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Responsibility of the Holders of the Highest Offices in the State on the Example of Austrian Solutions

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Abstract

The article is a synthetic discussion of legal regulations on the proceedings regarding the responsibility of piastunes of the highest offices in the state on the example of Austrian solutions. The authors present the understanding of constitutional responsibility not only by the Austrian legislator but also Spanish and French, who differently came up to the issue of understanding the responsibility of piastunes of the highest offices in the state.

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Streszczenie**Odpowiedzialność piastunów najwyższych urzędów
w państwie na przykładzie rozwiązań austriackich**

Artykuł jest syntetycznym omówieniem regulacji prawnych postępowania dotyczącego odpowiedzialności piastunów najwyższych urzędów w państwie na przykładzie rozwiązań austriackich. Autorzy przedstawiają pojmowanie odpowiedzialności konstytucyjnej nie tylko przez ustrojodawcę austriackiego, ale także hiszpańskiego i francuskiego, którzy w zgoła odmienny sposób podeszli do kwestii rozumienia odpowiedzialności piastunów najwyższych urzędów w państwie.

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I.

Defining the concept of liability based on legal sciences encounters many difficulties. The basic problem is the lack of a uniform definition of this concept for individual areas of law. It is understood differently based on different regulations, which results in the functioning of different terminology side by side. Currently, the science of law distinguishes criminal liability, civil liability, constitutional liability, and others³. Legal entities may also be liable of a different type, resulting from the violation of administrative law, labor law, and other provisions. At the same time, the institution of responsibility is of fundamental importance for the functioning of law as a regulator of social relations. The definition of law, apart from indicating that it is a set of binding legal norms, i.e., binding general and abstract norms of ought conduct, also indicates its binding nature and the state's right to impose sanctions, including criminal sanctions in the event of breaking the law. A separate issue is a reflection on the duplication of types of responsibility in modern countries, their effectiveness, and the correlation between its various types⁴.

³ S. Grabowska, *Modele odpowiedzialności konstytucyjnej prezydenta we współczesnych państwach europejskich*, Toruń 2012, p. 10.

⁴ M. Podolak, M. Żmigrodzki, *System polityczny i jego klasyfikacje*, [in:] *Współczesne systemy polityczne*, eds. M. Żmigrodzki, B. Dziemidok-Olszewska, Warsaw 2013, pp. 11–23.

Constitutional liability is undoubtedly a form of legal liability, as it is defined by law. Usually, it is also functionally related to the violation of legal norms, referred to as the so-called constitutional tort⁵. The specific nature of constitutional responsibility was aptly captured by M. Pietrzak, paying attention to its: special objective scope, special subjective scope, special method of implementation, and a special system of penalties⁶.

The article aims to provide a synthetic overview of the legal regulations of the procedure relating to constitutional liability, based on the example of Austrian solutions. Moreover, the author intends to present the understanding of constitutional responsibility by the Spanish and French legislators, who approached the issue of understanding the responsibility of the highest offices in the state in a completely different way.

II.

The Austrian Constitution in Art. 142 sec. 2 states that the Federal President may be held constitutionally liable on account of a breach of the Federal Constitution, and sec. 1 of the same article states that the violation should be culpable, committed intentionally or unintentionally⁷, i.e., it is a personal liability and as such cannot be transferred to another person holding this office⁸. The Austrian legislator decided to define in detail and broadly the state bodies whose guardians may be held constitutionally liable by means of complaints⁹.

On the other hand, Art. 67 of the French Constitution introduces in para. 1 the principle that the President shall not be liable for official acts, subject to Art. 53-2 and Art. 68. In sec. 2 Art. 67, a ban on bringing the President

⁵ S. Grabowska, *Constitutional Delicate*, [in:] *The Dictionary of Political Knowledge*, eds. J. Marszałek-Kawa, D. Plecka, Toruń 2019, pp. 107–111.

⁶ M. Pietrzak, *Odpowiedzialność konstytucyjna w Polsce*, Warsaw 1992, p. 9.

⁷ Federal Constitutional Act of the Republic of Austria of October 1, 1920 (B – VG) StF (BGBl. Nr. 1/1930 idF BGBl. I No. 60/2011, <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138> (20.07.2021).

⁸ M. Jabłoński, *Formy odpowiedzialności konstytucyjnej w Republice Austrii*, [in:] *Formy odpowiedzialności konstytucyjnej w państwach europejskich*, eds. S. Grabowska, R. Grabowski, Toruń 2010, p. 49.

⁹ S. Grabowska, *Modele odpowiedzialności konstytucyjnej...* p. 163.

to justice by both judiciary and administrative authorities was introduced, as well as a ban on summoning him to testify, provide information or prosecute¹⁰. In these cases, the limitation period is suspended for the term of office of the head of state. The proceedings may be initiated only one month after the end of his term of office¹¹.

A separate issue concerns Art. 68 introducing the possibility of removing the President from office. It may only be the case if the duties entrusted to him have been neglected in a manner incompatible with the performance of his mandate. The body competent to take up this case is the parliament, acting in the joint chambers as the Supreme Court¹². With such a definition of the subject of liability, it cannot be classified as constitutional.

At present, members of the government, under the provisions of Chapter X (Art. 68–1 to 68–3) of the Constitution, introduced by the Constitutional Act No. 93–952 of July 27, 1993¹³, bear only criminal liability for acts committed in the performance of their functions and at the time of committing the features of a crime or misdemeanor (Art. 68–1). It is for the Court of Justice of the Republic to adjudicate such offenses. This Tribunal is bound by the definition of a crime or misdemeanor and the penalties provided for in legal acts¹⁴.

The Spanish Constitution of 1978 states in Art. 56 sec. 3 that the “person of the king is inviolable and not subject to responsibility”¹⁵. It is manifested

¹⁰ Constitution de la République française du 4 octobre 1958 la loi constitutionnelle n 2008–724 du 23 juillet 2008, <https://www.assemblee-nationale.fr/connaissance/constitution.asp> (20.07.2021).

¹¹ W. Skrzydło, *Formy odpowiedzialności konstytucyjnej w Republice Francuskiej*, [in:] *Formy odpowiedzialności...*, pp. 139–140.

¹² Ibidem.

¹³ Loi constitutionnelle no 93–952 du 27 juillet 1993 portant révision de la Constitution du 4 octobre 1958 et modifiant ses titres VIII, IX, X et XVIII (Journal Officiel du 27 juillet 1993, page 10600), <https://www.conseil-constitutionnel.fr/les-revisions-constitutionnelles/loi-constitutionnelle-n-93-952-du-27-juillet-1993> (20.07.2021).

¹⁴ K. Kubuj, *Francja: Odpowiedzialność karna Prezydenta V Republiki Francuskiej*, “Przegląd Sejmowy” 2002, No. 3, pp. 119–122.

¹⁵ Constitución Española aprobada por Las Cortes en sesiones plenarias del Congreso de los Diputados y del Senado celebradas el 31 de octubre de 1978 (Boletín Oficial del Estado: viernes 29 de diciembre de 1978, Núm. 311) <https://www.senado.es/web/conocersenado/normas/constitucion/index.html> (20.07.2021).

not only in the lack of political responsibility of the head of state, which is common in parliamentary-cabinet systems but also in the case of constitutional responsibility. According to Art. 59 sec. 2 of the Constitution, it is possible to remove the king from office when the Cortes Generales find that the king cannot perform his functions. Thus, one can speak of a specific constitutional responsibility of the king *sui generis*, which has never been applied in the previous practice¹⁶.

In the case of members of the Spanish government, the legislator also excluded constitutional liability and limited liability only to criminally unlawful acts¹⁷. Members of the government are responsible for acts related to their administrative activities. It applies to controlling the legality of administrative acts issued by them, both general and individual acts. This control is exercised by the Administrative Chamber of the Supreme Tribunal (Art. 58 of the Law on the Judiciary)¹⁸. Another responsibility of members of the government relates to the scope of civil matters for acts related to the performance of their functions and is exercised by the Civil Chamber of the Supreme Tribunal (Art. 56 of the Law on the Judiciary).

III.

The only condition whose existence enables the President of Austria to be effectively brought to justice before the Constitutional Tribunal is proving that he committed a culpable violation of the Constitution by his act (or omission). An indictment may only be admitted if the Federal Assembly (joint session of the National Council and the Federal Council) agrees and adopts a relevant resolution.

¹⁶ Reglamento del Congreso de los Diputados de 10 de febrero de 1982 («BOE» núm. 55, de 05 de marzo de 1982), <https://www.boe.es/buscar/pdf/1982/BOE-A-1982-5196-consolidado.pdf> (20.07.2021). Reglamento del Senado de 3 de mayo de 1994 (BOE núm. 114, de 13/05/1994), <https://www.senado.es/web/conocersenado/normas/reglamentootrasnormas-senado/index.html> (20.07.2021).

¹⁷ M. Myśliwiec, *Formy odpowiedzialności konstytucyjnej w Królestwie Hiszpanii*, [in:] *Formy odpowiedzialności...*, pp. 407–408.

¹⁸ Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE nº 157, 2-Jul-1985), <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666> (20.07.2021).

Following the amendment of the French Constitution in 2007, the legal responsibility of the President has changed. According to Art. 68 of the Constitution of France, the President may be removed from office in the event of failure to perform the duties entrusted to him in a manner incompatible with the performance of his duties¹⁹. Thus, also in this case, the subject of the President's legal responsibility is imprecise, although Art. 67 sec. 1 of the French Constitution ruled out the possibility of holding the President responsible for actions taken as part of his function and of being a party or a witness in court proceedings (Art. 67 sec. 1 of the French Constitution). However, the President is answerable to the parliament constituted by the Supreme Court²⁰. With such a definition of the subject of liability, it cannot be classified as constitutional²¹.

In Spanish regulations, we distinguish two categories of acts causing liability of members of the government. The first concerns crimes of treason and crimes against state security committed in connection with the performance of their functions by members of the government. The second category is other offenses²².

In Spain, the criminal liability of members of the government, including its President, is borne by the Criminal Chamber of the Supreme Court, regardless of the nature of the crime committed, regardless of whether the crime is related to the office or whether there is no such connection. So, it is simply a *privilegium fori* for members of the government and other state bodies. The Supreme Court is also competent in criminal cases against the President of Congress, the President of the Senate, the President of the Supreme Tribunal, and the General Council of the Judiciary, the President of the Constitutional Tribunal, deputies, senators, members of the General Council of the Judiciary, members of the Constitutional Tribunal and the Supreme Tribunal, Defender of the People, the chairman and members of the Council of

¹⁹ Loi constitutionnelle no 2007-238 du 23 février 2007 portant modification du titre IX de la Constitution (Journal Officiel du 24 février 2007, page 3354), <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000245803> (20.07.2021).

²⁰ B. Dziemidok-Olszewska, *Odpowiedzialność polityczna rządu w III Rzeczypospolitej Polskiej i V Republice Francuskiej*, "Przeгляд Prawa Konstytucyjnego" 2010, No. 2-3, p. 209.

²¹ K. Kubuj, *Odpowiedzialność karna Prezydenta V Republiki Francuskiej*, "Przeгляд Sejmowy" 2008, No. 6, p. 71.

²² M. Myśliwiec, *op.cit.*, pp. 410-412.

State²³. Therefore, in this case, it is difficult to talk about recognizing such responsibility as constitutional responsibility.

IV.

In Austria, under § 26 sec. 1 of the Regulations of the National Council²⁴, each deputy or, pursuant to § 21 sec. 1 of the Regulations of the Federal Council²⁵, each of its members. In the case of applications submitted based on these regulations, there is a requirement to obtain support: an application submitted by a member of the National Council, by five deputies (§ 26 sec. 4 of the Austrian National Council Regulations), including the applicant, and in the case of a Federal Council member, by three members of the Federal Council including the applicant (§ 21 sec. 3 of the Rules of Procedure of the Austrian Federal Council).

The application to bring to constitutional liability should contain a short description of the alleged acts, an indication of the infringed provisions, and a draft resolution in this matter. The application should be submitted to the committee of the chamber to which it was submitted. Austrian law does not provide for any joint committee apart from the Main Committee²⁶. Before the Federal Assembly is convened, the proposal should be examined in committee. It may also be withdrawn by the applicant pending a vote on it in the relevant committee, if referred to it, or – respectively – at a plenary session of the National Council or the Federal Council (§ 26 sec. 8 of the Rules of the National Council of Austria, and § 21 sec. 1). 4 of the Regulations of the Austrian Federal Council).

The impeachment of the Federal President of Austria is only admissible if the Federal Assembly (joint session of the National Council and the Fed-

²³ Ibidem.

²⁴ Bundesgesetz über die Geschäftsordnung des Nationalrates, Geschäftsordnungsgesetz 1975 (BGBl.No. 410/1975) idF (BGBl. I Nr. 12/2010), <http://www.parlament.gv.at/PERK/RGES/GOGNR> (20.07.2021).

²⁵ Geschäftsordnung des Bundesrates (BGBl.No. 361/1988) idF: (BGBl. I No. 41/2010), <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000976> (20.07.2021).

²⁶ P. Sarnecki, *Parlament Federalny Republiki Austrii*, Warsaw 1996, pp. 17–18.

eral Council) gives its consent to this by adopting a resolution²⁷. For this purpose, the Chancellor convenes a meeting of the Federal Assembly (Art. 68 sec. 2 of the Austrian Constitution) based on a resolution of the National Council or the Federal Council. The meetings of the Federal Assembly are chaired under Art. 39 sec. 1 of the Austrian Constitution, alternately the presidents of both chambers, but the first to be chaired by the President of the National Council. The Federal Assembly lays down the rules of procedure at its first session.

A resolution to bring the Federal President to constitutional accountability before the Constitutional Court is adopted in the presence of more than half of the members of both houses. To adopt it, it is required to obtain a qualified majority of 2/3 of the votes cast. Such a resolution must indicate the actions (omissions) that meet the conditions of constitutional responsibility and the justification on which the accusation is based. The resolution is authenticated by one of the presidents of the chambers and countersigned by the Federal Chancellor. By adopting a resolution, the Federal Assembly appoints from among its members persons whose task will be to support the accusation before the Constitutional Court. The law does not specify how many parliamentarians should be appointed. The plural used in § 72 sec. 2 of the Act on the Constitutional Tribunal suggests that there should be at least two of them²⁸.

Importantly, the Austrian regulations do not provide for the possibility of the Federal President participating in meetings of the Federal Assembly, during which activities related to the accusation brought against him are carried out. Thus, he is not able to present any explanations on this matter. The Federal Assembly may – pending the conclusion of the preliminary proceedings in the Constitutional Court – withdraw the indictment against the Federal President. The possible end of the parliamentary term does not affect the proceedings regarding the President's commission of a constitutional tort.

²⁷ P. Sarnecki, *System konstytucyjny Austrii*, Warsaw 1999, p. 52.

²⁸ Verfassungsgesetz 1953 (BGBl. 85/1953 (Wiederverlautbarung), vielfach novelliert, zuletzt BGBl. I Nr. 111/2010). <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000245> (20.07.2021).

V.

In Austria, a preliminary investigation is carried out before the main hearing at the Constitutional Court. They are conducted by an investigating judge appointed by the President from among the members of the Constitutional Tribunal. Importantly, when conducting interrogations of state officials by the investigating judge and during a public oral hearing, there is no obligation to maintain official secrecy²⁹. The Constitutional Court discontinues the preliminary investigation if, according to a resolution, the indictment is withdrawn by the Federal Assembly, which brought the indictment (§ 74 of the Austrian Constitutional Court Act).

According to Austrian law, the files are submitted to the Constitutional Court after the investigating judge has completed the activities. The next stage of the proceedings is to schedule a hearing while at the same time providing the accused with a deadline of fourteen days to prepare a defense, although he may request a faster setting of the date of the first hearing. The hearing is oral and public, and the public may be restricted only due to a threat to state security (§ 77 of the Austrian Constitutional Court Act). The following are summoned to the hearing: the accused, his defense counsel, and persons appointed by the authority that adopted the resolution on the accusation as prosecutors. The judge who conducted the preliminary investigation may not participate in the hearing. The trial begins with reading the indictment by the recording clerk. Then the witnesses and the accused are interviewed, and evidence in the case is presented. Finally, the Constitutional Tribunal rules on the commission of a constitutional tort. It is not possible to appeal against a judgment or order of the Tribunal in this case (§ 75–85 of the Austrian Constitutional Court Act).

This procedure is the same for all constitutionally designated organs, whose supervisors may be indicted before the Tribunal by a previous resolution shaping the content of the complaint (allegations) (§ 72–81 of the Act on the Constitutional Tribunal).

²⁹ M. Jabłoński, *op.cit.*, p. 50.

VI.

Under Austrian law, if the Constitutional Court finds a culpable violation of the Constitution, it may remove the Federal President from office³⁰. Moreover, in justified cases, it may rule on the loss of political rights by the Federal President. The Tribunal may also refrain from imposing a penalty and limit itself to stating that the Federal President has committed a constitutional tort (Art. 142 sec. 4 of the Austrian Constitution).

In the systemic practice of the Republic of Austria, the regulations on the constitutional responsibility of the federal President have never been applied. On the other hand, complaints in matters of constitutional responsibility were brought under Art. 142 and 143 of the Constitution against state bodies, particularly against federal ministers, members of national governments, and against heads of national governments in matters of their operation within indirect federal administration. It is characteristic that most often, complaints are rejected because of their inadmissibility due to the lack of legitimacy to bring proceedings and for reasons of formal defects³¹. However, there are fully substantive proceedings, including those in which the Tribunal has issued acquittal³².

VII.

The presented analysis of legal regulations on the example of three European countries leads to the following conclusions:

In the analyzed European countries, the legislators approached the issues related to the constitutional responsibility of the holders of high state offices diametrically differently. In Austria, the President, all members of the government, and officials in the highest state are subject to constitutional responsibility. On the other hand, in Spain and France, the holders of the highest state offices are subject only to criminal liability, respectively: before the Su-

³⁰ Ibidem.

³¹ S. Grabowska, *Modele odpowiedzialności konstytucyjnej...* pp. 326–336.

³² The cases concerned: a complaint relating to the failure to ban the staging of Schnitzler's play "Reigen" in Vienna; Complaints about the opening of a crematorium in the Vienna Central Cemetery.

preme Court and the Court of Justice of the Republic, and in Spain also administrative and civil liability before the Supreme Court.

As mentioned, the regulations on the constitutional responsibility of the federal President have never been applied in the systemic practice of the Republic of Austria. It may prove either a responsible approach to the office held by successive presidents or the President's weak position in the context of exercising actual power in the state and thus a little possibility of committing a tort.

I think that how constitutional responsibility is regulated in a given country depends mainly on the legal traditions present in the legal acquis of a given country and the approach of the holders to the performance of their official duties³³. On the other hand, the form of the state – republic or monarchy – has no bearing on solutions regarding constitutional responsibility.

I believe that all holders of the highest state offices should be legally liable but limited only to constitutional responsibility. On the other hand, liability such as civil, administrative, or criminal (except for “red-handed”) should be allowed only after the termination of office by a given person.

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³³ About Polish regulations in legal liability of guardians see: M. Milczarek, *Odpowiedzialność karna Prezydenta Rzeczypospolitej Polskiej*, “Przegląd Prawa Konstytucyjnego” 2010, No. 1, p. 137; K. Dąbrowski, *Odpowiedzialność Prezydenta za wykroczenia*, “Przegląd Prawa Konstytucyjnego” 2017, No. 1, p. 109, DOI 10.15804/ppk.2017.01.05; idem, *Legalizm czy oportunizm? – analiza postępowania w sprawie odpowiedzialności konstytucyjnej*, “Przegląd Prawa Konstytucyjnego” 2019, No. 1, p. 133, DOI 10.15804/ppk.2019.01.07; A. Gajda, *Sejm, jako organ właściwy do pociągnięcia Naczelnego Dowódcy Sił Zbrojnych do odpowiedzialności konstytucyjnej przed Trybunałem Stanu*, “Przegląd Prawa Konstytucyjnego” 2017, No. 5, p. 167, DOI 10.15804/ppk.2017.05.10; J. Juchniewicz, *O odpowiedzialności Marszałka Sejmu – przyczynek do dyskusji*, “Przegląd Prawa Konstytucyjnego” 2018, No. 5, p. 107, DOI 10.15804/ppk.2018.05.07; R. Kropiwnicki, *Komisyjna faza prac nad wnioskiem o pociągnięcie do odpowiedzialności konstytucyjnej*, “Przegląd Prawa Konstytucyjnego” 2019, No. 4, p. 145, DOI 10.15804/ppk.2019.04.08.

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