A country that punishes.

On January 28, 2016, the Law on the Public Prosecution Service was adopted, the draft of which was submitted by MPs from the Law and Justice party to the Parliament (Sejm) of Poland on December 24, 2015.[1]

The submission of the bill on the Public Prosecution Service as a parliamentary bill meant that the government's way of submitting the bill was omitted, and thus the consultation between the ministries concerned was omitted. The act entered into force on March 4, 2016.

The introduction of the new law was preceded by numerous statements by politicians from Law and Justice and the Minister of Justice himself – the Prosecutor General, about the need to improve the functioning of the prosecutor's office and improve its effectiveness.[2]

However, the actual goal of this act, which was revealed in the following years of the law on the public prosecutor's office, was to take absolute control over the prosecution, gain by the Prosecutor General - the Minister of Justice to influence decisions inside the prosecution, and to fill the highest positions in the prosecutor's office with people favoring power.

The most dangerous changes introduced by the 2016 Act on the Public Prosecution Service - from the point of view of the independence of the public prosecutor's office, its effectiveness and the implementation of its basic function - prosecuting of criminality, include:

I. Concentration of power in the hands of the Prosecutor General - the Minister of Justice.

The current act states directly that it is the Prosecutor General who decides on the type of distinctions, promotions and the procedure for their awarding. Additionally, the current provisions of the law on Public Prosecution Service allow the Prosecutor General (or the National Public Prosecutor

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[1]The Act of January 28, 2016, Law on the Public Prosecution Service, Journal of Laws from 2019, position nr: 740.

[2] M. Wójcik: (deputy of MoJ): From this point I want to assure Poles that we have prepared a good law. In view of the challenges that are today: threats of a terrorist attack, organized crime, corruption, which actually devours our country, today there must be a person responsible for the Polish prosecutor's office and this person will be the Minister of Justice-Prosecutor General.
https://www.tvn24.pl/wiadomosci-z-kraju,3/nowa-ustawa-o-prokuraturze-w-punktach,614596.html
B. Szydło (former Prime Minister): There is a conviction that the weaker are to wait endlessly to adjudicate cases, they feel that the decisions made in their cases are wrong and unfair. We are introducing institutional changes to which we have committed ourselves to Poles.
https://wpolityce.pl/polityka/283802-zmiany-w-prokuraturze-wchodza-w-zycie-ziobro-to-przywroci-zaufanie-polakow-do-wymiaru-sprawiedliwosci-sprawdz-szczegoly
Our goal is to look for a solution [...] that will improve the safety of Poles.
https://www.youtube.com/watch?v=Plw3qf5MfIQ
This power will be under strict parliamentary control. Act on the so-called the independent prosecutor's office has deprived the Sejm of the possibility of controlling the executive power, which is the prosecutor's office.
https://wpolityce.pl/polityka/283802-zmiany-w-prokuraturze-wchodza-w-zycie-ziobro-to-przywroci-zaufanie-polakow-do-wymiaru-sprawiedliwosci-sprawdz-szczegoly

who exercises his prerogatives as the first Deputy of Prosecutor General) to transfer a public prosecutor to another public prosecutor's office without his consent.

The absolute power of the Prosecutor General covers, above all, the personnel policy, i.e. the policy of promotion, demotion and temporary delegation of public prosecutors to higher or lower-level public prosecutor's offices, treated as an additional disciplinary penalty not provided for in the Act. The law on the public prosecutor's office of 2016 gave the superiors of prosecutors the opportunity to freely create a policy of rewards and promotions in such a way as to reward the obedient and punish persons who make their own, independent decisions in proceedings, without even remaining in opposition to the party currently in power.

II. Degradation and transfer to lower-level prosecutor's offices.

In 2016, the law on the public prosecutor's office and its introductory provisions allowed for a one-off transfer of public prosecutors from the highest levels of the public prosecutor's office, mainly from the former General Prosecutor's Office to lower-level prosecutor's offices. The Prosecutor General was not guided by substantive considerations (qualifications and professional experience) when making these decisions, and these decisions were penalties for the prosecutors who were affected.

The idea was to remove from their posts prosecutors who might turn out to be against the new ruling majority. Often from the lowest ranks, prosecutors were promoted to prosecutors in their places. In this way, nearly 1/3 of the prosecutors of the former General Prosecutor's Office and former appellate prosecutor's offices were demoted.

Transferring to another official position is one of the disciplinary penalties specified in Art. 142 § 1 of the Law on Public Prosecution Service. But the degradations and transfers made by the Prosecutor General - after the dissolution of the General Public Prosecutor's Office and the change of the Appellate Prosecutor's Offices to the Regional Prosecutors' Offices did not result from disciplinary proceedings against demoted prosecutors. However, taking into account that these were decisions of the Prosecutor General, without the prosecutor being able to appeal against this decision, these actions can be considered a hidden quasi-disciplinary penalty.
The parliamentary majority, headed by the ruling Law and Justice party, apparently reorganized the prosecutor's office. Thus, the units of public prosecutor's offices in the form of: the Appellate and General Public Prosecutor's Offices were established instead of the Appellate Public Prosecutor's Offices, and the National Public Prosecutor's Office instead of the General Public Prosecutor's Office with the National Public Prosecutor who performs most of the powers of the Prosecutor General, i.e. the Minister of Justice.

Apart from demotion, a commonly used "penalty" by the Prosecutor General or his subordinate National Public Prosecutor against public prosecutors who show signs of independence, e.g. in investigations that are of interest to the Minister of Justice, is to delegate them to public prosecutor's offices often distant from their place of residence and, as a rule, a lower level.

In the actual sense, it is a hidden disciplinary penalty,[3] in the legal sense; the act defines such action as the possibility of the Prosecutor General and the National Public Prosecutor to act to meet the staffing needs of other public prosecutor's office units. The transferred prosecutor cannot comment on such a decision, or appeal against it or appeal to the court. Moreover, the decisions on the secondment of a prosecutor do not contain any justification. In many cases, such a formal delegation means a real temporary demotion to a lower position and making life difficult by being referred to work, e.g. several hundred kilometers from the place of residence.

The Prosecutor General or the National Public Prosecutor may delegate a public prosecutor, without his consent, for a period of 12 months in a year, which actually means the possibility of an endless delegation, extended year after year. As a result of staff changes, after the government of the united right with the hegemony of Law and Justice took power, 6 of 7 deputies of the Public Prosecutor General were replaced, almost all prosecutors managing leading offices and departments in the current National Public Prosecutor's Office, all heads and their deputies in Regional Prosecutor's Offices and District Prosecutor's Offices, and in 90% of District Prosecutor's Offices.

The same mechanism of delegating prosecutors by the Prosecutor General or the National Public Prosecutor also functions in an inverted form: not as a punishment, but a reward for prosecutors considered by the current authorities of the Public Prosecutor's Office to be favorable to the government. Currently, it is possible to promote a prosecutor from the lowest rank of the prosecutor's office to the highest one.

From March 4, 2016, i.e. from the entry into force of the Act on the Public Prosecutor's Office, the Prosecutor General determines the types of distinctions and awards and the procedure for granting them. The terms of office were also abolished in managerial positions in the prosecutor's office. Competitions for the position of a district public prosecutor are omitted, and the role of the public prosecutor's self-government in this respect has actually ceased to exist. The Act allows for omitting the competition "in particularly justified cases" and then the candidate indicated in the application of the National Public Prosecutor is appointed to the position. In this way, the Prosecutor General may freely control the personnel policy in the public prosecutor's office.

[3] European Commission for Democracy through law (Venice Commission) Poland opinion on the Act on the Public Prosecutor's Office as amended adopted by the Venice Commission at its 113th plenary session (Venice, 8-9 December 2017), Opinion 892 / 2017, CDL-AD(2017)028, Council of Europe.

The Prosecutor General, at the request of the National Public Prosecutor, appoints and dismisses the heads of regional, regional and district public prosecutor's offices.

III. Weakening of the prosecutors' responsibility.

Another change introduced by the Law on the Public Prosecution Service of 2016 is the discretionary use of the provisions on disciplinary liability of public prosecutors. The change consists in the exclusion of disciplinary liability in the case of the prosecutor's actions *"solely in the public interest"*.[4]

Such an unclear wording makes it possible to abuse and treat activities for the benefit of the authorities as carried out in the public interest. The actual public interest may not matter, and the case of the prosecutor who committed such an abuse may not be brought to a disciplinary court at all.

The amendment to the act did not contribute to the improvement of the existing shortcomings of the disciplinary system towards prosecutors. The new act did not solve, or even deepened, the problem of the lack of responsibility of prosecutors for acting to the detriment of society. Wrong decisions, especially those taken under the pressure of their superiors, negatively influencing, for example, the lives of wrongly accused and injured persons, do not lead to prosecution of prosecutors who take such actions. They can always be considered by their disciplinary superiors to be undertaken solely in the public interest.
The above-mentioned changes have led to the creation of a system of incentives in the hands of the executive. The strong influence of the authorities on the decisions of prosecutors is conducive to making decisions that are desirable and appropriate from the point of view of the rulers.

IV. The system of disciplinary liability of public prosecutors.

In addition to the informal disciplinary system described above, the prosecution service uses which the prosecution authorities punish and reward selected prosecutors; there is also a formal system of disciplinary proceedings. This system is also used to prosecute prosecutors who exercise their freedom of expression and freedom of association.

The entry into force of the new regulations did not change the grounds for instituting disciplinary proceedings and did not eliminate the ambiguities which now make it possible for the Prosecutor General and the National Public Prosecutor to prosecute disobedient public prosecutors. The broad scope of interpretations of the grounds for initiating these proceedings remained unchanged.

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[4] Art. 137 §2 of law on Public Prosecution Service (Journal of Laws from 2019, position nr: 740).

The basis for instituting disciplinary proceedings against a public prosecutor is:

1. obvious and gross offense against the law,
2. action or omission that may hinder the functioning of a judicial authority or prosecutor's office,
3. action questioning the existence of the service relationship of a judge or a public prosecutor, the effectiveness of the appointment of a judge or a public prosecutor or the power of a constitutional body of the Republic of Poland,
4. public activity incompatible with the principle of the prosecutor's independence,
5. breach of the dignity of the office,
6. abuse of the freedom of speech in the performance of official duties, constituting an insult of a party, its attorney or defense lawyer, probation officer, witness, expert or translator, prosecuted by private prosecution,
7. committing a misdemeanor by the prosecutor.[5]

The prosecutor's offense against the law is closely related to the performance of his/her official duties. It is about *"contempting the provisions that are used by the prosecutor as an organ of the conducted preparatory proceedings or as a party to court proceedings"*.

The abuse of freedom of speech is similarly closely related to the performance of official duties. Disciplinary liability for an offense is also clear, as the catalog of offenses is defined in the law.

The problem arises when trying to define what is an action or omission that may impede the functioning of a judiciary or prosecutor's office, an action questioning the existence of a judicial or public prosecutor's service relationship, the effectiveness of the appointment of a judge or a public prosecutor or the power of a constitutional body of the Republic of Poland, public activity incompatible with the principle of independence prosecutor.[6]

Neither the law on Prosecution Service nor any other normative act indicates the catalog of behaviors. Also, none of the acts define these terms. That is why there is a gate in this field for prosecuting prosecutors for actions that their superiors do not like, headed by the Prosecutor General. It poses a real threat to these prosecutors, especially in a situation where the prosecutor's office becomes a powerful tool in the hands of one person and is used by the Minister of Justice, the Prosecutor General, to achieve party goals. It allows these grounds to be used to put pressure on disobedient prosecutors and attempt to intimidate them, as is the case today.

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[5] Art. 137 § 1 of law on Public Prosecution Service (Journal of Laws from 2019, position nr: 740).

[6] A country that punishes. Pressure and repression of Polish judges and prosecutors. Report of the Justice Defense Committee (Komitet Obrony Sprawiedliwości), Warsaw 2019, http://komitetobronysprawiedliwosci.pl/archiwum-represji/ https://foreignpolicy.com/2019/10/11/poland-is-purging-its-prosecutors/

Pursuant to the new regulations, it is not a basis for instituting disciplinary proceedings acting solely in the *"public interest",* even if one of the above conditions occurs.

This mechanism can work both ways, i.e. it allows protecting those prosecutors who have contributed to the present management of the prosecution service and, by not applying the principle of acting in the public interest, to prosecute disobedient prosecutors. In a system where the prosecutor's office becomes a tool in the hands of the executive, these two mechanisms: prosecuting disobedient prosecutors and protecting submissive ones, give an unlimited field of activity.[7]

V. Disciplinary Courts.

1. In the first instance:

The Disciplinary Court at the Public Prosecutor's Office. Disciplinary judges are prosecutors elected in organizational units of the prosecutor's office, the chairman of the Disciplinary Court is appointed by the Prosecutor General. The composition of the team of the Disciplinary Court at the Public Prosecutor General is appointed by the chairman according to the list of all members of that court, in the order in which cases were received, provided that the court consists of at least one prosecutor from an organizational unit of the prosecutor's office equivalent to the one in which the accused served or performed official duties at the time of committing the act. The Supreme Court composed of one judge of the Disciplinary Chamber of the Supreme Court in cases of disciplinary offenses that meet the features of willful offenses prosecuted on public prosecution or intentional fiscal offenses or in cases where the application was filed by the Supreme Court.

2. In the second instance:

decisions are made by the Supreme Court composed of three judges of the Disciplinary Chamber of the Supreme Court. The new Disciplinary Chamber of the Supreme Court was established on the basis of the Act of December 8, 2017 on the Supreme Court, which entered into force on April 3, 2018. The basic problem was and still is the selection of new judges to the Supreme Court, who are assessed by the new National Council of the Judiciary, dominated by the ruling party's nominees. This raises concerns as to the independence of these judges. The Disciplinary Chamber of the Supreme Court is currently composed only of newly appointed persons, mostly former prosecutors, beneficiaries of the new government. Therefore, it is difficult to talk about its independence, and it is even difficult to say that the Disciplinary Chamber is a real court.[8]

VI. Powers of the Prosecutor General (Minister of Justice).

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[7] see footnote 6.

[8] ibidem.

The Minister of Justice, as the Prosecutor General, is the supreme body of the prosecutor's office. The Law on the Public Prosecution Service indicates his numerous competences in the field of the functioning of the public prosecutor's office, however, special attention should be paid to those which have enabled him to influence disciplinary proceedings against prosecutors:
1. The Prosecutor General is the disciplinary superior in relation to public prosecutors of common organizational units of the public prosecutor's office (he may order the initiation of explanatory proceedings against each public prosecutor),
2. The Prosecutor General appoints the chairman and deputy chairman of the Disciplinary Court at the Public Prosecutor General,
3. The Prosecutor General appoints disciplinary spokesmen (prosecutors before disciplinary courts),
4. The Prosecutor General may, at the request of the National Public Prosecutor, dismiss a public prosecutor, if the public prosecutor, despite being punished twice by a disciplinary court with a disciplinary penalty other than an admonition, has committed misconduct, including an obvious offense or an offense against the dignity of the law.

Disciplinary spokesmen appointed by the Prosecutor General pursue prosecutors for disobedience to the authorities. An example of "*disobedient"* actions is the official, public and educational activity of prosecutors, but also media statements. Disobedience is also punished by demotion and transfer, which is not disciplinary in itself but is related to it, as it is one of the penalties that can be applied to prosecutors and does not even require the end to the disciplinary proceedings.

The most glaring example of pressure and harassment of prosecutors are disciplinary proceedings or explanatory proceedings for prosecutors 'media statements. For example, one of the prosecutors was accused of the disciplinary spokesman that he*: "posted entries and comments that undermine the dignity of the office and weakened confidence in its impartiality".* The posts concerned a special, extraordinary amount of monthly remuneration for judges appointed to the new Disciplinary Chamber of the Supreme Court.[9]

Another prosecutor was investigated in relation to his publication of texts in one of the newspapers. Disciplinary proceedings were initiated and conducted against a prosecutor for participating in a demonstration against the so-called reform of the judiciary.

Even if in some cases this type of procedure ends with the discontinuation of the procedure, their conduct is to result in the so-called a chilling effect of an attempt to intimidate prosecutors who are critical of the Law and Justice government.[10]

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[9] Disciplinary proceedings against judges and prosecutors, Helsinki Foundation for Human Rights, February 2019, Warsaw. www.hfhr.pl

[10] https://4liberty.eu/law-and-justices-concentrated-power-over-polish-prosecutors/

In the present shape of the prosecutor's office and the provisions of the Law on Public Prosecution Service in force since 2016, there are two main threats:

1. delegation of the power of the Prosecutor General - the Minister of Justice over the prosecution to one person - an active politician - makes the professional fate of individual prosecutors fully dependent on his decisions. It can influence them with awards and promotions, delegations or intimidate them with the initiation of disciplinary proceedings,

2. risk of the abusing of the applicable provisions on disciplinary liability and their use to punish disobedient prosecutors. Prosecution of prosecutors for *"wrong decisions"* and statements is a dangerous phenomenon, especially if it is combined with the absolute influence of the same politician who decides on the prosecution, i.e. the Minister of Justice, on the judiciary and disciplinary proceedings against judges. Such actions are to induce full obedience of subordinates, limit their freedom of expression, discourage association, lead to justifiable concerns about disciplinary reliability and progressive independence, and cause a chilling effect.

The changes after the 2015 elections in Poland showed very clearly how important an organ in the state structure is the prosecutor's office, and above all, how it can be used to deal with the interests of political parties exercising power in the state.

A visible problem at the moment is the politicization of the prosecutor's office, which concentrates a significant part of the efforts and resources on matters important for the rulers or on conducting proceedings against political opponents or ordinary citizens participating in various forms of social protests in defense of the rule of law in Poland. In the prosecution, the political goal has become dominant over the provisions of the law, and the facts and their assessment are adjusted to particular political interests.

Since 2016, Poland has departed far from the principle that states should take effective steps to guarantee the independence of the prosecutor's office from both the executive, legislative and judicial authorities, and that they should adopt mechanisms and guarantees that will ensure the independence of the prosecutor in the performance of official duties, and defining the role and tasks of prosecutors in the area of criminal law and beyond should be enshrined in a legal act of the highest possible order and should be based on the democratic principles and values of the European Union and Council of Europe. The independence and autonomy of the prosecution service is a necessary condition for the independence of the judiciary. But the independence and autonomy of the prosecution service is no longer a value on which the Law on the Public Prosecution Service is based. Additionally, the practice of the Prosecutor General - the Minister of Justice does not recognize the existence of such rules, checking the prosecution for a party tool to fight political opponents.[11]

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[11] Matczak, Marcin:10 Facts on Poland for the Consideration of the European Court of Justice, VerfBlog, 2018/5/13, https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice/