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CONSTITUTIONAL ASPECTS OF THE DEATH OF THE HEAD OF STATE. POLISH EXPERIENCES OF 2010

Abstract

The death of the President of the Republic of Poland Lech Kaczyński and other high officials in a plane crash, which took place on the 10th of April 2010, gave rise to the question about further functioning of the Polish state. The Constitution of the Republic of Poland gives a precise description of the situation of death of the head of state. The constitution shall require the Marshal of the Sejm to perform the duties of the head of state. He performs the duties of the head of state only temporarily. In case when the Marshal of the Sejm is unable to perform the duties of the president, it is the Marshal of the Senate who should assume the duties. From the constitutional point of view the person substituting the president holds all constitutional rights of the head of state. The only issue about which the substitute is not authorized to decide is the dissolution of the parliament.

Key words: President of the Republic of Poland, death of the head of state, substitution of the president

The death of the President of the Republic of Poland Lech Kaczyński¹ and other high officials in a plane crash, which took place on the 10th of April 2010, gave rise to the question about further functioning of the Polish state. The Constitution of the Republic of Poland of 2nd April 1997 gives a precise description of the situation of death of the head of state. It is necessary since the President is the head of state and shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority (Article 126 Paragraph 1). Therefore the Polish Constitution in a detailed, almost casuistic way, regulates situations in which the President is either temporarily unable to perform his duties or in the event of the office of President of the Republic falling vacant. First of all, in Poland there is no such an institution as Vice-president, who would be able to assume the duties of the President just after his death (like for example in the United States). Because of this, and with the aim of ensuring the continuity of State authority, the constitution shall require the Marshal of the Sejm (the chairman of the lower chamber of the parliament) to perform the duties of the head of state².

Article 132 regulates two situations in which the President is unable to perform his functions. Firstly, this inability may be of a temporary nature (e.g. in the event of prolonged illness). Then, in accordance with Article 131 Paragraph 1 the President shall communicate this fact to the Marshal of the House of Representatives (*Sejm*), who shall temporarily assume the duties of the President of the Republic. If the President of the Republic is not in a position to inform the Marshal of the House of Representatives of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the

House of Representatives, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the House of Representatives (*Sejm*) to temporarily perform the duties of the President of the Republic.

The President, by communicating to the Marshall of the Sejm his temporary inability to perform the duties of the head of state, does not need to be guided by objective considerations (e.g. an illness). The notification may also be caused by subjective reasons (e.g. family problems), which may affect the performance of his duties improperly (Ciapała 1999: 126). President's decision is not subject to any control, including the Constitutional Tribunal. The Marshal of the Sejm wouldn't be able in this situation to submit to the Tribunal a motion to investigate whether the circumstances disabling the President from performing his office really occur.

Only in a situation where the President is unable to inform the Marshal of the Sejm about his inability (e.g. in the event of loss of consciousness or kidnapping), he may submit to the Constitutional Tribunal a motion to decide whether the state of temporary inability of the President to perform the duties of the head of state really occurs. The content of Article 131 Paragraph 1 shows clearly that a motion by the Marshal of the Sejm about recognizing temporary inability of the President to perform his office is not binding on the Tribunal (Sarnecki 1999: 3). The Tribunal does not act here as "notary public of the constitution", indicating the existence of a particular state of affairs, but examines in a comprehensive manner the state of things and decides if in this situation we can speak of a temporary inability of the President to hold his office. However, if the Tribunal decides that the President is temporary unable to hold his office, its duty is to confer execution of the duties of the head of state to the Marshal of the Sejm. It should be noted that recognizing temporary inability to hold office by the President does not suspend the running of his five-year term of office (Banaszak 2009: 654-655).

A different regulation refers to a situation in which occurs a permanent incapacity of the President to discharge his duties that is a vacancy in the office. Article 131 Paragraph 2 of the Constitution provides for five such situations: 1) death of the President; 2) the President's resignation from office; 3) judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election; 4) a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly; 5) dismissal of the President of the Republic from office by a judgment of the

Tribunal of State. In contrast to Article 131 Paragraph 1 the state of vacancy in the office of the President does not need to be announced by the Constitutional Tribunal. In either of the afore mentioned circumstances, the Marshal of the Sejm assumes the duties of the head of state by virtue of the constitution itself (Zubik 2010: 75). None of any state authorities pronouncing the death of the President has to take the decision and there is no need to swear the Marshal of the Sejm into the office of President, since he performs the duties of the head of state only temporarily. In case when the Marshal of the Sejm is unable to perform the duties of the President (e.g. due to an illness), it is the Marshal of the Senate (the chairman of the upper chamber of the parliament) who should assume the duties³. On the 10th of April 2010 the Marshal of the Sejm Bronisław Komorowski at the news of the plane crash and death of President Lech Kaczyński arrived in Warsaw immediately and assumed the duties of the head of state⁴.

From the constitutional point of view the person substituting the President holds all constitutional rights of the head of state (Winczorek 2008: 289). The only issue about which the substitute is not authorized to decide is the dissolution of the parliament. However, from the political point of view it is advisable for the Marshal of the Sejm (Senate) to abstain from taking decisions which may be of crucial importance for the public policy, for he was not elected in universal elections directly by the Nation.

At the time of the office of President falling vacant his five-year term of office is interrupted. Therefore the main duty of the Marshal of the Sejm who temporarily exercises the duties of the President is to order the election of the President of the Republic. The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no later than the 14th day after the death of the President, specifying the date of the election which shall be on a non-working day and within a period of 60 days of the day of ordering the election. The Marshal of the Sejm ordered the election on the 21th of April 2010. The election was held on the 20th of June, and the second round two weeks later, on 4th July 2010⁵. For the second round of voting went: the Marshal of the Sejm Bronisław Komorowski and Jarosław Kaczyński, brother of the late President, the head of the opposing party “Law and Justice” (“Prawo I Sprawiedliwość”). The election was won by Bronisław Komorowski who obtained 53% of votes.

In the plane crash which took place on the 10th of April 2010, apart from the President of the Republic of Poland and his wife, many other public officials were killed⁶. Among them were: the Commissioner for Citizens’ Rights (Janusz Kochanowski), the President of the National Bank of Poland (Sławomir Skrzypek), the President of the Institute of National Remembrance (Janusz Kurtyka), the Chief of the General Staff (Franciszek Gągor), Deputies

and Senators. It was necessary to appoint new officials to the positions. In accordance with the articles of the constitution the President of the National Bank of Poland was elected by the Sejm on the request of the President (a candidate was nominated by the Marshal of the Sejm substituting the President)⁷. Before the election of a new President of the National Bank of Poland his duties was performed by his first deputy. The Commissioner for Citizens' Rights and the President of the Institute of National Remembrance were elected by the Sejm with the consent of the Senate⁸.

According to the Acts on Elections to the Sejm and Senate, which were in force at that time⁹, in case of expiry of the mandate of a Deputy¹⁰ the Marshal of the Sejm informed of this fact, in accordance with the information of the National Electoral Commission, the next candidate from the same constituency list who received the next highest consecutive number of votes in the ballot about his precedence to the mandate. If the number of votes given to two or more candidates is equal, the priority is decided by the precedence of the candidate on the constituency list¹¹.

Mandates of Senators were filled by means of by-elections to the Senate¹². By-elections were ordered by the President (or the Marshal of the Sejm substituting the President) within a period of 3 months from the day of the mandate of a Senator being judged expired. Parliamentary elections – similarly to presidential election – may only be held on a non-working day (which in Poland traditionally is Sunday). By-elections to the Senate were held on the day of the first round of presidential election, i.e. on the 20th of June 2010.

Because of the death of the Chief of the General Staff of the Polish Army and commanders of branches of the Armed Forces the command of the army was assumed by their first deputies. The Chief of the General Staff of the Polish Army and commanders of branches of the Armed Forces were appointed by the Marshal of the Sejm substituting the President. Other persons that were killed in the crash in the Katyn Forest were officials of the Presidential Chancellery (including the Chief of the Presidential Chancellery), vice-ministers in the Polish government, representatives of churches and religions, representatives of Katyn families, accompanying persons¹³, officers of the Government Protection Bureau and a seven-person crew. Altogether 96 people died.

Notes

¹ In the history of Poland it is the second instance of the death of the incumbent President. The first one happened in 1922 after the assassination of Gabriel Narutowicz when the Constitution of March 1921 was in force.

² Substitution of the President by the chairman of the first chamber of the parliament often happens also in other countries. In Poland the solution was already adopted in the Constitution of March (1921). After the death of the

President Narutowicz, the office of the head of the state was temporarily performed by the Marshal of the Sejm Maciej Rataj.

³ In performing the duties of the head of state the Marshal of the Sejm cannot be replaced by Vice-marshals of the Sejm but by the Marshal of the Senate (Zubik 2010: 75).

⁴ The assumption of the duties of the head of state by Bronisław Komorowski created a complicated political situation, since earlier he had been nominated as a candidate to presidential elections by the “Civic Platform” (“Platforma Obywatelska”). However, there are no constitutional impediments for the Marshal of the Sejm who performs the duties of the head of state to stand for presidential elections.

⁵ Initially, the first round of the presidential elections in Poland was to take place on the 3rd of October, the second one – on the 17th of October. In the crash, next to President Lech Kaczyński, who was supposed to run for the re-election, died the second candidate for presidential election – Jerzy Szmajdziński, who was supported by the Democratic Left Alliance.

⁶ The delegation led by President Lech Kaczyński were on their way to Katyń, where they wanted to commemorate 20 thousand officers of the Polish Army, policemen, priests, civil servants and others, who were murdered in 1940 on the order of Joseph Stalin.

⁷ Marek Belka was appointed the new president of the National Polish Bank.

⁸ Irena Lipowicz was appointed the new Commissioner for Citizens’ Rights.

⁹ On the 5th of January 2011 the Sejm adopted the Election Code which provides for analogical rules of completing the composition of the Sejm and Senate in case of death of deputies and senators.

¹⁰ 15 Deputies, including 2 Vice-marshals of the Sejm, were killed in the crash.

¹¹ This principle derives from the established in Poland proportional representation in the elections to the Sejm.

¹² 3 Senators, including a Vice-marshal of the Senate, were killed in the crash.

¹³ One of the victims was Anna Walentynowicz, a co-ordinator of Solidarity movement in 1980.

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