

CIVIL LIABILITY OF POLICE OFFICERS IN UKRAINE AND GERMANY: LEGAL ASPECTS AND PROBLEMATIC ISSUES

Galiya I. Chanysheva, Odessa Law Academy

Oleksandr S. Yunin, Dnipropetrovsk State University of Internal Affairs

**Nadiia V. Milovska, F. H. Burchak Scientific-Research Institute of Private
Law and Entrepreneurship NALS of Ukraine**

**Roman V. Pozhodzhuk, F. H. Burchak Scientific-Research Institute of Private
Law and Entrepreneurship NALS of Ukraine**

Viktoriia V. Mazur, National Academy of Internal Affairs

ABSTRACT

Description: The article is to investigation of the peculiarities of civil liability of police officers in Ukraine and Germany. Methodology. The study used general scientific and special methods. Thus, the analysis and synthesis method as well as the logical method were used to develop a holistic view on the institution of civil liability of police in Ukraine and in Germany. The dialectical method made it possible to consider the state of scientific researches concerning this issue. The comparative legal method was used when analyzing German legislation on the issue under consideration. The logical-semantic method was used to establish the meaning of the term of “civil liability of police officers”. With the help of the normative-dogmatic method, the content of the normative-legal acts of domestic legislation governing the issue under consideration was analyzed. The use of the legal modeling method made it possible to develop proposals for the optimization of the current civil legislation of Ukraine concerning civil liability of police officers. The materials studied are the legislation of Ukraine and Germany as well as the scientific works of Ukrainian and foreign scientists on this subject. The results of the study made it possible to study the peculiarities of the civil liability of police officers in Ukraine and Germany, to examine the legislation of the countries under study that regulates this issue, to analyze the relevant provisions of the legal acts and to conclude that they need to be amended. Practical implications. According to the results of the research, proposals have been made to amend the Civil Code of Ukraine and the special law that regulates the issue of civil liability of police officers in Ukraine. Value/originality. On the basis of the study the advantages and disadvantages of legal framework, which regulates the issue of civil liability of police officers in Ukraine and Germany, were determined.

Keywords: Civil Liability, Damage, Non-Pecuniary Damage, Police Officers, Ukraine, Germany, Positive Experience.

INTRODUCTION

The National Police of Ukraine started its work on November 7, 2015; so many issues related to its functioning require clarification and legal regulation. Instead, the history of the

organization of the activity of this agency in European countries goes back many years, so it is logical to refer to the practice of those countries, in which law enforcement agencies had been reformed more than a decade ago and now meet all the requirements of the democratic state of law. Adopting a positive foreign experience and its implementation in the law enforcement system of Ukraine is a guarantee that the newly established police will work on the basis of cooperation with public and protection of its interests. Besides, our country is a candidate for membership of the European Union, and therefore must ensure the stable and reliable functioning of those state institutions that care for the protection of rights and freedoms of an individual.

In order to gain positive experience on this issue, we will consider the organization of police activities in the country, in which law enforcement system is one of the most stable and well-established-in Germany, and will find out what are the peculiarities of bringing police officers of this State to civil liability.

LITERATURE REVIEW

Such scholars studied the issues of civil liability as a result of the damage caused. The issues of compensation for damage caused by public authorities and their officials in Ukraine and foreign countries examined Khomenko, Lovyak, Nizhynska, Frolov, Protas & Boyarsky.

MATERIALS AND METHODS

The study used general scientific and special methods. Thus, the analysis and synthesis method as well as the logical method were used to develop a holistic view on the institution of civil liability of police in Ukraine and in Germany. The dialectical method made it possible to consider the state of scientific researches concerning this issue. The comparative legal method was used when analyzing German legislation on the issue under consideration. The logical-semantic method was used to establish the meaning of the term of “*civil liability of police officers*”. With the help of the normative-dogmatic method, the content of the normative-legal acts of domestic legislation governing the issue under consideration was analyzed. The use of the legal modeling method made it possible to develop proposals for the optimization of the current civil legislation of Ukraine concerning civil liability of police officers. The materials studied are the legislation of Ukraine and Germany as well as the scientific works of Ukrainian and foreign scientists on this subject.

The studied materials are the legislation of Ukraine and Germany on the issue under consideration, namely: the Law of Ukraine “*On the National Police*”, the Civil Code of Ukraine, the Law of Ukraine

“On the Procedure of Compensation for Damage Caused to a Citizen by the Illegal Actions of the Bodies Performing Operative Investigation Activities, Pre-trial Investigation Bodies, Prosecution and Judicial Authorities”

German Federal Police Act, Civil Code of Germany, works of the scientists who have studied the investigated issue, concluding observations that are assessments of the implementation of human rights treaties by a State, which are issued by the respective treaty bodies after their examination of the State Reports (Law of Ukraine, 1994; Federal Police Act, 1994).

RESULTS AND DISCUSSION

According to article 1, part 1 of the Law of Ukraine (2015) “*On the National Police*” of 02 July 2015 no. 580-VIII the National Police of Ukraine is the central executive authority which serves the society by ensuring the protection of human rights and freedoms, combating crime, maintaining public safety and order. In case of committing unlawful acts, police officers bear criminal, administrative, civil and disciplinary responsibility in accordance with the law (Article 19 of the Law on the National Police).

Civil liability of police officers in Ukraine is based on article 1176 of the Civil Code of Ukraine, stating that the damage caused to an individual as a result of his (her) unlawful conviction, unlawful prosecution, unlawful use of preventive measures, unlawful detention, unlawful imposition of administrative penalties in the form of arrest or community service, is compensated by the State despite the guilt of the officers engaged in police operations, pre-trial investigation, officials of prosecution and judicial authorities.

Based on the study of this article, it is possible to distinguish the features of civil liability of police officers, which are:

1. The special subjective composition of the persons, who bear responsibility;
2. An exhaustive list of police misconduct resulting in a special tort;
3. Unlawfulness of the police officers’ actions, which must be accordingly confirmed;
4. Compensation for damage caused by police officers regardless of their guilt;
5. Compensation for such damage at the expense of the State budget, with the obligatory participation of the bodies of the State Treasury of Ukraine as the representative of the State;
6. Full compensation of the damage caused;
7. The right of the State to sue the guilty person by way of recourse under certain conditions.

The type of liability, which a police officer bears for damage caused is a recourse liability, since the State, having compensated for such damage, has the right to sue the guilty person. In case of harm to a citizen as a result of the unlawful actions of several police officers, the latter will be jointly and severally liable to the State by way of recourse.

The right to sue the guilty person is enshrined in article 1191 of the Civil Code of Ukraine, which states that a person who compensated for the damage caused by another person, has a right of the opposite demand from the guilty person in the amount of compensation paid.

If the damage is caused by police officers who are not officials of the body engaged in police operations or pre-trial investigation, then article 1191, part 4 of the Civil Code of Ukraine should be applied to bring them to justice. According to it, the State, having compensated the damage caused by an official as a result of his (her) illegal decision, act or omission the State has the right has a right of the opposite demand from the guilty persons in the amount of compensation paid.

Police officers who have jointly caused damage are jointly and severally liable to the State by way of recourse under article 543 of the Civil Code of Ukraine. It is understood that the creditor (in the relations under consideration-the State) has the right to demand the fulfillment of the obligation partially or fully, both from all the debtors (that is, the persons who caused the damage) and from any of them separately. Joint debtors remain obliged until their duty is fully fulfilled (article 543, part 2 of the Civil Code of Ukraine). The fulfillment of a joint commitment by one of the debtors terminates the obligation (article 543, part 3 of the Civil Code of Ukraine). In this case, the person who fully compensated the damage has the right to claim back to each of the other claimants in equal proportion minus his (her) share.

Civil liability for damage caused by unlawful acts of police officers is expressed in the form of full compensation for damages. In accordance with the provisions of article 22 of the Civil Code of Ukraine the losses are:

1. Losses suffered by the person in connection with the destruction or damage of the thing, as well as the expenses that the person has made or should make for the restoration of his (her) violated right (real losses);
2. Income that a person could actually receive in ordinary circumstances if his (her) right was not violated (loss of profit).

Besides, a person has the right to obtain compensation for non-pecuniary damage caused by the violation of his (her) rights, which is compensated regardless of material damage, and is not related to the amount of such compensation (Article 23 of the Civil Code of Ukraine).

According to Article 3 of the Law *“On the Procedure of Compensation for Damage Caused to a Citizen by the Illegal Actions of the Bodies Performing Operative Investigation Activities, Pre-trial Investigation Bodies, Prosecution and Judicial Authorities”* (hereinafter-the Law) a citizen shall be compensated:

1. Earnings and other monetary income that he (she) lost as a result of unlawful acts;
2. Property (including money, cash and interest amounts, securities and interest amounts, share in the authorized fund of the company, and income that he (she) did was not able to receive from this share, other values) confiscated or transferred to the State by a court decision;
3. Fines collected according to the court decision, legal fees and other costs paid by the citizen;
4. Money paid by a citizen for legal assistance;
5. Non-pecuniary damage.

With no regard for the fact that the law enshrines the principle of full compensation for the damage caused by police, the Law states anything about compensation for loss of profit or methods for its calculation in this category of cases. As Loviak (2011), points out that:

“The loss of profit is not included in the amount of compensation for damage in this offense and is not indisputably compensated. In case of a dispute over compensation for loss of profit, such dispute must be resolved on a common ground”.

We believe that such a position cannot be accepted, because it is contrary not only to the provisions of article 1176 of the Civil Code of Ukraine, but also to the general principle of civil law-the principle of full compensation for damage. As Fomicheva (2001), correctly states:

“The universality of the principle of full compensation for damage makes it possible to speak of its extension to the whole sphere of civil relations, including property relations, contractual and non-contractual obligations”.

In doing so, the application of the article of the Civil Code of Ukraine, in which this principle is enshrined, is connected not with an analogy, but with a direct effect of the relevant norm.

Besides, according to article 1195 of the Civil Code of Ukraine, a person who suffered from illegal acts of police officers should be compensated for damage caused by injury or other damage to health or by death. Thus, a natural or a legal person who caused injury to an individual is obliged to compensate the victim for the income lost by him (her) as a result of the loss or reduction of professional or general working capacity, as well as to reimburse additional

expenses if necessary (nutrition, medical treatment, medicines, prosthetics, care, provided by third parties etc.).

According to article 1202, part 1 of the Civil Code of Ukraine, compensation for the damage caused by death of the victim is made in a monthly installments. In certain circumstances and taking into account the material situation of the victim, the amount of compensation may be paid in one amount, but not more than for three years in advance.

Regarding the compensation of non-pecuniary damage caused by police officers, either of the acts, enshrined in article 1 of the Law, may be grounds for its compensation (namely, unlawful conviction, unlawful reporting of a suspected criminal offense, unlawful detention, unlawful conducting of a search, seizure in criminal proceedings, unlawful seizure of property, unlawful suspension from work (office) and other procedural actions, which limit the rights of citizens, unlawful application of administrative arrest or correctional labor, unlawful confiscation of property, unlawful fines, unlawful conduct of police operations).

Compensation for non-pecuniary damage caused to a person by a police officer is paid if there are all general requirements for responsibility for causing harm. In particular, the following shall be investigated: the presence of such damage, the wrongfulness of the perpetrator's act, the existence of a causal link between the harm and the wrongful act of the perpetrator and the fault of the latter. The court must determine whether the fact of causing non-pecuniary or physical harm to the plaintiff is confirmed, under which circumstances or by which acts (omission) this harm has been inflicted, in what amount of money or in what material form does the plaintiff evaluate the damage caused and what he (she) refers to, as well as other circumstances relevant to the resolution of the dispute.

According to article 13, part 3 of the Law compensation of non-pecuniary damage during detention or trial is calculated based on the minimum wage for each month of detention or trial. But how can we calculate the amount of compensation in other cases, namely when the person is not under investigation or prosecution (for example, in case of unlawful detention, unlawful conduction of police operations, etc.)? Responding to this question, the legislator found that the amount of non-pecuniary damage is determined taking into account the circumstances of the case within the limits established by civil law (article 13, part 2 of the Law). The Civil Code of Ukraine also notes that the amount of monetary compensation for non-pecuniary damage is determined by court, depending on the nature of the offense, the depth of physical and mental suffering, the deterioration of the victim's abilities or deprivation of his (her) abilities to realize them, the guilt of the person who caused non-pecuniary damage if the guilt is the ground for compensation, as well as other relevant circumstances.

However, currently, there is no single methodology that can accurately calculate the amount of non-pecuniary damage, and therefore this issue remains a problem and causes some difficulties for judges when considering such category of cases.

And now we turn to the study of the peculiarities of civil liability of police officers in Germany.

The German police are recognized as a kind of standard for organization and practical implementation of law enforcement activities. It is a body of state executive power that successfully combines the best traditions of the police service with the latest achievements in creating legal, democratic, socially oriented state (Sobol, 2010).

The Federal Police of Germany (die Bundespolizei) is the part of the Ministry of the Interior of the Federal Republic of Germany (hereinafter referred to as Germany). The activities of the Federal Police are governed by the Federal Police Act of October 19, 1990, as amended on

May 05, 2017, as well as the Laws on the New Federal Police Organization, on the Federal Police Officers, and other regulations. The issue of civil liability of employees of the Federal Police is regulated by the Federal Police Act (section 3 entitled “*Compensation for Damage*”) and the relevant provisions of the German Civil Code (Civil Code, 2002).

Thus, § 51 of the Federal Police Act (1994) states that if a person has suffered damage as a result of the misconduct of the officers of the Federal Police when performing their duties, or if a third party was harmed by such acts, then the victim must be given reasonable compensation. Compensation is also guaranteed to persons who, with the consent of the competent authorities, have voluntarily assisted police officers in carrying out their duties or otherwise assisted them in their work, and persons who have been harmed by the unlawful activities of auxiliary forces involved in the police ranks on the basis of paragraph § 63, subparagraph 2.

According to § 52 compensation is generally granted only for damage to property. For loss of profit, which goes beyond the failure of the ordinary earnings or usage fee, and disadvantages that are not directly related to the regulatory measure, compensation is only due if and to the extent deemed necessary to avoid undue hardship appears. For a violation of the body, health or liberty is also the damage is not financial loss, offset by a fair compensation. The compensation shall be paid in cash. Has to compensate the compulsory measure the elimination or reduction of earning capacity or an increase in the needs or the loss or impairment of a right to maintenance result, the compensation by payment of a pension is to be granted. § 760 of the Civil Code shall apply. Instead of a pension compensation may be required in cash, for an important reason. The claim is not thereby excluded that another has to grant the injured party maintenance. In determining the compensation of all the circumstances are taken into account, in particular the nature and predictability of the damage and whether the injured person or his property has been protected by the measure of authority.

There are circumstances, for which the victim is responsible, for example, if his (her) actions contributed to the occurrence or increase of harm. In this case, the obligation to pay compensation and its amount depends in particular on the extent of the damage has been caused mainly by the victim or by the authority (§ 52 subparagraph 5 of the Federal Police Act).

In the case of slaughter in accordance with § 52 subparagraph 5 equalize that of the costs of the funeral, which is responsible for the obligation to pay these costs. If the deceased at the time of injury to a third party in a relationship, on the basis of which it by law was alimony this over or could be dependents, and is the third party deprived of the right to livelihood as a result of the killing, the third party may entitled to claim reasonable compensation under § 52 subparagraph 5, the deceased would have been committed during his or her life for the grant of maintenance. § 52 subparagraph 3 sentence 3 to 5 shall apply *mutatis mutandis*. The compensation can be demanded even if the third party witnessed the time of the injury, but was not yet born (§ 53 of the Federal Police Act).

The claim to the compensation limitation period of three years from the date in which the victim, in the case of § 53 of the beneficiaries, of the damage and to compensate debtor obtains knowledge, regardless of this knowledge in thirty years of the entry of the damaging event.

The compensation is paid at the expense of the State budget of the Federal Republic of Germany. This also applies to compensation for official actions by police officers in this country in accordance with § 64 subparagraph 1 of the Federal Police Act, that is, for official actions of law enforcement agencies of other states, as well as their employees, who act under the law within the jurisdiction of the Federal Police. The State may require the perpetrators to recover the funds that were provided to the victim under § 51 subparagraphs 1-3. If few persons are guilty of

an offense, they are jointly and severally liable to the State. Has been offered compensation on the basis of an official act of an official of the police of the country in accordance with § 64 Section 1 only because of the way the implementation of a measure, the Federal Republic of Germany is available from the country in whose service the official require reimbursement of their expenses, unless they themselves will be responsible for the manner of implementation.

With regard to the issue of compensation for non-pecuniary damage, it is subject to compensation only in cases expressly provided by law according to § 253 of the Civil Code of Germany. Such cases are: bodily harm, harm to health, liberty, and sexual self-determination. It does not matter whether such liability is based on the requirements of the law, or whether it follows from the provisions of the contract. In order to receive compensation, it is not necessary to prove the guilt of the offender. It is enough if the requirements of strict liability are fulfilled (i.e. liability that arises regardless of guilt).

However, the German courts face the issue on how to calculate properly the amount of compensation for pain and suffering. In practice, the courts use certain indexes to obtain the proper amount of compensation. Clearly, these amounts cannot be compared to the costs awarded, for example, by US courts in this category of cases. However, there is a tendency to award a sufficient amount of compensation in case of serious injury.

The amount of compensation is influenced by such factors as strength, duration and intensity of pain, the nature of suffering and deformation. Besides, the Federal Supreme Court set up that the degree of negligence of the victim and his (her) property status should also be taken into account (Tolani, 2011). The standard amount of non-pecuniary damage in Germany is typically € 1200 per year.

Studying the legal grounds for bringing police officers in Germany to civil liability, it should be noted that there is no effective mechanism to investigate such cases in this country. Thus, according to the data of Amnesty International (2018) to date, both federal and federal state authorities have failed to establish independent investigation mechanisms or oversight bodies. Three states (Bavaria, Bremen and Hamburg) have established centralized units to investigate those allegations. However, those units are part of the Ministry of Interior of each respective state and thus lack full independence.

In its 6th Concluding Observations on Germany (article 37), the United Nation Committee against Torture (2019) stated that:

“While welcoming the establishment of ombudspersons in several Länder to facilitate the independent and impartial investigation of allegations of misconduct by police officers, the Committee remains concerned that in other Länder and at the federal level, no such mechanism exists. The Committee is concerned that the State party does not consider it necessary to establish such a mechanism at the federal level, despite the recent judgment by the European Court of Human Rights in Hentschel and Stark v. Germany, and other reports by civil society that investigations of police misconduct have been inadequate.”

There is also such a problem in Ukraine. Having studying this issue Muzyka-Stefanchuk, (2012) emphasizes that:

“Given that the actions of investigators, police officers and others in such cases as mentioned above are rarely qualified as crimes, they cannot be sued by way of recourse”.

It is worth noting that currently there is only few court decisions on recourse against the police officers, which means that the State, having compensated the victim for damage, caused

by unlawful actions of police officers, cannot reimburse funds spent from the State budget. We believe that such a situation has arisen due to the absence of special bodies that would be engaged in the investigation of criminal offenses committed by officers of law enforcement agencies. At present, such a function is assigned to the prosecutors; however, since the prosecutor is a party to the prosecution in all categories of cases, this does not contribute to an effective and comprehensive investigation of such a category of cases. Therefore, in our view, it is also worth creating the agency in Ukraine, which task would be to conduct an independent and objective investigation of misconduct of police officers, as it has already been done in some German Lander.

CONCLUSION

Based on a comparative analysis, it has been established that police in Germany are responsible for the damage caused by their illegal actions under the Federal Police Act; in Ukraine, police officers are held liable on the basis of the provisions of the Civil Code of Ukraine and the Law of Ukraine.

“On the Procedure of Compensation for Damage Caused to a Citizen by the Illegal Actions of the Bodies Performing Operative Investigation Activities, Pre-trial Investigation Bodies, Prosecution and Judicial Authorities”.

In both of these countries, the principle of full compensation for damage caused by police misconduct is applicable. Property damage is compensated in any case; in doing so both direct losses and loss of profit are compensated. However, loss of profit it is not always subject to compensation in Germany, but only when it is deemed necessary to avoid adverse impacts.

Although the principle of full compensation for damage is also applied in Ukraine, however, in accordance with the Law, the loss of profit is not included in the amount of compensation and is not reimbursed by uncontested procedures.

Based on the above mentioned, we consider that the Law should be complemented with the provision on compensation of loss of profit and the mechanism for its compensation.

In our view, positive is the German practice to provide the victim with an annuity, which is assigned not only in the case of causing him (her) injury or other damage to health, as it is stipulated in the legislation of Ukraine, but also in case of increasing his (her) needs or diminishing prospects for the future. This gives the person the opportunity to compensate the expenditures, which wouldn't have been incurred if the offense had not been committed, or to obtain what he (she) had been expected for if the misconduct of police officers did not limit his (her) ability.

Non-pecuniary damage in Germany is compensated only in case of unlawful imprisonment; in case of causing damage by committing other lawful or unlawful acts compensation for moral harm is not provided. In Ukraine, any misconduct by police officers may be the basis for a claim for compensation of non-pecuniary damage.

The amount of compensation for non-pecuniary damage in Germany is also not statutory, but there is a considerable case law relating to this issue, and therefore the courts are not entitled to award lower amounts of compensation. As a rule, the standard amount of compensation for non-pecuniary damage in Germany is 1,200 euros.

In our view, the introduction of the practice of calculating the amount of non-pecuniary damage within certain limits is more than appropriate for Ukraine, since the absence of a

framework gives room to courts, which often award the compensation twice or even more below asking.

Finally, we place emphasis on the need to create a special agency that would be responsible for an independent and objective investigation of misconduct of police officers, as it has already been done in some German Lander.

REFERENCES

- Amnesty International. (2018). *Germany: Human rights guarantees undermined: Submission for the UN Universal Periodic Review-30th session of the UPR Working Group [EUR 23/7375/2017]*. Retrieved from https://www.ecoi.net/en/file/local/1422247/1226_1516189882_eur2373752017english.pdf
- Civil Code. (2002). *Civil Code as amended by the notice of 2 January*. Retrieved from <https://www.gesetze-internet.de/bgb/BJNR001950896.html>
- Committee against Torture. (2019). Concluding observations on the sixth periodic report of Germany at its 1750th meeting, held on 14 May. Retrieved from: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqkhzDrS5b7WwzT1uQvroadACz8ta0G58EoYKrcGSK8%2baCNZpKQWe3IIoqwlQEAlEsFL48PC6Ex3QnMuxP0LF LKB97>.
- Federal Police Act. (1994). Federal Law Gazette I, last amended by Article 1 of the Law of 21 June.
- Fomicheva, O.V. (2001). *The principle of full compensation for losses and its implementation in Russian civil law*. Published PhD dissertation, Samara: Samara State Economic Academy.
- Law of Ukraine. (1994). *On the Procedure of compensation for damage caused to a citizen by the illegal actions of the bodies performing operative investigation activities, pre-trial investigation bodies, prosecution and judicial authorities: Law of Ukraine No. 266/94-VR*. Retrieved from <https://zakon.rada.gov.ua/laws/show/266/94-%D0%B2%D1%80>
- Law of Ukraine. (2015). *On the National Police of July 02, no. 580-VIII*. Kyiv: Alerta.
- Loviak, O.O. (2011). *Legal regulation for compensation of damage caused by internal affairs agencies of Ukraine*. Kyiv: National Academy of Internal Affairs.
- Muzyka-Stefanchuk, O.A. (2012). Financial and legal problems of compensation for damage caused by unlawful decisions, acts or omission of public authorities. *Law and Society*, 3(1), 89–92.
- Sobol, Y.Y. (2010). Experience on organization and activity of police in leading countries. *Forum Prava*, 2(1), 461–466.
- Tolani, M. (2011). Punitive damages before german courts: A comparative analysis with respect to the ordre public. *Annual Survey of International & Comparative Law*, 17(1), 1-11.