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Tort Liability of Public Authorities in Light of the Legal Doctrine of Stanislaw Kasznica's Era and Contemporary Doctrine: The Remarks of a Civil Law Specialist

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Abstract
The author of the text notes that the development of administrative law and its science at the turn of the 19th and 20th centuries was related to the development of the law on tort liability of public authorities. This is most evident in the example of French law. It is one of the few cases where the science of administrative law and administrative court judgments contributed to the development of civil law and its science. It is about the issues of tort liability of legal persons characterized by an extensive organizational structure. Therefore, it makes sense to analyze the issue of tort liability of public authorities in connection with the analysis of the scientific achievements of Stanisław Kasznica, an outstanding Polish specialist in administrative law. The author claims that the publications of Stanisław Kasznica, especially his textbook *Polish Administrative Law*, first edition 1943). influenced the development of both Polish administrative law and the law on tort liability of public authorities. In particular, i.a. under the influence of this author's position, the opinion that the tort liability of public authorities is of a civil law and not administrative law nature has become established in Poland. The author of the text tries to show that the issue of tort liability of public authorities generates legal problems in every epoch. The problems that exist today differ from those that existed in the times of Stanisław Kasznica. Concluding his arguments, the author puts forward the thesis that the issue of tort liability of public authorities tends to elude the standards of classical civil law. Therefore, these issues should be dealt with by both civil and administrative law specialists.

Keywords
tort liability of public authorities; scientific achievements of Stanisław Kasznica; Stanisław Kasznica; civil law; administrative law

1. Introduction

It might appear that, by choosing this topic, I am aligning my interests with the theme of the conference dedicated to Stanisław Kasznica. This is particularly relevant as Kasznica did not focus his studies specifically on the liability of public authorities for damage, making it challenging to claim it as his specialisation.

However, I aim to demonstrate the legitimacy of addressing this topic in a book dedicated to Stanisław Kasznica. While he did not specialise in this area, he could not overlook it. During his time, the evolution of the regime of public authorities' liability for damage was closely intertwined with the development of administrative law and its scholarship. This connection was not incidental, but marked a profound relationship between these branches of the legal system.

It can be argued that Stanisław Kasznica's life coincided with the formative period of modern administrative law and its scholarship, as well as the development of the regime of compensatory liability of public authorities. In Poland, he stands out as one of the foremost figures contributing to the shaping of administrative law and, to some extent, as I will endeavour to illustrate, to the development of the regime of public authorities' compensatory liability.

Born in 1874, his lifetime overlapped with significant milestones in the evolution of administrative law, such as the landmark Blanco ruling by the French Court of Competence (*Tribunal des Conflits*) in 1873, which played a pivotal role in shaping French administrative law.[1] As is well known, French administrative law exerted a significant influence on the development of administrative law, not only in Romance countries but also in Germany, and to some extent indirectly influenced Polish administrative law. Stanisław Kasznica passed away in 1958, just two years after the enactment of Poland's first comprehensive law – excluding legislation from the partition era on Polish territory[2] – during the period known as the "Gomułka Thaw". This law fundamentally regulated the state's liability for damage caused by its officials.[3]

The 1956 law introduced the principle of state liability for damage, irrespective of whether the damage occurred during the exercise of commanding or non-commanding actions. However, the practical application of this law was initially quite restrictive, contrary to its principles, with significant obstacles to claiming damages for harm caused by administrative acts and court decisions. Additionally, the lack of an administrative judiciary at that time significantly hindered the pursuit of claims against the administration.

2. Administrative law and the administration's liability for damage

On a highly abstract level, it could be argued that the Blanco judgment marked the inception of French administrative law and, more precisely, initiated the process of distinguishing administrative law as a distinct field within the French legal system. This field is characterised by significant autonomy, especially in relation to civil law and civilian traditions, encompassing a wide range of norms that cover virtually all aspects of administrative functioning, including liability for damage. The system of legal

1 See the judgment of the Tribunal des Conflits No. 00012 [1873], <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007605886/> accessed 1 Aug 2024.

2 This refers in particular to the Prussian law of 1 August 1909 on liability for officials and the law of 22 May 1910 on the liability of the Reich for its officials.

3 See ustawa z dnia 15 listopada 1956 r. o odpowiedzialności Państwa za szkody wyrządzone przez funkcjonariuszów państwowych [Act of 15 November 1956 on State Liability for Damage Caused by State Officials] [1956] JoL 243.

sources in French administrative law is notably unique in Continental Europe, with a pronounced reliance on judicial law ("droit prétorien") established by the Council of State (Conseil d'Etat), widely recognised as the first modern administrative court in Europe.

In essence, the Blanco judgment can be seen as the foundational act of French administrative law. It effectively removed the regime of administrative liability for damage from the constraints of civil law and the prevailing civilian legal principles of that era.[4] The regime of indemnity liability of public authorities has indeed become one of the most significant and foundational aspects of French administrative law.

With this in mind, it is worth revisiting the pivotal aspects of the Blanco ruling. At its core was a jurisdictional dispute between the Council of State and the civil (ordinary) courts. The issue at stake was whether cases seeking compensation for damage caused by administrative actions should be adjudicated by ordinary or administrative courts. Importantly, the case did not involve injury resulting from a typical sovereign act, such as an administrative decision. Instead, it concerned a child, Agnès Blanco, who was struck and injured by a wagon from a state-owned tobacco factory operating under a state monopoly. The Court of Conflicts of Jurisdiction determined that such cases should fall within the purview of the administrative judiciary, reasoning that they involved actions carried out in the public interest – termed "public service" – even if not necessarily through traditional sovereign methods.

This judgment was groundbreaking on a European scale. By transferring cases involving compensation for damage caused by administrative actions to the Council of State and the administrative courts, it reflected the assumption that all actions of the administration possess a certain specificity. Consequently, cases of this nature should not be adjudicated by ordinary courts under the Civil Code.

The Council of State's assumption of jurisdiction over compensation claims from public authorities spurred the development of innovative legal solutions and institutions in substantive law as part of French administrative law. The Council of State, through its jurisprudence, played a pivotal role in shaping these institutions.

However, the Blanco judgment marked only the beginning of a lengthy evolution in French Praetorian administrative law. The Council of State proved to be an exceptionally creative institution, decisively abandoning the distinction between commanding (*actes d'autorité*) and non-commanding (*actes de gestion*) actions. This shift included the development of the concept of "service public", which departed from the prevailing European principle that administrations were not liable for damage caused by authoritative acts at the time.

To this day, France remains a leader in the field of public authorities' liability for damage, thanks to the enduring influence of the Council of State's jurisprudence. Some of the legal solutions pioneered by the Council of State more than half a century ago are still not generally available in Polish law. For instance, unlike in French law, there is currently no comprehensive legal basis in the Republic of Poland for claiming compensation for lawful acts of the administration when no personal injury has occurred.[5]

4 See for example S Rosmarin, *O roszczeniach odszkodowawczych z powodu bezprawia urzędnika administracyjnego* [On Claims for Compensation Due to the Unlawfulness of an Administrative Official] (Zakład Prawa Politycznego i Prawa Narodów UJK 1933) 57, 73, 74. For more on this subject see J Kosik, *Zasady odpowiedzialności państwa za szkody wyrządzone przez funkcjonariuszów* [Principles of State Liability for Damage Caused by Officers] (Ossolineum 1961) 30, note 32.

5 The Council of State, in this type of case, allows the public authority to be liable for damage based on the principle of social solidarity. See the judgment of the Council of State No. 50438 [1963], <https://www.revuegeneraledudroit.eu/blog/decisions/conseil-detat-section-22-fevrier-1963-commune-de-gavarnie-requete-numero-50438-rec-113/> accessed 1 Aug 2024.

In highlighting the achievements of the Council of State, it becomes evident that its impact extends far beyond the borders of France, and even beyond the realm of administrative law in a broad sense. Across Europe, influenced by French solutions, the autonomy of administrative law as an independent branch, especially in relation to detailed legal doctrines of civil law, has been significantly reinforced.

What stands out, particularly from a civil law perspective, is the Council of State's role in advancing civil liability, particularly in complex cases involving large corporations. During the period, the concept of tort liability for legal entities was considered questionable within civil law scholarship. However, the Council of State's jurisprudence helped shape and develop this concept, contributing to the evolution of civil law principles and enhancing the regime of tort liability for legal entities.

Thus, the Council of State's contributions not only elevated administrative law to a position of autonomy and significance, but also influenced the broader legal landscape across Europe, including developments within civil law regarding liability for legal entities. This underscores the Council's profound impact on legal thought and practice beyond national boundaries.[6] In civil law doctrine during that period, there was a notable tendency towards rigidity and a restrictive interpretation of key concepts such as fault and subordination. The Council of State's jurisprudence played a crucial role in breaking away from these entrenched perspectives, often referred to metaphorically as "civil stilts".[7] It was the Council of State that broke with the subjective notion of fault in favour of what it called objectified fault, also known as organisational, nameless or anonymous fault. Consequently, it was no longer necessary to identify the specific officer whose unlawful conduct had caused the damage in order to award damages. This case law also essentially broke with the civilian classical concept of subordinate, in favour of the concept of officer. Thus, the requirement of a strict understanding of subordinates was abandoned. As a result, it also began to abandon, for the purposes of tort liability of legal entities, the classic distinction between organs and those subordinate to them.[8] This marked a fundamental change in thinking and a new perspective on the issue of the tort liability of legal entities, especially those with a very complex organisational structure. In summary, the described output of the Council of State became an inspiration for civilians, who could finally deal with the indicated dilemmas of tort liability of legal entities in the middle of the 20th century.

This is undoubtedly one of the few cases where the development of the science of administrative law, so intensive under Kasznica, resulted in the development of civil law. For it was usually the other way round. As a rule, it was civil law and civilian science that inspired the luminaries of administrative law. At the turn of the 19th century, one of the more widespread methods of developing administrative law was the creation of what were called parallels, i.e. institutions of administrative law modelled on those of civil law. In this way, the idea of administrative-law declarations of intent, administrative-law contract, public subjective rights and, in particular, public-law property or public-law unjust enrichment developed.[9]

6 On the subject of these doubts, W Czachórski wrote extensively in the monograph entitled Liability of legal persons for damage caused by a tort. W Czachórski, *Odpowiedzialność osób prawnych za szkody wyrządzone czynem niedozwolonym. Studium z zakresu prawa obligacyjnego* [Liability of Legal Persons for Damage Caused by Tort. Study in the Field of Obligation Law] (Biblioteka Wydziału Prawa i Administracji Uniwersytetu Warszawskiego 1948).

7 See for example S Rosmarin (1933) 57, 73, 74. For more on this subject see J Kosik (1961) 30, note 32.

8 These postulates have still not been fully achieved in Polish law, see Z Radwański, A Olejniczak, *Zobowiązania – część ogólna* [Liabilities – General Part] (CH Beck 2005) 180.

9 On the development of administrative law through the mechanism of parallelism, see R Szczepaniak in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 91, 512.

3. The research attitude of Stanislaw Kasznica

Stanisław Kasznica wrote relatively little. This may be one reason why his texts are considered deeply thoughtful and had their own weight.

In 1943, in Warsaw, i.e. during the occupation, the first edition of his textbook *Polskie prawo administracyjne* was published in a secret printing house.[10] This textbook should undoubtedly be regarded as part of the achievements of the science of administrative law of the Second Republic. It is significant that, in his textbook, which is not very extensive by today's standards, he devoted a separate section to the issue of the liability of administration for damage (§ 27[11]). This is clear evidence of the recognition of this problem as one of the most important legal issues of the functioning of the administration. The influence of French law and French science can be discerned here. However, it is also significant, and even rather problematic, that this section of the textbook was entitled "Civil liability for damage caused by the administration". The following conclusions can be drawn from this fact:

(1) Stanisław Kasznica thus gave expression to the fact that, being an administrativeist, he was nevertheless inclined to ascribe a civil law nature to the issue of the administration's liability for damage. This is important. The civil law nature of the liability for damage of public authorities was not yet determined in Poland at that time. In the period of the Second Republic of Poland, almost the same number of jurists were of the opposite opinion, i.e. they were inclined, under the influence of French science, to give this problem an administrative character.[12] It is worth noting at this point that, in his textbook, Kasznica presented in a summary of the features of the French regime of public authorities' liability as a fragment of administrative law. It should be assumed, therefore, that his advocacy of the civil law nature of this compensation regime was fully conscious. As can be seen, Stanislaw Kasznica was not familiar with the "battles over affiliation" of particular legal institutions between civilists and administrativists, typical for some lawyers of that epoch. In particular, the administrativists were active in these battles as the representatives of a relatively new, still developing detailed science of law. However, for Stanislaw Kasznica, evidently more important than these battles were efforts "to improve the conceptual and normative system of the law in force"[13];

(2) Stanisław Kasznica was free from "absolutizing"[14] the division into private and public law so characteristic of some representatives of science at the turn of the nineteenth and twentieth centuries.

10 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946).

11 Ibid., 181–184.

12 W Zylber, in his monograph entitled *Wynagrodzenie szkód spowodowanych przez działalności władz publicznych według prawa polskiego* presented many views of Polish lawyers on the nature of the problem of the indemnity liability of public authorities from the 1880s to the early 1930s. This presentation shows that almost half of the jurists were in favour of the public-law nature of this liability. See W Zylber, *Wynagrodzenie szkód spowodowanych przez działalności władz publicznych według prawa polskiego* [Compensation for Damage Caused by the Activities of Public Authorities under Polish Law] (Księgarnia Prawnicza 1932).

13 On the subject of these "battles over affiliation" see J Boć, 'Formy prawne w sferze działań zewnętrznych' [Legal Forms in the Sphere of External Activities] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Prawne formy działania administracji* System Prawa Administracyjnego [Legal Forms of Administration. Administrative Law System] (CH Beck 2011) 258.

14 The phrase "absolutisation of the division between public and private law" occurs in German literature to denote the phenomenon of exaggerating the importance of this division; see H de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht. Dargestellt anhand der privatrechtlichen Regeln über Rechtsgeschäfte und anhand des Allgemeinen Schuldrechts* (Mohr Siebeck 1999) 61.

when administrative law and its doctrine were still in their infancy; this "absolutizing" was an attitude characterised by the assumption that the whole sphere of administrative functioning would be subject exclusively to administrative law, which was to form a closed and self-sufficient legal system. Administrative law understood in this way was to be the core of public law. In its extreme form, this attitude manifested itself in a refusal to apply civil law to administrative actions regardless of the nature of those actions; instead of civil law institutions, at most the indicated parallels were to be applied, i.e. administrative law institutions that were merely the equivalents of civil law institutions. This attitude is also noticeable nowadays; it leads to the creation of "walls of autonomy" of particular branches of the legal system[15];

(3) In Stanisław Kasznica's attitude, one can also discern manifestations of a distinction between administrative law and law of administrative. An expert in administrative law should not only study administrative law *sensu stricto*, but also the law of administration, e.g. the law governing the liability for damage of the administration; this does not mean, of course, that this subject matter cannot be the subject of analyses by civilians, since it is a civil law matter; however, cooperation between civilians and administrators would be advisable here;

(4) Stanislaus Kasznica's stance thus clearly departed from the French paradigm based on the assumption of a strong autonomy of even totality and self-sufficiency of administrative law as a law regulating, as a rule, all or almost all manifestations of administrative activity. As a result, he unquestionably contributed to shaping the Polish model of administrative law, characterised by a weaker autonomy than French or even German law. Therefore, in Polish administrative law, to a much weaker degree than in France and even Germany, there are a number of parallels, i.e. administrative law institutions that are equivalents of civil law institutions, such as administrative liability for damage, public law property, unjust enrichment of public law and administrative law contract. The principle of unity of civil law is definitely stronger in Polish law. This principle appears in Polish law even in a directive (normative) sense, i.e. as an order to qualify as civil law all institutions that have a civil law provenance. In other words, there is a presumption that a given institution has a civil law nature if there is an equivalent under civil law. For example, one can refer to an unspoken presumption in the Polish legal system that a contract is a civil law contract. Consequently, the concept of an administrative-legal contract is still poorly developed in Poland.[16] Related to this principle is another regularity consisting in the relatively frequent attribution of a civil law nature to social relations. There is, in fact, a feedback loop here. Since the legislator refers to the institution of civil law provenance, there is a presumption that the legislator is regulating a relationship of a civil law nature.[17] It is reasonable to conclude that the principle of unity of civil law understood in this way is already an element of Polish legal culture. Therefore, one may risk the claim that Stanisław Kasznica's textbook has contributed to the formation of this principle in Polish law. This is because Stanisław Kasznica's thought concerned an aspect of the functioning of public administration that was already exposed at the time, namely its liability for damage.

15 See M Zirk-Sadowski, 'Problem autonomii prawa podatkowego w orzecznictwie NSA' [The Problem of the Autonomy of Tax Law in the Jurisprudence of the Supreme Administrative Court] (2004) Przegląd Orzecznictwa Podatkowego vol. 2, 123. The author aptly argues against such a wall dividing public and private law. On the causes of this absolutisation and its manifestations at the turn of the nineteenth and twentieth centuries, see R Szczepaniak (2020) 52.

16 *In statu nascendi*.

17 On the evolution of this principle and the reasons for its strength in Polish law, see R Szczepaniak (2020) 87–92.

However, it should be noted that the principle of unity of civil law is still evolving in Poland. One can even see some manifestations of its weakening as a result of the development of the science of administrative law. Consequently, certain parallels, i.e. institutions of administrative law that are counterparts of civil law institutions, are taking shape, although this development is not yet completed as a rule. As an example, one can point to the issue of the administration's liability for damage for legal acts.[18]

4. The current state of development of regimes of administrative liability for damage

The question should be raised as to how the regime of administrative liability for damage in Poland is currently shaped against the background of the legal state of Stanislaw Kasznica's era.

There has certainly been progress when it comes to the possibility for a private individual to claim damages. As a rule, public authorities are also liable for damage for sovereign acts. It can even be said that liability for sovereign acts is in some respects even more severe for public authorities; for it has been made independent of fault by Article 77(1) of the Polish Constitution.[19] Unexpectedly, however, the entry into force of the Constitution of the Republic of Poland of 1997 in some sense revived the old division into commanding and non-commanding actions. This is because an internal stratification of the responsibility of public authorities emerged. According to the still strongly held view, the provisions of Articles 417-421 of the Civil Code apply only to damage caused by acts of authority ("in the exercise of public authority"), for the rest, the administration is to be liable on general principles (Articles 45-416 of the Civil Code), so the requirement of fault should apply to damage caused by non-commanding actions.[20] Of course, this division is no longer invoked today to justify the non-compensatory liability of public authorities for acts of authority.

In each epoch, lawyers have had to face problems that are typical of the period. Even today, one can point to phenomena that were unknown to lawyers living in Stanislaw Kasznica's time. The author of this text draws attention to two such phenomena.

Firstly, since the second half of the twentieth century, there has been a luxuriant development of regimes of liability for damage. Undeniably, this issue is one of the most important issues

18 On the formation of the public-legal regime of compensation liability of the administration for legal acts, see P Wszołek, *Kryteria wyodrębnienia prawa administracyjnego* [Criteria for the Separation of Administrative Law] (Wolters Kluwer 2016) 175–176; M Kruś, 'Publicznoprawny charakter roszczeń odszkodowawczych za wywłaszczenie nieruchomości' [Public Law Nature of Compensation Claims for Expropriation of Real Estate] (2016) Ruch Prawniczy, Ekonomiczny i Socjologiczny 78(2), 96; these authors advocate granting this regime a public law character largely for utilitarian reasons, in order to avoid the plea of limitation of the claim; see on this subject R. Szczepaniak (2020) 282–284.

19 See the judgment of the Polish Constitutional Tribunal of 4 December 2021, SK 18/00 (2021) Lex 50257.

20 Critically on such an interpretation R Szczepaniak, *Odpowiedzialność odszkodowawcza gminy* [Compensatory Liability of the Commune] (Wolters Kluwer 2018) 133. Even the Polish Constitutional Court cannot decide how broadly Article 77(1) of the Constitution applies. It is significant that in its judgment of 4 December 2021 (SK 18/00), it refers to the French experience: "There can be no doubt that all cases in which the actions of state organs related to imperium (or even more broadly, related to the performance of a public function, to which the notion formed in French doctrine against the background of the jurisprudence of the Council of State of the »actes de services« corresponds well), leading to damage caused by the functionaries, fall within the field of liability for damage so defined common to Article 77(1) of the Constitution and Article 417 of the Civil Code". This proves that the jurisprudential output of the Council of State from a century and more ago, cited in this text, continues to inspire contemporary courts.

in civil law. Torts as sources of obligations now play an equal role in terms of theoretical and practical importance with legal acts, including contracts. In doing so, new theoretical concepts justifying liability for damage are constantly emerging.[21] As indicated above, this development has been significantly influenced by the jurisprudence of the French Council of State. One of the manifestations of this development is the tendency observed for many years to broaden the scope of the indemnity liability of public authorities. There is an argument that such a tendency has a deep justification in the principles of the Polish Constitution, such as the principle of a democratic state of law or the principle of legalism.[22]

This fact raises questions about the limits of the effectiveness of public authorities' compensation liability regimes, particularly concerning liability for mass events. Such mass events are typical of the functioning of public authorities, which employ a wide range of forms in their activities, including normative acts. Additionally, their activities have macro-level effects. At times, one might perceive that information about successful compensation lawsuits against the state or other public authorities, for example, for statutory violations or omissions, generates a sense of admiration for the effectiveness of the contemporary legal system. It has been suggested that the liability regime of public authorities, along with the system of protection of human rights, has reached an advanced stage of development, particularly in European countries. This advanced stage allows individuals to claim compensation from the state for various sophisticated forms of damage that seemed impossible or unimaginable just a few years ago. Moreover, it is suggested that we may have reached a peak stage in the development of legal consciousness among citizens, who have become aware of the state's real obligations towards them. A natural consequence of this awareness is the proposition that we should consider which other inconveniences of daily life result from state or public authority negligence. Once identified, individuals would be entitled to seek compensation from the state or other public authorities on these grounds. As an example of this trend, we can cite the reparations awarded in recent years by the state to residents of major Polish cities for living in polluted environments.[23]

However, a fundamental question arises as to whether such suggestions and assumptions are indeed accurate. Perhaps it is the other way round, i.e. that the claims for compensation from the state and local governments due to the occurrence of mass events and the judgements handed down are not so much the result of the maturity of modern man's legal consciousness and the effectiveness of the legal system, but, on the contrary, are the result of the growth of an entitlement attitude as well as a manifestation of the dominance of certain trends of thought displaying the characteristics of fashions and ideologies. The question arises as to whether, by recognising such claims as legitimate, we do not go far beyond the framework of

21 In France, under the influence of jurisprudence, for example, the concept of tort liability for loss of a chance of cure began to take shape, see M Nesterowicz, 'Utrata szansy wyleczenia lub przeżycia w prawie francuskim' [Loss of Chance of Cure or Survival under French Law] (2010) Państwo i Prawo vol. 3, 32; E Bagińska, 'Tendencje rozwojowe odpowiedzialności deliktowej w Europie w końcu XX i początkach XXI wieku' [Development Trends in Tort Liability in Europe at the End of the 20th and the Beginning of the 21st Century] in M Nesterowicz (ed), *Czyny niedozwolone w prawie polskim i prawie porównawczym* [Torts in Polish and Comparative Law] (Wolters Kluwer 2012) 72.

22 L Bosek, P Grzegorczyk, K Weitz in M Safjan, L Bosek (eds), *Konstytucja RP. Komentarz do art. 1–86* [Constitution of the Republic of Poland. Commentary on art. 1–86] (CH Beck 2016) commentary to the art. 77 point 18.

23 For more on this topic, see R Szczepaniak, 'Smog a odpowiedzialność odszkodowawcza władz publicznych' [Smog and the Compensation Liability of Public Authorities] (2020) Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 2(66), 26–48.

the classic mechanism of liability for damage developed by civilian science. It seems that at least sometimes such transgressions takes place.[24]

Admittedly, the argument put forward back in the first half of the twentieth century, whereby a public authority should not be held liable for damage, as this would result in its financial ruin and, consequently, its inability to perform its basic public tasks, has long since been discredited. Nevertheless, the attempt to hold the public authority responsible for the consequences of mass phenomena must inspire the question of the limits of the effectiveness of the compensation liability regime. The public authority (state or local government) is the embodiment of the whole society, or at least a large part of it. Is it therefore possible to talk meaningfully about damage when, as a result of mass events, all the members of society, or a large part of it, are affected? Such a question arises, for example, in the case of a claim for compensation for living in a polluted environment.[25] These questions impose themselves with particular force at the present time, when geopolitical uncertainty, threats to world order and the onset of a global economic crisis as a result of the coronavirus pandemic and Russia's aggression against Ukraine, among other things, are emerging.

Secondly, the case law of the CJEU has had a significant impact on the regimes of liability for damage of public authorities for many years now. A system of supranational European law such as EU law obviously did not exist during Kasznica's time. Under the influence of this jurisprudence, among other things, the view has become established that a public authority may also be liable for normative acts, including statutory unlawfulness as well as for statutory omissions. This liability exists in particular if a Member State has failed to implement an EU directive on time or has implemented it incorrectly. Among other things, this is so because the tortious liability of public authorities is intended to be one more instrument to ensure the effectiveness of EU law (known as the *effet utile*)[26] and its primacy over national law. This effectiveness and primacy is to be manifested, among other things, through the direct and horizontal application of EU law, i.e. in relations between private entities and also as a basis for a private entity raising claims against the state for damages for a breach of EU law, including the non-implementation or incorrect implementation of EU directives. The state's liability for damage towards an individual for a breach of EU law is intended to be, especially with regard to directives, a substitute for this horizontality and an expression of the primacy of EU law.[27]

One may get the impression that in this type of state compensation liability, the compensation of the damage caused is in the background, the most important being the political objective, i.e. confirming the primacy of EU law over national law. This, in turn, results in the liability for damage regime being used for purposes other than those for which it was created. This may lead to certain aberrations and anomalies.[28]

24 Ibid.

25 Ibid.

26 This was perhaps most bluntly expressed by the CJEU in its judgment in joined cases C-6/90 and C-9/90 (EU:C:1991:428, para. 34 of the grounds), where it stated that an award of damages from a Member State is primarily necessary where the full effectiveness of the provisions of Community law depends on the activity of the authorities of that state and consequently the individual, as a result of a breach by the state of obligations imposed on it by Union law, is deprived of the possibility of exercising his rights conferred by Community law before the national courts.

27 See S Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016) 178; E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) European Law Journal 21(5), 664. see also the judgment of the CJEU in joined cases C-6/90 and C-9/90, as well as the judgment of the CJEU C-282/10 EU:C:2012:33, para. 43.

28 They consist in the fact that, in order to ensure the effectiveness of Union law, certain breaches of Union law by Member State authorities give rise to liability for damage, whereas other similar breaches of Member State public

This last observation can be given a more general dimension. The regime of compensatory liability is indeed characterised by a certain universality. It can be said to be one of the most important mechanisms of restitution as well as the repartition of goods or obligations. This universalism has begun to be realised with redoubled force in connection with the exuberant development of the institution of liability for damage in recent decades. Legislators sometimes want to use it as a universal, inter-branch mechanism. It happens, for example, that the regime is used as an instrument of state social policy, which in itself is rather bizarre.[29] Once again, then, the question arises, albeit in a slightly different sense, about the limits of the effectiveness of this civilian-formed mechanism.

5. Conclusion

The functioning of the regimes of compensatory liability of public authorities, both in Stanislaw Kasznica's time and today, generates problems, although their nature has changed over time.

There are still fundamental questions about the legal nature of the regime of compensatory liability of public authorities. The regime of compensatory liability of public authorities has always shown a tendency to elude the framework of classical civilianism. At the forefront is the fact that the subject under discussion is strongly linked to political doctrines attempting to describe and explain the role of the state and its relations with citizens and other individuals, and influencing the scope of duties and tasks attributed to public entities. The shape of the regime is in some sense dependent on these prevailing doctrines. This was already noted several decades ago by Adam Szpunar, when he wrote that the interpretation of the existing rules governing the liability for damage by public entities cannot be carried out completely independently of the position taken in the dispute as to the theoretical justification of the liability of those entities.[30]

To conclude, the thesis should once again be that it is not the battles over affiliation that are

authorities which do not relate to Union law may not give rise to such liability. See FG Jacobs, 'Some Remarks on Community and Member State Liability' in J Wouters, J Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia Publishing 2001) 131. For example, the need for a Member State to pay compensation for damage caused by a failure to implement an EU directive does not necessarily mean that the state will be so liable for other instances of legislative omission. An analogous divergence may apply, for example, to the consequences of an infringement by national courts. An example is the judgment of the CJEU C-224/01 EU:C:2003:513, in which the CJEU, based on the guiding principle of the effectiveness of EU law and contrary to Austrian law, held a national court liable for damage for a decision of a national court in breach of EU law (para. 32 of the grounds). A more glaring case in this genre is the judgment of the CJEU C-453/00 EU:C:2004:17 and the judgment of the CJEU C-234/04 EU:C:2006:178, in which the CJEU held that a finding by that court that a national law is incompatible with EU law may give rise to an obligation on the Member State to set aside earlier final judicial decisions or final administrative decisions which have been made on the basis of that national law. In doing so, the CJEU ruled that even the absence of appropriate procedures in national law in the light of which such revocation would take place could not relieve the state of such an obligation. For more on these judgments, see A Kubas, 'Deliktowa odpowiedzialność odszkodowawcza Skarbu Państwa (wybrane zagadnienia)' [Tortious Liability for Damages of the State Treasury (Selected Issues)] (2011) Transformacje Prawa Prywatnego vol. 3, 65.

29 A prominent example of this is Article 18(5) of ustawa z dnia 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego [Act of 21 June 2001 on the Protection of Tenants' Rights, Municipal Housing Resources and Amending the Civil Code] [2001] JoL 1360. For more on this subject, see R Szczepaniak (2020) 285–287.

30 See A Szpunar, *Odpowiedzialność Skarbu Państwa za funkcjonariuszy* [Liability of the State Treasury for Officers] (Państwowe Wydawnictwo Naukowe 1985) 90. For more on this subject, see R. Szczepaniak (2020) 267–273.

most important. Attributing a civil or administrative character to an institution is frequently the result of a certain convention. It is not a problem that in France the regime of liability for damage by public authorities is assigned an administrative-legal character and in Poland a civil-legal one. These conventions are a fragment of the legal culture and legal traditions of individual states that should be respected. The specific nature of public entities can be respected by making one assumption or the other. One can speak here of a kind of functional equivalent.[31] Problems arise when a country does not respect this specific nature, i.e. it lacks solutions to take sufficient account of the specific characteristics of the state and other public actors in the process of applying institutions of civil law provenance, such as the liability for damage regime. Various types of abuse and manipulation may then occur.[32] The peculiar nature of this environment, which is the public sector, makes the legal institutions applied in this environment, even if we attribute to them a civil law character, at least partially modified, and thus escaping the framework of classical civilianism. It seems that Stanisław Kasznica understood this well.

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31 The functional method continues to dominate the science of comparative law, at the core of this method is the conviction that all states, as well as societies, have essentially similar or even identical problems. Consequently, measures applied in one legal system to eliminate these problems are functional equivalents of instruments found in other legal systems. Of course, these counterparts or equivalents may have varying degrees of effectiveness. See O Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) Brooklyn Journal of International Law 32(2), 409; R Michaels, 'Comparative law' in J Basedow, K Hopt, R Zimmermann (eds), *Oxford Handbook of European Private Law* (Oxford University Press 2011) 1, <https://scholarship.law.duke.edu/faculty_scholarship/2388> accessed 1 Aug 2024; A Doczekalska, 'Comparative Law and Legal Translation in the Search for Functional Equivalents – Intertwind or Separate Domains?' (2013) Comparative Legilinguistics vol. 16, 63.

32 See R Szczepaniak (2020) 639.

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