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# Death as a Prerequisite for Vacating the Office of President of the Republic of Poland

**Keywords**: substitution of President in his/her office, death of the president, Marshal of the Sejm, President of the Republic of Poland
**Słowa kluczowe**: zastępstwo prezydenta w urzędzie, śmierć prezydenta, Marszałek Sejmu, Prezydent RP

**Abstract**

This article is devoted to the issue of death as a premise for vacating the office of President of the Republic of Poland. The Constitution of the Republic of Poland comprehensively regulates the institution of substitution of the President of the Republic of Poland, specifying the legal forms of its execution and indicating the Marshals (of the Sejm and the Senate) as entities authorized to carry out the duties of the head of state. In the event of the occurrence of the death of the President, doubts arise as to the possibility of implementing civilian regulations at the time of triggering the procedure of substitution of the President provided for in Art. 131 of the Constitution. The analysis carried out in the ar-

ticle is aimed at answering the question of whether the Marshal of the Sejm (on whom the duty to assume the duties of head of state is incumbent), functioning in the field of constitutional law, is bound by the regulations applicable in principle on civil law grounds.

**Streszczenie**

**Śmierć jako przesłanka opróżnienia urzędu Prezydenta RP**

Niniejszy artykuł poświęcony jest problematyce śmierci będącej przesłanką opróżnienia urzędu Prezydenta RP. Konstytucja RP reguluje w sposób kompleksowy instytucję zastępstwa Prezydenta RP, określając prawne formy jej wykonywania oraz wskazując Marszałków (Sejmu oraz Senatu) jako podmioty uprawnione do realizacji obowiązków głowy państwa. W przypadku wystąpienia śmierci Prezydenta pojawia się wątpliwość co do możliwości wdrożenia regulacji cywilistycznych w momencie uruchamiania procedury zastępstwa Prezydenta przewidzianej w art. 131 Konstytucji. Przeprowadzona w artykule analiza ma na celu udzielenie odpowiedzi na pytanie czy funkcjonujący w obszarze prawa konstytucyjnego marszałek Sejmu (na którym ciąży obowiązek objęcia obowiązków głowy państwa) jest związany regulacjami obowiązującymi co do zasady na gruncie cywilnoprawnym.

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## I. Introductory remarks

Death is undoubtedly the worst possible constitutional scenario for the vacating of the office of the President under Art. 131 sec. 2[1]. If it occurs, the state automatically goes into a state of emergency and the relevant authorities are forced to take appropriate action. A special role is then assigned to the Marshal of the Sejm, who is obliged to replace the President. This is because the Marshal must organise and conduct presidential elections (Art. 128 sec. 2 Constitution) and at the same time perform duties incumbent upon it on an ongoing basis (when the Marshal of the Sejm cannot do so, these duties are taken over the Marshal of the Senate – Art. 131 sec. 3 Constitution). For this

[1] The Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78 item. 483 as amend.).

reason, it is so important that the authority of the deceased head of state is efficiently and effectively transferred to this entity.

This article aims to clarify whether the Marshal of the Sejm or Senate, who is faced with the death of the President, should wait for the delivery of a formal death certificate, or whether he or she can act in a discretionary manner, based on his or her own assessment of the situation. The main research problem is therefore related to resolving the issue of the legitimacy of the application of the relevant civil law provisions within this decision-making process. This is the subject of the study presented to the reader.

## II. The issue of death under civil law regulations

The issue of human death is particularly widely developed in civil law regulations. Treating it as a legal event of great significance, these provisions define the formal conditions for the declaration of death and at the same time indicate the various legal consequences connected with death. Taken together, they form a regulation of a complex nature that is dispersed in several normative acts.

The substantive law regulations concerning the issue of death are contained in the Act of 23 April 1964. – Civil Code[2], specifically in Chapter III entitled – Recognition of death (Art. 29–32 inclusive), while procedural regulations are contained in the Act of 17 November 1964 Civil Procedure Code – Recognition of death and declaration of death (Art. 526–534)[3]. Provisions concerning the issue of death can also be found in the Act of 28 November 2014, Law on Civil Status Records[4] (Chapter 6 – 'Types of Civ-

[2] Act of 23 April 1964, Civil Code (cons. text Dz.U. 2022 item. 1360 as amend.).

[3] Act of 17 November 1964, Code of Civil Procedure (cons. text Dz.U. 2023 item. 1550, 1429, 1606, 1615, 1667).

[4] Act of 28 November 2014, Law on Civil Status Record (cons. text Dz.U. 2023 item. 1378). According to the provisions of the Law on Civil Status Records, the regulation of matters relating to the registration of deaths falls within the competence of civil status offices. It should be noted that they have not been transferred by the legislator to the jurisdiction of the ordinary courts. See: S. Dmowski, *Komentarz do art. 29* [in:] *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2011, Lex/el. The death certificate is based on the death certificate and the report of death (Art. 92 sec.2 of the Act).

il Status Records', and specifically in Art. 92–95 concerning the procedure for issuing a death certificate).

The above-mentioned regulations treat the death of a natural person (death of a human being) as a legal event, the occurrence of which gives rise to significant consequences of a civil law nature. These are, of course, effects in the form of loss of legal capacity and capacity to act, but also effects related to inheritance and marriage[5].

Both the death of a person and the recognition of a missing person have consequences in terms of the regulation of the legal relations of the missing person[6]. This means that both cases give rise to the same legal consequences. Pursuant to Art. 29 § 1 of the Civil Code, the cumulative occurrence of two prerequisites is necessary for a person to be declared dead. These are namely: 1) the disappearance of a natural person and 2) the lapse of a strictly defined period of time indicated by the legislator. It is worth emphasising that what is important from the point of view of the time frame concerning the period after which an individual may be declared dead are the circumstances surrounding the disappearance of that person. Thus, in the case of a so-called simple disappearance, occurring when the circumstances of the event were not specific, pursuant to Art. 29 § 1. and 2 "A missing person may be declared dead if ten years have elapsed since the end of the calendar year in which, according to existing knowledge, he or she was still alive; however, if, at the time of being declared dead, the missing person had reached the age of seventy, the lapse of five years shall suffice. § (2) A person shall not be declared dead before the end of the calendar year in which the missing person would have attained the age of twenty-three years". If, however, we are dealing with an aggravated case, characterised by special circumstances increasing the probability of death, then another provision applies, i.e. Art. 30, § 1,

[5] S. Dmowski, *Komentarz…*

[6] It is also worth explaining what the key difference is that makes it possible to distinguish between the institution of confirmation of death and the institution of recognition of death. The possibility of a declaration of death occurs when the death is beyond reasonable doubt, but a document – a death certificate – is missing (of course, this is a situation where no such document has been drawn up and, at the same time, there are no prerequisites which would give grounds for its drawing up). A declaration of death, on the other hand, refers to a person who has disappeared – it is therefore uncertain whether they have died or are still alive (S. Dmowski, *Komentarz…*).

according to which "Whoever is missing during a voyage by air or sea due to shipwreck or other special occurrence may be presumed dead after the lapse of six months from the day on which the shipwreck or other special occurrence occurred. § 2. If the ship or vessel cannot be proved to have been shipwrecked, the period of six months shall begin to run with the lapse of one year from the date on which the ship or vessel was due to arrive at the port of destination, or, if it had no port of destination, with the lapse of two years from the date on which there was last knowledge of it. § (3) Whoever is missing on account of imminent danger to life not provided for in the preceding paragraphs may be presumed dead after the expiry of one year from the day on which the danger ceased or, according to the circumstances, should have ceased". On the other hand, the procedure for the confirmation of death is regulated in the Code of Civil Procedure, specifically in Art. 535–538. It refers to situations where there is no doubt about the death of a person, but his or her death can be confirmed by applying the ordinary procedure. This type of situation is encountered, in particular, when the death of an individual is not in doubt, but his or her remains are missing[7].

## III. Assessment of the legitimacy of the application of civil law regulations in the context of the application of Art. 131 of the Constitution

In the context of the issue of the death of the President, which is of interest to us, the question arises as to the applicability of the above-described regulations when triggering the procedure set out in Art. 131 of the Constitution. Specifically, what is interesting here is whether the Marshal of the Sejm, who is charged with the duty of assuming the duties of the Head of State, should wait for the formal determination of the death of the Head of State by way of a death certificate (which may be done by way of standard determinations, but may also involve the application of civilian procedures for declaring the President dead), or whether, on the contrary, he or she should, without waiting, proceed immediately to perform the functions of the presidential deputy. The knotty dilemma thus concerns the question of whether or not the Mar-

[7] A. Lutkiewicz-Rzucińska, *Komentarz do art. 29* [in:] *Kodeks cywilny. Komentarz,* Warszawa 2023, Lex/el.

shal, moving in the area of constitutional law, is bound by the regulations applicable in principle to civil law.

Turning to the attempt to clarify the aforementioned dilemma, it is worth recalling that it has its historical origins in the events that took place immediately after the Smolensk catastrophe in 2010. It was then that the incumbent Marshal of the Sejm, Bronisław Komorowski, decided to take over as deputy within hours of the death of the head of state, without having an officially drawn up death certificate in his hands. This immediately raised the question of the compatibility of such behaviour with the provisions of the current law. Many began to wonder whether the functioning.

As a starting point for these considerations, it is worth recalling that civil law and constitutional law are separate branches of law, which have their own specificities and are characterised by systemic autonomy. Therefore, although both should be treated as integrated subsets of a larger set – the system of the law of the Republic of Poland, one must not lose sight of the differences separating them. These relate to a number of elements, i.e. belonging to two separate areas of law: private and public, different subject of regulation, different method of regulation, different characteristics of legal institutions or, finally, different conceptual grid.

This state of affairs does not, of course, exclude the existence in the legal system of norms which, due to their substantive connections, are situated at the civil and constitutional 'interface' and thus form a normative complex of provisions from one and the other branch. Similar cases are rare, however, and are rather evidence that the exception confirms the rule. The best example is Art. 10 § 2 of the Electoral Code, which deprives incapacitated persons of the active right to vote[8]. This regulation demonstrates very clearly that a civil law institution can be closely correlated with a strictly systemic construction and thus become part of a broader systemic mechanism of the state. More – such correlation may be determined by the legislator himself, acting in this respect consciously and intentionally.

The above observation allows us to look at the case of the death of the President that interests us and the related necessity to trigger his deputation in a suitably broad perspective. Undoubtedly, thanks to it, it is not possible

[8] Act of 5 January 2011, Election Code (cons. text Dz.U. 2023 item 2408).

to question the obligation of the Marshal of the Sejm to make an official determination of death by means of a death certificate using the argument that the norms governing the execution of a deputy and the formal determination of the death of the Head of State are not interrelated. This issue requires deeper argumentation and compels a full-scale analysis of the issue at hand.

In undertaking this effort, it should first be emphasised that the concept of death is not standardised in any way in the provisions of the current Constitution. The legislator uses it in Art. 131 sec. 2 (1) of the Constitution, using the term as it stands and abandoning even the formulation of its legal definition[9]. The lack of juridicalisation of this element forces one to reflect whether, in the process of decoding the norm stemming from the indicated provision, it is justified to reach for civil law regulations regulating the issue of human death and the scope of use of the document, i.e. the death certificate.

The views on the indicated dilemma formulated in the doctrine of constitutional law are not uniform. In the legal discourse to date, we can find theses going in two opposite directions.

Even in the period preceding the Smolensk catastrophe, Bogusław Banaszak expressed his position on this issue. This author, without analysing the issue in depth, laconically stated that the death of the President is confirmed by an official death certificate[10]. Konrad Walczuk also followed the same line of thought, albeit in full awareness of the complications that the death of the head of state caused by the said disaster entailed. In his opinion, he criticised the actions of Marshal Bronisław Komorowski, who did not wait for formal confirmation of the death of President Lech Kaczyński but decided to take over automatically as his deputy. According to Walczuk, the legal path used was incorrect. As he emphasized, 'The regulations of Art. 131 sec. 2 were applied, although it seems that in such a case it would have been more appropriate to proceed according to Arti. 131 sec. 1. Undoubtedly, this was a case where "the President of the Republic is unable to notify the Marshal of the Sejm of his inability to perform his office", but there was no certainty (at least a formal confirmation) that the President of the Republic was dead. In such a case, "the determination of an impediment to the exercise of the office of the President of the Republic shall be de-

[9] M. Chmaj, *Komentarz do Konstytucji RP art. 131,132,133*, Warszawa 2023, p. 52.

[10] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 656.

cided by the Constitutional Court at the request of the Marshal of the Sejm". Assuming, of course, that hours rather than days are involved. Such a "gradual" ascertainment of the vacancy of the office of the President of the Republic of Poland would raise fewer doubts (of a legal, but also of a political nature) than the automatic assumption of power by the Marshal of the Sejm"[11].

The view indicated here was met with strong disapproval by the majority of representatives of the doctrine of constitutional law. Based on the situation related to the Smolensk catastrophe, this part of the scientific community considered that the Marshal could independently assess the circumstances and proceed to perform the duties of the head of state, and that therefore a death certificate was not necessary. There were various arguments underpinning this position, referring both to the pragmatics of the action of the state authorities and to rationales of a systemic nature.

Marek Zubik made a similar statement. Namely, this author emphasised that in the case of the death of President Lech Kaczyński, "[…] diplomatic correspondence concerning the catastrophe was abandoned and on this basis the Marshal of the Sejm took over the performance of presidential duties". In view of these circumstances, forcing a long wait, this solution should, in his opinion, have been considered appropriate[12]. Monika Florczak-Wątor also referred to the issue under consideration in the same way, expressing it in a longer statement in which she argued that: "In the event of the President's death, the Marshal of the Sejm should start performing the duties of the Head of State on the date specified in the death certificate or the court decision declaring him dead. These two documents constitute official certification of the death of the person concerned. It should be noted that especially obtaining the lat-

[11] K. Walczuk, *Konstytucyjne aspekty tymczasowego wykonywania obowiązków Prezydenta RP przez Marszałka Sejmu*, "Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach" 2015, no. 104, series "Administracja i Zarządzanie", pp. 202–203; K. Walczuk, *Kompetencje z zakresu bezpieczeństwa państwa przynależne Marszałkowi Sejmu tymczasowego wykonującemu obowiązki Prezydenta RP* [in:] *Bezpieczeństwo narodowe Rzeczypospolitej Polskiej. Wybrane zagadnienia prawne,* eds. M. Karpiuk, K. Orzeszyna, Warszawa 2014, p. 44; M. Jagła, A. Kawa, J. Olek, D. Podolanko, G. Płatek, M. Pach, *Zastępstwo Prezydenta RP. Analiza obowiązujących przepisów na tle wydarzeń po 10 kwietnia 2010 r.* [in:] *Raport Klubu Jagiellońskiego,* ed. E. Sadowska, Kraków 2011, p. 27.

[12] M. Zubik, *Gdy Marszałek Sejmu jest pierwszą osobą w państwie, czyli polskie interregnum*, "Przegląd Sejmowy" 2010, no. 5, p. 78.

ter document requires a lapse of time under civil law. Hence, the question arises as to whether it is permissible for the Marshal of the Sejm to take over the duties of the President in a situation where the documents certifying the death of the former have not yet been drawn up. Negating such a possibility would lead to a situation in which there would be no person performing the duties of the head of state for many months or perhaps even years (obviously not beyond the end of the term of office of the missing president)"[13]. This line of thinking can also be found in Sławomir Patyra, who assessed the case of the violent death of the President. Well, according to the author: "In this case, where the determination of the death of the President takes place outside the resuscitation centre, it should be assumed that the vacating of the office of the head of state takes place when the permanent, irreversible cessation of vital bodily functions is established in the course of forensic medical examination of the corpse at the place where it was found. In view of such a course of events, it should be deemed unreasonable to make the possibility of ascertaining the vacating of the office of the Head of State in the legal sense dependent on the drawing up and subsequent handing over to the disposal of the Marshal of the Sejm of a formal death certificate of the President, as this act is of a purely declarative, and not of a constitutive nature"[14]. Finally, a view falling in this direction was expressed by Grzegorz Pastuszko. In his statement, we are confronted with a particularly strong exposition of the systemic rationale opposing the recognition of the necessity for the Marshal of the Sejm to use a death certificate. Explaining his position, the author raised namely: "In particular, there is a dilemma here as to whether, if Art. 131 sec. 2 (1) of the Constitution is interpreted in this way, the necessary waiting by the Marshal for a presidential death certificate to be presented to him does not conflict with the constitutional principle of continuity of constitutional organs. After all, it should be borne in mind that, in the extreme case, an official confirmation of the President's death would require the initiation of the procedure known to the Civil Code for declaring the President dead (when it is not

[13] M. Florczak-Wątor, *Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących*, "Przegląd Prawa Konstytucyjnego" 2010, no. 2–3, p. 199.

[14] S. Patyra, *Przesłanki i tryb przejmowania obowiązków Prezydenta Rzeczypospolitej Polskiej w ramach tzw. władzy rezerwowej*, "Studia Iuridica Lublinensia" 2013, no. 20, pp. 39–40.

certain whether the missing President is alive or has died due to the impossibility of finding him or identifying his body), and this – as is well known – in the most pessimistic scenario may end in a final court decision only after the lapse of ten years from the end of the calendar year in which, according to existing information, the President was alive (Art. 29 § 1 of the Civil Code). For obvious reasons, it would be completely absurd to hold up a decision on the assumption of presidential duties by the Marshal for such a long time due to the absence of a death certificate. This is therefore probably sufficient reason to conclude that the requirement in civilian and several other areas of law for the use of a death certificate by public authorities proves to be unreliable here. After all, it is difficult to assume that the aforementioned legal security regarding the assumption of presidential duties represents a greater value than the continuity of the organs of state power and the associated proper functioning of the constitutional mechanism of state power"[15].

In assessing the above opinions, in my view one should opt for the position expressing acceptance of the assumption of deputies by the Marshal without the need to await the official death certificate, and thus also the application of the provisions of the law governing the recognition of the President as dead. Arguments that emphasise the need to preserve the appropriate dynamics of the process of the acts performed here and, in this context, emphasise the need to safeguard the continuity of state power are convincing. In fact, it may be thought that the use of the sometimes lengthy civil law procedures for declaring a person dead and obtaining a death certificate on that basis could appear to be unjustified, all the more so as neither the institution of substitution nor the said procedures were conceived with the idea that in certain situations the rules governing them could be applied cumulatively.

This thesis is supported, moreover, by arguments that follow from a literal analysis of the constitutional and statutory provisions regulating the issue of the deputy head of state.

Thus, in my opinion, the interpretative concept assuming an obligation on the part of the Marshal to act on the basis of a death certificate is inappropriate for the reason, among others, that in a situation of temporary, especially

[15] G. Pastuszko, *Ustrojowy model zastępstwa prezydenta według postanowień Konstytucji z 1997 r.*, Warszawa 2022, pp. 99–100.

prolonged, inability to obtain such a certificate, the Marshal is forced to make use of a constitutional procedure which, by definition, serves to examine temporary impediments to the exercise of the office of the President, and not such circumstances which, de facto, are of a permanent and unpromising nature for the return to office. By definition, therefore, he must use an incorrect tool, acting contrary to the logic of Art. 131 sec. 1 of the Constitution normalizing the indicated procedure. This – let us emphasise explicitly – dictates that the Marshal should address a motion to the Constitutional Tribunal for the recognition of the President's temporary inability to perform his office and entrust his duties to the Marshal only when, despite the appearance of objective grounds, the fact of the impediment is not notified by the still living Head of State. This follows directly from the wording of the regulation in question, which states that "If the President of the Republic is temporarily unable to discharge the duties of his office, he shall notify the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. When the President of the Republic is unable to notify the Marshal of the Sejm of his inability to perform his office, the determination of the impediment to the performance of the office of the President of the Republic shall be decided by the Constitutional Tribunal on the motion of the Marshal of the Sejm".

The same problem applies to the Constitutional Tribunal adjudicating this case. If an interpretation is adopted which assumes that it is necessary for the Marshal of the Sejm to turn to this body in the absence of the possibility of death being confirmed by a death certificate, the panel of judges is forced to recognise a temporary impediment to the exercise of the President's office, despite the factual finding that this impediment is a – by no means transitory – death (the Court would have to rule that the President is probably dead).

Besides, if this interpretation is accepted – which should also be borne in mind – the rulings of this composition may prove insufficient to adequately secure the State's performance of its presidential duties for a sufficiently long period of time. For it must be borne in mind that the provisions contained in the Act of 30 November 2016 on the organisation and procedure before the Constitutional Court[16], defining the Court's action in such a situ-

[16] Act of 30 November 2016 on the organization and procedure before the Constitutional Court (cons. text Dz.U. 2019 item. 2393).

ation, are not conducive to long-term cases of non-performance of functions by the head of state (and thus also to long-lasting civil procedures for declaring the President dead)[17].

It follows that the Tribunal shall issue an order declaring an impediment to the performance of the office of the President of the Republic of Poland and entrusting the Marshal of the Sejm, for a period of not more than 3 months, with the temporary performance of the duties of the President of the Republic of Poland, provided that the President of the Republic of Poland notifies the Marshal of the Sejm and the Tribunal, before the expiry of the period specified therein, that he is able to perform his office (Art. 89 sec. 1 and sec. 2 (1) of the Act). If necessary, he has the right to take similar action once again if the obstacle giving rise to the deposition does not cease within the said 3 months. The prerequisite for this is a repeated request by the Marshal of the Sejm, as referred to in the provisions of the Act (Art. 90 sec. 1 of the Act). However, this is where the possibilities of a deputation performed under conditions of temporary impossibility end. Exhaustion of the procedure path described here prevents further activation of the substitution procedure. And since this is the case, it is obvious to the naked eye that the cited provisions are by no means correlated with the mechanism regulated in the Civil Code for declaring the President dead and obtaining a death certificate by this means. This mechanism, in the light of Art. 29 § 1, can, after all, take up to 10 years. In such a situation, it is difficult to speak of the legitimacy of the joint application of the regulations of both laws.

## IV. Final conclusions

Two main conclusions emerge from the analysis. They constitute the main theses of this study.

Firstly, it is indisputable that, despite their systemic differences, the provisions of constitutional and civil law can sometimes serve as a combined basis

[17] It is important to be aware that the current regulations have been shaped differently from those in force at the time when the indicated interpretation was created, i.e. in 2020. This does not relieve us of the obligation to also look at the interpretation in question in terms of the current legal situation.

for certain matters. This is the case when a given issue lies at the junction of one and the other branch and due to the need to ensure the comprehensiveness of legal regulation, but also the necessity to maintain formal logic, both types of normative provisions are required to be taken into account. Thus, it cannot be assumed a priori that constitutional law and civil law, which belong to different spheres and have a different subject matter, cannot have points in common within the existing legal system.

Secondly, despite the above thesis, there is no argument that Art. 131 sec. 2 (1) of the Constitution, which deals with the death of the President, needs to be supplemented by civil law norms defining the procedures for obtaining an official death certificate. Such thinking is opposed by the different purposes of establishing one and the other regulation, but also by the different nature of the normalized matter. Article 131 sec. 2 (1) of the Constitution was enacted in order to guarantee the exercise of the deputy presidency in the period of permanent – resulting from death – inability to perform the office. It thus serves, by definition, to serve momentous constitutional values, including first and foremost the continuity of state power. The norms introduced to "serve" civil law transactions, which define the procedure of declaring someone dead and the scope of use of the official death certificate, are not compatible with it. My analysis of the literal wording of Art. 131 of the Basic Law confirms this conviction.

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