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The Rights and Duties of a Minister – Member of the Council of Ministers

Keywords: minister, Council of Ministers, rights and duties

Słowa kluczowe: minister, prawa i obowiązki, Rada Ministrów

Abstract

The Constitution provides the possibility of appointing the ministers in two categories – ministers in charge of the government administration department and ministers performing tasks assigned by the President of the Council of Ministers. The conditions for holding the office define the rights and duties of a minister. While analyzing them, it is necessary to highlight those resulting from the fact that ministers are members of the collective executive body as well as those related to the exercise of office. The status of “departmental” ministers and that of ministers without portfolio are equivalent within the cabinet. The Act on the Council of Ministers does not define separate rights, does not impose separate obligations resulting from membership in the Council of Ministers, and the obligations toward the Sejm and its bodies remain the same.

Streszczenie

Prawa i obowiązki ministra – członka Rady Ministrów

Konstytucja przewiduje możliwość powołania dwóch kategorii ministrów – ministrów kierujących działem administracji rządowej oraz ministrów wykonujących zadania wy-

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znaczone przez Prezesa Rady Ministrów. Analizując prawa i obowiązki ministrów można wskazać te, które wynikają z członkostwa w Radzie Ministrów, a także wynikające ze sprawowania urzędu. W sferze praw i obowiązków pozycja ministrów „resortowych” oraz ministrów „bez teki” jest równorzędna. Ustawa o Radzie Ministrów nie określa odrębnych praw, nie nakłada odrębnych obowiązków z tytułu członkostwa w Radzie Ministrów, jednakowe pozostają również obowiązki wobec Sejmu i jego organów.

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I.

The office of a minister has become a permanent fixture in the Polish political system. With its origins in the times of the First Republic of Poland, it has always been connected with the authority and mechanisms of its exercise. Along with the development of constitutionalism, the adoption of subsequent Basic Laws, the tasks of ministers, their competences or issues related to accountability were subject to change, but the activities of ministers were always connected with the performance of executive functions. This has been confirmed by the history of the office and regulations contained in successive Polish constitutions².

The current Constitution of April 2, 1997 adopted a governance model described as a rationalized parliamentary and cabinet system. Such a model is based on the principle of dividing and balancing the legislative, executive and judicial powers. Among the three indicated powers, the notion of the executive is of the broadest scope. It may be viewed through the prism of activities related to it, such as governance, management and administering³; in another perspective, attention is drawn to the political and administrative aspects⁴. According to Article 10(2) of the Basic Law, the President of the Republic of Poland and the Council of Minis-

² J. Juchniewicz, *Prawnoustrojowy status ministra członka Rady Ministrów*, Toruń 2018, pp. 12–53.

³ P. Sarnecki, *Komentarz do art. 10*, [in:] *Konstytucja Rzeczypospolitej Polskiej*, eds. L. Garlicki, M. Zubik, Warsaw 2016, p. 8.

⁴ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, p. 86.

ters are the bodies of the executive power. The dualism of the executive, expressed in therein, is increasingly often criticised in the relevant literature, where the authors point to the strengthening of the position of the Prime Minister, which actually justifies inclusion of this position among the executive power bodies. Therefore, it seems more legitimate to speak not so much about the dualism of the executive, but about its multicomponent structure.

It is the responsibility of the Council of Ministers to carry out activities that fall within the scope of the executive power⁵. This has been explicitly stated by the legislator, who has attributed the government the conduct of state policy, moreover, the presumption of competence has been linked to the activities of the Council of Ministers (the Council of Ministers resolves matters which have not been reserved for other organs). Identifying the sphere of government activity is important not only in view of the need to establish mutual relations between the President and the cabinet, but also from the point of view of determining the position of ministers who are obliged to initiate the policy of the Council of Ministers and to implement the assumptions, programmes and strategies adopted by the government. A multi-unit executive requires the definition of mutual relations between the executive authorities; relations which should be based primarily on the cooperation directive expressed in the Preamble to the Polish Constitution of 1997. The formal mechanisms of cooperation between the government and the head of state have to include the countersignature and the possibility to convene a Cabinet Council. Apart from them, meetings, consultations or even agreements can be classified as less formalized.

II.

It is necessary to adopt a broad perspective in order to determine the political status of ministers. Ministers are not only members of the collective executive body – i.e. the Council of Ministers, but at the same time they are also government administration bodies, maintaining autonomy in the performance

⁵ For more information see J. Juchniewicz, *Rada Ministrów*, [in:] *Administracja rządowa w Polsce*, ed. M. Chmaj, Warsaw 2012, pp. 51–59.

of tasks resulting from the exercise of the office. Both spheres where ministers function interact and permeate each other⁶.

The Constitution provides for the possibility of appointing the ministers in two categories – ministers in charge of the government administration department and ministers performing the tasks assigned by the President of the Council of Ministers. Both these categories can be classified as constitutional bodies of state authority, since they meet the conditions which are addressed in the doctrine of constitutional law to constitutional bodies of the state (inclusion in the Constitution, indication of tasks and manner of appointment and dismissal)⁷. Concurrently, ministers represent an element of extensive government administration, in which they play a dual role – a member of the Council of Ministers obliged to implement government policy, while retaining a superior position in relation to other bodies functioning in the sphere of administration. Despite the fact that the legislator does not explicitly state this, the political status of both ministers is different. It is reflected not only in the fact that it is only the ministers in charge of the government administration department who are obligatory members of the government and their appointment determines the existence of the cabinet. This is also apparent in the greater dependence of ministers without portfolio on the Prime Minister, and above all in the lack of capacity of ministers performing the tasks entrusted to them by the Prime Minister to issue regulations and acts of internally binding law.

The scope of activity of the minister in charge of the government administration department is stipulated in the law and determined by the so-called attributional regulation⁸. It includes the following elements: setting out the detailed scope of the minister's activity by indicating the department or departments the minister will manage, indicating the part of the state budget at the disposal of the minister, and indicating the ministry or other gov-

⁶ M. Grzybowski, *Konstytucyjne i ustawowe uwarunkowania struktury rządu a praktyka ustrojowa*, [in:] *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, ed. M. Grzybowski, Warsaw 2006, p. 126; L. Garlicki, *Polskie prawo konstytucyjne*, Warsaw 2017, p. 345.

⁷ M. Zubik, *Wybrane problemy dotyczące statusu prawnego Marszałka Sejmu*, „Przegląd Sejmowy” 2002, No. 4, pp. 9–10; J. Trzcziński, *Pojęcie konstytucyjnego organu państwa socjalistycznego (na tle Konstytucji PRL)*, Wrocław 1974, p. 58.

⁸ J. Juchniewicz, *Prawnoustrojowy status...*, pp. 108–110.

ernment administration body providing services to the minister. The annex to the regulation specifies the bodies under the supervision of the minister or those subordinate to him. Which departments are to be assigned to a particular minister remains the sole responsibility of the head of government, however, the freedom of the Prime Minister is subjected to three limitations. The first is connected with the prohibition of dividing the department. The entire department must be entrusted to a single minister. The second restriction comes down to the prohibition of assigning the same department to two or more ministers. The Law allows one minister to be in charge of several departments, but this depends on the decision of the Prime Minister responsible for structuring the cabinet. Only in relation to three departments: budget, public finance, financial institutions, the Act on departments directly indicates that they must be assigned to one minister. The third limitation to be indicated requires the Prime Minister to distribute the departments among ministers in such a way that each department is headed by a minister.

Ministers performing the tasks designated by the Prime Minister constitute the other category of ministers, whose appointment to the Cabinet depends exclusively on the Prime Minister⁹. The tasks assigned by the head of government are included in an attributional regulation, the content of which should also specify the mechanisms through which ministers may carry out the tasks entrusted to them. It should be emphasized that when assigning tasks to a minister, the prime minister may not interfere with the scope of matters previously entrusted to other ministers, nor may he delegate tasks covered by the departments of government administration.

Constitutionalism points to three models defining the way of shaping the composition of the Council of Ministers¹⁰. The first one assumes precise specification of the number of ministries and their names in the provisions of constitutional or statutory rank. In the second model, cabinet members are identified only in a generic way, while the third model is based on the constitutionalisation of some ministries only, with the generic identification of

⁹ M. Bożek, *Rada Ministrów*, [in:] *Polskie prawo konstytucyjne na tle porównawczym*, ed. R.M. Małajny, Warsaw 2013, p. 533; R. Mojak, *Parlament a rząd w ustroju Trzeciej Rzeczypospolitej Polskiej*, Lublin 2007, p. 153.

¹⁰ B. Pytlík, *Naczelne organy władzy w projektach Konstytucji III Rzeczypospolitej Polskiej*, Warsaw 2005, p. 129.

the others. Polish solutions can be located between the second and the third model. Members of the Council of Ministers have been defined in a generic way (Prime Minister, ministers, vice-presidents of the Council of Ministers, chairpersons of committees defined in the law), and only two ministers have been indicated directly in the Constitution – the Minister of National Defence and the Minister of Justice. The Prime Minister is the entity deciding on the staffing of ministerial positions. The freedom of choice is not limited by the necessity to meet any conditions by candidates for the office. The office of a minister is of a political nature¹¹, and the political support coming from the parliamentary majority, not substantive preparation, is of key importance¹². Only in the case of a candidate for the office of Minister of Justice, in view of combining it with the position of the Public Prosecutor General, it is required to fulfil the conditions set out in the Law. It should also be stressed that the office of a minister may be held by a person who is not a Polish citizen or is of multiple citizenships.

III.

The conditions for holding the office define the rights and duties of a minister. While analyzing them, it is necessary to highlight those resulting from the fact that ministers are members of the collective executive body as well as those related to the exercise of office. Membership in the Council of Ministers implies an obligation, which is at the same time the right of ministers, to participate in sittings of the Cabinet. The functioning of the Council of Ministers is based on the principle of collegiality¹³. This means that government decisions must be taken by its members at meetings convened by the Prime Minister or by means of a correspondence agreement on positions. Ministers are obliged to participate in each session of the government, regardless of the

¹¹ W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona*, Warsaw 2016, p. 109.

¹² More in D. Dudek, *Komentarz do art. 147*, [in:] *Konstytucja RP*, t. II: *Komentarz do art. 87–243*, eds. M. Safjan, L. Bosek, Warsaw 2016, p. 769.

¹³ K. Leszczyńska, *Tryb pracy Rady Ministrów w latach 1989–2001*, „Przeгляд Sejmowy” 2006, No. 1, p. 31; A. Kulig, *Rada Ministrów*, [in:] *Prawo konstytucyjne Rzeczypospolitej Polskiej*, ed. P. Sarnecki, Warsaw 1999, pp. 272–273.

subject of the meeting and the nature of the matters under consideration¹⁴. Bearing in mind that participation in meetings should not only be seen as the duty of ministers, but also as their right, it has to be assumed that neither the Prime Minister nor any other member of the cabinet may exclude a minister from participation in a meeting. In particularly justified cases, a minister may be exempted by the Prime Minister from participation in the meeting. This requires the minister to state the reason for absenteeism at the meeting and to indicate another minister who will be substituting for the absent minister and a secretary or undersecretary of state who will attend the Cabinet meeting, give explanations and make statements. A certain discord may be pointed out here, which on the one hand requires the minister to designate another minister to represent him, while at the same time conferring on the Prime Minister the right to designate a minister to replace the absent minister.

Participation in Cabinet meetings is not the sole obligation of ministers resulting from the fact that they are members of the Council of Ministers. The Act on the Council of Ministers formulates a whole series of obligations inherent to the fact that they are members of the Cabinet. Ministers are involved in shaping state policy, bearing responsibility for the content and implementation of government actions. In this context, one can speak of an obligation to initiate the Cabinet's policy, to present proposals, assumptions and draft normative acts. In the light of Art. 146 (1), the Council of Ministers remains the final entity deciding on the directions of internal and foreign policy and the methods of its conduct, however, ministers are required to take an active stance and engage in developing the state policy.

Apart from participating in the shaping of state policy, in accordance with Article 7(3) of the Act on the Council of Ministers, ministers are obliged to implement the policy established by the Council of Ministers. The legislator has indicated a catalog of measures for the implementation of government policy in the form of an exemplary enumeration of the spheres of ministerial activity, thus not closing the possibility of using other instruments consistent with the principles of a democratic state of law. When implementing the policy of the Council of Ministers, ministers should cooperate with other members of the cabinet, local government, social organizations, representatives of social,

¹⁴ J. Juchniewicz, *Prawnoustrojowy status...*, pp. 166–171.

professional and creative circles. Furthermore, ministers supervise the activities of local government administration bodies, and may also appoint bodies of a political nature following notification to the Prime Minister.

While analyzing the duties of ministers resulting from holding office, attention should be drawn to the obligation expressed in Article 8 of the Act on the Council of Ministers imposed on ministers to reflect in their speeches a position consistent with the arrangements adopted by the Council of Ministers. Thus, it is possible to speak of an order of loyalty toward ministers, exemplified by refraining from commenting on matters which were not the subject of the government's findings and a prohibition on presenting a position contrary to the findings of the cabinet. In their public activities, ministers should also refrain from criticizing the actions of the government and other members of the cabinet. The aforementioned regulations should be approached in the context of the principle of collegiality and the need to maintain unity and coherence of the actions of the Council of Ministers. Thus, ministers should withhold from any actions that could violate this coherence or cast doubt on it. At the same time, it is worth stressing the great importance of the so-called political culture in this area, which cannot be replaced even by the most extensive normative solutions¹⁵.

The rights and obligations stemming from membership in the Council of Ministers constitute just a certain portion of the conditions for holding the office of a minister. Aside from them, the rights and obligations resulting from the office should also be indicated. These include management, control and supervision¹⁶. The three spheres of activity of ministers have not been included in the framework of legal definitions, thus decoding the notions requires a look at them through the prism of scientific findings, as well as the practice of ministerial activities. The concept of leadership is the broadest in scope. It is possible to look at leadership as a possibility of applying sovereign influence measures, which in the case of ministers entails both creative powers and the possibility of formulating guidelines and instructions, while maintaining subjective and objective limitations. An important element of the ministers' activity is their power in the sphere of lawmaking. It should be emphasized

¹⁵ R. Mojak, *Parlament a...*, p. 143; J. Juchniewicz, *Prawnoustrojowy status...*, pp. 173–175.

¹⁶ J. Juchniewicz, *Prawnoustrojowy status...*, pp. 176–182.

that in this respect it is not possible to speak of an equal position of ministers in charge of the government administration department and ministers without portfolio. Speaking of the lawmaking activity of ministers, it should be pointed out that it is possible for the ministers to issue departmental regulations and orders. Although it may be deduced from the provisions of the Basic Law that ministers performing tasks entrusted to them by the Prime Minister may issue orders, it is nevertheless a fact that orders belonging to the sources of internally binding law may be issued in relation to entities remaining in the relationship of organizational subordination to the issuing entity and, in the absence of such entities subordinated to the ministers without portfolio, the right to issue orders is only hypothetical in relation to them. Speaking of the lawmaking activity of ministers, it is also worth noting the participation of ministers in the drafting of laws.

Analyzing the issue of the duties of the members of the Council of Ministers, attention should be drawn to their duties toward the legislative authorities. Ministers have to attend sittings of the Sejm, they are obliged to represent the government before the Sejm in matters in which the Council of Ministers was the initiator and other matters being the subject of the chamber's work. The key group of responsibilities are those of informative nature. They are based on the Article 115 of the Constitution, according to which the Prime Minister and members of the Council of Ministers, including ministers, are obliged to answer queries, parliamentary inquiries within 21 days and questions on current issues at each session of the Sejm. The indicated instruments belong to the sphere of controlling function of the Sejm, ministers also have duties resulting from the Act on the performance of the mandate of a Member of Parliament and Senator – providing information and explanations on matters resulting from the performance of the obligations¹⁷.

It would not be possible to carry out tasks arising from holding the office of a minister without equipping ministers with the so-called auxiliary apparatus, within the framework of which the political apparatus plays a crucial role. Within the political apparatus, ministers may establish political offices and appoint a secretary and undersecretaries of state. The institution of political cabinets, already known in the period of the Second Polish Republic,

¹⁷ J. Juchniewicz, *Prawnoustrojowy status...*, pp. 189–193.

is evaluated ambiguously in the literature of the subject, while in the journalistic discourse negative opinions are formulated toward them a lot more frequently. This is due not only to the fact that a uniform model for the creation of cabinets was not defined, but above all to the lack of a general definition of the scope of duties of political cabinets. A positive aspect of the functioning of political cabinets is undoubtedly the fact that by defining the political directions of the ministerial activity, they enable the ministry officials to concentrate on substantive activities¹⁸.

Political offices are not the only entities supporting ministers in the exercise of their duties. The ministers' closest associates include the secretary and undersecretaries of state. Their appointment is formally vested in the Prime Minister, and this competence is exercised at the request of a minister. In the context of appointing and dismissing the secretary and undersecretaries of state, attention should be drawn to the limitation of the independence of ministers in the selection of persons with whom they intend to cooperate. While a motion for appointment is required from a minister, the dismissal is the sole responsibility of the head of government, who may recall the secretary, the undersecretaries of state without a motion from a minister.

IV.

The Constitution makes it possible to appoint two categories of ministers to the Council of Ministers – ministers in charge of the government administration department, who are obligatory members of the cabinet, and ministers performing the tasks assigned by the Prime Minister, whose appointment to the government is decided upon by the Prime Minister. Ministers of both categories are constitutional bodies of the state. With regard to the execution of tasks and competences, ministers maintain a far-reaching independence. Their status are equivalent within the cabinet. The Act on the Council of Ministers does not define separate rights, does not impose separate obli-

¹⁸ M. Kulesza, A. Barbasiewicz, M. Kulesza, A. Barbasiewicz, *Gabinety polityczne w polskim ustroju administracyjnym*, [in:] *Gabinety polityczne narzędzie skutecznego rządzenia*, ed. D. Bach-Golecka, Cracov–Nowy Sącz 2007, p. 40; G. Dostatni, *Koncepcje służby cywilnej a realizacja konstytucyjnego celu jej działania*, Warsaw 2011.

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