

AGATA KRYGIER*

The institution of the State's liability for detrimental acts of officials –

do today binding legal orders give effective (legal and judicial) protection to the victim and the State? –
some remarks on German, Polish and European Union law
from Roman law perspective

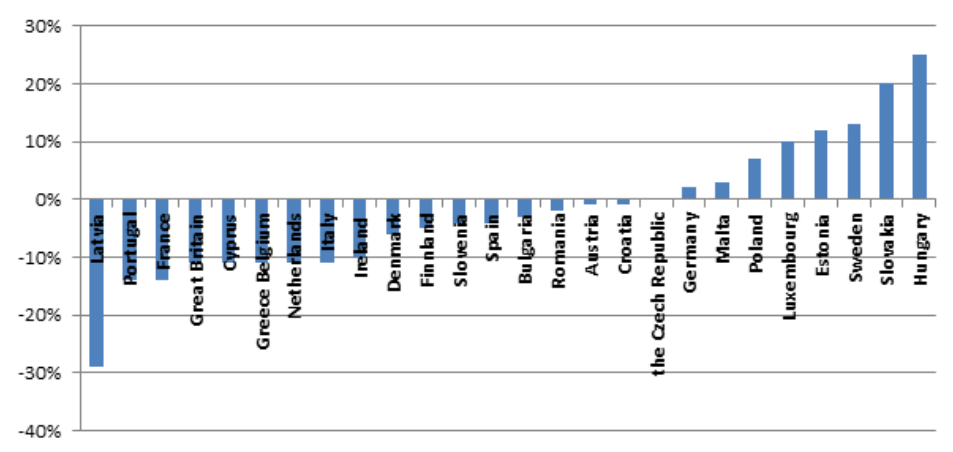
1. Introduction

One of the theory in an administrative law states that the more bureaucracy is developed, the more complicated is its system to operate. This phenomenon leads at the same time to the situation, in which on the one hand there is a demand to employ more officials (public functionaries, civil servants) in public administration to operate the system while on the other hand it increases 'the risk of administration' that may cause damages in regard to the individuals.¹ Actually, when we analyse the following statistics about the employment in public administration, both in Germany and in Poland, we can come to the conclusion that this statement is not meaningless.

* AGATA KRYGIER, M.A., PH.D. CANDIDATE – Specialization in Polish and German civil law – tort law, Chair of Civil Law and Law of Civil Procedure, Roman Law and European Legal History, University of Augsburg, e-mail: krygieragata@gmail.com

¹ M. Błachucki, Ustawa o odpowiedzialności majątkowej funkcjonariuszy publicznych za rażące naruszenie prawa i jej wpływ na postępowania administracyjne, in: *Analiza i ocena zmian Kodeksu Postępowania Administracyjnego w latach 2010-2011*, ed. M. Błachucki, T. Górzyńska, G. Sibiga, Warszawa 2012, p. 45-46. E. Łętowska, *Odpowiedzialność odszkodowawcza administracji*, in: *System prawa administracyjnego*, t. III, ed. T. Rabska, J. Łętowski, Wrocław 1978, p. 452-453.

Dynamics of employment in public administration in the European Union's Member States in 2008-2013 (%).²



The first graph shows the employment in public administration in member states of the European Union in 2008-2013 (%). It can be noticed that there are some countries (like: Spain or Italy) where the employment in public administration decreased (supposedly because of economic crisis and budget cuts) while in other states the employment in that period increased – especially: in Germany – 2% and in Poland – 7%.

Employment in public administration in Germany on the 30th of June 2014 (in million)³
Employed persons in civil service: 4 652 500.

Army	496 565
Länder	2 356 565
Municipalities	1 427 985
Social security	371 385

² <http://serwisy.gazetaprawna.pl/praca-i-kariera/galerie/864777,duze-zdjecie,2,w-ue-zatrudnienie-w-administracji-publicznej-spada-w-polsce-urzednikow-jest-coraz-wiecej.html> [Access: on the 29th of May 2017].

³ See: Zahlen Daten Fakten dbb Beamtenbund und Tarifunion, Berlin 2016, p. 11. http://www.dbb.de/fileadmin/pdfs/2016/zdf_2016.pdf [Access: on the 29th of May 2017].

Employment in public administration in Poland on the 31st of December 2014
(in thousand)⁴

Public administration and defence; compulsory social security	644,7
Public sector	644,2
Private sector	0,5

The statistics present the number of people employed in public administration in Germany and in Poland in 2014 and at the same time indicate that public administration in both countries needs a huge number of civil servants to operate its system.

Generally, the proper activity of civil servants proves that public administration works in an appropriate way. However, in order that such activity, as well as, the tasks carried out by public functionaries maintain at a high level, it is necessary for legislator to pass the proper law in relation to the state's and officials' liability for damages caused in exercising public authority to the individuals. The appropriate execution of this kind of liability is also a significant element of this process.⁵

Every day officials look after citizens' cases. Unfortunately, they sometimes make a mistake and as a result of their decisions in the name of the State, individuals suffer from damages. Here comes to the main problem: if there is a dispute between a victim and the State because of damage caused by an official in exercising public authority, it can be posed some questions:

– Who does bear the liability in Germany and in Poland in the first place? Official or the State?

– Does the German and Polish legal order protect in an enough way the victim's and the State's interest? In other words: do both legal orders give effective (legal and judicial) protection to the victim and the State in such cases?

2. Roman law

Before the author answers these questions, it will be presented in short the roots of the institution of the State's liability in Roman law. In Roman law it did not

⁴ See: *Zatrudnienie i wynagrodzenia w gospodarce narodowej w 2014r.*, Główny Urząd Statystyczny, Table 10th, Warszawa 2015, p. 30. https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5474/1/17/1/zatrudnienie_i_wynagrodzenia_w_2014.pdf [Access: on the 29th of May 2017].

⁵ M. Błachucki, *Ustawa o odpowiedzialności...*, p. 43.

exist an idea of the State's liability for detrimental acts of officials.⁶ The Romans did not regard the State as a legal person in today's meaning, so they came to the conclusion that as a result it (i.e. the State) could not bear the liability for damages caused by officials (i.e. magistrates).⁷ Then, it clearly explains why personal magistrate's liability was distinguished in this legal system.

In relation to Roman magistrates, they were divided into:

- *magistratus maiores* – the higher one (e.g. consul, praetor),
- *magistratus minores* – the lower one (e.g. censor, quaestor).

They had *imperium* or *potestas* power.⁸ The relations between them and the State were seen as a private mandate. In practise, it meant that when one of them infringed the law, he was personally liable for caused damages to the victim because his act was not regarded as an activity of the State. In this scope, the magistrates could bear civil or penal liability.⁹ However, on the other hand, they were to some extent protected by the law. It explains why a distinction between *magistratus maiores* and *minores* played a significant role. In the doctrine there are a lot of discussions who could be summoned to the court (*ius vocare*). After analysing the literature, it seems that generally the victims could summon only the lower officials (*magistratus minores*) and already during exercising their duties. More problematic is the question about *magistratus maiores*. Some authors indicate, this group of officials were protected by immunity and what is more interesting even after the ending of their tenure because such offices (the higher one) were held in principle by influential Roman citizens.¹⁰

All in all, in Roman law it was easier to summon civil servant from lower group than from *magistrate maiores*. It seems that by this solution the Romans fully protected the State's interests and ensured the continuity of the exercising authority while the victims' rights were not regulated in an effectively way because they could not summon every magistrates but only the lower one.

⁶ J. Kohl, *Die Lehre von der Unrechtsunfähigkeit des Staates*, Köln-Berlin-Bonn-München 1977, p. 11. B. P. Wróblewski, *Odpowiedzialność odszkodowawcza państwa za działania ustawodawcy*, Warszawa 2011, p. 3.

⁷ E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warszawa 2006, p. 1. J. Kohl, *Die Lehre...*, p. 11-12.

⁸ A. Dębiński, J. Misztal-Konecka, M. Wójcik, *Prawo rzymskie publiczne*, Warszawa 2010, p. 21-22.

⁹ T. Mommsen, *Römisches Staatsrecht*, V. 1, Graz – Austria 1969, p. 698-699.

¹⁰ More about it see: P. Kołodko, *Uwagi na temat odpowiedzialności „Magistratus Populi Romani” w świetle prawa prywatnego oraz prawa publicznego*, in: *Zeszyty Prawnicze*, 14.3/2014, p. 117-174. A. Karakocali, *Magistrate: The most political body of Roman Republic*, in: *Ankara Bar Review*, Vol. 6,2/2013, p. 65-80.

3. German and Polish law – today binding provisions

In the course of time, the institution evaluated from personal magistrate's liability to the State's liability. Actually, such solutions are in force now, both in Germany and in Poland. The legal basis for the State's liability for detrimental acts of officials are regulated there in the Constitutions and in Civil Codes.

In German law the legal basis for this kind of liability is Art. 34 of German Constitution¹¹ in connection with section 839 paragraph 1 of German Civil Code (BGB).¹²

Art. 34 of German Constitution states that:

If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

In turn, Section 839 (1) sentence 1 BGB provides that:

If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this.

In Poland, the legal basis for the State's liability is Art. 77 (1) of Polish Constitution¹³ in connection with Art. 417 §1 of Polish Civil Code (KC).¹⁴

Art. 77 (1) of Polish Constitution states 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.

In turn, the Art. 417 KC §1 provides that:

The State Treasury or a local government unit or another person exercising public authority by force of law is liable for any damage caused by an unlawful action or omission while exercising public authority.

In this point it is worth to mention that the regulation of art. 77 (1) of Polish Constitution caused that the provisions in KC had to be interpreted in a new way. On the 4th of December 2001 the Constitutional Tribunal released a judgement, in which it repealed art. 418 KC because it was unconstitutional and at the same

¹¹ The Basic Law for the Federal Republic of Germany of 8th May, 1949.

¹² German Civil Code of 18th August, 1896.

¹³ The Constitution of the Republic of Poland of 2nd April, 1997 (Dz.U. No. 78, item 483).

¹⁴ Polish Civil Code of 23rd April, 1964(Dz.U. No. 16, item 93 with amendments).

time it interpreted art. 417 KC in a new way. The changes in this scope finished with the amendment of Polish Civil Code in 2004. In practice, it means that the victim in order to claim his rights from the State in court does not have to indicate the guilty official who caused a damage but only has to prove that such a damage was caused during exercising public authority.¹⁵

When we compare German and Polish legal order, it can be seen that above mentioned solutions are quite similar because in both countries in the first place the State bears liability for detrimental acts of officials and in accordance with civil legal rules. However, in order that the State could bear such liability, the following prerequisites must be met:

- Polish law – damage, official's illegal behaviour who exercises public authority, the causal connection between this damage and behaviour,¹⁶

- German law – official who exercise official duty, intentional or negligent breaching the official duty in relation to a third party, damage, fault, the causal connection between this damage and behaviour.¹⁷

The German law distinguishes more prerequisites. Moreover, in this legal order the liability is based on principle of fault while in Poland some authors state that this institution is based on principle of risk.¹⁸ However lately, it has increased the number of supporters who claim that this kind of liability should be based on principle of illegality.¹⁹

Although in Germany and in Poland, there are some discussions about material regulations in this scope, it seems that both legal orders give effective legal protection to the individuals because the victims have enough legal means (ensured not only in civil codes but above all in the constitutions) to claim his rights and compensation from the State in the court. Their interests from legal point of view are protected in an enough and a right way. In case the victim's claim is justified, he can be sure, he will receive the compensation from the State in accordance with the circumstances.

More problematic is however another issue. Namely, if the State which, paid a compensation to a victim, protects enough its interests in other words: if the State has enough legal means (especially the right of recourse) to execute the

¹⁵ The judgment of Polish Constitutional Tribunal of 4th December 2001, SK 18/00, OTK 2001, No 8, item 256. W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, 11th Ed., Warszawa 2009, p. 239.

¹⁶ Z. Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, 2nd ed., Warszawa 2015, p. 123-165.

¹⁷ M. Fuchs, W. Pauker, *Delikts- und Schadenersatzrecht*, 8th ed., Berlin Heidelberg 2012, p. 204-209.

¹⁸ A. Bieranowski, P. Bogdalski, M. Goettel, *Prawo cywilne. Zarys wykładu*, Warszawa 2009, p. 203.

¹⁹ J. Kuźmicka-Sulikowska, *Zasady odpowiedzialności deliktowej w świetle nowych tendencji w ustawodawstwie polskim*, Warszawa 2011, p. 328.

financial liability from a civil servant who caused a damage in exercising public authority.

Actually, the German and Polish legislator regulated the execution of such liability but in practice these provisions work in Poland and in Germany with different results.

In Poland, in 2011 came into force the act which regulates the public functionaries' financial liability for flagrant breaches.²⁰ The main aim of this regulation were i.a.: a decrease of a number of flagrant breaches of law cases, a reduction of financial burdens of State Treasury and other public entities, an increase of citizen's trust in public administration. In legal community however, this act was criticised by professors and lawyers and just before its passing. Some of them, namely, claimed that in Polish civil law, it had existed enough legal regulations to execute financial liability from a delinquent official and as a result according to them there was no need to pass a new law. After a few amendments this act came into force but it is difficult not to agree with its opponents because actually this regulation does not belong to the best one. It contains a lot of mistakes and its solutions are very often impractical, e.g. the definition of public functionary is not compatible with the one in Polish Penal Code (art. 115 §13)²¹ so a result the State cannot execute financial liability from every civil servant in such cases. Moreover, there are loads of doubts, if the prosecutor is the right organ to carry out the preparatory proceedings or it should be conducted by the State Treasury Solicitor's Office. Eventually, due to the fact that as a rule in court in these cases it is difficult to prove that an official acted intentionally, his acts will be probably seen as an unintentional and as a result he will be obliged to return only a part of a compensation to the State.²²

In German law it seems that the State's interests are better protected since the right of recourse is already ensured in a constitution. Art. 34 sentence 2 of German Constitution²³ states that:

In the event of intentional wrongdoing or gross negligence, the right to recourse against the individual officer shall be preserved.

Just as in Polish law, the State's right to recourse is limited to the situation of intentional wrongdoing or gross negligence. More specialised provisions are

²⁰ The Public Functionaries' Financial Liability for Flagrant Breaches of Law Act of 20th January 2011 (Dz.U. 2011 No 34, item 173).

²¹ Polish Penal Code of 6th June, 1997 (Dz.U. 1997 No 88, item 553 with amendments).

²² M. Błachucki, *Ustawa o odpowiedzialności...*, p. 43-65. See also: E. Bagińska, *Opinia prawna o projekcie ustawy o szczególnych zasadach odpowiedzialności funkcjonariuszy publicznych za rażące naruszenie prawa*, Druk Sejmowy No 1407 – www.sejm.gov.pl. *Opinia Krajowej Reprezentacji Samorządowych Kolegiów Odwoławczych o Projekcie ustawy o szczególnych zasadach odpowiedzialności funkcjonariuszy publicznych za naruszenie prawa*, Kraków 15 maja 2006 r. – <http://orka.sejm.gov.pl/Druki5ka.nsf/wgdruku/504>.

²³ The Basic Law for the Federal Republic of Germany of 8th May, 1949.

regulated in other acts, especially in section 48 sentence 1 *Beamtenstatusgesetz*²⁴ and in section 75 § 1 sentence 1 *Bundesbeamtengesetz*²⁵ which provide that if the official violates his duty intentionally or by gross negligence, then he is obliged to compensate to the State the damages he caused.

In relation to the right of recourse, it can be also interesting the fact that in German law such cases take place in an administrative proceeding while in Poland in civil one.

4. The principle of state liability in European Union law

The member states of the European Union are obliged to adapt their law to the UE's regulations. The process of directives' implementation to the national law predominantly controls the European Commission, which alongside a member state, has the right to file the complaint to the European Court of Justice, in case of non-fulfilment this onus (i.e. implementation of a directive to the domestic law) by a member state. In this scope, the European Union also protects the individuals' rights. In 1991 the European Court of Justice made a judgement in which it forced each member state to compensate the damages caused to individuals by non-transposing a directive into a national law.²⁶ Thanks to this solution arose the principle of state liability in European Union law.²⁷

5. Summary

The above conducted analyse showed that Roman law fully protected the State's interests while a victim could summon only some magistrates. What concerns today binding provisions in this scope in Germany and in Poland, both countries give enough (legal and judicial) protection to the victims while the State's interests are protected only to some extent.

Due to the fact that bureaucracy will be constantly developing and at the same time the number of disputes between victims and the State for detrimental acts of officials will be decreasing, it is necessary for legislator to follow the regulations of this institution and if applicable to introduce appropriate amendments and changes.

²⁴ *Beamtenstatusgesetz* of 17th June, 2008 (with amendments).

²⁵ *Bundesbeamtengesetz* of 5th February, 2009 (with amendments).

²⁶ *Francovich v Italy*; C-6/90 (1991).

²⁷ More about see: N. Półtorak, *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Zakamycze 2002.

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https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5474/1/17/1/zatrudnienie_i_wynagrodzenia_w_2014.pdf [Access: on the 29th of May 2017].
http://www.dbb.de/fileadmin/pdfs/2016/zdf_2016.pdf [Access: on the 29th of May 2017].

Instytucja odpowiedzialności państwa za szkody wyrządzone przez funkcjonariuszy – czy współcześnie obowiązujące porządki prawne zapewniają skuteczną (prawną i sądową) ochronę poszkodowanemu i państwu? – kilka uwag na temat prawa niemieckiego, polskiego oraz Unii Europejskiej z perspektywy prawa rzymskiego

Streszczenie:

Instytucja odpowiedzialności państwa za szkody wyrządzone przez funkcjonariuszy ma swoje korzenie w starożytnych systemach prawnych, w szczególności w prawie rzymskim. Ze względu na fakt, iż Rzymianie nie wyróżniali państwa jako osoby prawnej w dzisiejszym tego słowa znaczeniu, w sposób jasny wyjaśnia dlaczego winny urzędnik (łac. *magistratus*) ponosił osobistą odpowiedzialność za szkody wyrządzone przy wykonywaniu swoich obowiązków. W tym systemie prawnym, państwo w pełni chroniło swoje interesy, podczas gdy poszkodowani mogli pozywać tylko niektórych urzędników, co nie gwarantowało im (tj. poszkodowanym) skutecznej (prawnej i sądowej) ochrony.

Na przestrzeni wieków, instytucja ta stopniowo ewoluowała od osobistej odpowiedzialności urzędnika do odpowiedzialności państwa, m.in. w Niemczech i w Polsce. Współcześnie, uczeni jak i praktykujący prawnicy zastanawiają się, czy obowiązujące przepisy prawne w obu państwach zapewniają skuteczną (prawną oraz sądową) ochronę za szkody wyrządzone przez funkcjonariuszy: poszkodowanemu względem państwa z jednej strony, a państwu względem winnego urzędnika z drugiej strony. Wydaje się, że nie ma zbyt wielu wątpliwości w odniesieniu do ochrony poszkodowanego, czego nie można stwierdzić w stosunku do ochrony interesów państwa. Zastanawiające jest również zagadnienie, w jaki sposób instytucja ta funkcjonuje w prawie Unii Europejskiej?

Ponieważ obecnie instytucja odpowiedzialności państwa, a w szczególności jej skuteczność, jest szeroko dyskutowana w środowisku prawnym, głównym celem autorki jest podjęcie próby odpowiedzi na pytanie zawarte w tytule niniejszej publikacji.

Słowa kluczowe: prawo rzymskie, prawo Unii Europejskiej, niemieckie prawo cywilne, polskie prawo cywilne, delikty, odpowiedzialność państwa za szkody wyrządzone przez funkcjonariuszy, ochrona prawna i sądowa, interes poszkodowanego a interes państwa.

The institution of the State's liability for detrimental acts of officials – do today binding legal orders give effective (legal and judicial) protection to the victim and the State? – some remarks on German, Polish and European Union law from Roman law perspective

Abstract:

The institution of State's liability for detrimental acts of officials has its roots in ancient legal systems, especially in Roman law. Due to the fact that the Romans did not recognize the State as the legal person in today's meaning, it clearly explains why a guilty official (lat. *magistratus*) bore personal liability for damage caused in exercising his duties. In this legal system the State completely protected its interests while the victims could only sued some of guilty magistrates what it did not guarantee them (i.e. the victims) effective (legal and judicial) protection.

Over centuries, the institution has gradually evaluated from magistrate's personal liability to the State's liability (i.a. in Germany and in Poland). Nowadays, scholars and practising lawyers ponder over if binding provisions in both countries give effective (legal and judicial) protection for detrimental acts of officials: the victims against the State on the one hand and the State against the delinquent official on the other hand. It seems that there are no so many doubts about the victim's protection, what it cannot be said in relation to the protection of the State's interests. It is also interesting how this institution functions in the European Union?

Because of the fact that the institution of the State's liability, and in particular its effectiveness, is widely discussed in legal community, the main aim of the author is to take an attempt to answer the question which is posed in the topic.

Keywords: Roman law, European Union law, German civil law, Polish civil law, tort law, State's liability for detrimental acts of officials, legal and judicial protection, victim's interest and State's interest.
