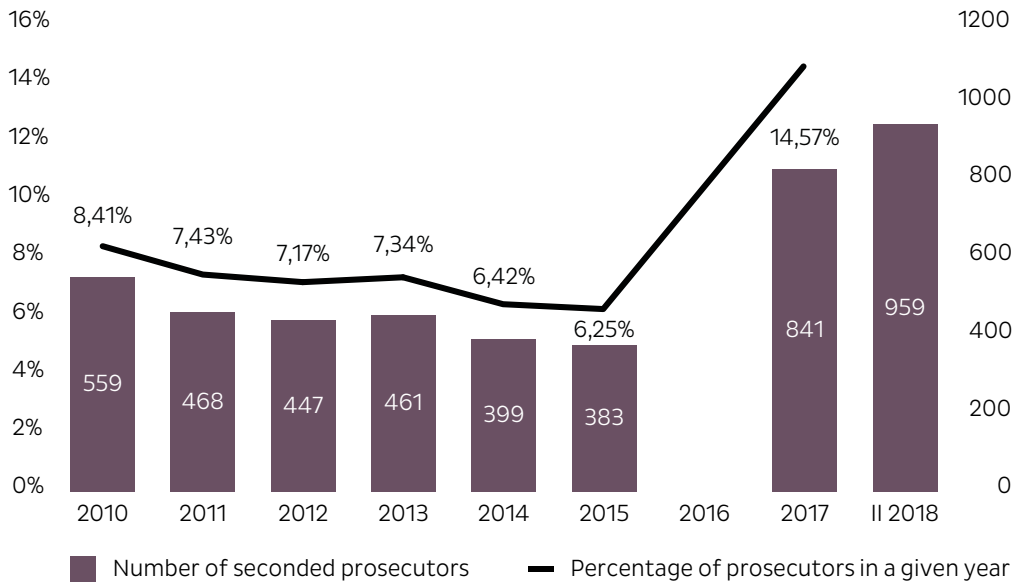


Chart 1. Prosecutors seconded to other units of the prosecution service[47]

45 This requirement was included in the "old" Prosecution Service Act.

46 The Supreme Court ruled on the admissibility of early termination of prosecutors' secondments governed by provisions of the Labour Code in the context of persons performing work based on appointment in the judgment of 16 June 2021, case no. III PSKP 23/21.

47 For figures related to the periods 2011–2015 and 2017, see konkret24.tvn24.pl, "Minister Wójcik: za prokuratora Seremeta było zjawisko 'delegacjoza'. Tak, a teraz się nasiliło" (accessed on: 01.02.2022). For figures related to February 2019, see E. Ivanova, "959 prokuratorów w delegacji, czyli droga armia Ziobry" (accessed on: 01.02.2022); the overall number of prosecutors based on the end-of-year data of the Central Statistical Office (authors' own elaboration).

The graph above shows that in 2016-2018 secondments of prosecutors were an important element of the cadre policies of the new leadership of the prosecution service. During that period, significantly more prosecutors were seconded than during the term of the previous Prosecutor General.

On the other hand, mandatory secondments were used as an unofficial form of punishment for prosecutors. In certain personal circumstances, such secondments may be considered an example of mobbing practices.

An example

Prosecutor Piotr Skiba launched an investigation into the case involving the criminal insult of President of the Supreme Court Małgorzata Gersdorf, allegedly committed by the Berlin correspondent of Polish public television TVP. The case was referred to the Circuit Prosecutor's Office in Warsaw. The prosecutor himself was assigned for a period of 12 months to perform duties in the District Prosecutor's Office in Grodzisk Mazowiecki.

Another prosecutor, Wojciech Pełeszok, was temporarily transferred from the Circuit Prosecutor's Office in Warsaw to the District Prosecutor's Office for the Śródmieście-Północ district in Warsaw after he stated during a detention hearing that he personally disagreed with the request for pre-trial detention of a person arrested in connection with a "Black Protest" (a string of nationwide demonstrations against the anti-abortion judgment of the Constitutional Court of 22 October 2020) and the only reason he submitted this request was the official instructions received from his superiors.

Prosecutor Waldemar Osowiecki, a former District Prosecutor in Płock leading the prosecutor's office which charged the current Prosecutor General with disclosing information from preliminary proceedings, has been constantly seconded to work at different units of the prosecution service since 11 July 2016. He was temporarily assigned to a District Prosecutor's Office in Częstochowa, District Prosecutor's Office in Płock and District Prosecutor's Office in Ciechanów.[48]

48 E. Ivanova, "Prokuratura tłumaczy się ze sprawy wulgarnego wpisu Gmyza o prezes Gersdorf" (accessed on: 15.02.2022). P. Rojek-Socha, "Delegacja karą dla prokuratora, bo nie poparł żądania aresztu? RPO interweniuje" (accessed on: 15.02.2022). M. Mamoń, "Nadzorował śledztwo przeciw Ziobrze. Zesłany do Częstochowy" (accessed on: 15.02.2022).

It is reasonable to doubt that the above-described system of appointment, promotion and transfer of prosecutors is rational and conducive to maintaining prosecutorial independence. In this context, it is worth pointing out that, in accordance with a recommendation of the Council of Europe[49], states should take steps to ensure that the appointment, promotion and transfer of prosecutors is carried out in accordance with fair and impartial procedures. These procedures should embody safeguards against any approach favouring or excluding certain groups of prosecutors.

Similar concerns can be raised about the system of incentives for prosecutors. The new Prosecution Service Act has significantly changed the foundations of this system, allowing the Prosecutor General and National Prosecutor to award prizes and distinctions to any prosecutor who "has shown initiative, performed duties in an exemplary and conscientious manner and particularly contributed to the performance of official responsibilities". At the same time, the Act did not specify the types of prizes and distinctions that prosecutors may receive. The law only provides that prosecutors may be rewarded by being promoted ahead of a schedule laid down in the regulations. The Prosecutor General has been obliged to determine other types of incentives, as well as a procedure for their award.

The HFHR filed an access to public information request with the National Prosecutor's Office asking the Office to send the executive order that determines a list of prizes and distinctions and specifies the award procedure. The National Prosecutor's Office replied that the requested document is not an official public document, does not concern public matters and does not define the legal situation of any entities "outside the prosecution service".[50] However, the wording of the actual order has been disclosed by Lex Super Omnia Association, an independent organisation of prosecutors. The Associations informs that prosecutors can receive four types of incentives: an expedited promotion, a Medal of Merit for the Prosecution Service of the Republic of Poland, a financial award and an in-kind award. The first two can only be granted by the Prosecutor General. The remaining two may also be presented by the National Prosecutor. Incentives are awarded ex officio or

49 Recommendation of the Committee of Ministers of the Council of Europe Rec(2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

50 Reply of the National Prosecutor's Office to an access to public information request (accessed on: 01.02.2022).

at the reasonable request of the superior of the prosecutor to whom the prize is to be awarded. According to reports of Lex Super Omnia Association, in 2016-2019, units of the prosecution service spent about PLN 4 million on prizes awarded to prosecutors.[51] These incentives were earmarked for a group of prosecutors consisting primarily of those working in the National Prosecutor's Office and regional prosecutor's offices. In 2019, awards were given only to two prosecutors working at the lowest-level units of the prosecution service (district prosecutor's offices, employing approx. 60% of all prosecutors).

2.7. HOW HAVE OTHER CHANGES IN LEGISLATION AFFECTED THE POSITION OF THE PROSECUTION SERVICE?

Since 2016, several legislative changes introduced to the criminal procedure and other legal areas have significantly reinforced the position of the prosecution as a party to proceedings before criminal courts.

Subsequent amendments to the Code of Criminal Procedure provided prosecutors with stronger means of influencing decisions to exclude the publicity of proceedings[52], replace pre-trial detention with financial surety[53] or grant safe conduct in preliminary proceedings[54]. However, the most significant change in this respect concerned the procedure for the mandatory referral of a case pending before a court to be re-examined at the stage of preliminary proceedings, initiated at the prosecutor's request.[55]

51 Stowarzyszenie Lex Super Omnia (Lex Super Omnia Association), *Prokuratura w pandemii czy pandemia w prokuraturze* (accessed on: 21.01.2022).

52 Act of 10 September 2016 amending the Code of Criminal Procedure, the Doctor and Dentist Professions Act and the Patient Rights and Ombudsman for Patient Rights Act (Journal of Laws 2016, item 1070, as amended).

53 Act of 19 September 2019 amending the Code of Criminal Procedure and certain other acts (Journal of Laws 2013, item 1694).

54 Act of 20 April 2021 on the Amendment to the Criminal Code and Certain Other Acts (Journal of Laws of 2021, item 1023).

55 The Act of 10 September 2016 amending the Code of Criminal Procedure, the Doctor and Dentist Professions Act and the Patient Rights and Ombudsman for Patient Rights Act (Journal of Laws, item 1070).

The lawmakers defined grounds for submitting the prosecutor's request in a very general fashion (citing, e.g. a necessity to search for evidence or perform other steps aimed at clarifying the circumstances of the case), which gives law enforcement authorities unrestricted discretion in applying the measure in question. This, combined with the court's legal obligation to grant the prosecution's "return referral" request, allowed the prosecution service to arbitrarily decide which criminal cases it should "revisit".

The Ministry of Justice has even sought to extend this exception to cases already being examined by the court of second instance.[56] The proposed mechanism would automatically result in the affected court's ruling being set aside, irrespective of the pleas or defences raised by parties to the proceedings. However, the proposal faced significant backlash and was withdrawn at the stage of works in the Senate.

2.8. OTHER CHANGES IN LAW AFFECTING THE POSITION OF THE MINISTER OF JUSTICE/PROSECUTOR GENERAL

Changes in the Prosecution Service Act were accompanied by a parallel process of expanding the supervisory powers of the Minister of Justice/Prosecutor General exercisable vis-a-vis courts. The Prosecutor General acquired, inter alia, important competencies related to recalling and appointing judges, influencing the composition of bodies conducting disciplinary proceedings against judges, initiating and supervising disciplinary proceedings, as well as submitting extraordinary appeals.

56 8th Sejm, Government-sponsored proposal of the act amending Act on the complaint on infringement of the party's right to have their case examined in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings without undue delay and certain other acts, Parliamentary Paper no. 851.

3. Changes in the prosecution service and the efficiency of proceedings – statistical data

The introduced changes were advertised as beneficial to the safety of Poles in many press releases and statements made during press conferences of the Ministry of Justice and the National Prosecutor's Office.[57] This was allegedly confirmed primarily by the statistics on the number of new cases submitted to the prosecutor's offices, the number of indictments filed, and even the number of persons in pre-trial detention. However, evidence-based analysis of the work of the prosecution service casts significant doubt not only on the extent of the impact of the reforms but also on whether they can at all be described as a success.

It should be noted at the outset that the new Prosecution Service Act no longer obliges the Prosecutor General to submit annual reports on the work of the prosecution service to the Sejm (the lower house of Polish parliament). This change should be viewed negatively as detrimental to the public oversight of the prosecution service. A publication of the National Prosecutor's Office, *Nowa Prokuratura w świetle danych statystycznych* (The New Prosecution Service in Statistical Data)[58] may serve as a source of information on the work of the prosecution service in Poland. Significantly, each indicator presented in the publication makes the year 2015 the point of comparison. The year 2015 marked the introduction of a criminal procedure reform. It also was, as far as statistics are concerned,

57 See e.g. *Dziennik Gazeta Prawna*, "Ziobro: Nastąpiła zmiana jakości prokuratury" (accessed on: 26.01.2022); K. Sobczak, "Prokuratura chwali się wybiórczo" (accessed on: 26.01.2022); E. Ivanowa, *Gazeta Wyborcza*, "VAT. Ziobro chwali się sukcesami, na które pracowała prokuratura Seremeta" (accessed on: 17.02.2022).

58 Prokuratura Krajowa (National Prosecutor's Office), *Nowa Prokuratura w świetle danych statystycznych*, Warszawa 2019 (accessed on: 15.02.2022).

the "worst" year for the functioning of the prosecution service over the past twelve years. Had the effects of the prosecution service's work been compared with any other year of the "old" prosecution system or with the average of the results achieved in that period, there would be no clear and obvious evidence to suggest that the functioning of the prosecution service has improved after the adoption of the new legislation.

3.1. RECEPTION AND HANDLING OF CASES BY THE PROSECUTION SERVICE

Since 2010, more than a million cases have been received, on average, each year by the general units of the prosecution service.

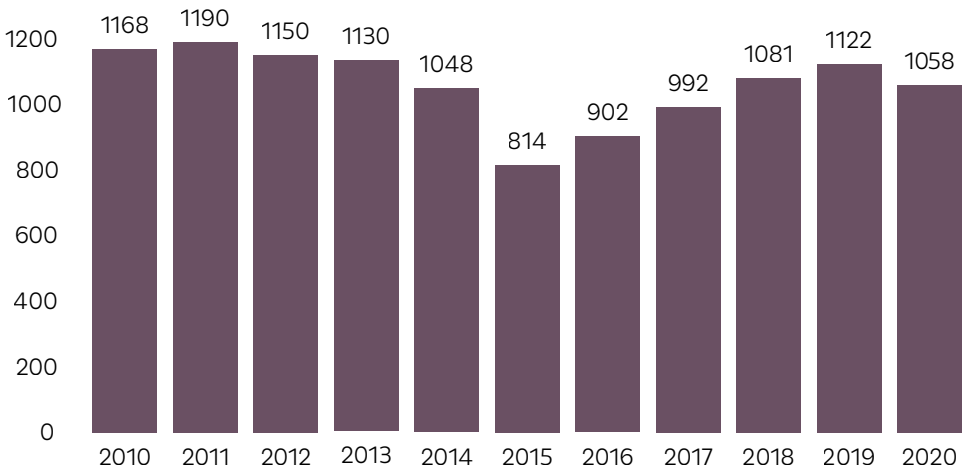


Chart 2. Cases received by the general units of the prosecution service, 2010-2020[59]

The prosecution service handled the received cases with a varying degree of efficiency. The graph shows that the changes introduced in 2016 resulted in a significant decrease in the efficiency of handling the influx of new cases over a two-year period. It was not until five years after the adoption of the new law that the prosecution service was again able to handle a larger number of cases as compared to the number of received cases.

59 Based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

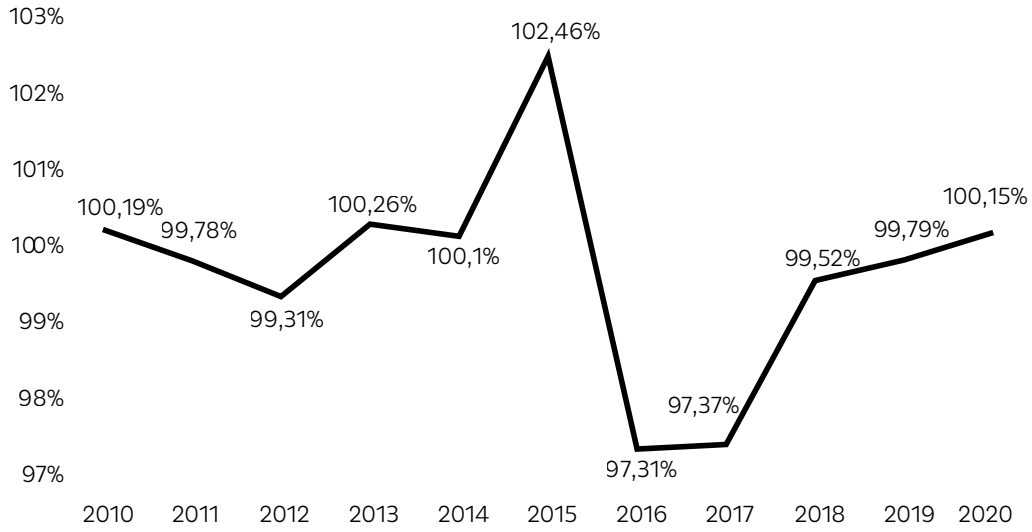


Chart. 3 Effective handling of new cases indicator, 2010-2020[60]

The 2016 changes also had a significant qualitative impact on the work of the prosecution service. They influenced decisions taken by prosecutors in a statistically meaningful way. A comparison of the number of initiated cases and the total number of cases annually dealt with by the prosecution service shows a significant decrease in the number of cases in which law enforcement authorities decided to launch preliminary proceedings. In 2010-2015, the ratio of the numbers of initiated preliminary proceedings ("initiated cases") to the number of cases of suspected crimes notified to prosecution service ("received cases") was 60-64% but after 2015 the figure has been steadily declining, reaching the low of 53% in 2020. This means that almost every second person seeking state protection is confronted with a decision not to investigate their complaint.

60 The ratio of handled vs. received cases annually. Authors' own elaboration based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

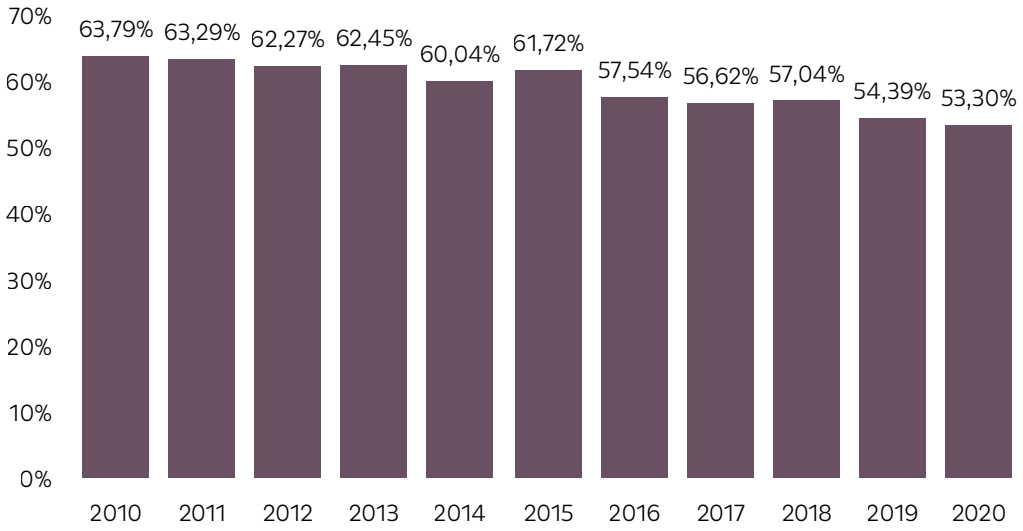


Chart 4. Ratio of initiated vs. received cases[61]

Another interesting comparison concerns the reasons for prosecutorial decisions to discontinue preliminary proceedings. During the discussed period of 12 years, the number of cases in which prosecutors cited article 17 § 1 (2) of the Code of Criminal Procedure (the absence of legally defined elements of a prohibited act) as the grounds for discontinuing proceedings, increased by as much as 10 percentage points. On the other hand, there was a significant decrease in the number of cases discontinued under article 322 CCP applied *a contrario,* i.e. in a situation where the completed proceedings have not uncovered grounds for the filing of an indictment.

Notably, the vast majority of prosecutors' decisions to refuse the initiation of proceedings or discontinue proceedings are upheld at the judicial review phase. However, the number of cases in which courts allowed the party's interlocutory appeal against the prosecution's decision to discontinue the preliminary proceedings or to refuse to initiate proceedings has in fact increased by several percentage points, as compared to 2014 being the first year for which the relevant detailed statistics are available. For example, in 2019-2020, between 29-30% of interlocutory appeals against the discontinuation of proceedings were granted while the figure for 2014 was 27%. However, the situation with discontinued proceedings

61 Authors' own elaboration based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

was completely different in the years immediately following the most recent reforms of the prosecution service. During that period, nearly half of the interlocutory appeals was affirmed (46-47%).

At the same time, an emphasis must be placed on the deteriorating effectiveness of the work of the prosecution service. The negative developments in this area can be evidenced by such metrics as the increasing number of cases that have not been completed in a given reporting period, the number of suspended cases, as well as the number of complaints about the excessive length of preliminary proceedings.

Since 2016, there has been a steady increase in the number of suspended cases. This trend is partly driven by the increasing number of cases received by the public prosecution service. Nevertheless, a comparison of 2014 and 2020, the years in which a similar number of cases was received by the prosecution service (the difference being less than 10,000), shows that an increase in the total number of suspended cases amounting to no fewer than 34,000 cases. The number of cases pending for a period of 2-5 years and those pending for a period longer than 5 years is also growing. The recorded results for both categories have been the worst in the last 12 years, probably more.

Recent years saw the rise of another negative trend, the increasing number of preliminary proceedings which are not completed in a given calendar year. Reports of the National Prosecutor's Office show a growing number of protracted proceedings with a duration of over 12 months. In 2020, the total number of proceedings lasting more than 12 months reached the level of nearly 9,000 – for comparison, the figure recorded 12 years ago was less than 1,300. As many as 450 of those proceedings lasted longer than 5 years. Although the COVID-19 pandemic certainly had an impact on the above figure, earlier statistics should have been considered equally alarming.

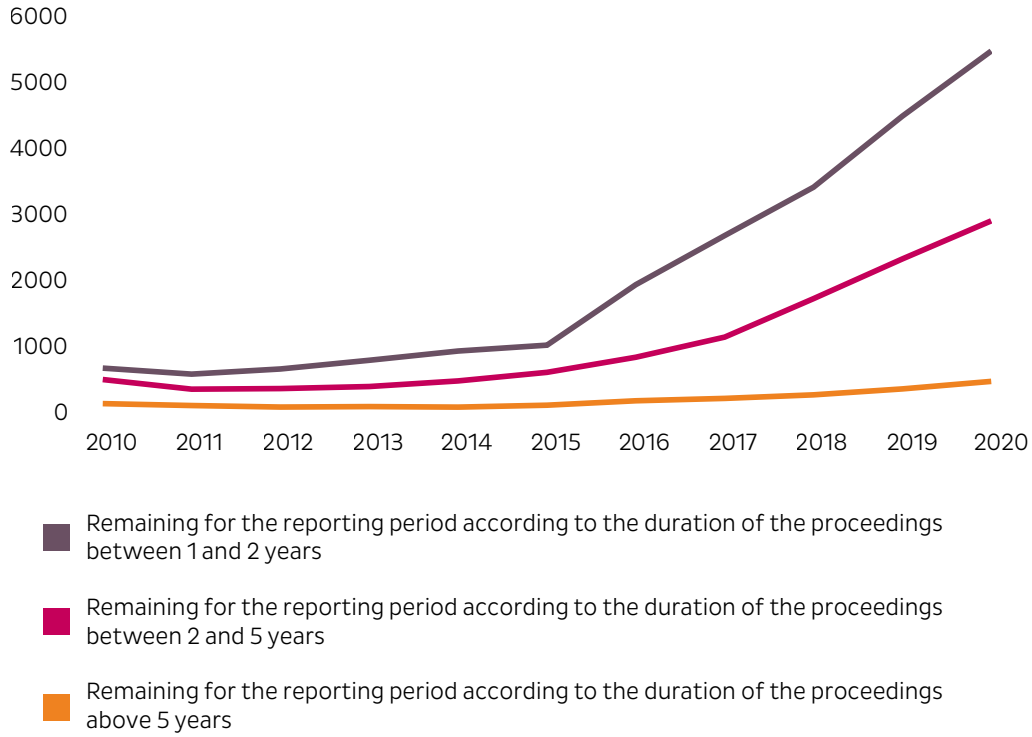
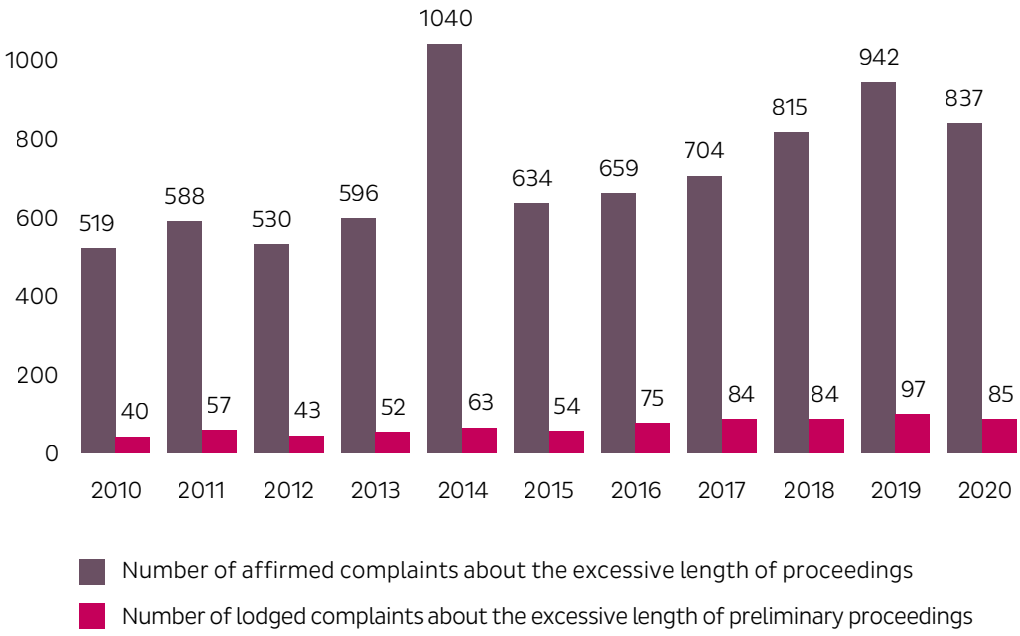


Chart 5. Cases left open for the next reporting period and their duration[62]

The number of lodged complaints about the excessive length of preliminary proceedings, including those granted by the courts, has also been growing faster than it would normally be associated with the overall increase in the number of cases dealt with by the prosecution service. In the period preceding the reform of the prosecution service, nearly 600 complaints about the excessive length of the proceedings were recorded on average per annum, as compared to 800 following the reform.

62 Based on 2010–2020 reports of the Prosecutor General and National Prosecutor.



Graph 6. Complaints citing the party's right to have their case examined in preliminary proceedings within a reasonable time[63]

3.2. PRE-TRIAL DETENTION REQUESTS

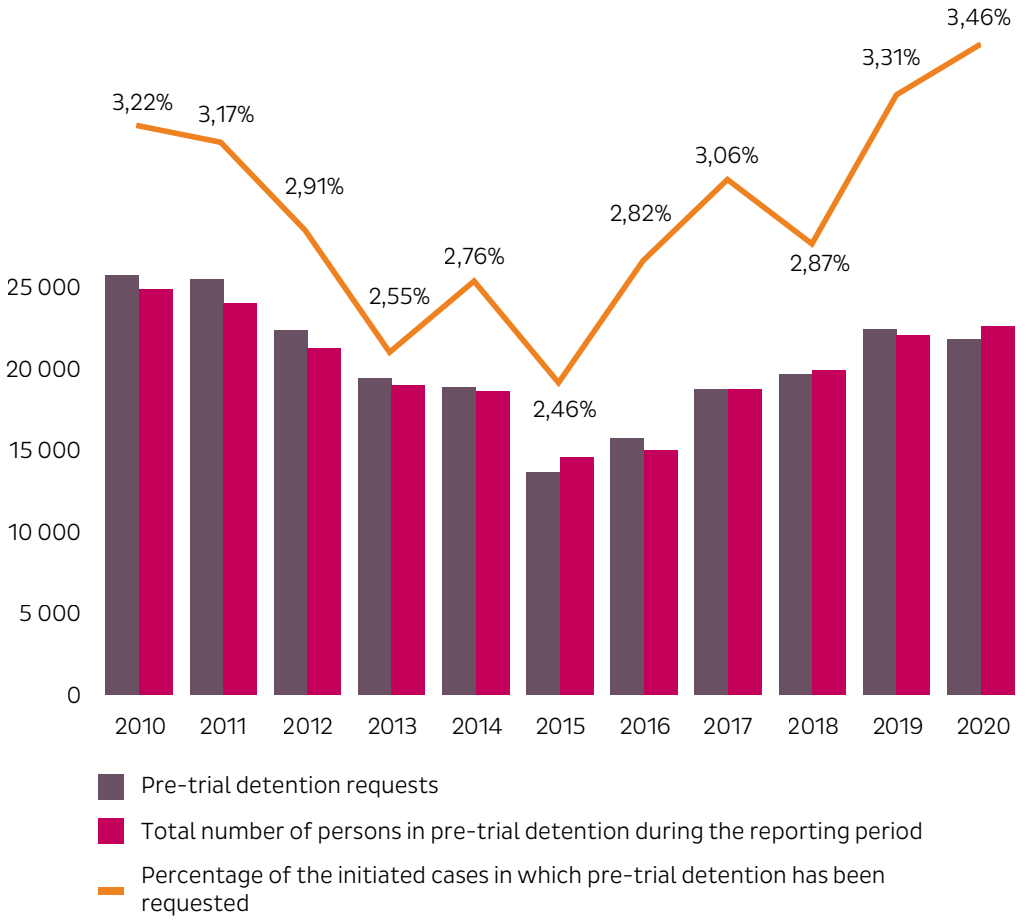
Since 2016, an increasingly higher number of requests for the application of pre-trial detention has been recorded, entailing a significant increase in the number of persons detained for the duration of criminal proceedings. In view of the extensive body of judgments of the European Court of Human Rights[64] in which the Court found the Polish justice system responsible for abusing pre-trial detention, these statistics can hardly be seen as a success of the reformed prosecution service. To put things in perspective, one should note that the National Prosecutor's Office itself has expressed a different opinion on the matter arguing that an increase in the number of pre-trial detention requests proves the reform successful.[65]

63 Based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

64 See e.g. *Burża v. Poland*, no. 15333/16, 18 October 2018; *Zieliński v. Poland*, no. 43924/12, 5 July 2018.

65 Prokuratura Krajowa, *Nowa Prokuratura...*, p. 13.

The increasingly frequent use of pre-trial detention cannot be explained only by the increase in the number of cases received or initiated by the prosecution service. However, the fact that pre-trial detention is so readily applied proves that – virtually year after year – the prosecution requests this measure in a large majority of the cases conducted. Interestingly, the increased use of pre-trial detention is not accompanied by the more frequent application of non-custodial preventive measures. Non-custodial measures are applied roughly as frequently as before, in 7% to 9% of the initiated cases.



Graph 7. Pre-trial detention requests, number of persons in pre-trial detention and the percentage of initiated cases in which pre-trial detention has been requested[66]

66 Authors' own elaboration based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

A consequence of this situation is a steady increase in the number of persons held in pre-trial detention. Furthermore, as the statistics highlight, the number of cases involving pre-trial detention applied for at least six months is also on the rise. This is a decisive reversal of the trend observed in 2010-2015. While the number of persons held in pre-trial detention for a period longer than 12 months in 2011 did not exceed 290, in 2020 it was as high as 787.

Duration of pre-trial detention	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
More than 6 months, less than 1 year	2310	2105	2310	1689	1763	1432	1538	2177	2717	2915	2920
More than 1 year, up to 2 years	278	283	278	244	164	157	130	215	452	535	697
More than 2 years	11	8	11	6	14	11	21	18	35	76	90

Table 1. Number of persons put in pre-trial detention in 2010-2020, broken down by duration of detention[67]

3.3. INDICTMENTS FILED

Since 2016, there has been a steady decrease in the share of prosecutorial decisions to file an indictment in relation to the overall number of cases closed in a given reporting period. In practical terms, this means that the prosecution service is less likely to bring cases to courts and more frequently chooses other options of closing the proceedings.

Equally importantly, the collected data show a sharp decrease in the number of cases in which the indictment included a motion for conviction without trial under article 335 CCP. Article 335 enables the prosecutor and suspect to enter into a settlement regarding the criminal sanction imposed for a less serious offence. In the absence of the victim's objection, the measure allows for the quick completion of court proceedings, "freeing up" resources of the justice system to be used in other cases. In the 2015-2020 perspective, the number of indictments with a motion for conviction without trial decreased by two-thirds.[68]

67 Based on 2010-2020 reports of the Prosecutor General and National Prosecutor.

68 The decrease can be partly attributed to the change in the requirements for sentencing without trial, introduced in 2015. At that time, the rules governing the application of that measure were

3.4. EFFECTIVENESS OF THE PROSECUTION SERVICE

With minor exceptions, institutional changes in the prosecution service have not had a broader impact on the attitude of criminal courts towards the work of the prosecutor's offices, and specifically in respect of their applications, means of challenge and procedural decisions. The percentage of granted prosecutorial pre-trial detention requests remained very high (88%–92% in 2015–2020). There was also a high percentage of the detained persons who has been convicted by the first instance court (on average, 87%). Almost 2 out of each 3 appeals filed by prosecutors in 2016–2020 were – at least on some counts– affirmed by appellate courts. This means that only a marginally "worse" prosecution's performance is observed in this area, as compared to 2010–2015. In the period under review, there is also a noticeable increase in the number of cassation appeals brought by the Prosecutor General, with a relatively high number of cassation appeals having been granted (on average, 64%, as compared to the average of 57% for 2010-2015).

All these statistics show that the emerging allegations of lack of independence of the prosecution service have not, statistically speaking, affected the courts' assessment of procedural decisions taken by prosecutors.

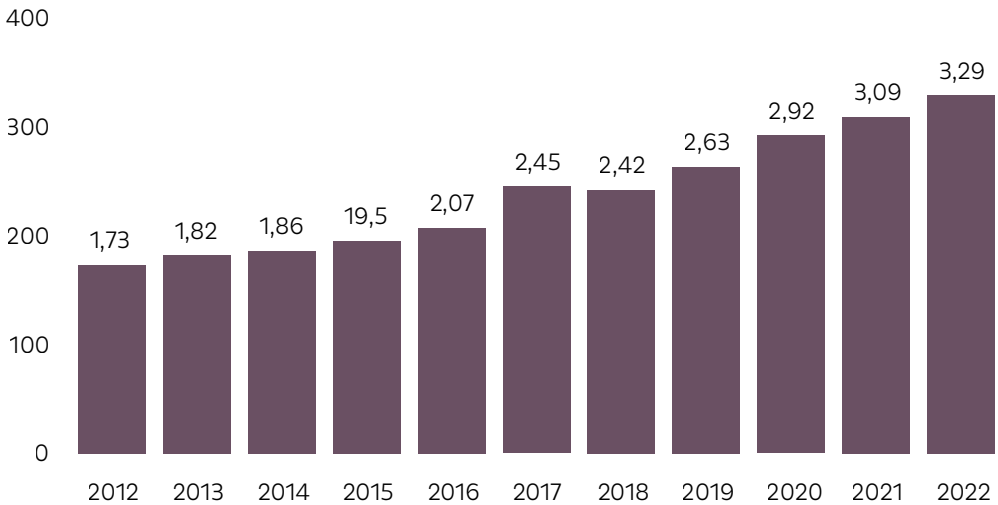


Chart 8. Budget of general units of the prosecution service[69]

clarified, indicating that it may only be used if the circumstances of the commission of the offence and the suspect's guilt does not raise doubts in view of the suspect's testimony.

69 Authors' own elaboration based on the 2011–2022 budget laws.

The lengthy investigations and an increase in the number of suspended or overlong cases stand in stark contrast to the figures for the prosecution service budget. The graph highlights the significant increase in state expenditure allocated to the operation of the prosecution service. These expenditures almost doubled over the 2012–2022 period. Moreover, in 2016–2017 the annual increases in budgetary funding reached an impressive level of 18% year-on-year. A noticeable beneficiary of these changes was the administrative staff of the public prosecution service, who successfully campaigned for the October 2019 salary increase.

3.5. ASSESSMENTS OF THE OPERATION OF THE PROSECUTION SERVICE IN PUBLIC OPINION POLLS

The reforms introduced did not contribute to the improvement of the public perception of prosecutors' work. Although the proportion of those giving a negative assessment of the work of the prosecution service in 2021 is lower compared to 2014, it is still higher than the percentage of respondents who give the prosecution service a positive assessment.

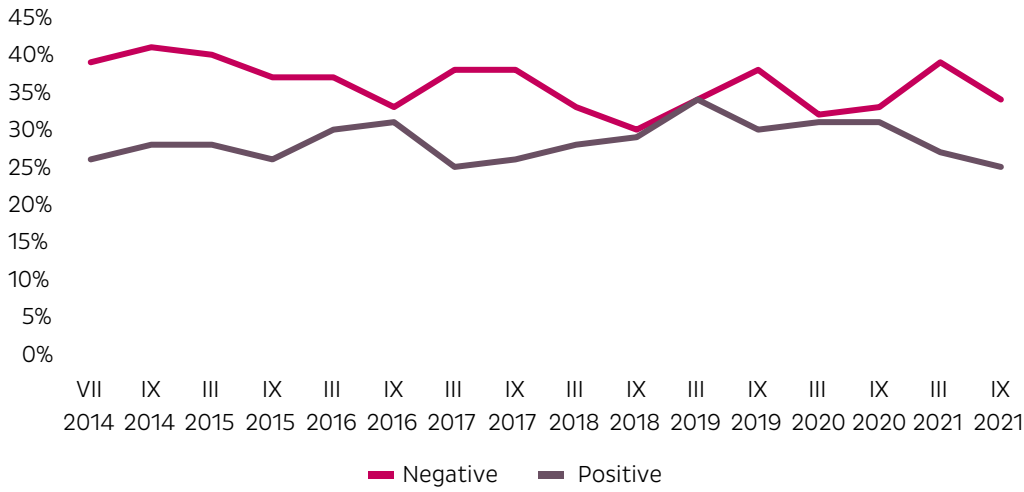


Figure 9. Evaluation of activities of the prosecution service[70]

70 CBOS, *Oceny działalności instytucji publicznych. Komunikat z badań nr 119/2021*.

4. Disciplinary proceedings concerning prosecutors

Under the 2016 Prosecution Service Act, a prosecutor is liable to disciplinary action for, inter alia, offending against the law, acting in a manner that may significantly impede the functioning of the judicial body or the prosecution service, acting in breach of the dignity of the office or acting in a public manner that is incompatible with the principle of the prosecutor's independence.

The disciplinary system of the public prosecution service consists of a disciplinary tribunal attached to the Prosecutor General, which adjudicates as a court of first instance, and the Disciplinary Chamber of the Supreme Court, which adjudicates as an appellate court or a court of first instance in disciplinary cases that involve a criminal offence. Judges of the disciplinary tribunal are appointed by the Prosecutor General for a four-year term (under the law in force by 2016, the judges were elected by the meeting of prosecutors of the Prosecutor General's Office and prosecutors' assemblies of the appellate prosecutor's offices). Also, the president and deputy president of the disciplinary tribunal are nominated by the Prosecutor General (and not by the disciplinary judges themselves as was the case under the pre-2015 legislation).

The Disciplinary Chamber of the Supreme Court was established under the Supreme Court Act adopted in December 2017. Since the moment of its creation, legal concerns have been expressed as to the status and organisation of the Chamber, as well as the appointments, status and independence of its judges.

Disciplinary proceedings are conducted by the Disciplinary Officer of the Prosecutor General and 13 of his deputies appointed in all prosecutorial regions. The Disciplinary Officer is selected by the Prosecutor General from among the prosecutors (the "old" law

provided that the college of prosecutors of appellate prosecutor's offices issued an opinion on candidates for this position). Under the Prosecution Service Act, the Prosecutor General appoints the Disciplinary Officer of the Prosecutor General for a term of 6 years; regional disciplinary officers are appointed for a term of 4 years. In practice, however, as the Ombudsman and media[71] have pointed out, the Prosecutor General did not appoint prosecutors to serve as regional disciplinary officers for a specific term, but only to "perform duties of disciplinary officers" or as "acting disciplinary officers" (neither of these roles is prescribed by the Prosecution Service Act). In such a situation, the persons appointed to such roles may be dismissed at any time because the performance of their functions is not guaranteed by a term of office established in law. In his statement to the Prosecutor General, the Ombudsman also noted that procedural decisions taken by persons performing these functions may be challenged because they are not issued by persons properly appointed to serve as disciplinary officers.

The Prosecutor General's disciplinary powers also include the authority to demand initiation of disciplinary proceedings against a given prosecutor and the appointment of a Disciplinary Officer of the Minister of Justice to conduct a specific case concerning a prosecutor.

Another significant change under the new measures concerning disciplinary proceedings of prosecutors is also the rule that such proceedings are to be open to the public.

4.1. SELECTED EXAMPLES OF REPRESSIVE ACTIONS AGAINST PROSECUTORS

Disciplinary proceedings

Since 2016, the media and social organisations have documented an increasing number of disciplinary proceedings taken against prosecutors including those who expressed reservations about the direction of reforms in the prosecution service.

71 Rzecznik Praw Obywatelskich (Polish Ombudsman), *Prokuratorscy rzecznicy dyscyplinarni mogą być w każdej chwili odwołani. RPO pisze do Prokuratora Generalnego* (accessed on: 03.02.2022).

Krzysztof Parchimowicz, former chairman of the independent association of prosecutors Lex Super Omnia, was one of the prosecutors targeted by a substantial number of active disciplinary proceedings. He has been the defendant in 17 disciplinary actions concerning, among other things, his critical statements about the situation in the prosecution service.[72] Disciplinary proceedings initiated against Mr Parchimowicz concern matters such as his public statements regarding reforms of the prosecution service, opposition to superiors' instructions, alleged irregularities in proceedings conducted by the prosecutor and an alleged delay in taking steps in other proceedings, as well as his failure to inform the superiors about the submission of an application to the European Court of Human Rights in relation to the decision to demote Mr Parchimowicz and other prosecutors. In July 2021, the Disciplinary Chamber examined two cases in which Mr Parchimowicz was accused of negligence in the performance of his duties and of submitting a statement in defence of a judge named in a reportedly stigmatizing communication of a regional prosecutor's office. The proceedings in both cases were discontinued by the Disciplinary Tribunal attached to the Prosecutor General. Following an appeal of the Disciplinary Officer, the Disciplinary Chamber set aside both decisions and ordered a re-examination of the cases.[73]

Since 2016, the Disciplinary Officer has initiated many proceedings in relation to public statements of prosecutors. One of the first of such proceedings concerned prosecutor Beata Mik. Ms Mik is the author of publications regularly appearing in newspapers and law journals over the last two decades. In 2016, a superior prosecutor withdrew her official permission to publish, but Ms Mik continued her journalistic activities. In 2018, a disciplinary tribunal passed an official reprimand[74] on prosecutor Mik, but the Disciplinary Chamber of the Supreme Court acquitted her of any wrongdoing.[75] A similar procedure was initiated against prosecutor Wojciech Sadrakuła who publicly criticised the changes concerning the Constitutional Court introduced in 2016. In November 2021, the Disciplinary Chamber reprimanded Mr Sadrakuła in a final and unappealable ruling.[76]

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72 E. Ivanova, Ścigany prokurator Parchimowicz. Nielegalna Izba Dyscyplinarna kasuje korzystne dla niego orzeczenia dyscyplinarne, Wyborcza.pl (accessed on: 17.02.2022).

73 Decision of the Disciplinary Chamber of 6 July 2021, case no. DO 78/20.

74 Onet.pl, "Prokurator Beata Mik upomniana za pisanie felietonów", (accessed on: 17.02.2022).

75 Łukaszewicz A., "SN: prokurator Beata Mik była pisać do Rzeczpospolitej" (accessed on: 17.02.2022).

76 M. Jałoszewski, Oko.press, "Nielegalna Izba Dyscyplinarna skazała prokuratora Sadrakułę, który bronił konstytucji i TK" (accessed on: 17.02.2022).

The disciplinary proceedings against another prosecutor, Andrzej Kaucz, concerned, among other things, his media statements about the reforms of the prosecution service. Proceedings in these cases were twice discontinued but following an appeal of the National Prosecutor, disciplinary action against Mr Kaucz was initiated for the third time (the prosecutor died when the proceedings were pending).

Disciplinary proceedings were launched against prosecutors Ewa Wrzosek, Piotr Wójtowicz, Katarzyna Gembalczyk and Dariusz Korneluk in response to their involvement in the advocacy of rule of law and independence of the justice system.[77] The allegations against them related to their public statements as well as the publication of press releases.

Similar proceedings, concerning the content of prosecutors' press articles or their statements made during media appearances, were initiated against, among others, Jacek Bilewicz and Jarosław Onyszczuk (publications in *Rzeczpospolita*, a daily newspaper), Bogusław Olewiński (statement for a TV station) and Mariusz Krason (statement for a daily newspaper). However, these proceedings did not result in disciplinary charges. All the prosecutors mentioned above are members of the Lex Super Omnia association.[78]

Secondment of prosecutors to other units of the prosecution service

Another form of repression against prosecutors is their mandatory assignment to work in other units of the prosecution service for a period of 6 months.

In 2019, Mariusz Krasoń, a prosecutor of the Regional Prosecutor's Office in Kraków, was given a six months secondment to the District Prosecutor's Office in Wrocław. The decision to transfer the prosecutor was related to his public activities, including statements in defence of the independence of the prosecution service, as well as the fact of him being an initiator of the adoption by the professional association of prosecutors of a resolution

77 Jałoszewski M., Oko.press, "Niezależni prokuratorzy ścigani i nękani dyscyplinarkami [PUBLIKUJEMY LISTĘ]", (accessed on: 17.02.2022).

78 *Ibid*.

critical of the changes in the prosecution service. In June 2021, the Regional Court in Kraków ruled that his secondment had been unlawful.[79]

Almost immediately after the end of his Wrocław assignment, Mr Krasoń was seconded to the District Prosecutor's Office in Kraków and then, in January 2021, once again transferred together with six other prosecutors. While prosecutor Krasoń was sent to another unit of the prosecution service in Kraków, other prosecutors were transferred to cities located far away from their original workplaces. For example, Katarzyna Kwiatkowska was transferred from a prosecutor's office in Warsaw to Golub Dobrzyń, Jarosław Onyszczuk was transferred from Warsaw to Lidzbark Warmiński, Ewa Wrzosek – from Warsaw to Śrem and Artur Matkowski was forced to move from Poznań to Rzeszów. All these individuals are active members of the Lex Super Omnia association.

Legal proceedings against prosecutors

Since 2016, also criminal and civil proceedings have been brought against some prosecutors.

In 2020, the Internal Affairs Department of the Prosecution Service launched proceedings against prosecutor Ewa Wrzosek. The case is related to Ms Wrzosek's decision to initiate criminal proceedings regarding the so-called "postal elections", i.e. the organisation of the presidential elections by postal voting in May 2020 during a pandemic emergency. The proceedings are still pending.[80] In December 2021, the media revealed that Ms Wrzosek was exposed to the *Pegasus* spy software used to obtain virtually unlimited access to the targeted person's phone, including the possibility of remotely activating audio and video recordings without the targeted person's consent.[81]

In February 2021, the National Prosecutor's Office announced that it would file a lawsuit against prosecutor Katarzyna Kwiatkowska in connection with her public statements

79 TVN24.pl, "Delegacje prokuratora Krasonia 'bezsprzecznie bezprawne'. 'Tak nie wolno robić'" (accessed on: 17.02.2022).

80 Gajos-Kaniewska D., *Rzeczpospolita*, "Chcą posłać prokurator Wrzosek do więzienia za śledztwo ws. wyborów kopertowych" (accessed on: 17.02.2022).

81 Bajak F., Gera V., AP News, "AP Exclusive: Polish opposition duo hacked with NSO spyware" (accessed on: 17.02.2022).

which allegedly violated the interests of the Prosecutor's Office. The total value of the remedies sought by the National Prosecutor's Office (including the cost of apologies and payments for a good cause) exceeds PLN 2 million.[82]

82 Jędrzejczyk A., Oko.press, "Nad prokurator Kwiatkowską wisi pozew o 2 mln zł. 'Jeśli myślą, że mnie upokorzą, to się mylą'", (accessed on: 17.02.2022).

5. Selected examples of proceedings conducted by the prosecution service

Since 2016, the increasing political involvement of the prosecution service has become evident. This state of affairs is reflected, inter alia, in procedural decisions taken by the prosecution service, which are assessed to be controversial because of the persons concerned or the spheres of public life to which they relate. These decisions involve, most of all, presenting charges or filing indictments, on the one hand, and refusing to instigate (or discontinuing) criminal proceedings in specific cases, on the other.

5.1. CASES CONCERNING THE INTERESTS OF THE RULING MAJORITY

Investigation into the finances of the United Poland party

The case involving the finances of United Poland (*Solidarna Polska*) clearly shows the danger that results from the possibility of influencing the course of criminal proceedings in cases concerning the interests of the parties forming the governing majority in a situation where a member of this party is also the Prosecutor General.

In 2016, the weekly *Newsweek* revealed that the European Parliament's political faction MELD, which includes the political party of the Polish Minister of Justice/Prosecutor General, Zbigniew Ziobro, financed a conference held by United Poland. The conference, for which MELD paid about EUR 40,000 with the funds of the European Parliament, was

supposed to discuss the EU climate policy and take place on 30 June 2013 in Kraków.[83] In fact, instead of the climate conference, United Poland held a party convention on that day that brought together 1200 participants under the slogan *A new state, new constitution*. The analysis of the available recordings shows that climate issues were barely touched on during the conference.

As a result of a notification of a suspected criminal offence filed on 26 January 2017 by parliamentarians of the opposition, the Circuit Prosecutor's Office in Warsaw initiated an investigation into "the appropriateness of obtaining funds from the European Union budget for the organisation (...) of the so-called climate conference on 30 June 2013 in Kraków" and two other events held by other parties.[84] According to the information from the National Prosecutor's Office, Zbigniew Ziobro was not to supervise the ongoing proceedings.

Following a nearly 3-year long investigation, in October 2019, the Circuit Prosecutor's Office in Warsaw took a decision to discontinue the proceedings. According to some excerpts from the statement of grounds for the decision disclosed by the media, the Prosecutor's Office concluded that during the conference "matters concerning the climate package were present and related to the national policy, including the impact of the climate package on energy prices in Poland".[85] The Prosecutor's Office also pointed out that the issue of assessing the legitimacy of spending money obtained from MELD is a matter for the supervisory bodies of the European Parliament and the European Union, "including OLAF, which conducts proceedings in this regard, but they have been pending for 4 years and have not ended with the formulation of final conclusions yet".

83 W. Cieśla, Newsweek.pl, "Partyjny kongres, który udaje konferencję o klimacie – za pieniądze europarlamentu" (accessed on: 17.02.2022).

84 Dziennik.pl, "Śledztwo ws. finansowania konferencji i kongresów Solidarnej Polski, PO i PSL oraz SLD" (accessed on: 17.02.2022).

85 M. Baczyński, Onet.pl, "Zbigniew Ziobro nadzorował śledztwo w sprawie nielegalnego finansowania własnej partii. Zostało umorzone. Znamy oficjalne uzasadnienie" (accessed on: 17.02.2022).

Discontinuation of proceedings in the case of refusal to publish the Constitutional Court's judgment

The investigation related to the refusal to publish the Constitutional Court's judgment of 9 March 2016 (case no. K 47/15) is an example of criminal proceedings that have been discontinued by the prosecution service in circumstances causing reasonable suspicion that political pressure could have been exerted. In the said judgment the Constitutional Court found that provisions of the newly-adopted Constitutional Court Act were unconstitutional.

Despite the constitutional obligation to immediately publish the ruling in the Journal of Laws, the government refused to do so and, as it later became known, the relevant instructions were issued personally by the then prime minister Beata Szydło. As a result, several organisations (including the Helsinki Foundation for Human Rights) filed a notification of a suspected offence of a failure to fulfil obligations by the Council of Ministers, and the prosecution service has initiated an investigation into the matter. However, this investigation was soon discontinued, and in the justification of the decision the prosecution service argued, among other things, that the Prime Minister's decision not to publish the judgment was taken "in the public interest".

The decision of the prosecution service was challenged by the HFHR, as a result of which the court decided in October 2016 to repeal it and ordered to re-open the preliminary proceedings. However, on 10 February 2017, the prosecution service again discontinued the proceedings, this time arguing that the refusal to publish the judgment of the Constitutional Court did not present any elements of a criminal offence.

Indictment of a participant in the accident involving Prime Minister Beata Szydło

In another case concerning then Prime Minister Beata Szydło, a prosecutor's office decided to file an indictment against a young motorist, Sebastian Kościelnik, who was accused of causing a traffic accident in Oświęcim in February 2017. In this case, the victims were Beata Szydło and a member of her security detail, an officer of the Government Protection Bureau (*Biuro Ochrony Rządu*, BOR).

The court of first instance found that Sebastian K. caused the accident but did not issue a criminal conviction conditionally discontinuing the proceedings.[86] The court found, in particular, that a driver of the government motorcade was also at fault.

The prosecution service refused to initiate criminal proceedings against the BOR driver, arguing that Sebastian Kościelnik was fully responsible for causing the accident. In addition, the prosecution service appealed against the judgment conditionally discontinuing the proceedings in Mr Kościelnik's case. In the appeal, the prosecution service demanded the judgment be amended by finding the accused guilty of the offence and imposing a penalty of the restriction of liberty (community service) for a period of one year.[87] The prosecution service also questioned the credibility of the 13 witnesses summoned by the defence who, according to the prosecution, should have been subjected to a psychological examination due to their addiction to alcohol.

At the time this report is written, the appeal proceedings are pending before the Regional Court in Kraków. In December 2021, *Gazeta Wyborcza* published an interview with a retired officer of the State Protection Service (*Służba Ochrony Państwa*, formerly named *Biuro Ochrony Rządu*, BOR) who was allegedly travelling in the motorcade when the accident happened.[88] He revealed, among other things, that BOR officers testifying in the investigation as witnesses had been previously instructed by their superiors as to the content of the testimony and, as a result, untruthfully confirmed that the motorcade vehicles had used not only light signals but also sound signals (which would give them the status of privileged vehicles and right of way on public roads). In light of the disclosed information, the defence lawyer of Sebastian Kościelnik filed a motion with the Regional Court in Kraków requesting the questioning of all officers of Prime Minister Beata Szydło's security detail on the day of the accident.[89]

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86 Tvn24.pl, "Zderzył się z rządową kolumną Beaty Szydło. Sąd wydał wyrok w sprawie kierowcy seicento. Będzie apelacja", (accessed on: 17.02.2022).

87 A. Drożdżak, Gazetakrakowska.pl, "Wypadek Beaty Szydło w Oświęcimiu. Są już apelacje obrony i prokuratora" (accessed on: 17.02.2022).

88 W. Czuchnowski, Wyborcza.pl, "Oficer BOR: Sumienie każe mi wyznać prawdę o wypadku premier Beaty Szydło", (accessed on: 17.02.2022).

89 J. Sidorowicz, krakow.wyborcza.pl, "Wypadek Szydło. Jest wniosek o przesłuchanie oficerów BOR. 'Mogli składać fałszywe zeznania'" (accessed on: 17.02.2022).

Refusal to initiate proceedings in the case of "two towers"

Recent years have also seen the involvement of the prosecution service in cases involving key politicians of the ruling majority and businesspeople.

In January 2019, a series of publications by *Gazeta Wyborcza* exposed the behind-the-scenes negotiations between Jarosław Kaczyński, the leader of Law and Justice, and the Austrian entrepreneur Gerald Birgfellner over a plan to build two high-rise buildings on a Warsaw plot of land owned by a company named Srebrna.[90]

After the transaction failed to materialise, Gerald Birgfellner's attorneys, Roman Giertych and Jacek Dubois, notified the prosecutor's office of the possibility that Mr Kaczyński had committed fraud. Although article 307 of the Code of Criminal Procedure provides for a maximum period of 30 days to verify the information obtained about the commission of an offence before the formal initiation of the preliminary proceedings, the preliminary inquiry in this case lasted for several months.

Eventually, after its completion in October 2019, the prosecution service refused to initiate criminal proceedings in the case of "two towers", finding, in particular, that "there were no circumstances ... indicating a justified suspicion that the offence of fraud was committed", and the "collected and meticulously analysed ... evidence clearly showed that there were no circumstances indicating a justified suspicion that the offence of fraud was committed"[91]. The decision, challenged by the lawyers of Mr Birgfellner, was later (in 2020) upheld by a decision of the Regional Court in Warsaw, which assessed the prosecutorial investigation as "thorough and accurate".[92] As pointed out by Mr Birgfellner's legal representatives, the court criticised the conduct of the proceedings by the prosecution service in the verbal justification of the decision but found that, despite the fact that

90 Wyborcza.pl, "Taśmy Kaczyńskiego. Posłuchaj nagrania prezesa PiS [AUDIO I STENOGRAM]" (accessed on: 17.02.2022).

91 Polsatnews.pl, "Prokuratura odmówiła wszczęcia śledztwa ws. budowy 'dwóch wież'. Dwa dni przed wyborami", (accessed on: 17.02.2022).

92 Polstanews.pl, "Sąd zdecydował w sprawie śledztwa dt. budowy 'dwóch wież'", (accessed on: 17.02.2022).

provisions had been violated, the decision not to initiate the proceedings should be upheld.[93]

Discontinuation of proceedings in the case of Daniel Obajtek

The highly politically charged Daniel Obajtek's case is another example of how certain criminal proceedings are affected by changes to the law on the functioning of the prosecution service.

Daniel Obajtek, a trusted confidante of highest-ranking members of the ruling majority, is the CEO of the state-owned oil concern Orlen. In 2013, the prosecutor's office in Ostrów Wielkopolski filed an indictment charging Mr Obajtek with the offence of fraud to the detriment of the company Elektroplast (for the amount of approximately PLN 700,000) and "passive corruption" (accepting a financial benefit of PLN 50,000).[94] Following the merger of the roles of the Minister of Justice and the Prosecutor General, the proceedings were transferred to another unit of the prosecution service in April 2016. The prosecutors in charge of the case took advantage of a transitional provision introduced in August 2016[95] and requested the court to return the pending case to preliminary proceedings in order to take supplementary steps. Under the provision in question, the court was obliged to grant the request. Later, in June 2017, the prosecution invoked the same provision and submitted a new indictment to the court, which no longer named Mr Obajtek as a suspect.[96]

The line of inquiry involving Daniel Obajtek was transferred to proceedings conducted by the Małopolska local branch of the National Prosecutor's Office, which were later

93 K. Sobczak, Prawo.pl, "Sąd: Prokuratura prawidłowo prowadziła śledztwo w sprawie wież spółki Srebrna" (accessed on: 17.02.2022).

94 A. Kondzińska, I. Szpala, Wyborcza.pl, "Obajtek, 'Prezes', oszustwa i łapówka. Szczegóły aktu oskarżenia, który prokuratura Ziobry wycofała z sądu" (accessed on: 17.02.2022).

95 Article 5 of the Act of 10 September 2016 amending the Code of Criminal Procedure, the Doctor and Dentist Professions Act and the Patient Rights and Ombudsman for Patient Rights Act (Journal of Laws, item 1070).

96 E. Siedlecka, Polityka.pl, "'Lex Obajtek'? PiS znów tworzy prawo na zamówienie" (accessed on: 17.02.2022).

discontinued. In January 2018, the Regional Court in Kraków upheld the decision to discontinue the proceedings.

5.2. POLITICALLY MOTIVATED USE OF CRIMINAL PROCEEDINGS IN CASES CAUSING PUBLIC OUTRAGE

In recent years, there has also been a clear tendency on the part of the Minister of Justice/Prosecutor General to use criminal proceedings in cases that have caused most public outrage in Poland to advance his day-to-day political needs. The information from active investigations revealed by the Prosecutor General was also sometimes used as a justification for instructing subordinate prosecutors to take certain steps in these investigations.

An example is the brutal murder of 10-year-old Kristina from Mrowiny, which took place in June 2019. While a large-scale manhunt for the perpetrator was still being carried out by the police supervised by a prosecutor's office (and one hour after the official press statement of the Circuit Prosecutor's Office in Świdnica denying that anyone was arrested in the case), the Polish Press Agency – quoting the Minister of Justice/Prosecutor General – reported the capture of a male suspect.[97] As Zbigniew Ziobro added, the prosecution service under his charge was to make "every effort to ensure that [the perpetrator] receives the most severe penalty possible". During a press conference held on the next day, Mr Ziobro informed that he instructed the prosecutors conducting the case to request the pre-trial detention of the suspect. He also pledged, in his capacity as the Prosecutor General, to spare no effort to ensure that "the most severe possible sentence provided for in Polish law will be handed down" in this case, "because such evil can only be repaid with the harshest possible punishment provided for in the Criminal Code" (i.e. the penalty of life imprisonment with the restricted possibility of applying for parole).[98] During the same conference, Mr Ziobro informed about the adoption by the Sejm of the amendment to the Criminal Code introducing the possibility of imposing a penalty of "absolute life imprisonment", which was prepared by the Ministry of Justice.

97 A. Dobkiewicz, Wyborcza.pl, "Ziobro ujawnia: 'Mężczyzna podejrzewany o zabójstwo 10-letniej Kristiny zatrzymany'. Śledczy nieoficjalnie: Doszło do kuriozalnej sytuacji" (accessed on: 17.02.2022).

98 Gazetaprawna.pl, "Ziobro ws. Zabójstwa 10-latki z Mrowin: Uczynię wszystko, by w tej sprawie zapadł najsurowszy wyrok" (accessed on: 17.02.2022).

The above case was one of many that the Minister of Justice/Prosecutor General discussed publicly. For example, when commenting on another offence committed against a child (the manslaughter of a three-year-old girl by her mother, which took place in 2021 in Poznań), Zbigniew Ziobro made public on social media drastic details of the incident, including a description of the stabbings inflicted on the victim, making all these comments during an ongoing investigation.[99] The Prosecutor General informed that the prosecution service had been instructed to charge the suspect in this case with a more serious offence (manslaughter with particular atrocity – an aggravated form of manslaughter), assessing that she had planned the crime "in cold blood". In a similar case, which took place earlier in 2021 and in which the child was alleged to have died as a result of a beating, the Minister of Justice/Prosecutor General tweeted about an order to detain the victim's parents and charge them with manslaughter and abuse with particular atrocity.[100]

5.3. CASES INVOLVING POLITICAL OPPONENTS

A number of cases from recent years indicate that the changes introduced by the ruling majority in the management and functioning of the prosecution service have led to its increasing politicisation.

The case of Getin Noble Bank – requests for the pre-trial detention of R. Czarnecki and P. Osiecki; arrest of R. Giertych

The case of Leszek Czarnecki, the owner of Getin Noble Bank, is a flagship example of the politicisation of the prosecution service.

In 2018, Mr Czarnecki revealed a recording of a conversation he had that year with the chairman of the Polish Financial Supervision Authority. During the conversation, the chairman of the Polish Financial Supervision Authority allegedly made a corruption proposal to Czarnecki, offering favourable treatment of Mr Czarnecki's business ventures in exchange for hiring a certain lawyer and paying him a very high fee.

99 Gazetaprawna.pl, "Ziobro interweniuje w sprawie dzieciobójczyni. Polecił zmienić zarzut na surowszy" (accessed on: 17.02.2022).

100 ZiobroPL (accessed on: 17.02.2022).

In August 2020, the prosecution service filed a motion for the pre-trial detention of Mr Czarnecki. However, he secretly left Poland in November 2018 and has since remained abroad. In the opinion of Mr Czarnecki's lawyers, the launch of criminal proceedings and the pre-trial detention request constituted direct repression for revealing corruption at Poland's top financial supervision agency.

In August 2018, the businessman Piotr Osiecki was put in pre-trial detention for a period of 3 months in another case involving Getin Noble Bank. The prosecution service accuses him of participating in a conspiracy to sell the company to an entity affiliated with Getin Noble Bank for "an excessively high price". Despite the court's decision ordering his release in exchange for financial surety, a prosecutor's office refused to grant Mr Osiecki's lawyers entry on its premises for several hours, preventing them from depositing the surety. Finally, Piotr Osiecki was released after the payment of a record-breaking surety of PLN 110 million.[101]

In addition, in October 2020, a day before the scheduled hearing on Mr Czarnecki's detention, one of his lawyers, Roman Giertych, was arrested by agents of the Central Anti-corruption Bureau acting on instructions from the prosecutions service, on charges of, inter alia, acting to the detriment of the company Polnord. A former politician (parliamentarian and deputy prime minister) and now practising lawyer Roman Giertych is known for his public criticism of the actions of the ruling majority. He has also represented opposition members and businessmen who have entered into disputes with the state in legal proceedings. While in custody, Mr Giertych allegedly collapsed and was taken to hospital, where a prosecutor presented him with charges and attempted to question him. According to case records, the lawyer was said to be unconscious and unresponsive, which – in the opinion of Mr Giertych's lawyer – means that the charges were not effectively presented and his client did not have the status of a suspect.[102] Due to Mr Giertych's consistent failures to appear on the summons from the prosecution service, prosecutors are considering requesting his pre-trial detention.[103] In December 2020, the court granted Roman Giertych's interlocutory appeal against the search of his law firm and ordered the

101 Forbes.pl, "Piotr Osiecki opuści areszt po wpłaceniu dodatkowej kaucji" (accessed on: 17.02.2022).

102 Tvn24.pl, "'Bez kontaktu, nieprzytomny'. Wyborcza ujawnia fragmenty protokołu z przesłuchania Giertycha" (accessed on: 17.02.2022).

103 Rp.pl, "Prokuratura wzywa mec. Giertycha. Może trafić do aresztu" (accessed on: 17.02.2022).

immediate return of the seized computers and documents. In January 2021, after hearing an interlocutory appeal concerning Mr Giertych's arrest and conveyance, a court found that these steps were unjustified and unlawful citing the absence of legal grounds.[104]

The case of the TVN cameraman who shot footage for reportage on neo-Nazis

In January 2018, the TVN TV station aired an episode of the programme *Superwizjer* entitled *Polish Neo-Nazis*. The episode featured the findings of a journalistic investigation, in which reporters recorded with a hidden camera the celebration of the 128th anniversary of Adolf Hitler's birthday, held in 2017 in a forest near Wodzisław Śląski. The footage showed, among other things, participants in the event, dressed in Wehrmacht uniforms, making Nazi gestures and toasts in honour of Hitler, surrounded by flags of the Third Reich, a burning swastika and an altar with the image of the Nazi leader.

The Prosecutor General ordered an investigation in the case, which was conducted by the Circuit Prosecutor's Office in Gliwice.[105] In the process, the Internal Security Agency (ABW) detained the organiser of the events and several of its participants linked to the neo-Nazi organisation Pride and Modernity. The detainees were charged, among other things, with promoting a totalitarian system.

In November 2018, citing the testimony of the organiser of the "Hitler's birthday", the wPolityce.pl portal wrote that the event was in fact commissioned by anonymous men who paid the organiser PLN 20,000.[106] The condition for receiving the payment was that a certain female participant, whom the portal identified as one of the Superwizjer journalists and a co-author of the reportage, would attend the event. This information was categorically denied by TVN, which announced it would file a lawsuit for the protection of the station's personality rights. The portal also revealed photographs from the case files of the proceedings, showing the cameraman of the Superwizjer crew, Piotr Wacowski,

104 Rp.pl, "Zatrzymanie Romana Giertycha było niezasadne i nielegalne – uznał sąd w Poznaniu" (accessed on: 17.02.2022).

105 Rmf24.pl, "Jest akt oskarżenia przeciwko organizatorom 'urodzin Hitlera'" (accessed on: 17.02.2022).

106 W. Biedroń, wPolityce.pl, "TYLKO U NAS. Znamy kulisy śledztwa w sprawie „urodzin Hitlera". W tle tajemniczy zleceniodawcy, duże pieniądze i dziennikarka TVN" (accessed on: 17.02.2022).

making a Nazi hand salute.[107] According to the authors of the publication, Wacowski voluntarily insisted "that one of the participants capture him next to a portrait of Adolf Hitler and the swastikas" and discussed political and philosophical issues with one of the participants of Hitler's birthday celebration, who testified that Wacowski "urged him to take illegal actions directed against immigrants".

In connection with the publication of wPolityce.pl, Prosecutor General Zbigniew Ziobro informed during a press conference on 8 November 2018 that one of the lines of the investigation conducted by the prosecution service was related to "the circumstances of fabricating this event for (...) a certain sum of money, which was obtained by the main organiser of this event"[108]. In addition, on 23 November 2018, ABW officers entered Piotr Wacowski's apartment and handed him a summons to appear at the Circuit Prosecutor's Office in Gliwice for questioning as a person suspected of promoting Nazism (contrary to article 256(1) of the Criminal Code)[109]. However, on 25 November 2018, the National Prosecutor's Office decided that bringing charges against Piotr Wacowski would be premature and cancelled the scheduled hearing date transferring the proceedings to the Circuit Prosecutor's Office in Katowice (where an investigation into the alleged payment for the organisation of Hitler's birthday by unknown men was conducted in parallel).

Finally, on 14 February 2019, due to the absence of any elements of a prohibited act, the Circuit Prosecutor's Office in Katowice discontinued the investigation involving the conduct attributed to Piotr Wacowski[110]. According to the comprehensive grounds for the decision of the prosecutor's office, the Nazi gestures made by the reporter were to make him more credible in the eyes of other participants in the event and thus achieve the goal of assumed identity journalism. According to the prosecutor's office, there was also no evidence of incitement to national hatred by the cameraman. The proceedings concerning

107 Gazetaprawna.pl, "Szokujące zdjęcia dziennikarza TVN z 'urodzin Hitlera'" (Accessed on: 16.11.2018).

108 A. Główczeski, N. Nowotnik, Gazetaprawna.pl, "Ziobro: jednym z wątków śledztwa dot. 'urodzin Hitlera' jest sprokurowanie tego zdarzenia za pieniądze" (accessed on: 17.02.2022).

109 Onet.pl, "PK o sprawie 'urodzin Hitlera': stawianie zarzutów operatorowi z TVN jest przedwczesne" (accessed on: 17.02.2022).

110 Tvn24.pl, "Śledztwo przeciwko operatorowi 'Superwizjera' umorzone. 'Brak znamion czynu zabronionego'" (accessed on: 17.02.2022).

the alleged commissioning of and payment for organising Hitler's birthday celebrations were also discontinued.

5.4. CASES INVOLVING LGBTQI+ COMMUNITIES

In recent years, the Prosecutor General and units of the prosecution service subordinate to him have been very active in relation to cases involving sexual orientation or gender identity. As a result, by exercising his powers to appeal or issue instructions in specific proceedings, the Prosecutor General has since 2016, contributed to increasing pressure on the LGBTQI+ community in Poland.

Indictment against IKEA store manager

In 2020 the prosecution service brought an indictment against an IKEA shop manager in connection with the dismissal of one of her employees[111].

On an internal employee forum, under an article describing the company's efforts to promote LGBTI equality, the employee placed posts calling homosexuality an "abomination" and quoted passages from the Bible which stated that gay people would be punished by death. The manager was accused of the offence of religious discrimination (restriction of rights based on religious affiliation).

Earlier, the Prosecutor General found the dismissal of the employee "absolutely scandalous" and instructed the prosecution to immediately investigate the case[112].

111 Prokuratura Okręgowa Warszawa-Praga w Warszawie (Circuit Prosecutor's Office Warszawa-Praga in Warsaw), Akt oskarżenia w sprawie ograniczenia praw pracowniczych ze względu na wyznanie (Indictment in a case involving a charge of restricting workers' rights on grounds of religion) (accessed on: 17.02.2022).

112 OKO.Press, "IKEA zwolniła za słowa o zabijaniu gejów. Zbigniew Ziobro i Piotr Duda oburzeni. Nie znają Kodeksu pracy?", (accessed on: 17.02.2022).

Prosecutor General's cassation appeal in the case of a Łódź printer

This case originated in 2015, when the defendant, an employee of a printing house in Łódź, refused to provide a service (preparing a roll-up) for a foundation acting for LGBT people. The man justified the refusal with his religious beliefs.

On 31 March 2017, the District Court for Łódź-Widzew found the employee guilty of a petty offence contrary to article 138 of the Petty Offences Code, namely "refusal of service without good cause". On 26 May 2017, the Regional Court in Łódź upheld the decision of the court of first instance. It was the landmark judgment stating that LGBT+ persons could not be discriminated against in their access to services because of their orientation[113]. The Prosecutor General filed a cassation appeal in favour of the defendant with the Supreme Court.

On 14 June 2018, the Supreme Court decided to dismiss the cassation appeal of the Prosecutor General in the widely reported case of the printer from Łódź[114]. The Supreme Court shared the view expressed by the courts of first and second instance, according to which Article 138 of the Petty Offences Code has acquired the value of an anti-discrimination provision, which implies the restriction of the right of a service provider to invoke religious beliefs as grounds for conscientious objection An individual worldview or a subjective understanding of the religion cannot, therefore, constitute a justified reason for a refusal to provide services within the meaning of Article 138 of the Petty Offences Code.

As the Supreme Court further noted, the right to act in accordance with one's own conscience is not restricted if the performance of a given service in an objective sense does not remain in obvious conflict with the values underlying the refusal to perform it, including constitutional rights and freedoms. As for the possible occurrence of such a conflict, it should always be assessed considering the factual circumstances of a given case. At the same time, the Supreme Court stressed that a refusal cannot, in any case, be justified by

113 Kampania Przeciw Homofobii, *Sprawa drukarza z Łodzi wraca do Sądu Najwyższego. To walka o praworządną Polskę!*, 7 December 2020.

114 Decision of the Supreme Court of 14 September 2018, case no. II KK 333/17.

individual qualities of the persons for whom the service is to be provided, e.g. religious beliefs, manifested views or sexual preferences.

The Supreme Court noted that the defendant had been motivated by his beliefs when denying services and therefore had no good cause to do so. Moreover, his involvement was solely reproductive and related to the performance of purely technical activities, because the ordered roll-up was an advertisement of the foundation containing its logo, and the content contained in it did not promote behaviour that could be contrary to the values of the Catholic faith professed by the defendant.

Although the decision of the Supreme Court to dismiss the cassation appeal was final, the proceedings in this case continued. In December 2017, the Prosecutor General applied to the Constitutional Court to examine the compliance with the Constitution of Article 138 of the Petty Offences Code (the provision which gave rise to punishing the printer). On 26 June 2019, the Constitutional Court declared that the said Article was contrary to the Constitution in its part reading as follows: "or intentionally, without good reason, refuses to provide a service which they are obliged to provide".[115] In connection with the decision of the Constitutional Court, on 30 December 2019 the Court of Appeal in Łódź, acting at the request of the prosecutor general, resumed the proceedings in the case and reversed the rulings of the courts of first and second instance that found the printer guilty of having committed a petty offence, and discontinued the petty offences proceedings in this case.

As a result of the appeal brought against the judgment of the Court of Appeal in Łódź by a legal representative of the subsidiary prosecutor (the foundation to which the service had been denied), the case was once again referred to the Supreme Court. The appeal of the legal representative concerned both the original ruling, namely the reopening of the proceedings and reversal of the judgments of the first and second instance courts, as well as the subsequent ruling that discontinued the proceedings. With the judgment of 8 December 2020, the Supreme Court, applying the literal wording of the provision of the Code of Criminal Procedure[116] *a contrario*, decided to disregard the appeal insofar as it concerned the original ruling and to uphold the judgment of the Court of Appeal in Łódź

115 Judgment of the Constitutional Court of 26 June 2019, case no. K 16/17.

116 Article 547 § 3, second sentence: "A judgment that acquits the accused or discontinues the proceedings may be contested by way of an appellate measure".

on the remaining counts[117]. Despite the "procedural" nature of the ruling, the Supreme Court also made a number of substantive remarks, noting, among other things, that the judgment of the Constitutional Court of 26 June 2019 may have undesirable consequences related to the possibility of submitting motions for the reopening of proceedings and, consequently, the revocation of the judgments issued and the discontinuation of proceedings in cases in which the defendants behaved in a reprehensible manner in the opinion of the Prosecutor General.

Cases concerning the transcription of civil registry records

In 2017, the National Prosecutor instructed prosecutors to participate in any proceedings regarding the transcription of foreign marriage certificates of same-sex couples.[118]

In addition, the prosecution service is also involved in proceedings concerning the transcription of birth certificates of children of same-sex couples. For example, in a 2019 case, in which the Supreme Administrative Court issued a resolution of 7 judges closing the possibility of transcribing birth certificates of children, the prosecution service sought recognition that transcribing birth certificates in which persons of the same sex are entered as parents is unacceptable.

5.5. INSTRUMENTAL USE OF THE EXTRAORDINARY APPEAL – EXAMPLES

From the outset, the introduction of the institution of the extraordinary appeal has raised significant questions regarding the possibility of using it as an instrument to achieve certain politically motivated objectives. In fact, in some of the appeals brought by the Prosecutor General, such motivations may have played a role.

117 Judgment of the Supreme Court of 8 December 2020, case no. II KA 1/20.

118 Prokuratura Krajowa (National Prosecutor's Office), *Niedopuszczalne jest zarejestrowanie w Polsce małżeństwa zawartego przez osoby tej samej płci*, 7 February 2017.

Case of Judge Waldemar Żurek

For example, the Prosecutor General brought an extraordinary appeal in a case to which judge Waldemar Żurek, a critic of the policy pursued by the Prosecutor General, was a party. The case concerned financial settlements between ex-spouses. The Prosecutor General argued that the ruling of the court of second instance violated the "principle of legality, the rule of law, procedural justice, as well as the right to a fair procedure, the principle of citizens' confidence in the state and the law made by it, and the principles of legal certainty and security". The Chamber of Extraordinary Control and Public Affairs of the Supreme Court based its decision on the fact that: "the version of events presented by the claimant is not reflected in the evidence gathered in the case file" and that "the courts of both instances ignored the defendant's claims that she was intimidated and blackmailed when concluding loan agreements". The appealed judgment was largely revoked and the action dismissed.[119] Since judgments of the Chamber of Extraordinary Control and Public Affairs are not subject to appeal, in the discussed case the court used the extraordinary procedure for amending the previous court rulings on the basis of a different assessment of the evidence. In a dissenting opinion to the judgment, a judge argued that the extraordinary appeal should be dismissed.[120]

The case of the crucifix in a teachers' room

The Prosecutor General also filed an extraordinary appeal against a teacher who removed the crucifix from a wall in the teachers' room and who felt discriminated against because of her views.

A regional court awarded her compensation and the appellate court upheld the ruling. The prosecution service brought a cassation appeal in this case, which was dismissed by the Supreme Court. In the extraordinary appeal, a prosecutor argued that the court "did not sufficiently explain what the applicant's discrimination on the grounds of her worldview and the related harassment consisted in the present case, and did not establish an adequate link between the claimant's worldview and the actions that could have

119 Judgment of 30 June 2021, case file no. I NSNc 79/20.

120 The dissenting opinion of Judge Jacek Widło to the judgment and the reasoning of the Supreme Court of 30 June 2021, case no. I NSNc 79/20.

satisfied criteria of discrimination in employment". The Chamber of Control found that the pleas put forward were the same as those previously raised in the cassation appeal and dismissed the appeal.[121] The Prosecutor General found that there had been no violation of the Equal Treatment Act.

The Ombudsman expressed a different view on the matter and requested that the extraordinary appeal lodged by the Prosecutor General be dismissed.[122]

Case brought by Lech Wałęsa against Krzysztof Wyszkowski

The Prosecutor General also filed an extraordinary appeal in the case of Krzysztof Wyszkowski, who was sued by former President Lech Wałęsa for accusing the latter of paid collaboration with the secret services of communist Poland. In 2011, the Court of Appeal finally ruled in favour of Mr Wałęsa. The Prosecutor General argued, among other things, that the decision violated the constitutional freedom of speech. In April 2021, 10 years after the decision of the Court of Appeal, the Chamber of Extraordinary Control and Public Affairs of the Supreme Court upheld the extraordinary appeal and set aside the contested part of the judgment.[123]

The case of Jerzy Urban

An example of the instrumental use of an extraordinary appeal in an ideologically motivated case is the proceedings involving Jerzy Urban, the editor-in-chief of the weekly magazine *NIE.* In December 2021, the media reported that the Prosecutor General had filed an extraordinary appeal against the final judgment acquitting J. Urban of the charge of offending religious feelings.[124]

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121 Decision of the Supreme Court of 14 September 2021, case no. I NSNc 104/21; Sn.pl, Sąd Najwyższy odrzucił skargę nadzwyczajną w przedmiocie odszkodowania za dyskryminowanie z naruszeniem przepisów Kodeksu pracy (accessed on 14.12.2021).

122 Response to the appeal.

123 Sn.pl, "Europejski Trybunał Praw Człowieka potwierdza rozstrzygniecie Sądu Najwyższego", 6 September 2021.

124 M. Mikowski, Gazetaprawna.pl, "Ziobro złożył skargę nadzwyczajną w sprawie uniewinnienia Urbana" (Accessed on 03.12.2021).

The case originated in 2012 when the weekly *NIE* published on the cover of one of the weekly's issues a satirical image of a surprised Jesus Christ inscribed in a road prohibition sign. The graphic was intended as an illustration for an article describing the decline in the number of believers in the Catholic Church.[125] In 2014, the prosecution service brought an indictment against Mr Urban to court, arguing that freedom of expression is not unlimited and that artistic expression must not be "insulting to others for no reason". Although the court of first instance found Jerzy Urban guilty and in 2018 sentenced him to a fine of PLN 120,000, as a result of an appeal lodged by the defence, the court of second instance reversed the judgment and remanded the case for reconsideration to the District Court for Warszawa-Mokotów. In 2020, the district court acquitted the editor-in-chief of *NIE* stating in particular that not every behaviour violating the standards of culture and customs can be treated as an insult. As the judgement was not appealed against in time by the prosecution service, it became final.

According to the Prosecutor General, who filed an extraordinary appeal in the case, the contested ruling of the District Court for Warszawa-Mokotów issued in 2020 violates the right to protection of freedom of conscience and religion of the victims. In his opinion, the court's findings also contradict the evidence gathered.

5.6. THE OPERATIONS OF THE PROSECUTION SERVICE AND INDEPENDENCE OF THE JUDICIARY

Given the constitutional role of the prosecution service, its activities that are part of the ruling parliamentary majority's strategy of limiting the independence of the judiciary are especially disturbing. These activities, diverse as they are, can be divided into several types of actions.

First of all, one should mention various activities taken by the prosecution service to challenge court rulings with the use of methods other than legal means of challenge. As part of these activities, the prosecution service disputes individual rulings in statements sent to the media or made at press conferences[126], calling the rulings "scandalous" or

125 Press.pl, "Tygodnik 'Nie' ukarany grzywną za okładkę ze zdziwionym Chrystusem", 22 July 2013.

126 M. Jałoszewski, "Sędzia zwolniła z aresztu prokuratora, bo immunitet uchyliła mu nielegalna Izba Dyscyplinarna", https://oko.press/sedzia-z-warszawy-zwolnila-z-aresztu-prokuratura/

qualifying them as "disgraceful"[127]. Their aim is to present the judiciary in a negative light, which is combined with the desire to show the leaders of the prosecution service as people who oppose erroneous court rulings in the name of public interest.

These activities also include a case recorded in Kraków, where prosecutors complained to the President of the Regional Court about a decision taken by a district court judge in a high-profile manslaughter investigation. The prosecutors demanded that this kind of practice (refusal to approve a search of a residential cell) should not happen again. To that end, they asked the President of the Court to circulate their letter to other judges in that judicial region.[128]

The illegitimate commencement of preliminary proceedings in cases directly concerning judges is another method used to interfere with the independence of judges. In this context, one should mention the case involving the death of the Minister of Justice's father, in which the prosecution service initiated an investigation into a procedural decision made by a judge in the course of the proceedings just before the delivery of the ruling by the judge. A similar mechanism was also applied in the case of judges deciding the case of secondment of the prosecutor Mariusz Krasoń. The investigation (currently discontinued) conducted at that time was aimed at verifying if they had not exceeded their powers, questioning the secondment of the prosecutor Krasoń to a remote unit of the prosecution service.[129] In another case, Warsaw prosecutors are currently investigating the possible liability of judges of the CJEU. The pre-trial proceedings are to provide them with answers as to whether the judges of the Court did not exceed their powers by issuing a ruling against Poland[130].

(accessed on: 15.02.2022).

127 Polsatnews.pl, "'Hańbiący wyrok. Prokuratura Krajowa przystąpi do postępowania'. Ziobro o sprawie Hansa G." (accessed on: 17.02.2022).

128 Sidorowicz J., Figurski P., "Prokurator się skarży, wiceprezes sądu upomina sędziów. 'Tak ma wyglądać niezawisłość według PiS?'" (accessed on: 17.02.2022).

129 Rp.pl, "Sprawa Krasonia. Prokuratura umorzyło śledztwo przeciwko 13 sędziom" (accessed on: 17.02.2022).

130 Partyk A., Rojek-Socha P., Prawo.pl, "Jest śledztwo prokuratury w sprawie sędziów TSUE" (accessed on: 17.02.2022).

Numerous applications of the Prosecutor General to the Constitutional Court, in which he questions the compliance with the Constitution of specific provisions of EU treaties or the Convention for the Protection of Human Rights and Fundamental Freedoms are also a manifestation of the trend of combating the independence of the judiciary.

Furthermore, since December 2019, prosecutors have adopted a practice of responding to court decisions challenging the status of individual judges in line with the CJEU and ECtHR jurisprudence.[131] The National Prosecutor instructed prosecutors to seek disqualification of a judge challenging the status of another judge and to report the status of such cases to regional prosecutors. Regional prosecutors were obliged to forward relevant information to competent judicial disciplinary officers.[132]

However, the most egregious element of the strategy of suppressing the independence of the judiciary is the use of the prosecution service to charge individual judges with abuse of powers in relation to their procedural decisions. In recent months, such attempts have been made, for example, in relation to judge Igor Tuleya. The prosecution service has targeted other judges, such as Włodzimierz Wróbel or Beata Morawiec, because of their advocacy of the rule of law.

131 Ivanova E., Wyborcza.pl, "Prokuratura politycznym młotem na sędziów. Co prokurator krajowy polecił śledczym? [DWA PISMA]" (accessed on: 17.02.2022).

132 Rp.pl, "Prokuratorzy mają donosić na sędziów. Ujawniono pismo PK", (accessed on: 17.02.2022).

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