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The Hidden Dimension of the Protection Granted as a Result of Filing a Complaint with an Administrative Court
(Reflections on the Act of Withdrawal of Countersignature by the Prime Minister)[2]

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Abstract

Following a complaint to an administrative court by two judges, the Prime Minister used the self-revision procedure and revoked his countersignature of the President's official act. This is a true precedent in the history of Polish constitutionalism. Yet, the permissibility of judicial review of presidential acts performed in individual cases should not give rise to any doubts. This is because such acts are subject to the general control regime set forth in the Act of 30 August 2002 – Law on Proceedings before Administrative Courts. What we can learn from other judicial systems indicates that the acts of central executive authorities are not, with some exceptions, exempt from such supervision. An analysis of the judicial decisions of, for instance, the Supreme Administrative Court of the Czech Republic, which recognises its jurisdiction over appointments of judges serves as a convincing example.

Keywords: administrative court, complaint, self-revision of administration, countersignature of presidential act, militant democracy.

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Methodological background of the problem

The high-profile case of the Prime Minister's challenging – under the self-revision procedure regulated by Article 54 § 3 of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts (hereinafter: the LPBAC)[3] – of the countersignature concerning the President's official act (decision) regarding the appointment of the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court, will probably continue to attract the attention of legal scholars, commentators, and practitioners for a long time to come. Perhaps it will also be subject to more cross-sectional and in-depth theoretical studies and analyses, taking into account both its constitutional and legal-administrative aspects. This is by all means desirable, because a review of the statements of many scientists and scholars, and even more so of representatives of legal journalism, the media, and politics, reveals a far-reaching schematism and one-sidedness of the presented opinions. The point is that many of them are limited to reiterating a simple – seemingly – picture of the construction governed by Article 144 of the Constitution, in isolation from its relationship to ordinary legislation and ignoring the principles of systemic interpretation, which are necessary in resolving doubts of the kind discussed here. Categorising certain phenomena, behaviours, and events in terms assigned to only one branch or area of law is a mistake that has been repeated for years (is it only our – Polish – case?), with their complexity being often ignored. As a result, we begin to view the law itself purely dogmatically, dividing and isolating what does – or at least should – make up a coherent, consistent whole. In doing so, we overlook the conventionality of the adopted divisions and research methods and their functions. The case under consideration, which for some is at best a noteworthy precedent, but a real shock for others, makes the above absolutely clear. At the same time, it prompts questions that, sooner or later, will have to be dealt with in judicial practice and that, I believe, will lead to further – considerable – dilemmas. But isn't the essence of the development of law as a tool of regulation precisely about overcoming long-existing stereotypes, challenging seemingly unshakeable theses, and departing from age-old habits that fail to keep up with a rapidly changing reality?

[3] Uniform text in the Journal of Laws of the Republic of Poland of 2023, item 1634.

The peculiarity of the dispute initiated by the complaints of Supreme Court judges

The Prime Minister's act of withdrawing the countersignature on the President's appointment of the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court on 9 September 2024, on the eve of the meeting of this body, was performed as a result of two Supreme Court judges filing complaints with the Provincial Administrative Court in Warsaw, submitted in two ways: 1) insofar as they concerned the official act of the President – directly to the court, 2) insofar as they concerned the act of countersignature – through the Prime Minister, who, applying Article 54 § 3 of the Code of Civil Procedure, respecting the terminology of this provision, rescinded the countersignature (understood as consent to the appointment of the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court) and refused to countersign again, thus complying with the provision included in the second sentence of the indicated editorial unit. According to the provisions of Article 54(3) of the LPBAC, the authority whose action, inaction or protracted conduct of proceedings is challenged has the right "to consider the complaint in its entirety within thirty days of its receipt, within the scope of its competence." According to the second sentence of § 3, if a complaint is filed against a decision, in recognising the complaint in its entirety, "the authority shall revoke the contested decision and issue a new decision." In the case discussed here, the issuance of a new decision, or – more precisely (as discussed in the next paragraph) – making a new decision regarding the Prime Minister's consent, necessary to give the President's official act the attribute of legal effectiveness, took the form of a refusal, which closed the proceedings with a negative outcome (the presidential act was excluded from legal circulation). At the same time, it should be stressed that the provision of the third sentence of § 3, which reads: "When considering the complaint, the authority shall at the same time determine whether the action, inaction or protracted conduct of proceedings took place without legal grounds or in gross violation of the law." was not applied in this case. The word "whether" used in this provision is of crucial significance here as it creates an obligation on the part of the competent authority to consider one of the two forms of qualified violation of the law (which is a prejudication for the assertion of possible claims by the complaining party), but only if the authority finds that such a defectiveness has actually occurred. By adopting this regulation, the legislator made sure that the initiation of the self-revision procedure and the following elimination of the mechanism for an administrative court to adjudicate and make relevant judgements did not worsen the legal position of a party to proceedings. This means that, contrary to some existing opinions, the occurrence of a legal defectiveness defined as a lack of legal

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grounds or a gross violation of law is not an obligatory condition for the application of Article 54 § 3 of the LPBAC.

For the purpose of this discussion, it is further necessary to determine the legal essence of the procedure of cooperation of the President and the Prime Minister established under Article 144(2) of the Constitution, and, thus, the nature of the acts issued under this procedure, and – in this context – to establish what was the subject of the complaints filed by the two Supreme Court judges. It seems to follow from the fact that the Prime Minister applied the second sentence of Article 54 § 3 of the LPBAC that the act of self-revision was considered equivalent to the issuance of a decision, i.e. an individual act, as provided for in Article 3 § 2(1) of that law. After all, can the phrase "In the case of a complaint against a decision […]" included in the first regulation be interpreted differently? This, in turn, forces an answer to the rather surprising (especially for constitutionalists) question of whether the provisions of Article 106 of the act of 14.06.1960 – Code Code of Administrative Procedure[4] – regarding the procedure of cooperation in proceedings before a public administration body should apply to the appointment of the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court. A detailed analysis of this issue is, however, outside the scope of this paper. In my opinion, it is enough to do with a statement that Article 144(2) of the Constitution's making the "validity" of the President's official act (which is equivalent to such an act becoming legally effective) dependent on the Prime Minister's signature would require us to see it as a joint decision of two entities, rather than a separate decision the issuance of which "without obtaining the legally required opinion of another body" would justify the application of the institution of resumption of proceedings (Article 145 § 1(6) of the Code of Administrative Procedure).[5] Thus, in the absence of the aforementioned signature, we would be dealing with an absolutely invalid (non-existent) act, not one challengeable in extraordinary proceedings.[6] Thus, initiating the procedure regulated by Article 106 of the Code of Administrative Procedure to deal with such an act would be pointless since, in accordance with the Constitution, the Prime Minister's signature is supposed to be an action that ends the proceedings, taken outside of its instructional phase, and not anything that

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4 Uniform text – Journal of the Republic of Poland of 2022, item 2000 as amended.

5 The countersignature should, after all, "constitute an expression of cooperation and agreement between the President and the Prime Minister on a given official act," see: J. Ciapała, *Prezydent Rzeczypospolitej Polskiej (pozycja konstytucyjna oraz wybrane zagadnienia z praktyki instytucjonalnej)*, "PiP" 2022, 10, p. 245.

6 As argued by L. Garlicki, an act of the President "becomes valid (and therefore, among other things, legally effective) only after being countersigned, the head of state does not have the capacity to act against the will of the government." Countersignature is, therefore, a form of "limiting the position of the head of state and forcing the two segments of the executive power – the President and the government – to take a unified stance." – see: *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2024, p. 305.

documents the opinion expressed during this phase – in the prescribed procedural form.[7]

As raised by Piotr Czarny, countersignature is subject to "an act already issued (signed) by the President, as long as it is subject to exclusion." However, he adds, it works a bit different in practice because "the President forwards a 'draft' (unsigned) document to the Prime Minister, and only after the act is countersigned by the latter, is it signed by the President."[8] Paradoxically, such a sequence of activities would make it only natural to work out a formula for the cooperation of the two highest executive authorities in matters covered by Code of Civil Procedure, corresponding to the procedure set forth in Article 106 of that law. Can a practice shaped by non-legal circumstances, but deviating from the constitutional standard, determine the procedural qualification of their behaviour? I argue that it cannot, which ultimately leads to the conclusion that the construction formed by Article 144(2) of the Constitution involves complete autonomy.[9]

Approving the claim that the decision designating the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court is a joint act of the President and the Prime Minister does not leave the slightest doubt as to the subject of the complaints filed with the Provincial Administrative Court in Warsaw. It was that act, treated as an integral – albeit two-stage – decision, no matter what name it was given. The subject was not the Prime Minister's countersignature and the President's decision considered separately. Pursuant to Article 54 § 1 of the LPBAC, a complaint submitted to an administrative court is filed through the authority whose action, inaction or protracted conduct of proceedings is challenged. Such an authority becomes able, from the date of receipt of the complaint, subject to a time limit of 30 days, to make use of a self-revision mechanism if the prerequisites for upholding the complaint in full (1) and only within its competence (2) are met. The Prime Minister exercised this power, which is exercised always – it must be emphasised – on the initiative of the complaining party. He actually settled the matter without exceeding the scope of his legal authority and within the limits of the complaining party's allegations, revoking the prior approval (not the signature as such, which is, after all, nothing more than an externalisation of the authority's act of will). As the state of *lis pendens* was restored, the Prime Minister

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7 Z. Kmieciak, *Zakres ochrony wynikającej z prawa unijnego i krajowego w sprawach przeniesienia sędziego bez jego zgody do innego sądu lub między wydziałami tego samego sądu. Związanie oceną prawną zawartą w wyroku TS a dopuszczalność skargi do sądu administracyjnego na postanowienie Prezydenta RP o wyznaczeniu sędziego do orzekania w Izbie Odpowiedzialności Zawodowej SN. Glosa do wyroku TS z 6.10.2021 r., C-487/19*, „PiP" 2023, issue 9, p. 177.

8 P. Czarny, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 430.

9 Z. Kmieciak, *Zakres ochrony…*, p. 177.

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refused to accept the President's proposal to fill the position of the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court.[10] The settlement of the case in the complaining party's favour, with the withdrawal – after a short period of time – of the judges' complaints filed directly with the Provincial Administrative Court in Warsaw (containing charges against the President's actions), rendered the administrative court proceedings pointless and created the basis for its discontinuance. The artificial separation of the subject matter of the complaints did not, of course, affect the Prime Minister's capacity to make use of the self-revision mechanism granted under the provisions of Article 54(3) of the LPBAC, although it certainly somewhat obscured the picture of the case, at least in its procedural aspect.

By way of a decision of the Provincial Administrative Court in Warsaw of 29.10.2024, ref. VI SA/Wa 3316/24, the complaint submitted to the President was dismissed as inadmissible on the grounds of Article 58.1.1 of the LPBAC because – as it was found – his decision appointing the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court "does not fall within the realm of public administration, subject to the jurisdiction of administrative courts, but constitutes only an official act of a systemic nature," i.e. one that is related to the internal organisation of the court in question. The dismissal of the complaint was motivated by the fact that "the statement of withdrawal of the complaint could not be considered effective because the withdrawal of an inadmissible complaint could not be effective." According to Article 60 of the LPBAC, the complaining party has the right to withdraw the complaint, and their will shall be binding upon the court, but the latter "shall declare the withdrawal of the complaint inadmissible if it is aimed at circumventing the law or would have the effect of upholding the act or actions affected by the defect of invalidity." Unfortunately, the Court did not explain whether one of these prerequisites had been fulfilled, apparently forgetting that the mere conviction that a complaint is inadmissible is – in light of Article 60 in the final part of the LPBAC – an insufficient circumstance to refuse to consider the withdrawal of a complaint. It also failed to indicate whether this action – and the resulting dismissal of the complaint challenging the President's decision – made the Prime Minister's act of rescinding the countersignature, issued following the filing of a separate complaint, legally ineffective.

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[10] The authority's recognition of a complaint in its entirety is by no means the same as the settlement of a new case, since such a case is not pending. Instead, what happens is that the case is settled again, in a way that differs from the previous one – see: a study discussing a number of court rulings, A. Kabat, *Instytucja autokontroli w ujęciu ustawy o Naczelnym Sądzie Administracyjnym*, [in:] I. Skrzydło-Niżnik, P. Dobosz, D. Dąbek, M. Smaga (eds.), *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka*, Kraków 2001, p. 314.

The scope and nature of self-revision in administrative court proceedings

The distinguishing feature of the regulation shaped by the provisions of Article 54 § 3 of the LPBAC is its liberalism. The filing of complaints with administrative courts through administrative authorities whose actions, inaction or protracted conduct of proceedings is the subject of the complaint enables such authorities to exercise their self-revision powers without involving the court, which in itself serves to protect the public interest and the interests of the parties involved.[11] Literature dealing with the matter discussed here highlights the fact that the legislator has avoided defining the prerequisites for administrative authorities to recognise the complaint in its entirety, within the scope of its jurisdiction. However, this fact doesn't always translate into correct conclusions. According to Tadeusz Woś, since "a public administration authority performs self-revision of the challenged decision, as if as a substitute for an administrative court," it should be assumed that, in the absence of relevant specific provisions, it is "entitled and obliged to do so to the same extent as the administrative court […], i.e. only »in terms of legality«."[12] I would counter this view with the argument that the legislator has purposefully decided not to indicate what the authority is to be guided by when considering a complaint, deliberately granting it a broader range of options to review its own actions and omissions than those available to administrative courts. Such an authority acts not so much "as a substitute for an administrative court," but rather as a "good administrator" who has the opportunity to correct any mistakes it has made and the shortcomings it has discovered, and to settle the case in its substantive aspect, without the court having to get involved in resolving the dispute that has arisen. This standpoint is all the more valid in particular when the administrative authority operates under conditions of a large margin of discretion – especially when it comes to interpretation and and the choice of consequences. In such cases, the separation of considerations of legality and rightness/purposefulness of behaviour encounters serious obstacles, which are far easier to overcome for the administration than for the judiciary. If a party has, for example, several options for settlement and chooses precisely the one that it finds, subjectively, less favourable than it is assumed – taking into account objective criteria – by the administrative authority applying the provision containing the authorisation of discretion, will that be an instance of violation of the law?

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11 See: A. Kabat, [in:] B. Dauter, B. Gruszczyński, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2009, p. 180.

12 See: T. Woś, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, T. Woś (ed.), Warszawa 2016, pp. 477–478, as well as publications by other authors he cites.

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Equally importantly, an authority making use of the self-revision mechanism under Article 54 § 3 of the LPBAC is not subject to such strict formal requirements as administrative courts. The degree of rigour of the steps taken at this stage of proceedings is much lower than in the in-court stage. The provisions of the applicable law do not require such an authority to carry out an examination of the admissibility of a complaint on subject-related or object-related grounds ex officio, authoritatively, and with binding effect. At the stage of proceedings before an administrative court, the paradigm of a review disqualifying a complaint is the rejection of the complaint (Article 58 of the LPBAC). In situations that raise doubts, the authority should, at most, refrain from applying Article 54 § 3 of the LPBAC, expressing its views in its response to the complaint forwarded to the court.

The case of a clerical mistake, an oversight that happened when the Prime Minister signed the documents, is the kind of negligence easily remediable precisely by way of the procedure of self-revision initiated by a complaint to the administrative court. What caused objections and reservations – or even open criticism of the analysed way of eliminating the effects of the perceived mistake – was the constitutional context of the entire event and its gravity. Under the current constitution, this was the first time that the Prime Minister's countersignature was withdrawn, and it occurred amid exacerbating antagonism between him and the President, or, from a different perspective, between the current ruling camp and that ruling from 2015 to 2023. Might it be surprising, then, to see a politically fuelled dispute over the constitutionality and legality of the Prime Minister's act of self-revision? One party involved considers it a result of a legally permissible procedure, in line with all principles of legal practice. The other views it as a result of an abuse of the law, a trick to get out of a situation that could harm the image of the Prime Minister. It is even more difficult to decide due to the scarcity of knowledge from the border of constitutional and administrative laws, and the controversy that has arisen from the clash of two options: a more conservative view of the functioning of institutions anchored in the constitution, treated as sacred and inviolable, and the pragmatic view, a product of recent decades, focused on the protection of individual rights and viewing control-type procedures as a fundamental guarantee of the rule of law. I shall return to this matter further in item *Constitutionally protected acts, or acts that fall outside constitutional standards?* below.

Admissibility of challenging the Prime Minister's act of self-revision

The matter of covering the President's official acts – including those subject to the countersignature procedure – by the scope of judicial administrative review has long been the subject of intense discussion.[13] The outcome of the determination of whether the parties involved in a given case can settle their dispute in court as they have standing to complain and the challenged action or inaction falls within the jurisdiction of the court (Article 3 § 2–3 of the LPBAC) obviously decides the admissibility of the application of Article 54 § 3 of the LPBAC by the relevant authority. An act taken as a result of the initiation of the procedure established thereby can be appealed to an administrative court on general principles, from which it follows that the verification of the correctness of the Prime Minister's action in the form of withdrawal of the countersignature would require another complaint – this time not against the President's official act (which is in fact a joint act of two entities), but the action taken on 9 September 2024 by the Prime Minister himself on the grounds of the provision on self-revision. The question that emerges is who would have the legitimacy – and thus the capacity – to initiate the control procedure. In line with Article 50 § 1 of the LPBAC, it is anyone who has a legal interest in it, but also the prosecutor, the Ombudsman, the Ombudsman for Children, and a social organisation within the scope of its statutory activity, in cases concerning the legal interests of others – as long as it has participated in the administrative proceedings. This right is also granted to other entities, according to the rules set forth in the provisions of specific laws (Article 50 § 2 of the LPBAC). The entity who would have real interest in the filing of the complaint would undoubtedly be the person appointed by the President to serve as the chair of the General Assembly of Judges of the Civil Law Division of the Supreme Court. However, this entity does not have a legal interest therein, as this interest must be individual, concrete, current, and objectively verifiable, as well as supported by the factual circumstances that are prerequisites for the application of the relevant provision of substantive law.[14] Meanwhile, the case in which the Prime Minister performed a countersignature was a matter of entrusting an organisational function, and not of granting

[13] More extensively on this matter, with reference to other publications and foreign cases – Z. Kmieciak, *Prezydent RP jako organ administrujący a pojęcie jego prerogatyw*, "PiP" 2023, 7, pp. 3 *et seq.*, idem: *O pojęciu tzw. prerogatyw prezydenckich raz jeszcze*, "PiP" 2024, 1, pp. 7 *et seq.*

[14] See: J. Borkowski, B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2019, p. 248, with reference to the views of W. Klonowiecki.

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a personal right (making a change in the sphere of individual rights or duties).[15] In view of the low probability of the Prime Minister's reapplication of the procedure of self-revision, is the scenario of abandoning the formal examination in the statutory procedure – with binding consequences upon the course of the proceedings – of the legitimacy of the person who files the complaint (evading the court's examination of whether they have a legal interest in filing the complaint) possible?

Constitutionally protected acts, or acts that fall outside constitutional standards?

The key argument made by those who consider the withdrawal of the Prime Minister's countersignature under the procedure regulated by the provisions of Article 54 § 3 of the LPBAC to be a legally impermissible action is the conviction that the President's official acts are not subject to judicial review at all – or, in other terms, are constitutionally protected. However, they overlook the fact that the appointment of a person to serve as chair of the assembly of one of the divisions of the Supreme Court was regulated by the provisions (Article 13 § 3 in conjunction with Article 15 § 3 *ab initio*) of the Act of 8 December 2017 on the Supreme Court,[16] not by the Constitution. Making use of this power thus goes beyond the constitutional matter, so to speak, and the scope of tasks traditionally assigned to the head of state, which are naturally closely related to the realm of politics. After all, this does not mean that this power or other of the powers entrusted to the President in recent times have been shaped in isolation from strictly political intentions. On the contrary – they have left a visible mark on established solutions, incorporated into our legal order intentionally, with the clear intention of complicating the processes of governance (blocking necessary changes). This, among other things, can explain the "expansion" of the President's official acts, leading to the straining of his systemic role.[17] Should we – given the peculiarity of the regime created, with the constitutionally imposed element of the Prime Minister's countersignature – exclude judicial review in cases to be decided by said acts? It is not hard to guess how this would affect the standard of protection of individual rights and damage the image of a state committed to respecting the rule of law.

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15 Z. Kmieciak, *Wybory w SN obarczone wadą prawną*, "Rzeczpospolita", 12 September 2024, p. A14.

16 Uniform text in the Journal of Laws of the Republic of Poland of 2024, item 622.

17 According to E. Łętowska, this phenomenon emerged when "other parts of the executive power (the government), together with the purely political power (the ruling party), made efforts after 2015 to colonise the judiciary." – see: E. Łętowska, *Fałszywa etykieta*, "Rzeczpospolita", 'Prawo' supplement of 11.04.2023, p. D2.

Our domestic idea of constitutional protection of a certain group of acts of government, tantamount to covering them by judicial immunity – particularly those of them associated with the exercise of presidential prerogatives, is (rather obviously) not as strongly grounded in the views of legal scholars and commentators and extensively documented in judicial practice as the concepts worked out in other legal systems, including *justiciability* (United Kingdom) and *actes de gouvernement* (France). In the case of the former, attempts to delineate areas where the Crown's prerogatives were to be particularly protected, i.e. not subject to judicial review, were met with disapproval. The negative response to the enumeration of them in the so-called Lord Roskill's list was justified on the grounds that allowing a view according to which it would be possible to have a group of "absolutely non-justiciable" (i.e. non-challengeable) prerogatives was incompatible with the modern understanding of the "object" as the sole determinant of the right to challenge a given action (act) in court[18]. What makes them excluded from judicial review is only the inability of the court to hear the case, which should be determined by the nature of the case – not by the type of power exercised by some authority and its source.[19] The doctrine of *justiciability* is invoked when there is an apparent lack of judicial or reconstructable standards for judges, a good example of which are acts of "high policy" or acts related to the pursuit of goals of a "political" nature. After all, judges cannot be expected to perform tasks that "are not judicial or manageable."[20]

The ideas behind the French concept of "acts of government," formed in the course of the Council of State's jurisprudential activity, are founded on quite different arguments. For understandable reasons, it was accompanied by a desire to prevent conflicts with the government and parliament regarding matters concerning the interplay of constitutional authorities or foreign policy. The self-imposed restraint of the Council of State was thus considered to be a "price paid voluntarily" for preserving the independence and authority of the administrative judiciary (which is

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18 Lord E. Roskill did not see any logical reason why the fact of deriving power from a prerogative – rather than from a statute – should "deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of power is statutory." Both of these cases involve, in fact, an act of the executive power. He considered only certain prerogatives of a "sensitive" nature, such as those concerning "making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers" to be not subject to judicial review. D. Torrance, *The Royal Prerogative and Ministerial Advice*, House of Commons Library, 24 October 2023, pp. 96.

19 See: A. Carroll, *Constitutional and Administrative Law*, Harlow 2011, pp. 272–273 and R. Mastermann, *The Separation of Powers in the Contemporary Constitution. Judicial Competence and Independence in the United Kingdom*, Cambridge 2011, pp. 99–100.

20 Said in a lecture delivered on 27 November 2017 at Middle Temple in honour of Francis Mann – Lord J. Mance, Deputy President of The Supreme Court, Justiciability. Available from: https:www.supremecourt.uk/docs/speech-171127.pdf (accessed: 18.12.2023). At the same time, the author signals the vagueness and even insidiousness of the concept of *justiciability*, used as an aggregate category, serving as a *portmanteau*.

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formally part of the executive power) and taking a step back in situations in which courts would probably not be able to impose its opinion on the political power anyway, exposing itself to the unnecessary risk of disrespecting the significance and legitimacy of judgements.[21] Existing judicial decisions do not provide a satisfactory answer to the question of the criteria for distinguishing those executive acts whose existence is subordinated to the performance of the function of government from the totality of executive acts. Here, the findings are marked by a considerable degree of casuistry, the reasons for which stem from the difficulties accompanying the demonstration of the "inseparable connection" of an act with the formation of systemic relations with constitutional authorities, or the fulfilment of the state's tasks in the sphere of international relations. Many believe that the extension of judicial immunity to acts of governance can be justified insofar as the *checks and balances* existing within constitutional authorities fully compensate for the lack of administrative court reviews[22]. Some recognised authorities claim, in turn, that these acts, in view of the ongoing dynamic evolution of public law, are now an anachronism, a remnant of constructs that came to be in a completely different age.[23] In France, following the well-established standpoint of European legal science, the question is also constantly raised whether leaving such acts of government outside the scope of judicial review violates the constitutionally-ranked principle of the rule of law.[24]

The Prime Minister's withdrawal of countersignature and the theory of *militant democracy*

The Prime Minister's act of self-revision regarding the countersignature of the President's act coincided with his declaration (made public) that the government was taking measures in line with the idea of militant democracy. The unfamiliarity of this concept among the recipients of that news, combined with the reception of the political situation of the time, shaped after the parliamentary elections of 15 October 2023, caused even some consternation – not to say anxiety – in the media. There arose a question of whether the ruling camp wanted to act on the edge of the law

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21 See: R. Chapus, *L'acte de gouvernement, montre ou victime?*, Recueil Dalloz, Chronique II, 1958, pp. 5–10 and S. Braconnier, *France* [in:] J.-B. Auby (ed.), *Codification of Administrative Procedure*, Bruxelles 2014, pp. 190–191; from among Polish-language studies – a cross-sectional study by R. Puchta, *Granice sądowej kontroli aktów prawnych organów władzy wykonawczej – doświadczenia francuskie*, "PiP" 2024, 7, p. 67.

22 R. Puchta, *Granice sądowej…*, pp. 67–68.

23 See the already referenced publication from the late 1950s and early 1960s, R. Chapus, *L'acte de gouvernement…*, p. 6.

24 From among studies dealing with this matter, see in particular: Å. Frändberg, *From Rechtsstat to Universal Law-State*, Heidelberg–New York–Dordrecht–London 2014, p. 50.

or contrary to its spirit and letter. These fears were only dispelled to some extent by the news that "militant democracy" was the proper name for the theory coined by Karl Loewenstein – a prominent German constitutionalist and political scientist who fled to the United States in 1933 – and discussed in a two-part article published there. After World War II, it gained great popularity and continues be a source of inspiration for scientific research, as well as an impetus and guide for the formulation of political programmes – especially where liberal democracy has been warped and degenerated. In his article published in 1937, Karl Loewenstein argued that Europe's failed democracies lacked effective means of defence against modern anti-democratic movements. He used the term "militant democracy" (according to modern Polish translations that take into account the context of the use of the term – "a democracy capable of defending itself") to describe a democracy that is ready to fight, equipped with robust constitutional mechanisms to oppose autocrats who have come to power by popular vote[25]. Enemies of democracy, he stressed, would use the freedoms guaranteed to them to destroy the democratic order from within, while claiming their individual rights from the government. In this regard, the author argued that a self-preserving democratic state must be prepared to use emergency powers (e.g. banning a political party) and temporarily suspend basic human rights should the institutional rule of law be disrupted or sabotaged.

In his article, Karl Loewenstein focused on analysing the phenomenon of the collapse of democracy in Hitler's Germany, pointing to a mechanism that can (and does) apply to different places, times, political conditions, and circumstances. He saw fascism as "the the most effective political technique in modern history."[26] According to Loewenstein, it was applied with the intention of systematically discrediting the democratic order and making it unworkable by paralysing its functions "until chaos reigns." Paradoxically, democracy was unable to "forbid the enemies of its very existence the use of democratic instruments." As a result, fascism – under the guise of a legally recognised political party – "were accorded all the opportunities of democratic institutions." This was fostered by colossal propaganda aimed at those who were "the most conspicuously vulnerable targets." The general discontent of the time focused on palpable targets (Jews, freemasons, bankers, chain stores). A technique of incessant repetition, of over-statements, and over--simplifications evolved and became perfected, turning different social groups against each other. Appealing to emotion (including a sense of national injustice, growing threats, patriotic symbolism) rather than reason entered the range of sys-

[25] See: K. Loewenstein, *Militant Democracy and Fundamental Rights*, I, II, "The American Political Science Review" 1937, XXXI(3, 4), pp. 417 *et seq.* and 638 *et seq.*

[26] K. Loewenstein, *Militant Democracy…*, I, p. 423.

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tematically applied measures. This technique, Karl Loewenstein argued, could only be successful under the conditions provided by democratic institutions. Its success was based on its perfect alignment with democracy. Democracy and the tolerance inherent thereto were used for their own destruction. Under the cover of fundamental rights and the rule of law, the anti-democratic machine was set up and put into operation legally.[27]

The message from Karl Loewenstein's teachings does not, as some would like to see it, legitimise actions contrary to the law, although it is an encouragement (even if one hard to hide) to take advantage of any decision-making discretion that can be derived from it.[28] The measures argued for by the author will always be the type of behaviour within the limits of the applicable law, not beyond them. This is also how the Prime Minister's words regarding militant democracy, marked by a sense of realism rather than a desire to exacerbate the political struggle in an intractable situation for a country facing numerous problems, should most likely be interpreted.

Conclusions

The case of the Prime Minister's withdrawal of his countersignature in the statutorily regulated procedure of self-revision, initiated by complaints filed with an administrative court, is an interesting precedent that makes it only reasonable to share some thoughts and observations. First of all, it reveals the hidden, usually overlooked or downplayed, dimension of the protection granted by administrative court proceedings, without a court deciding on the validity of the allegations raised, but with the relevant administrative authority acknowledging the complaining party's claims as valid. The Prime Minister's exercise of the powers set forth in Article 54 § 3 of the LPBAC fulfils the criteria of dependent remonstrance in its classic form. Making use of the stipulation contained in Article 90(2) of the Decree of the

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27 *Ibidem*, I, pp. 423–424.

28 This remark is in line with what L. Garlicki argued by saying that recognising the changes of the last eight years as falling within the framework of "abusive constitutionalism excludes any tolerance for «destructive activities», the real purpose of which is to depart from (destroy) the existing constitutional order. This is, as the author emphasizes, "a «wrong purpose», serving to destroy the Constitution, thus devoid of all legitimacy. In turn, corrective measures – which are often the opposite of destructive activities – serve the legitimate goal of restoring the state required by the Constitution." This can, he goes on to note, "create a broader margin of tolerance for corrective measures that are on the edge of the law. However, it does not create any kind of *carte blanche* for determining the scope and intensity of these activities." – L. Garlicki, *Co pozostało z Konstytucji RP? – Diagnoza i terapia*, a study-commentary to the Report of the Polish Society of Constitutional Law: *Stan przestrzegania Konstytucji RP w okresie IX kadencji Sejmu RP (2019–2023)*, 2023, p. 11.

President of the Republic of Poland of 22 March 1928 on Administrative Procedure was once treated in a similar way.[29] According to this stipulation, when the decision of an authority was appealed to an administrative court, the provision of section 1 should apply accordingly. Pursuant to that provision, in turn, if the authority issuing the decision found that the appeal deserved to be upheld, it could change it itself "as long as other parties did not acquire the rights in the decision." The provision of Article 54(3) of the LPBAC did not introduce such a reservation. Moreover, even if it had been introduced, it would have not applied in the case of entrusting the chairmanship of the General Assembly of Judges of one of the divisions of the Supreme Court (in such a case, there is no acquisition of rights within the meaning of administrative law). The act of self-revision shall be qualified as a form of remonstrance, i.e. an imperfect remedy (a type of request), due to the fact that the competence of the administrative authority whose action, inaction or protracted conduct of proceedings is challenged does not correspond in any way to the procedural claim of the complaining party to grant this party an administrative means of protection.[30] It is only up to the authority whether it does so to the benefit of the complaining party or whether it leaves the review of its own behaviour – albeit only in terms of its legality – to an administrative court.[31]

To view the constitutional authorisation of the Prime Minister's countersignature as a general obstacle to subjecting the President's official acts to judicial review is, in my opinion, unfounded. After all, these acts include also those that, by their nature, are subject to the jurisdiction of administrative courts. When referring to the acts listed under Article 144(3) of the Constitution, Ewa Łętowska used a vivid phrase of "a conglomerate of various beings."[32]. The expression aptly captures the heterogeneous nature of the much broader set of acts referred to in section 2 of this provision. In addition to the practice briefly discussed in section 5 of the article,

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29 Journal of Laws of the Republic of Poland no. 36, item 341 as amended, expired – Journal of Laws of the Republic of Poland of 1960, no. 30, item 168.

30 Z. Kmieciak, *Wszczęcie postępowania przed Wojewódzkim Sądem Administracyjnym*, [in:] Z. Kmieciak (ed.), *Polskie sądownictwo administracyjne – zarys systemu*, Warszawa 2017, p. 154 *et seq.*

31 For a more extensive discussion of the essence and typology of remonstrance, see: Z. Kmieciak, *Zarys teorii postępowania administracyjnego*, Warszawa 2014, p. 304 *et seq.* and E. Szewczyk, *Remonstracja w prawie administracyjnym procesowym*, Warszawa 2018, pp. 35 *et seq.* and 89 *et seq.*

32 E. Łętowska, *Fałszywa etykieta…*, p. D2, similarly – J. Jagielski, *W sprawie pozycji Prezydenta Rzeczypospolitej Polskiej w systemie administracji publicznej i wykonywania funkcji administracji*, [in:] *Ius est ars boni et aequi. Studia ofiarowane Profesorowi Romanowi Hauserowi Sędziemu Naczelnego Sądu Administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2021 (special issue), pp. 238–239. The other author persuasively argues that one thing is presidential powers "to act in the political sphere and the functioning of the mechanisms of power […], and another thing is powers of a personal nature […], or powers to decide on individual matters, related to the development of the legal situation of an individual." Actions taken in the exercise of prerogatives carry – in view of this – "various contents, which include also those that characterise the function of administration."

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one that has been shaped in the course of the jurisprudential activity of the British and French courts, the claim of the admissibility of judicial review of a certain group of presidential acts is supported by the absolutely clear stance of a body that enjoys the same achievements of European legal culture as the Polish courts, i.e. the Supreme Administrative Court of the Czech Republic. This is illustrated by the judgement of 27.04.2006,[33] in which it found that the competence of the president of the republic regarding the subject of appointment of an individual as a judge is derived from their position within the executive branch as an administrative body *sui generis (pravomoc prezydenta republiky jmenovat soudce je výrazem jeho postavení v rámci moci výkonné jako "správního úřadu" sui generis*). They appear in this role when two conditions are met together: the exercise of the power entrusted to them is bound by law *(je vázán zákonem*), and the decision to exercise this power affects the public subjective rights of specific persons *(jeho rozhodnutí pří výkonu takové pravomoci zasahuje do veřejných subjektivních práv konkrétních osob*).[34] According to David Kryska, who wrote a comment on this judgement, the subject whose rights may be violated should not be left unprotected, which leads to the claim that "the president of the republic is an administrative body (in the functional sense), i.e. they exercise an administration function to a certain extent" – *prezident republiky je správním orgánem (ve funkčním smyslu), tedy že v určitém rozahu vykonává veřejnou správu*.[35] The decisions of the Supreme Administrative Court set the basis for a dichotomous distinction between presidential acts consistently labelled as constitutional and administrative *(ústavní acts and správní acts*). According to this concept, constitutional acts – whether or not they require the countersignature of the prime minister or a person authorised by the prime minister – are not subject to judicial review. Administrative acts, on the other hand, are subject to judicial review under the general rules applicable to public administration activity.[36]

Will the the Prime Minister's decision to recognise, by way of self-revision, the complaint of two judges of the Supreme Court in full, as a decision that can be considered bold and rather divergent from the established pattern of thinking in the science of constitutional law, have a motivating effect on judicial activism, and – consequently – contribute to the modification of the rather conservative judicial practice of Polish administrative courts? If this happens, it will mark a new chapter for the implementation of the principle of a democratic state of law, and in light

33 Č.j. 4 Aps 3/2005-35, č. 905/2006, seš. 8.

34 As cited in: D. Kryska, *Srovnání českého a polského správního soudnictví*, Prague 2013, p. 238.

35 D. Kryska, *Srovnání…*, p. 242. The court also found it permissible to challenge an act of the Chamber of Deputies of the Parliament of the Czech Republic when it acts as an administrative body in the material (functional) sense – pp. 244–245.

36 D. Kryska, *Srovnání…*, p. 242, in Polish-language literature – Z. Kmieciak, *Prezydent RP jako…*, pp. 8–9.

of what Karl Loewenstein wrote years ago, a decisive move towards the variant of a "normative" constitution and a simultaneous departure from its "nominal" variant.[37] My impression is that in order to achieve this, the set of sanctions designed to enforce the provisions of the Constitution and subordinate acts needs to be substantially strengthened, to break with the syndrome once gracefully referred to by the Italians as *deficit esecutivo*.[38] In essence, we are witnessing an experiment of systemic significance – one that could revolutionise not only the way we view the Constitution and the techniques of applying the act in practice, but also its relationship to the entirety of institutional guarantees of the rule of law derived from the provisions of ordinary legislation.

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[37] See: K. Loewenstein, *Political Power and the Governmental Process*, Chicago 1957, German edition – *Verfassungslehre*, Tübingen 1959 (translated by Rüdiger Börner – published by Mohr Siebeck, Tübingen 2000). The author, regarded as a prominent proponent of constitutional realism, made the following classification of constitutions according to their impact on the rule of law: 1) normative constitutions – fully effective, which is manifested by the compliance of political systems with their provisions); 2) nominal constitutions – with limited effectiveness, due to the fact that the practical implementation of their provisions is hampered by political and economic power structures (these provisions are not, as a rule, faithfully applied); 3) semantic constitutions – reflecting a political vision, but having no impact on the rule of law.

[38] See: R. Bettini, *Legislazione e politiche in Italia*, Milano 1990, p. 65 *et seq*.

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