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The Scope of the Head of State's Liability Based on the Example of the Principality of Liechtenstein and the Principality of Monaco

Keywords: head of state; constitutional liability; Prince of Monaco; Prince of Liechtenstein

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Summary

The subject of this article is the character and meaning of the head of state's liability. The author notices that this institution is an important factor that determines the systemic and legal position of the supreme body in the country, and adopting different solutions in this matter may make the position of heads of state significantly different, even if they seem to have a similar character. This relation has been shown on the example of regulations of liability of the heads of state in Monaco and Liechtenstein. In both countries, there is an almost identical manner of appointing to the office of a head of state and the scope of their authorities. However, the matter of liability has been regulated in a completely different way in these two countries.

Streszczenie

Zakres odpowiedzialności głowy państwa na przykładzie Księstwa Liechtensteinu i Księstwa Monako

Przedmiotem niniejszego artykułu jest charakter i znaczenie odpowiedzialności konstytucyjnej głowy państwa. Autor zauważa, że instytucja ta jest ważnym czynnikiem, który

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determinuje systemową i prawną pozycję najwyższego organu w państwie, a przyjęcie różnych rozwiązań w tej kwestii może znacząco zmienić stanowisko głów państw, nawet jeśli wydają się one mieć podobny charakter. Zależność ta została wykazana na przykładzie regulacji odpowiedzialności głów państw w Monako i Liechtensteinie. W obu państwach istnieje zbliżony sposób wyboru głowy państwa i zakres ich władzy. Jednak kwestia odpowiedzialności została uregulowana w zupełnie inny sposób w tych dwóch państwach.

I. The meaning of the head of state's liability

The head of state's liability is one of the most important factors affecting this figure's constitutional and legal position (the other two factors include their granted powers and used method of appointing to the office). At the same time, liability is an element which conditions dependence on or guarantees independence from the other systemic authorities, determines individual relations of a head of state within an established regime, and is decisive for the way this person's power is exercised. Thus, even if the method of appointing and the scope of authority are similar, differences in the system of the head of state's liability may significantly differentiate a constitutional and legal position of heads of state with seemingly similar characteristics.

However, the institution of the head of state's liability as such is not a uniform category. It has a complex origin and has evolved significantly over the centuries. Contemporary studies of constitutional law distinguish three types of liability that emerged in the course of its development; these include moral, political, and legal liability². Moral liability originates from Christian ethics and indicates that there are negative consequences of behaving against the moral norms that qualify one's behaviour as good or bad. In constitutional law, such liability appears where there are no formal mechanisms of taking negative consequences of the head of state's behaviour, and law gives way to morality³. Historically, moral liability is the oldest form of a head of

² B. Dziemidok-Olszewska, *Odpowiedzialność głowy państwa i rządu we współczesnych państwach europejskich*, Lublin 2012, p. 61.

³ B. Dziemidok-Olszewska, *op.cit.*, p. 18.

state's liability. Originally, in pre-constitutional times, authority personified in the figure of a king, in accordance with the rule of *rex non potest peccare* (the king can do no wrong) never bore legally regulated negative consequences of their actions. This means that in the system of moral liability of a head of state, the citizens have no measures of making authorities account for their actions in any way.

A strict character of moral liability from the perspective of citizens softened only with the emergence of the concept of political liability. The genesis of the latter is related to the creation and development of a parliamentary system. The king did not lose his special status in the system, but the liability for his actions was transferred to his officials who were not entitled to immunity. The institution of countersignature became a formal act connected to assuming political liability by an official (a minister). Such liability is borne for political decisions, the direction applied while serving at the office, or the efficiency of one's politics, and it does not have to result from infringing any legal norms. It is usually related to the loss of political trust of an entity that makes decisions in this area – trust regarding the politics of a head of state or their officials. Depending on the adopted model, different assessing entities may function: it may be a parliament (parliamentary political liability) or other entity (non-parliamentary political liability). What is important, due to political liability, it is possible to ensure indirect liability of a head of state for their actions in the public area⁴. In case when the head of state's actions are not related to their office, only the moral liability could apply.

The last type of the head of state's liability is a legal one, applicable in case of infringing a legal norm. What is an important change in comparison to the previous types, the scope of liability has been extended to include also other actions of a head of state, not just the public ones. Depending on the source of the infringed norm, we can differentiate between a constitutional, criminal, and other types of liability. A fundamentally important type of liability for a head of state is constitutional liability. Distinguishing this type of liability is related to the development of a republican form of state. A president, as a head of state, retains their special status that justifies the exclusions of

⁴ M.M. Wiszowaty, *Zasada monarchiczna i jej przejawy we współczesnych ustrojach europejskich i pozaeuropejskich monarchii mieszanych*, Gdańsk 2015, p. 157.

ordinary forms of liability, but, at the same time, the head of state's complete immunity loses all of its justifications. As a consequence, the liability of a republican head of state is based on a specific formula of liability based on four special characteristics: its subject – and object – related scope, way of creation, and the system of punishment⁵. The subject of constitutional liability is a constitutional tort or an offence related to one's office. The object of such liability includes individuals holding the most important functions in a country. A special way of executing constitutional liability is visible in the exclusion of common court jurisdiction and transferring it to other bodies. A specific character of the system of punishment includes the sanctions of removing the ruler from the office and banning them from holding certain offices in the future⁶.

The meaning of an adopted type of liability of a head of state for the constitutional and legal position can be seen on the example of the Principality of Monaco and the Principality of Liechtenstein – political systems in which the manner of appointing to the office and the scope of granted authorities of a head of state is almost the same. Both countries are led by a sovereign representing a hereditary monarchy taking an office regardless of the citizens' will, based on an adopted order of succession to the throne (Art. 2 of the Constitution of Monaco of 17 December 1962 and Art. 2 of the Constitution of Liechtenstein of 5 October 1921). Moreover, both rulers have kept extensive powers allowing to actually shape country politics – they mostly appoint to and remove from offices (Art. 43 of the Constitution of Monaco and Art. 79 of the Constitution of Liechtenstein), take an active part in the legislative process (Art. 3 of the Constitution of Monaco and Art. 64 of the Constitution of Liechtenstein), and keep the right to issue some legal acts independently – *ordonnances* (*ordonnance*) in the case of the Principality of Monaco (Art. 45 of its constitution), and *unordinary* (*Notverordnungen*) and *ordinary* decrees (*Verordnungen*) in the case of the Principality of Liechtenstein (Art. 10 of its constitution). In spite of numerous constitutional similarities resulting from a common origin of both monarchies and common geopolitical loca-

⁵ J. Zawadzki, *Problem odpowiedzialności*, Kraków 1984, pp. 192–193 (cited after: S. Grabowska, *Modele odpowiedzialności konstytucyjnej prezydenta we współczesnych państwach europejskich*, Toruń 2012, p. 11).

⁶ S. Grabowska, *op.cit.*, pp. 11–12.

tion (as small immanent countries with ruling families), the systemic evolution of Monaco and Liechtenstein led to significant differences in the institution of head of state's liability.

II. The liability of the Prince of Monaco

The liability of Monaco's head of state is regulated by the Constitution of Monaco and the Statutes of Sovereign Family of 5 June 2015⁷. (SSF). It is crucial for the scope of this liability that both acts have been brought in by the same ruler. The constitution in force was overthrown by Prince Rainier III without any formal participation of the parliament, and SSF is a collection of executive acts to the constitution, introduced with prince's ordinance with no necessity to be accepted by any other body (Art. 46 of the Constitution).

A consequence of prince's unlimited power over the regulation of his liability is the primary character of his accountability; it has remained in an unchanged form till today. Pursuant to Art. 3 of the Constitution, the Prince is inviolable, and he is granted a complete immunity. There are no legal measures to efficiently express opposition against the monarch's actions. What is more, this constitutional system even failed to develop any political liability to control its officials. Even if Art. 50 of the constitution burdens the Minister of State and members of the Council of Government with the liability for administering the country, but they are responsible only before the Prince. The citizens have a right to file a claim in the Supreme Court to declare the invalidity of decisions due to the abuse of power and to investigate the validity of decisions made by administrative authorities and their ordinances issued for the execution of laws (Art. 90, letter B), but any decisions in this area never lead to any direct penal liability of the Prince and the members of the country's administrative bodies who take illegal actions.

In the Monegasque system, the only authority which can limit the position of the Prince is the Prince of Monaco himself. Alternatively, the Prince's immunity may be possible if provided for in the Statutes of Sovereign Family. In the applicable act, the Prince used this right only in an indirect way,

⁷ *Ordonnance n. 5.344 du 02/06/2015 portant statuts de la Famille Souveraine*, "Journal de Monaco", Bulletin Officiel de la Principauté no. 8228 of 5 June 2015.

specifying the matters related to the Prince's civil liability regarding his private property. Article 20 of the ordinance confirms that no legal remedy may be pursued against the Prince, but, at the same time, some civil claims can be legally pursued. It is permitted that actions regarding the prince's private property are taken against the Administrator of Prince's Goods (*l'Administrateur des Biens*), who serves as a defender of the Prince's financial interest in the process⁸. This allows for a minimal liberalization of law with the preservation of the lack of the head of state's liability.

However, the current system can change in a more complex way only by means of changing the constitutional regulation. Still, also in this case the Monegasque constitution guarantees the influence of the head of state on the final form of the regulation. A constitutional mechanism of change requires the Prince's active participation. Even though, pursuant to Art. 95 of the constitution, the initiative to change the constitution can be undertaken by the National Council, Art. 94 of the constitution reserves that both complete and partial changes require a mutual consent of the National Council and the Prince.

III. The liability of the Prince of Liechtenstein

A significantly more extensive evolution took place in the regulations of the head of state's liability in the Principality of Liechtenstein. Currently, these changes result from the Constitution of Liechtenstein and the Constitution of the House of Liechtenstein of 29 October 1993 (CHL)⁹ which is a special source of law that regulates the internal structure of the reigning dynasty. As opposed to the Prince of Monaco, the ruler of Liechtenstein was not independent in the procedure of creating both acts regulating the scope of his liability. The text of the constitution was passed by Landtag and approved by the ruler, while the house constitution was passed jointly by the ruling family.

⁸ *Ordonnance n. 5.344 du 02/06/2015 portant statuts de la Famille Souveraine*, "Journal de Monaco", Bulletin Officiel de la Principauté no. 8228 of 5 June 2015.

⁹ *Hausgesetz des Fürstlichen Hauses Liechtenstein vom 26. Oktober 1993*, Liechtensteinisches Landesgesetzblatt nr 100 V/1993, 6.12.1993, <https://www.gesetze.li/lilexprod/showpdf.jsp?media=pdf&lgblid=1993100000&gueltigdate=07052017> (7.05.2017).

In the original version of the constitution, the Prince of Liechtenstein, similarly to the Prince of Monaco, had a complete immunity against state authorities and the citizens. Certain possibilities to subordinate the head of state existed only based on the family structure, but only the members of the dynasty could use them. Such institution of subordination is still regulated based on Art. 14 of CHL. In this procedure, liability is regulated by the Crown Council which is outside of the system of state authorities. The mechanism of disciplinary liability, as named by M.M. Wiszowaty¹⁰, may be initiated when the Prince's actions are harmful for the reputation, honour, or prosperity of the House or the Principality of Liechtenstein. Before this procedure is initiated, the prime minister shall be informed in confidentiality. The Council can impose two types of sanctions: a reprimand or losing the throne. The latter can be applied only if the Prince has been first reprimanded or the reprimand was disproportionate to the act of which the Prince is accused. The decision is made with a 2/3 majority of votes with over a half of family members eligible for voting present. Then, such a decision is sent to all members of the family and the government, and if the Prince is to lose the office, the decision is also announced in the official journal. It should also be noted that this procedure is an internal mechanism of liability before the ruling family that executes the liability of the Prince with no participation of the citizens.

An important change in the scope of liability of the head of state in Liechtenstein occurred with the constitutional reform of 2003. The decision was made to balance the Prince's power, which was strengthened at that time, with the right for the citizens to use disciplinary measures with respect to the Prince. This regulation correlates with a constitutional dualism of a sovereign in Liechtenstein, as, pursuant to Art. 2 of the constitution, state authority belongs to the Prince and the Nation. At the same time, new legal institutions have been created in a way that did not infringe the basic rule of *rex non potest peccare*. The Sovereign Prince did not lose his status of inviolability guaranteed by Art. 7 sec. 2 of the constitution, based on which the person of the Sovereign Prince and his deputy are not subject to the judiciary and do not take legal liability. In turn, the sovereign nation was granted the right to truly oppose the Prince's actions. Such an opposition can be expressed di-

¹⁰ M.M. Wiszowaty, *Zasada...*, p. 162.

rectly with a referendum on a vote of no. confidence, or indirectly with a referendum on the abolition of monarchy. Together with a previously existing mechanism of disciplinary liability before the dynasty, two new institutions form a system of ruler's liability that is original among all monarchies.

The first institution results from Art. 13-ter of the constitution, pursuant to which at least 1500 citizens can file a justified claim for a vote of no. confidence regarding the Reigning Prince. This claim is directed to Landtag, which order a referendum during its next meeting. The constitution does not include detailed regulations regarding the consequences of a positive result of the referendum. It only requires that the citizen's decision was presented to the Reigning Prince, who should consider it in accordance with the family constitution, and present Landtag with his opinion within 6 months from presenting him with the results of the referendum. The provisions of the constitution are specified in Art. 16 of CHL, referring to the procedure of disciplinary liability in front of the Crown Council. At that time, certain changes are introduced to the already presented institution. First, the body that executes the Prince's liability is not the Crown Council, but members of the Family who have the right to vote. Second, a deadline is introduced, allowing to make a decision within 2 months from the conducted referendum. The Prince can renounce the throne, refuse to abdicate, or refrain from taking any stand. Members of the family have the right to the same sanctions as in the basic procedure. They can reprimand the Prince, make him renounce the throne, or refuse to use disciplinary measures. Failure to take a stand within the deadline or renouncing the right to sanctions means that a vote of no. confidence from the nation is rejected. Thus, final results do not depend on the citizens themselves, and their opinion expressed in the referendum does not have to be taken into consideration. Thus, as M.M. Wiszowaty asserts, such an institution functions more as a petition to the Prince or, alternatively, to the ruling family¹¹.

The weakness of actual consequences of the referendum on the vote of no. confidence for the Prince does not mean that the citizens of Liechtenstein have no. real measures of executing the liability for inappropriate behaviours of the head of state and the Ruling family. The deficit of democra-

¹¹ M.M. Wiszowaty, *Zasada...*, p. 425.

cy is supposed to be compensated by the second institution introduced in 2003, a referendum on abolishing the monarchy¹². In itself, this institution is not a mechanism of executing the Prince's liability. The initiative to abolish the monarchy may have significantly different reasons, also regardless of the person of the monarch. Still, it is not possible to exclude the possibility of using it as a final solution in the case of failure of the mechanism of a vote of no. confidence and disciplinary liability on the Family's forum. In this situation, the object of the referendum may be to punish not only the Prince, but also the Ruling family by depriving them of their special status and turning Liechtenstein into a republic.

Article 113 of the constitution allows for the initiative of conducting a referendum for 1500 citizens. A positive result of the referendum means that Landtag is obliged to prepare a project of a new constitution based on the republican reign. Then, not earlier than a year and not later than two years after that, there is another referendum. Its object is whetherto pass a new constitution or keep the current one. Not only Landtag, but also the Prince has the right to have his own project. In this case, the constitution does not specify the requirement to base the proposal of a constitution on the republic form of reign as well. Thus, it should be allowed to base the constitution proposal presented by the Prince also on the republican reign form. Thus, it should be deemed permissible for the Prince to opt for his project in exchange for keeping the monarchy. The referendum can have a twofold character, depending on whether the monarch used the right to present his proposal. If he failed to exercise this right, only the Landtag's project is put to voting; it can be accepted if it receives an absolute majority of votes. If, however, the Prince has used the right to present his own constitution project, 3 acts are put to voting – the currently binding constitution, a republican project by Landtag, and the Prince's project, and the referendum takes place in two stages. In the first one, a citizen can use two votes which can go to those variants they want to see go to the next stage. In the second stage, they can cast only one vote, and voting includes two the most popular options. The project which receives an absolute majority of votes is deemed passed (or preserved, if the currently binding

¹² M.M. Wiszowaty, *Formy odpowiedzialności konstytucyjnej w Księstwie Liechtenstein*, [in:] *Formy odpowiedzialności konstytucyjnej w państwach europejskich*, eds. S. Grabowska, R. Grabowski, Toruń 2010, p. 427.

constitution wins). The Prince's right to sanctions is then excluded (Art. 112, sec. 2 *in fine*), so the Prince of Liechtenstein can in no way block the change of reign conducted in this manner. Therefore, a referendum on the abolition of monarchy has a character of a final measure.

Similarly to Monaco, the conditions for possible extension of the head of state's liability can be also found in the institution of constitution change. In Liechtenstein, this option, however, seems the least beneficial, as it is definitely more rigorous than a referendum on the abolition of monarchy. Above all, an ordinary procedure of changing the constitution requires a sanction of the Reigning prince, so also his active participation. In turn, in the case of referendum on the abolition of monarchy, it seems that even if there is no eventual change to the political structure, the referendum itself will definitely be a clear impulse to apply a mechanism of disciplinary liability provided for by law on the forum of the Ruling family.

Apart from the unusual forms of the Prince's liability in Liechtenstein, there is also a *sensu stricto* constitutional liability borne by ministers as a part of a special procedure before the Tribunal of State. What is worth noting, for ministers punished in this manner, the Reigning prince's power of pardon can apply only after it is accepted by the parliament (Art. 12 sec. 2 of the constitution).

In Liechtenstein, there is also an institution of countersignature and, as a result, of a political liability of the government which, together with the ministers, is politically accountable before the Prince and Landtag for their politics. The basis for their liability is the loss of trust of the subjects (Art. 80 of the constitution).

IV. Conclusions

Comparing types of head of state's liability distinguished in the doctrine to systemic regulations in the Principality of Monaco and the Principality of Liechtenstein, it seems that the solutions adopted in the country presented first never exceeded the monarch's moral liability. In terms of liability, the position of the Prince of Monaco is the strongest execution of ideas supporting the *rex non potest peccare* principle and ensures the strongest position for

this head of state, as compared to other European monarchies. The monarch is not subject to any liability and the other state bodies and citizens can only use extra-legal measures that speak to the ruler's conscience. The only institutionalized measure, based on which it is possible to make an attempt to discipline the prince, is a systemic initiative to which the National Council is entitled. In certain circumstances, it may be used as a manifestation of opposition against the ruler's actions. However, we should remember that any change in the constitution requires the prince's consent, as a result of which no. such initiative will bring him to liability, but it will definitely start a discussion and strengthen an extra-legal mechanism of moral liability.

The main factor significant for the evaluation of Monegasque solution is the fact that the constitutional system did not develop any form of liability transfer. The Prince of Monaco then seems above the law, which, based on the constitution the prince himself adopted, he has agreed to conform to. As a consequence, the group of acts for which no. subject is responsible include not only the prince's non-official actions, but also the whole sphere of his activity as the head of state. Such a situation, as A. Cieleń reasonably assesses, threatens the guarantee of the country as a state of law¹³. Also the Venice Commission emphasizes the deficiency in this area. In the opinion on the balance of authorities in Monaco in 2013, the current legal status in this regard was assessed as unsatisfactory and a radical reform of constitution was recommended¹⁴.

The evolution of the Prince of Liechtenstein's liability has gone into a completely different direction. Above all, the objections which the Venice Commission has towards the Monegasque regulations do not apply to the current form of liability that results from the national or family constitution in Liechtenstein. The former allows for the political and constitutional liability of members of the government; thus, according to the rule, similarly to other European monarchies, public acts of the head of state for which no. bodies take any liability have been limited. What is more, as a solution unusual for a monarchy, this rule has been additionally extended, creating unique

¹³ A. Cieleń, *Formy odpowiedzialności konstytucyjnej w Księstwie Monako*, [in:] *Formy odpowiedzialności konstytucyjnej...*, pp. 447–448.

¹⁴ *Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco adopted by the Venice Commission at its 95th Plenary Session* (Venice, 14–15 June 2013).

country-specific institutions, which consider the Prince himself. Their character should be especially taken into consideration, as their careful analysis leads to the conclusion that, in spite of reforms, basic rules in the system of the monarch's liability have stayed unchanged and are still subject to the *rex non potest peccare* principle.

Above all else, it should be noted that none of three forms of the head of state's liability *de iure* provided for in the law of Liechtenstein is subject to sanctions regarding the Prince imposed by a democratic body. In the system of liability resulting from the family constitution, the ruler is accountable before internal dynasty bodies. However, it is not a specific act that serves as ground for holding the Prince accountable, but its result of a jeopardized reputation, honour, or prosperity of the House or the Principality of Liechtenstein. As presented above, this solution is as if an example of a disciplinary liability that is outside of legal jurisdiction. What is more, the principles regulating the liability have a character of general clauses. When compared to the classification of the head of state's liability presented in the doctrine, this mechanism can be seen as a moral liability, however with one difference – it refers to the morality of the dynasty members and not the Reigning Prince himself. The same characteristics can be found in the second form of executing liability in the form of referendum regarding the vote of no. confidence for the prince which is, in fact, a petition to the prince, asking him to abdicate, or to the dynasty bodies, requesting them to apply the measures of disciplinary liability.

There is also a special case of executing liability in the form of a referendum on the abolition of monarchy. Even though a positive result of voting leads to the loss of office by the prince, it is only an indirect consequence of a referendum, the subject of which is, in fact, the abolition of the monarchy. It is the monarchy that is accountable before the citizens, and not the still inviolable prince, as a result of which the principle allowing for the lack of ruler's liability is not compromised. At the same time, nothing stands in the way for this measure to be applied with an intention to hold the prince accountable. It is Hans-Adam II's task to provide the citizens of Liechtenstein with powers that are not granted in any other country: "The Prince holds the office of the head of state as long as the majority of citizens want it. As far as I know, the history of humanity does not know any monarchy that would be direct-

ly based on the will of a nation”¹⁵. It shows that the Constitution of Liechtenstein managed to reach a certain compromise between the requirements of the state of law principles and the tradition of its own monarchy. This solution should definitely be seen as positive. In my opinion, it can serve as an example of a direction for similar changes in the Monégasque regulations.

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¹⁵ A speech by Hans-Adam II, Prince of Liechtenstein for the opening of Landtag's session of 13 February 2003 (translated from M. Łukaszewski, *Czy renesans monarchii absolutnej? Zmiany w Konstytucji Księstwa Liechtensteinu z 2003 r.*, “Refleksje” 2010, no. 1, p. 164).