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Between the Politicisation and Juridisation of Constitutional Accountability in Poland

Abstract: The article discusses the models of constitutional accountability as well as the personal and material scope. The Polish model of accountability is much closer to politicization than to juridization. The Constitution defines a closed circle of entities that may be held accountable before the State Tribunal, which adjudicates on three types of liability: 1. For a constitutional tort, i.e. a violation of the Constitution or a statute, however, without the characteristics of a criminal offence. 2. Criminal law unrelated to a constitutional tort, this applies only to the person holding the office of the President of the Republic of Poland. 3. Criminal for a constitutional delict meeting the criteria of a criminal offence, concerning an act committed in connection with the function performed.

Key words: constitutional accountability, State Tribunal, constitution, parliament

1. Introduction

Each society creates its own decision-making mechanisms that affect the whole group. The way of making decisions in groups and influencing their quality has long been studied by philosophers and social sciences. An issue similar to decision-making is the influence of individual people on society, followed by questions about the responsibility of the individual to the group for the actions taken.

Plato already drew attention to the need to protect the community against the power abuse on the rulers' part. His recipe was the communitarisation of property, women, and children so everyone could access all desirable goods. In this way, he hoped that those holding office would refrain from plundering the common property. The second element to protect the community against the rulers' desires was their thorough education and their older age (Zweiffel, 2007, p. 24).

The subjects tried in various ways to limit the omnipotence of monarchs, the most famous and earliest examples in Europe include the regulations of the English *Magna Carta Libertatum* or later Polish examples of concluding the Henrician Articles, i.e., a kind of contract between the ruler and his subjects.

Nowadays, the responsibility of the rulers has been shaped as political, criminal, civil, and constitutional.

M. Pietrzak (1983, p. 69) indicates two tendencies in the development of constitutional accountability. The first is the direction of juridisation or legalisation, and the second is politicisation. Proponents of the first method advocate a strict definition of who and for what can be responsible, that is, if possible, a precise indication of the circle of entities and writing a clear catalogue of cases for which one can be convicted. The

second tendency tends to leave considerable freedom to assess the personal and material scope by the competent judicial authority.

Each of these directions has its supporters and many arguments in favour of it. The strict legalisation of constitutional accountability is supported by the need for specificity of the provisions for which compliance should be held accountable and by limiting the freedom of their political successors to hold their predecessors accountable. Where the rules of law have been clearly defined, they cannot be extended subsequently to penalise their predecessors under the principle of *lex retro non agit*.

The direction of politicisation of constitutional accountability recognises that it is precisely the strict definition that blocks real responsibility, because people who can answer to state organs do everything to avoid this responsibility, especially if the regulations precisely determine its scope. Therefore, it is only a broad definition of the accountability framework that enables political successors to actually consider individual decisions to qualify for proper prosecution. A threat to this approach is the actual lack of legal limits for politicians to accuse their predecessors. This direction can only be used when the deciding body is an independent court or the political class is at a very high level of legal and political culture, which can guarantee the absence of abuse in the overly frequent accusations made against former public officials.

The Polish model of constitutional accountability is difficult to define unambiguously. It seems that a mixed direction dominates, and different parts of the system of constitutional accountability are taken from both systems. We can state that the personal scope is strictly defined, which comes from the legalisation trend, and the material scope is undefined, which is closer to the politicisation trend. This paper aims to answer the question of whether the Polish model, in its practice, is more dependent on politics or similar to the juridical model. The legal-dogmatic method was used for the analysis of solutions.

2. Model of constitutional accountability in Poland after 1989

The Polish model of constitutional accountability in its essential elements was shaped by the Act of 26 March 1982, which has been amended several times since then (Law of 26 March 1982). The most important amendment took place in 2003 because it adapted the law to the Constitution of 1997.

The body deciding on constitutional accountability remained the State Tribunal (hereinafter: ST), which has been known to Polish systemic practice since the March Constitution of 1921, when it had been first introduced into Polish regulations.

According to Article 199 of the Constitution (1997), the Tribunal shall consist of 19 judges, the President of the Tribunal being the First President of the Supreme Court and 18 persons elected by the Sejm, for the duration of the term of office of the Sejm, including two deputy chairmen. The deputy chairmen and at least half of the members should be qualified to hold the office of judge. The Constitution imposes on the Sejm a soft restriction on the composition of the Tribunal by indicating what qualifications judges should have. It means that they may but do not have to have qualifications to hold the position of judge. Ultimately, the decision in this matter was left to the Sejm.

The Constitution does not regulate entities entitled to submit an application to the State Tribunal. This issue has been left to the ordinary legislator, which may indicate a more political than strictly legal approach. The lack of constitutional regulation of entities entitled to submit applications indicates that constitutional accountability has been directed to the politicisation trend. The right to be held constitutionally accountable before the State Tribunal shall be vested in the Sejm in respect of all except the President, who may be impeached only by the National Assembly and senators, against whom only the Senate may submit a motion. It means that the Sejm and its organs play a key role in the adopted model. It can be assumed that in Poland, there is a parliamentary-judicial model of constitutional accountability.

3. Personal scope of constitutional accountability

The Constitution formulates a closed catalogue of entities which may be held accountable before the State Tribunal for violation of its provisions or laws. Article 198 indicates: the President of the Republic of Poland, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Broadcasting Council, persons entrusted by the Prime Minister with the management of the Ministry, and the Supreme Commander of the Armed Forces. The accountability of deputies and senators was limited only to the violation of Article 107 of the Constitution, i.e., the prohibition of conducting business activity using the assets of the State Treasury or local government. It is worth noting that the responsibility is borne by all persons with the status of a member of the Council of Ministers, i.e., also secretaries of state – members of the Council of Ministers, it is a broader circle than just ministers managing individual departments of state administration.

The circle of persons covered by constitutional accountability does not include the Prosecutor General, the Commissioner for Civil Rights Protection, the Ombudsman for Children, and the President of the Constitutional Tribunal.

The President is accountable before the State Tribunal for violations of the Constitution and laws, but also for all crimes committed during his term of office.

There is no clear regulation regarding former presidents. It can be assumed that if parliamentarians want to hold a former president accountable, the same procedure as for the incumbent President must be followed.

Parliamentary deputies are only narrowly responsible for economic activities carried out using the property of the State Treasury or local government. Article 107 of the Constitution introduces material unconnectability in the exercise of mandates by deputies and senators. It means that parliamentarians who break the prohibition outlined in Article 107(1) may answer before the State Tribunal, which “rules on the deprivation of their mandate”. A motion to the Tribunal in this matter may be submitted only by the Sejm or the Senate, and the procedure itself in the Sejm and the Senate may be initiated only by the Marshal of the Sejm in the case of deputies, or by the Marshal of the Senate in the case of senators. The procedure applied to deputies and senators differs from that to which other persons accountable to the State Tribunal are subject.

The scope of penalties that the Tribunal may impose on parliamentarians seems very limited because it can only be a deprivation of the mandate of a deputy or senator. There are no other types of penalties. It is a consequence of Article 198(2) of the Constitution, which limits the constitutional accountability of deputies only to the scope specified in Article 107 of the Constitution. Its first sentence states: "Within the scope specified by an act, a deputy may not conduct business activity..." It means that a detailed regulation of accountability should be included in the act. The relevant act in this matter is the Act of 9 May 1996 on Exercising the Mandate of Deputy and Senator (Act of 9 May 1996). Its provisions clarify the situations in which deputies or senators may conduct business activity.

The essence of material unconnectability is the introduction of a ban on certain activities that could entangle parliamentarians in dependence on executive power. It also counteracts conflicts of interest to which a deputy could be exposed in parliamentary work, if at the same time, he would obtain material benefits from work using public assets.

Although Article 107 of the Constitution refers only to deputies, it also applies to senators because of reference used in Article 108. For this reason, all competencies of the Marshal of the Sejm shall be taken over by the Marshal of the Senate, respectively, and the powers of the Sejm shall be taken over by the Senate. In this context, the only possibility of bringing a senator before the State Tribunal is to submit such a request by the Senate.

The Act on the State Tribunal also adds the responsibility of the Marshal of the Sejm and the Marshal of the Senate for acts committed as persons replacing the President. This solution is questionable because the Constitution does not include a provision regarding such accountability. On the other hand, one can accept arguments that since the President is accountable to the Tribunal, the people who are to replace him should also answer in the same way (Juchniewicz, 2018, p. 118). It will concern the full responsibility that the President bears, i.e., also for crimes unrelated to the performed function, if they were committed during the period of his replacement (Pach, 2012, p. 37).

Against the background of the scope of constitutional accountability, the Constitutional Accountability Commission of the Sejm of the seventh term dealt with two cases. The first was individual accountability of the members of the National Broadcasting Council, and the second was the accountability of the Minister of Justice as the prosecutor general.

In the case of the members of the National Broadcasting Council, a preliminary motion was submitted by a group of deputies, common to four members of the Council.¹ The Marshal of the Sejm requested the opinion of the Committee on this proposal. The adopted opinion stated that it is necessary "to divide the motion among the individual persons accused of the acts described in the initial application. Constitutional accountability is inherently individual, and therefore requests should also be individualised. Individualisation of the motion is also necessary because a significant part of the document contains allegations against the omissions of the National Broadcasting Council, which suggests that they concern all its members" (Opinion..., 2012). In connection with the

¹ Footnote to the motion.

allegations raised, the Committee requested the Marshal of the Sejm to return the initial motion to the applicants for supplementation. The members of the National Broadcasting Council, although they perform their functions collectively, can only be held responsible for their actions individually, because apart from the chairman, they do not have any individual powers (Full record..., 2012, p. 7).

An interesting issue arose based on the preliminary motion to bring Zbigniew Ziobro before the State Tribunal. He was charged in connection with his function performed as the Minister of Justice – Prosecutor General. In his line of defence, Zbigniew Ziobro used arguments that the allegations concern his activities as the Prosecutor General, and not as the Minister of Justice. Therefore, he cannot be held accountable for these acts before the State Tribunal. In the position raised by Zbigniew Ziobro's representative and repeated later in the minority motion, the Minister of Justice was a function separate from that of the Prosecutor General (Report...). It was indicated that these functions had separate competencies that did not overlap, and they were united by a single personal union. There was a personal relationship, but there was no relationship of competence between the two positions. The actions raised in the motion to be brought before the State Tribunal were committed using the function of the Prosecutor General, who cannot answer to the Tribunal. Therefore, according to the authors of the minority motion, Zbigniew Ziobro could not answer in this way.

In its report to the Sejm, the Committee did not share the arguments of Z. Ziobro because it was recognised that Article 156(1) of the Constitution states: "Members of the Council of Ministers shall be accountable before the State Tribunal for violations of the Constitution or laws, as well as for crimes committed in connection with their position". Under the then provisions of the Act on the Public Prosecutor's Office, the "functions of the Prosecutor General shall be performed by the Minister of Justice" (Report..., p. 19). It was rightly considered that in this case, there was a case of performing the function of the Prosecutor General in connection with the position of the Minister of Justice. It was not possible for the Prosecutor General to be a person other than the Minister of Justice, so the condition "in connection with the position held" was met. If the Prosecutor General could be a person other than the Minister of Justice, that condition would require a deeper justification of the relationship between the function of the Minister, who is accountable to the State Tribunal, and the Prosecutor General, who has no such accountability. However, in a situation of legal automatism, the case is obvious and did not require more extensive proofing.

4. Material scope

The Constitution defines the material scope of accountability before the State Tribunal. It varies depending on the position held. Article 145 regulates the accountability of the President, who is responsible for violation of the Constitution, the law, or committed crimes.

Article 156 of the Constitution stipulates that members of the Council of Ministers are accountable for violations of the Constitution or laws, as well as for offences committed in connection with their position. Article 198 of the Constitution states that all those

mentioned in this article bear constitutional accountability “for violation of the Constitution or a law, in connection with their position or within the scope of their office”.

The President has the broadest scope of accountability before the State Tribunal, but it should be noted that in addition to accountability for violation of the Constitution or laws, he is also responsible for all crimes. It is the only exception when the Tribunal can adjudicate in cases not related to constitutional accountability, because in the case of the President, the Tribunal will also adjudicate for ordinary crimes. It is a kind of privilege of the head of state, and at the same time, an exception to the principle of equal criminal accountability of all citizens (Kowalska, 2018, p. 234). The exclusion of the cognition of common courts is unique and particularly important in the context of the appointment of judges by the President. Judges of the State Tribunal are the only ones who are not appointed by the President, as in the case of judges of common courts, and do not take the judicial oath from them, as in the case of judges of the Constitutional Tribunal. The exception is the First President of the Supreme Court, who presides over the State Tribunal. Such a construction is one of the guarantees of the independence of the office from other powers, especially the executive and the judiciary.

Due to the fact that the Sejm is the body deciding on bringing before the State Tribunal (except for the President and senators), it should be expected that the scope of accountability may be interpreted broadly. It results from the structure of the proceedings in the Sejm and the need to build a political majority that can decide to bring before the State Tribunal, the general constitutional formulations are conducive to this type of proceedings.

It seems questionable whether it will also be possible to be accountable for breaking the programme norms of the Constitution, which are not strictly defined. According to many authors, programme norms are treated as optimisation orders (Kropiwnicki, 2018, p. 103), which means that they do not contain specific instructions for specific authorities, but impose an obligation to take action to fulfil them as much as possible. It should be noted that, like the programme norms contained in the Constitution, there are also general norms in bills (Zalesny, 2004, p. 168). It can be stated that the lack of action of the authority or actions contrary to the programme norms may be the basis for a motion to start the constitutional accountability procedure. The case of the judgment before the Tribunal is more questionable and may depend on the effectiveness of the argumentation of both the prosecutor and the defenders of the person held accountable.

The key concept in constitutional accountability is a constitutional tort, by which we mean an “act of an individual person holding a specific function of a public authority, and exceptionally also distinguishable individual conduct within the framework of the operation of a multi-person body, committed within the scope of his office in excess of his powers or by failure to comply with legal obligations or committed in connection with the position held, but outside the limits actually vested in legal competencies, violating the Constitution or other law (at the same time, not meeting the conditions of a criminal offence), giving rise to accountability regulated in the provisions of constitutional law” (Dudek, 2016, p. 837).

Accountability for a constitutional tort is subordinated to the principle of opportunism, i.e., the free assessment of the decision-making body, in this case the Sejm, as to the need to formulate an indictment.

The Tribunal rules on three types of accountability:

- 1) for a constitutional tort, i.e., violation of the Constitution or law, but without the elements of a criminal offence;
- 2) criminal, unrelated to a constitutional tort – it applies only to the person holding the office of the President of the Republic of Poland;
- 3) criminal, for a constitutional tort fulfilling the constituent elements of a criminal offence, concerning an act committed in connection with the performed function (Grabowska, 2018, p. 35).

Accountability before the Tribunal has the character of constitutional accountability for a constitutional tort. Even if the tort is a crime, it cannot be treated identical as the constitutional tort does not include the concept of crime. It is due to different approaches and regimes of accountability. Constitutional accountability is closely related to constitutional law and the interpretation of the Constitution, and criminal liability is related to criminal law and the conceptual system developed by this branch of law. Even if the two types are combined in the same proceedings before the Tribunal, they remain separate in the application of the law. The application of criminal law by the Tribunal is a kind of exception allowed by the Constitution. Criminal proceedings within the framework of constitutional accountability are ancillary. They should not be fundamental because common courts are designated to apply criminal law. It would be different if the Constitution designated the Tribunal as an exclusive court for members of the Council of Ministers and other key officials, as indicated in the case of the President. Then, all criminal proceedings concerning these people would have to take place before the State Tribunal, but this is not the case. The right option was used, which allowed a constitutional tort and a criminal tort to be dealt with in the same proceedings. Otherwise, there could often be two separate proceedings in a similar case before different courts.

Members of the Council of Ministers are also criminally accountable to the State Tribunal for crimes committed in connection with their position. Therefore, proceedings may be conducted simultaneously by the prosecutor's office and the Sejm. In order to prevent this, the Act on the State Tribunal provides for the priority of the parliamentary procedure. However, there is no exclusivity in this situation, as in the case of torts committed by the President.

A constitutional tort has been defined from the formal perspective (Pietrzak, 1983, p. 103). The necessity of violating the provisions of the Constitution or laws has been indicated, and no substantive provisions have been added for which violations constitutional accountability may be applied. In the course of the constitutional discussion, there were proposals that this should be supplemented by clauses such as: whoever caused damage to the interests of the state, exposed them to serious danger (Sakowicz, Steinborn, 2016, p. 1325). However, it was not accepted because the arguments prevailed that the most important thing is the violation of the norms of the Constitution or laws, and the gravity of individual violations will be important in the assessment of evidence and will affect the punishment applied by the Tribunal.

The condition for a constitutional tort is to commit an act, i.e., psychologically controlled human behaviour. As an act we always consider a "certain human activity in relation to the surrounding reality, which may be manifested through an act and

omission to which the subject was obliged, being contrary to the norm expressed in the Constitution of the Republic of Poland or a bill” (Sakowicz, Steinborn, 2016, p. 1325). The definition of action does not cause any problems, but the concept of omission is not so obvious, which is why the quoted authors indicate that omission is a “manifestation of conscious human activity, consisting in refraining from action that is required by the norm of law expressed in the Constitution of the Republic of Poland or a bill” (Sakowicz, Steinborn, 2016, p. 1326). In these cases, accountability will arise if a provision of the Constitution or a bill prescribes a specific action, and the office holder does not fulfil this obligation.

Based on Article 198 of the Constitution, constitutional accountability may be incurred for:

- 1) violation of a constitutional norm derived directly from the Constitution;
- 2) violation of a statutory norm established solely based on an ordinary act;
- 3) violation of a statutory-constitutional norm, i.e., one that is based on both the provisions of the Constitution and ordinary bills.

In the doctrine of constitutional law, there is a debate on accountability for violation of sub-statutory acts, particularly regulations issued based on a statute, acts of international law, and applicable acts of law equal to a bill. The latter set includes decrees (e.g., Bierut’s decree of 1946) or acts issued under the Constitution from the period of the Second Polish Republic, several of which are also in force. In the case of the last two categories, the situation does not raise major doubts because international agreements have a higher status than bills, so naturally, one can be accountable before the ST for violating their provisions, similarly with acts equal to bills. More problematic is the issue of regulations, because they usually are closely related to bills, are issued on their basis, are generally applicable legal acts, but are not listed in the Constitution. K. Działocha and T. Zalasinski (2001, p. 3) cite arguments for the fact that the issuance of a regulation may block the proper implementation of a bill or Constitution, and this is an argument for a broad interpretation of possible constitutional accountability. Rather, one should agree with the supporters of the competing thesis, which recognises that the violation of the provisions of sub-statutory acts cannot be held accountable before the Tribunal. The main argument is that in a repressive situation, a broad interpretation cannot be applied, and yet there are no regulations listed in the Constitution. Another important argument is that if a regulation is issued that is inconsistent with the law or the Constitution, this in itself is a violation of the norms of the ordinary or fundamental law and thus qualifies for constitutional accountability (Sakowicz, Steinborn, 2016, p. 1328). The issuance of a sub-statutory act by a body listed in Article 198 of the Constitution which is inconsistent with the fundamental law or ordinary bills unambiguously qualifies for constitutional accountability. Each of the indicated authorities may be accountable for its legislative or decision-making activities.

Another important prerequisite for committing a constitutional tort is its implementation “in connection with the position held or within the scope of one’s office”, which means that only actions, including omissions, related to the held position can be the cause of constitutional accountability. It should be understood that private actions or activities related to activities in non-governmental or private organisations cannot be the basis for appearing before the State Tribunal. That condition also determines

the time of the offence, which may be the subject of the charge, which must have been committed during the period of holding the post in question. However, it should be noted that a motion for accountability may be submitted within ten years of its committing unless other provisions provide for a longer limitation period for this act. Filing a motion for constitutional accountability interrupts the limitation period (Article 23 of the Law...).

The Constitution defines two premises for committing an act, namely “in connection with the position held” or “within the scope of office”. The first of them concerns situations indirectly related to the performed function, i.e., the violation of the Constitution or the bill occurs through the use of the position. The responsible person must first occupy a specific position, which then gives her the opportunity to carry out certain activities that are not directly related to this position. Without taking office, the provisions of the laws could not be violated. The act or omission committed does not have to be related to the scope of competence resulting from the performed function.

The second premise is closely related to the office held, by which we mean the scope of competence granted to a given entity by statutes or other legal acts. Competencies can be divided into:

- 1) organisational and preparatory;
- 2) implementation, coordination, and supervision;
- 3) decision-making, understood in the category of resolving, as well as in the category of declaration of will for the state (Sakowicz, Steinborn, 2016, p. 1330).

All these competencies should be strictly expressed and specifically described so that they do not raise doubts and limit any presumptions as much as possible.

Conclusion

The described parliamentary-judicial model is characterised by a stronger emphasis on elements related to constitutional accountability, which is more politicised than juridical. It is mainly evidenced by the nature of the initiation of the procedure and the scope of constitutional accountability. The initiation of the procedure depends solely on political entities, which by their nature focus on the acquisition and maintenance of power and all activities of political bodies are subordinated to this goal. Thus, the assessment of individual events is carried out through the prism of the political interest of the entity entitled to submit the initial motion. Also, the decision to file the motion to the State Tribunal is made by the chamber of parliament and thus has a strong political dimension. In Polish regulations, the scope of constitutional accountability is also strongly discretionary, which is conducive to free assessment by political bodies. Especially at the first stages of the procedure, it is an important indicator of the political nature of constitutional accountability. The large decision-making slack at the stage of preparing the initial motion and the proper motion voted in the Sejm or the National Assembly indicates a significant politicisation of the procedure of bringing the accused person before the State Tribunal. All these arguments indicate that the Polish model of accountability is closer to politicisation than the juridisation of constitutional accountability.

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Pomiędzy polityzacją a jurydyzacją odpowiedzialności konstytucyjnej w Polsce

Summary

W artykule omówiono modele odpowiedzialności konstytucyjnej oraz jej zakres przedmiotowy i podmiotowy. Polski model odpowiedzialności jest znacznie bliżej polityzacji niż jurydyzacji. Konstytucja określa zamknięty krąg podmiotów, które mogą odpowiadać przed Trybunałem Stanu, który orzeka co do trzech rodzajów odpowiedzialności: 1) za delikt konstytucyjny, czyli naruszenie konstytucji lub ustawy jednakże bez znamion przestępstwa kryminalnego; 2) karnej bez związku z deliktem konstytucyjnym, to dotyczy wyłącznie osoby sprawującej urząd prezydenta RP; 3) karnej za delikt konstytucyjny wypełniający znamiona przestępstwa kryminalnego, dotyczącej czynu popełnionego w związku z pełnioną funkcją.

Słowa kluczowe: odpowiedzialność konstytucyjna, Trybunał Stanu, konstytucja, parlament

