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The President of Poland's immunity in criminal matters

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Abstract: *The issue analysed by the author is that of the institution of Presidential immunity pertaining to the President of the Republic of Poland, and operating in such a way that a sitting President cannot be held criminally liable before a common court for acts tantamount to offences. Inclining towards the essence of this solution and its consequences when it comes to respect for constitutional principles of legalism and equality before the law, the author at the same time seeks to assess the completeness of the provisions in effect in Poland, in so doing identifying a lack of clear directives as to how a former President (i.e. one who has left office) is to be held criminally liable. The conclusion reached by the author can be said to boil down to a recognition that the liability of a former President before Poland's Tribunal of State for offences or crimes committed is of an accessory nature where common courts are concerned, with the condition underpinning recognition of the Tribunal's primacy in matters of jurisdiction being the National Assembly's adoption of a Resolution holding a former President liable constitutionally, and potentially at the same time initiating action in respect of given offences. Any lack of such a National Assembly Resolution must give rise to a particular kind of reactivation – in respect of the former President – of jurisdiction in the dispensing of justice by common courts, given the fact that one of the negative procedural premises has ceased to be non-applicable. Thus, unlike in the case of a President still holding office, the cognition of the Tribunal of State in relation to a former President is neither exclusive nor automatic. Such observations have also stimulated work by*

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the author to develop de lege ferenda postulates regarding the subject matter, as set against the wider background of Poland's political and constitutional system.

Introductory remarks. The accountability and liability of the President of the Republic of Poland

What Polish language refers to as *odpowiedzialność* (and English might see in different contexts as either "responsibility" or "accountability" or "answerability" or most of all in this context "liability") is one of the key notions in today's political science and constitutional law study. Its multi-dimensional nature reflects, not only the many different areas of human activity, but also manifold research perspectives that might be legal, moral, praxiological, economic or political. The principle in this respect arises out of core assumptions applying in duly-constituted democratic states operating under the rule of law, whereby organs of power and authority are limited in what they can do by way of the law, and customs relating to the separation of powers. The measurability of responsibility over time ensures that it related to the past but also to the future (given the possibility of it applying in line with future effects), while *telos* in relation to the concept also denotes the prospect of prevention being achieved[1]. And of course, accountability and liability can be assumed, not only for what we do, but also for what we neglect or fail to do.

The subject matter of this article focuses in on matters of accountability and liability of the President of Poland, as these may be assigned to different regimes of activity encompassing both politics and the law.

The very process by which the Head of State in a Republic is held accountable is reflected in matters of the legitimisation of authority, given that this is a procedure far from trivial when it comes to acceptance by the public, not only in regard to the way power is exercised, but also in relation to those that exercise it, and indeed the institution of the Presidency as such[2]. For accountability has an immeasurable impact in legitimising, not only the President as a constitutional organ, but also the individuals actually holding the post and discharging the duties associated with it. This reflects the way in which it is the "guar-

[1] J. Szymanek, *Epistemologia odpowiedzialności politycznej*, [in:] Z. Kiełmiński, J. Szymanek (eds.), *Instytucje prawa konstytucyjnego w perspektywie politologicznej*, Warsaw 2013, p. 90.

[2] See G. Sartori, *Teoria demokracji*, Warsaw 1994, p. 233.

antor of the effectiveness of the system"[3] (that the President of Poland unquestionably is) that is involved here. And in the context of Poland's political and governance system, the position of the President has been shaped by a general political clause regarding the non-accountability and non-liability of the Head of State[4], as this also co-exists with and within a principle of the duly-constituted State governed by and subject to the rule of law, in which the conduct of functionaries (up to and including the foremost or supreme example) is subject to scrutiny – from the point of view of the law as well as democracy.

Political non-accountability/non-liability on the part of a Head of State represents a transposition of a traditional principle regarding the untouchability of monarchs, and in consequence – as Jerzy Ciapała has indicated – "political non-accountability has become a reflex for neutrality in the face of currently-ongoing political processes"[5]. And, while legal accountability (and as necessary liability) is directed at the rule of law, its political counterpart is centred around effectiveness of action.

Along with the principle of non-combination and incompatibility with other posts (*incompatibilitas*), Presidential immunity is one of the guarantors that the President will be in a position to discharge duties *vis-à-vis* a political and governance system, in this case that of the Republic of Poland. For immunity denotes relief or release from burdens that do oblige others. In the doctrine of the Polish penal process, immunity as regards proceedings is conceptualised from the negative side. Thus, for example, Stanisław Śliwiński treated immunity as the total or partial freeing of defined categories of person from the application of criminal-law provisions of a material or procedural nature, or else the exclusion of defined persons from under the jurisdiction of criminal courts – on account of these persons enjoying rights in the extra-territoriality context[6]. Marian Cieślak in turn defined immunity under criminal law as "applying to persons in a defined category by virtue of a privilege that liability be precluded or limited in a given situation"[7].

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[3] Cf. T. Słomka, *Prezydent Rzeczypospolitej po 1989 roku. Ujęcie porównawcze*, Warsaw 2005, pp. 75, 89.

[4] See J. Szymanek, *Zasada nieodpowiedzialności politycznej prezydenta – arbitra*, [in:] T. Mołdawa, J. Szymanek (eds.), *Instytucja prezydenta. Zagadnienia teorii i praktyki na tle doświadczeń polskich oraz wybranych państw obcych*, Warsaw 2010, p. 169 *et seq.*

[5] J. Ciapała, *Prezydent w systemie ustrojowym Polski (1989–1997*), Warsaw 1999, p. 351.

[6] See S. Śliwiński, *Polskie prawo karne materialne*, Warsaw 1946, pp. 521–522, 525; S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warsaw 1948, pp. 171–172.

[7] M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Kraków 2011, pp. 96–97.

The scope of the immunity enjoyed by a President ought to delineate a boundary between protection of the person and the functioning of the office thereof (a primary function as a guarantor), on the one hand, and the objectives of the justice system on the other. Immunity should not serve to extend privilege to the Head of State, with this then denoting limits to the power of the judiciary that cannot be justified in a democratic state[8]. Rather, the immunity of the President has as its aim to secure against baseless accusations, possible blackmail, or in fact the concrete threat of criminal proceedings being initiated.

In accordance with Art. 145(1) of the Polish Constitution[9], "the President of the Republic [*of Poland*] may be held accountable before the Tribunal of State [*TS*] for an infringement of the Constitution or statute, or for commission of an offence"[10]. However, for the President of Poland to stand accused of something in this way (in effect to experience a kind of impeachment), there needs to be a Resolution of the National Assembly adopted by at least a two-thirds majority of the statutory number of members thereof, thus at the request of at least 140 of the said members. On the day any such Resolution were to be adopted, that would denote a suspending of activity in office, with the obligations of President temporarily taken on by the Speaker (*Marshal*) of the *Sejm*.

The provisions set out in Poland's basic law inclined one to believe that the President's accountability (and potential liability) in line with the Constitution is focused around matters of accountability/liability as such (*privilegium personae*); around the organ who can actually decide about that (*privilegium fori*), around the nature and essence of the office actually being held in this case (*privilegium offici*), and around the issue of sanctions (*privilegium poenae*) – i.e. prevention and punishment. For accountability under and before the Constitution, as well as the attendant matter of the immunity of those discharging constitutional functions,

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[8] K. Grajewski, *Immunitet parlamentarny w prawie polskim*, Warsaw 2001, p. 8. See also the Resolution of the Supreme Court dated 24.02.1998, I KZP 36/97, OSNKW 1998, nos. 3–4.

[9] The Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*) of April 2nd 1997 (the *Dziennik Ustaw* Official Journal of Laws of 1997, no. 78, item 483, as amended subsequently).

[10] Art. 2(1) of the Act of March 26th 1982 on the Tribunal of State (i.e. the *Dziennik Ustaw* Official Journal of Laws of 2002, no. 101, item 925, with subsequent amendments) provides that the President can be liable, not only for offences in general but also for Treasury offences. The liability regime in the latter case is autonomous *vis-a-vis* that in the former. "Offence" and "Treasury offence" are in fact two entirely different categories.

represent some specific kind of infringement of the general principle of equality before the law[11].

The Constitution in fact ushers in a three-fold type of accountability or liability on the part of the President of Poland, i.e. that: 1) for constitutional tort, 2) for the committing of a crime, and 3) for a constitutional tort that at the same time meets the criteria for a prohibited act, i.e. a crime or offence. The perpetration of a constitutional tort entails violation of the Constitution or a state that may take the form of action or neglect in connection with work in the office held, or merely during the time in office[12]. Accountability/liability for a constitutional tort is of a personalised nature and is updated when fault is found, irrespective of whether there was witting or unwitting perpetration. Tort is any and every breach or violation of the Constitution, irrespective of either the effects thereof or the degree of seriousness or gravity. And in accordance with Art. 3 of the Act on the Tribunal of State, constitutional liability is borne by an incumbent President in connection with the office held and within the remit thereof, even where the said violation in question is unwitting. The second type of liability arising for a President is that associated with the committing of a crime outside the realm of activity associated with the office, thus when a common crime or offence has been permitted to take place. The third type then takes in an activity or deed within the remit of the sitting President and at the same time constituting a crime.

In seeking to distinguish constitutional and criminal liability, it is necessary to point to differences in the degree of precision with which the scope of liability of the former kind if set out – given the political dimension to activity and the associated interpretation of constitutional notions that are of a somewhat indeterminate nature through the prism of political criteria[13]. Constitutional liability manifests itself in a predisposition to politicise or juridify. A criterion doing much to differentiate here concerns the nature of the judicial body[14] and the source of its legitimacy, as well as the determination of the subject matter, scope, con-

[11] Cf. J. Filip, *Pojęcie oraz rodzaje odpowiedzialności konstytucyjnej*, [in:] S. Grabowska, R. Grabowski (eds.), *Formy odpowiedzialności konstytucyjnej w państwach europejskich*, Toruń 2010, p. 21.

[12] The terms "within their office" and "within its scope" arise out of Art. 198(1) of the Constitution.

[13] See B. Dziemidok-Olszewska, *Odpowiedzialność głowy państwa i rządu we współczesnych państwach europejskich*, Lublin 2012, pp. 64–65; as well as M. Pietrzak, *Odpowiedzialność konstytucyjna w Polsce*, Warsaw 1992, p. 39.

[14] M. Pietrzak, *Odpowiedzialność konstytucyjna…*, p. 42.

tent and procedures associated with accountability or liability expressed in a clear way or by way of generalisation[15].

The Polish constitutional tradition in matters of Presidential accountability and liability

The problem of the accountability of the Head of State, as well as the nature and scope thereof, should be considered in the context of Poland's system of governance, and the traditions and key assumptions thereof. The March 1921 Constitution of Poland basically prejudged that the President was non-accountable before Parliament for activity while in office. In connection with the existing counter-signature process, the Government assumed responsibility for official regulations in law[16].

Poland's April 1935 Constitution in turn put in place a principle as regards the non-liability of a President for his official acts, and in the realms of both parliamentary and constitutional accountability. The President might thus take advantage of a material immunity encompassing, not only offences, but also constitutional torts. This particular kind of "licence to not be held liable" (and to be accountable solely before God and history) did not correlate positively with the entitlements of Head of State. For acts not associated with the discharge of duties in office, a President might still not be called to account for as long as he was in post (Art. 15(2)). In contrast, on leaving office, the President could be held accountable before a common court where an offence committed was not linked to the holding of office.

It was in turn by virtue of the April amendment to the Constitution of the Polish People's Republic (Art. 32d)[17], as well as the Small Constitution (under Art. 50(1) thereof)[18] that the legal liability of the

[15] See B. Dziemidok-Olszewska, *Odpowiedzialność głowy*…, p. 68.

[16] By virtue of the binding status of the Act of 27th April 1923 on the Tribunal of State (the *Dziennik Ustaw* Official Journal of Laws, no. 59, item 415) the President is answerable before the Tribunal of State for treason and witting violation of the Constitution, and likewise for crimes and offences arising out of Acts on criminal law, even where the latter are not connected with the discharging of the *ex officio* functions assigned to the President. Once the President has left office, he or she is only accountable before the TS for deeds connected with the said holding of Presidential office (Art. 27).

[17] The Act of April 7th 1989 *o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej* (amending the Constitution of the Polish People's Republic) (the *Dziennik Ustaw* Official Journal of Laws, no. 19, item 101).

[18] The Constitutional Act of October 17th 1992 *o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz samorządzie terytorialnym* (on the

President before the TS was established, in relation to a violation of the Constitution and Acts, as well as the committing of an offence.

The President's accountability before the TS for a disciplinary tort committed is thus included among solutions characteristic for Polish constitutional tradition. In contrast, the TS ruling in the matter of the President's liability for a crime is a distinct and unique type of accountability before the law. In the context of what was established on March 25th 1997 by Poland's Supreme Court[19], reference was made to the *ratio legis* of provisions in the Constitution and the Act on the TS – it being indicated that there is no way of considering that the Tribunal of State was established, not only as a special court for judging constitutional accountability or liability, but also as a special criminal court to decide upon the criminal liability of high-level state officials when it comes to crimes committed in connection with the post held.

In the view of the Supreme Court – "in this category of criminal matters, the perceived need entailed conferment upon a special court, in recognition of the fact that common courts are not qualified to judge cases reliably. For that would be an exception to the rule of equality before the law and as such would have to be established explicitly". As the Supreme Court emphasised: "The Tribunal of State was established with a view to a defined category of person holding a particularly important state post characterised by additional responsibility being put beyond the liability borne by all other citizens". Criminal liability is thus of an accessory nature when set against constitutional accountability and liability[20].

Criminal liability

A particular former of legal liability of the Head of State is criminal liability, whose pursuit is in essence a matter of jurisdiction for the courts dispensing justice in Poland. In accordance with Art. 175(1) of the Constitution, courts include the Supreme Court of the Republic of Poland (*Sąd Najwyższy*), common courts, administrative courts and

mutual relations between the legislature and executive of the Republic of Poland and local and regional government) (the *Dziennik Ustaw* Official Journal of Laws, no. 84, item 426).

19 U KKN 235/96.

20 See M. Milczarek, *Odpowiedzialność karna Prezydenta Rzeczypospolitej Polskiej*, «Przegląd Prawa Konstytucyjnego» 2010, no. 1, p. 138. It also needs to be mentioned that the legislator uses the term "Members of the Tribunal of State", while never in the Constitution resorting to the wording "Judges of the Tribunal of State" (*vide* Art. 199 of the Constitution).

military courts. The Tribunal of State (*Trybunał Stanu*) does not constitute a court, rather belonging to the separate category of Tribunals (and included alongside the country's Constitutional Tribunal – *Trybunał Konstytucyjny*). Art. 145(1) of the Constitution prejudges that a person holding the office of President may be held accountable before the Tribunal of State for offences committed[21]. There is thus a precluding of accountability of the President of Poland before a common court, and this exceptional solution gains justification in line with "particular respect for the office of the highest representative of the Republic", as well as difficulties linking up with any submission to the deliberations and decisions of judges the President actually nominates[22].

In turn, accountability in respect of a constitutional tort or offence committed may be pursued irrespective of whether the person involved continues to hold the office of President of Poland or no longer does so, as jurisdiction in these matters is that of the Tribunal of State in any case. And as regards the accountability or liability of the President for an offence committed in the circumstances of his/her still being in the office, proceedings before the TS constitute an exclusive material jurisdiction. However, in the case of a former President, the materially appropriate organ is either the TS or a common court. For a person no longer holding the office has lost the special protection that immunity provides.

In accordance with Art. 2(2) of the Act on the Tribunal of State, during such time as he/she remains in office, the President does not become subject to any expiry of exposure to potential punishment for an offence (or Treasury offence) for which the office-holder has not stood accused before the TS. In the context of constitutional regulation, a question arising does indeed concern the temporal scope of immunity due to the President, but also as regards its scope in terms of subject matter and

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[21] The currently binding Constitution is in essence identical in this respect to what was provided for in the so-called Small Constitution of 1992. It is true that Art. 50 thereof is worded: *Prezydent za naruszenie konstytucji lub ustawy oraz za popełnienie przestępstwa może być pociągnięty do odpowiedzialności tylko przed Trybunałem Stanu* (this basically reading that the President can be held to account before the Tribunal of State *only*, where he is in violation of the Constitution or has infringed an Act of Parliament). However, as Jacek Zaleśny indicates, that change was unwittingly deconstitutionalised by the use of the term "only"; or as may have been the intention. – J. Zaleśny, *Odpowiedzialność konstytucyjna w prawie polskim okresu transformacji ustrojowej*, Toruń 2004, p. 193.

[22] P. Sarnecki, *Uwaga 3 do art. 145*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, Warsaw 1999, p. 2.

permissible procedural action; as well as in the matter of the Tribunal of State's exclusive legal competence and jurisdiction.

The scope of the immunity enjoyed by the President of the Republic of Poland

There has been no defining of the concept of an offence by virtue of the Constitution. In the alternative, regard needs to be had to Art. 42(1) of the Constitution, the English translation of which refers to a person's being held criminally "responsible" for an act subject to a penalty and "prohibited by a statute in force at the moment of commission".

When it comes to the scope of the immunity of the Head of State in regard to subject matter, questions are raised in connection with liability for more minor offences, as well as disciplinary liability. Superficially, it might appear that, since the President as supreme representative of the Polish State is not to be held accountable before a common court for a crime committed, how much more would he or she not be called to account for some minor offence. In its definitions, the relevant Polish Code in respect of minor offences notes that it relates to a deed prohibited by a statute in force at the time of perpetration, on pain of arrest, deprivation of liberty or a fine of up to PLN 5000, or else reprimand, which is harmful to society and the subject of fault or blame.

Indeed criminal liability as broadly conceived takes in both crimes and minor offences. And, in relation to the President, use is made of a wording whereby the holder of that office is held accountable for "crimes committed". Now there is no doubt that proceedings in respect of minor offences are characterised by autonomy vis-a-vis criminal proceedings *sensu stricto*, as is made clear (as early as in) Art. 1 § 1 of the Act of August 24th 2001 on the Code of Procedure for Petty Offences (*Kodeks postępowania w sprawach o wykroczenia*)[23]. Poland's Supreme Court has also taken up such a position[24]. Andrzej Marek points out that, notwithstanding exemption under Art. 145(1) of the Constitution that literally applies

[23] I.e. the *Dziennik Ustaw* Official Journal of Laws of 2020, item 729 with subsequent amendments.

[24] See what was established by the Supreme Court on 29th January 2004, I KZP 40/03, OSNKW 2004/2, item 22. Likewise, in the Justification of the Government draft version of the Code of Procedure for Petty Offences of December 12th 2000 it is indicated directly that proceedings in such matters are not criminal proceedings *sensu stricto*, but rather something distinct that relates to judgment in matters other than crimes, albeit on the basis of similar principles. See Publication no. 2465, p. 33.

solely to *odpowiedzialność za przestępstwo* (translated into English as being held accountable for "commission of an offence"), the *argumentum a maiori ad minus* principle applies even more so to minor offences[25].

An analogous stance is adopted by Tomasz Grzegorczyk, as he expresses the view that Art. 145 of the Constitution excludes the President from judicial accountability for offences committed, it at the same time being indicated that the TS has jurisdiction in matters of this kind[26]. While it is true that, under Art. 5 § 1, point 7 of the aforesaid 2001 Procedural Code in matters of minor offences (as opposed to more serious crimes), there shall be no launching of proceedings, while proceedings already commenced with shall be stayed, where – by virtue of detailed provisions – an accused person is not (or is no longer) subject to the jurisprudence provided for under that Code, it remains the case that there is no statutory regulation explicitly precluding liability on the part of the President of the Republic of Poland.

What is more, the fact there is a proscription on any presumption regarding the existence – or the extended scope – of immunity may cause it to be stated that the scope of the Head of State's liability for minor offences committed is the same as that applying in the case of other entities, while that liability is borne by way of the same procedure[27]. Any privileging of the President when it comes to the scope of non-liability for minor offences ought to arise directly from legal provisions, with the acceptance of any interpretation other than that certain to violate the principle of citizens' equality before the law. Furthermore, in and of itself, the role of the President in Poland's system of governance does not justify conferment of exceptional forms of non-liability not arising directly from legal regulations; while the jurisdiction of the TS does *not* extend to the trying of minor offences committed by a President (*argumentum a contrario ex* Art. 2(1) of the Act on the Tribunal of State).

Current statutory regulation arising out of the Act on the Tribunal of State and concerned with the President's liability for offences (given as *przestępstwa* in Polish, rather than *wykroczenia*) actually precludes any constitutional conceptualisation of this said notion of the term "offence" being some category common to both the *przestępstwa* set out in Poland's Acts of Parliament and the minor offences termed *wykroczenia* in Polish.

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[25] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2008, p. 167.

[26] T. Grzegorczyk, *Remark 6 to Art. 5*, [in:] *Kodeks postępowania w sprawach o wykroczenia. Komentarz* (the *Commentary* to the Code of Procedure for Petty Offences), Warsaw 2012.

[27] Also K. Dąbrowski, *Odpowiedzialność Prezydenta za wykroczenia*, «Przegląd Prawa Konstytucyjnego» 2017, no. 1, p. 113.

It is imperative to recall the *ratio legis* arising out of Art. 145(1) of the Constitution in respect of the sole and total jurisdiction of the TS in matters of crimes, which boils down to restrictions on opportunities to apply punishments involving deprivation of liberty entirely detrimental to a President of Poland being in a position to pursue and discharge functions designated therefor in line with Poland's political system and system of governance. In that context, likewise problematical would be any administering of the punishment of arrest for a minor offence committed, given the fact that at least temporary obstacles to the pursuit of activity associated with the office would be put in place.

Thus, the treatment of liability for a minor offence committed as *sensu largo* liability for a "crime" as conceptualised by the country's basic law would ensure the Tribunal of State's being recognised as *privilegium fori* in respect of the relevant Presidential liability. That kind of stance justified by legal construal of a functional nature finds no justification by virtue of the legislation in force, the exceptional nature of the institution of immunity and the prohibition on any extension of the scope thereof when it comes to subject matter.

In accordance with Art. 132 of the Constitution, the President may not hold any other office or any public post other than those associated with the key office held. However, the formal immunity of the President does not extend to acts that were the subject of disciplinary proceedings prior to the office being taken up. The legislator remains silent in this matter, not encompassing with formal immunity proceedings that related to professional or disciplinary liability. An analogous situation pertains in the case of liability arising out of the submission of a false declaration relating to work or service in – or cooperation with – state-security bodies in the period between July 22nd 1944 and July 31st 1990 (i.e. disclosure proceedings); or in the case of punishment by disciplinary sanction involving the arrest of a President declining to give testimony as a witness (Art. 287 § 2 of the Code of Criminal Procedure[28]).

When it comes to immunity for a crime committed by a President of Poland, we are dealing with a temporary excluding of any possibility of the holder of office being brought as a defendant before a Polish criminal court, with this being related to the entity, and to the Head of State's enjoyment of absolute immunity, i.e. immunity incapable of being revoked, even as it is not of a permanent nature.

[28] The Code of Criminal Proceedings (*Kodeks postępowania karnego*) Act of June 6th 1997 (i.e. the *Dziennik Ustaw* Official Journal of Laws of 2020 item 30, as amended subsequently).

The temporal scope of the immunity enjoyed by the President of Poland and the jurisdiction of the Tribunal of State

There is no dispute as to the jurisdiction of the TS where constitutional accountability is concerned, irrespective of whether the office of President is still held or not. No other organ or body has jurisdiction in this regard. Where doubts arise it is in relation to immunity in the face of a President being called to account before a criminal court for a crime committed. The President's formal immunity precludes material jurisdiction of common courts when it comes to the pursuit of liability in respect of a crime, and it constitutes an exception to the constitutional principle of justice being received before a court. The sole organ of power able to ensure that a Polish President in office can stand accused of something is the National Assembly[29]. An undoubted justification for the sole and total jurisdiction of the TS in respect of a constitutional tort or crime perpetrated by a President lies in the fact that there is no possibility of a presidential self-pardon. For, in accordance with Art. 139, sentence 2 of the Constitution "The power of pardon may not be extended to individuals convicted by the Tribunal of State".

In temporal terms, the scope of the President's accountability before the TS can be looked for in the following dimensions:

1) a deed takes place prior to the office of President being taken up, while judgment is to be passed while the term is still ongoing;
2) a deed takes place prior to the office of President being taken up, while judgment is to be passed following its elapse;
3) the deed and the judgment in the matter of accountability/liability take place while the President remains in office;
4) the deed takes place during the time in office, while judgment is a matter for the time after;
5) both the deed and the process of judgment in respect of accountability/liability take place following the time in office[30].

The scope of the President's non-liability before a common court for a crime committed is linked temporally with the time the office continues to be held – during which the sole jurisdiction is that of the TS. And this is true of situations in which the time of perpetration falls during

[29] Cf. R. Mojak and J. Sobczak, *Zgromadzenie Narodowe*, «Przegląd Sejmowy» 1994, no. 2, pp. 22–25.

[30] D. Szumiło-Kulczycka, *Odpowiedzialność karna przed Trybunałem Stanu*, «Przegląd Sejmowy» 2001, no. 4, p. 95.

the time in office, or else prior to its being taken on. Under these circumstances, the criminal liability of a President in office is made a reality before the Tribunal of State, if at all. For, in accordance with Art. 17 § 1 point 8 of the Code of Criminal Procedure, and via a negative premise as to any process, proceedings may not take place given the person involved in perpetration and his/her non-subordination to Polish courts.

Jurisdiction in remaining areas is with a common court, given that prior holding of the Presidential office does not give rise to any permanent change of legal status, and immunity no longer has application once the person has left office. As regards acts that are the subject of criminal liability committed prior to the office of President being taken on, an incumbent is held accountable before the Tribunal of State on the grounds that formal immunity applies, and thus acts to safeguard the supreme representative of the Republic of Poland against destabilisation in the course of the term in office.

Doubts might be raised by a situation in which a Presidential lapse ensures the committing of an offence during the time the office is being held, while judgment is passed once the incumbent has left office. Then, hypothetically at least, it could be recognised that sole jurisdiction is anyway in the hands of the TS, by virtue of Art. 23(1) of the Act on the Tribunal of State, in accordance with which prosecution remains permissible up to 10 years after a given deed is done, unless the said deed is a Treasury offence or crime (in which case a longer period of validity is provided for).

However, the temporal extension of the jurisdiction of the TS does not constitute grounds for limiting or narrowing the cognition of the common courts, as loss of formal immunity follows on from the end of the term in office, thereby reopening possibilities for a person to be called to account before such a common court. Art. 23(1) of the Act on the TS lays down a time limit for the expiry of liability for a constitutional tort on the part of the Head of State, but not in matters of jurisdiction *vis-à-vis* criminal matters[31].

Thus the circumstance that the perpetrator (President) no longer holds the office or discharges the function does not stand in the way of the launching and pursuit of proceedings before a common court. In accordance with Art. 145(1) of the Constitution, it is the President of the Republic of Poland who commits a crime, rather than the person

[31] See S. Steinborn, *Remark 7 on Art. 23*, [in:] K. Grajewski and S. Steinborn (eds.), *The Commentary* to the *Act on the Tribunal of State*, Warsaw 2020, p. 377.

who holds that office, who may be called to account before the Tribunal of State[32]. Thus the legislator does not introduce exclusive jurisdiction of the Tribunal when it comes to liability or accountability for a crime (or Treasury offence) committed by the President, or else by others who can be held accountable before the TS[33].

In answering a question as to whether the negative procedural premise referred to above has application once the office of President ceases to be held by a given person, it is necessary to invoke the essence of immunity in the context of equality before the law. While no doubts need be raised by the fact that – when it comes to crimes committed prior to the office being taken on – there is an updating to allow for criminal liability before a common court, a question remaining complex concern the material jurisdiction of a common court when it comes to holding a President criminally liable after he or she leaves office, for deeds that do have the status of crimes committed during the time in office, and in connection with both the pursuit of activity in respect of the post held and beyond that remit. The exceptional nature of the immunity justifies acceptance of an idea regarding the non-exclusivity of the TS's material jurisdiction

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[32] See D. Szumiło-Kulczycka, *Odpowiedzialność karna…*, p. 97. As D. Szumiło-Kulczycka rightly indicates *przedłużanie specyficznej ochrony sądowej na czas po opuszczeniu stanowiska nie ma racji bytu. Mało tego, mogłoby stać się bardzo niebezpiecznym precedensem. Zarówno bowiem tryb uruchamiania orzeczniczych kompetencji TS, jaki dotychczasowa praktyka wskazują, że dominujące znaczenie mają tu nastroje i układy polityczne* ("extension of the specific judicial protection into the time following departure from office is unsustainable. Indeed, it could set a very dangerous precedent. For both the means of mobilising the remit of the TS to make judgments and the practice to date both show that it is political configurations and moods that are overriding significance here") – *ibidem*. Furthermore, J. Ciapała, indicates that *"uzasadnienie privilegium fori zasadza się na konieczności zapewnienia stabilności urzędu i ochrony jego piastuna przed pochopnymi inicjatywami prawnymi, w tym w sprawach o mniejszej wadze. Określa to sui generis immunitet formalny Prezydenta RP. Uzasadnienie takie nie występuje już wobec osób niesprawujących władzy. Co więcej, wydaje się, że wyłączenie właściwości sądów powszechnych stanowiłoby naruszenie zasady równości obywateli wobec prawa.* ("the *privilegium fori* justification is based around the need to ensure stability of office and the sefaguarding of the office-holder from over-hasty legal initiatives, including as regards matters of lesser importance. This is termed the *sui generis* formal immunity enjoyed by the President of the Republic of Poland. The justification does not arise in respect of those not exercising power. Indeed, any precluding of the jurisdiction of the common courts would appear to constitute a violation of the principle of the equality of all citizens before the law") – J. Ciapała, *Zagadnienie odpowiedzialności prawnej Prezydenta Rzeczypospolitej Polskiej*, «Przegląd Sejmowy» 2005, no. 5, p. 115.

[33] The Prime Minister (as Chair of the Council of Ministers) as well as Members of the said Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Audit, Members of the National Broadcasting Council of Poland, persons upon whom the Prime Minister as Chair of the Council of Ministers confers responsibility for running a Ministry, and the Commander-in-Chief of the Armed Forces.

in respect of crimes or offences committed by a sitting President, but following the completion of the term in office[34].

Thus, in relation to the President of Poland's criminal liability, we are dealing with a constitutionally-defined, temporal *privilegium fori* in the form of the TS, having the effect of precluding any jurisdiction on the part of the common courts. However, for exclusive jurisdiction of the TS *vis-à-vis* an ex-President to be ushered in, it would be necessary to ensure an explicit resignation from the principle of legalism in respect of this subject. While a former President usually remains a "public figure", he or she has no particular privileges where the justice system is concerned. Limitations on the criminal liability of a Head of State in a modern democratic state relates less to accountability or liability as such, and more to the procedures via which that is borne[35], first and foremost with a shift in the timing of procedural actions until such time as the office ceases to be held[36].

The fact that a President participates in the procedure whereby judges take office cannot be taken to prejudge potential loyalties of judges in the common courts. Indeed, where a proceedings relates to a President playing no part in the appointment of a given judge issues inferring judicial decisions coloured by matters personal or sentimental can be discounted entirely. Possible criminal non-liability of a President before a common court in the period following the end of the term in office gains no justification from the traditions of the parliamentary system, the institution of counter-signature or (even more so) the dogma of the sanctity of power.

In its judgment of 21st February 2001 (P 12/00), Poland's Constitutional Tribunal held that Art. 32(1) of the Constitution gave rise to an order that entities in law within a defined class or category needed to be treated uniformly, with "all entities in law characterised by a given material feature to an equal extent needing to be subject to equal treatment, i.e. a uniform measure, with no differentiation in the direction of either discrimination or favouritism".

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[34] D. Szumiło-Kulczycka, *Odpowiedzialność karna…*, p. 102.

[35] S. Grabowska, *Modele odpowiedzialności konstytucyjnej we współczesnych państwach europejskich*, Toruń 2012, p. 30.

[36] S. Grabowska, *W sprawie rozumienia immunitetu oraz odpowiedzialności konstytucyjnej, winy i kary Prezydenta RP*, [in:] M. Kłopocka-Jasińska, M. Filipowska-Tuthill (eds.), *Immunitet parlamentarny i immunitet głowy państwa z perspektywy konstytucyjnej i karnoprocesowej*, Warsaw 2018, p. 33. See also the judgment of the European Court of Human Rights concerning the conferment of blanket immunity upon a Head of State in the case *Urechean and Pavlicenco* versus the Republic of Moldova dated 2nd December 2014, Cases 27756/05 and 41219/07.

Now, in assessing the given legal regulation from the point of view of the principle of equal treatment, is it possible to point to a common material feature justifying equal treatment of an entity in law, bearing in mind the content and objective of the said regulation? Equality before the law is also the justification for the selection of this criterion for differentiation, as opposed to another. The principle of equality at the same time assumes different treatment of different entities, i.e. those not characterised by having a material feature in common. And, in answering a question as to whether a given criterion may constitute grounds for drawing a distinction between entities in law, it will be necessary to determine:

1) if the criterion in question retains rational linkage with the objective and content of the given regulation,
2) if the weight of the interest the process of differentiation is to serve remains proportionate to the weight of the interests that will be infringed or otherwise impinged upon as a result of the process of differentiation being introduced, and
3) if the distinguishing criterion is linked with other values, principles or constitutional norms that justify differential treatment of defined entities.

An interpretation entirely precluding Presidential liability before a common court following the given President's time in office would in essence collide with the principles of equal treatment and of legalism, and in this way ensure the granting of privilege lacking adequate justification. A former President is not an entity whose features demand different treatment by virtue of material and formal criminal law than would be extended to citizens in general. Indeed, the adoption of any other standpoint in this matter would put the person in this category beyond the reach of the law.

While the *de facto* particular and exclusive cognition of the TS in regard to a President in office, and in respect of his/her criminal liability, is justified to an adequate degree by the position in the political system and system of governance as top person in the State, it is not possible to recognise such an individual as the "former President". No systemic justification for such a stance is to be perceived, and principles as regards the division of powers and equilibrium between them would not anyway suffice to allow for the non-liability of a former President.

A consequence of the general competence of courts to dispense justice, as expressed in Art. 177 of the Constitution, is the lack of a possibility for an extending interpretation to be made. Thus, where for any

reason a former President's action subject to accusations in respect of constitutional tort or crime has not been taken up in a criminal proceedings before the Tribunal of State, it will then be the duty of a common court to launch criminal proceedings within the framework of general competences as regards the dispensing of justice. In any other situation there would be a glaring violation of the principles of legalism, equality before the law and equal treatment, achieved by and in regard to public authorities; as well as shortcomings where the division of powers and checks and balances are concerned[37].

The TS does not constitute a *sui generis* special court for former Presidents, to whom charges are addressed in respect of the perpetration of crimes in connection with the office held; irrespective of whether this is accompanied by allegations that a constitutional tort has been committed, and irrespective of whether this is in close connection or no connection with the holding of the office. Any adopting of the contrary position in this regard would lead to a "limiting of the position within the system of governance of the system of common justice; and would represent a special kind of relic from the era of the formal primacy of the Polish *Sejm* (Lower House of Parliament) over remaining authorities in the state"[38].

For as long as the National Assembly fails to impeach a former President for a crime, the common court retains its jurisdiction to launch criminal proceedings encompassing the deed involved in this. Furthermore, the jurisdiction of the common court in the matter of a crime is also retained where the subject of a proceedings before the TS is not deemed to be in the nature of a constitutional tort.

The scope of procedural activity in the context of the immunity enjoyed by the President of the Republic of Poland

A problem of relevance to Presidential liability/accountability is the permissibility of procedural activity being pursued in respect of preparatory (or pre-judicial) proceedings that related to deeds done by a President of the Republic Poland that do fall within the jurisdiction of the TS during the time the given President is in office. The fact that the Head of State enjoys a *privilegium forum* does not of itself preclude the launching

[37] See P 12/00.
[38] P 12/00.

of preparatory (*in rem*) proceedings by a Prosecutor. Indeed, such would actually be imperative in line with the principle of legalism. There would be requirements as regards both the objective of the criminal proceedings (with account for example taken of the legally-protected interests of the person to whom harm has been done), and the objectives of preparatory proceedings first and foremost entailing the collection, securing and as necessary preserving or otherwise maintaining of evidence for court (Art. 298 § 1, point 5 of the Code of Criminal Procedure).

Two solutions are to be considered where there is a determination that a President in office has permitted a situation of the above kind to arise through his/her deeds and actions, and all the more so where it looks possible that *ad personam* proceedings will be addressed. The first of these entails the non-instituting of proceedings by virtue of Art. 17 § 1, point 8 of the Code of Criminal Procedure (on the basis of the perpetrator not being subject to the jurisdiction of the Polish courts). However, this does not look justified given the exemption being of a temporary nature. A second solution entailing a suspending of proceedings (by virtue of Art. 22 § 1 of the Criminal Code) until such time as the President who is the subject of suspicion leaves office – would seem to be the optimal solution[39]. And where permissible procedural activity is concerned, the position that must be taken is one whereby this cannot extend beyond the *in rem* phase.

What would then be permissible are all kinds of procedural activity pursued with a view to determining whether a crime had actually been committed, as well as securing evidence. The formal immunity enjoyed by a President in office may not be deemed tantamount to a total prohibition on all procedures against that office-holder, and all the more so given the circumstance distinct from that applying to parliamentarians (under Art. 105(5) of the Constitution), whereby the President of the Republic of Poland is not apparently untouchable where detention and arrest are concerned. This of course has bearing on the means used in, for example, the search for evidence and/or confiscation of items.

Paradoxically, the narrower scope of immunity protection afforded to the President of Poland as opposed to the country's parliamentarians needs to be seen in the light of regulation under the Constitution, the obtainment of consent for parliamentarians to be held criminally liable, the privilege of untouchability *versus* "the liability for crimes" applying in the case of the President, and attendant lack of untouchabil-

[39] See D. Szumiło-Kulczycka, *Odpowiedzialność karna…*, p. 101.

ity[40]. While it would be a simplification to equate the boundary between the (*in rem* and *ad personam*) phases of preparatory proceedings with the moment of acceptance that what is being dealt with is the assuming of criminal liability for a crime[41], it is nevertheless possible to accept that criminal prosecution in connection with a crime committed (or suspicion in relation thereto) commences as the *ad personam* phase is entered into. However, criminal liability in the case of a President will not ensue with the transition between phases, on account of the procedure involving the formal presenting of charges in respect of the defined crime (Art. 313 § 1 of the Code of Criminal Procedure), though prosecution begins at the moment action is first taken against the person – specifically "the suspect" in the context of preparatory proceedings (Art. 71 § 1 Code of Criminal procedure, in association with Art. 74 § 2 and 3 therein).

This phase therefore has its formal dimension (the pressing of charges) and one of a material nature (a sufficiently justified suspicion of a deed having been perpetrated by a defined perpetrator). It is thus impermissible for factual and case-related procedures linked with the guiding of proceedings against a President enjoying formal immunity to be taken up (e.g. through the application of preventative measures or the seizing of assets). In the case of the procedural activity that seeking permission to search premises occupied by a person who enjoys formal immunity represents, this will depend on a determination as to whether this is a manifestation of that person's being prosecuted in connection with his/her committing of a crime[42]. However, it is possible to regard as justified the remarks of Barbara Janusz-Pohl, for whom: "immunity as a premise closely linked with a person being subject to prosecution does not stand in the way of the pursuit of preparatory proceedings in respect of a matter (and hence *in rem*)"[43].

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[40] For a broader treatment of the immunity enjoyed by parliamentarians, see S. Kozłowski, *Immunitet jako przedmiot dyskusji o przywilejach parlamentarzystów*, «Studia Politologiczne» 2017, vol. 45.

[41] See S. Steinborn, *O zakresie ochrony immunitetowej w postępowaniu karnym*, [in:] M. Kłopocka-Jasińska, M. Filipowska-Tuthill (eds.), *Immunitet parlamentarny i immunitet głowy państwa z perspektywy konstytucyjnej i karnoprocesowej*, Warsaw 2018, p. 80.

[42] Ibidem, p. 89.

[43] B. Janusz-Pohl, *Pojęcie „pociągnięcie do odpowiedzialności karnej" na tle konstrukcji karnoprocesowych immunitetów względnych w prawie polskim*, [in:] M. Kłopocka-Jasińska, M. Filipowska-Tuthill (eds.), *Immunitet parlamentarny i immunitet głowy państwa z perspektywy konstytucyjnej i karnoprocesowej*, Warsaw 2018, p. 103.

Summary

The constitutional principles justifying the President of Poland's bearing of criminal liability are those relating to (what the official translation into English has as): the "democratic state ruled by law" (under Article 2, and also interpretable as a state duly constituted under the rule of law), legalism (under Art. 7 – with the precise wording in English being that "the organs of public authority shall function on the basis of, and within the limits of, the law"), equality before the law (under Art. 32(1)), and presumption of innocence and the right to be defended in court (under Art. 42)[44]. While there are similarities, and links of a subject-related, object-related and procedural nature, liability under the Constitution and criminal liability remain complementary to one another. That said, it has to be remembered that the Tribunal of State is selected and appointed by the *Sejm* (lower house of the Polish Parliament), with the result that its composition as regards membership will depend to a greater or lesser extent on the configuration of party-political forces in Parliament, to the point at which the President's liability under the Constitution will have its political context. The facts of Presidential immunity, or else the need to bring together at least 374 parliamentarians ready to back a motion holding the President criminally liable for an offence, are justified by the need to leave the Head of State above and beyond day-to-day political disputes or squabbles, with the holder of the office in this way left to exercise the function of arbiter, moderator and guarantor of relative harmony within the structures of power. The liability of a President for an offence committed, irrespective of whether the latter related directly to the office held or is merely a common offence, will always remain a political process *par excellence*, given the person of the perpetrator.

Today's criminal trial is universal in character, meaning that everybody – irrespective of their position in society or in the system of gov-

[44] For more on the limitation of the right to court in the context of the protection provided by immunity, and also in relation to immunity in line with the *Ashingdane* tests – as connected with the need to determine whether: 1) immunity is justified by a legitimate goal, 2) the level of immunity protection is proportionate, 3) immunity leads to violation of the essence of the right to court; see M. Kłopocka-Jasińska, *Immunitet parlamentarny i immunitet głowy państwa jako ograniczenia prawa dostępu do sądu w orzecznictwie Europejskiego Trybunału Praw Człowieka*, [in:] M. Kłopocka-Jasińska, M. Filipowska-Tuthill (eds.), *Immunitet parlamentarny i immunitet głowy państwa z perspektywy konstytucyjnej i karnoprocesowej*, Warsaw 2018, pp. 135–149; as well as the judgment of the European Court of Human Rights in the case *Ashingdane* versus the United Kingdom dates 28th May 1985, no. 8225/78.

ernance – can become the subject thereof, if they commit an offence, be that a major crime or a more minor matter. This shaping of the regulatory environment ensures the pursuit in practice of the aforesaid Constitutional principle of equality before the law.

However, those responsible for putting Poland's new system of governance under the Constitution in place ensured that the country's basic law was in a position to develop exceptions from the principle in question, through the setting-out of categories of person who are to be excluded from the rules otherwise applying universally. Thus to immunity, as traditionally associated with defined persons no longer remaining under judicial authority[45]. By definition, these are situations of an exceptional, particular and entirely individual nature[46], with the *exceptiones non sunt extendendae* principle precluding any extending interpretation. Equally, there is no possibility of a court arriving at an interpretation that is narrower than the one intended[47]. *De lege ferenda* there should likewise be a clear defining of principles when it comes to liability once a President has left office.

To sum up, the immunity in matters criminal that a President is able to enjoy is formal in nature (as it precludes procedural regulations being applied), total (given its encompassing of all acts potentially committed by a President and legally forbidden on pain of punishment), but also of course limited temporally (in that it is absolute during the time office is held, but only during that time). There is thus no personal aspect to this, with all linked solely and organically to the status as holder of the given office. A President may not even seek to have the protection afforded by immunity waived (unlike a Parliamentarian enjoying immunity (with the English-language wording of Art. 105(4) of Poland's Constitution reading that "a Deputy may consent to be brought to criminal liability")). In this same way, the time during which a President is holding office cannot be associated with progress of preparatory proceedings from the *in rem* to *ad personam* phases.

In Poland, justice in respect of criminal liability is delivered by the common courts and the Supreme Court, as mentioned in the sub-section of the country's Constitution entitled "Courts" (Art. 175 *et seq.*). However, the Tribunal of State does not fall under this category, in this place, but

[45] S. Glaser, *Polski proces karny w zarysie*, Warsaw 1934, p. 85.

[46] W. Michalski, *Immunitety w polskim procesie karnym*, Warsaw 1970, p. 3.

[47] See R.A. Stefański, *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie postępowania karnego za 2012 r.*, «Ius Novum» 2013, no. 2, p. 175. Also L. Schaff, *W sprawie immunitetu sędziowskiego*, «Państwo i Prawo» 1956, no. 12, p. 1062.

is a matter for a separate sub-section (being set out in Art. 198 *et seq.*). This is of itself sufficient basis to sustain the conclusion that the distinct positions within the system of governance of courts on the one hand and the Tribunal of State on the other also arise from the systematics and means of categorisation and organisation present in Chapter VIII of the Constitution. The latter in fact introduces two exceptions from the principle that justice in Poland is dispensed by courts. The first of these is laid down in Art. 145(1), whose English text is worded as follows: "The President of the Republic may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence". This in turn leads to a recognition that the TS has sole and total jurisdiction when it comes to ensuring that the President is made liable for a crime or offence committed. Furthermore, the totality of the Tribunal of State's jurisdiction holds true in respect of liability for each and every offence a President may perpetrate during his or her time in office, hence not merely any offences committed as the functions specific to that office are being pursued and exercised.

In sum, it is the role of the President within the Polish system of governance under the Constitution that ensures the jurisdiction of the TS in matters of the commission of offences whose perpetrator is an incumbent Head of State. Where a President no longer holds that office, a thesis for which justification can be found concerns the accessory nature of a former President's accountability before the TS for offences committed. Construal of the law on both a systemic and functional basis gives rise to a conclusion that the TS only becomes an organ dispensing justice (in essence a court) once the National Assembly has passed its Resolution bringing the former President to constitutional liability and at the same time ensuring that he or she is held accountable. In the face of this conceptualisation, the Tribunal's cognition *vis-à-vis* a former President and an offence committed thereby may not be regarded as either exclusive or automatic.

Had the framers of the Constitution as people seeking to shape a new system of governance wished to make the Tribunal of State a Special Court for former Presidents, then they would have resorted to a name or title of that kind. As things stand, there is no proper way to draw a conclusion regarding court-like status from either the Constitutional provisions in place in Poland, or what is provided for in the country's Act on the Tribunal of State. At the same time, this kind of means of interpretation needs to be set against the content of principles of fundamental and irrevocable significance to a democratic state constituted

in line with the rule of law, i.e. the principles of legalism (Art. 7 of the Constitution) and equality before the law (Art. 32). Legalism by virtue of criminal proceedings denotes an absolute obligation to prosecute offences and to hold each perpetrator thereof criminally liable. In accordance with Art. 10 § 1 of the Code of Criminal Procedure, an organ called upon to prosecute offences is obliged to launch and pursue preparatory proceedings, while a public prosecutor is likewise obliged *ex officio* to bring and to press charges.

The inability to call to account a sitting President (one who continues to exercise the functions of that office) for acts tantamount to offences against the law gains justification given the need to ensure unhindered pursuit of functions provided for in line with the system of governance in Poland, as well as freedom of speech. It further represents a *signum specificis* in respect of the position of Head of State who is at the same time in receipt of a popular mandate, i.e. enjoys legitimacy via the ballot box. *De lege ferenda*, the Constitution of the Republic of Poland should have precisely defined guarantees as regards this untouchability of the Head of State, the material immunity attendant upon the post, and the temporary precluding of criminal liability before a common court (in respect of both major or minor offences committed).

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