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State Liability for Damages in the COVID-19 Pandemic – Selected Issues

Keywords: state liability for damages, COVID-19, Constitutional Court
Słowa kluczowe: odpowiedzialność odszkodowawcza państwa, COVID-19, Trybunał Konstytucyjny

Abstract

In this article, the author addresses the issue of state compensation liability. She presents Polish constitutional regulations as well as civil law regulations. In the analysis, she takes into account current problems related to the consequences resulting from the introduction of restrictions on rights and freedoms during the COVID-19 pandemic.

Streszczenie

Odpowiedzialność odszkodowawcza państwa w pandemii COVID-19 – wybrane zagadnienia

W niniejszym artykule autorka porusza problematykę dotyczącą odpowiedzialności odszkodowawczej państwa. Przedstawia polskie regulacje konstytucyjne jak również regulacje z zakresu prawa cywilnego. W analizie uwzględnia aktualne problemy związane z konsekwencjami wynikającymi z wprowadzenia ograniczeń praw i wolności w trakcie pandemii COVID-19.

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Issues concerning the protection of citizens from the consequences of unlawful actions of public authorities constitute a topical issue in the field of civil law, linked to administrative law as well as constitutional law. The present topic also touches upon the problem of guarantees of human and civil rights and the implementation of the principle of a democratic state under the rule of law. The norms regulating the responsibility of public authorities are a determinant of law-governance in a given state. They constitute a guarantee of protection against unlawful behaviour of public officials[2]. Compensation of damage caused by public authorities is one of the basic pillars of protection of values in a democratic state of law. Compensatory liability, included by the legislator in Art. 77 sec. 1 of the Constitution of the Republic of Poland, is a measure that 'enforces' lawful (and at the same time legalistic) behaviour of public authorities[3].

The formula for the state's liability for damages in 20'th century Polish law took extremely long time to take shape. Nevertheless, the beginnings of the transformation took place as early as in the 19'th century. The views expressed by the representatives of German and French doctrine and jurisprudence during that period provided inspiration for Polish legal scholars, resulting in the gradual formation of the concept of state liability[4].

The issue of the statutory treatment of the scope of state liability for damage in Poland was closely linked to the political situation at the time of the enactment of the law regulating such liability. It is interesting to note that each

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[2] J. Filaber, *Z problematyki odpowiedzialności odszkodowawczej władzy publicznej – wybrane zagadnienia*, "Studia Erasmiana Wratislaviensia" 2009, no. 2, p. 356, B. Jaworski, *Odpowiedzialność podmiotów władzy publicznej na podstawie art. 417[2] Kodeksu cywilnego*, "Folia Iuridica Universitatis Wratislaviensis" 2017, vol. 6, p. 139.

[3] M. Safjan, K.J. Matuszyk, *Odpowiedzialność odszkodowawcza władzy publicznej*, Warszawa 2009, p. 116.

[4] M. Haczkowska, *Przemiany w konstrukcji odpowiedzialności odszkodowawczej państwa w Polsce XX wieku. Od ustawy zasadniczej z 1921 r. do Konstytucji RP z 1997 r.*, "Krakowskie Studia z Historii Państwa i Prawa" 2021, no. 14, p. 474; J. Frąckowiak, *Odpowiedzialność Skarbu Państwa za szkody wyrządzone wydaniem prawomocnego orzeczenia lub ostatecznej decyzji*, "Acta Universitatis Wratislaviensis" 2009, no. 3161, p. 99.

statutory change, which extended the scope concerning state liability, was conditioned by a liberalisation of state policy in relation to civil rights[5]. The Constitution of the Polish Republic (the so-called March Constitution) passed on 17 March 1921 by the Legislative Sejm was significant in this respect[6]. A modern element in this act was Art. 121 containing regulations concerning the institution of the state's liability for damages for illegal actions of its organs. This was an innovative solution for those times. This provision elevated the legal institution in question to the status of a constitutional principle. Moreover, it had a significant impact on the direction of research of twentieth century legal thought. Namely, the dogma of irresponsibility of public authority was broken[7].

The regulation of the institution of liability of the state for illegal actions of authorities at the constitutional level took place in connection with the enactment of the Constitution of the Republic of Poland on 2 April 1997[8]. The enactment of the Basic Law meant that, after more than seventy years, the legislator decided to regulate the institution discussed in Art. 77 sec. 1, which reads: "Everyone has the right to compensation for the damage that has been caused to him by the unlawful action of a public authority"[9].

The legislator has based the liability of the state on illegality in the broadest sense, thus extending the scope of the previously existing regulations contained in the Act of 23 April 1964. – Civil Code[10]. It is worth emphasising that the premise of the claims for damages against the authority was the unlawfulness of the action. It was no longer the fault of a particular officer or the so-called 'anonymous fault'. In addition to the unlawful action of public authorities, other prerequisites include damage and a causal link between the unlawful action and the damage caused. On the basis of Art. 77 sec. 1, claims may be asserted by anyone. This means that it may include not only natural persons, but also legal persons and organisational units

[5] M. Przysucha, *Konstytucyjne prawo do odszkodowania w III RP,* "Przegląd Prawa Konstytucyjnego" 2014, no. 1, p. 151.

[6] The Constitution of the Republic of Poland of March 17, 1921 (Dz.U. No. 44, item. 267).

[7] M. Haczkowska, op.cit., p. 474, A. Cebera, *Odpowiedzialność odszkodowawcza za bezprawne działanie organów administracji publicznej,* Warszawa 2018, p. 26.

[8] The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item. 483).

[9] Ibidem, M. Haczkowska, op.cit., pp. 486–487.

[10] Dz.U. 1964, no. 16, item. 93.

without legal personality, but to which legal capacity is granted by law[11]. It is worth noting that the creators of the 1997 Constitution of the Republic of Poland adopted an assumption of a realistic nature, according to which infringements of the law may take place, while there must always be a mechanism in place to ensure the establishment of, as well as compensation for, the damage that has occurred[12].

Zbigniew Radwański points out that the Constitution of the Republic of Poland does not expressis verbis specify the entities that bear liability for damages. In Art. 77 sec. 1, the legislator only indicates the prerequisites on the fulfilment of which the right of the injured party to demand compensation depends. It speaks of an unlawful action of a public authority. However, this should not be understood in the sense that the public authority incurring liability for damages is liable of a civil law nature. Such liability can only be borne by a civil law entity and not by a public authority[13].

As mentioned above, the legislator has guaranteed two subjective rights to everyone in Art. 77 of the Polish Constitution. In addition to this, the analysed provision also guarantees means of protection of constitutional rights and freedoms. These are: (1) the right to compensation for the unlawful action of a public authority body and (2) the right to a judicial path to assert infringed freedoms or rights. Both the one and the other right have the dimension of constitutional principles. They are an institutional guarantee of the principle of legalism as well as an essential element of the idea of a democratic state of law. However, it is important to note a crucial difference between the two. Namely, Art. 77 sec. 1 indicates the means of reacting to an infringement of individual rights that has been committed within the realm of verticular relations. Article 77 sec. 2, on the other hand, is characterised by a somewhat greater degree of universality, in that it also applies to violations of these rights committed within the scope of horizontal relations[14].

[11] M. Haczkowska, op.cit., pp. 486–487.

[12] L. Garlicki, *Art. 77*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, ed. L. Garlicki, Warszawa 2007, p. 4.

[13] Z. Radwański, *Odpowiedzialność odszkodowawcza za szkody wyrządzone przy wykonywaniu władzy publicznej w świetle projektowanej nowelizacji kodeksu cywilnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, no. 2, p. 9.

[14] M. Florczak-Wątor, *Art. 77. Prawo do wynagrodzenia szkody*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warszawa 2019, p. 253.

The right to compensation for damage has been included in a special way in the Constitution of the Republic of Poland. This manifests itself primarily in the departure from the principle of fault as well as in the tightening of the prerequisites of liability for damages. It is worth emphasising that this exacerbation is addressed exclusively to situations where we are dealing with the unlawful infliction of damage by public authorities. The original nature of the right to compensation for damage inflicted by public authorities manifests itself in the fact that, from a constitutional point of view, the claim for compensation for damage is not connected with the assessment of the activities undertaken by administrative authorities or specific functionaries. Its scope covers, on equal terms, the objective assessment of the effects of the activities of all constitutional authorities (this also applies to the legislature and the judiciary). As Leszek Bosek points out, taking into account the purpose, as well as the normative features of the constitutional right to compensation for damage, one may formulate the conclusion that the legislator has created a measure of protection of human rights and freedoms of special significance. Namely, it goes beyond the average state-dard characteristic of measures of protection of property and non-property rights, which is derived from the clause of the democratic state of law, as well as other constitutional orders of democratic states[15].

The liability of public authority is an issue that has been repeatedly approached in the literature, particularly in relation to the liability for damages for unlawful acts or omissions of its subjects, regulated by Art. 417 and 417^1 of the Civil Code. Article 417^1 is lex specialis in relation to Art. 417. This provision concerns specific cases in which damage is caused in the exercise of public authority. It concerns damage that has resulted from the issuance of: 1)a normative act, 2) a final judgment or 3) a decision of a definitive nature, as well as damage that arose as a consequence of the failure to issue these acts, judgments or decisions. The provision under examination introduces the requirement of obtaining the prejudicature indicated in the special provisions. Thus, it is a decision declaring the unlawfulness of a specific conduct of public authorities. The essence of the aforementioned

[15] L. Bosek, *Komentarz do art. 77,* [in:] *Konstytucja RP. Komentarz,* t. I, *Komentarz. Art. 1–86,* eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1725.

prejudicature is that, prior to its issuance, it is not possible for compensation to be awarded for damage that has arisen as a result of a public authority's tort. As Grzegorz Karaszewski points out: "The compensation process cannot become a field in which the legality of normative acts, final judgments and final decisions is examined". The author emphasises that the moment such a process would serve as a surrogate of another instance, which would subject final acts of law application to verification, or in the event that they could constitute an instrument for examining the legality of established norms, we would then be dealing with a violation of the sense of legal certainty. It is noteworthy that only in § 4 of the provision in question (in the cases indicated therein), the legislator exempted the aggrieved persons from the necessity of obtaining a prejudicature[16].

I.

On 28 August 2020, the Constitutional Tribunal received a motion filed by Prime Minister Mateusz Morawiecki (file ref. no. K 18/20) asking whether Art. 417^1 § 1 of the Civil Code, which allows claiming compensation from the State Treasury for damage caused by issuing a normative act inconsistent with a higher-order norm, is inconsistent with the Constitution of the Republic of Poland. The President of the Council of Ministers requested, pursuant to Art. 191 sec. 1 point 1 of the Constitution of the Republic of Poland, an examination of the compatibility of Art. 417^1 § 1 of the Act of 23 April 1964. – Civil Code, in the scope in which it does not introduce the requirement of establishing by the Constitutional Tribunal of the inconsistency of the regulation with the Constitution, ratified international agreement or statute, with Art. 2, 188 point 3 and Art. 193 of the Constitution of the Republic of Poland. Subsequently, on 16 September 2020, the Constitutional Tribunal received another application (file ref. no. K 21/20). This time, the applicant was the Speaker of the Sejm of the Republic of Poland, Elżbieta Witek. This application also concerns Art. 4171 § 1 of the Civil Code. Pursuant to Art. 191 sec. 1 point 1 of the Constitution of the Republic of Poland, she applied for a declaration

[16] G. Karaszewski, *Komentarz do art. 4171,* [in:] *Kodeks cywilny. Komentarz aktualizowany,* eds. J. Ciszewski, P. Nazaruk, LEX/el. 2022.

of incompatibility of Art. 417[1] § 1 of the Act of 23 April 1964. – Civil Code with: 1) Art. 77 sec. 1 of the Constitution, in conjunction with the principle of trust in the State and the law created by the State derived from Art. 2 of the Constitution; 2) Art. 188 and 190 sec. 1 and 3 of the Constitution to the extent to which Art. 417[1] § 1 of the Civil Code permits determination, in proceedings other than before the Constitutional Tribunal, of the inconsistency of a normative act with the Constitution, a ratified international agreement or a statute; 3) the principle of the clarity of provisions of law derived from Art. 2 of the Constitution[17].

According to the Prime Minister, clarification of the content of Art. 471 § 1 of the Civil Code, in the scope in which it concerns the illegality of regulations, by means of introduction of the obligation to obtain a preliminary ruling of the Constitutional Tribunal will result in alignment of this provision with the principle of a democratic state under the rule of law, as well as with the principle derived from this principle, the principle of citizen's trust in the state and the law created by it. Moreover, in the justification, the mover states that this will also bring the provision into line with Art. 188 sec. 3 of the Constitution. This provision confers on the Constitutional Tribunal the exclusive competence to declare a regulation unconstitutional with erga omnes effect. At the same time, in the applicant's opinion, there would then also be a reconciliation of Art. 471 § 1 of the Civil Code with Art. 193 of the Constitution of the Republic of Poland, which equips the court with the right, but also – according to the applicant – with the obligation to address a legal question to the Constitutional Tribunal[18].

In the grounds for the motion, the Prime Minister emphasises that a finding of incompatibility of a normative act with an act higher in the hierarchy of sources of law is not the same as a finding of its illegality within the meaning of the Code. He goes on to point out that the ruling issued

[17] https://trybunal.gov.pl/sprawy-w-trybunale/art/odpowiedzialnosc-odszkodowawcza-skarbu-panstwa-za-szkode-wyrzadzona-przez-wydanie-niekonstytucyjnego-aktu-normatywnego;, https://trybunal.gov.pl/sprawy-w-trybunale/art/odpowiedzialnosc-odszkodowawcza-skarbu-panstwa-za-szkode-wyrzadzona-przez-wydanie-niekonstytucyjnego-aktu-normatywnego-1 (30.06.2022).

[18] https://trybunal.gov.pl/sprawy-w-trybunale/art/odpowiedzialnosc-odszkodowawcza-skarbu-panstwa-za-szkode-wyrzadzona-przez-wydanie-niekonstytucyjnego-aktu-normatywnego (30.06.2022).

by the Constitutional Tribunal should constitute a necessary precondition for considering whether it is reasonable to attribute liability for damages to the State Treasury. The President of the RM draws particular attention to the fact that a decision of the Constitutional Tribunal based on Art. 188 of the Constitution of the Republic of Poland is a sine qua non requirement for consideration of the State Treasury's compensatory liability. Subsequently, after obtaining an appropriate prejudiciate, a common court is obliged to consider the legitimacy of the illegality of a given normative act in the codicil sense[19].

The proposal also stipulates that a damages court cannot, therefore, determine on its own that a normative act is defective or declare a final judicial decision or final decision unlawful. The court in such a case must base its decision on this issue on a prior determination of this fact in the relevant proceedings. The applicant points out that otherwise, this would not only lead to the duplication within the indemnification proceedings of specific proceedings aimed at establishing the unlawfulness of the public authority's activity, but also to the danger of inconsistent or contradictory rulings adopting – with regard to the events giving rise to liability for damages – different legal assessments. In the context of normative acts which are sources of universally binding law of the Republic of Poland, the so-called 'proper procedure' which may establish the unlawfulness of such an act is the control procedure which lies within the competence of the Constitutional Tribunal. The applicant cited a similar position presented in the case law of the common courts. As an example, he pointed to the ruling of the Court of Appeal in Warsaw, in which the states that: "Undoubtedly, on the grounds of the norm contained in Art. 417^1 § 1 of the Civil Code, the judgement of the Constitutional Tribunal constitutes a prejudicial document, which determines the possibility to pursue […] claims for damages in connection with the legislative unlawfulness causing the damage"[20].

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[19] Ibidem.

[20] https://trybunal.gov.pl/sprawy-w-trybunale/art/odpowiedzialnosc-odszkodowawcza-skarbu-panstwa-za-szkode-wyrzadzona-przez-wydanie-niekonstytucyjnego-aktu-normatywnego (30.06.2022), Judgment of the Court of Appeal of Warsaw of 5 December 2018, http://orzeczenia.waw.sa.gov.pl/details/$N/154500000002503_V_ACa_000064_2018_Uz_2018-12-13_002 (30.06.2022).

II.

In her motion, the Speaker of the Sejm, points out that Art. 417[1] § 1 of the Civil Code unambiguously makes the award of damages conditional on the prior obtaining of a precedent in the form of a determination in a relevant proceeding of the incompatibility of a normative act with the Constitution, a ratified international agreement or a statute, constituting the basis for the claimant to seek damages. In her opinion, the provisions of the Civil Code do not define precisely what kind of proceedings is a "relevant proceeding" within the meaning of Art. 417 [1] § 1 of the Civil Code (which gives the possibility to effectively establish the incompatibility of a legal act). Additionally, the Speaker of the Sejm points out that the provisions of the Code of Civil Procedure do not determine in which proceedings the incompatibility of a legal act with a higher-order legal act is to be established. The Code of Civil Procedure contains provisions concerning the procedure for ascertaining the illegality of a judicial decision (Art. 417[1] § 2 of the Civil Code – e.g. action for a declaration of the illegality of a final decision – Art. 4241 et seq. Code of Civil Procedure). The Marshal of the Sejm observes, however, that there are no regulations which would specify which proceedings are the proceedings giving the possibility to state, for the purposes of Art. 417[1] § 1 of the Civil Code, the inconsistency of a normative act with the Constitution, a ratified international agreement or a statute. The justification concludes by stating that neither the wording of Art. 417[1] § 1 of the Civil Code, nor any other provision of the Civil Code or the Code of Civil Procedure determines which proceedings are the "relevant proceedings". In the further part of the justification, he emphasises that on the basis of Art. 188 of the Constitution in conjunction with Art. 190 of the Constitution, the Constitutional Tribunal is the body that is exclusively authorised to rule on the issue of hierarchical control of norms. He notes that the system legislator has not conferred on any other state organ the competence to adjudicate on matters of hierarchical control of norms. The competence of the Constitutional Court, as set out in the provisions of the Constitution, cannot be either excluded or limited by statute. A statute may not confer upon any other body the power to transfer, in whole or in part, its exclusive jurisdiction to the Constitutional Tribunal. The Speaker of the Sejm goes on to point out that no state organ has the right to "bail out" or replace

the Constitutional Tribunal in the exercise of its exclusive competence. He stresses that, in the context of the interpretative directive that may be derived from Art. 7 of the Constitution, the conclusion is that, since this competence has not been expressly conferred on any other organ, it cannot be presumed and cannot be inferred by means of judicial decisions. Pursuant to Art. 190 sec. 1 of the Constitution, judgments of the Constitutional Tribunal have universally binding force and are final. The scope of this power extends to all courts. The Basic Law does not provide for a single exception to the principle contained in Art. 190 sec. 1 of the Constitution. The Speaker of the Sejm also cites the jurisprudence of the Constitutional Tribunal of 2 July 2003[21]. where it was indicated that Art. 178 sec. 1 of the Constitution, in particular, cannot be regarded as such an exception. This provision lists the normative acts to which judges of the courts mentioned in Art. 175 of the Constitution are subject. The subjection of judges of these courts to the Constitution and to the laws is an issue situated on a different plane than the universally binding force of the judgments of the Constitutional Tribunal, which were issued within the scope determined by the provisions of the Constitution, based on Art. 190 sec. 1 of the Constitution[22].

In the conclusion to the justification, the Speaker of the Sejm points out that the wording of the provision subject to legal action does not determine what type of proceedings are the "relevant" proceedings. Thus, the proceedings in question are those in which the plaintiff should obtain a prejudicial document in the form of a declaration of inconsistency of the legal act for the enactment of which the plaintiff claims compensation with the Constitution of the Republic of Poland, a ratified international agreement or a statute. The petitioner emphasises that the analysis of the rulings of common and administrative courts, the Supreme Administrative Court and the Supreme Court clearly shows that we are dealing with the so-called 'consent' to incidental control by courts on the issue of compliance of legal acts with the Constitution of the Republic of Poland. The Marshal of the Sejm points out that the

[21] Judgement of the Constitutional Tribunal of July 2, 2003, file ref. no. P 1/05, of December 17, 2008, file ref. no. P 16/08, OTK-A no. 10 of 2008, item 181.

[22] https://trybunal.gov.pl/sprawy-w-trybunale/art/odpowiedzialnosc-odszkodowawcza-skarbu-panstwa-za-szkode-wyrzadzona-przez-wydanie-niekonstytucyjnego-aktu-normatywnego (25.06.2022).

courts do not see in this kind of practice any contradiction with the competence of the Constitutional Tribunal arising from Art. 188 of the Constitution of the Republic of Poland. He points out that within the literal layer of Art. 417^1 § 1 of the Civil Code, it is based on an "automatic" acknowledgement that a finding of inconsistency of an act with the Constitution of the Republic of Poland, a ratified international agreement or a statute is a prerequisite for the State Treasury's liability for damages, while at the same time there is no possibility for the adjudicating panel to assess the rank of that violation, as well as to take into account other constitutional values that could have been the basis for justifying the enactment of the act[23].

As of 20 March 2021, the Polish authorities have decided to introduce further restrictions on the territory of the Republic of Poland in connection with the SARS-CoV-2 coronavirus pandemic. These include restrictions on business activities. Such action is colloquially referred as lockdown. A large number of entrepreneurs in Poland suffered huge losses as a result of government decisions, despite the fact that the authorities launched a compensation programme – the so-called 'anti-crisis shield'. However, the aid offered proved to be insufficient in the face of the huge losses caused by the pandemic crisis. For this reason, the media are increasingly raising the issue of the possibility of seeking compensation from the Treasury[24].

The motion under case file ref. no. K 21/20, in which the initiating entity was the Speaker of the Sejm, was joined with the motion of the Prime Minister under case file ref. no. K 18/20. The case is being heard under the joint case file ref. no. K 18/20 – a motion to examine the compliance of Art. 417^1 § 1 of the Act of 23 April 1964 – Civil Code with the Constitution of the Republic of Poland. The Constitutional Tribunal has not yet examined the above applications. However, it is already possible to formulate a conclusion that the subject judgements of the Constitutional Tribunal which will be issued as a result of their recognition will be of key importance with respect to the effectiveness of possible claims for damages by entrepreneurs which are or will be addressed to the State Treasury.

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[23] Ibidem.

[24] https://www.specprawnik.pl/poradnik-prawny/odszkodowanie-z-lockdown-czekajac-na-werdykt-tk (13.07.2022).

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