

Marcin Wielec

Cardinal Stefan Wyszyński University in Warsaw

<https://orcid.org/0000-0001-6716-3224>

m.wielec@uksw.edu.pl

Between legalism and trust – the question of the effectiveness of the actions of the National Prosecutor appointed incorrectly

Między legalizmem a zaufaniem – kwestia skuteczności działań Prokuratora Krajowego powołanego niezgodnie z prawem

Abstract

The article analyses the legal consequences of the rulings of the Supreme Court (resolution of 27.09.2024, I KZP 3/24) and the Constitutional Tribunal (judgment of 22.11.2024, SK 13/24) in the context of the appointment of the National Prosecutor. The main problem is the assessment of the effectiveness of the actions taken by the person performing the function of the National Prosecutor, if his appointment was ineffective. It seems that the lack of an effective appointment causes the ineffectiveness of the independent and imperious actions of this person (the principle of legalism – Article 7 of the Constitution of the Republic of Poland). However, the procedural actions of lower-level prosecutors appointed by the Prosecutor General remain, in principle, effective in protecting the stability of the system and the trust of citizens. The decision was inspired by the French theory of *fonctionnaire de fait*, which protects legal certainty against a defectively empowered authority.

Keywords: National Prosecutor, effectiveness of procedural actions, principle of legality, principle of trust in the state and law, *fonctionnaire de fait*, Supreme Court, Constitutional Tribunal

Streszczenie

Artykuł analizuje skutki prawne orzeczeń Sądu Najwyższego (uchwały z dnia 27 września 2024 r., I KZP 3/24) oraz Trybunału Konstytucyjnego (wyroku z dnia 22 listopada 2024 r., SK 13/24) w kontekście powołania Prokuratora Krajowego. Zasadniczym problemem jest ocena skuteczności czynności podejmowanych przez osobę pełniącą funkcję Prokuratora Krajowego w sytuacji, gdy jej powołanie było nieskuteczne. Wydaje się, że brak skutecznego powołania powoduje bezskuteczność samodzielnych i władczych działań tej osoby (zgodnie z zasadą legalizmu z art. 7 Konstytucji RP). Jednak czynności procesowe prokuratorów niższych szczebli powołanych przez Prokuratora Generalnego pozostają co do zasady skuteczne, co służy ochronie stabilności systemu oraz zaufania obywateli. Rozstrzygnięcie zostało zainspirowane francuską teorią *fonctionnaire de fait* (funkcjonariusza faktycznego), która chroni pewność prawną w sytuacji działania organu obarczonego wadliwym umocowaniem.

Słowa kluczowe: Prokurator Krajowy, skuteczność czynności procesowych, zasada legalizmu, zasada zaufania do państwa i prawa, *fonctionnaire de fait*, Sąd Najwyższy, Trybunał Konstytucyjny

1. Introduction

The problem of the effectiveness of actions taken by public authorities, the appointment of which raises constitutional doubts, is one of the fundamental issues of a democratic state governed by the rule of law. In the Polish legal system, this issue has become particularly important in the context of the appointment of the National Prosecutor and a number of lower-level prosecutors after 12 January 2024.

The rulings of the Supreme Court of 27 September 2024 (I KZP 3/24)¹ and the Constitutional Tribunal of 22 November 2024 (SK 13/24)² have established a new platform for analysing this problem. Their content, despite media and journalistic controversies, constitutes an important interpretative matrix in the Polish constitutional order. They have created a significant jurisprudential standard in the problem signalled here, giving a fairly consistent direction of interpretation. An important

¹ Resolution of the Supreme Court of 27 September 2024, I KZP 3/24, OSNK 2025, No. 1, item 1.

² Judgment of the Constitutional Tribunal of 22 November 2024, SK 13/24, OTK-A 2024, No. 120.

assumption here is the assumption that these are binding judgments that should be fully respected. This is important because there are currently no important reasons and no real procedural decisions in legal transactions deeming these rulings to be non-existent or defective.

This article analyses the legal consequences in terms of the effectiveness of the actions taken resulting from the exercise of the competences of the National Prosecutor by a person who, in the light of the above-mentioned rulings, has not been effectively appointed to this position. The subject of the discussion is the tension between two fundamental constitutional principles: the principle of the rule of law (Article 7 of the Constitution of the Republic of Poland) and the principle of protection of citizens' trust in the state and the law (derived from Article 2 of the Constitution of the Republic of Poland).

2. Constitutional and jurisprudential framework of the problem

2.1. Political position of courts and tribunals

The Constitution of the Republic of Poland of 2 April 1997³ establishes fundamental principles concerning the judiciary. In accordance with Article 173 of the Constitution of the Republic of Poland, courts and tribunals are separate and independent of other authorities. They issue judgments on behalf of the Republic of Poland (Article 174 of the Constitution of the Republic of Poland). The administration of justice is administered by the Supreme Court, common courts, administrative courts and military courts (Article 175(1) of the Constitution of the Republic of Poland).

The Supreme Court, on the other hand, supervises the activities of common and military courts in the field of adjudication (Article 183 of the Constitution of the Republic of Poland). In turn, the Constitutional Tribunal rules on the compliance of laws and other normative acts with the Constitution (Article 188 of the Constitution of the Republic of Poland) and resolves competence disputes between central constitutional

³ The Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item 483 as amended.

bodies of the state (Article 189 of the Constitution of the Republic of Poland). The rulings of the Constitutional Tribunal have universally binding force and are final (Article 190(1) of the Constitution of the Republic of Poland)⁴.

2.2. Resolution of the Supreme Court of 27 September 2024

On 27 September 2024, the Supreme Court adopted a resolution (I KZP 3/24)⁵ according to which the provisions of Article 47 § 1 and 2 of the Act of 28 January 2016 – Provisions Introducing the Act – Law on the Public Prosecutor⁶'s Office are not episodic and do not contain a temporal limitation on their application. These provisions are of a systemic nature and remain in force until they are eliminated in the manner provided for by law.

This means that a prosecutor who is retired on the date of entry into force of the said Act may, at his or her request, return to the last position or an equivalent position. This right does not apply only to those prosecutors who have retired for health reasons. The Supreme Court ruled that a prosecutor who exercised this power is a prosecutor in active service, and the decisions taken by the Prosecutor General on this legal basis cannot be considered defective, non-binding or without legal effects⁷.

2.3. Judgment of the Constitutional Tribunal of 22 November 2024

On 22 November 2024, the Constitutional Tribunal issued a judgment (SK 13/24)⁸ according to which Article 47 § 1 and 2 of the Act Introducing the Law on the Public Prosecutor's Office, understood in such a way that a prosecutor who is retired on the date of entry into force of the Act of 28 January 2016 may return to service only within a period of two months from the date of entry into force of that Act (i.e. from 4 March 2016 to 4 May 2016), is inconsistent with Article 60 in conjunction with Article 31(3) of the Constitution of the Republic of Poland.

⁴ Articles 173, 174, 175(1), 183, 188, 189 and 190 of the Constitution of the Republic of Poland.

⁵ Resolution of the Supreme Court of 27.09.2024, I KZP 3/24, OSNK 2025, No. 1, item 1.

⁶ Act of 28 January 2016 – Provisions introducing the Act – Law on the Public Prosecutor's Office, Dz.U. of 2016, item 178, as amended.

⁷ Resolution of the Supreme Court of 27.09.2024, I KZP 3/24, thesis 1.

⁸ Judgment of the Constitutional Tribunal of 22.11.2024, SK 13/24, OTK-A 2024, No. 120.

The Tribunal held that the introduction of a time limit of two months for the return of a prosecutor from retirement to active service was not provided for in Article 47 § 1 and 2 of the Act introducing the Law on the Public Prosecutor's Office. Such a restriction resulted from the unfounded legislature interpretation of the law made by the Prosecutor General. The law-making interpretation of the Prosecutor General led to a *contra legem interpretation* of the content of Article 47 § 1 and 2, which violated the constitutional right of access to public service⁹.

2.4. Competence dispute Capt. 1/24 – motion of the President of the Republic of Poland

In addition, as a result of the request of the President of the Republic of Poland to resolve the competence dispute of 15 January 2024, the Constitutional Tribunal initiated a competence dispute (Capt 1/24) between the President of the Republic of Poland and the Prime Minister and the Prosecutor General¹⁰.

3. Fundamental constitutional principles in the context of the defective appointment of the body

3.1. The rule of law (Article 7 of the Constitution of the Republic of Poland)

The Constitution of the Republic of Poland contains a number of principles that form the absolute basis for the Polish legal order¹¹. According to Article 1 of the Constitution of the Republic of Poland, “the Republic of Poland is a common good of all citizens”. According to Article 2 of the Constitution of the Republic of Poland, “the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice”. Finally, according to Article 7 of the Constitution

⁹ Judgment of the Constitutional Tribunal of 22.11.2024, SK 13/24, justification, point III.

¹⁰ The competence dispute Kpt 1/24 was initiated at the request of the President of the Republic of Poland on 15 January 2024.

¹¹ J. Sozański, *The Principle of a Democratic State of Law in Polish Legal Practice*, „Vistula University Scientific Quarterly” 2014, No. 4 (42), pp. 28-40.

of the Republic of Poland, “Public authorities shall act on the basis of and within the limits of the law”¹².

The rule of law, expressed in Articles 2 and 7 of the Constitution of the Republic of Poland¹³, requires that all actions of public authorities be unambiguously and correctly based on the applicable law¹⁴. Actions taken by a person who does not have legal authority to perform the function of the National Prosecutor violate the standards of formal legality¹⁵.

3.2. The principle of protection of trust in the state and the law

Not all constitutional principles are explicitly provided for in the provisions of the Constitution of the Republic of Poland, and their validity often results from the jurisprudence of the Constitutional Tribunal. One of such principles is the principle of protection of trust in the state and the law, also referred to in the case law of the Constitutional Tribunal as the principle of loyalty of the state to the addressee of legal norms¹⁶.

As indicated by the Constitutional Tribunal in its judgment of 15 February 2005 (K 48/04), this principle is expressed in the creation and application of the law in such a way that it does not become a kind of trap for the citizen, who should be able to arrange his affairs in confidence, that he is not exposed to legal consequences that cannot be foreseen at the time of making a decision and that his actions are in accordance with the applicable law and will also be recognized by the legal order in the future¹⁷.

The fact that a person who claims to be the National Prosecutor and performs the activities provided for this body has not been effectively appointed to perform this function raises serious constitutional and systemic doubts. Such a situation strikes at two fundamental principles of the political system: *firstly*, the principle of the rule of law, *and secondly*, the principle of citizens’ trust in the state and the law¹⁸.

¹² Articles 1, 2 and 7 of the Constitution of the Republic of Poland.

¹³ A. Miętek, *The Principle of the Democratic State of Law in the Jurisprudence of the Constitutional Tribunal*, „Dialogi Polityczne” 2009, No. 11, pp. 75-85.

¹⁴ L. Garlicki, *Polish Constitutional Law*, Part I, Warszawa 1997, p. 73 et seq.

¹⁵ Cf. the judgment of the Constitutional Tribunal of 15.02.2005, K 48/04, OTK-A 2005, No. 2, item 15.

¹⁶ Judgment of the Constitutional Tribunal of 15.02.2005, K 48/04, OTK-A 2005, No. 2, item 15.

¹⁷ Judgment of the Constitutional Tribunal of 15.02.2005, K 48/04, OTK-A 2005, No. 2, item 15, justification, point III.2.

¹⁸ Cf. Articles 2 and 7 of the Constitution of the Republic of Poland and the judgment of the Constitutional Tribunal of 15 February 2005, K 48/04.

3.3. Tension between constitutional principles

The fundamental problem here remains the disturbance of the balance between two constitutional values: the rule of law, which requires strict adherence to the procedures for the appointment of state bodies, and the principle of citizens' trust in the state and the law, which requires that the effects of the actions of the authorities be predictable and do not lead to a state of legal uncertainty¹⁹.

On the one hand, in the light of the rule of law and the principle of the citizen's trust in the state and the law, it is impossible to accept the exercise of competences by an unauthorised person in an effective manner²⁰. On the other hand, the actual functioning of such activities in legal transactions, confirmed by successive institutions, leads to complications related to the protection of the stability of the system and the legal security of citizens²¹.

4. The theory of *fonctionnaire de fait* as doctrinal inspiration

4.1. Origin and assumptions of the theory

In order to reconcile two values – the protection of the continuity of the state's operations and legal certainty, and the protection of the interests of third parties – it is worth referring to the concept developed in the doctrine of French public law, referred to as *théorie du fonctionnaire de fait*²². Its essence is to recognize the effectiveness of the actions of a body or an official who²³, although not properly appointed, actually performs a public function and whose activities are accepted in legal transactions²⁴.

¹⁹ On the tension between these principles, see M. Safjan, L. Bosek (eds.), *The Constitution of the Republic of Poland. Volume I. Commentary on Art. 1–86*, Warszawa 2016, pp. 245–267.

²⁰ R. Grochowski, *Democracy and the State of Law*, „Central European Political and Media Studies” 2008, No. 1, pp. 139–150.

²¹ On the principle of trust in the state and the law in the context of the actions of state authorities, see the judgment of the Constitutional Tribunal of 15.02.2005, K 48/04.

²² G.-F. Raneri, *L'usurpation de fonctions de titres ou de nom*, [in:] *Les infractions contre la foi publique* (red.), Bruxelles 2012, pp. 365–482.

²³ D. Deroussin, *Lived Reality, Legal Reality and Judicial Truth in Rome and in Ancient French Law. Historical Contribution to the Study of the Theory of Appearance*, „Droits” 2003, vol. 37, nr 1, pp. 191–202.

²⁴ F. Crouzatier-Durand, *Le fonctionnaire de fait ou quand le juge sauve les apparences*, [in:] N. Jacquinet (ed.), *Juge et Apparence(s)*, Toulouse 2010.

It could be pointed out that this theory is translated into Polish called the theory of the factual official (*théorie du fonctionnaire de fait*).

The theory of *fonctionnaire de fait* derives from the French doctrine of public law²⁵. It was classically formulated by Gaston Jèze, who already in 1914 indicated that its task was to “reconcile opposing interests in the most elegant way possible”, i.e. to ensure the continuity of the functioning of the public service and to protect the legitimate interests of third parties²⁶. It was Jèze who formulated this theory in his monumental work *Les principes généraux du droit administratif*. It was there that he argued that for the good of the public service and the security of legal transactions, actions taken by a person who has the “appearance” of being an official (even if his appointment was invalid) must be considered effective against third parties²⁷.

This construction assumes that in a situation where a state authority or its representative actually exercises power, although it has been invoked in a defective manner or has lost the legal basis for action, the acts adopted by it may be considered effective as long as they are not formally challenged²⁸.

4.2. Application in French case-law

In the jurisprudence of the French administrative judiciary, this theory was initially used in extraordinary situations, e.g. related to war, occupation or reorganization of the state, when the requirement of legality had to give way to the need to maintain the continuity of public institutions. Over time, however, its use began to expand²⁹.

An example is the judgment of *the Cour administrative d'appel de Lyon* of 27 June 2019 (no. 17LY01350), concerning resolutions of the administrative board of *the École Normale Supérieure de Lyon*, adopted under the chairmanship of a person who has formally lost his mandate as president. The Court, relying on the theory of *fonctionnaire de fait*, held

²⁵ P. Carcelle, G. Mas, *Les positions de fait des fonctionnaires*, „La Revue administrative” 1958, vol. 11, no. 63, pp. 260-265.

²⁶ G. Jèze, *Essai d'une théorie générale des fonctionnaires de fait*, „Revue du Droit Public” 1914, p. 52.

²⁷ G. Jèze, *Le service public*, „Revista de drept public” 1926, pp. 93-103.

²⁸ F. Crouzatier-Durand, *Le fonctionnaire de fait...*, pp. 260-265.

²⁹ A. Lassale-Jacquemond, *Towards a Trivialization of the Theory of the De Facto Civil Servant*, „Revue Alyoda” 2024.

that, despite the irregularities of the authorisation, these acts should be treated as effective³⁰.

An analysis of this case shows that this theory has undergone a kind of “trivialization” – i.e. it has also begun to be used in cases of ordinary dysfunctions of the administration, and not only in exceptional conditions. This makes it possible to “neutralise” the disadvantage of lack of competence and to prevent the undermining of many acts that could have far-reaching consequences for the stability of legal transactions³¹.

4.3. Possibilities of adaptation in Polish law

From the perspective of Polish law, the theory of *fonctionnaire de fait*³² is not known or regulated anywhere, but its assumptions can be an interesting inspiration. Faced with the problem of assessing the effectiveness of the actions of a person who actually exercises competences but has not been effectively appointed, Polish courts could – with great caution – consider whether the need to protect the stability of legal transactions and the certainty of citizens does not speak exceptionally in favour of adopting a similar construction³³.

This solution would not abolish the requirement of the rule of law, but could act as a subsidiary in order to reconcile it with the principle of protecting the citizen’s trust in the state and the law. The principle of legalism (Article 7 of the Constitution of the Republic of Poland) is not absolute, but in any case the starting point must remain the requirement of state authorities to act on the basis of and within the limits of the law³⁴.

³⁰ Cour administrative d’appel de Lyon, judgment of 27 June 2019, No 17LY01350.

³¹ A. Lassale-Jacquemond, *Vers une banalisation de la théorie du fonctionnaire de fait*, „Revue Alyoda” 2024.

³² L.L. Milano, *La reconstitution de carrière des fonctionnaires, entre principe et effectivité*, „AJFP. Actualité juridique Fonctions publiques” 2010, nr 1, p. 18.

³³ On the possibility of adapting foreign legal constructions in the Polish constitutional order, see L. Garlicki, *Polish Constitutional Law. Outline of the Lecture*, Warszawa 2020, pp. 89-102.

³⁴ Cf. Article 7 of the Constitution of the Republic of Poland and its interpretation in the jurisprudence of the Constitutional Tribunal.

5. Two categories of activities of the National Prosecutor

On the basis of the law of the Act of 28 January 2016 – the Law on the Public Prosecutor’s Office³⁵, two categories of activities of the National Prosecutor can be distinguished, which should be assessed differently from the point of view of legal effectiveness.

5.1. Category One: Independent and Authoritative Actions

Firstly, these are activities in which the National Prosecutor acts independently and domineeringly, making final decisions. An example is the provisions of Article 15 of the Law on the Public Prosecutor’s Office, according to which the regional, regional and district prosecutor is appointed and dismissed by the National Prosecutor after presenting a candidacy to the competent assembly of prosecutors (§ 1). Prosecutors are appointed and dismissed from these positions to perform other functions in the prosecutor’s office by the National Prosecutor or heads of organisational units of the prosecutor’s office authorised by him (§ 4)³⁶.

There is no room for relaxing legality requirements in this category. Since the decision is entirely an act of a body whose effective appointment raises doubts, it is difficult to talk about the effectiveness of such actions. The principle of legalism is paramount here and wins over other values³⁷.

5.2. Second category: participatory and non-dependant activities

Secondly, there are situations in which the National Prosecutor does not act independently, but only participates in the decision-making process. A typical example is Article 74 of the Law on the Public Prosecutor’s Office, according to which prosecutors of common organisational units of the prosecutor’s office are appointed to the position of prosecutor by the Prosecutor General at the request of the National Prosecutor (§ 1)³⁸.

³⁵ The Act of 28 January 2016 – Law on the Public Prosecutor’s Office, i.e. Journal of Laws of 2024, item 390 as amended. as amended.

³⁶ Article 15 § 1 and § 4 of the Act – Law on the Public Prosecutor’s Office.

³⁷ Cf. the principle of legalism from Article 7 of the Constitution of the Republic of Poland.

³⁸ Article 74 § 1 of the Act – Law on the Public Prosecutor’s Office.

In such cases, it may be considered whether the principle of protecting citizens' trust in the state and the law should not take precedence. A citizen whose legal situation has been shaped by a decision finally taken by another authority should not be exposed to legal uncertainty just because a person whose political status has been challenged took part in the proceedings³⁹.

6. Effectiveness of procedural actions – detailed analysis

6.1. Activities of a person performing the function of the National Prosecutor

As far as the actions of the National Prosecutor himself are concerned, performed independently and in an imperious manner, the principle of legality resulting from Article 7 of the Constitution of the Republic of Poland must take precedence. The lack of effective appointment of the body means that the autonomous acts taken by it – both procedural and systemic and personal, as well as all organisational and financial activities in which the National Prosecutor acts as the final decision-maker – should be considered ineffective⁴⁰.

Also, procedural activities performed directly by a person performing the function of the National Prosecutor, due to the lack of constitutional legitimacy, should be treated as lacking in legal effectiveness. This applies in particular to procedural acts regulated by the Act of 6 June 1997 – Code of Criminal Procedure⁴¹, including the use of coercive measures or the issuance of decisions terminating proceedings.

6.2. Activities of lower-level prosecutors

The situation is different with regard to lower-level prosecutors. It is necessary to distinguish here the status of a prosecutor itself, resulting

³⁹ Cf. the judgment of the Constitutional Tribunal of 15 February 2005, K 48/04, concerning the principle of citizens' trust in the state and the law.

⁴⁰ Article 7 of the Constitution of the Republic of Poland in conjunction with Article 15 of the Law on the Public Prosecutor's Office.

⁴¹ The Act of 6 June 1997 – Code of Criminal Procedure, i.e. Dz.U. of 2024, item 1309 as amended. as amended.

from Article 74 of the Law on the Public Prosecutor's Office, from the appointment of a specific position in the organisational structure on the basis of the act of the National Prosecutor. The status of prosecutor is granted by the Prosecutor General, and the participation of the National Prosecutor is limited to a request⁴².

This means that appointments made by the Prosecutor General remain effective in principle, and the procedural actions of such prosecutors should not be automatically challenged. Adopting the opposite position would lead to the possibility of challenging thousands of criminal proceedings and to serious legal chaos. Therefore, in this area, priority should be given to the principle of protection of citizens' trust in the state and the law, in accordance with a construction similar to the French theory of *fonctionnaire de fait*, the purpose of which is to protect the stability of legal transactions⁴³.

6.3. Delegations and appointments after 12 January 2024

With regard to procedural actions undertaken by regional, regional or district prosecutors who were appointed to service after 12 January 2024, their status of prosecutor is granted by the Prosecutor General on the basis of Article 74 of the Law on the Public Prosecutor's Office, and the role of the National Prosecutor in this case is only of a requesting nature⁴⁴.

For this reason, the acts of appointment made by the Prosecutor General remain effective in principle, and the procedural actions undertaken by such prosecutors are valid. A different position would lead to the possibility of questioning thousands of proceedings, which in turn would threaten to paralyze the justice system and violate the principle of protection of citizens' trust in the state and the law⁴⁵.

⁴² Article 74 § 1 of the Act – Law on the Public Prosecutor's Office.

⁴³ Cf. *theory of fonctionnaire de fait*.

⁴⁴ Article 74 § 1 of the Act – Law on the Public Prosecutor's Office.

⁴⁵ Cf. the principle of protection of citizens' trust in the state and the law, judgment of the Constitutional Tribunal of 15 February 2005, K 48/04.

7. The possibility of challenging the standing of the public prosecutor in the context of appeals

7.1. General principle

Regardless of the distinction between the two categories of activities of the National Prosecutor, any action of a person acting as a National Prosecutor or ineffectively appointed should be able to be challenged using the ordinary remedies provided for in criminal proceedings⁴⁶. Maintaining this possibility ensures that a balance is maintained between the requirements of the principle of legality and the need to protect the stability of trade and citizens' trust in the state⁴⁷.

7.2. Ordinary and extraordinary remedies

In the current legal situation, the possibility of challenging the legitimacy of a prosecutor appointed after 12 January 2024 or delegated after that date to another organisational unit of the prosecutor's office should be considered differently depending on the type of appeal and the political position of a given body⁴⁸.

With regard to a person who has been ineffectively appointed to the position of the National Prosecutor, all independent actions – both procedural activities and organisational or financial activities carried out in an imperious manner – should be treated as ineffective. The lack of proper authority of the authority makes it impossible to assume that the acts adopted by it have legal effects⁴⁹.

The situation of lower-ranking prosecutors – regional, regional and district – who were appointed to service by the Prosecutor General after 12 January 2024 should be assessed differently. According to Article 74 of the Law on the Public Prosecutor's Office, it is the Prosecutor General who grants them the status of a prosecutor, and the participation of the National Prosecutor is reduced to the application. In this case, the

⁴⁶ W. Grzeszczyk, *Code of Criminal Procedure. Commentary*, Warszawa 2014, p. 559 et seq.

⁴⁷ Cf. Art. 425 et seq. and Article 521 et seq. of the Code of Criminal Procedure.

⁴⁸ See. Articles 425-467 of the Code of Civil Procedure (ordinary remedies) and Articles 521-545 of the Code of Criminal Procedure (extraordinary remedies).

⁴⁹ Article 7 of the Constitution of the Republic of Poland.

possibility of challenging standing should be assessed on a case-by-case basis, within the framework of ordinary and extraordinary remedies provided for in the Code of Criminal Procedure, taking into account the specific legal and factual situation of the case⁵⁰.

7.3. Protection of the stability of legal transactions

It remains crucial to ensure that procedural actions can be verified in the manner of remedies provided for in the criminal procedure. Adopting this perspective makes it possible to reconcile the principle of legality with the principle of protecting citizens' trust in the state and the law. This avoids automatically challenging thousands of criminal proceedings, while maintaining mechanisms for controlling individual cases⁵¹.

8. Effectiveness of activities outside criminal proceedings

8.1. Activities within the framework of prosecutorial supervision

Apart from the sphere of criminal proceedings, the National Prosecutor also performs the activities and powers provided for in a number of special acts, including: the Police Act⁵², the Border Guard Act⁵³, the Internal Security Agency and the Intelligence Agency⁵⁴ Act, the Central Anti-Corruption Bureau Act⁵⁵, the Military Counterintelligence Service

⁵⁰ Article 74 of the Act – Law on the Public Prosecutor's Office in conjunction with Article 425 et seq. "k.p.k."

⁵¹ See the judgment of the Constitutional Tribunal of 15 February 2005, K 48/04, and the theory of *fonctionnaire de fait*.

⁵² The Act of 6 April 1990 on the Police, i.e. Journal of Laws of 2024, item 145 as amended. as amended.

⁵³ The Act of 12 October 1990 on the Border Guard, i.e. Journal of Laws of 2023, item 1080 as amended. as amended.

⁵⁴ The Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency, i.e. Journal of Laws of 2023, item 1136 as amended. as amended.

⁵⁵ The Act of 9 June 2006 on the Central Anti-Corruption Bureau, i.e. Journal of Laws of 2022, item 1900 as amended. as amended.

and the Military Intelligence Service⁵⁶ Act, the Anti-Terrorist⁵⁷ Activities Act and the Act on the National Tax Administration⁵⁸.

In the context of these powers, the performance of activities by a person who was “entrusted with the duties” of the National Prosecutor on 12 January 2024, and subsequently by a person appointed to perform this function under conditions of defective authorization, should be assessed according to the same criteria as in the sphere of criminal proceedings⁵⁹.

8.2. Principle of analogy

If these actions are of an independent and authoritative nature, they should be considered ineffective due to the lack of political legitimacy of the person undertaking them. If, on the other hand, the role of the National Prosecutor is limited to participation in the decision-making process, and the final decision belongs to another body, their effectiveness may be maintained to protect the stability of legal transactions and legal certainty⁶⁰.

9. Conclusion

The analysis carried out in this article leads to the following conclusions:

Firstly, the fact that a person performing the function of the National Prosecutor has not been effectively appointed has serious constitutional consequences. Any independent and authoritative actions taken by this person – both in the procedural and systemic and organisational spheres – should be treated as ineffective in the light of the principle of legalism (Article 7 of the Constitution of the Republic of Poland).

Secondly, the procedural actions of lower-level prosecutors, appointed by the Prosecutor General at the request of a defectively authorised

⁵⁶ The Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service, i.e. Journal of Laws of 2023, item 81 as amended. as amended.

⁵⁷ The Act of 10 June 2016 on anti-terrorist activities, i.e. Journal of Laws of 2024, item 92 as amended. as amended.

⁵⁸ The Act of 16 November 2016 on the National Tax Administration, i.e. Journal of Laws of 2023, item 615 as amended. as amended.

⁵⁹ Cf. the analysis in point 6 of this article.

⁶⁰ Cf. the theory of *fonctionnaire de fait* and the principle of protection of citizens’ trust in the state and the law.

National Prosecutor, should, in principle, be considered effective. This solution serves to protect the stability of the legal system and the principle of citizens' trust in the state and the law.

Thirdly, such a distinction may be inspired by the French theory of *fonctionnaire de fait*, which makes it possible to reconcile the requirement of legality with the need to protect the certainty of legal transactions. This theory, although unknown in the Polish legal system, provides useful analytical tools.

Fourthly, it is crucial to maintain the possibility of verifying the effectiveness of the various procedural steps by means of remedies – ordinary and extraordinary – provided for in criminal proceedings. This allows for an individual assessment of specific factual and legal situations, without automatically negating all proceedings.

Fifth, the tension between the rule of law and the principle of protecting citizens' trust in the state and the law requires a careful balancing of constitutional values in each case. The starting point is always the requirement for state authorities to act on the basis of and within the limits of the law, but in exceptional situations it is possible to use subsidiary constructions to protect the stability of legal transactions.

Sixthly, the problem of the effectiveness of actions taken by a defectively empowered body goes beyond the technical and legal sphere and touches the foundations of a democratic state governed by the rule of law. Its solution requires reconciling the rigor of the principle of legalism with pragmatism to protect the interests of citizens and the stability of the legal system.

To sum up, in a situation where a person performing the function of the National Prosecutor has not been effectively appointed, the principle of legality should be given priority in relation to his or her independent and authoritative actions. On the other hand, in the case of actions of lower-level prosecutors acting on the basis of the appointment of the Prosecutor General, priority should be given to the principle of protection of citizens' trust in the state and the law – while maintaining the possibility of their individual verification by means of appeals provided for in the applicable provisions of criminal procedure.

Bibliography

- Carcelle P., Mas G., *Les positions de fait des fonctionnaires*, „La Revue administrative” 1958, vol. 11, nr 63
- Crouzatier-Durand F., *Le fonctionnaire de fait ou quand le juge sauve les apparences*, [in:] N. Jacquinot (red.), *Juge et Apparences*, Toulouse 2010
- Deroussin D., *Réalité vécue, réalité juridique et vérité judiciaire à Rome et dans l’ancien droit français. Contribution historique à l’étude de la théorie de l’apparence*, „Droits” 2003, vol. 37, nr 1
- Garlicki L., *Polskie prawo konstytucyjne*, cz. I, Warszawa 1997
- Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2020
- Grochowski R., *Demokracja a państwo prawa*, „Środkowoeuropejskie Studia Polityczne i Medioznawcze” 2008, nr 1
- Grzeszczyk W., *Kodeks postępowania karnego. Komentarz*, Warszawa 2014
- Jèze G., *Essai d’une théorie générale des fonctionnaires de fait*, „Revue du Droit Public” 1914
- Jèze G., *Le service public*, „Revista de drept public” 1926
- Lassale-Jacquemond A., *Vers une banalisation de la théorie du fonctionnaire de fait*, „Revue Alyoda” 2024
- Milano L.L., *La reconstitution de carrière des fonctionnaires, entre principe et effectivité*, „AJFP. Actualité juridique Fonctions publiques” 2010, nr 1
- Mątek A., *Zasada demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego*, „Dialogi Polityczne” 2009, nr 11
- Raneri G.-F., *L’usurpation de fonctions de titres ou de nom*, [in:] *Les infractions contre la foi publique* (red.), Bruxelles 2012
- Safjan M., Bosek L. (red.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016
- Sozański J., *Zasada demokratycznego państwa prawnego w polskiej praktyce prawnej*, „Kwartalnik Naukowy Uczelni Vistula” 2014, nr 4 (42)

List of legal acts

- Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended.
- Act of 6 June 1997 – Code of Criminal Procedure, consolidated text Journal of Laws of 2024, item 1309, as amended.
- Act of 6 April 1990 on the Police, consolidated text Journal of Laws of 2024, item 145, as amended.

Act of 12 October 1990 on the Border Guard, consolidated text Journal of Laws of 2023, item 1080, as amended.

Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency, consolidated text Journal of Laws of 2023, item 1136, as amended.

Act of 9 June 2006 on the Central Anti-Corruption Bureau, consolidated text Journal of Laws of 2022, item 1900, as amended.

Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service, consolidated text Journal of Laws of 2023, item 81, as amended.

Act of 28 January 2016 – Law on the Public Prosecutor’s Office, consolidated text Journal of Laws of 2024, item 390, as amended.

Act of 28 January 2016 – Provisions introducing the Act – Law on the Public Prosecutor’s Office, Journal of Laws of 2016, item 178, as amended.

Act of 10 June 2016 on anti-terrorist activities, consolidated text Journal of Laws of 2024, item 92, as amended.

Act of 16 November 2016 on the National Tax Administration, consolidated text Journal of Laws of 2023, item 615, as amended.

List of judgments

Judgment of the Constitutional Tribunal of 15 February 2005, K 48/04, OTK-A 2005, No. 2, item 15.

Judgment of the Constitutional Tribunal of 22 November 2024, SK 13/24, OTK-A 2024, No. 120.

Resolution of the Supreme Court of 27 September 2024, I KZP 3/24, OSNK 2025, No. 1, item 1.