

General Principles of Administrative Law

§ 8 State Liability

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§ 8 State Liability

Recommendation CM/Rec(2007)7 on good administration

Article 23 – Compensation

1. Public authorities shall provide a remedy to private persons who suffer damages through **unlawful administrative decisions or negligence on the part of the administration or its officials.**
2. Before bringing actions for compensation against public authorities in the courts, private persons may first be required to submit their case to the authorities concerned.
3. Court orders against public authorities to provide compensation for damages suffered shall be executed within a reasonable time.
4. It shall be possible, where appropriate, for public authorities or private persons adversely affected to issue legal proceedings against public officials in their personal capacity.

§ 8 State Liability

Recommendation No R(84)15 relating to public liability

Principles

- I. Reparation should be ensured for damage caused by an act due to a **failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person**. Such a failure is presumed in case of transgression of an established legal rule.
- II.
 1. Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.
 2. The application of this principle may be limited to certain categories of acts only.

A) Reasons for and Foundation of State Liability

- I. State Liability as a Sanction**
- II. State Liability as an Element of the “Rule of Law”**
- III. State Liability as an Element of “Justice”**
- IV. State Liability as a Fundamental Right**

A) Reasons for and Foundation of State Liability

I. State Liability as a Sanction?

- State liability as an instrument to “motivate” citizens to ensure the principle of legality by filing court actions?
- Can an administrative authority be “motivated” to respect the law by threatening with financial “punitive” sanctions?

A) Reasons for and Foundation of State Liability

II. State Liability as an Element of the Rule of Law?

What is the “rule of law” in the European Law?

Document [“The Council of Europe and rule of law – an overview CM\(2008\)170, 21 November 2008”](#) prepared by the Council of Europe's secretariat:

- Different principles
- All “rule of law”- requirements seek to avoid arbitrariness and offer individuals’ protection from arbitrariness - especially in the relations between the individual and the state

Even if it is not explicitly mentioned in this document, state liability may be considered as an element of the rule of law – but this does not really justify that a legitimation is given.

A) Reasons for and Foundation of State Liability

III. State Liability as a an Element of Justice?

- The existence of administration is in everybody's interest
- Every administration employs civil servants
- Civil servants are human beings that may fail
- Illegal acts of administration are inevitable
- Because administration is in everybody's interest everybody should take on the risk of illegal administrative measures
- This is assured when the victims of illegal administrative measures are compensated by the treasury that has been "filled" with the taxes of the population

A) Reasons for and Foundation of State Liability

III. State Liability as a Fundamental Right?

Liability of the EU as a part of the right to good administration:

Art 41 of the Charter of Fundamental Rights of the EU Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes: [...]
3. **Every person has the right to have the Union make good any damage caused by its institutions** or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. [...]

A) Reasons for and Foundation of State Liability

III. State Liability as a Fundamental Right?

Right to compensation as a part of the right to liberty and security:

Art 5 ECHR Right to liberty and security

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law [...]:

[2 – 4] [...].

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

A) Reasons for and Foundation of State Liability

III. State Liability as a Fundamental Right?

Right to compensation as an element of every fundamental freedom:

Art 41 ECHR Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

A) Reasons for and Foundation of State Liability

III. State Liability as a Fundamental Right?

- CFREU and ECHR treat state liability as a fundamental right, comparable to – or as a part of – the right to an effective remedy
- CFREU and ECHR do nevertheless not explicitly guarantee a general fundamental right of state liability in case of violation of fundamental rights
- But: there is a tendency at least in Germany to enrich the national fundamental rights – traditionally seen only as “negative liberties” directed at governmental interference – with a positive element: The right to get compensated in case of illegal governmental interference which otherwise cannot be undone
- Are there comparable tendencies in other Member States?

B) Responsibility for Unlawful Administrative Measures

- Standard case of state liability
- Intensity of judicial control, state liability and fault requirement
- State liability and risk of life

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C) Responsibility for Accidents

Consequences of accidents may be governed by public (state liability) law, civil (tort) law, social security law

- Traffic accidents and other banalities – why not private law?
- What about accidents caused by unsafe infrastructure (roads etc.) – is the state responsible to guarantee (to which extent) that the use of public infrastructure is safe?
- What about consequences of missed shots by the police? – banal accident or misuse of public power?
- What about accidents in schools, universities and accidents on the job (civil servants, soldiers)? – often: compensation following social security law or law on the protection of civil servants
- What about battlefield injuries and other wartime damages? – often: special legislation, even concerning compensation in case of war crimes

D) Responsibility for Lawful Administrative Measures

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Principles .

- II. 1. Even if the conditions stated in Principle I are not met, **reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances:** the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.
2. The application of this principle may be limited to certain categories of acts only.

E) Responsibility for Legislation

- Is the responsibility of parliament a question of constitutional or administrative law?
- No general answer in the European States: Due to possibly enormous consequences for the state budget such a responsibility is not known in every European State (e. g. not in Germany).

F) Extent and Limits of State Liability

Recommendation No R(84)15 relating to public liability

- III. If the victim has, by his own fault or by his failure to use legal remedies, contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed.
The same should apply if a person, for whom the victim is responsible under national law, has contributed to the damage.
- IV. The right to bring an action against a public authority should not be subject to the obligation to act first against its agent.
If there is an administrative conciliation system prior to judicial proceedings, recourse to such system should not jeopardise access to judicial proceedings.
- V. Reparation under Principle I should be made in full, it being understood that the determination of the heads of damage, of the nature and of the form of reparation falls within the competence of national law.
Reparation under Principle II may be made only in part, on the basis of equitable principles.

F) Extent and Limits of State Liability

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- VI. Decisions granting reparation should be implemented as quickly as possible. This should be ensured by appropriate budgetary or other measures.
If, under domestic law, a system for a special implementation procedure is provided for, it should be easily accessible and expeditious.
- VII. Rules concerning time limits relating to public liability actions and their starting points should not jeopardise the effective exercise of the right of action.
- VIII. The nationality of the victim should not give rise to any discrimination in the field of public liability.