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The independence of the public prosecutor's office

STUDIA I ANALIZY

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Abstract: *An analysis of the legal aspects of the independence of public prosecutors should examine the contexts that frame their external and internal independence. The paper proposes the thesis that although the legislation proclaims that within the scope of his/her activities a public prosecutor is independent, though a particular legal solution has significantly limited this independence, and this has made public prosecutors dependent on political guidelines, dispositions, and orders.*

Introduction

The key feature of the organization of the public prosecutor's office in Poland is its hierarchical arrangement. The relationship between those with a supervisory role and their subordinates determines the organization of the public prosecutor's office and thus its activities. They also imply the legal and constitutional character of the public prosecutor. In other words, the hierarchical organization of the public prosecutor's office has far-reaching implications for the public prosecutor's status.

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Additionally, the formal and legal layers of the issue are overlapped by its less important actual circumstances. These follow from the application of acts of law, i.e. the national traditions of the system of the public prosecutor's office, and how these are realized in practice. These do not provide grounds for optimism, as far as the public prosecutor's independence and professionalism are concerned. This is important as the essence of professionalism is acting objectivity and fairly in the protection of the rule of law as a significant element for the preservation of the social order and protection of rights.

From a historical viewpoint, Poland did not have a professional public prosecutor's office, which would realize the tasks entrusted to it in an independent, objective, and professional way. During the political transformation, what has proved especially destructive to the independence of public prosecutors was a lack of reflection on the role of the public prosecutor's office under communist rule. In the communist period the public prosecutor's office was an instrument of a repressive state, which was used to strengthen the communist hold on power and to repress the Polish nation. In the period of political transformation after 1989 public prosecutors were not subjected to an evaluation concerning their independence. The existing model of the public prosecutor's office as an organ (established in 1990), which did not so much protect individual rights and freedoms, but which was instead a prosecuting body, was mainly strengthened.

An independent prosecutor – what kind of a prosecutor?

In art. 7 of the Act of 28 January 2016, the Act on the Public Prosecutor's Office¹, the parliament proclaimed the independence of the public prosecutor. This is an important declaration since it comprehensively expresses the constitutional character of the prosecutor, the *modus operandi* of their functioning. The public prosecutor's independence declared in statute is not valuable in itself. The public prosecutor is expected to act independently and lawfully – independently of how the courts should act.

The independence of the public prosecutor should be manifested in their professionalism while ethically performing their role, and in the impartial and reliable realization of the protection of public order and – at

¹ Journal of Laws from 2017 item 1767 with amendments.

the same time – in impartial and reliable protection of human freedoms and rights. The abiding role of the public prosecutor as the guardian of law should be emphasized. It should have priority over the other role of a public prosecutor, namely the prosecution of crimes. The prosecutor realizes the function of prosecuting in order to achieve another goal, which is of key importance in a state ruled by law, i.e. adherence to the legal relations occurring in a state abiding with the rule of law.

The role of the public prosecutor as the guardian of abiding with the law, a feature requiring independence, is strongly emphasized in the oath that the public prosecutors take when they are appointed. They solemnly swear that in the public prosecutor's position they will serve faithfully the Republic of Poland, guard the law and maintain law and order, diligently perform their duties of office, keep legally protected secrets, and be guided by the principles of dignity and honesty in their conduct.

It is a logical and internally coherent oath, which contains all the necessary elements. Attention should be drawn to the fact that the oath does not mention the requirement to diligently performance the orders given to them by those who supervise them, or of other circumstances that negatively affect the public prosecutor's independence. On the contrary, all the enumerated features are immanently related to independence, which is not specified in other provisions of the Act on the Public Prosecutor's Office.

In the light of the oath, a public prosecutors' independence is not only their right, but also their fundamental obligation. A public prosecutor's duty should be the reliable realization of the law, independent of any external or internal influences, but also it should also mean the reliable protection of human freedoms and rights. This means that within the frameworks of their activities, a public prosecutor should be directed by the law and objectivity by treating the participants of the proceedings in the same manner, without any discrimination or the showing favor.

The independence of a public prosecutor, like the independence of a judge, should be the features of their character. These features cannot be put within legal frameworks. A public prosecutor's independence does not only follow from the regulations of the law. It is also the resultant of a public prosecutor's legal consciousness and culture as well as their character². Independently of how the guarantees of independence or autonomy are shaped in the law, a person with a servile attitude, or with

² M. Mistygacz, *Konstytucjonalizacja prokuratury*, [in:] S. Sulowski, J. Szymanek (eds.), *Ustrój polityczny państwa. Polska, Europa, świat*, Warszawa 2013, p. 148.

a weak character – with or without a public prosecutor's robe – will still be characterized by the attitude of a servant, and this weak character will not be changed by legal regulations³. This, however, does not mean that legal regulations are not of great importance. Legal regulations can support certain features which are necessary for independent activity, they emphasize their constitutional importance but, on the other hand, they can also blur or question them. As emphasized in the literature, a lack of guarantees over the independence of the public prosecutor throws a negative light on the whole activity of the public prosecutor's office⁴ and on its inability to safeguard the observance of the law⁵.

In reference to the independence of the public prosecutor, the doctrine⁶ distinguishes two dimensions of studying it:

- 1) the external dimension, i.e. the relationship between the public prosecutor, on the one hand, and other organs of public authority and the other participants in social relations, on the other;
- 2) the internal dimension, i.e. the relationship between public prosecutors within the frameworks of the organizational structure of the public prosecutor's office.

The external independence of a public prosecutor is the degree to which external entities can influence the status of the public prosecutor and the activities undertaken by the latter⁷. Internal independence of a public prosecutor, on the other hand, is the degree to which supervisory public prosecutors influence the status of the prosecutor and the activities undertaken by the latter.

The independence of the public prosecutor was defined in the Act from 14 April 1967 on the Public Prosecutor's Office of the Polish People's Republic⁸. Art. 5 which stated that public prosecutors in performing their functions were independent of the local organs of power and the organs of state administration and that they were subordinated only to supervisory public prosecutors. Therefore, the Act directly emphasized the external dimension of the public prosecutor's independence, and at

³ Cf. M. Mistygacz, *Ustrój prokuratury w Polsce. Tradycja i współczesność*, Warszawa 2013, p. 203.

⁴ R. Stefański, *Prokurator jako organ postępowania karnego*, [in:] Z. Kwiatkowski (ed.), *Sądy i inne organy postępowania karnego*, Warszawa 2015, p. 819.

⁵ M. Mistygacz, *Ustrój prokuratury w Polsce...*, p. 201.

⁶ *Ibidem*, pp. 201–202.

⁷ More on this subject, see: M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury a najnowsze zmiany polskiego porządku prawnego*, «Czasopismo prawa karnego i nauk penalnych» 2017, No. 2, pp. 111 ff.

⁸ Journal of Laws from 1967 No. 13, item 55.

the same time their internal dependence on the public prosecutors who supervised them.

Political background of the public prosecutor's office

Thus, any analysis of the legal aspects of the independence of public prosecutors should examine the contexts that frame their external and internal independence⁹.

The law from 28 January 2016 – the Act on the Public Prosecutor's Office – restored the external dependence of the public prosecutor's office on the Minister of Justice, and through the latter – on the Council of Ministers¹⁰ and the secret services. At the same time the Public Prosecutor General does not have to possess the qualifications of a public prosecutor and this has been the practice. He/she is not limited by the principle of incompatibility. The Minister of Justice, who holds the office of Public Prosecutor General, does not cease to be a member of the Council of Ministers. By virtue of the provisions of the Act on the Council of Ministers¹¹, he/she has an obligation to participate in determining the state's policy (art. 7 of the act on the Council of Ministers) or realizing the policy established by the Council of Ministers (art. 7 of the act on the Council of Ministers). In public the Public Prosecutor General is bound by collective responsibility for the decisions taken by the Council of Ministers (art. 8 of the act on the Council of Ministers).

The Public Prosecutor General's membership of a political party or running party political activity would seem to conflict with the principle of impartiality and objectivity. The proper fulfillment of the task of the public prosecutor's office to prosecute and accuse perpetrators of crimes requires formal and legal guarantees that could prevent the accusation

⁹ More on this subject, see: 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/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e) (12.07.2020).

¹⁰ The validity of the concept of subordinating the public prosecutor's office to the government is indicated in a part of the doctrine, e.g. H. Suchocka. She argues that the separation of the public prosecutor's office towards the government leads to a situation when the Minister of Justice has too little influence on the shaping of the fight against crime and on the protection of law abidingness. Cf. H. Suchocka, *W poszukiwaniu modelu ustrojowego prokuratury (w świetle prac Komisji Rady Europy „Demokracja poprzez Prawo”)*, «Ruch Prawniczy, Ekonomiczny i Socjologiczny» 2014, No. 2, p. 165.

¹¹ Journal of Laws from 2012 item 392.

that in individual cases a public prosecutor is guided by other respects other than law¹² and justice. On the other hand, a feature of political party activity is the realization of party political objectives, which do not have to be identical with the activities performed in the name of law and justice. In this sphere, practice seems to be standing in opposition to a public prosecutor's independence¹³. From the perspective of the independence of public prosecutors, this is a relevant concern considering the vast scope for interference by the Public Prosecutor General with the activities of public prosecutors. The chairman of a political party, i.e. – speaking as briefly and as generally as possible – an organization called to acquire power and use it – realizes the tasks which are *sensu stricto* political as this is the essence of political activity. One of the instruments, besides the typically inter-party instruments, to reach these goals is the public prosecutor's office itself. Possessing a wide range of competences to shape the behaviour of public prosecutors, the chairman of a political party uses them. They are meant to be used.

A thesis can be put forward that due to the rules of hierarchical subordination and the accessible disciplinary measures this activity is a more effective means of realizing party goals, than through party resources. As for the use of party staff, in this sphere of activity, it is the chairmen of the party who have to prove themselves towards the party members. Indeed, he/she can formulate definite expectations or requirements, but in return he/she must secure the posts or participation in the redistribution of public goods understood in a different way. Otherwise, the party leadership will be undermined, and an attempt will be made to change the leader, or party members will desert it for another more rewarding party. The situation is different with public prosecutors. The Public Prosecutor General does not have to secure anything for them. It is enough that he/she delegates them to the public prosecutor's office in some far-off area, or appoints them to a low-level position in a public prosecutor's office. On the other hand, he/she can appreciate them and appoint the prosecutor to a higher-level position¹⁴. It is for these very reasons why, for the chairman of a ruling party, the public prosecutor's

¹² The sentence of the Constitutional Tribunal from 10 April 2002, reference symbol K 26/00, Journal of Laws No. 56, item 517.

¹³ In the actual state, the chairman of a political party, a deputy to the Sejm is the Public Prosecutor General, which at the same time gives rise to a question about the violation of the incompatibility of a parliamentary mandate provided in art. 103 of the Constitution of the Republic of Poland.

¹⁴ In the actual state, about 1/5 of the public prosecution corps remained in delegation in 2018.

office might be a more effective instrument than the party they preside over.

The situation when the office of the Public Prosecutor General is taken by a party member when the public prosecutor's office is subordinated to the Council of Ministers as a *par excellence* body radiates onto the goals placed before public prosecutors and onto their conduct. This thesis is confirmed by a decrease in the coefficients of the activity of the public prosecutor's office in 2017. The coefficients of effective activity of the public prosecutor's office were lowered because public prosecutors felt more insecure than before about how their superiors would treat their activities and they, therefore, waited for dispositions or orders. There was a large scale promotion of public prosecutors from district offices to more senior positions in the public prosecutor's offices. These offices mostly supervise the district public prosecutor's offices, rather than conduct the preparation for proceedings, and the promotions generated delays in the preparatory proceedings.

The prosecution of crimes is decided upon by a political organ together with all the political consequences. If the public prosecutor's office is directed by a politician, it is only natural that the public prosecutor's office is an instrument of political competition and public prosecutors realize political goals. It is hard to expect that politicians will not seek to realize political goals, as this would contradict the very essence of a party's political activity.

The independence of the public prosecutor's office as an institution is directly related to abiding with the law¹⁵. The organ which is expected to safeguard the observance of law by those in power cannot be dependent on those who hold the power at a given moment. When the public prosecutor's office is subordinated to the government this principle is violated. With the existing competencies of the Public Prosecutor General, the analyzed motif of public prosecutors' independence is of no greater importance in the case where the posts of the Minister of Justice and the Public Prosecutor General are held by different people. In such a situation party political interest as a leading motif of the activity of the Public Prosecutor General, in the realization of party political interests, is not as important.

What needs to be added is the typical participation of the public prosecutor's office in the fight for public resources and their redistribution, which takes place in Poland independently of whether the office

¹⁵ R. Stefański, *Prokurator jako organ postępowania karnego...*, p. 818.

of the Public Prosecutor General is combined with the office of the Minister of Justice, or whether they are separated.

The hierarchical subordination of public prosecutors

The law from 2016 significantly extended the competences of the Public Prosecutor General – the Minister of Justice, in relation to public prosecutors. Without the need to interfere with concrete proceedings, without the need to affect concrete court decisions, the Public Prosecutor General is able to affect the decisions of public prosecutors, especially those of a servile mentality. This influence takes place through the Public Prosecutor General's right to delegate a public prosecutor of a common organizational unit of the public prosecutor's office to another unit for a period of up to 6 months, even without their agreement, and in justified cases (due to staff needs) for a period up to 12 months within a year. In practice, the Public Prosecutor General uses these competences, for example by delegating (in case of delegations for up to 6 months) from the public prosecutor's office in the public prosecutor's place of residence to the public prosecutor's office to a far-off, and for a period of up to 12 months – from the National Public Prosecutor's Office, for example, to a district public prosecutor's office.

Another mechanism to discipline public prosecutors are transfers. A transfer of a public prosecutor to another place of work can take place only with their agreement. However, the consent of the public prosecutor is not necessary, for instance, in the case of the termination of a post due to a change in the organization of the public prosecutor's office, or the termination of a given organizational unit of the public prosecutor's office, or – finally – the transfer of its seat. The regulation itself – out of the practical context – does not raise any doubts. It is obvious that organizational changes must be followed by personal changes. However, the statutory changes in the organization of the public prosecutor's office, were in direct relation to the parliamentary election from 2015. As the person who decided on the reappointment of public prosecutors to particular organization units of the public prosecutor's office changed, there was a rotation of public prosecutors: with some being awarded promotions, and others were punished by being transferred to public prosecutor's offices of a lower level¹⁶ (but still receiving the same remuneration).

¹⁶ Cf. M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury...*, pp. 129–130.

In addition to this, the way the legislation outlined the penalties that can be imposed on public prosecutors also undermined their independence. Transfer to another post is one of the most severe disciplinary penalties administered to a public prosecutor in disciplinary proceedings. Its severity is only second to dismissal from office. As the verification of public prosecutors, based on the arbitrary recognition of the Minister of Justice holding the office of the Public Prosecutor General, was carried out by the chairman of the political party, who performed these functions¹⁷, which in turns creates the social perception that public prosecutors are a politically dependent social group. This neither helps to build its independence nor the social perception of public prosecutors being politically independent.

Because staff rotation is justified in the statute on the premise of a required reorganization of the system of prosecutors' offices, it did not require further justification and could be easily conducted. However, for the professional activity of public prosecutors these changes were negative. Since promotions and demotions of particular public prosecutors did not have any substantive justification, they were both linked by public prosecutors and large social groups with the political assessment of the activity of particular public prosecutors.

Since the 2016 review of public prosecutor staff took place, which was justified by an organizational change of the public prosecutor's office, there is no doubt that if the latter does not still realize the aims set for them in a satisfactory degree, more changes in the organization of the public prosecutor's office and related rotations may follow. As Eduard Bernstein wrote, what we commonly call the ultimate goal is nothing, while movement is everything. Through successive organizational changes in the public prosecutor's office, and in the conditions to be fulfilled by candidates for public prosecutors, it is possible to create a politically desirable profile of a public prosecutor, i.e. a submissive public prosecutor who seeks to realize the needs of his supervisors, which is directly or indirectly expressed by them.

In the context of independence, the competences of the Public Prosecutor General in disciplinary proceedings are significant. As to the substance, the Public Prosecutor General is the administrator of dis-

¹⁷ This issue is emphasized by the Commissioner for Human Rights in a motion to the Constitutional Tribunal to ascertain incompatibility of definite regulations introducing the law – the Act on the Public Prosecutor's Office with the provisions of the Constitution of the Republic of Poland. See: KwRPO VII.519.5.2016.ST, pp. 13–18.

ciplinary proceedings¹⁸. He appoints a disciplinary spokesperson, who can be called off in certain conditions. The disciplinary spokesperson has an obligation to undertake activities any time the Public Prosecutor General should require it. The Public Prosecutor General appoints the president and vice-president of the disciplinary court. The Public Prosecutor General also has the right to have insight into the activities of disciplinary courts. He/She can draw attention to infringements, require explanations and removal of the consequences of infringements. However, these activities cannot enter the domain where members of disciplinary courts are independent.

The Public Prosecutor General is a so-called disciplinary public prosecutor. Among others, he/she has the right to suspend public prosecutors from their activities for a period of up to 6 months if he/she thinks that due to the character of the disciplinary misconduct the public prosecutors must be immediately suspended in their duties.

Although in the light of the Act on the Public Prosecutor's Office the Public Prosecutor General is not a public prosecutor and does not have to have a public prosecutor's qualifications, he/she is a superior public prosecutor to every public prosecutor. He/She has the right to issue guidelines, dispositions, and orders to public prosecutors. The Public Prosecutor General has the right to change and repeal public prosecutors' decisions. He/She is competent to conduct control over operational and exploratory activities and give orders to conduct it. The Public Prosecutor General can use the principles of substitution and devolution, i.e. transfer the proceedings between different organizational units of the public prosecutor's office. He/She is competent to order that particular preparatory proceedings should be conducted in the National Public Prosecutor's Office, even independently of the general competence¹⁹. In other words, the Public Prosecutor General is competent to effect practically any subject or personal combination from the angle of the effect of the proceedings which he/she desires. Practically, he/she has an unlimited right to interfere with the public prosecutors' work. It is only a question of choosing the means by which it happens.

Considering this, it is justified to state that the combining of functions of the Public Prosecutor General and the Minister of Justice has resulted in the fact that the public prosecutor's office has ceased to be externally independent.

¹⁸ Cf. K. Kułak, *Kwestia niezależności prokuratora w nowej ustawie – Prawo o prokuraturze*, «Studia Iuridica Lublinensia» 2016, Vol. XXV, p. 114.

¹⁹ Cf. *ibidem*, pp. 115–116.

The article will now discuss the issue of the internal independence of a public prosecutor. It is emphasized in the literature that the aim of legal regulations that guarantee the independence of public prosecutors should not only be to preserve its independence from external entities but also – and this is of no less importance – protect it from abusive misconduct from inside the organization²⁰.

In art. 7 of Act on the Public Prosecutor's Office from 2016, the independence of public prosecutors is connected with the performance of their activities. This refers both to the external dimension of a public prosecutor's independence and their internal independence in relation to superior public prosecutors. At the same time, however, in the same art. 7 the parliament made certain reservations concerning the scope of a public prosecutor's independence. They refer to the independence of a public prosecutor within the frameworks of the organization of the public prosecutor's office, and they are of a restrictive nature.

As declared by the lawmaker in art. 7 of Act on the Public Prosecutor's Office, within the range of official activities performed by a public prosecutor, they are independent. At the same time, in the very same art. 7 of Act on the Public Prosecutor's office the legislator makes a reservation that a public prosecutor is obliged to enforce dispositions, guidelines, and orders of a supervisory public prosecutor. The orders concerning the content of an act in court proceedings is given by a superior public prosecutor in writing and, if requested by the public prosecutor, together with a statement giving the reasons.

Dispositions, guidelines, and orders can be issued only by a supervisory public prosecutor and the Public Prosecutor General. Insofar as the guidelines and dispositions do not raise any greater doubts concerning a public prosecutor's independence, and they are necessary for the organizational efficiency of the public prosecutor's office. As for orders, there are certain differences. It should be simultaneously remarked that the legislator did not make a reservation – like it was in the previous regime – that the guidelines and dispositions of the Public Prosecutor General cannot concern the content of acts in court proceedings. Therefore, there are no contraindications in giving a public prosecutor this type of guidelines or dispositions, for example as to the way of terminating preparatory proceedings.

²⁰ M. Mistygacz, M. Szeroczyńska, *Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury z dnia 11 września 2014 r. – analiza krytyczna wybranych zagadnień*, «Prokuratura i Prawo» 2015, No. 7–8, p. 221.

On the other hand, the most authoritarian and formalized form of interfering into a public prosecutor's independence are orders. They most frequently refer to specific proceedings and the activities undertaken in connection with them. The right to give orders belongs to each public prosecutor who is the official superior of other public prosecutors. Moreover, these supervisory public prosecutors are entitled to change or revoke the decision of a subordinated public prosecutor. The public prosecutor who is a direct superior as well as any other public prosecutor who has a supervisory role can give orders concerning the content of an act in court proceedings, and also give orders concerning the way of terminating preparatory proceedings and court proceedings. This is a significant limitation of a public prosecutor's independence²¹, as public prosecutors in a supervisory role have the right of unlimited interference into the procedural acts in legal proceedings of subordinate public prosecutors. In matters which are politically or otherwise controversial a public prosecutor must take into account either the risk of the supervising public prosecutor changing their decision or the supervising public prosecutor's expectations of the specific actions to be taken. It might affect the specific nature of the procedural decision a public prosecutor takes and – which is no less important – in the social perception of the public prosecutor's motifs of activity. And this is what public prosecutors might have to take into consideration while choosing their strategy, independently of the binding legal and facts of the matter. This contradicts the function of the public prosecutor's office which is to uphold the law, regardless of who is the participant of a given case and whose interests it concerns.

The formal guarantee of preserving public prosecutors' independence in case they do not agree with the content of an order is their right to demand:

- changing the order,
- being excluded from administering the act,
- being excluded from participation in the case.

This kind of demand by a public prosecutor refers to those orders which concern the content of an act in procedural proceedings, which means specifically the ongoing preparatory proceedings. This is a legal solution with no greater effect on a public prosecutor's everyday activity. There are few circumstances where a public prosecutor would demand

²¹ A. Gerecka-Żołyńska, *Niezależność prokuratury i prokuratorów – nowe rozwiązania na tle dotychczasowych kontrowersji (uwagi w związku z ustawą z 28 stycznia 2016 r. – Prawo o prokuraturze)*, «Ruch Prawniczy, Ekonomiczny i Socjologiczny» 2016, No. 1, p. 66.

the changing of an order from their supervisor, or their supervisor having to justify their order, as the request is made to the supervisor who had given the order in the first place. One situation, which seems unlikely, would be if a public prosecutor already had the permission of their supervisor to change an order but required official permission from their supervisor. On the other hand, if an order was given by the Public Prosecutor General, a public prosecutor cannot challenge this order as the Public Prosecutor General does not have a supervisor. In practice, the chance for this kind of situation occurring is low, which is the result of the structuring of the decision process.

Thus, the right to give different kinds of orders to subordinate public prosecutors belongs to every supervisory public prosecutor (and not only the directly superior) of a public prosecutor and – respectively – within the range of the commissioned activities other authorized staff, such as directors of departments of the National Prosecutor's Office, heads of offices in the departments of the National Prosecutor's Office, heads and chiefs of sectors and independent divisions of provincial prosecutor's offices, etc.

Supervisory public prosecutors can also give orders concerning the ways to terminating proceedings. The legislator does not provide for subject-related or objective limitations as for the right to give orders. This is despite the promise made in art. 7 of the Act on the Public Prosecutor's Office about the independence of a public prosecutor while he/she is administering the acts specified by laws, this is its significant limitation. A public prosecutor is independent within the independence established for them and acceptable by supervisory public prosecutors. The principle of public prosecutors' activity which is of real importance within the system is their subordination to their supervisors²², while the independence mentioned in art. 7 of Act on the Public Prosecutor's Office is of secondary importance. It can be applied if it does not come into conflict with the principle of subordination. In the case of a clash between these two principles, the principle of subordination of a subordinate public prosecutor to a supervisory public prosecutor has a priority of application.

The risk to the protection of citizens' rights and freedoms, which is connected to the hierarchical subordination of public prosecutors directed by political activists, is not limited or eliminated by the judicial

²² J. Zaleśny, *Prokuratura*, [in:] M. Kruk, M. Olszówka, M. Godlewski, M. Jarosz, M. Laskowska, J. Zaleśny, *Ochrona praw i wolności. System instytucjonalny w Rzeczypospolitej Polskiej*, Warszawa 2019, p. 318.

control of the preparatory proceedings. To varying degrees this judicial control takes place both during the preparatory proceedings and the jurisdictional proceedings. Additionally, in a limited number of situations the court conducts evidence procedures for preparatory proceedings, such as the hearing involving a witness who is under 15 years of age at the time of the hearing, or in cases concerning crimes using violence or unlawful threats. The above examples of the forms of judicial control over the activities performed by public prosecutors in the course of preparatory proceedings are a significant guarantee of their correctness: a formal but not material guarantee because the practice of performing these activities varies. Having a servile attitude is not unknown to some judges too. One should also take into consideration the situational factor. To a considerable degree, the judicial control of the activities undertaken in preparatory proceedings is conducted by one person and, in addition, as in the case of the decision concerning temporary arrest, under the pressure of time, which favours the mechanical consideration of the public prosecutor's decision.

Informing on the course of proceedings

A significant limitation of the principle of the independence of a public prosecutor that is expressed in art. 12 and art. 7 of the Act on the Public Prosecutor's Office²³. The Public Prosecutor General, the National Public Prosecutor or other public prosecutors authorized by them can present information concerning specific matters to the organs of authority (like a minister), and in especially justified cases, can also present information to other persons, if such information is significant to the, "security of the state and its correct functioning". To do this, they do not need consent from the authority conducting the preparatory proceedings. Based on this regulation access to the information from concrete preparatory proceedings, the information following from concrete procedural activities can be obtained by the organs of public authority as well as by any other persons, as the legislator does not establish the status of those other persons. In particular, apart from access to classified information, the legislator does not apply restrictions on the information

²³ Cf. A. Kiełtyka, W. Kotowski, A. Ważny, *Prawo o Prokuraturze. Komentarz*, Warszawa 2017, pp. 126–129.

that can be disclosed to these persons when it is necessary to them to perform their professional duties (the principle *need to know*)²⁴.

These persons can also get access to the materials from preparatory proceedings on the post of the investigating authority, which conflicts with the principle that public prosecutors conduct the activities provided by law, and they independently take the decisions concerning those activities, without any pressure either from the outside or from their supervisors.

Any persons can get acquainted with any information from specific preparatory proceedings and any information from specific procedural activities. This can also be classified information since no exclusion was provided in the same art. 12 in relation to the information from preparatory proceedings leaked to the mass media. In the case of the mass media a clear reservation is made that classified information is not included. It should be observed that these can be persons, who are not required to obtain security clearance as required by the provisions of the Act of 5 August 2010 on the Protection of Classified Information²⁵, as the provisions of the Act on the Public Prosecutor's Office do not refer to the provisions of the Act on the Protection of Classified Information.

Art. 12 of the Act on the Public Prosecutor's Office does not provide for subjective limitation of the disclosed information of preparatory proceedings. The transfer of information can concern any persons included within procedural activities, i.e. suspects, victims and witnesses.

The information from preparatory proceedings can be transferred due to the, "security of the state and its correct functioning". It is an indeterminate phrase, legally indefinable. It consists of two general clauses, namely, "security of the state" and the, "correct functioning of the state". The non-determinability of the premise for disclosing a secret from a preparatory proceedings allows for the actual freedom of disclosing this kind of secret.

From the point of view of public prosecutors' independence in the sphere of their activities, one important aspect is the regulation referring to the disclosure of information from ongoing preparatory proceedings. The Public Prosecutor General and the heads of organizational units of the public prosecutor's office can pass – personally or through an authorized public prosecutor – information from the ongoing prepara-

²⁴ More on this subject, see: J. Zaleśny, *Dostęp do informacji niejawnych w sferze spraw publicznych*, [in:] T. Gardocka (ed.), *Obywatelskie prawo do informacji*, Warszawa 2008.

²⁵ Journal of Laws from 2018, item 412 with amendments.

tory proceedings, excluding classified information, which is connected with an important public interest. This solution also undermines public prosecutors' independence, which is *expressis verbis* observed by the legislator. The latter provides that no consent of the authority conducting preparatory proceedings is necessary to disclose secrets of the preparatory proceedings. Therefore, passing information from the proceedings to the mass media can also take place against the will of the public prosecutor conducting specific preparatory proceedings. In this respect too, for the reasons outlined above, the disclosure of information from concrete preparatory proceedings can negatively affect the course of penal proceedings and their effectiveness.

These limitations on the independence of public prosecutors and the problems that could result from the passing of information was acknowledged by the authors of the Act. This is the reason why in the same art. 12 of the Act on the Public Prosecutor's Office they protect themselves by saying that legal responsibility for any claims that appear as a result of a disclosure of secrets from the preparatory proceedings is borne by the State Treasury.

The regulations concerning the disclosure of secrets from preparatory proceedings are a consequence of the legal problems of members of the present majority government, which they had in the past in connection with unauthorized access to information from the ongoing preparatory proceedings, and their use for in their party political activity. In this respect, this is also a legal regulation that violates the principle of the equality of procedural opportunities. The accused, their procedural representative and other participants in preparatory proceedings are bound by the secrecy of preparatory proceedings, while the public prosecutor can freely share materials from the preparatory proceedings to the mass media, presenting the information in the order and combination that best suits his or her purposes, especially in cooperation with the secret service and journalists.

Legal responsibility of the public prosecutors

The complete realization of the independence of public prosecutors should be based on three major pillars, namely professionalism, the observance of the rules of deontology, and professional ethics. We will examine the part the legal responsibility of public prosecutors plays in the violation of the rules of pursuing a public prosecutor's profession.

A few years ago the doctrine emphasized the necessity of changing the model of public prosecutors' disciplinary responsibility²⁶, with the justifiability of legal solutions adopted in this sphere in the inter-war period being the reference point²⁷. During this period the composition of the disciplinary courts for public prosecutors included judges, who constituted the majority of the adjudicating panel (depending on the composition, a disciplinary court comprised of two judges and one public prosecutor, or three judges and two public prosecutors). This way of shaping the composition of the disciplinary courts for public prosecutors, on the one hand, secured the professionalism and objectivity of the judges, and the knowledge of the specific characteristics and conditions of a public prosecutor's function connected with disciplinary judges who had the status of public prosecutors. It also guaranteed independence and impartiality, and especially specific immunity to environmental relations. At that time, this model of disciplinary proceedings of public prosecutors was confronted by the doctrine with the realized model of proceedings, where disciplinary responsibility was determined by public prosecutors among themselves²⁸. It was introduced in 1950 and this model of disciplinary proceedings was binding till the provisions of the Act of 8 December 2017 on the Supreme Court²⁹ were enacted. Based on these provisions, public prosecutors appear in front of disciplinary proceedings conducted by the Disciplinary Chamber of the Supreme Court.

Like it was postulated in the doctrine, the legislator introduced a universal model that applied to all the legal professions. As it could be suggested that disciplinary proceedings conducted within the judicial structure should promote objectivism and the impartiality of disciplinary jurisdiction, which can be guaranteed by judges, and this is a significant guarantee of a public prosecutor's independence. In this context the issue which should not be ignored are the features of the court determining disciplinary responsibility as if this Chamber of the Supreme Court is dominated by former public prosecutors, then this is a different court, to a court where independent judges adjudicate. After all, one thing is the independence of a former public prosecutor (or other persons with similar predispositions to adjudicate) who, for example (as was in

²⁶ P. Kardas, *Rola i miejsce prokuratury w systemie organów demokratycznego państwa prawnego*, «Prokuratura i Prawo» 2012, No. 9, pp. 42 ff.

²⁷ Ibidem, pp. 42–43.

²⁸ Ibidem, pp. 43–44.

²⁹ Journal of Laws from 2018, item 5 with amendments.

practice), tortured a nine months pregnant woman and another is the independence of a judge.

Public prosecutors' penal liability for violating the regulations of law in the course of professional activities should be rethought, for instance, violating civil rights during preparatory proceedings, or in the case when an unfounded indictment is brought. Unfortunately, the legislator adopted a different legal solution, which strengthened the unpunished abuse of power by public prosecutors. In accordance with art. 137 § 2 of the Act on the Public Prosecutor's Office, a public prosecutor's action or omission performed exclusively in the public interest is not a disciplinary misconduct. And it has been known for a long time now, that everything that public prosecutors and other functionaries of public authority do and everything that they do not do is undertaken, "exclusively in the public interest". It is so now, it was so in the past, both more and less distant.

This behavior is in conflict with the principle of legality from art. 7 of the Constitution of the Republic of Poland with the constitutionally based assumption that public prosecutors also have the obligation to function on the basis of, and within the limits of, the law, whereas acting in the public interest is inherent in the activity of the public prosecutor's office as an organ of legal protection. The introduction of this counter-type within the disciplinary responsibility of public prosecutors makes it possible to exclude unlawfulness of an act fulfilling the attributes of a disciplinary delict and this is towards a public functionary. Insofar as organs of public authority are supposed to act on the basis of, and within the limits of, the law, which is based on art. 137 § 2 of the Act on the Public Prosecutor's Office, this principle does not have to include public prosecutors. According to the aforementioned provision of the Act on the Public Prosecutor's Office, public prosecutors do not have to undertake acts only on the basis of a clear authorization included in legal regulations. They do not have to act whenever such an obligation follows from the binding regulations. They do not have to act within the range of the competences they possess. In the light of art. 137 § 2 of the Act on the Public Prosecutor's Office, public prosecutors can act arbitrarily.

It is enough that they have the consent of a supervisory public prosecutor for their activity or omission of activity to be excluded from disciplinary responsibility, which should not take place in a state ruled by law, and which undermines social trust in the public prosecutor's office as an organ, which objectively and professionally safeguards the observance of the binding regulations of the law.

Paths to a public prosecutor's profession

We will now discuss the motif of a public prosecutor's qualifications as one of the guarantees of independence, as entry to professional entities is usually characterized by experience, specific qualifications and ethical awareness, which is necessary for the proper performance of the entrusted tasks. Previously, the doctrine of law acknowledges that the desired independence of a public prosecutor is served by consciously conducted competition proceedings within the framework of which the candidate who is best prepared for the performance of a public prosecutor's tasks is selected among those who apply³⁰. This assumption was removed from the new Act on the Public Prosecutor's Office, which abolished the obligation of conducting a competition. Public prosecutors of common organizational units of the public prosecutor's office are now appointed to the public prosecutor's office by the Public Prosecutor General from a motion from the National Public Prosecutor. To secure the proper realization of the statutory tasks of the public prosecutor's office, in especially justified cases the Public Prosecutor General – from a motion of the National Public Prosecutor – may appoint a public prosecutor to perform duties in the National Public Prosecutor's Office, in a district public prosecutor's office or in a regional public prosecutor's office without regarding the requirements concerning professional experience.

The abandoning of competition procedures to fill public prosecutors' posts as well as the abandoning of the requirement of sufficient experience for appointments to the more senior public prosecutor positions, increases the risk of appointing persons with insufficient knowledge or ethical preparation to hold the post of a public prosecutor. A person who is less competent, less experienced, or less able to make ethical decisions about the freedoms and rights of others, is at the same time more susceptible to adopting a servile attitude, and more likely to realize the orders which conflict with the lawful and effective preparatory proceedings. In this sphere theoretical reflections cannot be separated from an analysis of practice. No sooner had these exceptions been enacted, than the process of appointing the children of public prosecutors who had the merits of strengthening the communist regime in the past, and those who now have these merits for the party began.

³⁰ Cf. M. Szeroczyńska, *Międzynarodowy standard statusu i organizacji prokuratury...*, pp. 135–136.

The same mechanism can be observed in the way that public prosecutors are promoted. Within the exceptional procedure, the public prosecutors who are promoted are not those who meet the general statutory conditions as to the work experience, but those who are politically engaged. The mechanism of exceptional promotion proceedings should be linked to the mechanism of exceptional demotion or delegation. This is the very same mechanism for the systemic and organized shaping of preparatory proceedings by public prosecutors, who are on call and who are characterized by a servile attitude towards the wielders of political power and have a flexible approach to the principles of the rule of law in shaping the activity of the public prosecutor's office.

Conclusion

Summing up the characteristics of the motifs of public prosecutors' independence, despite the parliament's declarations that public prosecutors are independent, they are not independent from political guidelines, dispositions, and orders. They are not required to have the experience, qualifications, or ethical awareness. It is enough that they serve the will of the Public Prosecutor General – the Minister of Justice.

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