

Prosecutor's Office in Contemporary Poland: A Quest for Independence amid Political Tensions

Abstract

The Public Prosecutor's Office is a state body charged with the prosecution of criminal offences. By its very nature, it is situated "between" the executive and the judiciary. The proper legal status of the Prosecutor's Office should guarantee its effectiveness and resistance to political pressure. Over the last three decades, Poland has seen a series of reforms of the prosecution service. Formally, they were intended to ensure the implementation of the above-mentioned values, but in practice they were conditioned by the current interests of the ruling parties. The following paper discusses the main problems of these reforms, highlighting such phenomena as the legislator's desire to break with the prosecutorial model inherited from the communist period and the lack of a clear vision of the model to be introduced. The paper critically analyses the content of these reforms as well as the views of Polish legal scholars, pointing out some mistakes in the process of formulating problems and searching for their solutions.

KEYWORDS: polish constitutional law, Prosecutor's Office in Poland, democratic transformation and backsliding of democracy in Poland, independence of Prosecutor's Office, separation of powers

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1 | Introduction

Discussions about what model of the Prosecutor's Office should be implemented have been held in the Polish scientific literature and the public sphere over the last 30 years. These never-ending debates resulted in consecutive reforms of the legal position of the Prosecutor's Office in Poland that were accompanied by political and legal discussions on probably all possible models of this institution, its aims, and functions.^[1] This is evidence that, firstly, the Prosecutor's Office is a salient element of the political system of a country, as its activities affect the legal and political dimensions of the society; secondly, it is hard to determine what model of the Prosecutor's Office could serve effectively in the case of a country that, like Poland, underwent democratic transformation and consolidation.

This paper attempts to characterize the evolution of the Prosecutor's Office in contemporary Poland as a continuous search for a hypothetical balance between its independence and effectiveness and to discuss the main challenges to the implementation of such ideas. The paper updates the state of the art since occasional English-language studies devoted to the Polish model of the Prosecutor's Office were published before the last reform of 2016,^[2] while in the Polish academia this topic is frequently scrutinized.^[3] The paper starts with an overview of a typology of the models of the Prosecutor's Office in contemporary democratic European states, which is popular in the Polish legal literature. Subsequently, it discusses the evolution of the constitutional status of the Prosecutor's Office in Poland from 1945 up to the present day. Finally, it critically approaches contemporary problems of the Prosecutor's Office in Poland and the main scholarly narratives related to this matter. The paper stresses an important challenge that lawmakers in post-authoritarian states should face – to ensure the effectiveness of the Prosecutor's Office and simultaneously to immunize it against political influences, conflicts, and bargains.

¹ Piotr Kardas, "Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego" *Prokuratura i Prawo*, No. 5 (2012): 8-49 (translations of all cited fragments are my own).

² Tony Marguery, "The 'Plurality of Functions' of the Polish Minister of Justice – General Prosecutor: Paradox or Adaptation" *European Journal of Crime, Criminal Law and Criminal Justice*, No. 1 (2007): 67-82; Krzysztof Krajewski, "Prosecution and Prosecutors in Poland: In Quest of Independence" *Crime and Justice*, No. 1 (2012): 75-116.

³ Cf. recently published: *Minister Sprawiedliwości a Prokuratura. W poszukiwaniu optymalnego modelu relacji*, ed. Michał Mistygacz, Grzegorz Kuca, Piotr Mikuli (Kraków: Księgarnia Akademicka, 2021).

2 | Models of the Prosecutor's Office

In many contemporary countries, the Prosecutor's Office is the main state organ in charge of prosecuting offenses and issuing indictments. It undertakes auxiliary actions in relation to the courts, consisting of, *inter alia*, instituting or supervising preparatory proceedings in criminal cases and performing the function of a public prosecutor before courts. The scope of the prosecutor's powers in European countries varies. Generally, among members of the Council of Europe two groups of countries can be distinguished: those where the prosecution service has no competence outside the criminal law area and those where the Prosecutor's Offices have some (even extensive) powers outside the scope of criminal law. The Prosecutor's Offices in most member states of the Council of Europe have, however minor, tasks and functions outside of criminal law. The scope of competencies is different and includes, among others, tasks related to civil, family, labor, administrative, and electoral law as well as environmental protection, social rights and the rights of vulnerable groups, such as minors, disabled people and people with low incomes. In some Council of Europe member states, the tasks of prosecutors in this field even outweigh the role of the prosecution service in the criminal justice system.^[4]

At present, in democratic countries, there are various models of the location of the Prosecutor's Office in the system of state power. Although there is a consensus that it is regarded as a state office upholding the rule of law by prosecuting crimes and representing the state in court, different models can be distinguished based on the criterion of relations with other authorities. The Polish legal literature, following the renowned constitutionalist Bogusław Banaszak, distinguishes four models:

- a. Independent prosecution – where the constitution provides the Prosecutor's Office with the same guarantees and independence that the law provides to the courts. Public prosecutors report to and are appointed by the professional self-government body. Independence applies to the Prosecutor's Office as a whole and to all its prosecutors. Examples of this model can be found in Anglo-Saxon countries and Italy.

⁴ Opinion no. 3(2008) of the Consultative Council of European Prosecutors on "The Role of Prosecution Services Outside the Criminal Law Field". <https://rm.coe.int/16807474ee>.

- b. A Prosecutor's Office subordinated to the Parliament, which nominates the Prosecutor General. The Prosecutor General submits reports on the activities of the Prosecutor's Office to the Parliament and may be held accountable by it for the results of its work. This model is represented in such countries as Hungary and Slovakia.
- c. A Prosecutor's Office subordinated to the head of state (the President or the monarch), who appoints the Prosecutor General (a head of the Prosecutor's Office) independently or at the request of another body e.g. the Parliament, government or judiciary council. Such a model functions in *inter alia* Belgium, Norway and Portugal.
- d. A Prosecutor's Office subordinated to the government, particularly to the Minister of Justice. The appointment of the Prosecutor General is at the discretion of the government. In terms of organization and structure the Prosecutor's Office may be related to the courts. This model is used in, among others: Austria, France, the Netherlands and Poland.^[5]

The term "subordination" used by Bogusław Banaszak, as well as the entire typology, requires a significant caveat. Subordination, as a rule, does not preclude the independence of the Prosecutor's Office and often comes down to nomination issues. In particular cases, e.g. in Portugal, there are separate organizational structures of the Prosecutor's Office, granting it independence of action from a formally "superior" interference. Moreover, the classification does not give a full picture of the inter-institutional relations of the prosecution service. For example, in France, which is the classic and oldest European model of the Public Prosecutor's Office, its head is the Minister of Justice, i.e. a member of the executive, which does not prevent the Prosecutor's Office from being included in the structures of the judiciary.

To sum up, there is no uniform practice in Europe regarding the system of the prosecution service. Regulation of the status of the Prosecutor's Office in the constitution adds to its prestige, durability, and resistance to political influences, but does not guarantee independence or effectiveness.^[6] As far as the European Union states are concerned, 17 of the

⁵ Bogusław Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych* (Warszawa: Wolters Kluwer, 2012), 898.

⁶ Grzegorz Kuca, "Konstytucjonalizacja prokuratury: dyskusja naukowa czy ustrojowa potrzeba?," [in:] *Konieczne i pożądane zmiany ustroju prokuratury w Polsce*, ed. Michał Mistygacz (Warszawa: Difin, 2020), 15-29.

27 constitutions have some provisions pertaining to the Prosecutor's Office. The remaining constitutions, including those of Germany, France, Greece, Poland and Sweden, are silent in this regard. Differences in the approach of European countries to the issue of the legal position of the Prosecutor's Offices are admissible and accepted by the European Union. From 2021, this organization has its own structure – the European Public Prosecutor's Office, whose competencies are limited to the issues of the EU budget and finances. Currently, several EU member states, including Poland, remain outside the European Public Prosecutor's Office.

3 | Historical Background: The Evolution of the Prosecutor's Office in Poland after 1945

The first regulation concerning the Prosecutor's Office in post-war Poland was adopted by the Act of 20 July 1950, when the communist system was taking roots.^[7] This act broke down the pre-war model of the Prosecutor's Office in Poland, whose activity in the organizational and functional dimensions was related to the judiciary, and its status was regulated under the Act on Judiciary of 1928.^[8]

The Act of 1950, declaring as the purpose of the Prosecutor's Office "consolidation of people's rule of law, protection of social property and prosecution of crimes" (Article 1), brought solutions known from the legal system of the Soviet Union. The Prosecutor's Office was to operate based on principles of hierarchism, centralism and indivisibility of tasks.^[9] For the first time, the concept of "general supervision" was introduced to the Polish model of prosecution, as a mechanism of control of compliance with the law and the safeguarding of the rule of law pertaining not only to the citizens,

⁷ Dz. U. z 1950 r., nr 38, poz. 346. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19500380346>.

⁸ Dz. U. z 1928 r., nr 12, poz. 93. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19280120093>; Lidia Mazowiecka, *Prokuratura w Polsce 1918–2014* (Warszawa: Wolters Kluwer, 2015), 74.

⁹ Michał Mistygacz, *Ustrój prokuratury w Polsce. Tradycja i współczesność* (Warszawa: Elipsa, 2013), 134.

but also to the entire bureaucratic apparatus of the state.^[10] According to this act, the Prosecutor's Office was separated as a state body independent from the Minister of Justice. This was justified by the fact that the Prosecutor's Office was intended to "guard the observance of the law" also by other state authorities and control the legality of their operation within the so-called general supervision.^[11] The mode of selection of the Prosecutor General by the highest state organ in Poland – the Council of State – was a direct manifestation of this independence. Thus, while formally making the Prosecutor's Office independent, the legislator linked it to the Council of State. Every year, the Prosecutor General presented a report on the activities of his office. The report was subject to discussion by the Council of State, during which recommendations and directions of activities of the Prosecutor's Office were formulated. The Prosecutor's Office was also linked to the Polish Parliament – the Sejm. The members of the Parliament were allowed to submit formal questions (interpellations) to the Prosecutor General, and the Prosecutor General could deliver speeches to the Sejm. It would be futile to discuss the relationship between the Prosecutor's Office and the legislature and executive as well as its independence since socialist constitutionalism rejected the concept of the separation of powers.^[12]

The stipulations of the Act of 1950 were confirmed by the first post-war constitution of the Polish People's Republic, adopted on 22 July 1952,^[13] which included a separate chapter devoted to this issue: "The Judiciary and the Prosecutor's Office" (Article 64-66). Following the abovementioned act, the constitution of 1952 declared the Prosecutor's Office "a guard of the rule of law", also ordering that it watch over the protection of social property and safeguard the observance of citizens' rights.

A new law on the prosecution was adopted on 14 April 1967, increasing the subordination of the Prosecutor's Office to the Council of State.^[14]

¹⁰ Kardas, „Rola i miejsce prokuratury,” 22; Mazowiecka, *Prokuratura w Polsce 1918–2014*, 78.

¹¹ Halina Zięba-Załużka, Beata Stępień-Załużka, "Historyczne uwarunkowania ustrojowego modelu prokuratury a prokuratura III RP," [in:] *Z prawem ustrojowym porównawczym przez półwiecze. Księga jubileuszowa dedykowana prof. M. Grzybowskiemu z okazji 55-lecia pracy naukowej*, ed. Bogusław Przywora, Anna Rogacka-Łukasik, Krzysztof Skotnicki (Częstochowa: Uniwersytet Jana Długosza, 2022), 824.

¹² Krajewski, "Prosecution and Prosecutors in Poland," 78.

¹³ Dz. U. z 1952 r., nr 33, poz. 232. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19520330232>.

¹⁴ Dz. U. z 1967 r., nr 13, poz. 55. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19670130055>.

This organ was granted the right to influence the most important decisions made by the Prosecutor's Office. This resulted from the provision of Article 4 of the act: "The Prosecutor General reports to the Council of State and acts in accordance with its guidelines". The obligation of the Prosecutor's Office to ensure the rule of law was specifically formulated: "The activities of the Prosecutor's Office are aimed at protecting and strengthening the political and socio-economic system of the Polish People's Republic" (Article 2(2)). The next step in the evolution of prosecution was associated with the adoption of a new act on the Prosecutor's Office, on 20 June 1985, but without significant changes in its position in the political system.^[15]

Negotiations between the communist authorities and the democratic opposition represented by the "Solidarność" trade union took place in 1989 at the so-called round table and led to gradual changes in the Polish legal system. An important consequence of these changes was the amendment to the constitution made on 29 December 1989.^[16] As a result, the full name of the state – the Republic of Poland – was restored, and the collective Council of State as the highest state authority was replaced by the President. As regards the Prosecutor's Office, the amendment stipulated that it was "subordinated to the Minister of Justice, who performs the function of the Prosecutor General".

The amended constitution became the basis for the consecutive amendment of the Act on the Prosecution of 22 March 1990.^[17] Its core feature was the linking of the Prosecutor's Office not to the head of state, but to the government – the Council of Ministers – due to the fact that the function of the Prosecutor General was to be performed by the Minister of Justice. The reason for this becomes clear when the political realities of that time are taken into account. The round table agreement guaranteed the office of the President of Poland to General Wojciech Jaruzelski, the leader of the Polish United Workers' Party, while the formation of the "first democratic government" was a task of the "Solidarność" trade union. Yet, thanks to the introduction of subordination of the Prosecutor's Office to the government, the former was supposed to safeguard the durability and irreversibility of democratic reforms in Poland. At that time, the

¹⁵ Dz. U. z 1985 r., nr 31, poz. 138. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19850310138>.

¹⁶ Dz. U. z 1989 r., nr 75, poz. 444. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19890750444>.

¹⁷ Dz. U. z 1990 r., nr 20, poz. 121. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19900200121>.

Prosecutor General's Office was liquidated, and its tasks were transferred to the Prosecution Department established in the Ministry of Justice. Prosecutors were screened for their abuses of power during the previous regime, but this did not result in many dismissals. The purpose of the Prosecutor's Office was defined as "guarding the rule of law and overseeing the prosecution of crimes". The combination of the functions of the Prosecutor General and the Minister of Justice in one hand turned out to be quite permanent, as it lasted until 2010 and to some extent resembled the solution that was in force in Poland in the interwar period. In 1993, the structure of the Prosecutor's Office was adapted to the local structure of the judiciary, introducing a new level – appellate Prosecutor's Offices. Then, in 1996, the Country's Prosecutor's Office (Prokuratura Krajowa) was established, headed by the Country's Prosecutor (Prokurator Krajowy), who was simultaneously the Deputy Prosecutor General. The Country's Prosecutor was appointed and dismissed by the Prime Minister at the request of the Prosecutor General – the Minister of Justice.

4 | Apolitical Character, Effectiveness, Accountability – Changing Concepts of the Prosecutor's Office and the Law on the Prosecution after 2007

The first post-communist constitution of the Republic of Poland, which is still in force, was adopted on 2 April 1997.^[18] This fact opens the modern period of constitutionalism in Poland. Due to differences in concepts of how to regulate the legal position of the Prosecutor's Office, the authors of the constitution eventually decided not to regulate this issue at all. This is an unfavorable and surprising situation, since the constitution-makers found it reasonable to include in the constitution regulations devoted to the functioning of such a specific body as the National Broadcasting Council. As a result of the lack of constitutionalization, the authority of the Prosecutor's Office decreased. The Parliament retained the right to regulate its

¹⁸ Dz. U. z 1997 r., nr 78, poz. 483. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483>.

status more flexibly through ordinary legislation. This means that it is more susceptible to the influence of various political forces that are currently in power. Until now Polish law has not comprehensively defined the position of the Prosecutor's Office, while the legal literature places it between the judiciary and the executive.^[19] Thus, despite the adoption of the new constitution, the functioning of the Prosecutor's Office was based on the provisions adopted in the period of political transformation in the early 1990s.

The scientific literature has repeatedly indicated that a hypothetical amendment to the constitution of 1997, e.g. related to the need to regulate the relations between the President of the Republic of Poland and the government, could also "update" the status of the Prosecutor's Office and define its political basis. Some scholars proposed that the Prosecutor's Office be regulated in the chapter "Courts and Tribunals", which would emphasize its role in the process of exercising justice and its symbiosis with the judiciary.^[20] Others asserted that the prosecution deserved a separate chapter in the constitution.^[21] Some, such as Stefan Jaworski, while rightly pointing out that due to the current political circumstances any amendment to the constitution would not take place, stressed that the separateness of the Prosecutor's Office can be ensured by an independent Prosecutor General, appointed by the President at the request of the Prime Minister, from a group of candidates consisting of prosecutors recommended by the National Council of the Judiciary and Prosecution (Krajowa Rada Sądownictwa i Prokuratury) for a four-year tenure.^[22]

In 2007, during the campaign before the parliamentary elections, the conservative-liberal Civic Platform (Platforma Obywatelska) party (at the time the main opposition party) declared that if they won the elections, they would reform the Prosecutor's Office introducing transparency and depoliticization. Splitting the functions of the Prosecutor General and the Ministry of Justice was thought to be the core element of such a reform. As a result,

¹⁹ Zięba-Załucka, Stępień-Załucka, „Historyczne uwarunkowania ustrojowego modelu prokuratury,” 827.

²⁰ Cf. Andrzej Stankowski, "Propozycja unormowań prokuratury w Konstytucji RP" *Prokuratura i Prawo*, No. 10 (2009): 5-15; Romuald Kmiecik, "Prokuratura w 'demokratycznym państwie prawnym' (refleksje sceptyczne)," *Prokurator*, No. 17 (2000): 17.

²¹ Cf. Piotr Winczorek, "Dalszy ciąg dyskusji konstytucyjnych" *Ruch Prawniczy, Ekonomiczny i Społeczny*, No. 2 (2011): 43-56.

²² Stefan J. Jaworski, "Rozważania na temat modelu prokuratury" *Prokuratura i Prawo*, No. 5 (2005): 16.

after the electoral victory of the Civic Platform, on 9 October 2009, the Sejm adopted an amendment to the Act on the Public Prosecutor's Office.^[23] It removed the provision that "the function of the Prosecutor General is performed by the Minister of Justice", and that "the Prosecutor General is the supreme authority of the Prosecutor's Office".

According to the new law, the Prosecutor General was appointed by the President of the Republic of Poland from persons nominated by the National Council of the Judiciary and a new body – the National Council of Public Prosecution (*Krajowa Rada Prokuratury*). The term of office of the Prosecutor General was six years. Candidates for the position of the Prosecutor General had to meet the criteria of prosecutorial education and at least ten years of professional experience. In practice, from March 2010 until the consecutive reform of the prosecutor's office in 2016, the position of the Prosecutor General, separately from the Minister of Justice, was held by one person, Andrzej Seremet.

The intention behind the separation of the Prosecutor's Office from the state executive power was to ensure its independence, efficiency and apolitical character. Practice has shown some difficulties in this regard. Firstly, the model adopted in 2009 did not grant the Prosecutor's Office full independence from the government and the Sejm. The Prosecutor's Office did not have its own financial resources and did not adopt its own budget; it had no right of legislative initiative, and the Prosecutor General continued to submit annual reports to the Prime Minister, the rejection of which could lead to his/her removal from office. Should the report of the Public Prosecutor General be rejected, the Prime Minister had the power to request that the Sejm, after prior consultation with the National Council of Public Prosecution, should dismiss the Prosecutor General before the end of the term. Secondly, the appointment of the Prosecutor General involved the Prime Minister – although the President of Poland formally appointed the Prosecutor General, the act of appointment, like other legal acts of the head of state, required the countersignature of the Prime Minister (Article 144 of the Constitution). This made the appointment of the Prosecutor General *par excellence* a political decision.^[24]

²³ Dz. U. z 2009 r., nr 178, poz. 1375. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20091781375>.

²⁴ Aleksander Herzog, "Niezależność prokuratury – mit czy nadzieja?" *Prokuratura i Prawo*, No. 1 (2009): 111-128; Anna Gerecka-Żołyńska, "Niezależność prokuratury i prokuratorów – nowe rozwiązania na tle dotychczasowych kontrowersji"

The separation of the two positions has created an undesirable lack of coordination on current issues. For example, at the beginning of 2012, both the Prosecutor General and the Minister of Justice undertook preparations of a new act on the Prosecutor's Office. It is worth noting that the model adopted in 2009 was from the beginning frequently criticized by the right-wing opposition Law and Justice (*Prawo i Sprawiedliwość*) party. The then President Lech Kaczyński vetoed the aforementioned act, and the veto was overridden by the parliamentary majority of the Civic Platform. Lech Kaczyński called for the creation of an independent Prosecutor's Office and blamed his opponents from the Civic Platform for "the government's withdrawal from responsibility for ensuring public security and order in Poland".^[25]

The latest change in the model of prosecution in Poland took place with the adoption of a new law on 28 January 2016.^[26] The essence of the reform was the reunification of the positions of the Prosecutor General and the Minister of Justice. This reform, introduced by a new right-wing government of the United Right (*Zjednoczona Prawica*) alliance with the leading role of Law and Justice, was in line with the rhetoric of a general strengthening of state institutions, including the elimination of the arbitrariness of prosecutors and the need to effectively combat organized crime.^[27] Reference was made to the government's obligation to ensure comprehensive internal security of the country and public order contained in Article 146(4) of the Constitution.

The new act provided the Prosecutor General with the right to directly manage the whole system of the Prosecutor's Office or manage it through the Country's Prosecutor, who is his/her first deputy, as well as other deputies. The Country's Prosecutor and other deputies of the Prosecutor General are appointed by the Prime Minister upon the request of the Prosecutor General, after consulting the President. Their dismissal, at the request of the Prosecutor General, requires the consent of the President, and this

Ruch Prawniczy, Ekonomiczny i Socjologiczny, No. 1 (2016): 58; Halina Zięba-Załucka, "Prokuratura a Sejm" *Przegląd Prawa Konstytucyjnego*, No. 3 (2022): 173-187.

²⁵ Weto do ustawy o zmianie ustawy o prokuraturze oraz niektórych innych ustaw. www.prezydent.pl/kancelaria/archiwum/archiwum-lecha-kaczynskiego/ustawy/ustawy-zawetowane/weto-do-ustawy-o-zmianie-ustawy-o-prokuraturze-oraz-niektorych-innych-ustaw,23958.

²⁶ Dz. U. z 2016 r., poz. 177. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000177>.

²⁷ "Zbigniew Ziobro, "Połączenie MS z PG wzmacnia odpolitycznienie prokuratury" *Dziennik Gazeta Prawna*. www.gazetaprawna.pl/wiadomosci/artykuly/925824,zbigniew-ziobro-polaczenie-ms-z-pg.html.

safeguard is intended to contribute to his/her stable functioning. Under the current act, in terms of territorial organization the Prosecutor's Office consists of the Country's Prosecutor's Office (*Prokuratura Krajowa*), regional (formerly – appellate), district and local Prosecutor's Offices (*prokuratura regionalna, okręgowa, rejonowa*). The structures of the Military Prosecutor's Office were abolished (including the Chief Military Prosecutor's Office, district and garrison Prosecutor's Offices). In the case of the merger of the military and civil structures of the prosecution, the act completed the process of the impairment of the Military Prosecutor's Offices initiated in 2009.^[28] The abovementioned National Council of Public Prosecution, a prosecutors' self-government body established under the Act of 2009, ceased to exist in 2016. However, the purpose of the recent reform was not only to strengthen the prosecution as a whole and its subordination to the government. The position of the Prosecutor General – Minister of Justice towards the subordinated to him prosecutors was also strengthened. Formally, prosecutors are independent, but in practice they must implement hierarchical orders and guidelines of superior prosecutors, including the Prosecutor General, who has the right to change or overrule the decisions of subordinate prosecutors (Article 7-8 of the Act).^[29]

The merger of the positions of the Minister of Justice and the Prosecutor General, as a core element of the reform, is the subject of controversy and debate about its admissibility. Generally, the discussion is placed within the broader context of political reforms that are introduced by the Law and Justice party, which are marked by right-wing populism, the rise of illiberal tendencies and democratic backsliding.^[30] Despite this, the Polish legal scholars are not unanimous when it comes to the admissibility and reasonability of such a merger. For example, the lawyer Hanna Suchocka, a former Christian-democratic politician who served as the Prime Minister of Poland in 1992-1993, claims that the 1997 constitution is silent on the position of the Prosecutor's Office in the state system, assuming that the function of the Prosecutor General is performed by one of the

²⁸ Dz. U. z 2008 r., nr 237, poz. 1651. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20082371651>.

²⁹ Jacek Zaleśny, "The Independence of the Public Prosecutor's Office" *Studia Politologiczne*, No. 58 (2020): 60-80.

³⁰ Wojciech Sadurski, "Constitutional Design: Lessons from Poland's Democratic Backsliding" *Constitutional Studies*, No. 6 (2020): 59-79.

ministers (the Minister of Justice).^[31] Criticism of the 2016 reform is part of the general critique of the authoritarian turn in Polish public life under the rule of the United Right. Interestingly, the government of the United Right does not completely deny the politicization of the Prosecutor's Office. The Minister of Justice–Prosecutor General Zbigniew Ziobro suggested that independence should be an attribute of the courts, not the Prosecutor's Office. In his opinion “the Prosecutor's Office is to be an instrument through which the government can influence the implementation of the principle of social justice”.^[32] Nevertheless, in reality the Prosecutor's Office is regularly involved in politically motivated investigations. The Minister of Justice has frequently ordered the Prosecutor's Office to search for evidence of alleged corruption and other crimes committed by political opponents in 2007–2015, when Law and Justice was not in power. These actions were directed against frontline politicians as well as managers of large state-owned enterprises, such as the energy company Orlen.^[33]

5 | Current Problems and Doubts

As the above analysis shows, the model of the Prosecutor's Office in Poland remains a subject of discussion, both political and scientific. The long and winding road of the reforms of the prosecution does not mean that the current model is optimal and fully effective. This is even declared by the current Prosecutor General–Minister of Justice, Zbigniew Ziobro, one of the leaders of the United Right and one of the authors of the current act on the Prosecutor's Office^[34]. This section of the paper seeks to critically analyze the main problems present in the scientific and political discourse

³¹ Hanna Suchocka, “W poszukiwaniu modelu ustrojowego prokuratury (w świetle prac Komisji Rady Europy ‘Demokracja poprzez Prawo’)” *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 2 (2014): 167.

³² “Piotrowicz w Sejmie: Niezależne mają być sądy, niezawisli sędziowie – ale nie prokuratura” *Dziennik Gazeta Prawna*. <https://prawo.gazetaprawna.pl/artykuly/917547/piotrowicz-sejm-reforma-prokuratury-pis.html>.

³³ Krajewski, “Prosecution and Prosecutors in Poland,” 95–98.

³⁴ “Prokurator generalny wraca pod jurysdykcję ministerstwa sprawiedliwości”. <https://www.pap.pl/aktualnosci/news%2C479483%2Cprokurator-generalny-wraca-pod-jurysdykcje-ministerstwa-sprawiedliwosci.html>.

on the model of the Prosecutor's Office in Poland. This includes issues such as dependence vs. independence from the government, and politicization vs. apoliticality. I point out that the problem is primarily vested in the specific understanding of the relationship between the Prosecutor's Office and the other public authorities, as well as the very concept of "politicization", which in Poland is a frequent tool for discrediting political opponents.

At the top of the pyramid of accusations against the model of the Polish Prosecutor's Office is the lack of its constitutionalization in the act of 1997. The introduction of a relatively permanent legal framework for the Prosecutor's Office to the text of the Constitution would end the period of uncertainty and unproductive discussions. Meanwhile, the lack of constitutional regulations and the scope of the consecutive reforms of the Prosecutor's Office in 2009 and 2016 reveal a salient problem: the lack of a clear vision of what the Prosecutor's Office should be and what functions it should perform, as well as its vulnerability to political influences. Both of the aforementioned reforms were motivated by the desire to discard the model adopted by the former Parliament majority and its government.

The analysis of political and scientific discourse on the issue of the Prosecutor's Office in Poland shows that its participants focus on two key values: independence and efficiency. They are not treated as antonyms, however, but as difficult to combine. The expectations of independence and effectiveness of the Prosecutor's Office are not controversial and are present in the discourse of each of the relevant political options in Poland, liberal and conservative. They are understood in accordance with different logics and philosophies of the state: for liberals, independence and efficiency can be achieved by separating and depoliticizing the Prosecutor's Office, while for conservatives, the prosecution should be integrated into the government administration and implement the government's penal policy.

The model of the Prosecutor's Office and the scope of its independence are determined by its – both normatively regulated and politically determined – relations with the legislative, executive and judiciary authorities. It is crucial which authority has the right to appoint and dismiss the Prosecutor General, and therefore to whom he or she is responsible for the performance of its tasks. The current close link between the Prosecutor's Office and the government (in fact an annexation of the Prosecutor's Office by the Ministry of Justice) regularly raises questions about the extent to which the prosecution is independent and apolitical. It is hard to assert that the prosecution is independent when the Prosecutor General is simultaneously the Minister of Justice, whose superior is the Prime Minister and who

is politically accountable to the Sejm and may be dismissed, due to political reasons, by the Sejm.^[35] For this reason, politicization is *ex definitione* an inherent feature of the prosecution.

It is worth noting that even the Polish constitution of 1997, which did not regulate the position of the Prosecutor's Office, made an attempt to secure its non-partisan character. It stipulates that a parliamentary mandate cannot be combined with certain other public functions, including the position of a prosecutor (Article 103(2) of the Constitution). The Act of 2016 also states that "while holding the position of a prosecutor, he or she should not belong to political parties and may not engage in any political activity" (Article 97(1) of the Act). Meanwhile, the current Minister of Justice and Prosecutor General, Zbigniew Ziobro, is the leader of the Sovereign Poland^[36] (*Suwerenna Polska*) party, which together with Law and Justice forms the ruling coalition. Some criticism of the current model of the Prosecutor's Office in Poland was expressed by the Venice Commission, pointing out that the positions of the Minister of Justice and the Prosecutor General should be separate, even if it is not prohibited. Should the merger be continued, the Venice Commission proposed limiting the powers of the Prosecutor General to interfere in individual cases.^[37]

In the scientific literature it is acknowledged that the legislator should take into account the fact that in the Polish constitutional system the Minister of Justice and the Prosecutor General perform two different functions.^[38] The implementation of the penal policy by the government should not affect the standard functioning of the Prosecutor's Office, as well as the courts. The Prosecutor General should be a kind of "advocate of the rule of law", but not a member of the government, who subordinates to the Prime Minister. Moreover, the combination of both functions in the Polish reality means that the head of the Prosecutor's Office is not obliged to meet professional criteria and have any qualifications required from prosecutors,

³⁵ Paweł Kuczma, "Uwagi o konstytucyjnym ujęciu prokuratury w kontekście jej niezależności," [in:] *XXV lat Konstytucji Rzeczypospolitej Polskiej. Księga jubileuszowa dedykowana profesor Halinie Ziębie-Załućkiej z okazji 70. rocznicy urodzin*, ed. Radosław Grabowski (Toruń: Wydawnictwo Adam Marszałek, 2022), 357.

³⁶ In May 2023 the party was renamed. The former name was "Solidary Poland" (*Solidarna Polska*).

³⁷ The Venice Commission Opinion no. 892/2017, CBL-REF(2017)048. [www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2017\)048-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)048-e).

³⁸ Halina Zięba-Załućka, "Prokuratura w nowej ustawie z 2016 roku. Eksperyment z podległością władzy wykonawczej" *Przegląd Prawa Konstytucyjnego*, No. 5 (2016): 111-124.

and what is more, it is not prohibited to belong to political parties. Polish constitutional law does not exclude the possibility of cumulating several positions in one hand: the Prime Minister, the Minister of Justice and the Prosecutor General. Due to the fact that the Minister of Justice–Prosecutor General does not have to meet the criteria set for prosecutors, some scholars argue that the Prosecutor General is not actually a prosecutor–the position is in fact adopted by the Ministry of Justice.^[39] Even if it is so, at the same time, not being a prosecutor, he has the powers of a superior to prosecutors of all levels.

Another objection to the current model of the Prosecutor’s Office in Poland is its politicization. The experience of the years 2010–2016 has shown that the separation of the positions of the Minister of Justice and the Prosecutor General did not eliminate the politicization of the Prosecutor’s Office, but at most the non-partisanship of its management.^[40] The “politicization” narrative was partly owed to the fact that the Prosecutor’s Office, like many other public institutions, was the target of constant attacks from the largest opposition party, Law and Justice. This partly resulted from the act of 2009: the two functions were then separated, and the Minister of Justice ceased to be the Prosecutor General at the same time, becoming the Prosecutor’s actual superior. This was due to the fact that the annual report of the Prosecutor General was reviewed by the Minister of Justice. Finally, the Sejm, an apolitical institution *par excellence*, could approve or reject this report for any reason, including party bargains within the Parliament.

The experience of the period 2010–2016, which was marked by the separation of the positions of the Prosecutor General and the Minister of Justice and the growing independence of the Prosecutor’s Office from the government, shows that such measures do not automatically lead to transparency and apoliticality. Due to the fact that the discourse around the Prosecutor’s Office in Poland in the last 30 years has been focused on the issue of the compatibility or incompatibility of the positions of the Prosecutor General and the Minister of Justice, one should consider whether the separation

³⁹ Ministerstwo Sprawiedliwości, Łączenie mandatu posła z funkcją Prokuratora Generalnego – stanowisko Ministerstwa Sprawiedliwości, 6 September 2016. www.arch.ms.gov.pl/pl/archiwum-informacji/news,8572,10,laczenie-mandatu-posla-z-funkcja-prokuratora.html#:~:text=%20Prawo%20o%20prokuraturze%2C%20wyraźnienie%20oróżnienia,Prokuratora%20Generalnego%20sprawuje%20Minister%20Sprawiedliwości.

⁴⁰ Anna Frankiewicz, “W sprawie niezależności Prokuratora Generalnego w Polsce” *Przegląd Prawa Konstytucyjnego*, No. 1 (2010): 197–198.

of them would be enough to ensure the independence of the Prosecutor's Office. The cases of other countries with a rich legal culture, such as France, prove that the subordination of the Prosecutor's Office to the executive power is possible, and it is reasonably emphasized by some Polish lawyers.^[41]

However, the separation of positions that existed in 2010-2016 did not guarantee the independence of the Prosecutor's Office, since the Prosecutor General, obliged to report on his activities, was *de facto* subordinated to both the executive and legislature. Separation of functions, under the current constitution, deprives the Prosecutor General of an important prerogative, which is the legislative initiative. Currently, the Prosecutor General does not have it directly, but he/she can use it as the Minister of Justice – a member of the Council of Ministers. The possible granting of the right of legislative initiative to the Prosecutor General would require an amendment to the Constitution of Poland (Article 118).

Even though the idea of political independence of the Prosecutor's Office is tempting and rational, in practice it is hard to imagine that this office could be completely independent from other branches of power. This would mean that there would be no mechanisms of accountability for the implementation of its tasks, evaluation of the reports on their performance, mechanism of coordination with other state organs. There is rather no doubt that some form of accountability of the Prosecutor's Office to the government is necessary, since the government is responsible for the overall fight against crime and ensuring public safety.

In this context, it is reasonable to consider amending the Constitution of 1997 and introducing regulations on the status of the Prosecutor's Office. Such a decision would end discussions and further consecutive changes, as a result of which the Prosecutor's Office is either merged or separated from the Ministry of Justice. In the scientific literature, it is recognized that the constitutional regulation of the position of the Prosecutor's Office would make sense if it would not be subordinated to the Minister of Justice, and therefore would be outside the structure of the executive power. It is pointed out that "the lack of constitutional responsibility for the actions of the Prosecutor General as well as the fragmentation and incompleteness of the model of the Prosecutor's Office as an organ of legal protection

⁴¹ Jacek Kędzierski, "O niezależność prokuratury – w kręgu faktów i mitów" *Prokuratura i Prawo*, No. 1 (2009): 106.

make the postulate of constitutionalizing the Prosecutor's Office deserve consideration".^[42]

Since it brings long-term effects in the material sphere, by determining the priorities of the Prosecutor's Office, the constitutionalization of the Prosecutor's Office should not be conditioned only by political circumstances. Thus, if the Prosecutor's Office is included in the executive, which would emphasize its role in the penal policy of the state, relevant provisions should be included in Chapter VI of the Constitution, "The Council of Ministers and Government's Administration". In the case of the priority of ensuring its separation from the executive, two solutions are possible. Firstly, it can be placed among the "Courts and Tribunals", the status of which is defined in Chapter VIII of the Constitution. This would be justified if priority was given to the participation of the prosecutors in criminal trials and their close cooperation with the courts. Secondly, the complete separation of the Prosecutor's Office from the judiciary would be ensured by a relevant amendment of Chapter IX, "Organs of State Control and Protection of the Law". This would be justified if the Prosecutor's Office were to focus on the comprehensive protection of the rights and freedoms of a person and the democratic rule of law. In such a situation, it would become one of the legal protection organs, cooperating more closely with the Ombudsman. It is not easy to find a proper solution for contemporary Poland: the concept of linking the Prosecutor's Office with the courts makes it difficult to perform tasks other than criminal proceedings, particularly the control of the rule of law. Adoption of the opposite position, a full independence of the Prosecutor's Office, would enable the implementation of non-processual functions, and at the same time make it difficult to influence the government's criminal policy.^[43]

⁴² Suchocka, „W poszukiwaniu modelu ustrojowego prokuratury,” 166; Przemysław Witkowski, „Kilka uwag w sprawie dekonstytucjonalizacji prokuratury” *Przegląd Prawa Konstytucyjnego*, No. 1 (2010): 203-220.

⁴³ Kardas, „Rola i miejsce prokuratury,” 33.

6 | Conclusions

As has been discussed, in contemporary Poland, the Prosecutor's Office is an institution that is subjected to consecutive serious reforms. So far, they have mainly been concerned with its relations with other state organs and the degree of independence from them. There are no major disputes regarding the basic functions of the Prosecutor's Office – prosecution of crimes and public prosecution in criminal trials.

Two dimensions of the contemporary discourse on the problems of the Prosecutor's Office in Poland can be distinguished – academic and political. The analysis of academic discourse reveals that researchers have not avoided the trap of attempts to implement into life theoretical, ideal entities. The postulate of independence and apolitical character of the Prosecutor's Office was taken too literally, illustrating the fact that the Prosecutor's Office is an institution that does not fit into Montesquieu's classic concept of the separation of powers. As an organ of law enforcement, it does not clearly fit into the structure of the state administration (i.e. the executive), nor is it part of the judiciary. The Polish political discourse attempts to distance itself from the experience of the communist period and to build a vision of the Prosecutor's Office that would correspond to the ideological coordinates of consecutive ruling parties. Until now the demand for depoliticization occurred mainly as a demand for de-partisanship and was formulated by the opposition to the current rulers.

Over the past 30 years of democratisation, it has proven impossible to develop an optimal model for the Prosecutor's Office in Poland. Instead, further reforms have been dictated by the interests of the dominant political parties. Two opposing tendencies have clashed over the last three decades with regard to the functioning of the Prosecutor's Office in Poland. Firstly, there is a postulate to link the Prosecutor's Office with the executive power, thanks to which the latter could better perform its duties in law protection and criminal policy. Secondly, there is a demand to ensure the independence and apolitical nature of the Prosecutor's Office, which makes sense in a situation of a very polarized, antagonized Polish political scene. Emphasis on the principle of independence of the Prosecutor's Office stems from its location among the judiciary. In a modern democratic state governed by the rule of law, priority is given to the separation of the three branches of power, with particular emphasis on the judiciary, which also raises expectations of the independence of the Prosecutor's Office.

In the context of the illiberal turn and the undermining of the principle of the rule of law in contemporary Poland, the search for ways to ensure the full apolitical character of the Prosecutor's Office is an important issue, although it is a cognitive error because the important role of the Prosecutor's Office in the system of state authorities means that it functions in a political context. The attention of legislators and legal scholars should therefore focus on the problem of party-oriented prosecution and its involvement in political competition, both in terms of the current operational activities of the Prosecutor's Office and the modification of its structure after each successive change of power in Poland.

Thus, the main problem of the contemporary legal position of the Prosecutor's Office in Poland is the establishment of instruments aimed at effectively subjecting it to the necessary control. This leads researchers of Polish constitutional law to rightly claim that the Prosecutor's Office will continue to undergo reforms.^[44] In the context of current developments regarding the rule of law in Poland, the Venice Commission's position seems correct. In its report on Poland, it stated that the problem of the independence and autonomy of the Prosecutor's Office is not as categorical as the problem of independence and non-partisanship of the judiciary.^[45]

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⁴⁴ Zięba-Załucka, Stępień-Załucka, „Historyczne uwarunkowania ustrojowego modelu prokuratury,” 831.

⁴⁵ The Venice Commission Opinion no. 892/2017, CBL-REF(2017)048, available at [www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2017\)048-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)048-e).

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