

JUDGEMENT
of 4 December, 2001
No. Ref. SK 18/00*

The Constitutional Tribunal, in a bench composed of:

Marek Safjan – Presiding Judge
Wiesław Johann
Krzysztof Kolasiński – Judge Rapporteur
Andrzej Mączyński
Jerzy Stepień,

Lidia Banaszekiewicz – Recording Clerk,

having considered, at the hearing on 4 December 2001, in the presence of duly authorised representatives of the parties to the case at hand: the complainants, the Polish Sejm, the Office of the Public Prosecutor-General and the Commissioner for Citizens' Rights:

- the constitutional complaint of Romuald K., seeking to determine the non-conformity of: Article 417 and Article 418 of the of the Civil Code to Article 77 paragraph 1 of the Constitution of the Republic of Poland;

- the constitutional complaint of Ryszard and Małgorzata B., seeking to determine the non-conformity of: art 418 of the Civil Code to Article 64 and Article 77 paragraph 1 of the Constitution of the Republic of Poland

a d j u d i c a t e s a s f o l l o w s :

1. Article 417 of the Civil Code Act of April 23, 1964 (Journal of Laws – Dz.U. No. 16, item 93, amended in: 1971 No. 27 item 252; 1976 No. 19 item 122; 1982 No. 11 item 81, No. 19 item 147 and No. 30 item 210; 1984 No. 45 item 242; 1985 No. 22 item 99; 1989 No. 3 item 11; 1990 No. 34 item 198, No. 55 item 321 and No. 79 item 464; 1991 No. 107 item 464 and No. 115 item 496; 1993 No. 17 item 78; 1994 No. 27 item 96, No. 85 item 388 and No. 105 item 509; 1995 No. 83 item 417; 1996 No. 114 item 542, No. 139 item 646 and No. 149 item 703; 1997 No. 43 item 272, No. 115 item 741, No. 117 item 751 and No. 157 item 1040; 1998 No. 106 item 668 and No. 117 item 758; 1999 No. 52 item 532; 2000 No. 22 item 271, No. 74 item 855 and 857, No. 88 item 983 and No. 114 item 1191; 2001 No. 11 item 91 and No. 71 item 733) **understood in the way that the State Treasury bears responsibility for the damage caused by unlawful action of a state functionary performing his duties conforms to Article 77 paragraph 1 of the Constitution of the Republic of Poland.**

2. Article 418 of the Civil Code does not conform to Article 77 paragraph 1 and does not conform to Article 64 of the Constitution of the Republic of Poland

Statement of Reasons:

I

* The sentencing part of the judgement was published in the Journal of Laws – [Dziennik Ustaw] - Dz.U. No 145, item 1638.

1. In the constitutional complaint of 25 August 2000, Romuald K.'s attorney applied for determination of non-conformity of Article 417 and Article 418 of the Civil Code to Article 77 paragraph 1 of the Constitution of the Republic of Poland. These regulations were the basis for dismissal – by the common courts and, finally, by a verdict of the Supreme Court on 15 May 2000, file Ref. No. II CKN 293/2000 which dismissed the cassation compliant – of Romuald K.'s claim to receive from the State Treasury a compensation for his unlawful dismissal from Militia¹ service in 1974.

The complaint results from the following facts:

Romuald K., was released from service for the Militia forces on 12 December 1974, on the grounds of Article 65 paragraph 2 subparagraph 2 of the Militia Service Act of 31 January 1959 (Journal of Laws – Dz.U. 1973 No. 23 item 136 with subsequent amendments; further referred to as the Militia Act) as a result of his failure to fulfil duties during his service, as established in 2 successive service opinions separated by at least a 6-month period. The complainant was employed again as a Militia officer on general terms, with the omission of the provisions of the Act of 24 May 1989 on Restoring Employee's Rights to Persons Dismissed for Trade Union or Self-governmental Activities, or Political or Religious Views (Journal of Laws – Dz.U. No. 32 item 172 with subsequent amendments; further referred to as the Act on Restoring Employee's Rights). As late as in July 1993, the efforts of the complainant resulted in his having the years spent outside the Militia structures included in his career period in line with the provisions of the Act on Restoring Employee's Rights.

On 28 September 1993, Romuald K. submitted to the Provincial Court in Poznań a damage suit against the State Treasury for his unlawful dismissal from service at the Militia forces because the true reason of his dismissal was the fact that he had his marriage registered at the church. Courts of both instances which examined the case found it beyond any question that the dismissal of the complainant was caused by his getting married at the church. The courts of both instances, the Provincial Court in Poznań – judgement of 4 November 1997, file Ref. No. I C 1523/96 – and the Court of Appeal in Poznań – judgement of 25 February 1998, file Ref. No. I A Ca 835/97 – dismissed the compensation claims and the Supreme Court's Civil Law Chamber – judgement of 15 May 2000, file Ref. No. II CKN 293/2000 – rejected the cassation submitted by the complainant. The common courts decided that in the case in question, adjudicating a compensation from the State Treasury on the grounds of Article 417 of the Civil Code is prevented by the lack of causes, resulting from Article 418 of the Civil Code. The decision to dismiss an employee from service for the Militia, which was the complainant's case, fits into the concept of a sentence or order but it was not accompanied with any penal or disciplinary procedure and there was no guilty criminal or disciplinary verdict against the state functionary who had made the dismissal decision, and no organ supervising him had established such a guilt. Furthermore, these courts recognised that in relation to the situation in which Romuald K. has found himself, the Act on Restoring Employee's Rights determines the full range of compensations for wrongs suffered in the sphere of labour relations by, among others, those who had religious outlooks other than socialist ones. Since this Act was intended by its maker and it really is an act of full moral compensation for any reprisal at work related to religious views and, despite this, no compensations have been prescribed, then such a compensation is not due for the complainant. The provisions of the Act on Restoring Employee's Rights are *lex specialis* in relation to the complainant and they exclude the application of the Civil Code's regulations.

The Supreme Court stated – in its position on the appeal to a court of cassation – that the courts of both instances omitted Article 77 of the Constitution of the Republic of Poland and the question of direct application of the Constitution by the courts under its Article 8

¹ Militia – in the times of People's Republic of Poland, a counterpart of the Police.

paragraph 2, stated that the new Constitution had no relation to the situation of Romuald K., because it "...does not make an exception for the time when it is binding and does not undermine the principle of non-retroactive validity of law which is the foundation of the legal order. We can say that Article 77 of the Constitution, cited by the complainant, regulates the future, not the past. The principle of *lex retro non agit*, derived from the fundamental constitutional principle (Article 2) is part of the canon of fundamental directives of a state ruled by law. It is not of an absolute character and it may clash with other constitutional values, especially with the principle of justice mentioned in Article 1 of the constitutional provisions or with the principle of equality before the law" and, further on: „The arguments raised in the cassation, confronted with findings described in the statements of reasons given by courts of both instances, do not allow to break the principle of *lex retro non agit* with reference to the conformity to the principle of justice. ... The complainant also did not contend that the provisions cited in the appeal to a court of cassation were unconstitutional under the Constitution that was binding on the day of the event to which the claimant associates his damage. We should note, eventually, that the refusal to recognise breaching the constitutional ban on retroaction as justified – in the circumstances of the whole case – makes the considerations on the acceptability of retroaction based on the hierarchically lower normative act (Article 3 of the Civil Code) groundless and useless.”

Concluding the rejection of the cassation, the Supreme Court stated that the grounds on which the compensation claims of Romuald K. were dismissed was, finally, his failure to demonstrate the fact of any damage during the court procedure. And fulfilling of condition is the starting point in claiming any compensation.

According to the complainant, the concept and way in which the state is responsible for damages done by its functionaries performing their duties is usually associated with concrete assumptions of the social and economic system. The binding provisions of Article 417 and Article 418 of the Civil Code were produced in a social and economic system different than the one existing today, under a different Constitution. The Constitution of the Republic of Poland which is in force now, in its Article 77, introduces a general principle that the State Treasury is responsible for damage caused to the citizens by an unlawful action of public authority organs and it does not provide for any limits of eligibility for compensation. Article 418 of the Civil Code introduces a modification of the principle of the State Treasury's general principle of responsibility for the damages caused by state functionaries by narrowing it down to the damages caused as a result of issuing a decision or order. Referring to the view of the doctrine (*Komentarz do Kodeksu cywilnego. Księga III. Zobowiązania [Commentary to the Civil Code, Book III. Liabilities]*, Warszawa 1996 vol. I) the complainant says that limitations to the State Treasury's responsibility (resulting from Article 418 of the Civil Code) for damages caused by its functionaries to merely actions consisting in issuing a decision or order are evidence of the non-conformity of Article 417 and 418 of the Civil Code to the Article 77 paragraph 1 of the Constitution.

2. Attorney of the married couple of Małgorzata and Ryszard B., submitted the constitutional complaint of 18 January 2001, for determining that Article 418 of the Civil Code, being conflicting with the citizen's personal rights, particularly with the right to a constitutional protection of property – does not conform to Article 64 of the Constitution and Article 77 paragraph 1 of the Constitution which institutes „as part of the protection of freedoms and rights” a constitutional guarantee for the compensation of a damage to anyone who suffered it as a result of an unlawful action by the public authority.

The complaint results from the following facts:

In their complaint of 19 November 1999, the married couple of Małgorzata and Ryszard B. claimed for the adjudication from the State Treasury – in the person of the Manager of the

Tax Office No. 4 in Lublin – the amount of PLN 3,397.48 as compensation for an unlawful collection and holding for the period of 1,503 days of the execution costs in the amount of PLN 2,454.50 which was not due for the State Treasury. The unlawfulness of the collection of these costs was established by the decisions of the High Administrative Court.

The Regional Court in Lublin in its decision of 27 April 2000, file Ref. No. I C 2069/99 stated that there were no reasons in that case to claim the compensation in an administrative procedure because there were no relevant regulations in the Tax Law and in the Code of Administrative Procedure, hence the only possibility was to claim the compensation in a civil litigation. At the same time, on the grounds of Article 418 of the Civil Code the Court dismissed the claim and said in the conclusion that the fact that the High Administrative Court established the unlawfulness of the decision of the Tax Office No. 4 in Lublin to collect the execution costs was not equal to establishing the guilt of an officer of that Office in a criminal or disciplinary procedure and that it couldn't be assumed that this guilt was recognised by an organ supervising the damage perpetrator.

In its decision of 9 October 2000, file Ref. No. II Ca 472/00, the District Court in Lublin dismissed the appeal and fully shared the view of the court of the first instance saying additionally that: „the fact of non-existence of the grounds for the State Treasury's responsibility provided for in the cited Article 418 of the Civil Code also results in the fact that there are no grounds for recognising the compensation claims made by the claimants under Article 77 paragraph 1 of the Constitution of the Republic of Poland. Only meeting the reasons prescribed in Article 418 of the Civil Code is a condition allowing a compensation claim under Article 77 paragraph 1 of the Constitution.”

According to the attorney of the complainants, the position of both courts which narrows down the question of State Treasury's responsibility for damages resulting from unlawful action of officers performing public authority, limiting the responsibility only to cases that meet the provisions of Article 418 of the Civil Code, is clearly contradictory to the responsibility standard proclaimed by the Constitution of the Republic of Poland and to the legislation implemented in the European Union. Expanding the scope of the State Treasury's responsibility for damages results in a situation where, clearly all those cases that meet the criteria of Article 418 of the Civil Code are also cases covered by the State Treasury's responsibility resulting from Article 77 paragraph 1 of the Constitution while responsibility resulting from the constitutional norm cannot be limited to these cases only. The reasons of constitutional responsibility institute a norm under which anyone who has suffered a damage as a result of unlawful action of public officers is eligible for compensation. Any limitations on the right to a compensation for the damage, especially limitations forcing the citizen to prove the guilt of the public authority officer are contradictory to the cited Constitution's norm and with the generally accepted and in the past successfully applied in courts concept of abstract guilt which, on the other hand, is not an equivalent of unlawfulness.

Referring to the norm resulting from Article 77 paragraph 1 of the Constitution, the complainants' attorney says that the standard of State Treasury's responsibility resulting from this article cannot be limited by the ordinary law. For this clashes with the guarantor's function of this provision being part of a set of provisions pertaining to the means of protecting freedoms and rights.

The fact that this postulate is justified is also directly confirmed by the provision of the constitutional principle of judiciary's independence set forth in Article 178 paragraph 1 which says: „Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.” The principle resulting from this Article also requires the judges performing the administration of justice in the Republic of Poland to apply first of all the principles of the Constitution and then the ordinary law if it is not contradictory to the former.

Concluding, the complainants' attorney motioned for determining the unconstitutionality of Article 418 of the Civil Code because it serves as a basis for dismissing claims seeking compensation for damages resulting from unlawful action of public authority organs, despite the recognition by the court of a clear unlawfulness of the action of those authority organs.

3. President of the Constitutional Tribunal ordered in his ordinance of 14 February 2001, that the above-described complaints will be examined jointly because their subject pertains to the same question.

4. The Public Prosecutor-General, in his position on the constitutional complaint of Romuald K. said that Article 417 of the Civil Code does conform to Article 77 paragraph 1 of the Constitution of the Republic of Poland and the rest of the proceeding is dismissed on the grounds of Article 39 paragraph 1 item 1 of the Constitutional Tribunal Act of 1 August 1997, because issuing a decision is inadmissible.

At the beginning, the Public Prosecutor-General stated that the final decision on Romuald K.'s case was issued on the grounds of Article 417 of the Civil Code which provides a basis for claiming a compensation resulting from the State Treasury's responsibility for damages caused by state functionaries performing their duties. The Supreme Court, when stating the absence of a material damage which should have been demonstrated by the complainant under Article 6 of the Civil Code, did not go on to establish any other circumstances conditioning the responsibility of the State Treasury. Considerations – presented in the Supreme Court's statement of reasons of the judgement concerning the potential unlawfulness of the decision which was the basis for the claim discussed – were directed only against the charges raised in the appeal to a court of cassation saying that the courts failed to apply directly the constitutional norm set forth in Article 77 paragraph 1.

In this situation, according to the Public Prosecutor-General, we should assume that only the provision of Article 417 of the Civil Code was the basis for a final decision of the case and the charge of the unconstitutionality of Article 418 of the Civil Code is unjustified and legally inadmissible in this case.

The Public Prosecutor-General did not share the view that the provision of Article 417 of the Civil Code does not conform to Article 77 paragraph 1 of the Constitution of the Republic of Poland in terms of a decision on the case of Romuald K. In his opinion the norm resulting from Article 77 paragraph 1 of the Constitution guarantees protection of the rights of individuals and legal persons to claim compensation for a damage caused by unlawful operation of public authority organs. This legal protection measure is associated with demonstrating the fact of the damage and an unlawful action of the public authority organ. This norm does not define the subject obliged to provide compensation for the damage and does not provide for a condition of guilt in the action of the public authority organ.

The challenged provision of Article 417 of the Civil Code as a basis for the claim also indicates the necessity to establish the fact of a damage caused by the action or abandonment to act on the part of a state functionary. But it does not make the responsibility of the State Treasury dependent on the unlawfulness of action or failure to act on the part of the state officer as the constitutional norm does. The unlawfulness of action, conditioning the responsibility of the State Treasury as a limitation on the application of the general norm is set forth in Article 418 of the Civil Code which was not used as basis for the decision on this case. Establishing the unlawfulness of the conduct of a public officer, that is, his breaching the law when issuing a decision or order, belongs to the organ authorised to issue such decisions according to a procedure prescribed by the law. This is a real circumstance beyond the scope of cognition and decisions of the Constitutional Tribunal.

According to the Public Prosecutor-General, the Supreme Court referred in its decision to the question of unlawfulness only in its aspect related to the response to charges raised in

the appeal to a court of cassation without judging the fact whether there was a breach of law present in releasing the complainant from service. It considered as essential only the lack of the established damage. According to the constitutional norm, this condition must be met to protect the rights of anyone seeking a compensation for a damage caused by unlawful action of public authority organs.

5. In his opinion on the constitutional complaint from the married couple of Małgorzata and Ryszard B., the Public Prosecutor-General assumed a position that Article 418 of the Civil Code does not conform to Article 77 paragraph 1 and is not in non-conformity to Article 64 of the Constitution of the Republic of Poland.

The chapter of the Constitution of the Republic of Poland titled „Means for protection of freedoms and rights” includes Article 77 paragraph 1 which gives everyone the right to get compensation for damages caused to them by unlawful action of public authority organs. Such compensations may be claimed in administrative procedure (Article 60 of the High Administrative Court Act, Article 160 of the Code of Civil Procedure) or in a civil litigation before a common court. Respective organs have been appointed – in tune with the relevant procedure – to determine the non-conformity of public authority organs’ action to the law when they verify decisions issued by these organs. This may be verification of instance, supervision, or as a cassation. The responsibility of the State Treasury for a damage resulting from „a forbidden deed,” that is, action or failure to act by public authority officers performing their duties in an unlawful way and causing the damage of physical or legal persons, is adjudicated by the common court in a civil litigation. Although Article 417 of the Civil Code narrows the responsibility for damages down to „the forbidden deeds” of state officers and the norm of Article 77 paragraph 1 of the Constitution extends this responsibility over all the organs of public authorities, the Public Prosecutor-General believes that this question should be put outside the considerations related to the present cause because the decisions in relation to the complainants were issued by state functionaries, that is, employees of the Tax Office and the Tax Chamber and the provision of Article 417 of the Civil Code remains beyond the scope of the complaint. The unlawfulness of the action of the state functionaries was adjudicated by the High Administrative Court in an appropriate procedure and for the common court examining the question of compensation claimed from the State Treasury this circumstance was indisputable and it was not subject to its control.

The common court, bound with such a decision, should only decide whether the complainant suffered a damage understood as such by the Civil Code, whether that damage was in a causative relation with an action or failure to act by the public authority organ, and to determine the amount of the claimed compensation. The principal obstacle in adjudicating the compensation was the lack of establishing the guilt of the state functionary which was the condition of the State Treasury’s responsibility for the damages caused by that functionary when performing his duties. The guilt established in a respective procedure as a requirement of Article 418 of the Civil Code is not an anonymous guilt but a specific one established in an appropriate procedure.

In its Article 77 paragraph 1, the constitution says that the condition for a damage compensation claim is „unlawful action.” According to the Public Prosecutor-General, this should be understood as action breaching the law or deprived of a legal ground and, also, failure to act, understood as the lack of action where the law obligates the public authority to undertake a specific action. The reason for responsibility here is not the guilt of the perpetrator of the damage, i.e. the officer or employee, but the unlawfulness of the action by the public authority.

The above-indicated constitutional norm, in the opinion of the Public Prosecutor-General, also does not offer grounds for differentiating the reasons of the responsibility of the public authorities depending on whether the damage-causing event was a decision made in a

law-prescribed form (decision or order mentioned in art 418 of the Civil Code) or an actual action undertaken at performing public authority. This responsibility results from the action (or failure to act) by broadly understood organs of public authority (legislative, executive, and judicial) and, moreover, according to the indications of the Constitution, it should be abstracted from the condition of a concrete guilt of a state functionary.

The provisions of Article 418 of the Civil Code obligate the harmed person to what is known as a „pre-judicial” procedure, that is, to initiate a penal or disciplinary proceeding against the guilty public authority functionary which is not always possible to do. The Public Prosecutor-General stressed that disciplinary proceedings against general administration officers was not allowed in the years 1964-1969 and 1975-1982.

Articles 417-419 of the Civil Code have remained unchanged from the time of their adoption, that is since 1964. The Constitution’s Article 77 paragraph 1 introduces a new solution in the field of shaping the civil liability for damages caused by unlawful action of public authority organs and it should be filled with a new contents in the ordinary legislation.

The Public Prosecutor-General indicated that the non-conformity of premises for the responsibility for damages caused by the conduct of public authority described in Article 418 of the Civil Code to the purport of Article 77 paragraph 1 of the Constitution of the Republic of Poland is more and more frequently reported in the civil and constitutional law doctrine (M. Safjan *Odpowiedzialność państwa na podstawie art. 77 Konstytucji RP [The state’s responsibility under Article 77 of the Constitution of the Republic of Poland]*, PiP[State and Law monthly] 1999, No. 4 and E. Łętowska, *W kwestii zmian przepisów kc o odpowiedzialności za szkody wyrządzone działaniem władzy publicznej [On the question of changes in the Civil Code regulations on responsibility for damages caused by the action of public authorities]*, PiP 1999, No. 7).

The Public Prosecutor-General explained that in order to remove these non-conformity, the Civil Law Codification Commission operating at the Minister of Justice had developed draft amendments to the Civil Code pertaining to the responsibility for damages caused at performing the public authority and the operation of legal persons. The responsibility of the State Treasury or a territorial self-government body for damages caused at performing public authority and even of a person to whom the power of performing public authority was delegated, was not associated with the requirement of guilt but only with a condition of unlawful conduct of a functionary or an employee or some other indicated person. Such responsibility was also envisaged in the case where the damage was an effect of a lawful performance of public authority and the allocation of a compensation is supported by reasons of fairness. However, in the case of a damage to property, if the action was undertaken in the public interest, the court will be able to adjudicate a compensation up to the value of the suffered damage. The proposed changes include Recommendations No. R/84/5 adopted by the Council of Europe’s Committee of Ministers on 18 April 1984.

The Public Prosecutor-General did not share the view of the complainants that Article 418 of the Civil Code did not conform to Article 64 of the Constitution of the Republic of Poland, since in his opinion Article 418 of the Civil Code pertains to the means of law protection described in Article 417 of the Civil Code, that is, to a compensation for a damage caused by the action of public authorities. The Constitution provides this protection measure in Article 77 paragraph 1, which constitutes a special guaranty that does not require reaching for the general property protection rules. The right to claim compensation for a damage on property results, as a matter of fact, from the general property protection principles but we cannot say that the challenged provision diminished the property of the complainants. This diminishing was done by the public authority organ with its unlawful decision. A special constitutional norm is a sufficient model and there is no need to reach for the general rules.

6. In a position presented by the Marshal of the Sejm in the letter of 24 May 2000, the Sejm of the Republic of Poland recognised that Article 417 of the Civil Code conformed to Article 77 paragraph 1 of the Constitution, while Article 418 of the Civil Code did not conform to Article 77 paragraph 1 of the Constitution.

According to the Sejm, the State Treasury's responsibility stemming from the principle set forth in Article 417 of the Civil Code depends on the presence of all the following premises at the same time:

- 1) the damage must be done by the state functionary at carrying out his duties;
- 2) the conduct of the state functionary must bear the properties of unlawfulness;
- 3) there should be a causal nexus between the damage and the conduct of the functionary.

The individual components of the disposal of Article 417 §1 of the Civil Code do not carry any subjective or objective limitations that would run counter to Article 77 paragraph 1 of the Constitution of the Republic of Poland. The provision of Article 417 of the Civil Code offers each subject an opportunity to claim compensation for a damage caused by an unlawful action of state authorities (state functionary). Article 417 of the Civil Code is an implementation of the constitutional principle resulting from Article 77 paragraph 1 of the Constitution under which the responsibility of the State Treasury for damages caused by state functionaries is not linked with the premise of guilt.

As regards Article 418 of the Civil Code, the Sejm agreed with the view that it did not conform to Article 77 paragraph 1 of the Constitution of the Republic of Poland.

In the opinion of the Sejm, the constitutional principle set forth in Article 77 paragraph 1 of the Constitution, which grants the right to get compensation for a damage caused by an unlawful action of public authorities to everyone is not implemented by Article 418 of the Civil Code which sets forth the premise of the state functionary's guilt as a condition of the compensatory responsibility of the State Treasury for damages caused by the above-mentioned deeds of the authorities. According to the Sejm, differentiating the premises of responsibility in relation to whether the damage was caused by an act of the authorities given in a specific form – under Article 418 of the Civil Code by a decision or order – or by a real action undertaken in connection with the execution of the state's governing tasks also raises some objections as to the constitutionality of this provision.

The Sejm pointed to the fact that both provisions, Article 417 as well as Article 418 of the Civil Code had been binding before the Constitution of the Republic of Poland entered into force and introduced on 17 October 1997, (in Article 77 paragraph 1) the principle of compensation for damages caused by unlawful operation of the public authorities with no limitations.

The Sejm represents an opinion that under Article 8 paragraph 2 of the Constitution of the Republic of Poland, from 17 October 1997 onwards, the principle set forth in this article allows a direct application of the provisions of the Constitution, hence Article 77 paragraph 1 of the Constitution will be applicable wherever the statutory provisions regulate the question of responsibility for damages caused by deeds of public authorities in any other way or wherever they exclude certain types of public authority actions from the regulations governing compensations.

According to the Sejm, lack of a possibility to direct application of the given provision of the Constitution must directly result from the same Constitution. This regards first of all those provisions that refer to ordinary laws in the detailed regulation.

In the case of Article 77 paragraph 1 of the Constitution, there is no such reference, which means that direct application of this Article is admissible.

7. When voicing his opinion on the constitutional complaint from the married couple f Małgorzata and Ryszard B., the Commissioner for Citizens' Rights, who joined the

proceedings under Article 51 of the Constitutional Tribunal Act, stated that Article 418 of the Civil Code did not conform to Article 77 paragraph 1 of the Constitution of the Republic of Poland.

The Commissioner for Citizens' Rights started his considerations on the constitutionality of Article 418 of the Civil Code with the statement that „a certain basic outline of public authorities' responsibilities for the damages caused can be reconstructed directly from the constitutional norm.” If the provision, namely Article 77 paragraph 1 of the Constitution, speaks of compensating a damage caused by the public authority organ, then according to the Commissioner for Citizens' Rights, it should be understood that it covers all types of authorities in the constitutional sense: the legislative, the executive, and the judicial one. The concept of a public authority organ, as the Commissioner for Citizens' Rights stated, was understood by the constitutional lawmaker as the activities of the institutions of public authority as such, while responsibility is localised on the part of this authority's structure, not on persons associated with that structure. The constitutional provision de-personalises the responsibility of public authority.

Comparing the above with the hitherto regulation by the Code, the Commissioner for Citizens' Rights notes that „in the light of Article 417 of the Civil Code, the State Treasury does not bear responsibility for its own guilt. For even if the damage was caused by the organ's guilt, the State Treasury is responsible for the guilt of a functionary operating in the capacity of an organ as if it were somebody else's guilt.” Under Article 417 of the Civil Code, the damage needs to be caused by a public officer performing his duties, while his conduct must carry the features of guilt. Moreover, the responsibility of the State Treasury for the damage caused as a result of issuing a decision or order, that is, such deeds which are usually carried out by state organs, was based on additional conditions: a special procedure of establishing the functionary's guilt in a criminal or disciplinary procedure or as a result of recognising the guilt by an organ superior to the damage perpetrator. The harmed person has usually no impact on starting and the course of the above-mentioned proceedings and on whether the superior will recognise the existence of the damage.

According to the Commissioner for Citizens' Rights, regulations of the Code pertaining to the constitutional premise of responsibility stemming from „unlawful action of a public authority organ” seem to be more than obvious. The issue here consists above all in the de-personalisation of the responsibility of public authorities and separating it from the criterion of guilt and, instead, basing it on the criterion of the lawfulness of action. The Commissioner for Citizens' Rights points to the fact that although in the sphere of code regulations the judicial decisions have already developed a concept (supported by the doctrine) of an anonymous or organisational guilt, this often leading to a situation that often it is enough to establish the unlawfulness of action and the functionary's guilt is taken by the presumed guilt of „an anonymous” functionary associated with the action of a given structure of the public organ's body, yet this concept cannot be applied when the damage was caused as a result of issuing a decision or order since in that case the functionary's guilt must be determined in a special way (Article 418 of the Civil Code). Even if we assume that with the concept of the anonymous guilt the mere establishing of the unlawfulness of action results in the responsibility of the public authority, which would be close to the condition of „unlawful action,” then Article 418 of the Civil Code clearly goes beyond the constitutional framework of public authority's responsibility for the damages caused. In the Commissioner for Citizens' Rights' opinion, this is not altered by the fact that Article 160 of the Code of Civil Procedure strongly limits the action of Article 418 of the Civil Code. As has been demonstrated by the case of the constitutional complaint of married couple of Małgorzata and Ryszard B., one could quote many examples of narrowing effects which the Article 418 of the Civil Code imposes on the responsibility of public authorities. What strikes here is a total inconsistency

in selecting the premises of the responsibility of public authority. For, in line with the purport of Article 126 of the Code of Civil Procedure, the provisions of Article 107 §2-5 and Article 109-113 of the Code of Civil Procedure are respectively applied to administrative decisions, while Article 145-152 and Article 156-159 of the Code of Civil Procedure are applicable for decisions that can be appealed against. This means that when amending the Code of Civil Procedure in 1995, the legislator expanded regulations governing the resumption of proceedings and determination of the decision's invalidity also on administrative decisions. This was done, however, without simultaneous opening way for compensation claims, for Article 126 of the Code of Civil Procedure excludes the respective application of Article 153 and Article 160 of the Code of Civil Procedure to the decisions. An analogous solution was adopted in Article 219 of the Tax Law of 29 August 1997 (Journal of Laws – Dz.U. No. 137 item 926 and subsequent amendments) in relation to decisions issued in tax procedure. It is easy to imagine the damages caused by unlawful decision, e.g. in the case of halting construction work (Article 50 paragraph 1 and 5 of the Construction Law of 7 July 1994; Journal of Laws – Dz.U. No. 89 item 414 with subsequent amendments) or suspending the proceedings (Article 97 §1 of the Code of Administrative Procedure). Claiming a compensation in such cases will hit a barrier set by Article 418 of the Civil Code, whereas it will be a damage caused by issuing „a decision or order” just like in the case of administrative decisions.

In the opinion of the Commissioner for Citizens' Rights, it should be considered whether only qualified violation of the law resulting in, e.g., determining the invalidity of a decision or other deed or statement should be a basis for compensatory responsibility for unlawful action by public authorities, or whether it should be enough that as a result of the control of the operations of public administration, performed by the administrative court (Article 184 of the Constitution) the unlawful action will be established also in some other way. Anyway, in all the cases of „decisions or orders” issued by public authorities that cause damages and do not fit to the responsibility described in Article 160 of the Code of Civil Procedure and, by this, are now subject to the rigours of Article 418 of the Civil Code, we should make compensation claims possible under the principles set forth in Article 77 paragraph 1 of the Constitution. To make this possible, we need to eliminate the peculiar „pre-judicial” procedure required to establish the public functionary's guilt and introduced by Article 418 of the Civil Code and this is, in the Commissioner for Citizens' Rights' opinion, the reason why this Article does not conform to the Constitution.

II

1. In a letter of 21 November, 2001, the Presiding Judge asked the President of the Civil Law Codification Commission, Professor Zbigniew Radwański, to present the Committee's position on the conformity of Article 417 and Article 418 of the Civil Code to Article 77 paragraph 1 of the Constitution of the Republic of Poland and to present information on the status and direction of work on the prospective regulation of the State Treasury's responsibility.

2. The President of the Civil Law Codification Commission in a letter of 27 November 2001, presented the „Opinion on the conformity of Article 417 and Article 418 of the Civil Code to Article 77 paragraph 1 of the Constitution.”

The Opinion presents the following arguments and circumstances:

When approaching the problem of regulating in the Civil Code the responsibility of the State Treasury for damages caused by unlawful action of its functionaries, the Civil Law Codification Commission assumed that the provisions of Article 417 and 418 of the Civil Code in force did not conform to Article 77 paragraph 1 of the Constitution, hence they

should be derogated and replaced with regulations meeting the directives set forth by Article 77 paragraph 1 of the Constitution.

This assumption was founded on the recognition that the provision of Article 77 paragraph 1 of the Constitution expresses a legal norm and not just a declaration announcing a regulation of this issue in future. This understanding of the above-mentioned regulation is clearly indicated by Article 87 paragraph 1 in connection with Article 8 of the Constitution. There are no grounds to recognise that Article 77 paragraph 1 acquires legal significance only as a result of adopting a law that will regulate the question mentioned there, for this regulation includes no stipulation limiting in this way the validity of the norm of Article 77 paragraph 1 of the Constitution. Therefore, there should be no doubt that the norm under which everyone has the right to get compensation for a damage suffered by them, which was caused by an unlawful action of public authority organs also applies to the already existing laws.

In an explanation of the nature of the non-conformity of Article 417 of the Civil Code to Article 77 paragraph 1 of the Constitution, the Opinion emphasises:

– first, that the constitutional norm recognises the „unlawful” action of a public authority organ as a constitutional premise for compensation. In this context we should agree that the very unlawful action is a sufficient basis for compensatory responsibility and, as a consequence, the guilt of the public authority organ is not a must. Thus, all the norms set forth in the (ordinary) laws that would reserve the guilt as a premise of responsibility in such cases would be against the Constitution. One must remember that Article 77 paragraph 1 of the constitution is included in a group of regulations intended to protect the freedoms and rights (compare the heading of Chapter II of the Constitution). So, recognising the admissibility of instituting of an additional premise for responsibility in the form of the guilt by statutory provisions, would certainly lead to limiting the guaranteed by the Constitution protection of citizens’ freedoms and rights and this can in no case be accepted. The core sense of Article 77 paragraph 1 of the Constitution consists in the fact that it introduces stricter premises for compensatory responsibility in relation to unlawful action of public authorities than the general principles based on the guilt condition (Article 415 of the Civil Code). Otherwise, Article 77 paragraph 1 of the Constitution would be redundant. This departure from the general principles is justified by a special, subordinate role of public authority organs that are there to guarantee the freedom and rights of the human being and a citizen (Article 5 and the Preamble to the Constitution). Strict responsibility for damages caused by unlawful action of public authority organs based on this assumption leads to a differentiated protection of the harmed persons and this is not a flaw but advantage of the Polish legal system guided by the modern achievements of the doctrine and legislation of democratic countries.

The Opinion analyses whether the existing Article 417 of the Civil Code ensures the above-mentioned protection standard, in particular whether it justifies the compensatory responsibility without guilt, just for the unlawful action of public authority organs.

The text of Article 417 §1 of the Civil Code does not solve the question unequivocally but its interpretation has established itself from 1971, as indicated by the resolution of the Full Bench of the Supreme Court’s Civil Law Chamber of 15 February 1971 (*Ref. No. III CZP 33/70*; Supreme Court Decisions – OSN 1971 No. 4 item 59) under which „the principal condition of the responsibility of the State Treasury and the State agencies with the status of a legal person, on the grounds of Article 417 §1 of the Civil Code, is the unlawfulness of action or failure to act by the state functionary and the existence of his/her guilt.” This view is based on the analysis of the whole package of norms regulating responsibility for delicts in the Civil Code. All courts have unchangeably relied on this view in their verdicts for 30 years now. The sense of the legal norm set forth in Article 417 §1 of the Civil Code, understood in this way, therefore clearly does not conform to the norm of Article 77 paragraph 1 of the Constitution.

In theory, the elimination of this non-conformity would, perhaps, be possible by changing the interpretation of Article 417 §1 of the Civil Code in the sense that it would provide for a compensatory responsibility without guilt. But we must also take into consideration that courts are independent of the other authorities (Article 173 of the Constitution) and, consequently, neither the Sejm nor the Constitutional Tribunal can impose on them any other interpretation of Article 417 §1 of the Civil Code than the one they are applying. However, it is difficult to accept the idea that the imposed by the Constitution process of co-ordinating the purport of the acts with constitutional norms consists in assuming that the courts will change the 30 years old interpretation of Article 417 § 1 of the Civil Code which has some legal grounds, after all. Therefore, the practical implementation of this process can be done only by way of the lawmaker's interference in the form of amending this provision.

The above-mentioned co-ordination cannot be done by the application of the „anonymous guilt” adopted in the court judicature which practically leads to the creation of compensatory responsibility that is no longer based on guilt. For it is applied in a limited way only to cases where the direct damage perpetrator cannot be identified. On the other hand, in a situation where the functionary who had unlawfully caused a damage is known, then the State Treasury is responsible for him on general principles, that is, only when the guilt can be assigned to him.

– Second, the non-conformity of Article 417 §1 of the Civil Code to Article 77 paragraph 1 of the Constitution consists in the different scope of actions to which the responsibility mentioned by these regulations is associated. The Constitution attaches this responsibility only to performing the functions of a public authority, since this is the only justification of stipulating the grounds of compensatory responsibility without guilt. Under Article 417 of the Civil Code, however, the compensatory responsibility is associated with the operation of functionaries who belong to a group more precisely described in this provision. It covers not only employees of the organs of the authorities and administration, but also those working for the national economy, where Article 420 of the Civil Code says: „if the damage was caused by a functionary of a state legal person, that legal person bears the responsibility for this damage instead of the State Treasury.”

This regulation in an unjustified way differentiates the legal situation of state legal persons on the market which radically clashes with the system of market economy adopted in the Republic of Poland (compare Article 20 and 64 paragraph 2 of the Constitution). It is a relic of the system of the People's Republic of Poland where the sphere of public and private law and, by this, the functions described as dominium, were inseparably interweaved with the function described as imperium. Further maintaining of this notion in the Republic of Poland, in the context of its Constitution, seems to be no longer possible.

– Third, the basic structure of the both compared norms is different. Article 77 paragraph 1 of the Constitution associates the responsibility described in that article directly with the unlawful action of a public authority organ, whatever its position, and especially its position in the hierarchy of those organs. On the other hand, the responsibility referred to in Article 417 of the Civil Code is based on the concept of responsibility for actions of a better defined group of functionaries, that is, persons having some specific features.

These differences of concept lead not only to establishing different grounds for the responsibility (in relation to the premise of guilt) but also to a different definition of subjects responsible for damages under Article 417 *et sec.* of the Civil Code and Article 77 paragraph 1 of the Constitution.

President of the Civil Law Codification Commission then presented a reasoning for the statement determining the non-conformity of Article 418 of the Civil Code to Article 77 paragraph 1 of the Constitution.

The provision of Article 418 of the Civil Code leads to a significantly stricter premises of the State Treasury's responsibility in cases where the damage was caused by a state functionary as a result of issuing a decision or order. In such a situation, the State Treasury's responsibility is limited in two ways: 1) down to a qualified form of unlawfulness (when „a law violation prosecuted in a criminal or disciplinary procedure occurs”) and, additionally 2) only to a qualified way of establishing the guilt („the damage perpetrator's guilt was established by a court judgement or disciplinary decision, or it was recognised by an organ superior to the damage perpetrator”).

Moreover, limiting the State Treasury's responsibility down to the mere qualified form of unlawfulness should be recognised as in non-conformity to the Constitution; Article 77 paragraph 1 of the Constitution does not indicate such a limitation, hence it cannot be introduced by an ordinary law.

Furthermore, introducing a peculiar „pre-judicial” procedure as a condition for claiming compensation violates the provision of Article 45 paragraph 1 of the Constitution which grants the right of court to everyone. Proceedings mentioned in Article 418 §1 of the Civil Code are not being held as a result of a compensation claim and not with its participation, not to mention the fact that not all of them are closed with a court decision.

Such making the premises of State Treasury's responsibility stricter, as provided for in Article 418 §1 of the Civil Code, has almost completely prevented the harmed persons from making their claims in a situation where the damage was caused by an unlawful administrative decision. This is the reason why the legislator made a number of separate provisions (compare Article 153, 160 of the Code of Civil Procedure, Article 60 of the High Administrative Court Act) to establish separate grounds for the responsibility of the State Treasury in this respect which, among other things, provide for the responsibility without guilt. These are, however, partial solutions, internally inconsistent, and carrying an purport that is not absolutely clear. We cannot recognise their overall exclusion of the application of Article 418 of the Civil Code which does not conform to the Constitution.

Further part of the Opinion presents the state and directions of works of the Civil Law Codification Commission.

The Civil Law Codification Commission started works on a new regulation of issues addressed by the purport of Article 417-421 of the Civil Code as early as in 1997, soon after the Constitution of the Republic of Poland had entered into force. The Committee considered the issue urgent because of Article 236, paragraph 1 of the Constitution which required the Council of Ministers to submit to the Sejm (within 2 years after the Constitution's entering into force) draft laws indispensable for its application. According to the Codification Commission, the very provisions of Article 77 paragraph 1 required the preparation of the above-mentioned draft because the Article 417-421 of the Civil Code in force did not conform to the Constitution.

The draft compiled by the Codification Commission provided not only for new regulation of the issues covered by the set of provisions given in Article 417-421 but also an amendment of Article 416 of the Civil Code which the Justice Minister directed to the path of inter-ministerial co-ordination. Then, on 20 January 1999, It was positively evaluated by the Legislative Council at the Prime Minister, which said in the conclusion that „the new text of Article 417 of the Civil Code, proposed by the Minister of Justice, corresponds with the provisions of the Constitution and is necessary for the conformity of the Civil Code's provisions to the Constitution.”

It has also been approved by the Social Affairs Committee of the Council of Ministers as a result of which it was presented at the meeting of the Council of Ministers where the Minister of Economy, unexpectedly, raised objections against Article 416 of the Civil Code and the Minister of Finance blamed it for failing to determine the exact (numerical) value of

the financial consequences of the bill. In this connection, the Prime Minister submitted the bill to further co-ordination by the Ministries and the process started. But, due to the Council of Ministers' preoccupation with work on other urgent bills, this draft was never again debated by that forum.

After the new government was established in November last year, the Civil Law Codification Commission submitted to the Legislative and Legal Department of the Ministry of Justice a draft of broad amendments in the Civil Code, covering also new regulations of the issues addressed by Article 417-421 of the Civil Code but without the challenged Article 416 of the Civil Code that regulates a different problem. Proposals included in the draft do not depart from the previously established text. However, in connection with the change of the cabinet and parliament, the legislative process must be started all over again.

According to Professor Z. Radwański, the question of potential negative financial consequences ensuing from the amendment of Article 417 *et sec.* of the Civil Code, should not have an effect on the evaluation of these provisions with the Constitution and on the evaluation of the proposed amendments intended to bring the Civil Code's provisions to conformity to the Constitution.

The Codification Commission assumed that central budget expenditures made under this law cannot be estimated even roughly as they depend on factors that cannot be defined in advance, such as: the number of unlawful actions carried out by the public authority organs and the size of damages suffered by the harmed persons.

We can only approximate that the introduction of the new regulation will not cause any major change in the hitherto expenditures of the State Treasury.

The Codification Commission indicated that in the scope covered by the regulation of Article 417 and 418 of the Civil Code, the proposed changes are going in the following direction: a) responsibility is associated solely with performing public authority; b) it is borne by: the State Treasury or an appropriate unit of territorial self-government that has a legal personality, or other appropriate person performing public authority; c) this responsibility arises when a functionary or employee of the person indicated in item b) or another person participating in performing public authority causes a damage by its unlawful conduct; d) if the damage was caused as a result of enacting a normative act or issuing an individual decision in a proper procedure, the compensation for the damage can be claimed as soon as the normative act loses its binding force for being in non-conformity to the Constitution, an international agreement or an act of parliament or in a situation of determining non-conformity to the law of a decision issued on the grounds of the normative act which does not conform the Constitution, an international agreement, or an act of parliament. Repairing a damage can take place after the non-conformity to the law of a given decision is determined under the principles set forth in the act. At the same time, Article 153, Article 160, and Article 161 §3-5 are envisaged to be abolished from the Code of Administrative Procedure.

III

At the hearing on 4 December 2001, the duly authorised representatives of the participants in the proceedings confirmed their positions taken in their written statements.

The representative of the Commissioner for Citizens' Rights supported the position of the Civil Law Codification Commission as regards the impossibility to co-ordinate the text of Article 417 of the Civil Code with Article 77 paragraph 1 of the Constitution.

The representative of the complainants, the married couple of Małgorzata and Ryszard B., corrected the complaint by motioning for the determination of the non-conformity of Article 418 of the Civil Code to Article 77 paragraph 1 in connection with Article 64 of the Constitution of the Republic of Poland.

IV

The Constitutional Tribunal considered the following:

1. Having analysed the constitutional complaint of Romuald K., the Constitutional Tribunal shared the opinion of Public Prosecutor-General that the final solution to the complainant's case, that is, the Supreme Court's decision of May 15, 2000, file sign. II CKN 293/2000 dismissing the appeal to a court of cassation, was issued under the provision of Article 417 of the Civil Code which offers a basis for compensation claims resulting from the responsibility of the State Treasury for damages caused by the state functionaries performing their duties. The Supreme Court's considerations related to the „unlawful character of decisions” being the basis for the compensation claim pertain to the charges in the cassation against the refusal to direct application of the norm set forth in Article 77 paragraph 1 of the Constitution of the Republic of Poland by the courts which examined the case. In this situation, the Constitutional Tribunal, in line with the recorded jurisdiction, in relation to the constitutional complaint of Romuald K., will examine the charge of non-conformity of Article 417 of the Civil Code to Article 77 of the Constitution of the Republic of Poland because only this regulation was the basis for the final court decision that Romuald K. was not eligible for a compensation from the State Treasury for his unlawful dismissal from Militia service.

The charge of non-conformity of Article 418 of the Civil Code to Article 77 paragraph 1, and additionally to Article 64 of the Constitution of the Republic of Poland, will be considered by the Constitutional Tribunal regarding the constitutional complaint of the married couple of Ryszard and Małgorzata B., submitted to the Constitutional Tribunal in the context of different facts.

2. The Constitutional Tribunal found it expedient to refer to the principle of direct application of the Constitution by common courts, although it is not the subject of constitutional complaints. This principle, however, served as a basis of Romuald K.'s cassation claim in its part that raised the charge of refusal to solve the case directly on the grounds of Article 77 paragraph 1 of the Constitution, that is, with overlooking the Civil Code's provisions which, in the opinion of the complainant, determine the premises of State Treasury's responsibility in a way that does not conform to the Constitution. Considering the significance of this principle in the existing legal system, the Constitutional Tribunal states that a recorded jurisdiction has already been established in this field (*judgements with file Ref. No.: P. 12/98, P. 8/99, P. 8/00, U. 4/97, SK 19/99*) and it was best expressed in the judgement of the full bench on 31 January 2001, file Ref. No. P. 4/99: „In no case the principle of direct application of the Constitution (Article 8 paragraph 2 of the Constitution) (...) can make the grounds for the refusal to apply the statutory regulations by the court.” This view is shared by most of the scholars of the authority (compare i.a., A. Mączyński, *Bezpośrednie stosowanie Konstytucji przez sądy [Direct application of the Constitution by courts]*, PiP 2000, No 5; A. Wasilewski, *Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP [The presentation of legal questions to the Constitutional Tribunal by the courts (Article 193 of the Constitution of the Republic of Poland)]* PiP 2000, No. 5; St. Rudnicki, *Glosa do wyroku SN z 7 kwietnia 1998 r., [A gloss to the Supreme Court's judgement of April 7, 1998, I PKN 90/98]*, Official Gazette of the Republic of Poland Monitor Polski – MP 2002 No. 11). The directness of application of the Constitution does not mean its competence to check the constitutionality of the existing law by the courts and other law enforcing organs. The procedure of this control was very clearly and unequivocally determined by the Constitution itself. Its Article 188 reserves the judgements in these cases for the exclusive competence of the Constitutional Tribunal. The presumption of conformity

to the constitution may be overthrown only by a judgement of the Constitutional Tribunal and binding the judge by the act of parliament provided in Article 178 paragraph 1 of the Constitution is valid as long as this act of parliament remains in force (compare *Judgement of the Supreme Court of 25 August 1994, Ref. No. I PRN 53/94*, OSN PiUS 1994, book 11 item 179; *Judgement of the High Administrative Court of November 27, 2000, Ref. No. II SA/Kr 609/98*). Considering the purport and scope of regulations pertaining to the State Treasury's responsibility we can note, by the way, that, there were no premises whatsoever to recognise that there was a symmetry of purport between the constitutional norm and the provisions of the Code which assuming the existence of non-conformity between the Code's provisions and the Constitution would permit stating that the Code's regulations have lost their power under the principle of *lex posterior derogat legi priori* at the time of entering into force of the new Constitution.

The institution of a legal question, regulated by Article 193, is a major component of the model of review of the conformity of laws to the Constitution adopted by the Constitution of the Republic of Poland after the other European states. The regulation based on Article 188 and 193 of the Constitution, interpreted in the light of the principle of the state ruled by law set forth in Article 2 of the Constitution, is not excluded by the judges' subordination to the Constitution and acts of parliament prescribed in Article 178, paragraph 1 of the Constitution. This provision does not directly define the way of solving conflicts between the Constitution and the acts of parliament but it completes the regulation envisaged in Article 193 of the Constitution by introducing the obligation to use the power granted by this provision in each case, whenever the court comes to a conclusion that the norm providing the basis for the judgement fails to conform to the Constitution (compare J. Trzeciński, *Orzeczenia interpretacyjne Trybunału Konstytucyjnego [Interpretation sentences of the Constitutional Tribunal]*, PiP 2002, No 1). Also, the courts are not excluded from the principle set forth in Article 190 paragraph 1 of the Constitution which says that the judgements of the Constitutional Tribunal have the generally binding power.

3. Considerations over the evaluation of the conformity of Code's regulations to the Constitution in the field of the State Treasury's responsibility should be preceded by a statement that the problems of public authority's responsibility has a long tradition in Polish legal system, a tradition going back to the March Constitution of 1921. A respective provision of Article 121 of the March Constitution had the following wording: „Every citizen has the right to get compensation for a damage caused to him by organs of the state, civil or military authority, resulting from an official action which did not conform to the law or its service duties. The state is responsible for the damage in solidarity with other guilty organs; submitting a complaint against the state and the officials is not subject to any permission from the public authority. Municipalities and territorial self-government bodies and their organs are held responsible in the same way. The implementation of this principle is determined by separate acts of parliament.” The Second Republic of Poland was one of the first European countries that granted a constitutional rank to the principle of responsibility of the public authority and it was one of the first group of states that – in a way continuing the trends developed by the French jurisdiction by *Conseil d'Etat* – rejected the principle previously established in most European legal systems under which the states were not responsible for the damages caused by the action related to performing the function of a public authority. Although the provision of Article 121 of the March Constitution was never unfolded by detailed regulations at the level of parliamentary acts, it nonetheless exerted influence on the development of legal outlooks on the question of public authority's responsibility, among other things, on the interpretation of regulations governing the delict responsibility in such a direction as to cover with its application scope at least some damages caused by the action of the public authorities (compare J. Langrod, *Praworządność w problemie odszkodowania, o*

odpowiedzialności państwa za naruszenie prawa przez jego organy [Observance of the law in the problem of compensation, about the state's responsibility for breaching the law by its organs], Warszawa, 1926).

During the post-war era, a return to the concept of the state's compensatory responsibility became a fact only after the October 1956 upheaval, in the form of the Act of 15 October 1956 on the Responsibility of the State for Damages Caused by State Functionaries, (Journal of Laws – Dz.U. No. 54 item 243). Later on, this Act was almost completely incorporated in the Title VI of the Book III of the Civil Code as Articles 417-421.

Taking into account the history of the development of the concept of the compensatory responsibility of public authority in the Polish law, entering into force of the Constitution of 1997, combined with the new approach to this responsibility which had no equivalent in the provisions of the previous Constitution, in no case can be treated as just a confirmation or a kind of proclamation of the idea of compensatory responsibility in this area. For the confirmation alone of such a responsibility, without defining its principal elements, would be deprived of any guaranteeing meaning if there has been no doubt about the principle long ago adopted by the Polish legal system, that the state can be held responsible for damages caused by the operation of the public authority. An important innovation of this regulation must, therefore, be looked for not in the confirmation of the state's responsibility (because this is unnecessary) but in mapping out the limits within which this responsibility can take place. In this direction, that is looking for independent normative elements of regulation set forth in Article 77 paragraph 1, the efforts were made in the doctrine after the new Constitution's entering into force (compare, among other items, E. Łętowska, *W kwestii zmian przepisów kc o odpowiedzialności za szkody wyrządzone działaniem władzy publicznej [On the issue of amendments to the Civil Code's regulations on responsibility for damages caused by the operation of public authorities]*, PiP 1999 No 7; M. Kępiński, R. Szczepaniak, *O bezpośrednim stosowaniu artykułu 77 ust. 1 Konstytucji [On the direct application of Article 77 paragraph 1 of the Constitution]*, PiP 2000, No 3; P. Granecki, *Odpowiedzialność cywilna Skarbu Państwa za szkodę wyrządzoną działaniem swojego funkcjonariusza (wybrane zagadnienia) [The State Treasury's civil liability for damages caused by its functionary (selected questions)]*, Palestra 2000, No. 11-12; M. Safjan, *Odpowiedzialność cywilna Skarbu Państwa za szkodę wyrządzoną działaniem swojego funkcjonariusza (wybrane zagadnienia), [The state's responsibility under Article 77 of the Constitution of the Republic of Poland]*, PiP 1999 No 4). This direction of interpretation is fully convergent with the directive of the Constitution's interpretation, according to which its provisions have their own normative significance and their sense cannot be interpreted by statutory regulations. Adopting an opposite assumption would be equal to distortion of the relations between the provisions of the law within the hierarchical structure of legal norms and, in consequence, would strip the constitutional regulations of their practical protective sense. Thus, the Constitutional Tribunal assumes that the regulation set forth in Article 77 paragraph 1 of the Constitution is not a repetition of the principles developed within the framework of the current law but introduces new independent purports that must be taken into account at the level of statutory regulation – above all that included in the Civil Code. It is, therefore, indispensable to determine the premises of the constitutional right to have the damage repaired when it was caused by unlawful action of the public authority organ, this being a model for the evaluation of statutory regulations pertaining to this area.

The „initial” premise for the compensatory responsibility of the public authorities is the occurrence of a damage. The concept of „damage” used in the Constitution should be understood in a way accepted by the civil law as a branch of law where regulations specifying the mechanism of functioning of the compensatory responsibility are localised. The scope of the compensation, especially the components of the damage that are subject to compensation,

should be determined on the basis of respective Civil Code regulations, especially its Article 361 §2. Consequently, we should assume that this is true for every detriment to the legally protected goods of a given subject having both, the property and non-property character. One cannot, therefore, exclude the responsibility of the public authorities for breaching the citizen's personal good, including the possibility of the harmed person to make a claim seeking a financial compensation for the suffered non-property damage (compare Article 445 and Article 448 of the Civil Code).

The concept of „public authority” in the understanding of Article 77 paragraph 1 of the Constitution, covers all the authorities in their constitutional sense: the legislative, the executive, and the judiciary one. We should emphasize that the concepts of the state organ and the public authority organ are not identical. The concept of „public authority” comprises also institutions other than state or territorial self-government institutions if they perform the functions of public authority as a result of being entrusted to do so or as in the way of delegating these functions to them by an organ of state or territorial self-government authorities. Performing the public authority refers to all forms of activities carried out by the state, territorial self-government and other public institutions which perform a wide variety of activities. Performing such functions is usually, but not always, associated with the possibility of an imperious shaping the situation of an individual. This is true for the area in which the individual's rights and freedoms may be violated by the public authority.

The term „organ” of the public authority used in Article 77 paragraph 1 of the Constitution means an institution, an organisational structure, a public authority unit with whose activities the damage is associated, but not an organ of a legal person in the categories of civil law. Responsibility based on this regulation is borne by the structure (institution) and not persons associated with it (its functionaries). It is essential to establish whether an action by a public authority organ is associated with the implementation of its prerogatives. A formal character of relations between the direct damage perpetrator and public authority is less important. Establishing the status of the person who is the direct damage perpetrator helps to assign the given action to the public authority organ.

The concept of „action” by the public authority organ has not been defined in e Constitution. This concept comprises both, the active behaviour of this organ and failure to act. Individual solutions, such as, decisions, statements, and orders are contained by the scope of active behaviours of a public authority. The concept of a public authority's „failure to act” refers to situations in which the obligation to undertake some action by the public authority is specified by the law and one can establish what exactly the public authority's action would have to be to avoid the damage.

Article 77 paragraph 1 of the Constitution links the obligation to repair the damage only to such action of the public authority organ which is „unlawful.” The concept of an „unlawful action” has a well-established meaning. In the context of constitutional regulation, it should be understood as the opposite to a behaviour conforming to orders and bans resulting from a legal norm. „Unlawfulness,” in the light of Article 77 paragraph 1 of the Constitution, must be understood precisely in line with the constitutional definition of the source of law (Article 87-94 of the Constitution). This concept is, therefore, narrower than the traditional concept of unlawfulness in the sphere of civil law which comprises – apart from violations of the legal regulations, also violation of moral and customary standards described by the term „principles of social life” or as the „good manners.” We should emphasize, however, that there are no constitutional objections to link, under the ordinary legislation, the concept of compensatory responsibility of public authorities with the traditional concept of unlawfulness established on the plane of civil law.

According to Article 77 paragraph 1 of the Constitution, only the „unlawful” operation of public authority organs makes the grounds for responsibility, so it does not matter whether

there was a subjective guilt behind this action. This provision is included in a group of regulations governing the constitutional measures of protection of freedoms and rights. A possible recognition of the admissibility of instituting of additional premises for the responsibility by statutory regulations, such as the guilt, would lead to limiting the constitutionally defined framework of protecting these freedoms and rights. The significance of Article 77 paragraph 1 of the Constitution consists in the fact that in relation to the unlawful actions of public organs it establishes stricter conditions of compensatory responsibility when compared to the general principles based on the premise of guilt (Article 415 of the Civil Code). This departure from the general rules is justified by a special, subordinate role of the public authority organs that are there to protect the freedoms and of human and citizen's rights.

4. The above-described new and fully independent approach of Article 77 paragraph 1 of the Constitution, in fact, boils down to associating the compensatory responsibility with an illegal (unlawful) action of the public authority organ. Today, the re-constructed normative purport of Article 77 of the Constitution should be confronted with a solution adopted in the regulation of a key importance for the State Treasury's responsibility, namely the purport of Article 417 of the Civil Code.

To start with, it should be noted, that the scope of application of Article 77 paragraph 1 of the Constitution and Article 417 of the Civil Code are principally different:

– first, the compensatory responsibility adopted by the constitutional regulation is linked with the activity of every public authority organ and this does not correspond with the approach adopted in the Code, where responsibility is localised on the part of the State Treasury (State agencies with the status of a legal person). In this respect, there is a relation of criss-crossing: on the one hand not every State (municipal) agency with the status of a legal person is a part of public authority organs, on the other – there are non-State (non-municipal) agencies with the status of a legal person that perform certain prerogatives of public authorities;

– second, the compensatory responsibility set forth in Article 77 paragraph 1 of the Constitution is not associated with the operation of specific functionaries as required by Article 417 of the Civil Code (a damage caused by the functionary performing his duties) but it is associated with the operation of an organ of the public authority. Hence, it does not matter what was the formal situation (formal status) of the direct damage perpetrator in the organ's structure.

Differences in the approach to the subjective scope of responsibility do not *per se* necessarily prove the unconstitutional character of the Code's provisions. For the Constitutional Tribunal is not examining the entire legal mechanisms of public authority organs' responsibility, but a specific part of this responsibility regulated by Article 417 of the Civil Code, that is, one associated with the responsibility of the State Treasury. Therefore, the evaluation focuses on that part of the regulation which is common for both provisions. There can be no doubt that any cases where state organs actions related to the imperium (and even broader – associated with performing public functions to which the concept developed in the French doctrine corresponds well in the context of the *Conseil d'Etat* jurisdiction, known as *actes de services*) leading to a damage caused by the functionaries are comprised in the area of compensatory responsibility defined in such a way and common for both, Article 77 paragraph 1 of the Constitution and Article 417 of the Civil Code. In this scope, a solution adopted at the Code level must not narrow down the responsibility of the organs of public authorities in relation to that set forth in the constitutional regulation. If it happened to turn out, in tune with Article 417 of the Civil Code, that responsibility for damages caused by functionaries is linked with some additional premises other than those in Article 77 paragraph

1 of the Constitution, it would be equal to its narrowing down and we would have to recognise that the Code's formula does not conform to the Constitution.

According to the recorded line of judicature established on the grounds of Article 417 of the Civil Code since the resolution of the Supreme Court of 15 February 1971, file Ref. No. III CZP 33/70 (guidelines of the administration of justice and court practice regarding the responsibility of the State Treasury and state legal persons for damages caused by state functionaries) a necessary premise of the State Treasury's responsibility under Article 417 of the Civil Code is the guilt of a functionary. We have to note here that the question of the functionary's guilt – similarly as the independence of the grounds of the state's responsibility adopted by Article 417 of the Civil Code, has earlier caused major doctrinal discrepancies and was subject to non-homogenous decisions. Introduction of the premise of guilt as a necessary component whose occurrence allowed making a compensation claim against the State Treasury did not get support from the semantic interpretation and was, above all, a result of a systemic interpretation which placed stress on the priority of the general principle of guilt (Article 415 of the Civil Code) as the grounds for responsibility for prohibited deeds. This approach to responsibility under Article 417 of the Civil Code compared with the above-reconstructed purport of Article 77 paragraph 1 of the Constitution significantly narrows the State Treasury's responsibility. This assessment – as for the principle – is not altered by the major easing of the requirement of the functionary's guilt consisting in adopting in the jurisdiction (with full doctrinal approval) of a concept known as the anonymous or organisational guilt which enabled the occurrence of the state's responsibility also in the situation when the damage was associated with the conduct of an unidentified functionary (compare: many comments on this issue in literature, among other works, A. Szpunar, *Odpowiedzialność Skarbu Państwa za funkcjonariuszy* [*Responsibility of the State Treasury for its functionaries*], Warszawa 1985; R. Stępkowski, *Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez funkcjonariuszy państwowych* [*Responsibility of the State Treasury for damages caused by state functionaries*], Wrocław 1985). For this did not remove the exclusion of State Treasury's responsibility in each case where despite obvious unlawfulness of the functionary's conduct there were circumstances on his side which prevented assigning guilt to him in the face of the existing facts indicated by Article 425 of the Civil Code (excluding the guilt for reasons specified in the article, such as the mental or physical condition). Resting the potential compensatory claim against the State Treasury on the principle of fairness (Article 419 of the Civil Code) does not offer a satisfactory alternative in such a situation, considering the narrow approach to these claims (in fact only damages to the person) and the freedom of the judging organ obligated to adjudicate a compensatory claim only when this is justified by the principles of community life. Maintaining the solution that provides for having the functionary's guilt as a necessary premise cannot, therefore, be reconciled with the clear purport of the constitutional norm which links this responsibility only with the condition of unlawful action.

Before the new Constitution entered into force, the position of the Supreme Court's guidelines of 1971 could not be questioned from the viewpoint of other general and hierarchically superior solutions existing outside the civil law system. This situation was radically changed by entering into life of the new Constitution, determining the independent premises for responsibility for damages caused by an unlawful action of public authority organs.

In the context of the new normative circumstances, the Constitutional Tribunal had to consider whether the understanding of this regulation in the jurisdiction practice as was established by 1997 should be the reference point for the evaluation of constitutionality of Article 417 of the Civil Code or whether it is possible today to adopt such interpretation of the regulation that would correspond with the constitutional regulation. The former option would

mean the necessity to recognise the regulation set forth in Article 417 of the Civil Code as not conforming to the Constitution. In the opinion of the Constitutional Tribunal, such a solution is not necessary and this is supported by the following reasons:

- first, recognising the guilt of a functionary as a necessary condition of the State Treasury's responsibility under Article 417 of the Civil Code received no support – as has been shown above – from the literal text of the regulation. The abolishing of the guilt from the list of premises on which the State Treasury's responsibility depends will not, therefore, lead to an interpretation contradictory to the clear wording of the provision and, moreover, it will to some extent restore one of the possible interpretation directions allowed for before the final crystallising of the court practice directions in relation to the resolution of the Supreme Court of 1971. We can even note, by the way, that this interpretation direction better corresponds with the statement adopted in the above-indicated Supreme Court's guidelines of 1971 which spoke of the independent character of the grounds for the State Treasury's responsibility in relation to other *ex delicto* grounds for responsibility;

- secondly and more importantly, the interpretation of legal provisions cannot have a static nature and, in line with the directive never questioned in the jurisprudence, it should always allow for the supremacy of such interpretation of legal provisions as conforms to the constitutional norm. With the above-established understanding of the premises of responsibility set forth in Article 77 paragraph 1 of the Constitution, there can be no doubt that the „functionary's guilt” does not fit in the list of the necessary premises of the public authority organs' responsibility. A sufficient premise remains – as was indicated above – the unlawfulness of the a public authority organ's action and this, in terms of civil law, means linking the responsibility with an objective premise, that is, the unlawfulness of conduct of the damage perpetrator;

- third, the definition of the interpretation of Article 417 of the Civil Code going in the direction adopted in the judgement finds support in many doctrinal opinions published after entering into force of the Constitution (compare i.a., the above-quoted publications by P. Granecki, M. Kępiński, R. Szczepaniak, E. Łętowska, M. Safjan). This position began to get increasingly more support from court practice which is testified to by, among other things, the decision of the Supreme Court of 26 September 2000, file Ref. No III CKN 1089/00 (Supreme Court's Decisions – OSP 2001, book 4 item 65) which adopted as basis for the evaluation the understanding of Article 417 of the Civil Code adopted by the judgement of the Constitutional Tribunal which excluded the functionary's guilt from the necessary premises of the State Treasury's responsibility (compare also *Supreme Court's decision of 15 May 2000, Ref. No. II CKN 293/00*, Supreme Court's decisions – OSP 2000, book 12 item 188).

We should also note that the Constitutional Tribunal abstains in its so-called interpretational judgements from adopting such an interpretation of regulations that would run counter with the recorded jurisdiction and with the doctrinal interpretation (compare e.g., *Judgement of the Constitutional Tribunal's of 8 May 8 on the case Ref. No. SK 22/99*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 4/2000, item 107). In the context of the analysed provision of the Civil Code, one should recognise that the hitherto interpretation of Article 417 of the Civil Code lost its validity at the moment when the new Constitution entered into force. But the development of any integrated and durable jurisdiction line can hardly be noticed in the jurisdiction after that date in relation to the premises of the responsibility of the State Treasury under Article 417 of the Civil Code, although a predominating majority of the doctrine has stood on the side, as has been demonstrated above, of the necessity to change the existing interpretation of this regulation.

The presented arguments do not mean, however, challenging the previous jurisdiction practice established after 1971, before the new constitutional regulations entered into force. We need to emphasize above all the fact that by 1997 there had been no constitutional-level

regulations or any international regulations binding for Poland that would point to the need for abandonment of the guilt of the functionary requirement in public authority's responsibility cases.

There is no doubt, however, that the direction of interpretation of Article 417 of the Civil Code, established by the judgement and conforming to the constitutional regulation, clearly corresponds with trends going on in European countries and the currently developing concept of responsibility of the public authority. This is unequivocally suggested by the decisions included in the Council of Europe's recommendations of 1984 concerning the responsibility of public authorities (see M. Safjan, *Standardy Prawne Rady Europy [The legal standards of the Council of Europe]*, vol. II, Warszawa 1995 p. 262 *et seq.*) as well as the jurisdiction of the European Tribunal of Justice in Luxembourg (compare e.g. *decision of 2 December 1971 concerning the Schoeppenstedt/Council case 5/71*), which widely adopts the state's responsibility for actions (failure to act, also in the legislative sphere) which do not conform to the Community law regulations.

As was emphasised above, the position taken by the Constitutional Tribunal pertains only to the legal solution set forth in the present approach of Article 417 §1 of the Civil Code. However, we must not fail to notice the fact that the problem of compensative responsibility of the public authorities requires a comprehensive approach in the Polish legal system, an approach allowing a clear separation of the responsibility of state (municipal) legal persons that are not performing the functions of public authority organs from the responsibility of other public institutions that are performing these functions. It is also justified to abolish the persisting doubts about the responsibility of public institutions of other than state or municipal nature, to which performing of some prerogatives of public authorities was delegated. The proposed solutions presented by the Civil Law Codification Commission during the proceedings before the Constitutional Tribunal are going in this direction.

While evaluating, on the base of the charges included in the complaint of Romuald K., the conformity of Article 417 of the Civil Code to Article 77 paragraph 1 of the Constitution, the Constitutional Tribunal recognised that the purport of this provision does not include any premises for the State Treasury's responsibility for state functionaries that would fail to conform to the Constitution. What does not conform to the Constitution is only the broad interpretation, established before the Constitution entered into force, of the premises of State Treasury's responsibility for the state functionaries. A precise linguistic interpretation of Article 417 of the Civil Code shows its conformity to Article 77 of the Constitution. The Constitutional Tribunal voiced the priority of the interpretation of the challenged regulation's conformity to the Constitution considering the fact that an unconstitutional interpretation of this regulation had emerged before the Constitution entered into force. The interpretation of Article 417 of the Civil Code, adopted in the sentencing part of the Constitutional Tribunal's judgement is generally binding on the grounds of Article 190 paragraph 1 of the Constitution.

3. Proceeding to the evaluation of the conformity of Article 418 of the Civil Code to the Constitution, that is, the provision challenged in the latter of the two jointly analysed constitutional complaints of the married couple of Ryszard and Małgorzata B., we should first of all note that this regulation was intended as an important exception from the concept of the State Treasury's responsibility set forth in Article 417 of the Civil Code and its principal intention was, as a result, to introduce additional remises not provided for in Article 417. Article 418 §1 of the Civil Code links the adjudication of compensation with a qualified unlawfulness and the functionary's guilt.

The challenged provision regulates the scope of responsibility the State Treasury for the deeds of the authorities (decisions and orders, including court judgements). Since the time when the State Treasury's responsibility for damages caused by state functionaries was introduced and since the adoption of this regulation into the Civil Code, the wording of this

provision has not changed. From the very beginning, the State Treasury's responsibility for a damage caused by a state functionary depended, and continues to depend now, on meeting premises independent of the harmed person and ones variable *in concreto* over time. For this responsibility depends on the result of the peculiar „pre-judicial” procedure that is a guilty sentence (double qualified) on the state functionary in a criminal or disciplinary procedure if at issuing the decision or order there was a violation of law prosecuted in criminal or disciplinary procedure. The harmed person has no direct influence on initiating the „pre-judicial” procedure. A criminal or disciplinary proceedings against the state functionary may be instituted only by organs specified by the law. This type of conditions are present in the constitutional complaint under study which prevented claiming a compensation from the State Treasury. The unlawfulness of the action of state functionaries in relation to the complainants, the married couple of Małgorzata and Ryszard B., was adjudicated – in the appropriate procedure – by the High Administrative Court. The common court that had examined the question of compensation from the State Treasury did not investigate this circumstance considering it as unquestioned. The complainants proved the emergence of a damage, determined its amount and a causative relation with the unlawful action of a state functionary. The grounds on which their claims were rejected was the absence of a statement obtained in an appropriate procedure, of the guilt of the state functionary who had issued the decision, that is meeting of one of the premises of responsibility of the State Treasury for damages caused by a functionary, prescribed by Article 418 of the Civil Code.

The evaluation of the principles of the State Treasury's responsibility for unlawful decisions and orders must be completed by indicating, above all, the regulations included in the provisions of the Code of Administrative Procedure and the High Administrative Court Act, which significantly modify the general civil law principles in this respect. In the context of these provisions, major interpretation doubts persist in relation to, among other issues, the question of the premise of the functionary's guilt because these solutions are not homogenous. Some include a reference to the provisions of the Civil Code (Article 153 §1 Code of Administrative Procedure) this meaning – in the light of the dominating interpretation – a reference to Article 417 of the Civil Code (compare *the Supreme Court's resolution (7) of 26 January 1989, Supreme Court's Decisions – OSN 1989, item 129*). Some, excluding direct application of Article 418 of the Civil Code, provide – in tune with the dominating interpretation trend – an independent basis for responsibility (compare Article 160 Code of Administrative Procedure in relation to the nullity of decision, similarly, Article 31 paragraph 4 of the High Administrative Court Act) separate from the criteria and premises of not only art 418 but also Article 417 of the Civil Code (compare, A. Szpunar, *Znaczenie art. 160 kpa jako podstawy odpowiedzialności odszkodowawczej [The role of Article 160 Code of Administrative Procedure as a basis for compensatory responsibility]*, PiP 1990 No 9). Generally speaking, one should recognise that under the regulations adopted in relation to administrative decisions, the legislator, in principle, departed from the condition of a „double qualified” guilt set forth in Article 418 of the Civil Code. The provision of Article 418 of the Civil Code will not be applicable also to damages caused during executory proceeding performed by the court executive officer (Article 769 of the Code of Civil Procedure – in this case the premise is a deliberate action or negligence in the conduct of the court executive officer) and to the decisions leading to an unjustified conviction or temporary arrest as part of a penal procedure (compare Article 552 Code of Criminal Procedure – in this case the doctrinal view on the independence of the State Treasury's responsibility from the state functionary's guilt premise is correct).

However, there is no doubt that beyond the sphere of specific regulations, there remains a still broad area of decisions and orders covered by the application of Article 418 of the Civil Code (e.g., administrative decisions, including those issued as part of the tax

procedure, that is, on the grounds of the Tax Law, and also decisions and orders in all other procedures except for the administrative procedure). In these cases, the requirements prescribed by Article 418 of the Civil Code are fully applicable.

It should be emphasised that the subject of the Constitutional Tribunal's evaluation in the present proceeding are only the regulations of the Civil Code, not any other, above-indicated specific solutions pertaining to the problem of the responsibility of the public authority for its faulty decisions and orders.

A comparison of the premises of the State Treasury's responsibility set forth in Article 418 of the Civil Code and referring to the concept of double qualified guilt with the provision set forth in Article 77 paragraph 1 of the Constitution shows a clear non-conformity that can be abolished only by the elimination of the challenged provision from the legal system. The opinion on the unconstitutionality of this provision was frequently voiced in civil law literature (compare i.a., the above-quoted statements of E. Łętowska, P. Granecki, M. Kępiński and R. Szczepaniak). Elimination of Article 418 of the Civil Code from the legal system as a result of the Constitutional Tribunal's judgement determining its non-conformity to the Constitution means that the responsibility of the State Treasury for the action of public organs consisting in issuing unlawful decisions or orders will result from the general premises of responsibility provided for in Article 417 of the Civil Code. This, however, does not rule out the application in the present legal system of other extra-statutory grounds for compensatory responsibility, present in the above-mentioned specific provisions. The legislator's task is to introduce an overall integrated regulation of these problems by way of adequate modifications in the relevant provisions, thus adjusting them to the requirements of Article 77 paragraph 1 of the Constitution.

At the same time, it must be emphasised that the establishing of a new legal situation in the area of the analysed responsibility of the State Treasury, as a result of the Constitutional Tribunal's judgement, must not be understood as providing grounds for claiming compensations in relation to any faulty decision or order subject to instance or court supervision. There is no doubt that the question of determining non-conformity to the law of individual solutions that may provide grounds for the state's compensatory responsibility should be clearly regulated by the act of parliament – since only this can eliminate in future the principal interpretation discrepancies and lack of integrity in the court practice. Finally, it should be noted that the new legal situation will not open the possibility to challenge the normative acts as acts that do not conform to the law as long as they are not removed from the legal system in a Constitution-prescribed procedure, because of their non-conformity to the Constitution, an international agreement, or a parliamentary act.

4. The Constitutional Tribunal recognised that in a court process preceding the submission of the constitutional complaint by the married couple of Małgorzata and Ryszard B., there was a violation of a constitutional right of the complainants to get a compensation guaranteed by Article 77 paragraph 1 of the Constitution, as a result of a decision made on the grounds of a provision set forth in Article 418 of the Civil Code which did not conform to the Constitution. For the fundamental provision of the regulation given in Article 77 paragraph 1 is, as for the principle, the independence of the responsibility of the public authority organ for an unlawful action from the premise of the guilt of a functionary, and even more so from the requirement of the peculiar double qualification of the guilt which was introduced by Article 418 of the Civil Code.

It should be also noted that as a result of abolishing of Article 418 of the Civil Code, the State Treasury's compensatory responsibility for a damage caused by a functionary through issuing a decision or order, will be developed on the grounds of the general formula given in Article 417 of the Civil Code.

5. The Constitutional Tribunal did not share the opinion of the complainants that the provision of Article 418 of the Civil Code also did not conform to Article 64 of the Constitution. Article 418 of the Civil Code pertains to the responsibility of the State Treasury for damages caused by state functionaries as a result of issuing a decision or order, that is, a damage caused by the action of the public authority, while the Constitution ensures protection against unlawful action of an organ of public authority in Article 77 paragraph 1 included in the Chapter „Means of protection of freedoms and rights.” This is a special constitutional guarantee of the protection of the freedoms and rights violated by unlawful action of public authority organs. However the right to claim compensation for a damage caused on property results from the general principle of property protection, the special constitutional norm given in Article 77 paragraph 1 is a sufficient model for the evaluation of the challenged provision and, therefore, there is no need to analyse its conformity to the general norm of Article 64 of the Constitution that ensures the protection of property and other property rights.

For these reasons, the Constitutional Tribunal adjudicates as in the sentencing part of the judgement.