Judgment of 4th December 2001, SK 18/00

STATE LIABILITY FOR HARM CAUSED BY UNLAWFUL ACTIONS OF ITS FUNCTIONARIES

Type of proceedings:	Composition of Tribunal:	Dissenting opinions:
Constitutional complaint **Initiators:** Natural persons	5-judge panel	0

Legal Provisions under review	Basis of review
Civil liability of the State Treasury for harm caused by a State functionary [Civil Code 1964: Article 417]	Right to compensation for harm caused by a public authority organ [Constitution: Article 77(1)]
Conditioning the liability of the State Treasury for harm caused by issuing of an authoritative act upon the formal confirmation of a perpetrator's fault [*Ibidem*: Article 418]	Protection of ownership Right to compensation for harm caused by a public authority organ [Constitution: Article 64 and Article 77(1)]

The liability of the State Treasury for harm caused by actions of State functionaries contrary to law is regulated by various statutes. The first statutes to be applied are those creating special rules regarding compensation for certain activities of public authorities, such as those relating to administrative or criminal procedure. Where no such special rules exist, the general rules governing State Treasury liability in tort (liability *ex delicto*) will apply, as contained in provisions of the Civil Code.

According to Article 417 § 1 of the Civil Code "The State Treasury shall be liable for harm caused by a State functionary in the performance of the duties entrusted to him". The definition of "State functionaries" is provided in Article 417 § 2; for instance, this category includes the following groups: public administration servants, judges, public prosecutors and soldiers. Until the judgment of the Constitutional Tribunal in the present case was delivered, however, State liability for harm was dependent on the fulfilment of two restrictive prerequisites.

The first prerequisite was based on the manner in which Article 417 of the Code had been understood. Although this provision does not stipulate *expressis verbis* that State liability is conditional on the fault of a State functionary, case-law from the 1960's and 1970's assumed that such fault was an indispensable condition for State liability. The general position adopted by the Civil Code is that liability in tort is limited – apart from in some specific cases foreseen by the legislator – to instances of fault (Article 415 of the Civil Code: "Anyone who by his own fault causes harm to another person is obliged to redress it"). Such an interpretation was confirmed by the judgment of a plenary session of the Civil Chamber of the Supreme Court of 15th February 1971.

The second restrictive prerequisite for State liability followed expressly from Article 418 of the Civil Code. That Article provides that, where harm was caused by a State functionary as a result of him

having issued an authoritative act (*verba legis*: "a decision or an order"), the State Treasury is liable only when, in issuing the decision or order, a breach of law occurred which was subject to criminal or disciplinary proceedings and where the fault of the functionary had been confirmed by a criminal sentence, or a disciplinary decision, or had been acknowledged by an organ superior to the person having caused such harm. Exceptionally, the State Treasury could be held liable even in the absence of a finding of fault in criminal or disciplinary proceedings, where it was not legally possible to institute such criminal or disciplinary proceedings.

When the new Constitution of 1997 entered into force, questions arose as to the compatibility of the aforementioned restrictions with Article 77(1) of the Constitution. Article 77(1) provides that: "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law".

These questions were answered in the case at hand, in which the Constitutional Tribunal examined two constitutional complaints against Articles 417 and 418 of the Civil Code. The applicants argued that the interpretations given to these provisions led the courts to reject their claims for compensation. The first case concerned the applicant's dismissal from the "Civil Militia" (*Milicja Obywatelska*, the official name of the Police under the Communist regime). The second case concerned costs, for the execution of tax payments, which had been unlawfully collected and had been withheld for some time before being returned.

The first point of the Constitutional Tribunal's ruling may be characterised as a so-called interpretative ruling. In such rulings, the Tribunal establishes that the reviewed provision conforms to the Constitution, provided that it is interpreted in a particular way (in this case: in conformity with Article 77(1) of the Constitution, which does not limit the right to compensation to instances where a public functionary has been shown to be at fault). The second part of the ruling, however, meant that Article 418 of the Civil Code would lose binding force from the date on which the Tribunal's judgment was officially published in the Journal of Laws.

RULING

1. Article 417 of the Civil Code, understood in a way which imposes liability on the State Treasury for harm caused by the actions of a State functionary contrary to law in the performance of duties entrusted to him, conforms to Article 77(1) of the Constitution.

2. Article 418 of the Civil Code does not conform to Article 77(1) and is not inconsistent with Article 64 of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The provisions of the Constitution have their own normative meaning, which cannot be construed in the light of the contents of statutory provisions. To adopt a contrary viewpoint would be to distort the hierarchical structure of legal norms and would render provisions of the Constitution devoid of any practical protective importance.

2. Article 77(1) of the new Constitution and Articles 417 and 418 of the Civil Code have a common scope, concerning all cases where the actions of State organs in respect of their *imperium* – and even wider activities associated with the performance of public functions – lead to harm caused by a State functionary. There is, however, no symmetry of contents between this constitutional norm and the provisions of the Code which would lead to the conclusion, in the event that the latter conflicted with the former, that the provisions of the Code lost their binding force when the Constitution entered into force, in accordance with the principle of *lex posterior derogat legi priori*.

3. The notion of a "public authority" in Article 77(1) of the Constitution comprises all authorities in the constitutional sense, as well as other institutions – other than State or self-government organs – which have been entrusted by State or self-government organs to exercise powers on their behalf, or have had such powers conferred upon them by such organs. The ability to exercise such functions is usually, though not always, related to the ability to determine an individual's legal position, from the perspective of the authority.

4. Reference to "an organ" in Article 77(1) of the Constitution means any institution or organisational structure whose activities were connected with the infliction of harm. This provision deals with the liability of a structure (i.e. an institution) rather than persons associated with the structure (i.e. its functionaries).

5. In the light of Article 77(1) of the Constitution, it is of crucial importance to establish whether the actions of a public authority are connected with the exercise of that authority's prerogatives. Although the formal nature of links between the public authority and the person having directly perpetrated the harm is less important, establishing the status of the person who perpetrated the harm facilitates the task of attributing a given action to an organ of public authority.

6. In the interpretation of Article 77(1) of the Constitution, the scope of compensation may be established on the basis of relevant provisions of the Civil Code and, in particular, Article 361 § 2. Compensation should be provided whenever a legally protected interest – whether pecuniary or non-pecuniary – has been harmed. Accordingly, public authority liability may not be excluded for infringing a citizen's personal interests, including in relation to claims for pecuniary satisfaction for non-pecuniary harm (cf. Article 445 and Article 448 of the Civil Code).

7. Reference to the "actions" of organs of public authority in Article 77(1) of the Constitution includes both positive acts of such organs and omissions. As far as positive acts are concerned, they include in particular individual decisions. Omissions of organs of public authority may be important, from the perspective of the constitutional norm under discussion, where legal provisions create an obligation to act and it is possible to establish how the organ should act in order to avoid the infliction of harm.

8. The notion of "an action contrary to law" in Article 77(1) of the Constitution should be understood as an action which does not comply with obligations and prohibitions imposed by binding legal norms, established in accordance with the constitutionally recognised sources of law (Articles 87-94 of the Constitution). Accordingly, this concept is narrower than the traditional concept of "unlawfulness" in civil law, which also comprises an infringement of moral or customary rules known as the "principles of social co-existence" (*zasady współżycia społecznego* – a Civil Code notion) and the

principles of good customs (*dobre obyczaje*). However, there are no constitutional obstacles to linking, in ordinary statutes, the liability of public authorities for harm with this broader, civil law concept of unlawfulness.

9. Since a prerequisite for liability under Article 77(1) of the Constitution is an action of an organ of public authority contrary to law, it is irrelevant whether this action was subjectively culpable; in terms of civil law this means that liability is linked with an objective prerequisite of the unlawfulness of action performed by the perpetrator of the harm. Although the existence of fault is a prerequisite of liability for harm in accordance with the general rules (cf. Article 415 of the Civil Code), disregarding such a requirement in these circumstances is justified by the special role of public authority organs, which are obliged to serve citizens and to protect the rights and freedoms of persons and citizens; the discussed constitutional norm is one of the constitutionally defined means of providing such protection. Accordingly, it would not be permissible to introduce, by way of ordinary legislation, an additional prerequisite (i.e. the existence of fault).

10. The interpretation of legal provisions may not have a static nature and, furthermore, should always allow for the priority of such an interpretation which conforms to currently binding constitutional norms.

11. The recognition of fault as a necessary prerequisite for State Treasury liability on the basis of Article 417 of the Civil Code – which was assumed by the case-law prior to the entry into force of the 1997 Constitution – did not follow from the literal text of this provision. Under the new Constitution (cf. point 9 above), it is justifiable – and widely supported in legal writing – to adopt an alternative understanding of Article 417 of the Civil Code, strictly corresponding with its literal wording and with the new Constitution.

12. According to Article 418 of the Civil Code, State Treasury liability for harm caused by a State functionary, as a result of issuing a decision or order, requires that functionary to have been found to be at fault by prior criminal or disciplinary proceedings (i.e. specific “pre-judgment”), which may not be directly initiated by the injured person. The fact that such a finding of fault (“double-qualified”) in prior proceedings represented an indispensable requirement for imposing liability on the State is conclusive to finding it inconsistent with Article 77(1) of the Constitution. Such inconsistency may only be remedied by removing Article 418 of the Civil Code from the legal system.

13. Although the right to claim compensation for harm to property stems from the general principle of property protection, the special constitutional norm provided for in Article 77(1) constitutes a sufficient basis for reviewing Article 418 of the Civil Code, so there is no need to review this provision in the light of Article 64 of the Constitution.

14. *De lege ferenda*, the issue of public authority liability for harm requires comprehensive regulation in the Polish legal system, in order to fulfil the exigencies of Article 77(1) of the Constitution. It is especially advisable to explicitly differentiate between, on the one hand, the liability of State (municipal) legal persons which do not perform the functions of organs of public authority and, on the other hand, the liability of public institutions which do perform such functions. It would also be desirable to have an explicit determination of the liability of public institutions which do not have the character of State or municipal organs, but which have been assigned the task of perform-

ing some of the prerogatives of a public authority. The need for legislative intervention is also substantiated by the existence of interpretative doubts concerning the relationship between general norms included in the Civil Code and special norms included in other provisions (e.g. Article 153 § 1 and Article 160 of the Administrative Procedure Code; Article 31(4) of the Supreme Administrative Court Act; Article 769 of the Civil Procedure Code; Article 552 of the Criminal Procedure Code). Having regard to the loss of binding force of Article 418 of the Civil Code, in consequence of this judgment, the issue of determining the unlawfulness of individual decisions – as a prerequisite for liability for harm – also needs to be explicitly regulated by statute.

15. The legal situation created as a result of this judgment does not allow the possibility to challenge normative acts as contrary to law until they are removed from the legal system in the manner provided for by the Constitution, as a result of their inconsistency with the Constitution, a ratified international agreement or a statute.

16. In issuing, occasionally, so-called interpretative rulings (cf. point 1 of the ruling), the Constitutional Tribunal refrains from adopting an interpretation of the reviewed provision which would contradict established judicial practice and legal theory. The present judgment does not contravene this practice, since the questioned manner in which Article 417 of the Civil Code was previously interpreted lost all relevance at the moment of the entry into force of Article 77(1) of the new Constitution.

17. The interpretation of Article 417 of the Civil Code, adopted in point 1 of the ruling in this case, has a universally binding force by virtue of Article 190(1) of the Constitution.

18. The courts are not excluded from the principle expressed in Article 190(1) of the Constitution, which provides that the rulings of the Constitutional Tribunal are of universally binding application.

19. The direct applicability of the Constitution (Article 8(2)) does not imply that the courts, or other organs empowered to apply the law, have the competence to control the constitutionality of binding legislation. The manner of any such control has been unequivocally defined by the Constitution itself, which in Article 188 reserves adjudication in these matters to the exclusive competence of the Constitutional Tribunal. The presumption that a statute conforms to the Constitution may only be rebutted by a judgment of the Constitutional Tribunal and judges are bound to apply statutes, in accordance with Article 178(1) of the Constitution, as long as such statutes continue to have binding force.

20. As regards the method of reviewing the constitutionality of statutes, an important element in this process is the mechanism for referring questions of law to the Tribunal (Article 193). The application of Articles 188 and 193 of the Constitution is not restricted by the subjecting of judges to the Constitution and statutes, as provided for in Article 178(1) of the Constitution, since this provision does not regulate the determination of an incompatibility between a statute and the Constitution. Whenever the court adjudicating a case comes to the conclusion that the norm representing the basis of adjudication does not conform to the Constitution, it should make use of the possibility provided by Article 193, i.e. to refer a question of law to the Constitutional Tribunal.

Provisions of the Constitution

Art. 8. 1. The Constitution shall be the supreme law of the Republic of Poland.
2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

Art. 77. 1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.

Art. 87. 1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations
2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

Art. 88. 1. The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof.
2. The principles of and procedures for promulgation of normative acts shall be specified by statute.
3. International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.

Art. 89. 1. Ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute - if such agreement concerns:
1) peace, alliances, political or military treaties;
2) freedoms, rights or obligations of citizens, as specified in the Constitution;
3) the Republic of Poland's membership in an international organization;
4) considerable financial responsibilities imposed on the State;
5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

2. The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute. 3. The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute.

Art. 90. 1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
2. A statute, granting consent for ratification of an international agreement referred to in paragraph1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Art. 91. 1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

Art. 92. 1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.
2. An organ authorized to issue a regulation shall not delegate its competence, referred to in paragraph 1 above, to another organ.

Art. 93. 1. Resolutions of the Council of Ministers and orders of the Prime Minister shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act.
2. Orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects.
3. Resolutions and orders shall be subject to scrutiny regarding their compliance with universally binding law.

Art. 94. On the basis of and within limits specified by statute, organs of local self-government and territorial organs of government administration shall enact local legal enactments applicable to their territorially defined areas of operation. The principles of and procedures for enacting local legal enactments shall be specified by statute.

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:
1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;

4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Article 79, paragraph 1.

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.